



March 7, 2016

**Via Electronic Mail ([rule-comments@sec.gov](mailto:rule-comments@sec.gov))**

Mr. Brent J. Fields  
Secretary  
U.S. Securities & Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

Re: File No. S7-23-15: Regulation of NMS Stock Alternative Trading Systems

Dear Mr. Fields:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> appreciates the opportunity to provide the Securities and Exchange Commission (“Commission”) with comments regarding proposed Regulation of NMS Stock Alternative Trading Systems.<sup>2</sup> For many years, SIFMA and its members have been vocal advocates and thought leaders on equity market structure issues. The U.S. equity markets are the deepest, most liquid and most efficient in the world, with investors enjoying extraordinarily low transaction costs, narrow spreads, and fast execution speeds. Nevertheless, SIFMA believes there are aspects of market structure that could be enhanced through steps designed to decrease unnecessary market complexity, increase transparency of market information, and promote fairness in access. To sharpen the focus on these important issues, SIFMA’s Board of Directors has convened a broad-based task force on equity market structure, consisting of members from across the country and across the industry, including retail and institutional dealers and asset managers, to develop a series of tangible and actionable market structure reforms. Through this task force, SIFMA has developed more than a dozen specific recommendations for improving and strengthening equity market structure.<sup>3</sup> In this regard, SIFMA has recommended greater transparency for automated trading systems (“ATs”).

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<sup>1</sup> The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

<sup>2</sup> Regulation of NMS Stock Alternative Trading Systems, Exchange Act Release No. 76,474, 80 Fed. Reg. 80,998 (Dec. 28, 2015) (“Proposing Release”).

<sup>3</sup> See SIFMA Equity Market Structure Recommendations (July 10, 2014), available at <http://www.sifma.org/workarea/downloadasset.aspx?id=8589949840>.

## I. Introduction

SIFMA supports the proposed rule's goal of enhancing transparency around the operations of ATSS.<sup>4</sup> In the more than 17 years since the Commission adopted Regulation ATS,<sup>5</sup> the U.S. equity markets have evolved dramatically, resulting not only in a significant increase in the number of trading centers and volume of shares traded, but also in a reduced concentration of trading activity in NMS stocks at any one venue. In the course of that growth, ATSS that trade NMS stocks ("NMS Stock ATSS") have become a significant part of the national market system. Although NMS Stock ATSS now represent an established presence and considerable source of liquidity in the U.S. equity markets, the regulatory requirements to which they are subject have not changed significantly since Regulation ATS was adopted in 1998.

Existing Regulation ATS already sets a considerable number of regulatory requirements on these venues. Not only are ATSS subject to registration and regulation as broker-dealers, including various requirements on their capital and supervisory controls, but they must also meet heightened requirements established under Regulation ATS itself, including filing requirements in connection with material changes to their operations,<sup>6</sup> public dissemination of best priced orders for securities for which trading exceeds certain thresholds,<sup>7</sup> principles related to the establishment of subscriber fees,<sup>8</sup> requirements for standards governing access,<sup>9</sup> volume reporting,<sup>10</sup> and protocols relating to safeguards and procedures to protect the confidentiality of trading information for the ATSS's subscribers.<sup>11</sup> In addition to Commission oversight, ATSS must meet requirements established by FINRA for broker-dealers in general, including the rigorous review process established under NASD Rule 1017 related to changes in a broker-dealer's business operations, and as well as recent FINRA requirements promulgated for ATSS in particular.<sup>12</sup> And there have been consequences imposed on these ATSS by the Commission,

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<sup>4</sup> The Commission articulated a number of purposes informing the proposal, summarizing its broad intent as seeking "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." Proposing Release, 80 Fed. Reg. at 81,002.

<sup>5</sup> See Regulation of Exchange and Alternative Trading Systems, Exchange Act Release No. 40,760 (Dec. 8, 1998), 63 Fed. Reg. 70,844 (Dec 22, 1998) ("Regulation ATS Adopting Release").

<sup>6</sup> 17 C.F.R. 242.301(b)(2)(ii).

<sup>7</sup> 17 C.F.R. 242.301(b)(3).

<sup>8</sup> 17 C.F.R. 242.301(b)(4).

<sup>9</sup> 17 C.F.R. 242.301(b)(5).

<sup>10</sup> 17 C.F.R. 242.301(b)(8).

<sup>11</sup> 17 C.F.R. 242.301(b)(10).

<sup>12</sup> See NASD Rule 1017; FINRA Rule 4552. See also FINRA Notice 15-03 (Feb. 6, 2015); FINRA Notice 14-53 (Nov. 21, 2014); FINRA Notice 14-51 (Nov. 14, 2014); FINRA Notice 14-07 (Feb. 14, 2014).

FINRA and other self-regulatory organizations where they have determined that ATSS have not fulfilled their obligations.

SIFMA believes that key elements of the Commission's proposal as well as its broad underlying goals would contribute meaningfully to enhancing the quality of as well as confidence in the integrity of the equity markets. SIFMA members believe that making appropriate enhancements to the disclosure and oversight regime for NMS Stock ATSS is an important component of equity market structure reform. Likewise, standardizing the disclosures made by NMS Stock ATSS will help subscribers and other market participants better evaluate and compare these trading venues with one another and with other market centers.

While SIFMA supports the proposal's goals, we also believe the final rule should be tailored in several important ways to appropriately balance the benefits of public disclosure and commercial confidentiality. As an initial matter, SIFMA has supported making Form ATS public, and we note that many ATSS are now in fact doing so. Nevertheless, we support making that transparency mandatory and agree that harmonizing and making more uniform the disclosures provided in connection with their registration makes sense for NMS Stock ATSS and their broker-dealer operators. If they are designed and executed appropriately, those disclosures should benefit subscribers and investors alike.

SIFMA strongly believes that well-calibrated disclosure requirements will establish a clear set of expectations for NMS Stock ATSS – a development that is only appropriate given their significant role in the markets. At the same time, SIFMA is concerned that overbroad and imprecise disclosure rules would create unnecessary burdens for NMS Stock ATSS and potential confusion for subscribers.

In addition, we agree with the view expressed in the Proposing Release that ATSS trading other instruments, particularly fixed income ATSS and ATS that trade government securities, should be excluded from the scope of the new requirements at this time.<sup>13</sup> As the Commission notes, most fixed income trading occurs bilaterally and has markedly different characteristics from equity trading.<sup>14</sup> Given these and other distinctions and the relative infancy of ATS trading in fixed income and government securities, we believe they should be excluded from the scope of the current proposal. SIFMA does believe, however, that additional transparency about the operations of such ATSS is desirable and would support the public availability of current Form ATSS for such entities as an interim step toward scoping out an appropriately tailored disclosure regime. We also provide below our observations on how ATSS that trade in fixed income and government securities function and outline potential areas for further consideration as to the scope of useful disclosure for such entities.

## **II. Summary**

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<sup>13</sup> Proposing Release, 80 Fed. Reg. at 81,017.

<sup>14</sup> *See id.*

SIFMA's comments on the NMS Stock ATS proposal are set forth in detail below. At the outset, however, SIFMA would like to describe in broad terms a number of considerations that inform many of the particular observations included in this letter:

- **Focusing Public Disclosure Items.** The final rulemaking should emphasize disclosures that will provide subscribers and other market participants with the most probative items of information to enable them to assess the operations of an NMS Stock ATS and its interactions with certain affiliates. To that end, SIFMA strongly supports disclosure of potential conflicts of interest, disclosures related to types of orders and order handling procedures, and disclosures addressed to the confidentiality of subscriber information. At the same time, SIFMA believes it is not necessary for the general public to have access to exhaustive detail on an NMS Stock ATS's operations and interactions. SIFMA supports adoption of many of the proposed disclosure items, but in some instances the proposed Form ATS-N poses questions that will yield unnecessarily voluminous information about an NMS Stock ATS's operations and relationships. If a key policy goal for disclosures is to allow subscribers to easily compare entities with one another, then descriptive questions that yield highly customized detail will make such comparisons difficult. Furthermore, some of the details requested in proposed Form ATS-N touch upon sensitive or proprietary information that NMS Stock ATSs should not be required to make public. In addition, unnecessarily granular disclosures will be difficult to keep up-to-date given the way products and services may evolve and the way internal operations, reporting lines, organizational changes, and staffing may change when changes typically have little or no effect on subscribers.
- **Tailoring Disclosure about Affiliates.** The final rule should address only the direct activities of the NMS Stock ATS. In this regard, Form ATS-N should require information about affiliates only to the extent that an affiliate's activities have a direct bearing on the operation of the NMS Stock ATS. As proposed, the Form ATS-N disclosure requirements on affiliates are so broad that they could be construed to require a broker-dealer operator to disclose significant amounts of ancillary information about its non-ATS business and affiliations.
- **Providing Disclosure Items to Regulators.** SIFMA believes that some of the information required by Form ATS-N is not appropriate for inclusion in a public filing. This information is maintained as part of the books and records of the ATS as a regulated broker-dealer and therefore is available at any time to the Commission or other applicable regulators. Some of these items represent sensitive or proprietary information about the ATS or its clients and would have little practical effect on an ATS's subscribers or potential subscribers. SIFMA recommends that the Commission eliminate these items from the Form ATS-N.
- **Clarifying Commission Review of Form ATS-N.** The Commission should provide more clarity and guidance on the standards it expects to apply to the review of an

NMS Stock ATS's Form ATS-N filings and amendments. The Commission's standards should emphasize completeness instead of detail and granularity. In addition, the Commission should only make "effective" filings publicly available. The entities that will be subject to Form ATS-N have operations, offerings, and interactions that are and will be regularly evolving, and so it will be essential for NMS Stock ATSs to have clear and specific expectations from the Commission on the level of detail to include as content and the types of changes that would be deemed "material" to require an amendment to a filed Form ATS-N. Clarifying and simplifying the content of the Form ATS-N also will make the Forms more useful documents for subscribers and other market participants to review and compare with one another.

- **Addressing Fixed-Income and Government Securities ATSs.** SIFMA agrees with the Commission's determination not to include fixed income ATSs or ATSs that serve other markets in the scope of the current proposal. At the same time, SIFMA strongly supports increased operational transparency for these entities and encourages the Commission to review Form ATS and consider ways to tailor all Form ATS disclosures in a manner that addresses the unique characteristics of the fixed income and other marketplaces to best serve investors. We would, however, endorse making the current Form ATS filings public as an interim step while the Commission gains more experience with fixed income ATSs more generally and with the specific proposed disclosure regime for NMS Stock ATSs. We believe a tailored Form ATS for fixed income or government securities may more readily ensure that investors are provided with the most useful information – especially given the diverse practices and methodologies employed by these other ATSs.

This letter addresses items of proposed Form ATS-N sequentially, beginning with Part II of the Form, continuing through Parts III and IV in detail, as well as the proposed certification process. We also address issues relating to the filing and review process, and the determination of effectiveness/ineffectiveness as well as the Commission's requested comments relating to fixed income and government securities ATS operator disclosures. However, before discussing the proposed rules in more granular detail and these other themes, SIFMA would like to highlight three general categories of proposed disclosures that it strongly supports. Despite our critiques of specific aspects or current forms of disclosures as contained in the proposed rules, we believe that the proposed rules' focus on (i) conflicts of interest; (ii) order characteristics and handling; and (iii) confidentiality of information and information barriers are important and, if properly executed, will well-serve investors, market participants and ATS operators alike.

#### **a. Conflicts of Interest**

The proposed rules include provisions designed to require disclosure of principal trading activities by the ATS operator or affiliated broker-dealers (such as Part III, Item 1) as well as disclosures relating to preferential routing arrangements (Part III, Item 4). The proposed rules would also require disclosure as to whether all subscribers have access to same suite of products and services (Part III, Item 3). We think disclosures relating to these and other substantially

similar issues are particularly appropriate and useful, notwithstanding our concerns about the particular scope or format of disclosures that we discuss below. These areas of disclosure address fundamental transparency issues, will make available information which may not be otherwise known to subscribers or general market participants in the absence of a publicly available Form ATS-N, and can also be configured in such a way that is not unnecessarily burdensome or invasive to registrants.

#### **b. Order Characteristics and Handling**

The proposed rules also provide for making available more information about the various types of orders and order handling arrangements that may exist at a given ATS operator (such as Part IV, Item 3 and Part III, Items 1 and 2). We believe that providing additional disclosure regarding order types and handling (including the use of IOIs) is useful information for subscribers and the general investing public, whose investments may be traded indirectly on ATS platforms via their third party broker-dealers. In order for this information to be most useful to ATS subscribers and other market participants, however, the disclosures regarding order characteristics and handling should be presented in a format that better enables comparison across various ATS operators. We provide recommendations in this regard below.

#### **c. Confidential Information and Information Barriers**

The proposed rules seek disclosure of safeguards and protections to preserve the confidentiality of trading information (most notably, Part III, Item 10). We strongly favor the maintenance of confidential trading information as such, including the preservation of certain information barriers between ATS operators and affiliated broker-dealers. We think subscribers and regulators in particular have a keen and appropriate interest in assuring themselves that the confidentiality of trading information is maintained.

While we support reforms to public disclosure regarding conflicts of interest, order characteristics and handling, and confidential information and information barriers, we are concerned by certain proposed disclosures because they (i) seek public disclosure of proprietary or confidential information that would pose unintended consequences or security risks to ATS operators; (ii) would require a near-continuous disclosure regime; or (iii) are so broad in scope or particular in detail as to be impractical or unhelpful. Where appropriate, we have offered below practical suggestions on how to limit the scope of disclosures in order to preserve confidential and proprietary information, maintain security and information barriers, as well as focus disclosures on appropriate matters of interest for subscribers or other market participants. Likewise, we have identified specific items that would impose unnecessary burdens and excessive costs in order to keep disclosures up to date, particularly where such disclosures are of limited value.

### **III. Disclosures under Proposed Form ATS-N**

This section focuses on the disclosures outlined in the most significant sections of proposed Form ATS-N. As summarized above, several common themes run through our

comments. First, SIFMA believes that certain of the requested items as currently proposed require additional clarification, while others are overbroad or potentially require information that is either proprietary, of a granularity or volume that would make them unhelpful to most prospective clients or other consumers of the disclosure, or very difficult to keep updated. We focus on where such concerns are most acute, but we encourage the Commission to review the full suite of proposed disclosures more generally with an eye toward making them easier for operators to prepare, and more digestible and readily comparable for subscribers and other readers.

As noted above, SIFMA suggests that the Commission consider evaluating the proposed disclosures and separating them into (i) those that make sense to disclose publicly and (ii) those that are made available or provided on a confidential basis to the Commission or other applicable regulators. Such an approach would better ensure that the most useful information is provided to the public in Form ATS-N without necessarily seeking all the information the Proposing Release requests. As detailed below, requesting all the items included in the proposal would risk information overload or disclosure of sensitive information that could harm ATSS and subscribers alike or that could be used for inappropriate purposes. We suggest the Commission consider ways to prioritize certain items in order to achieve the transparency goals of the proposed rules while still protecting proprietary or confidential information and facilitating further competition and innovation among ATSS to the benefit of subscribers and the markets.

#### **a. Part II**

As an example, SIFMA notes that Part II, Exhibit 1 requires the NMS Stock ATS to provide “any materials provided to subscribers or other persons related to the operations of the NMS Stock ATS or the disclosures on Form ATS-N.”<sup>15</sup>

On its face, this item requests a broad and unnecessarily cumbersome amount of disclosure – i.e., every response to a due diligence request could be within scope. Likewise, the terms “any materials” and “other persons related to the operations of an ATS” potentially encompass a broad a set of tangential relationships will be covered and that, among other materials, technical specifications, some of which could be either unintelligible or highly sensitive, would be in scope. SIFMA believes additional instruction and narrowing of “any materials” and “other persons related” into a menu of categories of information would simplify and improve this disclosure.

Irrespective of whether the Commission accepts this recommendation, SIFMA strongly believes certain materials should be expressly excluded from this or other items in the Form, such as technical or configuration information (e.g., FIX specifications) and detailed information about electronic trading protocols or other customer agreements. We suggest that proprietary materials prepared for clients or prospective clients should only be provided upon request to

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<sup>15</sup> Proposing Release, 80 Fed. Reg. at 81,140 (Proposed Form ATS-N, Part II, Exhibit I); *see also* Proposing Release, 80 Fed. Reg. at 81,094.

regulators, but not included in the filing itself. This limited set of information should focus on materials routinely prepared in the course of marketing or on-boarding subscribers, but would not include more sensitive proprietary information like specifications, configurations, subscriber agreements, or one-off or proprietary analyses prepared for an individual customer.

Additionally, we suggest that certain documents contemplated for public disclosure by this section instead be furnished by the NMS Stock ATS via weblink in order to avoid potentially onerous filing requirements that might otherwise be necessary to keep an NMS Stock ATS's Form ATS-N updated. Otherwise, SIFMA believes the breadth of information requested would pose serious challenges to regulated entities' ability to meet their duty to make and update such filings. Furnishing a more limited set of information via weblink would be a less cumbersome means of disclosure that would not interfere with the goal of providing the public with access to useful information.<sup>16</sup>

### **b. Part III**

Part III of proposed Form ATS-N requests various disclosures relating to the activities of the broker-dealer operator of the NMS Stock ATS and its affiliates.<sup>17</sup> SIFMA appreciates the Commission's belief that, in order 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 ... and the affiliates of its broker-dealer operator."<sup>18</sup> It is often the case that the broker-dealer operator, or in some cases, its affiliates, may direct the personnel that service an ATS or otherwise manage service providers that perform functions of the ATS. Thus, SIFMA supports the idea of increasing transparency around these operations to assist subscribers and other market participants in assessing how they function and evaluating potential conflicts of interest that might arise. SIFMA believes, however, that Part III of proposed Form ATS-N requires information that goes well beyond the activities of the operator or affiliate that bear directly on the operations of the NMS Stock ATS or that would be of practical use for subscribers and other market participants. As a result, the current scope of the proposed disclosures in Part III risks obscuring the kind of information that subscribers would find most useful and would make evaluation of an NMS Stock ATS or comparisons among NMS Stock ATSs more difficult. Put simply, certain items under Part III do not establish clear expectations as to where the operator should draw the line on how much information to provide, and SIFMA believes the disclosures related to broker-dealer affiliates should be limited to only what is germane to an understanding of how the NMS Stock ATS operates.

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<sup>16</sup> In connection with the more precise information now available on FINRA's website and given the detail to be included in connection with periodic updates to new Form ATS-N, SIFMA also recommends rescinding outdated Form ATS-R.

<sup>17</sup> Proposing Release, 80 Fed. Reg. at 81,095--98.

<sup>18</sup> Proposing Release, 80 Fed. Reg. at 81,041.

While the stated goals of the proposal are improved transparency and disclosure, we are concerned about the potential for unintended consequences resulting from the extent, scope, and range of the requested disclosure items. In particular, the proposed disclosures are so extensive and potentially broad that they would also impose a difficult-to-manage obligation to keep the form sufficiently detailed and up-to-date, as well as an implied obligation on subscribers and other market participants to parse through the disclosures in order to determine whether to send orders to the NMS Stock ATS or fulfill certain obligations, such as their best execution duties.<sup>19</sup> If the Commission is establishing expectations around information disclosures in order to arm other market participants to fulfill their regulatory responsibilities, those other entities need to be able to readily assimilate the information for a wide range of NMS Stock ATSs – something that will not be easy to do if each entity’s Form ATS-N is filled with complex, highly tailored responses that the ATS or its broker-dealer operator is frequently obliged to update. In light of these considerations, reformatting some of the descriptive items into yes/no or more easily comparable short responses that target key areas of regulatory or subscriber interest would ease the burden on operators in preparing the Form ATS-N and on market participants in evaluating these disclosures and comparing entities for purposes of assessing whether to send orders to a particular NMS Stock ATS. Streamlining such questions would also avoid instances where an operator might offer excessive information and thereby obscure key metrics that would otherwise facilitate more meaningful comparisons across NMS Stock ATSs.

SIFMA also notes that the information requested in Form ATS-N would be more complex for a large broker-operated ATS than for a standalone ATS. As a result, the responses could pose challenges for subscribers seeking to use the Form ATS-N to compare offerings and services among entities, since responses could appear more as an apples-to-oranges comparison than the comparison that the Commission’s stated goals of transparency and disclosure would suggest. Such details underscore the importance of simplifying the form and, as appropriate, drawing a clearer distinction between the operations of the ATS, which should be the proper focus of Form ATS-N, and affiliated activities that relate to order routing and user preferences but that are not housed within the operations of the ATS itself.

#### Broad Recommendations on Part III Disclosures:

- Revise descriptive questions into yes/no or short response prompts that are more narrowly targeted. In particular, revise those items which contain the prompt “describe the circumstances” or “in connection with” which will lead to discursive responses and information overload, and will otherwise obscure key metrics.
- Clarify that the disclosures related to the ATS operator and affiliates should focus on activities directly related to their interactions with the ATS.

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<sup>19</sup> The Commission notes this point expressly, stating in the Proposing Release that “[m]ore 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.” Proposing Release, 80 Fed. Reg. at 81,130.

- Draw a more rigorous line between the operations of the NMS Stock ATS itself, on one hand, and algorithmic and/or trading decisions, on the other.

**i. Part III, Item 1**

Item 1 of Part III requests information regarding whether the broker-dealer operator or its affiliates operate or control any non-ATS trading center that is an OTC market maker or executes orders in NMS stocks internally by trading as principal or crossing orders as agent.<sup>20</sup> As phrased, the item seeks information covering a broad variety of activities conducted by an NMS Stock ATS's affiliates. If a "non-ATS trading center" (itself an undefined term) is distinct in its operations and has little to no potential order interaction with the ATS other than to route orders like any other subscriber to the ATS, then further details about the affiliate should not be required. Left as currently proposed, this item would result in the disclosure of affiliated activities that are not central to the operation of the ATS and thus would vary significantly among registrants and potentially even result in disclosures that obscure true potential conflicts.

SIFMA believes the proposed instructions to Item 1 articulate a standard for disclosure that is broad and unnecessarily cumbersome, and the variety and volume of potential scenarios that might populate such responses will be difficult to capture and unhelpful to most end-readers.<sup>21</sup> This is due to the many permutations of parent-child order configurations and dynamic routing decisions, which can be either manual or algorithmic. The breadth and volume of information requested will also pose challenges to the NMS Stock ATSs in maintaining up-to-date disclosures.

Recommendations:

- Define the term "non-ATS trading center" so that broker-dealer operators can better focus on making proper disclosures.
- Narrow the points in Item 1 to a yes/no or short answer format and limit the disclosure to a high level description of points of interaction that an affiliate has with the ATS, and only those touchpoints.
- Narrow the questions in Items 1 and 2 to apply only to non-ATS trading centers that interact with or exchange information with the ATS.
- Eliminate scope of vague or overbroad requests for information, such as "describe" (1.b), "circumstances under which... orders are removed" (1.b.iii), "otherwise made known" (1.b.ii).

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<sup>20</sup> Proposing Release, 80 Fed. Reg. at 81,141 (Proposed Form ATS-N, Part III, Item 1); *see also* Proposing Release, 80 Fed. Reg. at 81,095.

<sup>21</sup> Proposing Release, 80 Fed. Reg. at 81,141 (Proposed Form ATS-N, Part III, Item 1(b)(i)); *see also* Proposing Release, 80 Fed. Reg. at 81,095.

## ii. Part III, Item 2

Item 2 requests information on whether the broker-dealer operator or an affiliate operates one or more other NMS Stock ATS than the named entity, and, as with Item 1, seeks details on how such activity may interact with the NMS Stock ATS, including how orders or indications of interest (“IOIs”) may be sent or made known to, or executed by any other non-ATS trading center.<sup>22</sup>

Our concerns with Item 1 regarding the breadth of prompts like “interaction and coordination” as well as the challenges in describing the underlying complexities of order handling and routing decisions apply here as well. SIFMA believes the Commission should simplify the items and responses to make them easier to prepare (for the NMS Stock ATS) and to digest (for subscribers and other market participants). Specifically, this item should focus on the functionality of the NMS Stock ATS and not on circumstances where algorithms or routers operating outside the ATS might break parent orders into child orders or send orders to multiple venues, including the subject ATS.

Likewise, where the item currently seeks information about circumstances where orders or indications of interest are removed from one ATS and then sent to another execution venue, various interpretive questions could arise. It would be cumbersome – and not particularly helpful to subscribers – to require disclosure of all or most automated functions and details relating to nuanced scenarios involving order entry, order handling, and indications of interest.

### Recommendations:

- Limit the disclosures relating to order routing in Item 2 to the function of the ATS operation, as distinguished from other algorithmic or routing functions housed within the broker-dealer operator or an affiliate, which appear to be addressed in Item 3.
- State whether the ATS operator should distinguish between parent and child orders, and what it means to “remove” an order.<sup>23</sup>

## iii. Part III, Item 3

Item 3 requests disclosure of products and services offered to subscribers by the broker-dealer operator or an affiliate *in connection with* the NMS Stock ATS, and whether terms and conditions are the same for all subscribers.<sup>24</sup>

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<sup>22</sup> Proposing Release, 80 Fed. Reg. at 81,141 (Proposed Form ATS-N, Part III, Item 2); *see also* Proposing Release, 80 Fed. Reg. at 81,095.

<sup>23</sup> Proposing Release, 80 Fed. Reg. at 81,142 (Proposed Form ATS-N, Part III, Item 2(b)(iii)); *see also* Proposing Release, 80 Fed. Reg. at 81,096.

SIFMA agrees that disclosures that provide investors with more information regarding products and services offered by broker-dealer operators or affiliates and conflicts of interest are appropriate and in the market's best interest, but does not believe that an investor or the general public needs detailed information on every change to an algorithm in order to understand how its orders are handled. Thus, we suggest that this item's disclosures be converted to a yes/no format accompanied by short-form responses (examples of which might be provided in the adopting release or in the instructions accompanying the finalized Form ATS-N) that avoid the granular detail that would be required to address potential customizations that vary by entity or subscriber.

Likewise, rather than asking an NMS Stock ATS to "describe" products and services,<sup>25</sup> it would be more useful to list or to outline broad categories of products and services. For example, it is unclear whether this item requires detailed disclosure related to each of a firm's algorithms. Given the potential breadth of the "in connection with" prompt and given the pace of innovation, we are concerned that a requirement that asks for each algorithm to be named and described would be challenging for the NMS Stock ATS, would impose difficulties on subscribers trying to parse and compare disclosures, and, if additional disclosures are required and must be reviewed by the agency before new products or services are offered, would chill innovation and competition in this sector, to the detriment of subscribers and investors.

Additionally, information about a firm's algorithms or smart order routers is often highly proprietary or sensitive, and SIFMA does not believe detailed public disclosure would be appropriate or necessary to sufficiently inform subscribers or, more generally, the public of the nature of products and services offered by the NMS Stock ATS operator, much less that of its affiliates. Rather, it would be preferable to offer high-level categories of information that enable subscribers to generate comparisons between registrants, but which are less detailed and therefore less burdensome to maintain in an updated form and also less likely to require sensitive or proprietary information. Moreover, limiting these high-level categories to products and services that are used to effect trading on the NMS Stock ATS would more efficiently narrow the range of information, while still providing meaningful disclosure to subscribers, investors, and the general public.

SIFMA also encourages the Commission to clarify the terminology used in this item because it appears to conflate the NMS Stock ATS itself with routing and algorithmic functions. We think a clearer distinction between the three functions (ATS, router, algorithm) would be useful to enhance public understanding of ATS operations, broker-dealer operations, and subscriber-driven decision making. It appears that the Commission would like to ensure that if a subscriber is using an affiliated broker-dealer's or broker-dealer operator's router, that it is not receiving preferential treatment. However, it is unclear what the standard for that preferential

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<sup>24</sup> Proposing Release, 80 Fed. Reg. at 81,142 (Proposed Form ATS-N, Part III, Item 3); *see also* Proposing Release, 80 Fed. Reg. at 81,096.

<sup>25</sup> Proposing Release, 80 Fed. Reg. at 81,142 (Proposed Form ATS-N, Part III, Item 3(a)); *see also* Proposing Release, 80 Fed. Reg. at 81,096.

treatment might be, since algorithms and routers vary by performance, which is not necessarily tied to an NMS Stock ATS's operations.

Recommendations:

- Exclude sensitive or proprietary information from public disclosure.
- Request high-level categories of information in either a short-answer or yes/no format that will more readily permit comparison of product and service related information across registrants.
- Limit the application of this item to the broker-dealer operator or affiliates that have significant interactions with the NMS Stock ATS, and limit the disclosures only to those points of interaction with the NMS Stock ATS, rather than to all products and services offered by the given affiliate.

**iv. Part III, Item 4**

Item 4 requests disclosure of formal or informal arrangements with unaffiliated trading centers regarding access, including any preferential routing arrangements.<sup>26</sup>

SIFMA appreciates the Commission's attention to disclosure of potential conflicts of interest, such as may exist in connection with preferential routing treatment; however, we note that the item as proposed ("any formal or informal arrangement ... regarding access") could be read to call for an exhaustive answer. SIFMA recommends that the question be narrowed to focus on preferential arrangements. For example, we think that a more reader-friendly way of disclosing pertinent information would be to focus on whether the broker-dealer operator has established preferential routing arrangements, and reduce the ambiguity or uncertainty in the question. If the registrant responds yes, then it should provide a high-level description of the practice. As applicable, this revision should also make clear that it is often the case that routers, rather than broker-dealer operators or the ATSS themselves, engage in routing decisions.

Recommendation: Rephrase the prompt to ask whether the broker-dealer operator has preferential routing arrangements. If the answer is yes, then require a short-form response that does not set detailed disclosure requests of the identities or specific characteristics of the arrangement.

**v. Part III, Item 5**

Item 5 requests disclosure of whether the broker-dealer operator or its affiliates enter orders on the NMS Stock ATS, details on how they trade, and whether subscribers can be

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<sup>26</sup> Proposing Release, 80 Fed. Reg. at 81,142 (Proposed Form ATS-N, Part III, Item 4); *see also* Proposing Release, 80 Fed. Reg. at 81,096.

excluded from interacting with the broker-dealer's order flow.<sup>27</sup> Item 5(a) requests the identity of each affiliate and business unit of the broker-dealer operator that may enter orders or other trading interest on the NMS Stock ATS. This item seems to request especially granular detail of a potentially wide range of entities, and largely duplicates the disclosure concerning the broker-dealer operator and its affiliates that already appear in the entity's Form BD. SIFMA also notes that the idea of a "business unit" is likely to vary considerably from firm to firm and could lead to disparate responses depending on how trading is aggregated within firms. We suggest that this item be eliminated, given that it seeks duplicative information requested in Item 4, or clarified to encourage comparable disclosures given the inexactness of such terms as "business unit."

The remaining subparts to Item 5 prompt registrants to "describe the circumstances," "describe the manner," or "describe the means" by which trading activity is undertaken, managed, or limited.<sup>28</sup> SIFMA believes that, as is the case elsewhere in proposed Form ATS-N, these open-ended prompts will yield an array of responses that do not provide useful information for subscribers or elicit ready or meaningful comparisons between registrants. SIFMA believes that here, as elsewhere, short answer or yes/no formatted questions, with high-level explanations to accompany the responses, would better achieve the goals of transparency and useful comparisons.

Recommendations:

- Eliminate the current prompts from Item 5 and replace with yes/no prompts or short-answer responses that are more focused and narrowly tailored.
- Eliminate or further clarify and limit the request for identification of affiliates and business units.

**vi. Part III, Item 6**

Item 6 requests disclosure regarding whether the broker-dealer operator or its affiliates use smart order routers or algorithms to send or receive orders or IOIs to or from the NMS Stock ATS and details on how the ATS and smart order routers or algorithms interact.<sup>29</sup> It also requests details on circumstances where information might be shared among persons about such

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<sup>27</sup> Proposing Release, 80 Fed. Reg. at 81,143 (Proposed Form ATS-N, Part III, Item 5); *see also* Proposing Release, 80 Fed. Reg. at 81,096.

<sup>28</sup> Proposing Release, 80 Fed. Reg. at 81,143 (Proposed Form ATS-N, Part III, Items 5(b) - (d)).

<sup>29</sup> Proposing Release, 80 Fed. Reg. at 81,143 (Proposed Form ATS-N, Part III, Item 6); *see also* Proposing Release, 80 Fed. Reg. at 81,097.

orders or IOIs, and the individual identities of the smart order routers or algorithm operators if other than the broker-dealer operator.<sup>30</sup>

Generally, these requests appear to be duplicative of Items 3 and 5, and accordingly, we believe that information should be consolidated in this item or this item could be eliminated altogether. We further question whether such granularity is necessary or appropriate, since Item 6 appears to request that the registrant name and describe each individual algorithm and variation thereof on offer.

Because smart order routers route to multiple venues, a description of smart order routers seems beyond the scope for Form ATS-N as an ATS-focused regulation. If the item is retained, we believe a more appropriate focus would be disclosure that focuses on controls within the ATS instead of attributes of the smart order router or algorithms that route to the ATS.

As currently proposed, this item delves into the mechanics of smart order routers in ways that would require disclosure of sensitive or proprietary information. We note again that an ATS is typically one of a number of venues that the smart order router may route an order to, depending on the circumstances. Moreover, given the pace of innovation and adaptability of the use of algorithms and smart order routers, maintaining these disclosures in an evergreen form also poses unique challenges, in the event the Commission expects changes to elements of disclosure provided in connection with this item to constitute a material change that would require amendment of the Form.

Similarly, we suggest that Item 6(b)'s request for a description of the "interaction or coordination" between the smart order routers, algorithms, and the ATS should be reworded to request simply whether affiliated smart order routers possess information that other smart order routers do not have by virtue of their affiliation with the ATS. If the affiliated smart order router is empowered in a way that other, non-affiliated smart order routers are not, this Item could explicitly request such disclosure and capture the essential details in a simpler manner.

Finally, we read the use of "person" in Item 6 to signify a legal entity, but would appreciate this definition being made explicit, should this request remain in final version of the Form ATS-N. We think identifying individuals who operate smart order routers or algorithms creates unnecessary privacy and security issues and will require frequent updating. Such matters are of interest to regulators, who can always obtain such information upon request, but seem beyond the scope of disclosures appropriate for a public filing.

**Recommendation:** Eliminate or consolidate Item 6 in light of Items 3 and 5, or significantly narrow and tailor its focus and terms that modify the requested disclosures as set forth above.

#### **vii. Part III, Item 7**

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<sup>30</sup> See *id.*

Item 7 requests disclosure regarding whether the broker-dealer operator or its affiliates share employees with the NMS Stock ATS.<sup>31</sup>

SIFMA believes that maintaining an updated list could be challenging and unnecessarily burdensome because of periodic changing of roles and responsibilities within an entity. Finally, the disclosures do not seem well suited to provide useful information to readers of the Form ATS-N. Of course, the Commission and other regulators would have access to this information.

As proposed, this item also implies that it might be unacceptable for employees to service multiple businesses (e.g., legal, compliance, risk, and information technology). As with other businesses, ATSS often operate with shared services and, for larger firms, a given employee could provide service to several business units. If the item is retained, it would be preferable for firms to simply state the types of functions within the broker-dealer operator that offer shared services.

Recommendation: Eliminate this item or confine disclosure of the requested information to categories of employees responsible for the operation of the NMS Stock ATS who also perform services shared among affiliates. State that such information represents circumstances as of the date of filing and need only be updated periodically (e.g., annually).

#### **viii. Part III, Item 8**

Item 8 requests disclosure regarding whether the NMS Stock ATS outsources any of its operations, services, or functions, and seeks associated details of such arrangements.<sup>32</sup>

In our view, this information would not provide any relevant benefit to subscribers or the general public. This item is potentially very broad, and would benefit if the instructions specified certain types of operations, services, or functions as the primary areas of focus. In addition, some of the services offered by vendors could be subject to confidentiality considerations given the nature of contracts between registrant and the vendor. In sum, this information is suitable for production to the Commission or another regulator, not for a public disclosure document.

Recommendation: Eliminate this item, and make available the information on a confidential basis to the Commission.

#### **ix. Part III, Item 9**

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<sup>31</sup> Proposing Release, 80 Fed. Reg. at 81,144 (Proposed Form ATS-N, Part III, Item 7); *see also* Proposing Release, 80 Fed. Reg. at 81,097.

<sup>32</sup> Proposing Release, 80 Fed. Reg. at 81,144 (Proposed Form ATS-N, Part III, Item 8); *see also* Proposing Release, 80 Fed. Reg. at 81,097.

Item 9 requests disclosure regarding whether there are any services, functionalities, or procedures of the NMS Stock ATS that apply only to the broker-dealer operator, and what those are.<sup>33</sup>

This item should be clarified or narrowed to specify the types of services, functionalities or procedures that are being targeted (i.e., the core trading activities of the NMS Stock ATS), since as proposed it potentially calls for a broad universe of information – such as supervisory procedures and the ability to perform certain analyses. As a more general matter, we are also concerned about the cybersecurity risks posed by public disclosure of ATS operational details. To the extent the item touches on proprietary operational information, public disclosure is not appropriate.

Recommendation:

- Narrow the request to basic general information, specified types of services, functionalities, and procedures (relating to the core function of the NMS Stock ATS).
- Confine disclosure of the requested information to information current at the time of filing.
- Make the information available on a confidential basis only to the Commission or other regulators, not for public disclosure, to be updated only periodically (e.g., annually).

**x. Part III, Item 10**

Item 10 requests a description of written safeguards and procedures to protect confidential trading information of NMS Stock ATS subscribers, including consent and withdrawal of consent, the identification of individuals with access to the information and how they access it.<sup>34</sup> SIFMA supports the idea of ATSs providing disclosure relating to protecting confidential information. However, this item raises similar privacy and security concerns as discussed above in connection with Item 7. We are also concerned about the public disclosure of proprietary information similar to the concerns discussed in connection with Item 9.

Furthermore, instead of the descriptive disclosure prompted by “describe,” “describe the means,” or “describe the circumstances,” we suggest registrants be required to offer a statement that the NMS Stock ATS has in place written safeguards and procedures to protect the confidential trading information of its subscribers, as well as yes/no questions to confirm

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<sup>33</sup> Proposing Release, 80 Fed. Reg. at 81,145 (Proposed Form ATS-N, Part III, Item 9); *see also* Proposing Release, 80 Fed. Reg. at 81,098.

<sup>34</sup> Proposing Release, 80 Fed. Reg. at 81,145 (Proposed Form ATS-N, Part III, Item 10); *see also* Proposing Release, 80 Fed. Reg. at 81,098.

whether there is a mechanism for the subscriber's withdrawal of consent (Item 10(a)), and written oversight procedures to ensure the safeguards and procedures are followed (Item 10(d)). We recommend the elimination of other detailed information requests in connection with this item.

Recommendation:

- Eliminate the request for identification of specific individuals in Item 10(b).
- Confine disclosure of such information to be a snapshot at the time of filing, that is provided on a confidential basis only to the Commission or other regulators, not for public disclosure, to be updated only periodically (e.g., annually).
- Replace the narrative responses calling for descriptions with yes/no or short-form responses and a general attestation regarding the existence of written confidentiality safeguards and procedures.

**c. Part IV – Overview**

Part IV focuses on disclosures relating to the manner of operations of the NMS Stock ATS itself. SIFMA has endorsed disclosure and enhancements to Form ATS, including disclosure about colocation and other market access arrangements.<sup>35</sup> SIFMA has favored disclosure that illuminates standard, high speed, colocation or other means by which members may access an ATS, and offers details of categories of market participants that use such means, in addition to data capacity associated with such arrangements, and quotation and transaction volume attributable to such arrangements.<sup>36</sup> SIFMA has also supported disclosure of order types supported on the ATS.<sup>37</sup> In keeping with these longstanding positions, we offer the following recommendations to focus the requested disclosures to promote transparency and allow readers to compare ATS operators, but not jeopardize proprietary information or implicate broader security issues.

**i. Part IV, Item 1**

Item 1 requests subscriber information, including eligibility, terms and conditions of use, types of subscribers, liquidity providers, and circumstances where services may be limited or denied.<sup>38</sup>

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<sup>35</sup> SIFMA Recommendations for Equity Market Structure Reforms (Oct. 24, 2014).

<sup>36</sup> SIFMA Comment Letter on Concept Release on Equity Market Structure (Apr. 29, 2010).

<sup>37</sup> SIFMA Recommendations for Equity Market Structure Reforms (Oct. 24, 2014).

<sup>38</sup> Proposing Release, 80 Fed. Reg. at 81,146 (Proposed Form ATS-N, Part IV, Item 1); *see also* Proposing Release, 80 Fed. Reg. at 81,098.

As noted in connection with items under Part III, SIFMA is concerned that the request in each sub-item to “describe” circumstances, arrangements, or categories of information will encourage widely varying responses that are not as useful to subscribers and other end readers. We are also concerned that the prompt is vague enough that there would be no way to know whether the disclosure meets the Commission’s expectation until after the Form ATS-N itself or an amendment is filed.

A reworking of Item 1’s sub-prompts into yes/no or short formatted responses would reduce these uncertainties. It will also make disclosures easier for subscribers, potential subscribers, and other market participants to review and compare.

In Item 1(a), it is unclear what the Commission means by “eligibility requirements.”<sup>39</sup> The prompt also assumes that all ATSs have eligibility requirements, which may not be the case. We believe using the term eligibility “standards” may be a more accurate way of capturing the various subscriber criteria an ATS might evaluate. Moreover, even if a potential subscriber might be eligible based on the standards listed in response to Item 1(a), there should be flexibility for an ATS to shut off such a client in particular circumstances. As more fully discussed below under Item 1(e), Item 1(a) also seems to raise the specter of fair access requirements. If the Commission is seeking to change regulatory expectations relating to fair access, then it should do so in a straightforward manner and not by way of requiring disclosures around “eligibility requirements.”

Item 1(b) requests a description of terms and conditions of use of an ATS. It is unclear how much specificity is expected, and how helpful this disclosure would be to the average subscriber. We suggest requiring only a general description of customary agreement terms and conditions. The prompt for “terms and conditions of any contractual agreements” implies that agreements should be standardized or that all specific agreements should be included in the filing. This should not be the case. ATS operators should continue to be free to negotiate specific agreements with clients, rather than be held to a standardized agreement.

We are especially concerned about the implications for fair market access raised in Item 1(e) regarding denial of service. We also cannot distinguish between the requested information in Items 1(a) and 1(e). We assume that the Commission intends that Item 1(e) should apply only to entities that are already subject to the five percent Fair Access threshold. We think it is important to note that unless an ATS hits the Fair Access threshold, it should be able to deny access for any reason (e.g., credit risk). If this interpretation is erroneous, SIFMA respectfully requests clarification from the Commission to avoid later misunderstandings or interpretive conflicts.

Even if Item 1(e) is applicable only to those entities subject to the Fair Access Rule, the prompt’s mandate for public disclosure of limitation and denial of services is inconsistent with the Fair Access Rule, which requires a covered ATS to make and keep records of all grants,

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<sup>39</sup> See *id.*

denials, and limitations of access, and to report that information to the Commission, but not publicly.<sup>40</sup> If the Commission intends to replace the Fair Access Rule with a different regulatory and disclosure regime, the agency should put its affected entities on notice and address this issue directly instead of implying it in proposed Form ATS-N. Similarly, the prompt to “describe the circumstances” related to limitations or denials of service goes beyond the current Fair Access Rule requirements.

Finally, it is unclear whether Item 1(e) requests disclosure of instances where a subscriber requests not to interact with certain counterparties. If so, then a more general statement of policy and procedure would suffice, rather than more specific or identifying information – particularly given that such exposure would seem to work against the interests of subscribers and, by extension, investors seeking to effect transactions according to particular strategies. In light of the other items that request information about subscribers, segmentation, and liquidity providers, much of the information requested in Item 1, notwithstanding that such information requests may be overbroad or too granular, appears to be captured elsewhere in the proposed Form ATS-N.<sup>41</sup>

Recommendations:

- Replace expansive prompts with yes/no or short-answer formatted questions.
- Items 1(c) and 1(d) appear to be redundant with information about segmentation sought in Part III. Consider eliminating or consolidating.
- Apply Item 1(e) only to entities subject to the Fair Access Rule.

**ii. Part IV, Item 3**

Item 3 requests specific details regarding eight order type characteristics and handling, as well as a description of any type of order that is entered.<sup>42</sup> This item also requires disclosure of any differential order handling, size requirements, handling for odd-lot or mixed-lot orders, and IOIs or conditional orders (and any differential terms and conditions for IOIs or conditional orders between subscribers).

SIFMA has endorsed disclosure of information about order types supported on an ATS.<sup>43</sup> Certain disclosures outlined in this item, however, would be unnecessarily burdensome,

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<sup>40</sup> Proposing Release, 80 Fed. Reg. 81,146.

<sup>41</sup> See, e.g., Proposing Release, 80 Fed. Reg. at 81,141--43 (Proposed Form ATS-N, Part III, Items 2, 3, and 5); Proposing Release, 80 Fed. Reg. at 81,148 (Proposed Form ATS-N, Part IV, Item 5).

<sup>42</sup> Proposing Release, 80 Fed. Reg. at 81,147 (Proposed Form ATS-N, Part IV, Item 3); see also Proposing Release, 80 Fed. Reg. at 81,099.

<sup>43</sup> SIFMA Recommendations for Equity Market Structure Reforms (Oct. 24, 2014).

duplicative, and offer up excessive information to non-subscribers to the detriment of the ATS, its subscribers and investors. The challenge inherent in requesting information regarding order types is deciding how best and at what level of detail to present the information. Here, it is unclear whether the Commission considers order types to differ based on behavior or simply by some category they are perceived to represent. There is no standard definition of what constitutes an order type and interpretations may vary widely by firm. Given that Commission has included this provision to allow readers to compare ATSS, we urge more clarity and simplicity, which could be effected by suggested terms and definitions or a table template with yes/no fields in order to enable side-by-side comparisons.

For example, the Commission's focus on order types in Item 3(a)(vi), which concerns availability of order types across all forms of connectivity, seems to be primarily concerned with asking whether each order type is available to all subscribers. If this is a correct reading of the item, then it should simply be a yes/no question: Is each order type available to all subscribers?

The details requested in this item underscore that, at a certain point, too much specificity ceases being useful to the reader. In particular, the disclosures under Item 3(a)(viii), which asks for a description of circumstances for certain sources of and behavior by orders, would be difficult to write up in a digestible or comprehensible format to many readers without a tremendous amount of detail. And, ultimately, how useful is such description? We believe it is better to indicate that there are various scenarios that might play out as orders are entered into the ATS and to give a range of such outcomes rather than granular depictions that may not actually capture how such scenarios play out for a particular subscriber.

Such disclosure also raises concerns that the specificity of detail requested will encourage a merits review process by the Commission for deeming ATSS or their amendments effective or ineffective.

Recommendations:

- Define a standardized set of recommended order type terminology for purposes of completing the form and convert the requested questions into a table with yes/no fields in order to encourage a side-by-side comparison across ATS operators.
- Reconsider what level of detail would make for the most useful disclosure in the Form ATS-N.

**iii. Part IV, Item 4**

Item 4 requests disclosure on how subscribers connect to, enter orders on, or send IOIs to the NMS Stock ATS, whether and how any colocation services or speed-enhancing mechanisms are used, and whether terms and conditions differ among subscribers.<sup>44</sup>

Items 4(a)'s prompt to "describe" the means of connectivity by "other persons" is potentially overbroad—particularly for ATSs with affiliated broker-dealers or other business units that may connect directly or indirectly to the ATS. As proposed, this item conflates both identities of market participants (subscribers or other persons) with the means of connectivity. Assuming the focus of the item is the means of connectivity (e.g., FIX, smart order router, algorithm, sales desk), then end users would be better served by a table identifying various means of connectivity that the ATS makes available, without respect to the identities of who connects and in which fashion.

Item 4(b)'s prompt to describe colocation services or analogous arrangements would be more focused and easier for subscribers to compare across ATS operators if it were reworded—perhaps as two yes/no questions: (i) Do you offer colocation to the ATS matching engine? and (ii) Do all clients have the same access to colocation services? If further information is requested in connection with the yes/no questions, the answers should be as simple and direct as possible without requiring detailed, idiosyncratic information in the form.

Recommendations:

- Revise questions into a yes/no format.
- Narrow the focus to differentiate from other potentially duplicative disclosure requests.

**iv. Part IV, Item 5**

Item 5 requests disclosure regarding whether orders or IOIs are segmented, and whether subscribers may block counterparties or designate counterparties for execution.<sup>45</sup> If order preferencing is permitted, the item requests disclosure regarding whether and how it affects order priority and interaction.<sup>46</sup>

The prompts to describe segmentation and preferencing overlap with Part IV, Item 1 regarding categorization, eligibility, and classification. Market participants would be better served if this item were converted to a series of narrower yes/no questions to pinpoint the key

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<sup>44</sup> Proposing Release, 80 Fed. Reg. at 81,148 (Proposed Form ATS-N, Part IV, Item 4); *see also* Proposing Release, 80 Fed. Reg. at 81,100.

<sup>45</sup> Proposing Release, 80 Fed. Reg. at 81,148--49 (Proposed Form ATS-N, Part IV, Item 5); *see also* Proposing Release, 80 Fed. Reg. at 81,100.

<sup>46</sup> *See id.*

disclosure points the Commission believes are important to subscribers. Otherwise, this item is unfocused and could command unmanageable detail.

SIFMA supports providing a general summary on how ATS operators segment orders, but does not believe that disclosing proprietary or sensitive information, which this item seems to request in its current form, is necessary or appropriate. As an alternative, this information could be made available on a confidential basis to the Commission or other regulators, but not the broader public. Further, we note that there are information barriers between ATSs and other entities, such as broker-dealer affiliates, which need to be maintained and would make it challenging or inappropriate for the ATS itself to seek some of this information.

Recommendations:

- Rephrase into yes/no and short answer format.
- Limit or tier disclosure so that registrants do not risk obtaining or disclosing proprietary or sensitive information.

**v. Part IV, Item 6**

Item 6 requests disclosure of whether orders or IOIs are ever displayed in external venues, and identification of the subscribers who receive displayed orders or IOIs.<sup>47</sup>

SIFMA believes that this item should be revised to clarify its scope and purpose. For example, certain individuals responsible for maintaining the ATS, based on their technical or quality assurance roles, may have information concerning the orders and IOIs that come into an ATS, but without any consequences for trading activity. A better way of phrasing this item would be to ask whether orders or IOIs are ever displayed in external venues, with which venues, and what information is shared.

This item represents another area where registrants and subscribers would be better served if the Commission drew a clearer distinction between the actions and operations of an ATS operator and those of affiliated broker-dealers, and instead laid emphasis and focus on disclosures relating to the ATS operator itself. Similarly, we assume that this item is limited to trading venues and does not extend to disclosure for affiliates. We believe this item should be confined to whether the ATS itself sends orders or IOIs for external display. Because affiliated broker-dealers can employ numerous algorithms for a variety of purposes under the general mission of execution, and because so many affiliated broker-dealers could potentially be captured under an expansive reading of the proposed rule, responses that include affiliated broker-dealer activities may result in confusing disclosures, rather than crisp, and easily comparable ones.

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<sup>47</sup> Proposing Release, 80 Fed. Reg. at 81,149 (Proposed Form ATS-N, Part IV, Item 6); *see also* Proposing Release, 80 Fed. Reg. at 81,101.

With respect to Item 6(b), which calls for the identification of subscribers or natural persons, we are concerned that identifying individuals by title or more specific identifying characteristics would present security and privacy issues, as well as client confidentiality issues. Moreover, it will be difficult to update the filings or maintain them. The same is true for the request for information related to the identity of vendors that may have touchpoints on an order.

There is concern that, as currently proposed, registrants would be filing frequent amendments with the Commission. To reiterate a point highlighted earlier, the demand for specificity will result in numerous updates and diminish the readability, comparability, and ultimately the usefulness of the Form for subscribers and other end readers. SIFMA strongly encourages the Commission to provide a framework for more generalized but useful comparative disclosure that is publicly available.

Recommendations:

- Focus on information within the ATS and what the ATS does with that information.
- Exclude technical support teams or others external to the ATS.
- Exclude categories of disclosure that present privacy or security threats to ATSs and their employees.

**vi. Part IV, Items 7 and 8**

Items 7 and 8 request disclosure regarding how orders are matched (e.g., cross, auction, etc.) and associated order interaction and trading procedures, and procedures governing trading suspensions, or system disruptions and malfunctions.<sup>48</sup>

These items have the potential to become quite technical and granular, and therefore perhaps of limited use to end-readers. The prompts to “describe” various means, methods, and procedures again raise the issue of discursive disclosures that will be challenging to maintain as current. We suggest the Commission consider requesting high-level, generalized descriptions or converting these prompts to a more narrow set of focused, yes/no or short-answer questions with more detail available to regulators as needed for surveillance or other purposes.

In addition, these items illustrate the distinction that should be drawn between information that is useful and should be made available to subscribers, as the information requested in 7 and 8 should be, as opposed to information made public for all to see, irrespective of their actual interest in ATS operations. This information would be better suited as a required disclosure to subscribers that could be included in contractual agreements or systematically made

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<sup>48</sup> Proposing Release, 80 Fed. Reg. at 81,149--50 (Proposed Form ATS-N, Part IV, Items 7 and 8); *see also* Proposing Release, 80 Fed. Reg. at 81,101.

available to subscribers on ATS operators' websites, rather than formally filed with the Commission.

Recommendations:

- Request only a high-level, generalized description.
- Convert these prompts to a more narrow set of yes/no questions that more readily permit comparison across registrants.
- Provide this information only to subscribers in another format, rather than as a required component of Form ATS-N.

**vii. Part IV, Item 11**

Item 11 requests disclosure regarding how the NMS Stock ATS uses market data (including its sources) to determine NBBO, pricing, and routing destinations.<sup>49</sup>

As currently proposed, this item requires disclosure of proprietary and sensitive information. While some general description regarding the determination of NBBO and pricing is appropriate, we are concerned that innovation with respect to routing decisions would be affected if this item remains in its current form. To the extent the Commission is requesting disclosure regarding whether and how pricing and routing decisions are related to one another, we believe these issues have been addressed elsewhere in the Form ATS-N and are duplicative.

Recommendations:

- Request a general, high-level description regarding the determination of NBBO and pricing.
- Eliminate prompts that request proprietary or sensitive information.

**viii. Part IV, Item 12**

Item 12 requests a description of fees, and whether there are differences between subscribers.<sup>50</sup> The proposal would require disclosure in the form of a high/low range of fees and charges.<sup>51</sup> We believe a broad description of compensation mechanisms is appropriate, but that requiring disclosure of specific differences is not. Fee arrangements can vary across registrants

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<sup>49</sup> Proposing Release, 80 Fed. Reg. at 81,150 (Proposed Form ATS-N, Part IV, Item 11); *see also* Proposing Release, 80 Fed. Reg. at 81,103.

<sup>50</sup> Proposing Release, 80 Fed. Reg. at 81,151 (Proposed Form ATS-N, Part IV, Item 12); *see also* Proposing Release, 80 Fed. Reg. at 81,103.

<sup>51</sup> *See id.*

for a variety of reasons, such as commissions, volume-based discounts, and bundling. A description of the mechanisms and categories of fee structures would offer an appropriate level of clarity and transparency. For example, disclosure of the existence of rebates or commissions relating to volume are workable, but a high/low range of fees or more client-specific descriptions affect registrants' ability to negotiate custom agreements with subscribers.

In addition, some subscribers may incur additional fees from third parties (e.g., related to colocation), which the ATS operator may not be aware of. It is important that this item be expressly limited to fees set by the ATS operator, and not include fees from other affiliates or third parties.

Recommendations:

- Rephrase the prompt to request a general description of the various compensation mechanisms employed by the ATS operator.
- Exclude disclosure of other compensation from attenuated relationships.

**ix. Part IV, Item 13**

Item 13 requests disclosure of any arrangements for trade reporting, clearance, and settlement, and whether there are differences in procedures or arrangements among subscribers.<sup>52</sup> The prompt to disclose "any arrangements" is broad and poses challenges to maintain in an updated or evergreen form. As with other broad disclosure requests, it is unclear how these categories are all relevant. It would be more useful to limit the requested arrangements to those that are material to or a core feature of the operations of the ATS.

Recommendation: Focus Item 13 on specific arrangements that are central to the operation of the ATS.

**x. Part IV, Items 14 and 15**

Items 14 and 15 address order display, execution, and fair access for circumstances where the NMS Stock ATS executes five percent or more of the average daily volume of a given NMS stock during four of the preceding six months.<sup>53</sup> If the NMS Stock ATS displays those stock orders externally, it would be required to disclose the ticker, and a description of how it (i) displays those orders and (ii) provides equivalent access to those displayed orders as to other displayed orders. If the NMS Stock ATS executed above the threshold (in undisplayed venues),

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<sup>52</sup> Proposing Release, 80 Fed. Reg. at 81,151 (Proposed Form ATS-N, Part IV, Item 13); *see also* Proposing Release, 80 Fed. Reg. at 81,103.

<sup>53</sup> Proposing Release, 80 Fed. Reg. at 81,151 (Proposed Form ATS-N, Part IV, Items 14 and 15); *see also* Proposing Release, 80 Fed. Reg. at 81,103.

it would be required to disclose the ticker and describe the written standards for granting access on the NMS Stock ATS.

It is unclear how subscribers would benefit from the detailed information under this item or how it would be used. Such information is more appropriate in the context of an examination by the Commission or other regulator, rather than a public document. We are also concerned that this provision may have the effect of undermining subscriber access criteria that NMS Stock ATSs have created based on their own risk assessments and other considerations.

Recommendation: Eliminate this request altogether as a component of Form ATS-N.

#### **xi. Part IV, Item 16**

This item addresses the disclosure of aggregate order and execution data.<sup>54</sup> If the NMS Stock ATS provides aggregate order and execution data selectively to certain subscribers, it would be required to list the categories or metrics of data, criteria or methodology to calculate the statistics, and attach the most recent example of selective disclosure as of the end of the calendar quarter.

If this provision takes effect as proposed, ATSs would stop sharing some categories of information with clients, which would be unfortunate and have a deleterious effect on subscriber knowledge and understanding of a given ATS's operations, and negatively affect the availability of information that some subscribers consider important for their best execution determinations. It is critically important that ATS operators be able to answer one-off or individual subscriber questions and not be constrained by an overly broad or ambiguous disclosure obligation. ATS operators and their affiliated broker-dealers should be permitted to respond to individualized questions from subscribers and to continue to provide customized reports in the course of responding to those individualized questions without attendant Form ATS-N revisions or amendment requirements.

Moreover, aggregate statistics and analyses are used for a variety of purposes, with varying methodologies. The extent of the disclosures required under this item could reduce the disclosure of such statistics and analysis. Given the risk of heightened scrutiny, ATS operators would cease providing this information and instead simply direct requesting parties to order information available on FINRA's website or through third-party vendors.

Item 16(c) requires disclosure of such reports for "each category or metric" on a quarterly basis. It is unclear what value this snapshot will have for the general public. Without clarification regarding how individualized or custom reports are to be treated, it could potentially introduce misleading or skewed information into the public arena, which would undermine the transparency goals of the proposed rules.

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<sup>54</sup> Proposing Release, 80 Fed. Reg. at 81,152 (Proposed Form ATS-N, Part IV, Item 16); *see also* Proposing Release, 80 Fed. Reg. at 81,104.

Likewise, if the Commission is seeking quarterly reports on aggregate order flow and executions, then it should expressly propose such a report and that it be filed on a confidential basis with the Commission as an exhibit to Form ATS-N.

Recommendations:

- Eliminate this item.
- Propose a revised report on aggregate order flow and execution that is to be filed on an annual and confidential basis with the Commission.

#### **IV. ATS-N Filings and Review of Filings**

For NMS Stock ATSs it is important to establish clear and reasonable expectations around how Form ATS-N is filed, how such filings are reviewed, and how they can be amended. To assist users of the NMS Stock ATSs, it is important to obtain disclosures that are of good quality, consistent in their presentation, and readily digested. As Commissioner Piwowar stated:

The Commission is not introducing a regime of merit review of ATS operations. *This proposal is about disclosure, and disclosure alone.*<sup>55</sup>

To that end, SIFMA seeks further clarification and offers several observations as to expectations laid out in the Proposing Release for the filing, amendment, and other processes related to Form ATS-N.

##### **a. Filing of Form ATS-N and Amendments**

The filing of the Form ATS-N (or an amendment) triggers the review period under the proposed rule and, as a result, the Commission's standards for accepting a Form ATS-N review should be clear and objective. In this regard, we believe filings of Form ATS-N or any amendments should be returned by the Commission to the ATS only for purely technical deficiencies, such as missing pages, or when the ATS does not respond to all questions, including sub-questions. For example, if a Form ATS-N is filed with a section completely unanswered it should be subject to rejection. However, the Commission should not reject a Form ATS-N as "incomplete" simply because the Commission believes a given answer is not sufficient. The Commission should not conduct an "accuracy and completeness" review in connection with accepting a Form ATS-N filing. Rather, that analysis should be carried out during the review period in the determination of whether to declare the Form ATS-N effective or ineffective.

##### **b. Filing of Initial Form ATS-N for Existing ATSs**

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<sup>55</sup> Michael S. Piwowar, Commissioner, SEC, Statement at Open Meeting on Regulation of NMS Stock Alternative Trading Systems (Nov. 18, 2015) (emphasis added).

SIFMA also seeks clarification on the Commission's expectations related to the filing of the initial Form ATS-N for existing ATSs. Proposed Rule 304(a)(1)(i) would require an existing 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.<sup>56</sup> The Commission proposes that a "legacy NMS Stock ATS" may continue to operate pursuant to a previously filed Form ATS pending the Commission's review of the filed Form ATS-N.<sup>57</sup> 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 and would continue to be required to file amendments on Form ATS to provide notice of changes to the operations of its system.<sup>58</sup> Under the proposal, the Commission would have 120 days to review the Form ATS-N, and it could extend that review period by another 120 days.<sup>59</sup>

This approach raises at least two process issues for legacy NMS Stock ATSs. First, if an ATS makes changes to its systems during the 120/240 day review period, it should not also be required to amend its Form ATS-N. Rather, the Commission should consider the amended Form ATS in its determination of whether to declare the Form ATS-N effective. The NMS Stock ATS could then make a subsequent "clean up" amendment to its Form ATS-N. In the alternative, if the Commission does require the legacy NMS Stock ATS to make concurrent amendments to its initial Form ATS-N, then that Form ATS-N should still be subject to the same 120/240 day review period, and the review period should not restart with every amendment. Second, if the Commission declares a legacy NMS Stock ATS ineffective, the ATS should have an opportunity to amend its Form ATS-N to achieve an effective declaration before it has to commence the cessation of its operations. Such declaration should remain confidential until the NMS Stock ATS has amended its Form ATS-N and that amended form is not approved. SIFMA believes that it is important for the Commission to provide clarification of its expectations on these points.

### **c. Determination of Effectiveness/Ineffectiveness**

It is also critical that the Commission provide clear and objective standards for determining whether to declare a Form ATS-N (or amendment) effective or ineffective. The Proposing Release states that, to declare a Form ATS-N effective, the Commission would "evaluate, among other things, whether the entity satisfies the definition of ATS, and more specifically, the definition of NMS Stock ATS."<sup>60</sup> In addition, the Proposing Release states that the Commission would declare ineffective a Form ATS-N if it finds that one or more disclosures

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<sup>56</sup> See Proposing Release, 80 Fed. Reg. at 81,136 (to be codified at 17 C.F.R. 242.304(a)(1)(i)); *see also* Proposing Release, 80 Fed. Reg. at 81,023.

<sup>57</sup> *See id.*

<sup>58</sup> *See id.*

<sup>59</sup> See Proposing Release, 80 Fed. Reg. at 81,136 (to be codified at 17 C.F.R. 242.304(a)(1)(ii)(A)); *see also* Proposing Release, 80 Fed. Reg. at 81,023.

<sup>60</sup> Proposing Release, 80 Fed. Reg. at 81,024.

on Form ATS-N are “materially deficient” with respect to their accuracy, currency, or completeness.<sup>61</sup>

Under the proposal, the key to the analysis is the term “materially deficient.” This term should be understood to represent an extreme situation, not a circumstance where additional color or language might be viewed as preferable to a disclosure as filed. SIFMA agrees with and appreciates the examples the Commission describes in the release;<sup>62</sup> they are clear and can be readily addressed by an ATS faced with an ineffective declaration. However, SIFMA believes the Commission should also make clear, by category and example, situations where disclosures would not be viewed as materially deficient. In particular, a Form ATS-N should not be declared ineffective simply because the Commission would prefer the disclosure to read differently; a difference in opinion on style or syntax should not be treated as a “material deficiency.” If the registrant provides an answer that is facially responsive, that should be deemed sufficient for purposes of effectiveness review.

Moreover, if the Commission declares a Form ATS-N (or amendment) ineffective, it should be required to provide the ATS with a clear written statement of the reasons for that declaration. SIFMA strongly believes that NMS Stock ATSs will be incentivized (given competitive forces relating to a highly overlapping subscriber base) to provide robust, readable disclosures. Likewise, NMS Stock ATSs will be disincentivized to make disclosures that are deficient given the variety of other regulatory tools the Commission and other regulators already have at their disposal to police the quality and content of statements made on Form ATS-N. In this regard, SIFMA notes that 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.<sup>63</sup> Given these safeguards and protections, SIFMA urges the Commission to provide clarity and practical guidance around its expectations on declaring filings and amendments effective, and to keep that review process simple.

#### **d. Material Amendments**

The Commission also should provide clear and objective standards on what triggers the requirement for an NMS Stock ATS to file a Form ATS-N amendment. The Proposing Release states that an NMS Stock ATS would have to file an amended Form ATS-N at least thirty (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.”<sup>64</sup> While we believe that a “material change” is an appropriate standard (qualified by

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<sup>61</sup> Proposing Release, 80 Fed. Reg. at 81,025.

<sup>62</sup> *See id.*

<sup>63</sup> Proposing Release, 80 Fed. Reg. at 81,023 n.280.

<sup>64</sup> Proposing Release, 80 Fed. Reg. at 81,136 (to be codified at 17 C.F.R. 242.304(a)(2)(i)); *see also* Proposing Release, 80 Fed. Reg. at 81,027.

the concerns expressed elsewhere in this letter as to certain proposed disclosure items, including those around affiliate activities or service providers), it needs to be clear that amendments subject to this filing process should be limited to what are, in fact, material amendments. The Commission provides some helpful examples of what would be considered material changes, but it also should provide examples of what types of changes would not be material or would be excluded from being considered “material” given the impracticality of the 30-day amendment period. For example, changes to software, hardware, or other trading infrastructure that are not subscriber facing would not be material.

Put simply, if the staff regards every change as material, then it means nothing to provide that amendments are required only for material changes. NMS Stock ATSs should not be put in the position of making a good-faith decision that a change is not material only to be informed that the Commission has decided the change is material based on an unpublished standard. Moreover, SIFMA believes that absent the narrowing of this requirement, the obligation to file an amendment 30 days prior to an anticipated change could have significant unintended consequences. The proposal could affect an ATS operator’s ability to take decisive action. ATS operators often must take decisive action without any time for a lengthy review and approval process—much less a public review and approval process—given that the speed of response to technical or operational issues (including cybersecurity) often is measured in seconds. In addition to excluding changes that are not subscriber-facing from inclusion as material amendments, SIFMA further believes there should be a carve out for exigent circumstances when an ATS operator must act swiftly. And, as noted elsewhere in this letter, we do not support the filing process being public pre-effectiveness.

**e. Public Access**

Form ATS-N amendments should not be made public until they are declared effective. Under proposed Rule 304(b), the Commission would publicly post not just effective Form ATS-N filings, but any filed amendments.<sup>65</sup> Making Form ATS-N amendments public before becoming effective would be an unnecessary competitive burden on NMS Stock ATSs. In this regard, we suggest the Commission keep Form ATS-N amendments confidential upon filing and then declare them effective or ineffective during the proposed 30-day period.<sup>66</sup> The amendments would become publicly accessible only upon being declared effective. Amendments that the Commission declares ineffective would be returned to the ATS and would not be made publicly accessible.

The focus should be on putting into the hands of subscribers and other market participants amendments that will in fact affect their decisions. Otherwise, the Commission risks inundating subscribers and other market participants with information that is premature and puts

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<sup>65</sup> See Proposing Release, 80 Fed. Reg. at 81,136 (to be codified at 17 C.F.R. 242.304(b)); *see also* Proposing Release, 80 Fed. Reg. at 81,034.

<sup>66</sup> See Proposing Release, 80 Fed. Reg. at 81,136 (to be codified at 17 C.F.R. 242.304(a)(2)(ii)); *see also* Proposing Release, 80 Fed. Reg. at 81,029.

subscribers in the position of feeling obliged to review each such filing for its possible effect on them and their underlying customers. Moreover, the effectiveness process is not intended to give competitors an opportunity to comment on others' ability to conduct business.<sup>67</sup> Should the pending amendments be made public, the Commission risks turning the effectiveness process into an extended review, notice, and comment period, which would be inappropriate and unwarranted.

**f. Standard of Review**

The Commission should adopt a specific completeness standard of review for declaring a Form ATS-N effective or ineffective. The proposal does not include a specific standard, but rather states more broadly in Proposed Rule 304 that an NMS Stock ATS must comply with Regulation ATS to be exempt from the definition of an exchange pursuant to Exchange Act Rule 3a1-1(a)(2). Proposed Rule 304(a)(1) states further that the exemption is not available to an NMS Stock ATS unless that ATS files a Form ATS-N with the Commission and the Commission declares the form effective.<sup>68</sup> The closest expression of a specific standard is in Proposed Rule 304(c), which states that "A filed Form ATS-N must respond to each item, as applicable, in detail and disclose information that is accurate, current, and complete."<sup>69</sup>

The Commission addresses the issue further in the Proposing Release but does not articulate a consistent standard of review. For example, the Commission states in footnote 280 that "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."<sup>70</sup> In other parts of the release, the Commission states that it would declare a Form ATS-N ineffective if it is "materially deficient" with respect to "accuracy, currency, or completeness." Still later in the release, when discussing the amendment process to Form ATS-N under Proposed Rule 301(a)(2)(ii), the Commission asks whether it might be appropriate to declare a filing ineffective "if one or more disclosures on the amended Form ATS-N are materially deficient with respect to their accuracy, currency, completeness, or fair presentation."<sup>71</sup>

SIFMA believes that the final rule text should articulate the specific standard that the Commission will apply to declare a Form ATS-N (or amendment) ineffective -- that standard should be only if it is "materially deficient with respect to completeness." Given the wide array

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<sup>67</sup> Proposing Release, 80 Fed. Reg. at 81,115.

<sup>68</sup> Proposing Release, 80 Fed. Reg. at 81,136 (to be codified at 17 C.F.R. 242.304(a)(1)); *see also* Proposing Release, 80 Fed. Reg. at 81,023.

<sup>69</sup> Proposing Release, 80 Fed. Reg. at 81,137 (to be codified at 17 C.F.R. 242.304(c)); *see also* Proposing Release, 80 Fed. Reg. at 81,037.

<sup>70</sup> Proposing Release, 80 Fed. Reg. at 81,023 n.280.

<sup>71</sup> Proposing Release, 80 Fed. Reg. at 81,136 (to be codified at 17 C.F.R. 242.304(a)(2)(ii)); *see also* Proposing Release, 80 Fed. Reg. at 81,029.

and detail associated with items to be disclosed, the standard should be kept as simple and attainable as possible, and minimize the need for guessing by NMS Stock ATSs about the disclosure necessary to satisfy the review requirements or the potential for an extended back and forth with the Commission regarding the sufficiency of the disclosures, which subjective standards like currency, accuracy, or fair presentation invite. These subjective standards are also difficult to standardize in application from firm to firm. Including those considerations would make the review of the forms overly complicated for the Commission, and are not necessary to achieve the goals of providing information on Form ATS-N to allow subscribers to evaluate whether a particular NMS Stock ATS would be a desirable venue to which to route their orders and to make sure a “consistent level of information is made available to market participants in evaluating NMS Stock ATSs.”<sup>72</sup> The Commission would have flexibility in the rule’s directives to consider whether declaring a Form ATS-N ineffective is “necessary or appropriate in the public interest” and “consistent with the protection of investors,” without injecting additional subjectivity. SIFMA believes that standard is completeness. As described above, registrants have incentives to ensure accuracy.

## V. Certification and Liability

Under the proposed rules, an authorized person must certify that the form is “current, true, and complete.”<sup>73</sup> We believe this certification would be more appropriate if it were instead a standard of complete and accurate information in all material respects in order to eliminate the potential for immaterial errors to serve as a hook for liability.

Similarly, the Form ATS-N is styled as a “report” which means it would be unlawful for any person willfully or knowingly to make (or cause to be made) a false or misleading statement with respect to a material fact contained in the Form.<sup>74</sup> We acknowledge that this is the same standard that applies to the current Form ATS, but we are concerned that given the breadth and volume of disclosures contemplated in the proposed Form ATS-N, there are serious and troubling consequences for willfully or knowingly filing a false or misleading statement. Setting aside instances of knowingly or intentionally filing a false or misleading statement, we are concerned that the potential for unknowingly but willfully filing a statement that turns out to be false is heightened by the increased amount and scope of disclosure contemplated under the proposed rules.<sup>75</sup> We think these potentially very severe consequences are yet another reason to narrow the scope of disclosures and standardize their format in order to permit more straightforward presentation of key topics.

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<sup>72</sup> Proposing Release, 80 Fed. Reg. at 81,023.

<sup>73</sup> Proposing Release, 80 Fed. Reg. at 81,152.

<sup>74</sup> Proposing Release, 80 Fed. Reg. at 81,034.

<sup>75</sup> Note “willfulness” standard of *Wonsover v. SEC*. See *Wonsover v. SEC*, No. 99-1167 (DC Cir. Mar. 14, 2000) (“Generally, [willful] means no more than that the person charged with the duty knows what he is doing.”).

## **VI. Fixed Income ATSS**

As we noted above, we support the Commission's preliminary determination to apply heightened regulatory requirements to NMS Stock ATSS, but to exclude fixed income ATSS from the scope of the current proposal. Fixed income ATSS still occupy a relatively small footprint and electronic trading of fixed income instruments is still in its early stages. Thus, there are concerns that demanding regulatory requirements for ATSS could prove a disincentive to the growth and innovation among new and existing electronic trading platforms for such instruments. Several platforms already provide services to facilitate electronic trading but are not registered as ATSS. Likewise, we acknowledge (as the release discusses) that the fixed income market at large also varies considerably from the equity markets: trading is largely bilateral; there is less reliance on speed or automation to accomplish trades; trades generally do not involve order types or strategies of the same complexity as in the equity markets; and subscribers may have different reasons for using fixed income ATSS and for comparing them to one another than is the case in the equity markets.<sup>76</sup> As a result, many of the regulatory disclosures and other requirements contemplated in the current proposal would simply be inapposite for these entities. Electronic venues for fixed income trading are evolving and care should be taken with any regulatory requirements imposed on them in order not to create disincentives to reasonable growth in this sector or to set regulatory expectations that simply do not match how these entities operate.

At the same time, SIFMA believes additional transparency about the operation of fixed income ATSS would encourage this market to grow and mature responsibly. Not only would better information equip subscribers with a clearer sense of how these entities operate, it would also provide them and other market participants and observers with a mechanism to more readily compare the operations and key features of these ATSS with one another.

Thus, as a general matter, while the current proposal would not serve well for disclosures related to the fixed income ATSS model, we encourage the Commission to consider other ways to adapt Form ATSS to address the unique characteristics of the fixed income market and the variability in the trade execution methodologies or protocols used by ATSS, including fixed income. Given that fixed income investors do not, in many cases, have readily accessible information that sets forth how each fixed income ATSS operates, such investors may face challenges in assessing the suitability of ATSS as venues through which to effect transactions. We support efforts to increase operational transparency and reduce conflicts that might exist at trading venues, but believe that disclosures to give effect to this goal should be tailored for fixed income venues.

SIFMA believes that the Commission should consider mechanisms to make available information on the basic operational features of fixed income ATSS in order to provide subscribers with better tools to determine if trading on these venues is appropriate and in the best interests of clients. There is value in operational transparency related to the basic rules of

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<sup>76</sup> Proposing Release, 80 Fed. Reg. at 81,017.

operation of the venue, the availability of priority or preferential treatment (if any) for certain desks or clients, and information on risk controls. Among other things, more operational transparency would aid investors in conducting best execution analysis – an area of increased interest, as witnessed by FINRA and MSRB rules and guidance. Provisionally, the Commission could simply require that firms post their current Form ATS filings while the Commission considers alternative forms of disclosure. ATSs should however be provided with an opportunity to revise their Forms ATS before such public disclosure to avoid disclosure of proprietary information that may have been included. By mandating the public posting of Forms ATS for such entities, the Commission would be establishing basic transparency expectations and taking a useful step in providing investors with better information to make determinations on their own behalf and on behalf of investors. Moreover, we believe that requiring the posting of their current Form ATSs will encourage such entities to improve their disclosures vis a vis their competitors without creating premature regulatory burdens. An incremental approach in fixed income will allow the Commission to build a regime that addresses a changing marketplace in a manner that does not curtail the entry of new platforms or impede competition among existing ATSs, new platforms and other more traditional sources of fixed income liquidity.

## **VII. Government Securities ATSs**

Given the current ongoing review of the market structure and transparency needs of the U.S. Treasury securities market,<sup>77</sup> SIFMA believes further evaluation of the considerations noted by the Commission concerning ATSs for government securities should inform that overall review. While the recent Joint Staff Report<sup>78</sup> highlighted a number of significant structural changes in the U.S. Treasury market, particularly with respect to the increase in automated trading, the review of the market continues and any additional regulatory proposals with respect to ATSs, particularly the threshold question of subjecting government securities ATSs to Regulation ATS, should be informed by the results of that review. The review will provide feedback on the overall liquidity, risk management, regulatory and transparency landscape of this market and should help identify those areas where a further regulatory response is needed to enhance liquidity and efficiency.

While automated trading within the Treasury market has grown markedly, determining the overall informational needs of market participants in a way that supports the continued development, efficiency and liquidity of this important market may be premature. We would stress as well, as is noted in the discussion above on fixed income ATSs, that the market in U.S. Treasury securities is different from the equity markets in that large parts of the market continue to transact bilaterally and provisions of the current proposal may not be appropriate for the government securities market. We believe that the market for government securities continues to

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<sup>77</sup> Notice Seeking Public Comment on the Evolution of the Treasury Market Structure (“RFI”), available at <https://www.treasury.gov/press-center/press-releases/Documents/Market%20Structure%20RFI%20Final.pdf>.

<sup>78</sup> Joint Staff Report: The U.S. Treasury Market on October 15, 2014, available at [https://www.treasury.gov/press-center/press-releases/Documents/Joint\\_Staff\\_Report\\_Treasury\\_10-15-2015.pdf](https://www.treasury.gov/press-center/press-releases/Documents/Joint_Staff_Report_Treasury_10-15-2015.pdf).

evolve and additional regulatory requirements on ATSS that transact in government securities should be developed in the context of the overall review of the Treasury market.

As noted above with respect to fixed income ATSS, we believe additional operational transparency with respect to government securities ATSS would encourage this market to grow and mature responsibly. Not only would better operational information equip market participants with a clearer sense of how these entities operate, it would allow for the appropriate comparisons as new entities join the market. While SIFMA supports efforts to increase operational transparency and reduce conflicts that might exist at trading venues, we believe that disclosures to give effect to this goal should be tailored to the unique characteristics of the government securities market. Operational transparency related to the basic rules of operation of the venue is beneficial to many market participants.

We would stress, as well, that Form ATS should be adapted to meet more specifically the characteristics of the government securities activities on ATSS before additional requirements are established. Thus, as a general matter, while the current form and proposals may not be appropriate for government securities ATSS, a more carefully tailored form should be developed eventually to reflect the unique characteristics of the Treasury market.

Finally, with respect to reporting quotes and/or trade information for public dissemination, we stress that the evaluation of potential proposals in this area must take into consideration the feedback and other data that are gained from the ongoing review of the structure and transparency of the Treasury market that is contemplated by the current RFI. Evaluations of how and when to provide for public dissemination of trade information and the potential impact of such information on liquidity, efficiency and depth should be considered as part of that overall review and integrated into market-wide approaches to dissemination. SIFMA will be providing input to the RFI that will reflect our members' views on public dissemination of trade information.

## **VIII. Conclusion**

SIFMA reiterates its general support for the proposed reforms outlined in the Commission's proposal. Nevertheless, it is important that such reforms be well-designed and executed to ensure they achieve the Commission's stated policy goals. SIFMA also views the transparency initiative for ATSS as representing just a part of a comprehensive approach to improving equity market structure, so we look forward to the Commission's next steps toward the more comprehensive agenda laid out in Chair White's 2014 equity market structure speech. By itself, the proposal represents an incremental reform and highlights the need for other changes to the duties attendant on a broad assortment of market participants.

We encourage the Commission to revise the disclosure items and establish reasonable review standards in the final rule so that it delivers better transparency and uniformity of disclosure without creating or maintaining burdens that would inhibit the important role performed by ATSS in U.S. equity markets. Likewise, the agency has laid a good foundation

Mr. Brent J. Fields, Secretary, Securities and Exchange Commission  
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upon which, in time and as the markets further develop, appropriate measures could be undertaken to establish an enhanced disclosure regime for ATSS other than NMS Stock ATSS.

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SIFMA appreciates your consideration of these views. If you have any questions or require further information, please contact me at [REDACTED], my colleagues Sean Davy at [REDACTED] ([REDACTED]) and Robert Toomey at ([REDACTED] ([REDACTED])), or our counsel, Jim Burns of Willkie Farr & Gallagher LLP, at [REDACTED] ([REDACTED]) with any questions.

Sincerely,



Theodore R. Lazo  
Managing Director and  
Associate General Counsel

cc: Mary Jo White, Chair  
Michael S. Piwowar, Commissioner  
Kara M. Stein, Commissioner

Stephen Luparello, Director, Division of Trading and Markets  
Gary Goldsholle, Deputy Director, Division of Trading and Markets  
David S. Shillman, Associate Director, Division of Trading and Markets