SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240, 242, 249

Release No. 34-76474; File No. S7-23-15

RIN 3235-AL66

Regulation of NMS Stock Alternative Trading Systems

AGENCY: Securities and Exchange Commission

ACTION: Proposed rule

SUMMARY: The Securities and Exchange Commission is proposing to amend the regulatory requirements in Regulation ATS under the Securities Exchange Act of 1934 ("Exchange Act") applicable to alternative trading systems ("ATSs") that transact in National Market System ("NMS") stocks (hereinafter referred to as ("NMS Stock ATSs"), including so called "dark pools." First, the Commission is proposing to amend Regulation ATS to adopt Form ATS-N. Proposed Form ATS-N would require NMS Stock ATSs to provide information about the broker-dealer that operates the NMS Stock ATS ("broker-dealer operator") and the activities of the broker-dealer operator and its affiliates in connection with the NMS Stock ATS, including: their operation of non-ATS trading centers and other NMS Stock ATSs; products and services offered to subscribers; arrangements with unaffiliated trading centers; trading activities on the NMS Stock ATS; smart order router (or similar functionality) and algorithms used to send or receive orders or other trading interest to or from the ATS; personnel and third parties used to operate the NMS Stock ATS; differences in the availability of services, functionalities, or procedures; and safeguards and procedures to protect subscribers' confidential trading information. Proposed Form ATS-N would also require NMS Stock ATSs to provide detailed information about the manner of operations of the ATS, including: types of subscribers; hours of

operation; types of orders; connectivity, order entry, and co-location procedures; segmentation of order flow and notice about segmentation; display of order and other trading interest; trading services, including matching methodologies, order interaction rules, and order handling and execution procedures; procedures governing suspension of trading or trading during system disruption or malfunction; opening, reopening, closing, and after hours procedures; outbound routing services; fees; market data; trade reporting; clearance and settlement; order display and execution access (if applicable); fair access (if applicable); and market quality statistics published or provided to one or more subscribers. Second, the Commission is proposing to make filings on Form ATS-N public by posting certain Form ATS-N filings on the Commission's internet website and requiring each NMS Stock ATS that has a website to post on the NMS Stock ATS's website a direct URL hyperlink to the Commission's website that contains the documents enumerated in proposed Rule 304(b)(2). Third, the Commission is proposing to amend Regulation ATS to adopt new Rule 304, which would provide a process for the Commission to determine whether an entity qualifies for the exemption from the definition of "exchange" pursuant to Exchange Act Rule 3a1-1(a)(2) with regard to NMS stocks and declare an NMS Stock ATS's Form ATS-N either effective or, after notice and opportunity for hearing, ineffective. Fourth, under the proposal, the Commission could suspend, limit, or revoke the exemption provided under Rule 3a1-1(a)(2) after providing notice and opportunity for hearing. Fifth, the Commission is proposing to amend Exchange Act Rule 301(b)(10) of Regulation ATS to require that an ATS's safeguards and procedures to protect subscribers' confidential trading information be written. The Commission is also proposing to make conforming changes to Regulation ATS and Exchange Act Rule 3a1-1(a). Additionally, the Commission is requesting comment about, among other things, changing the requirements of the exemption provided under

Exchange Act Rule 3a1-1(a) for ATSs that facilitate transactions in securities other than NMS stocks. Lastly, the Commission is also requesting comment regarding its consideration to amend Exchange Act Rules 600 and 606 to improve transparency around the handling and routing of institutional customer orders by broker-dealers.

DATES: Comments should be received on or before [insert date 60 days after publication in the Federal Register].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-23-15 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper comments:

- Send paper comments to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-23-15. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/proposed.shtml). Comments will also be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; the Commission does not

edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by e-mail.

FOR FURTHER INFORMATION CONTACT: Tyler Raimo, Senior Special Counsel, at (202) 551-6227; Matthew Cursio, Special Counsel, at (202) 551-5748; Marsha Dixon, Special Counsel, at (202) 551-5782; Jennifer Dodd, Special Counsel, at (202) 551-5653; David Garcia, Special Counsel, at (202) 551-5681; or Derek James, Special Counsel, at (202) 551-5792; Office of Market Supervision, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

SUPPLEMENTARY INFORMATION:

The Commission is proposing: (1) new Form ATS-N under the Exchange Act provided by Rule 3a1-1(a) of the Exchange Act [17 CFR 240.3a1-1(a)], which NMS Stock ATSs would rely on to qualify for the exemption from the definition of "exchange"; (2) to amend Regulation ATS under the Exchange Act [17 CFR 242.300-303] to add new Rule 304 to provide new conditions for NMS Stock ATSs seeking to rely on the exemption from the definition of "exchange"; and (3) related amendments to Rule 300, 301, and 303 of Regulation ATS and Rule 3a1-1(a) under the Exchange Act [17 CFR 242.300; 17 CFR 242.301, 17 CFR 242.303; and 17 CFR 240.3a1-1]. The Commission is also proposing amendments to Rules 301(b)(10) and 303 of Regulation ATS under the Exchange Act [17 CFR 242.301(b)(10) and 17 CFR 242.303] to

require all ATSs to make and keep written safeguards and written procedures to protect subscribers' confidential trading information.

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I. Introduction

Section 11A(a)(2) of the Exchange Act,[1] enacted as part of the Securities Acts Amendments of 1975 ("1975 Amendments"),[2] directs the Commission, having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, to use its authority under the Exchange Act to facilitate the establishment of a national market system for securities in accordance with the Congressional findings and objectives set forth in Section 11A(a)(1) of the Exchange Act.[3] Among the findings and objectives in Section 11A(a)(1) are that "[n]ew data processing and communications techniques create the opportunity for more efficient and effective market operations"[4] and "[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure . . . the economically efficient execution of securities transactions"[5] and the "practicability of brokers executing investors' orders in the best markets."[6] Congress also found, as noted by the Commission when it adopted Regulation ATS, that it was in the public interest to assure ''fair competition . . . between exchange markets and markets other than exchange markets.''[7]

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1 15 U.S.C. 78k-1(a)(2).

2 Pub. L. 94-29, 89 Stat. 97 (1975).

3 15 U.S.C. 78k-1(a)(1).

4 Section 11A(a)(1)(B) of the Exchange Act, 15 U.S.C. 78k-1(a)(1)(B).

5 Section 11A(a)(1)(C)(i) of the Exchange Act, 15 U.S.C. 78k-1(a)(1)(C)(i).

6 Section 11A(a)(1)(C)(iv) of the Exchange Act, 15 U.S.C. 78k-1(a)(1)(C)(iv).

7 See Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) (Regulation of Exchanges and Alternative Trading Systems, hereinafter "Regulation ATS Adopting Release") at 70858 n.113 and accompanying text (citing Section 11A(a)(1)(C)(ii) of the Exchange Act, 15 U.S.C. 78k-1(a)(1)(C)(ii)). The Commission also noted that a fundamental goal of a national market system was to "achieve a market characterized by economically efficient executions, fair competition,

Congress recognized that the securities markets dynamically change and, accordingly, granted the Commission broad authority to oversee the implementation, operation, and regulation of the national market system in accordance with Congressional goals and objectives.[8]

In December 1998, the Commission adopted Regulation ATS to advance the goals of the national market system and establish a regulatory framework for ATSs.[9] At that time, there had been a surge in a variety of alternative trading systems that traded NMS stocks and furnished services traditionally provided by national securities exchanges,[10] such as matching counterparties' orders, executing trades, operating limit order books, and facilitating active price discovery.[11] The Commission observed at the time that, among other things, activity on ATSs was not fully disclosed, or accessible, to investors, and that these systems had no obligation to provide investors a fair opportunity to participate on the systems or to treat their participants fairly.[12] The Commission noted in the Regulation ATS Adopting Release that while ATSs at that time operated in a manner similar to registered national securities exchanges, each type of trading center was subject to different regulatory regimes, and that these differences created

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[and the] broad dissemination of basic market information." See id. at 70858 n.113 (quoting S. Rep. No. 75, 94th Cong., 1st Sess. 8 (1975) at 101).

8 See id. at 70858 n.110 and accompanying text (citing S. Rep. No. 75, 94th Cong., 1st Sess. 8 (1975) at 8-9). The Commission also noted that Congress explicitly rejected mandating specific components of a national market system because of uncertainty as to how technological and economic changes would affect the securities market. See id. at 70858 n.109 and accompanying text (citing S. Rep. No. 75, 94th Cong., 1st Sess. 8 (1975) at 8-9).

9 See generally Regulation ATS Adopting Release, supra note 7.

10 See id. at 70845.

11 See id. at 70848.

12 See id. at 70845.

disparities that affected investor protection and the operation of the markets as a whole, calling into question the fairness of the then-current regulatory requirements.[13]

In response to the substantial changes in the way securities were traded at the time, and the regulatory disparity between registered national securities exchanges and non-exchange markets, the Commission adopted a new regulatory framework that the Commission believed would encourage market innovation, while ensuring basic investor protections,[14] by giving securities markets a choice to register as national securities exchanges, or to register as broker-dealers and comply with Regulation ATS. Regulation ATS was designed to permit market centers meeting the Commission's updated interpretation of the definition of "exchange," as set forth in Exchange Act Rule 3b-16,[15] to select the regulatory framework more applicable to their business models. Among other things, Regulation ATS was intended to better integrate ATSs into the national market system, and ensure that market participants have fair access to ATSs with significant volume.[16]

In the seventeen years since the Commission adopted Regulation ATS, the equity markets have evolved significantly, resulting in an increased number of trading centers and a

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13 See id. at 70845-46 (noting that alternative trading systems prior to the adoption of Regulation ATS were private markets, which were open to only chosen subscribers, and were regulated as broker-dealers and not like registered national securities exchanges).

14 See id. at 70847.

15 17 CFR 240.3b-16.

16 See Regulation ATS Adopting Release, supra note 7, at 70846, 70874. The Commission also notes that when it adopted Regulation ATS, it stated its belief that the Commission's regulation of markets should both accommodate traditional market structures and provide sufficient flexibility to ensure that new markets promote fairness, efficiency, and transparency. See Regulation ATS Adopting Release, supra note 7, at 70846.

reduced concentration of trading activity in NMS stocks.[17] The growth in trading centers and trading activity has been fueled primarily by advances in technology for generating, routing, and executing orders. These technologies have markedly improved the speed, capacity, and sophistication of the trading mechanisms and processes that are available to market participants. Today, ATSs that trade NMS stocks have become an integral part of the national market system, as the number of these ATSs, and the volume of NMS stocks transacted on them, has increased significantly since the adoption of Regulation ATS.[18] Despite the emergence of ATSs as a significant source of liquidity in NMS stocks among today's markets, and the fact that ATSs compete with, and operate with almost the same complexity and sophistication as, registered national securities exchanges, the regulatory requirements applicable to ATSs have remained, for the most part, the same since Regulation ATS was adopted.[19]

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17 See Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72251 (December 5, 2014), 72262 (adopting final rules for systems compliance and integrity) ("SCI Adopting Release") at 72262 n.105 and n.106 and accompanying text (discussing the increased significance of NMS Stock ATSs).

18 See infra notes 116-122 and accompanying text.

19 The Commission notes that when the Commission adopted Regulation NMS, it also amended Regulation ATS to lower the threshold that triggers the Regulation ATS fair access requirements from 20% of the average daily volume in a security to 5%. See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37550 (June 29, 2005) ("Regulation NMS Adopting Release"). See also infra notes 92-95 and accompanying text (discussing the fair access requirements of Regulation ATS).

When adopting Regulation ATS, the Commission noted that the 20% volume threshold was based on current market conditions, and that if such conditions changed, or if the Commission believed that alternative trading systems with less than 20% of the trading volume were engaging in inappropriate exclusionary practices or in anticompetitive conduct, the Commission could revisit the fair access thresholds. See Regulation ATS Adopting Release, supra note 7, at 70873 n.245. The Commission also stated its intent to monitor the impact and effect of the fair access rules, as well as the practices of ATSs, and consider changing the rules if necessary to prevent anticompetitive behavior and

Although ATSs and registered national securities exchanges generally operate in a similar manner and compete as trading centers for order flow in NMS stocks, each of these types of trading centers is subject to a separate regulatory regime with a different mix of benefits and obligations, including with respect to their obligations to disclose information about their trading operations. Unlike ATSs, national securities exchanges must register with the Commission pursuant to Section 6 of the Exchange Act,[20] and undertake self-regulatory[21] obligations over their members. Before a national securities exchange may commence operations, the Commission must approve the national securities exchange's application for registration filed on Form 1. Section 6(b) of the Exchange Act requires, among other things, that the national securities exchange be so organized and have the capacity to carry out the purposes of the Exchange Act and to comply and enforce compliance by its members, and persons associated with its members, with the federal securities laws and the rules of the exchange.[22] Both a national securities exchange's registration application and the Commission's order approving the application are public. After registering, a national securities exchange must file with the

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ensure that qualified investors have access to significant sources of liquidity in the securities markets. See id.

See also infra note 107 and accompanying text (discussing amendments to Regulation ATS in connection with the adoption of Regulation SCI).

[20] 15 U.S.C. 78f.

[21] Section 3(a)(26) of the Exchange Act defines a self-regulatory organization ("SRO") as any national securities exchange, registered securities association, registered clearing agency, or (with limitations) the Municipal Securities Rulemaking Board. See 15 U.S.C. 78c(a)(26).

[22] See Section 6(b)(1) of the Exchange Act, 15 U.S.C. 78f(b)(1). The Commission must also find that the national securities exchange has rules that meet certain criteria. See generally Exchange Act Section 6(b)(2)-(10), 15 U.S.C. 78f(b)(2)-(10).

Commission any proposed changes to its rules.[23] The initial application on Form 1, amendments thereto, and filings for proposed rule changes, in combination, publicly disclose important information about national securities exchanges, such as trading services and fees. As an SRO, a national securities exchange enjoys certain unique benefits, such as limited immunity from private liability with respect to its regulatory functions and the ability to receive market data revenue, among others.

Although falling within the statutory definition of "exchange," an ATS is exempt from that definition if it complies with Regulation ATS. Regulation ATS includes the requirement that, as an alternative to registering as a national securities exchange, an ATS must register as a broker-dealer with the Commission, which entails becoming a member of an SRO, such as the Financial Industry Regulatory Authority ("FINRA").[24] Unlike national securities exchanges, ATSs are not approved by the Commission, but are instead required only to provide notice of their operations by filing a Form ATS with the Commission 20 days before commencing operations as an ATS.[25] Form ATS is "deemed confidential when filed,"[26] and it only requires an ATS to disclose limited aspects of the ATS's operations. ATSs are neither required to file proposed rule changes with the Commission nor otherwise publicly disclose their trading services, operations, or fees.

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23 See generally Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b).

24 Section 15(b)(8) of the Exchange Act requires a broker or dealer to become a member of a registered national securities association, unless it effects transactions in securities solely on an exchange of which it is a member. 15 U.S.C. 78o(b)(8).

25 See Regulation ATS Adopting Release, supra note 7, at 70863 and infra Section II.B (discussing the current requirements of Regulation ATS applicable to all ATSs).

26 See 17 CFR 242.301(b)(2)(vii).

The Commission is concerned that the current regulatory requirements relating to operational transparency for ATSs, particularly those that execute trades in NMS stocks, may no longer fully meet the goals of furthering the public interest and protecting investors. Today, ATSs account for approximately 15.4% of the total dollar volume in NMS stocks[27] and as noted, compete with, and operate with respect to trading in a manner similar to, registered national securities exchanges. Unlike registered national securities exchanges, however, there is limited public information available to market participants about the operations of ATSs, including how orders and other trading interest may interact, match, and execute on ATSs. The Commission is concerned that the differences between ATSs that trade NMS stocks and registered national securities exchanges with regard to operational transparency may be creating a competitive imbalance between two functionally similar trading centers that may trade the same security but are subject to different regulatory requirements. The Commission is also concerned that this difference in operational transparency disadvantages market participants by limiting their ability to adequately assess the relative merits of many trading centers.[28] Specifically, the Commission is concerned that the lack of operational transparency around ATSs limits market participants' ability to adequately discern how their orders interact, match, and execute on ATSs and to find the optimal market or markets for their orders.

The Commission is also concerned about the current lack of transparency around

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[27] See infra Table 1 "NMS Stock ATSs Ranked by Dollar Trading Volume – March 30, 2015 to June 26, 2015." Total dollar trading volume on all exchanges and off-exchange trading in the second quarter of 2015 was approximately $16.3 trillion and approximately 397 billion shares. See id.

[28] Market participants may include many different types of persons seeking to transact in NMS stocks, including broker-dealers and institutional or retail investors.

potential conflicts of interest that arise from the activities of the broker-dealer operator of the NMS Stock ATS and its affiliates[29] in connection with the ATS. As discussed herein, an ATS must register as a broker-dealer pursuant to Rule 301(b)(1) of Regulation ATS. This broker-dealer operator, its affiliates, or both, however, may also conduct brokerage or dealing activities in NMS stocks in addition to operating the ATS.[30] Broker-dealer operators may also have affiliates that support the operations of the ATS or trade on it. The Commission notes that these multi-service broker-dealers that engage in brokerage and dealing activities, in addition to the operation of their ATSs, have become more prevalent since the adoption of Regulation ATS and the other services multi-service broker-dealers provide have become increasingly intertwined with the operation of their ATSs. Given the unique position that the broker-dealer operator and its affiliates occupy with regard to the operation of an ATS, potential conflicts of interest arise when the various business interests of the broker-dealer operator or its affiliates compete with the interests of market participants that access and trade on the ATS.[31] Some of the recent settled

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29 The Commission is proposing to define "affiliate" for purposes of proposed Form ATS-N as described and discussed further below. See infra note 376 and accompanying text. See also Instruction G to proposed Form ATS-N.

30 Throughout this release, broker-dealer operators of NMS Stock ATSs that also provide brokerage or dealing services in addition to operating an NMS Stock ATS are referred to as "multi-service broker-dealers".

31 See infra Section VII.A (discussing the relationship between NMS Stock ATSs and the other business functions of their broker-dealer operators). The Commission notes that, although it was concerned at the time of adoption of Regulation ATS about conflicts of interest that may be present when the broker-dealer operator of an ATS also performs other trading functions (see infra notes 526-528 and accompanying text discussing the Commission's concerns regarding the potential for misuse of confidential trading information that led to the adoption of Rule 301(b)(10)), the business structure of broker-dealers that operate NMS Stock ATSs has changed since 1998.

actions against ATSs highlight this potential.[32] As discussed further below, although the operations of most ATSs and their broker-dealer operators have become more closely connected, market participants receive limited information about the activities of the broker-dealer operator and its affiliates and the potential conflicts of interest that arise from these activities.

Transparency is a hallmark of the U.S. securities markets and a primary tool by which investors protect their own interests, and the Commission is concerned that the current lack of transparency around potential conflicts of interest of the broker-dealer operator may impede market participants from adequately protecting their interests when doing business on the NMS Stock ATS. The Commission preliminarily believes that if market participants have more information about the operations of NMS Stock ATSs and the activities of the broker-dealer operators and the broker-dealer operators' affiliates, they could better evaluate whether to do business with an ATS and make more informed decisions about where to route their orders.[33]

The Commission has long recognized that effective competition requires transparency and access across the national market system.[34] The Commission preliminarily believes that the proposals discussed below could promote more efficient and effective market operations by

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32 See infra note 373 and accompanying text.

33 See, e.g., infra notes 187 and 189 and accompanying text (discussing a comment by the Consumer Federation of America about how more detailed information about ATS operations would allow participants to assess whether it makes sense to trade on that venue, and a comment by Bloomberg Tradebook LLC that because buy-side representatives might not be customers of all ATSs, they could not assess order interaction that occurs across the market structure); and infra note 372 (citing recent enforcement actions settled by the Commission, many of which, such as the Liquidnet Settlement, the Pipeline Settlement, the UBS Settlement, and the ITG Settlement, included allegations that subscribers were fraudulently misled about the operations of certain ATSs).

34 See generally Regulation ATS Adopting Release, supra note 7.

providing more transparency to market participants about the operations of ATSs and the potential conflicts of interest of the controlling broker-dealer operator and its affiliates.[35] The Commission preliminarily believes that the operational transparency rules being proposed today could increase competition among trading centers in regard to order routing and execution quality. For example, the proposed rules could reveal order interaction procedures that may result in the differential treatment of some order types handled by an NMS Stock ATS. This improved visibility, in turn, could cause market participants to shift order flow to NMS Stock ATSs that provide better opportunities for executions. The Commission preliminarily believes that the proposal could facilitate comparisons among trading centers in NMS stocks and increase competition by informing market participants about the operations of NMS Stock ATSs.

The Commission preliminarily believes that a wide range of market participants would benefit from the operational transparency that would result from the proposal. For example, many brokers subscribe to NMS Stock ATSs and route their orders, and those of their customers, to NMS Stock ATSs for execution. The Commission preliminarily believes that improved transparency about the operations of NMS Stock ATSs could aid brokers with meeting their best execution obligations to their customers, as they can better assess the trading venues to which

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[35] See infra Sections XIII.B and C (analyzing the possible impact from the current lack of public disclosure of NMS Stock ATSs' operations, as well as disparate levels of information available to market participants about NMS Stock ATS operations and the activities of their broker-dealer operators and their affiliates; the competitive environment between national securities exchanges and NMS Stock ATSs, between NMS Stock ATSs, and between broker-dealers that operate NMS Stock ATSs and broker-dealers that do not operate NMS Stock ATSs; and the anticipated costs and benefits of improving transparency).

they route orders.[36] The duty of best execution requires broker-dealers to execute customers' trades at the most favorable terms reasonably available under the circumstances (i.e., at the best reasonably available price).[37] The Commission has not viewed the duty of best execution as inconsistent with the automated routing of orders or requiring automated routing on an order-by-order basis to the market with the best quoted price at the time.[38] Rather, the duty of best execution requires broker-dealers to periodically assess the quality of competing markets to

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36 See, e.g., infra note 187 and accompanying text (noting that The Consumer Federation of America previously commented that Form ATS should require ATSs to provide "critical details about an ATS's participants, segmentation, and fee structure" because the "information will allow market participants, regulators, and third party analysts to assess whether an ATS's terms of access and service are such that it makes sense to trade on that venue").

37 A broker-dealer's duty of best execution derives from common law agency principles and fiduciary obligations, and is incorporated in SRO rules and, through judicial and Commission decisions, in the antifraud provisions of the federal securities laws. See Order Execution Obligations, Securities Exchange Act Release No. 37619A (Sept. 6, 1996), 61 FR 48290, 48322 (Sept. 12, 1996). See also Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266, 270, 273 (3d Cir. 1998) (en banc), cert. denied, 525 U.S. 811 (1998) (finding that failure to satisfy the duty of best execution can constitute fraud because a broker-dealer, in agreeing to execute a customer's order, makes an implied representation that it will execute it in a manner that maximizes the customer's economic gain in the transaction, and stating that''[T]he basis for the duty of best execution is the mutual understanding that the client is engaging in the trade—and retaining the services of the broker as his agent—solely for the purpose of maximizing his own economic benefit, and that the broker receives her compensation because she assists the client in reaching that goal.''); Matter of Marc N. Geman, Securities Exchange Act Release No. 43963 (Feb. 14, 2001), aff'd, Geman v. SEC, 334 F.3d 1183 (10th Cir. 2003) (citing Newton, but deciding against finding a violation of the duty of best execution based on the record). See also Payment for Order Flow, Securities Exchange Act Release No. 34902 (Oct. 27, 1994), 59 FR 55006, 55009 (Nov. 2, 1994). If the broker-dealer intends not to act in a manner that maximizes the customer's economic gain when he accepts the order and does not disclose this to the customer, a trier of fact could find that the broker-dealer's implied representation was false. See Newton, 135 F.3d at 273–274.

38 See Regulation NMS Adopting Release, supra note 19, at 37538.

assure that order flow is directed to the markets providing the most beneficial terms for their customer orders.[39]

In addition, the Commission preliminarily believes that the proposal could also help customers of broker-dealers, whose orders are routed to an NMS Stock ATS for possible execution in the ATS, evaluate whether their broker-dealer fulfilled its duty of best-execution. The Commission preliminarily believes that institutional investors, who may subscribe to an NMS Stock ATS or whose orders may be routed to an NMS Stock ATS by their brokers, should have more information about how NMS Stock ATSs operate, including how the ATS may match and execute customer orders.[40] The Commission preliminarily believes that additional information about how NMS Stock ATSs operate could aid these investors in evaluating the routing decisions of their brokers and understanding whether their broker routed their orders to a

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39 Id.

40 See, e.g., Consumer Federation of America letter, infra note 175, at 22, 37-38 (expressing support for requiring all ATSs to publicly disclose Form ATS "so that the public can see how these venues operate," and opining that the Commission should "undertake an exhaustive investigation of the current order types, requiring exchanges and all ATSs . . . to disclose in easily understandable terms what their purpose is, how they are used in practice, who is using them, and why they are not discriminatory or resulting in undue benefit or harm to any traders"); Citadel letter, infra note 214, at 4 (expressing the view that "dark pools should be subject to increased transparency," and that "ATS operational information and filings should be publicly available"); KOR Group letter, infra note 175, at 12 (opining that the fact that "ATS filings are hidden from the public while the burden is on SROs to file publicly . . . does not serve the public interest in any way" and that there "should not be any reasoned argument against" making Form ATS publicly available); Liquidnet letter #1, infra note 166, at D-5-6, -11 (stating that the Commission should require institutional brokers, including institutional ATSs, to disclose to their customers specific order handling practices, including identification of external venues to which the broker routes orders, the process for crossing orders with other orders, execution of orders as agent and principal, a detailed description of the operation and function of each ATS or trading desk operated by the broker, and a clear and detailed description of each algorithm and order type offered by the broker and expressing the view that Form ATS should be made publicly available).

trading venue that best fits their needs. To illustrate this point, institutional investors would likely find it useful to know whether an NMS Stock ATS provides execution priority to customer order flow, uses strict price-time priority rules to rank and execute orders, or applies certain execution allocation methodologies for institutional orders. Such information could permit an institutional investor to compare NMS Stock ATSs against each other, as well as against national securities exchanges, to determine which trading centers would best fit its needs. Additionally, there may be market participants, who may not currently subscribe to an NMS Stock ATS, that may wish to obtain information about how a particular NMS Stock ATS operates before sending orders to that trading venue.

This proposal is primarily designed to provide market participants with greater transparency around the operations of NMS Stock ATSs and potential conflicts of interest that may arise involving the broker-dealer operator and its affiliates. The proposed rules would require public, detailed information to be disclosed about the activities of the broker-dealer operator and its affiliates in connection with the NMS Stock ATS, including: their operation of non-ATS trading centers and other NMS Stock ATSs; the products and services offered to subscribers; any arrangements with unaffiliated trading centers; trading activities on the NMS Stock ATS of the broker-dealer operator or its affiliates; the use of smart order routers ("SORs") (or similar functionality) and algorithms used to send or receive orders or other trading interest to or from the NMS Stock ATS; shared employees of the NMS Stock ATS and third parties used to operate the NMS Stock ATS; any differences in the availability of services, functionalities, or procedures to subscribers and the availability of those services, functionalities, or procedures to the broker-dealer operator or its affiliates; and the NMS Stock ATS's safeguards and procedures to protect subscribers' confidential trading information. Form ATS-N would also require

detailed information about the operations of the NMS Stock ATS, including: any eligibility requirements and any terms and conditions imposed for subscribers; the NMS Stock ATS's hours of operation; the types of orders or other trading interest that can be entered on the NMS Stock ATS; any connectivity, order entry, and co-location procedures or services; the segmentation of order flow (and notice given about segmentation); the display of order and other trading interest; trading services, including matching methodologies, order interaction rules, and order handling and execution procedures; procedures governing the suspension of trading and trading during a system disruption or malfunction; opening, re-opening, closing, and after hours processes or trading procedures; any outbound routing services; the NMS Stock ATS's use of market data; fees, rebates, or other charges of the NMS Stock ATS; any trade reporting, clearance or settlement arrangements or procedures; order display and execution access and fair access information (if applicable); and market quality statistics published or provided to one or more subscribers. The Commission preliminarily believes that greater transparency in this regard would provide important information to market participants so they can evaluate whether submitting order flow to a particular NMS Stock ATS aligns with their trading or investment objectives. Among other things, these enhanced, public disclosures also are designed to limit the potential that a broker-dealer operator of an NMS Stock ATS could provide certain subscribers with greater disclosure about the operations and system functionalities of the ATS than it provides to other market participants.

The Commission also preliminarily believes that proposing a process for the Commission to determine whether an NMS Stock ATS qualifies for the exemption from the Exchange Act definition of "exchange" would facilitate better Commission oversight of NMS Stock ATSs and

thus, better protection of investors.[41] The proposed process would provide the Commission with an opportunity to review disclosures on Form ATS-N for compliance with the Form ATS-N requirements, Regulation ATS, and other applicable requirements of the federal securities laws and regulations. To qualify for the exemption from the Exchange Act definition of "exchange," an NMS Stock ATS would be required to file with the Commission a Form ATS-N, in accordance with the instructions therein, and the Form ATS-N would need to be declared effective by the Commission. The Commission would declare ineffective a Form ATS-N if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest and is consistent with the protection of investors.[42] If the Commission declares a Form ATS-N ineffective, the NMS Stock ATS would be prohibited from operating as an NMS Stock ATS,[43] but would not be prohibited from subsequently filing a new Form ATS-N. The Commission also preliminarily believes that proposing a process for the Commission to review and declare ineffective Form ATS-N Amendments, if it finds that such action is necessary or appropriate in the public interest and is consistent with the protection of investors, would aid the Commission's ongoing oversight of NMS Stock ATSs.[44]

In this light, the Commission is proposing to amend Regulation ATS, including as follows: (1) define in proposed Rule 300(k) of Regulation ATS the term NMS Stock ATS,

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41 See proposed Rule 304(a)(1)(i). See also infra Section IV.C.0 (discussing the proposed process for Commission review of Form ATS-N and circumstances under which an NMS Stock ATS may not qualify for the exemption, as well as the benefits that the process should provide to market participants).

42 See proposed Rule 304(a)(1)(iii).

43 See proposed Rule 304(a)(1)(iv).

44 See infra Section IV.C.6 (discussing the proposed process for Commission review of amendments). See also proposed Rule 304(a)(2)(ii).

amend the definition of “control” under current Rule 300(f) of Regulation ATS to specify that control means to direct the management or policies of the broker-dealer of an ATS, and amend the exemption from the definition of “exchange” in Rule 3a1-1(a) to require NMS Stock ATSs to comply with proposed Rule 304 (in addition to the other requirements of Regulation ATS) as a condition of the exemption; (2) amend Rule 301(b)(2) to require NMS Stock ATSs to file the reports and amendments mandated by proposed Rule 304, which would include filing proposed Form ATS-N, in lieu of current Form ATS, to provide detailed disclosures about an NMS Stock ATS’s operations and the activities of its broker-dealer operator and its affiliates and amend Rule 301(b)(2) to require an ATS that effects transactions in both NMS stocks and non-NMS stocks to file the reports and amendments mandated by proposed Rule 304 for its NMS stock trading activity and the reports and amendments required under current Rule 301(b)(2) of Regulation ATS for its non-NMS stock trading activity; (3) amend Rule 301(b)(9) to require an ATS that trades both NMS stocks and non-NMS stocks to separately report its transactions in NMS stocks on one Form ATS-R, and its transactions in securities other than NMS stocks on another Form ATS-R; (4) provide a process for the Commission, pursuant to proposed Rule 304(a)(1), to declare a Form ATS-N effective or, after notice and opportunity for hearing, ineffective; (5) establish the requirements for amending Form ATS-N pursuant to proposed Rule 304(a)(2); (6) provide, pursuant to proposed Rule 304(a)(3), that a notice of cessation shall cause the Form ATS-N to be ineffective on the date designated by the NMS Stock ATS; (7) provide a process for the Commission, pursuant to proposed Rule 304(a)(4), to suspend, limit, or revoke the exemption of an NMS Stock ATS’s Form ATS-N upon notice and after opportunity for hearing; (8) provide that the Commission, pursuant to proposed Rule 304(b), will publicly post on its website: each effective Form ATS-N, each properly filed Form ATS-N Amendment, and each

properly filed Form ATS-N notice of cessation, as well as each order of effectiveness or ineffectiveness of a Form ATS-N, order of ineffectiveness of a Form ATS-N Amendment, and order suspending, limiting, or revoking an NMS Stock ATS's exemption, issued by the Commission; and also require each NMS Stock ATS that has a website to post on the NMS Stock ATS's website a direct URL hyperlink to the Commission's website that contains the documents enumerated in proposed Rule 304(b)(2); (9) amend existing Rule 301(b)(10) of Regulation ATS to require all ATSs to adopt written safeguards and written procedures to protect subscribers' confidential trading information, as well as written oversight procedures to ensure those safeguards and procedures are followed; and (10) amend Rule 303(a) to require that the written safeguards and written procedures required by proposed Rule 301(b)(10) and reports pursuant to proposed Rule 304 be preserved.

II. Current ATS Regulatory Framework

A. Exemption from National Securities Exchange Registration

A fundamental component of the current ATS regulatory framework adopted by the Commission in 1998 is Exchange Act Rule 3b-16.[45] Rule 3b-16 was designed to address the blurring of traditional classifications between exchanges and broker-dealers as a result of advances in technology by providing a more comprehensive and meaningful interpretation of what constitutes an exchange under Section 3(a) of the Exchange Act.[46] Rule 3b-16(a) provides a functional test to assess whether a trading platform meets the definition of exchange under Section 3(a)(1) of the Exchange Act, and thus is required to register as a national securities exchange pursuant to Sections 5 and 6 of the Exchange Act.[47] Under Rule 3b-16, an organization, association, or group of persons shall be considered to constitute, maintain, or provide "a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange," if such organization, association, or group of persons: (1) brings together the orders for securities of multiple buyers and sellers; and (2) uses established, non-discretionary methods

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45 See 17 CFR 240.3b-16.

46 See Regulation ATS Adopting Release, supra note 7, at 70847. Pursuant to Section 3(a)(1) of the Exchange Act, the statutory definition of "exchange" means "any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange…." 15 U.S.C. 78c(a)(1).

47 See 15 U.S.C. 78e and 78f. A "national securities exchange" is an exchange registered as such under Section 6 of the Exchange Act.

(whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade.[48]

The Commission adopted Exchange Act Rule 3b-16(b) to explicitly exclude certain systems that the Commission believed did not meet the exchange definition.[49] Specifically, Rule 3b-16(b) excludes systems that perform only traditional broker-dealer activities, including: (1) systems that route orders to a national securities exchange, a market operated by a national securities association, or a broker-dealer for execution, or (2) systems that allow persons to enter orders for execution against the bids and offers of a single dealer if certain additional conditions are met.[50] Accordingly, a system is not included in the Commission's interpretation of "exchange" if: (1) the system fails to meet the two-part test in paragraph (a) of Rule 3b-16; (2) the system falls within one of the exclusions in paragraph (b) of Rule 3b-16; or (3) the

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48 See 17 CFR 240.3b-16(a).

49 See Regulation ATS Adopting Release, supra note 7, at 70852.

50 See 17 CFR 240.3b-16(b). Specifically, Rule 3b-16(b)(2) excludes such systems that allow persons to enter orders for execution against the bids and offers of a single dealer if (i) as an incidental part of such activities, the system matches orders that are not displayed to any person other than the dealer and its employees; or (ii) in the course of acting as a market maker registered with [an SRO], the system displays the limit orders of the market maker's, or other broker-dealer's, customers, and in addition, (A) matches customer orders with those displayed limit orders, and (B) as an incidental part of its market making activities, the system crosses or matches orders that are not displayed to any person other than the market maker and its employees. See 17 CFR 240.3b-16(b)(2). The purpose of these exclusions was to encompass systems operated by third market makers, as well as those systems operated by dealers, primarily in debt securities, who display their own quotations to customers and other broker-dealers on a proprietary basis. Rule 3b-16(b)(2)(ii) was adopted to exclude registered market makers that display their own quotes and, in order to comply with a Commission or SRO rule, customer limit orders, and allow their customers and other broker-dealers to enter orders of execution against the displayed orders. Additionally, it was designed to allow registered market makers, as an incidental activity resulting from their market maker status, to match or cross orders for securities in which they make a market, even if those orders are not displayed. See Regulation ATS Adopting Release, supra note 7, at 70854.

Commission otherwise conditionally or unconditionally exempts[51] the system from the definition.

For those systems that meet the criteria of Rule 3b-16(a) and are not excluded under Rule 3b-16(b) of the Exchange Act,[52] Rule 3a1-1(a)(2)[53] provides an exemption from the definition of "exchange." Specifically, Exchange Act Rule 3a1-1(a)(2) exempts from the Exchange Act Section 3(a)(1) definition of "exchange" an organization, association, or group of persons that complies with Regulation ATS,[54] which includes, among other things, the requirement to register as a broker-dealer.[55] Therefore, an organization, association, or group of persons that complies with Regulation ATS is not subject to Section 5 of the Exchange Act,[56] which requires that an "exchange" register with the Commission as a national securities exchange pursuant to Section 6 of the Exchange Act[57] or otherwise be exempt. Additionally, an ATS that is not required to register as a national securities exchange pursuant to Section 5 is not an SRO[58] and is not required to comply with applicable requirements.[59]

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51 See 17 CFR 240.3b-16(e).

52 See 17 CFR 240.3b-16(b).

53 See 17 CFR 240.3a1-1(a)(2).

54 See 17 CFR 240.3a1-1(a)(2). Rule 3a1-1 also provides two other exemptions from the definition of "exchange" for: (1) any ATS operated by a national securities association and (2) any ATS not required to comply with Regulation ATS pursuant to Rule 301(a) of Regulation ATS. See 17 CFR 240.3a1-1(a)(1) and (3).

55 See 17 CFR 242.301(b)(1).

56 15 U.S.C. 78e.

57 15 U.S.C. 78f.

58 See supra note 21 (setting forth the statutory definition of SRO).

59 See, e.g., Section 19 of the Exchange Act, 15 U.S.C. 78s.

To satisfy the requirements of the Rule 3a1-1(a)(2) exemption, a system that otherwise meets the definition of an "exchange" must comply with Regulation ATS. An ATS that fails to comply with the requirements of Regulation ATS would no longer qualify for the exemption from the definition of an "exchange" provided under Exchange Act Rule 3a1-1(a)(2), and thus, risks operating as an unregistered exchange in violation of Section 5 of the Exchange Act.[60]

B. Conditions to the ATS Exemption; Confidential Notice Regime

Rule 300(a) of Regulation ATS defines an ATS as: "any organization, association, person, group of persons, or system: (1) [t]hat constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of [Rule 3b-16]; and (2) [t]hat does not: (i) [s]et rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or (ii) [d]iscipline subscribers other than by exclusion from trading."[61] Governing the conduct of or disciplining subscribers are functions performed by an SRO that the Commission believes should be regulated as such.[62] Accordingly, pursuant to the

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60 See 15 U.S.C. 78e.

61 See 17 CFR 242.300(a).

62 See Regulation ATS Adopting Release, supra note 7, at 70859. As the Commission noted when it adopted Regulation ATS, the Commission believes that any system that uses its market power to regulate its participants should be regulated as an SRO. The Commission noted that it would consider a trading system to be "governing the conduct of subscribers" outside the trading system if it imposed on subscribers, as conditions of participation in trading, any requirements for which the trading system had to examine subscribers for compliance. In addition, the Commission stated its belief that if a trading system imposed as conditions of participation, directly or indirectly, restrictions on subscribers' activities outside of the trading system, such a trading system should be a registered exchange or operated by a national securities association, but that the

definition in Rule 300(a), a trading system that performs SRO functions, or performs functions common to national securities exchanges, such as establishing listing standards, is precluded from the definition of ATS and would be required to register as a national securities exchange or be operated by a national securities association (or seek another exemption).[63]

Rule 301(b)(1) of Regulation ATS requires that every ATS that is subject to Regulation ATS, pursuant to paragraph (a) of Rule 301,[64] be registered as a broker-dealer under Section 15 of the Exchange Act,[65] and thus become a member of an SRO, such as FINRA.[66] In the Regulation ATS Adopting Release, the Commission stated that an ATS that registers as a broker-dealer must, in addition to complying with Regulation ATS, comply with the filing and conduct

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limitation would not preclude an alternative trading system from imposing credit conditions on subscribers or requiring subscribers to submit financial information to the alternative trading system. See id.

63 See id.

64 Pursuant to Rule 301(a), certain ATSs that are subject to other appropriate regulations are not required to comply with Regulation ATS, including any ATS that is: (1) registered as an exchange under Section 6 of the Exchange Act; (2) exempt from exchange registration based on the limited volume of transactions effected; (3) operated by a national securities association; (4) registered as a broker-dealer under Sections 15(b) or 15C of the Exchange Act, or is a bank, that limits its activities to certain instruments; or (5) exempted, conditionally or unconditionally, by Commission order, after application by such alternative trading system. See 17 CFR 242.301(a). For example, an ATS that is registered as a broker-dealer, or is a bank, and limits its securities activities solely to government securities is not required to comply with Regulation ATS. See 17 CFR 242.301(a)(4).

65 See 17 CFR 242.301(b)(1).

66 See Section 15(b)(8) of the Exchange Act; 15 U.S.C. 78o(b)(8). See also supra 24 note and infra note 294 and accompanying text (setting forth the requirements of Section 15(b)(8) of the Exchange Act).

obligations associated with being a registered broker-dealer, including membership in an SRO and compliance with SRO rules.[67]

In addition, Rule 301(b)(2) of Regulation ATS requires an ATS to file an initial operation report with the Commission on Form ATS[68] at least 20 days before commencing operations.[69] The Commission stated in the Regulation ATS Adopting Release that Form ATS would provide the Commission the opportunity to identify problems that might impact investors before the system begins to operate.[70] Unlike a Form 1 filed by a national securities exchange, Form ATS is not approved by the Commission. Instead, Form ATS provides the Commission with notice about its operations prior to commencing operations.[71]

Form ATS requires, among other things, that an ATS provide information about: classes of subscribers and differences in access to the services offered by the ATS to different groups or classes of subscribers; securities the ATS expects to trade; any entity other than the ATS involved in its operations; the manner in which the system operates; how subscribers access the trading system; procedures governing order entry and execution; and trade reporting, clearance and settlement of trades on the ATS. Regulation ATS states that information filed by an ATS on

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67 See Regulation ATS Adopting Release, supra note 7, at 70903.

68 Form ATS and the Form ATS Instructions are available at http://www.sec.gov/about/forms/formats.pdf.

69 See 17 CFR 242.301(b)(2)(i).

70 See Regulation ATS Adopting Release, supra note 7, at 70864.

71 See id. As discussed more fully below, the current notice process applicable to ATSs is very different than the process by which exchanges register with the Commission and how amendments to exchange rules are regulated. See infra notes 158-162 and accompanying text.

Form ATS is "deemed confidential when filed."[72] Thus, under the current regulatory requirements, market participants generally do not have information about, for example, how orders are entered, prioritized, handled, and executed on an NMS Stock ATS, ATSs are not otherwise required to publicly disclose such information.[73]

In addition to providing notice of its initial operation, an ATS must notify the Commission of any changes in its operations by filing an amendment to its initial operation report. There are three types of amendments to an initial operation report.[74] First, if any material change is made to its operations, the ATS must file an amendment on Form ATS at least 20 calendar days before implementing such change.[75] Second, if any information contained in the initial operation report becomes inaccurate for any reason and has not been previously reported to the Commission as an amendment on Form ATS, the ATS must file an amendment on Form ATS correcting the information within 30 calendar days after the end of the calendar quarter in which the system has operated.[76] Third, an ATS must promptly file an amendment on Form ATS correcting information that it previously reported on Form ATS after discovery that

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72 See 17 CFR 242.301(b)(2)(vii).

73 The Commission does note, however, that some ATSs may currently make voluntary public disclosures. See, e.g., infra note 156.

74 Form ATS is used for three types of submissions: (1) initial operation reports; (2) amendments to initial operation reports; and (3) cessation of operations reports. An ATS designates the type of submission on the form. See Form ATS.

75 See 17 CFR 242.301(b)(2)(ii). A "material change," includes, but is not limited to, any change to the operating platform, the types of securities traded, or the types of subscribers. In addition, the Commission has stated that ATSs implicitly make materiality decisions in determining when to notify their subscribers of changes. See Regulation ATS Adopting Release, supra note 7, at 70864. See also supra Section IV.C.IV.6 (discussing the proposed materiality standard that would apply to the filing of amendments on Form ATS-N).

76 See 17 CFR 242.301(b)(2)(iii).

any information was inaccurate when filed.[77] Also, upon ceasing to operate as an ATS, an ATS is required to promptly file a cessation of operations report on Form ATS.[78] As is the case with respect to initial operation reports, Form ATS amendments and cessation of operations reports serve as notice to the Commission of changes to the ATS's operations,[79] and Rule 301(b)(2)(vii) and the instructions to the form state that Form ATS is "deemed confidential."[80]

Rule 301(b)(9) of Regulation ATS also requires ATSs to periodically report certain information about transactions on the ATS and information about certain activities on Form ATS-R within 30 calendar days after the end of each calendar quarter in which the market has operated.[81] Form ATS-R requires quarterly volume information for specified categories of securities, as well as a list of all securities traded on the ATS during the quarter and a list of all subscribers that were participants during the quarter.[82] Form ATS-R also requires an ATS that is subject to the fair access obligations under Rule 301(b)(5) of Regulation ATS to: (1) provide a list of all persons granted, denied, or limited access to the ATS during the period covered by the ATS-R and (2) designate for each person: (a) whether they were granted, denied, or limited access; (b) the date the ATS took such action; (c) the effective date of such action; and (d) the

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77 See 17 CFR 242.301(b)(2)(iv).

78 See 17 CFR 242.301(b)(2)(v).

79 See Regulation ATS Adopting Release, supra note 7, at 70864.

80 See 17 CFR 242.301(b)(2)(vii); Form ATS at 3, General Instructions A.7.

81 See 17 CFR 242.301(b)(9)(i). Form ATS-R and the Form ATS-R Instructions are available at https://www.sec.gov/about/forms/formats-r.pdf.

82 See Form ATS-R at 4, Items 1 and 2 (describing the requirements for Exhibit A and Exhibit B of Form ATS-R). ATSs must also complete and file Form ATS-R within 10 calendar days after ceasing to operate. See 17 CFR 242.301(b)(9)(ii); Form ATS-R at 2, General Instructions A.2 to Form ATS-R.

nature of any denial or limitation of access.[83] In the Regulation ATS Adopting Release, the Commission stated that the information provided on Form ATS-R would permit the Commission to monitor the trading on ATSs.[84] Like Form ATS, Rule 301(b)(2)(vii) and the instructions to Form ATS-R state that Form ATS-R is "deemed confidential."[85]

In addition to the reporting requirements under Rules 301(b)(2) and 301(b)(9) of Regulation ATS, an ATS's exemption from national securities exchange registration is conditioned on the ATS complying with the other requirements under Regulation ATS. Under Rule 301(b)(3), an ATS that (1) displays subscriber orders in an NMS stock to any person (other than an employee of the ATS) and (2) during at least four of the preceding six calendar months, had an average daily trading volume of 5% or more of the aggregate average daily share volume for that NMS stock, as reported by an effective transaction reporting plan, must:[86]

- pursuant to Rule 301(b)(3)(ii),[87] provide to a national securities exchange or national securities association the prices and sizes of the orders at the highest buy price and the lowest sell price for such NMS stock, displayed to more than one person in the ATS, for inclusion in the quotation data made available by the national securities exchange or national securities association pursuant to Rule 602 under Regulation NMS;[88] and

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83 See Form ATS-R at 6, Item 7 (explaining requirements for Exhibit C).

84 See Regulation ATS Adopting Release, supra note 7, at 70878.

85 See 17 CFR 242.301(b)(2)(vii); Form ATS-R at 2, General Instruction A.7.

86 See 17 CFR 242.301(b)(3)(i).

87 See 17 CFR 242.301(b)(3)(ii).

88 See 17 CFR 242.602.

- pursuant to Rule 301(b)(3)(iii),[89] with respect to any such order displayed pursuant to Rule 301(b)(3)(ii), provide to any broker-dealer that has access to the national securities exchange or national securities association to which the ATS provides the prices and sizes of displayed orders pursuant to Rule 301(b)(3)(ii), the ability to effect a transaction with such orders that is:
    - equivalent to the ability of such broker-dealer to effect a transaction with other orders displayed on the exchange or by the association; and
    - at the price of the highest priced buy order or lowest priced sell order displayed for the lesser of the cumulative size of such priced orders entered therein at such price, or the size of the execution sought by such broker-dealer.

These order display and execution access obligations were adopted by the Commission with the expectation they would promote additional market integration and further discourage two-tier markets when trading in an NMS stock on an ATS reaches a certain level.[90]

Under Rule 301(b)(4), an ATS must not charge any fee to broker-dealers that access the ATS through a national securities exchange or national securities association that is inconsistent with the equivalent access to the ATS that is required under Rule 301(b)(3)(iii).[91]

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89 See 17 CFR 242.301(b)(3)(iii).

90 See Regulation ATS Adopting Release, supra note 7, at 70867.

91 See 17 CFR 242.301(b)(4). In addition, if the national securities exchange or national securities association to which an ATS provides the prices and sizes of orders under Rules 301(b)(3)(ii) and 301(b)(3)(iii) establishes rules designed to assure consistency with standards for access to quotations displayed on such national securities exchange, or the market operated by such national securities association, the ATS shall not charge any

Under Rule 301(b)(5) – and even if the ATS does not display subscribers' orders to any person (other than an ATS employee) – an ATS with 5% or more of the average daily volume in an NMS stock during at least four of the preceding six calendar months, as reported by an effective transaction reporting plan, must:[92]

- establish written standards for granting access to trading on its system;
- not unreasonably prohibit or limit any person in respect to access to services offered by such ATS by applying the above standards in an unfair or discriminatory manner;
- make and keep records of:
    - all grants of access including, for all subscribers, the reasons for granting such access; and
    - all denials or limitations of access and reasons, for each applicant, for denying or limiting access; and
- report the information required in Exhibit C of Form ATS-R regarding grants, denials, and limitations of access.[93]

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fee to members that is contrary to, that is not disclosed in the manner required by, or that is inconsistent with any standard of equivalent access established by such rules. See id.

92 17 CFR 242.301(b)(5)(i).

93 See 17 CFR 242.301(b)(5)(ii). Regulation ATS does not mandate compliance with these requirements when an ATS reaches the 5% trading threshold in an NMS stock if the following conditions are met:

- the ATS matches customer orders for a security with other customer orders;
- such customers' orders are not displayed to any person, other than employees of the ATS; and
- such orders are executed at a price for such security disseminated by an effective transaction reporting plan, or derived from such prices.

See 17 CFR 242.301(b)(5)(iii).

The above requirements of Rule 301(b)(5) are referred to as the "fair access" requirements and apply on a security-by-security basis.[94] A denial of access to a market participant after an ATS reaches the above 5% fair access threshold in an NMS stock would be reasonable if it is based on objective standards.[95]

Additionally, under Rule 301(b)(6), an ATS that trades only municipal securities or corporate fixed income debt with 20% or more of the average daily volume traded in the U.S. during at least four of the preceding six calendar months, must do the following with respect to those systems that support order entry, order routing, order execution, transaction reporting, and trade comparison:[96]

- establish reasonable current and future capacity estimates;
- conduct periodic capacity stress tests of critical systems to determine such system's ability to process transactions in an accurate, timely, and efficient manner;
- develop and implement reasonable procedures to review and keep current its system development and testing methodology;
- review the vulnerability of its systems and data center computer operations to internal and external threats, physical hazards, and natural disasters;
- establish adequate contingency and disaster recovery plans;

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94 The fair access requirements also apply for non-NMS stocks when an ATS reaches a 5% trading threshold in certain securities other than NMS stocks, including certain equity securities, municipal securities and corporate debt securities. See 17 CFR 242.301(b)(5)(i).

95 See Regulation ATS Adopting Release, supra note 7, at 70874.

96 See 17 CFR 242.301(b)(6)(i).

- on an annual basis, perform an independent review, in accordance with established audit procedures and standards, of the ATS's controls for ensuring that the above requirements are met, and conduct a review by senior management of a report containing the recommendations and conclusions of the independent review; and
- promptly notify the Commission and its staff of material systems outages and significant systems changes.[97]

Prior to the Commission's adoption of Regulation SCI,[98] the requirements of Rule 301(b)(6) also applied to ATSs with regard to their trading in NMS stocks and non-NMS equity securities.[99] Regulation SCI superseded and replaced Rule 301(b)(6)'s requirements with regard to ATSs that trade NMS stocks and non-NMS stocks.[100] In general, Regulation SCI requires SCI entities,[101]

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97 See 17 CFR 242.301(b)(6)(ii). Also, as with the fair access requirements pursuant to Rule 301(b)(5), Regulation ATS does not mandate compliance with the requirements under Rule 301(b)(6) when an ATS reaches a 20% trading threshold if the following conditions are met:

- the ATS matches customer orders for a security with other customer orders;
- such customers' orders are not displayed to any person, other than employees of the ATS; and
- such orders are executed at a price for such security disseminated by an effective transaction reporting plan, or derived from such prices.

See 17 CFR 242.301(b)(6)(iii).

98 See SCI Adopting Release, supra note 17.

99 See Regulation ATS Adopting Release, supra note 7, at 70875-76.

100 Regulation SCI does not apply to ATSs that trade only municipal securities or corporate debt securities. See SCI Adopting Release, supra note 17, at 72262. Prior to the adoption of Regulation SCI, Rule 301(b)(6) of Regulation ATS imposed by rule certain aspects of Commission policy statements with respect to technology systems of significant-volume ATSs.

Specifically, Regulation SCI, with regard to SCI entities (as defined in Regulation SCI; see infra note 101), superseded and replaced the Commission's prior Automation Review Policy ("ARP"), established by the Commission's two policy statements, each titled

including NMS Stock ATSs that meet the definition of an "SCI ATS,"[102] to establish written policies and procedures reasonably designed to ensure that their systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets, and that they operate in a manner that complies with the Exchange Act.[103] In addition, Regulation SCI requires SCI entities, including NMS Stock ATSs that are SCI entities, to take corrective action with respect to SCI events (defined to include systems disruptions, systems compliance issues, and systems intrusions), and notify the Commission of such events.[104] Regulation SCI further requires SCI entities, including NMS Stock ATSs that are SCI entities, to disseminate information about certain SCI events to

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"Automated Systems of Self-Regulatory Organizations," issued in 1989 and 1991, see Securities Exchange Act Release Nos. 27445 (November 16, 1989), 54 FR 48703 (November 24, 1989), and 29185 (May 9, 1991), 56 FR 22490 (May 15, 1991), including the aspects of those policy statements previously codified in Rule 301(b)(6) of Regulation ATS applicable to significant-volume ATSs that trade NMS stocks and non-NMS stocks. See SCI Adopting Release, supra note 17, at 72252.

101 Regulation SCI defines "SCI entity" to mean "an SCI self-regulatory organization, SCI alternative trading system, plan processor, or exempt clearing agency subject to [the Commission's Automation Review Policies]." See 17 CFR 242.1000.

102 Regulation SCI defines "SCI alternative trading system" or "SCI ATS" to mean an ATS, which during at least four of the preceding six calendar months: (1) had with respect to NMS stocks (a) five percent (5%) or more in any single NMS stock, and one-quarter percent (0.25%) or more in all NMS stocks, of the average daily dollar volume reported by applicable transaction reporting plans, or (b) one percent (1%) or more in all NMS stocks of the average daily dollar volume reported by applicable transaction reporting plans; or (2) had with respect to equity securities that are not NMS stocks and for which transactions are reported to a self-regulatory organization, five percent (5%) or more of the average daily dollar volume as calculated by the self-regulatory organization to which such transactions are reported. However, an SCI ATS is not required to comply with the requirements of Regulation SCI until six months after satisfying the aforementioned criteria. See 17 CFR 242.1000.

103 See SCI Adopting Release, supra note 17, at 72252.

104 See id.

affected members or participants and, for certain major SCI events, to all members or participants of the SCI entity. In addition, Regulation SCI requires SCI entities, including NMS Stock ATSs that are SCI entities, to conduct a review of their systems by objective, qualified personnel at least annually, submit quarterly reports regarding completed, ongoing, and planned material changes to their SCI systems to the Commission, and maintain certain books and records.[105] It also requires SCI entities, including NMS Stock ATSs that are SCI entities, to mandate participation by designated members or participants in scheduled testing of the operation of their business continuity and disaster recovery plans, including backup systems, and to coordinate such testing on an industry- or sector-wide basis with other SCI entities.[106] Regulation SCI, as compared to the former Rule 301(b)(6), also modified the volume thresholds applicable to SCI ATSs.[107]

Rule 301(b)(7)[108] requires all ATSs, regardless of the volume traded on their systems, to permit the examination and inspection of their premises, systems, and records, and cooperate with the examination, inspection, or investigation of subscribers, whether such examination is being conducted by the Commission or by an SRO of which such subscriber is a member. Rule

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105 See id.

106 See id.

107 See supra note 102. Prior to the adoption of Regulation SCI, the requirements of Rule 301(b)(6) also applied to ATSs that, during at least 4 of the preceding 6 calendar months, had with respect to any NMS stock, 20% or more of the average daily volume reported by an effective transaction reporting plan.

108 See 17 CFR 242.301(b)(7).

301(b)(8)[109] requires all ATSs to make and keep current the records specified in Rule 302 of Regulation ATS[110] and preserve the records specified in Rule 303 of Regulation ATS.[111]

Under Rule 301(b)(10), all ATSs must establish adequate safeguards and procedures to protect subscribers' confidential trading information, which must include the following:

- limiting access to the confidential trading information of subscribers to those employees of the ATS who are operating the system or responsible for its compliance with these or any other applicable rules; and
- implementing standards controlling employees of the ATS trading for their own accounts.[112]

Furthermore, all ATSs must adopt and implement adequate oversight procedures to ensure that the above safeguards and procedures are followed.[113]

Finally, Rule 301(b)(11)[114] expressly prohibits any ATS from using the word "exchange" or derivations of the word "exchange," such as the term "stock market," in its name.[115]

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109 See 17 CFR 242.301(b)(8).

110 See 17 CFR 242.302.

111 See 17 CFR 242.303. In the Regulation ATS Adopting Release, the Commission stated that these requirements to make, keep, and preserve records are necessary to create a meaningful audit trail and to permit surveillance and examination to help ensure fair and orderly markets. See Regulation ATS Adopting Release, supra note 7, at 70877-78.

112 See 17 CFR 242.301(b)(10)(i).

113 See 17 CFR 242.301(b)(10)(ii).

114 See 17 CFR 240.301(b)(11).

115 When the Commission proposed Regulation ATS, it said that "it is important that the investing public not be confused about the market role [ATSs] have chosen to assume." See Securities Exchange Act Release No. 39884 (April 21, 1998), 63 FR 23504, 23523 (April 29, 1998) ("Regulation ATS Proposing Release"). The Commission expressed concern that "use of the term 'exchange' by a system not regulated as an exchange would

III. Role of ATSs in the Current Equity Market Structure

A. Significant Source of Liquidity for NMS Stocks

The equity market structure in 1998 was starkly different than it is today. At the time Regulation ATS was proposed, there were only 8 registered national securities exchanges,[116] and the Commission estimated that there were approximately 43 systems that would be eligible to operate as ATSs.[117] Currently, there are 18 registered national securities exchanges, of which there are 11 national securities exchanges that trade NMS stocks,[118] and 84 ATSs with a Form ATS on file with the Commission. Currently, there are 46 ATSs that have noticed on their Form ATS that they expect to trade NMS stocks.[119] As the Commission noted in the SCI Adopting Release, even smaller trading centers, such as certain high-volume ATSs, now collectively represent a significant source of liquidity for NMS stocks, and some ATSs have similar and, in some cases, greater trading volume than some national securities exchanges.[120] In the second quarter of 2015, there were 38 ATSs that reported transactions in NMS stocks, accounting for 59 billion shares traded in NMS stocks ($2.5 trillion), and represented approximately 15.0% of total share trading volume (15.4% of total dollar trading volume) on all national securities exchanges,

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be deceptive and could mislead investors that such alternative trading system is registered as a national securities exchange." See id.

116 See Regulation ATS Proposing Release, supra note 115, at 23543 n.341.

117 See id. at 23540 n.313 and accompanying text.

118 The Commission notes that National Stock Exchange, Inc. ceased trading on its system as of the close of business on May 30, 2014. See Securities Exchange Act Release No. 72107 (May 6, 2014), 79 FR 27017 (May 12, 2014) (SR-NSX-2014-14).

119 Data compiled from Forms ATS submitted to the Commission as of November 1, 2015.

120 See SCI Adopting Release, supra note 17, at 72262.

ATSs, and non-ATS OTC trading venues combined.[121] During this period, no individual ATS executed more than approximately 13% of the total share volume on NMS Stock ATSs and no more than approximately 2% of total NMS stock share volume.[122] Given this dispersal of trading volume in NMS stocks among an increasing number of trading centers, NMS Stock

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[121] See infra Table 1 – "NMS Stock ATSs Ranked by Dollar Trading Volume – March 30, 2015 to June 26, 2015." Total dollar trading volume on all exchanges and off-exchange trading in the second quarter of 2015 was approximately $16.3 trillion and approximately 397 billion shares. See Market Volume Summary, https://www.batstrading.com/market_summary/. See also infra Section XIII.B.1.

Competitors for listed-equity (NMS) trading services also include several hundred OTC market makers and broker-dealers.

[122] The NMS Stock ATS with the greatest volume executed approximately 12.7% of NMS Stock ATS share volume and 1.9% of the total consolidated NMS stock share trading volume.

The market share percentages were calculated by Commission staff using market volume statistics reported by BATS and FINRA ATS data collected from ATSs pursuant to FINRA Rule 4552. See infra Table 1 – "NMS Stock ATSs Ranked by Dollar Trading Volume – March 30, 2015 to June 26, 2015."

FINRA recently adopted a rule that requires NMS Stock ATSs to report aggregate weekly volume information and number of trades to FINRA in certain equity securities, including NMS stocks, some of which FINRA makes publicly available. Reporting is on a security-by-security basis for transactions occurring within the ATS. Each ATS is also required to use a unique MPID in its reporting to FINRA, such that its volume reporting is distinguishable from other transaction volume reported by the broker-dealer operator of the ATS, including volume reported for other ATSs operated by the same broker-dealer. See FINRA Rules 4552, 6160, 6170, 6480 and 6720. See also Securities Exchange Act Release No. 71341 (January 17, 2014), 79 FR 4213 (January 24, 2014) (SR-FINRA-2013-042) (order granting approval of a proposed rule change to require alternative trading systems to report volume information to FINRA and use a unique market participant identifier) ("FINRA ATS Reporting Approval").

FINRA publishes on its website the trading information (volume and number of trades) reported for each equity security, with appropriate disclosures that the information is based on ATS-submitted reports and not on reports produced or validated by FINRA. See id. at 4214. See also Alternative Trading System (ATS) Transparency on FINRA's website, available at http://www.finra.org/Industry/Compliance/MarketTransparency/ATS/.

ATSs, with their approximately 15% market share, represent a significant source of liquidity in NMS stocks.

Another significant aspect of the increased role of NMS Stock ATSs in equity market structure is the proliferation of ATSs that trade NMS stocks but do not publicly display quotations in the consolidated quotation data, commonly referred to as "dark pools."[123] Dark pools originally were designed to offer certain market participants, particularly institutional investors, the ability to minimize transaction costs when executing trades in large size by completing their trades without prematurely revealing the full extent of their trading interest to the broader market. The disclosure of large size trades could have an impact on the market, and reduce the likelihood of the orders being filled.[124] As the Commission has previously noted, some dark pools, such as block crossing networks, offer specialized size discovery mechanisms that attempt to bring large buyers and sellers in the same stock together anonymously and to facilitate a trade between them.[125] The traditional definition of block orders are orders for more

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[123] The term "dark pool" is not used or defined in the Exchange Act or Commission rules. For purposes of this release, the term refers to NMS Stock ATSs that do not publicly display quotations in the consolidated quotation data. See Regulation of Non-Public Trading Interest, Securities Exchange Act Release No. 60997 (November 13, 2009), 74 FR 61208, 61209 (November 23, 2009) ("Regulation of Non-Public Trading Interest") (proposing rules and amendment to joint-industry plans describing the term dark pool).

Some trading centers, such as OTC market makers, also offer dark liquidity, primarily in a principal capacity, and do not operate as ATSs. For purposes of this release, these trading centers are not defined as dark pools because they are not ATSs. These trading centers may, however, offer electronic dark liquidity services that are analogous to those offered by dark pools. See id. at 61209 n.8.

[124] See, e.g., Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3599 n.28 (January 21, 2010) ("2010 Equity Market Structure Release").

[125] See id. at 3599.

than 10,000 shares,[126] however average trade sizes can far exceed this and be as high as 500,000 shares per trade.[127]

Most dark pools today, however, primarily execute trades with small sizes that are more comparable to the average size of trades on registered national securities exchanges, which is 181 shares.[128] These dark pools that primarily match smaller orders (though the matched orders may be "child" orders of much larger "parent" orders) execute more than 90% of dark pool volume.[129] The majority of this volume is executed by dark pools that are operated by multi-service broker-dealers.[130] These broker-dealers typically also offer order routing services, trade as principal in the ATS that they are operating, or both.[131]

In recent years, as the number of NMS Stock ATSs has increased, so has the number of dark pools. The number of active dark pools trading NMS stocks has increased from approximately 10 in 2002,[132] to 32 in 2009,[133] to over 40 today.[134] Furthermore, in 2009, dark

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126 See Rule 600(b)(9) of Regulation NMS (defining block size with respect to an order), 17 CFR 242.600(b)(9). See also Laura Tuttle , Alternative Trading Systems: Description of ATS Trading in National Market System Stocks, at 9-10 (October 2013), available at http://www.sec.gov/marketstructure/research/alternative-trading-systems-march-2014.pdf ("Tuttle: ATS Trading in NMS Stocks").

127 See infra, Table 2 – "NMS Stock ATSs Ranked by Average Trade Size – March 30, 2015 to June 26, 2015."

128 See infra note 719 and accompanying text.

129 See 2010 Equity Market Structure Release, supra note 124, 75 FR at 3599; see also infra, Table 2 – "NMS Stock ATSs Ranked by Average Trade Size – March 30, 2015 to June 26, 2015."

130 See infra note 362 and accompanying text and Table 1 – "NMS Stock ATSs Ranked by Dollar Trading Volume – March 30, 2015 to June 26, 2015."

131 See 2010 Equity Market Structure Release, supra note 124, at 3599.

132 See Regulation of Non-Public Trading Interest, supra note 123, at 61209 n.9 and accompanying text.

pools accounted for 7.9% of NMS share volume.[135] It is now estimated that of the approximately 397 billion shares traded in NMS stocks ($16.3 trillion), 14.9% of total NMS stock share volume is attributable to dark pools, with no single individual dark pool executing more than 1.9% of total NMS stock share volume.[136] The Commission also notes that some NMS Stock ATSs, which do not provide their best priced-orders for inclusion in the consolidated quotation data, make available to subscribers real-time information about quotes, orders, or other trading interest on the NMS Stock ATS.

In contrast to dark pools, an ATS could be an Electronic Communication Network ("ECN"). ECNs are ATSs that provide their best-priced orders for inclusion in the consolidated quotation data, whether voluntarily or as required by Rule 301(b)(3) of Regulation ATS.[137] In general, ECNs offer trading services (such as displayed or non-displayed order types, maker-taker pricing, and data feeds) that are analogous to registered national securities exchanges.[138]

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133 See 2010 Equity Market Structure Release, supra note 124, at 3598 n.22 and accompanying text.

134 Data compiled from Forms ATS and Forms ATS-R filed to the Commission as of the end of, and for the third quarter of, 2015.

135 See 2010 Equity Market Structure Release, supra note 124, at 3598.

136 See infra Section XIII.B.1.

137 See Rule 600(b)(23) of Regulation NMS, 17 CFR 242.600(b)(23) (definition of "electronic communications network"); see also 2010 Equity Market Structure Release, supra note 124, at 3599.

138 See 2010 Equity Market Structure Release, supra note 124, at 3599. See infra note 490 (describing the maker-taker pricing model).

B. Heightened Operational Complexity and Sophistication of NMS Stock ATSs

Since Regulation ATS was adopted, ATSs have gained market share in NMS stocks and have also evolved to become more complex and sophisticated trading centers. In addition, ATSs that transact in NMS stocks increasingly are operated by multi-service broker-dealers that engage in significant brokerage and dealing activities in addition to their operation of their ATSs, and the operations of NMS Stock ATSs have become increasingly intertwined with operations of their broker-dealer operator, adding to the complexity of the manner in which those ATSs operate.[139] The Commission is concerned that market participants have limited information about the complex operations of NMS Stock ATSs and the unique relationship between an NMS Stock ATS and its broker-dealer operator and the affiliates of the broker-dealer operator, who often provide a significant source of liquidity on the NMS Stock ATS. The Commission preliminarily believes that improving transparency of information available to market participants would enable them to better assess NMS Stock ATSs as potential trading venues.[140]

Since Regulation ATS was adopted, ATSs that effect transactions in NMS stocks have grown increasingly complex in terms of the services and functionalities that they offer subscribers. Over the past 16 years, these ATSs, like registered national securities exchanges, have used advances in technology to improve the speed, capacity, and efficiency of their trading

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139 As exemplified by some commenters' responses and as discussed further below, market participants are interested in information about, among other things, ATS affiliations, sharing of order information, operation of smart order routers and to whom they give preference, priority rules, order types, calculation of reference prices, and segmentation. See, e.g., infra notes 186 and 190 and accompanying text (describing comments received from Blackrock, Inc. and Bloomberg Tradebook LLC).

140 See, e.g., infra note 187 and accompanying text (describing a comment received from the Consumer Federation of America).

functionalities to bring together the orders in NMS stocks of multiple buyers and sellers using established, non-discretionary methods under which such orders interact and trade. Before Regulation ATS was adopted, ATSs primarily operated as ECNs, as dark pools were not prevalent during that period. Today, the vast majority of NMS Stock ATSs operate as dark pools. Furthermore, based on Commission experience, ATSs that traded NMS stocks prior to the adoption of Regulation ATS did not offer the same services and functionalities as they do today. Today, most NMS Stock ATSs, like most registered national securities exchanges, are fully-electronic, automated systems that provide a myriad of trading services to facilitate order interaction among various types of users on the NMS Stock ATS. For example, NMS Stock ATSs offer a wide range of order types, which are a primary means by which subscribers communicate their instructions for the handling of their orders on the ATS. Based on Commission experience, some NMS Stock ATSs allow subscribers to submit indications of interests, conditional orders, and various types of pegged orders, often with time-in-force, or other specifications, which are similar to those offered by exchanges, such as all or none, minimum execution quantity, immediate or cancel, good till cancelled, and day. Unlike registered national securities exchanges, however, most NMS Stock ATSs have adopted a dark trading model, and do not display any quotations in the consolidated quotation data.

Additionally, at the time Regulation ATS was adopted, SORs were not a primary point of access to ATSs that trade NMS stocks. Today, however, brokers compete to offer sophisticated technology tools to monitor liquidity at many different venues and to implement order routing strategies.[141] Using that knowledge of available liquidity, many brokers offer smart order

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[141] See 2010 Equity Market Structure Release, supra note 124, 75 FR at 3602.

routing technology to route orders to various trading centers to access such liquidity.[142] Based on Commission experience, broker-dealer operators frequently use SORs (or similar functionality) to route orders to their NMS Stock ATSs in today's marketplace. Furthermore, for some NMS Stock ATSs, most orders must pass through the broker-dealer operator's SOR (or similar functionality) to enter the ATS.[143]

In today's highly automated trading environment, NMS Stock ATSs offer various matching systems to bring together orders and counterparties in NMS stocks. These automated matching systems, including limit order books, crossing systems, and various types of auctions, are generally pre-programmed to execute orders pursuant to established non-discretionary methods. These established non-discretionary methods dictate the terms of trading among multiple buyers and sellers entering orders into the NMS Stock ATS and generally include priority and allocation procedures. Based on Commission experience, some NMS Stock ATSs offer price-time priority, while others offer midpoint only matching with time priority, or time priority at other prices derived from the NBBO. Some NMS Stock ATSs may also offer priority mechanisms with additional overlays. For example, amongst orders at a given price, priority may be given to a certain type of order (e.g., agency orders), before then applying time priority. Additionally, some NMS Stock ATSs offer order routing services similar to those offered by national securities exchanges.[144]

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142 See id.

143 For a further discussion about the increased use of SORs (or similar functionalities) by broker-dealer operators of NMS Stock ATSs, see infra Section VII.B.7.

144 For example, based on Commission experience, some NMS Stock ATSs, like national securities exchanges, will route a subscriber's order to another trading center when the

Some NMS Stock ATSs also offer subscribers the ability to further customize trading parameters, or the broker-dealer operator may set parameters around the interaction of various order flow. Based on Commission experience with information disclosed on Form ATS, some NMS Stock ATSs may enable subscribers to select the types of, or even specific, subscriber or order flow with which the subscriber wishes to interact. For example, some NMS Stock ATSs may enable subscribers to prevent their orders from interacting with principal order flow of the ATS's broker-dealer operator, or may enable subscribers to prohibit execution of their order flow against that of subscribers with certain execution characteristics (e.g., so called high-frequency traders or "HFTs"). Subscribers may also have the option to prevent self-matching with other order flow originating from the same firm. Some NMS Stock ATSs may also segment order flow into various classifications of subscribers based upon parameters set by the broker-dealer operator, such as historical execution characteristics, or may limit access to certain crossing mechanisms based on a subscriber's profile (e.g., the system may be programmed such that institutional order flow only executes against other institutional order flow).[145] Subscribers may or may not be aware that they have been classified as a particular type of participant on the NMS Stock ATS, which may limit their ability to interact with order flow of certain other subscribers to that NMS Stock ATS.

The Commission also preliminarily believes that, since Regulation ATS was adopted, the operations of NMS Stock ATSs have become increasingly intertwined with operations of the

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NMS Stock ATS cannot execute the order without trading through the NBBO, or if otherwise directed by the subscriber.

145 A purported reason for such segmentation may be to help reduce information leakage or the possibility of trading with undesirable counterparties.

broker-dealer operator, providing additional complexity to the manner in which NMS Stock ATSs operate. Given this close relationship, the Commission preliminarily believes that conflicts of interest can arise between the broker-dealer operator's interest in its NMS Stock ATS and its interest in its other non-ATS businesses. As discussed further below, at the time Regulation ATS was adopted, the Commission recognized that broker-dealer operators may perform additional functions other than the operation of their ATS, such as other trading services, and adopted Rule 301(b)(10), which requires that ATSs have safeguards and procedures to protect confidential subscriber trading information.[146] The Commission is concerned that today, the potential for conflicts of interest as a result of a broker-dealer operator's other business interests, including those of its affiliates, may be greater than it was at that time, particularly due to trading centers that multi-service broker-dealer operators own and operate.[147] Additionally, the broker-dealer operator of an NMS Stock ATS controls all aspects of the operation of the ATS, including, among other things: means of access; who may trade; how orders interact, match, and execute; market data used for prioritizing or executing orders; display of orders and trading interest, and determining the availability of ATS services among subscribers.[148] The non-ATS operations of a broker-dealer operator and its NMS Stock ATS typically are connected in many ways. For example, in some cases, the broker-dealer operator, or its affiliates, owns,

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146 See infra Part IX.

147 See infra Section VII.A (discussing the activities of broker-dealer operators of NMS Stock ATSs and the possible conflicts of interest that may result, and the Commission's preliminary belief that providing market participants with information about such activities will enable market participants to assess whether potential conflicts of interest exist so that they may make more informed decisions about whether to send their order flow to a particular NMS Stock ATS).

148 See infra Section VII.A.1.

and controls access to, the technology and systems that support the trading facilities of the NMS Stock ATS, and provides and directs personnel to service the trading facilities of the ATS. As discussed in more detail below,[149] the Commission is aware that most NMS Stock ATSs are operated by broker-dealers that also engage in brokerage and dealing activities, and offer their customers a variety of brokerage services, including algorithmic trading software, agency sales desk support, and automated smart order routing services, often with, or through, their affiliates. In addition, multi-service broker-dealers and their affiliates may operate, among other things, an OTC market making desk or proprietary trading desk in addition to operating an ATS, or may have other business units that actively trade NMS stocks on a principal or agency basis in the ATS or at other trading centers. Furthermore, the broker-dealer operator of an NMS Stock ATS may have arrangements with third-parties to perform certain aspects of its ATS's operations, and affiliates of those third parties may subscribe to the NMS Stock ATS, which the Commission is concerned give rise to the potential for information leakage or conflicts of interest, of which market participants may be unaware.[150]

As discussed further below, the Commission preliminarily believes that details about the operations and trading services of ATSs, such as those described above, are useful to market participants' understanding of the terms and conditions under which their orders will be handled and executed on a given ATS.[151] The Commission also preliminarily believes that market participants should have access to information about the relationship between a broker-dealer, its

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149 See id.

150 See infra Sections VII.B.6 and 9 (discussing trading on the ATS by the broker-dealer operator and its affiliates, and the relationship between an NMS Stock ATS and its service providers, and proposing to require related disclosure).

151 See generally infra Sections VII and VIII.

affiliates, and the NMS Stock ATS that it operates, to adequately understand the operations of the ATS and potential conflicts of interest that may arise.

C. Lack of Operational Transparency for NMS Stock ATSs

The Commission believes that one of the most important functions it can perform for investors is to ensure that they have access to the information they need to protect and further their own interests.[152] As noted above, although transparency has long been a hallmark of the U.S. securities markets and is one of the primary tools used by investors to protect their interests, market participants have limited knowledge of the operations of ATSs and how orders interact, match, and execute on ATSs.[153] The Commission is concerned that market participants have limited information about the non-ATS activities of the broker-dealer operators of NMS Stock ATSs and potential conflicts of interest that might arise from those activities.[154] The Commission is also concerned that different classes of subscribers may have different levels of information about the operations of NMS Stock ATSs and how their orders or other trading interests may interact on the NMS Stock ATS. To address these concerns, the Commission's proposal is designed to provide better access to information about the operations of NMS Stock ATSs to all market participants, including subscribers and potential subscribers.

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152 See, e.g., Securities Exchange Act Release No. 42208, 64 FR 70613, 70614 (December 17, 1999) (concept release reviewing regulation of market information fees and revenues).

153 See supra notes 40 and 139 (citing prior comment letters expressing the view that Form ATS should be made publicly available and expressing support for making publicly available ATS filings with the Commission, and exemplifying the kinds of information about NMS Stock ATS operations that market participants, including broker-dealers and intuitional investors, seek, but to which they may not currently have access).

154 See infra Section VII.A.

Under current rules, a Form ATS is "deemed confidential when filed."[155] As a result, market participants typically have, at best, limited access to Form ATS filings and the information contained therein. Additionally, Form ATS discloses only limited aspects of an ATS's operations, and the Commission preliminarily believes that even where an ATS has voluntarily made public its Form ATS,[156] market participants currently might not be able to obtain a complete understanding of how ATSs operate. In addition, Form ATS does not solicit information about possible circumstances that give rise to potential conflicts of interest resulting from the activities of the broker-dealer operator and its affiliates. Despite the confidentiality afforded Form ATS, based on Commission experience, including the Commission's experience reviewing disclosures made by ATSs on Form ATS over the past 16 years, ATSs have often provided minimal, summary disclosures about their operations on Form ATS. Furthermore, the Commission preliminarily believes that the complexity of the operations of NMS Stock ATSs has increased substantially and in a manner that causes the current disclosure requirements of

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155 See 17 CR 242.301(b)(2)(vii). The information on Form ATS is available for examination by staff, state securities authorities, and SROs. See Form ATS at 3, Instruction A.7.

156 The Commission notes that some ATSs have chosen to make Form ATS filings publicly available. See, e.g., IEX ATS Form ATS Amendment, dated July 29, 2015, available at http://www.iextrading.com/policy/ats/; PDQ ATS Inc's Form ATS Amendment, dated January 30, 2015, available at http://www.pdqats.com/wp-content/uploads/2013/10/PDQ-FORM-ATS-FILING_01_30_15-website.pdf; Liquidnet H20 ATS Form ATS Amendment, dated February 4, 2015, available at http://www.liquidnet.com/uploads/ATS_(H2O)_Form-Exhibits_CLEAN_4feb2015.pdf; SIGMA X Form ATS Amendment, dated May 21, 2014, available at http://www.goldmansachs.com/media-relations/in-the-news/current/pdf-media/gs-form-ats-amendment.pdf; POSIT Form ATS Amendment, dated January 26, 2015, available at http://www.itg.com/marketing/ITG_Form_ATS_for_POSIT_02112015.pdf.

Form ATS to result in a potentially insufficient, and inconsistent, level of detail about the operations of NMS Stock ATSs.

By comparison, national securities exchanges, with which NMS Stock ATSs directly compete, are subject to comprehensive registration and rule filing requirements under Section 19(b) of the Exchange Act.[157] Under these requirements, national securities exchanges must make public their trading rules and detail their trading operations. As discussed above, national securities exchanges register with the Commission on Form 1, and thereafter file proposed rule changes on Form 19b-4, which are not confidential, are approved by the Commission or become effective by operation of law, and are made public.[158] These mandatory filings publicly disclose, among other things, details about the exchange's trading services, operations, order types, order interaction protocols, priority procedures, and fees.[159] A national securities exchange must file such a proposed rule change any time it seeks to change its rules,[160] and even non-controversial rule changes cannot be implemented until the exchange files a Form 19b-4 with the

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157 15 USC 78s(b).

158 See generally 15 U.S.C. 78s(a) and (b); and 17 CFR 240.19b-4. See also supra notes 20-23 and accompanying text; http://www.sec.gov/rules/sro.shtml.

159 Among other things, Form 1 requires an exchange applying for registration as a national securities exchange to disclose its procedures governing entry and display of quotations and orders in its system, procedures governing the execution, reporting, clearance and settlement of transactions in connection with the system, and fees. See Form 1, Exhibits E.2-E.4. The disclosures required in Form 1 must include sufficient detail for the Commission to determine the exchange's rules are consistent with the Act. See generally 15 U.S.C. 78f(b)(1). Once registered, a national securities exchange must file any proposed rule or any proposed change in, addition to, or deletion from its rules. See 15 U.S.C. 78s(b)(2).

160 See 15 U.S.C. 78s(b)(1).

Commission.[161] In contrast, an ATS can change its operations in certain cases before notifying the Commission, and in all cases, without obtaining Commission approval or notifying ATS subscribers or the public about the change.[162]

The Commission preliminarily believes that the increased complexity of NMS Stock ATS operations and the business structures of their broker-dealer operators, combined with a lack of transparency around the operation of NMS Stock ATSs and the activities of their broker-dealer operators, could inhibit a market participant's ability to assess an NMS Stock ATS as a potential trading venue. Further, the Commission recognizes that Form ATS was designed before NMS Stock ATSs operated at the level of complexity that they do today, and the equity market structure has substantially changed since Regulation ATS was adopted.[163] As such, the

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161 See 17 CFR 240.19b-4(f).

162 See supra notes 20-25 and accompanying text and infra notes 341-342 and accompanying text (discussing, in more detail, the differences in the regulatory regimes for registered national securities exchanges and ATSs, including with respect to requirements related to transparency of operations). See also 17 CFR 242.301(b)(2) (requiring ATSs to file amendments on Form ATS at least 20 days prior to implementing a material change to the operation of the ATS, and within 30 calendar days after the end of each calendar quarter to update any other information that has become inaccurate and not previously reported).

163 As discussed below, the Commission preliminarily believes that information solicited on Form ATS-N would be similar to portions of what registered national securities exchange are required to publicly disclose, and thus, that disclosure of the information would not place NMS Stock ATSs at a competitive disadvantage with respect to competing trading venues. See infra Section IV.D. The Commission notes that, while some of the questions on Form ATS-N are designed to provide information about potential conflicts of interest arising from the activities of the broker-dealer operator or its affiliates and are dissimilar to information required to be disclosed by a national securities exchange, national securities exchanges must have rules that are consistent with the Exchange Act, and in particular Section 6. As discussed below, to date, national securities exchanges have implemented rules to address the potential for conflicts of interest when the national securities exchange is affiliated with a broker-dealer that is a member of the national securities exchange. See, infra, notes 367-371 and accompanying text (discussing the

Commission preliminarily believes that transparency of NMS Stock ATSs' operations will promote competition and benefit investors by informing market participants about differences between trading venues that could impact the quality of the execution of their orders.[164] The Commission preliminarily believes that requiring ATSs to respond to proposed Form ATS-N, which would require more detailed information about the ATSs' operations and be made available to the public on the Commission's website, would facilitate the public's understanding of NMS Stock ATSs by improving the information available to market participants, enabling them to make better decisions about where to route their orders to achieve their investing or trading objectives.

D. Prior Comments on Operational Transparency and Regulatory Framework for NMS Stock ATSs

As discussed in more detail below, the Commission is proposing to amend Regulation ATS to adopt Form ATS-N, which would require an NMS Stock ATS to publicly disclose detailed information about its operations and the activities of the broker-dealer operator and its affiliates. The Commission is also proposing to modify the regulatory requirements that apply to NMS Stock ATSs and qualify NMS Stock ATSs for the exemption from the definition of "exchange" under Exchange Act Rule 3a1-1(a)(2) by declaring the Form ATS-N effective or ineffective.

Commission's concerns regarding conflicts of interest in the context of national securities exchanges).

164 See infra Section XIII.C (discussing the Commission's preliminary belief that the proposal would help market participants make better decisions about where to route their orders, improve the efficiency of capital allocation, and execution quality, and also addressing the effect of the disclosure of proprietary information on competition).

In 2009, the Commission proposed to amend the regulatory requirements of the Exchange Act that apply to non-public trading interest in NMS stocks, including dark pools.[165] Among other things, the Commission proposed to substantially lower the trading volume threshold in Regulation ATS that triggers public display obligations for ATSs and to amend joint-industry plans for publicly disseminating consolidated trade data to require real-time disclosure of the identity of an ATS in the consolidated last-sale report. The Commission received four comments on its Regulation of Non-Public Interest proposal that directly relate to the amendments to Regulation ATS that the Commission is proposing today.[166]

Three commenters expressed the view that the Commission should address the regulatory disparity between national securities exchanges and ATSs. Senator Edward E. Kaufman expressed the view that "as trading continues to become faster and more dispersed, it is that much more difficult for regulators to perform their vital oversight and surveillance functions," and that "the Commission should consider strengthening the regulatory requirements for becoming an Alternative Trading System or starting a new trading platform for existing market

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165 See Regulation of Non-Public Trading Interest, supra note 123, at 62108 (proposing rules and amendment to joint-industry plans).

166 See letter to Mary L. Schapiro, Chairman, Commission, from Sen. Edward E. Kaufman, United States Senate, dated August 5, 2010 ("Kaufman letter"); letters to Elizabeth M. Murphy, Secretary, Commission, from Janet M. Kissane, Senior Vice President, Legal & Corporate Secretary Office of the General Counsel, NYSE Euronext, dated February 22, 2010 ("NYSE Euronext letter #1"); from Jeffrey D. Morgan, CAE, President and CEO, National Investor Relations Institute, dated February 16, 2010 ("National Investor Relations Institute letter"); letter to the Commission, from Seth Merrin, Chief Executive Officer; Anthony Barchetto, Head of Trading Strategy; Jay Biancamo, Global Head of Marketplace; Vlad Khandros, Market Structure Analyst; Howard Meyerson, General Counsel, Liquidnet, Inc., dated December 21, 2009 ("Liquidnet letter #1").

centers."[167] Senator Kaufman further urged the Commission to "harmonize rules across all market centers to ensure exchanges and ATSs are competing on a level playing field that serves the interests of all investors." NYSE Euronext stated that because "ATSs now represent a significant share of trading volume in NMS stocks . . . the time is ripe to move to a framework that has consistent regulatory requirements when the trading activity at issue is essentially the same."[168] The National Investor Relations Institute opined that "the same regulatory oversight, market surveillance, reporting, and other investor safeguards that exist for exchanges should be in place for all trading venues to ensure maximum investor protection."[169]

Liquidnet expressed the view that the Commission should require institutional brokers, including institutional ATSs, to disclose to their customers specific order handling practices and that Regulation ATS should be amended to enhance the review process of new ATSs and material changes to ATSs' business operations.[170] Liquidnet stated that disclosures by institutional brokers, including institutional ATSs, to their customers should include, among other things, identification of external venues to which the broker routes orders, the process for crossing orders with other orders received by the broker, execution of orders as agent and principal, a detailed description of the operation and function of each ATS or trading desk operated by the broker, a clear and detailed description of each algorithm and order type offered by the broker, categories of participant and admission criteria for each ATS or trading desk with which the customer's order can interact, and internal processes and policies to control

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167 Kaufman letter, supra note 166, attachment at 4-5.

168 NYSE Euronext letter #1, supra note 166, at 3.

169 National Investor Relations Institute letter, supra note 166, at 2.

170 See Liquidnet letter #1, supra note 166, at D-5-6, 11.

dissemination of the institution's order and trade information and other confidential information.[171] Liquidnet also suggested that the Commission amend "Regulation ATS to permit the Commission to delay the effective date of a new ATS commencing operation or of an existing ATS implementing a material business change if the Commission believes that information in the ATS filing is unclear or incomplete or raises an issue of potential non-compliance with applicable law or regulation," and expressed support for making publicly available ATS filings with the Commission.[172]

In 2010, the Commission issued a Concept Release that, among other things, solicited comment on whether trading centers offering undisplayed liquidity are subject to appropriate regulatory requirements for the type of business they conduct.[173] Specifically, the Commission asked, among other things, for comment on the following:[174]

- Do investors have sufficient information about dark pools to make informed decisions about whether in fact they should seek access to dark pools? Should dark pools be required to provide improved transparency on their trading services and the nature of their participants? If so, what disclosures should be required and in what manner should ATSs provide such disclosures?
- Are there any other aspects of ATS regulation that should be enhanced for dark pools or for all ATSs, including ECNs?

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171 See Liquidnet letter #1, supra note 166, at D-5-6.

172 Id. at D-11.

173 See 2010 Equity Market Structure Release, supra note 124, at 3614.

174 See id.

- Are there any ways in which Regulation ATS should be modified or supplemented to appropriately reflect the significant role of ATSs in the current market structure?

The Commission received 20 comment letters that addressed these questions as they relate to the proposal.[175] The 20 comment letters offered contrasting views.

Five commenters expressed support for Commission action to address the regulatory disparity between national securities exchanges and ATSs, particularly where such trading venues perform similar functions. Security Traders Association of New York noted that it has

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[175] See letters from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated October 24, 2014 ("SIFMA letter #2); Richie Prager, Hubert De Jesus, Supurna Vedbrat, and Joanne Medero, BlackRock, Inc., dated September 12, 2014 ("Blackrock letter"); Micah Hauptman, Consumer Federation of America, dated September 9, 2014 ("Consumer Federation of America letter"); Christopher Nagy and Dave Lauer, KOR Group LLC, dated April 4, 2014 ("KOR Group letter"); Bill Neuberger, Andrew Silverman, Paul Fitzgerald, and Sapna Patel, Morgan Stanley, dated March 7, 2011 ("Morgan Stanley letter"); Raymond M. Tierney III and Gary Stone, Bloomberg Tradebook LLC, dated June 28, 2013 ("Bloomberg Tradebook letter"); Greg Tusar, Goldman Sachs Execution & Clearing, L.P., and Matthew Lavicka, Goldman Sachs & Co., dated June 25, 2010 ("Goldman Sachs letter"); Jeffrey S. Wecker, Lime Brokerage LLC, dated May 21, 2010 ("Lime Brokerage letter"); Andrew C. Small, Scottrade, dated May 19, 2010 ("Scottrade letter"); Kimberly Unger, The Security Traders Association of New York, Inc., dated May 10, 2010 ("Security Traders Association of New York letter"); Stuart J. Kaswell, Managed Funds Association, dated May 7, 2010 ("Managed Funds Association letter"); Raymond M. Tierney III, Bloomberg L.P., dated May 7, 2010 ("Bloomberg L.P. letter"); James J. Angel, Georgetown University, McDonough School of Business, dated January 16, 2011 ("Angel letter"); Joan C. Conley, Nasdaq OMX Group, Inc., dated April 30, 2010 ("Nasdaq OMX letter"); Ann Vlcek, Securities Industry and Financial Markets Association, dated April 29, 2010 ("SIFMA letter #1"); Joseph M. Velli, BNY ConvergEx Group, LLC, dated April 29, 2010 ("BNY CovergEx Group letter"); O. Mason Hawkins, Richard W. Hussey, Deborah L. Craddock, Jeffrey D. Engelberg, and W. Douglas Schrank, Southeastern Asset Management, Inc., dated April 28, 2010 ("Southeastern Asset Management letter"); Janet M. Kissane, NYSE Euronext, dated April 23, 2010 ("NYSE Euronext letter #2"); David C. Cushing, Wellington Management Company, LLP, dated April 21, 2010 ("Wellington Management Company letter"); Seth Merrin, Howard Meyerson, and Vlad Khandros, Liquidnet, Inc., dated March 26, 2010 ("Liquidnet letter #2").

"called for the harmonization of regulatory oversight and the need for similar rules across venues, including exchanges, ATSs and other liquidity sources that are connected through the Reg. NMS regulatory framework."[176] Nasdaq OMX expressed the view that the "Commission has flexibility to adopt a more principles-based regulatory structure" which it could use to "level the competitive playing field between ATSs and exchanges," and that "[i]n areas where ATS and exchange activities overlap, differences in [regulatory] approach should persist only if there is a clear policy basis for those differences."[177] NYSE Euronext opined that the "lighter regulatory oversight for ATSs puts transparent, regulated markets at a competitive disadvantage, to the potential detriment of investors" and that "now that ATSs represent a significant share of trading volume in NMS stocks, . . . the Commission should address the regulatory disparity between registered exchanges and ATSs that engage in trading activities analogous to traditional exchange trading."[178] Wellington Management Company expressed the view that "regulatory requirements for types of venues should differ only to the extent the differentiated requirements are specifically designed to address clearly identifiable and compelling needs" and that "material disparities in regulatory requirements could make it difficult for exchanges to compete with ATSs and broker-dealers and could threaten their long-term survival."[179] Liquidnet stated that "[t]o the extent that an exchange conducts the equivalent business function as a broker or an ATS, regulators should ensure that levels of regulation are consistent."[180]

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176 Security Traders Association of New York letter, supra note 175, at 2.

177 Nasdaq OMX letter, supra note 175, at 13, 16.

178 NYSE Euronext letter #2, supra note 175, at 7.

179 Wellington Management Company letter, supra note 175, at 3.

180 Liquidnet letter #2, supra note 175, at F-7.

However, three commenters expressed the view that in order to rectify the regulatory disparity, the Commission should lessen regulatory burdens on exchanges, rather than enhance its regulation of ATSs. Goldman Sachs urged the Commission to "consider expanding the types of rule changes that exchanges . . . can propose on an immediately effective basis," which "would help to level the playing field between exchanges and ATSs."[181] Wellington Management Company opined that "the burden of regulation should be shared fairly by execution venues" and that "exchanges should be granted the ability to make certain rule changes in a manner similar to ATSs (i.e., as a notification with SEC veto authority, and not as part of a lengthy notice, comment, and approval process)."[182] Liquidnet stated that "regulators should not impose unnecessary burdens on ATSs and brokers, but rather should remove unnecessary regulatory burdens from exchanges, to the extent that they exist."[183]

Ten commenters expressed the view that ATSs and broker-dealers should be required to provide more enhanced disclosures regarding their operations, and described specific disclosures that the Commission should require of ATSs. SIFMA stated that the Commission "should require broker-dealers to publish on their websites, on a monthly basis, a standardized disclosure report that provides an overview of key macro issues that are of interest to clients," including, among other things, "order types supported on the broker-dealer's ATS (if applicable)."[184] Blackrock, Inc. expressed the view that although some ATSs voluntarily publish their Form ATS filings and supplemental materials, the "particular operational features specified and degree of

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181 Goldman Sachs letter, supra note 175, at 10.

182 Wellington Management Company letter, supra note 175, at 3.

183 Liquidnet letter #2, supra note 175, at F-7.

184 SIFMA letter #2, supra note 175, at 13.

detail lack consistency from one [Form ATS] submission to another" and that "[a]dditional standardization and information are required in disclosures about ATS practices."[185] Blackrock further stated that "[m]andatory ATS disclosures should include greater detail on how the platform calculates reference prices, determines order priority, matches orders between client segments, monitors execution quality, advertises orders, interacts with affiliates and is compensated by subscribers."[186] The Consumer Federation of America stated that Form ATS should require ATSs to provide "critical details about an ATS's participants, segmentation, and fee structure" because the "information will allow market participants, regulators, and third party analysts to assess whether an ATS's terms of access and service are such that it makes sense to trade on that venue."[187] The Consumer Federation of America further opined that "the Commission should undertake an exhaustive investigation of the current order types, requiring exchanges and all ATSs, including dark pools, to disclose in easily understandable terms what their purpose is, how they are used in practice, who is using them, and why they are not discriminatory or resulting in undue benefit or harm to any traders."[188]

Bloomberg Tradebook LLC noted that buy-side representatives with whom it met at a workshop for members of equity trading desks of asset managers stated that although they periodically send questionnaires to their brokers regarding order handling and internalization (dark pool) matching protocols, because the buy-side representatives might not be customers of

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185 Blackrock letter, supra note 175, at 4.

186 Id.

187 Consumer Federation of America letter, supra note 175, at 22.

188 Id. at 37-38.

all ATSs, they could not assess order interaction that occurs across the market structure.[189] Bloomberg Tradebook also recommended that the Commission ask exchanges and ATSs to complete a questionnaire with "Yes" and "No" checkboxes that would provide an overview of each exchange's or ATS's operations, and which Bloomberg Tradebook suggested could be posted on the Commission's website. Bloomberg Tradebook provided a sample questionnaire that included questions relating to, among other things, affiliations, riskless principal trades, trades effected in a proprietary capacity, sharing of orders or order information with affiliates or other trading venues and compensation for such sharing, operation of a smart order router and whether it gives preference to the exchange or ATS or an affiliate, priority rules, order types that enable customers to gain preference, and special fees or rebates which lead to a preference of one order over another.[190]

Goldman Sachs recommended an enhanced disclosure regime for exchanges and ATSs consisting of four components. First, exchanges and ATSs would be required to "provide descriptions of the types of functionalities that they provide, such as types of orders (e.g., flash/pinging orders, conditional orders), services (e.g., co-location, special priority), and data (e.g., depth-of-book quotations, per order information)." Second, they would "disclose the basis upon which members/subscribers access the type of order, service or data," and "whether only a certain class of market participants has access." Third, they would be required to disclose how commonly the functionality is used. Fourth, the exchanges and ATSs would disclose more

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189 Bloomberg Tradebook letter, supra note 175, at 1.

190 Id. at 2-3.

market quality statistics "so that investors and other market participants could better gauge execution quality."[191]

Lime Brokerage, LLC recommended that the Commission should require "transparency around pricing, access criteria and membership of dark pools."[192] Managed Funds Association stated that "as long as co-location is available to investors, traders and larger brokers on an equal basis, the secondary market for such services to smaller customers from their brokers should be competitive and thus, fairly priced," and therefore, "we believe market centers should disclose if they or third parties offer co-location services on a priority basis other than first available."[193] SIFMA stated its belief that "added disclosure about co-location and other market access arrangements would be beneficial to market participants," and that "[s]uch disclosure might describe standard, high speed, co-location, or other means by which members may access an exchange or ATS, and provide market participants with details regarding the categories of market participants that use each means of access, the data capacity associated with each arrangement, and the quotation and transaction volume attributable to each arrangement."[194]

Southeastern Asset Management, Inc. commented that brokers and trading venues should disclose to investors information such as payments, rebates, and fees related to execution venues, venue rankings by routing brokers and routing venues, and the inputs that create the routing rankings, and the transparency of customer specific order routing and execution available to the

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191 Goldman Sachs letter, supra note 175, at 9-10.

192 Lime Brokerage letter, supra note 175, at 7.

193 Managed Funds Association letter, supra note 175, at 27.

194 SIFMA letter #1, supra note 175, at 7.

specific customer.[195] Liquidnet recommended that institutional ATSs make similar disclosures to those it recommended when commenting on the Regulation of Non-Public Interest proposing rules and amendment to joint-industry plans.[196]

In addition to the ten commenters that provided specific Form ATS disclosure recommendations, one commenter provided some examples of customer questions and requests specific to dark pools that it received. Such questions and requests related to, among other things, whether the commenter's dark pool is truly dark, categorization or tagging of order flow, whether participants may opt out of or into interaction with certain flow, proprietary orders interaction with the dark pool, priority rules, requests to exclude certain types of venues for routing of orders, maintenance of confidential trading information, use of direct market data feeds by the dark pool's servers and algorithmic strategies, and co-location of servers and algorithmic strategies to exchange and ATS servers.[197] The commenter also provided some sample questions for its clients to ask of their dark pool providers. These included questions relating to the dark pools methods of access, client/subscriber base, types of orders permitted, matching of dark pool orders at the NBBO, price improvement, interaction of the dark pool's principal and proprietary orders with client orders on the dark pool, categorization or tagging of

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195 See Southeastern Asset Management letter, supra note 175, at 7.

196 See Liquidnet letter #2, supra note 175, at F-1-F-2; see also supra note 129.

197 See Morgan Stanley letter, supra note 175, at 12-14. Additionally, representatives from Morgan Stanley met with staff from the Commission's Division of Trading and Market to discuss market structure issues. During that meeting, Morgan Stanley provided, among other things, examples of frequently asked questions that it believes could be standardized to provide mandated transparency about how orders are handled on dark pools. See Memorandum from the Division of Trading and Markets regarding an October 1, 2015, meeting with representatives of Morgan Stanley, available at https://www.sec.gov/comments/s7-02-10/s70210.shtml.

order flow, and order types.[198] The commenter also included several questions that clients should ask dark pools about the sell-side broker-dealers and exchanges that the dark pools access.

In response to the questions the Commission raised in the Equity Market Structure Release, one commenter raised questions relating to the transparency of ATSs' operations. The commenter asked, among other things, whether:

- Form ATS filings provide the Commission with complete and timely information about the operation of ATSs, and whether such filings are sufficiently frequent and detailed to allow the Commission to understand planned system changes by ATSs;
- the Commission has adequate tools to respond to concerns about the operations of ATSs;
- the Commission has adequate information about the relationships between ATSs and their subscribers, including how "toxicity" ratings are assigned to subscribers, and their impact on individual subscriber's access and fees, and whether it is acceptable that ATS subscribers can assign such ratings to counterparties within and outside the ATS without disclosing objective criteria;
- the Commission has adequate information about ATS pricing, noting that but for the Rule 3a1-1 exemption from exchange registration, ATSs would be required to charge fees that are fair and not unreasonably discriminatory; and

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198 See Morgan Stanley letter, supra note 175.

- the Commission receives enough information from ATSs about their access policies to make comprehensive assessment about competitive dynamics at work in the market.[199]

The commenter stated its belief that responding to the Commission's questions in the Equity Market Structure Release with the commenter's own responsive questions was "entirely appropriate" because the "public cannot comment on the adequacy of Form ATS filings," and therefore, "the Commission and its staff are uniquely qualified to assess whether the requirements of the Form and the content of actual submitted filings provide adequate and timely information."[200]

One commenter discussed a May 2009 Opinion Research Corporation survey of 284 executives from NYSE-listed companies, noting that only 17% of the executives were satisfied with the transparency of trading in their company's stock, and that 69% of the executives "indicated there is inadequate regulatory oversight of non-exchange trading venues, including dark pools."[201]

Five commenters expressed the view that Form ATS filings should be made publicly available. SIFMA opined that "[t]o enhance transparency and confidence, all ATSs should publish the Form ATS and make their forms available on their websites."[202] Blackrock stated that current and historical Form ATS filings for active ATSs "should be made immediately available to the public, subject to appropriate redaction of confidential information," noting that

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199 See Nasdaq OMX letter, supra note 175, at 14-16.

200 Id. at 16.

201 NYSE Euronext letter #2, supra note 175, at 7.

202 SIFMA letter #2, supra note 175, at 13.

some ATS operators "have already displayed exemplary transparency by voluntarily publishing their Form ATS filings and supplemental materials."[203] The Consumer Federation of America stated its support for requiring all ATSs, including dark pools, to publicly disclose their Forms ATS "so that the public can see how these venues operate."[204] KOR Group LLC opined that the fact that "ATS filings are hidden from the public while the burden is on SROs to file publicly . . . does not serve the public interest in any way, and makes it easy for media and others to sensationalize and demonize what is occurring in this part of the market," further opining that there "should not be any reasoned argument against" making Form ATS publicly available.[205] Goldman Sachs recommended disclosing Form ATS publicly because "[s]uch disclosure would provide investors with useful information regarding the business practices of ATSs," and supported a requirement for "ATSs to provide public notice of material changes to their business practices," but also stated its opposition to "any requirement that ATSs disclose information about their matching algorithms or the nature of their subscribers" because such disclosure "could result in information leakage that would detrimentally impact liquidity."[206] James J. Angel commented that Form ATS should be publicly available on the Commission's Electronic Data Gathering, Analysis, and Retrieval System ("EDGAR").[207] As it had done when commenting on the Regulation of Non-Public Interest proposing rules and amendment to joint-

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203 Blackrock letter, supra note 175, at 4.

204 Consumer Federation of America letter, supra note 175, at 22.

205 KOR Group letter, supra note 175, at 12.

206 Goldman Sachs letter, supra note 175, at 10.

207 See Angel letter, supra note 175, at 13.

industry plans,[208] Liquidnet recommended that ATS filings with the Commission be made publicly available.[209]

Three commenters expressed their opposition to enhanced regulation of ATSs. Scottrade, Inc. stated it believed that ATSs had "brought innovation and better execution quality to the equity markets," and that it "would not be in favor of additional regulation that would reduce competition, raise barriers to entry for ATSs or force orders to be routed to specific destinations."[210] Bloomberg L.P. stated that it had "heard exchanges argue it would be in the interest of the exchanges to regulate ATSs more aggressively," but that it had "not seen evidence why that which is in the exchanges' interest is necessarily in the public interest," and suggested that the Commission should "look to investors' needs," which Bloomberg L.P. thought "do not . . . justify increasing the regulatory burdens on alternative trading systems."[211] BNY ConvergEx Group stated its belief that "the current system of ATS regulation works well and structural changes are not necessary," and that because "[d]ark ATSs market their services to institutional customers and prospective customers on a continuous basis . . . institutions know full well what types of customers each ATS caters to and the services they offer."[212] BNY ConvergEx Group acknowledged that "some retail investors may not understand precisely how dark ATSs operate," but opined that "[a]ny perceived lack of information for retail investors about an ATS's trading services would only become an issue if the ATS was to become subject to the Fair Access

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208 See Liquidnet letter #1 supra note 166.

209 See Liquidnet letter #2, supra note 175, at F-8.

210 Scottrade letter, supra note175, at 4.

211 Bloomberg L.P. letter, supra note175, at 4-5.

212 BNY ConvergEx Group letter, supra note175, at 18, 21.

provisions of Regulation ATS," and that "because retail investors are unlikely to pass the objective credit and other financial standards that would be required under a Fair Access regime to become subscribers of the ATS, this may not be a real issue."[213]

The Commission received two comment letters on its Market Structure website relevant to the Commission's proposal to amend Regulation ATS.[214]

Blackrock submitted the same comment letter to the Market Structure website that it submitted with respect to the 2010 Equity Market Structure Release.[215] Citadel expressed the view that "dark pools should be subject to increased transparency," and that "ATS operational information and filings should be publicly available."[216]

The Commission has considered these comments, and, for the reasons set forth throughout this release, is proposing the amendments to Regulation ATS and Exchange Act Rule 3a1-1 as described herein.

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213 See id. at 21.

214 See Blackrock letter, supra note 175; letter from John C. Nagel, Managing Director and Senior Deputy Counsel, Citadel LLC, dated July 21, 2014 ("Citadel letter"). See also Securities and Exchange Commission Market Structure website ("Market Structure website"), available at http://www.sec.gov/marketstructure/.

215 See Blackrock letter, supra notes 175, 185, 186, and 203 and accompanying text.

216 See Citadel letter, supra note 214, at 4.

IV. Proposed Amendments to Regulation ATS and Rule 3a1-1 to Heighten Regulatory Requirements for ATSs that Transact in NMS Stocks

A. Proposed Definition of NMS Stock ATS

The Commission is proposing to amend Rule 300 of Regulation ATS to provide for the definition of "NMS Stock ATS" in a new paragraph (k). The purpose of proposed Rule 300(k) is to specify the type of ATS that would be subject to the heightened conditions under Exchange Act Rule 3a1-1, as described further below. Proposed Rule 300(k) would define "NMS Stock ATS" to mean an "an alternative trading system, as defined in Exchange Act Rule 300(a), that facilitates transactions in NMS stocks, as defined in Exchange Act Rule 300(g)."[217] Rule 300(g) of Regulation ATS currently provides, and would continue to provide, that the term "NMS stock" has the meaning provided in Exchange Act Rule 600 of Regulation NMS; provided, however, that a debt or convertible debt security shall not be deemed an NMS stock for purposes of Regulation ATS.[218] Pursuant to Exchange Act Rule 600(b), an NMS stock is any NMS security other than an option,[219] and an NMS security is "any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan."[220] Thus, under the

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217 See proposed Rule 300(k).

218 See 17 CFR 242.300(g).

219 See 17 CFR 242.600(b)(47).

220 See 17 CFR 242.600(b)(46). Transaction reports for securities that are listed and registered, or admitted to unlisted trading privileges on a national securities exchange, are collected, processed, and made available pursuant to the Consolidated Tape Association ("CTA") plan ("CTA Plan") and the OTC/UTP Plan. See, e.g., CTA Plan (dated as of October 1, 2013), available at https://www.ctaplan.com/publicdocs/ctaplan/notifications/plans/trader-update/5929.pdf at 34 (describing the types of securities to which the CTA plan applies).

proposed amendment to Regulation ATS, an NMS Stock ATS would include any ATS that effects transactions in securities that are listed on a national securities exchange (other than options, debt or convertible debt). In addition, to meet the definition of an NMS Stock ATS, the organization, association, person, group of persons or system must meet the definition of an alternative trading system under Rule 300(a) of Regulation ATS.[221]

See also Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchange on an Unlisted Trading Privilege Basis, available at http://web.archive.org/web/20070114023844/http://www.utpdata.com/docs/UTP_PlanAmendment.pdf at 2, 10-13 ("OTC/UTP Plan") (describing the securities for which transaction information is collected and disseminated as any Nasdaq Global Market or Nasdaq Capital Market security, as defined in then-operative NASDAQ Rule 4200). Nasdaq Rule 5005(a)(26) defines Nasdaq Global Market security as: any security listed on Nasdaq that (1) satisfies all applicable requirements of the Rule 5100 and 5200 Series and meets the criteria set forth in the Rule 5400 Series; (2) is a right to purchase such security; (3) is a warrant to subscribe to such security; or (4) is an Index Warrant which meets the criteria set forth in Rule 5725(a). Nasdaq Rule 5005(a)(28) defines Nasdaq Capital Market security as: any security listed on The Nasdaq Capital Market that (1) satisfies all applicable requirements of the Rule 5100, 5200 and 5500 Series but that is not a Nasdaq Global Market security; (2) is a right to purchase such security; or (3) is a warrant to subscribe to such security.

These plans are filed with, and approved by, the Commission in accordance with the requirements of Rule 608 of Regulation NMS, and pursuant to Rule 601 of Regulation NMS, which requires every national securities exchange to "file a transaction reporting plan regarding transactions in listed equity and Nasdaq securities executed through its facilities" and every national securities association to "file a transaction reporting plan regarding transactions in listed equity and Nasdaq securities executed by its members otherwise than on a national securities exchange."

221 17 CFR 242.300(a).

As it did in the Regulation ATS Adopting Release, the Commission notes that whether the actual execution of the order takes place on the system is not a determining factor of whether a system falls under Rule 3b-16. A trading system that falls within the Commission's functional definition of ''exchange'' pursuant to Rule 3b-16 will still be an ''exchange,'' even if it matches two trades and routes them to another system or exchange for execution. See Regulation ATS Adopting Release, supra note 7, at 70851-70852.

The Commission requests comment on the proposed definition of NMS Stock ATS. In particular, the Commission solicits comment on the following:

1. Do you believe the Commission should adopt a more limited or expansive definition of NMS Stock ATS? Why or why not? Please support your arguments.
2. Should the Commission create the NMS Stock ATS category? Why or why not? Please support your arguments.
3. Should the Commission modify its proposed definition in any way? If so, in what way and why? If not, why not? Please support your arguments.

B. Rule 3a1-1(a)(2): Proposed Amendments to the Exemption from the Definition of "Exchange" for NMS Stock ATSs

Exchange Act Rule 3a1-1(a) exempts from the definition of "exchange": (1) any alternative trading system operated by a national securities association,[222] (2) any alternative trading system that complies with Regulation ATS,[223] and (3) any alternative trading system that under Rule 301(a) of Regulation ATS is not required to comply with Regulation ATS.[224] Most ATSs fall within the second prong of Exchange Act Rule 3a1-1 and thus, must comply with Regulation ATS to qualify for an exemption from the statutory definition of an "exchange."

As discussed in more detail below, the Commission is now proposing to expand the conditions with which NMS Stock ATSs would be required to comply in order to use the exemption from the definition of "exchange." To provide for these new conditions, the

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222 17 CFR 240.3a1-1(a)(1).

223 17 CFR 240.3a1-1(a)(2).

224 17 CFR 240.3a1-1(a)(3).

Commission is proposing to amend Rules 3a1-1(a)(2) and (3) to include proposed Rule 304 within the scope of Regulation ATS.[225] Amended Rule 3a1-1(a)(2) would condition the exemption for any ATS that meets the definition of "NMS Stock ATS" in compliance with Rules 300-303 of Regulation ATS (except Rule 301(b)(2)) and proposed Rule 304.[226] The Commission is proposing to amend Rule 3a1-1(a)(3) by changing the reference to Rule 303 to proposed Rule 304. This is merely a conforming change to make clear that an NMS Stock ATS that meets the requirements of Rule 301(a) is not required to comply with Regulation ATS, which would be amended to include proposed Rule 304. Rule 3a1-1(a)(1), which exempts any ATS that is operated by a national securities association, is not impacted by the amendments the Commission is proposing today.

The Commission preliminarily believes that amending the conditions to the Rule 3a1-1(a) exemption would more appropriately calibrate the level of operational transparency between registered national securities exchanges and NMS Stock ATSs, which in many regards, are functionally similar trading centers, while maintaining the regulatory framework that permits NMS Stock ATSs to decide whether to register and be regulated as broker-dealers or as national

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225 In Exchange Act Rules 3a1-1(a)(2) and (3), Regulation ATS is currently defined as "17 CFR 242.300 through 242.303." The Commission is proposing to amend these references to Regulation ATS to define Regulation ATS as "17 CFR 242.300 through 242.304."

226 See infra Section IV.C. Specifically, the Commission is proposing to amend Rule 3a1-1(a)(2) by changing the reference to Rule 303 to proposed Rule 304. Under the proposal, an NMS Stock ATS would not be required to file the reports and amendments that it is currently required to file on Form ATS pursuant to Rule 302(b)(2), unless the ATS also effects transactions in securities other than NMS stock and is not otherwise exempt. See proposed Rule 301(b)(2)(viii).

securities exchanges.[227] The Commission notes, as it has in other contexts,[228] that SRO and non-SRO markets, such as NMS Stock ATSs, are subject to different regulatory regimes, with a different mix of benefits and obligations. Pursuant to this proposal, NMS Stock ATSs would continue to be able to choose to register as national securities exchanges or as broker-dealers. The Commission is proposing, however, to increase the scope of the conditions to the exemption for the purpose of providing more transparency around the operations of NMS Stock ATSs and potential conflicts of interest resulting from the unique relationship between the broker-dealer operator and the NMS Stock ATS, as discussed further below. While questions have been raised in other contexts as to whether the broader regulatory framework for national securities exchanges and ATSs should be harmonized,[229] the Commission preliminarily believes that the proposals are an appropriate response to concerns about the need for transparency about the operations of NMS Stock ATSs and potential conflicts of interest resulting from the activities of their broker-dealer operators and the broker-dealer operators' affiliates. The Commission preliminarily believes that the proposals would help market participants make better informed decisions about where to route their orders for execution; the proposed disclosures would also provide the Commission with improved tools to carry out its oversight of NMS Stock ATSs. Moreover, as explained above, the Commission is concerned that market participants have limited information about the increasingly complex operations of NMS Stock ATSs,[230] and need more transparency on NMS Stock ATSs to fully evaluate how their orders are handled and

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227 See Regulation ATS Adopting Release, supra note 7, at 70856-70857.

228 See, e.g., SCI Adopting Release, supra note 17, at 72264.

229 See id.

230 See supra Sections III.B and C.

executed on NMS Stock ATSs. The Commission preliminarily believes that the enhanced disclosures about the operations of NMS Stock ATSs elicited by proposed Form ATS-N would provide better information about how NMS Stock ATSs operate and, thereby, enable the Commission to determine whether additional regulatory changes for either or both national securities exchanges and ATSs are necessary.

The Commission has considered the alternative of requiring different levels of disclosure among NMS Stock ATSs based on volume.[231] However, the Commission preliminarily believes that it is necessary and appropriate for the protection of market participants to apply the proposed heightened conditions for the Rule 3a1-1(a)(2) exemption to all NMS Stock ATSs. The Commission notes that market participants may subscribe to multiple ATSs and route orders in NMS stocks among various ATSs prior to receiving an execution. The Commission preliminarily believes that because orders in NMS stocks may be routed to any NMS Stock ATS, regardless of the volume traded on the NMS Stock ATS, all market participants would benefit from the disclosures provided pursuant to proposed Rule 304. Accordingly, the Commission believes that the proposed rules addressing greater operational transparency should apply equally to all NMS Stock ATSs.

The Commission requests comment on the scope of the proposed amendments to Rules 3a1-1(a)(2) and (3), which would apply the proposed new conditions of Rule 304 to all NMS Stock ATSs. In particular, the Commission solicits comment on the following:

4. Do you believe that the current conditions to the exemption from the definition of "exchange" for NMS Stock ATSs are appropriate in light of market developments

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231 See infra Section XIII.D.4.

since Regulation ATS was adopted in 1998? Why or why not? Please support your arguments.

5. Do you believe there is sufficient transparency with respect to the operations of NMS Stock ATSs? If not, what information do you believe should be disclosed regarding the operations of an NMS Stock ATS, how frequently should it be disclosed, and why? Does the need for, and availability of, information about the operations of NMS Stock ATSs vary among market participants? If so, how? Please explain in detail.

6. Do you believe there is sufficient transparency with respect to the activities of the broker-dealer operator and its affiliates in connection with NMS Stock ATSs? If not, what information do you believe should be disclosed regarding the activities of the broker-dealer operator and its affiliates and why? Does the need for, and availability of, information about the activities of the broker-dealer operator and its affiliates vary among market participants? If so, how? Please explain in detail.

7. Should the Commission adopt the proposal to apply the requirements of proposed Rule 304 to all NMS Stock ATSs? Why or why not? Please support your arguments.

8. Do you believe that the Commission should provide any exceptions to the application of proposed Rule 304 to NMS Stock ATSs seeking to operate pursuant to the Rule 3a1-1(a)(2) exemption? Why or why not? For example, should the requirements to comply with proposed Rule 304, including the disclosure requirements of proposed Form ATS-N, only be applicable to NMS

Stock ATSs that meet certain thresholds (such dollar volume, trading volume, or number of subscribers)? If so, what should the threshold be, and why? If not, why not? Please support your arguments.

9. Do you believe that the Commission should require different levels of disclosure for any proposed Form ATS-N items based on the NMS Stock ATS's volume? If so, why, what should the different thresholds be, and which items on proposed Form ATS-N should depend on an NMS Stock ATS's volume? If not, why not? Please support your arguments.

At this time, the Commission preliminarily believes that the above operational transparency conditions to the exemption to Exchange Act Rule 3a1-1(a) should only apply to NMS Stock ATSs. The Commission, however, requests comment and data on whether its preliminary view is warranted for each category of non-NMS stock ATS.

First, approximately 27 ATSs that currently have a Forms ATS on file with the Commission disclose that they exclusively trade fixed income securities, such as corporate or municipal bonds, and approximately 2 ATSs effect transactions in both fixed income securities and other securities, including NMS stocks.[232] Based on Commission experience, the equity markets, which are generally highly automated trading centers that are connected through routing networks, operate and execute orders at rapid speeds using a variety of order types. Unlike the complex trading centers of the equity markets, the Commission preliminarily believes that fixed income markets currently rely less on speed, automation, and electronic trading to execute orders

[232] Data compiled from Forms ATS and ATS-R submitted to the Commission as of November 1, 2015.

and other trading interest,[233] although that may be changing in some fixed income markets such as those that trade certain government securities.[234] Generally, fixed income ATSs offer less complex order types to their subscribers than those offered by NMS Stock ATSs, sometimes restricting incoming orders to limit orders, and the execution of matched interest involves negotiation or a process. In addition, the municipal and corporate fixed income markets tend to be less liquid than the equity markets, with slower execution times and less complex routing strategies.[235]

Furthermore, market participants trading fixed income securities are typically not comparing transparent trading venues against non-transparent trading venues in the same manner as market participants seeking to execute NMS stock orders. Although two affiliated national securities exchanges operate electronic systems for receiving, processing, executing, and reporting bids, offers and executions in fixed income debt securities,[236] the Commission preliminarily believes that the majority of trading in fixed income securities occurs on the

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233 See SCI Adopting Release, supra note 17, at 72270.

234 See October 15 Staff Report, infra note 247 at 35-36.

235 See SCI Adopting Release, supra note 17, at 72270.

236 See Securities Exchange Act Release Nos. 55496 (March 20, 2007) 72 FR 14631 (March 28, 2007) (NYSE-2006-37) (approving the establishment of NYSE Bonds as an electronic order-driven matching system for debt securities, including, but not limited to corporate bonds (including convertible bonds), international bank bonds, foreign government bonds, U.S. government bonds, government agency bonds, municipal bonds, and debt-based structured products under NYSE Rule 86) and 58839 (October 23, 2008) 73 FR 64645 (October 30, 2008) (NYSEALTR-2008-03) (notice of filing and immediate effectiveness of the Exchange's proposal to relocate the Exchange's debt trading and adopt NYSEAlternext Equities Rule 86 (now NYSEMKT – Equities Rule 86) in order to facilitate trading on the system NYSE Alternext Bonds system (now NYSEMKT Bonds)).

bilateral market.[237] As such, ATSs that effect trades in fixed income securities primarily compete against other trading venues with limited or no operational transparency requirements or standards. By contrast, NMS Stock ATSs, which provide limited information to market participants about their operations, compete directly with national securities exchanges, which are required to publicly disclose information about their operations in the form of proposed rule changes and a public rule book. Accordingly, the Commission preliminarily believes that any proposed revisions to the disclosure requirements for fixed income ATSs under Regulation ATS should be specifically tailored to the attributes of the fixed income market and, therefore, may require different changes to the current Regulation ATS regime and Form ATS than those being proposed herein, which are in direct response to specific transparency concerns related to the operational complexities of NMS Stock ATSs and market participants' general inability to compare NMS Stock ATSs to one another and to national securities exchanges.

The Commission recognizes, however, that trading on fixed income ATSs continues to evolve as fixed income securities are increasingly being traded on ATSs and that trading is occurring in an automated manner. Furthermore, while the specific conflicts of interest that might arise on NMS Stock ATSs operated by multiservice broker dealers may not be identical to the potential conflicts of interest that might arise on a fixed income ATS,[238] the current operations of fixed income ATSs may give rise to potential conflicts of interest between the non-

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237 For interdealer trading for "benchmark" U.S. Treasury securities, however, trading occurs mainly on centralized electronic trading platforms using a central limit order book, namely ATSs. See October 15 Staff Report, infra note 247 at 11.

238 For instance, the Commission preliminarily believes that non-ATS business units of broker-dealer operators of fixed income ATSs may not trade proprietarily on their ATSs to the same extent that proprietary trading desks, or other business units, of multiservice broker-dealer operators trade on NMS Stock ATSs.

ATS operations of a broker-dealer operator, or its affiliates, and the fixed income ATS. Accordingly, the Commission seeks comment on the following:

10. Do you believe that market participants have sufficient information about the operations of fixed income ATSs to evaluate such ATSs as potential trading venues? Why or why not? Please support your arguments.

11. Do you believe that the Commission should apply proposed Rule 304, in whole or in part, to fixed income ATSs, or some subset of fixed income ATSs? Why or why not? If proposed Rule 304 should be applied only in part to fixed income ATSs, which parts should be applied and why? What, if any, specific modifications or additions to proposed Rule 304 should be made in any application of it to fixed income ATSs? Please support your arguments.

12. Do you believe that fixed income ATSs raise the same or similar operational transparency concerns that the Commission preliminarily believes to exist for NMS Stock ATSs? Why or why not? Please support your arguments. If not, do you believe that fixed income ATSs raise other operational transparency concerns that warrant inclusion of fixed income ATSs within the scope of proposed Rule 304? Why or why not? Please support your arguments.

13. Do you believe that there are potential conflicts of interest for broker-dealer operators of fixed income ATSs, or their affiliates, that may warrant inclusion of fixed income ATSs within the scope of proposed Rule 304? Why or why not? Please support your arguments. If yes, what are those potential conflicts of interest and how do those potential conflicts of interest differ from or resemble

the potential conflicts of interest for broker-dealer operators of NMS Stock ATSs and their affiliates? Please be specific.

14. Do you believe that the current conditions to the exemption from the definition of "exchange" are appropriate for fixed income ATSs? Why or why not? Please support your arguments.

15. Do you believe that applying proposed Rule 304 to fixed income ATSs would place them at a competitive disadvantage with respect to non-ATS trading venues that trade fixed income securities and would not be subject to such disclosure requirements? Why or why not? Please support your arguments.

16. Should the Commission adopt a new form that is designed specifically to solicit information about the operations of fixed income ATSs or the operations of certain types of fixed income ATSs? If so, please explain, in detail, the information the new form should require. If not, why not? Please support your arguments. Do you believe that part or all of any new form designed specifically for fixed income ATSs should be made available to the public? Why or why not? Please support your arguments.

As noted above, the Commission recognizes that fixed income securities markets continue to evolve as fixed income securities are increasingly being traded on ATSs in an automated manner. Thus, under the current regulatory requirements, market participants generally do not have information about how fixed income ATSs operate as ATSs are not

otherwise required to publicly disclose such information[239] and Forms ATS filed with the Commission by fixed income ATSs are deemed confidential.

As such, the Commission is seeking public comment on whether it should make public current Forms ATS filed by fixed income ATSs. Though the solicitations on current Form ATS are not specifically tailored to fixed income ATSs like proposed Form ATS-N would be tailored to NMS Stock ATSs, market participants could use the information to assess and compare fixed income ATSs when deciding where to trade fixed income securities. The Commission is cognizant, however, that fixed income ATSs currently file Form ATS with the understanding that the Form ATS is deemed confidential and thus, a fixed income ATS may not have chosen to operate as an alternative trading system if its Form ATS filing was originally intended to be made public. In response to any change in the regulatory requirements, a fixed income ATS may change its business model and choose to curtail its activities or cease operating as an ATS.

Accordingly, the Commission seeks comment on the following:

17. Do you believe that the current Forms ATS initial operation report, or parts thereof, filed by fixed income ATSs should be made available to the public? Why or why not? Please support your arguments.

18. Do you believe that amendments to Form ATS initial operation reports, or parts thereof, filed by fixed income ATSs should be made available to the public? Why or why not? Please support your arguments.

19. Do you believe that current Form ATS is sufficient to elicit useful information about the operations of fixed income ATSs? If so, why? If not, in what ways

[239] The Commission does note, however, that some ATSs may currently make voluntary public disclosures. See, e.g., infra note 156.

should Form ATS be modified to better inform the Commission about the operations of fixed income ATSs? Please explain in detail the manner in which Form ATS should be modified for fixed income ATSs.

20. Do you believe that fixed income ATSs may curtail or cease operations if the Commission rescinded the confidential treatment of Form ATS and made Forms ATS filed by fixed income ATSs public? Why or why not? Please support your arguments.

21. Do you believe that if fixed income ATSs curtail or cease operations in response to the Commission rescinding the confidentiality of the Form ATS, the limitation or exit of those ATSs from the fixed income market would impact the quality of the fixed income markets in any way? Why or why not? Please support your arguments.

The questions above relate to all fixed income securities, but the Commission is also interested in learning commenters' specific views about whether ATSs that effect transactions in fixed income securities that are government securities, as defined under the Exchange Act,[240] should be subject to increased regulation, operational transparency requirements, or both. Under Rule 301(a)(4) of Regulation ATS, an ATS that solely trades government securities and is registered as a broker-dealer or is a bank is exempt from the requirement to either register as a national securities exchange or comply with Regulation ATS.[241] If an ATS trades both

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240 See 15 U.S.C. 78c(a)(42) (defining "government securities" as, among other things, "securities which are direct obligations of, or obligations guaranteed as to principal or interest by, the United States").

241 See 17 CFR 242.301(a)(4)(i) and (ii)(A).

government securities and non-government securities – such as NMS stocks, corporate or municipal fixed income securities – it must either register as a national securities exchange or comply with Regulation ATS. However, these ATSs are not subject to several requirements under Regulation ATS with regard to their trading in government securities. First, ATSs that do not trade NMS stocks are not subject to the order display and execution access provisions under Rule 301(b)(3).[242] Additionally, the government securities activities of ATSs that trade both government and other securities are not subject to either the fair access provisions of Rule 301(b)(5)[243] or the capacity, integrity, and security of automated systems provisions under Rule 301(b)(6).[244]

Pursuant to the Exchange Act (particularly the provisions of the Government Securities Act of 1986, as amended [245]) and federal banking laws, brokers and dealers in the government securities market are regulated jointly by the Commission, the United States Department of the Treasury ("U.S. Treasury Department"), and federal banking regulators.[246] Recently, staff members from the U.S. Treasury Department, the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of New York, the Commission, and the U.S. Commodity Futures Trading Commission issued a joint report about the unusually high level of volatility and

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242 See supra notes 86-90 and accompanying text.

243 See supra notes 92-94 and accompanying text.

244 See supra notes 96-97 and accompanying text.

245 See Public Law 99-571, October 28, 1986, and Public Law 103-202, December 17, 1993.

246 The Government Securities Act authorized the U.S. Treasury Department to promulgate rules governing transactions in government securities by government securities brokers and dealers. See October 15 Staff Report, infra note 247, at 9. The Commission, FINRA, and federal bank regulators – in consultation with the U.S. Treasury Department – also have the authority to issue sales practice rules for the government securities secondary market. See id.

rapid round-trip in prices that occurred in the U.S. Treasury market on October 15, 2014 (the "October 15 Staff Report").[247] The October 15 Staff Report discusses the conditions that contributed to the October 15, 2014 developments and key findings from the analysis of data from that day.

The October 15 Staff Report also provides an overview of the market structure, liquidity, and applicable regulations of the U.S. Treasury market, as well as the broad changes to the structure of the U.S. Treasury market that have occurred over the past two decades.[248] For the secondary market in cash U.S. Treasury securities ("Treasury securities"), the October 15 Staff Report explains that trading occurs: (1) in bilateral transactions via voice or a variety of electronic means; or (2) on centralized electronic trading platforms using a central limit order book.[249] The October 15 Staff Report notes that the structure of the U.S. Treasury market has "evolved notably in recent years" and electronic trading has become an increasingly important feature of the modern interdealer market for Treasury securities.[250] Like modern-day trading in NMS stocks, the majority of interdealer trading in benchmark Treasury securities,[251] which is the

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247 See Joint Staff Report: The U.S. Treasury Market on October 15, 2014 (July 13, 2015) (the "October 15 Staff Report"), available at http://www.treasury.gov/press-center/press-releases/Documents/Joint_Staff_Report_Treasury_10-15-2015.pdf.

248 See October 15 Staff Report, supra note 247, at 8-14, 35-44.

249 See id. at 11.

250 See id. at 35.

251 Benchmark issues are the most recently issued nominal coupon securities. See id. at 11. Nominal coupon securities pay a fixed semi-annual coupon and are currently issued at original maturities of 2, 3, 5, 7, 10, and 30 years. See id. at 11, n.6.

most liquid type of Treasury security, currently occurs on centralized electronic trading platforms using a central limit order book, namely ATSs.[252]

The October 15 Staff Report notes that the growth in high-speed electronic trading has contributed to the growing presence of Principal trading firms ("PTFs") in the Treasury market, with these firms accounting for the majority of trading and providing the vast majority of market depth.[253] PTFs, which have direct access to electronic trading platforms for Treasury securities, now represent more than half of the trading activity on electronic interdealer trading platforms for Treasury securities.[254] Similar to HFTs in the equity markets, PTFs trading on the electronically brokered interdealer market for Treasury securities often employ automated algorithmic trading strategies that rely on speed and allow the PTFs to cancel or modify existing quotes in response to perceived market activity.[255] Furthermore, most PTFs trading Treasury securities on electronic platforms also restrict their activities to proprietary trading and do not hold long positions.[256]

The October 15 Staff Report also notes that increased trading speed due to automated trading in the U.S. Treasury market has challenged the traditional risk management protocols for market participants, trading platforms, and clearing firms.[257] The October 15 Staff Report notes

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252 See id. at 11, 35-36. The October 15 Staff Report also notes that the majority of interdealer trading of "seasoned" Treasury securities and the majority of dealer-to-customer trading is via bilateral transactions. See id. at 11, 35-36 n.31.

253 See id. at 36.

254 See id.

255 See id. at 32, 35-36, 39.

256 See id. at 38.

257 See id. at 36.

that automated trading can occur at speeds that exceed the capacity of manual detection and intervention, posing a challenge to traditional risk management protocols, and forcing market participants, trading platforms, and clearing firms to develop internal risk controls and processes to manage the potential for rapidly changing market and counterparty risk exposures.[258]

As indicated in the October 15 Staff Report, the staff of the U.S. Treasury Department, the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of New York, the Commission, and the U.S. Commodity Futures Trading Commission plan to continue to analyze the events of October 15, 2014 and examine changes to the U.S. Treasury market structure. The October 15 Staff Report identified four areas for further work. One of the four areas includes the continued monitoring of trading and risk management practices across the U.S. Treasury market and a review of the current regulatory requirements applicable to the government securities market and its participants.[259] In connection with this, the cross-agency staff expressed support for a review of the current regulatory requirements applicable to the government securities market and its participants and suggested studying the implications of a registration requirement for firms conducting certain types of automated trading in the U.S. Treasury market and for government securities trading venues.[260] The staff also recommended an assessment of the data available to the public and to the official sector on U.S. Treasury cash securities markets, which would include efforts to enhance public reporting on U.S. Treasury market venue policies and services.[261]

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258 See id. at 36-37.

259 See id. at 45.

260 See id. at 47.

261 See id. at 48.

Based on the rapid and continued evolution of the market for government securities, the Commission is seeking comment on whether as part of its continued cooperation and coordination with other regulators, it should include ATSs whose trading activity is solely in government securities within the scope of current Regulation ATS and amend Regulation ATS to provide for enhanced operational transparency for ATSs that trade government securities.[262] Specifically, the Commission seeks comment on the following:

22. Do you that believe market participants have sufficient information about the operations of ATSs that effect transactions in government securities in order to evaluate such ATSs as potential trading venues? Why or why not? Please support your arguments.

23. Do you believe that the Commission should adopt amendments to Regulation ATS to remove the exemption under Rule 301(a)(4)(ii)(A) of Regulation ATS for ATSs whose trading activity is solely in government securities? Why or why not? Please support your arguments. If so, do you believe that the Commission should make public Form ATS filings or otherwise increase the transparency requirements under Regulation ATS for ATSs whose sole trading activity is in government securities? Why or why not? Please support your arguments.

24. Do you believe that the Commission should adopt amendments to Regulation ATS to enhance the transparency requirements applicable to ATSs that effect

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[262] Prior to adopting any changes to Regulation ATS with regard to ATSs that trade government securities, the Commission would, as appropriate, consult with and consider the views of the Secretary of the Treasury and any other appropriate regulatory agencies. See 15 U.S.C. 78o(c)(2)(E).

transactions in both government securities and non-government securities? Why or why not? If so, how? Please support your arguments.

25. Do you believe that ATSs that effect transactions in government securities raise the same operational transparency concerns that the Commission preliminarily believes to exist for NMS Stock ATSs? Why or why not? Please support your arguments. If not, do you believe that ATSs that effect transactions in government securities raise other operational transparency concerns that warrant expanding the scope of Regulation ATS to encompass ATSs whose sole trading activity is in government securities or increasing the transparency requirements for ATSs that effect transactions in both government securities and non-government securities? Why or why not? Please support your arguments.

26. Do you believe that there are potential conflicts of interest for broker-dealer operators of ATSs, or their affiliates, that effect transactions in government securities that may justify greater operational transparency for ATSs that effect transactions in government securities? Why or why not? Please support your arguments. If yes, what are those potential conflicts of interest and how do those potential conflicts of interest differ from or resemble the potential conflicts of interest for broker-dealer operators of NMS Stock ATSs and their affiliates? Please be specific.

27. Do you believe that current Form ATS is sufficient to elicit information about the operations of ATSs that effect transactions in government securities? If not, in what ways should Form ATS be modified to better inform the Commission about the operations of ATSs that effect transactions in government securities? Please

explain in detail the manner in which Form ATS should be modified. Do you believe that the current Forms ATS, or parts thereof, for ATSs that effect transactions in government securities and non-government securities should be made available to the public? Why or why not? Please support your arguments.

28. Do you believe that the Commission should adopt amendments to existing rules under Regulation ATS, including, Rules 301(b)(3) (order display and execution access), 301(b)(5) (fair access), and 301(b)(6) (capacity, integrity, and security of automated systems), to make those rules applicable to trading in government securities on ATSs? Why or why not? If so, how? Please provide support for your arguments. Should the Commission adopt amendments to Rule 301(b)(3) of Regulation ATS to require ATSs that trade government securities to report quotes and/or trade information for public dissemination after crossing certain volume thresholds in a government security? Should such information be reported only after a delay? Why or why not? Please support your arguments.

29. Do you believe that the Commission should apply proposed Rule 304, in whole or in part, to ATSs that effect transactions in government securities? Why or why not? Please support your arguments.

30. Do you believe that the Commission should adopt a new form that is specifically designed to solicit information about the operations of ATSs that effect transactions in government securities? If so, please explain, in detail, the information the new form should require from ATSs that effect transactions in government securities. If not, why not? Please support your arguments. Do you believe that any new form designed specifically for ATSs that effect transactions

in government securities should be made available to the public? Why or why not? Please support your arguments.

31. Do you believe that broker-dealers that effect transactions in government securities may modify their business models in order to need not comply with Regulation ATS in response to enhanced regulatory or operational transparency requirements for ATSs that effect transactions in government securities? Why or why not? Please support your arguments.

There are also ATSs whose activity is solely the facilitation of trading in OTC Equity Securities.[263] At this time, the Commission preliminarily believes that many of its specific concerns related to the current operations of NMS Stock ATSs, which proposed Rule 304 and proposed Form ATS-N seek to address directly, are not equally applicable to OTC Equity Securities ATSs. The Commission preliminarily believes that OTC Equity Securities ATSs do not currently operate with the same complexities as NMS Stock ATSs. Additionally, trading in OTC Equity Securities is almost always facilitated through ATSs, through inter-dealer quotation systems that are not ATSs,[264] or elsewhere in the bilateral market. Accordingly, trading in the

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263 For the purposes of this analysis and request for comment, the Commission is using the term "OTC Equity Security" as it is defined in FINRA's 6400 rule series for quoting and trading in OTC Equity Securities. FINRA defines OTC Equity Security as "any equity security that is not an 'NMS stock' as that term is defined in Rule 600(b)(47) of SEC Regulation NMS; provided, however, that the term 'OTC Equity Security' shall not include any Restricted Equity Security," which FINRA defines as "any equity security that meets the definition of 'restricted security' as contained in Securities Act Rule 144(a)(3)." See FINRA Rules 6420(f), (k).

264 FINRA Rule 6420 defines an interdealer quotation system as "any system of general circulation to brokers or dealers which regularly disseminates quotations of identified brokers or dealers." See FINRA Rule 6420(c). An example of an interdealer quotation system is the OTC Bulletin Board that FINRA operates.

market for OTC Equity Securities is typically facilitated by platforms or amongst market participants that are not subject to operational transparency requirements comparable to those imposed on national securities exchanges (i.e., the self-regulatory organization rule filing process). The Commission also preliminarily believes that OTC Equity Securities ATSs are evolving and, therefore, the Commission seeks comment on the following:

32. Do you believe that market participants have sufficient information about the operations of OTC Equity Securities ATSs to evaluate such ATSs as potential trading venues? Why or why not? Please support your arguments.

33. Do you believe that OTC Equity Securities ATSs raise the same operational transparency concerns that the Commission preliminarily believes to exist for NMS Stock ATSs? Why or why not? Please support your arguments. If not, do you believe that OTC Equity Securities ATSs raise other operational transparency concerns that warrant inclusion of OTC Equity Securities ATSs within the scope of proposed Rule 304? Why or why not? Please support your arguments.

34. Do you believe that there are potential conflicts of interest for broker-dealer operators of ATSs, and their affiliates, that facilitate transactions in OTC Equity Securities that may justify greater operational transparency for OTC Equity Securities ATSs? Why or why not? Please support your arguments. If yes, what are those potential conflicts of interest and how do those potential conflicts of interest differ from or resemble the potential conflicts of interest for broker-dealer operators of NMS Stock ATSs and their affiliates? Please be specific.

35. Do you believe that the Commission should apply proposed Rule 304, in whole or in part, to OTC Equity Securities ATSs? Why or why not? Please support your arguments.

36. Do you believe that applying proposed Rule 304 to OTC Equity Securities ATSs would place them at a competitive disadvantage with respect to other trading venues that facilitate transactions in OTC Equity Securities in the bilateral market, which would not be subject to such disclosure requirements? Why or why not? Please support your arguments.

37. Do you believe that current Form ATS is sufficient to elicit relevant information about the operations of OTC Equity Securities ATSs? If so, why? If not, in what ways should Form ATS be modified to better inform the Commission about the operations of OTC Equity Securities ATSs? Please explain in detail the manner in which Form ATS could be modified. Do you believe that the current filed Forms ATS, or parts thereof, for OTC Equity Securities ATSs should be made available to the public? Why or why not? Please support your arguments.

38. Do you believe that the Commission should adopt a new form that is designed specifically for OTC Equity Securities ATSs to promote operational transparency of such ATSs? If so, please explain, in detail, the information the new form should require. If not, why not? Please support your arguments. Do you believe that any new form designed specifically for OTC Equity Securities ATSs should be made available to the public? Why or why not? Please support your arguments.

Additionally, the Commission notes that there are active ATSs that trade in securities other than NMS stocks, fixed income securities, or OTC Equity Securities.[265] For example, an ATS might help match orders for options contracts or facilitate trades in cooperative interests or membership units in limited liability companies. At this time, the Commission does not believe that these ATSs raise the same operational transparency concerns as NMS Stock ATSs. The products traded on these ATSs are not traded on national securities exchanges and, therefore, these ATSs are not competing against platforms with greater transparency requirements. Furthermore, the Commission preliminarily believes that ATSs that trade in securities other than NMS stocks, fixed income securities, or OTC Equity Securities do not currently operate with the same complexities as NMS Stock ATSs. For such ATSs, however, the Commission seeks comment on the following:

39. Do you believe that market participants have sufficient information about the operations of ATSs that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities as potential trading venues? Why or why not? Please support your arguments.

40. Do you believe that ATSs that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities raise the same operational transparency concerns that the Commission preliminarily believes to exist for NMS Stock ATSs? Why or why not? Please support your arguments.

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[265] The Commission notes that, based on information provided on Forms ATS and ATS-R as of November 1, 2015, 5 ATSs may trade such securities.

41. Do you believe that there are potential conflicts of interest for broker-dealer operators of ATSs, and their affiliates, that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities that may justify greater operational transparency for ATSs that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities? Why or why not? Please support your arguments. If yes, what are those potential conflicts of interest and how do those potential conflicts of interest differ from or resemble the potential conflicts of interest for broker-dealer operators of NMS Stock ATSs and their affiliates? Please be specific.

42. Do you believe that the Commission should apply proposed Rule 304, in whole or in part, to ATSs that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities? Why or why not? Please support your arguments. If so, please explain the types of ATSs to which proposed Rule 304 should apply and why. If not, why not? Please support your arguments.

43. Do you believe that Form ATS is sufficient to elicit useful information about the operations of ATSs that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities? If so, why? If not, in what ways should Form ATS be modified to better inform the Commission about the operations of ATSs that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities? Please explain in detail the manner in which Form ATS could be modified. Do

you believe that current filed Forms ATS, or parts thereof, for ATSs that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities should be made available to the public? Why or why not? Please support your arguments.

44. Do you believe that the Commission should adopt a new form specifically designed for ATSs that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities in order to promote operational transparency of such ATSs? If so, please explain, in detail, the information the new form should elicit from ATSs that effect or facilitate transactions in such securities. If not, why not? Please support your arguments. Do you believe that any new form designed specifically for ATSs that effect or facilitate transactions in securities other than NMS stocks, fixed income securities, or OTC Equity Securities should be made available to the public? Why or why not? Please support your arguments.

C. Proposed Rule 304: Enhanced Filing Requirements for NMS Stock ATSs

1. Application of Existing Requirements to NMS Stock ATSs

Proposed Rule 304(a) would require that, unless not required to comply with Regulation ATS pursuant to Rule 301(a) of Regulation ATS, an NMS Stock ATS must comply with Rules 300-304 of Regulation ATS (except Rule 301(b)(2), as discussed in Section IV.C.2 below) to be exempt from the definition of an exchange pursuant to Rule 3a1-1(a)(2).[266] The Commission is

[266] As discussed above, the Commission is proposing to amend Rule 3a1-1(a) to provide for modified conditions to the exemption set forth in proposed Rule 304. See supra Section IV.B.

not proposing to change Rule 301(a) as part of this proposal, but is simply making clear that Rule 301(a) continues to apply to NMS Stock ATSs, unless otherwise exempt.[267] Thus, NMS Stock ATSs would still be required to comply with the existing requirements of Rules 300-303 of Regulation ATS, and would additionally be required to comply with proposed Rule 304.

The Commission also notes that the requirements of Rule 301(b) (except Rule 301(b)(2)) of Regulation ATS[268] would continue to apply to NMS Stock ATSs. As discussed above, Rule 301(b) sets forth the conditions with which an ATS must comply to benefit from the exemption provided by Exchange Act Rule 3a1-1(a). The Commission continues to believe that compliance by NMS Stock ATSs with the provisions of Rule 301(b) of Regulation ATS (except Rule 301(b)(2)), as amended, is a necessary and appropriate condition to the Rule 3a1-1(a)(2) exemption from the definition of exchange in that the purpose of such condition is the protection of investors.[269] The Commission would no longer require an NMS Stock ATS to comply with the reporting and amendment requirements of Rule 301(b)(2) because such conditions would be

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[267] Pursuant to Rule 301(a), certain ATSs that are subject to other appropriate regulations are not required to comply with Regulation ATS, including any ATS that is: (1) registered as an exchange under Section 6 of the Exchange Act; (2) exempt from exchange registration based on limited volume; (3) operated by a national securities association; (4) registered as a broker-dealer, under Sections 15(b) or 15C of the Exchange Act, or that is a bank, that limits its securities activities to certain instruments; or (5) exempted, conditionally or unconditionally, by Commission order, after application by such alternative trading system from one or more of the requirements of Rule 301(b). See 17 CFR 242.301(a). See also Regulation ATS Adopting Release, supra note 7, at 70859-63.

[268] See 17 CFR 242.301(b)(1), (b)(3)-(11).

[269] See, e.g., Regulation ATS Adopting Release, supra note 7, at 70856. In adopting the existing conditions in Rule 301, the Commission determined that the exemption in Rule 3a1-1 was consistent with the protection of investors because the Commission believed that investors would benefit from the conditions governing an alternative trading system, in particular Regulation ATS's enhanced transparency, market access, system integrity, and audit trail provisions. See id.

replaced with the more specific disclosure requirements of proposed Rule 304 for NMS Stock ATSs, discussed in further detail below. The Commission is also proposing to make non-substantive amendments to Rule 301(b)(2)(i) and Rule 301(b)(2)(vii)[270] to delete outdated references to dates for phased in compliance with Regulation ATS for ATSs that were operational as of April 21, 1999, and to update the name of the Division of Trading and Markets, respectively.[271]

The Commission requests comment generally on all aspects of proposed Rule 304(a).

2. Rule 301(b)(2) and Form ATS; ATSs That Trade in Non-NMS Stocks

The Commission is proposing Rule 301(b)(2)(viii) to provide that an NMS Stock ATS shall file the reports and amendments required by proposed Rule 304 and would not be subject to the requirements of Rule 301(b)(2). Existing Rule 301(b)(2) requires an ATS to file with the Commission a Form ATS initial operation report, amendments to the Form ATS initial operation report, and cessation of operations reports on Form ATS, all of which are "deemed confidential when filed."[272] Because the Commission is proposing rules to govern the content and manner in which an NMS Stock ATS would be required to disclose information to the public and the Commission on proposed Form ATS-N, existing Rule 301(b)(2), which applies, and will continue to apply, to ATSs that do not effect transactions in NMS stocks would be duplicative of the proposed amendments.[273]

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270 See proposed Rules 301(b)(2)(i) and (vii), respectively.

271 See 17 CFR 242.301(b)(2)(i) and (vii), respectively.

272 See 17 CFR 242.301(b)(2).

273 See supra Section IV.B. (discussing the proposed conditions to the exemption in Rule 3a1-1(a) for ATSs that trade NMS stocks, as compared to the conditions for ATSs that trade other securities or that trade NMS stocks as well as other securities).

Proposed Rule 301(b)(2)(viii) would also provide that an ATS that effects transactions in both NMS stocks and non-NMS stocks would be subject to the requirements of proposed Rule 304 with respect to NMS stocks and Rule 301(b)(2) with respect to non-NMS stocks. The Commission recognizes that some existing ATSs that would meet the definition of NMS Stock ATS also transact in securities other than NMS stocks. For these ATSs to be eligible for the exemption under Rule 3a1-1(a)(2), the Commission preliminarily believes that it is not necessary to mandate compliance with the heightened transparency requirements under proposed Rule 304 with respect to their non-NMS stock operations. Based on Commission experience, these ATSs are designed so that the platform on which non-NMS stock order flow interacts and executes differs from the platform on which NMS stock order flow interacts and executes. Furthermore, as explained above, the Commission preliminarily believes that the operational transparency concerns for NMS Stock ATSs do not apply equally to the markets for non-NMS stocks.[274] As such, the Commission has tailored proposed Form ATS-N to address the specific operational transparency concerns raised by the current functionalities of the ATS platforms on which NMS stock order flow interacts and executes. Additionally, the Commission preliminarily believes that applying proposed Rule 304 to the non-NMS stock operations of ATSs that trade both NMS stocks and non-NMS stocks would impose unequal regulatory burdens across ATSs that transact in non-NMS stocks. Under such a rule, ATSs that trade both NMS stocks and non-NMS stocks would be required to meet the heightened standards of proposed Rule 304 to be eligible for the exemption under Rule 3a1-1(a)(2) with regard to their non-NMS stock operations, whereas ATSs that only trade non-NMS stocks would not be subject to the standards under proposed Rule 304.

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[274] See supra Section IV.B.

The Commission also proposes to amend Rule 301(b)(9),[275] which requires an ATS to report transaction volume on Form ATS-R on a quarterly basis and within 10 calendar days after it ceases operation. The Commission proposes to amend Rule 301(b)(9) to require an ATS that trades both NMS stocks and non-NMS stocks to separately report its transactions in NMS stocks on one Form ATS-R, and its transactions in non-NMS stocks on another Form ATS-R. The information filed on Form ATS-R permits the Commission to monitor trading on an ATS.[276] As noted above, the Commission proposes to require each ATS with both NMS stock and non-NMS stock operations to file a Form ATS-N for its NMS stock operations and a separate Form ATS for its non-NMS stock operations. Because the proposed Form ATS-N and Form ATS filings of such ATSs would describe separate functionalities – the functionalities for the trading of NMS stocks and those for the trading of non-NMS stocks, respectively – the Commission preliminarily believes that these ATSs should file a separate Form ATS-R to report the trading activity for each functionality to avoid confusion and for regulatory efficiency. Accordingly, the Commission is proposing to require that these ATSs file a Form ATS-R to report transaction volume resulting from their NMS stock operations, as disclosed on a Form ATS-N, and a separate Form ATS-R to report transaction volume resulting from their non-NMS stock operations, as disclosed on Form ATS. The Commission notes that Form ATS-R would continue to be deemed confidential.

The Commission requests comment on the proposed amendments to Rules 301(b)(2) and 301(b)(9). In particular, the Commission solicits comment on the following:

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275 See 17 CFR 242.301(b)(9).

276 See Regulation ATS Adopting Release, supra note 7, at 70878.

45. Should the Commission require ATSs that trade both NMS stocks and non-NMS stocks to make filings on both proposed Form ATS-N, with respect to its NMS stock operations, and Form ATS, with respect to its non-NMS stock operations? Why or why not? Please support your arguments.

46. Should the Commission require ATSs that trade both NMS stocks and non-NMS stocks to file a Form ATS-R with respect to their NMS stock operations and a separate Form ATS-R with respect to their non-NMS stock operations? Why or why not? Please support your arguments.

47. Do you believe that ATSs that trade both NMS stocks and non-NMS stocks should be subject to proposed Rule 304, in whole or in part, for both their NMS stock operations and non-NMS stock operations? Why or why not? Please support your arguments.

48. Do you believe that ATSs that trade both NMS stocks and non-NMS stocks should be required to disclose their NMS stock and non-NMS stock operations solely on proposed Form ATS-N? If so, why, and what additional disclosures should be required on proposed Form ATS-N to reflect non-NMS stock operations? If not, why not? Please support your arguments.

3. Proposed Rule 304(a)(1)(i) and (ii): Filing and Review of Form ATS-N

Proposed Rule 304(a)(1)(i) would provide that no exemption from the definition of "exchange" is available to an NMS Stock ATS pursuant to Exchange Act Rule 3a1-1(a)(2) unless the NMS Stock ATS files with the Commission a Form ATS-N and the Commission declares the Form ATS-N effective. The Commission preliminarily believes that an NMS Stock ATS that is not operating on the effective date of proposed Rule 304 should not be permitted to

commence operations until the Commission has had the opportunity to assess whether the NMS Stock ATS qualifies for the Rule 3a1-1(a)(2) exemption. As discussed above,[277] the current requirements of the Rule 3a1-1(a)(2) exemption mandate that an ATS only provide notice of its operation on a Form ATS initial operation report 20 days prior to commencing operations.[278] The Commission's review of Form ATS-N would help ensure that an NMS Stock ATS's disclosures comply with the requirements of proposed Rule 304 and that a consistent level of information is made available to market participants in evaluating NMS Stock ATSs.[279]

Proposed Rule 304(a)(1)(i) is also designed as a transition for currently operating ATSs that meet the proposed definition of NMS Stock ATS. Proposed Rule 304(a)(1)(i) would require an existing ATS that facilitates transactions in NMS stocks and that operates pursuant to a previously filed initial operation report on Form ATS as of the effective date of proposed Rule 304 (i.e., a "legacy NMS Stock ATS") to file a Form ATS-N with the Commission no later than 120 calendar days after the effective date of proposed Rule 304. In other words, the effectiveness of an existing Form ATS would not suffice for a legacy NMS Stock ATS to retain its exemption from the definition of "exchange" with respect to its Rule 3b-16 activity in NMS stocks beyond the transition period following the effectiveness of proposed Rule 304. The Commission is also proposing in Rule 304(a)(1)(i) that a legacy NMS Stock ATS may continue

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277 See Section IV.B.

278 17 CFR 242.301(b)(2).

279 The Commission notes, however, that Form ATS-N is intended to provide regulatory and public transparency. As such, its review of Form ATS-N will be focused on an evaluation of the completeness and accuracy of the disclosure thereon, and compliance with federal securities laws. Even if the Commission declares a Form ATS-N effective, the Commission would not be precluded from later determining that an NMS Stock ATS had violated the federal securities laws or the rules and regulations thereunder. See infra Section IV.CIV.8.

to operate pursuant to a previously filed initial operation report on Form ATS pending the Commission's review of the filed Form ATS-N.[280] This provision would allow the NMS Stock ATS to continue its current operations without disruptions to the NMS Stock ATS or its current subscribers and provide the NMS Stock ATS with sufficient time to make an orderly transition from compliance under the current Regulation ATS requirements to compliance with the proposed requirements of Rule 304. The Commission notes that during the Commission's review of the filed Form ATS-N, the NMS Stock ATS would continue to operate pursuant to its existing Form ATS initial operation report and would continue to be required to file amendments on Form ATS to provide notice of changes to the operations of its system.[281]

The Commission considered the alternative of allowing an existing ATS that engages in Rule 3b-16 activity in NMS stocks to retain its exemption from the definition of "exchange" by virtue of its existing Form ATS, and to require only a new NMS Stock ATS to file Form ATS-N. However, the Commission preliminarily believes that this alternative would not be appropriate as it would create a significant competitive disparity between a "new" and "legacy" NMS Stock ATS, with the latter benefitting from substantially lighter disclosure requirements. More importantly, it would perpetuate the problem of limited information being available to market participants. Nevertheless, the Commission preliminarily believes that it would be appropriate to provide existing ATSs that engage in Rule 3b-16 activity with regard to NMS stocks an adjustment period after the effective date of proposed Rule 304 to file a Form ATS-N. The Commission preliminarily believes that 120 calendar days is sufficient time for a legacy NMS

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280 The NMS Stock ATS would be required to continue to comply with Regulation ATS.

281 17 CFR 242.301(b)(2)(ii)-(iv).

Stock ATS to respond to the disclosure requirements on the new Form ATS-N because an ATS that is currently operating should be knowledgeable about the operations of its system and the activities of its broker-dealer operator and its affiliates.

Proposed Rule 304(a)(1)(ii)(A) would provide that the Commission declare a Form ATS-N filed by an NMS Stock ATS operating as of the effective date of proposed Rule 304 effective or ineffective no later than 120 calendar days from filing with the Commission. Similarly, Proposed Rule 304(a)(1)(ii)(B) would provide that the Commission declare a Form ATS-N filed by an NMS Stock ATS that was not operating as of the effective date of proposed Rule 304 effective or ineffective no later than 120 calendar days from filing with the Commission. The disclosures required by proposed Form ATS-N are more comprehensive than those required on current Form ATS, particularly in terms of volume, complexity, and detail. Based on its experience over the past seventeen years of receiving and reviewing notices on Form ATS, the Commission preliminarily believes that it would receive a large amount of information provided in Form ATS-N filings. The Commission preliminarily believes that 120 calendar days would provide the Commission adequate time to carry out its oversight functions with respect to its review of Forms ATS-N filed by legacy and new NMS Stock ATSs, including its responsibilities to protect investors and maintain fair, orderly, and efficient markets.[282]

Proposed Rule 304(a)(1)(ii)(A) would further provide a process for the Commission to extend the review period for Forms ATS-N filed by NMS Stock ATSs operating as of the effective date of proposed Rule 304: (1) an additional 120 calendar days, if the Form ATS-N is

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[282] As discussed above, a legacy NMS Stock ATS would be able continue to operate pursuant to a previously filed initial operation report on Form ATS pending the Commission's review of the filed Form ATS-N.

unusually lengthy or raises novel or complex issues that require additional time for review, in which case the Commission will notify the NMS Stock ATS in writing within the initial 120-day review period and will briefly describe the reason for the determination that additional time for review is required; or (2) any extended review period to which the NMS Stock ATS agrees in writing. Proposed Rule 304(a)(1)(ii)(B) would include a similar provision for NMS Stock ATSs not operating as of the effective date of proposed Rule 304, except that the Commission could extend its review period up to 90 calendar days. The proposed disclosure requirements require more detailed disclosures regarding the operations of an NMS Stock ATS than do the current requirements; thereby increasing the amount of information for the Commission to review. The Commission preliminarily believes that the additional time provided by the proposed rule is appropriate because it would allow Commission and its staff to conduct a thorough review of certain lengthy, novel, or complex Form ATS-N filings and provide sufficient opportunity to discuss the filing with the NMS Stock ATS if necessary.

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49. Do you believe the Commission should adopt a rule in which it is required to declare a Form ATS-N filed by an NMS Stock ATS effective or ineffective within 120 calendar days of filing? Do you believe this is an appropriate time frame in light of the amount and nature of information to be submitted on Form ATS-N? Why or why not? Does any experience with Exchange Act Rule 19b-4 filings by self-regulatory organizations, either in draft or in formal submission, inform the appropriate time frame?

50. Should the Commission adopt a process to further extend the period of review under certain circumstances? If so, what circumstances and why? Please support your arguments.

51. If the Commission does not declare a Form ATS-N filing effective or ineffective within 120 calendar days from filing with the Commission, or any extension of the 120-day period pursuant to proposed Rule 304(a)(1)(ii), do you believe the Form ATS-N should be automatically deemed effective? Why or why not? Please support your arguments.

52. If the Commission does not declare a Form ATS-N filing effective or ineffective within 120 calendar days from filing with the Commission, or any extension of the 120-day period pursuant to proposed Rule 304(a)(1)(ii), do you believe the Form ATS-N should be automatically deemed ineffective? Why or why not? Please support your arguments.

4. Proposed Rule 304(a)(1)(iii): Declarations of Effectiveness or Ineffectiveness of Form ATS-N

Proposed Rule 304(a)(1)(iii) would provide that the Commission will declare effective a Form ATS-N if the NMS Stock ATS qualifies for the Rule 3a1-1(a)(2) exemption. Proposed Rule 304(a)(1)(iii) would also provide that the Commission will declare ineffective a Form ATS-N if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors.[283]

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[283] A submitted Form ATS-N that contains technical deficiencies, such as missing pages or one in which the entity does not respond to all questions, including all sub-questions, would not be complete and would be returned to the NMS Stock ATS. See also 17 CFR 240.0-3. Return of a Form ATS-N would not prejudice any decision by the Commission

Under the proposal, the Commission would use Form ATS-N to evaluate whether an entity qualifies for an exemption under Rule 3a1-1(a)(2).[284] For the Commission to declare a Form ATS-N effective, it would evaluate, among other things, whether the entity satisfies the definition of ATS,[285] and more specifically, the definition of NMS Stock ATS.[286] The Commission preliminarily believes that whether an entity meets the definition of "NMS Stock ATS" should be a threshold requirement for the Commission to declare a Form ATS-N effective, and therefore for the ATS to qualify for the Rule 3a1-1(a)(2) exemption. Proper classification of an entity would clearly indicate to market participants, as well as the Commission, the functions

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regarding effectiveness or ineffectiveness should the NMS Stock ATS resubmit a Form ATS-N. The Commission notes an NMS Stock ATS also can choose to withdraw a filed Form ATS-N.

284 An NMS Stock ATS would also be required to comply with other requirements of Rules 300-303 of Regulation ATS (except Rule 301(b)(2)) and proposed Rule 304.

285 Regulation ATS defines an ATS as any organization, association, person, group of persons, or system that constitutes a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of Exchange Act Rule 3b-16, and does not set rules governing the conduct of subscribers, other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system, or discipline subscribers under the Exchange Act other than by exclusion from trading. See 17 CFR 242.300(a).

Under Exchange Act Rule 3b-16, an organization, association, or group of persons shall be considered to constitute, maintain, or provide "a marketplace or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange," if such organization, association, or group of persons: (1) brings together the orders for securities of multiple buyers and sellers; and (2) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade. See supra note 48 and accompanying text. See also supra Section IV.A (discussing the proposed definition of "NMS Stock ATS").

286 See proposed Rule 300(k). See also supra Section IV.A (discussing the proposed definition of NMS Stock ATS).

that entity performs and the regulatory framework and attendant obligations that attach to that entity.[287] Thus, if the proposed category of NMS Stock ATS is adopted, the Commission preliminarily believes it needs to mitigate concerns that market participants may be confused or misled about whether an entity in fact meets the definition of an NMS Stock ATS. If an entity does not meet the definition, market participants may hold false expectations about how their orders may interact or be matched with other orders or they may not fully understand whether the entity with which they are doing business is required to comply with Regulation ATS. For these reasons, the Commission preliminarily believes that it would be necessary or appropriate in the public interest, and consistent with the protection of investors, to declare ineffective a Form ATS-N if it finds, after notice and opportunity for hearing, that the Form ATS-N was filed by an entity that does not meet the functional test under Exchange Act Rule 3b-16, does not perform functions commonly performed by a stock exchange, or exercises SRO powers.[288] Similarly, the Commission preliminarily believes that it would be necessary or appropriate in the public interest, and consistent with the protection of investors, to declare ineffective a Form ATS-N if it finds, after notice and opportunity for hearing, that the Form ATS-N was filed by an entity that does not meet the proposed definition of "NMS Stock ATS."

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[287] For example, an ATS that is not an NMS Stock ATS would be subject to different conditions to be eligible for the Rule 3a1-1(a)(2) exemption. Similarly, depending on the facts and circumstances, an entity that is not an ATS may be subject to requirements as a broker-dealer, but not the conditions of Regulation ATS, or may be required to register as an exchange.

[288] See supra Section IV.A. (discussing the definition of NMS Stock ATS and the underlying definition of ATS).

The entity would not fall within the definition of an "exchange" under Section 3(a)(1) of the Exchange Act and the exemption provided in Exchange Act Rule 3a1-1 would not be applicable.

The Commission also preliminarily believes that it would be necessary or appropriate in the public interest, and consistent with the protection of investors, to declare ineffective a Form ATS-N if it finds, after notice and opportunity for hearing, that one or more disclosures on Form ATS-N are materially deficient with respect to their accuracy, currency, or completeness. The requirements of proposed Form ATS-N are set forth in proposed Rule 304(c)(1), which provides that an NMS Stock ATS must respond to each item on Form ATS-N, as applicable, in detail and disclose information that is accurate, current, and complete. The Commission preliminarily believes that market participants would use information disclosed on Form ATS-N to evaluate whether a particular NMS Stock ATS would be a desirable venue to which to route their orders. In addition, the Commission intends to use the information disclosed on the Form ATS-N to exercise oversight over and monitor developments of NMS Stock ATSs. Given these potential uses, the Commission preliminarily believes that it is important that Form ATS-N contain detailed disclosures that are accurate, current, and complete.[289]

The following non-exhaustive examples are provided to illustrate various applications of proposed Rule 304(a)(1)(iii) that could cause the Commission to declare a Form ATS-N ineffective because it contains one or more disclosures that appear to be materially deficient.[290]

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[289] Proposed Form ATS-N is designed to provide market participants and the Commission with, among other things, current information about the operations of the NMS Stock ATS and the activities of the broker-dealer operator and its affiliates. Accordingly, an NMS Stock ATS would be required to provide information on proposed Form ATS-N that reflects the operations of the NMS Stock ATS at the time its Form ATS-N is declared effective by the Commission. Any changes in the operations of the NMS Stock ATS must be disclosed by the NMS Stock ATS in a Form ATS-N Amendment.

[290] The Commission notes that these are some, but not necessarily all, of the types of circumstances that could result in the Commission declaring a Form ATS-N ineffective under the proposed rule.

For instance, if an NMS Stock ATS discloses an order type on Form ATS-N but does not describe the key attributes of the order type, such as time-in-force limitations that can be placed on the ability to execute the order, the treatment of unfilled portions of orders, or conditions for cancelling orders in whole or in part, the Form ATS-N would not be sufficiently detailed. Likewise, if an NMS Stock ATS generally describes some of its priority rules, but fails to describe conditions or exceptions to its priority rules, or fails to describe any priority overlays,[291] the Form ATS-N would lack sufficient detail. If a Form ATS-N states that the NMS Stock ATS has only one class of subscribers but the Commission or its staff learns through discussions (during the review period) with the NMS Stock ATS or otherwise that the NMS Stock ATS in fact has several classes of subscribers, or if the Form ATS-N states that two classes of subscribers are charged the same trading fees but the Commission or its staff learns through discussions with the NMS Stock ATS or otherwise that in fact one class receives more favorable fees than the other, the Form ATS-N would not be accurate. If a Form ATS-N includes inconsistent information, such as a statement in one part of the form that the entity uses private feeds to calculate the NBBO, but in another part of the form it indicates that it uses the Securities Information Processor ("SIP"), the Form ATS-N would not be accurate.

The Commission preliminarily believes that it would be necessary or appropriate in the public interest, and consistent with the protection of investors, to declare ineffective a Form ATS-N if it finds, after notice and opportunity for hearing, that one or more disclosures reveals non-compliance with federal securities laws, or the rules or regulations thereunder, including

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[291] In other words, if the NMS Stock ATS fails to describe which order would receive priority when two or more orders are otherwise on par, such as whether customer orders receive priority in a price priority system if a customer and non-customer order are at the same price, the disclosure would not be sufficient.

Regulation ATS. The Commission notes that the responsibility for accurate, current, and complete disclosures on Form ATS-N lies with the NMS Stock ATS.[292] The Commission's review of Form ATS-N would focus on an evaluation of the completeness and accuracy of the disclosures, and compliance with federal securities laws, including Regulation ATS. The Commission's evaluation regarding compliance with federal securities laws would involve a "red-flag" review of the Form ATS-N disclosures for apparent non-compliance with federal securities laws, or other rules or regulations thereunder, including Regulation ATS, and would focus on the disclosures made on the Form ATS-N. For example, as a condition to the Rule 3a1-1(a)(2) exemption, Rule 301(b)(1) of Regulation ATS requires that an ATS register as a broker-dealer under Section 15 of the Exchange Act.[293] Section 15(b)(8) of the Exchange Act[294] prohibits a registered broker or dealer from effecting a transaction unless the broker or dealer is a member of a securities association registered pursuant to Section 15A of the Exchange Act[295] or effects transactions solely on a national securities exchange of which it is a member. Therefore, to comply with Regulation ATS, and thus qualify for the Rule 3a1-1(a)(2) exemption, an ATS must become a member of an SRO. If an entity were to file a Form ATS-N before registering as a broker-dealer under Section 15 of the Exchange Act, the entity would not be in compliance with Rule 301(b)(1) of Regulation ATS.[296] Moreover, if the entity were to file a Form ATS-N

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292 See infra Section IV.E. and accompanying discussion. Proposed Rule 304(c)(1) would require NMS Stock ATSs to respond to each item on Form ATS-N, as applicable, in detail and disclose information that is accurate, current, and complete.

293 17 CFR 242.301(b)(1).

294 15 U.S.C. 78o(b)(8).

295 15 U.S.C. 78o-3.

296 See 17 CFR 301(b)(1). Rule 301(b)(1) requires an ATS to register as a broker-dealer under section 15 of the Exchange Act.

before becoming a member of an SRO, the entity would not be in compliance with Rule 301(b)(1) of Regulation ATS because Section 15(b)(1) provides that a Commission order granting registration is not effective until the broker-dealer has become a member of a national securities association registered pursuant to Section 15A of the Exchange Act,[297] and the Commission's order granting broker-dealer registration would not be effective.[298] The Commission preliminarily believes that it would be necessary or appropriate in the public interest, and consistent with the protection of investors, to declare ineffective a Form ATS-N if it finds, after notice and opportunity for hearing, that a Form ATS-N reveals non-compliance with Regulation ATS because such non-compliance would be inconsistent with proposed Rule 304(a), which requires that an NMS Stock ATS comply with Rules 300-304 (except Rule 301(b)(2)) as a condition to the exemption from the definition of exchange pursuant to Rule 3a1-1(a)(2).[299] As another example, if a Form ATS-N reveals non-compliance with Rule 612 of Regulation NMS, known as the "Sub-Penny Rule," which prohibits market participants, including ATSs, from displaying, ranking, or accepting orders, quotations, or indications of interest in NMS stock priced in an increment smaller than $0.01,[300] the Form ATS-N would not be consistent with the

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297 See 15 U.S.C. 78o(b)(1).

298 See 17 CFR 242.301(b)(1).

299 The Commission notes that determining whether an NMS Stock ATS qualifies for the exemption from the definition of "exchange" would be based on information as it appears in Form ATS-N. If the Commission were to learn of different information, that determination may change.

300 Specifically, Rule 612(a) of Regulation NMS provides that "no national securities exchange, national securities association, alternative trading system, vendor, or broker or dealer shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock priced in an increment smaller than $0.01 if that bid or offer, order, or indication of interest is priced equal to or greater than $1.00 per share." See 17 CFR 242.612(a).

proposed Rule because the NMS Stock ATS would operate in a manner that would violate the federal securities laws.

During its review, the Commission and its staff may provide comments to the entity, and may request that the entity supplement information in the Form ATS-N or revise its disclosures on Form ATS-N.[301] An order declaring a Form ATS-N effective would not constitute a finding that the NMS Stock ATS's operations are consistent with the Exchange Act and the rules and regulations thereunder. Rather, the declaration of effectiveness would only address the issue of whether the NMS Stock ATS has complied with the requirements of Form ATS-N and would focus on the disclosures made on the Form ATS-N. The Commission would not be precluded from later determining that an NMS Stock ATS had violated the federal securities laws or the rules and regulations thereunder.

Request for Comment

53. Should Form ATS-N be deemed immediately effective without Commission action? Why or why not? Please support your arguments.

54. Should Form ATS-N be considered ineffective on filing with the Commission until the Commission affirmatively declares the Form ATS-N ineffective? Why or why not? Please support your arguments.

55. Should the process for making a Form ATS-N effective for a legacy NMS Stock ATS be different from the process for making a Form ATS-N effective for an NMS Stock ATS that files a Form ATS-N after the effective date of the proposed

[301] The Commission notes, however, that Form ATS-N is intended to provide regulatory and public transparency. As such, its review of Form ATS-N will be focused on an evaluation of the completeness and accuracy of the disclosure thereon, and compliance with federal securities laws.

rule? Why or why not? Please support your arguments. If so, how should the processes for the two categories of NMS Stock ATSs differ?

56. Do you believe that the proposed 120 calendar days after the effective date of proposed Rule 304 is a reasonable amount of time for legacy NMS Stock ATSs to complete and file a Form ATS-N? If so, why? If not, why not, and what amount of time would be reasonable? Please support your arguments.

57. Do you believe that new NMS Stock ATSs would be at a competitive disadvantage if existing NMS Stock ATSs were not required to file a Form ATS-N? Why or why not? Please support your arguments.

58. Do you believe that the proposed 120 calendar day period from filing with the Commission is a reasonable amount of time for the Commission to declare a Form ATS-N filed by an NMS Stock ATS that was not operating as of the effective date of proposed Rule 304 effective or ineffective? Do you believe the review period would place an undue burden on the NMS Stock ATS that filed the Form ATS-N? If yes, what amount of time would be reasonable? Please support your arguments.

59. Should the Commission adopt the proposal to allow a legacy NMS Stock ATS to continue operations pursuant to an existing filed initial operation report on Form ATS pending the Commission's review of its Form ATS-N? Why or why not? Please support your arguments.

60. Do you believe that if a legacy NMS Stock ATS is allowed to continue operations during the Commission's review of its Form ATS-N the Commission should

make such NMS Stock ATS's Form ATS-N publicly available upon filing? Why or why not? Please support your arguments.

61. Should the Commission permit existing NMS Stock ATSs to be exempt from the definition of "exchange" by virtue of the NMS Stock ATS's current Form ATS on file with the Commission and require only new NMS Stock ATSs to file Form ATS-N? Why or why not? Would this raise competitive concerns with respect to disparate regulatory treatment of "new" and "legacy" NMS Stock ATSs? Why or why not? Please support your arguments.

62. Do you believe that the proposed 90 calendar days for the Commission to extend the Form ATS-N review period for new NMS Stock ATSs where the Form ATS-N is unusually lengthy or raises novel or complex issues is reasonable? Do you believe it would place an undue burden on the NMS Stock ATS? If so, why, and what amount of time would be reasonable? Do you believe that the proposed 90 calendar day extension period disproportionately affects new NMS Stock ATSs? Please support your arguments.

63. Should the Commission adopt the proposal to declare ineffective a Form ATS-N if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors? Please support your arguments.

64. Do you believe that the Commission's examples of reasons that the Commission might declare a proposed Form ATS-N ineffective are appropriate? If yes, why? If not, why not? Please support your arguments.

65. Do you believe that the Commission should consider any other factors in determining whether a Form ATS-N should be declared effective or ineffective? If so, what are they and why? If not, why not? Please support your arguments.

66. Should the Commission require public notice and comment before declaring a Form ATS-N effective or ineffective? Why or why not? Please support your arguments.

5. Proposed Rule 304(a)(1)(iv): Orders Regarding Form ATS-N Effectiveness

Proposed Rule 304(a)(1)(iv) would provide that the Commission will issue an order to declare a Form ATS-N effective or ineffective. Proposed Rule 304(a)(1)(iv) would also provide that upon the effectiveness of the Form ATS-N, the NMS Stock ATS may operate pursuant to the conditions in proposed Rule 304. Proposed Rule 304(a)(1)(iv) would also provide that if the Commission declares a Form ATS-N ineffective, the NMS Stock ATS shall be prohibited from operating as an NMS Stock ATS. Proposed Rule 304(a)(1)(iv) would provide that a Form ATS-N declared ineffective would not prevent the NMS Stock ATS from subsequently filing a new Form ATS-N.

Proposed Rule 304(a)(1)(iv) is designed to provide notice to the public that the NMS Stock ATS that filed a Form ATS-N qualifies for the exemption provided under Exchange Act Rule 3a1-1(a)(2) and may commence operations, or if the NMS Stock ATS was operating pursuant to a previously filed Form ATS, may continue to operate as an NMS Stock ATS. For an NMS Stock ATS operating before the effective date of proposed Rule 304 pursuant to a current Form ATS, the Form ATS for that NMS Stock ATS would no longer have any legal effect with respect to the regulatory status of the NMS Stock ATS upon the Commission declaring its Form ATS-N effective. As a result, the effective Form ATS-N would supersede

and replace the NMS Stock ATS's previously filed Form ATS; and the NMS Stock ATS would no longer be subject to Rule 301(b)(2) of Regulation ATS and would not be required to file a Form ATS cessation of operation report because the NMS Stock ATS would continue operations under the effective Form ATS-N. Declaring a Form ATS-N ineffective would provide the public with notice that an entity that filed a Form ATS-N does not qualify for the exemption under Exchange Act Rule 3a1-1(a)(2) and would be precluded from operating as an NMS Stock ATS.

Under Proposed Rule 304(a)(1)(iv), an entity that had filed a Form ATS-N that had been declared ineffective by the Commission would be able to subsequently file a new Form ATS-N. This would allow an entity an opportunity to attempt to address any disclosure deficiencies or compliance issues that caused the first Form ATS-N to be declared ineffective.

Request for Comment

67. Do you believe that a Commission order declaring a Form ATS-N ineffective would have an unduly prejudicial effect on an entity when it refiles Form ATS-N, even where the Commission declares effective the refiled Form ATS-N? Why or why not? Please support your arguments.

6. Proposed Rule 304(a)(2): Form ATS-N Amendments

The Commission is proposing Rule 304(a)(2) to provide the requirements for filing a Form ATS-N Amendment, which would be a public document that would provide information about the operations of the NMS Stock ATS and the activities of its broker-dealer operator and its affiliates. The information required to be filed on proposed Form ATS-N is designed to enable market participants to make more informed decisions about routing their orders to the NMS Stock ATS. The Commission's proposal to require such public disclosure is designed, in part, to bring operational transparency of NMS Stock ATSs more in line with the operational

transparency of national securities exchanges.[302] Proposed Form ATS-N is also designed to provide information to the Commission that would allow it to monitor developments among NMS Stock ATSs and carry out its oversight functions of protecting investors and the public interest. Given these intended uses, the Commission believes that it is important for an NMS Stock ATS to maintain an accurate, current, and complete.

The Commission is proposing Rule 304(a)(2)(i) to require an NMS Stock ATS to amend an effective Form ATS-N in accordance with the instructions therein: (A) at least 30 calendar days prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS-N; (B) within 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate for any reason and has not been previously reported to the Commission as a Form ATS-N Amendment; or (C) promptly, to correct information in any previous disclosure on Form ATS-N, after discovery that any information filed under Rule 304(a)(1)(i) or (a)(2)(i)(A) or (B) was inaccurate or incomplete when filed.[303]

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302 See, e.g., supra notes 158-162 and accompanying text (discussing generally differences in disclosure requirements for national securities exchanges and ATSs). The Commission also notes that Rule 19b-4(m)(1) of the Exchange Act (17 CFR 240.19b-4(m)(1)), requires each SRO to post and maintain a current and complete version of its rules on its website. This requirement was designed to assure that SRO members and other interested persons have ready access to an accurate, up-to-date version of SRO rules. See Securities Exchange Act Release No. 50486 (October 5, 2004), 69 FR 60287 (October 8, 2004) (adopting amendments to Rule 19b-4 under the Act).

303 The Commission notes that ATSs currently are required to file amendments to the disclosures describing their operations on Form ATS (see supra Section II.B describing the current requirements applicable to ATSs), and that national securities exchanges, as SROs, are required to file proposed rule changes with the Commission before implementing such changes, even if such changes are non-controversial (see generally supra note 161 and accompanying text).

Proposed Rule 304(a)(2)(ii) would provide that the Commission will, by order, if it finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, declare ineffective any Form ATS-N Amendment filed pursuant to Rule 304(a)(2)(i)(A)-(C) no later than 30 calendar days from filing with the Commission. If the Commission declares a Form ATS-N Amendment ineffective, the NMS Stock ATS shall be prohibited from operating pursuant to the ineffective Form ATS-N Amendment. The NMS Stock ATS could, however, continue to operate pursuant to a Form ATS-N that was previously declared effective. A Form ATS-N Amendment declared ineffective would not prevent the NMS Stock ATS from subsequently filing a new Form ATS-N Amendment that resolves the disclosure deficiency that resulted in the declaration of ineffectiveness.

a. Proposed Rule 304(a)(2)(i)(A): Material Amendments

Proposed Rule 304(a)(2)(i)(A) would, in part, require an NMS Stock ATS to amend an effective Form ATS-N in accordance with the instructions therein at least 30 calendar days prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS-N. Proposed Rule 304(a)(2)(i)(A) is designed to provide advance notice to the Commission and market participants of a material change to the operations of the NMS Stock ATS and the disclosures regarding the activities of the broker-dealer operator or its affiliates. The Commission notes that under current Rule 301(b)(2)(ii) of Regulation ATS, ATSs are required to file an amendment on Form ATS at least 20 calendar days prior to implementing a material change to the operation of the ATS.[304] The Commission is proposing to apply a longer time

[304] See 17 CFR 242.301(b)(2)(ii).

period of 30 days in proposed Rule 304(a)(2)(i)(A) due to the additional detail and information that would be provided in response to the solicitations on Form ATS-N as compared to Form ATS. As stated in the Regulation ATS Adopting Release, the Commission believes that requiring an ATS to provide the Commission advance notice of certain changes to its operation is a reasonable means for the Commission to carry out its market oversight and investor protection functions.[305] The Commission preliminarily believes that the 30 calendar day advance notice period before material changes are implemented would give the Commission the opportunity to make inquiries to clarify any questions that might arise or to take appropriate action, if appropriate, regarding problems that may impact market participants, including investors, before the NMS Stock ATS implemented the changes. Because material changes would be publicly disclosed upon filing, the 30 calendar day advance notice would also allow market participants to evaluate the changes before implementation and assess the NMS Stock ATS as a continued, or potential, trading venue.[306]

The Commission preliminarily believes that a change to the operations of an NMS Stock ATS, or the disclosures regarding the activities of the broker-dealer operator and its affiliates, would be material if there is a substantial likelihood that a reasonable market participant would consider the change important when evaluating the NMS Stock ATS as a potential trading venue. When the Commission adopted Regulation ATS in 1998, it noted that ATSs "implicitly make

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305 See Regulation ATS Adopting Release, supra note 7, at 70864. The Commission also stated that "[i]f a system were only required to provide notice after it commenced operations, the Commission would have no notice of potential problems that might impact investors before the system begins to operate." Id.

306 See infra Section IV.D (explaining proposed public disclosure requirements for Form ATS-N filings under proposed Rule 304(b)(2)).

materiality decisions in determining when to notify their subscribers of changes."[307] The Commission is proposing to modify the conditions to the exemption to the definition of "exchange" under Rule 3a1-1(a)(2) for NMS Stock ATSs, which includes, among other things, the increased disclosure of information required on Form ATS-N. Because proposed Form ATS-N would be a public document, the Commission preliminarily believes that the use of this materiality standard discussed below would be appropriate as it is similar to materiality standards applied in the context of securities disclosures made pursuant to other Commission rules.[308]

To determine whether a change is material, and thus subject to the 30-day advance notice requirement, an NMS Stock ATS would need to consider all the relevant facts and circumstances, including the reason for the change and how it might impact the NMS Stock ATS and its subscribers, as well as market participants that may be evaluating the NMS Stock ATS as a potential trading venue. Scenarios that are particularly likely to implicate a material change are (1) a broker-dealer operator or its affiliates beginning to trade on the NMS Stock ATS; (2) a change to the broker-dealer operator's policies and procedures governing the written safeguards and written procedures to protect the confidential trading information of subscribers pursuant to Rule 301(b)(10)(i) of Regulation ATS; (3) a change to the types of participants on the NMS

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307 See id. at 70864.

308 See, e.g., Securities Exchange Act Release No. 43154 (August 15, 2000), 65 FR 51716, 51721 (August 24, 2000) (Selective Disclosure and Insider Trading) (stating that to satisfy the materiality requirement, there must be a substantial likelihood that a fact would be viewed by the reasonable investor as having significantly altered the total mix of information made available); see also Regulation C under the Securities Act of 1933, 17 CFR 230.405 ("The term material, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered.").

Stock ATS; (4) the introduction or removal of a new order type on the NMS Stock ATS; (5) a change to the order interaction and priority procedures; (6) a change to the segmentation of orders and participants; (7) a change to the manner in which the NMS Stock ATS displays orders or quotes; and (8) a change of a service provider to the operations of the NMS Stock ATS that has access to subscriber confidential subscriber trading information. This list, however, is not intended to be exhaustive, and the Commission does not mean to imply that other changes to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates could not constitute a material change. Rather an NMS Stock ATS should be expected to consider the facts and circumstances of every change to determine whether advance notice is required.

Request for Comment

68. Do you believe that the Commission's proposal to require an NMS Stock ATS to file a Form ATS-N Amendment at least 30 calendar days before implementing a material change is reasonable? Why or why not? Please support your arguments. Do you believe that the advance notice period for material change on Form ATS-N should be shorter (e.g., 20 calendar days, as is the case on current Form ATS) or longer (e.g., 45 calendar days)? Please support your arguments. Do you believe it would place an undue burden on the NMS Stock ATS? If so, why, and how much advance notice, if any, would be reasonable? Please support your arguments.

69. Are the enumerated scenarios each particularly likely to constitute a material change, such that the Commission and the public should be provided with 30 calendar days advance notice pursuant to proposed Rule 304(a)(2)(i)(A)? If yes,

why? If not, why not? Are there any other scenarios generally likely to constitute a material change? If so, why, and what are those scenarios? Please support your arguments.

70. Do you believe that the Commission should propose separate tiers of material changes (e.g., based on the significance or number of changes) to the operations of the NMS Stock ATS or disclosures on Form ATS-N and that a different materiality analysis should be applied depending on the tier of change to the operations of the NMS Stock ATS or disclosures on Form ATS-N? Why or why not? Please support your arguments.

71. Do you believe that any types of material changes to an NMS Stock ATS should be eligible to be implemented immediately upon filing? If so, what are such scenarios (regardless of facts and circumstances)? Please support your arguments.

72. Do you believe that certain changes to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that would be subject to disclosure on Form ATS-N should always be considered material changes? Why or why not? If so, please explain in detail those changes to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that would be subject to disclosure on Form ATS-N that should always be considered material changes.

73. Do you believe that certain changes to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates on Form ATS-N, such as order types, should be subject to Commission approval? Why or why not? If

so, please identify such changes and support your argument.

74. Should the Commission require public notice and comment for determinations of ineffectiveness of Form ATS Amendments? Why or why not? Please support your arguments.

75. Do you believe that the Commission should make public on its website upon filing a Form ATS-N Amendment for a material change, as proposed? Why or why not? Please support your arguments. Do you believe that there should be a delay in when the Form ATS-N Amendment for a material change is made public? Why or why not? Please support your arguments.

76. Do you believe that making an NMS Stock ATS's Form ATS-N Amendment public upon filing would affect competition? Why or why not? Please support your arguments. If so, how?

b. Proposed Rule 304(a)(2)(i)(B): Periodic Amendments

Proposed Rule 304(a)(2)(i)(B) would require an NMS Stock ATS to amend an effective Form ATS-N within 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate for any reason and has not been previously reported to the Commission as a Form ATS-N Amendment.[309] The proposed rule would enable NMS Stock ATSs to update information from the preceding quarter that does not constitute a material change

[309] The Commission notes that this requirement would be substantively identical to the current requirement under Rule 301(b)(2)(iii) of Regulation ATS, which provides that: "If any information contained in the initial operation report…becomes inaccurate for any reason and has not been previously reported to the Commission as an amendment on Form ATS, the alternative trading system shall file an amendment on Form ATS correcting such information within 30 calendar days after the end of each calendar quarter in which the alternative trading system has operated." See 17 CFR 242.301(b)(2)(iii).

in the NMS Stock ATS's Form ATS-N filing.[310] The Commission preliminarily believes that providing a mechanism for NMS Stock ATSs to disclose changes to their operations or to update information that does not constitute a material change within 30 calendar days after the end of each calendar quarter would tailor the reporting burden on NMS Stock ATSs to the degree of significance of the change in a manner that does not compromise the Commission's oversight of NMS Stock ATSs or its ability to protect investors and the public interest. The Commission preliminarily believes that allowing NMS Stock ATSs to implement such changes immediately would allow NMS Stock ATSs to make periodic changes to their operations without delay, while at the same time provide disclosure about those changes to market participants and the Commission within an appropriate time frame.

Request for Comment

77. Should the Commission require NMS Stock ATSs to file a Form ATS-N Amendment for periodic changes at the end of each calendar quarter? Why or why not? Please support your arguments.

78. Do you believe that the Commission should require an NMS Stock ATS to file a Form ATS-N Amendment before implementing a periodic change? Why or why not? If so, what period of time should an NMS Stock ATS be required to wait before implementing a periodic change? Please explain in detail.

79. Do you believe that 30 calendar days after the end of each calendar quarter is a reasonable amount of time for NMS Stock ATSs to correct information that does

[310] That Form ATS-N Amendment, filed pursuant to proposed Rule 304(a)(2)(i)(B), would become public upon filing. See infra Section IV.D (explaining proposed public disclosure requirements for Form ATS-N filings under proposed Rule 304(b)(2)).

not constitute a material change? If so, why? If not, why not, and what amount of time would be reasonable? Please support your arguments. Do you believe there are any processes the Commission should consider for correcting information on a Form ATS-N that does not constitute a material change? If so, what are such processes? Please explain in detail.

80. Do you believe that certain changes to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that would be subject to disclosure on Form ATS-N should always be considered periodic changes? Why or why not? If so, please explain in detail those changes to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that should always be considered periodic changes.

Do you believe that the Commission should make public on its website upon filing a Form ATS-N Amendment for a periodic change? Why or why not? Please support your arguments. Do you believe that there should be a delay in when the Form ATS-N Amendment for a periodic change is made public? Why or why not? Please support your arguments.

c. Proposed Rule 304(a)(2)(i)(C): Amendment to Correct Information on Previously Filed Form ATS-N

Proposed Rule 304(a)(2)(i)(C) would require an NMS Stock ATS to amend an effective Form ATS-N promptly to correct information in any previous disclosure on Form ATS-N after discovery that any information filed in a Form ATS-N or Form ATS-N Amendment was

inaccurate or incomplete when filed.[311] For example, if an NMS Stock ATS discovers that information that it previously disclosed on Form ATS-N was incorrect, such as an address or contact information, or that information it previously disclosed was incomplete, such as where the NMS Stock ATS failed to fully describe the characteristics of an order type, it would be required to promptly amend its Form ATS-N. Although the Commission recognizes that a change disclosed on a Form ATS-N Amendment that is reported pursuant to proposed Rule 304(a)(2)(i)(C) would likely be already implemented by the NMS Stock ATS, the Commission believes that it would benefit market participants to receive accurate and complete information about the NMS Stock ATS so they can use the information in deciding where to route their orders.[312]

Request for Comment

81. Do you believe that making amendments "promptly" is a reasonable requirement for NMS Stock ATSs to correct information that was inaccurate or incomplete when filed? If so, why? If not, why not, and what amount of time would be reasonable? Please support your arguments.

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311 The Commission notes that this requirement would be substantively identical to Rule 301(b)(2)(iv) of Regulation ATS that an ATS "promptly file an amendment on Form ATS correcting information previously reported on Form ATS after discovery that any information filed" in a Form ATS initial operation report or amendment "was inaccurate when filed." See 17 CFR 242.301(b)(2)(iv).

312 That Form ATS-N Amendment, filed pursuant to proposed Rule 304(a)(2)(i)(C), would become public upon filing. See infra Section IV.D (explaining proposed public disclosure requirements for Form ATS-N filings under proposed Rule 304(b)(2)).

82. Do you believe there are any other processes the Commission should consider for correcting information on Form ATS-N that was inaccurate at the time it was filed? If so, what are such processes? Please explain in detail.

83. Do you believe that the Commission's proposal to provide an NMS Stock ATS the opportunity to correct information that was inaccurate or incomplete when filed creates an unreasonable risk to market participants that an NMS Stock ATS might fail to provide accurate, current, and complete information on Form ATS-N when filing the form? Why or why not? Please support your arguments.

d. Proposed Rule 304(a)(2)(ii): Commission Review of Form ATS-N Amendments

The Commission is proposing Rule 304(a)(2)(ii) to provide that the Commission will, by order, if it finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, declare ineffective any Form ATS-N Amendment filed pursuant to Rule 304(a)(2)(i)(A)-(C) no later than 30 calendar days from filing with the Commission.[313] The Commission could, for example, declare ineffective a Form ATS-N Amendment if one or more disclosures on the amended Form ATS-N are materially deficient with respect to their accuracy, currency, completeness, or fair presentation. The Commission is concerned that an NMS Stock ATS whose Form ATS-N filing was declared effective could file a Form ATS-N Amendment that contains materially deficient disclosures. The Commission is also concerned that market participants could use this information in connection with their

[313] A filed Form ATS-N Amendment that contains technical deficiencies, such as missing pages or one in which the entity does not respond to all questions, including all sub-questions, would not be complete and would be returned to the NMS Stock ATS. See also 17 CFR 240.0-3.

evaluation of an NMS Stock ATS and potentially be confused or misinformed about the operations of an NMS Stock ATS. The Commission preliminarily believes that a filed Form ATS-N should contain detailed disclosures that are accurate, current, and complete and therefore is proposing a mechanism for it to declare amendments ineffective as appropriate.[314]

The Commission could also declare ineffective a Form ATS-N Amendment if it finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, because the amendment describes a change that, under a "red flag" review, would not comply with the federal securities laws or the rules or regulations thereunder, including Regulation ATS. The Commission preliminarily believes that it would be hindered in protecting investors and maintaining fair and orderly markets if an NMS Stock ATS were allowed to implement or continue the use of a service, functionality, or procedure that does not comply with the federal securities laws or the rules or regulations thereunder, including Regulation ATS.

Under proposed Rule 304(a)(2)(ii), the Commission could declare a Form ATS-N Amendment ineffective within 30 calendar days from filing with the Commission. During its review of a Form ATS-N Amendment, the Commission and its staff may provide comments to the NMS Stock ATS, and may request that the NMS Stock ATS supplement information in the Form ATS-N Amendment or revise its disclosures on the Form ATS-N Amendment. Like the Commission's review of a Form ATS-N initially filed by an entity with the Commission,[315] the Commission notes that its review of a Form ATS-N Amendment would focus on the disclosures

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314 See proposed Rule 304(c)(1).

315 See supra Section IV.C.

made on the Form ATS-N. The Commission would not be precluded from later determining that an NMS Stock ATS had violated the federal securities laws or the rules and regulations thereunder. The Commission preliminarily believes that the 30 calendar day review period would provide the Commission with adequate time to review the Form ATS-N Amendment, discuss the changes with the broker-dealer operator as explained above and decide whether to declare the Form ATS-N Amendment ineffective.

Under proposed Rule 304(a)(2)(ii), if the Commission declares a Form ATS-N Amendment ineffective, the NMS Stock ATS would be prohibited from operating pursuant to the ineffective Form ATS-N Amendment. As discussed above, under proposed Rule 304(a)(2)(i), an NMS Stock ATS must amend its Form ATS-N at least 30 days before implementing a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS-N, or within 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate for any reason and has not been previously reported to the Commission as a Form ATS-N Amendment. The Commission preliminarily believes the proposed rule strikes a proper balance between, on the one hand, providing an NMS Stock ATS with the flexibility to implement a change to its operations without unnecessary delay, and on the other hand, giving the Commission time to adequately review Form ATS-N Amendments and carry out its oversight functions and responsibilities.[316]

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[316] The Commission also preliminarily believes that the proposed process that would permit the Commission to declare Form ATS-N Amendments ineffective, even if the change disclosed in the Form ATS-N Amendments has already been implemented, would be consistent with better aligning the Commission's oversight of NMS Stock ATSs with its oversight of national securities exchanges. The Commission notes, for example, that

Under proposed Rule 304(a)(1)(iv), an NMS Stock ATS that had filed a Form ATS-N Amendment that has been declared ineffective would be able to subsequently file a new Form ATS-N Amendment. This would allow an NMS Stock ATS to attempt to address any disclosure deficiencies or compliance issues that caused a Form ATS-N Amendment to be declared ineffective.

Request for Comment

84. Should the Commission adopt the proposal to declare ineffective any Form ATS-N Amendment if it finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors? Why or why not? Please support your arguments.

85. Do you believe that the Commission should affirmatively declare material amendments to Form ATS-N effective? Why or why not? If so, do you believe the Commission should declare material changes to Form ATS-N effective before the NMS Stock ATS implements the material change? Why or why not? Please support your arguments.

86. Do you believe that the Commission should provide a longer time period for the Commission to review material amendments to Form ATS-N (e.g., 45 calendar days) and a shorter period of time for the NMS Stock ATS to be able to

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pursuant to Section 19(b)(3)(C) of the Exchange Act, the Commission, at any time within the 60-day period beginning on the date of filing of a proposed rule change filed by a national securities exchange, "summarily may temporarily suspend the change in the rules of the [SRO] made thereby, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Act]." 15 U.S.C. 78s(b)(3)(C). As a result, the Commission may suspend a national securities exchange's proposed rule change, even if the change was eligible to be effective upon filing with the Commission.

implement the material change (e.g., 10, 20, or 30 calendar days)? Why or why not? Please support your arguments. Do you believe that a longer Commission review period coupled with a shorter advance notice period would balance the burdens on an NMS Stock ATS that would be required to provide advance notice of a material change to the operations of the NMS Stock ATS with the time necessary for the Commission to review a Form ATS-N material amendment? Why or why not? Please support your arguments. Do you believe a longer Commission review period coupled with a shorter advance notice period would lead to practical challenges (e.g., confusion among market participants or difficulty to NMS Stock ATSs to unwind a change)? Please support your arguments.

87. Do you believe that a Form ATS-N Amendment should become effective by operation of rule if the Commission does not affirmatively declare it ineffective? Why or why not? Please support your arguments.

88. Do you believe that the proposed 30 calendar days from filing with the Commission is a reasonable time period for the Commission to declare a Form ATS-N Amendment ineffective? Do you believe it would place an undue burden on the NMS Stock ATS that filed the Form ATS-N Amendment? If so, why, and what would be a reasonable amount of time? Please support your arguments. Do you believe that a longer period of time (e.g., 45 days) for the Commission to declare a Form ATS-N Amendment ineffective would be reasonable? Why or why not? Please support your arguments. Do you believe that a longer period of

time would place an undue burden on the NMS Stock ATS that filed the Form ATS-N Amendment? Why or why not? Please support your arguments.

89. Do you believe the Commission should adopt a process to extend its review period for a Form ATS-N Amendment similar to the processes being proposed under proposed Rule 304(a)(1)(ii) for initial Form ATS-N filings? Why or why not? Please support your arguments. If so, how long should the extension of the review period be (e.g., 10, 15, 20, or 30 calendar days) and should the process apply to material amendments, periodic amendments, amendments to correct information in any previous Form ATS-N filing that was inaccurate or incomplete when filed, or all categories of Form ATS-N Amendments? Should the process differ depending on the category of amendment? Please be specific.

90. Should the Commission adopt the proposal that a Form ATS-N Amendment should become effective without the Commission issuing an order declaring effective the relevant Form ATS-N Amendment? Do you believe that the lack of a Commission order declaring a Form ATS-N Amendment ineffective within 30 calendar days from filing would provide an NMS Stock ATS sufficient notice that a Form ATS-N Amendment has become effective? Why or why not? Please support your arguments.

91. Do you believe that a determination of ineffectiveness of a Form ATS-N Amendment should be subject to notice and hearing, as is the case with initial determinations about Form ATS-N? Why or why not? Please support your arguments.

7. Proposed Rule 304(a)(3): Notice of Cessation

Proposed Rule 304(a)(3) would require an NMS Stock ATS to notice its cessation of operations on Form ATS-N at least 10 business days before the date the NMS Stock ATS ceases to operate as an NMS Stock ATS.[317] The notice of cessation would cause the Form ATS-N to become ineffective on the date designated by the NMS Stock ATS. Requiring an NMS Stock ATS to file a Form ATS-N notice of cessation at least 10 business days before the date the NMS Stock ATS ceases operations would provide notice to the public and the Commission that the NMS Stock ATS intends to cease operations. By making the notices of cessation public, as discussed herein,[318] the Commission preliminarily believes that all market participants that had routed orders to the NMS Stock ATS would be able to make arrangements to select alternative routing destinations for their orders. Regulation ATS currently requires an ATS to "promptly file a cessation of operations report on Form ATS" upon ceasing to operate.[319] Proposed Rule 304(a)(3) would require an NMS Stock ATS to disclose on Form ATS-N the date it will cease operating at least 10 business days before doing so. The Commission preliminarily believes that the proposal to require NMS Stock ATSs to provide notice at least 10 business days before the date an NMS Stock ATS ceases to operate is a reasonable period for the NMS Stock ATS to provide market participants and the Commission with notice that it intends to cease operations, as market participants would have adequate time to find and select other routing destinations for their orders.

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317 The Commission would post a notice of cessation upon completing its review for accuracy and completion.

318 See infra Section V (discussing public disclosure of filings on Form ATS-N, including cessation of operation reports).

319 17 CFR 242.301(b)(2)(v).

Request for Comment

92. Should the Commission require an NMS Stock ATS to give notice that it intends to cease operations 10 business days or more before ceasing operations as an NMS Stock ATS? If so, why and how much advance notice is appropriate? If not, why not? Please support your arguments.

93. Should the Commission allow an NMS Stock ATS to notice its cessation of operations after it has ceased operations, as is currently the requirement under Regulation ATS, or at the same time that it ceases operations? If so, why and how long after the NMS Stock ATS has ceased operations? If not, why not? Please support your arguments.

94. Should the Commission create a process to revoke the exemption from Rule 3a1-1(a)(2) if the NMS Stock ATS reports no volume for two consecutive quarters, four consecutive quarters, eight consecutive quarters, or over some other time period? Why or why not? Are there any other circumstances under which the Commission should revoke the exemption if the NMS Stock ATS appears to be inactive? Please support your arguments.

8. Proposed Rule 304(a)(4): Suspension, Limitation, or Revocation of the Exemption from the Definition of Exchange

To rely on an exemption from the Exchange Act or the rules and regulations thereunder granted by the Commission, the person seeking the exemption must comply with the conditions to the exemption established by the Commission. A person that fails to comply with those

conditions would therefore fall outside of the scope of the exemption.[320] In adopting Exchange Act Rule 3a1-1(a)(2) and Regulation ATS, the Commission established conditions under which an ATS would be exempt from the definition of "exchange," and therefore would not be required to register as a national securities exchange. Rule 3a1-1(a)(2) provides that a system that meets the criteria of Rule 3b-16 is exempt from the definition of "exchange" on condition that the system complies with Regulation ATS. As discussed above, the Commission is proposing to expand the set of conditions that an NMS Stock ATS would need to satisfy to qualify for the exemption provided under Rule 3a1-1(a)(2).

The Commission is proposing to amend Regulation ATS to include proposed Rule 304(a)(4), to provide a process for the Commission to suspend for a period not exceeding twelve months,[321] limit, or revoke an NMS Stock ATS's exemption from the definition of the term exchange pursuant to Rule 3a1-1(a)(2) under certain circumstances. Regulation ATS currently does not provide a process for the Commission to suspend, limit, or revoke the exemption under which an ATS operates other than pursuant to the Commission's general enforcement authority.[322] The Commission is proposing Rule 304(a)(4)(i), which would provide that the

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320 See proposed Rule 304(a)(4)(iv).

321 The proposed limitation on the time frame for suspension is consistent with federal securities law provisions pursuant to which the Commission may suspend the activities or registration of a regulated entity. See, e.g., Section 15(b)(4) (15 U.S.C. 78o(b)(4)) and 15B(c)(2) (15 U.S.C. 78o-4(c)(2)).

322 See generally Exchange Act Section 21C (15 U.S.C 78u-3). Use of the proposed process whereby the Commission could suspend, limit, or revoke an NMS Stock ATS's Rule 3a1-1(a)(2) exemption would not preclude the Commission from using its general enforcement authority, or other specific enforcement authority that may be applicable such as, for example, pursuant to Section 15(b)(4) and 15(c) (15 U.S.C. 78o(b)(4); 15 U.S.C. 78o(c)). Rather, it would provide an additional means of helping to ensure that NMS Stock ATSs that no longer qualify for the Rule 3a1-1(a)(2) exemption are unable to

Commission will, by order, if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, suspend for a period not exceeding twelve months, limit, or revoke an NMS Stock ATS's exemption from the definition of "exchange" pursuant to Rule 3a1-1(a)(2).[323] Proposed Rule 304(a)(4)(ii) would make clear that if an NMS Stock ATS's exemption is suspended or revoked pursuant to proposed Rule 304(a)(4)(i), the NMS Stock ATS would be prohibited from operating pursuant to the exemption from the definition of "exchange" provided under Rule 3a1-1(a)(2); if an NMS Stock ATS's exemption is limited pursuant to proposed Rule 304(a)(4)(i), the NMS Stock ATS would be prohibited from operating in a manner inconsistent with the terms and conditions of the Commission order.

The Commission preliminarily believes that it is appropriate to provide a process by which the Commission may, by order, suspend, limit, or revoke an NMS Stock ATS's exemption from the definition of "exchange" if the NMS Stock ATS is operating in a manner such that the exemption from the definition of "exchange" for the NMS Stock ATS is not necessary or appropriate in the public interest, or consistent with the protection of investors. For example, in making a determination as to whether suspension, limitation, or revocation of an NMS Stock ATS's exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors, the Commission would take into account whether the entity no longer

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take advantage of it. For example, if an NMS Stock ATS failed to file a Form ATS-N Amendment to disclose material changes to the operation of the NMS Stock ATS, the Commission could invoke the process to suspend, limit or revoke the NMS Stock ATS's exemption, but would not be precluded from bringing an action against the broker-dealer operator of the NMS Stock ATS for failing to comply with Rule 304(a)(2), or violating the antifraud provisions of the federal securities laws.

323 See proposed Rule 304(a)(4)(i).

meets the definition of NMS Stock ATS under Rule 300(a)(k), does not comply with the conditions to the exemption (in that it fails to comply with any part of Regulation ATS, including proposed Rule 304), or otherwise violates any provision of federal securities laws.

The Commission preliminarily believes, for example, that it would be appropriate to provide for the suspension, limitation, or revocation of an NMS Stock ATS's exemption from the definition of "exchange" pursuant to Rule 3a1-1(a)(2) if the Commission finds that an NMS Stock ATS no longer meets the definition of "NMS Stock ATS."[324] If a system does not meet the functional test of an "exchange" under Rule 3b-16, it would not be eligible for the exemption from the definition of "exchange" pursuant to Rule 3a1-1(a)(2) as it is not an "exchange" in the first instance.[325] If an NMS Stock ATS no longer meets the criteria of Rule 3b-16—or meets the criteria of Rule 3b-16 but no longer effects transactions in NMS stocks—or otherwise does not meet the definition of an alternative trading system, it would not continue to be eligible for the exemption in Rule 3a1-1(a)(2) even if it had met the definition of an NMS Stock ATS at the time that the Commission declared its Form ATS-N effective. Permitting a system to operate that does not otherwise meet the definition of an NMS Stock ATS would deny investors appropriate regulatory protection and could also be misleading to investors.

The Commission also preliminarily believes that it would be appropriate to provide for

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[324] The Commission preliminarily believes that a determination as to whether to suspend, limit, or revoke an NMS Stock ATS's exemption would depend on the particular facts and circumstances; however, the Commission also preliminarily believes that revocation would be the appropriate course of action if the Commission finds that an entity no longer meets the definition of NMS Stock ATS or otherwise satisfies the criteria of the functional test under Rule 3b-16.

[325] See supra Section IV.A. (discussing the definition of NMS Stock ATS and the availability of the Rule 3a1-1(a)(2) exemption).

the suspension, limitation, or revocation of an NMS Stock ATS's exemption from the definition of exchange pursuant to Rule 3a1-1(a)(2) if, for example, the Commission finds that an NMS Stock ATS fails to comply with any part of Regulation ATS, including proposed Rule 304. As discussed in the Regulation ATS Adopting Release, instead of imposing requirements applicable to national securities exchanges, the Commission adopted enhanced regulation for ATSs that would provide more protections for investors who used the systems.[326] To the extent that an NMS Stock ATS fails to comply with the conditions set forth in Regulation ATS, investors would no longer be protected by the conditions of Regulation ATS or the protections afforded by the provisions of the Exchange Act and the rules thereunder that apply to national securities exchanges. For example, pursuant to proposed Rule 304(a)(4)(i), the Commission would suspend, limit, or revoke an NMS Stock ATS's exemption from the definition of "exchange" if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, because the NMS Stock ATS is no longer a registered broker-dealer, which is a requirement of Regulation ATS.[327] The Commission would also suspend, limit, or revoke an NMS Stock ATS's exemption if the Commission finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, because, for example, the ATS's Form ATS-N contains inaccurate or incomplete responses. Proposed Form ATS-N would be a public reporting document that is designed to provide the Commission and market participants with information about the operations of the NMS Stock ATS and the

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326 See Regulation ATS Adopting Release, supra note 7, at 70857.

327 See 17 CFR 242.301(b)(1).

circumstances under which the activities of the broker-dealer operator of the NMS Stock ATS and its affiliates may give rise to potential conflicts of interest. The Commission preliminarily believes that market participants would likely use the information provided on Form ATS-N to make decisions about where to route orders. The Commission is concerned that information provided on Form ATS-N that is inaccurate or incomplete could misinform or mislead market participants about the operations of the NMS Stock ATS or the activities of the broker-dealer operator, including how their orders may be handled and executed, and impact their decisions about where they should route their orders. To prevent an NMS Stock ATS from potentially misinforming or misleading market participants about the operations of the system, proposed Rule 304(a)(4) would provide a process for the Commission to suspend, limit, or revoke the NMS Stock ATS's Rule 3a1-1(a)(2) exemption.

Additionally, the Commission preliminarily believes that it would be appropriate to provide for the suspension, limitation, or revocation of an NMS Stock ATS's exemption from the definition of exchange pursuant to Rule 3a1-1(a)(2) if, for example, the Commission finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, because that NMS Stock ATS has violated or is violating any provision of the federal securities laws. The Commission is concerned that market participants may be harmed by an NMS Stock ATS that is, for example, providing false or misleading information to market participants, and preliminarily believes that such an NMS Stock ATS should not be able to continue to operate pursuant to an exemption provided by the Commission.

Pursuant to proposed Rule 304(a)(4)(ii), an NMS Stock ATS whose exemption had been suspended or revoked would be prohibited from operating pursuant to the Rule 3a1-1(a)(2)

exemption; and if an NMS Stock ATS were to continue to engage in Rule 3b-16 activity in NMS stocks without the exemption, it would be an unregistered exchange because it would no longer qualify for the exemption from the exchange definition.[328] If an NMS Stock ATS's exemption was limited pursuant to proposed Rule 304(a)(4)(iv), the NMS Stock ATS would be prohibited from operating in a manner otherwise inconsistent with the terms and conditions of the Commission order, and if it did operate in a manner inconsistent with the terms and conditions of the order, would risk operating as an unregistered national securities exchange. The exemption provided under Rule 3a1-1(a)(2) is conditional upon initial and ongoing compliance with Regulation ATS. The proposed process for suspending, limiting, or revoking an NMS Stock ATS's exemption, in the event the Commission finds, for example, that there is a failure to adhere to the conditions of the exemption and that suspending, limiting, or revoking the exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors, is designed to protect investors in the case of potential non-compliance by an NMS Stock ATS with the conditions with which the NMS Stock ATS must adhere in order to continue to qualify for an exemption from the statutory definition of "exchange."

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328 If the Commission revoked the exemption of an NMS Stock ATS and the NMS Stock ATS wished to continue operations, the entity could do so only if it was registered as a national securities exchange pursuant to Section 6 of the Exchange Act or was exempted by the Commission from such registration based on the limited volume of transactions effected on such exchange, or seeks another exemption. See 17 CFR 242.301(a)(1)-(2). The NMS Stock ATS would not be prohibited from filing a new Form ATS-N, pursuant to proposed Rule 304(a)(1).

An NMS Stock ATS that has had its exemption suspended or limited may, depending on the facts and circumstances, be able to file a Form ATS-N Amendment or revise its operations to come into compliance with the conditions of the exemption or the provision of any other federal securities law that may have been the basis of the Commission's findings.

The Commission also preliminarily believes that providing a process by which the Commission can determine to suspend, limit, or revoke an NMS Stock ATS's exemption from the definition of "exchange" would provide appropriate flexibility to address the specific facts and circumstances of an NMS Stock ATS's failure to comply with Regulation ATS or the nature of the violation of federal securities laws, and the possible harm to investors as a result of the non-compliance or violation. For example, the Commission preliminarily believes that providing a process by which the Commission could limit the exemption provided in Rule 3a1-1(a)(2) would provide flexibility to address specific disclosures or activities that are the cause of the non-compliance with Regulation ATS or that violate federal securities laws. For illustration, if the Commission found that an NMS Stock ATS implemented a material change to its operations, but failed to disclose the material change on its Form ATS-N, the Commission could determine to allow the NMS Stock ATS to continue to operate as disclosed on its Form ATS-N, but prohibit the NMS Stock ATS from engaging in the undisclosed activity until the NMS Stock ATS properly amends its Form ATS-N in accordance with proposed Rule 304(a)(2). If the Commission found that an NMS Stock ATS offered an order type that resulted in violations of the Commission's rules restricting the acceptance and ranking of orders in impermissible sub-penny increments, the Commission could allow the NMS Stock ATS to continue to operate but prohibit the NMS Stock ATS from offering the order type, if it found that doing so was necessary or appropriate in the public interest, and consistent with the protection of investors. The Commission preliminarily believes that, depending on the facts and circumstances, it may be more appropriate in the public interest, and consistent with the protection of investors, to limit the scope of an NMS Stock ATS's exemption, instead of revoking or suspending the exemption and causing the NMS Stock ATS to cease operations. In comparison, the Commission

preliminarily believes it would be more appropriate to revoke the exemption of an NMS Stock ATS that no longer meets the definition of NMS Stock ATS or is no longer a registered broker-dealer, as these conditions are fundamental to the exemption. Additionally, the Commission preliminarily believes that it would be necessary or appropriate in the public interest, and consistent with the protection of investors, to revoke the exemption of an NMS Stock ATS if, for example, the ATS is found to be violating the antifraud provisions of the federal securities laws. Nonetheless, the entry of an order revoking an NMS Stock ATS's exemption would not prohibit the broker-dealer operator of the NMS Stock ATS from continuing its other broker-dealer operations.

The Commission is also proposing that prior to issuing an order suspending, limiting, or revoking an NMS Stock ATS's exemption pursuant to proposed Rule 304(a)(4)(i), the Commission would provide notice and opportunity for hearing to the NMS Stock ATS, and make the findings specified in proposed Rule 304(a)(4)(i) described above, that, in the Commission's opinion, the suspension, limitation or revocation is necessary or appropriate in the public interest, and is consistent with the protection of investors. The Commission preliminarily believes that the proposed process of providing an NMS Stock ATS with notice and opportunity for hearing provides the NMS Stock ATS with adequate opportunity to respond before the Commission determines that the NMS Stock ATS's exemption from the definition of "exchange" is no longer appropriate in the public interest or consistent with the protection of investors. The Commission also preliminarily believes that the possibility that the Commission may suspend, limit, or revoke an NMS Stock ATS's exemption from the definition of "exchange" would not be unduly burdensome because an NMS Stock ATS would be given advance notice and have an opportunity to respond, and, depending on the facts and circumstances, revise its operations or

disclosures on Form ATS-N to bring its operations or disclosures into compliance with Regulation ATS or federal securities laws. The Commission preliminarily believes that proposed Rule 304(a)(4) would provide the Commission with an appropriate tool, which is subject to notice and hearing safeguards, to protect the investing public and the public interest from an NMS Stock ATS that fails to comply with Regulation ATS or otherwise violates any provision of the federal securities laws.

Request for Comment

95. Do you believe the proposed process for the Commission to suspend, limit, or revoke an NMS Stock ATS's exemption from the definition of "exchange" is necessary or appropriate to protect investors and other market participants and maintain fair and orderly markets? Why or why not? Please support your arguments.

96. What criteria should the Commission use in deciding whether to suspend, limit, or revoke an NMS Stock ATS's exemption as proposed? Are there alternative actions or processes the Commission should consider for suspending, limiting, or revoking the exemption? Please support your arguments and provide details.

97. Should the Commission adopt the proposal to provide flexibility as to whether to suspend, limit, or revoke an NMS Stock ATS's exemption depending on the facts and circumstances and possible harm to investors? If so, why? If not, what other criteria, if any, should the Commission use in deciding whether to suspend, limit, or revoke the exemption? Please support your arguments.

98. Do you believe there should be a maximum time frame following notice and opportunity for hearing within which the Commission should be required to act?

If so, why, and what would be the appropriate time frame? If not, why not? Please support your arguments.

99. Do you believe that 12 months is the appropriate limit on the amount of time by which the Commission could suspend an NMS Stock ATS's exemption? If so, why? If not, why not, and what would be the appropriate time frame? Please support your arguments.

100. Do you believe that the Commission's proposal to declare ineffective a Form ATS-N Amendment if it finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, is appropriate as a supplement to the proposal that the Commission suspend, limit, or revoke an NMS Stock ATS's exemption from the definition of "exchange" under proposed Rule 304(a)(4)? Why or why not? Please support your arguments.

101. Do you believe there are other processes by which the Commission should enforce the conditions to the Rule 3a1-1(a)(2) exemption? If so, what are they and why would they be preferable to the proposed process?

D. Rule 304(b): Public Disclosure of Form ATS-N and Related Commission Orders

The Commission is proposing to make public certain Form ATS-N reports filed by NMS Stock ATSs.[329] Commission orders related to the effectiveness of Form ATS-N will also be publicly posted on the Commission's website. As discussed above, there currently is limited information available to the public about the operations of ATSs that trade NMS stocks and the

[329] See proposed Rule 304(b)(1) (providing that every Form ATS-N filed pursuant to Rule 304 shall constitute a "report" within the meaning of Sections 11A, 17(a), 18(a), and 32(a) and any other applicable provisions of the Exchange Act).

activities of their broker-dealer operators and the broker-dealer operators' affiliates.[330] Furthermore, as discussed further below, market participants may not be informed about potential conflicts of interest that arise as a result of the other business activities of the broker-dealer operator of the NMS Stock ATS, or its affiliates, such as trading NMS stocks on the NMS Stock ATS or operating multiple trading centers, including multiple ATSs.[331] The only information the Commission currently makes publicly available regarding ATSs is a list, which is updated monthly, of ATSs with a Form ATS on file with the Commission.[332] Therefore, the Commission is proposing Rule 304(b) to mandate greater public disclosure of NMS Stock ATS operations through the publication of Form ATS-N and to provide for the posting of Commission orders on the Commission's website related to the effectiveness of Form ATS-N.

First, the Commission is proposing Rule 304(b)(1) to provide that every Form ATS-N filed pursuant to Rule 304 shall constitute a "report" within the meaning of Sections 11A, 17(a), 18(a), and 32(a) and any other applicable provisions of the Exchange Act. Because proposed Form ATS-N is a report that is required to be filed under the Exchange Act, it would be unlawful for any person to willfully or knowingly make, or cause to be made, a false or misleading statement with respect to any material fact in Form ATS-N.[333] The Commission notes that proposed Rule 304(b)(1) is nearly identical to current Rule 301(b)(2)(vi),[334] which provides that every notice or amendment filed pursuant to Rule 301(b)(2), including Form ATS, shall

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330 See supra Section III.C.

331 See infra Section VII.

332 See Alternative Trading System ("ATS") List, available at http://www.sec.gov/foia/docs/atslist.htm.

333 See 15 U.S.C. 78ff(a).

334 17 CFR 242.301(b)(2)(vi).

constitute a "report" within the meaning of Sections 11A, 17(a), 18(a), and 32(a), and any other applicable provisions of the Exchange Act.[335]

Under proposed Rule 304(b)(2), the Commission would make public via posting on the Commission's website, each: (A) order of effectiveness of a Form ATS-N; (B) order of ineffectiveness of a Form ATS-N; (C) effective Form ATS-N; (D) filed Form ATS-N Amendment; (E) order of ineffectiveness of a Form ATS-N Amendment; (F) notice of cessation; and (G) order suspending, limiting, or revoking the exemption from the definition of an "exchange" pursuant to Exchange Act Rule 3a1-1(a)(2). Proposed Rule 304(b)(3) would require each NMS Stock ATS to make public via posting on its website a direct URL hyperlink to the Commission's website that contains the documents enumerated in proposed Rule 304(b)(2).

Once the Commission has declared a Form ATS-N effective, the Commission preliminarily believes that making Form ATS-N public would provide market participants with important information about the operations of the NMS Stock ATS and its broker-dealer operator and the broker-dealer operator's affiliates. As discussed further below, proposed Form ATS-N would provide information about the broker-dealer operator and the activities of the broker-dealer operator and its affiliates in connection with the NMS Stock ATS, including: their operation of trading centers and other NMS Stock ATSs; products and services offered to subscribers; arrangements with unaffiliated trading centers; trading activities on the NMS Stock ATS; smart order router (or similar functionality) and algorithms used to send or receive orders or other trading interest to or from the ATS; personnel and third parties used to operate the NMS Stock ATS; differences in the availability of ATS services, functionalities, or procedures; and

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[335] 15 U.S.C. 78k-1, 78q(a), 78r(a), and 78ff(a). See 17 CFR 242.301(b)(2)(vi).

safeguards and procedures to protect subscribers' confidential trading information.[336] Proposed Form ATS-N would also provide market participants with important information about the manner of operations of the NMS Stock ATS, including: subscribers; hours of operation; types of orders; connectivity, order entry, and co-location procedures; segmentation of order flow and notice about segmentation; display of order and other trading interest; trading services, including matching methodologies, order interaction rules, and order handling, and execution procedures; procedures governing suspension of trading and trading during a system disruption or malfunction; opening, re-opening, closing, and after hours procedures; outbound routing services; fees; market data; trade reporting; clearance and settlement; order display and execution access; fair access; and market quality statistics published or provided to one or more subscribers.[337] Accordingly, the Commission proposes to make public – via the public posting of Form ATS-N on the Commission's website – information that it preliminarily believes should be easily accessible to all market participants so that market participants may better evaluate how to achieve their investing or trading objectives.

The Commission would not post on its website a filed Form ATS-N before the Commission declares that Form ATS-N effective. Under the proposal, an NMS Stock ATS that was not in operation as of the effective date of proposed Rule 304 may not commence operations as an NMS Stock ATS until the Commission issues an order declaring its Form ATS-N

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336 See infra Section VII (discussing proposed disclosure requirements related to broker-dealer operators under Form ATS-N).

337 See infra Section VIII (discussing proposed operational disclosure requirements of Form ATS-N).

effective.[338] Additionally, if the Commission declares ineffective a Form ATS-N filed by a legacy NMS Stock ATS, that ATS would be prohibited from operating as an NMS Stock ATS going forward.[339] Furthermore, while the Commission is reviewing a Form ATS-N prior to declaring it effective or ineffective, Commission staff would likely engage in discussions with the entity regarding its disclosures and could request that the entity revise or augment its disclosures to provide market participants with greater clarity regarding the entity's operations. Accordingly, the Commission preliminarily believes that it would be premature to provide market participants with information regarding an initial Form ATS-N filing until after it is declared effective.

The proposal to make public each Form ATS-N Amendment upon filing with the Commission is to provide market participants with immediate transparency into the operations of an NMS Stock ATS, which would be operational and to which market participants might currently enter—or consider entering—orders for execution. The Commission preliminarily believes that making public Form ATS-N Amendments would benefit market participants by allowing them to obtain current information regarding changes to the operation of an NMS Stock ATS and its relationship with its broker-dealer operator and the broker-dealer operator's affiliates; if it would benefit their investment or trading strategies, market participants would also be able to continually evaluate that NMS Stock ATS as a potential destination to route their orders. The Commission preliminarily believes that, while Form ATS-N Amendments would be publicly posted before the Commission has completed its review, it would be useful to market

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338 See proposed Rule 304(a)(1)(iv).

339 Id. Nothing would preclude the NMS Stock ATS from later submitting a new or revised Form ATS-N for consideration by the Commission.

participants to have immediate access to the disclosures contained in an amendment so market participants may, for example, assess and prepare for upcoming material changes on an NMS Stock ATS or more quickly understand any operational changes that have occurred over the previous quarter on the NMS Stock ATS. The Commission also proposes to make the public aware of which Form ATS-N Amendments filed by NMS Stock ATSs posted on the Commission's website are pending Commission review and could still be declared ineffective. The Commission believes that publicly posting filed Form ATS-N Amendments would strike the right balance of enabling market participants to better understand upcoming or recent changes to an operational NMS Stock ATS in a timely manner, while informing market participants that the Form ATS-N Amendment is pending Commission review and could still be declared ineffective.[340]

The Commission also preliminarily believes that making public each properly filed Form ATS-N notice of cessation would provide the public with notice that the NMS Stock ATS will cease operations and that the organization, association, or group of persons no longer operates pursuant to the exemption provided under Exchange Act Rule 3a1-1(a)(2). The notice of cessation would provide market participants with the date that the NMS Stock ATS will cease operations, as designated by the NMS Stock ATS. Market participants would be able to use this information to make arrangements to select alternative routing destinations for their orders.

Furthermore, the Commission understands that many broker-dealer operators maintain websites for their NMS Stock ATSs. The Commission preliminarily believes that market

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[340] Market participants would also be made aware if the Commission declares a Form ATS-N Amendment ineffective, because the Commission would also post each order of ineffectiveness of a Form ATS-N Amendment. See proposed Rule 304(b)(2)(E).

participants would find it helpful for an NMS Stock ATS to make market participants aware that certain of the NMS Stock ATS's Form ATS-N filings are publicly posted on the Commission's website. Therefore, to the extent that an NMS Stock ATS has a public website, the Commission is proposing that Rule 304(b)(3) require each NMS Stock ATS that has a website to post on the NMS Stock ATS's website a direct URL hyperlink to the Commission's website that contains the documents enumerated in proposed Rule 304(b)(2), which includes the NMS Stock ATS's Form ATS-N filings. The Commission preliminarily believes that this requirement would make it easier for market participants to review an NMS Stock ATS's Form ATS-N filings by providing an additional means for market participants to locate Form ATS-N filings that are posted on the Commission's website.

The Commission preliminarily believes that publicly posting Form ATS-N filings on the timelines described above is important because most market participants do not have access to information that permits them to adequately compare and contrast how some NMS Stock ATSs would handle their orders against how a given national securities exchange or other NMS Stock ATS would handle their orders. Currently, a Form ATS filed with the Commission by an NMS Stock ATS is "deemed confidential when filed" under Rule 301(b)(2)(vii) of Regulation ATS,[341] whereas a national securities exchange is required to both (i) make available to the public its entire rule book and (ii) publicly file all proposed rule changes pursuant to Section 19(b) of the Exchange Act.[342] The Commission preliminary believes that since the adoption of Regulation ATS, the market in execution services for NMS stocks has evolved such that trading functions of

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[341] See 17 CFR 240.301(b)(2)(vii).

[342] See 15 U.S.C. 78s(b).

NMS Stock ATSs have become more functionally similar to those of national securities exchanges.[343] Unless an NMS Stock ATS voluntarily publicizes how those functionalities operate and affect the handling of subscriber orders, there is no publicly available information for market participants to use in order to compare and contrast the trading platform of an NMS Stock ATS with that of a national securities exchange. Accordingly, through Form ATS-N, the Commission proposes to require disclosures that would provide information that market participants could use to compare and contrast the important order handling features, and other important functionalities, of an NMS Stock ATS with those of other NMS Stock ATSs or national securities exchanges. The Commission therefore proposes to make those disclosures public so that market participants would have access to important information when evaluating trading venues.

Additionally, the Commission preliminarily believes that, given changes with respect to NMS Stock ATSs since the adoption of Regulation ATS,[344] the reasons given in the past for maintaining the confidentiality of Form ATS filings are no longer justified for NMS Stock ATSs in light of the benefits of operational transparency for NMS Stock ATSs that are discussed above. First, when the Commission adopted Regulation ATS, it chose, at that time, to deem Form ATS confidential because "[i]nformation required on Form ATS may be proprietary and disclosure of such information could place alternative trading systems in a disadvantageous competitive position."[345] As noted above, the Commission preliminarily believes that NMS Stock ATSs have generally evolved to the point that their trading functionalities often resemble

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343 See supra Section III.B.

344 See generally supra Section III.

345 See Regulation ATS Adopting Release, supra note 7, at 70864.

those of national securities exchanges. The Commission preliminarily believes that much of the type and level of information that would have to be publicly disclosed by an NMS Stock ATS pursuant to this proposal is very similar to information that national securities exchanges must publicly disclose. For instance, proposed Form ATS-N would require an NMS Stock ATS to disclose, among other things, information about available order types and modifiers, hours of operations, connectivity, order entry, co-location, order display, matching methodologies, and order interaction procedures, all of which must be publicly disclosed by national securities exchanges. Accordingly, the Commission preliminarily believes that, in the current market environment, the disclosures mandated by Form ATS-N would not place NMS Stock ATSs at a competitive disadvantage with respect to national securities exchanges.[346]

Second, when the Commission adopted Regulation ATS, it sought to "encourage candid and complete filings in order to make informed decisions and track market changes," and believed that keeping the reports filed on Form ATS confidential would "provide[] respondents with the necessary comfort to make full and complete filings."[347] Based on Commission experience, however, many Form ATS filings currently provide only rudimentary and summary information about the manner of operation of NMS Stock ATSs, which often requires the Commission and its staff to ask the ATSs follow-up questions, and results in ATSs filing follow-up amendments, to fully disclose how they operate. Thus, the Commission preliminarily believes that maintaining the confidentiality of Form ATS filings with regard to NMS Stock ATSs has not resulted uniformly in ATSs "mak[ing] full and complete filings."

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346 See infra Section XIII.C.2.

347 See Regulation ATS Adopting Release, supra note 7, at 70864.

Request for Comment

102. Do you believe market participants currently have access to information about the operations of NMS Stock ATSs and the activities of their broker-dealer operators and the broker-dealer operators' affiliates, either through private disclosures from NMS Stock ATSs, from NMS Stock ATSs that voluntarily make their Forms ATS public, or from NMS Stock ATSs that issue frequently asked questions about their operations, including changes to their operations, that is sufficient to help market participants select the markets to which to route and execute their orders? Why or why not? Please support your arguments.

103. Do you believe the Commission should adopt the proposal to make public certain Form ATS-N filings by NMS Stock ATSs? Why or why not? Please support your arguments.

104. Do you believe the Commission should adopt the proposal to require an NMS Stock ATS to post on the NMS Stock ATS's website a direct URL hyperlink to the Commission's website that contains the documents enumerated in proposed Rule 304(b)(2)? Why or why not? Please support your arguments.

105. Do you believe the Commission should require each NMS Stock ATS to directly post its Form ATS-N filings on the NMS Stock ATS's website? If so, why, and which Form ATS-N filings? If not, why not? Please support your arguments.

106. Do you believe the Commission should require each NMS Stock ATS to directly post Commission orders related to the effectiveness or ineffectiveness of the NMS Stock ATS's Form ATS-N, Form ATS-N Amendments, or both on the website of

the NMS Stock ATS? If so, why, and which orders should NMS Stock ATSs be required to post? If not, why not? Please support your arguments.

107. Do you believe that the Commission should make public on its website the Form ATS-N of an NMS Stock ATS that was not in operation as of the effective date of proposed Rule 304 during the Commission's review period and prior to declaring the Form ATS-N effective of ineffective? Why or why not? Please support your arguments.

108. Do you believe that the Commission should make public on its website a Form ATS-N that it has declared ineffective? Why or why not? Please support your arguments.

109. Do you believe that the Commission should make public on its website a Form ATS-N filed by a legacy NMS Stock ATS during the Commission's review period and prior to its declaring the Form ATS-N effective or ineffective? Why or why not? Please support your arguments?

110. Do you believe that the Commission should adopt the proposal to make public on its website all Form ATS-N Amendments during the Commission's review period and prior to its determination as to whether a Form ATS-N Amendment should be declared ineffective? If so, why? If not, why not? Please support your arguments.

111. Do you believe that the Commission should adopt the proposal whereby the Commission would continue to make public on its website a Form ATS-N Amendment that it has declared ineffective? Why or why not? Please support your arguments.

112. Do you believe the Commission's current practice of making publicly available a list of ATSs with a Form ATS on file with the Commission puts market participants on sufficient notice of the regulatory status of NMS Stock ATSs with which they may do business? Why or why not? Please support your arguments.

113. Does the Commission's current practice of making publicly available a list of ATSs with a Form ATS on file with the Commission create the potential for market participants to misunderstand the operations of the market? If so, how? If not, why not? Please support your arguments.

114. Do you believe that market participants currently have sufficient information regarding the activities of an NMS Stock ATS's broker-dealer operator and its affiliates as they relate to the ATS, including changes to such activities, to evaluate conflicts of interest that may arise out of the position that the broker-dealer occupies as the operating entity of the NMS Stock ATS? Why or why not? Please support your arguments.

115. Do you believe the Commission's proposal to make public certain Form ATS-N filings would better enable market participants to evaluate conflicts of interest that may arise out of the position that the broker-dealer occupies as the operating entity of the NMS Stock ATS? Why or why not? Please support your arguments.

116. Do you believe that making public Form ATS-N filings would place NMS Stock ATSs at a competitive disadvantage with respect to other trading centers, including national securities exchanges? Why or why not? Please support your arguments.

117. Do you believe that making public Form ATS-N filings would incentivize NMS Stock ATSs to make more accurate, current, and complete disclosures? Why or why not? Please support your arguments.

118. Do you believe the Commission should continue to make public a Form ATS-N or Form ATS-N Amendments where the Commission has suspended, revoked, or limited the NMS Stock ATS's exemption pursuant to Rule 304(a)(4)? Why or why not? Please support your arguments.

119. Do you believe that responding to questions on proposed Form ATS-N would require an NMS Stock ATS to disclose proprietary information that could place the NMS Stock ATS or its broker-dealer operator's other business activities at a competitive disadvantage? If so, please identify the question on the Form ATS-N and specify what information in response to that question would result in the disclosure of proprietary information and describe why the disclosure could create a competitive disadvantage for the NMS Stock ATS or its broker-dealer operator's other business activities.

120. In light of the information that national securities exchanges, which compete with NMS Stock ATSs, are required to disclose regarding their operations, should NMS Stock ATSs continue to be eligible for the exemption from the definition of exchange without having to disclose such information? Why or why not? Please explain in detail.

E. Rule 304(c)(1) and (2): Proposed Form ATS-N Requirements

Proposed Rule 304(c)(1) would require NMS Stock ATSs to respond to each item on Form ATS-N, as applicable, in detail and disclose information that is accurate, current, and

complete. The Commission preliminarily believes that market participants would use information disclosed on proposed Form ATS-N to evaluate whether a particular NMS Stock ATS would be a desirable venue to which to route their orders. In addition, the Commission intends to use the information disclosed on the Form ATS-N to exercise oversight over and monitor developments of NMS Stock ATSs. Given these potential uses, the Commission preliminarily believes that it is important that the Form ATS-N contain detailed disclosures that are accurate, current, and complete.

The Commission notes that Regulation ATS requires NMS Stock ATSs to be registered as broker-dealers with the Commission, which entails becoming a member of FINRA and fully complying with the broker-dealer regulatory regime. FINRA Rule 3130 requires each member to designate and specifically identify to FINRA one or more principals to serve as a chief compliance officer and each member to have its chief executive officer certify annually that the member has in place processes to establish, maintain, review, test and modify written compliance policies and written supervisory procedures reasonably designed to achieve compliance with applicable FINRA rules, MSRB rules and federal securities laws and regulations, and that the chief executive officer(s) has conducted one or more meetings with the chief compliance officer(s) in the preceding 12 months to discuss such processes.[348] The Commission requests

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[348] See FINRA Rule 3130(b). FINRA Rule 3120(c) sets forth the following:

The certification shall state the following:

The undersigned is/are the chief executive officer(s) (or equivalent officer(s)) of (name of member corporation/partnership/sole proprietorship) (the "Member"). As required by FINRA Rule 3130(b), the undersigned make(s) the following certification:

1. The Member has in place processes to:

comment on whether the certification required under FINRA Rule 3130 will help ensure that the broker-dealer operator of the NMS Stock ATS complies with proposed Rule 304, including proposed Rule 304(c)(1), which would require the accurate, current, and complete disclosures on Form ATS-N.

Request for Comment

121. Do you believe that the certification required under FINRA Rule 3130 will help ensure an NMS Stock ATS's compliance with proposed Rule 304, including the

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(A) establish, maintain and review policies and procedures reasonably designed to achieve compliance with applicable FINRA rules, MSRB rules and federal securities laws and regulations;

(B) modify such policies and procedures as business, regulatory and legislative changes and events dictate; and

(C) test the effectiveness of such policies and procedures on a periodic basis, the timing and extent of which is reasonably designed to ensure continuing compliance with FINRA rules, MSRB rules and federal securities laws and regulations.

2. The undersigned chief executive officer(s) (or equivalent officer(s)) has/have conducted one or more meetings with the chief compliance officer(s) in the preceding 12 months, the subject of which satisfy the obligations set forth in FINRA Rule 3130.

3. The Member's processes, with respect to paragraph 1 above, are evidenced in a report reviewed by the chief executive officer(s) (or equivalent officer(s)), chief compliance officer(s), and such other officers as the Member may deem necessary to make this certification. The final report has been submitted to the Member's board of directors and audit committee or will be submitted to the Member's board of directors and audit committee (or equivalent bodies) at the earlier of their next scheduled meetings or within 45 days of the date of execution of this certification.

4. The undersigned chief executive officer(s) (or equivalent officer(s)) has/have consulted with the chief compliance officer(s) and other officers as applicable (referenced in paragraph 3 above) and such other employees, outside consultants, lawyers and accountants, to the extent deemed appropriate, in order to attest to the statements made in this certification.

requirement that disclosures on Form ATS-N are accurate, current, and complete? Why or why not? Please support your arguments.

Proposed Rule 304(c)(2) would provide that any report required to be filed with the Commission under proposed Rule 304 of Regulation ATS must be filed electronically on Form ATS-N, and include all information as prescribed in proposed Form ATS-N and the instructions thereto. The Commission's proposal contemplates the use of the electronic form filing system ("EFFS") to file a completed Form ATS-N. Based on the widespread use and availability of the Internet, the Commission preliminarily believes that filing Form ATS-N in an electronic format would be less burdensome and a more efficient filing process for NMS Stock ATSs and the Commission, as it is likely to be less expensive and cumbersome than mailing paper forms to the Commission. The proposed Form ATS-N would require an electronic signature to help ensure the authenticity of the filing. The Commission preliminarily believes these proposed requirements would expedite communications between the Commission and its staff and the broker-dealer operator concerning the NMS Stock ATS and help to ensure that only personnel authorized by the NMS Stock ATS are filing required materials. This proposed requirement is intended to provide a uniform manner in which the Commission would receive—and the broker-dealer operator would file—the Form ATS-N made pursuant to proposed Rule 304 of Regulation ATS. Also, NMS Stock ATSs would be able to review how other filers that were allowed to become effective responded to the same questions on Form ATS-N for guidance on how to respond. Additionally, the consistent framework would make it easier and more efficient for the

Commission and market participants reviewing the disclosures to promptly review, analyze, and respond, as necessary, to the information proposed to be provided.[349]

Further, the Commission also is proposing that documents filed through the EFFS system must be in a text-searchable format without the use of optical character recognition. The Commission believes that proposing to require documents to be filed in a text-searchable format would allow the Commission and its staff and market participants to efficiently review and analyze information provided on proposed Form ATS-N. In particular, a text-searchable format would allow the Commission and its staff to better gather, analyze, and use data filed as exhibits, whereas a non-text-searchable format filing would require significantly more steps and labor to review and analyze data.

The Commission is proposing that proposed Form ATS-N be filed with the Commission in a structured format. The Commission preliminarily believes that proposing Form ATS-N to be filed with the Commission in a structured format could allow the Commission and market participants to better search and analyze information about NMS Stock ATSs. The Commission is proposing that Parts I (Name) and II (Broker-Dealer Operator Registration and Contact Information) of proposed Form ATS-N would be provided as fillable forms on the Commission's EFFS system. The Commission is proposing that Part III (Activities of the Broker-Dealer Operator and Affiliates) of proposed Form ATS-N would be filed in a structured format whereby the filer would provide checkbox responses to certain questions and narrative responses that are block-text tagged by Item. The Commission is proposing that Part IV (The NMS Stock ATS

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349 This proposed requirement is consistent with electronic-reporting standards set forth in Form SCI. See SCI Adopting Release, supra note 17, at 72357 (discussing electronic filing requirements of Form SCI).

Manner of Operations) of proposed Form ATS-N would also be filed in a structured format in that the filer would block-text tag narrative responses by Item. The Commission is proposing that Part V (Contact Information, Signature Block, and Consent to Service) of proposed Form ATS-N would be provided as fillable forms on the Commission's EFFS system.

The Commission notes that there are a variety of methods by which information can be collected and structured for review and analysis. For example, some or all of the information provided on Form ATS-N could be structured according to a particular standard that already exists, or a new taxonomy that the Commission creates, or as a single machine-readable PDF. Given the Commission's proposal that information on Form ATS-N be filed in a structured format, the Commission seeks comment on the manner in which proposed Form ATS-N could be structured to better enable the Commission and market participants to collect and analyze the data.

Request for Comment

122. Do you believe that the electronic filing requirement of proposed Rule 304(c)(2) is appropriate? Do you believe that the electronic filing of Form ATS-N would be less burdensome and/or a more efficient filing process for NMS Stock ATSs compared to delivering the Form ATS-N by mail on paper? Alternatively, would the submission of proposed Form ATS-N via electronic mail to one or more Commission email addresses be a more appropriate way for NMS Stock ATSs to file Form ATS-N with the Commission? Are there other alternative methods that would be preferable? If so, please describe. Is the proposal to require an electronic signature appropriate? If not, why not? Please support your arguments.

123. Should the Commission adopt the proposal that proposed Form ATS-N should be filed with the Commission in a structured format? Why or why not? If so, what standards of structuring should be used for information to be provided on proposed Form ATS-N? Please explain. If not, what format should proposed Form ATS-N take? Please identify the format and explain.

124. Are there any specific aspects of proposed Form ATS-N that should or should not be provided in a structured format? Please identify those aspects of proposed Form ATS-N that should or should not be provided in a structured format and explain why those aspects of the form should or should not be structured.

125. Should the Commission adopt the proposal to require documents to be filed in a text-searchable format on proposed Form ATS-N? Why or why not? Please support your arguments.

V. Proposed Form ATS-N: Submission Type and Part I of Form ATS-N

Proposed Form ATS-N would require that an entity identify the type of filing by marking the appropriate checkbox. The Form ATS-N filing may either be a Form ATS-N, a Form ATS-N Amendment, or a notice of cessation. In addition, proposed Form ATS-N would require the NMS Stock ATS to indicate whether a Form ATS-N Amendment is being submitted as a material amendment, periodic amendment, or correcting amendment. The Commission is also proposing that, for an Form ATS-N Amendment, the NMS Stock ATS provide a brief narrative description of the amendment so market participants can quickly understand the nature of the Form ATS-N Amendment.[350] For notices of cessation, proposed Form ATS-N would require the date that the NMS Stock ATS will cease to operate. A Form ATS-N filer may also withdraw a previously filed Form ATS-N. [351]

Part I of proposed Form ATS-N would require the name of the broker-dealer operator and the NMS Stock ATS. Rule 301(b)(1) requires that an ATS, including an NMS Stock ATS, register as a broker-dealer under Section 15 of the Exchange Act.[352] Today, while some broker-dealers are registered with the Commission for the sole purpose of operating as an ATS, most broker-dealer operators of ATSs engage in brokerage and/or dealing activities in addition to

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350 For a Form ATS-N Amendment, the NMS Stock ATS would also be required to attach as Exhibit 3A and/or Exhibit 4A a redline(s), showing changes to Part III and/or Part IV of proposed Form ATS-N, respectively, in order to point out the amendment(s) to its prior Form ATS-N filing. The Commission preliminarily believes that requiring NMS Stock ATSs to attach redlines to their Form ATS-N Amendments would better enable market participants and the Commission to review Form ATS-N Amendments in a more efficient manner.

351 Instruction B to proposed Form ATS-N would provide that if an NMS Stock ATS determines to withdraw a Form ATS-N, it must select the appropriate checkbox and provide the correct file number to withdraw the submission.

352 17 CFR 242.301(b)(1); 15 U.S.C. 78o.

operating an NMS Stock ATS. In some cases, broker-dealers operate multiple NMS Stock ATSs.[353] To identify the registered broker-dealer for an NMS Stock ATS and to assist the Commission in collecting and organizing its filings, proposed Form ATS-N would require the name of the registered broker-dealer for the NMS Stock ATS (i.e., the broker-dealer operator), as it is stated on Form BD, in Part I, Item 1 of proposed Form ATS-N. The name of the registered broker-dealer for the NMS Stock ATS would also assist the Commission in ensuring that the NMS Stock ATS has appropriately registered as a broker-dealer as part of its exemption from exchange registration under Exchange Act Rule 3a1-1(a)(2). To the extent that a "DBA" (doing business as) is used to identify the NMS Stock ATS to the public or the Commission, or if a registered broker-dealer operates multiple NMS Stock ATSs, proposed Form ATS-N would require the full name of the NMS Stock ATS under which business is conducted, if any, in Part I, Item 2 of proposed Form ATS-N. Part I, Item 3 of proposed Form ATS-N would require the NMS Stock ATS to provide its Market Participant Identifier ("MPID") for the NMS Stock ATS.[354] The Commission preliminarily believes that providing the name of the NMS Stock ATS or DBA and its MPID would provide clarity to the public and Commission about the identity under which the business of the NMS Stock ATS is conducted. Proposed Form ATS-N would

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[353] A broker-dealer operator would be required to file a separate Form ATS-N for each NMS Stock ATS operated by the broker-dealer. See Instruction A of proposed Form ATS-N.

[354] An MPID, or other mechanism or mnemonic, is used to identify a market participant for the purposes of electronically accessing a national securities exchange or an ATS. See, e.g., Securities Exchange Act Release No. 63241 (November 3, 2010), 75 FR 69792 (November 15, 2010). ATSs are required to use a unique MPID for the ATS when reporting trade information to FINRA. See FINRA ATS Reporting Approval, supra note 122.

also require an ATS to identify whether it is currently operating pursuant to a previously filed initial operation report on Form ATS.

Request for Comment

126. Do you believe that Part I of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required? If not, how should Part I of proposed Form ATS-N be revised to provide additional clarity? Please explain in detail and support your arguments.

127. Do you believe there is other information that market participants might find relevant or useful with regard to the disclosures in Part I? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

128. Do you believe that the broker-dealer operator should be required to identify the type of Form ATS-N filing (i.e., Form ATS-N, Form ATS-N Amendment, notice of cessation, or withdrawal) by marking the appropriate checkbox, and for notices of cessation, provide the date that the NMS Stock ATS will cease to operate? Why or why not? Please support your arguments.

129. Do you believe that the broker-dealer operator should be required to provide a brief summary of a Form ATS-N Amendment? Why or why not? Please support your arguments.

130. Do you believe that a broker-dealer operator should be allowed to withdraw a previously filed Form ATS-N? Why or why not? Please support your arguments.

If so, when should a broker-dealer operator be permitted to withdraw a previously filed Form ATS-N? Please explain.

131. Do you believe that the broker-dealer operator should be required to disclose the date on which it commenced, or intends to commence, operation of the NMS Stock ATS in Part I of Form ATS-N? Why or why not? Please support your arguments.

132. Do you believe that the Commission should require the MPID of the NMS Stock ATS as a required disclosure on proposed Form ATS-N? Why or why not? Please support your arguments.

133. What are the potential costs and benefits of disclosing the information required by Part I of proposed Form ATS-N? Would the proposed disclosures in Part I of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information? Why or why not? Please support your arguments.

VI. Part II of Proposed Form ATS-N: Broker-Dealer Operator Registration Information

Part II of proposed Form ATS-N would require certain general information regarding the broker-dealer operator and the NMS Stock ATS. With respect to the broker-dealer operator, Part II of proposed Form ATS-N would require registration information including: its SEC File Number, Central Registration Depository ("CRD") Number, effective date of the broker-dealer operator's registration with the Commission, the name of the national securities association with which it is a member, and the effective date of broker-dealer operator's membership with the national securities association (e.g., FINRA). The Commission proposes to require this information to assess whether the NMS Stock ATS has complied with the requirement to register as a broker-dealer pursuant to Rule 301(b)(1) of Regulation ATS. This information also would expedite the Commission's communications with the broker-dealer operator's self-regulatory organization as needed.

Additionally, Part II of proposed Form ATS-N would require certain information regarding the legal status of the broker-dealer operator. Specifically, proposed Form ATS-N would require that the broker-dealer operator provide its legal status (e.g., corporation, partnership, sole proprietorship) and except in the case of a sole proprietorship, the date of formation and state or country in which it is formed. The Commission is proposing to require the information related to the broker-dealer operator's legal status to help ensure that the broker-dealer operator has appropriately filed as a legal entity (except in the case of sole proprietorships).

Proposed Form ATS-N would also require the address of the physical location of the NMS Stock ATS matching system and, if it is different from the physical location, the mailing

address of the NMS Stock ATS. If the broker-dealer operator is a sole proprietorship and an address of the NMS Stock ATS is a private residence, the Commission would not make that information available on the Commission's website due to concerns about the confidentiality of personally identifiable information. Furthermore, Part II would require the NMS Stock ATS to provide a URL address for the website of the NMS Stock ATS, and in the signature block in Part V of proposed Form ATS-N, the representative of the broker-dealer operator would also be required to provide his or her business contact information, including the person's name and title, telephone number, and e-mail address.[355] This information would facilitate communication with the broker-dealer operator and the NMS Stock ATS during the Commission's review of a Form ATS-N and later as necessary as part of the Commission's ongoing monitoring of the NMS Stock ATS. To the extent the broker-dealer operator's contact information that is provided in Part II is made publicly available, that information would also facilitate communication between subscribers and the broker-dealer operator.

Part II of proposed Form ATS-N would also require an NMS Stock ATS to attach, as Exhibit 1, a copy of any materials currently provided to subscribers or other persons, related to

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[355] The Commission would also keep the contact information of the broker-dealer operator's representative confidential, subject to applicable law.

Consistent with the requirements of proposed Form ATS-N, the signature block in Part V would also require the NMS Stock ATS to consent that service of any civil action brought by, or notice of any proceeding before, the Commission or a SRO in connection with the ATS's activities may be given by registered or certified mail or email to the contact employee at the primary street address or email address, or mailing address if different, given in Part I. The signatory would further represent that the information and statements contained on the submitted Form ATS-N, including exhibits, schedules, attached documents, and any other information filed, are current, true, and complete.

the operations of the NMS Stock ATS or the disclosures on Form ATS-N.[356] The Commission understands that some ATSs may provide to subscribers, or other persons, marketing material or other material containing important information about the ATS's operations in FIX protocol procedures, rules of engagement/user manuals, or frequently asked questions. These documents may include information regarding, among other things, the order matching procedures, priority rules, order types, and order entry and execution procedures of the ATS, and in some instances, such documents may contain important information about an NMS Stock ATS that may not be specified in the required disclosures under proposed Form ATS-N. The Commission notes that the purpose of proposed Form ATS-N is to provide operational transparency with regard to the NMS Stock ATS. To the extent that the NMS Stock ATS discloses information on standardized materials provided to certain subscribers, whether an individual or on group basis, the Commission preliminarily believes the NMS Stock ATS should make this information available to all subscribers, and therefore the Commission is proposing to require these materials be filed as an attachment to Exhibit 1 to proposed Form ATS-N. The Commission further notes that this requirement is similar to the requirement of subpart (f) of Exhibit F on existing Form ATS.[357]

Proposed Form ATS-N also would require that the broker-dealer operator attach, as Exhibits 2A and 2B (or provide a link to the relevant URL address where the required documents can be found), a copy of the most recently filed Schedule A of the broker-dealer operator's Form

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356 For currently operating NMS Stock ATSs that file a Form ATS-N, each ATS would only be required to provide the materials it currently provides to subscribers or other persons and would not be required to attach materials provided to subscribers or other person in the past.

357 Subpart (f) of Form ATS requires a copy of the ATS's subscriber manual and any other materials provided to subscribers.

BD disclosing information related to direct owners and executive officers, and a copy of the most recently filed Schedule B of the broker-dealer operator's Form BD disclosing information related to indirect owners, respectively. The proposed Form ATS-N would require information from the broker-dealer operator's Schedule A and Schedule B of Form BD to help market participants understand the persons and entities that directly and indirectly own the broker-dealer operator. The Commission is requiring that NMS Stock ATSs provide names of the direct and indirect owners of the broker-dealer operator on Form ATS-N, even though the same information is provided on Form BD, because information about the ownership of the broker-dealer operator will enable market participants to understand better any potential conflicts of interest that may arise therefrom, which is one of the central purposes of proposed Form ATS-N. Also, providing this information on Form ATS-N would facilitate the Commission's, as well as market participants', analysis of the ownership and any potential for conflicts arising therefrom by providing this information all on one form. Moreover, the Commission preliminarily believes it is appropriate for NMS Stock ATSs to provide this information using a URL address for these documents in lieu of attaching the actual documents to their Form ATS-N filings.

Request for Comment.

134. Do you believe that Part II of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required? If not, how should Part II of proposed Form ATS-N be revised to provide additional clarity? Please explain in detail.

135. Do you believe there is other information that market participants might find relevant or useful with regard to the disclosures in Part II? If so, describe such information and explain whether, and if so why, such information should be

required to be provided under proposed Form ATS-N. Please support your arguments.

136. Do you believe that the Commission should require the effective date of broker-dealer registration with the Commission as a required disclosure on proposed Form ATS-N? Why or why not? Please support your arguments.

137. Do you believe that the Commission should require the SEC File number of the broker-dealer operator as a required disclosure on proposed Form ATS-N? Why or why not? Please support your arguments.

138. Do you believe that the Commission should require the CRD number of the broker-dealer operator as a required disclosure on proposed Form ATS-N? Why or why not? Please support your arguments.

139. Do you believe that the Commission should require the address of the physical location of the NMS Stock ATS's matching system as a required disclosure on proposed Form ATS-N? Why or why not? Please support your arguments.

140. Do you believe that the Commission should require the mailing address of the NMS Stock ATS as a required disclosure on proposed Form ATS-N? Why or why not? Please support your arguments.

141. Do you believe that the Commission should require the website URL of the NMS Stock ATS as a required disclosure on proposed Form ATS-N? Why or why not? Please support your arguments.

142. Do you believe that the Commission should require NMS Stock ATSs to disclose materials provided to subscribers or other persons related to the operations of the NMS Stock ATS on proposed Form ATS-N? Why or why not? Please support

your arguments. Do you believe such materials should be provided to the Commission as an Exhibit? Why or why not? Please support your arguments. Do you believe that the NMS Stock ATS should be able to provide a URL where these documents can be found in lieu of providing the documents as an Exhibit? Why or why not? Please support your arguments.

143. Do you believe it is appropriate for the Commission to not make public the address of the NMS Stock ATS that is a sole proprietorship? Why or why not? Please support your arguments.

144. Do you believe it is appropriate for the Commission to not make public the contact information of the broker-dealer operator's representative? Why or why not? Please support your arguments.

145. Do you believe that there is any information, that would be required to be disclosed in Part II of proposed Form ATS-N that the Commission should not require to be disclosed due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

146. What are the potential costs and benefits of disclosing the information required by Part II of proposed Form ATS-N? Would the proposed disclosures in Part II of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information? Why or why not? Please support your arguments.

147. Do you believe there are there certain types of materials provided to subscribers that would be responsive to Exhibit 1 that should or should not be disclosed on Form ATS-N? If so, what types of materials and why? Do you believe an NMS

Stock ATS should provide in response to Exhibit 1 the materials the NMS Stock ATS provides to subscribers such as FIX protocol procedures, rules of engagement/user manuals, frequently asked questions, or marketing materials? Why or why not? Please support your arguments.

148. Do you believe the Commission should require NMS Stock ATSs to provide on Form ATS-N information on Exhibits 2A and 2B, in light of the fact that the information is already provided on Form BD?

149. Do you believe the Commission should require the NMS Stock ATS to provide disclosure about its governance structure and compliance programs and controls to comply with Regulation ATS? Why or why not? If so, what aspects of the NMS Stock ATSs' governance structure and compliance programs and controls to comply with Regulation ATS should the NMS Stock ATS be required to disclose? Please support your arguments.

VII. Part III of Proposed Form ATS-N: Activities of the Broker-Dealer Operator and Its Affiliates

A. The Relationship between the Broker-Dealer Operator's Operation of the NMS Stock ATS and Its Other Operations

1. Background

The Commission preliminarily believes that to understand the operations of an NMS Stock ATS, it is necessary to understand the relationship and interactions between the NMS Stock ATS and its registered broker-dealer operator as well as the relationship and interactions between the NMS Stock ATS and the affiliates of its broker-dealer operator. As previously noted, Rule 301(b)(1) of Regulation ATS requires that an ATS, including an NMS Stock ATS, register as broker-dealer under Section 15 of the Exchange Act (the "broker dealer operator").[358] The broker-dealer operator of the ATS trading platform is legally responsible for all operational aspects of the ATS and for ensuring that the ATS operates in compliance with applicable federal securities laws and the rules and regulations thereunder, including Regulation ATS. The broker-dealer operator, and in some cases, its affiliates,[359] controls access to the ATS and provides the technology and systems that support the trading on the ATS.[360] Based on Commission experience, the broker-dealer operator, or in some cases, its affiliates, directs the personnel that

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358 17 CFR 242.301(b)(1); 15 U.S.C. 78o. Additionally, as a registered entity with the Commission, a broker-dealer operating an ATS is subject to applicable federal securities laws, as well as other requirements, including the rules of any SRO of which it is a member.

359 The Commission is proposing to define "affiliate" for purposes of Form ATS-N as described and discussed further below. See infra note 376 and accompanying text. See also Instruction G of proposed Form ATS-N.

360 Some technology or functions of an ATS may be licensed from a third party. The broker-dealer operator of the ATS is nonetheless legally responsible for ensuring that all aspects of the ATS comply with applicable laws.

service the ATS or otherwise manages service providers that may perform certain functions of the ATS. The broker-dealer operator, or in some cases, its affiliates, also determines, among other things: (1) what securities will trade on the ATS; (2) who may become subscribers that will participate on the ATS; (3) whether there will be segmented categories of order flow in the ATS, and if so, how the order flow will be segmented; (4) order matching methodologies and priority rules; (5) the rules governing the interaction and execution of orders; and (6) the display, if any, of orders and trading interest. Additionally, the broker-dealer operator, or in some cases, its affiliates, determines the means by which orders are entered on and subscribers access the ATS, in many cases, through the use of a smart order router that is owned and operated by the broker-dealer operator or one of its affiliates. The broker-dealer operator, or in some cases, its affiliates, also controls the market data that the ATS uses to prioritize, match, and execute orders and the transmission of and access to confidential order and execution information sent to and from the ATS.[361] Based on Commission experience, the operations of the NMS Stock ATS and the other operations of the broker-dealer operator are usually closely intertwined as the broker-dealer operator generally leverages its information technology, systems, personnel, and market data, and those of its affiliates, to operate the ATS.

The Commission is also aware that most ATSs that currently transact in NMS stocks are operated by broker-dealers that engage in significant brokerage and dealing activities in addition to their operation of an ATS(s).[362] These multi-service broker-dealers may offer their customers

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361 For example, the broker-dealer operator determines the source of market data that the NMS Stock ATS uses to calculate the NBBO and how the NBBO will be calculated.

362 The Commission notes that, based on Form BD disclosures from June of 2015, all but 7 of the 36 broker-dealer operators whose ATSs trade NMS stocks disclose business activities other than operating an ATS. The other business activities disclosed by broker-

a variety of brokerage services, often with or through their affiliates, including algorithmic trading strategy software, agency sales desk support, and automated smart order routing services. Multi-service broker-dealers that also operate an NMS Stock ATS may use the ATS as a complement to the broker-dealer's other service lines and may use the ATS as an opportunity to execute orders "in house" before seeking contra-side interest at other execution venues. For instance, a broker-dealer operator, or its affiliate, may operate, among other things, an OTC market making desk or proprietary trading desks in addition to operating an NMS Stock ATS.[363] A multi-service broker-dealer may also execute orders in NMS stocks internally (and not within its respective NMS Stock ATS(s)) by trading as principal against such orders or crossing orders as agent in a riskless principal capacity, before routing the orders to its NMS Stock ATS(s) or

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dealer operators (and the number of such broker-dealer operators providing such disclosure) include: retailing corporate equity securities over-the-counter (22); put and call broker or dealer or option writer (18); exchange commission business other than floor activities (18); private placements of securities (17); selling corporate debt securities (17); government securities broker (15); trading securities for own account (15); municipal securities broker (13); exchange member engaged in floor activities (13); non-exchange member arranging for transactions in listed securities by exchange member (12); underwriter or selling group participant (corporate securities other than mutual funds) (13); selling interests in mortgages or other receivables (12); making inter-dealer markets in corporate securities over-the-counter (11); government securities dealer (11); municipal securities dealer (11); solicitor of time deposits in a financial institution (7); investment advisory services (7). This data does not include the business activities of affiliates of the broker-dealer operators. Of the 10 ATSs that traded the most NMS stock measured by total shares executed during the second quarter of 2015, 6 disclose on Form BD that they engage in proprietary trading and making inter-dealer markets in corporate securities OTC, and 7 disclose retailing corporate equities OTC. See FINRA's ATS Transparency Data Quarterly Statistics, 2nd Quarter of 2015, available at http://www.finra.org/industry/ats/ats-transparency-data-quarterly-statistics.

363 These non-ATS, OTC activities in NMS stocks may include operating as an OTC market maker, block positioner, or operating an internal broker-dealer system. See 2010 Equity Market Structure Release, supra note 124 at 3599-3600. See also infra note 385 and accompanying text. Additionally, an affiliate of the broker-dealer operator of an NMS Stock ATS may also operate non-ATS trading centers.

another external trading center.[364] Consequently, non-ATS trading centers operated by the broker-dealer operator of an ATS (i.e., internal executions by the broker-dealer outside of an ATS), or its affiliates, often compete with the ATS as a trading venue for the execution of transactions in NMS stocks.

2. Potential Conflicts of Interest for the Broker-Dealer Operator or its Affiliates

Due to the frequent overlap between the operations of the broker-dealer operator or its affiliates outlined above and the operations of ATSs that trade NMS stocks, the Commission preliminarily believes that the interests of the broker-dealer operator or its affiliates sometimes compete with the interests of an ATS's subscribers, or customers of the ATS's subscribers, for executions on the ATS. Accordingly, the Commission preliminarily believes that these competing interests, at times, may give rise to potential conflicts of interest for broker-dealer operators of NMS Stock ATSs or their affiliates. Furthermore, the Commission preliminarily believes that the frequent overlap between the operation of ATSs that trade NMS stocks and the other operations of broker-dealer operators or their affiliates gives rise to the potential for information leakage of subscribers' confidential trading information to other business units of the broker-dealer operator or its affiliates.[365]

When evaluating an NMS Stock ATS as a possible trading venue, a market participant would likely want to know about the various activities in which a broker-dealer operator and its

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364 17 CFR 242.600(b)(78).

365 In the Regulation ATS Adopting Release, the Commission recognized the potential for abuse involving a broker-dealer that operates an ATS and offers other traditional brokerage services, and expressed concern about the potential for the misuse of confidential trading information. See Regulation ATS Adopting Release, supra note 7, at 70879.

affiliates engage that may give rise to conflicts of interests. For example, as noted above, the broker-dealer operator of an NMS Stock ATS may operate multiple trading centers, which operate as competing trading venues for the execution of trades in NMS stocks. Many broker-dealer operators or their affiliates trade proprietarily on the NMS Stock ATS. If a broker-dealer operator that operates an NMS Stock ATS is also able to trade on that NMS Stock ATS, there may be an incentive for the broker-dealer operator to operate its NMS Stock ATS in a manner that favors the trading activity of the broker-dealer operator's business units or affiliates. A broker-dealer operator of an NMS Stock ATS may provide its other business units or affiliates, who may be subscribers to the NMS Stock ATS, with access to certain services of the NMS Stock ATS that are not provided to other subscribers, which may result in trading advantages to those business units or affiliates.[366] The Commission preliminarily believes that market participants that subscribe and route orders to NMS Stock ATSs would want to know how a broker-dealer operator of an NMS Stock ATS treats subscriber orders versus orders of its business units or its affiliates. The Commission preliminarily believes that customers of the broker-dealer operator, who may also be subscribers to the NMS Stock ATS, would also want to better understand the circumstances in which the broker-dealer operator may send their orders to its NMS Stock ATS, internalize their orders outside of the NMS Stock ATS, or route to another trading venue.

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[366] Such benefits or other advantages could include the NMS Stock ATS providing itself or its affiliates with faster access to the NMS Stock ATS or priority in executions over other subscribers. Unlike registered national securities exchanges, ATSs are not required to have rules that are designed not to permit unfair discrimination; however, the advantages that a broker-dealer operator may provide to itself or its affiliates may not be fully disclosed to subscribers to an ATS.

Concerns regarding potential conflicts of interests involving trading venues that execute securities transactions are not novel.[367] In the context of national securities exchanges, the Commission has expressed concern that the affiliation of a registered national securities exchange with one of its members raises potential conflicts of interest, and the potential for unfair competitive advantage.[368] Because the Commission reviews the rules of registered national securities exchanges, a process which requires, among other things, that to approve certain rule changes the Commission find that the exchange's proposed rule changes are consistent with the Exchange Act,[369] each existing national securities exchange has implemented

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367 See, e.g., Securities Exchange Act Release Nos. 50700, 69 FR 71256, 71257 (December 8, 2004) (discussing the inherent conflicts of interest between a self-regulatory organization's regulatory obligations and the interests of its members, its market operations, its listed issuers, and, in the case of a demutualized SRO, its shareholders); 50699, 69 FR 71126 (December 8, 2004) (proposing rules that the Commission believed would help insulate the regulatory activities of an exchange or national securities association from the conflicts of interest that otherwise may arise by virtue of its market operations); 63107, 75 FR 65882 (October 26, 2010) (proposing Regulation MC under the Exchange Act to mitigate conflicts of interest regarding ownership interests and voting rights with respect to security-based swap clearing agencies, security-based swap execution facilities, and security-based swap exchanges pursuant to the Dodd Frank Act, Pub. L. No. 111-203, Section 765).

368 See, e.g., Securities Exchange Act Release Nos. 66808 (April 13, 2012) 77 FR 23294 (April 18, 2012)(SR-BATS-2012-013) (order approving a proposed rule change by BATS Exchange, Inc. ("BATS Exchange") relating to its ability to receive inbound routes of equities orders through BATS Trading, Inc., BATS Exchange's routing broker-dealer, from BATS-Y Exchange, Inc.) at 23295 n.16 and accompanying text; 59281 (January 22, 2009), 74 FR 5014 (January 28, 2009) (SR-NYSE-2008-120) (order approving a joint venture between NYSE and BIDS Holdings L.P.) ("NYSE/BIDS Order"); 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR-NASDAQ-2006-006) (order approving Nasdaq's proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members) ("Nasdaq Affiliation Order"); and 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving the combination of the New York Stock Exchange, Inc. and Archipelago Holdings, Inc.) ("NYSE/Arca Order").

369 See 15 U.S.C. 78s(b).

rules that restrict affiliation between the national securities exchange and its members to mitigate the potential for conflicts of interest.[370]

In the context of a national securities exchange's affiliation with one of its members, the Commission's concerns stem from, among other things, the potential for unfair competitive advantages that the affiliated member could have by virtue of informational or operational advantages or the ability to receive preferential treatment.[371] These same concerns are present in the context of trading by the broker-dealer operator, or its affiliates, on the ATS that the broker-dealer operator operates. For example, the potential exists for the broker-dealer operator of an NMS Stock ATS to place its commercial interests, or those of its affiliates, before those of

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370 For example, registered national securities exchanges have rules that prevent the national securities exchange from being affiliated with a member of the exchange, or with an affiliate of a member of the exchange, absent Commission approval. See, e.g., NYSE Rule 2B, which provides, in part, that: "Without prior SEC approval, the [New York Stock Exchange LLC ("NYSE")] or any entity with which it is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in a member organization. In addition, a member organization shall not be or become an affiliate of the [NYSE], or an affiliate of any affiliate of the [NYSE] . . . ." See also Nasdaq Rule 2160, and BZX Rule 2.10. In cases where the Commission has approved exceptions to this prohibition, there have been limitations and conditions on the activities of the exchange and its affiliated member designed to address concerns about potential conflicts of interest and unfair competitive advantage. See, e.g., Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10-182) (In the Matter of the Application of BATS Exchange, Inc. for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission), at 49502 n.90-94 and accompanying text (approving the affiliation between BATS Exchange and its affiliated member BATS Trading in connection with the provision of routing services by BATS Trading for BATS Exchange and subject to certain limitations and conditions).

371 See, e.g., Nasdaq Affiliation Order, supra note 368, at 42151. The Commission's concern with respect to a national securities exchange's affiliation with one of its members also stemmed from the possible conflicts of interest that could arise between a national securities exchange's self-regulatory obligations and its commercial interest. See id. Because ATSs are not SROs, and therefore do not have self-regulatory obligations, this particular concern is not present in the context of ATSs.

subscribers that route orders to the NMS Stock ATS directly or indirectly through the broker-dealer operator of the NMS Stock ATS or its affiliates. Some of the settled enforcement actions against ATSs that trade NMS stocks highlight this potential.[372] Therefore, as explained further below, the Commission proposes to require NMS Stock ATSs to disclose information about certain aspects of the activities of the NMS Stock ATS's broker-dealer operator, and its affiliates,

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[372] See, e.g., In the Matter of ITG Inc. and Alternet Securities Inc., Securities Exchange Act Release No. 75672 (Aug. 12, 2015), available at https://www.sec.gov/litigation/admin/2015/33-9887.pdf (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order) ("ITG Settlement"); In the Matter of UBS Securities LLC, Securities Exchange Act Release No. 74060 (Jan. 15, 2015), available at http://www.sec.gov/litigation/admin/2015/33-9697.pdf (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order) ("UBS Settlement"); In the Matter of Lavaflow, Inc., Securities Exchange Act Release No. 72673 (Jul. 25, 2014), available at http://www.sec.gov/litigation/admin/2014/34-72673.pdf (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order) ("LavaFlow Settlement"); In the Matter of Liquidnet, Inc., Securities Exchange Act Release No. 72339 (Jun. 6, 2014), available at http://www.sec.gov/litigation/admin/2014/33-9596.pdf (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order) ("Liquidnet Settlement"); In the Matter of eBX, LLC, Securities Exchange Act Release No. 67969 (Oct. 3, 2012), available at http://www.sec.gov/litigation/admin/2012/34-67969.pdf (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order) ("LeveL Settlement"); In the Matter of Pipeline Trading Systems LLC, Fred J. Federspiel, and Alfred R. Berkeley III, Securities Exchange Act Release No. 9271 (Oct. 24, 2011) (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order), available at https://www.sec.gov/litigation/admin/2011/33-9271.pdf ("Pipeline Settlement"); In the Matter of INET ATS, Inc., Securities Exchange Act Release No. 53631 (Apr. 12, 2006), available at https://www.sec.gov/litigation/admin/2006/34-53631.pdf (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order); and In the Matter of BRUT, LLC, Securities Exchange Act Release No. 48718 (Oct. 30, 2003), available at http://www.sec.gov/litigation/admin/34-48718.htm (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order).

in connection with the NMS Stock ATS, to help market participants assess potential conflicts of interest that may adversely impact their trading on the NMS Stock ATS.

Finally, due to the overlap between the operation of NMS Stock ATSs and the other operations of broker-dealer operators, the Commission is concerned that market participants have limited information about how the operations of the broker-dealer operator's business units or its affiliates may give rise to information leakage of subscribers' confidential trading information among those business units or affiliates. For instance, if a proprietary trading desk of the broker-dealer operator is able to enter orders or other trading interest to the NMS Stock ATS, that trading desk may have means to see the incoming order flow of unaffiliated subscribers to the NMS Stock ATS. Furthermore, as demonstrated by several enforcement actions, a broker-dealer operator may at times provide some subscribers—including its business units or those of its affiliates—access to certain trading information that it does not provide to others.[373] Accordingly, the Commission preliminarily believes that the disclosure of certain information about the activities of the broker-dealer operator and its affiliates with respect to the NMS Stock ATS would enable market participants to better assess whether the potential for information leakage exists. The Commission preliminarily believes that such disclosures would help a market participant independently evaluate whether submitting order flow to a particular NMS Stock ATS aligns with its business interests and would help it achieve its investing or trading objectives.

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[373] See id.

B. Disclosures Required under Part III of Proposed Form ATS-N

Part III of proposed Form ATS-N would require that broker-dealer operators of NMS Stock ATSs include, as applicable, disclosures that pertain to the broker-dealer operator and its affiliates of an NMS Stock ATS. The Commission preliminarily believes that these proposed disclosure requirements would help ensure that market participants and the Commission are adequately informed about: (1) the operation of the NMS Stock ATS—regardless of the corporate structure of the NMS Stock ATS and that of its broker-dealer operator, or any arrangements the broker-dealer operator may have made, whether contractual or otherwise, pertaining to the operation of its NMS Stock ATS; and (2) any potential conflicts of interest the broker-dealer operator may have with respect to the operation of its NMS Stock ATS.

The Commission has also considered other alternatives to address the potential conflicts of interest between NMS Stock ATSs and their broker-dealer operators.[374] For example, the Commission could require an NMS Stock ATS to operate as a "stand-alone" entity having no affiliation with any broker-dealer that seeks to execute proprietary or agency orders in the NMS Stock ATS. This alternative would eliminate any potential conflicts of interest by requiring a broker-dealer that operates an NMS Stock ATS to have only a single business function—operating the NMS Stock ATS—and eliminating any other functions, such as trading on a proprietary basis or routing customer orders. As another alternative, and short of requiring NMS Stock ATSs to operate on a stand-alone basis, the Commission could continue to permit broker-dealer operators to continue to act as a broker-dealer operator of an NMS Stock ATS and engage in non-ATS functions while imposing new requirements designed to limit potential conflicts.

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[374] See Section.XIII.D.7 for a further discussion of alternatives to address potential conflicts of interest.

The Commission preliminarily believes that the above alternatives could be significantly more intrusive and substantially affect or limit the current operations of ATSs that trade NMS stocks relative to requiring additional disclosures about the operations of the broker-dealer operator and its affiliates, and therefore is not proposing such alternatives at this time. The Commission is instead proposing that NMS Stock ATSs and their broker-dealer operators provide additional disclosures, both to the Commission and the public, about how they interact.

Request for Comment

150. Do you believe that it is necessary to have some understanding of the broader activities of the broker-dealer operator and its affiliates in order to understand and evaluate the operation of an NMS Stock ATS? Why or why not? Please support your arguments.

151. Do you believe that conflicts of interest could arise from a broker-dealer's operation of an NMS Stock ATS? Why or why not? If so, please explain what these conflicts of interest are. Do you believe that potential conflicts of interest should be disclosed to the public? Why or why not? Please support your arguments.

152. Do you believe that certain conflicts of interest arising out of the broker-dealer's operation of the NMS Stock ATS should be prohibited? Why or why not? Please support your arguments.

153. Do you believe that the Commission should adopt an alternative approach, either those described above or any other alternative, such as a prohibition, regarding potential conflicts of interest arising from a broker-dealer's operation of an NMS

Stock ATS? Why or why not? Please support your arguments. If so, what approach should the Commission adopt? Please be specific.

154. Do you believe that the Commission should require information barriers between the ATS and non-ATS business units of the broker-dealer operator? Why or why not? Please support your arguments.

155. Do you believe that the Commission should require an NMS Stock ATS to operate as a "stand-alone" entity and have no affiliation with any broker-dealer that seeks to execute proprietary or agency orders in the ATS? Why or why not? Please support your arguments. Do you believe that the proposed disclosures on Form ATS-N would help broker-dealers better assess whether the routing of their customers' orders to a particular NMS Stock ATS fulfills the broker-dealer's duty of best execution?[375] Why or why not? Please support your arguments.

156. Do you believe that the proposed disclosures on Form ATS-N would help customers of broker-dealers to better evaluate whether their broker-dealer is fulfilling its duty of best-execution with respect to orders routed to NMS Stock ATSs? Why or why not? Please support your arguments.

1. Proposed Definitions of "Affiliate" and "Control"

For the purposes of the proposed disclosures regarding affiliates of the broker-dealer operator, the Commission is proposing to define the term "affiliate" to mean "with respect to a specified person, any person that directly, or indirectly, controls, is under common control with,

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375 See supra notes 36-40 and accompanying text (relating to the duty of best execution).

or is controlled by, the specified person."[376] This proposed definition is consistent with the definition of an "affiliate" for the purposes of Form 1 disclosures,[377] and relates closely to the definition of a similar term under Regulation ATS.[378]

The Commission also proposes to amend the existing definition of the term "control" under Regulation ATS to add the phrase "the broker-dealer of" before the two instances of the phrase "an alternative trading system" and before the phrase "the alternative trading system" in subsections (2) and (3) of the definition.[379] As proposed to be amended, "control" would mean "the power, directly or indirectly, to direct the management or policies of the broker-dealer of an alternative trading system, whether through the ownership of securities, by contract, or otherwise. A person is presumed to control the broker-dealer of an alternative trading system, if that person (1) is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); (2) directly or indirectly has the right to vote 25% or more of a class of voting securities or has the power to sell or direct the sale of 25% or more of a class of voting securities of the broker-dealer of the alternative trading system; or (3) in the case of a partnership, has contributed, or has the right to receive, upon dissolution, 25% or more of the capital of the broker-dealer of the alternative trading system."[380] The purpose of these amendments to the definition of control under Regulation ATS is to make clear that,

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376 See Instruction G to proposed Form ATS-N.

377 See Instruction B to Form 1; 17 CFR 249.1.

378 See 17 CFR 242.300(c) (defining affiliate of a subscriber as any person that, directly or indirectly, controls, is under common control with, or is controlled by, the subscriber, including any employee).

379 17 CFR 242.300(f).

380 See id. and Instruction G to proposed Form ATS-N.

because an ATS must register as a broker-dealer, control of the broker-dealer of the ATS is control of the ATS, and that the broker-dealer (also referred to as the broker-dealer operator) is legally responsible for all operational aspects of the ATS and for ensuring that the ATS complies with applicable federal securities laws and the rules and regulations thereunder, including Regulation ATS.

The proposed disclosures of affiliate activities under Part III of proposed Form ATS-N are designed to provide market participants and the Commission with a comprehensive understanding of the potential conflicts of interest that may arise from the broker-dealer operator's other business activities and its operation of the NMS Stock ATS. Under the proposed definition of "affiliate" and amended definition of "control," any affiliate of the broker-dealer operator of the NMS Stock ATS would be an affiliate of the NMS Stock ATS.[381] The Commission preliminarily believes that the proposed definition of an "affiliate" and amended definition of "control" would cover entities that have a close relationship with the broker-dealer operator and whose activities could raise potential conflicts of interest, or could otherwise be relevant to market participants in evaluating an NMS Stock ATS. Extending the proposed disclosures to affiliates of the broker-dealer operator could also reduce the potential for an entity to structure its organization in a way that would not provide complete disclosure of information in response to Part III of proposed Form ATS-N. The Commission notes that the proposed disclosures related to affiliates extends to persons that control, are controlled by, or are under

[381] The instructions in proposed Form ATS-N would require an NMS Stock ATS to provide the identity of affiliates and business units of the broker-dealer operator, provide the name under which each affiliate or business unit conducts business (e.g., the formal name under which a proprietary trading desk of the broker-dealer operator conducts business) and the applicable CRD number and MPID(s) under which the affiliate or business unit conducts business.

common control with the broker-dealer operator, and, as a result, parallels the disclosures related to "control affiliates" that are required in Form BD, to which broker-dealer operators are already subject.[382]

Request for Comment

157. Should the Commission adopt the proposal to define "affiliate" for purposes of proposed Form ATS-N as, with respect to a specified person, any person that, directly or indirectly, controls, is under common control with, or is controlled by, the specified person? Why or why not? Please support your arguments. Do you believe that the Commission should adopt a more limited or expansive definition of an "affiliate"? Why or why not? Please support your arguments. What advantages or disadvantages might result from a more limited or expansive definition of an affiliate? Please support your arguments.

158. Do you believe that the Commission should use the definition of an "affiliated person" as defined in the Exchange Act for purposes of proposed Rule 304?[383] Why or why not? Please support your arguments. If so, do you believe that the

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382 See Form BD at 2 (defining "control affiliate").

383 Under the Exchange Act, an "affiliated person" of another person means: (A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting securities of such other person; (B) any person 5 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner, or employee of such other person; (E) if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and (F) if such other person is an unincorporated investment company not having a board of directors, the depositor thereof. 15 U.S.C. 78c(a)(19); 15 U.S.C. 80a-2(a)(3).

Commission should require disclosures about the activities of affiliated persons of the NMS Stock ATS, and/or affiliated persons of an affiliated person of an NMS Stock ATS? Why or why not? Please support your arguments.

159. Do you believe that the proposed amendments to the definition of "control" under Regulation ATS are appropriate in this context? Do you believe the Commission should adopt a more limited or expansive definition of "control"? Why or why not? Please support your arguments.

160. Do you believe the voting interest or partnership interest thresholds for "control" of an entity (i.e., 25% or more) should be higher or lower for purposes of Rule 304? For example, should the voting interest or partnership interest threshold for control of an entity to be presumed be 5%, 10%, 15%, 30%, or 50% for purposes of Rule 304? If so, what is the appropriate percentage threshold and why would such alternate percentage threshold be more appropriate? Please support your arguments.

161. Do you believe that the definition of "control" should deem an affiliate of the broker-dealer of the NMS Stock ATS to be an affiliate of the NMS Stock ATS, such that the ATS would be subject to all of the proposed disclosures relating these entities? Should the definition of "control" be amended? If so, how should it be amended? Please support your arguments.

162. Do you believe that the information required to be filed on proposed Form ATS-N about affiliates of the NMS Stock ATS would provide useful information to market participants? Why or why not? Please support your arguments.

163. Do you believe that the Commission should require that the MPID and/or CRD number for affiliates and business units of the broker-dealer operator be disclosed on proposed Form ATS-N? Would such disclosure help market participants identify the broker-dealer operator's affiliates and business units? Why or why not? Please support your arguments.

2. Non-ATS Trading Centers of the Broker-Dealer Operator

Part III, Item 1 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether the broker-dealer operator or any of its affiliates operate or control any non-ATS trading center(s)[384] that is an OTC market maker or executes orders in NMS stocks internally by trading as principal or crossing orders as agent ("non-ATS trading centers"),[385] and if so, to (1) identify

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384 A trading center is defined under Regulation NMS as a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent. 17 CFR 242.600(b)(78). The Commission preliminarily believes that the last two components of the definition of a trading center (i.e., an OTC market maker and any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent) are the trading centers for which conflicts of interests of the broker-dealer operator and its affiliates are relevant, as such trading centers operate as competing venues for the execution of NMS stock over-the-counter.

385 References to non-ATS trading centers, as used herein, encompass all executions that occur off of an exchange and outside of an ATS, including when a broker-dealer is acting as an OTC market-maker, block positioner (i.e., any broker-dealer in the business of executing, as principal or agent, block size trades for its customers), or operation of an internal broker-dealer system. See 17 CFR 242.600(b)(52) (defining "OTC market maker" as any dealer that holds itself out as being willing to buy and sell to its customers, or others, in the United States, an NMS stock for its own account on a regular or continuous basis otherwise than on a national securities exchange in amounts of less than block size); 17 CFR 242.600(b)(9) (defining "block size" as an order of at least 10,000 shares or for a quantity of stock having a market value of at least $200,000); and 17 CFR 240.17a-3(a)(16)(ii)(A) (defining "internal broker-dealer system" as any facility, other than a national securities exchange, an exchange exempt from registration based on limited volume, or an alternative trading system as defined in Regulation ATS that

the non-ATS trading center(s); and (2) describe any interaction or coordination between the identified non-ATS trading center(s) and the NMS Stock ATS including: (i) circumstances under which subscriber orders or other trading interest (such as quotes, indications of interest ("IOI"), conditional orders or messages (hereinafter collectively referred to as "trading interest")) sent to the NMS Stock ATS are displayed or otherwise made known to the identified non-ATS trading center(s) identified in Item 1(a) before entering the NMS Stock ATS; (ii) circumstances under which subscriber orders or other trading interest received by the broker-dealer operator or its affiliates may execute, in whole or in part, in the identified non-ATS trading center identified in Item 1(a) before entering the NMS Stock ATS; and (iii) circumstances under which subscriber orders or other trading interest are removed from the NMS Stock ATS and sent to the identified non-ATS trading center(s).[386]

The Commission is aware that many broker-dealer operators of ATSs that currently trade NMS stocks facilitate the execution of NMS stock outside of their ATSs.[387] As discussed above, a broker-dealer operator is permitted to engage in broker or dealer activities independent of its operation of an ATS, such as operating proprietary trading desks; the proposed rules do not eliminate or otherwise restrict such activities. The Commission, however, is proposing to require

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provides a mechanism, automated in full or in part, for collecting, receiving, disseminating, or displaying system orders and facilitating agreement to the basic terms of a purchase or sale of a security between a customer and the sponsor, or between two customers of the sponsor, through use of the internal broker-dealer system or through the broker or dealer sponsor of such system). See also 2010 Equity Market Structure Release, supra note 124, at 3599-3600.

386 See Part III, Item 1 of proposed Form ATS-N.

387 See, e.g., Laura Tuttle, Over-the-Counter Trading: Description of Non-ATS OTC Trading in National Market System Stocks (March 2014), available at http://www.sec.gov/dera/staff-papers/white-papers/otc-trading-white-paper-03-2014.pdf.

the public disclosure on proposed Form ATS-N of such activities as they relate to the NMS Stock ATS. As noted above, the Commission preliminarily believes that circumstances could arise whereby a broker-dealer operator of an NMS Stock ATS may place the interests of its or its affiliates' non-ATS trading center ahead of the interests of the operations of the NMS Stock ATS and its subscribers. The Commission recognizes the sensitive nature of the confidential trading information of subscribers to an ATS and the potential for its misuse. The Commission preliminarily believes that non-ATS trading centers of a broker-dealer operator of an NMS Stock ATS or its affiliates may have incentives, and the opportunity to access, NMS Stock ATS subscriber orders received by the broker-dealer operator, which may result in information leakage.

Furthermore, the Commission preliminarily believes that subscribers to NMS Stock ATSs currently have limited information about the various non-ATS trading centers operated by an NMS Stock ATS broker-dealer operator, or its affiliates, and the extent to which the operations of these non-ATS trading centers may interact with subscriber orders or other trading interest sent to the NMS Stock ATS. Orders or other trading interest sent by subscribers to the NMS Stock ATS may pass through the broker-dealer operator's systems or functionality before being entered into the NMS Stock ATS. Such systems and functionalities, which could include a common gateway function, algorithm, or smart order router, may be used to support the broker-dealer operator's other business units, including any non-ATS trading centers. The broker-dealer operator typically controls the logic contained in these systems or functionality that determines where an order that the broker-dealer receives will be handled or sent. The Commission preliminarily believes that it would be helpful for NMS Stock ATS subscribers to know the extent to which subscriber orders received by the broker-dealer operator may interact, or be

handled in any coordinated manner, with a non-ATS trading center of that broker-dealer operator or its affiliates.[388] In addition, Form ATS-N would require the disclosure of circumstances under which subscriber orders or other trading interest received by the broker-dealer operator may execute, in whole or in part, in a non-ATS trading center(s) operated by the broker-dealer operator or its affiliates before entering the NMS Stock ATS; the circumstances under which subscriber orders or other trading interest would be displayed or otherwise made known to the systems or personnel operating the non-ATS trading center(s); and the circumstances under which subscriber orders or other trading interest are removed from the NMS Stock ATS and sent to the non-ATS trading center(s) for execution. To the extent that the broker-dealer operator or its affiliates operate a non-ATS trading center(s), but NMS Stock ATS subscribers' orders could not execute, route, or otherwise be shared with that non-ATS trading center(s), the NMS Stock ATS could note this fact in Part III, Item 1 of proposed Form ATS-N.

The disclosures in Part III, Item 1 of proposed Form ATS-N are designed to reduce information asymmetries between subscribers and the broker-dealer operator regarding the

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[388] As noted above, the Commission is aware that most of the broker-dealer operators of ATSs that currently trade NMS stocks also facilitate the execution of NMS stocks in non-ATS trading centers outside of the NMS Stock ATS. See supra note 362 and accompanying text. In October of 2013, the Commission and its staff estimated that about 16.99% of total dollar volume (18.75% of share volume) of NMS stocks is executed over-the-counter ("OTC") without the involvement of an ATS. In contrast, the Commission and its staff estimated that ATSs comprise 11.31% of total dollar volume (12.04% of share volume). See Tuttle: ATS Trading in NMS Stocks, supra note 126, at 2. Given that a greater percentage of OTC executions in NMS stock occur outside of ATSs rather than inside of ATSs, the Commission preliminarily believes that some disclosure of the presence of these non-ATS trading centers is appropriate. Accordingly, to the extent that an NMS Stock ATS subscriber's orders may execute, be displayed, or otherwise made known in a non-ATS trading center operated by or affiliated with the broker-dealer operator, the Commission preliminarily believes that disclosure of such possibility would be relevant to market participants in deciding whether to subscribe or route orders to a particular NMS Stock ATS.

operation of the NMS Stock ATS and competing venues for the execution of NMS stock transactions (i.e., non-ATS trading centers) that the broker-dealer operator operates and the circumstances in which the broker-dealer operator may handle or choose to execute subscriber orders outside of the NMS Stock ATS that might otherwise have been sent to the NMS Stock ATS.

Request for Comment

164. Do you believe the Commission should require the disclosure of the information on Part III, Item 1 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

165. Do you believe Part III, Item 1 of proposed Form ATS-N captures the information regarding non-ATS trading centers operated or controlled by the broker-dealer operator or any of its affiliates that is most relevant to understanding the operations of the NMS Stock ATS? Why or why not? Please support your arguments.

166. Do you believe there is other information that market participants might find relevant or useful regarding non-ATS trading centers operated or controlled by the broker-dealer operator or any of its affiliates? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

167. Do you believe that Part III, Item 1 of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required? If not, how should Part III, Item 1 of proposed Form ATS-N be revised to provide additional clarity? Please explain in detail.

168. Do you believe that the non-ATS trading centers operated by the broker-dealer operator or its affiliates could raise potential conflicts of interest? Why or why not? If so, do you believe that such potential conflicts of interest should be disclosed? Please support your arguments.

169. Part III, Item 1 of proposed Form ATS-N would require disclosure about the non-ATS trading center activities of affiliates of the broker-dealer operator. Do you believe that disclosure about the activities of the broker-dealer operator's affiliates in this context is necessary? Why or why not? Should disclosure of non-ATS trading center activities extend to more remote affiliates under a revised definition of "affiliate"?[389] Should disclosure of non-ATS trading center activities apply to a more limited set of affiliates? Why or why not? Please support your arguments.

170. What are the potential costs and benefits of disclosing the information required by Part III, Item 1 of proposed Form ATS-N? Do you believe the proposed disclosures in Part III, Item 1 have the potential to impact innovation? Why or why not? Do you believe that the proposed disclosures in Part III, Item 1 of proposed Form ATS-N would require broker-dealer operators of NMS Stock ATSs to reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

171. Do you believe there is other information that market participants might find relevant or useful regarding the disclosure of non-ATS trading centers operated by the broker-dealer operator or its affiliates? If so, describe such information

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389 See, e.g., supra note 383 and accompanying text.

and explain whether or not such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

172. Do you believe there is any information regarding the non-ATS trading centers of the broker-dealer operator or its affiliates that should not be required to be disclosed on proposed Form ATS-N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

173. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 1 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 1?

3. Multiple NMS Stock ATS Operations of the Broker-Dealer Operator

Part III, Item 2 of proposed Form ATS-N would require an NMS Stock ATS to state whether the broker-dealer operator, or any of its affiliates, operates one or more NMS Stock ATSs other than the NMS Stock ATS named on the Form ATS-N, and, if so, to (1) identify the NMS Stock ATS(s) and provide its MPID(s); and (2) describe any interaction or coordination between the identified NMS Stock ATS(s) and the NMS Stock ATS named on the Form ATS-N including: (i) the circumstances under which subscriber orders or other trading interest received by the broker-dealer operator or its affiliates to be sent to the NMS Stock ATS named on the Form ATS-N may be sent to any identified NMS Stock ATS(s); (ii) circumstances under which subscriber orders or other trading interest to be sent to the NMS Stock ATS named on the Form ATS-N are displayed or otherwise made known in any other identified NMS Stock ATS(s); and

(iii) the circumstances under which subscriber orders or other trading interest received by the NMS Stock ATS named on the Form ATS-N may be removed and sent to any other identified NMS Stock ATS(s).[390]

The Commission is aware that some broker-dealer operators operate multiple ATSs that trade NMS stocks and that subscriber orders or other trading interest received by such broker-dealer operators could be routed between those NMS Stock ATSs. The Commission preliminarily believes that—similar to the potential conflicts of interest that may arise or information leakage that may occur when a broker-dealer operator, or its affiliate, operates or controls a non-ATS trading center—circumstances might arise whereby a broker-dealer that operates multiple NMS Stock ATSs may place its interests ahead of the interests of subscribers of one or more of its NMS Stock ATSs.[391] To the extent that the broker-dealer operator or its affiliates operate multiple NMS Stock ATSs, but the subscribers' orders of the NMS Stock ATS named in the Form ATS-N filing could not execute, route, be displayed, or otherwise made known to the NMS Stock ATS(s) identified in Item 2(a) of proposed Form ATS-N, the NMS Stock ATS could note this fact in Part III, Item 2 of proposed Form ATS-N.

Therefore, under Part III, Item 2 of proposed Form ATS-N, a broker-dealer operator that operates multiple NMS Stock ATSs would be required to disclose how these trading venues interact with one another, if at all. To the extent that a broker-dealer operator could allocate subscriber orders it receives among the various NMS Stock ATSs that it or its affiliates operate, the broker-dealer operator would be required to describe how it determines such allocation in

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390 See Part III, Item 2 of proposed Form ATS-N.

391 See supra note 366.

response to Item 2. For example, a broker-dealer operator may send all subscriber orders that it receives first to one of its NMS Stock ATSs, and if there is no execution after a certain period of time, the orders may then be routed directly to a second NMS Stock ATS operated by the broker-dealer operator or its affiliates, or may be returned to the broker-dealer operator (or its SOR or similar functionality), and may then be routed to a non-affiliated NMS Stock ATS for execution. Similarly, an NMS Stock ATS would be required to describe the circumstances under which subscriber orders on the NMS Stock ATS might be removed from the NMS Stock ATS and routed to another NMS Stock ATS that is operated by that broker-dealer operator or its affiliates.[392]

The Commission preliminarily believes that subscribers to NMS Stock ATSs currently have limited information about the extent to which the operations of other ATSs operated by the same broker-dealer operator, or its affiliates, may interact with their orders sent to the NMS Stock ATS. Specifically, because subscriber orders received by a broker-dealer operator could be sent to multiple NMS Stock ATSs operated by that broker-dealer operator, the Commission preliminarily believes that subscribers should be provided with a better understanding of how their orders may interact, if at all, with multiple NMS Stock ATSs operated by the same broker-dealer operator or its affiliates. The proposed disclosures in Part III, Item 2 of proposed Form ATS-N are designed to help subscribers evaluate potential conflicts of interest for the broker-dealer operator or the potential for information leakage in connection with multiple NMS Stock

[392] As is the case with the proposed disclosures under Part III, Item 1 of proposed Form ATS-N in regard to non-ATS trading centers, Part III, Item 2 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether any affiliates of the broker-dealer operator operates an NMS Stock ATS. This disclosure is designed to elicit certain information about the relationship of related NMS Stock ATSs, regardless of the organizational structure of the broker-dealer operator and its affiliates.

ATSs that the broker-dealer operator, or its affiliates, operates.[393] Accordingly, the Commission preliminary believes that the disclosures required under Part III, Item 2 of proposed Form ATS-N would provide market participants with better information about how orders would be handled by a broker-dealer operator that operates multiple NMS Stock ATSs and the potential conflicts of interest and potential for information leakage that might arise as a result of such a business structure.

Request for Comment

174. Do you believe the Commission should require the disclosure of the information on Part III, Item 2 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

175. Do you believe Part III, Item 2 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding any other NMS Stock ATSs (other than the one named on the Form ATS-N) operated or controlled by the broker-dealer operator or any of its affiliates? Why or why not? Please support your arguments.

176. Do you believe that Part III, Item 2 of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required? If not, how should Part III, Item 2 of proposed Form ATS-N be revised to provide additional clarity? Please explain.

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393 The Commission notes that a broker-dealer operator may have valid business reasons for operating multiple NMS Stock ATSs, and the Commission is not proposing to limit the ability for a broker-dealer operator to operate multiple NMS Stock ATSs. For example, the broker-dealer operator may establish several NMS Stock ATSs so that each NMS Stock ATS offers subscribers specific trading services (block order executions) or other particular trading functionalities (e.g., an auction mechanism or a limit order book).

177. Do you believe that the operation of multiple NMS Stock ATSs by the broker-dealer operator or its affiliates could raise potential conflicts of interest? Why or why not? If so, do you believe that such potential conflicts of interest should be disclosed? Please support your arguments.

178. Do you believe that the information that would be solicited by Part III, Item 2 of proposed Form ATS-N would be useful to market participants in deciding whether the participate on an NMS Stock ATS? Why or why not? Please support your arguments.

179. Part III, Item 2 of proposed Form ATS-N would require disclosure of whether the affiliates of the broker-dealer operator operate an NMS Stock ATS (other than the NMS Stock ATS filing the Form ATS-N). Do you believe that disclosure about affiliates of the broker-dealer operator in this context is necessary? Why or why not? Should disclosure of affiliates that operate another NMS Stock ATS be extended to more remote affiliates under a revised definition of "affiliate"?[394] Should disclosure apply to a more limited set of affiliates? Why or why not? Please support your arguments.

180. What are the potential costs and benefits of disclosing the information required by Part III, Item 2 of proposed Form ATS-N? Do you believe the disclosures in Part III, Item 2 of proposed Form ATS-N would have the potential to impact innovation? Why or why not? Would the proposed disclosures in Part III, Item 2 of proposed Form ATS-N require broker-dealer operators of NMS Stock ATSs to

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394 See, e.g., supra note 383 and accompanying text.

reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

181. Do you believe there is other information that market participants might find relevant or useful regarding the operation of multiple NMS Stock ATSs by a broker-dealer operator or its affiliate? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

182. Do you believe that the Commission should require NMS Stock ATSs to disclose the names of any non-NMS stock ATSs that are operated by its broker-dealer operator or one of its broker-dealer operator's affiliates? Why or why not? If so, what information should the NMS Stock ATS be required to disclose about such non-NMS stock ATSs? Please support your arguments.

183. Do you believe there is any information regarding the multiple NMS Stock ATS operations of a broker-dealer operator that the NMS Stock ATS should not be required to disclose on proposed Form ATS-N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please explain.

184. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 2 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 2?

4. Products or Services Offered to Subscribers by the Broker-Dealer Operator

Part III, Item 3 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether the broker-dealer operator, or any of its affiliates, offer subscribers of the NMS Stock ATS any products or services used in connection with trading on the NMS Stock ATS (e.g., algorithmic trading products, market data feeds). If so, the NMS Stock ATS would be required to describe the products and services and identify the types of subscribers (e.g., retail, institutional, professional) to which such services or products are offered, and if the terms and conditions of the services or products are not the same for all subscribers, describe any differences.[395]

Based on the Commission's experience, broker-dealer operators of NMS Stock ATSs may, directly or indirectly through an affiliate, offer products or services to subscribers in addition to the trading services of the NMS Stock ATS. For example, a broker-dealer operator may offer subscribers the use of an order management system to allow them to connect to or send orders or other trading interest to the NMS Stock ATS. Some broker-dealer operators may also offer subscribers the use of algorithmic trading strategies, which are computer assisted trading tools that, for instance, may be used by or on behalf of institutional investors to execute orders that are typically too large to be executed all at once without excessive price impact, and divide the orders into many small orders that are fed into the marketplace over time.[396] In some cases, a broker-dealer operator offering products or services in connection with a subscriber's

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395 See Part III, Item 3 of proposed Form ATS-N.

396 See Staff of the Division of Trading and Markets, Commission, "Equity Market Structure Literature Review, Part II: High Frequency Trading," at 5 (March 18, 2014), available at http://www.sec.gov/marketstructure/research/hft_lit_review_march_2014.pdf.

use of the NMS Stock ATS may result in the subscribers receiving more favorable terms from the broker-dealer operator with respect to their use of the NMS Stock ATS. For example, if a subscriber purchases a service offered by the broker-dealer operator of an NMS Stock ATS, the broker-dealer operator might also provide that subscriber more favorable terms for their use of the NMS Stock ATS than other subscribers who do not purchase the service. Such favorable terms could include fee discounts or access to a faster connection line to the NMS Stock ATS. Additionally, a broker-dealer operator of an NMS Stock ATS may only offer certain products and services to certain subscribers or may offer products and services on different terms to different categories of subscribers. The Commission preliminarily believes that market participants would want to know, when assessing an NMS Stock ATS as a potential trading venue, the range of services or products that the broker-dealer operator or its affiliates may offer subscribers of the NMS Stock ATS because such services or products may have an impact on the subscribers' access to, or trading on, the NMS Stock ATS.

Request for Comment

185. Do you believe the Commission should require the disclosure of the information on Part III, Item 3 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

186. Do you believe Part III, Item 3 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding other products or services offered to subscribers used in connection with trading on the NMS Stock ATS by the broker-dealer operator or any of its affiliates? Why or why not? Please support your arguments.

187. Do you believe that Part III, Item 3 of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required? If not, how should Part III, Item 3 of proposed Form ATS-N be revised to provide additional clarity? Please explain in detail.

188. Do you believe there is other information that market participants might find relevant or useful regarding other products and services offered to subscribers by broker-dealer operators or their affiliates? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

189. Do you believe that the Commission should expand the proposed disclosures in Part III, Item 3 of proposed Form ATS-N to products or services offered by the broker-dealer operator or its affiliates that are offered to subscribers, but not necessarily offered in connection with transacting on the NMS Stock ATS? Why or why not? Please explain. Do you believe there is other information that market participants might find useful regarding the products or services offered to subscribers by the broker-dealer operator or its affiliates? If so, what information should be added to the disclosure requirements? Please explain.

190. What are the potential costs and benefits of disclosing the information required by Part III, Item 3 of proposed Form ATS-N? Do you believe the disclosures in Part III, Item 3 of proposed Form ATS-N would have the potential to impact innovation? Why or why not? Would the proposed disclosures in Part III, Item 3 of proposed Form ATS-N require broker-dealer operators of NMS Stock ATSs to

reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

191. Do you believe there is any information regarding the products or services offered to subscribers by the broker-dealer operator that the NMS Stock ATS should not be required to disclose on proposed Form ATS-N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

192. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 3 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 3?

5. Broker-Dealer Operator Arrangements with Unaffiliated Trading Centers

Part III, Item 4 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether the broker-dealer operator or any of its affiliates have any formal or informal arrangement with an unaffiliated person(s), or affiliate(s) of such person, that operates a trading center[397] regarding access to the NMS Stock ATS, including preferential routing arrangements. If so, the NMS Stock ATSs would be required to identify the person(s) and the trading center(s) and to describe the terms of the arrangement(s).[398]

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397 See supra note 384 (defining trading center).

398 See Part III, Item 4 of proposed Form ATS-N.

Part III, Item 4 of proposed Form ATS-N is designed to inform subscribers and the Commission about arrangements that may impact a subscriber's experience on the NMS Stock ATS and allow market participants to evaluate potential conflicts of interest of the broker-dealer operator. For example, Part III, Item 4 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether its broker-dealer operator has any arrangement with another unaffiliated NMS Stock ATS pursuant to which the NMS Stock ATS would route orders or other trading interest to the unaffiliated NMS Stock ATS for possible execution prior to routing to any other destination. Similarly, Part III, Item 4 of proposed Form ATS-N would require disclosure of an arrangement pursuant to which any subscriber orders routed out of the unaffiliated NMS Stock ATS would be routed first to the NMS Stock ATS before any other trading center, and would also require disclosure of the terms of the arrangement, for example, whether the NMS Stock ATS was providing monetary compensation or some other brokerage service to the unaffiliated NMS Stock ATS in exchange for the order flow.[399]

The Commission preliminarily believes that market participants would consider information about any arrangements between a broker-dealer operator of an NMS Stock ATS and other trading centers relevant to their evaluation of an NMS Stock ATS as a potential trading venue. The disclosure of such arrangements could reveal potential conflicts of interest of the broker-dealer operator or could identify potential sources of information leakage. For example, a potential conflict of interest could arise where an NMS Stock ATS has a preferred routing

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399 The Commission notes that a broker-dealer operator may have valid business reasons for it or its affiliates to have formal or informal arrangements with an unaffiliated person(s), or affiliate(s) of such person, that operates a trading center regarding access to the NMS Stock ATS. The Commission is not proposing to limit the ability for a broker-dealer operator to have such arrangements.

arrangement with an unaffiliated non-ATS trading center that provides that all orders sent to the NMS Stock ATS would first be routed to the unaffiliated non-ATS trading center before entering the NMS Stock ATS in exchange for monetary compensation. Such an arrangement could also pose a risk of information leakage in that the non-ATS trading center would know that those orders that it does not execute would be routed to the NMS Stock ATS.[400] Part III, Item 4 of proposed Form ATS-N would also require disclosure of mutual access arrangements between an NMS Stock ATS and other trading centers whereby, for example, a broker-dealer operator or its affiliates may offer access to its NMS Stock ATS in exchange for access to the NMS Stock ATS of another broker-dealer operator.

The Commission notes that an NMS Stock ATS would not be prohibited from establishing arrangements with other trading centers, provided that such arrangements comply with other applicable laws and rules, including applicable federal securities laws and Regulation ATS. However, the Commission preliminarily believes that market participants could benefit from disclosures about such arrangements and would use such information when determining whether to subscribe, or route orders, to a particular NMS Stock ATS. Additionally, the Commission preliminarily believes that disclosure of such arrangements would help the Commission perform its oversight functions by enabling it to better evaluate an NMS Stock ATS's compliance with the requirements of Regulation ATS, such as Rule 301(b)(10).

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400 Alternatively, if an arrangement between the NMS Stock ATS and unaffiliated trading center provided that any subscriber orders routed out of the NMS Stock ATS would be first routed to the unaffiliated non-ATS trading center, the NMS Stock ATS may have an incentive to remove subscribers' orders from the NMS Stock ATS and allow the unaffiliated non-ATS trading center the opportunity to execute those orders.

Request for Comment

193. Do you believe the Commission should require the disclosure of the information on Part III, Item 4 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

194. Do you believe Part III, Item 4 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding any formal or informal arrangement by the broker-dealer operator or any of its affiliates with an unaffiliated person(s), or affiliate(s) of such person, that operates a trading center[401] regarding access to the NMS Stock ATS, including preferential routing arrangements? Why or why not? Please support your arguments.

195. Do you believe that Part III, Item 4 of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required relating to access arrangements and preferred routing arrangements with other unaffiliated trading centers? If not, how should Part III, Item 4 of proposed Form ATS-N be revised to provide additional clarity? Please explain.

196. What are the potential costs and benefits of disclosing the information required by Part III, Item 4 of proposed Form ATS-N? Do you believe the disclosures in Part III, Item 4 of proposed Form ATS-N would have the potential to impact innovation? Why or why not? Would the proposed disclosures in Part III, Item 4 of proposed Form ATS-N require broker-dealer operators of NMS Stock ATSs to

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401 See supra note 384 (defining trading center).

reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

197. Do you believe that the Commission should include access arrangements of affiliates of the broker-dealer operator in Part III, Item 4 of proposed Form ATS-N? Why or why not? Please support your arguments. Conversely, should disclosures of arrangements with other trading centers by affiliates be extended to more remote affiliates under a revised definition of "affiliate"?[402] Should disclosure apply to a more limited set of affiliates? Why or why not? Please support your arguments.

198. Do you believe that the Commission should expand the proposed disclosure requirements to other arrangements beyond access and preferred routing that the broker-dealer operator or its affiliates might have with other trading centers? If so, what other arrangements do you believe should be disclosed? Please explain in detail.

199. Do you believe that the Commission should limit or expand in any way the proposed disclosure requirements to require disclosure of arrangements regarding access by the broker-dealer operator or its affiliates to both other trading centers and affiliates of those other trading centers? Why or why not? Please support your arguments.

200. Do you believe there is other information that market participants might find relevant or useful regarding the broker-dealer operator or its affiliates'

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402 See, e.g., supra note 383 and accompanying text.

arrangements with other trading centers? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

201. Do you believe there is any information regarding the broker-dealer operator or its affiliates' arrangements with other trading centers that the NMS Stock ATS should not be required to disclose on proposed Form ATS-N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

202. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 4 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 4?

6. Trading on the NMS Stock ATS by the Broker-Dealer Operator and its Affiliates

Part III, Item 5 of proposed Form ATS-N would require certain disclosures related to the trading activity of the broker-dealer operator or its affiliates on the NMS Stock ATS. Specifically, Part III, Item 5 of proposed Form ATS-N would require the NMS Stock ATS to disclose whether the broker-dealer operator, or any of its affiliates, enters orders or other trading interest on the NMS Stock ATS. If so, the NMS Stock ATS would be required to: (1) identify each affiliate and business unit of the broker-dealer operator that may enter orders or other trading interest on the NMS Stock ATS; (2) describe the circumstances and capacity (e.g., proprietary, agency) in which each identified affiliate and business unit enters orders or other trading interest on the NMS Stock ATS; (3) describe the means by which each identified affiliate

and business unit enters orders or other trading interest on the NMS Stock ATS (e.g., directly through a FIX connection to the NMS Stock ATS, or indirectly, by way of the broker-dealer operator's SOR (or similar functionality), algorithm, intermediate application, or sales desk); and (4) describe any means by which a subscriber can be excluded from interacting or trading with orders or other trading interest of the broker-dealer operator or its affiliates on the NMS Stock ATS.[403]

As noted above, Part III, Item 5(a) of proposed Form ATS-N would require the NMS Stock ATS to identify each affiliate and business unit (e.g., a sales desk or proprietary trading unit) and affiliate of the broker-dealer operator that can enter orders or other trading interest on the NMS Stock ATS. The Commission preliminarily believes that disclosure of whether a broker-dealer operator of an NMS Stock ATS or its affiliates may trade on that NMS Stock ATS would be important to subscribers with respect to the potential conflicts of interest that may arise from the unique position the broker-dealer operator occupies in relation to the NMS Stock ATS. If the person that operates and controls a trading center is also able to trade on that trading center, there may be an incentive to design the operations of the trading center to favor the trading activity of the operator of the trading center or affiliates of the operator.[404] The operator of a trading center that also trades on the trading center it operates would likely have informational advantages over others trading on the trading center such as a better understanding of the manner in which the system operates or who is trading on the trading center. In the most

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403 The Commission notes that a broker-dealer operator may have valid business reasons for it or its affiliates to trade on the NMS Stock ATS. The Commission is not proposing to limit the ability for a broker-dealer operator to trade on any such NMS Stock ATS.

404 See supra note 368 and accompanying text.

egregious case, the operator of the trading center might use the confidential trading information of other traders to advantage its own trading on that trading center, which, in context of an ATS, would violate Rule 301(b)(10). Accordingly, the Commission believes that subscribers would benefit from knowing whether and how a broker-dealer operator or its affiliates trade on the NMS Stock ATS to which they may route orders or become a subscriber. Such information would allow market participants to evaluate the extent of the potential conflicts of interest posed by the broker-dealer operator or its affiliates' participation on the NMS Stock ATS and to inquire further about such trading activity if they choose.

Part III, Item 5(b) of proposed Form ATS-N would require an NMS Stock ATS to disclose the circumstances and capacity in which the broker-dealer operator's business units or affiliates may trade on the NMS Stock ATS, such as whether they are trading on a proprietary basis (i.e., for their own accounts) or agency basis or both. This disclosure is meant to provide insight as to the nature of the trading of the broker-dealer operator and/or its affiliates. The Commission preliminarily believes that market participants would find this information useful in evaluating NMS Stock ATSs because they may perceive agency trading by the broker-dealer operator or its affiliates as posing less of a conflict of interest as compared to proprietary trading. For example, market participants may perceive a lesser potential for a conflict of interest if the broker-dealer operator discloses that the broker-dealer operator or its affiliates trade on its own NMS Stock ATS only in an agency capacity with its customers' orders as opposed to trading on the NMS Stock ATS in a principal capacity on a proprietary basis—where the broker-dealer operator or its affiliates may have increased incentives to use their informational advantage in

operating the NMS Stock ATS to advance their trading opportunities.[405] Alternatively, market participants could conclude that the broker-dealer operator's agency trading on its own NMS Stock ATS could nevertheless pose an unacceptable conflict of interest as the broker-dealer operator may be able to advantage its customers' orders to the disadvantage of subscribers to the NMS Stock ATS. The Commission proposes to provide market participants with information regarding the nature of the trading activity of the broker-dealer operator and its affiliates on the NMS Stock ATS so that subscribers (and potential subscribers) can evaluate potential conflicts of interest that may arise from that trading activity.

Part III, Item 5(c) of proposed Form ATS-N would require an NMS Stock ATS to describe the means by which the business units of the broker-dealer operator and its affiliates enter orders or other trading interest into the NMS Stock ATS. Item 5(d) would require a description of any means by which a subscriber can be excluded from interacting or trading with orders or other trading interest of the broker-dealer operator or its affiliates. Some NMS Stock ATSs that currently transact in NMS stocks may provide both direct and indirect means for subscribers to enter orders or other trading interest to the ATS. Based on its experience, the Commission understands that subscribers to some NMS Stock ATSs may enter orders or other trading interest directly to the ATS using, for example, a direct FIX connection,[406] while other subscribers may enter orders or other trading interest indirectly to the ATS using, for example,

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405 See supra note 366.

406 To the extent that a subscriber to the NMS Stock ATS directly sends an order to the NMS Stock ATS by way of FIX protocol, the NMS Stock ATS should identify and describe any intermediate functionality that the subscriber order may pass through on its way to the NMS Stock ATS as part of the FIX process.

an algorithm, the broker-dealer operator's smart order router,[407] or the broker-dealer operator's sales desks. As such, there are a variety of means by which business units of the broker-dealer operator or its affiliates of the broker-dealer operator may connect to, and enter orders on, an NMS Stock ATS. The Commission preliminarily believes that market participants evaluating NMS Stock ATSs may find this information relevant in assessing any potential advantages that the broker-dealer operator or its affiliates may have over other subscribers to the NMS Stock ATS. For example, an NMS Stock ATS may permit orders or other trading interest of all of its affiliates that trade on the NMS Stock ATS to enter through a means that can be used only by the broker-dealer operator or its affiliates and not by non-affiliated subscribers to the NMS Stock ATS (e.g., bypassing the broker-dealer operator's SOR). The Commission preliminarily believes that market participants would want to know these circumstances, as the difference in access or order entry could result in certain advantages, such as the speed at which orders could be entered or cancelled. Moreover, the Commission preliminarily believes that based on how a broker-dealer operator's business units or affiliates access and trade on an NMS Stock ATS—or on other considerations—certain subscribers may not wish to interact with the order flow of the broker-dealer operator or its affiliates. Accordingly, the Commission preliminarily believes that it is important for market participants to have the information to elect whether and how they may avoid trading against orders or other trading interest of the broker-dealer operator or its affiliates on an NMS Stock ATS to achieve their investing or trading objectives.

Overall, the Commission preliminarily believes that the disclosures required under Part III, Item 5 of proposed Form ATS-N would be useful to many market participants. The

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[407] See infra Section VII.B.7 (discussing the use of smart order routers by broker-dealer operators of NMS Stock ATSs).

Commission notes that market participants may vary widely in their decision making process in selecting a particular trading center to effect their trades or route their orders, and therefore, the Commission preliminarily believes that some market participants may not be concerned with the potential conflicts of interest posed by the trading activity of the broker dealer operator or its affiliates on the NMS Stock ATS. However, absent disclosure of this trading activity of the broker-dealer operator or its affiliates, subscribers and potential subscribers that take such information into account when executing their trading or investment strategies likely would neither be aware of such potential conflicts nor able to assess whether the conflicts might impact those strategies. Consequently, the Commission preliminary believes that it would be useful to market participants for an NMS Stock ATS to be required to disclose the information required in Part III, Item 5 of proposed Form ATS-N.

Request for Comment

203. Do you believe the Commission should require the disclosure of the information on Part III, Item 5 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

204. Do you believe Part III, Item 5 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the trading activity of the broker-dealer operator or its affiliates on the NMS Stock ATS? Why or why not? Please support your arguments.

205. Do you believe that Part III, Item 5 of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required relating to the broker-dealer operator and its affiliates trading on the NMS Stock ATS? If not, how should Part

III, Item 5 of proposed Form ATS-N be revised to provide additional clarity? Please explain.

206. Do you believe proposed disclosures in Part III, Item 5 of proposed Form ATS-N should be applied to the trading activity on the NMS Stock ATS of affiliates of the broker-dealer operator? Why or why not? Should disclosures of affiliates trading on the NMS Stock ATS be extended to more remote affiliates under a revised definition of "affiliate"?[408] Should disclosures apply to a more limited set of affiliates? Why or why not? Please support your arguments.

207. Do you believe that the Commission should enhance measures to prevent potential conflicts of interest posed by the broker-dealer operator or its affiliates trading on its own NMS Stock ATS, such as prohibiting proprietary trading by the broker-dealer operator or its affiliates on the NMS Stock ATS? If no, why? If yes, what measures should the Commission consider? Please explain in detail.

208. What are the potential costs and benefits of disclosing the information required by Part III, Item 5 of proposed Form ATS-N? Do you believe the disclosures in Part III, Item 5 of proposed Form ATS-N would have the potential to impact innovation or discourage broker-dealer operators or their affiliates from trading on their own NMS Stock ATS? Why or why not? Would the proposed disclosures in Part III, Item 5 of proposed Form ATS-N require broker-dealer operators of NMS Stock ATSs to reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

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408 See, e.g., supra note 383 and accompanying text.

209. Do you believe there is other information that market participants might find relevant or useful regarding the trading activity on the NMS Stock ATS by the broker-dealer operator or its affiliates? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

210. Do you believe there is any information regarding the trading activity on the NMS Stock ATS by the broker-dealer operator or its affiliates that the NMS Stock ATS should not be required to disclose on Form ATS-N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

211. Should the Commission require separate disclosures for different types of trading conducted by the broker-dealer operator on the NMS Stock ATS, such as trading by the broker-dealer operator for the purpose of correcting error trades executed on the ATS, as compared to other types of proprietary trading? Why or why not? Please support your arguments. If so, what types of proprietary trading should be addressed separately and why? What disclosures should the Commission require about these types of proprietary trading and why? Please explain in detail.

212. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 5 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 5?

7. Broker-Dealer Operator Smart Order Routers (or Similar Functionalities) and Algorithms

Part III, Item 6 of proposed Form ATS-N would require the NMS Stock ATS to disclose whether the broker-dealer operator, or any of its affiliates, use a SOR(s) (or similar functionality), an algorithm(s), or both to send or receive subscriber orders or other trading interest to or from the NMS Stock ATS, and if so, to: (1) identify the SOR(s) (or similar functionality) or algorithm(s) and identify the person(s) that operates the SOR(s) (or similar functionality) or algorithm(s), if other than the broker-dealer operator;[409] and (2) describe the interaction or coordination between the identified SOR(s) (or similar functionality) or algorithm(s) and the NMS Stock ATS, including any information or messages about orders or other trading interest (e.g., IOIs) that the SOR(s) (or similar functionality) or algorithm(s) send or receive to or from the NMS Stock ATS and the circumstances under which such information may be shared with any person.

Today, most broker-dealers that operate an NMS Stock ATS use some form of SOR (or similar functionality) in connection with the NMS Stock ATS. A SOR (or similar functionality) can generally be understood as an automated system used to route orders or other trading interest among trading centers, including proprietary non-ATS trading centers operated by the broker-dealer operator, to carry out particular trading instructions or strategies of a broker-dealer. Smart order routers (or similar functionalities) have become an integral part of the business of many multi-service broker-dealers, given the increase in the speed of trading in today's equity markets and the large number of trading centers, including national securities exchanges, ATSs, and non-ATS trading centers, that have emerged since the adoption of Regulation ATS. In addition to the

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409 See supra note 360.

SOR (or similar functionality), orders or other trading interest may be entered on an NMS Stock ATS through the use of a trading algorithm, which is a computer assisted trading tool that, for instance, may be used by or on behalf of institutional investors to execute orders that are typically too large to be executed all at once without excessive price impact, and divide the orders into many small orders that are fed into the marketplace over time.[410]

Broker-dealer operators of NMS Stock ATSs or their affiliates may use SORs (or similar functionality) or algorithms in a variety of ways.[411] For example, the broker-dealer operator may use the SOR (or similar functionality) to route orders on behalf of its customers and proprietary trading desks to different trading venues, or the broker-dealer operator may use the SOR as the primary means of routing subscriber orders or other trading interest to or from the NMS Stock ATS. The Commission understands, based on experience, that for some ATSs that currently transact in NMS stocks, the SOR (or similar functionality) or algorithm of the broker-dealer operator or its affiliates is the only means of access (i.e., all orders or other trading interest entered on, or removed from, the ATS, must pass through the SOR (or similar functionality) or algorithm). A broker-dealer operator may also use a SOR (or similar functionality) or algorithm to handle all order flow received by the broker-dealer operator (or its affiliates), including both

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410 See Staff of the Division of Trading and Markets, Commission, "Equity Market Structure Literature Review, Part II: High Frequency Trading," at 5 (March 18, 2014), available at http://www.sec.gov/marketstructure/research/hft_lit_review_march_2014.pdf.

411 The Commission notes that, similar to legacy NMS Stock ATSs, broker-dealer operators are likely to vary in their organizational structures. Accordingly, the Commission proposes to include affiliates of the broker-dealer operator that may operate a SOR(s) (or similar functionality) or algorithm(s) in Part III, Item 6 of proposed Form ATS-N to ensure that SORs (or similar functionalities) or algorithms used in connection with the NMS Stock ATSs are disclosed regardless of whether the SOR(s) (or similar functionality) or algorithm(s) is operated by an affiliate of the broker-dealer operator.

orders that a subscriber has specifically directed to the NMS Stock ATS and orders that may not be sent to the NMS Stock ATS, as well as the broker-dealer's own proprietary orders and those of its affiliates. For many orders, the SOR (or similar functionality) or algorithm determines whether to route the order to the NMS Stock ATS, another NMS Stock ATS or non-ATS trading center operated by the broker-dealer operator, another broker-dealer, an unaffiliated NMS Stock ATS, or a national securities exchange. The SOR (or similar functionality) may obtain knowledge of subscriber orders or other trading interest that have been routed to the NMS Stock ATS (and may now be resting on the NMS Stock ATS) and subscriber orders that have been routed out of the NMS Stock ATS. Similarly, the system operating an algorithm used by the broker-dealer operator to enter subscriber orders based on the algorithm's trading strategy may obtain information about subscriber orders sent to the NMS Stock ATS. The broker-dealer operator (or its affiliates) programs and operates the SOR (or similar functionality) and/or algorithm(s), unless the broker-dealer operator contracts such functions to a third-party vendor, in which case the broker-dealer operator or third-party vendor may have access to information that passes through the SOR(s) (or similar functionality), algorithm(s) or both.

The Commission preliminarily believes that the high likelihood that a SOR (or similar functionality) or algorithm could access subscribers' confidential trading information necessitates disclosure of certain information to subscribers about the use of a SOR (or similar functionality) or algorithm by the broker-dealer operator or its affiliates to route subscriber orders to or out of the NMS Stock ATS. The Commission preliminarily believes that subscribers and the Commission would benefit from increased disclosures about the use of a SOR(s) (or similar functionality) or algorithm(s) by the broker-dealer operator or its affiliates in connection with the NMS Stock ATS because of the potential for information leakage. Existing Form ATS

does not specifically inquire about the use of a SOR (or similar functionality) or algorithms in connection with an ATS and based on Commission experience, the Commission is concerned that there is limited information available to subscribers about the interaction between SORs (or similar functionalities) or algorithms and affiliated ATSs that trade NMS stocks, despite the importance of SORs (or similar functionality) or algorithms to the functions and operations of such ATSs. The Commission preliminarily believes that information provided on Form ATS-N would allow market participants to better understand the operation of an NMS Stock ATS and the circumstances that may give rise to potential conflicts of interest and information leakage.

Part III, Item 6(a) of proposed Form ATS-N would require an NMS Stock ATS to identify the SOR(s) (or similar functionality) or algorithm(s) and identify the person(s) that operates the SOR (or similar functionality) and algorithm(s). Part III, Item 6(a) of proposed Form ATS-N is designed to provide subscribers with information about who operates the SOR(s) (or similar functionality) or algorithm(s) used in connection with the NMS Stock ATS, which would thereby inform subscribers about who may have access to their confidential trading information or control over the entry and removal of orders or other trading interest to and from the NMS Stock ATS. Information about the persons who operate a SOR(s) (or similar functionality) or algorithm(s) used in connection with the NMS Stock ATS and how the SOR(s) (or similar functionality) or algorithm(s) operates would allow subscribers to assess potential sources of information leakage and conflicts of interest that may arise from the operation of the SOR(s) (or similar functionality) and/or algorithm(s).

Part III, Item 6(b) of proposed Form ATS-N would require an NMS Stock ATS to describe the interaction or coordination between the identified SOR(s) (or similar functionality) or algorithm(s) and the NMS Stock ATS, including any information or messages about orders or

other trading interest (e.g., IOIs) that the SOR(s) (or similar functionality) or algorithm(s) send or receive to or from the NMS Stock ATS and the circumstances under which such information may be shared with any person. Because the SOR(s) (or similar functionality) or algorithm(s) and NMS Stock ATS are typically operated by the same broker-dealer operator (rather than a third-party vendor), the Commission preliminarily believes subscribers to the NMS Stock ATS are likely to find it important to understand what information about their orders is obtained by a SOR(s) (or similar functionality) or algorithm(s) and the circumstances under which that information may be used by the broker-dealer operator of the NMS Stock ATS, its affiliates, or other persons. The Commission is concerned that without this information, subscribers that send orders to the NMS Stock ATS by way of the broker-dealer operator's SOR (or similar functionality) or algorithm may not be able to understand the conditions under which information about their confidential trading information may be leaked.

The interaction or coordination of the SOR(s) (or similar functionality) or algorithm(s) with the NMS Stock ATS likely varies across NMS Stock ATSs. For instance, a SOR (or similar functionality) or algorithm may check for potential contra-side interest in a particular symbol on the NMS Stock ATS prior to sending the subscriber order or other trading interest into the NMS Stock ATS. Such protocol carried out by the SOR (or similar functionality) or algorithm may send only information about the symbol and side (i.e., buy or sell) of the subscriber's order or other trading interest, but not the size, price, identity of the subscriber or other information. As another example, an NMS Stock ATS that uses IOIs as part of its platform may use its SOR (or similar functionality) or an algorithm to facilitate the sending of IOIs to relevant persons regarding orders or other trading interest resting on the NMS Stock ATS. The Commission preliminarily believes that the operations and functions of the SOR(s) (or similar functionality)

or algorithm(s) in these examples would be relevant to subscribers and helpful in understanding how the NMS Stock ATS operates.

The Commission notes that an ATS may consist of various functionalities or mechanisms that operate collectively as a Rule 3b-16 system to bring together the orders for securities of multiple buyers and sellers using non-discretionary methods.[412] Based on Commission experience, most broker-dealer operators that use a SOR(s) (or similar functionality) or algorithm operate the SOR(s) (or similar functionality) or algorithm(s) separate and apart from their ATS. However, to the extent that a SOR (or similar functionality) or algorithm operates jointly with, or performs a function of, the NMS Stock ATS to bring together the orders for securities of multiple buyers and sellers using established nondiscretionary methods, the SOR (or similar functionality) or algorithm may be considered part of the NMS Stock ATS.[413] For example, a SOR (or similar functionality) or algorithm that is, based on the facts and

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412 Under Rule 3b-16 an organization, association, or group of persons shall be considered to constitute, maintain, or provide "a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange," if such organization, association, or group of persons: (1) brings together the orders for securities of multiple buyers and sellers; and (2) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade. 17 CFR 240.3b-16(a).

413 The Commission noted in adopting Regulation ATS that the Commission "will attribute the activities of a trading facility to a system if that facility is offered by the system directly or indirectly" and "if an organization arranges for separate entities to provide different pieces of a trading system, which together meet the definition contained in paragraph (a) of Rule 3b-16, the organization responsible for arranging the collective efforts will be deemed to have established a trading facility." See Regulation ATS Adopting Release, supra note 7, at 70852. If the SOR(s) (or similar functionality) or algorithm(s) were operated by an affiliate of the NMS Stock ATS or an entity unaffiliated with the NMS Stock ATS, the SOR(s) (or similar functionality) or algorithm(s) could still be considered a part of the NMS Stock ATS depending on the facts and circumstances.

circumstances, the exclusive means for subscribers to access and enter orders or other trading interest on NMS Stock ATS for execution would be regarded as part of the operations of the NMS Stock ATS because the SOR (or similar functionality) or algorithm would function as the mechanism for orders or other trading interest to be brought together and interact in the NMS Stock ATS. The Commission preliminarily believes that information provided on proposed Form ATS-N about the use of a SOR (or similar functionality) or algorithm under Part III, Item 6 of proposed Form ATS-N would allow the Commission to better understand the operations and scope of the NMS Stock ATS. That is, the proposed disclosures would assist the Commission in determining if a SOR (or similar functionality) or algorithm is facilitating the bringing together of orders for securities of multiple buyers and sellers using established nondiscretionary methods, and would consequently be part of the NMS Stock ATS for the purposes of Regulation ATS.

Request for Comment

213. Do you believe the Commission should require the disclosure of the information on Part III, Item 6 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

214. Do you believe Part III, Item 6 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding the use of a SOR or algorithm by the broker-dealer operators, or any of its affiliates, to send or receive subscriber orders or other trading interest to or from the NMS Stock ATS? Why or why not? Please support your arguments.

215. Do you believe that Part III, Item 6 of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required relating to the broker-dealer

operator and its affiliates' use of SORs (or similar functionality) and algorithms in connection with the NMS Stock ATS? If not, how should Part III, Item 6 of proposed Form ATS-N be revised to provide additional clarity? Please explain in detail.

216. Do you believe it is appropriate for the Commission to require disclosure about the use of SORs (or similar functionalities) and algorithms by the broker-dealer operator, or its affiliates, to send or receive orders or other trading interest to or from the NMS Stock ATS? Why or why not? Please support your arguments. If so, what level of detail should be disclosed about how SORs (or similar functionalities) and algorithms determine whether to send or receive orders or other trading interest to the NMS Stock ATS? Please be specific.

217. What are the potential costs and benefits of disclosing the information required by Part III, Item 6 of proposed Form ATS-N? Do you believe the disclosures in Part III, Item 6 of proposed Form ATS-N would have the potential to impact innovation? Why or why not? Would the proposed disclosures in Part III, Item 6 of proposed Form ATS-N require broker-dealer operators of NMS Stock ATSs to reveal too much (or not enough) about their structure and operations? Why or why not? Please support your arguments.

218. Do you believe the proposed disclosures in Part III, Item 6 of proposed Form ATS-N related to the use of SORs (or similar functionality) and algorithms should be applied to affiliates of the broker-dealer operator? Why or why not? Please support your arguments.

219. Do you believe there is other information that market participants might find relevant or useful regarding broker-dealer operators or their affiliates' SORs (or similar functionalities) and algorithms? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

220. Do you believe there is any information regarding broker-dealer operators or their affiliates' SORs (or similar functionality) and algorithms that the NMS Stock ATS should not be required to disclose on proposed Form ATS-N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

221. Do you believe that most subscribers to ATSs that transact in NMS stock access the ATSs through the SOR (or similar functionality) or algorithm of the broker-dealer operator (or its affiliates), or do they connect directly to the ATS through some other means, or both? Please explain in detail.

222. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 6 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 6?

8. Shared Employees of NMS Stock ATS

Part III, Item 7 of proposed Form ATS-N would require an NMS Stock ATS to state whether any employee of the broker-dealer operator that services the operations of the NMS Stock ATS also services any other business unit(s) of the broker-dealer operator or any

affiliate(s) of the broker-dealer operator ("shared employee") and, if so, to (1) identify the business unit(s) and/or the affiliate(s) of the broker-dealer operator to which the shared employee(s) provides services and identify the position(s) or title(s) that the shared employee(s) holds in the business unit(s) and/or affiliate(s) of the broker-dealer operator; and (2) describe the roles and responsibilities of the shared employee(s) at the NMS Stock ATS and the business unit(s) and/or affiliate(s) of the broker-dealer operator.[414]

Part III, Item 7 of proposed Form ATS-N is designed to provide information to market participants and the Commission about circumstances that might give rise to a potential conflict of interest and potential information leakage involving shared employees of the broker-dealer operator. Responses to Part III, Item 7 of proposed Form ATS-N would require an NMS Stock ATS to describe the roles and responsibilities of the shared employees with the NMS Stock ATS and the other business units of the broker-dealer operator or affiliates. Responses to Part III, Item 7 of proposed Form ATS-N would be required to be sufficiently detailed to provide a comprehensive understanding of the full range of the shared employee's responsibilities with the NMS Stock ATS and each relevant entity, and include disclosure of responsibilities that could enable the employee to view subscribers' confidential trading information. The Commission preliminarily believes that market participants would find information about the multiple roles or functions of shared employees disclosed in Part III, Item 7 of proposed Form ATS-N important in evaluating whether to route orders to a particular ATS. For example, to identify and understand potential sources of information leakage, market participants would likely want to know if an employee of the broker-dealer operator that is responsible for the operations of a

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414 See Part III, Item 7 of proposed Form ATS-N.

system supporting the NMS Stock ATS is also responsible for the proprietary trading activity of an affiliate of the broker-dealer operator that trades on the NMS Stock ATS. In this example, market participants might also be interested in understanding conflicts of interest that may result from the shared employee performing multiple roles, as the shared employee could have an incentive to alter the operations of the NMS Stock ATS to benefit the broker-dealer operator or an affiliate of the NMS Stock ATS.[415]

The Commission would preliminarily view any personnel that service the trading functions of the NMS Stock ATS, such as those performing information technology, programming, testing, or system design functions as employees that "service the operations of the NMS Stock ATS." Other employees of the NMS Stock ATS that are otherwise necessary for the trading functions of the NMS Stock ATS would also be included in the disclosure requirement of Part III, Item 7 of proposed Form ATS-N. Clerical employees or those performing solely administrative duties such as the payroll functions for the employees of the NMS Stock ATS would preliminarily not be included within the proposed disclosure.

Request for Comment

223. Do you believe the Commission should require the disclosure of the information on Part III, Item 7 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

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415 The Commission notes that a broker-dealer operator may have valid business reasons for it or its affiliates having shared employees, and the Commission is not proposing to limit the ability for a broker-dealer operator to have such arrangements.

224. Do you believe Part III, Item 7 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to "shared employees"? Why or why not? Please support your arguments.

225. Do you believe that Part III, Item 7 of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required relating to shared employees of the broker-dealer operator? If not, how should Part III, Item 7 of proposed Form ATS-N be revised to provide additional clarity? Please explain.

226. Do you believe that it is sufficiently clear who would be considered a "shared employee" under Part III, Item 7 of proposed Form ATS-N? Why or why not? Is the scope of "shared employees" provided under Part III, Item 7 reasonable? Why or why not? Please explain.

227. Do you believe there is any information contained in the proposed disclosures in Part III, Item 7 of proposed Form ATS-N regarding shared employees of the broker-dealer operator that the NMS Stock ATS should not be required to disclose on proposed Form ATS-N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

228. What are the potential costs and benefits of disclosing the information required by Part III, Item 7 of proposed Form ATS-N? Do you believe the disclosures in Part III, Item 7 of proposed Form ATS-N would have the potential to impact innovation or the manner in which NMS Stock ATSs and broker-dealer operators use their employees? Why or why not? Would the proposed disclosures in Part III, Item 7 of proposed Form ATS-N require broker-dealer operators of NMS

Stock ATSs to reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

229. Do you believe there is other information that market participants might find relevant or useful regarding shared employees of the broker-dealer operator? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

230. Do you believe that the Commission should expand the proposed disclosures in Part III, Item 7 of proposed Form ATS-N to other employees, personnel, or independent contractors of the broker-dealer operator? Why or why not? If so, which employees, personnel, or independent contractors should be included and what information about such persons should be solicited? Please explain.

231. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 7 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 7?

9. Service Providers to the NMS Stock ATS

Part III, Item 8 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether any operation, service, or function of the NMS Stock ATS is performed by any person(s) other than the broker-dealer operator of the NMS Stock ATS, and if so to: (1) identify the person(s) (in the case of a natural person, to identify only the position or title) performing the operation, service, or function and note whether this service provider(s) is an affiliate of the

broker-dealer, if applicable; (2) describe the operation, service, or function that the identified person(s) provides and describe the role and responsibilities of that person(s); and (3) state whether the identified person(s), or any of its affiliates, may enter orders or other trading interest on the NMS Stock ATS and, if so, describe the circumstances and means by which such orders or other trading interest are entered on the NMS Stock ATS.[416]

The Commission notes that Part III, Item 8 of proposed Form ATS-N expands on the disclosure requirements of Exhibit E on current Form ATS, which requires ATSs to disclose the name of any entity other than the ATS that will be involved in the operation of the ATS, including the execution, trading, clearing and settling of transactions on behalf of the ATS; and to provide a description of the role and responsibilities of each entity.[417] Part III, Item 8 of proposed Form ATS-N would require more detailed information about service providers to the NMS Stock ATS than is currently required by Form ATS, including whether affiliates of service providers may trade on the NMS Stock ATS.[418]

Under Part III, Item 8(a) of proposed Form ATS-N, the NMS Stock-ATS must identify any entity that performs any operation, service, or function for the NMS Stock ATS.[419] For

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416 See Part III, Item 8 of proposed Form ATS-N.

417 See Item 7 of Form ATS (describing the requirements for Exhibit E to Form ATS).

418 The Commission notes that a broker-dealer operator may have valid business reasons for it or its affiliates to have functions of the NMS Stock ATS performed by person(s) other than the broker-dealer operator of the NMS Stock ATS. The Commission is not proposing to limit the ability for a broker-dealer operator to have such arrangements

419 The Commission is not proposing to require than an NMS Stock ATS provide any personally identifiable information about any natural person in Part III, Item 8(a) of proposed Form ATS-N. Part III, Item 8(a) of proposed Form ATS-N is designed to solicit sufficient information to identify the entity or person providing the service, operation, or function to the NMS Stock ATS, such as the position or title in the case of a natural person acting as a service provider.

example, an NMS Stock ATS may engage a third-party service provider to provide market data for the NMS Stock ATS to, among other things, calculate reference prices (such as the NBBO). Responses to Part III, Item 8(a) of proposed Form ATS-N would be required to include the name of the company that provides the market data, as further described below. Part III, Item 8(b) of proposed Form ATS-N would require an NMS Stock ATS to provide, in detail, information about the operations, service, or function of the NMS Stock ATS that is provided by the identified third-party in Part III, Item 8(a) of proposed Form ATS-N and its roles and responsibilities with respect to that operation, service, or function. For example, a broker-dealer operator may engage a third party to host and maintain the trading platform of the NMS Stock ATS. Part III, Item 8(b) of proposed Form ATS-N would require a description of those services and the specific role and responsibilities of the company and its employees. Responses to Part III, Item 8(b) of proposed Form ATS-N would be required to be sufficiently detailed such that market participants and the Commission could understand what functions are performed by a person other than an employee of the broker-dealer operator and what those services include. As guidance for completing this proposed disclosure item, the Commission would view an NMS Stock ATS simply stating that a third-party provides technology or hardware services to the NMS Stock ATS as not sufficiently responsive to the required disclosure. Responses to Part III, Item 8(b) of proposed Form ATS-N, in the example above, would require a detailed description of information technology services, including both hardware and software that may be provided, as well as any programming, ongoing maintenance, monitoring, and other functions the service provider would perform with respect to the NMS Stock ATS. As additional guidance, responses to Item 8 would also be required to include any service provider that provides, for example, such functions as consulting relating to the trading systems or functionality, cyber security, regulatory

compliance, and record keeping services or functions of the NMS Stock ATS. Additionally, an NMS Stock ATS would be required to identify and describe the services of any service provider engaged for the purposes of the clearance and settlement of trades for the NMS Stock ATS.[420]

The Commission intends that the proposed disclosure requirements of Items 8(a) and (b) of Part III of proposed Form ATS-N would apply to any operation, service, or function performed by any person outside of the NMS Stock ATS entity, including affiliates of the broker-dealer operator.[421] However, services provided to the NMS Stock ATS by employees of the broker-dealer operator would not need to be disclosed in Part III, Item 8 of proposed Form ATS-N. The activities of such persons, to the extent they are shared employees, would be disclosed pursuant to Part III, Item 7 of proposed Form ATS-N.[422] The Commission also notes that it does not intend that the proposed disclosure requirements of Part III, Item 8 of proposed Form ATS-N would extend to operations, services, or functions that are administrative in nature and do not pose a significant risk of information leakage of confidential trading information, such as payroll functions servicing employees of the NMS Stock ATS or e-mail services provided by an outside provider, because the Commission preliminarily believes that information

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420 The Commission notes that the examples listed above are not intended to be an exhaustive list of the types of services, and the level of detail about those services, that would be required by Part III, Item 8 of proposed Form ATS-N. The Commission preliminarily believes that the appropriate disclosure would be driven by the particular facts and circumstances of operational structure of the NMS Stock ATS.

421 If, for example, the SOR of an affiliate of the broker-dealer operator is used to route orders to and from the NMS Stock ATS, the SOR would need to be disclosed in Part III, Item 8 of proposed Form ATS-N and would likely also need to be disclosed in Part III, Item 6 of proposed Form ATS-N, which relates to SORs used by the broker-dealer operator or its affiliates.

422 See supra Section VII.B.8 (discussing proposed requirements for disclosure pertaining to NMS Stock ATS employees that are shared employees with other business units of the broker-dealer operator or its affiliates).

about the services of such third-party services providers and their employees would not be relevant to market participants' evaluation of an NMS Stock ATS as a trading venue and would not be necessary for the Commission's oversight functions.

Items 8(a) and (b) of Part III of proposed Form ATS-N are designed to provide market participants and the Commission with information about how the NMS Stock ATS operates, potential conflicts of interest, and the potential for information leakage. In particular, the Commission preliminarily believes that this information would inform market participants, as well as the Commission, about what aspects of the NMS Stock ATS's operations are performed by third-parties that may or may not be under the control of the broker-dealer operator. For example, an NMS Stock ATS whose trading system is operated or supported by a third-party service provider may have business interests that are aligned with those of the service provider. Additionally, depending on the role and responsibilities of the third-party service provider, market participants may want to evaluate the robustness of the NMS Stock ATS's safeguards and procedures to protect confidential subscriber information.

Lastly, Part III, Item 8(c) of proposed Form ATS-N would require an NMS Stock ATS to state whether any person identified in Part III, Item 8(a) of proposed Form ATS-N or any of its affiliates may enter orders or other trading interest on the NMS Stock ATS and if so, to describe the circumstances and means by which such orders or other trading interests are entered on the NMS Stock ATS. The purpose of these disclosures is to provide market participants and the Commission with information about the potential for conflicts of interest that may result from a service provider, or its affiliates, trading on the NMS Stock ATS and the potential for information leakage. For example, the Commission preliminarily believes that a subscriber or potential subscriber likely would want to know whether a person that is not an employee of the

broker-dealer operator, but is contracted to service the trading platform that contains the NMS Stock ATS's book of orders, could enter orders or other trading interest on the NMS Stock ATS. Similarly, the Commission preliminarily believes that a subscriber or a potential subscriber would also want to know whether an affiliate of the service provider could enter orders or other trading interest on the NMS Stock ATS as well and whether its means of access differ from other subscribers. Under both of these scenarios, a potential conflict of interest could result if the service provider has business interests that compete with the trading interests of other subscribers to the NMS Stock ATS.

Request for Comment

232. Do you believe the Commission should require the disclosure of the information on Part III, Item 8 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

233. Do you believe Part III, Item 8 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding any operation, service, or function of the NMS Stock ATS performed by any person other than the broker-dealer operator? Why or why not? Please support your arguments.

234. Do you believe that Part III, Item 8 of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required relating to service providers of the NMS Stock ATS? If not, how should Part III, Item 8 of proposed Form ATS-N be revised to provide additional clarity? Please explain.

235. What are the potential costs and benefits of disclosing the information required by Part III, Item 8 of proposed Form ATS-N? Do you believe the disclosures in Part

III, Item 8 of proposed Form ATS-N would have the potential to impact innovation or discourage arrangements with other service providers? Why or why not? Would the proposed disclosures in Part III, Item 8 of proposed Form ATS-N require broker-dealer operators of NMS Stock ATSs to reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

236. Do you believe that any of the information in the proposed disclosure requirements of Part III, Item 8 of proposed Form ATS-N regarding service providers to the NMS Stock ATS should not be required to be disclosed on proposed Form ATS-N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

237. Do you believe the Commission should adopt a more limited or expansive definition of "affiliate" for purposes of this disclosure item? Why or why not? Please support your arguments.

238. Do you believe there is other information that market participants might find relevant or useful regarding any operation, service, or function of the NMS Stock ATS performed by any person other than the broker-dealer operator? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

239. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 8 of proposed Form ATS-N

other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 8?

10. Differences in Availability of Services, Functionality, or Procedures

Part III, Item 9 of proposed Form ATS-N would require an NMS Stock ATS to identify and describe any service, functionality, or procedure of the NMS Stock ATS that is available or applies to the broker-dealer operator or its affiliates, that is not available or does not apply to a subscriber(s) to the NMS Stock ATS. The purpose of this disclosure is to alert market participants to the existence of system, functionality, or trading features that the broker-dealer operator or its affiliates may have that other subscribers do not.[423] For example, an NMS Stock ATS may employ different procedures governing how orders entered on the NMS Stock ATS by the broker-dealer operator's business units or affiliates are segmented than it does for other subscribers. The Commission preliminarily believes that the disclosure of those differences in procedures would allow market participants to evaluate whether such differences might put them at a disadvantage when competing against the broker-dealer operator or its affiliates for an execution on the NMS Stock ATS and thus, better enable market participants to decide whether submitting order flow to that NMS Stock ATS aligns with their trading or investment objectives.

The Commission notes that a significant difference between national securities exchanges and NMS Stock ATSs is the extent to which each trading center allows access to its services by its users. Section 6(b)(2) of the Exchange Act generally requires registered national securities

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423 The Commission notes that it is similarly proposing to require NMS Stock ATSs to disclose differences in the treatment of subscribers on the NMS Stock ATS in a number of proposed disclosure requirements. See, e.g., proposed Items 1(a) and 1(b) of Part IV of proposed Form ATS-N.

exchanges to allow any qualified and registered broker-dealer to become a member of the exchange—a key element in assuring fair access to national securities exchange services.[424] In contrast, the access requirements that apply to ATSs are much more limited. Because NMS Stock ATSs are exempt from the definition of an "exchange" so long as they comply with Regulation ATS, and thus, are not required to register as a national securities exchange pursuant to Sections 5 and 6 of the Exchange Act, NMS Stock ATSs are not required to provide fair access unless they reach a 5% trading volume threshold in a stock, which almost all NMS Stock ATSs currently do not.[425] As a result, access to the services of NMS Stock ATSs is determined primarily by private negotiation, and such access to services can differ among persons that subscribe to the NMS Stock ATS.

While the Commission is not proposing to change the fair access requirements applicable to NMS Stock ATSs in this proposal, the Commission is proposing to require, among other things, disclosures on Form ATS-N that identify and describe differences among subscribers (or other persons) in the services, procedures or functionalities that an NMS Stock ATS provides, as well as disclosures that identify and describe any services, functionalities, or procedures of an NMS Stock ATS that are available to the broker-dealer operator's affiliates, but are not available to subscribers. The Commission preliminarily believes that the disclosure of these differences would allow market participants to evaluate whether such differences might put them at a disadvantage when trading on a particular NMS Stock ATS and thus, better enable market

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424 15 U.S.C. 78f(b)(2).

425 See 17 CFR 242.301(b)(5). See also supra notes 92-95 and accompanying text (discussing the fair access requirements of Regulation ATS).

participants to decide whether submitting order flow to that NMS Stock ATS aligns with their trading or investment objectives.

The Commission notes that ATSs may treat subscribers differently with respect to the services offered by the ATS unless prohibited by applicable federal securities laws or the rules and regulations thereunder. For example, an ATS with at least 5% of the average daily volume for any covered security during four of the preceding six months is required to comply with fair access requirements under Rule 301(b)(5) of Regulation ATS,[426] which, among other things, requires an ATS to establish written standards for granting access to trading on its system and not unreasonably prohibiting or limiting any person with respect to access to services offered by the ATS by applying the written standards in an unfair or discriminatory manner. Thus, for example, an ATS that discloses a service to one class of subscribers (or makes the associated functionality available to only one class of subscribers) could not, if it were subject to the fair access requirements, discriminate in this manner unless it had fair and non-discriminatory reasons for doing so. The Commission further notes that, even if an ATS is not subject to the fair access requirements, inaccurate or misleading disclosures about an ATS's operations could result in violations of the antifraud provisions of the federal securities laws.[427]

Request for Comment

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426 See id.

427 See, e.g., UBS Settlement at 14, ITG Settlement at 15, Pipeline Settlement at 16, and Liquidnet Settlement at 14, supra note 372 (all noting violations of Section 17(a)(2) of the Securities Act, which prohibits, directly or indirectly, in the offer or sale of securities, obtaining money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.) 15 U.S.C. 77q(a)(2).

240. Do you believe the Commission should require the disclosure of the information on Part III, Item 9 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

241. Do you believe Part III, Item 9 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to any service, functionality, or procedure of the NMS Stock ATS that is available or applies to the broker-dealer operator or its affiliates, that is not available or does not apply to a subscriber(s) to the NMS Stock ATS? Why or why not? Please support your arguments.

242. Do you believe there is other information that market participants might find relevant or useful regarding any service, functionality, or procedure of the NMS Stock ATS that is available or applies to the broker-dealer operator or its affiliates, that is not available or does not apply to a subscriber(s) to the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

243. Do you believe that Part III, Item 9 of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required relating to the differences in services provided to the broker-dealer operator or its affiliates trading on the NMS Stock ATS? If not, how should Part III, Item 9 of proposed Form ATS-N be revised to provide additional clarity? Please explain.

244. Do you believe that the proposed disclosures in Part III, Item 9 of proposed Form ATS-N that are intended to cover differences in services, functionalities, or

procedures should be applied to affiliates of the broker-dealer operator? Why or why not? Conversely, should such disclosures be extended to more remote affiliates under a revised definition of "affiliate"?[428] Should disclosure apply to a more limited set of affiliates? Why or why not? Please support your arguments.

245. What are the potential costs and benefits of disclosing the information required by Part III, Item 9 of proposed Form ATS-N? Do you believe the disclosures in Part III, Item 9 of proposed Form ATS-N would have the potential to impact innovation? Why or why not? Would the proposed disclosures in Part III, Item 9 of proposed Form ATS-N require broker-dealer operators of NMS Stock ATSs to reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

246. Do you believe there is any information regarding differences in services, functionalities, or procedures of the NMS Stock ATS that are available to the broker-dealer operator or its affiliates and not other subscribers that should not be required disclosures on Form ATS-N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

247. Do you believe that the Commission should propose amendments to Rule 301(b)(5) of Regulation ATS to lower the trading volume threshold in Regulation ATS that triggers the fair access requirement from its current 5%? If so, what is the appropriate threshold? Please support your arguments.

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[428] See, e.g., supra note 383 and accompanying text.

248. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 9 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 9?

11. Confidential Treatment of Trading Information

Part III, Item 10 of proposed Form ATS-N is based on the requirements of Rule 301(b)(10) of Regulation ATS,[429] and would require an NMS Stock ATS to describe the written safeguards and written procedures to protect the confidential trading information of subscribers to the NMS Stock ATS. It would also require an NMS Stock ATS to: (a) describe the means by which a subscriber can consent or withdraw consent to the disclosure of confidential trading information to any persons (including the broker-dealer operator and any of its affiliates); (b) identify the positions or titles of any persons that have access to the confidential trading information, describe the confidential trading information to which the persons have access, and describe the circumstances under which the persons can access confidential trading information; (c) describe the written standards controlling employees of the NMS Stock ATS trading for the employees' accounts; and (d) describe the written oversight procedures to ensure that the safeguards and procedures described above are implemented and followed.

As previously noted,[430] the Commission stated when adopting Regulation ATS that Rule 301(b)(10) did not preclude a broker-dealer that operated an ATS from engaging in other broker-

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429 17 CFR 242.301(b)(10).

430 See infra Section IX and X (discussing the requirements of Rule 301(b)(10) and proposed amendments to require that safeguards and procedures be written and preserved).

dealer functions. However, to prevent the misuse of private subscriber and customer trading information for the benefit of other customers or activities of the broker-dealer operator, the Commission required that ATSs have in place safeguards and procedures to protect that confidential trading information and to separate ATS functions from other broker-dealer functions.[431] In adopting Rule 301(b)(10), the Commission stated that the rule was meant to ensure that information, such as the identity of subscribers and their orders, be available only to those employees of the alternative trading system who operate the system or are responsible for its compliance with applicable rules.[432] Thus, a broker-dealer operator may not convert confidential trading information of ATS subscribers for use by the non-ATS business units operated by the broker-dealer.

The protection of subscribers' confidential trading information remains a bedrock component of the regulation of ATSs, including those that trade NMS stocks, and is essential to ensuring the integrity of ATSs as execution venues. To the extent that subscribers cannot be assured that their confidential trading information will be protected by an ATS, many of the advantages or purposes for which a subscriber may choose to send its orders to an ATS (e.g., trade anonymously and/or to mitigate the impact of trading large positions)[433] are eliminated. Moreover, if subscribers' confidential trading information is shared without subscribers' consent, that information may be used by the recipient of the information to gain a competitive advantage over the subscriber. In cases where the confidential trading information of a subscriber is

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431 See Regulation ATS Adopting Release, supra note 7, at 70879.

432 Id.

433 See id. (stating that many of the ATSs popular at the time Regulation ATS was adopted were anonymous and that many ECNs at that time were popular because they permitted wide dissemination of orders but provided anonymity).

impermissibly shared with the personnel of the broker-dealer operator or any of its affiliates (i.e., persons who are not responsible for the operation of the ATS or compliance with applicable rules), such an abuse is compounded by the conflicting interests of the broker-dealer operator. That is, in such a case, the broker-dealer operator has invited subscribers to trade on its ATS and may have abused that relationship to provide itself or its affiliates with a direct competitive advantage over that subscriber. The Commission preliminarily believes that disclosure is necessary in this area so market participants can independently evaluate the robustness of the safeguards and procedures that are employed by the NMS Stock ATS to protect subscriber confidential trading information and decide for themselves whether they wish to do business with a particular NMS Stock ATS.

Part III, Item 10(a) of proposed Form ATS-N would require the NMS Stock ATS to describe the means by which a subscriber can consent or withdraw consent to the disclosure of confidential trading information to any persons (including the broker-dealer operator and any of its affiliates). Disclosing the means by which a subscriber can consent or withdraw consent from the sharing of such information would allow subscribers and potential subscribers to understand what information about their orders or other trading interest will be kept confidential and how they can specify the means by which they choose to share confidential information. As the Commission noted in the adoption of Regulation ATS, subscribers should be able to give consent if they so choose to share their confidential trading information.[434] ATSs that transact in NMS stocks vary in terms of what types of orders, indications of interests, or other forms of trading interest are confidential on their systems and what specific information about such trading

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[434] See Regulation ATS Adopting Release, supra note 7, at 70879.

interest may be shared. For example, an ATS might provide that no IOIs submitted by subscribers will be considered confidential, but may provide subscribers with the option to restrict the information in the IOI message to just the symbol and side (i.e., buy or sell). In this example, responses to Item 10(a) would require an NMS Stock ATS to describe the means by which a subscriber or potential subscriber could control some of the information contained in the IOI message by providing consent or withdrawing such consent for the sharing of its confidential trading information.[435]

Part III, Item 10(b) of proposed Form ATS-N, which would require that ATSs identify any person that has access to confidential trading information, the type of information, and the circumstances under which they may access such information, is meant to provide transparency into the potential sources from which confidential trading information might be compromised. As noted above, Regulation ATS requires that access to confidential subscriber information be available only to those employees of the ATS that operate the system or are responsible for the ATS's compliance with applicable rules.[436] The Commission preliminarily believes that requiring ATSs to disclose the list by title or position of all personnel that can access the confidential trading information of subscribers would buttress the existing obligations on ATSs to restrict access only to permitted personnel (i.e., those responsible for its operation or compliance).

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435 The Commission notes that there may be some NMS Stock ATSs that might not offer any means by which a subscriber could consent to the dissemination of its confidential trading information. An NMS Stock ATS would be required to disclose this fact pursuant to Item 9(a).

436 See Regulation ATS Adopting Release, supra note 7, at 70879; 17 CFR 242.301(b)(10)(i)(A).

Part III, Item 10(b) of proposed Form ATS-N would also require the NMS Stock ATS to describe the confidential trading information that may be accessed by permitted persons. For example, employees that operate the NMS Stock ATS may be able to see the size, side, and symbol of an order but not the identity of the subscriber that submitted the order. The Commission preliminarily believes that subscribers and potential subscribers to the NMS Stock ATS likely would find it useful to know the range of confidential trading information that a person may have access to. Item 10(b) would also require the disclosure of the circumstances under which confidential trading information may be accessed by permitted persons. This disclosure requirement is designed to encompass the reasons for which confidential subscriber information might be accessed. For example, an NMS Stock ATS may only permit its designated employees access to confidential subscriber information when it is necessary to break certain trades or to perform system maintenance or repairs. Disclosures in Item 10(b) generally should describe whether the information is available in real-time (i.e., as trading is occurring on the platform) or whether the information relates to historical activity by one or more subscribers.[437]

Part III, Items 10(c) and (d) of proposed Form ATS-N closely track the existing requirements of Regulation ATS encompassed in Rule 301(b)(10)(i)(B) and (b)(10)(ii) respectively. The Commission preliminarily believes that market participants and the Commission would benefit from a description of the NMS Stock ATS's standards in ensuring that employees of the NMS Stock ATS cannot trade for their own account using confidential

[437] For example, an NMS Stock ATS that permits access to the confidential trading information of subscribers for breaking trades generally should specify, if true, that access to that information would only be of previous activity on the NMS Stock ATS for the purpose of breaking a trade.

trading information and the procedures adopted by the NMS Stock ATS to ensure its safeguards and procedures are followed. The Commission notes that, pursuant to existing Rule 301(b)(10), the Commission requires ATSs to have in place such standards, policies, and procedures. As discussed in greater detail below, the Commission is proposing to amend Regulation ATS to provide that these standards, policies, and procedures be written.[438] By requiring that these standards, policies, and procedures be written and that a description of them be publicly disclosed in Part III, Item 10 of proposed Form ATS-N, NMS Stock ATSs may be encouraged to carefully consider the adequacy of their means of protecting the confidential trading information of subscribers, which may result in more robust protections of such information. Market participants would be able to evaluate the relative robustness of such standards, policies, and procedures based on the disclosures provided in Part III, Item 10 of proposed Form ATS-N, which would in turn allow them to better evaluate the NMS Stock ATS to which they might route orders or become a subscriber.

Request for Comment

249. Do you believe the Commission should require the disclosure of the information on Part III, Item 10 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

250. Do you believe Part III, Item 10 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the written safeguards and written procedures to protect the

[438] See infra Section IX.

confidential trading information of subscribers to the NMS Stock ATS? Why or why not? Please support your arguments.

251. Do you believe that Part III, Item 10 of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required relating to the NMS Stock ATS's obligations under Rule 301(b)(10) of Regulation ATS, including a description of the safeguards and procedures of the NMS Stock ATS to protect the confidential trading information of subscribers? If not, how should Part III, Item 10 of proposed Form ATS-N be revised to provide additional clarity? Please explain.

252. Do you believe that any of information in the proposed disclosure requirements of Part III, Item 10 of proposed Form ATS-N, including a description of the NMS Stock ATS's safeguards and procedures to protect the confidential trading information of subscribers, should not be required to be disclosed on proposed Form ATS-N due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

253. Do you believe that the proposed disclosures in Part III, Item 10(a) of proposed Form ATS-N requiring an NMS Stock ATS to describe the means by which a subscriber can consent or withdraw consent to the disclosure of confidential trading information should be disclosed? Do ATSs that currently transact in NMS stock inform subscribers as to what trading information is considered confidential and/or provide a means for subscribers to give or withdraw consent to the disclosure of such trading information? Please explain.

254. Do you believe that the proposed disclosures in Part III, Item 10(b) of proposed Form ATS-N requiring an NMS Stock ATS to identify the positions or titles of any persons that have access to the confidential trading information of subscribers, what information they may obtain, and the circumstances under which such persons may obtain that information should be disclosed? Why or why not? Please support your arguments.

255. Do you believe there is other information that market participants might find relevant or useful regarding NMS Stock ATSs obligations under Rule 301(b)(10) and the protection of the confidential trading information of subscribers that has not been proposed in Part III, Item 10 of proposed Form ATS-N? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

256. What are the potential costs and benefits of disclosing the information required by Part III, Item 10 of proposed Form ATS-N? Would the proposed disclosures in Part III, Item 10 of proposed Form ATS-N require broker-dealer operators of NMS Stock ATSs to reveal too much (or not enough) information about their structure and operations? Why or why not? Please support your arguments.

257. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part III, Item 10 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part III, Item 10?

VIII. Part IV of Proposed Form ATS-N: The Manner of Operations of the NMS Stock ATS

Given the dispersal of trading volume in NMS stocks among an increasing number of trading centers,[439] the decision of where to route orders to obtain best execution for market participants is critically important. Today, NMS Stock ATSs account for a significant source of liquidity for NMS stocks and compete with, and operate functionally similar to, registered national securities exchanges.[440] Notwithstanding the importance of NMS Stock ATSs as a source of liquidity in NMS stocks and the increasing operational complexity of NMS Stock ATSs, market participants have limited information about how these markets operate. The Commission is concerned that this lack of operational transparency impedes market participants from adequately discerning how orders interact, match, and execute on NMS Stock ATSs, and may hinder market participants' ability to obtain, or monitor for, best execution for their orders. The current disclosures on Form ATS are confidential, and even in cases where an ATS voluntarily discloses its Form ATS publicly, ATSs have often been reluctant to provide more than summary disclosures about their operations. As a result, neither the Commission nor market participants currently receive a full picture of the operations of NMS Stock ATSs. The Commission preliminarily believes that the information that would be disclosed on proposed Form ATS-N, and in particular Part IV of the Form, would significantly improve the opportunity for market participants and the Commission to understand the operations of NMS Stock ATSs.

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439 See supra Section III.A (discussing the various trading venues for NMS stocks and the significance of NMS Stock ATSs as a significant source of liquidity).

440 See id.

Part IV of proposed Form ATS-N would require that the NMS Stock ATS include as Exhibit 4 information about the operations of an NMS Stock ATS. Specifically, Part IV of proposed Form ATS-N would require detailed information about the operations of NMS Stock ATSs, including the following, which are discussed in more detail below: subscribers; hours of operations; order types; connectivity and order entry; segmentation of order flow; display of orders and trading interest; trading services; procedures governing suspension of trading and trading during system disruptions and malfunctions; opening, reopening, closing and after-hours trading procedures; outbound routing from the NMS Stock ATS; use of market data by the NMS Stock ATS; fees; trade reporting, clearance and settlement procedures; order display and execution access; and fair access standards. The proposed disclosure requirements are designed to assist market participants in assessing an NMS Stock ATS as a trading venue. The Commission preliminarily believes that the information that would be required to be disclosed on proposed Form ATS-N would allow market participants to compare and evaluate NMS Stock ATSs, as well as compare NMS Stock ATSs with national securities exchanges, as the type and level of information required by Part IV of proposed Form ATS-N would be generally similar to the information disclosed by national securities exchanges about their operations. For example, the rules of national securities exchanges, which are publicly available,[441] include membership eligibility requirements, hours of operations, the operation of order types, the structure of the market (e.g., auction market, limit order matching book), priority, and opening and closing procedures, among other things. In addition, information provided on proposed Form ATS-N

[441] See supra note 302.

should assist the Commission, and the SRO for the broker-dealer operator, in exercising oversight over the broker-dealer operator.[442]

A. Subscribers

Part IV, Item 1 of proposed Form ATS-N would require an NMS Stock ATS to disclose information regarding any eligibility requirements to access the NMS Stock ATS, terms and conditions of use, types of subscribers, arrangements with liquidity providers, and any procedures or standards to limit or deny access to the NMS Stock ATS.[443]

Part IV, Item 1(a) of proposed Form ATS-N would require an NMS Stock ATS to describe any eligibility requirements to gain access to the services of the NMS Stock ATS. If the eligibility requirements are not the same for all subscribers and persons, an NMS Stock ATS would be required to describe any differences. This item is designed to provide potential subscribers with information about any conditions they would need to satisfy prior to accessing the NMS Stock ATS. Based on Commission experience, the eligibility process and requirements to access an NMS Stock ATS vary, and the requirements may differ depending on whether a potential subscriber is a customer of the broker-dealer operator of the NMS Stock ATS. For instance, some NMS Stock ATSs require that a potential subscriber be a broker-dealer to enter

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442 The SRO for an ATS has responsibility for overseeing the activities of the broker-dealer operator, which includes the activities of the NMS Stock ATS and surveilling the trading that occurs on the NMS Stock ATS. See Regulation ATS Adopting Release, supra note 7, at 70863.

443 The Commission notes that Exhibit A of current Form ATS requires an ATS to describe its classes of subscribers (for example, broker-dealer, institution, or retail) and any differences in access to the services offered by the ATS to different groups or classes of subscribers. Part IV, Section 1 of proposed Form ATS-N would require similar information, but the proposed requirements of Form ATS-N are designed to solicit more detailed information than that currently solicited by Form ATS.

orders on the NMS Stock ATS, while other NMS Stock ATSs do not. Some NMS Stock ATSs may require potential subscribers to submit financial information as a pre-requisite to subscribing to, or maintaining their subscriber status on, the NMS Stock ATS.[444] The Commission preliminarily believes that market participants would find it useful to understand an NMS Stock ATS's eligibility requirements so they may determine whether they may qualify for access to an NMS Stock ATS.[445] The Commission preliminarily believes that making such information publicly available would provide efficiencies, as a market participant could source information about, and compare and contrast, the eligibility processes and requirements to access different NMS Stock ATSs. The Commission also preliminary believes that it would be better able to monitor the extent to which NMS Stock ATSs are available to market participants and obtain a thorough understanding of NMS Stock ATS's eligibility processes and requirements.

Request for Comment

258. Do you believe the Commission should require the disclosure of the information on Part IV, Item 1(a) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

259. Do you believe Part IV, Item 1(a) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to eligibility requirements to gain access to the services of the NMS Stock ATS? Why or why not? Please support your arguments.

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444 See Regulation ATS Adopting Release, supra note 7, at 70859 (stating that the limitation on ATSs governing the conduct of subscribers does not preclude an ATS from requiring financial information from subscribers).

445 See Liquidnet letter #1, supra note 166 and accompanying text (stating disclosures should include the admission criteria for each ATS).

260. Is it sufficiently clear what information would be required by Part IV, Item 1(a) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

261. Do you believe there is other information that market participants might find relevant or useful regarding the eligibility process or requirements to gain access to the services of the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

262. Do you believe there is any information that would be required by Part IV, Item 1(a) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

263. Do you believe that subscribers and potential subscribers would benefit from knowing the eligibility requirements of the NMS Stock ATS? Why or why not? Please support your arguments.

264. What are the potential costs and benefits of disclosing the information required by Part IV, Item 1(a) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 1(a) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

265. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 1(a) of proposed Form ATS-N

other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 1(a)?

Part IV, Item 1(b) of proposed Form ATS-N would require an NMS Stock ATS to describe the terms and conditions of any contractual agreements for granting access to the NMS Stock ATS for the purpose of effecting transactions in securities or for submitting, disseminating, or displaying orders on the NMS Stock ATS, and to state whether these contractual agreements are written. Furthermore, if the terms and conditions of any contractual agreements are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. Based on Commission experience, these contractual agreements may or may not be in writing, and the terms and conditions therein can vary among subscribers to the NMS Stock ATSs.

The Commission preliminarily believes that it would be important for all subscribers to have access to all relevant information regarding the terms and conditions for accessing the trading services of the NMS Stock ATS, which today may not always be available to all subscribers. This item would allow subscribers to understand their rights and obligations in connection with their use of the NMS Stock ATS, and allow subscribers and potential subscribers to assess whether other market participants may have access arrangements more favorable than their own. This information is designed to help market participants when evaluating which trading centers they could or would like to access, and on which terms they could seek executions on those trading centers. The Commission preliminarily believes that having such information publicly available would provide efficiencies as market participants could more easily source information about the terms and conditions under which they could

trade across NMS Stock ATSs, as well as compare those terms and conditions to those of national securities exchanges. The Commission understands that some NMS Stock ATSs communicate the terms and conditions to access the NMS Stock ATS orally to subscribers, often as part of an onboarding process, and do not provide written contractual agreements. The Commission preliminarily believes that market participants would benefit from knowing whether a written contractual agreement exists that sets forth the terms and conditions for accessing and trading on the NMS Stock ATS. Furthermore, the Commission preliminarily believes that the disclosures that would be required under Item 1(b) would better inform potential subscribers about whether additional inquiry is necessary to fully understand the terms and conditions for trading on the NMS Stock ATS.

Request for Comment

266. Do you believe the Commission should require the disclosure of the information on Part IV, Item 1(b) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

267. Do you believe Part IV, Item 1(b) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the terms and conditions of any contractual agreements for granting access to the NMS Stock ATS? Why or why not? Please support your arguments.

268. Is it sufficiently clear what information would be required by Part IV, Item 1(b) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

269. Do you believe there is other information that market participants might find relevant or useful regarding the terms and conditions of any contractual agreements by which access is granted to the services of the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

270. Do you believe there is any information that would be required by Part IV, Item 1(b) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

271. Do you believe that NMS Stock ATSs commonly have written contractual agreements for granting access to the NMS Stock ATS? Why or why not, and what is the basis for such belief? If not, how is access granted? How are the terms and conditions of trading on the NMS Stock ATS communicated to subscribers? Is there commonly an onboarding process for new subscribers? What does such onboarding process entail? Please explain in detail.

272. Do you believe there are agreements between subscribers and an NMS Stock ATS that are not written? If so, what is the basis for your belief, what do those non-written agreements encompass, and how are they communicated to subscribers? Are any materials other than contracts provided to subscribers that set forth terms and conditions for granting access to the NMS Stock ATS? Please explain in detail.

273. What are the potential costs and benefits of disclosing the information required by Part IV, Item 1(b) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 1(b) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

274. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 1(b) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 1(b)?

Part IV, Item 1(c) of proposed Form ATS-N would require an NMS Stock ATS to describe the types of subscribers and other persons that use the services of the NMS Stock ATS (e.g., institutional and retail investors, broker-dealers, proprietary trading firms). The NMS Stock ATS would also be required to state whether it accepts non-broker-dealers as subscribers to the NMS Stock ATS and describe any criteria for distinguishing among types of subscribers, classes of subscribers, or other persons.

This item would provide information about the types of subscribers to the NMS Stock ATS, or other persons that can enter orders onto the NMS Stock ATS, so that market participants and the Commission would be better informed about the type of order flow that may be present on the NMS Stock ATS. Moreover, this item would, in conjunction with the other disclosure requirements of proposed Form ATS-N regarding differences in access to services or functionality of the NMS Stock ATS, inform market participants of any privileges or restrictions that attach to different categories of subscribers so that subscribers could evaluate which

privileges or restrictions might apply to them or the counterparties against which they would be trading.[446] For example, an NMS Stock ATS may only allow certain types of subscribers, including institutional investors, retail investors, broker-dealers, or proprietary trading firms, to enter a certain type of order on the NMS Stock ATS. Additionally, NMS Stock ATSs may assign different priorities to orders based on the types of subscribers that entered the orders on the NMS Stock ATS, such as orders originating from retail brokerage accounts or proprietary traders. Furthermore, the Commission understands that subscribers may wish to preclude or limit the interaction of their orders with the orders of certain other subscribers for several reasons, such as to help reduce information leakage or the possibility of trading with counterparties that they perceive to be undesirable. Accordingly, the Commission preliminarily believes that subscribers would find it useful to know the types of subscribers or other persons transacting on the NMS Stock ATS, and with that knowledge, they would be in a better position to evaluate the order flow on the NMS Stock ATS and determine whether they may wish to send their orders to the NMS Stock ATS for execution.[447] The Commission also preliminarily believes that increased transparency regarding the types of subscribers—and distinctions an NMS Stock ATS makes among subscribers or other persons when trying to access the ATS—would advance the Commission's objective of protecting investors by giving them better information with which to protect their own interests.

Request for Comment

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446 But see supra notes 92-95 and 425-427 and accompanying text (discussing the fair access requirements of Regulation ATS).

447 See Lime Brokerage letter, supra note 192 and accompanying text (stating the Commission should require "transparency around . . . membership of dark pools").

275. Do you believe the Commission should require the disclosure of the information on Part IV, Item 1(c) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

276. Do you believe Part IV, Item 1(c) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the types of subscribers and other persons that use the services of the NMS Stock ATS? Why or why not? Please support your arguments.

277. Is it sufficiently clear what information would be required by Part IV, Item 1(c) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

278. Do you believe there is other information that market participants might find relevant or useful regarding distinctions made by the NMS Stock ATS among subscribers? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

279. Do you believe there is any information that would be required by Part IV, Item 1(c) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

280. Do you believe that the information that would be required by Part IV, Item 1(c) of proposed Form ATS-N would aid subscribers in evaluating the order flow on

the NMS Stock ATS and determining whether they wish to send their orders there for execution? Why or why not? Please support your arguments.

281. What are the potential costs and benefits of disclosing the information required by Part IV, Item 1(c) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 1(c) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

282. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 1(c) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 1(c)?

Part IV, Item 1(d) of proposed Form ATS-N would require an NMS Stock ATS to describe any formal or informal arrangement the NMS Stock ATS has with a subscriber(s) or person(s) to provide liquidity to the NMS Stock ATS (e.g., undertaking to buy or sell continuously, or to meet specified thresholds of trading or quoting activity). Item 1(d) would further require an NMS Stock ATS to describe the terms and conditions of each arrangement and identify any liquidity providers that are affiliates of the broker-dealer operator.

An NMS Stock ATS may want to ensure that there is sufficient liquidity in a particular NMS stock to incentivize subscribers to send order flow in that NMS stock to the NMS Stock ATS; market participants may believe they are more likely to get an execution because of such liquidity. The Commission understands that some ATSs that trade NMS stocks may engage certain subscribers to provide liquidity to the NMS Stock ATS and perform similar functions to

that of a market maker on a national securities exchange.[448] These liquidity providers may quote in a particular NMS stock on the NMS Stock ATS during trading hours and may receive a benefit for performing this function, such as discounts on fees, rebates, or the opportunity to execute with a particular type of segmented order flow.[449] The obligations required of liquidity providers and the benefits they are provided vary across NMS Stock ATSs. Accordingly, the Commission proposes to require NMS Stock ATSs to describe the terms of any formal or informal arrangement with a liquidity provider, which could entail such obligations and benefits as well as a description of the process by which a subscriber could become a liquidity provider on the NMS Stock ATS. The Commission preliminarily believes that information about liquidity providers would be useful to subscribers and market participants who, for example, may want their orders to only interact with agency orders (and not with those of a liquidity provider), or, conversely, may themselves want to become a liquidity provider on the NMS Stock ATS.

Part IV, Item 1(d) of proposed Form ATS-N would also require an NMS Stock ATS to identify any liquidity providers that are affiliates of the broker-dealer operator. The Commission preliminarily believes that market participants would find it useful to know whether the broker-

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448 See, e.g., The NASDAQ Stock Market LLC, Rule 4613, Market Maker Obligations. Market-makers on a national securities exchange typically undertake, among other things, two-sided quote obligations where the market maker holds itself out as willing to buy and sell a particular security or securities for its own account on a continuous basis during trading hours. The obligations required of market makers may vary across national securities exchanges.

449 Often, market makers on national securities exchanges are provided benefits for providing liquidity to the exchange, such as fee discounts, rebates, or volume incentive programs that may not be available to non-market makers. See, e.g., The NASDAQ Stock Market LLC, Rule 7014, Market Quality Incentive Programs (describing the "Qualified Market Maker Program" and "Lead Market Maker Program"). The attendant benefits provided to market makers may vary across national securities exchanges.

dealer operator itself, or its affiliates, have an arrangement to provide liquidity to the NMS Stock ATS. The Commission preliminarily believes that such information could reveal potential conflicts of interest, if, for example, an NMS Stock ATS were to only permit affiliates to act as liquidity providers and provided significant benefits for performing that function.

Request for Comment

283. Do you believe the Commission should require the disclosure of the information on Part IV, Item 1(d) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

284. Do you believe Part IV, Item 1(d) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to any formal or informal arrangement the NMS Stock ATS has with a subscriber(s) or person(s) to provide liquidity to the NMS Stock ATS? Why or why not? Please support your arguments.

285. Is it sufficiently clear what information would be required by Part IV, Item 1(d) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

286. Do you believe there is other information that market participants might find relevant or useful regarding arrangements with subscribers or other persons to provide liquidity to the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

287. Do you believe there is any information that would be required by Part IV, Item 1(d) of proposed Form ATS-N that an NMS Stock ATS should not be required to

disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

288. Do you believe that the information that would be required by Part IV, Item 1(d) of proposed Form ATS-N would aid subscribers in evaluating the order flow on the NMS Stock ATS and determining whether they wish to send their orders there for execution? Why or why not? Please support your arguments.

289. Do you believe that the proposed requirement in Part IV, Item 1(d) of proposed Form ATS-N that the NMS Stock ATS identify any liquidity providers that are affiliates of the broker-dealer operator would aid subscribers in evaluating potential conflicts of interest of the broker-dealer operator, the order flow on the NMS Stock ATS, and determining whether they wish to send their orders there for execution? Why or why not? Please support your arguments.

290. What are the potential costs and benefits of disclosing the information required by Part IV, Item 1(d) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 1(d) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

291. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 1(d) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 1(d)?

Part IV, Item 1(e) of proposed Form ATS-N would require an NMS Stock ATS to describe the circumstances by which access to the NMS Stock ATS for a subscriber or other person may be limited or denied, and describe any procedures or standards that are used to determine such action. If these circumstances, procedures, or standards are not applicable to all subscribers and persons, the NMS Stock ATS would be required to describe any differences. As an ATS, an NMS Stock ATS cannot exercise SRO powers and may not discipline subscribers other than by excluding them from trading.[450] The Commission understands that ATSs that trade NMS stocks have rules governing subscribers' participation on the ATS, and that if a subscriber fails to comply with these rules, the ATS may limit or deny access to the NMS Stock ATS.[451] These limitations can result in some subscribers having different levels of functionality or more favorable terms of access than others. The Commission preliminarily believes that it is important for subscribers to have advance notice of the circumstances under which their access to NMS Stock ATSs would be limited or denied, and the procedures or standards that would be used to govern such actions. The Commission preliminarily believes that understanding such information would provide efficiencies as a market participant could source information about potential limits to accessing an NMS Stock ATS, even if that market participant otherwise meets the eligibility criteria for subscribing to the NMS Stock ATS, and it would allow them to evaluate whether any limitations may result in receiving less favorable access from the NMS

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450 See supra note 285 and accompanying text.

451 Form ATS-R, Exhibit C requires an ATS subject to the fair access obligations under Rule 301(b)(5) of Regulation ATS to list all persons granted, denied, or limited access to the ATS during the period covered by the ATS-R report, designating for each person (a) whether they were granted, denied, or limited access; (b) the date the alternative trading system took such action; (c) the effective date of such action; and (d) the nature of any denial on limitation of access. See Form ATS-R.

Stock ATS. The increased transparency regarding these procedures also may advance the Commission's objective of protecting investors by helping the Commission to understand when NMS Stock ATSs deny or limit access to market participants.

Request for Comment

292. Do you believe the Commission should require the disclosure of the information on Part IV, Item 1(e) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

293. Do you believe Part IV, Item 1(e) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the circumstances by which access to the NMS Stock ATS for a subscriber or other person may be limited or denied? Please explain.

294. Is it sufficiently clear what information would be required by Part IV, Item 1(e) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

295. Do you believe there is other information that market participants might find relevant or useful regarding the process by which access to an NMS Stock ATS for a subscriber may be limited or denied? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

296. Do you believe there is any information that would be required by Part IV, Item 1(e) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets,

burden, or any other concerns? If so, what information and why? Please support your arguments.

297. What are the potential costs and benefits of disclosing the information required by Part IV, Item 1(e) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 1(e) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

298. Do you believe there are circumstances under which NMS Stock ATSs currently limit the functionality available to subscribers due to an action or inaction on the part of a subscriber? If so, what is the basis for your belief, what are those circumstances, and what functionality is typically limited? Is it common for an NMS Stock ATS to deny access to subscribers as opposed to limiting access? Why or why not, and under what circumstances? Please be specific.

299. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 1(e) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Items 1(e)?

B. Hours of Operations

Part IV, Item 2(a) of proposed Form ATS-N would require an NMS Stock ATS to provide the days and hours of operation of the NMS Stock ATS, including the times when orders or other trading interest are entered on the NMS Stock ATS and the time when pre-opening or after-hours trading occur. Also, if the times when orders or other trading interest are entered on

the NMS Stock are not the same for all subscribers and persons, Part IV, Item 2(b) would require the NMS Stock ATS to describe any differences.

The Commission preliminarily believes that it is important for subscribers and the Commission to have information regarding when NMS Stock ATSs are operating and when orders can be entered on those trading centers, including when an NMS Stock ATS will accept orders outside of standard operating hours. The Commission notes that national securities exchanges' rulebooks, which are publicly available, include such information.[452] Making such information publicly available for NMS Stock ATSs would enable market participants to more easily compare when trading interest may be entered on NMS stock trading centers. This information also would allow the Commission to better understand the operations of NMS Stock ATSs.

Request for Comment

300. Do you believe the Commission should require the disclosure of the information on Part IV, Item 2 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

301. Do you believe Part IV, Item 2 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the days and hours of operation of the NMS Stock ATS? Why or why not? Please support your arguments.

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452 See, e.g., BATS Exchange Rules 1.5(c) (setting forth hours for the exchange's After Hours Trading Session), 1.5(r) (setting forth hours for the exchange's Pre-Opening Session), 1.5(w) (setting forth the hours for the exchange's Regular Trading Hours), and 11.1 (setting forth the exchange's hours of trading and trading days, and when certain order types may be entered).

302. Do you believe there is other information that market participants might find relevant or useful regarding the hours of operation of an NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

303. Do you believe that Part IV, Item 2 of proposed Form ATS-N is sufficiently clear with respect to the disclosures that would be required? If not, how should Part IV, Item 2 of proposed Form ATS-N be revised to provide additional clarity? Please explain in detail.

304. Do you believe there is any information that would be required by Part IV, Item 2 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

305. What are the potential costs and benefits of disclosing the information required by Part IV, Item 2 of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 2 of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

306. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 2 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could

this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 2?

C. Types of Orders

Part IV, Item 3(a) of proposed Form ATS-N would require an NMS Stock ATS to describe any types of orders that are entered on the NMS Stock ATS, their characteristics, operations, and how they are handled on the NMS Stock ATS, including: (i) priority for each order type; (ii) conditions for each order type; (iii) order types designed not to remove liquidity (e.g., post-only orders); (iv) order types that adjust their price as changes to the order book occur (e.g., price sliding orders or pegged orders) or have a discretionary range; (v) the time-in-force instructions that can be used or not used with each order type; (vi) the availability of order types across all forms of connectivity to the NMS Stock ATS and differences, if any, between the availability of an order type across those forms of connectivity; (vii) whether an order type is eligible for routing to other trading centers; and (viii) the circumstances under which order types may be combined with a time-in-force or another order type, modified, replaced, canceled, rejected, or removed from the NMS Stock ATS.[453] If the availability of order types and their terms and conditions are not the same for all subscribers and persons, Part IV, Item 3(b) would require the NMS Stock ATS to describe any differences. In addition, Part IV, Item 3(c) of Form ATS-N would require an NMS Stock ATS to describe any requirements and handling procedures for minimum order sizes, odd-lot orders, or mixed-lot orders. The NMS Stock ATS must also

[453] Items 3(a)(i), (ii), (iii), (iv) and (vii) of proposed Form ATS-N provide further requirements of what needs to be included in responding to these items. See discussion under each item infra.

describe any differences if the requirements and handling procedures for minimum order sizes, odd-lot orders, or mixed-lot orders are not the same for all subscribers and persons.[454]

As discussed above, NMS Stock ATSs offer a wide range of order types and modifiers and offer different minimum order size requirements. Order types, in particular, are a primary means by which users of an NMS Stock ATS communicate their instructions for handling their orders to the NMS Stock ATS. Moreover, order types can be complex and operate in various ways, and the Commission is therefore proposing to request that NMS Stock ATSs provide the level of detail set forth in subsections (i) – (viii) of Item 3(a). The Commission believes that all market participants should have sufficient information about all aspects of the operations of order types available on an NMS Stock ATS to understand how to use order types to achieve their investing or trading objectives, as well as to understand how order types used by other market participants could affect their trading interest. Item 3(a) would require a complete and detailed description of the order types available on the NMS Stock ATS, their characteristics, operations, and how they are handled to provide transparency to market participants and the Commission. Subsection (i) of Item 3(a) would require that the NMS Stock ATS describe the priority rules for each order type. The description would be required to include the order type's priority on the NMS Stock ATS upon order entry as well as any subsequent change to priority (if applicable). Also, the NMS Stock ATS would need to describe whether an order type can receive a new time stamp (such as, for example, in the case of order types that adjust price), and such order type's priority vis-à-vis other orders on the book due to changes in the NBBO or other

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454 The Commission notes that a broker-dealer operator may have valid business reasons for offering various order types to subscribers and the Commission is not proposing to limit the ability for a broker-dealer operator to have such arrangements.

reference price. In addition, this subsection would also require a description of any instance in which the order type could lose execution priority to a later arriving order at the same price.

Subsection (ii) of Item 3(a) would require that the NMS Stock ATS describe any conditions for each order type. Such conditions would include: any price conditions, including how the order type is ranked and how price conditions affect the rank and price at which it can be executed; conditions on the display or non-display of an order; or conditions on the execution or routing of orders.

Subsection (iii) of Item 3(a) would require that the NMS Stock ATS describe order types designed not to remove liquidity (e.g., post-only orders). The NMS Stock ATS would need to describe what occurs when such order is marketable against trading interest on the NMS Stock ATS when received.

Subsection (iv) of Item 3(a) would require that the NMS Stock ATS describe order types that adjust their price as changes to the order book occur (e.g., price-sliding orders or pegged orders) or have a discretionary range. As part of a response, this description would be required to include an order's rank and price upon order entry and whether such prices or rank may change based on the NBBO or other market conditions when using such an order type. In addition, the description would have to include when the order type is executable and at what price the execution would occur, and also whether the price at which the order type can be executed ever changes. Also, if the order type can operate in different ways, the NMS Stock ATS would need to explain the default operation of the order type.

Subsection (v) of Item 3(a) would require the NMS Stock ATS to describe the time-in-force instructions that can be used or not used with each order type.

Subsection (vi) of Item 3(a) would require a description of the availability of order types across all forms of connectivity to the NMS Stock ATS and differences, if any, between the availability of order types across those forms of connectivity. For example, if an NMS Stock ATS offers certain order types to persons who connect through the broker-dealer operator, such as through use of a SOR (or similar functionality) or algorithm, as opposed to persons who connect directly through a FIX connection, that difference in availability would need to be described in response to this subsection.

Subsection (vii) of Item 3(a) would require a description of whether the order type is eligible for routing to other trading centers. The response required by this item would be required to include, if it is routable, whether an order type can be used with any routing services offered.

Subsection (viii) of Item 3(a) would require the NMS Stock ATS to describe the circumstances under which order types submitted to the NMS Stock ATS may be combined with a time-in-force or another order type, modified, replaced, canceled, rejected, or removed from the NMS Stock ATS. If an NMS Stock ATS allows a subscriber to combine separate order types, or combine an order type with a time-in-force restriction, both of those instances would be responsive to subsection (viii) of Item 3(a).

Part IV, Item 3(b) of proposed Form ATS-N would require the NMS Stock ATS to describe any differences if the availability of its orders types and their terms and conditions are not the same for all subscribers and persons.

Part IV, Item 3(c) of proposed Form ATS-N would require an NMS Stock ATS to describe any requirements and handling procedures for minimum order sizes, odd-lot orders, or mixed-lot orders. If the requirements and handling procedures for minimum order sizes, odd-lot

orders, or mixed-lot orders are not the same for all subscribers and persons, the NMS Stock ATS would also be required to describe any differences. These would include, for example, any order size requirements that may differ based on factors such as the type of subscriber or person that uses the services of the NMS Stock ATS, or the type of order (e.g., if only certain subscribers or persons are eligible to use that order type).

The Commission preliminarily believes that a detailed description of the characteristics of the order types of an NMS Stock ATS would assist subscribers in better understanding how their orders would function and interact with other orders on the NMS Stock ATS.[455] It also would allow market participants to see what order types could be used by other market participants, which could affect the probability, timing, and quality of their own executions. Moreover, the Commission preliminarily believes that requiring comprehensive disclosure of an NMS Stock ATS's order types on proposed Form ATS-N would allow market participants to compare order types across NMS Stock ATSs and national securities exchanges. As a result, a market participant would be better able to assess the availability of order types and whether their characteristics would accomplish the market participant's investing or trading objectives.

The Commission also preliminarily believes that the disclosures about the characteristics and functions of order types would allow the Commission to better oversee NMS Stock ATSs, and alert the Commission as to whether the function of a particular order type may violate the federal securities laws or the rules or regulations thereunder, such as the requirement under Rule

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455 See Consumer Federation of America Letter, supra note 188 and accompanying text (stating the Commission should require all ATSs to disclose certain information about the order types offered on the ATS); Liquidnet letter #1, supra note 171 and accompanying text (stating institutional brokers, including institutional ATSs, should disclose the order types offered).

611 of Regulation NMS that a trading center have policies and procedures reasonably designed to prevent trade-throughs of protected quotations in NMS stocks.[456] The Commission preliminarily believes that the disclosures that would be required by Item 3(a) would help the Commission discover a potential violation of the federal securities laws and rules or regulations thereunder in a more expeditious manner than if the disclosures were not required. The disclosures required by Item 3(a) would also facilitate the Commission's comparison of how the characteristics of order types were described to subscribers and how they operate in practice as part of any examination of the NMS Stock ATS.

The Commission preliminarily believes this information would also advance the Commission's interest in the protection of investors by allowing subscribers to clearly see the types of orders available to them, as well as potential counterparties, and any differences between the order types, available among participants on the NMS Stock ATS.

As noted above, Part IV, Item 3(b) would require the NMS Stock ATS to describe any differences if the availability of its order types and their terms and conditions are not the same for all subscribers and persons. The Commission preliminarily believes that this information would be important for a market participant to better assess whether other participants on the NMS Stock ATS may receive advantageous or disadvantageous treatment as a result of the ATS's various order types and how that treatment may affect that market participant's trading interest. Information about any disparate treatment of investors also would be important for the Commission as it monitors developments in the national market system.

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[456] See 17 CFR 242.611.

Part IV, Item 3(c) of proposed Form ATS-N would require an NMS Stock ATS to describe any requirements and handling procedures for minimum order sizes, odd-lot orders, or mixed-lot orders. The NMS Stock ATS would also be required to explain any differences if the requirements and handling procedures for minimum order sizes, odd-lot orders, or mixed-lot orders are not the same for all subscribers and persons. The information that would be required by Item 3(c) is designed to facilitate the entry of orders by subscribers by providing information on minimum order sizes, odd-lot orders, and mixed-lot orders. An explanation of how an NMS Stock ATS's requirements and conditions for minimum order sizes, odd-lot orders, and mixed-lot orders differ among subscribers and persons would also provide a market participant with information regarding how its trading interest would be handled vis-à-vis other market participants. The information that would be required by Item 3(c) would also be useful to the Commission's monitoring of developments in market structure.

Request for Comment

307. Do you believe the Commission should require the disclosure of the information on Part IV, Items 3(a) – 3(c) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

308. Do you believe Part IV, Items 3(a) – 3(c) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the types of orders that are entered to the NMS Stock ATS, their characteristics, operations, and how they are handled on the NMS Stock ATS? Please explain.

309. Is it sufficiently clear what information would be required by Part IV, Items 3(a) - 3(c) of proposed Form ATS-N? Should the items be refined in any way? If so, how? Please be specific.

310. Do you believe the proposed requirement to disclose the information that would be required by Part IV, Item 3(a) of proposed Form ATS-N could impact innovation on NMS Stock ATSs? Why or why not? Please support your arguments.

311. Do you believe there is other information that market participants might find relevant or useful regarding the types of orders that are entered to the NMS Stock ATS, their characteristics, operations, and how they are handled on the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

312. Do you believe there is any information that would be required by Part IV, Items 3(a) - 3(c) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

313. Do you believe there are any other aspects of order types that an NMS Stock ATS should be required to disclose in a subpart to Part IV, Item 3(a) of proposed Form ATS-N that have not been identified? If so, what? Do you believe there are other order types about which the Commission should ask specifically? If so, what order types? Please explain in detail.

314. Should the Commission require greater specificity regarding the operation of order types? If so, why and how? If not, why not? Please support your arguments.

315. Do you believe that information relating to available order types would help market participants in determining the best trading venue for their orders? Why or why not? Please support your arguments.

316. Do you believe that Items 3(a) - 3(c) of Part IV of proposed Form ATS-N would advance the Commission's interest in the protection of investors by allowing market participants to consider the types of orders available to them, as well as potential counterparties, and any differences between the order types, modifiers, and size requirements available among participants on the NMS Stock ATS? Why or why not? Please support your arguments.

317. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Items 3(a) - 3(c) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Items 3(a) - 3(c)?

318. What are the potential costs and benefits of disclosing the information required by Part IV, Items 3(a) – 3(c) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Items 3(a) – 3(c) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

319. Do you believe that Part IV, Item 3(a) of proposed Form ATS-N should require a description of priority for each order type? Why or why not? Please support your answer.

320. Do you believe that Part IV, Item 3(a) of proposed Form ATS-N should require a description of any conditions for each order type? Why or why not? Please support your answer.

321. Do you believe that Part IV, Item 3(a) of proposed Form ATS-N should require a description of order types designed not to remove liquidity? Why or why not? Please support your answer.

322. Do you believe that Part IV, Item 3(a) of proposed Form ATS-N should require a description of order types that adjust their price as changes to the order book occur or have a discretionary range? Why or why not? Please support your answer.

323. Do you believe that Part IV, Item 3(a) of proposed Form ATS-N should require a description of the time-in-force instructions for each order type? Why or why not? Please support your answer.

324. Do you believe that Part IV, Item 3(a) of proposed Form ATS-N should require a description of the availability of order types across all forms of connectivity to the NMS Stock ATS? Why or why not? Please support your answer.

325. Do you believe that Part IV, Item 3(a) of proposed Form ATS-N should require a description of whether order types are eligible for routing to other trading centers? Why or why not? Please support your answer.

326. Do you believe that Part IV, Item 3(a) of proposed Form ATS-N should require a description of the circumstances under which order types may be combined with a time-in-force or another order type, modified, replaced, canceled, rejected, or removed from the NMS Stock ATS? Why or why not? Please support your answer.

Part IV, Item 3(d) of proposed Form ATS-N would require an NMS Stock ATS to describe any messages sent to or received by the NMS Stock ATS indicating trading interest (e.g., IOIs, actionable IOIs, or conditional orders), including information contained in the message, the means under which messages are transmitted, the circumstances in which messages are transmitted (e.g., automatically by the NMS Stock ATS or upon the subscriber's request), and the circumstances by which they may result in an execution on the NMS Stock ATS. If the terms and conditions regarding these messages, indications of interest, and conditional orders are not the same for all subscribers and persons, the NMS Stock ATS would be required describe any differences.

This item is designed to provide specific information about the use of IOIs, actionable IOIs, conditional orders, and similar functionalities on the NMS Stock ATS. Based on the Commission's experience, IOIs are used by NMS Stock ATSs to convey trading interest available on those trading centers. Some NMS Stock ATSs also transmit "actionable" IOIs to selected market participants for the purpose of attracting contra-side order flow to the ATS. In general, an actionable IOI is an IOI containing enough information to effectively alert the recipient about the details of the NMS Stock ATS's trading interest in a security. While an actionable IOI may not explicitly specify the price and/or size of the trading interest, the practical context in which it is submitted alerts the recipient about the side (buy or sell), size (minimum of

a round lot of trading interest), and price (at or better than the NBBO, depending on the side of the order).

Conditional orders are also messages indicating a trading interest on a trading venue, and conditional orders generally function in a similar manner to IOIs. A conditional order may contain the same attributes as other order types when a subscriber enters it onto the trading venue (e.g., side, price, and size), but NMS Stock ATSs will generally not transmit those details to other subscribers or market participants. Rather, the NMS Stock ATS will tentatively match the conditional order with contra side interest and then alert the subscriber that entered the conditional order of the potential match. That subscriber may then either accept or decline the execution (i.e., "firm up" the conditional order). Based on Commission experience, NMS Stock ATSs typically only permit conditional orders to execute against other conditional orders, but some ATSs allow conditional orders to interact with other order types.

The Commission preliminarily believes that understanding the manner in which NMS Stock ATSs use IOIs, actionable IOIs, conditional orders, and similar functionalities could be useful to market participants because it could impact the potential execution of a subscriber's trading interest. Also, because an actionable IOI conveys substantial information, the potential for information leakage could be a concern to NMS Stock ATS subscribers using IOIs, particularly when they are seeking to execute large-sized orders. In the Commission's experience, NMS Stock ATSs generally send IOIs and other conditional orders only to certain market participants. Accordingly, the disclosures that would be required by Item 3(d) are designed to help market participants better evaluate whether messages indicating trading interest (including IOIs, actionable IOIs, and conditional orders) are equally available to them as

compared to other market participants and would be appropriate tools to accomplish their investing or trading objectives.

Request for Comment

327. Do you believe the Commission should require the disclosure of the information on Part IV, Item 3(d) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

328. Do you believe Part IV, Item 3(d) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to any messages sent to or received by the NMS Stock ATS indicating trading interest? Please explain.

329. Is it sufficiently clear what information would be required by Part IV, Item 3(d) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

330. Do you believe there is other information that market participants might find relevant or useful regarding messages indicating trading interest (e.g., IOIs, actionable IOIs, or conditional orders)? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

331. Do you believe there are other types of messages that communicate trading interest that the Commission should specifically cite as examples in Part IV, Item 3(d) of proposed Form ATS-N? If so, what are those message types? Please provide a detailed explanation of each additional type of message and support your arguments as to each.

332. Do you believe there is any information that would be required by Part IV, Item 3(d) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? If so, what information and why? Please support your arguments.

333. Do you believe that there is potential concern for information leakage from the use of IOIs, particularly actionable IOIs on NMS Stock ATSs? If so, would disclosure about their operation on proposed Form ATS-N be an appropriate manner in which to mitigate any concern? If not, why not? Please support your arguments.

334. What are the potential costs and benefits of disclosing the information required by Part IV, Item 3(d) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 3(d) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

335. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 3(d) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 3(d)?

D. Connectivity, Order Entry, and Co-location

Part IV Item 4(a) of proposed Form ATS-N would require the NMS Stock ATS to describe the means by which subscribers or other persons connect to the NMS Stock ATS and

enter orders or other trading interest on the NMS Stock ATS (e.g., directly, through a Financial Information eXchange ("FIX") connection to the ATS, or indirectly, through the broker-dealer operator's SOR, or any intermediate functionality, algorithm, or sales desk). This item also would require an NMS Stock ATS to describe any differences if the terms and conditions for connecting and entering orders or other trading interest on the NMS Stock ATS are not the same for all subscribers and persons.

Based on Commission experience reviewing Forms ATS, subscribers send orders or other trading interest to the NMS Stock ATS both directly and indirectly. A direct method of sending orders or other trading interest to an ATS that trades NMS stocks, for example, may include the use of the FIX Protocol. The FIX Protocol allows subscribers to enter orders or other trading interest into the ATS without an intermediary. To the extent that a subscriber connects to the NMS Stock ATS by way of a FIX connection and an order sent by that subscriber passes through an intermediate application or functionality on its way to the NMS Stock ATS, the NMS Stock ATS should identify the application or functionality and provide a description of its purpose.[457] One example of an indirect method of sending orders or other trading interest to an NMS Stock ATS is sending orders or other trading interest to the broker-dealer operator, which may then use its SOR (or similar functionality) or algorithm to send such orders or other trading interest to the NMS Stock ATS.

The disclosures regarding the direct or indirect means of order entry could be important to subscribers because they would provide information about the possible methods to reach the

[457] The Commission notes that, in this example, given that the intermediate application or functionality has access to a subscriber's order information, the NMS Stock ATS should take appropriate measures to protect the confidentiality of such information pursuant to Rule 301(b)(10) of Regulation ATS.

NMS Stock ATS and applicable system requirements necessary to send orders or other trading interest to the NMS Stock ATS. This information would also alert subscribers to the NMS Stock ATS as to whether trading interest can be entered on the NMS Stock ATS through the broker-dealer operator, which would allow subscribers to assess any potential advantages that orders sent through the broker-dealer operator may have with respect to other subscribers on the NMS Stock ATS.[458] The Commission would find the information required by this item useful to understanding how trading interest moves from persons to possible trading centers and in evaluating any potential conflicts of interest presented between the broker-dealer operator and the NMS Stock ATS in how orders are entered onto the NMS Stock ATS.

The disclosure of the information required for order entry on the NMS Stock ATS, such as limit price, size, and/or side of the market, would inform all subscribers to the NMS Stock ATS about how to transmit orders or other trading interest to the NMS Stock ATS. The Commission preliminarily believes that understanding this information may expedite the order entry process of subscribers. The Commission, as part of its monitoring of developments in market structure, also could use this disclosure to better understand what information allows for the interaction of trading interest.

The Commission preliminarily believes that requiring NMS Stock ATSs to disclose any differences if the terms and conditions for connecting and entering orders or other trading interest on the NMS Stock ATS are not the same for all subscribers and persons would allow market participants to source the various order entry procedures offered by NMS Stock ATSs as

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[458] But see supra notes 92-95 and 425-427 and accompanying text (discussing the fair access requirements of Regulation ATS).

part of evaluating an NMS Stock ATS as a potential destination for them to route their orders for execution.

Request for Comment

336. Do you believe the Commission should require the disclosure of the information on Part IV, Item 4(a) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

337. Do you believe Part IV, Item 4(a) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the means by which subscribers or other persons connect to the NMS Stock ATS and enter orders or other trading interest on the NMS Stock ATS? Please explain.

338. Is it sufficiently clear what information would be required by Part IV, Item 4(a) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

339. What are the direct and indirect means through which subscribers and other persons can send orders or other trading interest to the NMS Stock ATS? Do you believe there any means for which the Commission should specifically request information in Part IV, Item 4(a) of proposed Form ATS-N? If so, please explain how those means to send orders or other trading interest are used by subscribers and other persons.

340. Do you believe there are any methods of sending orders or other trading interest to NMS Stock ATSs that are more advantageous than others? If so, please

explain how such methods provide advantages to subscribers or other persons who use them. Should those advantages, if any, be specifically disclosed?

341. Do you believe there is other information that market participants might find relevant or useful regarding the means by which subscribers can send orders or other trading interest to the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

342. Do you believe there is any information that would be required by Part IV, Item 4(a) of Proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

343. Do you believe that the information that would be required by Part IV, Item 4(a) of proposed Form ATS-N could be important to market participants in assessing any potential advantages that orders sent through the broker-dealer operator may have over other market participants on the NMS Stock ATS? Why or why not? Please support your arguments.

344. Do you believe that the information that would be required by Part IV, Item 4(a) of proposed Form ATS-N would be important to market participants when deciding whether to trade on an NMS Stock ATS and would assist them in devising appropriate trading strategies to help accomplish their investing or trading objectives? Why or why not? Please support your arguments.

345. What are the potential costs and benefits of disclosing the information required by Part IV, Item 4(a) of proposed Form ATS-N? Would the proposed disclosures in

Part IV, Item 4(a) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

346. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 4(a) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 4(a)?

Part IV Item 4(b) of proposed Form ATS-N would require that the NMS Stock ATS describe any co-location services or any other means by which any subscriber or other persons may enhance the speed by which to send or receive orders, trading interest, or messages to or from the NMS Stock ATS and the terms and conditions of co-location services. If the terms and conditions of the co-location services are not the same for all subscribers and persons, Part IV, Item 4(b) would require the NMS Stock ATS to describe any differences. Co-location is the placement of a user's systems in close physical proximity to the trading and execution system of a trading venue to reduce latency and enhance speed. The description of co-location services that could enhance the speed of orders and messages and the terms and conditions thereof would allow subscribers to evaluate these services and determine whether they would like to subscribe to such services if available. Moreover, subscribers and potential subscribers would know that others can use a co-location service even if they determine not to use it themselves, which would

assist them in devising appropriate trading strategies if they choose to participate.[459] For instance, a subscriber could choose certain types of orders or trading strategies with the knowledge that other subscribers have enhanced speeds for submitting trading interest through the use of the NMS Stock ATS's connectivity or co-location services.

The proposed requirement that the NMS Stock ATS describe any differences in the terms and conditions of an NMS Stock ATS's co-location services among subscribers or other persons also could help inform the trading strategies chosen by subscribers. Information on such connectivity and co-location options would further the Commission's understanding of the dynamics of the markets and overall market structure for NMS stocks. In addition, this information would allow the Commission to evaluate whether the NMS Stock ATS is unreasonably prohibiting or limiting any person with respect to the access to services offered by the NMS Stock ATS in contravention of Rule 301(b)(5) of Regulation ATS for those NMS Stock ATSs that have surpassed the applicable trading volume thresholds.

Request for Comment

347. Do you believe the Commission should require the disclosure of the information on Part IV, Item 4(b) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

348. Do you believe Part IV, Item 4(b) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS

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459 See SIFMA letter #1, supra note 194 and accompanying text (stating its belief that "added disclosure about co-location and other market access arrangements would be beneficial to market participants"); Morgan Stanley letter, supra note 197 and accompanying text (stating that it received questions from customers specific to dark pools related to the co-location of servers).

Stock ATS related to co-location services or any other means by which any subscriber or other persons may enhance the speed by which to send or receive orders, trading interest, or messages to or from the NMS Stock ATS? Please explain.

349. Is it sufficiently clear what information would be required by Part IV, Item 4(b) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

350. Do you believe there is other information that market participants might find relevant or useful regarding co-location services by which a subscriber may enhance the speed that it may submit orders or send and receive messages? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

351. Do you believe there is any information that would be required by Part IV, Item 4(b) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

352. Do believe that the information that would be required by Part IV, Item 4(b) of proposed Form ATS-N would be useful to market participants when deciding whether to trade on an NMS Stock ATS and would assist them in devising appropriate trading strategies to help accomplish their investing or trading objectives? Why or why not? Please support your arguments.

353. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 4(b) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 4(b)?

354. What are the potential costs and benefits of disclosing the information required by Part IV, Item 4(b) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 4(b) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

E. Segmentation of Order Flow and Notice About Segmentation

Part IV, Item 5(a) of proposed Form ATS-N would require an NMS Stock ATS to describe any segmentation of orders or other trading interest on the NMS Stock ATS (e.g., classification by type of participant, source, nature of trading activity). Part IV, Item 5(a) would also require the NMS Stock ATS to describe the segmented categories, the criteria used to segment these categories, and procedures for determining, evaluating, and changing segmented categories. If the segmented categories, the criteria used to segment these categories, and any procedures for determining, evaluating or changing segmented categories are not the same for all subscribers and persons, this item would require an NMS Stock ATS to describe any differences.

Based on Commission experience, some NMS Stock ATSs segment order flow entered on the NMS Stock ATS according to various categories and allow subscribers to select the type of persons or order flow they want to trade or not trade against. An NMS Stock ATS may segment trading interest by type of participant (e.g., buy-side or sell-side firms, proprietary

trading firms, agency-only firms, firms above or below certain assets under management thresholds). For example, buy-side or institutional order flow may seek to only trade against other buy-side or institutional order flow, or may seek to avoid trading against proprietary trading firms or so-called high frequency trading firms. When segmenting by source, an NMS Stock ATS may look to the underlying source of the trading interest in the case of trading interest that is intermediated, such as the trading interest of retail customers. Some NMS Stock ATSs segment by the nature of the trading activity, which could include segmenting by patterns of behavior, time horizons of traders, or the passivity or aggressiveness of trading strategies. NMS Stock ATSs might elect to use some combination of these criteria or other criteria altogether.

This item would require that an NMS Stock ATS disclose the segmented categories, the criteria used to segment these categories, and procedures for determining, evaluating, and changing segmented categories. This would include, for example, any modification or overriding of an existing segmented category and a description of how existing subscribers in the segmented category would be handled and notified. This item would provide market participants with an understanding of the categories of order flow or types of market participants with which they may interact and allow them to both assess the consistency of a segmented group and determine whether the manner in which the trading interest is segmented comports with its views of how certain trading interest should be categorized. Disclosure of the procedures and criteria used to segment categories would allow a market participant to determine whether its view of what constitutes certain trading interest it wants to seek or avoid is classified in the same way by the NMS Stock ATS. For example, a subscriber may find it useful to understand the metrics or criteria an NMS Stock ATS uses to categorize high frequency trading firms so that it can

compare the criteria used by the NMS Stock ATS with its view of what constitutes a high frequency trading firm, and thus be able to successfully trade against or avoid such trading interest. Similarly, information regarding the procedures applicable to trading among segmented categories would allow market participants to evaluate whether they can successfully trade against or avoid the segments of trading interest they desire.

In addition, disclosure of any differences in the segmentation among participants would allow subscribers to more clearly note if certain persons are, for instance, not subject to segmentation in the same way as other persons, or not subject to segmentation at all and able to trade against all order flow. All participants would have access to the same information as to how the NMS Stock ATS segments order flow, and whether the segmentation criteria are applied by the NMS Stock ATS uniformly.[460] These disclosures would help the Commission understand the categories and manner in which persons and order flow (or both) are segmented across NMS Stock ATSs and could aid the Commission in its oversight of the markets including, for example, its evaluation of whether segmentation could facilitate or hinder market participants from achieving their investing or trading objectives. The Commission is not proposing to prohibit NMS Stock ATSs from segmenting their order flow;[461] the Commission is instead proposing

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460 See Blackrock letter, supra note 186 and accompanying text (stating mandatory ATS disclosure should include greater detail on how the platform matches orders between client segments); Consumer Federation of America letter, supra note 187 and accompanying text (stating that Form ATS should require ATSs to provide "critical details about . . . segmentation" because "the information will allow market participants . . . to assess whether an ATS's terms of access and service are such that it makes sense to trade on that venue").

461 However, an ATS that crossed the fair access threshold and wished to segment its order flow could do so only in accordance with the fair access provisions of existing Rule 301(b)(5) of Regulation ATS.

only that an NMS Stock ATS disclose to market participants and the Commission how they segment their order flow.

Request for Comment

355. Do you believe the Commission should require the disclosure of the information on Part IV, Item 5(a) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

356. Do you believe Part IV, Item 5(a) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to segmentation of orders or other trading interest on the NMS Stock ATS? Please explain.

357. Is it sufficiently clear what information would be required by Part IV, Item 5(a) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

358. Do you believe there is other information that market participants might find relevant or useful regarding segmentation of order flow on the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

359. Do you believe there is any information that would be required by Part IV, Item 5(a) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

360. Do you believe there are any forms or types of order segmentation that would not be captured by Part IV, Item 5(a) of proposed Form ATS-N or should be addressed separately? If so, please provide a detailed explanation of how orders are segmented under such functionalities on NMS Stock ATSs.

361. What are the potential costs and benefits of disclosing the information required by Part IV, Item 5(a) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 5(a) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

362. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 5(a) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 5(a)?

Part IV, Item 5(b) of proposed Form ATS-N would require the NMS Stock ATS to state whether the NMS Stock ATS informs subscribers or persons about the segmentation category that a subscriber or a person is assigned and to describe any notice provided to subscribers or persons about the segmentation category that they are assigned and the segmentation identified in Part IV, Item 5(a), including the content of any notice and the means by which any notice is communicated. Also, an NMS Stock ATS would be required to describe any differences if the notice is not the same for all subscribers and persons. As discussed above, an NMS Stock ATS can elect to segment its order flow entered on the NMS Stock ATS according to various categories and allow subscribers and other persons to select the type of persons or order flow

they want to trade or not trade against. Based on the experience of the Commission and its staff, ATSs provide subscribers with limited information about how they segment order flow and do not always inform subscribers about the categories into which they are segmented. A market participant that is unaware of its segmented category may not know about the order flow it is trading against, and therefore, the Commission preliminarily believes that market participants trading on an NMS Stock ATS would want to know about their assigned segmented categories and understand how those categories were determined.[462] The category into which a subscriber is placed also informs its decision of where to trade because it could affect the contra-side trading interest available to them to trade against. Item 5(b) is therefore designed to inform market participants about the potential information that the NMS Stock ATS may provide to inform them about such segmentation, particularly with respect to whether the NMS Stock ATS informs subscribers about how it assigns a participant to a segmented category, as well as any differences in the notice provided to subscribers. The Commission preliminarily believes that market participants would find it useful to understand how they will be alerted about segmentation on an NMS Stock ATS before deciding whether or not to subscribe to the NMS Stock ATS.

Request for Comment

363. Do you believe the Commission should require the disclosure of the information on Part IV, Item 5(b) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

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[462] See supra notes 171, 186, 198, 199 and accompanying text.

364. Do you believe Part IV, Item 5(b) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to informing subscribers or persons about the segmentation category that a subscriber or a person is assigned? Please explain.

365. Is it sufficiently clear what information would be required by Part IV, Item 5(b) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

366. Do you believe there is any information that would be required by Part IV, Item 5(b) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

367. Do you believe there is any specific information that the Commission should require NMS Stock ATSs to disclose to each subscriber with regard to how it segments each subscriber's orders? If so, explain what information and why. Please support your arguments.

368. Do you believe transparency with respect to how an NMS Stock ATS notifies subscribers regarding how those subscribers' trading interests are segmented is useful to market participants when deciding whether to trade on the NMS Stock ATS and would assist them in devising appropriate trading strategies to help accomplish their investing or trading objectives? If not, why? Please support your arguments.

369. What are the potential costs and benefits of disclosing the information required by Part IV, Item 5(b) of proposed Form ATS-N? Would the proposed disclosures in

Part IV, Item 5(b) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

370. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 5(b) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 5(b)?

Part IV, Item 5(c) of proposed Form ATS-N would require an NMS Stock ATS to describe any means and the circumstances by which a subscriber, the broker-dealer operator, or any of its affiliates may designate an order or trading interest submitted to the NMS Stock ATS to interact or not to interact with specific orders, trading interest, or persons on the NMS Stock ATS (e.g., designating an order or trading interest to be executed against a specific subscriber) and how such designations affect order priority and interaction. Part IV, Item 5(c) would require the NMS Stock ATS to describe any means by which subscribers can seek or avoid certain executions against certain orders, persons, or trading interest. In response to this item, an NMS Stock ATS would be required to disclose, for example, any circumstances by which an NMS Stock ATS allows persons to designate an order submitted to the NMS Stock ATS to interact with specific orders resting on the NMS Stock ATS. The NMS Stock ATS would need to describe this process and how such order preferencing works with other rules governing order priority and interaction. The response to this item also would also be required to include a description of any means by which a subscriber could avoid executing against any order, person, or trading interest. For instance, an NMS Stock ATS would need to describe any mechanisms by

which a person could avoid executing against its own orders or orders of its affiliates on the NMS Stock ATS.

The Commission preliminarily believes that it is important for market participants to understand whether – and how – they may designate their orders or other trading interest to avoid interacting with specific orders, trading interest, or persons on an NMS Stock ATS. The Commission preliminarily believes that this understanding would help market participants better evaluate the NMS Stock ATS as a potential trading venue. For instance, if a market participant seeks to avoid interacting with an order type that is commonly employed as part of certain trading strategies, the Commission preliminarily believes that the disclosures required under Item 5(c) would better enable that market participant to determine whether submitting order flow to a particular NMS Stock ATS would allow it to carry out its own trading strategy. Similarly, if a market participant would find it desirable to be able to designate an order submitted to the NMS Stock ATS to interact with specific orders resting on an NMS Stock ATS's order book, the Commission preliminarily believes that the information required by Item 5(c) would inform that market participant whether – and how – it can do so on a particular NMS Stock ATS, thereby assisting that market participant when it evaluates that NMS Stock ATS as a potential trading venue.

Request for Comment

371. Do you believe the Commission should require the disclosure of the information on Part IV, Item 5(c) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

372. Do you believe Part IV, Item 5(c) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS

Stock ATS related to the means and the circumstances by which a subscriber, the broker-dealer operator, or any of its affiliates may designate an order or trading interest submitted to the NMS Stock ATS to interact or not to interact with specific orders, trading interest, or persons on the NMS Stock ATS? Please explain.

373. Do you believe there is other information that market participants might find relevant or useful regarding the means and the circumstances by which a subscriber, the broker-dealer operator, or any of its affiliates may designate an order or trading interest submitted to the NMS Stock ATS to interact or not to interact with specific orders, trading interest, or persons on the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

374. Is it sufficiently clear what information would be required by Part IV, Item 5(c) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

375. Do you believe there is any information that would be required by Part IV, Item 5(c) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

376. Should the requirement to describe the means by which persons, orders, or trading interest may be sought or avoided on an NMS Stock ATS be refined in any way? Please be specific.

377. Does the process for seeking or avoiding specific orders, persons, or trading interest raise any other market structure issues or concerns that the Commission should consider? Please be specific.

378. What are the potential costs and benefits of disclosing the information required by Part IV, Item 5(c) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 5(c) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

379. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 5(c) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 5(c)?

F. Display of Order and Trading Interest

Part IV, Item 6(a) of proposed Form ATS-N would require that an NMS Stock ATS describe any means and circumstances by which orders or other trading interest on the NMS Stock ATS are displayed or made known outside the NMS Stock ATS and the information about the orders and trading interest that are displayed. Also, if the display of orders or other trading interest is not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. Part IV, Item 6(b) of proposed Form ATS-N would also require the NMS Stock ATS to identify the subscriber(s) or person(s) (in the case of a natural person, to identify only the position or title) to whom the orders and trading interest are displayed or otherwise made known.

As discussed more fully above,[463] most NMS Stock ATSs do not publicly display quotation data and are commonly referred to as "dark pools." The Commission preliminarily believes that market participants generally are very sensitive to precisely how and when their trading interest is displayed or otherwise made known outside the NMS Stock ATS. The Commission is concerned that market participants currently may not know the extent to which their trading interest sent to ATSs is displayed outside those ATSs. Accordingly, for any NMS Stock ATSs that display some or all of the trading interest on their systems, Part IV, Item 6 of proposed Form ATS-N would require the NMS Stock ATS to identify the subscriber(s) or person(s) to whom orders or other trading interest information is displayed or otherwise made known, the means and circumstances by which orders or other trading interest are displayed or made known, and the contents of that information. Because NMS Stock ATSs that are also ECNs may differ in how and where orders or other trading interest are displayed, the Commission preliminarily believes this item would clarify for market participants and the Commission exactly how such display may occur. In addition, an NMS Stock ATS would need to disclose arrangements, whether formal or informal (oral or written) to the extent they exist, with third parties to display the NMS Stock ATS's trading interest outside of the NMS Stock ATS, such as IOIs from the NMS Stock ATS's subscribers being displayed on vendor systems, or arrangements with third parties to transmit IOIs between subscribers.

The Commission preliminarily believes that when an NMS Stock ATS sends electronic messages outside of the NMS Stock ATS that expose the presence of orders or other trading interest on the NMS Stock ATS, it is displaying or making known orders or other trading interest

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[463] See supra note 123 and accompanying text.

on the NMS Stock ATS. For instance, an NMS Stock ATS may send to subscribers or other persons a direct data feed from the NMS Stock ATS that contains real-time information about current quotes, orders or other trading interest on the NMS Stock ATS. Accordingly, it would be responsive to this item for the NMS Stock ATS to disclose the circumstances under which the NMS Stock ATS would send these messages, the persons that received them, and the information contained in the messages, including the symbol or any other information relating to trading interest on the NMS Stock ATS. The NMS Stock ATS would need to disclose the information required by this item, including the exact content of the information, such as symbol, price, size, attribution, or any other information made known. The Commission preliminarily believes that disclosures in response to this item are important because the information disclosed would provide market participants with advance notice of the potential display of their orders or other trading interest outside of the NMS Stock ATS.[464] The Commission preliminarily believes that market participants, whose trading strategies are sensitive to how and to whom their orders and trading interest are displayed, would use the information disclosed under Item 6 to evaluate whether routing orders to a particular NMS Stock ATS would be consistent with their respective strategies.

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[464] See Morgan Stanley letter, supra note 197 and accompanying text (stating customers questioned it about whether its dark pool is truly dark); Bloomberg Tradebook letter, supra note 190 and accompanying text (recommending that the Commission ask ATSs to complete a questionnaire that would include questions relating to the sharing of orders or order information with affiliates or other trading venues by the ATS).

Request for Comment

380. Do you believe the Commission should require the disclosure of the information on Part IV, Item 6 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific

381. Do you believe Part IV, Item 6 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the means and circumstances by which orders or other trading interest on the NMS Stock ATS are displayed or made known outside the NMS Stock ATS and the information about the orders and trading interest that are displayed? Please explain.

382. What are the means through which NMS Stock ATSs currently display or make known trading interest? Do you believe any of these means raise any concerns? If so, why? Please support your arguments. Do you believe that Part IV, Item 6 of proposed Form ATS-N would mitigate any of those concerns through the disclosure of responsive information? Why or why not? Please support your arguments.

383. Is it sufficiently clear what information would be required by Part IV, Item 6 of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

384. Do you believe there is other information that market participants might find relevant or useful regarding orders or other trading interest on the NMS Stock ATS that are displayed or otherwise made known outside the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such

information should be required to be provided under proposed Form ATS-N. Please support your arguments.

385. Do you believe there is any information that would be required by Part IV, Item 6 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

386. What are the potential costs and benefits of disclosing the information required by Part IV, Item 6 of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 6 of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

387. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 6 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 6?

G. Trading Services

Part IV, Item 7(a) of proposed Form ATS-N would require an NMS Stock ATS to describe the means or facilities used by the NMS Stock ATS to bring together the orders of multiple buyers and sellers, including the structure of the market (e.g., crossing system, auction market, limit order matching book). If the use of these means or facilities are not the same for all subscribers and persons, the NMS Stock ATS would also be required to describe any differences.

This item is primarily designed to inform market participants and the Commission about an NMS Stock ATS's market and the facilities and mechanisms that it uses to match counterparties. Part IV, Item 7(a) of proposed Form ATS-N would require a description, with specificity, of the facilities and mechanisms into which subscribers enter orders and how orders entered into these facilities and mechanisms would interact. The Commission has previously explained that a trading center brings together orders when orders entered into the system for a given security have the opportunity to interact with other orders entered into the system for the same security.[465] For instance, a trading center brings together orders if it displays, or otherwise represents, trading interests entered on the system, such as a consolidated quote screen, to system users.[466] Furthermore, a trading center also brings together orders if it receives subscribers' orders centrally for future processing and execution, such as part of a limit order matching book that allows subscribers to display buy and sell orders in particular securities and to obtain execution against matching orders contemporaneously entered or stored in the system.[467] Additionally, as explained above, to qualify for the Rule 3a1-1(a)(2) exemption from the statutory definition of "exchange," an ATS must bring together the orders of multiple buyers and sellers.[468]

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465 See Regulation ATS Adopting Release, supra note 7, at 70849.

466 See id.

467 See id.

468 See id. The Commission emphasized in the Regulation ATS Adopting Release that the mere interpositioning of a designated counterparty as riskless principal for settlement purposes after the purchasing and selling counterparties to a trade have been matched would not, by itself, mean that the system does not have multiple buyers and sellers. See id. Additionally, systems in which there is only a single seller, such as systems that permit issuers to sell their own securities to investors, would not be included within Rule 3b-16. See id.

Based on Commission experience, ATSs that trade NMS stocks use various types of trading mechanisms. For example, many ATSs bring together multiple buyers and sellers using limit order matching systems. Other ATSs use crossing mechanisms that allow participants to enter unpriced orders to buy and sell securities, with the ATS's system crossing orders at specified times at a price derived from another market.[469] Some ATSs use an auction mechanism that matches multiple buyers and sellers by first pausing execution in a certain security for a set amount of time, during which the ATS's system seeks out and/or concentrates liquidity for the auction; after the trading pause, orders will execute at either a single auction price or according to the priority rules for the auction's execution. Furthermore, some ATSs use a blotter scraping functionality, which may inform the ATS's system about the orders placed on a participant's order management system, but not yet entered into the ATS; the ATS or broker-dealer operator oftentimes can automatically generate those orders and enter them into the ATS on behalf of the subscriber, in accordance with the relevant terms and conditions, when certain contra-side trading interest exists in the ATS.

The Commission preliminarily believes that the disclosures required under Part IV, Item 7(a) would be useful to market participants when evaluating whether or not to route orders to a particular NMS Stock ATS. At times, market participants may route orders to a trading venue with certain characteristics to accomplish a particular trading strategy. For instance, a market participant aiming to execute a block transaction may seek out a trading platform that operates a block crossing network with specialized size discovery mechanisms and controls for information leakage. At the same time, a different market participant may seek to use an NMS Stock ATS's

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469 See Regulation ATS Adopting Release, supra note 7, at 70849 n.37.

auction function if that market participant believes the auction process would provide the best opportunity for price discovery or price improvement. Accordingly, the Commission preliminarily believes that disclosure of the information that would be required under Item 7(a) of proposed Form ATS-N would better enable market participants to evaluate an NMS Stock ATS as a potential destination for them to route their orders. In addition, this information also would assist the Commission to fully evaluate the facilities and mechanisms that consist of the NMS Stock ATS and whether an NMS Stock ATS meets the requirements of Rule 3b-16 that it is bringing together the orders for securities of multiple buyers and sellers.[470]

Request for Comment

388. Do you believe the Commission should require the disclosure of the information on Part IV, Item 7(a) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

389. Do you believe Part IV, Item 7(a) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the means or facilities used by the NMS Stock ATS to bring together the orders of multiple buyers and sellers, including the structure of the market? Please explain.

390. Is it sufficiently clear what information would be required by Part IV, Item 7(a) of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

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470 See 17 CFR 240.3b-16(a)(1).

391. Do you believe there is other information that market participants might find relevant or useful regarding the means or facilities used by the NMS Stock ATS to bring together the orders of multiple buyers and sellers? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

392. Do you believe there is any information that would be required by Part IV, Item 7(a) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

393. Are there particular means or facilities for bringing together the orders of multiple buyers and sellers on which the Commission should request information specifically that is not included as a component under Part IV, item 7(a) of proposed Form ATS-N?

394. What are the potential costs and benefits of disclosing the information required by Part IV, Item 7(a) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 7(a) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

395. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 7(a) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could

this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 7(a)?

Part IV, Item 7(b) of Form ATS-N would require an NMS Stock ATS to describe the established, non-discretionary methods that dictate the terms of trading among multiple buyers and sellers on the facilities of the NMS Stock ATS, including rules and procedures governing the priority, pricing methodologies, allocation, matching, and execution of orders and other trading interest. If these rules and procedures are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences.

Part IV, Item 7(b) of proposed Form ATS-N is primarily designed to inform market participants about how orders interact on an NMS Stock ATS upon being entered into the system. Item 7(b) would require a description, with specificity, of all rules and procedures relevant to order interaction and execution, such as those addressing order priority, pricing methodologies, allocation, matching, and execution of orders and other trading interest. The Commission previously explained in the Regulation ATS Adopting Release that use of established, non-discretionary methods could include operation of a trading facility or the setting of rules governing the trading of subscribers.[471] For example, the Commission considers the use of an algorithm by an electronic trading system, which sets trading procedures and priorities, to be a trading facility that uses established, non-discretionary methods.[472] Similarly, the

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471 See Regulation ATS Adopting Release, supra note 7, at 70851-52.

472 See id. at 70851.

Commission has previously stated that rules imposing execution priorities, such as time and price priority rules, would be "established, non-discretionary methods."[473]

Based on Commission experience, NMS Stocks ATSs employ various terms and conditions under which orders interact and match. As noted above, some NMS Stock ATSs may offer price-time priority to determine how to match orders (potentially with various exceptions), while other NMS Stock ATSs may offer midpoint-only matching with time priority. Some NMS Stock ATSs might also take into account other factors to determine priority. For example, an NMS Stock ATS may assign either a lower or higher priority to an order entered by a subscriber in a certain class (e.g., orders of proprietary traders or retail investors) or routed from a particular source (e.g., orders routed by the broker-dealer operator's SOR (or similar functionality) or algorithm) when compared to an equally priced order entered by a different subscriber or via a different source. Furthermore, in the Commission's experience, an NMS Stock ATS might elect to apply different priority rules for matching conditional orders than it does for matching other order types.

Part IV, Item 7(c) of proposed Form ATS-N would require an NMS Stock ATS to describe any trading procedures related to price protection mechanisms, short sales, locked-crossed markets, the handling of execution errors, time-stamping of orders and executions, or price improvement functionality. If the trading procedures are not the same for all subscribers and persons, the NMS Stock ATS would also be required to describe any differences. Some ATSs that trade NMS stocks apply various methods to determine an execution price based on the circumstances of the match. For example, an ATS may price an execution of a midpoint pegged

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473 See id. at 70852.

order with a limit or market order at the midpoint of the NBBO. An ATS executing a match of two limit orders, or a limit and market order, might price the execution at or within the NBBO, with the possibility of offering the limit order(s) price improvement. On the other hand, an ATS that operates a block crossing network, with specialized size discovery mechanisms, might calculate a volume-weighted average price after the final size of the execution has been determined.

In the Commission's experience, NMS Stock ATSs have also adopted other trading procedures governing the execution of orders, which the NMS Stock ATS would be required to explain under Part IV, Item 7(c) of proposed Form ATS-N. For instance, an NMS Stock ATS might elect to use price protections to re-price orders or prevent their execution under certain circumstances, such as Limit Up Limit Down price bands pursuant to the National Market System Plan to Address Extraordinary Market Volatility ("LULD Plan").[474] An NMS Stock ATS might also permit short sales to be executed on its system and would thus be required to configure its system to comply with federal securities laws related to short sales, including Regulation SHO.[475] Additionally, an NMS Stock ATS could have rules and procedures governing and/or precluding the execution of orders in a locked or crossed market. If an NMS Stock ATS has any procedures governing the handling of execution errors, such as the use of an

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474 See Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (File No. 4-631) ("LULD Approval Order"). The registered national securities exchanges and FINRA filed the LULD Plan to create a market-wide limit up-limit down mechanism to address extraordinary market volatility in NMS Stocks. See id. at 33500. The Plan sets forth procedures that provide for market-wide limit up-limit down requirements that would be designed to prevent trades in individual NMS Stocks from occurring outside of the specified price bands. See id.

475 17 CFR 242.200-204.

error account by the NMS Stock ATS, it would be required to explain those procedures in Item 7(c).

Furthermore, under Part IV, Item 7(c) of proposed Form ATS-N, an NMS Stock ATS would also be required to describe any protocols for time-stamping orders and executions to ensure compliance with the Exchange Act and the rules and regulations thereunder and any execution procedures related to price improvement. For example, if an NMS Stock ATS has procedures to reprice orders under its price protection mechanisms, to reprice short sale orders to ensure compliance with Regulation SHO, or to reprice orders due to price-sliding order types (such as certain pegged order types), it would be required to explain when it creates new timestamps for such re-priced orders.[476] In addition, any functionality or mechanism available on the NMS Stock ATS that allows for price improvement would also need to be described in response to this item.

The Commission preliminarily believes that information about how an NMS Stock ATS prices and matches orders is useful to market participants' and the Commission's understanding of that trading center's operation. The Commission preliminarily believes that the information required under Part IV, Items 7(b) and 7(c) of proposed Form ATS-N would allow market participants to evaluate the terms and conditions under which their orders will interact and execute on an NMS Stock ATS, and would thus provide them with a better opportunity to determine whether that NMS Stock ATS is the appropriate trading destination for their orders. For example, a market participant whose order would be given a higher priority on an NMS

[476] Additionally, if subscriber orders are routed from the NMS Stock ATS and are not filled, or filled only in part on the NMS Stock ATS, the Commission preliminarily believes that the NMS Stock ATS should describe how such orders are time stamped for priority purposes.

Stock ATS based on its subscriber class may choose to first route its order to that venue, whereas a market participant seeking to enter a conditional order may choose to route an order based on an NMS Stock ATS's specific priority rules governing conditional orders. Likewise, market participants likely would want to know whether an NMS Stock ATS applies price protection mechanisms, or other standards, that could re-price an order or prevent it from executing under certain conditions. In addition, the Commission preliminarily believes that the information provided in response to Items 7(a), 7(b), and 7(c) would allow the Commission to more easily evaluate whether the entity that filed the proposed Form ATS-N meets the criteria of Rule 3b-16 and the definition of an NMS Stock ATS.

Request for Comment

396. Do you believe the Commission should require the disclosure of the information on Part IV, Items 7(b) and 7(c) of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

397. Do you believe Part IV, Item 7(b) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to the established, non-discretionary methods that dictate the terms of trading among multiple buyers and sellers on the facilities of the NMS Stock ATS, including rules and procedures governing the priority, pricing methodologies, allocation, matching, and execution of orders and other trading interest? Please explain.

398. Do you believe Part IV, Item 7(c) of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding the trading procedures related to price protection

mechanisms, short sales, locked-crossed markets, the handling of execution errors, time-stamping of orders and executions, or price improvement functionality? Please explain.

399. Is it sufficiently clear what information would be required by Part IV, Items 7(b) and 7(c) of proposed Form ATS-N? Should these items be refined in any way? If so, how? Please be specific.

400. Do you believe there is other information that market participants might find relevant or useful regarding the established non-discretionary methods that dictate the terms of trading among multiple buyers and sellers on the market or facilities of an NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

401. Do you believe there is other information that market participants might find relevant or useful regarding trading procedures related to price protection mechanisms, short sales, locked-crossed markets, the handling of execution errors, time-stamping of orders and executions, or price improvement functionality on an NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

402. Do you believe there is any information that would be required by Part IV, Items 7(b) and 7(c) of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons,

trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

403. Are there any aspects of the non-discretionary methods that dictate the terms of trading among buyers and sellers on which the Commission should specifically require information that is not included as a component under Part IV, Item 7(b) of proposed Form ATS-N?

404. What are the potential costs and benefits of disclosing the information required by Part IV, Items 7(b) and 7(c) of proposed Form ATS-N? Would the proposed disclosures in Part IV, Items 7(b) and 7(c) of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

405. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Items 7(b) and 7(c) of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Items 7(b) and 7(c)?

H. Suspension of Trading, System Disruption or Malfunction

Part IV, Item 8 of proposed Form ATS-N would require an NMS Stock ATS to describe any procedures governing trading in the event the NMS Stock ATS suspends trading or experiences a system disruption or malfunction. In addition, if the procedures governing trading during a suspension or system disruption or malfunction are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. This item is designed to inform market participants of whether, among other things, an NMS Stock ATS will

continue to accept orders after suspension or system malfunction or disruption occurs, whether the NMS Stock ATS routes, holds, or continues to execute orders resting in the system prior to the disruption, and the type of notice the NMS Stock ATS provides to subscribers and other market participants during a suspension or system disruption or malfunction. Examples of system disruptions would include, but are not limited to, internal software problems that prevent the NMS Stock ATS's system from opening or continuing trading,[477] a significant increase in volume that exceeds the ability of the trading system of the NMS Stock ATS to process incoming orders,[478] and the failure of the ability of the trading system of the NMS Stock ATS to receive NBBO or other external pricing information that is used in the system's pricing methodology.

The Commission preliminarily believes that information regarding an NMS Stock ATS's procedures on how orders may be handled during a suspension of trading or system disruption or malfunction would be useful to market participants because such an event might preclude the NMS Stock ATS from accepting and/or executing time sensitive orders and could impact the price the subscriber receives. The information about how an NMS Stock ATS would handle orders under such circumstances would better inform a subscriber's trading decisions at the time of such an event and thus help that subscriber accomplish its investing or trading objectives.

Information regarding the procedures for how an NMS Stock ATS would handle orders during a suspension of trading or system disruption or malfunction would also help the Commission better monitor the securities markets. The Commission has recently noted that

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477 See SCI Adopting Release, supra note 17 at 72254-55 n.28.

478 See id. at 72255 n.29.

given the speed and interconnected nature of the U.S. securities markets, a seemingly minor systems problem at a single entity can quickly create losses and liability for market participants, and spread rapidly across the national market system, potentially creating widespread damage and harm to market participants and investors.[479] Accordingly, it is important to fully understand what, if any, trading procedures an NMS Stock ATS would follow during a suspension of trading or system disruption or malfunction. The Commission preliminarily believes that the disclosures that would be required by Item 8 would help the Commission discover a potential violation of the federal securities laws and rules or regulations thereunder in a more expeditious manner than if the disclosures were not required. The Commission notes that it is not proposing to require NMS Stock ATSs to adopt specific procedures governing trading during a system disruption or malfunction as it did under Regulation SCI for certain significant-volume ATSs that trade NMS stocks or non-NMS stocks.[480] Rather, under Part IV, Item 8 of proposed Form ATS-N, the Commission is only requiring an NMS Stock ATS to disclose what procedures, if any, it follows during a suspension of trading or system disruption or malfunction on the NMS Stock ATS. Accordingly, the disclosure requirements under Item 8, similar to other items on proposed Form ATS-N, are intended to inform market participants of an NMS Stock ATS's procedures rather than impose any new procedural requirements on NMS Stock ATSs.

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479 See id. at 72253.

480 See supra notes 102-103 and accompanying text.

Request for Comment

406. Do you believe the Commission should require the disclosure of the information on Part IV, Item 8 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

407. Do you believe Part IV, Item 8 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding any procedures governing trading in the event the NMS Stock ATS suspends trading or experiences a system disruption or malfunction? Please explain.

408. Is it sufficiently clear what information would be required by Part IV, Item 8 of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

409. Do you believe there is other information that market participants might find relevant or useful regarding procedures governing trading in the event an NMS Stock ATS suspends trading or experiences a system disruption or malfunction? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

410. Do you believe there is any information that would be required by Part IV, Item 8 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

411. What are the potential costs and benefits of disclosing the information required by Part IV, Item 8 of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 8 of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

412. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 8 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 8?

I. Opening, Reopening, and Closing Processes, and After Hours Procedures

Part IV, Item 9 of proposed Form ATS-N would require an NMS Stock ATS to describe its opening, reopening, and closing processes, if any, and any after-hours trading procedures. Part IV, Item 9(a) of proposed Form ATS-N would require an NMS Stock ATS to describe any opening and reopening processes, including how orders or other trading interest are matched and executed prior to the start of regular trading hours or following a stoppage of trading in a security during regular trading hours and how unexecuted orders or other trading interest are handled at the time the NMS Stock ATS begins regular trading at the start of regular trading hours or following a stoppage of trading in a security during regular trading hours. An NMS Stock ATS would also be required to describe any differences between pre-opening executions, executions following a stoppage of trading in a security during regular trading hours, and executions during regular trading hours. Part IV, Item 9(b) of proposed Form ATS-N would require a description of any closing process, including how unexecuted orders or other trading interest are handled at

the close of regular trading. An NMS Stock ATS would also be required to describe any differences between the closing executions and executions during regular trading hours. Part IV, Item 9(c) of proposed Form ATS-N would require a description of any after-hours trading procedures, including how orders and trading interest are matched and executed during after-hours trading. An NMS Stock ATS would also be required to describe any differences between the after-hours executions and executions during regular trading hours.

Part IV, Item 9 of proposed Form ATS-N is designed to inform market participants about whether an NMS Stock ATS uses any special procedures to match orders outside of regular trading hours and/or processes to set a single opening, reopening, or closing price to, for example, maximize liquidity and accurately reflect market conditions at the opening, reopening, or close of trading. The Commission notes that it is standard practice for national securities exchanges to conduct opening, reopening, and closing auctions, or similar procedures, to start and conclude the trading day, or reopen trading in a security during the trading day.[481] Furthermore, to facilitate their opening and closing processes, exchanges often permit members to enter orders specially designated to execute on the opening or closing.[482] The disclosures under this item would allow for comparisons between NMS Stock ATSs and exchanges.

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481 See, e.g., New York Stock Exchange Rule 123D (setting forth the duties of NYSE Designated Market Maker when opening and reopening trading in a stock); New York Stock Exchange Rule 123C (setting forth the exchange's closing procedures); The Nasdaq Stock Market LLC Rule 4752 (setting forth rules for the Nasdaq Opening Cross); The Nasdaq Stock Market LLC Rule 4753 (setting forth rules for the Nasdaq Halt Cross); The Nasdaq Stock Market LLC Rule 4754 (setting forth rules for the Nasdaq Closing Cross); BATS Exchange Rules 11.23 and 11.24 (setting forth the exchange's procedures for openings, closings and auctions following a trading halt).

482 See, e.g., New York Stock Exchange Rule 13 (defining Market-on-Open. Market-on-Close, Limit-on-Open, and Limit-on-Close, and Closing Offset order types); The Nasdaq Stock Market LLC Rule 4752 (a) (defining Market on Open, Limit on Open, Opening

Market participants would likely want to know about any special opening, reopening, or closing processes, and after-hours trading procedures, employed by an NMS Stock ATS. In particular, the Commission preliminarily believes that market participants would want to know which, if any, order types participate in an NMS Stock ATS's opening, reopening, and/or closing processes, and after-hours trading. The Commission preliminarily believes that such information would help market participants assess whether participating in an NMS Stock ATS's opening, reopening, or closing processes, or after-hours trading on the NMS Stock ATS, would help accomplish their investing or trading objectives and thus, cause them to route orders to the NMS Stock ATS.

The disclosures required under Part IV, Item 9 of proposed Form ATS-N are also designed to help the Commission to better oversee NMS Stock ATSs and alert the Commission about any potential regulatory issues arising from an NMS Stock ATS's opening, reopening, or closing processes, or after-hours trading procedures. For example, under Rule 611(b)(3) of Regulation NMS,[483] single-priced opening and closing transactions are excepted from the Order Protection Rule under Rule 611(a) of Regulation NMS.[484] The Commission preliminarily believes the disclosures required under Part IV, Item 9 of proposed Form ATS-N would help the Commission analyze whether the opening, reopening, and/or closing processes of an NMS Stock

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Imbalance Only, and Market Hours order types); The Nasdaq Stock Market LLC Rule 4754(a) (defining Market on Close, Limit on Close, and Imbalance Only order types); BATS Exchange Rule 11.23(a) (defining Eligible Auction, Market-on-Open, Limit-on-Open, Late-Limit-on-Open, Market-on-Close, Limit-on-Close, and Late Limit-on-Close order types).

483 See 17 CFR 242.611(b)(3).

484 See 17 CFR 242.611(a).

ATS, and after-hours trading procedures, are consistent with the Exchange Act and the rules and regulations thereunder.

Request for Comment

413. Do you believe the Commission should require the disclosure of the information on Part IV, Item 9 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

414. Do you believe Part IV, Item 9 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding its opening, reopening, or closing processes, if any, and any after-hours trading procedures? Please explain.

415. Do you believe there is other information that market participants might find relevant or useful regarding the opening or reopening processes, closing process, or after-hours trading procedures on the NMS Stock ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

416. Is it sufficiently clear what information would be required by Part IV, Item 9 of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

417. Do you believe there is any information that would be required by Part IV, Item 9 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

418. Do you believe the information that would be required by Part IV, Item 9 of proposed Form ATS-N would be useful to market participants when deciding whether to trade on the NMS Stock ATS and would assist them in devising appropriate trading strategies to help accomplish their investing or trading objectives? Why or why not? Please support your arguments.

419. What are the potential costs and benefits of disclosing the information required by Part IV, Item 9 of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 9 of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

420. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 9 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 9?

J. Outbound Routing

Part IV, Item 10(a) of Proposed Form ATS-N would require an NMS Stock ATS to describe the circumstances under which orders or other trading interest are routed from the NMS Stock ATS to another trading center, including whether outbound routing occurs at the affirmative instruction of the subscriber or at the discretion of the broker-dealer operator, and the means by which routing is performed (e.g., a third party or order management system or a SOR (or similar functionality) or algorithm of the broker-dealer operator or any of its affiliates). If the means by which orders or other trading interest are routed from the NMS Stock ATS are not the

same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences under Part IV, Item 10(b) of proposed Form ATS-N.

Based on Commission experience, some NMS Stock ATSs, by way of their broker-dealer operator, provide outbound routing services whereby a subscriber's order or trading interest could be routed to another trading center.[485] Orders and trading interest could be routed to other trading centers under a variety of circumstances. For instance, a subscriber could instruct the NMS Stock ATS to route its orders to another trading center if it is not immediately executed on the NMS Stock ATS upon entry. Also, a subscriber could enter an order on the NMS Stock ATS that rests as an open order on the NMS Stock ATS and is concurrently routed to another trading center for potential execution. If the order is executed at the away trading center, the NMS Stock ATS would cancel the order resting as an open order on the NMS Stock ATS. If the order is executed on the NMS Stock ATS, the order that was routed to the away market would be canceled.

The descriptions in response to Part IV, Item 10 of proposed Form ATS-N would be required to include who determines routing destinations, whether the subscriber, the broker-dealer operator, or both. This information is meant to illuminate when subscribers would have control over potential routing destinations and when the broker-dealer operator would have discretion to route away. The Commission preliminarily believes that subscribers would find it useful to be aware of any instance in which the broker-dealer operator has discretion to route

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485 "Trading center" under Regulation NMS is defined as "a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent." 17 CFR 242.600(b)(78).

trading interest so that a subscriber could better protect its interests and monitor any such routing. Item 10 of proposed Form ATS-N would also require a description of the means by which the routing is performed. Examples of the means of outbound routing could include a third-party router, an order management system or SOR (or similar functionality) or algorithm of the broker-dealer operator or any of its affiliates, or any other functionality used to outbound route trading interest.

The Commission preliminarily believes that it is important for subscribers and potential subscribers to know at whose discretion any outbound routing occurs and who would be performing the routing. The Commission preliminarily believes that such disclosures concerning outbound routing would provide subscribers and potential subscribers with the ability to gauge how their orders would be handled if they are not executed on the NMS Stock ATS. Subscribers and potential subscribers might, for example, have concerns about the leakage of confidential trading information when their orders are routed to other trading centers. Part IV, Item 10 of proposed Form ATS-N is designed to provide subscribers and potential subscribers with relevant information to evaluate the potential for leakage of their confidential trading information. In addition, subscribers and potential subscribers could have concerns about the treatment of their confidential trading information should their orders be routed by a third party or the SOR (or similar functionality) or algorithm of the broker-dealer operator. Overall, the Commission preliminarily believes that information about routing would likely be useful to market participants when deciding whether to subscribe or otherwise submit orders to an NMS Stock ATS that might be eligible for routing.

The Commission also preliminarily believes that the disclosures required by Part IV, Item 10 of proposed Form ATS-N would aid it in evaluating whether an NMS Stock ATS is in

compliance with Rule 301(b)(10) of Regulation ATS.[486] The Commission could use the disclosures required under Item 10 of proposed Form ATS-N to evaluate whether there are any risks to the confidentiality of trading information on an NMS Stock ATS due to the outbound routing functionality being used. These disclosures would provide the Commission with insight into what trading information may be visible to the entity performing the NMS Stock ATS's outbound routing functions, such as a third party or the broker-dealer operator's SOR (or similar functionality) or algorithm.

Request for Comment

421. Do you believe the Commission should require the disclosure of the information on Part IV, Item 10 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

422. Do you believe Part IV, Item 10 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding the circumstances under which orders or other trading interest are routed from the NMS Stock ATS to another trading center? Please explain.

423. Is it sufficiently clear what information would be required by Part IV, Item 10 of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

424. What mechanisms are available for NMS Stock ATSs to perform outbound routing? Do you believe there is any additional information that the Commission

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486 See 17 CFR 242.301(b)(10).

should require NMS Stock ATSs to disclose with regard to outbound routing? If so, explain what information and why. Please support your arguments.

425. Do you believe there is any information that would be required by Part IV, Item 10 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

426. Do you believe that the disclosures required under Part IV, Item 10 of proposed Form ATS-N would provide market participants with relevant information to evaluate the potential for leakage of their confidential trading information? Why or why not? Please be specific.

427. Do you believe transparency in how an NMS Stock ATS routes orders to other trading centers is useful to market participants when deciding whether to trade on the NMS Stock ATS and would assist them in devising appropriate trading strategies to help accomplish their investing or trading objectives? Why or why not?

428. Do you believe there is other information that market participants might find relevant or useful regarding the circumstances under which orders or other trading interest are routed from the NMS Stock ATS to another trading center? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

429. What are the potential costs and benefits of disclosing the information required by Part IV, Item 10 of proposed Form ATS-N? Would the proposed disclosures in

Part IV, Item 10 of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

430. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 10 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 10?

K. Market Data

Part IV, Item 11 of proposed Form ATS-N would require an NMS Stock ATS to disclose its sources and use of market data. Part IV, Item 11(a) of proposed Form ATS-N would require a description of the market data used by the NMS Stock ATS and the source of that market data (e.g., market data feeds disseminated by the consolidated data processor ("SIP") and market data feeds disseminated directly by an exchange or other trading center or third-party vendor of market data). Part IV, Item 11(b) of proposed Form ATS-N would require the NMS Stock ATS to describe the specific purpose for which the market data is used by the NMS Stock ATS, including how market data is used to determine the NBBO, protected quotes, pricing of orders and executions, and routing destinations. For instance, an NMS Stock ATS can elect to use market data feeds for purposes of complying with the trade through rule of Rule 611 of Regulation NMS[487] and for pricing executions on the NMS Stock ATS that are derived from prices on other trading centers, such as an execution at the mid-point of the NBBO. An NMS

[487] See 17 CFR 242.611(a).

Stock ATS also might use data feeds to determine the prices available at other trading centers for purposes of routing orders or other trading interest.

The Commission preliminarily believes that market participants would likely find it useful to know the source and specific purpose for which market data is used by an NMS Stock ATS. For instance, the market data received by an NMS Stock ATS might affect the price at which orders are executed on the NMS Stock ATS.[488] In addition, because of the latency differences between the SIP and the direct data feeds of the exchanges,[489] the source of an NMS Stock ATS's market data could impact the price received by a market participant, depending on the ATS's source of the market data. Accordingly, the Commission preliminarily believes that Part IV, Item 11 of proposed Form ATS-N would provide market participants with information to assist them in developing optimal trading strategies to account for any potential latency differences between market data feeds. Furthermore, the Commission preliminarily believes that these disclosures would assist subscribers to understand the procedures employed by the NMS Stock ATS for complying with Regulation NMS, including an understanding about how their orders might be routed by the NMS Stock ATS. The Commission also preliminarily believes that the disclosures required under Item 11 could help the Commission in understanding how

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488 See supra Section VIII.385 (explaining how NMS Stock ATSs might use the NBBO to set execution prices). See also Morgan Stanley letter, supra note197, (stating it received customer questions specific to the use of direct market data feeds by the dark pool's servers and algorithmic strategies).

489 See 2010 Equity Market Structure Release, supra note 124, at 3611 ("Given the extra step required for SROs to transmit market data to plan processors, and for plan processors to consolidate the information and distribute it the public, the information in the individual data feeds of exchanges and ECNs generally reaches market participants faster than the same information in the consolidated data feeds.").

market data is used for purposes of monitoring developments in market structure.

Request for Comment

431. Do you believe the Commission should require the disclosure of the information on Part IV, Item 11 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

432. Do you believe Part IV, Item 11 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding the sources and use of market data? Please explain.

433. Is it sufficiently clear what information would be required by Part IV, Item 11 of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

434. Do you believe there is other information that market participants might find relevant or useful regarding the sources and use of market data? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

435. Do you believe there is any information that would be required by Part IV, Item 11 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

436. Are there any other applications for which NMS Stock ATSs use market data that the Commission should specifically identify and/or discuss under Part IV, Item 11 of Proposed Form ATS-N?

437. Do you believe that transparency regarding what market data an NMS Stock ATS uses and how the NMS Stock ATS uses that market data is useful to market participants when deciding whether to trade on the NMS Stock ATS and would assist them in devising appropriate trading strategies to help accomplish their investing or trading objectives? Why or why not?

438. Do you believe that the disclosures required under Part IV, Item 11 of Proposed Form ATS-N would assist the Commission to understand the procedures employed by an NMS Stock ATS for complying with Regulation NMS and to understand how orders are priced, handled, and routed by the NMS Stock ATS? Why or why not?

439. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 11 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 11?

440. What are the potential costs and benefits of disclosing the information required by Part IV, Item 11 of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 11 of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

L. Fees

Part IV, Item 12 of proposed Form ATS-N would require the NMS Stock ATS to disclose and describe its fee and rebate structure. Part IV, Item 12(a) of proposed Form ATS-N would

require an NMS Stock ATS to describe any fees, rebates, or other charges of the NMS Stock ATS (e.g., connectivity fees, subscription fees, execution fees, volume discounts) and provide the range (e.g., high and low) of such fees, rebates, or other charges. If the fees, rebates, or other charges of the NMS Stock ATS are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences under Part IV, Item 12(b) of proposed Form ATS-N.

The Commission preliminarily believes that by requiring a description of an NMS Stock ATS's fees, rebates, and other charges, market participants would be able to review and evaluate the fee structure of each NMS Stock ATS. If an NMS Stock ATS has a recognized fee structure, such as a maker-taker pricing model,[490] that information would be required to be disclosed under Part IV, Item 12 of proposed Form ATS-N. The Commission preliminarily believes these disclosures would allow market participants to analyze the fee structures across NMS Stock ATSs in an expedited manner and decide which ATS offers them the best pricing according to the characteristics of their order flow, the type of participant they are (if relevant), or any other aspects of an ATS's fee structure that serves to provide incentivizes or disincentives for specific market participants or trading behaviors. For instance, an institutional subscriber that commonly adds non-marketable, resting orders that offer liquidity may choose to subscribe to an ATS that rewards liquidity-providing orders with rebates. The types of fees charged for services also could influence whether a market participant subscribes to, or the extent to which it participates on, an NMS Stock ATS. For instance, an NMS Stock ATS with relatively higher connectivity

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[490] Under the maker-taker pricing model, non-marketable, resting orders that offer (make) liquidity at a particular price receive a liquidity rebate if they are executed, while incoming orders that execute against (take) the liquidity of resting orders are charged an access fee. See 2010 Equity Market Structure Release, supra note 124, at 3598-3599.

fees and relatively lower execution fees may not be as attractive to a market participant that only intends to send the NMS Stock ATS a small amount of trading interest.

The Commission also is proposing to require that NMS Stock ATSs describe any differences in their fees, rebates, or other charges among differing types of subscribers or other persons. The Commission preliminarily believes that this information would further illuminate the types of subscribers and/or trading interest that the NMS Stock ATS may be trying to attract.[491] This information would allow market participants to observe whether an NMS Stock ATS is offering more preferential treatment to other market participants and, therefore, aid market participants in deciding where to route their trading interest accordingly.[492]

Part IV, Item 12 of proposed Form ATS-N also would require that the NMS Stock ATS provide the range (e.g., high and low) of such fees, rebates, or other charges. For these disclosures, the types of fees should be categorized in the same manner as the NMS Stock ATS divides fees internally or on its fee schedule. For example, if an NMS Stock ATS provides rebates for liquidity added onto the ATS, then the range for such rebates would be required by this item. If these rebates are further divided into differing rebate amounts depending on order types used, then the range of such rebates for each order type would also need to be disclosed on proposed Form ATS-N.

Item 12, however, does not require NMS Stock ATSs to disclose a complete schedule of their fees. In some cases, the fee schedules employed by NMS Stock ATSs are highly bespoke,

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491 See Bloomberg Tradebook letter, supra note 190 and accompanying text (recommending that the Commission ask ATSs to complete a questionnaire including questions relating to any special fees or rebates which lead to a preference of one order over another).

492 But see supra notes 92-95 and 425-427 and accompanying text (discussing the fair access requirements of Regulation ATS).

and it may not be practical or desirable to require an NMS Stock ATS to disclose the fee schedule applicable to each subscriber to the NMS Stock ATS. The Commission, therefore, is proposing that the NMS Stock ATS disclose only the range of fees for each service. These disclosures are designed to give market participants an awareness of the fees charged by the NMS Stock ATS and allow market participants to understand and compare fees across NMS Stock ATSs, which could reduce the search costs of market participants in deciding where to send their orders and trading interest. The Commission preliminarily believes that the disclosures required by Part IV, Item 12 of proposed Form ATS-N would also assist the Commission in better understanding the fee structures of NMS Stock ATSs and trends in the market as part of the Commission's overall review of market structure.

Request for Comment

441. Do you believe the Commission should require the disclosure of the information on Part IV, Item 12 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

442. Do you believe Part IV, Item 12 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding its fee and rebate structure? Please explain.

443. Is it sufficiently clear what information would be required by Part IV, Item 12 of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

444. Do you believe the Commission should require NMS Stock ATSs to publicly disclose their fees, charges, and rebates on proposed Form ATS-N? Why or why not?

445. Do you believe the Commission should require NMS Stock ATSs to disclose their complete fee schedules? Are there other ways that NMS Stock ATSs earn revenue about which the Commission should require disclosure?

446. Do you believe there is other information that market participants might find relevant or useful regarding fees, rebates and other charges? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

447. Do you believe there is any information that would be required by Part IV, Item 12 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

448. Do you believe that the information required by Part IV, Item 12 of proposed Form ATS-N would assist market participants and the Commission in comparing fees across NMS Stock ATSs? Why or why not? Please support your arguments.

449. Do you believe that the information required by Part IV, Item 12 of proposed Form ATS-N would allow the Commission to gather further information and analyze trends in the market, including how the prevalence of different fee structures may impact different categories of market participants? Would this information assist the Commission in evaluating the potential incentives and disincentives created by different fee structures in the market for NMS stocks? Why or why not? Please support your arguments.

450. What are the potential costs and benefits of disclosing the information required by Part IV, Item 12 of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 12 of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

451. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 12 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 12?

M. Trade Reporting, Clearance and Settlement

Part IV, Item 13 would require an NMS Stock ATS to describe its arrangements or procedures for trade reporting, clearance, and settlement of transactions. Part IV, Item 13(a) of proposed Form ATS-N would require an NMS Stock ATS to describe any arrangements or procedures for reporting transactions on the NMS Stock ATS and if the trade reporting procedures are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. Part IV, Item 13(b) of proposed Form ATS-N would require an NMS Stock ATS to describe any arrangements or procedures undertaken by the NMS Stock ATS to facilitate the clearance and settlement of transactions on the NMS Stock ATS. If the clearance and settlement procedures are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. The Commission notes that Item 13 of proposed Form ATS-N would solicit similar information that is solicited pursuant to Exhibit F, subsection (d) of Form ATS, which currently requires ATSs to provide their

procedures governing execution, reporting, clearance, and settlement of transactions effected through the ATS.[493]

Trade reporting furthers the transparent, efficient, and fair operation of the securities markets.[494] For example, among other requirements, a broker-dealer operator of an NMS Stock ATS that is a member of FINRA has trade reporting obligations to FINRA under FINRA Rule 4552 and FINRA Rule 6730. The Commission preliminarily believes the proposed disclosure of the trade reporting procedures of an NMS Stock ATS under Part IV, Item 13(a) of proposed Form ATS-N would also allow the Commission and the NMS Stock ATS's SRO to more easily review the compliance of the NMS Stock ATS with its applicable trade reporting obligations. The Commission also preliminarily believes market participants may also find the disclosure of these procedures useful to understanding how their trade information is reported.

Part IV, Item 13(b) of proposed Form ATS-N would require that an NMS Stock ATS describe any arrangements or procedures undertaken by the NMS Stock ATS to facilitate the clearance and settlement of transactions on the NMS Stock ATS. The Commission has previously stated that the integrity of the trading markets depends on the prompt and accurate

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493 In contrast to current Form ATS, Form ATS-N further would require that an NMS Stock ATS describe any differences in the manner in which its trade reporting, clearance, and settlement procedures are applied among subscribers and other persons. Also, Exhibit F, subsection (d) of Form ATS requires ATSs to provide the procedures governing execution in the same section as reporting and clearance and settlement procedures, whereas Form ATS-N would require information on execution procedures under a separate item, Part IV, Item 7.

494 See Regulation ATS Adopting Release, supra note 7, at 70887 (stating the market-wide transaction and quotation reporting plans operated by the registered national securities exchanges are responsible for the transparent, efficient, and fair operations of the securities markets).

clearance and settlement of securities transactions.[495] For example, the description of procedures required by Item 13(b) of proposed Form ATS-N could include the process through which an NMS Stock ATS clears a trade (e.g., whether the NMS Stock ATS becomes a counterparty to a transaction, interposing itself between two counterparties to a transaction, or whether the NMS Stock ATS submits trades to a registered clearing agency for clearing) and any requirements an NMS Stock ATS places on its subscribers, or other persons whose orders are routed to an NMS Stock ATS, to have clearance and settlement systems and/or arrangements with a clearing firm. The Commission preliminarily believes market participants would likely find the disclosures required by Item 13(b) to be useful in understanding the measures undertaken by an NMS Stock ATS to facilitate clearance and settlement of subscriber orders on the NMS Stock ATS and allow them to more easily compare the clearance arrangements required across NMS Stock ATSs as part of deciding where to route their trading interest. The Commission preliminarily believes that the disclosures required by Part IV, Item 13 of proposed Form ATS-N may assist the Commission in better understanding the trade reporting, clearance and settlement procedures of NMS Stock ATSs and trends in the market as part of the Commission's overall review of market structure.

Request for Comment

452. Do you believe the Commission should require the disclosure of the information on Part IV, Item 13 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

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495 See id. at 70897.

453. Do you believe Part IV, Item 13 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding its arrangements or procedures for trade reporting, clearance, and settlement of transactions? Please explain.

454. Do you believe there is other information that market participants might find relevant or useful regarding procedures for trade reporting, clearance, and settlement of transactions on the NMS Stock ATSs? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

455. Is it sufficiently clear what information would be required by Part IV, Item 13 of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific

456. Do you believe there is any information that would be required by Part IV, Item 13 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

457. Do you believe that the information required by Part IV, Item 13 of proposed Form ATS-N will assist market participants in the manner describe above? Why or why not? Please support your arguments.

458. What are the potential costs and benefits of disclosing the information required by Part IV, Item 13 of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 13 of proposed Form ATS-N require an NMS Stock ATS to reveal

too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

459. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 13 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 13?

N. Order Display and Execution Access

Part IV, Item 14 of proposed Form ATS-N would require an NMS Stock ATS to provide the following information if the NMS Stock ATS displays orders in an NMS stock to any person other than employees of the NMS Stock ATS and executed 5% or more of the average daily trading volume in that NMS stock as reported by an effective transaction reporting plan for four of the preceding six calendar months: (a) the ticker symbol for each such NMS stock displayed for each of the last 6 calendar months; (b) the manner in which the NMS Stock ATS displays such orders on a national securities exchange or through a national securities association; and (c) how the NMS Stock ATS provides access to such orders displayed in the national market system equivalent to the access to other orders displayed on that exchange or association.[496]

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[496] In response to Part IV, Item 14 of proposed Form ATS-N, an NMS Stock ATS filing a Form ATS-N would indicate "not applicable" if the NMS Stock ATS had not triggered the volume thresholds under Rule 301(b)(3)(i) of Regulation ATS before commencing operations pursuant to an effective Form ATS-N. If an NMS Stock ATS triggers the Rule 301(b)(3)(i) thresholds after commencing operations pursuant to an effective Form ATS-N, the Commission generally would consider this to be a material change to the operations of the NMS Stock ATS (assuming it is not already complying with the display and access requirements of Rule 301(b)(3)), and the NMS Stock ATS would be required to file a Form ATS-N Amendment pursuant to proposed Rule 304(a)(2)(i)(A). In the

The information elicited in Part IV, Item 14 relates to an NMS Stock ATS's obligations under current Rule 301(b)(3) of Regulation ATS, which applies if an ATS displays a subscriber order in an NMS stock to any person other than ATS employees, and during at least 4 of the preceding 6 calendar months, executed 5% or more of the average daily trading volume in that NMS Stock as reported by an effective transaction reporting plan . Rule 301(b)(3)(ii) and (iii) requires qualifying ATSs to report their highest bid and lowest offer for the relevant NMS stock for inclusion in the quotation data made available by the national securities exchange or national securities association to which it reports and provide equivalent access to effect a transaction with other orders displayed on the exchange or by the association.[497] Under the current

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case where an NMS Stock ATS has voluntarily chosen to comply with the display and access requirements of Rule 301(b)(3)(ii) and (iii) before crossing the relevant thresholds, the NMS Stock ATS would nevertheless have to file a Form ATS-N Amendment upon surpassing the thresholds within 30 days after the end of the calendar quarter pursuant to proposed Rule 304(a)(2)(i)(B).

[497] Specifically, Rule 301(b)(3)(ii) and (iii) of Regulation ATS require the following from ATSs that meet the display and volume thresholds of Rule 301(b)(1):

> (ii) Such alternative trading system shall provide to a national securities exchange or national securities association the prices and sizes of the orders at the highest buy price and the lowest sell price for such NMS stock, displayed to more than one person in the alternative trading system, for inclusion in the quotation data made available by the national securities exchange or national securities association to vendors pursuant to 17 CFR 242.602.
>
> (iii) With respect to any order displayed pursuant to paragraph (b)(3)(ii) of this section, an alternative trading system shall provide to any broker-dealer that has access to the national securities exchange or national securities association to which the alternative trading system provides the prices and sizes of displayed orders pursuant to paragraph (b)(3)(ii) of this section, the ability to effect a transaction with such orders that is:
>
> (A) Equivalent to the ability of such broker-dealer to effect a transaction with other orders displayed on the exchange or by the association; and

regulatory regime for ATSs, there is no mechanism under which an ATS must notify the Commission, its SRO, or market participants after it has triggered those requirements.[498]

The information required by Part IV, Item 14 of proposed Form ATS-N is designed to elicit information about how the NMS Stock ATS complies with the requirements of Rule 301(b)(3) of Regulation ATS when applicable. The Commission preliminarily believes that the disclosure of the information required by Item 14 of proposed Form ATS-N would facilitate the Commission's oversight of NMS Stock ATSs and their compliance with Rule 301(b)(3) and help the Commission discover a potential violation of the federal securities laws and rules or regulations thereunder in a more expeditious manner than if the disclosures were not required. In part, because the thresholds required for display and access are counted for each NMS stock individually, an NMS Stock ATS would be required to disclose the ticker symbol for the relevant NMS stock to aid the Commission in evaluating its compliance. The Commission also preliminarily believes that these disclosures would help ensure that market participants and the Commission are aware when an NMS Stock ATS has become a significant source of liquidity in an NMS stock. Further, the Commission preliminarily believes that market participants would

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(B) At the price of the highest priced buy order or lowest priced sell order displayed for the lesser of the cumulative size of such priced orders entered therein at such price, or the size of the execution sought by such broker-dealer.

498 In contrast, an ATS that triggers the "fair access" requirements under Rule 301(b)(5), see supra notes 92-95 and 424-427 and accompanying text, is required to attach Exhibit C to Form ATS-R, which is filed with the Commission, but not publicly available. Exhibit C of Form ATS-R requires an ATS that triggered the fair access requirements to: (1) provide a list of all persons granted, denied, or limited access to the ATS during the period covered by the ATS-R and (2) designate for each person (a) whether they were granted, denied, or limited access, (b) the date the ATS took such action, (c) the effective date of such action, and (d) the nature of any denial on limitation of access. See supra note 451.

find the information disclosed in this item useful to understand how they can access applicable quotations.

Request for Comment

460. Do you believe the Commission should require the disclosure of the information on Part IV, Item 14 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

461. Do you believe Part IV, Item 14 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding the NMS Stock ATS's obligations under current Rule 301(b)(3) of Regulation ATS? Please explain.

462. Do you believe there is other information that market participants might find relevant or useful regarding the NMS Stock ATS's obligations under current Rule 301(b)(3) of Regulation ATS? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

463. Is it sufficiently clear what information would be required by Part IV, Item 14 of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

464. Do you believe there is any information that would be required by Part IV, Item 14 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

465. Do you believe that the information required by Part IV, Item 14 of proposed Form ATS-N will assist market participants in accessing applicable quotations and ensuring they receive equivalent access on the NMS Stock ATS? Why or why not? Please support your arguments.

466. Do you believe that the imposition of the requirements of Rule 301(b)(3) on an NMS Stock ATS crossing the relevant volume thresholds of Rule 301(b)(3)(i) and meeting the display requirement of the rule, should constitute a material change in the operations of the NMS Stock ATS such that it should be reported to the Commission in advance? Why or why not?

467. What are the potential costs and benefits of disclosing the information required by Part IV, Item 14 of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 14 of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

468. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 14 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 14?

In 2009, the Commission published a proposal to address certain practices with respect to undisplayed liquidity, which is trading interest that is available for execution at a trading center,

but is not included in the consolidated quotation data that is widely disseminated to the public.[499] Among other things, the Commission proposed amending Rule 301(b)(3) of Regulation ATS to lower the trading volume threshold that triggers public display obligations for ATSs from 5% or more of the aggregate average daily share volume for an NMS stock as reported by an effective transaction reporting plan to 0.25% or more of the aggregate average daily share volume for an NMS stock as reported by an effective transaction reporting plan.[500] The Commission also proposed to change the definition of "bid" or "offer" in Regulation NMS to clarify that the public quoting requirements apply to actionable indications of interest privately transmitted by dark pools to selected market participants.[501]

Request for Comment

469. Do you believe that the Commission should lower the 5% trading volume threshold in Rule 301(b)(3) of Regulation ATS that triggers the public display requirement for ATSs? Why or why not? If so, what is the appropriate threshold level? Please support your arguments.

470. Do you believe that the Commission should define actionable indications of interest in the definition of "bid" and "offer" in Regulation NMS? Why or why not? Please support your arguments.

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499 See generally Regulation of Non-Public Trading Interest, supra note 123.

500 See id. at 61216.

501 See id.

O. Fair Access

Part IV, Item 15 of proposed Form ATS-N would require an NMS Stock ATS to provide the following information if the NMS Stock ATS executes 5% or more of the average daily trading volume in an NMS stock as reported by an effective transaction reporting plan for four of the preceding six calendar months: (a) the ticker symbol for each NMS stock for each of the last 6 calendar months; and (b) a description of the written standards for granting access to trading on the NMS Stock ATS.[502] As explained above,[503] Rule 301(b)(5)(ii)(A) of Regulation ATS requires an ATS to establish written standards for granting access to trading on its system when it crosses the fair access thresholds of Rule 301(b)(5)(i) and does not meet the exception set forth in Rule 301(b)(5)(iii). If an ATS crosses the fair access thresholds, Rule 301(b)(5)(ii)(B) requires the ATS to "not unreasonably prohibit or limit any person in respect to access to services offered by such alternative trading system by applying the [written] standards . . . in an unfair or discriminatory manner."[504]

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502 In response to Part IV, Item 15 of proposed Form ATS-N, an NMS Stock ATS filing a Form ATS-N would indicate "not applicable" if the NMS Stock ATS had not triggered the volume thresholds under Rule 301(b)(5)(i) of Regulation ATS before commencing operations pursuant to an effective Form ATS-N. If an NMS Stock ATS triggers the Rule 301(b)(5)(i) thresholds after commencing operations pursuant to an effective Form ATS-N, the Commission would generally consider this to be a material change to the operations of the NMS Stock ATS (assuming it is not already complying with the fair access requirements of Rule 301(b)(5)), and the NMS Stock ATS would be required to file a Form ATS-N Amendment pursuant to proposed Rule 304(a)(2)(i)(A). In the case where an NMS Stock ATS has voluntarily chosen to comply with the fair access requirements of Rule 301(b)(5)(ii) before crossing the relevant thresholds, the NMS Stock ATS would nevertheless have to file a Form ATS-N Amendment upon surpassing the thresholds within 30 days after the end of the calendar quarter pursuant to Rule proposed 304(a)(2)(i)(B).

503 See supra notes 92-95 and accompanying text.

504 See 17 CFR 242.301(b)(5)(ii)(B).

The Commission preliminarily believes that the disclosure of the information requested by Part IV, Item 15 of proposed Form ATS-N would facilitate the Commission's oversight of NMS Stock ATSs and their compliance with Rule 301(b)(5). Because the volume thresholds required for fair access are counted for each NMS stock individually, an NMS Stock ATS would be required to disclose the ticker symbol for the relevant NMS stock to aid the Commission in evaluating the NMS Stock ATS's compliance. The Commission also preliminarily believes that it is important for market participants to be aware of whether an NMS Stock ATS is a significant source of liquidity for an NMS stocks and therefore, must provide fair access. Although Exhibit C of Form ATS-R requires an ATS to notify the Commission when it has crossed a fair access threshold in a particular calendar quarter,[505] there is currently no requirement that an ATS must notify the public when it has done so. The Commission preliminarily believes that having such information publicly available will help market participants better evaluate trading opportunities and where to route orders in order to reach their trading and/or investment objectives. The Commission preliminarily believes that the disclosures that would be required by Item 15 would help the Commission discover a potential violation of the federal securities laws and rules or regulations thereunder in a more expeditious manner than if the disclosures were not required.

Request for Comment

471. Do you believe the Commission should require the disclosure of the information on Part IV, Item 15 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

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[505] See supra note 451.

472. Do you believe Part IV, Item 15 of proposed Form ATS-N captures the information that is most relevant to understanding the operations of the NMS Stock ATS regarding the written standards for granting access to trading on its system when it crosses the fair access thresholds of Rule 301(b)(5)(i) (and does not meet the exception set forth in Rule 301(b)(5)(iii))? Please explain.

473. Do you believe there is other information that market participants might find relevant or useful regarding the written standards for granting access to trading on its system when it crosses the fair access thresholds of Rule 301(b)(5)(i) (and does not meet the exception set forth in Rule 301(b)(5)(iii))? If so, describe such information and explain whether, and if so why, such information should be required to be provided under proposed Form ATS-N. Please support your arguments.

474. Do you believe there is any information that would be required by Part IV, Item 15 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

475. Is it sufficiently clear what information would be required by Part IV, Item 15 of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

476. Do you believe that the disclosures under Part IV, Item 15 of proposed Form ATS-N would help market participants better evaluate trading opportunities and where to route orders in order to reach their investment objectives? Why or why not? Please support your arguments.

477. Do you believe that the imposition of the requirements of Rule 301(b)(5) on an NMS Stock ATS crossing the relevant volume thresholds of Rule 301(b)(5)(i) should constitute a material change in the operations of the NMS Stock ATS such that it should be reported to the Commission in advance? Why or why not?

478. What are the potential costs and benefits of disclosing the information required by Part IV, Item 15 of proposed Form ATS-N? Would the proposed disclosures in Part IV, Item 15 of proposed Form ATS-N require an NMS Stock ATS to reveal too much (or not enough) information about its structure and operations? Why or why not? Please support your arguments.

479. Do you believe there are other ways to obtain the same information as would be required from NMS Stock ATSs by Part IV, Item 15 of proposed Form ATS-N other than through disclosure on proposed Form ATS-N? If so, how else could this information be obtained and would such alternative means be preferable to the proposed disclosures in Part IV, Item 15?

P. Market Quality Statistics Published or Provided by the NMS Stock ATS to Subscribers

Part IV, Item 16 of proposed Form ATS-N would require an NMS Stock ATS to explain and provide certain aggregate platform-wide market quality statistics that it publishes or provides to one or more subscribers regarding the NMS Stock ATS.[506] Under Item 16, if the NMS Stock ATS publishes or otherwise provides to one or more subscribers aggregate platform-wide order flow and execution statistics of the NMS Stock ATS that are not otherwise required disclosures

[506] An NMS Stock ATS would only be required to provide order flow and execution statistics that are aggregated across the ATS as a whole, not subscriber-specific order flow and execution statistics.

under Exchange Act Rule 605 of Regulation NMS, it would be required to: (i) list and describe the categories of the aggregate platform-wide order flow and execution statistics published or provided; (ii) describe the metrics and methodology used to calculate the aggregate platform-wide order flow and execution statistics; and (iii) attach as Exhibit 5 the most recent disclosure of the aggregate platform-wide order flow and execution statistics published or provided to one or more subscribers for each category or metric as of the end of the calendar quarter. An NMS Stock ATS would not be required to develop or publish any new statistics for purposes of making this disclosure; it would only be required to make the disclosures for statistics it already otherwise collects and publishes or provides to one or more subscribers to the NMS Stock ATS.

The Commission preliminarily believes that some NMS Stock ATSs voluntarily publish or otherwise provide to subscribers aggregate platform-wide order flow and execution statistics that do not fall under the statistical information that is required to be disclosed under Exchange Act Rule 605,[507] which requires market centers, such as NMS Stock ATSs, to publish monthly reports of statistics on their order executions. To the extent an NMS Stock ATS publishes or provides such aggregate platform-wide statistics to one or more subscribers, Part IV, Items 16(a) and (b) of proposed Form ATS-N would require the NMS Stock ATS to list and describe the categories or metrics of the statistics it publishes or provides to subscribers and describe any criteria or methodology that the ATS uses to calculate those statistics, respectively. Item 16(c) would require the NMS Stock ATS to attach as Exhibit 5 the most recent disclosure of order flow and execution statistics published or provided for each category or metric as of the end of

[507] 17 CFR 242.605.

the calendar quarter.[508] To comply with the requirements of Item 16(c), an NMS Stock ATS would file a Form ATS-N Amendment with an updated Exhibit 5 within 30 calendar days after the end of each calendar quarter.[509]

Under Part IV, Item 16, an NMS Stock ATS would be required to explain and provide any aggregate platform-wide order flow or execution statistic that is not otherwise a required disclosure under Exchange Act Rule 605 and published or provided to one or more subscribers by the NMS Stock ATS. An example of a type of statistic that would be a required disclosure under Item 16 would be statistics related to the percentage of midpoint executions on the NMS Stock ATS that the NMS Stock ATS publishes or otherwise provides to subscribers. The NMS Stock ATS would be required to list that category under Part IV, Item 16(a) and explain how the NMS Stock ATS calculates that statistic under Item 16(b). Within 30 calendar days after the end of each calendar quarter, the NMS Stock ATS would be required to attach an Exhibit 5 containing the most recent percentage it disseminated during the previous quarter. The Commission preliminarily believes that requiring the NMS Stock ATS to provide the statistic on Form ATS-N on a quarterly basis would allow market participants to obtain insight into the nature of trading on the NMS Stock ATS on a sufficiently frequent basis while minimizing the reporting burden for the NMS Stock ATS.

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508 For instance, if an NMS Stock ATS publishes or provides a particular statistic on a daily basis, the NMS Stock ATS would include in Exhibit 5 the statistic that was published or provided to one or more subscribers on the last trading day of the calendar quarter (e.g., the statistic published or provided on June 30th or last trading day prior to June 30th). If an NMS Stock ATS publishes or provides a particular statistic weekly, the NMS Stock ATS would be required to include in Exhibit 5 the statistic that was published or provided to one or more subscribers at the end of the week prior to the end of the calendar quarter (e.g., the statistic published for the last full week of June).

509 See proposed Rule 304(a)(2)(i)(B).

The Commission preliminarily believes that an NMS Stock ATS may choose to create and publish or provide to one or more subscribers information concerning order flow and execution quality for different reasons. For example, the NMS Stock ATS may have concluded that publication of certain statistics may highlight certain characteristics of the NMS Stock ATS that would attract certain order flow. Or a subscriber may have requested that the NMS Stock ATS provide certain aggregated information concerning order flow and execution quality that the subscriber needed to assess the ATS's operations. The Commission notes that certain performance metrics and statistics may be important factors for investors and subscribers in comparing and selecting an ATS that is most appropriate for their investment objectives.[510] Indeed, Exchange Act Rule 605 currently requires ATSs to provide quarterly public reports containing certain information concerning ATS executions. As such, to the extent that an NMS Stock ATS has made a determination to create and publish or provide to subscribers certain aggregate platform-wide order flow and execution quality statistics, the Commission preliminarily believes that others may also find such information useful when evaluating an NMS Stock ATS as a possible venue to which to route orders in order to accomplish their investing or trading objectives.

The Commission also solicits comment on whether other standardized statistical disclosures should be required from NMS Stock ATSs and the nature and extent of any such metrics or statistics that commenters believe should be disclosed.

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510 See generally Tuttle: ATS Trading in NMS Stocks, supra note 126.

Request for Comment

480. Do you believe the Commission should require the disclosure of the information on Part IV, Item 16 of Form ATS-N? Why or why not? If so, what level of detail should be disclosed? Please be specific.

481. Do you believe that the statistics required on Part IV, Item 16 of Form ATS-N should be provided on a more or less frequent basis? Why or why not? If so, how often should the statistics be provided (e.g., on a daily, weekly, monthly, quarterly, or annual basis)? Please support your arguments.

482. Is it sufficiently clear what information would be required by Part IV, Item 16 of proposed Form ATS-N? Should the item be refined in any way? If so, how? Please be specific.

483. Do you believe that the disclosures under Part IV, Item 16 of proposed Form ATS-N would help market participants better evaluate trading opportunities and where to route orders in order to reach their investment objectives? Why or why not? Please support your arguments.

484. Do you believe that the Commission should require standardized public disclosures of performance metrics or statistics for each NMS Stock ATS? Why or why not? Please support your arguments. If so, what metrics or statistics should NMS Stock ATSs be required to disclose publicly? Please be specific.

485. What percentage of NMS Stock ATSs publish or provide market quality statistics not otherwise required under Exchange Act Rule 605? Please explain how you have calculated this number.

486. Do you believe that there are other statistics or data that an NMS Stock ATS should be required to provide on proposed Form ATS-N that would be useful to market participants that either subscribe to or are considering subscribing to the NMS Stock ATS? If so, please identify those metrics and explain how they would be useful to market participants. Please support your arguments.

487. Should the Commission require NMS Stock ATSs to disclose on Form ATS-N, statistics regarding the extent of trading by the broker-dealer operator and its affiliates on the NMS Stock ATS? Why or why not? If so, what statistics should be required to be disclosed? Please support your arguments. If you believe that an NMS Stock ATS should disclose statistics about the extent of its broker-dealer operator's and its affiliates' trading activity on the NMS Stock ATS, how often should these statistics be disclosed (e.g., on a weekly, monthly, quarterly, annual basis)?

488. Do you believe there is any information that would be required by Part IV, Item 16 of proposed Form ATS-N that an NMS Stock ATS should not be required to disclose due to concerns regarding confidentiality, business reasons, trade secrets, burden, or any other concerns? Why or why not? Please support your arguments.

The Commission also notes that some industry participants have previously requested public statistics about the quality of these markets. In the 2010 Equity Market Structure Release, the Commission solicited public comment about, among other things, market structure performance and order execution quality, and how transparency could be improved in these

areas.[511] For example, the Commission noted that an important objective of many dark pools is to offer institutional investors an efficient venue in which to trade in large size with minimized market impact,[512] and requested comment on the extent to which dark pools meet this objective of improving execution quality for the large orders of institutional investors.[513] In seeking comment on other tools to protect investor interests, the Commission also requested comment on Exchange Act Rules 605 and Exchange Act Rule 606.[514] Exchange Act Rule 606 requires broker-dealers to publish quarterly reports on their routing practices, including the venues to which they route orders for execution.[515] Specifically, the Commission asked about the currency of Exchange Act Rules 605 and 606 and whether the information provided on the reports was useful to investors and their brokers in assessing the quality of order execution and routing practices.[516]

In response, some commenters stated their concern about the lack of market quality information available to the public about ATSs and other trading centers. For example, one commenter expressed support for national securities exchanges and ATSs to disclose how often a functionality is used and more market quality statistics, such as quote-per-execution ratios, duration of quotes and number of times orders are routed out without getting filled so that investors and other market participants could better gauge execution quality.[517] Another

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511 See Equity Market Structure Release, supra note 124 at 3602-3614. See also supra Section III.D (discussing certain comments received on the Equity Market Structure Release).

512 See Equity Market Structure Release, supra note 124 at 3612.

513 See id.

514 17 CFR 242.606.

515 See 2010 Equity Market Structure Release, supra note 124, at 3605-3606.

516 See id.

517 Goldman Sachs letter, supra note 175, at 10.

commenter stated that "regulators should direct broker-dealers to provide public reports of order routing and execution quality metrics that are geared toward retail investors."[518] This commenter also stated that "the Commission should direct broker-dealers to provide institutional clients with standardized execution venue statistical analysis reports" and noted its commitment "to working with other industry groups to develop consistent industry templates, which it believes will greatly enhance institutional investors' ability to evaluate their brokers' routing practices and the quality of execution provided by different venues."[519] Another commenter stated its belief that publicly available order routing and execution quality statistics pursuant to Rules 605 and 606 do not provide information to measure broker-dealers' and execution venues' performance with respect to specific institutional investors and that the reports are not presented in a uniform manner that allows for easy comparison across different broker-dealers and venues.[520]

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518 See SIFMA letter #2, supra note 175 at 12. For example, the commenter suggested including information on " (i) percent of shares Improved, (ii) average price improvement, (iii) net Price Improvement per share, and (iv) effective/quoted spread ratio."

519 See SIFMA letter #2, supra note 175 at 13. The commenter gave examples of the types of information (per venue) that should be incorporated into these reports as: (i) percentage of orders executed, (ii) average number of shares ordered and executed, (iii) fill rates–overall, taken, added, and routed, and (iv) percentage executed displayed and undisplayed.

520 See letter from Dorothy M. Donohue, Deputy General Counsel, Investment Company Institute; Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, Managed Funds Association; and Randy Snook, Executive Vice President, Securities Industry and Financial Markets Association, dated October 23, 2014, at 2.

This commenter also provided a template for disclosure of order routing and execution quality information that institutional investors could request from their broker-dealers, which included, among other things: the number of total shares routed as actionable IOIs; the percent of shares routed to the venue by the broker that resulted in executions at that venue); the average length of time (measured in milliseconds) that orders (other than IOCs) were posted to a venue before being filled or cancelled; the average size, by number of shares, of each order actually executed on the venue; the aggregate number of

With regard to the comment that the execution quality statistics currently made public under Rules 605 and 606 are inadequate, the Commission notes that it is considering proposing to amend Rules 600 and 606 to standardize and improve transparency around how broker-dealers handle and route institutional customer orders. These revisions being considered would include addressing commenter concerns regarding disclosures by broker-dealers about the trading venues to which they route orders, particularly with respect to order and execution sizes, fill rates, price improvement, and the use of actionable indications of interests.[521] The Commission also is considering disclosures to facilitate the ability of institutional investors to assess potential conflicts of interest and risks of information leakage.

Request for Comment

489. Do you believe that there is information that the Commission should require NMS Stock ATSs to disclose other than the information that is currently available to market participants from order execution reports pursuant to Exchange Act Rule 605? Why or why not? Please support your arguments. If so, what information should be disclosed and how would the information be useful to market participants? Please explain. Do you believe that there is information that the Commission should require a broker-dealer operator of the NMS Stock ATS to disclose other than the information that is currently available

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shares executed at the venue that were priced at or near the mid-point between the bid and the offer; and the percentage of total shares executed that were executed at or near the midpoint between the bid and the offer. See id. at "Broker Routing Venue Analysis Template Definitions."

521 See id.

to market participants from order routing reports pursuant to Exchange Act Rules 606? Why or why not? Please support your arguments.

490. Do you believe that there are other means by which market quality metrics should be required to be made available by NMS Stock ATSs to market participants, other than as disclosures on proposed Form ATS-N? Why or why not? Please support your arguments. If so, please identify by what means and why? Please support your arguments.

491. Do you believe that an NMS Stock ATS should be required to disclose information about orders entered into its system and the ultimate disposition of such orders? Why or why not? Please support your arguments. For example, should NMS Stock ATSs disclose information regarding the average order size, average execution size, and percentage of orders marked immediate or cancel? Why or why not? Please support your arguments.

492. Do you believe that NMS Stock ATSs should be required to disclose whether the NMS Stock ATS provided order flow and execution statistics to some subscribers and not others? Why or why not? Please support your arguments.

493. Do you believe that NMS Stock ATSs should be required to disclose execution information such as the total number and percentage of shares executed at the midpoint, total number and percentage of shares executed at the national best bid, total number and percentage of shares executed at the national best offer, total number and percentage of shares executed between the national best bid and the midpoint, and total number and percentage of shares executed between the midpoint and the national best offer? Why or why not? Please support your

arguments. If so, do you believe such information should be disclosed publicly on an aggregated basis or should the information be disclosed to each subscriber based on its own orders? Please support your arguments.

494. Do you believe that the joint-industry plan should be amended for publicly disseminating consolidated trade data to require real-time disclosure of the identity of NMS Stock ATSs on reports of their executed trades? Why or why not? Please support your arguments. Alternatively, should executions on NMS Stock ATSs be publicly disseminated on a delayed basis?[522] Why or why not? Please support your arguments. If so, how should this be done and what would be the appropriate delay? Please explain.

495. Do you believe that there are other data elements that should be provided by NMS Stock ATSs in the consolidated trade data? What are they and why should they be required? Please be specific.

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522 FINRA Rule 4552 requires each ATS to report to FINRA weekly volume information and number of trades regarding equity securities transactions within the ATS. Each ATS is also required to use a single MPID when reporting information to FINRA and to report weekly aggregate volume information on a security-by-security basis to FINRA.

IX. Proposed Amendment to Rule 301(b)(10): Written Safeguards and Written Procedures to Protect Confidential Trading Information

Current Rule 301(b)(10) of Regulation ATS[523] requires every ATS to have in place safeguards and procedures to protect subscribers' confidential trading information and to separate ATS functions from other broker-dealer functions, including proprietary and customer trading.[524] In the Regulation ATS Adopting Release, the Commission recognized that some broker-dealer operators provide traditional brokerage services as well as access to their ATS(s).[525] The Commission further stated that Rule 301(b)(10) was not intended to preclude an ATS from providing its traditional brokerage services; rather, Rule 301(b)(10) was designed to prevent the misuse of private customer information in the system for the benefit of other customers, the ATS's operator, or its employees.[526] The Commission also stated its belief that the sensitive nature of trading information subscribers send to ATSs requires such systems to take certain steps to ensure the confidentiality of such information.[527] To illustrate its point, the Commission provided the example that unless subscribers consent, registered representatives of an ATS should not disclose information regarding trading activities of such subscribers to other subscribers that could not be ascertained from viewing the ATS's screens directly at the time the information is conveyed.[528] As a result of its concerns regarding confidentiality, the

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523 See 17 CFR 242.301(b)(10).

524 See Regulation ATS Adopting Release, supra note 7, at 70879.

525 See id.

526 See id.

527 See id.

528 The Commission stated that its concern regarding confidentiality grew out of its inspections of some ECNs, during which the Commission and its staff found that some of the broker-dealers operating ECNs used the same personnel to operate the ECN as they

Commission adopted Rule 301(b)(10), which was designed to eliminate the potential for abuse of the confidential trading information that subscribers send to ATSs.[529]

Rule 301(b)(10), however, does not currently require that the safeguards and procedures mandated under Rule 301(b)(10) be memorialized in writing. The Commission is now proposing to amend Rule 301(b)(10) to require that such safeguards and procedures be reduced to writing.[530] Specifically, the Commission proposes to amend Rule 301(b)(10)(i) to require that all ATSs (including non-NMS Stock ATSs) establish written safeguards and written procedures to protect subscribers' confidential trading information.[531] This would include an ATS adopting written safeguards and written procedures that limit access to the confidential trading information of subscribers to those employees of the ATS who are operating the system or are responsible for its compliance with Regulation ATS or any other applicable rules,[532] and implementing written standards controlling employees of the ATS trading for their own accounts.[533] The Commission is also proposing to amend Rule 301(b)(10)(ii) to require that the

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did for more traditional broker-dealer activities, such as handling customer orders that were received by telephone. These types of situations create the potential for misuse of the confidential trading information in the ECN, such as customers' orders receiving preferential treatment, or customers receiving material confidential information about orders in the ECN. See id.

529 See id.

530 As discussed above, proposed Form ATS-N would also require NMS Stock ATSs to describe the written safeguards and procedures. See Part III, Item 10 of Proposed Form ATS-N. See also supra Section VII.B.11.

531 See proposed Rule 301(b)(10)(i).

532 See proposed Rule 301(b)(10)(i)(A).

533 See proposed Rule 301(b)(10)(i)(B).

oversight procedures, which an ATS adopts and implements to ensure that the above safeguards and procedures are followed, be in writing.[534]

The Commission continues to believe that safeguards and procedures to ensure the confidential treatment of ATS subscribers' trading information are important, and that the potential for misuse of such information continues to exist. The Commission preliminarily believes that requiring an ATS to reduce to writing those safeguards and procedures, as well as its oversight procedures to ensure that such safeguards and procedures are followed, would strengthen the effectiveness of the ATS's safeguards and procedures and would better enable the ATS to protect confidential subscriber trading information and implement and monitor the adequacy of, and the ATS's compliance with, its safeguards and procedures. For example, if an ATS were required to reduce its safeguards and procedures to writing, it could self-audit – or if it chose to do so, undergo a third-party audit – for compliance with those safeguards and procedures, and also assess their adequacy. In addition, the Commission preliminarily believes that reducing ATSs' safeguards and procedures under Rule 301(b)(10) to writing will help the Commission and its staff, and the staff of the SRO of which an ATS's broker-dealer operator is a member, evaluate whether an ATS has established such procedures and safeguards, whether the ATS has implemented and is abiding by them, and whether they comply with the requirements of Rule 301(b)(10). This should enable the Commission, and the applicable SRO(s), to exercise more effective oversight of ATSs regarding the ATSs' compliance with Rule 301(b)(10) and other federal securities laws, rules, and regulations. The Commission also preliminary believes that its proposal would benefit market participants because they would be able to better evaluate

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534 See proposed Rule 301(b)(10)(ii).

the implementation of such safeguards and procedures, due to the proposed rule to reduce those safeguards and procedures to writing.

Request for Comment

496. Do you believe the Commission should require ATSs to reduce to writing their safeguards and procedures as described above? Why or why not? Should the requirement apply to all ATSs or only a subset such as NMS Stock ATSs? Please support your arguments.

497. Do you believe that requiring ATSs to reduce to writing their safeguards and procedures, as proposed, would help to ensure that subscribers' confidential trading information is protected and not misused? If not, why not? Please support your arguments.

498. Are there other conditions that the Commission should implement to achieve the goal of protecting subscribers' confidential trading information? If so, what are they and why would they be preferable? Please be specific.

499. Currently, how common is it for ATSs to reduce to writing their safeguards and procedures to protect subscribers' confidential trading information and/or their oversight procedures to ensure that those safeguards and procedures are followed? For ATSs that have not reduced their safeguards and procedures to protect subscribers' confidential trading information to writing, how do they currently ensure their compliance with the requirements of Rule 301(b)(10)? Please be specific.

500. For ATSs that have not reduced to writing their safeguards and procedures to protect subscribers' confidential trading information and/or their oversight

procedures to ensure that those safeguards and procedures are followed, how long would it take to do so? Please explain.

X. Recordkeeping Requirements

The Commission is proposing to amend Rules 303(a)(1) and 303(a)(2) of Regulation ATS to reflect its proposed amendments to Rule 301(b)(2)[535] and 301(b)(10),[536] and its proposed addition of Rule 304.[537] In addition, the Commission is proposing to make a minor technical amendment to Rule 303.

Currently, unless not required to comply with Regulation ATS pursuant to Rule 301(a)[538] of Regulation ATS, an ATS must comply with the recordkeeping requirements of Regulation ATS. Specifically, Rule 301(b)(8) [539] requires an ATS to make and keep current the records specified in Rule 302[540] and to preserve the records specified in Rule 303.[541] In the Regulation ATS Adopting Release, the Commission stated that the requirements to make and preserve records set forth in Regulation ATS are necessary to create a meaningful audit trail and permit surveillance and examination to help ensure fair and orderly markets.[542]

Rule 303(a)(1) requires an ATS to preserve certain records for at least three years, the first two years in an easily accessible place.[543] Specifically, Rule 303(a)(1) [544] requires an ATS to preserve: all records required to be made pursuant to Rule 302; all notices provided to

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535 See supra Section IV.C.

536 See infra Section IX.

537 See supra Section IV.C.

538 17 CFR 242.301(a).

539 See 17 CFR 242.301(b)(8).

540 See 17 CFR 242.302.

541 See 17 CFR 242.303.

542 See Regulation ATS Adopting Release, supra note 7, at 70877-78.

543 See 17 CFR 242.303(a)(1).

544 See 17 CFR 242.303(a)(1).

subscribers, including notices addressing hours of operation, system malfunctions, changes to system procedures, and instructions pertaining to access to the ATS; documents made or received in the course of complying with the system capacity, integrity, and security standards in Rule 301(b)(6), if applicable;[545] and, if the ATS is subject to the fair access requirements under Rule 304(b)(5),[546] a record of its access standards. Rule 303(a)(2)[547] requires that certain other records must be kept for the life of the ATS and any successor enterprise, including partnership articles or articles of incorporation (as applicable), and copies of reports filed pursuant to Rule 301(b)(2),[548] which includes current Form ATS, and records made pursuant to Rule 301(b)(5).[549] In particular, reports required to be maintained for the life of the ATS or any successor enterprise include initial operation reports, amendments, and cessation of operations reports, filed on Form ATS.[550]

The Commission is proposing to amend the record preservation requirements of Rule 303 to incorporate the preservation of records that would be created pursuant to the proposed requirements that NMS Stock ATSs file Forms ATS-N, Form ATS-N Amendments, and notices of cessation instead of Form ATS. Specifically, the Commission is proposing to amend Rule 303(a)(2)(ii) to require that an ATS shall preserve, for the life of the enterprise and of any successor enterprise, copies of reports filed pursuant to Rule 301(b)(2) or – in the case of an

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545 See supra notes 96-100 and accompanying text.

546 See supra notes 92-95 and accompanying text.

547 See 17 CFR 242.303(a)(2).

548 See 17 CFR 242.301(b)(2).

549 See supra notes 92-95 and accompanying text.

550 See 17 CFR 242.301(b)(2).

NMS Stock ATS – Rule 304, and records made pursuant to Rule 301(b)(5).[551] As a result, because an NMS Stock ATS would be required to file Forms ATS-N, Form ATS-N Amendments, and notices of cessation pursuant to proposed Rule 304, instead of on Form ATS, the NMS Stock ATS would be required to preserve those reports for the life of the enterprise and of any successor enterprise pursuant to the proposed amendments to Rule 303(a)(2).[552] The Commission is not proposing any amendments to the recordkeeping requirements of Rule 302, or any other amendments to the record preservation requirements of Rule 303(a)(2).

The Commission is also proposing amendments to the record preservation requirements of Rule 303(a)(1) to incorporate the Commission's proposed amendments to Rule 301(b)(10),[553] which would require an ATS to reduce to writing its safeguards and procedures to ensure confidential treatment of subscribers' trading information and the oversight procedures to ensure that those safeguards and procedures are followed.[554] Accordingly, the Commission is proposing to require an ATS, for a period of not less than three years, the first two years in an easily accessible place, to preserve at least one copy of the written safeguards and written procedures to protect subscribers' confidential trading information and the written oversight procedures created in the course of complying with Rule 301(b)(10).[555] The Commission is not proposing to amend any other aspects of the records preservation requirements of Rule 303(a)(1). The Commission

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551 See proposed Rule 301(a)(2)(ii).

552 The Commission notes that an NMS Stock ATS that had previously made filings on Form ATS would be required to preserve those filings for the life of the enterprise, as well as filings made going forward on Form ATS-N.

553 See proposed Rule 301(b)(10).

554 See supra Section VII (discussing the Commission's proposed amendments to Rule 301(b)(10)).

555 See proposed Rule 303(a)(1)(v).

preliminarily believes that the proposed amendments to Rule 303 are necessary to create a meaningful audit trail of an ATS's current and previous written safeguards and procedures pursuant to Rule 301(b)(2) and permit surveillance and examination to help ensure fair and orderly markets,[556] without imposing any undue burden on ATSs.

Finally, the Commission proposes to make a minor technical amendment to Rule 303(a). Currently, Rule 303(a) references "paragraph (b)(9) of § 242.301" when setting forth the record preservation requirements for ATSs. The Commission is proposing to change the above reference to "paragraph (b)(8) of § 242.301" because Rule 301(b)(8) sets forth the recordkeeping requirements for ATSs.

Request for Comment

501. Do you believe the Commission should amend the recordkeeping requirements for ATSs as proposed? Why or why not?

502. Do you believe that there are any other requirements of Rule 303 that should be amended to satisfy the objectives of this proposal? If so, what are they and why?

503. Do you believe that the proposed amendments to the record preservation requirements of Rule 303 are reasonable? If not, why? Please support your arguments.

XI. General Request for Comment

The Commission is requesting comments from all members of the public. The Commission particularly requests comment from the point of view of persons who operate ATSs

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556 See Regulation ATS Adopting Release, supra note 7, at 70877-78.

that would meet the proposed definition of NMS Stock ATS, subscribers to those systems, investors, and registered national securities exchanges. The Commission seeks comment on all aspects of the proposed rule amendments and proposed form, particularly the specific questions posed above. Commenters should, when possible, provide the Commission with data to support their views. Commenters suggesting alternative approaches should provide comprehensive proposals, including any conditions or limitations that they believe should apply, the reasons for their suggested approaches, and their analysis regarding why their suggested approaches would satisfy the objectives of the proposed amendments. The Commission will carefully consider the comments it receives.

504. Do you believe that there is other information about the nature or extent of the operations of an NMS Stock ATS that should be disclosed on proposed Form ATS-N? Are there specific topics about which the Commission should request more information? If so, what information should be disclosed and why?

505. Do you believe that there are activities of an NMS Stock ATS broker-dealer operator and its affiliates that may give rise to potential conflicts of interest, other than those described, that should be disclosed on Form ATS-N? If so, what information should be disclosed and why? If so, what are they and why?

506. Is there other information or data that would be useful for a market participant to consider when evaluating an NMS Stock ATS as a potential trading center for its orders? If so, what are they and why?

XII. Paperwork Reduction Act

Certain provisions of the proposal contain ‘‘collection of information’’ requirements within the meaning of the Paperwork Reduction Act of 1995 (‘‘PRA’’).[557] The titles of these requirements are:

- Requirements for Alternative Trading Systems That Are Not National Securities Exchanges – Rule 301, Form ATS and Form ATS-R, 17 CFR 242.301 (OMB Control No. 3235-0509);
- Rule 303 (17 CFR 242.303) Record Preservation Requirements for Alternative Trading Systems (OMB Control No. 3235-0505).
- Rule 304 and Form ATS-N (a proposed new collection of information).

We are submitting these requirements to the Office of Management and Budget (‘‘OMB’’) for review and approval in accordance with the PRA and its implementing regulations.[558] We are applying for an OMB control number for the proposed new collection of information in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. If adopted, responses to the new collection of information would be mandatory. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.[559]

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557 44 U.S.C. 3501 et seq.

558 44 U.S.C. 3507; 5 CFR 1320.11.

559 5 CFR 1320.11(l).

A. Summary of Collection of Information

The proposed amendments to Regulation ATS include two new categories of obligations that would require a collection of information within the meaning of the PRA. The first category relates to Rule 301(b)(10) of Regulation ATS[560] and would apply to all ATSs, while the second category relates to proposed Form ATS-N and would apply only to NMS Stock ATSs.

1. Requirements Relating to Rule 301(b)(10) of Regulation ATS

Under Rule 301(b)(10) of Regulation ATS, all ATSs are currently required to: (1) establish adequate safeguards and procedures to protect subscribers' confidential trading information; and (2) adopt and implement adequate oversight procedures to ensure that the safeguards and procedures established to protect subscribers' confidential trading information are followed. Rule 301(b)(10) of Regulation ATS further requires that the safeguards and procedures to protect subscribers' confidential trading information shall include: (1) limiting access to the confidential trading information of subscribers to those employees of the ATS who are operating the system or responsible for its compliance with Regulation ATS or any other applicable rules; and (2) implementing standards controlling employees of the ATS trading for their own accounts. The proposed amendments to Regulation ATS would require written safeguards and written procedures to protect subscribers' confidential trading information and written oversight procedures to ensure that the safeguards and procedures are followed.

In addition, the Commission proposes to amend Rule 303(a)(1)[561] of Regulation ATS to provide that all ATSs must preserve at least one copy of their written safeguards and written

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560 17 CFR 242.301(b)(10).

561 17 CFR 242.303(a)(1).

procedures to protect subscribers' confidential trading information and the written oversight procedures created in the course of complying with Rule 301(b)(10) of Regulation ATS. Under the proposed amendment, Rule 303(a)(1)(v) would be added to Regulation ATS to require an ATS to preserve such written safeguards and written procedures, and written oversight procedures for a period of not less than three years, the first two years in an easily accessible place.[562]

2. Requirements Relating to Proposed Rules 301(b)(2)(viii) and 304 of Regulation ATS, including Proposed Form ATS-N

As described above, the Commission proposes that any ATS that meets the definition of an NMS Stock ATS would be required to complete Form ATS-N and file it with the Commission in a structured format. Upon the Commission declaring a Form ATS-N effective, the Commission would make the Form ATS-N publicly available. The Commission would also make publicly available upon filing all properly filed Form ATS-N Amendments and notices of cessation on Form ATS-N. The proposed amendments to Regulation ATS would also require each NMS Stock ATS to make public via posting on its website a direct URL hyperlink to the Commission's website that contains the documents enumerated in proposed Rule 304(b)(2).

Proposed Form ATS-N consists of five parts. First, the entity submitting the filing would indicate whether it is submitting or withdrawing an initial filing. The entity would also indicate the type of filing — whether the filing is a Form ATS-N, a Form ATS-N Amendment (whether a material amendment, periodic amendment, or correcting amendment), or a notice of cessation, and if it is a notice of cessation, the date the NMS Stock ATS will cease to operate. If the filing is a Form ATS-N Amendment, the NMS Stock ATS would also be required to provide a brief

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562 Id.

narrative description of the amendment and a redline(s) showing changes to Part III and/or Part IV of proposed Form ATS-N. Part I would require that entity to state the name of the Registered Broker Dealer of the NMS Stock ATS (i.e., the broker-dealer operator), the name under which the NMS Stock ATS conducts business, if any, the MPID of the NMS Stock ATS, and whether it is an NMS Stock ATS currently operating pursuant to a previously filed initial operation report on Form ATS. Part II would require registration information regarding the broker-dealer operator of the ATS, such as the broker-dealer's file number with the Commission, the name of the national securities association with which the broker-dealer operator is a member, the effective dates of the broker-dealer's registration with the Commission and membership in the national securities association, and the broker-dealer operator's CRD Number. In addition, Part II would require the address of the physical location of the NMS Stock ATS matching system, the NMS Stock ATS's mailing address, and a URL to the website of the NMS Stock ATS. Part II would also require information regarding the legal status of the broker-dealer operator of the NMS Stock ATS (e.g., corporation, partnership, sole proprietorship) and its date of formation. Furthermore, Part II of proposed Form ATS-N would require the NMS Stock ATS to attach the following three exhibits: (1) Exhibit 1 – a copy of any materials currently provided to subscribers or other persons related to the operations of the NMS Stock ATS or the disclosures on Form ATS-N; (2) Exhibit 2A – a copy of the most recently filed or amended Schedule A of the broker-dealer operator's Form BD disclosing information relating to direct owners and executive officers; and (3) Exhibit 2B – a copy of the most recently filed or amended Schedule B of the broker-dealer operator's Form BD disclosing information related to indirect owners. In lieu of attaching Exhibits 2A and 2B to proposed Form ATS-N, the NMS Stock ATSs would be able to provide a URL address for where the required documents can be found.

Part III of proposed Form ATS-N would require an NMS Stock ATS to provide certain disclosures related to the activities of the broker-dealer operator and its affiliates in connection with the NMS Stock ATS. Part III consists of ten items, which are summarized here, and explained in greater detail below in the discussion of the estimated burdens related to each disclosure requirement. Part III of proposed Form ATS-N would include disclosures relating to: (1) whether the broker-dealer operator, or any of its affiliates, operate or control any non-ATS trading centers and how such non-ATS trading centers coordinate or interact with the NMS Stock ATS, if at all; (2) whether the broker-dealer operator, or any of its affiliates, operates another NMS Stock ATS and how such other NMS Stock ATS coordinates or interacts with the NMS Stock ATS completing the Form ATS-N, if at all; (3) the products and services offered by the broker-dealer operator, or any of its affiliates, to subscribers in connection with their use of the NMS Stock ATS; (4) whether the broker-dealer operator, or any of its affiliates, has any formal or informal arrangement with an unaffiliated person(s), or affiliate(s) of such person(s), that operates a trading center regarding access to the NMS Stock ATS, including preferential routing arrangements; (5) whether the broker-dealer operator or any of its affiliates enter orders or other trading interest on the NMS Stock ATS and the manner in which such trading is done; (6) whether the broker-dealer operator or any of its affiliates use a SOR(s) (or similar functionality), an algorithm(s), or both to send or receive orders or other trading interest to or from the NMS Stock ATS, and the interaction or coordination between the SOR(s) (or similar functionality) or algorithm(s) and the NMS Stock ATS; (7) whether there are any employees of the broker-dealer operator that service the operations of the NMS Stock ATS that also service any other business unit(s) of the broker-dealer operator or any affiliate(s) other than the NMS Stock ATS, and the roles and responsibilities of such shared employees; (8) whether any

operation, service, or function of the NMS Stock ATS is performed by any person(s) other than the broker-dealer operator, a description of such operation, service, or function, and whether those person(s), or any of their affiliates, may enter orders or other trading interest on the NMS Stock ATS; (9) whether the NMS Stock ATS makes available or applies any service, functionality, or procedure of the NMS Stock ATS to the broker-dealer operator or its affiliates that is not available or does not apply to a subscriber(s) to the NMS Stock ATS and a description of such service, functionality, or procedure; and (10) a description of the written safeguards and written procedures to protect the confidential trading information of subscribers to the NMS Stock ATS, including (a) a description of the means by which a subscriber can consent or withdraw consent to the disclosure of confidential trading information, (b) identification of the positions or titles of any persons that have access to confidential trading information, the type of confidential trading information those persons can access, and the circumstances under which they can access it, (c) a description of the written standards controlling employees of the NMS Stock ATS trading for their own accounts, and (d) a description of the written oversight procedures to ensure that the ATS's Rule 301(b)(10) safeguards and procedures are implemented and followed.

Part IV of proposed Form ATS-N would require an NMS Stock ATS to provide certain disclosures related to the manner of operations of the NMS Stock ATS. Part IV consists of 15 items, which are summarized here, and explained in greater detail below in the discussion of the estimated burdens related to each disclosure requirement. Part IV of proposed Form ATS-N would include disclosures relating to: (1) subscribers to the NMS Stock ATS, including any eligibility requirements to gain access to the services of the ATS, the terms or conditions of any contractual agreement for access, the types of subscribers and other persons that use the services

of the ATS, any formal or informal arrangement the NMS Stock ATS may have with a subscriber or person to provide liquidity to the ATS (including the terms and conditions of each arrangement and the identity of any liquidity provider that is an affiliate of the broker-dealer operator), the circumstances by which a subscriber or other person may be limited or denied access to the NMS Stock ATS, and any differences in the treatment of different subscribers and persons with respect to eligibility, terms and conditions of use, criteria for distinguishing among subscribers or other persons, and limitations and denials of access; (2) the days and hours of operation of the NMS Stock ATS, including the times when orders or other trading interest are entered and the time when pre-opening or after-hours trading occur, and whether there are any differences in when orders or other trading interest may be entered by different subscribers or persons; (3) the order types and modifiers entered on the NMS Stock ATS, including their characteristics, operations, how they are ranked and executed on the ATS(such as priority vis-à-vis other orders), eligibility and conditions for routing to other trading centers, the available time-in-force instructions for each order type, whether the availability and terms and conditions of each order type is the same for all subscribers and persons, any requirements and handling procedures for minimum order sizes, odd-lot orders or mixed-lot orders, including whether such requirements and procedures are the same for all subscribers and persons, and any messages sent to or received by the NMS Stock ATS indicating trading interest, including any differences in the terms and conditions for such messages for different subscribers and persons; (4) the means by which subscribers and other persons connect to the NMS Stock ATS and enter orders or other trading interest on the NMS Stock ATS (e.g., direct FIX connection or indirect connection via the broker-dealer operator's SOR or any intermediate functionality, algorithm or sales desk); any co-location services or other means by which any subscriber or other persons may enhance the

speed by which to send or receive orders, trading interest, or messages to or from the NMS Stock ATS; and any differences in the terms and conditions for connecting and entering trading interest or co-location services for different subscribers or persons; (5) the segmentation of orders or other trading interest on the NMS Stock ATS and notice about segmentation to subscribers or persons, including the criteria used to segment orders or other trading interest on the NMS Stock ATS, any notice provided to subscribers or persons about the segmented category that a subscriber or a person is assigned, any differences in segmentation (or notice about segmentation) for different subscribers or persons, and order preferencing and its effect on order priority and interaction; (6) the means and circumstances by which orders or other trading interest on the NMS Stock ATS are displayed or made known outside the NMS Stock ATS, type of information displayed, any differences in display for different subscribers and persons, and to whom orders and trading interest is displayed; (7) the trading services of the NMS Stock ATS, including the means used by the ATS to bring multiple buy and sell orders together, the established, non-discretionary methods dictating the terms of trading on the facilities of the NMS Stock ATS, trading procedures related to price protection mechanisms, short sales, locked-crossed markets, the handling of execution errors, time-stamping of orders and executions, or price improvement functionality, and any differences for different subscribers and persons; (8) the procedures governing trading in the event the NMS Stock ATS suspends trading or experiences a system disruption or malfunction, including any differences in the procedures among subscribers and persons; (9) the opening, reopening or closing processes, or after-hours trading procedures of the NMS Stock ATS; (10) the circumstances under which orders or other trading interest are routed from the NMS Stock ATS to another trading center, and any differences in the means by which orders are routed among subscribers and persons; (11) the

market data used by the NMS Stock ATS and the source of that market data, and the specific purpose for which market data is used by the ATS, including how it is used to determine the NBBO; (12) the fees, rebates, or other charges of the NMS Stock ATS and whether such fees are not the same for all subscribers and persons; (13) arrangements or procedures for trade reporting of transactions on the NMS Stock ATS, and arrangements or procedures undertaken by the NMS Stock ATS to facilitate the clearance and settlement of transaction on the ATS, including any differences in these procedures among subscribers and persons; (14) information related to the NMS Stock ATS's order display and execution obligations under Rule 301(b)(3) of Regulation ATS, if applicable; (15) information related to the NMS Stock ATS's obligations under the fair access requirements of Rule 301(b)(5) of Regulation ATS, if applicable; and (16) aggregate market quality statistics published or provided to one or more subscribers.

Part V of proposed Form ATS-N would require an NMS Stock ATS to provide certain basic information about the point of contact for the NMS Stock ATS, such as the point of contact's name, title, telephone number and email address. Part V would also require the NMS Stock ATS to consent to service of any civil action brought by, or any notice of any proceeding before, the Commission or an SRO in connection with the ATS's activities.

The Commission proposes that Form ATS-N would be filed electronically and require an electronic signature. Consequently, the proposed amendments to Regulation ATS would require that every NMS Stock ATS have the ability to file forms electronically with an electronic signature. The Commission preliminarily believes that most, if not all, ATSs that transact in NMS stock currently have the ability to access and submit an electronic form such that the requirement to file Form ATS-N electronically with an electronic signature would not impose

new implementation costs. The burdens related to electronic submission and providing an electronic signature are included in the burden hour estimates provided below.

In addition, the Commission proposes to amend Rule 303(a)(2)(ii)[563] of Regulation ATS to provide that all ATSs must preserve copies of all reports filed pursuant to Rule 304, which includes Form ATS-N filings, for the life of the enterprise and any successor enterprise.

Furthermore, under this proposal, an ATS that effects transactions in both NMS stocks and non-NMS stocks would be required to file both a Form ATS-N with respect to its trading of NMS stocks and a revised Form ATS that removes discussion of those aspects of the ATS related to the trading of NMS stocks. The ATS would also be required to file two Forms ATS-R – one to report its trading volume in NMS stocks and another to report its trading volume in non-NMS stocks.

B. Proposed Use of Information

1. Proposed Amendments to Rules 301(b)(10) of Regulation ATS

As noted above, the proposed amendments to Rule 301(b)(10) of Regulation ATS would require all ATSs to have in place written safeguards and written procedures to protect subscribers' confidential trading information. Proposed Rule 303(a)(1)(v) of Regulation ATS would require all ATSs to preserve at least one copy of those written safeguards and written procedures.

The Commission preliminarily believes that both the Commission and the SRO of which the ATS's broker dealer-operator is a member will use these written safeguards and written procedures in order to better understand how each ATS protects subscribers' confidential trading

563 17 CFR 242.303(a)(2)(ii).

information from unauthorized disclosure and access. The Commission preliminarily believes that the information contained in the records required to be preserved by proposed Rule 303(a)(1)(v) would be used by examiners and other representatives of the Commission, state securities regulatory authorities, and SROs to evaluate whether ATSs are in compliance with Regulation ATS as well as other applicable rules and regulations. The Commission also preliminarily believes that the proposed requirements to memorialize in writing the safeguards and procedures to protect subscribers' confidential trading information would assist ATSs in more effectively complying with their existing legal requirements under Regulation ATS; in particular, the requirements to protect the confidentiality of subscribers' trading information under Rule 301(b)(10) of Regulation ATS.

2. Proposed Rules 301(b)(2)(viii), 304 of Regulation ATS, Including Proposed Form ATS-N, and 301(b)(9)

Proposed Rules 301(b)(2)(viii) and 304 of Regulation ATS would require each NMS Stock ATS to file a Form ATS-N, Form ATS-N Amendments, and a notice of cessation on proposed Form ATS-N.[564] As noted above, proposed Form ATS-N would require information regarding the broker-dealer operator of the NMS Stock ATS and, in some instances affiliates of

[564] Specifically, proposed Rule 304(a)(1) would require an NMS Stock ATS to file a Form ATS-N prior to the NMS Stock ATS commencing operations. Proposed Rule 304(a)(2)(i) would require an NMS Stock ATS to file amendments to its proposed Form ATS-N: (A) At least 30 calendar days prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS-N; (B) within 30 calendar days after the end of each calendar quarter to correct any other information on proposed Form ATS-N that has become inaccurate; or (C) promptly, to correct any information on proposed Form ATS-N that was inaccurate when originally filed. Proposed Rule 304(a)(3) would require an NMS Stock ATS to notice its cessation of operations at least 10 business days before the date on which the NMS Stock ATS ceases operation.

the broker-dealer operator, and the operation of the NMS Stock ATS, including detailed disclosures regarding the ATS's method of operation, order types and access criteria. Additionally, an ATS that effects transactions in both NMS stocks and non-NMS stocks would be required to file both a Form ATS-N with respect to its trading of NMS stocks and a revised Form ATS that removes discussion of those aspects of the ATS relating to the trading of NMS stocks.[565] Under the proposed amendments to Rule 301(b)(9), an ATS that effects trades in both NMS stocks and non-NMS stocks would be required to file two Forms ATS-Rs – one reporting its trading volume in NMS stocks and the other reporting its trading volume in non-NMS stocks.[566] The information filed on proposed Form ATS-N would be publicly available on the Commission's website and each NMS Stock ATS would be required to post on the NMS Stock ATS's website a direct URL hyperlink to the Commission's website that contains the documents enumerated in proposed Rule 304(b)(2), but information filed on Forms ATS and ATS-R would be kept confidential, subject to the provisions of current applicable law.

The Commission preliminarily believes that market participants would use the information publicly disclosed on proposed Form ATS-N to source, evaluate, and compare and contrast information about different NMS Stock ATSs, including information relating to the broker-dealer operator and any potential conflicts of interests it may have with respect to its operation of the NMS Stock ATS. The Commission also preliminarily believes that market participants would use the information publicly disclosed on proposed Form ATS-N to source, evaluate, and compare and contrast information about, among other things, an NMS Stock ATS's

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565 See proposed Rule 301(b)(2)(viii).

566 See proposed Rule 301(b)(9).

eligibility requirements, trading hours, order types, connection and order entry functionalities, segmentation of order flow, display of orders and other trading interests, trading platform functionality, procedures governing trading during a suspension of trading, system disruption, or system malfunction, opening, closing, and after-hours trading processes or procedures, routing procedures, market data usages and sources, fees, trade reporting, clearing, and settlement, order display and execution access standards, fair access standards, and market quality statistics published or provided to one or more subscribers. Accordingly, the Commission preliminarily believes that market participants would use the information disclosed on proposed Form ATS-N to better evaluate to which trading venue they may want to subscribe and/or route orders for execution in order to accomplish their investing or trading objectives.

The Commission preliminarily believes it will use the information disclosed on proposed Form ATS-N, Form ATS, and Form ATS-R to oversee the growth and development of NMS Stock ATSs, including those that also effect transactions in non-NMS stocks, and to evaluate whether those systems operate in a manner consistent with the federal securities laws should the disclosures provided on Form ATS-N reveal potential non-compliance with federal securities laws. In particular, the Commission preliminarily believes that the information collected and reported to the Commission by NMS Stock ATSs would enable the Commission to evaluate better the operations of NMS Stock ATSs with regard to the Commission's duty under the Exchange Act to remove impediments to and perfect the mechanisms of a national market system for securities[567] and evaluate the competitive effects of these systems to ascertain

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[567] See 15 U.S.C. 78b (providing that the necessity for the Exchange Act is, among other things, "to require appropriate reports, to remove impediments to and perfect the

whether the regulatory framework remains appropriate to the operation of such systems. The information provided on Form ATS-N should also assist the SRO for the broker-dealer operator in exercising oversight over the broker-dealer operator. For example, by having to describe their safeguards and procedures to protect the confidential trading information of subscribers, and knowing that such descriptions will be public, NMS Stock ATSs may be encouraged to carefully consider the adequacy of their means of protecting the confidential trading information of subscribers.

The Commission also proposes to amend Rule 303(a)(2)(ii) of Regulation ATS to provide that all ATSs must preserve copies of all reports filed pursuant to proposed Rule 304 for the life of the enterprise and any successor enterprise. The Commission preliminarily believes that the information contained in the records required to be preserved by the proposed amendment to Rule 303(a)(2)(ii) would be used by examiners and other representatives of the Commission, state securities regulatory authorities, and SROs to evaluate whether ATSs are in compliance with Regulation ATS as well as other applicable rules and regulations.

C. Respondents

The "collection of information" requirements under the proposed amendments to Regulation ATS relating to Rule 301(b)(10) and proposed Rule 303(a)(1)(v), as described above, would apply to all ATSs, including NMS Stock ATSs. The "collection of information" requirements under the proposed amendments to Regulation ATS relating to proposed Rule 304, Form ATS-N, and the proposed amendments to Rule 303(a)(2)(ii), as described above, would apply only to NMS Stock ATSs, and the "collection of information" requirements under the

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mechanisms of a national market system for securities . . . and to impose requirements necessary to make such regulation and control reasonably complete and effective . . .").

proposed amendments to Rule 301(b)(9), as described above, would apply to NMS Stock ATSs that also effect trades in both NMS stocks and non-NMS stocks.

Currently, there are 84 ATSs that have filed Form ATS with the Commission. Of these 84 ATSs, 46 would meet the definition of an NMS Stock ATS.[568] Accordingly, the Commission estimates that 84 entities would be required to comply with the proposed amendments related to Rule 301(b)(10) of Regulation ATS and 46 entities would be required to complete Form ATS-N.[569]

In addition, the Commission notes that there are currently 11 ATSs that trade, or have indicated in Exhibit B to their Form ATS that they expect to trade, both NMS stocks and non-NMS stocks on the ATS.[570] Under the proposed amendments to Regulation ATS, these 11 entities would be required to file a Form ATS-N to disclose information about their NMS stock activities and file a Form ATS to disclose information about their non-NMS stock activities.

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568 Data compiled from Form ATS submitted to the Commission as of November 1, 2015. That is, 46 ATS have disclosed on their Form ATS that they trade or expect to trade NMS stock.

569 The Commission recognizes that there may be new entities that will seek to become ATSs, or NMS Stock ATSs, that would be required to comply with the proposed amendments to Rule 301(b)(10). From 2012 through the first half of 2015, there has been an average of 8 Form ATS initial operation reports filed each year with the Commission. Similarly, there may be some ATSs that may cease operations in the normal course of business or possibly in response to the proposed amendments to Regulation ATS. From 2012 through the first half of 2015, there has been an average of 11 ATSs, including those that trade NMS stocks, that have ceased operations. For the purposes of this paperwork burden analysis, the Commission assumes that there are 84 respondents that would be required to comply with the proposed amendments to Rule 301(b)(10), if adopted. The Commission is estimating that the number of entities that may file a Form ATS initial operation report would generally offset any ATSs that may file a Form ATS cessation of operations report.

570 Data compiled from Forms ATS and ATS-R submitted to the Commission as of November 1, 2015. These 11 ATSs are included within the 46 NMS Stock ATSs.

Consequently, these 11 ATSs would have to amend their Forms ATS to remove discussion of those aspects of the ATS related to the trading of NMS stocks and on an ongoing basis, file separate Forms ATS-R to report trading volume in NMS stocks and trading volume in non-NMS stocks. [571]

With respect to proposed Form ATS-N, the Commission recognizes there may be entities that might file a Form ATS-N to operate an NMS Stock ATS in the future. From 2012 through the first half of 2015, there has been an average of 2 new ATSs per year that disclose that they trade or expect to trade NMS stocks on their initial operation reports, which would therefore fall within the proposed definition of an NMS Stock ATS. Similarly, some ATSs that currently trade NMS stocks may choose to cease operations rather than comply with the proposed amendments requiring them to file proposed Form ATS-N. Other ATSs may choose to cease operations in the normal course of business. From 2012 through the first half of 2015, there has been an average of 6 ATSs that trade NMS stocks that have ceased operations each year.

The Commission preliminarily believes that most ATSs that currently trade NMS stocks would continue to operate notwithstanding the proposed amendments to Regulation ATS. For the purposes of this analysis of the paperwork burden associated with the proposed amendments to Regulation ATS, the Commission assumes that there will be 46 respondents. The Commission preliminarily believes that this number is reasonable, as it assumes that most ATSs that currently

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[571] Pursuant to Rule 301(b)(9), all ATSs are required to file Form ATS-R within 30 calendar days after the end of each calendar quarter in which the market has operated, and within 10 calendar days after the ATS ceases to operate. For ATSs that trade both NMS stocks and non-NMS stocks, the ATS would report its transactions in NMS stocks on one Form ATS-R, and its transaction volume in other securities on a separate Form ATS-R.

trade NMS stocks would file a Form ATS-N with the Commission, and acknowledges that there may be some ATSs that cease operations altogether and other entities that may choose to commence operations as an NMS Stock ATS. Based on the number of initial filings and cessation of operations reports on current Form ATS for ATSs that trade NMS stocks described above, the Commission estimates that, 2 to 3 new entities will file to become an NMS Stock ATS and 4 to 6 NMS Stock ATSs will cease operations in each of the next three years.

D. Total Initial and Annual Reporting and Recordkeeping Burdens

1. Proposed Rules 301(b)(10) and 303(a)(1)(v) of Regulation ATS

a. Baseline Measurements

Under current Rule 301(b)(10) of Regulation ATS,[572] all ATSs must establish adequate safeguards and procedures to protect subscribers' confidential trading information, as well as oversight procedures to ensure such safeguards and procedures are followed. As noted above, the Commission preliminarily believes that ATSs – in particular, ATSs whose broker-dealer operators are large, multi-service broker-dealers – generally have and maintain in writing their safeguards and procedures to protect subscribers' confidential trading information, as well as the oversight procedures to ensure such safeguards and procedures are followed.[573] However, neither Rule 301(b)(10) nor Rule 303(a)(1) of Regulation ATS currently requires that an ATS have and preserve those safeguards and procedures in writing.

For ATSs that currently have and preserve in written format the safeguards and procedures to protect subscribers' confidential trading information under Rule 301(b)(10) of

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572 17 CFR 242.301(b)(10).

573 See supra Section XIII.B.4.

Regulation ATS, the Commission preliminarily estimates that the average annual burden they voluntarily undertake to update and preserve those written safeguards and written procedures is 4 hours.[574] Because neither current Rule 301(b)(1) nor current Rule 303(a)(1) requires an ATS to have and preserve its safeguards and procedures to protect subscribers' confidential trading information in writing, this burden is not reflected in the current PRA baseline burdens for Rules 301 and 303.[575] As such, in accordance with the below analysis, the Commission would modify the current PRA burdens for Rules 301 and 303 to account for the proposed requirement that ATSs have and preserve in written format the safeguards and procedures to protect subscribers' confidential trading information.[576]

b. Burden

The Commission recognizes that proposed Rules 301(b)(10) and 303(a)(1)(v) of Regulation ATS would impose certain burdens on respondents. For ATSs that currently have and preserve in written format the safeguards and procedures to protect subscribers' confidential trading information and written oversight procedures to ensure such safeguards and procedures are followed, the Commission preliminarily believes that there will be no increased burden under the proposed amendments to Rules 301(b)(10) and 303(a)(1)(v) of Regulation ATS. The

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574 Attorney at 2 hours + Compliance Clerk at 2 hours = 4 burden hours. For ATSs that do not have their safeguards and procedures or oversight procedures in a written format, these firms would incur a one-time initial burden to record their safeguards and procedures as well as their oversight procedures in a written format as described below.

575 See FR Doc. 2014-02143, 79 FR 6236 (February 3, 2014) (Request to OMB for Extension of Rule 301 and Forms ATS and ATS-R; SEC File No. 270-451; OMB Control No. 3235-0509) (hereinafter "Rule 301 PRA Update"); FR Doc. 2013-17474, 78 FR 43943 (July 22, 2013) (Request to OMB for Extension of Rule 303; SEC File No. 270-450; OMB Control No. 3235-0505) (hereinafter "Rule 303 PRA Update").

576 See infra note 582 and accompanying text.

Commission preliminarily believes that the current practices of those ATSs would already be in compliance with the proposed rules. Therefore, the proposed amendments should not require those ATSs to take any measures or actions in addition to those currently undertaken.

For ATSs that have not recorded in writing their safeguards and procedures to protect subscribers' confidential trading information and oversight procedures to ensure such safeguards and procedures are followed, there will be an initial, one-time burden to memorialize them in a written document(s). The Commission preliminarily estimates that an ATS's initial, one-time burden to put in writing its safeguards and procedures to protect subscribers' confidential trading information and the oversight procedures to ensure such safeguards and procedures are followed would be approximately 8 hours,[577] but the Commission preliminarily estimates that the burden could range between 5 and 10 hours.[578] Because ATSs are already required to have safeguards and procedures to protect subscribers' confidential trading information and to have oversight procedures to ensure such safeguards and procedures are followed, the Commission preliminarily believes that recording these items in a written format would not impose a substantial burden on ATSs. Consequently, the Commission preliminarily believes that ATSs would rely on internal staff to record the ATS's Rule 301(b)(10) procedures in writing. The Commission preliminarily estimates that, of the 84 current ATSs, 15 ATSs might not have their safeguards and procedures to protect subscribers' confidential trading information or oversight procedures to ensure such safeguards and procedures are followed in writing, and would therefore be subject to this one-time

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577 Attorney at 7 hours + Compliance Clerk at 1 hour = 8 burden hours.

578 Attorney at 4-9 hours + Compliance Clerk at 1 hour = 5-10 burden hours.

initial burden.[579] Accordingly, the Commission preliminarily estimates that the aggregate initial, one-time burden on all ATSs would be 150 hours based on the Commission's highest approximation of the additional burden per ATS.[580]

As explained above, the Commission preliminarily estimates that the average annual, ongoing burden per ATS to update and preserve written safeguards and written procedures to protect subscribers' confidential trading information, as well as to update and preserve the written standards controlling employees of the ATS trading for their own account and the written oversight procedures, would be 4 hours.[581] As a result, the Commission preliminarily estimates that the total aggregate, ongoing burden per year for all ATSs would be 336 hours,[582] and thus, the Commission is modifying the current PRA burden estimates for Rules 301 and 303 to account for this increased burden on ATSs.

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579 It is likely that most, if not all, ATSs fulfill their Rule 301(b)(10) obligations in writing, given the practical difficulty in ensuring such safeguards and procedures, as well as oversight procedures, are "adequate," as required under Rule 301(b)(10), and contain all necessary components. The Commission solicits comment on the accuracy of this estimate.

580 (Attorney at 9 hours + Compliance Clerk at 1 hour) x (15 ATSs) = 150 burden hours. See supra note 578 and accompanying text.

581 See supra note 574 and accompanying text.

582 (Attorney at 2 hours + Compliance Clerk at 2 hours) x 84 ATSs = 336 burden hours.

2. Proposed Rules 301(b)(2)(viii) and 304 of Regulation ATS, including Proposed Form ATS-N

a. Baseline Measurements

Currently, Rule 301(b)(2)(i) of Regulation ATS[583] requires an ATS to file an initial operation report on current Form ATS at least 20 days prior to commencing operation as an alternative trading system. Current Form ATS requires information regarding the operation of the ATS, including, among other things, classes of subscribers, the types of securities traded, the outsourcing of operations of the ATS to other entities, the procedures governing the entry of orders, the means of access to the ATS, and procedures governing execution and reporting. Regarding amendments to an existing Form ATS, Rule 301(b)(2)(ii) of Regulation ATS[584] requires an ATS to file amendments to its current Form ATS at least 20 calendar days prior to implementing a material change to its operations. Rule 301(b)(2)(iii) of Regulation ATS[585] requires an ATS to file amendments to its current Form ATS within 30 calendar days after the end of each calendar quarter if any information contained in its initial operation report becomes inaccurate and has not been previously reported to the Commission.[586] Regarding shutting down an ATS, Rule 301(b)(2)(v) of Regulation ATS[587] requires an ATS to promptly file a cessation of operation report on current Form ATS upon ceasing operations as an ATS.

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583 17 CFR 242.301(b)(2)(i).

584 17 CFR 242.301(b)(2)(ii).

585 17 CFR 242.301(b)(2)(iii).

586 In addition, Rule 301(b)(2)(iv) requires an ATS to promptly file an amendment on current Form ATS after the discovery that any information previously filed on current Form ATS was inaccurate when filed. 17 CFR 242.301(b)(2)(iv).

587 17 CFR 242.301(b)(2)(v).

The Commission's currently approved estimate for an initial operation report on current Form ATS is 20 hours to gather the necessary information, provide the required disclosures in Exhibits A through I, and submit the Form ATS to the Commission.[588] With respect to Form ATS amendments, the Commission understands, based on the review of Form ATS amendments by the Commission and its staff, that ATSs that trade NMS stocks typically amend their Form ATS on average twice per year.[589] The frequency and scope of Form ATS amendments vary depending on whether the ATS is implementing a material change or a periodic change. Some ATSs may not change the manner in which they operate or anything else that might require an amendment to Form ATS in a given year while others may implement a number of changes during a given year that require Form ATS amendments. The Commission estimates that the current average compliance burden for each amendment to Form ATS is approximately 6 hours.[590] Accordingly, the estimated average annual ongoing burden of updating and amending Form ATS is approximately 12 hours per NMS Stock ATS.[591] With respect to ceasing operations, the currently approved average estimated compliance burden for an ATS to complete a cessation of operations report is 2 hours to check the appropriate box on Form ATS and send the cessation of operations report to the Commission.[592]

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588 Attorney at 13 hours + Compliance Clerk at 7 hours = 20 burden hours. See Rule 301 PRA Update, supra note 575, 79 FR 6237.

589 See id.

590 Attorney at 4.5 hours + Compliance Clerk at 1.5 hours = 6 burden hours. See id.

591 2 Form ATS Amendments filed annually x 6 burden hours per Form ATS Amendment = 12 burden hours per ATS.

592 Attorney at 1.5 hours + Compliance Clerk at 0.5 hours = 2 burden hours. See id.

The Commission's currently approved estimate for the average compliance burden for each Form ATS-R filing is 4 hours.[593]

b. Burdens

The Commission recognizes that proposed Rules 301(b)(2)(viii) and 304 of Regulation ATS, including proposed Form ATS-N, would impose certain burdens on respondents.[594] Although the Commission preliminarily believes that many of the disclosures required by proposed Form ATS-N are currently required by Form ATS, proposed Form ATS-N would require an NMS Stock ATS to provide significantly more detail in those disclosures than currently is required by Form ATS. Proposed Form ATS-N would also require additional disclosures not currently mandated by current Form ATS such as those contained in Part III of proposed Form ATS-N. Under the proposed amendments to Regulation ATS, NMS Stock ATSs would be required to complete and file the enhanced and additional disclosures on proposed Form ATS-N.[595] Section XII.D.2.b.i below provides the estimated burden above the current Form ATS baseline of each item of proposed Form ATS-N. The Commission notes that many of the proposed disclosure items on proposed Form ATS-N are already required disclosures by respondents in whole or in part on current Form ATS, while other disclosure items on proposed

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593 Attorney at 3 hours + Compliance Clerk at 1 hour = 4 burden hours. See id.

594 In establishing the estimates below with respect to proposed Form ATS-N, the Commission has considered its estimate of the burden for an SRO to amend a Form 19b-4. Specifically, the Commission estimated that 34 hours is the amount of time required to complete an average rule filing and 129 hours is the amount of time required to complete a complex rule filing, and three hours is the amount of time required to complete an average amendment to a rule filing. See Securities Exchange Act Release No. 50486 (October 4, 2004), 69 FR 60287 (October 8, 2004), 60294.

595 These disclosures would be provided on proposed Form ATS-N and may have to be amended periodically as provided in proposed Rule 304.

Form ATS-N are novel (i.e., current Form ATS does not require some form of the proposed disclosure). Section XII.D.2.b.ii aggregates these new burdens and the additional burdens above the current Form ATS baseline that will be imposed by proposed Form ATS-N.

i. Analysis of Estimated Additional Burden for Proposed Form ATS-N

Parts I and II of proposed Form ATS-N would require disclosure of certain general information regarding the broker-dealer operator and the NMS Stock ATS. Part I of proposed Form ATS-N would require the NMS Stock ATS to state the name of its broker-dealer operator, the name under which the NMS Stock ATS conducts business, if any, the MPID of the NMS Stock ATS, and whether it is an NMS Stock ATS operating pursuant to a previously filed initial operation report on Form ATS. Part II of proposed Form ATS-N would require the address of the physical location of the NMS Stock ATS matching system and the NMS Stock ATS's mailing address. Part II of proposed Form ATS-N would also require registration information of the broker-dealer operator, including its SEC File Number, the effective date of the broker-dealer operator's registration with the Commission, its CRD Number, the name of its national securities association, and the effective date of the broker-dealer operator's membership with the national securities association. In addition, Part II of proposed Form ATS-N would require disclosure of certain information regarding the legal status of the broker-dealer operator and would require the NMS Stock ATS to provide a URL address to its website. Finally, Part II would require the NMS Stock ATS to attach Exhibit 1 (a copy of any materials provided to subscribers or any other persons related to the operations of the NMS Stock ATS or the disclosures on Form ATS-N), Exhibit 2A (a copy of the most recently filed or amended Schedule A of the broker-dealer operator's Form BD disclosing information related to direct owners and executive officers), and Exhibit 2B (a copy of the most recently filed or amended Schedule B of the broker-dealer

operator's Form BD disclosing information related to indirect owners). In lieu of attaching those exhibits to Form ATS-N, the NMS Stock ATSs would be able to provide a URL address to where the required documents can be found.

Under current Form ATS, an ATS is required to provide all of the information that would be required under Parts I and II of proposed Form ATS-N with the exception of: (1) its website address; (2) the effective date of the broker-dealer operator's registration with the Commission; (3) the name of the national securities association and effective date of the broker-dealer operator's membership with the national securities association; (4) the MPID of the NMS Stock ATS; (5) the broker-dealer operator's legal status (e.g., corporation or partnership); (6) the date of formation and the state in which the broker-dealer operator was formed; and (7) copies of the broker-dealer operator's most recently filed or amended Schedules A and B of Form BD.[596] Current Form ATS, however, requires an ATS to provide a copy of its governing documents, such as its constitution and bylaws,[597] which would not be required in proposed Form ATS-N. The Commission preliminarily believes that all ATSs currently have access to all of these items because such information is germane to the operation of its broker-dealer operator. Accordingly, the Commission preliminarily estimates that, on average, preparing Parts I and II for a Form ATS-N would add 0.5 hours to the current baseline for an initial operation report on current Form

596 Exhibit I of Current Form ATS requires ATS to provide a list with the full legal name of those direct owners reported on Schedule A of Form BD, but not a copy of Schedule A.

597 Exhibit D of Form ATS requires an ATS to provide a copy of its constitution, articles of incorporation or association, with all amendments, and of the existing bylaws or corresponding rules or instruments, whatever the name.

ATS. The aggregate initial burden on all NMS Stock ATSs to complete Parts I and II of proposed Form ATS-N would be 23 hours above the current baseline.[598]

Part III, Item 1 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether or not the broker-dealer operator or any of its affiliates operate or control any non-ATS trading center(s) that is an OTC market maker or executes orders in NMS stocks internally by trading as principal or crossing orders as agent ("non-ATS trading centers"), and if so, to (1) identify the non-ATS trading center(s); and (2) describe any interaction or coordination between the identified non-ATS trading center(s) and the NMS Stock ATS including: (i) circumstances under which subscriber orders or other trading interest received by the broker-dealer operator or its affiliates may execute, in whole or in part, in the identified non-ATS trading center before entering the NMS Stock ATS; (ii) circumstances under which subscriber orders or other trading interest sent to the NMS Stock ATS are displayed or otherwise made known to the identified non-ATS trading center(s) before entering the NMS Stock ATS; and (iii) circumstances under which orders or other trading interest are removed from the NMS ATS and sent to the identified non-ATS trading center(s). Under Proposed Form ATS-N, affiliates of the broker-dealer operator would only include any person that, directly or indirectly, controls, is under common control with, or is controlled by, the broker-dealer operator. The affiliates of the broker-dealer operator that might operate non-ATS trading centers under this proposal would thus be "control affiliates" that are either controlled by the broker-dealer operator or under common control with another entity. Consequently, because the broker-dealer operator would control all affiliates or would be under common control with those affiliates, the broker-dealer operator should be aware

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598 Compliance Clerk at 0.5 hours x 46 NMS Stock ATSs = 23 burden hours.

of whether its affiliates operate a non-ATS trading center or in most instances, should otherwise be able to readily obtain such information from its affiliates.[599]

To the extent the operation of a non-ATS trading center operated or controlled by the broker-dealer operator or any of its affiliates does not interact with the NMS Stock ATS (e.g., the two platforms do not share order flow or route trading interest between one another), the proposed disclosure requirement in Part III, Item 1, would require only that the NMS Stock ATS identify the non-ATS trading center in Item 1(a) and note that that there is no interaction between the non-ATS trading center and the NMS Stock ATS in Item 1(b). To the extent the operation of a non-ATS trading center of the broker-dealer operator or its affiliates interacts with the NMS Stock ATS, the Commission preliminarily believes that the NMS Stock ATS would likely already be aware of how such operation may interact with the NMS Stock ATS. If there is substantial interaction between the non-ATS trading center and the NMS Stock ATS, the burden related to this disclosure would be higher.

The Commission understands that most, but not all, broker-dealer operators of NMS Stock ATSs currently, either by themselves or through their affiliates, operate or control a non-ATS trading center. The Commission preliminarily estimates that, on average, preparing Part III, Item 1 for a Form ATS-N would add 10 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 460 hours above the baseline for all NMS Stock ATSs to complete Part III, Item 1 of proposed Form ATS-N.[600]

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599 To the extent the broker-dealer operator is currently unaware of whether its affiliates operate a non-ATS trading center, the Commission preliminarily believes that the broker-dealer operator could readily obtain this information from its affiliates.

600 (Attorney at 8 hours + Compliance Manager at 2 hours) x 46 NMS Stock ATSs = 460 burden hours.

Part III, Item 2 of proposed Form ATS-N would require an NMS Stock ATS to state whether the broker-dealer operator, or any of its affiliates, operates one or more NMS Stock ATSs other than the NMS Stock ATS named on the Form ATS-N, and, if so, to (1) identify the NMS Stock ATS(s) and provide its MPID(s); and (2) describe any interaction or coordination between the NMS Stock ATS(s) identified and the NMS Stock ATS named on the Form ATS-N including: (i) the circumstances under which subscriber orders or other trading interest received by the broker-dealer operator or any of its affiliates to be sent to the NMS Stock ATS named in the Form ATS-N may be sent to any identified NMS Stock ATS(s); (ii) circumstances under which subscriber orders or other trading interest to be sent to the NMS Stock ATS named on the Form ATS-N are displayed or otherwise made known in any other identified NMS Stock ATS(s); and (iii) the circumstances under which a subscriber order received by the NMS Stock ATS named on the Form ATS-N may be removed and sent to any other identified NMS Stock ATS(s). Broker-dealer operators of multiple NMS Stock ATSs would already be aware of how their NMS Stock ATSs may interact with one another and those of its affiliates by, for example, sharing order flow between each other.[601] Further, as noted above, affiliates under this proposed disclosure requirement would be control affiliates that are either controlled by the broker-dealer operator or under common control with another entity. Consequently, the NMS Stock ATS should already be aware through its control or common control of whether its affiliates operate another NMS Stock ATS.

[601] To the extent the broker-dealer operator or its affiliates operate multiple NMS Stock ATSs but there is no possibility of interaction between such NMS Stock ATSs, proposed Form ATS-N would only require that this fact be noted in Part III, Item 2(b).

Based on the currently filed Forms ATS reviewed by the Commission during the third quarter of 2015, the Commission estimates that there are 6 broker-dealer operators that operate, by themselves or through an affiliate, multiple ATSs that trade NMS stocks. The Commission notes that broker-dealer operators operating multiple NMS Stock ATSs, by themselves or with their affiliates, would be required to complete Part III, Item 2 of proposed Form ATS-N for each NMS Stock ATS. The Commission preliminarily believes that it would not be a significant burden for a broker-dealer operator to identify all of the NMS Stock ATSs operated by either itself or its affiliates because, among other reasons, FINRA maintains an updated list of ATSs that trade equity securities on its public website.[602] Furthermore, the disclosure requirement in Part III, Item 2(b) to describe the interaction of the various NMS Stock ATSs should generally be the same for each NMS Stock ATS, reducing the overall hour burden for completing multiple Forms ATS-N.[603] The Commission also notes that the disclosure requirement in Part III, Item 2 would not impose any significant burden on broker-dealer operators that, by themselves or with their affiliates, do not operate multiple NMS Stock ATSs. For broker-dealer operators operating multiple NMS Stock ATSs, by themselves or with their affiliates, the Commission preliminarily estimates that, on average, preparing Part III, Item 2 for a Form ATS-N would add 4 hours to the current baseline for an initial operation report on current Form ATS. This would result in an

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602 See FINRA Equity ATS Firm List, available at https://www.finra.org/file/finra-equity-ats-firms-list.

603 In other words, a broker-dealer operator that operates NMS Stock ATSs "A" and "B" would likely be able to use the disclosure in A's Form ATS-N for Part III, Item 2 for B as well.

aggregate initial hourly burden on such broker-dealer operators of 24 hours above the current baseline.[604]

Part III, Item 3 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether or not the broker-dealer operator or any of its affiliates offer subscribers of the NMS Stock ATS any products or services used in connection with trading on the NMS Stock ATS (e.g., algorithmic trading products, market data feeds). If so, the NMS Stock ATS would be required to describe the products and services and identify the types of subscribers (e.g., retail, institutional, professional) to which such services or products are offered, and if the terms and conditions of the services or products are not the same for all subscribers, describe any differences. These products and services may vary widely across NMS Stock ATSs, some of which may offer no additional products or services in connection with access to the NMS Stock ATS and others that may offer a wide array of other products or services such as trading algorithms, order management systems, or market data services. Because the broker-dealer operator controls all aspects of the NMS Stock ATS, it should already be aware of all the products and services that it or its affiliates provide to subscribers in connection with subscribers' access to the ATS. Accordingly, the Commission preliminarily believes that listing and describing these products and services in Part III, Item 3 would not impose a substantial burden on respondents. In addition, Part III, Item 3 would also require the NMS Stock ATS to describe which products and services are offered to which type of subscriber and any differences

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604 As noted above, the Commission estimates that there are currently approximately 6 broker-dealer operators that operate, by themselves or through an affiliate, multiple ATSs that trade NMS stocks. As such the increased burden would be calculated as follows: 6 operators of multiple NMS Stock ATSs x (Attorney at 2 hours + Senior Systems Analyst 2 hours) = 24 burden hours.

in the terms or conditions of the services or products among subscribers. Depending on the extent to which the terms and conditions of the services or products vary among subscribers, the hourly burden related to completing Part III, Item 3 would likely vary. The Commission preliminarily estimates that, on average, preparing Part III, Item 3 for a Form ATS-N would add 3 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 138 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 3 of proposed Form ATS-N.[605]

Part III, Item 4 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether or not the broker-dealer operator or any of its affiliates have any formal or informal arrangement with an unaffiliated person(s), or affiliate(s) of such person, that operates a trading center regarding access to the NMS Stock ATS, including preferential routing arrangements, and, if so, to identify the person(s) and the trading center(s) and describe the terms of the arrangement(s). The Commission understands from discussions with ATSs that some ATSs that currently trade NMS stock have arrangements with other ATSs to provide mutual access to the each other's respective ATSs. The Commission recognizes that an NMS Stock ATS could also have arrangements with other trading centers such as a non-ATS trading center or a national securities exchange. In addition, there may be NMS Stock ATSs that have no arrangements with any other trading center. As the broker-dealer operator controls all aspects of the operation of the NMS Stock ATS, the broker-dealer operator should already be aware of any such arrangements providing for mutual access or preferential routing that it has with other trading centers. Accordingly, the Commission preliminarily estimates that, on average, preparing Part

605 (Compliance Manager at 2 hours + Senior Marketing Manager at 1 hour) x 46 NMS Stock ATSs = 138 burden hours.

III, Item 4 for a Form ATS-N would add 4 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 184 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 4 of proposed Form ATS-N.[606]

Part III, Item 5 of proposed Form ATS-N would require certain disclosures related to the trading activity of the broker-dealer operator or its affiliates on the NMS Stock ATS. Specifically, Part III, Item 5 would require the NMS Stock ATS to disclose whether or not the broker-dealer operator or any of its affiliates enters orders or other trading interest on the NMS Stock ATS, and, if so, to provide detailed disclosures describing such trading activity.[607] As the broker-dealer operator controls all aspects of the operation of the NMS Stock ATS, the broker-dealer operator should already know all of the subscribers to the NMS Stock ATS, including any affiliates that trade on the ATS, whether the broker-dealer operator itself trades on the NMS Stock ATS, and how the broker-dealer operator or its affiliates trade on the NMS Stock ATS.[608]

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606 (Attorney at 2 hours + Compliance Manager at 2 hours) x 46 NMS Stock ATSs = 184 burden hours.

607 Specifically, the NMS Stock ATS would be required to: (a) identify each affiliate and business unit of the broker-dealer operator that may enter orders or other trading interest on the NMS Stock ATS; (b) describe the circumstances and capacity in which each identified affiliate and business unit enters orders or trading interest on the NMS Stock ATS (e.g., proprietary or agency); (c) describe the means by which each identified affiliate and business unit enters orders or other trading interest on the NMS Stock ATS (e.g., directly through a FIX connection to the NMS Stock ATS, or indirectly, by way of the broker-dealer operator's SOR (or similar functionality), algorithm, intermediate application, or sales desk); and (d) describe any means by which a subscriber can be excluded from interacting or trading with orders or other trading interest of the broker-dealer operator or its affiliates on the NMS Stock ATS.

608 There may be some NMS Stock ATSs for which neither the broker-dealer operator nor its affiliates trade on the NMS Stock ATS at all, and thus, for which the disclosures required under Part III, Item 5 would impose no significant burden. However, based on the review

The Commission preliminarily believes that this knowledge should allow NMS Stock ATSs to readily identify and list all affiliates that trade on the NMS Stock ATS pursuant to Part III, Item 5(a) without a significant burden. The broker-dealer operator may have to inquire as to the capacity in which each of its affiliates trade, the means by which they enter orders or other trading interest to the ATS, and any means by which a subscriber can be excluded from interacting with the orders or other trading interest of the broker-dealer operator or its affiliates pursuant to Items 5(b), (c), and (d). However, as previously noted, because the disclosure requirements with respect to affiliates would only apply to control affiliates, which would either be controlled by the broker-dealer operator or under common control with the broker-dealer operator, the broker-dealer operator may already have this information or would likely be able to obtain the information required under Items 5(b) and (c) without a significant burden. Accordingly, the Commission preliminarily estimates that, on average, preparing Part III, Item 5 for a Form ATS-N would add 5 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 230 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 5 of proposed Form ATS-N.[609]

Part III, Item 6 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether the broker-dealer operator, or any of its affiliates, use a SOR(s) (or similar

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of Forms ATS by the Commission and its staff and discussions with broker-dealer operators, the Commission understands that a majority of ATSs that trade NMS stocks currently either trade in their own ATSs, either by themselves or with or through their affiliates.

609 (Attorney at 2 hours + Compliance Manager at 3 hours) x 46 NMS Stock ATSs = 230 burden hours.

functionality), an algorithm(s), or both to send or receive subscriber orders or other trading interest to or from the NMS Stock ATS.[610] The Commission and its staff understand from conversations with ATSs that nearly every ATS that trades NMS stocks currently uses some form of SOR (or similar functionality) or algorithm. The Commission recognizes that the SOR(s) (or similar functionality) of the broker-dealer operator or its affiliates and any algorithm(s) employed by the broker-dealer operator or its affiliates to enter orders onto the NMS Stock ATS may vary widely among ATSs with respect to the manner in which they operate, the information they send or receive, and how the SOR(s) (or similar functionality) and/or algorithm(s) may determine to route certain orders to the NMS Stock ATS as opposed to other venues. Accordingly, the Commission preliminarily believes that the burdens associated with the disclosures in Part III, Item 6 of proposed Form ATS-N are likely to vary depending on the complexity of the SOR(s) (or similar functionality) and/or algorithm(s), its significance to the operation of the NMS Stock ATS, and the functions and roles that it performs.

For example, in responding to Part III, Item 6(b), which would require an NMS Stock ATS to describe, among other things, any information or messages about orders or other trading interest that the SOR(s) (or similar functionality) and algorithm(s) send or receive to or from the NMS Stock ATS, an NMS Stock ATS that uses IOIs to facilitate trades on the NMS Stock ATS and that uses its SOR(s) (or similar functionality) and/or algorithm(s) to facilitate the sending of

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610 Specifically, Part III, Item 6 of proposed Form ATS-N would require the NMS Stock ATS to: (a) identify the SOR(s) (or similar functionality) or algorithm(s) and identify the person(s) that operates the SOR(s) (or similar functionality) or algorithm(s), if other than the broker-dealer operator; and (b) describe the interaction or coordination between the identified SOR(s) (or similar functionality) or algorithm(s), including any information or messages about orders or other trading interest (e.g., IOIs) that the SOR(s) (or similar functionality) or algorithm(s) send or receive to or from the NMS Stock ATS and the circumstances under which such information may be shared with any person.

those IOIs to relevant persons would likely have a substantially greater burden in responding to Item 6(b) due to the number of messages that may be associated with an IOI and the subsequent responses to that IOI than an NMS Stock ATS that does not use IOIs. Accordingly, the Commission preliminarily estimates that, on average, preparing Part III, Item 6 for a Form ATS-N would add 10 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 460 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 6 of proposed Form ATS-N.[611]

Part III, Item 7 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether it has any shared employees,[612] and identify the business unit(s) and/or the affiliate(s) of the broker-dealer operator to which the shared employee(s) provides services and identify the position(s) or title(s) that the shared employee(s) holds in the business unit(s) and/or affiliate(s) of the broker-dealer operator; and (2) describe the roles and responsibilities of the shared employee(s) at the NMS Stock ATS and the business unit(s) and/or affiliate(s) of the broker-dealer operator. As the broker-dealer operator controls all aspects of the NMS Stock ATS, it should already be aware of all of its employees and likely aware of any other roles or functions that such employees provide to other business units or affiliates of the broker-dealer operator. The Commission therefore preliminarily believes that the NMS Stock ATS should be able to obtain this information readily. The extent of this disclosure burden would likely vary depending on the number of employees of the NMS Stock ATS and the extent to which such

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611 (Attorney at 4 hours + Compliance Manager at 3 hours + Sr. Systems Analyst at 3 hours) x 46 NMS Stock ATSs = 460 burden hours.

612 See supra Section VII.B.8 describing who would be considered a shared employee of the broker-dealer operator.

employees' roles are solely dedicated to operating the NMS Stock ATS versus also servicing other business unit(s) of the broker-dealer operator or its affiliates. Accordingly, the Commission preliminarily estimates that, on average, preparing Part III, Item 7 for a Form ATS-N would add 4 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 184 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 7 of proposed Form ATS-N.[613]

Part III, Item 8 of proposed Form ATS-N would require an NMS Stock ATS to disclose whether any operation, service, or function of the NMS Stock ATS is performed by any person(s) other than the broker-dealer operator of the NMS Stock ATS, and if so to: (1) identify the person(s) (in the case of a natural person, to identify only the person's position or title) performing the operation, service, or function and note whether this service provider(s) is an affiliate of the broker-dealer, if applicable; (2) describe the operation, service, or function that the identified person(s) provides and describe the role and responsibilities of that person(s); and (3) state whether the identified person(s), or any of its affiliates, may enter orders or other trading interest on the NMS Stock ATS and, if so, describe the circumstances and means by which such orders or other trading interest are entered on the NMS Stock ATS. The Commission notes that this proposed disclosure requirement is similar to the Exhibit E disclosure requirement under the current Form ATS.[614] The only additional disclosure requirement beyond that required currently

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613 (Attorney at 2 hours + Compliance Manager at 2 hours) x 46 NMS Stock ATSs = 184 burden hours.

614 Exhibit E of Form ATS requires an ATS to provide the name of any entity, other than the ATS, that is involved in the operation of the ATS, including the execution, trading, clearing, and settling of transactions on behalf of the ATS, and to provide a description of the role and responsibilities of each entity.

by Exhibit E to Form ATS would be Item 8(c), which would require the NMS Stock ATS to state whether or not the service provider or the service provider's affiliate may transact on the NMS Stock ATS, and if so, the circumstances and means by which they may do so. The Commission preliminarily believes based on its review of Form ATS Exhibit E disclosures that most, but not all, service providers to ATSs are not typically entities that would transact on the ATS by themselves. Based on Commission experience, affiliates of service providers to some ATSs that transact in NMS stock may subscribe to that ATS. An NMS Stock ATS may have to ask the service provider about the nature of the service provider's affiliates to ensure that such affiliates are not subscribers to the NMS Stock ATS or may otherwise be able to transact on the NMS Stock ATS to complete this disclosure. Accordingly, the Commission preliminarily estimates that, on average, preparing Part III, Item 8 for a Form ATS-N would add 3 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 138 hours above the baseline for all NMS Stock ATSs to complete Part III, Item 8 of proposed Form ATS-N.[615]

Part III, Item 9 of proposed Form ATS-N would require an NMS Stock ATS to identify and describe any service, functionality, or procedure of the NMS Stock ATS available to the broker-dealer operator or its affiliates that is not available or does not apply to a subscriber(s) to the NMS Stock ATS. The Commission is not currently aware of any NMS Stock ATS that provides services, functionalities, or procedures to itself or its affiliates and not to subscribers, although the Commission recognizes that an NMS Stock ATS could do so. To the extent that the services, functionalities, or procedures of the NMS Stock ATS provided to the broker-dealer

[615] (Attorney at 1 hour + Compliance Manager at 2 hours) x 46 NMS Stock ATSs = 138 burden hours.

operator or its affiliates on the NMS Stock ATS differ from those provided to non-affiliated subscribers, the NMS Stock ATS would have to describe all such differences in Item 9. Depending on the extent of such differences, the hourly burden for providing these disclosures would vary. Conversely, if there are no differences between the services, functionalities, or procedures of the NMS Stock ATS that are provided to the broker-dealer operator or its affiliates relative to subscribers, Part III, Item 9 would only require the NMS Stock ATS to note this fact. Accordingly, the Commission preliminarily estimates that, on average, preparing Part III, Item 9 for a Form ATS-N would add 2 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 92 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 9 of proposed Form ATS-N.[616]

Part III, Item 10 of proposed Form ATS-N would require certain disclosures related to the NMS Stock ATS's written safeguards and written procedures to protect the confidential trading information of subscribers pursuant to Rule 301(b)(10) of Regulation ATS.[617] As previously discussed, NMS Stock ATSs would be required under the proposed amendments to Regulation ATS to write their policies and procedures under Rule 301(b)(10) of Regulation ATS. Part III, Item 10 of proposed Form ATS-N would require a description of these policies and

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616 (Attorney at 1.5 hours + Compliance Manager at 0.5 hour) x 46 NMS Stock ATSs = 92 burden hours.

617 Specifically, an NMS Stock ATS would be required to: (1) describe the means by which a subscriber may consent or withdraw consent to the disclosure of confidential trading information to any persons (including the broker-dealer operator and any of its affiliates); (2) identify the positions or titles of any persons that have access to confidential trading information, describe the confidential trading information to which the persons have access, and describe the circumstances under which the persons can access confidential trading information; (3) describe the written standards controlling employees of the NMS Stock ATS that trade for employees' accounts; and (4) describe the written oversight procedures to ensure that the safeguards and procedures are implemented and followed.

procedures. Because NMS Stock ATSs would have already incurred an hourly burden in connection with writing its policies and procedures pursuant to Rule 301(b)(10) of Regulation ATS, the Commission preliminarily believes that Item 10 would impose only a minimal burden on NMS Stock ATSs to describe such written policies and procedures. Part III, Item 10(b) of proposed Form ATS-N would also require an NMS Stock ATS to identify the positions or titles of any persons that can access the confidential trading information of subscribers, a description of what information such persons can access, and the circumstances under which such persons can access the confidential trading information. The Commission preliminarily believes that NMS Stock ATSs should, pursuant to their existing obligations under Rule 301(b)(10), be aware of all persons that can access the confidential trading information of subscribers, the circumstances under which such persons can access that information, and what information they can access. As NMS Stock ATSs should already have this knowledge, the Commission preliminarily believes that the proposed disclosures of Item 10(b) would not be overly burdensome for an NMS Stock ATS to complete. Accordingly, the Commission preliminarily estimates that, on average, preparing Part III, Item 10 for a proposed Form ATS-N would add 2 hours above the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 92 hours above the current baseline for all NMS Stock ATSs to complete Item 10 of Part III of proposed Form ATS-N.[618]

Part IV, Item 1 of proposed Form ATS-N would require an NMS Stock ATS to disclose, among other things, information regarding: (1) any eligibility requirements to access the NMS Stock ATS; (2) the terms and conditions of any contractual agreements for granting access to the

[618] (Attorney at 1 hour + Compliance Manager at 1 hour) x 46 NMS Stock ATSs = 92 burden hours.

NMS Stock ATS for the purpose of effecting transactions in securities or for submitting, disseminating, or displaying orders on the NMS Stock ATS; (3) the types of subscribers and other persons that use the services of the NMS Stock ATS; (4) any formal or informal arrangement the NMS Stock ATS has with liquidity providers; and (5) any circumstances by which access to the NMS Stock ATS can be limited or denied and the procedures or standards that are used to determine such action. For each disclosure, the NMS Stock ATS would also be required to explain whether there are any differences in how these requirements, terms, conditions, criteria, procedures, and/or standards are applied among subscribers and persons.

The Commission notes that the proposed disclosure requirements of Part IV, Item 1 of proposed Form ATS-N are, in large part, already required under current Form ATS. Exhibit A of current Form ATS requires an ATS to describe its classes of subscribers (e.g., broker-dealer, institutional, or retail) and any differences in access to services offered by the ATS to different groups or classes of subscribers. Part IV, Item 1 of proposed Form ATS-N requires the disclosure of similar information to Exhibit A, but Part IV, Item 1 would expressly require significantly more detail, and a greater number of disclosures, than Exhibit A of current Form ATS including with respect to the terms and conditions of use and eligibility to become a subscriber. The Commission notes that ATSs currently vary in the depth of their discussion of subscribers in Exhibit A of their Forms ATS, with some providing a fulsome description that would likely include most of the express disclosures proposed under Part IV, Item 1 of proposed Form ATS-N, while other ATSs might not, for example, provide details surrounding differing eligibility requirements among subscribers.

Depending on the complexity of the NMS Stock ATS, the different types of subscribers, and, most significantly, the extent to which the terms and conditions vary among subscribers, the

disclosure burden related to Part IV, Item I of proposed Form ATS-N would likely vary. For example, an NMS Stock ATS with two classes of subscribers with identical terms and conditions of use, eligibility criteria, and the same circumstances and process regarding limiting and denying services of the NMS Stock ATS would likely have less of a burden than an NMS Stock ATS with five groups of subscribers with varying terms and conditions of use, eligibility criteria, and differing circumstances and processes for which they may be limited or denied the services of the NMS Stock ATS. Accordingly, the Commission preliminary estimates that, on average, preparing Part IV, Item 1 of a Form ATS-N would add 6 hours to the current baseline for an initial operation report on current Form ATS to respond to the more detailed questions regarding subscribers to the NMS Stock ATS. This would result in an aggregate initial burden of 276 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 1 of proposed Form ATS-N.[619]

Part IV, Item 2 of proposed Form ATS-N would require an NMS Stock ATS to provide the days and hours of operation of the NMS Stock ATS, including the times when orders or other trading interest are entered on to the NMS Stock ATS and the time when pre-opening or after-hours trading may occur. It would also require the NMS Stock ATS to explain differences, if any, among subscribers and persons in the times when orders or other trading interest are entered on the NMS Stock ATS. Current Form ATS does not specify similar disclosures, so the Commission preliminarily estimates that respondents would incur additional burdens above the current baseline when preparing the disclosures required under Part IV, Item 2 of proposed Form ATS-N. The NMS Stock ATS should already be aware of the hours during which it operates and

[619] (Attorney at 4 hours + Compliance Manager at 2 hours) x 46 NMS Stock ATSs = 276 burden hours.

whether and when it permits pre-opening or after-hours trading. Based on the experience of the Commission and its staff reviewing Form ATS and ATS-R filings, the Commission preliminarily believes that most ATSs that currently trade NMS stocks do not provide for after-hours or pre-opening trading of NMS stock. For NMS Stock ATSs for which the times when orders or other trading interest may be sent to the NMS Stock ATS are not the same for all subscribers and persons, the disclosure burden related to Part IV, Item 2 would likely increase. Accordingly, the Commission preliminarily estimates that, on average, preparing Part IV, Item 2 for a Form ATS-N would add 0.5 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 23 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 2 of proposed Form ATS-N.[620]

Part IV, Item 3 of proposed Form ATS would require an NMS Stock ATS to provide a detailed disclosure of the order types available on the NMS Stock ATS. Part IV Item 3(a) would require an NMS Stock ATS to describe any types of orders that are entered to the NMS Stock ATS, their characteristics, operations, and how they are handled on the NMS Stock ATS.[621] Part IV, Item 3(b) would require the NMS Stock ATS to describe any differences if the availability of its order types, and their terms and conditions, are not the same for all subscribers and persons.

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620 Compliance Manager at 0.5 hours x 46 NMS Stock ATSs = 23 burden hours.

621 This would include: (i) priority for each order type; (ii) conditions for each order type; (iii) order types designed not to remove liquidity (e.g., post-only orders); (iv) order types that adjust their price as changes to the order book occur (e.g., price sliding orders or pegged orders) or have a discretionary range; (v) the time-in-force instructions that can be used or not used with each order type; (vi) the availability of order types across all forms of connectivity to the NMS Stock ATS and differences, if any, between the availability of an order type across these forms of connectivity; (vii) whether an order type is eligible for routing to other trading centers; and (viii) the circumstances under which order types may be combined with a time-in-force or another order type, modified, replaced, canceled, rejected, or removed from the NMS Stock ATS.

Part IV, Item 3(c) would require an NMS Stock ATS to describe any requirements and handling procedures for minimum order sizes, odd-lot orders, and mixed-lot orders and to describe any differences if the requirements and handling procedures for minimum order sizes, odd-lot, or mixed-lot orders are not the same for all subscribers and persons. Part IV, Item 3(d) would require an NMS Stock ATS to describe any messages sent to or received by the NMS Stock ATS indicating trading interest (e.g., IOIs, actionable IOIs or conditional orders), including the information contained in the message, the means under which messages are transmitted, the circumstances in which messages are transmitted (e.g., automatically by the NMS Stock ATS, or upon the subscriber's request), and the circumstances in which they may result in an execution on the NMS Stock ATS; the NMS Stock ATS would also be required to describe any differences among subscribers and persons if the terms and conditions regarding these messages, IOIs, and conditional orders are not the same for all subscribers and persons.

The Commission notes that some of the proposed disclosure requirements of Part IV, Item 3 of proposed Form ATS-N are already required under current Form ATS. Exhibit F of current Form ATS requires an ATS to describe, among other things, the manner of operation and the procedures governing order entry and execution of the ATS. Part IV, Item 3 of proposed Form ATS-N would require significantly more detail, and a greater number of disclosures, in regard to types of orders than Exhibit F of current Form ATS. ATSs that trade NMS stocks currently vary in the extent of their disclosures relating to order types as provided in Exhibit F. Some provide a relatively fulsome discussion of different order types and to whom they are made available, while other ATSs that trade NMS stocks do not provide substantial detail in this area. Depending on the extent to which an ATS that trades NMS stocks already discloses most of the information regarding order types and trading interest on Exhibit F of its Form ATS, as

well as the variety and complexity of different order types available, the proposed disclosure burden of Part IV, Item 3 of proposed Form ATS-N will likely vary among NMS Stock ATSs. For example, those NMS Stock ATSs that send and receive actionable IOIs and/or conditional orders would be required to draft a detailed explanation regarding those order types for Part IV, Item 3(d), whereas NMS Stock ATSs without such order types would simply state that they do not send and receive IOIs and conditional orders. Accordingly, the Commission preliminarily estimates that, on average, preparing Part IV, Item 3 of a Form ATS-N would add 6 hours to the current baseline for an initial operation report on current Form ATS, depending on such factors as described above. This would result in an aggregate initial burden of 276 hours above the current baseline for an initial operation report on current Form ATS for all NMS Stock ATSs to complete Part IV, Item 3 of proposed Form ATS-N.[622]

Part IV, Item 4 of proposed Form ATS-N would require an NMS Stock ATS to disclose the means by which subscribers or other persons connect and send orders to the NMS Stock ATS. Part IV, Item 4(a) would require the NMS Stock ATS to describe the means by which subscribers or other persons connect to the NMS Stock ATS and enter orders or other trading interest on the NMS Stock ATS (e.g., via a direct FIX connection to the ATS or an indirect connection via the broker-dealer operator's SOR, any intermediate functionality, algorithm, or sales desk). This item would also require the NMS Stock ATS to describe any differences if the terms and conditions for connecting and entering orders or other trading interest are not the same for all subscribers and persons. Part IV, Item 4(b) would require the NMS Stock ATS to describe any co-location services or any other means by which any subscriber or other persons

[622] (Attorney at 1 hour + Compliance Manager at 2 hours + Sr. Systems Analyst at 3 hours) x 46 NMS Stock ATSs = 276 burden hours.

may enhance the speed by which to send or receive orders, trading interest, or messages to or from the NMS Stock ATS, the terms and conditions of such co-location services, and to describe any differences if the terms and conditions of the co-location services are not the same for all subscribers and persons.

The Commission notes that some of the proposed disclosure requirements of Part IV, Item 4 of proposed Form ATS-N are already required under current Form ATS. Exhibit F of current Form ATS requires an ATS to describe, among other things, the means of access to the ATS. Part IV, Item 4 of proposed Form ATS-N would expressly require significantly more detail, and a greater number of disclosures, in regard to order entry, connectivity, and co-location services than Exhibit F of current Form ATS. ATSs that currently trade NMS stocks vary in the depth of their disclosures related to order entry. Currently, most ATSs that trade NMS stocks do not provide much or any detail regarding the extent to which they provide co-location services or other speed advantages to subscribers or persons trading on the ATS. Accordingly, the Commission preliminarily estimates that respondents would incur an additional burden above the current baseline when preparing the disclosures required under Part IV, Item 4 of proposed Form ATS-N. The Commission preliminarily estimates that, on average, preparing Part IV, Item 4 for a Form ATS-N would add 5 hours to the current baseline for an initial operation report on current Form ATS to provide a more detailed description of the connection and order entry procedures, a description of any co-location or speed-advantage services, as well as any differences among subscribers and other persons with respect to these disclosures. This would result in an aggregate

initial burden of 230 hours above the current baseline for all NMS Stock ATSs to complete Item 4 of Part IV of proposed Form ATS-N.[623]

Part IV, Item 5 of proposed Form ATS-N would require an NMS Stock ATS to explain if and how it segments order flow, the type of notice about such segmentation that it provides to subscribers, and whether subscribers, the broker-dealer operator, or its affiliates may submit order preferencing instructions. Part IV, Item 5(a) would require an NMS Stock ATS to describe any segmentation of orders or other trading interest on the NMS Stock ATS (e.g., classification by type of participant, source, nature of trading activity), and to describe the segmentation categories, the criteria used to segment these categories, and procedures for determining, evaluating, and changing segmented categories. This item would require an NMS Stock ATS to describe any differences if the segmented categories, the criteria used to segment these categories, and any procedures for determining, evaluating, or changing segmented categories are not the same for all subscriber and persons. Part IV, Item 5(b) would require the NMS Stock ATS to state whether it notifies subscribers or persons about the segmentation category that a subscriber or a person is assigned and to describe any notice provided to subscribers or persons about the segmented category that they are assigned and the segmentation identified in Item 5(a), including the content of any notice and the means by which any notice is communicated. If the notice is not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. Part IV, Item 5(c) would require an NMS Stock ATS to describe any means and the circumstances by which a subscriber, the broker-dealer operator, or any of its affiliates may designate an order or trading interest submitted to the NMS Stock ATS to interact

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[623] (Attorney at 1 hour + Compliance Manager at 2 hours + Sr. Systems Analyst at 2 hours) x 46 NMS Stock ATSs = 230 burden hours.

or not to interact with specific orders, trading interest, or persons on the NMS Stock ATS (e.g., designating an order or trading interest to be executed against a specific subscriber) and how such designations affect order priority and interaction.

The Commission notes that some of the proposed disclosure requirements of Part IV, Item 5 of proposed Form ATS-N are already required under current Form ATS. Exhibit F of current Form ATS requires an ATS to describe, among other things, the manner of operation and the procedures governing order entry and execution of the ATS. However, Exhibit F of current Form ATS does not expressly enumerate the level of detail that an ATS must provide in regard to its segmentation of order flow and does not expressly ask for an ATS to describe any notice to subscribers regarding segmentation or explain any means and circumstances for order preferencing, whereas Part IV, Item 5 of proposed Form ATS-N would require detailed disclosures in regard to these subjects.[624] Based on its review of Exhibit F disclosures, the Commission understands that most, but not all, ATSs that currently trade NMS stocks segment orders in some manner and that many NMS Stock ATSs allow subscribers to enter some order preferencing criteria or limits. These ATSs vary in the depth of their description as to how they segment order flow and order preferencing. For instance, most ATSs that currently trade NMS stocks do not expressly provide the Commission with a description of the means by which persons might be notified about segmentation, as would be required by Part IV, Item 5(b) of proposed Form ATS-N. Accordingly, the Commission preliminarily estimates that respondents would incur an additional burden above the current baseline when preparing the disclosures

[624] Though Exhibit F of current Form ATS, unlike Item 5(b) of Part IV of proposed Form ATS-N, does not expressly require ATSs to describe the content of any notice to subscribers regarding segmentation, Exhibit F does require a copy of any materials currently provided to subscribers, which could include such a notice.

required under Part IV, Item 5 of proposed Form ATS-N. The Commission preliminarily estimates that, on average, preparing Part IV, Item 5 for a Form ATS-N would add 7 hours to the current baseline for an initial operation report on current Form ATS to provide a detailed description of how, if at all, the NMS Stock ATS segments order flow, provides any notice to those trading on the NMS Stock ATS regarding segmentation, and allows order preferencing. This would result in an aggregate initial burden of 322 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 5 of proposed Form ATS-N.[625]

Part IV, Item 6(a) of proposed Form ATS-N would require an NMS Stock ATS to describe any means and circumstances by which orders or other trading interest on the NMS Stock ATS are displayed or made known outside the NMS Stock ATS and the information about the orders and trading interest that are displayed. If the display of orders or other trading interest is not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. Part IV, Item 6(b) of proposed Form ATS-N would require the NMS Stock ATS to identify the subscriber(s) or person(s) (in the case of a natural person, the NMS Stock ATS would only identify the person's position or title) to whom the orders and trading interest are displayed or otherwise made known. Although Exhibit F of current Form ATS requires an ATS to describe, among other things, the manner of operation and the procedures governing order entry and execution of the ATS, Exhibit F does not expressly state that an ATS must explain if and how order information is displayed or otherwise made known outside the NMS Stock ATS. The Commission understands from its review of Forms ATS filings that a majority of ATSs that trade NMS stocks provide some form of IOI or conditional order that

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625 (Attorney at 2 hours + Compliance Manager at 2.5 hours + Sr. Systems Analyst at 2.5 hours) x 46 NMS Stock ATSs = 322 burden hours.

would likely need to be described in Part IV, Item 6 of proposed Form ATS-N.[626] Depending on the variety of trading interest that shares some trading information outside of the NMS Stock ATS and the complexity of such information sharing, the disclosure burden in responding to Part IV, Item 6 would likely vary among NMS Stock ATSs. The Commission also notes that there is currently one ATS that trades NMS stocks that operates as an ECN. This ATS would have to describe in Part IV, Item 6 how it displays orders and other information about trading interest on the ATS. Accordingly, the Commission preliminarily estimates that, on average, preparing Part IV, Item for a Form ATS-N would add 5 hours to the current baseline for an initial operation report on current Form ATS, depending on such factors as described above. This would result in an aggregate initial burden of 230 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 6 of proposed Form ATS-N.[627]

Part IV, Item 7 of proposed Form ATS-N would require an NMS Stock ATS to describe its trading services in detail. Part IV, Items 7(a) and 7(b) of proposed Form ATS-N would require an NMS Stock ATS to disclose the means or facilities used by the NMS Stock ATS to bring together the orders of multiple buyers and sellers, as well as the established, non-discretionary methods that dictate the terms of trading among multiple buyers and sellers on the facilities of the NMS Stock ATS, including rules and procedures governing the priority, pricing methodologies, allocation, matching, and execution of orders and other trading interest. Part IV, Item 7(c) would require the NMS Stock ATS to describe any trading procedures related to price protection mechanisms, short sales, locked-crossed markets, the handling of execution errors,

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626 See supra Part IV, Item 6 of proposed Form ATS-N.

627 (Attorney at 1 hour + Compliance Manager at 2 hours + Sr. Systems Analyst at 2 hours) x 46 NMS Stock ATSs = 230 burden hours.

time-stamping of orders and executions, or price improvement functionality. For all disclosures required under Item 7, the NMS Stock ATS would also be required to describe any differences in the availability of a functionality regarding its trading services among subscribers and persons.

The Commission notes that some of the proposed disclosure requirements of Part IV, Item 7 of proposed Form ATS-N are already required under current Form ATS. Exhibit F of current Form ATS requires an ATS to describe, among other things, the manner of operation and the procedures governing order entry and execution of the ATS. These required disclosures in Exhibit F of Form ATS are similar to those set forth in Item 7 of proposed Form ATS-N, which would require disclosures relating to matching methodology, order interaction rules, and execution procedures of the NMS Stock ATS. Consequently, the Commission preliminarily believes that NMS Stock ATSs already have some experience completing Exhibit F that would lessen the burden related to responding to the more detailed disclosures in Items 7(a), (b), and (c) of Part IV of proposed Form ATS-N.

Furthermore, Part IV, Item 7 of proposed Form ATS-N would require an NMS Stock ATS to describe how the NMS Stock ATS meets the two prongs necessary to meet the Exchange Act's definition of "exchange" pursuant to Rule 3b-16(a) under the Exchange Act in Items 7(a) and (b).[628] Based on reviews of Form ATS submissions, the Commission understands that ATSs that currently trade NMS stocks generally do not explicitly explain how their systems meet the requirements of each prong under Rule 3b-16, which are necessary in order to constitute an ATS.

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[628] See 17 CFR 240.3b-16 providing, among other things, that an entity must (1) bring together the orders for securities of multiple buyers and sellers; and (2) use established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade).

Those systems seeking to operate as NMS Stock ATSs would be required to draft those explanations, or modify existing descriptions of their current system as they may provide currently in Form ATS, to meet the disclosure requirements of Part IV, Item 7 of proposed Form ATS-N.

Accordingly, the Commission preliminarily estimates that respondents would incur an additional burden above the current baseline when preparing the disclosures required under Part IV, Item 7 of proposed Form ATS-N. The Commission preliminarily estimates that, on average, preparing Part IV, Item 7 for a Form ATS-N would add 6 hours to the current baseline for an initial operation report on current Form ATS to provide a description of the NMS Stock ATS's trading services. This would result in an aggregate initial burden of 276 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 7 of proposed Form ATS-N.[629]

Part IV, Item 8 of proposed Form ATS-N would require an NMS Stock ATS to describe any procedures governing trading in the event the NMS Stock ATS suspends trading or experiences a system disruption or system malfunction. If the procedures governing trading during a suspension or system disruption or malfunction are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences.

Exhibit G of Form ATS requires ATSs to describe the ATS's procedures for reviewing system capacity, security, and contingency planning procedures. The Commission preliminarily believes that the proposed disclosures in Part IV, Item 8 of proposed Form ATS-N relating to system disruptions, malfunctions, or other suspensions relate, in part, to the Exhibit G disclosures on current Form ATS. The Commission notes that some ATSs that trade NMS

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629 (Attorney at 1 hour + Compliance Manager at 2 hours + Sr. Systems Analyst at 3 hours) x 46 NMS Stock ATSs = 276 burden hours.

stocks currently provide some disclosures relating to system disruptions, malfunctions, and other suspensions in their Exhibit F, Exhibit G, or in subscriber manuals (or other materials provided to subscribers) that are required to be provided to the Commission under Exhibit F of current Form ATS. Consequently, the Commission preliminarily believes that NMS Stock ATSs should be able to provide the proposed disclosures in Part IV, Item 8 of proposed Form ATS-N without a significant burden over the current baseline as they should already be aware of how the ATS operates, handles system disruptions, malfunctions or other suspensions. The Commission recognizes, however, that Item Part IV, Item 8 is significantly more specific and detailed in its proposed disclosure requirements than current Form ATS.

Accordingly, the Commission preliminarily estimates that respondents would incur an additional burden above the current baseline when preparing the disclosures required under Part IV, Item 8 of proposed Form ATS-N. The Commission preliminarily estimates that, on average, preparing Part IV, Item 8 for a Form ATS-N would add 2.5 hours to the current baseline for an initial operation report on current Form ATS to provide a detailed description of the NMS Stock ATS's procedures for system disruptions, malfunctions, or other suspensions. This would result in an aggregate initial burden of 115 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 8 of proposed Form ATS-N.[630]

Part IV, Item 9 of proposed Form ATS-N would require an NMS Stock ATS to describe any opening, reopening and closing processes, and any procedures for after-hours trading. Part IV, Item 9(a) of proposed Form ATS-N would require an NMS Stock ATS to describe any opening and reopening processes, including how orders or other trading interest are matched and

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630 (Attorney at 1 hour + Compliance Manager at .5 hours + Sr. Systems Analyst at 1 hour) x 46 NMS Stock ATSs = 115 burden hours.

executed prior to the start of regular trading hours or following a stoppage of trading in a security during regular trading hours and how unexecuted orders or other trading interest are handled at the time the NMS Stock ATS begins regular trading at the start of regular trading hours or following a stoppage of trading in a security during regular trading hours. The NMS Stock ATS would also be required to describe any differences between pre-opening executions, executions following a stoppage of trading in a security during regular trading hours, and executions during regular trading hours. Part IV, Items 9(b) and (c) would require an NMS Stock ATS to describe any closing process and after-hours trading procedures, respectively, the manner in which unexecuted orders or other trading interest are handled at the close of regular trading, and how orders and trading interest are matched and executed during after-hours trading. The NMS Stock ATS would also be required to describe any differences between the closing and after-hours executions versus executions during regular trading hours.

The Commission notes that some of the proposed disclosure requirements of Part IV, Item 9 of proposed Form ATS-N are incorporated by some ATSs that trade NMS stocks into Exhibit F of their current Forms ATS, which requires an ATS to describe, among other things, the manner of operation and the procedures governing order entry and execution of the ATS. Currently, ATSs that trade NMS stocks vary in the depth of their disclosures relating to opening, reopening, or closing processes, and after-hours trading procedures. The Commission notes that these opening, reopening, or closing processes, and after-hours trading procedures, may vary widely across different NMS Stock ATSs, with some, for example, allowing for pre-opening executions and routing and after-hours trading and routing, while others may not have an opening process and simply commence with regular trading without any option for after-hours trading. In any case, NMS Stock ATSs should already be aware of any opening, reopening or

closing processes, and after-hours trading procedures, they may have as well as any differences in trading and execution during the opening, reopening, or closing processes, and during after-hours trading. Accordingly, the Commission preliminarily believes that preparing Part IV, Item 9 of proposed Form ATS-N for a Form ATS-N would not impose a significant additional burden above the current baseline for an initial operation report on current Form ATS. The Commission preliminarily estimates that, on average, preparing Part IV, Item 9 for a Form ATS-N would add 3 hours to the current baseline for an initial operation report on current Form ATS to describe its opening, reopening, or closing processes, and after-hours trading procedures. This would result in an aggregate initial burden of 138 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 9 of proposed Form ATS-N.[631]

Part IV, Item 10 of proposed Form ATS-N would require an NMS Stock ATS to describe its outbound routing functions. Part IV, Item 10(a) of proposed Form ATS-N would require an NMS Stock ATS to describe the circumstances under which orders or other trading interest are routed from the NMS Stock ATS to another trading center, including whether outbound routing occurs at the affirmative instruction of the subscriber or at the discretion of the broker-dealer operator, and the means by which routing is performed (e.g., a third party or order management system, or a SOR (or similar functionality) or algorithm of the broker-dealer operator or any of its affiliates). Part IV, Item 10(b) of proposed Form ATS-N would require an NMS Stock ATS to describe any differences if the means by which orders or other trading interest are routed from the NMS Stock ATS are not the same for all subscribers and persons. Exhibit F of current Form ATS requires an ATS to describe, among other things, the manner of operation and the

631 (Compliance Manager at 2 hours + Sr. Systems Analyst at 1 hour) x 46 NMS Stock ATSs = 138 burden hours.

procedures governing order execution of the ATS, but it does not specifically state the level of detail an ATS must provide when describing its outbound routing procedures. Additionally, the Commission understands based on disclosures in Form ATS submissions, some ATSs that currently trade NMS stocks do not route orders out of the ATS. Consequently, the disclosure burden related to Part IV, Item 10 of proposed Form ATS-N would likely vary among NMS Stock ATSs depending on whether they route orders at all, the variety of circumstances under which they may route orders, and the variety of destinations or criteria to determine such destinations to which an order or other trading interest may route. Accordingly, the Commission preliminarily believes that the average additional burden above the baseline imposed by Part IV, Item 10 of proposed Form ATS-N may vary significantly among NMS Stock ATSs. Accordingly, the Commission preliminarily estimates that, on average, preparing Part IV, Item 10 for a Form ATS-N would add 6 hours to the current baseline for an initial operation report on current Form ATS, depending on such factors as described above. This would result in an aggregate initial burden of 276 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 10 of proposed Form ATS-N.[632]

Part IV, Item 11 of proposed Form ATS would require an NMS Stock ATS to describe its sources and uses of market data. Part IV, Item 11(a) would require an NMS Stock ATS to describe the market data used by the NMS Stock ATS and the source of that market data (e.g., market data feeds disseminated by the SIP and market data feeds disseminated directly by an exchange or other trading center or third-party vendor of market data). Part IV, Item 11(b) would require the NMS Stock ATS to describe the specific purpose for which market data is

[632] (Attorney at 1 hour + Compliance Manager at 2 hours + Sr. Systems Analyst at 3 hours) x 46 NMS Stock ATSs = 276 burden hours.

used by the NMS Stock ATS, including how market data is used to determine the NBBO, protected quotes, pricing of orders and executions, and routing destinations. Form ATS does not specifically require an ATS to describe its sources of market data, though, this information is often important to understanding the execution of orders on an ATS. The Commission is aware based on Form ATS filings that many ATSs that trade NMS stocks provide descriptions related to their use of market data, including providing the name of their market data vendor. The Commission preliminarily believes that the proposed disclosures under Part IV, Item 11 would not impose any significant additional burden on NMS Stock ATSs, which should already be aware of the market data that they use and the manner in which they use it. Accordingly, the Commission preliminarily estimates that, on average, preparing Part IV, Item 11 for a Form ATS-N would add 4 hours to the current baseline for an initial operation report on current Form ATS to describe the sources of market data and the manner in which the NMS Stock ATS uses market data. This would result in an aggregate initial burden of 184 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 11 of proposed Form ATS-N.[633]

Part IV, Item 12 of proposed Form ATS-N would require an NMS Stock ATS to make certain disclosures regarding its fees, rebates, and other charges. Part IV, Item 12(a) of proposed Form ATS-N would require an NMS Stock ATS to describe any fees, rebates, or other charges of the NMS Stock ATS (e.g., connectivity fees, subscription fees, execution fees, volume discounts) and provide the range (e.g., high and low) of such fees, rebates, or other charges. Part IV, Item 12(b) of proposed Form ATS-N would require the NMS Stock ATS to describe any differences if the fees, rebates, or other charges of the NMS Stock ATS are not the same for all subscribers

[633] (Compliance Manager at 2 hours + Sr. Systems Analyst at 2 hours) x 46 NMS Stock ATSs = 184 burden hours.

and persons. Current Form ATS does not require an ATS to disclose and explain its fee structure, and based on Commission experience, few, if any, do so in their current Form ATS filings. The Commission recognizes that, like national securities exchanges, NMS Stock ATSs may adopt a variety of fee structures that may include rebates, incentives for subscribers to bring liquidity to the NMS Stock ATS, more traditional transaction-based fee structures, and other fees such as a monthly subscriber access fee. Depending on the complexity and variety of an NMS Stock ATS's fee structure and the extent to which these fees are not the same for all subscribers and persons, the proposed disclosure burden related to Part IV, Item 12 of proposed Form ATS-N will likely vary. Accordingly, the Commission preliminarily estimates that, on average, preparing Part IV, Item 12 for a Form ATS-N would add 5 hours to the current baseline for an initial operation report on current Form ATS to describe the NMS Stock ATS's fee structure and any differences among subscribers and persons relating to fees, rebates, or other charges. This would result in an aggregate initial burden of 230 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 12 of proposed Form ATS-N.[634]

Part IV, Item 13 of proposed Form ATS would require an NMS Stock ATS to describe any arrangements or procedures for trade reporting, clearance, and settlement on the NMS Stock ATS. Part IV, Item 13(a) of proposed Form ATS-N would require an NMS Stock ATS to describe any arrangements or procedures for reporting transactions on the NMS Stock ATS and if the trade reporting procedures are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. Part IV, Item 13(b) of proposed Form ATS-N would require an NMS Stock ATS to describe any arrangements or procedures undertaken by

[634] (Attorney at 1 hour + Compliance Manager at 3 hours + Sr. Systems Analyst at 1 hour) x 46 NMS Stock ATSs = 230 burden hours.

the NMS Stock ATS to facilitate the clearance and settlement of transactions on the NMS Stock ATS (e.g., whether the NMS Stock ATS becomes a counterparty, whether it submits trades to a registered clearing agency, or whether it requires subscribers to have arrangements with a clearing firm). If the clearance and settlement procedures are not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences. The Commission notes that some of the proposed disclosure requirements of Part IV, Item 13 of proposed Form ATS-N are already required under current Form ATS. Exhibit F of current Form ATS requires ATSs to describe, among other things, their procedures governing execution, reporting, clearance, and settlement of transactions effected through the ATS. Consequently, ATSs that currently trade NMS stocks already have experience providing disclosures related to how they report, clear, and settle transactions on the ATS. Accordingly, the Commission preliminarily believes that preparing Part IV, Item 13 for a Form ATS-N would not impose a significant additional burden above the current baseline for an initial operation report on current Form ATS. The Commission preliminarily estimates that, on average, preparing Part IV, Item 13 for a Form ATS-N would add 0.5 hours to the current baseline for an initial operation report on current Form ATS to provide a more detailed description of the NMS Stock ATS's trade reporting, clearance, and settlement arrangements or procedures. This would result in an aggregate initial burden of 23 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 13 of proposed Form ATS-N.[635]

Part IV, Item 14 of proposed Form ATS-N would require an NMS Stock ATS to provide the following information if the NMS Stock ATS displays orders in an NMS stock to any person

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[635] Compliance Manager at 0.5 hours x 46 NMS Stock ATSs = 23 burden hours.

other than employees of the NMS Stock ATS and executed 5% or more of the average daily trading volume in that NMS stock as reported by an effective transaction reporting plan for four of the preceding six calendar months: (a) the ticker symbol for each NMS stock for each of the last 6 calendar months; (b) a description of the manner in which the NMS Stock ATS displays such orders on a national securities exchange or through a national securities association; and (c) a description of how the NMS Stock ATS provides access to such orders displayed in the national market system equivalent to the access to other orders displayed on that exchange or association. Part IV, Item 15 of proposed Form ATS-N would require an NMS Stock ATS to provide the following information if the NMS Stock ATS executed 5% or more of the average daily trading volume in an NMS stock as reported by an effective transaction reporting plan for four of the preceding six calendar months: (a) the ticker symbol for each NMS stock for each of the last 6 calendar months; and (b) a description of the written standards for granting access to trading on the NMS Stock ATS. Current Form ATS does not require an ATS to disclose the information that would be required under Part IV, Items 14 and 15 of proposed Form ATS-N. However, based on the experience of the Commission and its staff, the Commission preliminarily believes that no ATSs currently executed 5% or more of the average daily volume in an NMS Stock as reported by an effective transaction reporting plan for four of the preceding six calendar months, and the Commission preliminarily believes that most – if not all – ATSs that currently trade NMS stocks already have procedures in place to prevent that threshold from being crossed on the ATS's system. Historically, ATSs have crossed these thresholds very rarely, with at most three ATSs that trade NMS stocks crossing either of the thresholds in any given year.

If, however, an NMS Stock ATS were to cross these 5% thresholds, a disclosure burden related to amending a Form ATS-N to complete Part IV, Items 14 and 15 of proposed Form ATS-N would result. Because Items 14 and 15 of Part IV are tied to existing obligations that arise from crossing the 5% thresholds pursuant to Rule 301(b)(3) and Rule 301(b)(5)(ii)(A) of Regulation ATS, respectively, the Commission preliminarily believes that NMS Stock ATSs should already be generally aware of the procedures they would follow if the 5% thresholds were crossed, which should reduce the burden associated with the disclosures that would be required under Items 14 and 15. The Commission notes that an NMS Stock ATS would only have to respond to Part IV, Items 14 or 15 of a Form ATS-N if the NMS Stock ATS previously operated as an ATS and triggered the applicable 5% thresholds. The Commission further notes that NMS Stock ATSs would be less likely to have to complete Item 14 as compared to Item 15 because Item 14 requires as an additional precondition that the NMS Stock ATS displays orders in an NMS stock to a person other than employees of the NMS Stock ATS. For new NMS Stock ATSs (i.e., NMS Stock ATSs that did not previously operate as an ATS), the NMS Stock ATS would not have been in operation for at least four months to trigger the applicable thresholds, meaning that such NMS Stock ATSs would only be required to complete Item 14 or 15 (or both) in a Form ATS-N Amendment. The Commission preliminarily estimates that completion of Part IV, Item 14 or 15 in a Form ATS-N Amendment (or in a Form ATS-N in the case of an NMS Stock ATS that previously operated as an ATS), would be 5 hours per item.

As explained above, the Commission notes that triggering the 5% threshold, a precondition necessary to require completion of Part IV, Items 14 and 15 of proposed Form ATS-N, currently occurs, and the Commission preliminarily estimates would continue to occur, very infrequently. Based on the review of Form ATS and Form ATS-R disclosures by the

Commission and its staff, the Commission preliminarily estimates that 1 NMS Stock ATS would have to complete Item 14 and 2 NMS Stock ATSs would have to complete Item 15 in any given year. Accordingly, the Commission preliminarily estimates that the disclosures that would be required under Part IV, Items 14 and 15 of proposed Form ATS-N would result in an aggregate initial burden of 15 hours above the current baseline.[636]

Part IV, Item 16 of proposed Form ATS-N would require an NMS Stock ATS to explain and provide certain aggregate platform-wide market quality statistics that it publishes or otherwise provides to subscribers regarding the NMS Stock ATS. Under Item 16, if the NMS Stock ATS publishes or otherwise provides to one or more subscribers aggregate platform-wide order flow and execution statistics of the NMS Stock ATS that are not otherwise required disclosures under Exchange Act Rule 605 of Regulation NMS, it would be required to: (i) list and describe the categories of the aggregate platform-wide order flow and execution statistics published or provided; (ii) describe the metrics and methodology used to calculate the aggregate platform-wide order flow and execution statistics; and (iii) attach as Exhibit 5 the most recent disclosure of the aggregate platform-wide order flow and execution statistics published or provided to one or more subscribers for each category or metric as of the end of the calendar quarter. An NMS Stock ATS would not be required to develop or publish any new statistics for purposes of making the required disclosures under Item 16; it would only be required to make the disclosures for statistics it already otherwise collects and publishes in the course of its operations. Thus, NMS Stock ATSs that do not publish or otherwise provide aggregate platform-wide market quality statistics would not incur any additional burden due to the

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636 (Attorney at 2 hours + Compliance Manager at 1 hour + Sr. Systems Analyst at 2 hours) x 3 NMS Stock ATSs = 15 burden hours.

proposed disclosure requirements of Item 16. For NMS Stock ATSs that do provide such statistics, Item 16 would impose an additional burden above the baseline because current Form ATS does not require the disclosure of market quality statistics. The Commission preliminarily estimates that preparing Part IV, Item 16 for a Form ATS-N would add 7 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 322 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 16 of proposed Form ATS-N.[637]

ii. Estimated Burden above the Current Baseline for a Form ATS-N, Form ATS-N Amendment, and Notice of Cessation on Form ATS-N

A. Proposed Form ATS-N

Based on the above analysis of the estimated additional burden for a proposed Form ATS-N, the Commission preliminarily estimates that a proposed Form ATS-N will, on average, require an estimated 121.3 burden hours above the current baseline for an initial operation report on current Form ATS. This results in an estimated 141.3 hours in total, including the current baseline.[638] The Commission notes that ATSs that trade NMS stocks vary in terms of their structure

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637 (Attorney at 1 hour + Compliance Manager at 1 hour + Senior Systems Analyst at 5 hours) x 46 NMS Stock ATSs = 322 burden hours.

638 (Current Baseline at 20 hours) + (Parts I and II at 0.5 hours) + (Part III at an average of 47 hours) + (Part IV at an average of 73.5 hours) + (Access to EFFS at 0.3 hours, see infra, Section XII.D.2.b.iv) = 141.3 burden hours. The aggregate totals by professional, including the baseline, are estimated to be approximately 54.8 hours for an Attorney, 43.5 hours for a Compliance Manager, 34.5 hours for a Sr. Systems Analyst, 1 hour for a Sr. Marketing Manager, and 7.5 hours for a Compliance Clerk.

This preliminary estimated burden for a Form ATS-N includes the hour burden associated with completing Part III, Item 2 and Part IV, Items 14 and 15 of proposed Form ATS-N. As explained above, however, the Commission preliminarily believes that the majority of NMS Stock ATSs would not be required to complete those items of the proposed form.

and the manner in which they operate. ATSs that currently trade NMS stocks also vary with respect to the depth and extent of their disclosures on Form ATS. Consequently, the Commission preliminarily believes that the estimated hour burdens herein regarding proposed Form ATS-N would likely vary among NMS Stock ATSs, depending on such factors as the extent of their current disclosures on Form ATS, the complexity and structure of their system, and the extent of their other broker-dealer activities.

B. Form ATS-N Amendments

As previously noted, the Commission currently estimates that ATSs that trade NMS stocks submit 2 amendments, on average, each year.[639] The Commission preliminarily estimates that the 46 respondents will file 3 Form ATS-N Amendments each year, for an estimated total of 138 Form ATS-N Amendments. The Commission notes that proposed Rule 304(a)(2) of Regulation ATS will contain the same three general categories of required amendments for proposed Form ATS-N as Rule 301(b)(2) of Regulation ATS currently requires for current Form ATS.[640] However, due to the greater detail and number of disclosures required by proposed Form ATS-N, the Commission preliminarily believes that respondents may find it necessary to file a greater number of amendments to proposed Form ATS-N than ATSs that trade NMS stocks currently do on Form ATS. For example, many of the disclosures related to the broker-dealer operator of the NMS Stock ATS contained in Part III of proposed Form ATS-N, which are not required disclosures under

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639 See supra note 589 and accompanying text. During the fiscal year of 2014, the Commission received 101 amendments from ATSs that trade NMS stocks, of which there were approximately 45 at any given time during 2014. Some ATSs that trade NMS stocks filed as many as 3 amendments while others did not file any amendments in 2014.

640 See 17 CFR 242.301(b)(2).

current Form ATS, would require an NMS Stock ATS to file Form ATS-N Amendments if the information provided on Form ATS-N changed.

As noted above, the Commission currently estimates that the hourly burden related to an amendment to Form ATS is 6 hours.[641] The Commission preliminarily estimates that the average hourly burden above this current baseline of 6 hours for each Form ATS-N Amendment would be 3 hours to accommodate the more voluminous and detailed disclosures required by Form ATS-N as compared to Form ATS.[642] An NMS Stock ATS would also be required to provide a brief narrative description of the amendment at the top of Form ATS-N and a redline(s) showing changes to Part III and/or Part IV of proposed Form ATS-N.[643] The Commission preliminarily estimates that this requirement would add an additional burden of 0.5 hours to draft the summary and prepare the redline version(s) showing the amendments the NMS Stock ATS is making.[644] This would result in a total estimated hourly burden, including the baseline, of 9.5 hours for a Form ATS-N Amendment,[645] and an aggregate annual burden on all NMS Stock ATSs of 1,311 hours.[646] The Commission notes that the frequency and scope of Form ATS-N Amendments would likely

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641 See supra note 590 and accompanying text.

642 Attorney at 1 hour + Compliance Manager at 2 hours = 3 burden hours above the baseline.

643 See Exhibits 3A and 4A to proposed Form ATS-N.

644 Compliance Clerk at 0.5 hours. The Commission notes that most word processing software provides for this functionality.

645 Attorney at 5.5 hours + Compliance Manager at 2 hours + Compliance Clerk at 2 hours = 9.5 burden hours.

646 138 amendments per year x 9.5 hours = 1,311 aggregate burden hours. The Commission further estimates that gaining access to EFFS for one additional person on an annual basis would require 0.15 burden hours for each NMS Stock ATS, or 7 hours annually for all NMS Stock ATSs (46 x 0.15 hours = 6.9 hours). Therefore, the aggregate burden hours equals 1,317.9 hours (1,311 hours + 6.9 hours).

vary, similar to amendments to Form ATS, depending on whether the NMS Stock ATS is implementing a significant change requiring substantial revisions to its Form ATS-N or whether the changes are less significant, such as updating the address of the NMS Stock ATS. Some NMS Stock ATSs might not file any Form ATS-N Amendments in a given year, while others – such as NMS Stock ATSs that publish or otherwise provide to one or more subscribers aggregate platform-wide market quality statistics that would be covered by Part IV, Item 16 of proposed Form ATS-N[647] – may file several Form ATS-N Amendments per year.

C. Notice of Cessation on Proposed Form ATS-N

As previously noted, from 2012 through the first half of 2015, there have been an average of 6 ATSs that trade NMS stocks that cease operations each year.[648] Although it is unclear how many NMS Stock ATSs might cease operations each year going forward, for purposes of making a PRA burden estimate, the Commission is estimating that this average would generally remain the same for NMS Stock ATSs using Form ATS-N as economic conditions, business reasons, and other factors may cause some NMS Stock ATSs to cease operations. Accordingly, the Commission preliminarily estimates that 6 respondents may to file a cessation of operation report on proposed Form ATS-N each year. The Commission preliminarily believes that the burden for filing a cessation of operation report on proposed Form ATS-N will not be significantly greater than that for filing a cessation of operation report on current Form ATS because proposed Form ATS-N does not contain any additional requirements for a cessation of operation report. For both Form ATS and proposed Form ATS-N, the primary requirement is to check the appropriate box indicating that the

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647 See supra Section VIII.P.

648 See supra Section XII.C.

ATS is ceasing operations. Accordingly, the Commission preliminarily estimates that the average compliance burden for each response would be 2 hours.[649] This would result in an aggregate annual burden of 12 hours for NMS Stock ATSs that choose to cease operations and submit a cessation of operation report on Form ATS-N.[650]

iii. ATSs that Transact in Both NMS and Non-NMS Stocks

Under proposed Rule 301(b)(2)(viii) of Regulation ATS, an ATS that effects trades in both NMS stocks and non-NMS stocks would have to submit a Form ATS-N with respect to its trading of NMS stocks and a revised Form ATS that removes discussion of those aspects of the ATS related to the trading of NMS stocks. Under the proposed amendments to Rule 301(b)(9), an ATS that effects trades in both NMS stocks and non-NMS stocks would also be required to file separate Forms ATS-R – one disclosing trading volume in NMS stocks and one disclosing trading volume in non-NMS stocks. Therefore, ATSs that are subject to these proposed requirements would incur: (1) the above baseline burdens related to filing a Form ATS-N and Form ATS-N Amendments;[651] (2) the additional burden of filing a new Form ATS to only disclose information related to non-NMS stock trading activity on the ATS;[652] and (3) the burden of completing and filing two Forms ATS-R.[653]

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649 Attorney at 1.5 hours + Compliance Clerk at 0.5 hours = 4 burden hours. See supra note 592, and accompanying text.

650 2 burden hours x 6 NMS Stock ATSs = 12 aggregate annual burden hours.

651 See supra Sections XII.D.2.b.ii.A and B.

652 See supra Section XII.D.2.a and accompanying text for the baseline estimates for submitting an IOR for Form ATS and amendments to Form ATS.

653 See supra note 593 and accompanying text for the baseline estimate for submitting a Form ATS-R.

Accordingly, the Commission estimates that the total hourly burden for an ATS to separately file a Form ATS for its non-NMS stock trading activity and Form ATS-N for its NMS stock trading activity would be 20 burden hours for the initial operation report on Form ATS for its non-NMS stock trading activity and 141.3 burden hours for its Form ATS-N. The Commission notes that the estimated hour burden related to the initial operation report submission on Form ATS for non-NMS stock trading activity might be less than the estimated 20 burden hours, as, to the extent the NMS Stock ATS in question is currently operating, the description of its non-NMS stock trading activity should already be contained in its existing Form ATS.[654] As previously noted, there are currently 11 ATSs that trade, or have indicated that they expect to trade in Exhibit B to their Form ATS, both NMS stocks and non-NMS stocks on the ATS. Consequently, the Commission preliminarily estimates that the aggregate initial burden on ATSs to file these separate forms would be 1,774.3 hours, and the aggregate annual burden for filing amendments to both forms would be 445.5 hours.[655]

The Commission estimates that the total burden for completing and filing two Form ATS-R would be 4.5 hours, which is 0.5 hours[656] above the current baseline burden of 4 hours

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654 The hourly burden related to amendments to its Form ATS and Form ATS-N would remain unchanged: 6 estimated burden hours for amendments to Form ATS, and 9.5 estimated burden hours for Form ATS-N Amendments. See supra notes 641 - 645 and accompanying text.

655 (Form ATS initial operation report at 20 hours + Form ATS-N at 141.3 hours) x 11 ATSs = 1,774.3 aggregate burden hours. Using the estimates of 2 amendments each year to Form ATS, see supra Section .XII.D.2.a, and 3 amendments each year to Form ATS-N, see supra Section XII.D.2.b.0.B, the ongoing aggregate burden for these bifurcated ATSs would be ((2 Form ATS Amendments per year x 6 hours) + (3 Form ATS-N Amendments per year x 9.5 hours)) x 11 respondents = 445.5 aggregate ongoing burden hours per year relating to amendments.

656 Attorney at .5 hours = .5 burden hours.

for filing a Form ATS-R.[657] The Commission preliminarily believes that ATSs required to file two Forms ATS-R would incur an additional burden above the baseline because they would be required to divide their trading statistics between two forms and file each form separately. The Commission does not believe that those ATSs would incur any additional burden to collect the required information because they currently assemble that information when preparing their current Form ATS-R filings. As previously noted, there are currently 11 ATSs that trade, or have indicated that they expect to trade in Exhibit B to their Form ATS, both NMS stocks and non-NMS stocks on the ATS; those ATSs would be required to file a pair of Forms ATS-R four times annually. Consequently, the Commission estimates that the aggregate annual burden of filing two Forms ATS-R for those ATS that effect transactions in both NMS stocks and non-NMS stocks would be 198 hours.[658]

iv. Access to EFFS

The Commission proposes that Form ATS-N would be submitted electronically in a structured format and require an electronic signature.[659] Currently, ATSs that transact in NMS stock do not have the ability to access and submit an electronic form. The proposed amendments to Regulation ATS would require that every NMS Stock ATS have the ability to submit forms electronically with an electronic signature. The Commission's proposal contemplates the use of

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657 See supra note 593 and accompanying text for the baseline estimate for submitting a Form ATS-R.

658 ((Attorney at 3.5 hours + Compliance Clerk at 1 hour) x (4 filings annually)) x 11 ATSs = 198 aggregate burden hours.

659 The Commission notes that all estimated burden hours with regard to completing Parts I-V of proposed Form ATS-N, which are explained above and herein, include the estimated burden associated with the proposed requirement that NMS Stock ATSs file proposed Form ATS-N in a structured format, including narrative responses that are block-text tagged.

an online filing system, the EFFS. Based on the widespread use and availability of the Internet, the Commission preliminarily believes that filing Form ATS-N in an electronic format would be less burdensome and a more efficient filing process for NMS Stock ATSs and the Commission, as it is likely to be less expensive and cumbersome than mailing and filing paper forms to the Commission.

To access EFFS, an NMS Stock ATS would have to submit to the Commission an External Account User Application ("EAUA") to register each individual at the NMS Stock ATS who would access the EFFS system on behalf of the NMS Stock ATS. The Commission is including in its burden estimates the burden for completing the EAUA for each individual at an NMS Stock ATS who would request access to EFFS. The Commission estimates that initially, on average, two individuals at each NMS Stock ATS would request access to EFFS through the EAUA, and each EAUA would take 0.15 hours to complete and submit. Therefore, each NMS Stock ATS would require a total of 0.3 hours to complete the requisite EAUAs,[660] or approximately 13.8 hours for all NMS Stock ATSs.[661] The Commission also preliminarily estimates that annually, on average, one individual at each NMS Stock ATS will request access to EFFS through the EAUA.[662] Therefore, the ongoing burden to complete the EAUA would be

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660 0.15 hours per EAUA x 2 individuals = 0.3 burden hours per NMS Stock ATS. These estimates are based on the Commission and its staff's experience with EFFS and EAUAs pursuant to Rule 19b-4 under the Exchange Act. The 0.3 hours represents the time spent by two attorneys. The Commission believes it is appropriate to estimate that, on average, each NMS Stock ATS will submit two EAUAs initially.

661 0.30 hours x 46 NMS Stock ATSs = 13.8 burden hours.

662 The Commission estimates that annually, on average, one individual at each NMS Stock ATS will request access to EFFS through EAUA to account for the possibility that an individual who previously had access to EFFS may no longer be designated as needing such access.

0.15 hours annually for each NMS Stock ATS,[663] or approximately 6.9 hours annually for all NMS Stock ATSs.[664]

In addition, the Commission estimates that each NMS Stock ATS will designate 2 individuals to sign Form ATS-N each year. An individual signing a Form ATS-N must obtain a digital ID, at the cost of approximately $25 each year. Therefore, each NMS Stock ATS would pay approximately $50 annually to obtain digital IDs for the individuals with access to EFFS for purposes of signing Form ATS-N,[665] or approximately $2,300 for all NMS Stock ATSs.[666]

v. Public Posting on NMS Stock ATS's Website

Proposed Rule 304(b)(3) would require each NMS Stock ATS to make public via posting on the NMS Stock ATS's website a direct URL hyperlink to the Commission's website that contains the documents enumerated in proposed Rule 304(b)(2). The Commission preliminarily estimates that each NMS Stock ATS would incur an initial, one-time burden to program and configure its website in order to post the required direct URL hyperlink pursuant to proposed Rule 304(b)(3). The Commission preliminarily estimates that this initial, one-time burden would be approximately 2 hours.[667] Because the Commission preliminarily believes that many broker-dealer operators currently maintain a website for their NMS Stock ATSs, the Commission

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663 0.15 hours per EAUA x 1 individual = 0.15 burden hours.

664 0.15 hours x 46 NMS Stock ATSs = 6.9 burden hours.

665 $25 per digital ID x 2 individuals = $50 per NMS Stock ATS.

666 $50 per NMS Stock ATS x 46 NMS Stock ATSs = $2,300.

667 Senior Systems Analyst at 2 burden hours.

preliminarily estimates that the aggregate initial, one-time burden would be approximately 92 hours.[668]

vi. Recordkeeping Requirements

As noted above, the Commission proposes to amend Rule 303(a)(2)(ii)[669] of Regulation ATS to provide that all ATSs must preserve copies of all reports filed pursuant to proposed Rule 304 for the life of the enterprise and any successor enterprise.

Rule 303(a)(ii) currently requires an ATS to preserve copies of reports filed pursuant to Rule 301(b)(2), which include all Form ATS filings, for the life of the enterprise and any successor enterprise. Because NMS Stock ATSs that solely trade NMS stocks would be filing Form ATS-N in lieu of Form ATS under this proposal, the Commission believes that the proposed amendment to Rule 303(a)(ii) would not result in any burden for those ATSs that is not already accounted for under the current baseline burden estimate for Rule 303.[670] For the 11 ATSs that trade, or have indicated in Exhibit B to their Form ATS that they expect to trade both NMS stocks and non-NMS stocks on the ATS, the Commission preliminarily estimates that the burden above the current baseline estimate for preserving records relating to compliance with the proposed amendment to Rule 303(a)(ii) would be approximately 3 hours annually per ATS for a total annual burden above the current baseline burden estimate of 33 hours for all respondents.[671]

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668 Senior Systems Analyst at 2 hours x 46 NMS Stock ATSs = 92 burden hours.

669 17 CFR 242.303(a)(2)(ii).

670 To comply with all of the record preservation requirements of Rule 303, the Commission currently estimates that ATSs spend approximately 1,380 hours per year. See Rule 303 PRA Update, supra note 575, 78 FR 43943. At an average cost per burden hour of $104.20, the resultant total related cost of compliance is $143,796 per year (1,380 burden hours x $104.20/hour). See id.

671 3 additional burden hours x 11 ATSs = 33 aggregate burden hours.

Accordingly, the Commission proposes to modify the current PRA burden for Rule 303 to account for the increased burden on ATSs that trade both NMS stocks and non-NMS stocks.

E. Collection of Information is Mandatory

All collections of information pursuant to the proposed rules would be mandatory for entities that meet the definition of NMS Stock ATS.

F. Confidentiality of Responses to Collection of Information

With respect to the proposed amendments to Rules 301(b)(2)(viii) and 304 of Regulation ATS, including proposed Form ATS-N, the Commission would make publicly available on its website all Forms ATS-N upon being declared effective. The Commission would also make publicly available on its website all properly filed Form ATS-N Amendments , and notices of cessation on Form ATS-N. The Commission would not make publicly available on its website Forms ATS-N that the Commission has declared ineffective, but these forms would be available for examination by the Commission and its staff, state securities authorities, and self-regulatory organizations. The proposed Form ATS amendments would also require each NMS Stock ATS that has a website to post on the NMS Stock ATS's website a direct URL hyperlink to the Commission's website that contains the documents enumerated in proposed Rule 304(b)(2). The collection of information required by the proposed amendments to Rules 301(b)(10), 303(a)(1)(v), 301(b)(9), and 303(a)(2)(ii) would not be made public, but would be used for regulatory purposes by the Commission and the SRO(s) of which the ATS's broker-dealer operator is a member. In Part III, Item 10 of Form ATS-N, however, NMS Stock ATSs would be required to describe the written safeguards and written procedures to ensure confidential treatment of trading information that would be required under the proposed amendment to Rule 301(b)(10); as explained above, the Commission would make certain Form ATS-N filings

publicly available. To the extent that the Commission receives confidential information pursuant to this collection of information, such information would be kept confidential, subject to the provisions of applicable law.

G. Retention Period for Recordkeeping Requirements

All reports required to be made under proposed Rules 301(b)(2)(viii), 301(b)(9), and 304 of Regulation ATS, including Proposed Form ATS-N, would be required to be preserved during the life of the enterprise and any successor enterprise, pursuant to the proposed amendment to Rule 303(a)(2) of Regulation ATS.

ATSs would be required to preserve a copy of their written safeguards and written procedures to protect subscribers' confidential trading information under proposed Rule 301(b)(10) of Regulation ATS for not less than 3 years, the first 2 years in an easily accessible place, pursuant to proposed Rule 303(a)(1)(v) of Regulation ATS.

H. Request for Comments

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comment to:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of our functions, including whether the information shall have practical utility;
2. Evaluate the accuracy of our estimate of the burden of the proposed collection of information;
3. Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and

4. Evaluate whether there are ways to minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090, with reference to File Number S7-23-15. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File Number S7-23-15 and be submitted to the Securities and Exchange Commission, Office of FOIA/PA Services, 100 F Street NE., Washington, DC 20549-2736. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

XIII. Economic Analysis

A. Background

The Commission is concerned that the current regulatory requirements relating to operational transparency for NMS Stock ATSs may no longer fully meet the goals of furthering the public interest and protecting investors. The market for NMS stock execution services consists of registered national securities exchanges, NMS Stock ATSs, and non-ATS broker-dealers that effect OTC transactions. As of the second quarter of 2015, NMS Stock ATSs account for approximately 15.4% of the total dollar volume in NMS stocks and compete with, and operate similar to, registered national securities exchanges. However, relative to registered national securities exchanges, there is limited and differential information publicly available to market participants about how NMS Stock ATSs operate, including how orders interact, match, and execute, and the activities of the broker-dealer operators and their affiliates. Not only is there a lack of consistency with respect to the quality of information that market participants receive from different NMS Stock ATSs, there are also differences due to the fact that for a given NMS Stock ATS, some subscribers might have more detailed information relative to other subscribers about how orders interact, match, and execute on the ATS.

Currently, NMS Stock ATSs provide the Commission with notice of their initial operations and changes to their operations on Form ATS. Although some NMS Stock ATSs voluntarily make their Form ATS publicly available on their website, they are not required to do so, as Form ATS is "deemed confidential when filed."[672] In light of this, subscribers to these NMS Stock ATSs may have more information about the operations of these NMS Stock ATSs

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[672] See 17 CFR 242.301(b)(2)(vii).

relative to subscribers to NMS Stock ATSs that do not make their Form ATS public. Moreover, an NMS Stock ATS may also make different information available to certain market participants about its operations than it does to other market participants. The Commission is concerned that this limited and differential level of operational transparency around NMS Stock ATSs may impede market participants' ability to adequately discern how their orders interact, match, and execute on NMS Stock ATSs, or fully understand the activities of an NMS Stock ATS's broker dealer-operator and its affiliates, and the conflicts that may arise from such activities. This could thereby impede a market participant's ability to evaluate whether submitting order flow to a particular NMS Stock ATS aligns with its business interests and would help it achieve its investing or trading objectives. In addition, the Commission is concerned that the current lack of transparency around the potential conflicts of interest that arise from the activities of the broker-dealer operator and its affiliates hinders market participants' abilities to protect their interests when doing business on the NMS Stock ATS.

The Commission is concerned that the current market for NMS stock execution services does not address the problems described above. Rather, when demanding services that are typically offered by NMS Stock ATSs – particularly, dark pools – some market participants trade off the less stringent transparency requirements applicable to NMS Stock ATSs, as compared to national securities exchanges, in exchange for obtaining some perceived advantages of trading on these venues, such as keeping their orders dark prior to execution.[673] Furthermore, the difficulty involved in comparing the operations and execution quality of an NMS Stock ATS to the operations and execution quality of national securities exchanges or other NMS Stock ATSs

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[673] See supra notes 123-126 and accompanying text.

may limit the ability of market participants to judge whether that tradeoff actually benefits either themselves or their customers when sending orders to a particular NMS Stock ATS. For example, as noted above, a certain category of subscribers may have access to services offered by an NMS Stock ATS that are not offered to another category of subscribers, but subscribers that fall under the latter category may not be fully aware of any potential disadvantages when submitting orders to that NMS Stock ATS. Furthermore, the Commission preliminarily believes that the NMS Stock ATS would generally not have a strong incentive to fully reveal how it operates to either category of subscriber under the current regulatory regime.

The Commission is proposing to amend Regulation ATS to adopt new Rule 304, which would provide a process for the Commission to determine if an NMS Stock ATS qualifies for the exemption from the definition of "exchange" pursuant to Rule 3a1-1(a)(2) and declare an NMS Stock ATS's Forms ATS-N either effective or ineffective. The proposal would also provide a process for the Commission to suspend, limit, or revoke an NMS Stock ATS's exemption from the definition of "exchange" under certain circumstances. The Commission is also proposing to amend Regulation ATS to require NMS Stock ATSs to file Form ATS-N, which would require NMS Stock ATSs to provide detailed disclosures about their trading operations and the activities of their broker-dealer operators and their affiliates. The Commission is proposing to make certain Form ATS-N filings public by posting them on the Commission's website and requiring each NMS Stock ATS that has a website to post on the NMS Stock ATS's website a direct URL hyperlink to the Commission's website that contains the documents enumerated in proposed Rule 304(b)(2). The Commission is also proposing to amend Rule 301(b)(10) of Regulation ATS to require that all ATSs have their procedures and safeguards to protect subscribers' confidential trading information in writing. The proposed amendments seek to improve and

make more consistent the information available to market participants regarding different NMS Stock ATSs' operations and the activities of their broker-dealer operators and their affiliates. The proposed amendments also aim to make the level and type of disclosures more consistent between NMS Stock ATSs. The Commission preliminarily believes that making publicly available a more consistent level of information to all market participants would help them to better evaluate NMS Stock ATSs as potential routing destinations for their orders.

The Commission is sensitive to the economic consequences and effects, including the costs and benefits, of its rules. The following economic analysis identifies and considers the costs and benefits – including the effects on efficiency, competition, and capital formation – that may result from the amendments to Regulation ATS being proposed. These costs and benefits are discussed below and have informed the policy choices described throughout this release.[674]

B. Baseline

The enhanced transparency and oversight of NMS Stock ATSs that the Commission preliminarily believes would result from the proposed amendments to Regulation ATS would increase the amount of information and improve the quality of information available to all market participants about the operations of NMS Stock ATSs and the activities of their broker-dealer operators and their affiliates. As a result, this information should better inform market

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674 Exchange Act Section 3(f) requires the Commission, when it is engaged in rulemaking pursuant to the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. See 15 U.S.C. 78c(f). In addition, Exchange Act Section 23(a)(2) requires the Commission, when making rules pursuant to the Exchange Act, to consider among other matters the impact that any such rule would have on competition and not to adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. See 15 U.S.C. 78w(a)(2).

participants making decisions about which trading venue to route their orders to. The proposed amendments would also affect the competitive dynamics between trading venues that compete for order flow. The numerous parties that would be affected by the proposed amendments include: existing NMS Stock ATSs; potential new NMS Stock ATSs; current and potential subscribers of NMS Stock ATSs; broker-dealers that are affiliated with NMS Stock ATSs and their customers; non-ATS affiliated broker-dealers and their customers; broker-dealers that do not operate NMS Stock ATSs but send order flow to NMS Stock ATSs; institutional investors that periodically transact large trades on NMS Stock ATSs; other persons that seek to effect transactions in NMS stocks on ATSs; and registered national securities exchanges that compete for order flow with NMS Stock ATSs.

The baseline against which economic costs and benefits, as well as the impact of the proposed amendments on efficiency, competition, and capital formation, are measured is the current market and regulatory framework for trading NMS stocks. The baseline, discussed in further detail below, includes statistics on the number of NMS Stock ATSs; current reporting requirements for NMS Stock ATSs; the lack of public disclosure of NMS Stock ATSs' operations, as well as disparate levels of information available to market participants about NMS Stock ATSs' operations and the activities of their broker-dealer operators and their affiliates; and the competitive environment between registered national securities exchanges and NMS Stock ATSs, among NMS Stock ATSs, and between broker-dealers that operate NMS Stock ATSs and broker-dealers that do not operate NMS Stock ATSs.

1. Current NMS Stock ATSs

In a concept release on equity market structure in 2010, the Commission stated that in the third quarter of 2009 there were 37 dark pools and ECNs that traded NMS stocks, and that they

accounted for 18.7% of total NMS share volume.[675] From mid-May to mid-September 2014, the trading volume of ATSs accounted for approximately 18% of the total dollar volume in NMS stocks.[676] During the second quarter in 2015, 38 ATSs traded NMS stocks[677] and these 38 ATSs accounted for approximately 59 billion shares traded in NMS stocks (approximately $2.5 trillion in dollar volume), representing approximately 15.0% of total share trading volume (15.4% of total dollar trading volume) on all registered national securities exchanges, ATSs, and non-ATS OTC trading venues in the second quarter of 2015.[678] There have been several changes in the market for NMS stocks execution services that may explain the volatility in fraction of share and dollar volume executed on NMS Stock ATSs since 2009. First, two ECNs have now registered as national securities exchanges.[679] Second, there has been a rise in the number of ATSs

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675 The Commission used data from the third quarter of 2009. Of these 37 ATSs that traded NMS stocks, 32 were classified as dark pools and 5 were classified as ECNs. These dark pools accounted for 7.9% of total NMS share volume and the ECNs accounted for 10.8% of total NMS share volume. Of the 10.8% attributable to ECNs, 9.8% was attributable to two ECNs that were operated by Direct Edge, which subsequently registered as national securities exchanges. See 2010 Equity Market Structure Release, supra note 124, at 3598-3599.

676 See SCI Adopting Release, supra note 17, at 72266 n.148 and accompanying text and n.150.

677 See infra Table 1, "NMS Stock ATSs Ranked by Dollar Trading Volume – March 30, 2015 to June 26, 2015."

678 See infra Table 1 "NMS Stock ATSs Ranked by Dollar Trading Volume – March 30, 2015 to June 26, 2015." Total dollar trading volume on all exchanges and off-exchange trading in the second quarter of 2015 was approximately $16.3 trillion and approximately 397 billion shares. See id.

679 EDGA Exchange, Inc. and EDGX Exchange, Inc. (f/k/a Direct Edge ECN) previously operated as ECNs and are now registered national securities exchanges. See In the Matter of the Applications of EDGX Exchange, Inc., and EDGA Exchange, Inc. for Registration as National Securities Exchanges: Findings, Opinion, and Order of the Commission, Securities Exchange Act Release No. 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (File Nos. 10-194 and 10-196). Prior to 2009, there were other

operating as dark pools. Since the third quarter of 2009, the number of ATSs operating as dark pools has increased from 32[680] to more than 40 today.[681] In 2009, dark pools accounted for 7.9% of NMS share volume[682] and by the second quarter of 2015, they accounted for 14.9% of NMS share volume.[683] In summary, in recent years, the number of NMS Stock ATSs has increased, and the percentage of NMS stocks executed in dark pools has also increased.

2. Current Reporting Requirements for NMS Stock ATSs

Even though ATSs directly compete for order flow in NMS stocks with national securities exchanges, ATSs are exempt from the definition of "exchange" and therefore are not required to register as national securities exchanges with the Commission. An ATS qualifies for

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ECNs that also became national securities exchanges. BATS Exchange Inc. (f/k/a BATS ECN) previously operated as an ECN and is now a registered national securities exchange. See In the Matter of the Application of BATS Exchange Inc. for Registration as National Securities Exchange: Findings, Opinion, and Order of the Commission, Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10-198). NYSE Arca, Inc., (f/k/a Archipelago) previously operated as an ECN and was acquired by the New York Stock Exchange LLC. See Order Granting Approval of Proposed Rule Change and Amendment Nos. 1, 3, and 5 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 6 and 8 Relating to the NYSE's Business Combination With Archipelago Holdings, Inc., Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77). Finally, The Nasdaq Stock Market LLC, prior to becoming a national securities exchange, acquired Brut ECN and INET ECN. See In the Matter of the Application of the Nasdaq Stock Market LLC for Registration as National Securities Exchange: Findings, Opinion, and Order of the Commission, Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550, n.137 (January 23, 2006) (File No. 10-131).

680 See supra note 133 and accompanying text.

681 See supra note 134 and accompanying text.

682 See supra note 135 and accompanying text.

683 See infra Table 1 "NMS Stock ATSs Ranked by Dollar Trading Volume – March 30, 2015 to June 26, 2015" and based on data compiled from Forms ATS submitted to the Commission as of the end of the second quarter of 2015.

an exemption from the definition of "exchange" provided by Exchange Act Rule 3a1-1(a)(2) on the condition that it complies with Regulation ATS, including registering as a broker-dealer, which includes joining a self-regulatory organization, such as FINRA. Thus, ATSs can collect and execute orders in securities electronically without registering as a national securities exchanges under Section 6 of the Exchange Act.

A broker-dealer can become an ATS by filing an initial operation report on Form ATS at least 20 days before commencing operations. Form ATS requires, among other things, that the ATS provide information about: classes of subscribers and differences in access to the services offered by the ATS to different groups or classes of subscribers; the securities the ATS expects to trade; any entity other than the ATS involved in its operations; the manner in which the system operates; how subscribers access the trading system; procedures governing order entry and execution; and trade reporting and clearance and settlement of trades on the ATS. Form ATS is not approved by the Commission;[684] rather, it provides the Commission with notice of an ATS's operations prior to commencing operations.[685]

An ATS must notify the Commission of any changes in its operations by filing an amendment to its Form ATS initial operation report under three circumstances. First, an ATS must amend Form ATS at least 20 days prior to implementing any material change to the operation of the ATS.[686] Second, if any information contained in the initial operation report becomes inaccurate and has not already been reported to the Commission as an amendment, the ATS must file an amendment on Form ATS within 30 calendar days after the end of each

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684 See supra Section II.B.

685 See Instruction A.1 to Form ATS.

686 See 17 CFR 242.301(b)(2)(ii).

calendar quarter.[687] Third, an ATS must also promptly file an amendment on Form ATS correcting information that it previously reported on Form ATS after discovery that the information was inaccurate when filed.[688] Regulation ATS also requires ATSs to report certain information about transactions on the ATS and information about certain activities on Form ATS-R within 30 days after the end of each calendar quarter.[689] Form ATS-R requires that ATSs report both total unit volume and dollar volume of their transactions over the quarter, as well as a list of all subscribers that were participants during the quarter and a list of all securities traded on the ATS at any time during the quarter.[690] In addition to the reporting requirements of Form ATS and Form ATS-R, there are other conditions under Regulation ATS, including those that address order display and access; fees and fair access; capacity, integrity, and security of automated systems; examinations, inspections, and investigations; recordkeeping; procedures to protect subscribers' confidential treatment of trading information; and limitations on the name of the ATS.[691]

All ATSs are currently members of FINRA and must therefore comply with all FINRA rules applicable to broker-dealers. FINRA rules require ATSs to report transaction volume. For instance, FINRA Rule 4552 requires each ATS to report to FINRA aggregate weekly trading volume on a security-by-security basis.[692] FINRA publishes the information regarding NMS

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687 See 17 CFR 242.301(b)(2)(iii).

688 See 17 CFR 242.301(b)(2)(iv).

689 See 17 CFR 242.301(b)(9).

690 See Form ATS-R.

691 See supra Section II.B; see also 17 CFR 242.301(b).

692 See FINRA Rule 4552.

stocks in the S&P500 Index or the Russell 1000 Index and certain exchange-traded products on a two-week delayed basis, and the information on all other NMS stocks and OTC equity securities on a four-week delayed basis.[693] In addition to FINRA Rule 4552, other rules pertaining to the operations of NMS Stock ATSs include FINRA Rules 6160 and 6170, which pertain to the use of a Market Participant Identifier ("MPID") for trade reporting purposes.[694]

3. Lack of Public Disclosure of NMS Stock ATS Operations and the Activities of the Broker-Dealer Operator and the Broker-Dealer Operator's Affiliates

Regulation ATS states that information on Form ATS is "deemed confidential when filed."[695] In the Regulation ATS Adopting Release, the Commission stated that preserving confidentiality of information on Form ATS would provide ATSs "with the necessary comfort to make full and complete filings," and noted that information required on Form ATS "may be proprietary and disclosure of such information could place alternative trading systems in a disadvantageous competitive position."[696]

Although the Commission does not require information provided on Form ATS to be made publicly available, the Commission has observed that some NMS Stock ATSs voluntarily make publicly available their Forms ATS.[697] However, even when ATSs publicly disclose their

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693 See id.

694 See FINRA Rules 6160 and 6170.

695 See 17 CFR 242.301(b)(2)(vii). While FINRA Rule 4552 requires dissemination of aggregate weekly trading volume on the ATS by stock, this data does not reveal any information about the ATSs trading operations. Some ATSs such as IEX Trading have voluntarily made public information about order size and fill rates, as well as volume that is matched and routed, on a monthly basis. See, e.g., IEX ATS Statistics, available at http://www.iextrading.com/stats/.

696 See Regulation ATS Adopting Release, supra note 7, at 70864.

697 See supra note 156.

Form ATS filings, it is often not easy for market participants to systematically compare one NMS Stock ATS to another based on these disclosures because the level of detail and the format in which it is presented on these Form ATSs may vary among the NMS Stock ATSs. In addition, the Commission notes that some of these NMS Stock ATSs do not make public the full version of the Form ATS that has been filed with the Commission. Also, NMS Stock ATSs are under no legal obligation to keep current a Form ATS they have made publicly available, so market participants cannot immediately confirm whether a publicly posted Form ATS is the most recent filing of the NMS Stock ATS.

Furthermore, different information is made available to different market participants regarding the operations of NMS Stock ATSs and the activities of NMS Stock ATSs' broker-dealer operators and their affiliates. NMS Stock ATSs that either voluntarily make their Form ATS publicly available, or publish summary information of their operations, may provide to market participants more information about their operations than NMS Stock ATSs that do not make their Forms ATS or information about their operations publicly available. Furthermore, subscribers to an NMS Stock ATS may have greater access to information about the NMS Stock ATS than other market participants, including the NMS Stock ATS's subscriber manual and access to other subscriber quotes.

NMS Stock ATSs also disclose some execution quality metrics. Exchange Act Rule 605(a) requires every market center, including ATSs, to make publicly available for each calendar month a report containing standardized data on the covered orders in NMS stocks that it

receives for execution from any market participant.[698] Data on execution quality required under Exchange Act Rule 605(a) includes order sizes, execution sizes, effective spreads, price improvement, and quarterly volume of shares traded. As such, market participants have access to actual market quality statistics of execution quality on NMS Stock ATSs. The Commission recognizes that some NMS Stock ATSs may publish or otherwise disclose to subscribers market quality statistics that may be useful to those subscribers in addition to what is currently required by Exchange Act Rule 605. However, the Commission does not believe that such market quality statistics are standardized in terms of how they are calculated, and it does not know how much information subscribers that receive these market quality statistics have about how the NMS Stock ATS calculates the statistics. The Commission preliminarily believes that some subscribers may have access to more information about a given NMS Stock ATS than other ATSs, and also may have more information about that NMS Stock ATS than non-subscribers.

The differences in information that certain subscribers have about an NMS Stock ATS's operations may be manifested through channels other than having differential access to Form ATS, an NMS Stock ATS's subscriber manual, or being granted access to certain market quality statistics as provided by an NMS Stock ATS in addition to what is currently publicly disclosed under Exchange Act Rule 605. To the extent that the NMS Stock ATS provides access to

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698 A covered order shall mean any market order or any limit order (including immediate-or-cancel orders) received by a market center during regular trading hours at a time when a consolidated best bid and offer is being disseminated, and, if executed, is executed during regular trading hours, but shall exclude any order for which the customer requests special handling for execution, including, but not limited to, orders to be executed at a market opening price or a market closing price, orders submitted with stop prices, orders to be executed only at their full size, orders to be executed on a particular type of tick or bid, orders submitted on a "not held" basis, orders for other than regular settlement, and orders to be executed at prices unrelated to the market price of the security at the time of execution. See Rule 605(a)(8).

services to certain subscribers and not others, the subscribers with greater access to the services of an NMS Stock ATS could be in a position to obtain more knowledge and information about the operations of NMS Stock ATSs than those subscribers who have limited access to the services of the NMS Stock ATS. Therefore, subscribers who have greater access to services offered by the NMS Stock ATS may be able to make more informed choices about their trading decisions relative to subscribers who have limited access to the services of the NMS Stock ATS. For instance, a broker-dealer operator may offer products or services in connection with a subscriber's use of the NMS Stock ATS, and, as a result, these subscribers may receive more favorable terms from the broker-dealer operator with respect to their use of the NMS Stock ATS. Such favorable terms could include preferential routing arrangements, access to certain order types, or access to a faster connection line to the ATS via a co-location service, as opposed to through the broker-dealer operator's SOR (or similar functionality) or algorithm. Granting access to these favorable terms can result in these subscribers having more detailed information about how their orders will interact, match, and execute relative to those of other subscribers. With this detailed information, these subscribers can make more nuanced decisions about which trading venue suits their trading purposes relative to other subscribers who do not have access to these services, and thus do not possess an informational advantage.

Even if having greater access to the services of an NMS Stock ATS yields additional information about the operations of the NMS Stock ATS to certain subscribers, it is possible that subscribers that do not have full access to services of the NMS Stock ATS, and the resulting additional information, may still want to trade on NMS Stock ATSs in spite of their relative informational disadvantage. It is possible that had these subscribers possessed more detailed information about the operations of the NMS Stock ATS, they may have been able to make more

informed – and therefore potentially different – decisions about where to route their orders for execution.

4. NMS Stock ATS Treatment of Subscriber Confidential Trading Information

Under current Rule 301(b)(10) of Regulation ATS,[699] all ATSs must establish adequate safeguards and procedures to protect subscribers' confidential trading information, and, to ensure that those safeguards and procedures are followed, the ATS must also establish adequate oversight procedures.[700] Furthermore, all ATSs are required to preserve certain records pursuant to Rule 303(a)(1).[701] However, neither Rule 301(b)(10) nor Rule 303(a)(1) of Regulation ATS currently require that an ATS have in writing and preserve their safeguards and procedures to protect subscribers' confidential trading information, or their related oversight procedures. Based on the experience of the Commission and its staff from periodic examinations or investigations of ATSs, the Commission preliminarily believes that ATSs – in particular, ATSs whose broker-dealer operators are large, multi-service broker-dealers – currently have and maintain in writing their safeguards and procedures to protect subscribers' confidential trading information, as well as the oversight procedures to ensure such safeguards and procedures are followed. Nevertheless, under the current regulatory environment for ATSs, absent specific questions in an examination by the Commission or its staff, the Commission is not able to determine the specific ATSs that currently have written safeguards and written procedures to protect subscribers' confidential trading information based on the disclosure requirements of current Form ATS.

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699 17 CFR 242.301(b)(10).

700 17 CFR 242.301(b)(10).

701 See supra Section X.

5. Current State of Competition Between NMS Stock ATSs and Registered National Securities Exchanges

In the market for NMS stock execution services, NMS Stock ATSs not only compete with other NMS Stock ATSs, but they also compete with registered national securities exchanges. As noted previously, while registered national securities exchanges compete with NMS Stock ATSs for order flow, NMS Stock ATSs and registered national securities exchanges are subject to different regulatory regimes, including different obligations to disclose information about their trading operations and activities.[702] For example, ATSs that operate pursuant to the exemption from the definition of "exchange" under Rule 3a1-1(a)(2) must register as broker-dealers,[703] and provide notice of their operations on Form ATS.[704] This notice of operations is not approved or disapproved by the Commission. Form ATS requires ATSs to disclose only limited aspects of their operations, and ATSs are not required to publicly disclose Form ATS, which is "deemed confidential when filed."[705] In addition, ATSs need not publicly disclose changes to their operations and trading functionality because amendments to Form ATS are not publicly disclosed.[706] Some market participants therefore have limited access to information about NMS Stock ATSs, including information related to the types of subscribers, means of access, order types, market data, and procedures governing the interaction and execution of orders on the NMS Stock ATS. On the other hand, national securities exchanges, with which

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702 See supra Section I (discussing the different mix of obligations and benefits applicable to ATSs and registered national securities exchanges).

703 See 17 CFR 242.301(b)(1).

704 See 17 CFR 242.301(b)(2).

705 See 17 CFR 242.301(b)(2)(vii).

706 Id.

NMS Stock ATSs compete for order flow, must register with the Commission on Form 1, must file proposed rule changes with the Commission under Section 19(b) of the Exchange Act, and are SROs. The proposed rule changes of national securities exchanges must be made available for public comment,[707] and in general, these proposed rule changes publicly disclose, among other things, details relating to the exchange's operations, procedures, and fees. National securities exchanges and other SROs also have regulatory obligations, such as enforcing their rules and the federal securities laws with respect to their members, which do not apply to market participants such as ATSs.[708]

While national securities exchanges have more regulatory burdens than NMS Stock ATSs, they also enjoy certain unique benefits that are not afforded to NMS Stock ATSs. While national securities exchanges are SROs, and are thus subject to surveillance and oversight by the Commission, they can still establish norms regarding conduct, trading, and fee structures for external access. ATSs on the other hand are regulated as broker-dealers, and must comply with the rules of FINRA, which is the SRO to which all ATSs currently belong. Trading venues that elect to register as national securities exchanges may gain added prestige by establishing listing standards for their securities. Additionally, national securities exchanges can be direct participants in the NMS plans, such as the ITS, the CTA Plan, Consolidated Quotation System, and the OTC/UTP Plan. Direct participation in these systems may provide a higher degree of transparency and execution opportunity than on NMS Stock ATSs. Furthermore, national

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707 See 15 U.S.C. 78s(b)(1).

708 See, e.g., Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b)(1), and Section 6(b) of the Exchange Act, 15 U.S.C. 78f(b).

securities exchanges are entitled to share in market data revenue generated by the CTA[709] and enjoy limited immunity from private liability with respect to their regulatory functions.

Since the adoption of Regulation NMS in 2005, the market for NMS stock execution services has become more and more fragmented and competitive. Currently there are 11 registered national securities exchanges that effect transactions in NMS stocks, namely, NYSE MKT LLC (formerly NYSE AMEX and the American Stock Exchange), BATS Exchange, Inc. ("BATS-Z Exchange"), BATS Y- Exchange, Inc. ("BATS-Y Exchange") ("BATS-Z Exchange and BATS-Y Exchange, collectively "the BATS Exchanges"), NASDAQ OMX BX, Inc. (formerly the Boston Stock Exchange), Chicago Stock Exchange, Inc., EDGA Exchange, Inc. ("EDGA"), EDGX Exchange, Inc. ("EDGX"), The Nasdaq Stock Market LLC ("Nasdaq"), New York Stock Exchange LLC ("NYSE"), NYSE Arca, Inc. ("NYSE Arca"), and NASDAQ OMX PHLX, Inc. (formerly Philadelphia Stock Exchange).[710]

Several of these national securities exchanges (NYSE Arca, Nasdaq, BATS Z-Exchange, EDGA and EDGX) previously operated as ECNs or acquired ECNs as part of their trading platforms.[711] A reason why an ECN might want to register as a national securities exchange is so that it can participate in and earn market data fees from U.S. tape plans, reduce clearing costs and operate a primary listings business.[712]

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709 See Regulation ATS Adopting Release, supra note 7, at 70880, 70902-70903 (discussing generally some of the obligations and benefits of registering as a national securities exchange).

710 As noted above, National Stock Exchange, Inc. ceased trading on its system as of the close of business on May 30, 2014. See supra note 118.

711 See supra note 679 and accompanying text.

712 See BATS Global Markets, Inc., Amendment to Form S-1 Registration Statement, available at

Over the past decade, with the increase in fragmentation in the market for execution services, there has been a shift in the market share of trading volume in NMS stocks across trading venues. For example, there has been a decline in market share of trading volume for exchange-listed stocks of the two traditionally dominant trading venues, NYSE and Nasdaq. The market share of the NYSE in NYSE-listed stocks fell dramatically from approximately 80% in 2005 to 20% in 2013, and for Nasdaq-listed stocks, Nasdaq's market share fell by approximately half, from 50% in 2005 to 25% in 2013.[713] Over the same time period, there has been an increase in market share on other newer national securities exchanges such as NYSE Arca, BATS-Z, BATS-Y, EDGA and EDGX, and an increase in the market share of off-exchange trading, which includes both internalization by dealers and trading on NMS Stock ATSs.[714] As discussed above, there has also been an increase in the number of NMS Stock ATSs that operate as dark pools, and the market share for these NMS Stock ATSs has increased.[715] Thus, greater fragmentation in the market for NMS stock execution services over the past decade has resulted in trading volume being executed on different venues, some of which include NMS Stock ATSs, particularly NMS Stock ATSs that operate as dark pools.

As discussed above, NMS Stock ATSs face lower regulatory burdens than national securities exchanges. Because national securities exchanges are SROs, they are subject to

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http://www.sec.gov/Archives/edgar/data/1519917/000119312512125661/d179347ds1a.htm.

713 See Angel, James, Lawrence Harris, and Chester Spatt (2013), "Equity Trading in the 21st Century: An Update," working paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1584026.

714 See id.

715 See supra Section XIII.B.1.

certain regulatory obligations, such as enforcing their own rules and the federal securities laws with respect to their members. NMS Stock ATSs do not have such oversight and enforcement responsibilities.[716] The Commission recognizes that the growth in the number of NMS Stock ATSs could be driven by these less stringent regulatory obligations.

6. Competition Among NMS Stock ATSs

NMS Stock ATSs also compete amongst each other in a niche in the market for NMS stock execution services. The rise in the number of NMS Stock ATSs has not only affected competition between national securities exchanges and ATSs for order flow of NMS stocks, it has also impacted competition among NMS Stock ATSs. Table 1 depicts the market share of total dollar volume for NMS stocks, and the total share volume for NMS stocks for individual ATSs, based on data collected from ATSs pursuant to FINRA Rule 4552 for 13 weeks of trading from late March 2015 to late June 2015. Even though there are many NMS Stock ATSs, much of the NMS stock dollar volume on ATSs is transacted by only a handful of venues. Table 1 shows that the top eight NMS Stock ATSs ranked by dollar volume accounted for 61.1% of total dollar volume transacted on ATSs and 58.9% of total share volume transacted on ATSs from late March 2015 to late June 2015.

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[716] See supra note 708.

MPID	ATS Description	Trades	Share Volume	Dollar Volume	% of ATS Dollar Volume	% of ATS Share Volume
CROS	CROS CROSSFINDER	41,672,006	7,551,914,806	$315,945,661,169	12.61%	12.70%
UBSA	UBSA UBS ATS	43,027,809	6,734,276,556	$291,180,523,638	11.62%	11.32%
DBAX	DBAX SUPERX	25,242,629	4,678,600,167	$199,074,916,743	7.94%	7.87%
IEXG	IEXG IEX	18,041,576	4,423,181,973	$186,499,748,586	7.44%	7.44%
MSPL	MSPL MS POOL (ATS-4)	18,236,411	4,289,819,243	$156,471,258,204	6.24%	7.21%
DLTA	DLTA DEALERWEB	1,516	764,998,801	$134,793,690,990	5.38%	1.29%
SGMA	SGMA SIGMA X	18,716,925	3,222,508,033	$131,407,703,348	5.24%	5.42%
MLIX	MLIX INSTINCT X	15,015,049	3,360,647,845	$116,747,351,177	4.66%	5.65%
JPMX	JPMX JPM-X	12,258,446	2,837,510,840	$116,561,158,849	4.65%	4.77%
ITGP	ITGP POSIT	10,227,796	2,900,218,900	$111,761,968,834	4.46%	4.88%
KCGM	KCGM KCG MATCHIT	14,173,631	2,423,079,322	$95,254,726,769	3.80%	4.07%
EBXL	EBXL LEVEL ATS	14,048,531	2,272,446,000	$94,803,590,528	3.78%	3.82%
BIDS	BIDS BIDS TRADING	4,317,658	2,208,466,908	$94,153,259,495	3.76%	3.71%
LATS	LATS BARCLAYS ATS ("LX")	13,743,582	2,365,482,491	$92,785,653,009	3.70%	3.98%
ICBX	ICBX INSTINET CONTINUOUS BLOCK CROSSING SYSTEM (CBX)	7,295,533	1,875,009,482	$70,029,206,516	2.79%	3.15%
XSTM	XSTM CROSSSTREAM	2,678,027	1,158,257,295	$40,156,942,579	1.60%	1.95%
LQNT	LQNT LIQUIDNET ATS	18,127	712,524,230	$31,447,183,492	1.25%	1.20%
IATS	IATS IBKR ATS	2,308,101	722,328,435	$31,399,360,633	1.25%	1.21%
NYFX	NYFX MILLENNIUM	1,801,107	647,366,571	$26,977,052,943	1.08%	1.09%
CXCX	CXCX CITI CROSS	3,047,670	680,227,091	$26,237,183,874	1.05%	1.14%
MSTX	MSTX MS TRAJECTORY CROSS (ATS-1)	4,032,146	670,349,940	$24,101,728,412	0.96%	1.13%
PDQX	PDQX PDQ ATS	2,843,539	519,782,380	$22,384,657,822	0.89%	0.87%
XIST	XIST INSTINET CROSSING	111,510	493,513,656	$19,449,543,200	0.78%	0.83%
BLKX	BLKX BLOCKCROSS	38,984	429,983,908	$17,125,909,759	0.68%	0.72%
LTPL	LTPL LIGHT POOL	2,275,740	403,527,790	$15,757,610,861	0.63%	0.68%
LQFI	LQFI LIQUIFI	18,322	233,816,558	$10,054,937,852	0.40%	0.39%
BTBK	BTBK TRADEBOOK	951,569	217,286,935	$9,105,149,522	0.36%	0.37%
LQNA	LQNA LIQUIDNET H2O	38,256	218,684,500	$8,397,182,948	0.34%	0.37%
VRTX	VRTX VORTEX	994,257	218,122,351	$6,968,936,215	0.28%	0.37%
MLVX	MLVX MERRILL LYNCH (ATS-1)	167,416	53,504,500	$2,509,930,415	0.10%	0.09%
JEFX	JEFX JET-X	162,053	47,294,192	$1,505,230,591	0.06%	0.08%
AQUA	AQUA AQUA	3,074	33,993,467	$1,276,459,816	0.05%	0.06%
RCSL	RCSL RIVERCROSS	169,033	35,504,467	$1,018,621,752	0.04%	0.06%
WDNX	WDNX XE	10,818	16,495,078	$965,039,562	0.04%	0.03%
BCDX	BCDX BARCLAYS DIRECTEX	371	27,323,975	$786,374,698	0.03%	0.05%
MSRP	MSRP MS RETAIL POOL (ATS-6)	44,498	16,392,000	$754,554,611	0.03%	0.03%
APOG	APOG APOGEE	14,960	3,016,349	$120,888,304	0.00%	0.01%
PROS	PROS PRO SECURITIES ATS	34	57,700	$1,874,537	0.00%	0.00%
	Total (NMS Stock ATS)	**277,748,710**	**59,467,514,735**	**$2,505,972,772,257**	**100.00%**	**100.00%**
	Total Consolidated Volume (NMS stock)[1]	-	**397,278,958,163**	**$16,272,538,057,045**	-	-
	NMS Stock ATS as a Fraction of Total Consolidated Volume	-	**15.0%**	**15.4%**	-	-
	Dark Pools as a Fraction of Total Consolidated Volume[2]	-	**14.9%**	**15.3%**	-	-

Table 1: NMS Stock ATSs Ranked by Dollar Trading Volume
(March 30, 2015 to June 26, 2015)

This table shows the 38 ATSs that effected transactions in NMS stocks from March 30, 2015 to June 26, 2015, ranked in descending order by dollar volume transacted. ATS data is reported weekly, and these dates approximately correspond to the second quarter of 2015. Dollar volume transacted on an ATS is calculated by multiplying the share volume for a given NMS stock on the ATS in a given week by the average trade price for that week. Dollar volume for each NMS stock is then aggregated across all NMS stocks that traded on the given ATS in that week. Also reported in this table is the number of trades, share volume, each NMS Stock ATS's market share of all NMS Stock ATS dollar volume and NMS Stock ATS share volume in that quarter. Note: [1] Total Consolidated Volume includes all trading in NMS stocks on all national securities exchanges, ATSs, and non-ATS OTC trading. [2] Dark Pools are defined as all NMS Stock ATSs with the exception of ECNs.

Sources: Data collected from ATSs pursuant to FINRA Rule 4552; Trade and Quote (TAQ) Data; Market Volume Summary, available at https://www.batstrading.com/market_summary/. Data compiled from Forms ATS filed with the Commission as of the end of, and during the second quarter of 2015.

Table 2, which is based on data collected from NMS Stock ATSs pursuant to FINRA Rule 4552 for 13 weeks of trading from late March 2015 to late June 2015, shows the average trade size, which is share volume divided by the number of trades on each of the NMS Stock ATSs. The table reveals marked differences in the average trade size of transactions executed on the various NMS Stock ATSs. Six NMS Stock ATSs had average trade sizes in excess of 10,000 shares. This suggests that some NMS Stock ATSs may receive large block orders and execute large trades.[717] One of the advantages for market participants of trading on block crossing networks is the ability to execute large block orders while minimizing the movement of prices against their trading interest.[718]

While these NMS Stock ATSs on average execute large size trades, the combined market share of these NMS Stock ATSs is only 7.8% when measured in dollar volume, and 3.7% when measured in share volume. The vast majority of NMS Stock ATSs have average trade sizes between 150 and 450 shares. The two NMS Stock ATSs with the highest market shares (measured either in dollar volume or share volume) have average trade sizes of 181 and 157 shares, respectively.

Though NMS Stock ATSs compete with each other in a niche in the market for NMS stock execution services, the trade sizes in Table 2 actually suggest that this niche market may

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717 For purposes of this analysis we considered block orders as orders of more than 10,000 shares, which is the traditional definition for block orders. See supra note 126.

718 See supra notes 124-125 and accompanying text.

not be very different from the market as a whole. The average trade size on NMS Stock ATSs is 214 shares, which is not significantly different from the average trade size of 181 shares on registered national securities exchanges.[719] Thus, on average, the trade size for executions on NMS Stock ATSs and national securities exchanges appears similar.

[719] These results are consistent with prior findings that average trade sizes on "lit" national securities exchanges are similar to those taking place on "dark ATSs." See Tuttle: ATS Trading in NMS Stocks, supra note 126. Unlike "lit" national securities exchanges, dark ATSs do not publicly disseminate top of the limit-order book information. See id. See also supra note 123 and accompanying text.

MPID	ATS Description	Trades	Share Volume	Dollar Volume	Average Trade Size	% of ATS Dollar Volume	% of ATS Share Volume
DLTA	DLTA DEALERWEB	1,516	764,998,801	$134,793,690,990	504,617	5.38%	1.29%
BCDX	BCDX BARCLAYS DIRECTEX	371	27,323,975	$786,374,698	73,650	0.03%	0.05%
LQNT	LQNT LIQUIDNET ATS	18,127	712,524,230	$31,447,183,492	39,307	1.25%	1.20%
LQFI	LQFI LIQUIFI	18,322	233,816,558	$10,054,937,852	12,762	0.40%	0.39%
AQUA	AQUA AQUA	3,074	33,993,467	$1,276,459,816	11,058	0.05%	0.06%
BLKX	BLKX BLOCKCROSS	38,984	429,983,908	$17,125,909,759	11,030	0.68%	0.72%
LQNA	LQNA LIQUIDNET H2O	38,256	218,684,500	$8,397,182,948	5,716	0.34%	0.37%
XIST	XIST INSTINET CROSSING	111,510	493,513,656	$19,449,543,200	4,426	0.78%	0.83%
PROS	PROS PRO SECURITIES ATS	34	57,700	$1,874,537	1,697	0.00%	0.00%
WDNX	WDNX XE	10,818	16,495,078	$965,039,562	1,525	0.04%	0.03%
BIDS	BIDS BIDS TRADING	4,317,658	2,208,466,908	$94,153,259,495	511	3.76%	3.71%
XSTM	XSTM CROSSSTREAM	2,678,027	1,158,257,295	$40,156,942,579	433	1.60%	1.95%
MSRP	MSRP MS RETAIL POOL (ATS-6)	44,498	16,392,000	$754,554,611	368	0.03%	0.03%
NYFX	NYFX MILLENNIUM	1,801,107	647,366,571	$26,977,052,943	359	1.08%	1.09%
MLVX	MLVX MERRILL LYNCH (ATS-1)	167,416	53,504,500	$2,509,930,415	320	0.10%	0.09%
IATS	IATS IBKR ATS	2,308,101	722,328,435	$31,399,360,633	313	1.25%	1.21%
JEFX	JEFX JET-X	162,053	47,294,192	$1,505,230,591	292	0.06%	0.08%
ITGP	ITGP POSIT	10,227,796	2,900,218,900	$111,761,968,834	284	4.46%	4.88%
ICBX	ICBX INSTINET CONTINUOUS BLOCK CROSSING SYSTEM (CBX)	7,295,533	1,875,009,482	$70,029,206,516	257	2.79%	3.15%
IEXG	IEXG IEX	18,041,576	4,423,181,973	$186,499,748,586	245	7.44%	7.44%
MSPL	MSPL MS POOL (ATS-4)	18,236,411	4,289,819,243	$156,471,258,204	235	6.24%	7.21%
JPMX	JPMX JPM-X	12,258,446	2,837,510,840	$116,561,158,849	231	4.65%	4.77%
BTBK	BTBK TRADEBOOK	951,569	217,286,935	$9,105,149,522	228	0.36%	0.37%
MLIX	MLIX INSTINCT X	15,015,049	3,360,647,845	$116,747,351,177	224	4.66%	5.65%
CXCX	CXCX CITI CROSS	3,047,670	680,227,091	$26,237,183,874	223	1.05%	1.14%
VRTX	VRTX VORTEX	994,257	218,122,351	$6,968,936,215	219	0.28%	0.37%
RCSL	RCSL RIVERCROSS	169,033	35,504,467	$1,018,621,752	210	0.04%	0.06%
APOG	APOG APOGEE	14,960	3,016,349	$120,888,304	202	0.00%	0.01%
DBAX	DBAX SUPERX	25,242,629	4,678,600,167	$199,074,916,743	185	7.94%	7.87%
PDQX	PDQX PDQ ATS	2,843,539	519,782,380	$22,384,657,822	183	0.89%	0.87%
CROS	CROS CROSSFINDER	41,672,006	7,551,914,806	$315,945,661,169	181	12.61%	12.70%
LTPL	LTPL LIGHT POOL	2,275,740	403,527,790	$15,757,610,861	177	0.63%	0.68%
SGMA	SGMA SIGMA X	18,716,925	3,222,508,033	$131,407,703,348	172	5.24%	5.42%
LATS	LATS BARCLAYS ATS ("LX")	13,743,582	2,365,482,491	$92,785,653,009	172	3.70%	3.98%
KCGM	KCGM KCG MATCHIT	14,173,631	2,423,079,322	$95,254,726,769	171	3.80%	4.07%
MSTX	MSTX MS TRAJECTORY CROSS (ATS-1)	4,032,146	670,349,940	$24,101,728,412	166	0.96%	1.13%
EBXL	EBXL LEVEL ATS	14,048,531	2,272,446,000	$94,803,590,528	162	3.78%	3.82%
UBSA	UBSA UBS ATS	43,027,809	6,734,276,556	$291,180,523,638	157	11.62%	11.32%
	Total (NMS Stock ATS)	**277,748,710**	**59,467,514,735**	**$2,505,972,772,257**	**-**	**100.00%**	**100.00%**
	Average Trade Size (NMS Stock ATS)	**-**	**-**	**-**	**214**	**-**	**-**
	Average Trade Size (Registered National Exchanges[1])	**-**	**-**	**-**	**181**	**-**	**-**

Table 2: NMS Stock ATSs Ranked by Average Trade Size
(March 30, 2015 to June 26, 2015)

This table shows 38 ATSs that effected transactions in NMS stocks from March 30, 2015 to June 26, 2015, ranked in descending order by average trade size. ATS data is reported weekly, and these dates correspond approximately to the second quarter of 2015. Also reported in this table is the raw number of trades, share volume, dollar volume, and each NMS Stock ATS's market share of all NMS Stock ATS dollar volume and NMS Stock ATS share volume. Dollar volume transacted on an ATS is calculated by multiplying the share volume for a given NMS stock on the ATS in a given week by the average trade price for that week. Dollar volume for each NMS stock is then aggregated across all NMS stocks that traded on the given ATS in that week.
Note: [1] Registered national securities exchanges that effect transactions in NMS stocks include NYSE MKT LLC, BATS Exchange, Inc.; BATS Y- Exchange, Inc.; NASDAQ OMX BX, Inc.; Chicago Stock Exchange, Inc.; EDGA Exchange, Inc.; EDGX Exchange, Inc.; The Nasdaq Stock Market LLC; New York Stock Exchange LLC; NYSE Arca, Inc.; and NASDAQ OMX PHLX, Inc. National Stock Exchange ceased trading on May 30, 2014, and is therefore not included in the calculation of average trade size on registered national securities exchanges.
Sources: Data collected by ATSs pursuant to FINRA Rule 4552, Trade and Quote (TAQ) Data; Securities Exchange Act Release No. 72107, supra note 118.

While many NMS Stock ATSs operating today are similar with respect to the limited transparency they provide with respect to their trading model, the Commission understands that the services offered vary significantly across NMS Stock ATSs. Some NMS Stock ATSs offer mid-point matching services exclusively while others may have more complex matching algorithms. Some other NMS Stock ATSs offer preferential treatment in execution priority to some groups of subscribers, but not others, and some NMS Stock ATSs may allow subscribers to avoid trading with specific counterparties. Additionally, order types and their characteristics can also vary significantly across NMS Stock ATSs, including with respect to how particular order types interact with other order types, which could affect execution priorities. Even though an NMS Stock ATS might not be privy to detailed information about the operations of other NMS Stock ATSs, it may be able to garner general information about the differential services offered by its competitors through websites and forums,[720] enabling it to modify its products and services to better compete within the market for NMS stock execution services. Thus, while an NMS Stock ATS may currently make available certain information about its products and services in an attempt to enable market participants to differentiate the ATS's products and services from those of its competitors, an NMS Stock ATS may not be incented to fully reveal how orders interact, match and execute on its platform, because revealing such information may adversely impact the ATS's position within the market by also informing its competitors.

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[720] Furthermore, a broker-dealer that operates an ATS may also be a subscriber to one or more ATSs that are owned or operated by other broker-dealers, and in this capacity, may obtain information about how such unaffiliated ATS(s) operate. For example, the broker-dealer operator of an ATS that is a subscriber to an unaffiliated ATS may obtain information about order types and priority rules of the unaffiliated ATS.

7. Competition Between Broker-Dealers That Operate NMS Stock ATSs and Broker-Dealers That Do Not Operate NMS Stock ATSs

Competition for NMS stock order flow not only exists between national securities exchanges and NMS Stock ATSs and among NMS Stock ATSs, but also exists between the broker-dealers that operate NMS Stock ATSs and those broker-dealer operators that do not operate NMS Stock ATSs. As discussed above, most ATSs that currently transact in NMS stocks are operated by multi-service broker-dealers that engage in significant brokerage and dealing activities in addition to their ATS operations. These multi-service broker-dealers operate one or more NMS Stock ATS as a complement to the broker-dealer's other service lines, often using the ATS(s) as an opportunity to execute customer orders "in house" before seeking contra-side interest at outside execution venues. They may also execute orders in NMS stocks internally on non-ATS trading centers by trading as principal against such orders, or crossing orders as agent in a riskless principal capacity, before routing the orders to an ATS that they operate.

The current competitive environment in which NMS Stock ATSs operate suggests that broker-dealers who operate their own NMS Stock ATS(s) may have certain trading advantages relative to broker-dealers that do not operate their own NMS Stock ATS. Broker-dealer owned NMS Stock ATSs may provide their business units or affiliates, that are also subscribers to the NMS Stock ATS, access to certain services, which may result in trading advantages, such as providing faster access to the ATS or priority in executions over other subscribers, such as broker-dealers that do not have their own ATS platform and may route their orders to these ATSs.

8. Effect of NMS Stock ATSs on the Current Market for NMS Stock Execution Services

As discussed above, the current market for NMS stock execution services consists of competition for order flow among national securities exchanges, NMS Stock ATSs, and broker-dealers who operate or control non-ATS trading centers.[721] This section specifically discusses the impact that this current market for NMS stock execution services has on trading costs to market participants; the process by which the price of NMS stocks are determined in the market ("price discovery"); and market efficiency.

a. Trading Costs

Since the adoption of Regulation ATS in 1998 and the implementation of Regulation NMS in 2005, trading costs have, on average, declined significantly in the U.S. Institutional trading costs – particularly for large capitalization stocks – are amongst the lowest in the world.[722] Since 1998, share and dollar trading volume, has generally increased, and with the exception of the financial crisis, bid-ask spreads (both quoted and effective spreads) have narrowed significantly.[723] Some research has suggested that these lower trading costs can, in part, be driven by the rising fragmentation of trading volume and competition for order flow, through the proliferation of new trading venues such as NMS Stock ATSs.[724]

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721 See supra Section XIII.A. See also supra note 123 (describing dark pools that are not ATSs) and note 385 (describing non-ATS trading centers).

722 See "View Point: US Equity Market Structure: An Investor Perspective," BlackRock, April 2014: https://www.blackrock.com/corporate/en-us/literature/whitepaper/viewpoint-us-equity-market-structure-april-2014.pdf; and Angel, supra note 713.

723 See BlackRock, supra note 722; and Angel, supra note 713.

724 See Foucault, Thierry and A.J. Menkveld, 2008, "Competition for Order Flow and Smart Order Routing Systems," Journal of Finance 63, 19–58; O'Hara, M. and M. Ye, 2011, "Is Market Fragmentation Harming Market Quality?" Journal of Financial Economics 100,

NMS Stock ATSs provide an environment whereby certain market participants can trade at low costs relative to national securities exchanges. For instance, if market participants submit to a national securities exchange a block order or a large "parent" order shredded into smaller "child" orders, they may experience "price impact" when others observe their trading and infer the presence of a large order. That is, the price at which these child orders execute may get subsequently worse from the time of the initial order submission to the time of the final execution of the order. Thus, when working these child orders, the order originator may seek to keep their executions "quiet" to minimize adverse price moves that may otherwise occur as other market participants infer that order originator is an institutional investor that is a large buyer or seller. As such, trading on NMS Stock ATSs may provide a useful tool whereby institutional investors may be able to reduce the extent to which their own trading signals additional trading intentions and obtain enhanced execution quality for their orders.

The current market for NMS stock execution services – which includes NMS Stock ATSs – provides value to market participants. If all NMS Stock ATSs were to cease operations, market participants may incur costs associated with not being able to find an adequate trading venue that offers benefits similar to those that NMS Stock ATSs provide. For example, certain market participants may be unable to find a trading center that adequately minimizes the revelation of their trading interest. Therefore, some of the trades by these market participants, which would have been executed on NMS Stock ATSs, may no longer be executed at all if NMS Stock ATSs cease operations. Even though NMS Stock ATSs provide value to some market participants by allowing them to trade on a venue that mitigates the signaling of information

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459–74; and Colliard, J.E. and Thierry Foucault (2012), "Trading Fees and Efficiency in Limit Order Markets," Review of Financial Studies 25, 3389–421.

regarding their trading interest while keeping their trading costs at a low level, NMS Stock ATSs are characterized by a lack of transparency regarding their operations and the activities of their broker-dealer operators and the broker-dealer operator's affiliates. Currently, disclosures on Form ATS are not required to be made public, and even when an NMS Stock ATS voluntarily discloses its Form ATS, the information provided tends to be limited. The Commission has also observed that NMS Stock ATSs vary with respect to the depth and extent of their disclosures on Form ATS, including basic aspects of their operations. This heterogeneity in terms of the level of disclosure pertaining to NMS Stock ATS operations has resulted in certain costs for market participants, in that currently a market participant has to expend some effort searching for a trading venue that would serve its investing or trading objectives. A by-product of these search costs for some market participants is uncertainty pertaining to how their orders will be handled. Because there is no current requirement for NMS Stock ATSs to disclose information about their operations to the public, some subscribers to NMS Stock ATSs – particularly subscribers to those NMS Stock ATSs that have not made their Form ATS public – may not fully know how their orders are handled. Furthermore, for a specific NMS Stock ATS, some subscribers may have been provided more information regarding how their orders will interact, match, and execute on the NMS Stock ATS, exacerbating this uncertainty.

b. Price Discovery

The current market for NMS stock execution services has resulted in the fragmentation of trading volume. While this fragmentation – which has in part been due to the rise in NMS Stock ATSs – has been a factor in currently providing low trading costs for market participants,[725] the

[725] See supra note 724.

contributions that this current market for NMS stock execution services provides in terms of price discovery has been mixed. Some academic studies imply that while national securities exchanges and NMS Stock ATSs are regulated differently, their coexistence in the current market has had a positive contribution to price discovery, as it has led to more aggressive competition among market participants in providing liquidity, which in turn has improved price discovery.[726] Other academic studies have suggested that because some NMS Stock ATSs are crossing networks and often derive their prices from national securities exchanges, price impact costs that result from trading on a national securities exchange harm prices on NMS Stock ATSs, resulting in less trading and harming price discovery.[727]

Some academic studies have also suggested that the coexistence of national securities exchanges and NMS Stock ATSs has led to market segmentation, i.e. to the extent that certain subscribers of NMS Stock ATSs have information regarding how orders will interact, match, and execute on an NMS Stock ATS, these subscribers may be able to make more informed decisions about where to route their orders, and, therefore, such subscribers may congregate and trade on either NMS Stock ATSs or national securities exchanges based on that information. These academic studies further suggest that this market segmentation, whereby certain subscribers of NMS Stock ATSs have information regarding how orders will interact, match and execute and,

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726 See Boulatov, Alex, and T.J. George, 2013, "Hidden and Displayed Liquidity in Securities Markets with Informed Liquidity Providers," Review of Financial Studies 26, 2095–2137.

727 See Ye, Mao, 2011, "A Glimpse into the Dark: Price Formation, Transaction Cost and Market Share of the Crossing Network," working paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1521494.

therefore, trade on NMS Stock ATSs or national securities exchanges, can improve price discovery.[728]

The theory that market segmentation of market participants leads to price discovery relies on the assumption that because trade executions on some NMS Stock ATSs are determined by matching orders, orders of informed market participants are more likely to cluster on one side of the market (either the buy-side or the sell-side).[729] For instance, if informed market participants believe that a security is undervalued, they will be more likely to submit a buy-order; and vice-versa if they believe a security is overvalued. This means that if these informed market participants trade on an NMS Stock ATS, their trading interest will likely cluster towards one side of the market and there will not be enough orders to take the opposite side of their trades. As a result, some orders will not be matched and there would be low rates of execution on NMS Stock ATSs. In contrast, orders by uninformed market participants are less likely to be correlated with one another because the reasons for their trading are somewhat idiosyncratic to the market participant.[730] These orders by uninformed market participants are, therefore, less likely to cluster on one side of the market, because trades by uninformed market participants are not grounded on fundamental information about the stock. As such, the orders from uniformed market participants will likely have higher rates of execution on NMS Stock ATSs relative to

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728 See Zhu, Haoxiang, 2014, "Do Dark Pools Harm Price Discovery?" Review of Financial Studies 27, 747–789. This academic study specifically examines dark pools.

729 See id.

730 Uninformed market participants trade for non-informational reasons. In some cases, they are termed "noise traders," since their trades are based on their beliefs and sentiments, and are not grounded on fundamental information. See Vishwanath, Ramanna. and Chandrasekhar Krishnamurti, 2009, "Investment Management: A Modern Guide to Security Analysis and Stock Selection," Springer Publishing.

rates of executions for informed participants.[731] Accordingly, this academic literature predicts that the set of market participants entering orders on national securities exchanges will contain a proportionately higher level of informed market participants.[732] This segmentation of market participants on NMS Stock ATSs and national securities exchanges potentially could result in informed market participants trading on national securities exchanges, and uninformed market participants trading on NMS Stock ATSs.[733] Because informed market participants have better knowledge about the value of a security than uninformed market participants, this segmentation can improve price discovery on national securities exchanges.[734]

Several academic studies suggest that the presence of NMS Stock ATSs in the current trading environment deteriorates price discovery[735] and liquidity.[736] When trading, informed

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731 See supra note 728.

732 See id.

733 It should be noted that this academic literature posits one theory regarding how the coexistence of national securities exchanges and NMS Stock ATSs results in segmented trading of informed and uninformed market participants. See supra note 728. Contrary to this theory regarding how market segmentation of national securities exchanges and NMS Stock ATSs can affect price discovery, a motivation for informed market participants to trade on NMS Stock ATSs is to minimize the price impact of large trades. Thus, it could be the case that the decision by informed market participants of where to trade is reduced to whether the value of minimizing the price impact of their trades outweighs the heightened execution risk (due to the difficulty in finding a counterparty to take the opposite side of the trade, perhaps because a market participant places a large order) they might incur if they trade on NMS Stock ATSs See supra note 727.

734 See Zhu, supra note 729; Comerton-Forde, Carole and T.J. Putnins, 2015, "Dark Trading and Price Discovery," working paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2183392. Both these studies specifically examine dark pools.

735 See Ye, Mao, 2011, "A Glimpse into the Dark: Price Formation, Transaction Cost and Market Share of the Crossing Network," working paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1521494; Degryse, Hans, Frank de Jong and Vincent van Kervel, 2015, "The Impact of Dark Trading and Visible

market participants often balance two types of costs, namely price impact costs and execution costs. On a national securities exchange, an informed market participant's order experiences lower execution risk, but because of price impact, each order is subsequently executed at a worse price.[737] On an NMS Stock ATS, price impact costs are smaller due to there being less informational dissemination than on national securities exchanges, however, the probability of execution decreases as order size increases, due to the increased difficulty in finding a counterparty to take the opposite side of a large trade.[738] Because trading on a national securities exchange generates price impact, the cost associated with this price impact also could affect a market participant's profit on trades executed on an NMS Stock ATS. The reason for this is that NMS Stock ATSs often match orders at prices derived from national securities exchanges, and if trading on these national securities exchanges generates worse prices due to price impact, this could therefore spill over and affect a market participant's profit on trades executed on the NMS Stock ATS. This spillover could result in informed market participants trading less aggressively, which could in turn reduce price discovery.[739] Finally, while low levels of trading on NMS Stock ATSs are not harmful, price discovery is harmed for high levels of trading on NMS Stock

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Fragmentation on Market Quality," Review of Finance 19, 1587-1622. Both these studies specifically examine dark pools.

736 See Zhu, supra note 729.

737 See Ye, supra note 735.

738 See Ye, supra note 735

739 See Ye, supra note 735(for theoretical work on this topic). See also Comerton-Forde and Putnins, supra note 734, for empirical work on this topic. Specifically, using Australian data, the latter paper finds that the migration of order flow into dark pools removes valuable information from the price formation process, and leads to increased adverse selection, larger bid-ask spreads (lower liquidity) and larger price impacts on the exchange (lower market quality). Both of these studies specifically examine dark pools.

ATSs (i.e., when trading on NMS Stock ATSs in a given NMS stock exceeds approximately 10% of dollar volume).[740] This implies that when most orders are filled on NMS Stock ATSs, market participants may withdraw displayed quotes because of the reduced likelihood of those orders being filled.[741]

Another element that may affect market quality is order internalization by broker-dealers. Academic literature has previously proposed theoretical models where broker-dealer operators have an incentive to internalize uninformed orders, by trading as principal against such orders or crossing orders as agent in a riskless principal capacity, before routing the orders to their respective ATSs.[742] The literature has also argued that internalization of order flow reduces market depth and price informativeness.[743] According to this literature, the internalization of order flow by broker-dealers, some of whom operate NMS Stock ATSs, is associated with wider spreads (quoted, effective, and realized), higher price impact per trade, and increased volatility of trades on the registered national securities exchanges, which translates into an increased cost for market participants, where market participants pay approximately $3.9 million more per security

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740 See also Comerton-Forde and Putnins, supra note 734.

741 See CFA Institute, 2012, "Dark Pools, Internalization, and Equity Market Quality," available at http://www.cfapubs.org/doi/pdf/10.2469/ccb.v2012.n5.1. This study specifically examines dark pools.

742 See Chordia, Tarun and Avanidhar Subrahmanyam, 1995, "Market making, the tick size, and payment-for-order flow: Theory and evidence," Journal of Business 68, 543–75; Easley, Kiefer and O'Hara, 1996, "Cream-skimming or profit-sharing? The curious role of purchased order flow," Journal of Finance 51, 811–33.

743 See Chakravarty, Sugato and Asani Sarkar, 2002, "A model of broker's trading, with applications to order flow internalization," Review of Financial Economics 11, 19–36.

per year.[744] In the current operational environment of NMS Stock ATSs, based on the Commission's experience, subscribers' orders or other trading interest could be removed from the broker-dealer's NMS Stock ATS and routed to, among other destinations, another trading center operated by the broker-dealer operator for internalization. Thus, the fact that some broker-dealers operate their own NMS Stock ATS, and yet internalize some order flow rather than executing it on their own NMS Stock ATS, may have a deleterious effect on market quality.

c. Market Efficiency

Currently, the coexistence of national securities exchanges and NMS Stock ATSs seems to have beneficial effects on market efficiency. One academic study suggests that while not all trades that execute on NMS Stock ATSs are large block trades, those that are have been seen to be beneficial to market efficiency.[745] If NMS Stock ATSs were not a viable trading venue for market participants, market participants might not execute large orders at all because of the price impact costs of executing on a national securities exchange. Therefore, the ability for market participants to execute large trades on NMS Stock ATSs generates liquidity. The same study also suggests that small trades that execute on NMS Stock ATSs are beneficial in that they also generate market efficiency.[746]

C. Economic Effects and Effects on Efficiency, Competition, and Capital Formation

The Commission has considered the economic effects of the proposed amendments to Rule 3a1-1(a) and Regulation ATS. This section provides an overview of the broad economic

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744 See Weaver, Daniel G., 2014, "The Trade-At Rule, Internalization, and Market Quality," working paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1846470.

745 See Comerton-Forde and Putnins, supra note 734.

746 See id.

considerations relevant to the proposed amendments to Rule 3a1-1(a) and Regulation ATS, and the economic effects, including the costs, benefits, and the effects on efficiency, competition, and capital formation. Additional economic effects, including benefits and costs related to specific requirements of the proposed amendments to Rule 3a1-1(a) and Regulation ATS, are also discussed.

The proposed amendments to Rule 3a1-1(a) and Regulation ATS[747] are designed to generate greater transparency about the operations of NMS Stock ATSs and the activities of their broker-dealer operators and their affiliates. By requiring NMS Stock ATSs to provide detailed, public disclosures about their operations and the activities of their broker-dealer operators and their broker-dealer operators' affiliates, the Commission preliminarily believes that the proposal would reduce the discrepancy in information that different market participants receive about NMS Stock ATS operations and provide market participants – particularly those that have access to less information about NMS Stock ATS operations – with more information about the means by which orders and trading interest interact, match, and execute on NMS Stock ATSs. The Commission preliminarily believes that the proposal would help market participants make better-informed decisions about where to route their orders in order to achieve their trading or investment objectives, improve the efficiency of capital allocation, and enhance execution quality.

The Commission further understands that the proposed amendments to Regulation ATS may generate some uncertainty for NMS Stock ATSs in that, under the proposal, the Commission would declare a Form ATS-N effective or ineffective (which is not currently the

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[747] See supra Sections IV.

case with respect to Form ATS), and this may act as a potential deterrent for ATSs wishing to transact NMS stocks, or legacy NMS Stock ATSs that would be required to file Form ATS-N. Moreover, the proposed amendments to Rule 3a1-1(a) and Regulation ATS could be costly, because NMS Stock ATSs would have to disclose detailed information about their operations and the activities of their broker-dealer operators and their affiliates. Together, these could harm the competitive dynamics in the market for NMS stock execution services, which includes competition between national securities exchanges and NMS Stock ATSs, among NMS Stock ATSs themselves, and between broker-dealers that operate NMS Stock ATSs and those that do not.[748] Increased costs associated with disclosure requirements for NMS Stock ATSs could result in some NMS Stock ATSs exiting the market or could create a disincentive for potential NMS Stock ATSs to enter the market. However, in spite of these costs, and as discussed in more detail below, the Commission preliminarily believes that the NMS Stock ATSs that remain in the market may propagate greater interaction between buyers and sellers who trade on these venues, fostering not only trading between one and another, but also facilitating the price discovery process and capital formation. The consistent set of information that is proposed to be disclosed in Form ATS-N may impact how market participants react in terms of their trading, which may improve market efficiency.[749]

Moreover, the Commission notes that increased transparency regarding the operations of NMS Stock ATSs may impact competition between broker-dealers that operate NMS Stock ATSs and broker-dealers who trade NMS stocks but do not operate an NMS Stock ATS.

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[748] See infra Section XIII.C.2.

[749] See id.

Because broker-dealers who transact in NMS stocks but do not operate ATSs are not subject to the proposed operational transparency requirements, these broker-dealers may be at a competitive advantage and attract and internalize order flow that would otherwise be entered and executed on NMS Stock ATSs. Furthermore, greater operational transparency of NMS Stock ATSs could also impact competition between NMS Stock ATSs and national securities exchanges, resulting in a larger amount of order flow being executed on national securities exchanges.

Further, the Commission preliminarily believes that the proposed amendments to Rule 301(b)(10) and 303(a)(1) that would require ATSs to establish and preserve written safeguards and written procedures to protect subscribers' confidential trading information, as well as the oversight procedures to ensure such safeguards and procedures are followed should strengthen the effectiveness of those safeguards and procedures and better enable an NMS Stock ATS to protect confidential subscriber trading information and implement and monitor the adequacy of, and the ATS's compliance with, its safeguards and procedures.[750] The Commission also preliminarily believes that requiring ATSs to adopt written safeguards and written procedures will benefit the Commission by helping it better understand, monitor, and evaluate how each ATS protects subscribers' confidential trading information from unauthorized disclosure and access.[751] The Commission also expects that this proposed requirement will help oversight by the SRO of which the NMS Stock ATS's broker-dealer operator is a member.

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750 See supra Section IX.

751 See id.

The Commission has attempted, where possible, to quantify the benefits and costs anticipated by the proposed amendments to Rule 3a1-1(a) and Regulation ATS. The Commission notes, however, that many of the costs and benefits of the proposed amendments are difficult to quantify with any degree of certainty. For instance, it is unclear how many NMS Stock ATSs might cease operations (or, less likely, switch to trading in a different class of securities) if they are required to publicly disclose information about their operations on proposed Form ATS-N. It is also unclear how many NMS Stock ATSs may decide to register as national securities exchanges, as some ECNs have in previous years, as a result of the proposed amendments to Rule 3a1-1(a) and Regulation ATS.[752] Therefore, quantifying the effects that the expanded disclosure requirements would have on market liquidity and capital formation is difficult. As the decision for an NMS Stock ATS to continue operating or to exit the market depends on numerous factors, one of which being the extent to which its competitive advantage is driven by its matching methodology or other operational characteristics, the Commission is unable to fully determine the extent to which the proposal would affect this decision. Furthermore, the decision to exit is idiosyncratic to the NMS Stock ATS and the Commission cannot ascertain whether large or small ATSs will be more prone to leaving the market. Additionally, the Commission cannot estimate the fraction of order flow that would be routed to other NMS Stock ATSs or national securities exchanges if some ATSs ceased operations. In light of all of these limitations on available information, the Commission is unable to make reasonable assumptions regarding the number of NMS Stock ATSs that may cease operations and exit the market; the number of NMS Stock ATSs that may register as national securities

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752 See supra note 679 and accompanying text.

exchanges; or the fraction of order flow that would be routed to other NMS Stock ATSs or national securities exchanges if some ATSs ceased operations. Given that the Commission is unable to make these assumptions, it is unable to quantify the effect of the proposed amendments to Rule 3a1-1(a) and Regulation ATS on trading volume on the NMS Stock ATS as well as quantify the effects on price discovery and market efficiency.

1. Costs and Benefits of Proposed Enhanced Filing Requirements

As discussed above, the Commission is proposing to amend Rule 3a1-1(a) and Regulation ATS to require ATSs that effect transactions in NMS stocks comply with the requirements of proposed Rule 304 in order to qualify for exemption from the definition of "exchange."[753] The proposed amendments would require an NMS Stock ATS to file reports and amendments pursuant to proposed Rule 304, which includes the requirement to file proposed Form ATS-N, in lieu of current Form ATS, to disclose information about its operations and the activities of its broker-dealer operator and its affiliates.

As noted above, an NMS Stock ATS may provide some subscribers access to certain trading information or services that it does not provide to others.[754] For example, an NMS Stock ATS may offer certain order types or special fees or rebates to particular subscribers, which might result in those subscribers obtaining an advantage when trading on the ATS. The proposed amendments would require NMS Stock ATSs to describe any such differentiation of services or information among subscribers, which would include certain disclosures related to the operations of their broker-dealer operators. The Commission preliminarily believes that

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[753] See supra Section IV (discussing the proposed amendments). See also proposed Rules 3a1-1(a)(2) and (3), 300, 301, and 304.

[754] See Section VII.B.VII.10.

those disclosures would help market participants assess potential conflicts of interest that may adversely impact their trading on the NMS Stock ATS.

Proposed Rule 304 would also provide a process by which the Commission would declare Form ATS-N filings effective or ineffective, and a process by which the Commission would review Form ATS-N Amendments and declare ineffective a Form ATS-N Amendment if it finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors. The Commission is also proposing a process by which the Commission could suspend, limit, or revoke an NMS Stock ATS's exemption from the definition of an "exchange" under Rule 3a1-1(a)(2).[755] An NMS Stock ATS would not qualify for the exemption from the definition of "exchange" unless the NMS Stock ATS files Form ATS-N with the Commission and the Commission declares the Form ATS-N effective.[756]

a. Better Regulatory Oversight and Increased Investor Protection

The Commission preliminarily believes that the proposed amendments to Rule 3a1-1(a) and Regulation ATS would result in better regulatory oversight of NMS Stock ATSs and increased investor protection. Form ATS discloses only limited aspects of an ATS's operations as compared to the information that would be provided on Form ATS-N by NMS Stock ATSs.

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755 Pursuant to proposed Rule 304(b)(2), the Commission would publicly post on its website each: order of effectiveness of a Form ATS-N; order of ineffectiveness of a Form ATS-N; effective Form ATS-N; filed Form ATS-N Amendment,; order of ineffectiveness of a Form ATS-N Amendment; notice of cessation; and order suspending, limiting, or revoking the exemption from the definition of an "exchange" pursuant to Rule 3a1-1(a)(2). Proposed Rule 304(b)(3) would also require an NMS Stock ATS that has a website to post on its website a direct URL hyperlink to the Commission's website that contains the documents enumerated in proposed Rule 304(b)(2). See supra, Section IV.D.

756 See supra Section IV.C.5.

Form ATS requires, for example, that an ATS provide information about: classes of subscribers and differences in access to the services offered by the ATS to different groups or classes of subscribers; securities the ATS expects to trade; any entity other than the ATS involved in its operations; the manner in which the system operates; how subscribers access the trading system; procedures governing order entry and execution; and trade reporting, clearance and settlement of trades on the ATS. On the other hand, Form ATS-N would require an NMS Stock ATS to disclose information about the manner of operations of the ATS, including: subscribers; hours of operation; types of orders; connectivity, order entry, and co-location procedures; segmentation of order flow and notice about segmentation; display of order and other trading interest; trading services, including matching methodologies, order interaction rules, and order handling and execution procedures; procedures governing suspension of trading or trading during a system disruption or malfunction; opening, closing, and after hours procedures; outbound routing services; fees; market data; trade reporting; clearance and settlement; order display and execution access (if applicable); fair access (if applicable); and market quality statistics published or provided to one or more subscribers.

In addition, current Form ATS does not require an ATS to disclose information about the activities of the broker-dealer operator and the broker-dealer operator's affiliates in connection with the ATS whereas the enhanced disclosure requirements under proposed Form ATS-N would require an NMS Stock ATS to disclose information about the activities of its broker-dealer operator and the broker-dealer operator's affiliates that may give rise to potential conflicts of interest, including: their operation of non-ATS trading centers and other NMS Stock ATSs; products and services offered to subscribers; arrangements with unaffiliated trading centers; trading activities on the NMS Stock ATS; smart order router (or similar functionality) and

algorithms used to send or receive orders or other trading interest to or from the ATS; personnel and third parties used to operate the NMS Stock ATS; differences in the availability of services, functionalities, or procedures; and safeguards and procedures to protect subscribers' confidential trading information. Accordingly, the Commission preliminarily believes that the enhanced disclosure requirements under proposed Form ATS-N would result in better regulatory oversight of NMS Stock ATSs and increased investor protection by providing the Commission, relevant SROs, and market participants with significantly more information with which to analyze and evaluate how orders are handled and executed on NMS Stock ATSs.

The Commission is proposing that Form ATS-N and Form ATS-N Amendments be filed electronically in a text-searchable format. The Commission preliminarily believes that requiring Form ATS-N and Form ATS-N Amendments to be filed in a text-searchable format, coupled with the enhanced disclosure requirements under the proposal, will facilitate a more effective and thorough review and analysis of NMS Stock ATSs by regulators, which should yield greater insights into the operations of NMS Stock ATSs and the activities of their broker-dealer operators and their affiliates. For example, under the proposal, examiners at the Commission and the SRO of which an NMS Stock ATS is a member would be able to run automated processes to review information disclosed on filed Forms ATS-N and Form ATS-N Amendments in order to select NMS Stock ATSs for examination based on certain criteria for the examination. Additionally, examiners would be better able to assemble and review a larger pool of data regarding NMS Stock ATSs to better inform their examinations. Both such benefits could increase investor protection by improving the effectiveness and efficiency of the examination process.

Furthermore, the Commission preliminarily believes that the proposed process of declaring a Form ATS-N effective or ineffective and the process to review and declare, if necessary, Form ATS-N Amendments ineffective would improve the quality of the information regulators receive from NMS Stock ATSs and increase the protection of investors. The proposed effectiveness process for a Form ATS-N is designed to provide an opportunity for the Commission to review Form ATS-N filings before an NMS Stock ATS commences operations (in the case of new NMS Stock ATSs), or while it continues operations under its Form ATS filing (in the case of legacy NMS Stock ATSs). The Commission preliminarily believes that the proposed process would allow the Commission to evaluate the adequacy of NMS Stock ATSs' disclosures for compliance with the Form ATS-N requirements before declaring the Form ATS-N effective or ineffective. As a result, once the Commission has made an effectiveness or ineffectiveness determination, only an NMS Stock ATS for which a Form ATS-N has been declared effective would be allowed to transact in NMS stocks without registering as a national securities exchange.

The Commission would make Form ATS-N Amendments public upon filing. As a result, a publicly disclosed Form ATS-N Amendment could contain potentially inaccurate or incomplete disclosures at the time it is posted on the Commission's webpage. Prior to the conclusion of its review of a Form ATS-N Amendment, the Commission would make the public aware of the fact that, though the amendment is posted on the Commission's website, it is still pending Commission review and could still be declared ineffective. The Commission preliminarily believes that this process would provide transparency to market participants about the operations of these ATSs and also provide market participants with information about forthcoming changes to the NMS Stock ATS while the Commission's review is pending.

The Commission preliminarily believes that the proposed review and public disclosure process for a Form ATS-N and Form ATS-N Amendments would allow the Commission to better protect investors from potentially inaccurate or incomplete disclosures that could misinform market participants about the operations of an NMS Stock ATS or the activities of its broker-dealer operator, including how their orders may be handled and executed, and thereby impact market participants' decisions about where they should route their orders.

If the Commission declares ineffective a Form ATS-N or Form ATS-N Amendment of an entity, that entity would have the opportunity to address deficiencies in the previously filed form by filing a new Form ATS-N or Form ATS-N Amendment. However, the Commission recognizes that an ineffectiveness declaration could impose costs on that entity – such as costs from having to cease operations, roll back a change in operations, or delay the start of operations – and could impose costs on the overall market for NMS stock execution services resulting from a potential reduction in competition or the removal of a sole provider of a niche service within the market. Furthermore, the removal of a sole provider of a niche service from the market could also impose costs on individual market participants, as they may have to subscribe to another NMS Stock ATS, or they may have to incur the cost of making changes to their SOR (or similar functionality) or algorithm in order to submit their orders for execution. However, NMS Stock ATSs and market participants would not incur these costs unless the Commission declares a Form ATS-N or a Form ATS-N Amendment ineffective. The Commission preliminarily believes that NMS Stock ATSs would be incentivized to comply with the requirements of Form ATS-N, as well as federal securities laws, including the other requirements of Regulation ATS, to avoid an ineffectiveness declaration, which produces benefits to the market. Therefore, the

Commission preliminarily believes that there would be no undue burden imposed in connection with resubmitting Form ATS-N for these entities or from an ineffective declaration in general.

b. Implementation and Ongoing Costs

The Commission understands that both new and existing NMS Stock ATSs would incur implementation costs in order to comply with the proposed amendments to Regulation ATS. Regardless of their size and transaction volume, all NMS Stock ATSs would need to ensure that their disclosures meet the requirements of proposed Form ATS-N and that they correctly file their Form ATS-N. NMS Stock ATSs may develop internal processes to ensure correct and complete reporting on Form ATS-N, which can be viewed as a fixed setup cost, which NMS Stock ATSs may have to incur, regardless of the amount of trading activity that takes place on them. As a result, these implementation costs may fall disproportionately on lower-dollar volume NMS Stock ATSs (as opposed to ATSs transacting greater dollar volume), since all ATSs would likely incur these fixed implementation costs. However, smaller NMS Stock ATSs that are not operated by multi-service broker-dealer operators and do not engage in other brokerage or dealing activities in addition to their NMS Stock ATSs would likely incur lower implementation costs because certain sections of proposed Form ATS-N (such as several items of Part III) would not be applicable to these NMS Stock ATSs.

Relative to the baseline, the proposed amendments to Regulation ATS would also impose implementation costs for all NMS Stock ATSs, including legacy ATSs, in that they would require NMS Stock ATSs to adhere to heightened disclosure and reporting requirements regarding their operations. Existing NMS Stock ATSs should already comply with the current requirements of Regulation ATS. Therefore, the compliance costs of the proposed amendments should be incremental relative to the costs associated with the existing requirements.

Specifically, the Commission preliminarily believes that the incremental costs would consist largely of providing new disclosures and updating records and retention policies necessary to comply with the proposed amendments. Based on the analysis for purposes of the PRA, the Commission preliminarily estimates that the proposed amendments to Regulation ATS relating to Rules 301(b)(2)(viii) and 304 of Regulation ATS, including Proposed Form ATS-N, could result in a one-time burden of 141.3 hours for each NMS Stock ATS,[757] which would result in an estimated one-time paperwork compliance cost to an NMS Stock ATS of approximately $42,838.50.[758] This would result in an aggregate estimated initial hour burden for all NMS Stock ATSs to complete Form ATS-N and comply with proposed Rules 301(b)(2)(viii) and 304 of Regulation ATS of 6,499.8 hours at an estimated cost of $1,970,571.00.[759]

Furthermore, the Commission preliminarily believes that there would be implementation costs for ATSs that have not reduced to writing their safeguards and procedures to protect subscribers' confidential trading information and their oversight procedures to ensure that those

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757 See supra note 638 and accompanying text.

758 (Attorney at $380 x 54.8 hours) + (Compliance Manager at $283 x 43.5 hours) + (Senior Systems Analyst at $260 x 34.5 hours) + (Senior Marketing Manager at $254 x 1 hour) + (Compliance Clerk at $64 x 7.5 hours) = $42,838.50. This preliminary compliance cost estimate for a Form ATS-N includes the estimated costs associated with completing Part III, Item 2 and Part IV, Items 14 and 15 of proposed Form ATS-N, but as explained above, the Commission preliminarily believes that the majority of NMS Stock ATSs would not be required to complete those items of the proposed form. See supra Section XII.D.2.b.

759 141.3 burden hours x 46 NMS Stock ATSs = 6,499.8 burden hours. $42,838.50 x 46 NMS Stock ATSs = $1,970,571.00. This preliminary aggregate compliance cost estimate assumes that all NMS Stock ATSs would be required to complete Part III, Item 2 and Part IV, Items 14 and 15 of proposed Form ATS-N. However, as noted above, the Commission preliminarily estimates that only 6 NMS Stock ATSs would be required to complete Part III, Item 2, see supra note 604, only 1 NMS Stock ATS would be required to complete Part IV, Item 14, see supra note 636 and accompanying text, and only 2 NMS Stock ATSs would be required to complete Part IV, Item 15, see id.

safeguards and procedures are followed, which are required under Rule 301(b)(10) of Regulation ATS.[760] Based on the analysis for purposes of the PRA, the Commission preliminarily estimates that, in order to comply with the proposed amendments to Rules 301(b)(10) and 303(a)(1)(v) of Regulation ATS,[761] it could take approximately 15 ATSs an estimated one-time burden of up to 10 hours each,[762] resulting in an estimated one-time paperwork cost for each of those 15 ATSs of $3,484.00 and an aggregate estimated hour burden of 150 hours at an estimated cost of $52,260.00.[763]

In addition to the implementation costs mentioned above, there are also expected ongoing costs for NMS Stock ATSs to comply with the proposed amendments to Rule 3a1-1(a) and Regulation ATS. For instance, NMS Stock ATSs would incur ongoing costs associated with amending their Forms ATS-N prior to material changes in their operations, or to correct any information that has become inaccurate. Regardless of the reason for filing a Form ATS-N Amendment, the Commission preliminarily estimates for the purposes of the PRA that it could take an NMS Stock ATS approximately 28.5 hours annually[764] to prepare and file its Form ATS-N Amendments at an estimated annual cost of $8,352.00.[765] This would result in an estimated

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760 See 17 CFR 242.301(b)(10).

761 See supra Section IX.

762 See supra notes 578-580.

763 (Attorney at $380 x 9 hours) + (Compliance Clerk at $64 x 1 hour) = $3,484.00. $3,484.00 x 15 ATSs = $52,260.00.

764 See supra notes 639-646 and accompanying text. As explained above, the Commission preliminarily estimates that each NMS Stock ATS would file 3 Form ATS-N Amendments per year, and the hourly burden per amendment would be 9.5 hours.

765 (Attorney at $380 x 16.5 hours) + (Compliance Manager at $283 x 6 hours) + (Compliance Clerk at $64 x 6 hours) = $8,352.00.

aggregate ongoing hour burden for all NMS Stock ATSs to amend their Forms ATS-N and comply with proposed Rules 301(b)(2)(viii) and 304 of Regulation ATS of 1,311 hours at an estimated cost of $384,192.00 annually.[766]

Furthermore, the proposed amendments to Rules 301(b)(10) and 303(a)(1)(v) relating to written safeguards and written procedures to protect subscribers' confidential trading information would impose ongoing costs for all ATSs. For the purposes of the PRA, the Commission preliminarily estimates it could take approximately 4 hours annually for each ATS to update and maintain these safeguards and procedures,[767] resulting in an estimated annual paperwork cost for each ATS of $888.00.[768] This would result in an estimated aggregate ongoing hour burden for all ATSs to maintain and update their safeguards and procedures pursuant to proposed Rules 301(b)(10) and 303(a)(1)(v) of 336 hours at an estimated cost of $74,592.00 annually.[769]

Some existing NMS Stock ATSs that also transact in non-NMS stocks might incur additional costs due to the proposed amendments. As discussed above,[770] pursuant to the proposed amendments to Regulation ATS, an ATS that effects transactions in both NMS stocks and non-NMS stocks would be subject to the requirements of Rule 304 with respect to its NMS stock trading operations and Rule 301(b)(2) with respect to its non-NMS stock trading operations. Accordingly, NMS Stock ATSs that also transact in non-NMS stocks would incur

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766 28.5 hours x 46 NMS Stock ATSs = 1,311 hours. $8,352.00 x 46 NMS Stock ATSs = $384,192.00.

767 See supra notes 581-582 and accompanying text.

768 (Attorney at $380 x 2 hours) + (Compliance Clerk at $64 x 2 hours) = $888.00 annual paperwork cost per ATS.

769 4 annual burden hours x 84 ATSs = 336 annual burden hours. $888.00 annual paperwork cost per ATS x 84 NMS Stock ATSs = $74,592.00 aggregate annual paperwork cost.

770 See supra Section IV.C.2.

additional implementation costs when compared to ATSs that only trade NMS stocks because the former group would be required to file both Form ATS-N and a revised Form ATS that removes discussion of those aspects of the ATS related to the trading of NMS stocks. Those NMS Stock ATSs would also be required to file a pair of Forms ATS-R four times annually. For the purposes of the PRA, the Commission preliminarily estimates that the aggregate initial burden for those ATSs to file a Form ATS-N in regard to their NMS stock trading activity and a current Form ATS in regard to their non-NMS stock trading activity would be 1,774.3 hours[771] at an aggregate estimated cost of $530,491.50.[772] The Commission also preliminarily estimates that that the aggregate annual burden to file separate Forms ATS-R for those ATSs that effect transactions in both NMS stocks and non-NMS stocks would be 198 hours[773] at an aggregate estimated cost of $1,394.[774] Furthermore, the Commission preliminarily estimates that these ATSs that facilitate transactions in both NMS stocks and non-NMS stocks would incur an additional estimated recordkeeping burden of 3 hours annually per ATS, resulting in an

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771 See supra notes 654-658 and accompanying text.

772 ((Attorney for Form ATS at $380 x 13 hours) + (Attorney for Form ATS-N at $380 x 54.8 hours) + (Compliance Manager for Form ATS-N at $283 x 43.5 hours) + (Senior Systems Analyst for Form ATS-N at $260 x 34.5 hours) + (Senior Marketing Manager for Form ATS-N at $254 x 1 hour) + (Compliance Clerk for Form ATS at $64 x 7 hours) + (Compliance Clerk for Form ATS-N at $64 x 7.5 hours)) x 11 ATSs = $530,491.50 This preliminary aggregate compliance cost estimate includes the estimated costs associated with completing Part III, Item 2 and Part IV, Items 14 and 15 of proposed Form ATS-N, but as explained above, the Commission preliminarily believes that the majority of NMS Stock ATSs would not be required to complete those items of the proposed form. See supra Section XII.D.2.b.

773 See supra notes 658 and accompanying text.

774 (Attorney at $380 x 3.5 hours) + (Compliance Clerk at $64 x 1 hours) = $1,394.

estimated cost of $312.60 per ATS[775] and an aggregate estimated hour burden of 33 hours at an estimated cost of $3,438.60, due to the proposed amendments to Rule 303(a)(2)(ii).[776]

Currently, ATSs that transact in NMS stocks do not have the ability to access and file the Form ATS electronically. The Commission proposes that proposed Form ATS-N would be filed electronically in a structured format and would require an electronic signature. These proposed amendments to Regulation ATS would require that every NMS Stock ATS have the ability to file forms electronically with an electronic signature. The Commission's proposal contemplates the use of an online filing system, the EFFS. Based on the widespread use and availability of the Internet, the Commission preliminarily believes that filing Form ATS-N in an electronic format would be less burdensome and a more efficient filing process than the current paper process for NMS Stock ATSs and the Commission, as it is likely to be less expensive and cumbersome than mailing and filing paper forms to the Commission.

To access EFFS, an NMS Stock ATS would need to submit to the Commission an EAUA to register each individual at the NMS Stock ATS who will access the EFFS system on behalf of the NMS Stock ATS. The Commission is including in its estimates the burden for completing the EAUA for each individual at an NMS Stock ATS that will request access to EFFS.[777] For the purposes of the PRA, the Commission preliminarily estimates that initially, on average, two

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775 At an average cost per burden hour of $104.20, see Rule 303 PRA Update, supra note 575, 78 FR 43943, the resultant total related cost of compliance for each ATS would be $312.60 ((3 burden hours) x $104.20 /hour).

776 3 hours x 11 ATSs = 33 burden hours. $312.60 x 11 ATSs = $3,438.60. See supra Section XII.D.2.b.vi.

777 For the purpose of completeness, the Commission has also included the initial estimated burden and costs related to completing the EAUA in its burden and cost estimates for the initial ATS-N filings by NMS Stock ATSs. See supra note 638.

individuals at each NMS Stock ATS will request access to EFFS through the EAUA, and each EAUA would require 0.15 hours to complete and submit.[778] Therefore, each NMS Stock ATS would require 0.3 hours to complete the requisite EAUAs[779] at a cost of $114.00,[780] and the aggregate initial burden would be approximately 13.8 hours for all NMS Stock ATSs[781] at a cost of $5,244.00.[782] The Commission also preliminarily estimates that annually, on average, one individual at each NMS Stock ATS will request access to EFFS through the EAUA.[783] Therefore, the ongoing burden to complete the EAUA would be 0.15 hours annually for each NMS Stock ATS[784] at a cost of $57.00,[785] and the aggregate ongoing burden would be approximately 6.9 hours for all NMS Stock ATSs[786] at a cost of $2,622.00.[787]

In addition, the Commission preliminarily estimates that each NMS Stock ATS will designate two individuals to sign Form ATS-N each year. An individual signing a Form ATS-N

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778 See supra note 660 and accompanying text.

779 0.15 hours per EAUA x 2 individuals = 0.3 burden hours per NMS Stock ATS. These preliminary estimates are based on the Commission and its staff's experience with EFFS and EAUAs pursuant to Rule 19b-4 under the Exchange Act. The 0.3 hours represents the time spent by two attorneys. The Commission believes it is appropriate to estimate that, on average, each NMS Stock ATS will submit two EAUAs initially.

780 Attorney at $380 x 0.3 hours per EAUA = $114.00.

781 0.30 hours per EAUA x 46 NMS Stock ATSs = 13.8 burden hours.

782 $114 cost per NMS Stock ATS x 46 NMS Stock ATSs = $5,244.00.

783 The Commission estimates that annually, on average, one individual at each NMS Stock ATS will request access to EFFS through EAUA to account for the possibility that an individual who previously had access to EFFS may no longer be designated as needing such access.

784 0.15 hours per EAUA x 1 individual = 0.15 hours.

785 Attorney at $380 x 0.15 hours per EAUA = $57.00.

786 0.15 hours x 46 NMS Stock ATSs = 6.9 hours.

787 $57 cost per NMS Stock ATS x 46 NMS Stock ATSs = $2,622.00.

must obtain a digital ID, at the cost of approximately $25.00 each year. Therefore, each NMS Stock ATS would require approximately $50.00 annually to obtain digital IDs for the individuals with access to EFFS for purposes of signing Form ATS-N,[788] and the aggregate initial burden would be approximately $2,300.00 for all NMS Stock ATSs.[789]

The Commission also preliminarily estimates that NMS Stock ATSs would incur a one-time cost to make public via posting on their websites a direct URL hyperlink to the Commission's website that contains their Form ATS-N filings.[790] For the purposes of the PRA, the Commission preliminarily estimates that this initial, one-time burden would be approximately 2 hours per NMS Stock ATS at an estimated cost of $520.00,[791] and the aggregate estimated burden for all NMS Stock ATSs would be approximately 92 hours[792] at an estimated cost of $23,920.00.[793]

2. Costs and Benefits of Public Disclosures of Proposed Form ATS-N

The Commission is proposing Rule 304(b) to mandate greater public disclosure of NMS Stock ATS operations by making Form ATS-N and Form ATS-N Amendments publicly available on the Commission's website, requiring each NMS Stock ATS that has a website to post a direct URL hyperlink to the Commission's website that contains the documents enumerated in proposed Rule 304(b)(2), and providing for the posting of Commission orders

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788 $25 per digital ID x 2 individuals = $50.00 per NMS Stock ATS.

789 $50 cost per NMS Stock ATS x 46 NMS Stock ATSs = $2,300.

790 See supra Section XII.D.2.b.v.

791 Senior Systems Analyst at $260 x 2 hours = $520.00.

792 2 hours per NMS Stock ATS x 46 NMS Stock ATSs = 92 burden hours.

793 $520 per NMS Stock ATS x 46 NMS Stock ATSs = $23,920.00.

related to the effectiveness of Form ATS-N on the Commission's website.[794] The Commission's proposal to require such public disclosure is designed, in part, to increase the operational transparency requirements of NMS Stock ATSs in order to bring those requirements more in line with the operational transparency requirements of national securities exchanges.[795] The Commission preliminarily believes the proposal should assist market participants in evaluating and choosing the NMS Stock ATSs to which they may route orders or become a subscriber due to the proposed enhanced disclosure requirements.

As mentioned above, the proposed amendments to Regulation ATS would make Form ATS-N publicly available, thereby improving the information available to market participants and making that information consistent. The Commission is proposing to amend Regulation ATS to require NMS Stock ATSs to file proposed Form ATS-N in lieu of Form ATS.[796] Furthermore, the Commission is proposing to require NMS Stock ATSs to disclose on Form ATS-N detailed information about the activities of the broker-dealer operator of the NMS Stock ATS and the broker-dealer operator's affiliates, including: the operation of non-ATS trading centers and other NMS Stock ATSs; products and services offered to subscribers; arrangements with unaffiliated trading centers; trading activities on the NMS Stock ATS by the broker-dealer operator or any of its affiliates; a SOR(s) (or similar functionality) or algorithm(s) used to send or receive orders or other trading interest to or from the ATS; personnel and third parties used to operate the NMS Stock ATS; differences in the availability of services, functionalities, or

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794 See supra Section IV.D.

795 See id.

796 As discussed above, to the extent an ATS trades both NMS stocks and non-NMS stocks, it would be required to file both a Form ATS and a Form ATS-N.

procedures between the broker-dealer operator or its affiliates and subscribers to the NMS Stock ATS; and safeguards and procedures to protect subscribers' confidential trading information. Proposed Form ATS-N would also require NMS Stock ATSs to provide detailed information about the manner of operations of the ATS, including: subscribers; hours of operation; types of orders; connectivity, order entry, and co-location procedures; segmentation of order flow and notice about segmentation; display of order and other trading interest; trading services, including matching methodologies, order interaction rules, and order handling and execution procedures; procedures governing suspension of trading and trading during a system disruption or malfunction; opening, closing, and after-hours procedures; outbound routing services; market data; fees; trade reporting; clearance and settlement; order display and execution access (if applicable); fair access (if applicable); and market quality statistics published or provided to one or more subscribers. The Commission is proposing to make certain Form ATS-N filings available to the public on the Commission's website and to require an NMS Stock ATS that has a website to post on the NMS Stock ATS's website a direct URL hyperlink to the Commission's website that contains the documents enumerated in proposed Rule 304(b)(2).

Despite NMS Stock ATSs' increasing operational complexities and importance as a source of liquidity for NMS stocks, the Commission preliminarily believes that many market participants have limited information about NMS Stock ATSs' order handling and execution practices. As noted above, while the current disclosures on Form ATS are "deemed confidential when filed," some ATSs voluntarily disclose their Form ATS filings.[797] Accordingly, there is disparate publicly available information regarding the current operations of NMS Stock ATSs.

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[797] See supra note 155-156.

Furthermore, even if an NMS Stock ATS publicly discloses its Form ATS, some subscribers of that ATS may be privy to more detailed information about how their orders are executed, routed and/or prioritized than other subscribers. Accordingly, the Commission preliminarily believes that, often, some subscribers are able to obtain a more complete picture of the operations of an NMS Stock ATS than other subscribers, and as a result, the latter group of subscribers may not be selecting the venue that most suits their investing or trading objectives. In addition, based on Commission experience, the confidentiality of Form ATS has not always resulted in NMS Stock ATSs disclosing significant details regarding their operations, services, and functions. Therefore, the status quo, as discussed above in Section XIII.B, is characterized by variable levels of public and confidential disclosure by NMS Stock ATSs, which makes it more difficult for both market participants to evaluate NMS Stock ATSs as potential trading venues and regulators to oversee NMS Stock ATSs.

a. Effects on Market Participants' Trading Decisions

The Commission preliminarily believes that the public disclosure of Form ATS-N would produce economic benefits for market participants. Specifically, the Commission preliminarily believes that requiring detailed, public disclosures about the operations of NMS Stock ATSs would, among other things, better standardize the type of information market participants receive about those operations. As a result, search costs for market participants would be lower relative to the baseline, as homogenous disclosure requirements for all NMS Stock ATSs as part of the proposed amendments to Regulation ATS should facilitate market participants' comparison of NMS Stock ATSs when deciding which venue most suits their trading purposes. Accordingly, the Commission preliminarily believes the enhanced operational transparency resulting from the

public disclosures on Form ATS-N should aid market participants when evaluating potential trading venues.

The market for NMS stock execution services has also evolved such that national securities exchanges and NMS Stock ATSs have increasingly become direct competitors. However, as explained above, Form ATS filings continue to be "deemed confidential when filed," while national securities exchanges must publicly file proposed rule changes and publicly disclose their entire rulebooks.[798] The Commission preliminarily believes that replacing the current Form ATS with proposed Form ATS-N and making Form ATS-N public would reduce the discrepancy in information that different market participants receive about NMS Stock ATSs relative to the information they receive about national securities exchanges, which would better enable market participants to compare the stock execution services of NMS Stock ATSs against those of national securities exchanges. For instance, having information allowing a more complete comparison between the trading operations of NMS Stock ATSs and national securities exchanges could reveal to a market participant certain order handling and preferencing differences that might result in superior or inferior treatment of orders handled by an NMS Stock ATS. It could also reveal differences in fee structures among subscribers that may result in costlier or less costly execution on a particular trading platform.

The Commission preliminarily believes that the proposed amendments would appropriately calibrate the level of transparency between NMS Stock ATSs and national securities exchanges, fostering even greater competition for order flow of NMS stocks between those trading platforms. As noted above, the Commission also preliminarily believes that the

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[798] See supra notes 155-162 and accompanying text.

proposed enhanced disclosure requirements for NMS Stock ATSs would calibrate the level of transparency among different NMS Stock ATSs. Moreover, requiring Form ATS-N to be made public upon being declared effective should lead to additional scrutiny of NMS Stock ATSs by market participants. Therefore, the Commission preliminarily believes that the proposal could foster even greater competition for order flow of NMS stocks among NMS Stock ATSs and between NMS Stock ATSs and national securities exchanges, which could lead to lower spreads and thereby foster greater capital formation and increased market liquidity relative to the baseline. This in turn could enhance execution quality and lower information opaqueness surrounding an NMS Stock ATS's operations.

The Commission also preliminarily believes that the proposed requirement for NMS Stock ATSs to disclose whether and how they segment their order flow, any criteria used to assign order flow, and their fee structures should provide market participants with a better understanding of the operating environment for NMS Stock ATSs. Search costs to identify which NMS Stock ATSs better serve a market participant's trading interests should be reduced relative to the baseline, as market participants may be more able to predict how their orders will be executed. Broker-dealers might also make better routing decisions for their particular interests, and the interests of their customers, which might therefore lead to better execution quality. Also, the proposed enhanced disclosure requirements for NMS Stock ATSs could better enable market participants to review trading decisions made by their broker-dealers. This in turn could lower the level of uncertainty that was present in the baseline regarding how orders would be executed on NMS Stock ATSs. As such, the Commission preliminarily believes that the proposed amendments to Regulation ATS could help market participants understand how their

orders will be executed on an NMS Stock ATS and evaluate any potential conflicts of interest involving the broker-dealer operator and its affiliates when handling such orders.

At the same time, the proposed enhanced disclosure requirements for NMS Stock ATSs could benefit certain ATSs or national securities exchanges. For example, market participants would be aware of which NMS Stock ATSs may offer better execution services or better protection against the dissemination of their non-public trading information, and as a result, these ATSs might attract even more order flow. By attracting greater order flow, NMS Stock ATSs might, in turn, provide benefits to market participants by offering them a trading platform that is more liquid and, possibly, has lower trading costs.

In the adopting release for Regulation ATS, the Commission explained that it believed that the regulatory framework established by Regulation ATS would encourage innovation and encourage the growing role of technology in the securities markets.[799] Since the establishment of Regulation ATS, the market for order execution services for trading NMS stocks – particularly on ATSs – has flourished. The number of ATSs that trade NMS stocks has increased substantially since the inception of Regulation ATS, and as of the end of the second quarter of 2015, trading volume of NMS stocks on ATSs accounted for 15% of total share volume.[800] As it is expected to calibrate the level of transparency between NMS Stock ATSs and national securities exchanges, the proposal may foster greater competition for order flow of NMS stocks between these trading platforms. This greater competition for order flow may in

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[799] See Regulation ATS Adopting Release, supra note 7, at 70910.

[800] See supra Section III.A.

turn incentivize NMS Stock ATSs to innovate – particularly in terms of their technology – so that they can attract more trading volume to their venue.

The proposed requirement under Part IV, Item 16 of proposed Form ATS-N to explain and provide aggregate platform-wide order flow and execution statistics regarding the NMS Stock ATS, which are not otherwise required disclosures under Exchange Act Rule 605 of Regulation NMS but still published or otherwise provided to one or more subscribers by the NMS Stock ATS, could have several potential economic effects. The economic effects would depend not only on the extent to which ATSs currently provide or publish such information and the content of the information which the Commission currently does not have (such as what order flow and execution statistics NMS Stock ATSs produce, how they are calculated and whether they are standardized across ATSs, and which subscribers currently receive these statistics),[801] but also on how NMS Stock ATSs choose to comply with the proposed amendments. Some NMS Stock ATSs may not currently disclose market quality statistics not otherwise required under Exchange Act Rule 605, and these ATSs would not incur costs to comply with the proposed disclosure requirements under Part IV, Item 16 of proposed Form ATS-N; therefore, the proposed disclosure requirements would provide no benefits to market participants in such cases. Additionally, there may be some NMS Stock ATSs that currently provide these aggregate platform-wide order flow and execution statistics not just to their subscribers, but also to the broader public. In such cases, the proposed disclosure requirements under Part IV, Item 16 of proposed Form ATS-N may not provide any additional benefit to

[801] See supra SectionXIII.B.3.

market participants because the information required under Item 16 would already be publicly available.

Furthermore, NMS Stock ATSs that currently provide these aggregate platform-wide order flow and execution statistics to one or more subscribers could continue to provide its subscribers with these market quality statistics, in which case, under the proposal, the NMS Stock ATS would publicly disclose these statistics and how they are calculated in proposed Form ATS-N. Another possibility is that these NMS Stock ATSs may choose to stop providing market quality statistics to subscribers so as not to have to publicly disclose information about those statistics and/or the statistics themselves in Form ATS-N. To the extent that an NMS Stock ATS continues to provide aggregate platform-wide order flow and execution statistics to subscribers only, it would publicly disclose and describe how those statistics are calculated in Form ATS-N, and all market participants, not just subscribers would have access to the information, which the Commission preliminarily believes would improve the opportunity for more market participants to benefit from this information. In addition, to the extent that subscribers that receive those market quality statistics currently do not know how the NMS Stock ATS calculates the market quality statistics, the proposal would help these subscribers better understand the statistics, and such information may be useful when evaluating an NMS Stock ATS as a possible venue to which to route orders in order to accomplish their investing or trading objectives.

However, NMS Stock ATSs that choose to publicly disclose aggregate platform-wide order flow and execution statistics regarding the NMS Stock ATS, which are not otherwise required disclosures under Exchange Act Rule 605 of Regulation NMS but still published or otherwise provided to one or more subscribers by the NMS Stock ATS would incur costs to do so. Therefore, some NMS Stock ATSs may choose to comply with the proposal by ceasing to

disclose these market quality statistics to subscribers. As a result, the proposal could reduce transparency to the detriment of the subscribers who currently benefit from the receipt of certain market quality statistics regarding an NMS Stock ATS, which could in turn result in spill-over effects on the market. Furthermore, the decision of whether to continue to disclose such statistics could depend, in part, on how favorable the statistics make the ATS appear. As such, if some NMS Stock ATSs choose to stop disclosing order flow and execution statistics due to the proposed requirements of Item 16 while others decide to make those statistics public through their Form ATS-N filings, market participants may perceive the latter group of NMS Stock ATSs as having better execution quality, and these trading venues may therefore benefit by attracting even more order flow as a result of such perceptions.

As most NMS Stock ATSs are operated by broker-dealers that also engage in other brokerage and dealing activities, a broker-dealer operator of an NMS Stock ATS, or its affiliates, may have business interests that compete with the ATS's subscribers, or customers of its subscribers, which in turn may give rise to potential conflicts of interest.[802] For instance, multi-service broker-dealers may execute orders in NMS stocks internally on non-ATS trading centers by trading as principal against such orders, or by crossing orders as agent in a riskless principal capacity. The Commission preliminarily expects that the proposal could discourage broker-dealer operators from trading internally as principal in their NMS Stock ATS under circumstances where such might raise conflict of interest concerns because those operations would be subject to public scrutiny by market participants seeking to trade on the ATS.

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802 The Commission notes that, based on information provided on Form ATS, a small number of ATSs solely limit their broker-dealer business to the operation of an ATS.

In addition to the possible conflicts of interest that may arise from internalization, broker-dealer operators that control and operate multiple NMS Stock ATSs may also face conflicts of interest. This is because such broker-dealers might operate competing trading venues for the execution of orders in NMS stocks without having fully separated the functions of these competing trading centers. As a result of these overlapping functionalities, broker-dealers operating multiple NMS Stock ATSs may provide subscribers of one ATS – which could include business units of the broker-dealer or its affiliates – with access to services or information about the other ATS that it does not provide to other subscribers. The Commission preliminarily believes that the proposed enhanced disclosure requirements should provide market participants with information to better evaluate potential conflicts of interest when making trading decisions; any resultant change in order flow to an NMS Stock ATS with such potential conflicts might cause that ATS to alter its operations to reduce such conflicts.

b. Structuring of Proposed Form ATS-N

The Commission is proposing that proposed Form ATS-N be filed electronically through the EFFS system in a structured data format. The Commission is proposing to make public on the Commission's website, among other things, an effective Form ATS-N , and each properly filed Form ATS-N Amendment upon filing with the Commission. The Commission would post the Form ATS-N or Form ATS-N Amendment in the same format that the Commission received the data.

The Commission preliminarily believes that by having NMS Stock ATSs file the proposed Form ATS-N in a structured data format, the information's usability for market participants would be enhanced. Once the data is structured, it is not only human-readable, but also becomes machine-readable such that market participants could download the information

directly into databases and analyze it using various software. With structured data, what was static, text-based information that had to be manually and individually reviewed, can be searched and analyzed, facilitating the comparison and aggregation across NMS Stock ATSs.

The Commission understands that there are varying costs associated with varying degrees of structuring. The Commission preliminarily believes that its proposed structuring of proposed Form ATS-N has minimal costs and enhanced benefits for market participants' use of proposed Form ATS-N information. The Commission is proposing that Parts I (Name) and II (Broker-Dealer Operator Registration and Contact Information) of proposed Form ATS-N would be provided as fillable forms on the Commission's EFFS system. The Commission is proposing that Part III (Activities of the Broker-Dealer Operator and Affiliates) of proposed Form ATS-N would be filed in a structured format whereby the filer would provide checkbox responses to certain questions and narrative responses that are block-text tagged by Item. The Commission is proposing that Part IV (The NMS Stock ATS Manner of Operations) of proposed Form ATS-N would also be filed in a structured format in that the filer would block-text tag narrative responses by Item. The Commission is proposing that Part V (Contact Information, Signature Block, and Consent to Service) of proposed Form ATS-N would be provided as fillable forms on the Commission's EFFS system. The Commission also preliminarily believes that requiring NMS Stock ATSs to file proposed Form ATS-N in a structured format could allow market participants to avoid additional costs associated with third party sources who might otherwise extract and structure all the narrative disclosures, and then charge for access to that structured data. The Commission notes that the structuring of Form ATS-N can be in a variety of manners. For example, some or all of the information provided on Form ATS-N could be structured according to a particular standard that already exists, or a new taxonomy that the Commission

creates, or as a single machine-readable PDF. The Commission seeks comment on the manner in which proposed Form ATS-N could be structured to enable the Commission and market participants to better collect and analyze the data.

c. Effects on Entry and Exit of NMS Stock ATSs

From an NMS Stock ATS's perspective, the proposed amendments to Regulation ATS may beget uncertainty as to whether its proposed Form ATS-N will be deemed effective or ineffective. Greater uncertainty surrounding this proposed process may act as a deterrent for potential ATSs wishing to effect transactions in NMS stocks. The disclosures required by proposed Form ATS-N would be more comprehensive and require significantly more detail than those required on current Form ATS, which in turn could delay the start of operations for new NMS Stock ATSs. Therefore, the proposed amendments could raise the entry barrier for new entrants to the market for NMS stock execution services.

The Commission is proposing that a legacy NMS Stock ATS would be able to continue its operations pursuant to a previously filed initial operation report on Form ATS pending the Commission's review of its initial Form ATS-N. However, if after notice and opportunity for hearing, the Commission declares the Form ATS-N filed by a legacy NMS Stock ATS ineffective, the ATS would be required to cease operations. The NMS Stock ATS would then have the opportunity to address deficiencies in the previously filed form by filing a new Form ATS-N.[803] The Commission is also proposing to make Form ATS-N Amendments public upon filing and also to make the public aware of which Form ATS-N Amendments filed by NMS Stock ATSs posted on the Commission's website are pending Commission review and could still

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[803] See supra Section IV.C.0.

be declared ineffective. The Commission preliminarily believes that this process would provide immediate transparency to market participants about an NMS Stock ATS's current operations while also notifying market participants that the disclosures in a filed Form ATS-N Amendment are still subject to Commission review. If the Commission declares a Form ATS-N Amendment ineffective, the NMS Stock ATS shall be prohibited from operating pursuant to the ineffective Form ATS-N Amendment. The NMS Stock ATS could, however, continue to operate pursuant to a Form ATS-N that was previously declared effective.[804] Given the uncertainty that may surround the process to declare Form ATS-N effective or ineffective or Form ATS-N Amendments ineffective, coupled with the number and complexity of the new disclosures that would be required under proposed Form ATS-N, some broker-dealer operators of legacy NMS Stock ATSs may find that the costs of compliance with this proposal outweigh the benefits of continuing to operate their NMS Stock ATS, particularly if the operation of the ATS does not constitute a significant source of profit for a broker-dealer operator. As such, the NMS Stock ATS may exit the market.

As explained above, NMS Stock ATSs would incur both implementation and ongoing costs to meet the regulatory requirements under proposed Rule 304. In particular, the proposed rules would require an NMS Stock ATS to file amendments on proposed Form ATS-N to notice a material change to its operations at least 30 days prior to implementing that material change. Under the proposal, if the Commission declares a material amendment ineffective after this advance notice period has expired, the NMS Stock ATS would be required to unwind the material change if it has already been implemented on the ATS or be precluded from proceeding

[804] Nothing would preclude the NMS Stock ATS from later submitting a new or revised Form ATS-N Amendment for consideration by the Commission.

to implement the change if it was not already implemented. This uncertainty regarding an NMS Stock ATS's ability to implement material changes may also result in some NMS Stock ATSs exiting the market.

Once an NMS Stock ATS's initial Form ATS-N is declared effective by the Commission, the information disclosed on Form ATS-N would be made available to the broader investing public. Proposed Form ATS-N Amendments would be made public upon filing, and in the case the amendments are not declared ineffective by the Commission, the Commission would no longer indicate that the Form ATS-N Amendment is under Commission review.[805] Examples of the operational information that could be disclosed to a given NMS Stock ATS's competitors and the public on proposed Form ATS-N would include: characteristics and use of order types (including indications of interest and conditional orders); order handling and priority distinctions among types of orders and/or subscribers; order entry and display procedures; the allocation and matching of orders, quotes, indications of interest and conditional orders; execution and trade reporting procedures, and aggregate platform-wide market quality statistics regarding the NMS Stock ATS that the NMS Stock ATS currently only provides to subscribers.

While the information elicited on proposed Form ATS-N would be similar to the information that national securities exchanges are required to publicly disclose, the Commission preliminarily believes that the disclosure of this previously non-public information could have some impact on the direction of order flow in the market. For instance, to the extent that an NMS Stock ATS's competitive advantage in the market is driven by its matching methodology, other operational characteristics that are currently confidential, or the non-public disclosure of

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805 See supra Section IV.D. See also proposed Rule 304(b)(2).

certain aggregate platform-wide market quality statistics provided to subscribers, the disclosure of this information could result in other NMS Stock ATSs implementing similar methodologies, which might cause market participants to direct more order flow to those other NMS Stock ATSs. In addition, some order flow may be directed away from NMS Stock ATSs and towards national securities exchanges or broker-dealers that operate non-ATS trading centers if market participants discover that their orders could receive lower execution quality on an NMS Stock ATS relative to these other trading centers. As such, the proposal may result in lower revenues for some NMS Stock ATSs, and those ATSs may then find it unprofitable to stay in the market. The Commission preliminarily believes that fewer trading venues in the market will affect competition between existing NMS Stock ATSs and national securities exchanges as well as among existing NMS Stock ATSs, which would in turn affect market participants.

Not only could an NMS Stock ATS's competitive advantage be driven by its current matching methodology or other operational characteristics, it could also be driven by the NMS Stock ATS's ability to improve these methodologies through technological innovation or enhancements. Under the proposal, the Commission preliminarily believes that the disclosure of an NMS Stock ATS's innovations in proposed Form ATS-N Amendments could potentially result in certain NMS Stock ATSs losing their technological advantage. If NMS Stock ATSs cannot innovate fast enough to regain their competitive advantage in the market, orders may also flow away from those NMS Stock ATSs, and as a result, these trading venues may choose to exit the market if operating the ATS becomes unprofitable for the broker-dealer operator.

Both large and small NMS Stock ATSs may be affected by the detailed disclosures required under proposed Rule 304 and Form ATS-N, though, the proposal may affect the ability of each type of ATS to stay in the market differently. As noted above, to the extent that an

ATS's dominance in the market – in terms of being able to attract substantial NMS stock trading volume – is driven by its matching methodology or other operational characteristics that are currently confidential, the public disclosure of this information may result in lower revenue for the NMS Stock ATS. If this is the case for a small NMS Stock ATS, or a large ATS without a substantial profit margin, the broker-dealer operator may no longer view the ATS as being profitable and may potentially exit the market altogether. Alternatively, if this is the case for a large NMS Stock ATS or a smaller NMS Stock ATS with large profit margins, while the NMS Stock ATS may not exit the market, such an ATS may need to engage in costly research in order to develop new matching methodologies to stay profitable in the market. Further, if revenue and earnings margins for operating an NMS Stock ATS are below the average for the entire market, the NMS Stock ATS risks being squeezed out by its competitors and would potentially exit the market.[806] The result of this may be that there would be fewer trading venues in the market for NMS stock execution services. This could affect the competition between existing NMS Stock ATSs and national securities exchanges as well as among existing NMS Stock ATSs, which would in turn affect market participants. The Commission notes, however, that many smaller NMS Stock ATSs may not engage in other brokerage or dealing activities in addition to the operation of their NMS Stock ATS. Therefore, certain aspects of proposed Form ATS-N (such as several items of Part III) may not be applicable to smaller NMS Stock ATSs, which would reduce the burdens and mitigate the effects of the proposed disclosure requirements on these smaller NMS Stock ATSs.

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[806] See Singhvi, Surrendra S. and Harsha B. Desai, 1971, "An Empirical Analysis of the Quality of Corporate Financial Disclosure," Accounting Review 46, 129–138.

The Commission expects that the implementation and ongoing costs associated with filing proposed Form ATS-N could also affect the nature of competition. As Table 1 shows, there is a significant degree of difference in the size of NMS Stock ATSs, when measured by dollar or share volume. If the costs associated with filing proposed Form ATS-N become disproportionately greater for smaller volume NMS Stock ATSs, some of these legacy NMS Stock ATSs might cease operations, and exit the market for NMS stock execution services. As explained above, based on analysis for purposes of the PRA, the Commission has calculated preliminary estimates of the implementation and ongoing costs for the proposed amendments to Regulation ATS. The Commission preliminarily believes that the estimated implementation cost is a fixed cost that would be roughly similar across NMS Stock ATSs, regardless of their dollar volume size; this implies that implementation costs will represent a larger fraction of revenue generated on a small NMS Stock ATS relative to that percentage on a large NMS Stock ATS, which could cause some smaller NMS Stock ATSs to exit the market. However, it could be the case that if the NMS Stock ATSs that decide to exit due to this fixed implementation cost only transact small dollar (or share) volume, the Commission may not expect to see a large impact on the overall competitive structure of the NMS Stock ATSs that would remain in the market. More so, the order flow that was being traded on these small NMS Stock ATSs might in fact be absorbed and redistributed amongst these larger surviving NMS Stock ATSs.

Another effect that the proposal could have on competition is that the greater disclosure requirements of NMS Stock ATSs, particular the disclosures related to the other business activities of the broker-dealer operator and its affiliates, may influence a broker-dealer operator's decisions with respect to its operations of the NMS Stock ATS. Given the proposed disclosure requirements regarding the activities of broker-dealer operators and their affiliates, a multi-

service broker-dealer operator of an NMS Stock ATS may cease operating its NMS Stock ATS and send its order flow, which would have gone to the broker-dealer operator's NMS Stock ATS, to other trading centers. For example, a multi-service broker-dealer operator could internalize the order flow that it would typically send to its ATS or send that order flow to a broker-dealer that, does not operate an NMS Stock ATS, to internalize. Alternatively, the broker-dealer operator might send the order flow to a non-affiliated NMS Stock ATS that is operated by a non-multi-service broker-dealer, who would likely not encounter the same potential conflicts of interest as a multi-service broker-dealer that operates an NMS Stock ATS. Finally, the broker-dealer operator could also send its order flow to national securities exchanges for execution.

Overall, the Commission preliminarily believes that the possible exit of NMS Stock ATSs from the market, or the reduced entry of new NMS Stock ATSs, due to the requirements under proposed Rule 304 and Form ATS-N might be potentially harmful to competition in the market for NMS stock execution services. The potential exit by existing NMS Stock ATSs and the reduced entry into the market by prospective NMS Stock ATSs may impact market participants by reducing the number of NMS stock trading venues and thus, reducing a market participant's opportunities to minimize its trading costs by sending orders to different trading platforms. As such, the possible exit of NMS Stock ATSs from the market for NMS stock execution services and lower rate of entry for new NMS Stock ATSs may result in greater costs relative to the baseline cost savings that NMS Stock ATSs currently afford market participants.[807] The Commission, however, is unable to predict whether legacy NMS Stock

[807] See supra Section XIII.B.7.

ATSs will exit the market and therefore, cannot quantify the ultimate effect that this will have on competition.

d. Effects on Trading Costs, Price Discovery and Market Efficiency

As discussed above, the proposed heightened disclosure requirements for NMS Stock ATSs might cause some NMS Stock ATSs to cease operations, which could result in reduced competition among and between NMS Stock ATSs. If it is the case that the NMS Stock ATSs that face the highest cost of disclosure are the ones that have worse execution quality, the surviving NMS Stock ATSs might enhance execution quality and may allow market participants to transact at lower prices. If order flow is directed towards these surviving NMS Stock ATSs after the trading venues that face the highest cost of disclosure cease operations, then a smaller number of surviving trading venues might mean that there would be a higher likelihood that the orders of buyers and sellers on an NMS Stock ATS would interact and execute, which could improve liquidity. Even if some of the order flow from NMS Stock ATSs that cease operations does not migrate to the surviving NMS Stock ATSs, but migrates towards national securities exchanges, greater order interaction between buyers and sellers on a national securities exchange might be fostered, thereby improving price discovery. Moreover, because some NMS Stock ATSs operate as crossing networks and derive their prices from national securities exchanges, greater price discovery on a national securities exchange could spill over to affect the execution prices on the surviving NMS Stock ATSs and thereby potentially reduce market participants' trading costs. Additionally, given the fairly standardized set of information that would be publicly disclosed on proposed Form ATS-N and that trading in the market by NMS Stock ATSs may in fact be concentrated on fewer NMS Stock ATSs as a result of this proposal, market participants may process, and react more quickly to, information pertaining to changes in an

NMS Stock ATS's operations when evaluating potential trading venues. As such, the proposed amendments to Regulation ATS might improve market efficiency.

Alternatively, heightened disclosure requirements pertaining to the public disclosure of proposed Form ATS-N could have a contrary effect, by increasing market participants' trading costs relative to the baseline. Institutional investors may use NMS Stock ATSs in an attempt to minimize the price impact of their trades. Even though the size of the average order on NMS Stock ATSs has been shown to be roughly equivalent to that on national securities exchanges, smaller orders on NMS Stock ATSs can be the result of shredding larger orders.[808] Preventing information regarding those orders from becoming public can minimize adverse price moves that may occur when proprietary traders learn that there may be large buyers or sellers in the market. Thus, NMS Stock ATSs represent a tool for institutional investors to help control information leakage. If some NMS Stock ATSs exit the market as a result of the proposed amendments, there could be a reduction in the number of trading platforms that allow institutional investors to control their price impact costs. Institutional investors, who would have traded on these NMS Stock ATSs if they did not exit the market, may now have to trade on other trading venues, such as other NMS Stock ATSs or national securities exchanges. If institutional investors execute their orders on a national securities exchange, they may have to absorb price impact costs, because national securities exchanges may not offer a means for reducing these costs. Insofar that an NMS Stock ATS's competitive advantage is driven by its matching methodology or other operational characteristics that are currently confidential, the Commission understands such disclosure could impact this competitive advantage. However, the Commission does not know

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[808] See Tuttle: ATS Trading in NMS Stocks, supra note 126.

the extent to which the proposal would affect an NMS Stock ATS's decision to continue operations or exit the market, and, therefore, cannot estimate the number of ATSs that may exit. Furthermore, the Commission does not have information in order for it to make reasonable assumptions about the fraction of displaced volume – from NMS Stock ATSs that would cease operations – that would be directed towards national securities exchanges, NMS Stock ATSs, or non-ATS OTC trading centers. Therefore, the Commission cannot estimate the impact that the proposal would have on an NMS Stock ATS's price impact costs.

The price impact cost institutional investors face on a national securities exchange is related to the depth of the market, and the depth of the market is often related to the market capitalization of a stock and its liquidity.[809] For instance, if an institutional investor were to trade a large capitalization stock on a national securities exchange as opposed to on an NMS Stock ATS, given that the large capitalization stock might be more liquid than a small capitalization stock, and thereby have greater market depth outside the inside quote, the institutional investor may suffer little difference in price impact costs by executing the order on a national securities exchange. On the other hand, a small capitalization, low priced stock might have much lower market depth outside the inside quote, and, therefore, the difference in price impact costs for executing orders of these stocks on an exchange might be substantial.[810] Furthermore, because NMS Stock ATSs trade larger dollar volume in small capitalization, low

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809 A deep market is one in which larger orders do not have a much greater impact on prices than smaller orders. See Foucault, Pagano and Roell, 2013, "Market Liquidity," Oxford University Press.

810 See Collver, Charles, 2014, "A Characterization of Market Quality for Small Capitalization US Equities," SEC Division of Trading and Markets Working Paper, available at http://www.sec.gov/marketstructure/research/small_cap_liquidity.pdf.

priced stocks, the price impact costs for institutional investors that trade in such stocks may in fact be severe if many NMS Stock ATSs decided to exit the market.[811] As mentioned above, while the Commission is unable to estimate the number of NMS Stock ATSs that may potentially exit the market, the Commission also does not know whether firms will send their small capitalization stock orders to other surviving NMS Stock ATSs, national securities exchanges, or non-ATS trading centers. Therefore, the Commission cannot estimate what price market participants would receive for the small capitalization stock orders and thus, the Commission cannot estimate the price impact costs associated with these small capitalization stock orders.

3. Written Safeguards and Written Procedures to Protect Subscribers' Confidential Trading Information, and Proposed Recordkeeping Requirements

The Commission is also proposing to amend existing Rules 301(b)(10) [812] and 303(a)(1)[813] of Regulation ATS to require all ATSs to adopt and preserve written safeguards and written procedures to protect subscribers' confidential trading information, as well as written oversight procedures to ensure those safeguards and procedures are followed. As explained above, the Commission preliminarily believes that these proposed amendments should both strengthen the effectiveness of ATS' safeguards and procedures and improve those ATSs' ability to implement and monitor the adequacy of, and the ATSs' compliance with, their safeguards and

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811 The Commission notes that it is difficult to quantify the increase in price impact costs faced by institutional traders because it is unclear how many NMS Stock ATSs may cease operations, and more so, it is unclear whether these institutional traders who would like to execute large orders will route them to other ATSs that may continue to operate.

812 See 17 CFR 242.301(b)(10).

813 See 17 CFR 242.303(a).

procedures.[814] Furthermore, the Commission preliminarily believes that requiring ATSs to adopt written safeguards and written procedures will benefit the Commission by helping it better understand, monitor, and evaluate how each ATS protects subscribers' confidential trading information from unauthorized disclosure and access.[815] The Commission also expects that this proposed requirement will help oversight by the SRO of which the NMS Stock ATS's broker-dealer operator is a member.

Under Rule 301(b)(10), all ATSs must establish adequate safeguards and procedures to protect subscribers' confidential trading information and adequate oversight procedures to ensure that the safeguards and procedures established to protect such trading information are followed. However, neither Rule 301(b)(10) nor the recordkeeping requirements under Rule 303(a)(1) of Regulation ATS require that an ATS have and preserve those safeguards and procedures in writing. As explained above, the Commission preliminarily believes that the proposal to require written safeguards and written procedures would better enable ATSs – in particular, those ATSs that do not currently maintain written safeguards and procedures – to protect confidential subscriber trading information and implement and monitor the adequacy of, and the ATS's compliance with, its safeguards and procedures.[816]

The Commission is also proposing to amend the recordkeeping rules relevant to the proposed amendments to Rule 301 and proposed Rule 304. The Commission is proposing that NMS Stock ATSs shall preserve Form ATS-N, Form ATS-N Amendments, and a Form ATS-N notice of cessation for the life of the enterprise and any successor enterprise pursuant to Rule

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814 See supra Section IX.

815 See id.

816 See id.

303(a)(2)[817] of Regulation ATS.[818] The Commission is also proposing to amend Rule 303(a)(1)[819] so that ATSs must preserve for a period of not less than three years, the first two in an easily accessible place, the written safeguards and procedures that would be required under the proposed amendments to Rule 301(b)(10). The Commission understands that these proposed amendments regarding recordkeeping requirements may require NMS Stock ATSs to set up systems and procedures, and these are expected to account for a portion of the implementation costs under this proposal.[820]

D. Alternatives

1. Require NMS Stock ATSs to Publicly Disclose Current Form ATS

One alternative would be to allow NMS Stock ATSs to continue to describe their operations on current Form ATS, but either make Form ATS public by posting on the Commission's website or require NMS Stock ATSs to publicly disclose their initial operation reports, amendments, and cessation of operations on Form ATS. Non-NMS Stock ATSs' Form ATS filings would continue to remain confidential.

Use of current Form ATS would lower the cost of compliance for current and future NMS Stock ATSs compared to compliance costs under the proposal. However, because the content of Form ATS would not change under this alternative, market participants would continue to receive limited information regarding how orders interact, match, and execute on

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817 See 17 CFR 242.303(a)(2).

818 The Commission notes that an NMS Stock ATS that had previously made filings on Form ATS would be required to preserve those filings for the life of the enterprise, as well as filings made going forward on Form ATS-N.

819 See 17 CFR 242.303(a)(1).

820 See supra Section XIII.C.1.

NMS Stock ATSs and the activities of NMS Stock ATSs' broker-dealer operators and their affiliates. Relative to the proposal, market participants' search costs in identifying which NMS Stock ATS may better serve their trading interests would increase. As a result, their trading costs may increase and the execution quality related to their orders may be reduced. The Commission expects public disclosure of Form ATS could have some harmful effects on the competitive dynamics of NMS Stock ATSs and result in some exiting the market. However, such effects would likely be smaller than those expected under the proposal because, under this alternative, Form ATS would require disclosure of less information about the operations of NMS Stock ATSs than the more expansive and granular information that NMS Stock ATSs would be required to disclose in Form ATS-N.

Requiring NMS Stock ATSs to publicly disclose initial operation reports, amendments, and cessation of operations on Form ATS would place NMS Stock ATSs under greater public scrutiny, which could improve the quality of the filings compared to the current baseline. Regulators' oversight of NMS Stock ATSs under this alternative would be similar to that under current Regulation ATS, so they would not be able to offer the same level of protection to market participants as under the proposal.

2. Require Proposed Form ATS-N But Deem Information Confidential

Another alternative would be to require NMS Stock ATSs to file proposed Form ATS-N with the Commission but not make Form ATS-N publicly available. Proposed Form ATS-N would include detailed disclosures about the NMS Stock ATS's operations and the activities of its broker-dealer operator and its affiliates, and the Commission would declare filings on Form ATS-N either effective or ineffective.

This alternative would improve the quality of NMS Stock ATSs' disclosures to the Commission because proposed Form ATS-N would require more information about the operations of NMS Stock ATSs than is currently solicited on Form ATS. In addition, proposed Form ATS-N would require information about the activities of the broker-dealer operator and its affiliates, whereas current Form ATS does not require such information. This alternative, which would include a process for the Commission to determine whether an NMS Stock ATS qualifies for the exemption from the definition of "exchange," and declare a proposed Form ATS-N effective or ineffective, would strengthen the Commission's oversight of NMS Stock ATSs.

However, this alternative would not make NMS Stock ATSs' operations more transparent for market participants. The lack of public disclosure of the means of order interaction, display and routing practices by NMS Stock ATSs could result in market participants making less informed decisions regarding where to route their orders and therefore result in lower execution quality than they would obtain under the proposal. Additionally, this alternative would not reduce the search costs for subscribers to identify potential routing destinations for their orders. Because proposed Form ATS-N would not be publicly disclosed under this alternative, the level of competition between NMS Stock ATSs would stay the same, and the lack of transparency about an NMS Stock ATS's operations and activities of the broker-dealer operator and its affiliates would be expected to persist.

3. Require NMS Stock ATSs to Publicly Disclose Proposed Form ATS-N But Not Declare Proposed Form ATS-N Effective or Ineffective

Under this alternative, the Commission would require NMS Stock ATSs to file proposed Form ATS-N and would make it public, but the Commission would continue to use the current

notice regime instead of declaring Form ATS-N effective or ineffective. The Commission would not determine whether an NMS Stock ATS qualifies for the exemption from the definition of "exchange," and would not declare proposed Form ATS-N filings effective or ineffective.

Benefits of maintaining the current notice regime would include a lower demand for Commission and its staff resources to determine whether an NMS Stock ATS qualifies for the exemption from the definition of "exchange" and whether the Commission should declare a proposed Form ATS-N effective or ineffective, and to assess whether the Commission should suspend, limit, or revoke the effectiveness of an NMS Stock ATS's Form ATS-N. In addition, maintaining the current notice regime as opposed to declaring the proposed Form ATS-N effective or ineffective could be cost-effective to NMS Stock ATSs and could lower the barriers to entry for new NMS Stock ATSs compared to such barriers under the proposal.

Without a process to declare proposed Form ATS-N effective or ineffective, there would be less assurance that disclosures by NMS Stock ATSs would be accurate, current, and complete Under this alternative, it would be more difficult for the Commission to exercise its oversight responsibilities with respect to the accuracy, currency, completeness and fair presentation of disclosures on proposed Form ATS-N than under the proposal, which would provide a process for the Commission to declare a proposed Form ATS-N effective or ineffective. Moreover, continued use of a notice regime could lessen the benefit of enhanced transparency relative to such benefit under the proposal and as a result, this alternative might not provide the same level of protection to market participants as the proposal.

4. Initiate Differing Levels of Public Disclosure Depending on NMS Stock ATS Characteristics

Under this alternative, the Commission would require different levels of disclosure among NMS Stock ATSs based on dollar trading volume. For instance, NMS Stock ATSs with lower transaction volumes would be subject to lower levels of disclosure on proposed Form ATS-N. As a result, their compliance costs would be lower, which could lower their entry barriers relative to such barriers under the proposal. Because these small NMS Stock ATSs would not have to disclose as much information pertaining to their operations, they could have more time to innovate without disclosing such innovation to competitors. This could allow these small NMS Stock ATSs to better compete with more established NMS Stock ATSs, national securities exchanges, and broker-dealers and put more competitive pressure on the market. Furthermore, reduced regulatory burdens for small NMS Stock ATSs may result in greater innovation relative to the proposal because these small NMS Stock ATSs would not have to be concerned about disclosing proprietary information. Greater innovation for small NMS Stock ATSs could give them a greater competitive advantage in attracting order flow relative to large NMS Stock ATSs. This competitive advantage for small NMS Stock ATSs could spill over to market participants who execute on these ATSs, by increasing the execution quality of their trades.

However, under this alternative, broker-dealer operators of NMS Stock ATSs could seek to allocate order flow to multiple NMS Stock ATSs operated by either the broker-dealer or its affiliates to avoid reaching threshold volumes that would trigger additional disclosure requirements. This could create some information opaqueness in the market, which could lead to lower execution quality for market participants relative to that under the proposal. The Commission notes, however, that although Regulation ATS currently has volume thresholds for

fair access and quote transparency requirements, the Commission has not observed any ATSs using such tactics to avoid crossing thresholds.

5. Require NMS Stock ATSs to Register as National Securities Exchanges and Become SROs

Under this alternative, the Commission would eliminate the exemption from the definition of "exchange" for NMS Stock ATSs under Exchange Act Rule 3a1-1(a) so that an NMS Stock ATS would be required to register as a national securities exchange and become an SRO. This alternative would provide market participants with the same protections that accompany the regulatory regime that applies to national securities exchanges. Without the benefit of the exemption from the definition of "exchange," an NMS Stock ATS would be required, among other things, to file proposed rule changes publicly on Form 19b-4 and make publicly available its entire rule book. Moreover, as a national securities exchange, an NMS Stock ATS would not be allowed to have conflicts of interest that it can as an NMS Stock ATS. More information about the priority, order interaction, display, and execution procedures would help market participants make better informed decisions about where to route their orders for best execution. If most NMS Stock ATSs decided to register as national securities exchanges and some NMS Stock ATSs withdrew from the market and stopped operating, competition among and between these trading venues could increase, leading to greater market liquidity and market efficiency. Further, this alternative could strengthen Commission oversight, thus benefitting market participants.

While NMS Stock ATSs would no longer need to register as broker-dealers or comply with Regulation ATS, registration as national securities exchanges would create high startup costs and high ongoing operational costs compared to what they would incur under the

proposal.[821] Under this alternative, these new national securities exchanges, which would be SROs, would, among other things, be required to comply with Section 6 of the Exchange Act. Because national securities exchange are SROs, a new national securities exchange would bear certain regulatory costs that are higher than those associated with registering as a broker-dealer. For example, a national securities exchange would bear expenses associated with joining the national market system plans and surveilling trading activity and member conduct on the exchange.[822]

6. Discontinue Quarterly Volume Reports on Form ATS-R

Another alternative would be to amend Regulation ATS so that NMS Stock ATSs would no longer be required to file quarterly volume reports on Form ATS-R because, as noted above, FINRA rules currently require ATSs that transact in NMS stocks to report aggregate weekly volume information and the number of trades to FINRA in certain equity securities, including NMS stocks.[823]

Instead, NMS Stock ATSs would be required to disclose, in quarterly amendments to Form ATS-N, the information that is currently captured by Form ATS-R that is not captured by FINRA reporting requirements. The Commission notes that, in addition to requiring unit volume

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821 Newly registered national securities exchanges must establish appropriate surveillance and disciplinary mechanisms, and as a result incur start-up costs associated with such obligations, such as writing a rule book. See Regulation ATS Adopting Release, supra note 7, at 70897. Furthermore, the cost of acquiring the necessary assets and the operating funds to carry out the day-to-day functions of a national securities exchange are significant. See id.

822 See Regulation NMS Adopting Release, supra note 7, at 70903.

823 Each ATS is also required to use a unique MPID in its reporting to FINRA, such that its volume reporting is distinguishable from other transaction volume reported by the broker-dealer operator of the ATS.

of transactions, Form ATS-R, which is "deemed confidential when filed,"[824] requires ATSs to report dollar volume of transactions during the quarter, a list of all subscribers that were participants on the ATS during the quarter, a list of all securities that were traded on the ATS during the quarter, and, if the ATS is subject to fair access requirements under Rule 301(b)(5), information about all persons that were granted, denied or limited access during the quarter.

The benefit of this alternative would be that NMS Stock ATSs would no longer be required to report quarterly on Form ATS-R information that is otherwise available. In addition, information that is currently deemed confidential on Form ATS-R would be made publicly available in quarterly amendments to Form ATS-N. NMS Stock ATSs would, however, be required to submit such quarterly amendments, which an NMS Stock ATS would not otherwise be required to do if the NMS Stock ATS did not have any other material changes to report during the quarter.

The Commission does not believe that this alternative would create significant new costs in preparing a quarterly Form ATS-N because the costs would be comparable to the costs of preparing Form ATS-R. However, as a result of the effective merging of proposed Form ATS-N and current Form ATS-R under this alternative, some of the information that would be made public on proposed Form ATS-N, such as the ATS's subscriber list and the list of persons granted, denied, or limited access during the reporting period (which is not being solicited under the proposed Form ATS-N) could be proprietary. Making such information public could harm the NMS Stock ATS as well as persons denied access.

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[824] See 17 CFR 242.301(b)(2)(vii).

7. Require NMS Stock ATSs to Operate as Limited Purpose Entities

Another alternative would be to amend Regulation ATS to require an NMS Stock ATS to operate as a "stand-alone" entity, which would exist only to operate the ATS and have no affiliation with any broker-dealer that seeks to execute proprietary or agency orders on the NMS Stock ATS. Under this alternative, NMS Stock ATSs would be required to publicly disclose proposed Form ATS-N, proposed Form ATS-N Amendments, and notices of cessation on proposed Form ATS-N, and would be limited purpose entities that could not engage in any activities other than operation of the ATS. This alternative would prohibit the broker-dealer operator of the NMS Stock ATS from engaging in any other broker-dealer activity, and would consequently prohibit the operation of an NMS Stock ATS by a multi-service broker-dealer.

The benefit of this alternative would be to eliminate potential conflicts of interest by requiring a broker-dealer that operates an NMS Stock ATS to have only a single business function, namely, operating the ATS. The broker-dealer would be required to eliminate any other functions, such as trading on a proprietary basis or routing customer orders.

However, this alternative may discourage broker-dealers from creating and operating innovative NMS Stock ATS platforms, and instead drive them to execute their own proprietary trades internally on their other broker-dealer systems. In addition, if they were no longer able to trade on a proprietary basis or route customer orders to their own NMS Stock ATS, many broker-dealers may choose to file a cessation of operations report and shut down the operations of their NMS Stock ATS.[825] Shutting down their NMS Stock ATS operations could result in

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[825] Alternatively, current broker-dealer operators of ATSs that trade NMS stocks may choose to spin-off or sell their ATS rather than cease operations. The expected number of broker-dealer operators selling their ATSs at once could affect the value the broker-dealer

similar (though potentially more severe) effects on the competitive dynamics of the ATS market as under the proposal. This could push more liquidity to less transparent venues (i.e., non-ATS OTC trading centers) or could result in more liquidity moving to national securities exchanges. The remaining NMS Stock ATSs, which would likely be fewer in number as some broker-dealer operators choose to cease operations of the ATSs, could become popular trading destinations because the absence of conflicts of interest could encourage market participants to route orders to those trading centers. Market participants would likely still have a need for anonymous trading, which could further contribute to liquidity still flowing to the stand-alone NMS Stock ATSs. Thus, if multi-service broker-dealers that operate their own NMS Stock ATS cease operating the ATSs, liquidity might move to other trading venues, including both transparent venues, such as national securities exchanges, and less transparent venues, such as non-ATS OTC trading centers. On the other hand, cessation of operations of NMS Stock ATSs owned by multi-service broker dealers could also result in stand-alone NMS Stock ATSs, which would not have the potential conflicts of interest discussed above, attracting more liquidity.

8. Lower the Fair Access Threshold for NMS Stock ATSs

As discussed above, NMS Stock ATSs are not required to provide fair access to the services of the NMS Stock ATS unless the ATS reaches the 5% trading volume threshold in a stock under Rule 301(b)(5) of Regulation ATS.[826] As an alternative to the proposed enhancements to the conditions to the exemption from the definition of "exchange" pursuant to Rule 3a1-1(a) for NMS Stock ATSs, which would include NMS Stock ATSs making the

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operator could receive from the sale and, as such, could factor into the decision of whether to spin-off, sell, or fold their ATS.

826 See supra notes 92-95 and accompanying text.

disclosures required by Form ATS-N so that market participants could make more informed decisions about an NMS Stock ATS as a potential trading venue,[827] the Commission considered lowering the fair access threshold under Rule 301(b)(5) of Regulation ATS[828] for NMS Stock ATSs to a level sufficiently low such that most NMS Stock ATSs would be prohibited from engaging in many discriminatory practices.[829]

One of the principal aims of this proposed rulemaking is to provide market participants with more information about the activities of the broker-dealer operator, its affiliates, and the operations of the NMS Stock ATS, so they may better assess NMS Stock ATSs as potential trading venue for their orders. For example, as discussed above, the Commission is concerned that market participants have limited or different levels of information about how the NMS Stock ATSs operate, and the activities of broker-dealer operators and their affiliates.[830] The Commission could propose new rules that would expressly prohibit or limit organizational structures that might raise conflicts of interest, or could expressly prohibit or limit the manner by which an ATS discriminates among or between subscribers. Lowering the threshold that triggers the fair access requirements would be one of the means of prohibiting or limiting certain discriminatory practices.

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827 As discussed above Sections VII and VIII, the information that would be disclosed on Form ATS-N would include, among other things, whether different classes of subscribers or persons have differing access to the services of the ATS.

828 17 CFR 242.301(b)(5).

829 As discussed above in Section VII.B., the requirements of Rule 301(b)(5) that prohibit or limit discriminatory practices of ATSs only apply to NMS Stock ATSs that cross the fair access threshold, and then, apply only with respect to the NMS stocks in which an ATS crosses the threshold.

830 See supra Section III.C.

The Commission preliminarily believes that lowering the fair access threshold for NMS Stock ATSs would require the Commission to consider lowering the fair access threshold to zero, or to some threshold between zero and 5%. If the fair access threshold remained at a threshold above zero, the benefit of this approach, as compared to the proposed disclosure requirements that would apply to all NMS Stock ATSs, could be further limited by the fact that the fair access requirements would apply only to the NMS stocks for which the NMS Stock ATS had crossed the fair access threshold. The Commission could address that situation by proposing further amendments to the fair access requirements that would extend an ATS's fair access duties to all NMS stocks once the fair access threshold had been crossed by an ATS in a certain number of NMS stocks, to revise the duties incurred when the threshold is crossed, or to simply lower the threshold to zero, which would have the effect of requiring all NMS Stock ATSs to immediately comply with the fair access requirements for all NMS stocks. However, the Commission preliminarily believes that the disclosures that would be required by proposed Form ATS-N requirements would be a cost effective and simpler approach than proposing fundamental revisions to the fair access requirements that would achieve the aim of providing market participants with information to better assess NMS Stock ATSs as potential trading venues.

9. Apply Proposed Rule 304 to ATSs that Trade Fixed Income Securities and ATSs that Solely Trade Government Securities

Another alternative would be to amend Regulation ATS to require ATSs that trade fixed income securities and ATSs that solely trade government securities to also report information about their operations and activities of the broker-dealer operator and affiliates on Form ATS-N. Under this alternative, NMS Stock ATSs, as well as ATSs that trade fixed income securities and ATSs that solely trade government securities, would be required to publicly disclose proposed

Form ATS-N, proposed Form ATS-N Amendments, and notices of cessation on proposed Form ATS-N.

The benefit of this alternative is that it may provide market participants with clearer transparency regarding the operations and activities of all types of ATSs, not just NMS stock ATSs. To the extent that there may be market participants who predominately trade orders of NMS stock, fixed income securities, and government securities on ATSs, these market participants would benefit from the added transparency regarding how these venues operate and the activities of their broker-dealer operators and affiliates.

ATSs that effect trades in fixed income securities primarily compete against other trading venues with limited or no operational transparency requirements or standards. This is not the case with NMS Stock ATSs, which provide limited information to market participants about their operations and compete directly with national securities exchanges, which are required to publicly disclose information about their operations in the form of proposed rule changes and a public rule book.[831] With government securities, trading occurs in bilateral transactions or on centralized electronic trading platforms that generally operate with limited transparency.[832] Because the market structure for and transparency requirements related to trading each of these types of securities (NMS Stock ATSs, fixed income, government securities) differ, Form ATS-N under this alternative would need to include different or additional disclosure requirements related to the operations and activities of each of these types of ATSs, so as to capture the nuances in each particular market. As a result, Form ATS-N under this alternative would need to

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831 See Section IV.B.

832 See id.

be much more complex than the proposed Form ATS-N, increasing the costs for investors to efficiently use Form ATS-N for a given type of security trading and for NMS Stock ATSs, reducing the benefits from Form ATS-N in NMS stocks. In addition, fixed income ATSs would incur costs to comply with the additional disclosures, which could result in an exit of existing fixed income ATSs, discourage innovation in surviving fixed income ATSs, and increase barriers to entry for new fixed income ATSs. Because the corporate and municipal fixed income markets lack much of the automation present for venues that trade NMS stocks, such costs could be more critical in the development of the fixed income market than in the markets for NMS stocks. Furthermore, as discussed above, ATSs that solely trade government securities are exempt from compliance with Regulation ATS.[833] To the extent that this exemption is removed and such ATSs were required to comply with Regulation ATS, including proposed Rule 304, these ATSs would incur costs associated with the public reporting and recordkeeping requirements of Regulation ATS.

Request for Comment on the Economic Analysis

The Commission is sensitive to the potential economic effects, including the costs and benefits, of the proposed amendments to Regulation ATS. The Commission has identified above certain costs and benefits associated with the proposal and requests comment on all aspects of its preliminary economic analysis. The Commission encourages commenters to identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such costs or benefits. In particular, the Commission seeks comment on the following:

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833 See supra note 64.

507. Do you believe the Commission's analysis of the potential effects of the proposed amendments to Regulation ATS is reasonable? Why or why not? Please explain in detail.

508. Do you believe the Commission's assessment of the baseline for the economic analysis is reasonable? Why or why not? Please explain in detail.

509. Do you believe that the proposing release provides a fair representation of current practices and how those current practices would change under the proposed amendments to Regulation ATS? Why or why not? Please explain in detail.

510. Do you believe that the Commission has reasonably described how the competitive landscape for the market for NMS stock execution services would be affected under the proposed amendments to Regulation ATS? Why or why not? Please explain in detail. Does the release discuss all relevant forms of competition and whether the proposal could alter them? If not, which additional forms of competition could the proposal impact and how? Please explain in detail.

511. Do you believe that the Commission has reasonably identified all market participants that would be affected by the proposed amendments to Regulation ATS? If so, why? If not, why not, and which market participants do you believe are not reasonably excluded or would be affected by the proposed amendments? Please explain in detail.

512. Do you believe that the Commission has reasonably described how market participants would be affected by the proposed amendments to Regulation ATS? Why or why not? Please explain in detail.

513. Do you believe that the Commission has reasonably described the information market participants currently receive? If so, why? If not, why not? Please explain in detail.

514. Do you believe that the Commission has reasonably described the benefits market participants would receive from the information that would be required to be disclosed by the proposed amendments to Regulation ATS? Why or why not? Please explain in detail.

515. Do you believe that market participants currently have all relevant information concerning the activities of the broker-dealer operator of the NMS Stock ATS and its affiliates as such activities relate to the NMS Stock ATS? Why or why not? Do you believe there is information that is not required in the proposed amendments to Regulation ATS that would be beneficial to market participants? If so, please describe that information and its benefits in detail. If not, why not? Please support your arguments.

516. Do you believe that market participants currently have all relevant information concerning the subscribers to the NMS Stock ATS where their orders are executed? Why or why not? Do you believe there is information that is not required in the proposed amendments to Regulation ATS that would be beneficial to market participants? If so, please describe that information and its benefits in detail. If not, why not? Please support your arguments.

517. Do you believe that market participants currently have all relevant information concerning the trading operations of the NMS Stock ATS where their orders are executed? Why or why not? Do you believe there is information that is not

required in the proposed amendments to Regulation ATS that would be beneficial to market participants? If so, please describe that information and its benefits in detail. If not, why not? Please support your arguments.

518. Do you believe that market participants currently have all relevant information concerning the services offered by the NMS Stock ATS where their orders are executed and their fee structures? Why or why not? Do you believe there is information that is not required in the proposed amendments to Regulation ATS that would be beneficial to market participants? If so, please describe that information and its benefits in detail. If not, why not? Please support your arguments.

519. Do you believe that market participants currently have all relevant information concerning the safeguards and procedures that NMS Stock ATSs have instituted to protect their confidential trading information? Why or why not? Is there information that is not required in the proposed amendments to Regulation ATS that would be beneficial to market participants? If so, please describe that information and its benefits in detail. If not, why not? Please support your arguments.

520. Do you believe that the Commission has reasonably described its analysis of the costs and benefits of each proposed amendment to Regulation ATS? Why or why not? Please explain in detail.

521. Do you believe that there are additional benefits or costs that could be quantified or otherwise monetized? Why or why not? If so, please identify these categories and, if possible, provide specific estimates or data.

522. Do you believe there are there any additional benefits that may arise from the proposed amendments to Regulation ATS? If so, what are such benefits? Please explain in detail.

523. Do you believe there are benefits described above that would not likely result from the proposed amendments to Regulation ATS? If so, please explain these benefits or lack of benefits in detail.

524. Do you believe there are any additional costs that may arise from the proposed amendments to Regulation ATS? If so, do you believe there are methods by which the Commission could reduce the costs imposed by the proposed amendments to Regulation ATS while still achieving the goals? Please explain in detail.

525. Do you believe there are any potential unintended consequences of the proposed amendments to Regulation ATS? If so, what are they? If not, why not?

526. Do you believe there are costs described above that would not likely result from the proposed amendments to Regulation ATS? Why or why not? Please support your arguments.

527. Do you believe that the proposing release appropriately describes the potential effects of the proposed amendments to Regulation ATS on the promotion of efficiency, competition, and capital formation? Why or why not? If possible, please provide analysis and empirical data to support your arguments on the competitive or anticompetitive effects, as well as the efficiency and capital formation effects, of the proposed amendments.

528. Do you believe that there are alternative mechanisms for achieving the Commission's goal of improving transparency of NMS Stock ATS's trading operations and regulatory oversight while promoting competition and capital formation? If so, what are such mechanisms? Please explain in detail.

529. Do you believe that market participants would change their behavior in response to the proposed amendments to Regulation ATS in any way? Why or why not? If so, which market participants would change their behavior and how? If not, why not? What would be the benefits and costs of these changes? How would these changes affect efficiency, competition, and capital formation? How would these changes affect market quality and market efficiency? Please support your arguments.

530. Do you believe there are benefits that may arise if the Commission were to apply proposed Rule 304, in whole or in part, to fixed income ATSs? If so, what are such benefits? Please explain in detail.

531. Do you believe there are costs that may arise if the Commission were to apply proposed Rule 304, in whole or in part, to fixed income ATSs? If so, what are such costs? Please explain in detail.

532. Do you believe that the proposed amendments could result in NMS Stock ATSs selecting to trade fixed income securities instead of NMS stocks, because, under the proposed amendments, Rule 304 would not apply to fixed income securities? Please explain in detail.

533. Do you believe that if the Commission were to apply proposed Rule 304 to fixed income ATSs, this could alter the nature of competition in the market for order

execution services for fixed income securities? Why or why not? Please support your arguments.

534. Do you believe that if the Commission were to apply proposed Rule 304 to fixed income ATSs, this could promote greater efficiency, competition, and capital formation relative to the current proposal? If so, please explain in detail.

535. Do you believe there are benefits that may arise if the Commission should adopt amendments to Regulation ATS to remove the exemption under Rule 301(a)(4)(ii)(A) of Regulation ATS for ATSs whose trading activity is solely in government securities? If so, what are such benefits? Please explain in detail.

536. Do you believe that there are benefits that may arise if the Commission enhances the transparency requirements applicable to ATSs that effect transactions solely in government securities? If so, what are such benefits? Please explain in detail.

537. Do you believe there are costs that may arise if the Commission adopted amendments to Regulation ATS to remove the exemption under Rule 301(a)(4)(ii)(A) of Regulation ATS for ATSs whose trading activity is solely in government securities? If so, what are such costs? Please explain in detail.

538. Do you believe that there are costs that may arise if the Commission were to apply Rule 304 to ATSs that effect transactions solely in government securities? If so, what are such costs? Please explain in detail.

539. Do you believe that the proposed amendments could result in ATSs selecting to solely trade government securities instead of NMS stocks, because, under the proposal, Rule 304 would not apply to government securities? Please explain in detail.

540. Do you believe that if the Commission were to apply Rule 304 to ATSs that solely trade government securities, this could alter the nature of competition in the market for order execution services for government securities? Why or why not? Please support your arguments.

541. Do you believe that if the Commission were to apply proposed Rule 304 to ATSs that solely trade government securities, this could promote greater efficiency, competition, and capital formation relative to the current proposal? If so, please explain in detail.

542. Do you believe that requiring NMS Stock ATSs to do something more to ensure compliance with proposed Rule 304 than the certification required under FINRA Rule 3130 would have effects on regulatory oversight and investor protection? If so, please explain in detail.

543. Do some NMS Stock ATSs currently disclose aggregate platform-wide order flow and execution statistics regarding the NMS Stock ATS that are not otherwise required disclosures under Exchange Act Rule 605 of Regulation NMS to one or more subscribers by the NMS Stock ATS? If so, what order flow and execution statistics are provided? How widely disseminated is the information? To what extent do the NMS Stock ATSs disclose how they calculate the statistics? Please explain in detail.

544. Do you believe that there are benefits to market participants from having NMS Stock ATSs publicly disclose aggregate platform-wide order flow and execution statistics regarding the NMS Stock ATS that are not otherwise required disclosures under Exchange Act Rule 605 of Regulation NMS but still published

or otherwise provided to one or more subscribers by the NMS Stock ATS, and from having NMS Stock ATSs describe how those statistics are calculated? If so, please explain in detail. Do you believe that there are costs to NMS Stock ATSs from having them publicly disclose those market quality statistics and describe how those statistics are calculated? If so, please explain in detail.

545. Do you believe that there are benefits to market participants if the Commission were to require NMS Stock ATSs to provide disclosure about their governance structure, compliance programs and controls to comply with Regulation ATS? If so, please explain in detail.

546. Do you believe that there are costs to NMS Stock ATSs if the Commission were to require them to provide disclosure about their governance structure, compliance programs and controls to comply with Regulation ATS? If so, please explain in detail.

547. Should proposed Form ATS-N be submitted or made publicly available on EDGAR instead of through the EFFS system and the Commission's website? What would be the advantages to the public or to NMS Stock ATSs of access through EDGAR instead of the Commission's proposed process?

548. Should some or all of the information in proposed Form ATS-N be submitted in a particular financial reporting language such as the FIX Protocol, eXtensible Business Reporting Language (XBRL), or some other open standard that is widely available to the public and at no cost? Should the Commission create a new taxonomy for submitting the information in proposed Form ATS-N?

549. Should the Commission require that some or all of the information in proposed Form ATS-N be tagged using standard electronic definitions of a particular taxonomy, and what would be the additional compliance costs associated with tagging the information?

550. Would requiring any of the information in the narrative responses to be submitted in a tagged format enhance the public's use of the data beyond the Commission's proposal? If so, how?

551. Could a format other than the one proposed to be accepted by the EFFS system reduce the burden on NMS Stock ATSs in filing the required disclosures with the Commission? For example, could a single machine-readable PDF reduce the filing burden on NMS Stock ATSs? If so, please identify the alternative format and the reduced filing burdens associated with it.

552. Should proposed Form ATS-N be structured in a more granular detail, and if so, how? In addition, how would the more granular detail enhance the public's use of the data beyond the Commission's proposal? What would be the costs of providing more granular detail?

553. Would the public's usability of the data be enhanced if it were structured in another format? If so, please identify the other format and describe how the public's use of the data would be enhanced by the other format. If possible, discuss factors about the other format such as how commonly available it is, whether it is viewer-independent, whether it is an open standard, how it has been adopted internationally and in other regulatory contexts, and how it supports document attachments or references as well as narrative and numeric data.

554. Do you believe that the Commission articulated all reasonable alternatives for the proposed amendments to Regulation ATS? If not, please provide additional alternatives and how their costs and benefits, as well as their potential impacts on the promotion of efficiency, competition, and capital formation, would compare to the proposed amendments.

555. Do you believe that the Commission has reasonably described the costs and benefits for the alternatives described above? If not, please provide more accurate descriptions of costs and benefits, including any data or statistics that support those costs and benefits.

556. Do you believe that the Commission has reasonably described the potential impacts on the promotion of efficiency, competition, and capital formation of the alternatives described above relative to the proposed amendments? If not, please explain in detail which impacts for which alternatives the Commission has not reasonably described, and support your arguments with any applicable data or statistics.

557. The Commission generally requests comment on the competitive or anticompetitive effects, as well as the efficiency and capital formation effects, of the proposed amendments to Regulation ATS on market participants if the proposed rules are adopted as proposed. Commenters should provide analysis and empirical data to support their views on the competitive or anticompetitive effects, as well as the efficiency and capital formation effects, of the proposed amendments to Regulation ATS.

558. The Commission generally requests comment on whether the benefits of the proposed amendments to Regulation ATS justify the costs. Please be specific and provide details. Commenters should provide analysis and empirical data to support their views on the benefits and costs of the proposed amendments to Regulation ATS.

559. Do you believe that the Commission has solicited the right set of information on proposed Form ATS-N, which will be made available to the public? Is there any other information the Commission should ask NMS Stock ATSs to provide on Form ATS-N? If so, please provide details.

XIV. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[834] the Commission requests comment on the potential effect of the proposed amendments and Form ATS-N on the United States economy on an annual basis. The Commission also requests comment on any potential increases in costs or prices for consumers or individual industries, and any potential effect on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

[834] 5 U.S.C. 603.

XV. Regulatory Flexibility Act Certification

Section 3(a) of the Regulatory Flexibility Act of 1980[835] ("RFA") requires the Commission to undertake an initial regulatory flexibility analysis of the impact of the proposed rule amendments on small entities unless the Commission certifies that the rule, if adopted, would not have a significant economic impact on a substantial number of small entities.[836] For purposes of Commission rulemaking in connection with the RFA,[837] a small entity includes a broker or dealer that: (1) had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a-5(d) under the Exchange Act,[838] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[839] With regard to national securities exchanges, a small entity is

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835 5 U.S.C. 603(a).

836 5 U.S.C. 605(b).

837 Although Section 601(b) of the RFA defines the term "small entity," the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term "small entity" for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in Rule 0-10 under the Exchange Act, 17 CFR 240.0-10. See Exchange Act Release No. 18451 (January 28, 1982), 47 FR 5215 (February 4, 1982) (File No. AS-305).

838 17 CFR 240.17a-5(d).

839 See 17 CFR 240.0-10(c). See also 17 CFR 240.0-10(i) (providing that a broker or dealer is affiliated with another person if: (1) Such broker or dealer controls, is controlled by, or is under common control with such other person; a person shall be deemed to control another person if that person has the right to vote 25 percent or more of the voting securities of such other person or is entitled to receive 25 percent or more of the net profits of such other person or is otherwise able to direct or cause the direction of the

an exchange that has been exempt from the reporting requirements of Rule 601 under Regulation NMS, and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[840]

All ATSs, including NMS Stock ATSs, would continue to have to register as broker-dealers.[841] The Commission examined recent FOCUS data for the 46 broker-dealers that currently operate ATSs that trade NMS stocks and concluded that 1 of the broker-dealer operators of ATSs that currently trade NMS stock had total capital of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter).[842] The Commission notes that this broker-dealer operator has never reported any transaction volume in any security, including NMS stock, to the Commission on Form ATS-R. Given that this particular ATS has never reported any transaction volume to the Commission over the six years since it first submitted its Form ATS to the Commission, the Commission preliminarily believes that this ATS would likely not submit a Form ATS-N if the proposed amendments to Regulation ATS are adopted. Consequently, the Commission certifies that the proposed amendments to

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management or policies of such other person; or (2) Such broker or dealer introduces transactions in securities, other than registered investment company securities or interests or participations in insurance company separate accounts, to such other person, or introduces accounts of customers or other brokers or dealers, other than accounts that hold only registered investment company securities or interests or participations in insurance company separate accounts, to such other person that carries such accounts on a fully disclosed basis).

840 See 17 CFR 240.0-10(e). The Commission notes that while national securities exchanges can operate an ATS, subject to certain conditions, such an ATS would have to be registered as a broker-dealer. See Regulation ATS Adopting Release, supra note 7, at 70891. Currently, no national securities exchange operates an ATS that trades NMS stocks.

841 17 CFR 242.301(b)(1).

Regulation ATS would not, if adopted, have a significant economic impact on a substantial number of small entities.

The Commission encourages written comments regarding this certification. The Commission solicits comment as to whether the proposed amendments could have impacts on small entities that have not been considered. The Commission requests that commenters describe the nature of any impacts on small entities and provide empirical data to support the extent of such effect. Such comments will be placed in the same public file as comments on the proposed amendments to Regulation ATS. Persons wishing to submit written comments should refer to the instructions for submitting comments in the front of this release.

XVI. Statutory Authority and Text of Proposed Amendments

Pursuant to Exchange Act, 15 U.S.C. 78a et seq., and particularly Sections [3(b), 5, 6, 11A, 15, 17(a), 17(b), 19, 23(a), and 36 thereof (15 U.S.C. 78c, 78k-1, 78o, 78q(a), 78q(b), 78w(a), and 78mm)], the Commission proposes to adopt Form ATS-N under the Exchange Act, to amend Rule 3a1-1 and Regulation ATS under the Exchange Act, and to amend 17 CFR 200.30-33.

List of Subjects in 17 CFR Parts 240, 242 and 249

Brokers; Confidential business information; Fraud; Reporting and recordkeeping requirements; and Securities.

For the reasons stated in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1934

1. The authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 et seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

2. Amending Section 240.3a1-1 by:

a. Changing the reference in paragraph (a)(2) from “17 CFR 242.303” to “17 CFR 242.304”.

b. Changing the reference in paragraph (a)(3) from “17 CFR 242.303” to “17 CFR 242.304”.

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PART 242 – REGULATIONS M, SHO, ATS, AC, NMS AND SCI AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

3. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k-1(c), 78l, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd-1, 78mm, 80a-23, 80a-29, and 80a-37.

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4. Amend § 242.300 by:

a. In paragraph (f) adding the phrase “the broker-dealer of” before the two instances of the phrase “an alternative trading system.”

b. In paragraph (f)(2), adding the phrase “the broker-dealer of” before the phrase “the alternative trading system.”

c. In paragraph (f)(3), adding the phrase “the broker-dealer of” before the phrase “the alternative trading system.”

d. Adding paragraph (k) to read as follows:

§ 242.300 Definitions.

* * * * *

(k) NMS Stock ATS means an alternative trading system, as defined in § 242.300(a), that facilitates transactions in NMS stocks, as defined in § 242.300(g).

5. Amend § 242.301 by:

a. In paragraph (b)(2)(i), removing the phrase “, or if the alternative trading system is operating as of April 21, 1999, no later than May 11, 1999”;

b. In paragraph (b)(2)(vii), removing the phrase “Market Regulation, Stop 10-2” and in its place adding “Trading and Markets” after the words “Division of”;

c. Adding paragraph (b)(2)(viii);

d. In paragraph (b)(9)(i), adding the word “Separately” before the word “File” and changing the first letter of the word “File” to lower case and adding the phrase “for transactions in NMS stocks, as defined in § 242.300(g), and transactions in securities other than NMS stocks” after the phrase “(§ 249.638 of this chapter)”;

e. In paragraph (b)(9)(ii), adding the word “Separately” before the word “File” and changing the first letter of the word “File” to lower case and adding the phrase “for transactions in NMS stocks and transactions in securities other than NMS stocks” after the phrase “required by Form ATS-R”;

f. In paragraph (b)(10), adding the word “Written” before the phrase “Procedures to ensure the confidential treatment of trading information” and changing the first letter of the word “Procedures” to lower case;

g. In paragraph (b)(10)(i), adding the word “written” before the word “safeguards” in both instances and adding the word “written” before the word “procedures” in both instances; and

h. In paragraph (b)(10)(ii), adding the word “written” before the word “oversight” and adding the word “written” before the word “safeguards”.

The addition reads as follows:

§ 242.301 Requirements for alternative trading systems.

* * * * *

(b) * * * * *

(2) * * * * *

(viii) An alternative trading system that is an NMS Stock ATS shall file the reports and amendments required by § 242.304, and shall not be subject to the requirements of this paragraph (b)(2). An alternative trading system that effects transactions in both NMS stocks and non-NMS stocks shall be subject to the requirements of § 242.304 of this chapter with respect to NMS stocks and this paragraph (b)(2) with respect to non-NMS stocks.

6. Amend § 242.303 by:

a. In paragraph (a), removing the phrase "(b)(9)" and add the phrase "(b)(8)" after the word "paragraph";

b. Adding paragraph (a)(1)(v);

c. In paragraph (a)(2)(ii), adding the phrase "or § 242.304" after the phrase "paragraph (b)(2) of § 242.301."

The addition reads as follows:

§ 242.303 Record preservation requirements for alternative trading systems.

* * * * *

(a) * * * * *

(1) * * * * *

(v) At least one copy of the written safeguards and written procedures to protect subscribers' confidential trading information and the written oversight procedures created in the course of complying with paragraph (b)(10) of § 242.301.

7. Add § 242.304 to read as follows:

§ 242.304 NMS Stock ATSs

(a) Conditions to the Exemption. Unless not required to comply with Regulation ATS pursuant to § 242.301(a), an NMS Stock ATS must comply with 17 CFR 242.300-304 (except § 242.301(b)(2)) to be exempt from the definition of an exchange pursuant to § 240.3a1-1(a)(2).

(1) Form ATS-N.

(i) Filing. No exemption from the definition of "exchange" is available to an NMS Stock ATS pursuant to § 240.3a1-1(a)(2) unless the NMS Stock ATS files with the Commission a Form ATS-N, in accordance with the instructions therein, and the Commission declares the Form ATS-N effective. If the NMS Stock ATS is operating pursuant to a previously filed initial operation report on Form ATS as of the effective date of § 242.304, such NMS Stock ATS shall file with the Commission a Form ATS-N, in accordance with the instructions therein, no later than 120 calendar days after the effective date of § 242.304. An NMS Stock ATS operating as of the effective date of § 242.304 may continue to operate pursuant to a previously filed initial operation report on Form ATS pending the Commission's review of the filed Form ATS-N.

(ii) Review Period and Extension of the 120-Day Review Period.

(A) The Commission will declare a Form ATS-N filed by an NMS Stock ATS operating as of the effective date of § 242.304 effective or ineffective no later than 120 calendar days from filing with the Commission. The Commission may extend the Form ATS-N review period for an NMS Stock ATS operating as of the effective date of § 242.304 for: (1) an additional 120 calendar days if the Form ATS-N is unusually lengthy or raises novel or complex issues that require additional time for review, in which case the Commission will notify the NMS Stock ATS in writing within the initial 120-day review period and will briefly describe the reason for

the determination for which additional time for review is required; or (2) any extended review period to which a duly-authorized representative of the NMS Stock ATS agrees in writing.

(B) The Commission will declare a Form ATS-N filed by an NMS Stock ATS that was not operating as of the effective date of § 242.304 effective or ineffective no later than 120 calendar days from filing with the Commission. The Commission may extend the Form ATS-N review period for: (1) an additional 90 days, if the Form ATS-N is unusually lengthy or raises novel or complex issues that require additional time for review, in which case the Commission will notify the NMS Stock ATS in writing within the initial 120-day review period and will briefly describe the reason for the determination for which additional time for review is required; or (2) any extended review period to which a duly-authorized representative of the NMS Stock ATS agrees in writing.

(iii) Effectiveness. The Commission will declare effective a Form ATS-N if the NMS Stock ATS qualifies for the Rule 3a1-1(a)(2) exemption. The Commission will declare ineffective a Form ATS-N if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors.

(iv) Order Regarding Effectiveness. The Commission will issue an order to declare a Form ATS-N effective or ineffective. Upon the effectiveness of the Form ATS-N, the NMS Stock ATS may operate pursuant to the conditions of this section. If the Commission declares a Form ATS-N ineffective, the NMS Stock ATS shall be prohibited from operating as an NMS Stock ATS. A Form ATS-N declared ineffective would not prevent the NMS Stock ATS from subsequently filing a new Form ATS-N.

(2) Form ATS-N Amendment.

(i) Form ATS-N Amendment Filing Requirements. An NMS Stock ATS shall amend an effective Form ATS-N, in accordance with the instructions therein:

(A) At least 30 calendar days prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS-N;

(B) Within 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate for any reason and has not been previously reported to the Commission as a Form ATS-N Amendment; or

(C) Promptly, to correct information in any previous disclosure on Form ATS-N, after discovery that any information filed under paragraphs (a)(1)(i) or (a)(2)(i)(A) or (B) of this section was inaccurate or incomplete when filed.

(ii) Commission Review. The Commission will, by order, if it finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, declare ineffective any Form ATS-N Amendment filed pursuant to § 242.304(a)(2)(i)(A)-(C) no later than 30 calendar days from filing with the Commission. If the Commission declares a Form ATS-N Amendment ineffective, the NMS Stock ATS shall be prohibited from operating pursuant to the ineffective Form ATS-N Amendment. A Form ATS-N Amendment declared ineffective would not prevent the NMS Stock ATS from subsequently filing a new Form ATS-N Amendment.

(3) Notice of Cessation. An NMS Stock ATS shall notice its cessation of operations on Form ATS-N at least 10 business days before the date the NMS Stock ATS ceases to operate as an NMS Stock ATS. The notice of cessation shall cause the Form ATS-N to become ineffective on the date designated by the NMS Stock ATS.

(4) Suspension, Limitation, and Revocation of the Exemption from the Definition of Exchange.

(i) The Commission will, by order, if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, suspend for a period not exceeding twelve months, limit, or revoke an NMS Stock ATS's exemption from the definition of "exchange" pursuant to § 240.3a1-1(a)(2).

(ii) If an NMS Stock ATS's exemption is suspended or revoked pursuant to paragraph (i), the NMS Stock ATS shall be prohibited from operating pursuant to the exemption from the definition an "exchange" pursuant to § 240.3a1-1(a)(2). If an NMS Stock ATS's exemption is limited pursuant to paragraph (i), the NMS Stock ATS shall be prohibited from operating in a manner otherwise inconsistent with the terms and conditions of the Commission order.

(b) Public Disclosures.

(1) Every Form ATS-N filed pursuant to § 242.304 shall constitute a "report" within the meaning of sections 11A, 17(a), 18(a), and 32(a) (15 U.S.C. 78k-1, 78q(a), 78r(a), and 78ff(a)), and any other applicable provisions of the Act.

(2) The Commission would make public via posting on the Commission's website, each:

(A) Order of effectiveness of a Form ATS-N;

(B) Order of ineffectiveness of a Form ATS-N;

(C) Effective Form ATS-N;

(D) Filed Form ATS-N Amendment;

(E) Order of ineffectiveness of a Form ATS-N Amendment;

(F) Notice of cessation; and

(G) Order suspending, limiting, or revoking the exemption from the definition of an

"exchange" pursuant to § 240.3a1-1(a)(2).

(3) Each NMS Stock ATS shall make public via posting on its website a direct URL hyperlink to the Commission's website that contains the documents enumerated in (b)(2).

(c) Form ATS-N Filing Requirements.

(1) A filed Form ATS-N must respond to each item, as applicable, in detail and disclose information that is accurate, current, and complete.

(2) Any report required to be filed with the Commission under § 242.304 shall be filed electronically on Form ATS-N, and include all information as prescribed in Form ATS-N and the instructions thereto and contain an electronic signature. The signatory to an electronically filed Form ATS-N shall manually sign a signature page or document, in the manner prescribed by Form ATS-N, authenticating, acknowledging, or otherwise adopting his or her signature that appears in typed form within the electronic filing. Such document shall be executed before or at the time Form ATS-N is electronically filed and shall be retained by the NMS Stock ATS in accordance with § 242.303.

* * * * *

PART 249 - FORMS, SECURITIES EXCHANGE ACT OF 1934

8. The general authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; 12 U.S.C. 5461 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

9. Amending Subpart G, to add § 249.640 to read as follows:

§ 249.640. Form ATS-N, information required of NMS Stock ATSs pursuant to § 249.304(a) of this chapter.

This form shall be used by every NMS Stock ATS to file required reports under § 249.304(a) of this chapter.

Note: The text of Form ATS-N will not appear in the Code of Federal Regulations.

United States Securities and Exchange Commission
Washington, DC 20510
FORM ATS-N

INTENTIONAL MISSTATEMENTS OR OMMISSIONS OF FACTS MAY CONSTITUTE CRIMINAL VIOLATIONS.
See 18 U.S.C.1001 and 15 U.S.C. 78ff(a)

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(Entity name) is making this filing pursuant to the Rule 304 under the Securities Exchange Act of 1934

- ☐ Initial Form Filing
- ☐ Withdrawal of Initial Form Filing

Submission Type (select one)

☐	Rule 304(a)(1)(i)	Form ATS-N
☐	Rule 304(a)(2)(i)(A)	Material Amendment to Form ATS-N
☐	Rule 304(a)(2)(i)(B)	Periodic Amendment to Form ATS-N
☐	Rule 304(a)(2)(i)(C)	Correcting Amendment to Form ATS-N
☐	Rule 304(a)(3)	Notice of Cessation

Date NMS Stock ATS will cease to operate: mm/dd/yyyy

Provide a brief narrative description of the Amendment:

Part I: Name

1. Full Name of Registered Broker-Dealer of the NMS Stock ATS ("broker-dealer operator") as stated on Form BD:_____

2. Full Name of NMS Stock ATS under which business is conducted, if any:_____

3. Market Participant Identifier (MPID) of the NMS Stock ATS: _____

4. Is the NMS Stock ATS currently operating pursuant to a previously filed initial operation report on Form ATS? Yes ☐ No☐

Part II – Broker Dealer Operator Registration and Contact Information

1. Effective date of broker-dealer registration with the Commission: mm/dd/yyyy
2. SEC File No.: 8-_____
3. CRD No.: _____
4. Full Name of the national securities association and the effective date of broker-dealer membership with the national securities association:

   Name _____ mm/dd/yyyy
5. Legal Status (select one)

   - ☐ Sole Proprietorship
   - ☐ Corporation
   - ☐ Partnership
   - ☐ Limited Liability Company
   - ☐ Other (Specify):_____

   If other than a sole proprietor, please provide the following:

   a) Date of Formation: mm/dd/yyyy

   b) State/Country of Formation: {pick list}
6. Physical Street Address of the NMS Stock ATS matching system:

   Street:_____

   City_____ State __ Zip Code_____

   If the broker-dealer operator is a sole proprietor and the physical street address is a private residence, check this box: ☐

   A private residential address of a sole proprietor will not be included in publicly available versions of this form.
7. Mailing Address: ☐ Same as physical address

   Street:_____

   City_____ State __ Zip Code_____

   If the broker-dealer operator is a sole proprietor and the mailing address is a private residence, check this box: ☐

   A private residential address of a sole proprietor will not be included in publicly available versions of this form.
8. Website URL of the NMS Stock ATS_____

Exhibit 1	Provide a copy of any materials currently provided to subscribers or other persons related to the operations of the NMS Stock ATS or the disclosures on Form ATS-N (e.g., FIX protocol procedures, rules of engagement/manuals, frequently asked questions, marketing materials).
Exhibit 2A	Provide a copy of the most recently filed or amended Schedule A of the broker-dealer operator's Form BD disclosing information related to direct owners and executive officers. ☐ In lieu of filing {entity} certifies that the information requested under this exhibit is available at the Internet website below and is accurate as of the date of this filing. URL:
Exhibit 2B	Provide a copy of the most recently filed or amended Schedule B of the broker-dealer operator's Form BD disclosing information related to indirect owners. ☐ In lieu of filing {entity} certifies that the information requested under this exhibit is available at the Internet website below and is accurate as of the date of this filing. URL:

Part III. Activities of the Broker-Dealer Operator and Affiliates

- Respond to each question below. Attach responses to each Item of Part III as Exhibit 3 with the information required for each "yes" response. Label each Item appropriately and organize responses according to Item number. For any Item or subpart of an Item that is inapplicable, state as such.

- For Items requesting the identity of affiliates and business units of the broker-dealer operator, provide the name under which each affiliate or business unit conducts business (e.g., the formal name under which a proprietary trading desk of the broker-dealer operator conducts business) and the applicable CRD number and MPID(s) under which the affiliate or business unit conducts business.

- For filings made pursuant to Rule 304(a)(2)(i) (i.e., Form ATS-N Amendments), also attach as Exhibit 3A a redline document to indicate additions to or deletions from any amended Item. Items in which there is no change do not need to be included within the Exhibit 3A.

Item 1: **Non-ATS Trading Centers**	Does the broker-dealer operator, or any of its affiliates, operate or control any non-ATS trading center(s) that is an OTC market maker or executes orders in NMS stocks internally by trading as principal or crossing orders as agent ("non-ATS trading centers")? If Yes: a) Identify the non-ATS trading center(s); and b) Describe any interaction or coordination between the non-ATS trading center(s) identified in Item 1(a) and the NMS Stock ATS, including: i. Circumstances under which subscriber orders or other trading interest (such as quotes, indications of interest ("IOI"), conditional orders or messages (hereinafter collectively referred to as "trading interest")) sent to the NMS Stock ATS are displayed or otherwise made known to the non-ATS trading center(s) identified in Item 1(a) before entering the NMS Stock ATS; ii. Circumstances under which subscriber orders or other trading interest received by the broker-dealer operator or its affiliates may execute, in whole or in part, in the non-ATS trading center(s) identified in Item 1(a) before entering the NMS Stock ATS; and iii. Circumstances under which subscriber orders or other trading interest are removed from the	Yes ☐

	NMS Stock ATS and sent to the non-ATS trading center(s) identified in Item 1(a).	
Item 2: **Multiple NMS Stock ATS Operations**	Does the broker-dealer operator, or any of its affiliates, operate one or more NMS Stock ATSs other than the NMS Stock ATS named on this Form ATS-N? If Yes: a) Identify the NMS Stock ATS(s) and provide the MPID(s); and b) Describe any interaction or coordination between each NMS Stock ATS(s) identified in Item 2(a) and the NMS Stock ATS named on this Form ATS-N including: i. The circumstances under which subscriber orders or other trading interest received by the broker-dealer operator or its affiliates to be sent to the NMS Stock ATS named on this Form ATS-N may be sent to an NMS Stock ATS identified in Item 2(a); ii. The circumstances under which subscriber orders or other trading interest to be sent to the NMS Stock ATS named on this Form ATS-N are displayed or otherwise made known in an NMS Stock ATS identified in Item 2(a); and iii. The circumstances under which subscriber orders or other trading interest received by the NMS Stock ATS named on this Form ATS-N may be removed and sent to the NMS Stock ATS(s) identified in Item 2(a).	Yes ☐
Item 3: **Products or Services Offered to Subscribers**	Does the broker-dealer operator, or any of its affiliates, offer subscribers any products or services used in connection with trading on the NMS Stock ATS (e.g., algorithmic trading products, market data feeds)? If Yes: a) Describe the products or services, and identify the types of subscribers (e.g., retail, institutional, professional) to which such services or products are offered; and b) If the terms and conditions of the services or products are not the same for all subscribers, describe any differences.	Yes ☐

Item 4: **Arrangements with Unaffiliated Trading Centers**	Does the broker-dealer operator, or any of its affiliates, have any formal or informal arrangement with an unaffiliated person(s), or affiliate(s) of such person(s), that operates a trading center regarding access to the NMS Stock ATS, including preferential routing arrangements? If Yes: a) Identify the person(s) and the trading center(s); and b) Describe the terms of the arrangement(s).	Yes ☐
Item 5: **Trading Activities on the NMS Stock ATS**	Does the broker-dealer operator, or any of its affiliates, enter orders or other trading interest on the NMS Stock ATS? If Yes: a) Identify each affiliate and business unit of the broker-dealer operator that may enter orders or other trading interest on the NMS Stock ATS; b) Describe the circumstances and capacity (e.g., proprietary or agency) in which each affiliate and business unit identified in Item 5(a) enters orders or other trading interest on the NMS Stock ATS; c) Describe the manner in which by which each affiliate or business unit identified in Item 5(a) enters orders or other trading interest on the NMS Stock ATS (e.g., directly through a Financial Information Exchange ("FIX") connection to the NMS Stock ATS, or indirectly, by way of the broker-dealer operator's SOR (or similar functionality), algorithm, intermediate application, or sales desk); and d) Describe any means by which a subscriber can be excluded from interacting or trading with orders or other trading interest of the broker-dealer operator or its affiliates on the NMS Stock ATS.	Yes ☐
Item 6: **Smart Order Router ("SOR") (or Similar Functionality) or Algorithms**	Does the broker-dealer operator, or any of its affiliates, use a SOR(s) (or similar functionality), an algorithm(s), or both to send or receive subscriber orders or other trading interest to or from the NMS Stock ATS? If Yes: a) Identify the SOR(s) (or similar functionality) or algorithm(s) and identify the person(s) that operates the SOR(s) (or similar functionality) and algorithm(s), if other than the broker-dealer operator; b) Describe the interaction or coordination between the	Yes ☒ No ☐

	SOR(s) (or similar functionality) or algorithm(s) identified in Item 6(a) and the NMS Stock ATS, including any information or messages about orders or other trading interest (e.g., IOIs) that the SOR(s) (or similar functionality) or algorithm(s) send or receive to or from the NMS Stock ATS and the circumstances under which such information may be shared with any person.	
Item 7: **Shared Employees of the NMS Stock ATS**	Does any employee of the broker-dealer operator that services the operations of the NMS Stock ATS also service any other business unit(s) or any affiliate(s) of the broker-dealer operator ("shared employee")? If Yes: a) Identify the business unit(s) and/or the affiliate(s) of the broker-dealer operator to which the shared employee(s) provides services and identify the position(s) or title(s) that the shared employee(s) holds in the business unit(s) and/or affiliate(s) of the broker-dealer operator; and b) Describe the roles and responsibilities of the shared employee(s) at the NMS Stock ATS and the business unit(s) and/or affiliate(s) of the broker-dealer operator.	Yes ☐
Item 8: **Service Providers to the NMS Stock ATS**	Is any operation, service, or function of the NMS Stock ATS performed by any person(s) other than the broker-dealer operator of the NMS Stock ATS? If Yes: a) Identify the person(s) (in the case of a natural person, identify only the person's position or title) performing the operation, service, or function and note whether this service provider(s) is an affiliate of the broker-dealer, if applicable; b) Describe the operation, service, or function that the person(s) identified in Item 8(a) provides and describe the role and responsibilities of that person(s); and c) State whether or not the person(s) identified in Item 8(a), or any of its affiliates, may enter orders or other trading interest on the NMS Stock ATS, and, if so, describe the circumstances and means by which such orders or other trading interest are entered on the NMS Stock ATS.	Yes ☐

Item 9: **Differences in Availability of Services, Functionalities or Procedures**	Is there any service, functionality, or procedure of the NMS Stock ATS that is available or applies to the broker-dealer operator or its affiliates, that is not available or does not apply to a subscriber(s) to the NMS Stock ATS? If Yes: a) Identify the service, functionality, or procedure; and b) Describe the service, functionality, or procedure that is available to the broker-dealer operator or its affiliates but is not available or does not apply to a subscriber(s) to the NMS Stock ATS.	Yes ☐
Item 10: **Confidential Treatment of Trading Information**	Describe the written safeguards and written procedures to protect the confidential trading information of subscribers to the NMS Stock ATS. Including: a) Describe the means by which a subscriber can consent or withdraw consent to the disclosure of confidential trading information to any persons (including the broker-dealer operator and any of its affiliates); b) Identify the positions or titles of any persons that have access to confidential trading information; describe the confidential trading information to which the persons have access; and describe the circumstances under which the persons can access confidential trading information; c) Describe the written standards controlling employees of the NMS Stock ATS that trade for employees' accounts; and d) Describe the written oversight procedures to ensure that the safeguards and procedures described above are implemented and followed.	

Part IV. The NMS Stock ATS Manner of Operations

- Respond to the questions below. Attach responses to each Item to Part IV as Exhibit 4 with the information required for each disclosure. Label each Item appropriately and organize responses according to Item number. For any Item or subpart of an Item that is inapplicable, state as such.

- For filings made pursuant to Rule 304(a)(2)(i) (i.e., Form ATS-N Amendments), also attach as Exhibit 4A a redline document to indicate additions to or deletions from any Item which is being amended. Items in which there is no change do not need to be included within the Exhibit 4A

Item 1: Subscribers	a) *Eligibility*: Describe any eligibility requirements to gain access to the services of the NMS Stock ATS. If the eligibility requirements are not the same for all subscribers and persons, describe any differences. b) *Terms and Conditions of Use*: Describe the terms and conditions of any contractual agreements for granting access to the NMS Stock ATS for the purpose of effecting transactions in securities or for submitting, disseminating, or displaying orders on the NMS Stock ATS. State whether these contractual agreements are written. If the terms or conditions of any contractual agreements are not the same for all subscribers and persons, describe any differences. c) *Types of Subscribers*: Describe the types of subscribers and other persons that use the services of the NMS Stock ATS (e.g., institutional investors, retail investors, broker-dealers, proprietary trading firms). State whether the NMS Stock ATS accepts non-broker-dealers as subscribers to the ATS. Describe any criteria for distinguishing among types of subscribers, classes of subscribers, or other persons. d) *Liquidity Providers*: Describe any formal or informal arrangement the NMS Stock ATS has with a subscriber(s) or person(s) to provide liquidity to the NMS Stock ATS (e.g., undertaking to buy or sell continuously, or to meet specified thresholds of trading or quoting activity). Describe the terms and conditions of each arrangement and identify any liquidity providers that are affiliates of the broker-dealer operator. e) *Limitation and Denial of Services*: Describe the circumstances by which access to the NMS Stock ATS for a subscriber or other person may be limited or denied, and describe any procedures or standards that are used to determine such action. If the circumstances, procedures, or standards are not applicable to all subscribers and persons, describe any differences.

Item 2: **Hours of Operations**	a) *Hours*: Provide the days and hours of operation of the NMS Stock ATS, including the times when orders or other trading interest are entered on the NMS Stock ATS and the time when pre-opening or after-hours trading occur. b) *Application*: If the times when orders or other trading interest are entered on the NMS Stock ATS are not the same for all subscribers and persons, describe any differences.
Item 3: **Types of Orders**	a) *Order Types and Modifiers*: Describe any types of orders that are entered on the NMS Stock ATS, their characteristics, operations, and how they are handled on the NMS Stock ATS, including: i. priority for each order type, including the order type's priority upon order entry and any subsequent change to priority (if applicable); whether the order type can receive a new time stamp; the order type's priority vis-à-vis other orders on the book due to changes in the NBBO or other reference price; and any instance in which the order type could lose execution priority to a later arriving order at the same price; ii. conditions for each order type, including any price conditions, including how the order type is ranked and how price conditions affect the rank and price at which it can be executed; conditions on the display or non-display of an order; or conditions on executability and routability; iii. order types designed not to remove liquidity (e.g., post-only orders), including what occurs when such order is marketable against trading interest on the NMS Stock ATS when received; iv. order types that adjust their price as changes to the order book occur (e.g., price sliding orders or pegged orders) or have a discretionary range, including an order's rank and price upon order entry and whether such prices or rank may change based on the NBBO or other market conditions when using such order type; when the order type is executable and at what price the execution would occur; whether the price at which the order type can be executed ever changes; and if the order type can operate in different ways, the default operation of the order type; v. the time-in-force instructions that can be used or not used with each order type; vi. the availability of order types across all forms of connectivity to the NMS Stock ATS and differences, if any, between the availability of an order type across those forms of connectivity; vii. whether an order type is eligible for routing to other trading centers, including, if the order type is routable, whether it can be used with any routing services offered; and viii. the circumstances under which order types may be combined with a time-in-force or another order type, modified, replaced, canceled, rejected, or removed from the NMS Stock ATS. b) *Application*: If the availability of order types and their terms and conditions are not the same for all subscribers and persons, describe

	any differences. c) *Order Size Requirements and Odd-Lot Orders*: Describe any requirements and handling procedures for minimum order sizes, odd-lot orders, or mixed-lot orders. If the requirements and handling procedures for minimum order sizes or, odd lot orders, or mixed lot orders are not the same for all subscribers and persons, describe any differences. d) *Indications of Interest ("IOI") and Conditional Orders*: Describe any messages sent to or received by the NMS Stock ATS indicating trading interest (e.g., IOIs, actionable IOIs, or conditional orders), including the information contained in the message, the means under which messages are transmitted, the circumstances in which messages are transmitted (e.g., automatically by the NMS Stock ATS, or upon the subscriber's request), and the circumstances in which they may result in an execution on the NMS Stock ATS. If the terms and conditions regarding these messages, indications of interests, and conditional orders are not the same for all subscribers and persons, describe any differences.
Item 4: **Connectivity, Order Entry, and Co-location**	a) *Connectivity and Order Entry*: Describe the means by which subscribers or other persons connect to the NMS Stock ATS and enter orders or other trading interest on the NMS Stock ATS (e.g., directly, through a Financial Information eXchange ("FIX") connection to the ATS, or indirectly, through the broker-dealer operator's SOR, or any intermediate functionality, algorithm, or sales desk). If the terms and conditions for connecting and entering orders or other trading interest on the NMS Stock ATS are not the same for all subscribers and persons, describe any differences. b) *Co-Location*: Describe any co-location services or any other means by which any subscriber or other persons may enhance the speed by which to send or receive orders, trading interest, or messages to or from the NMS Stock ATS. Describe the terms and conditions of co-location services. If the terms and conditions of the co-location services are not the same for all subscribers and persons, describe any differences.
Item 5: **Segmentation of Order Flow and Notice About Segmentation**	a) *Categories*: Describe any segmentation of orders or other trading interest on the NMS Stock ATS (e.g., classification by type of participant, source, nature of trading activity) and describe the segmentation categories, the criteria used to segment these categories, and procedures for determining, evaluating, and changing segmented categories. If the segmented categories, the criteria used to segment these categories, and any procedures for determining, evaluating or changing segmented categories are not the same for all subscribers and persons, describe any differences. b) *Notice about Segmentation*: State whether the NMS Stock ATS

	notifies subscribers or persons about the segmentation category that a subscriber or a person is assigned. Describe any notice provided to subscribers or persons about the segmentation category that they are assigned and the segmentation identified in 5(a), including the content of any notice and the means by which any notice is communicated. If the notice is not the same for all subscribers and persons, describe any differences. c) *Order Preferencing*: Describe any means and the circumstances by which a subscriber, the broker-dealer operator, or any of its affiliates may designate an order or trading interest submitted to the NMS Stock ATS to interact or not to interact with specific orders, trading interest, or persons on the NMS Stock ATS (e.g., designating an order or trading interest to be executed against a specific subscriber) and how such designations affect order priority and interaction.
Item 6: **Display of Order and Trading Interest**	a) *Display*: Describe any means and circumstances by which orders or other trading interest on the NMS Stock ATS are displayed or made known outside the NMS Stock ATS and the information about the orders and trading interest that are displayed. If the display of orders or other trading interest is not the same for all subscribers and persons, describe any differences. b) *Recipients*: Identify the subscriber(s) or person(s) (in the case of a natural person, identify only the person's position or title) to whom the orders and trading interest are displayed or otherwise made known.
Item 7: **Trading Services**	a) *Matching Methodology*: Describe the means or facilities used by the NMS Stock ATS to bring together the orders of multiple buyers and sellers, including the structure of the market (e.g., crossing system, auction market, limit order matching book). If the use of these means or facilities are not the same for all subscribers and persons, describe any differences. b) *Order Interaction Rules*: Describe the established, non-discretionary methods that dictate the terms of trading among multiple buyers and sellers on the facilities of the NMS Stock ATS, including rules and procedures governing the priority, pricing methodologies, allocation, matching, and execution of orders and other trading interest. If the rules and procedures are not the same for all subscribers and persons, describe any differences. c) *Other Trading Procedures*: Describe any trading procedures related to price protection mechanisms, short sales, locked-crossed markets, the handling of execution errors, time-stamping of orders and executions, or price improvement functionality. If the trading procedures are not the same for all subscribers and persons, describe any differences.
Item 8:	a) *Suspension of Trading, System Disruption or Malfunction:* Describe any procedures governing trading in the event the NMS

Suspension of Trading, System Disruption or Malfunction	Stock ATS suspends trading or experiences a system disruption or system malfunction. If the procedures governing trading during a suspension or system disruption or malfunction are not the same for all subscribers and persons, describe any differences.
Item 9: **Opening, Reopening, and Closing Processes, and After Hours Procedures**	a) *Opening and Reopening Processes*: Describe any opening and reopening processes, including how orders or other trading interest are matched and executed prior to the start of regular trading hours or following a stoppage of trading in a security during regular trading hours and how unexecuted orders or other trading interest are handled at the time the NMS Stock ATS begins regular trading at the start of regular trading hours or following a stoppage of trading in a security during regular trading hours. Describe any differences between pre-opening executions, executions following a stoppage of trading in a security during regular trading hours, and executions during regular trading hours. b) *Closing Process*: Describe any closing process, including how unexecuted orders or other trading interest are handled at the close of regular trading. Describe any differences between the closing executions and executions during regular trading hours. c) *After-Hours Trading*: Describe any after-hours trading procedures, including how orders and trading interest are matched and executed during after-hours trading. Describe any differences between the after-hours executions and executions during regular trading hours.
Item 10: **Outbound Routing**	a) *Routing*: Describe the circumstances under which orders or other trading interest are routed from the NMS Stock ATS to another trading center, including whether outbound routing occurs at the affirmative instruction of the subscriber or at the discretion of the broker-dealer operator, and the means by which routing is performed (e.g., a third party or order management system or a SOR (or similar functionality) or algorithm of the broker-dealer operator or any of its affiliates). b) *Application:* If the means by which orders or other trading interest are routed from the NMS Stock ATS are not the same for all subscribers and persons, describe any differences.
Item 11: **Market Data**	a) *Market Data:* Describe the market data used by the NMS Stock ATS and the source of that market data (e.g., market data feeds disseminated by the consolidated data processor ("SIP") and market data feeds disseminated directly by an exchange or other trading center or third-party vendor of market data). b) *Usage:* Describe the specific purpose for which market data is used by the NMS Stock ATS, including how market data is used to determine the NBBO, protected quotes, pricing of orders and executions, and routing destinations.

Item 12: **Fees**	a) *Fees:* Describe any fees, rebates, or other charges of the NMS Stock ATS (e.g., connectivity fees, subscription fees, execution fees, volume discounts) and provide the range (e.g., high and low) of such fees, rebates, or other charges. b) *Application*: If the fees, rebates, or other charges of the NMS Stock ATS are not the same for all subscribers and persons, describe any differences.
Item 13: **Trade Reporting, Clearance and Settlement**	a) *Trade Reporting*: Describe any arrangements or procedures for reporting transactions on the NMS Stock ATS. If the trade reporting procedures are not the same for all subscribers and persons, describe any differences. b) *Clearance and Settlement*: Describe any arrangements or procedures undertaken by the NMS Stock ATS to facilitate the clearance and settlement of transactions on the NMS Stock ATS (e.g., whether the NMS Stock ATS becomes a counterparty, whether it submits trades to a registered clearing agency, or whether it requires subscribers to have arrangements with a clearing firm). If the clearance and settlement procedures are not the same for all subscribers and persons, describe any differences.
Item 14: **Order Display and Execution Access**	If the NMS Stock ATS displays orders in an NMS stock to any person other than employees of the NMS Stock ATS and executed 5% or more of the average daily trading volume in that NMS stock as reported by an effective transaction reporting plan for four of the preceding six calendar months: a) Provide the ticker symbol for each NMS stock displayed for each of the last 6 calendar months; b) Describe the manner in which the NMS Stock ATS displays such orders on a national securities exchange or through a national securities association; and c) Describe how the NMS Stock ATS provides access to such orders displayed in the national market system equivalent to the access to other orders displayed on that exchange or association.
Item 15: **Fair Access**	If the NMS Stock ATS executed 5% or more of the average daily trading volume in an NMS stock as reported by an effective transaction reporting plan for four of the preceding six calendar months: a) Provide the ticker symbol for each NMS stock for each of the last 6 calendar months; and b) Describe the written standards for granting access to trading on the NMS Stock ATS.

Item 16: **Market Quality Statistics Published or Provided to Subscribers**	If the NMS Stock ATS publishes or otherwise provides to one or more subscribers aggregate platform-wide order flow and execution statistics of the NMS Stock ATS that are not otherwise required disclosures under 17 CFR § 242.605: a) List and describe the categories or metrics of aggregate platform-wide order flow and execution statistics published or provided; b) Describe any criteria or methodology used to calculate aggregate platform-wide order flow and execution statistics; and c) Attach as Exhibit 5 the most recent disclosure of aggregate platform-wide order flow and execution statistics published or provided to one or more subscribers for each category or metric as of the end of the calendar quarter.

Part V: Contact Information, Signature Block, and Consent to Service

Provide the following information of the person at {the name of the NMS Stock ATS} prepared to respond to questions for this submission:

First Name: Last Name:

Title:

E-Mail: Telephone:

The {name of the NMS Stock ATS} consents that service of any civil action brought by, or notice of any proceeding before, the SEC or a self-regulatory organizations in connection with the alternative trading system's activities may be given by registered or certified mail or email to the contact employee at the primary street address or email address, or mailing address if different, given in Part I above. The undersigned, being first duly sworn, deposes and says that he/she has executed this form on behalf of, and with the authority of, said alternative trading system. The undersigned and {name of NMS Stock ATS} represents that the information and statements contained herein, including exhibits, schedules, or other documents attached hereto, and other information filed herewith, all of which are made a part hereof, are current, true, and complete.

Date {auto fill} {Name of NMS Stock ATS}

By: _____ Title_____

(Digital sign)

FORM ATS-N INSTRUCTIONS

A. GENERAL INSTRUCTIONS:

- Form ATS-N is a public reporting form that is designed to provide the public and the Commission with information about the operations of the NMS Stock ATS and the activities of its broker-dealer operator and its affiliates. Form ATS-N is to be used by an NMS Stock ATS to qualify for the exemption from the definition of an "exchange" pursuant to Exchange Act Rule 3a1-1(a)(2), for which no other form is authorized or prescribed.

- An NMS Stock ATS must respond to each item, as applicable, in detail and disclose information that is accurate, current, and complete. An NMS Stock ATS must provide all the information required by the form, including the exhibits, and must present the information in a clear and comprehensible manner. A filing that is incomplete or similarly deficient may be returned to the NMS Stock ATS. Any filing so returned shall for all purposes be deemed not to have been filed with the Commission. See also Rule 0-3 under the Exchange Act (17 CFR 240.0-3).

- A separate Form ATS-N is required for each NMS Stock ATS operated by the same broker-dealer operator.

B. WHEN TO FILE FORM ATS-N

- Form ATS-N: Prior to commencing operations, an NMS Stock ATS shall file a Form ATS-N and the Form ATS-N must be declared effective by the Commission. If the NMS Stock ATS is operating pursuant to a previously filed initial operation report on Form ATS as of the effective date of proposed Rule 304, such NMS Stock ATS shall file with the Commission a Form ATS-N no later than 120 calendar days after such effective date.

- Form ATS-N Amendment: An NMS Stock ATS shall amend an effective Form ATS-N: (1) at least 30 calendar days prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS-N; (2) within 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate for any reason and has not been previously reported to the Commission as a Form ATS-N Amendment; or (3) promptly, to correct information in any previous disclosure on Form ATS-N, after discovery that any information filed under paragraphs (a)(1)(i) or (a)(2)(i)(A) or (B) of proposed Rule 304 was inaccurate or incomplete when filed.

- Notice of Cessation: An NMS Stock ATS shall notice its cessation of operations on Form ATS-N at least 10 business days before the date the NMS Stock ATS will cease to operate as an NMS Stock ATS.

- Withdrawal: If an NMS Stock ATS determines to withdraw a Form ATS-N, it must select the appropriate check box and provide the correct file number to withdraw the submission.

C. HOW TO FILE A FORM ATS-N

- Any report required to be submitted pursuant to Rule 304 of Regulation ATS shall be filed in an electronic format through the electronic form filing system ("EFFS"), a secure website operated by the Securities and Exchange Commission ("Commission"). Documents filed through the EFFS system must be in a text-searchable format without the use of optical character recognition.

- A duly authorized individual of the NMS Stock ATS shall electronically sign the completed Form ATS-N. In addition, a duly authorized individual of the NMS Stock ATS shall manually sign one copy of the completed Form ATS-N, and the manually signed signature page shall be preserved pursuant to the requirements of proposed Rule 303 of Regulation ATS.

D. CONTACT INFORMATION

- The individual listed on the NMS Stock ATS's response to Part V of Form ATS-N as the contact representative must be authorized to receive all incoming communications and be responsible for disseminating that information, as necessary, within the NMS Stock ATS.

E. RECORDKEEPING

- A copy of this Form ATS-N must be retained by the NMS Stock ATS and made available for inspection upon request of the SEC.

F. PAPERWORK REDUCTION ACT DISCLOSURE

- Form ATS-N requires an NMS Stock ATS to provide the Commission with certain information regarding: (1) the operation of the NMS Stock ATS and the activities of the broker-dealer operator and its affiliates; (2) material and other changes to the operation of the NMS Stock ATS; and (3) notice upon ceasing operation of the alternative trading system. Form ATS-N is intended to provide the public with information about the operations of the NMS Stock ATS and the activities of the broker-dealer operator and its affiliates so that they may make an informed decision as to whether to participate on the NMS Stock ATS. In addition, the Form ATS-N is intended to provide the Commission with information to permit it to carry out its market oversight and investor protection functions.

- The information provided on Form ATS-N will help enable the Commission to determine whether an NMS Stock ATS is in compliance with the federal securities laws and the rules or regulations thereunder, including Regulation ATS. An NMS Stock ATS must:

(1) file Form ATS-N prior to commencing operations; (2) file a Form ATS-N Amendment at least 30 calendar days prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS-N; (3) file a Form ATS-N Amendment within 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate for any reason and has not been previously reported to the Commission on Form ATS-N; (4) file a Form ATS-N Amendment promptly to correct information in any previous disclosure on a Form ATS-N or a Form ATS-N Amendment after discovery that any information filed was inaccurate or incomplete when filed; and (5) notice its cessation of operations at least 10 business days before the date the NMS Stock ATS ceases to operate as an NMS Stock ATS.

- This collection of information will be reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The Commission estimates that that an NMS Stock ATS will spend approximately 141.3 hours completing the Form ATS-N, approximately 9.5 hours preparing each amendment to Form ATS-N, and approximately 2 hours preparing a notice of cessation on Form ATS-N. Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.

G. EXPLANATION OF TERMS

The following terms are defined for purposes of Form ATS-N.

- **AFFILIATE:** Shall mean, with respect to a specified person, any person that, directly or indirectly, controls, is under common control with, or is controlled by, the specified person.

- **ALTERNATIVE TRADING SYSTEM**: Shall mean any organization, association, person, group of persons, or system: (1) that constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of Rule 3b-16 under the Exchange Act; and (2) that does not (i) set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system, or (ii) discipline subscribers other than by exclusion from trading. 17 CFR 242.300(a).

- **BROKER-DEALER OPERATOR**: Shall mean the registered broker-dealer of the NMS Stock ATS pursuant to 17 CFR 242.301(b)(1).

- **CONTROL**: Shall mean the power, directly or indirectly, to direct the management or policies of the broker-dealer of an alternative trading system, whether through ownership of securities, by contract, or otherwise. A person is presumed to control the broker-dealer of an alternative trading system if that person: (1) is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); (2) directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities of the broker-dealer of the alternative trading system; or (3) in the case of a partnership, has contributed, or has the right to receive upon dissolution, 25 percent or more of the capital of the broker-dealer of the alternative trading system.

- **NMS SECURITY**: Shall mean any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options. 17 CFR 242.600(b)(46).

- **NMS STOCK**: Shall mean any NMS security other than an option. 17 CFR 242.600(b)(47).

- **NMS STOCK ATS**: Shall mean an alternative trading system, as defined in Rule 300(a) under the Exchange Act, that facilitates transactions in NMS stocks, as defined in Rule 300(g) under the Exchange Act. [Proposed] 17 CFR 242.300(k).

- **ORDER**: Shall mean any firm indication of a willingness to buy or sell a security as either principal or agent, including any bid or offer quotation, market order, limit order or other priced order. 17 CFR 242.300(e).

- **PERSON**: Shall mean a natural person or a company. 15 U.S.C. 80a-2(a)(28).

- **SUBSCRIBER**: Shall mean any person that has entered into a contractual agreement with an alternative trading system to access an alternative trading system for the purpose of effecting transactions in securities, or for submitting, disseminating or displaying orders on such alternative trading system, including a customer, member, user, or participant in an alternative trading system. A subscriber, however, shall not include a national securities exchange or association. 17 CFR 242.300(b).

By the Commission

Brent J. Fields
Secretary

Dated: November 18, 2015