

Morgan Stanley

May 19, 2016

Via E-Mail: rule-comments@sec.gov

Brent J. Fields, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

**Re: Securities Exchange Act Release No. 34-76474 (File No. S7-23-15)
Regulation of NMS Stock Alternative Trading Systems**

Dear Mr. Fields:

Morgan Stanley & Co. LLC (“Morgan Stanley”) appreciates the opportunity to provide comments to the U.S. Securities and Exchange Commission (“SEC” or the “Commission”) on its proposal to require alternative trading systems (“ATs”) that trade NMS stocks to publicly disclose detailed information about their operations, as well as information related to the activities of their broker-dealer operators and affiliates (the “Proposal”).¹

Morgan Stanley strongly supports the SEC’s efforts to promote and mandate additional transparency around order handling practices. For many years, Morgan Stanley has advocated for more detailed disclosure to both regulators and clients regarding the manner in which brokers handle client orders, including with respect to the ATs that they may operate.² While Morgan Stanley is a strong proponent of disclosure, we believe that there is an important balance to be struck between public disclosure that is meaningful to clients and disclosure that is more suitable for the SEC.

I. More Meaningful, Comparable and Standardized Disclosure for Clients

Over the years, clients have sought specific information about broker order handling practices and have, in particular, asked for more detailed information about dark pool / ATS operations. Specific questions regarding ATS operations include information regarding matching logic, categorization of participants, counterparty selection, prioritization of orders, order types and market data feeds used. In the absence of any standardized, mandated transparency, clients are receiving varying levels of information from their brokers that is often not consistent or easily comparable. While we support the effort to mandate transparency, we are concerned that proposed Form ATS-N will result in more subjective, narrative responses that will not lend themselves to side-by-side comparison.

¹ Securities Exchange Act Release No. 34-76474 (Nov. 18, 2015), 80 FR 80,998 (Dec. 28, 2015) (“Proposing Release”), available at <https://www.sec.gov/rules/proposed/2015/34-76474.pdf>.

² See Morgan Stanley’s comment letters, presentations and statements on various equity market structure topics, including broker order handling practices, available at <http://www.morganstanley.com/institutional-sales/mset-regulatory-communications>.

Morgan Stanley suggests an alternative approach. The SEC should mandate broker-dealer ATS operators to publicly disclose (1) current and historical Form ATS filings (and related amendments) and (2) responses to standardized, frequently asked questions regarding ATS operations. While many Form ATS filings have been updated to provide additional disclosures such as market data feeds used, data center location, order type details, etc. and many broker-dealer operators have created their own ATS-specific frequently asked questions, we believe that standardization is the key to concise, comparable and meaningful information regarding ATS operations and is a more balanced and appropriate transparency solution. This approach has the added benefits of being less burdensome and faster to implement. Regulators can, of course, continue requesting any additional confidential information from ATSS and their broker-dealer operators.

More broadly, Morgan Stanley has advocated for more transparency around *all* broker order handling practices. We have recommended that the SEC mandate a standardized set of public frequently asked questions based on the questions typically asked by and of interest to market participants regarding all equity order handling practices.³

When considering public disclosure (and, therefore, arguably solicitation of public comments), it is also important to remember that ATSS and exchanges are intended to serve fundamentally different roles in the U.S. marketplace.⁴ Exchanges are “protected” and, therefore, all market participants are required to access them and thus understand and comment on their functionality. ATSS, on the other hand, are not inherently “protected” and, therefore, a market participant will only access an ATS if the operations of the ATS align with the market participant’s execution objectives. While public disclosure of ATS functionality is important to ATS users (and potential ATS users), any public disclosure requirements that have the effect of soliciting public comment should be revised to reflect this important distinction in offerings.⁵

II. Additional Specific Concerns Related to the Proposal

1. Broker Disclosure Should Be Uniform

The Proposal holds broker-dealer operators of ATSS to a higher standard than broker-dealer operators of non-ATS crossing platforms / internalization mechanisms. A broker-dealer that operates an ATS would be required to disclose publicly, and in significantly greater detail, more information about its overall trading infrastructure than a broker-dealer internalizer that does not operate an ATS.⁶

³ See Attachment to Memorandum from the Division of Trading and Markets regarding an October 1, 2015, meeting with representatives of Morgan Stanley, File No. S7-02-10, “Order Handling Transparency” (Oct. 1, 2015).

⁴ See, e.g., Regulation of Exchanges and Alternative Trading Systems, Release No. 34-40760 (Dec. 9, 1998), 63 FR 70,844, 70,857 (Dec. 22, 1998) (“Reg ATS Adopting Release”) at text accompanying n. 18, available at <https://www.sec.gov/rules/final/34-40760.txt> (“The Commission intends . . . to make clear that alternative trading systems that register as broker-dealers and comply with Regulation ATS not be regulated as national securities exchanges.”).

⁵ In this same regard, any required information beyond ATS functionality that relates to a broker-dealer’s other businesses, and any proprietary or commercially sensitive information, is more appropriate for non-public disclosure to the SEC.

⁶ For example, Part III, Item 1(b)(ii) of proposed Form ATS-N requires the disclosure of circumstances in which “orders or other trading interest received by the broker-dealer operator or its affiliates may execute, in whole or in part in non-ATS trading centers [disclosed elsewhere in the form] before entering the NMS Stock ATS.” In comparison, a broker-dealer that does not operate an ATS would not be required to disclose publicly the “circumstances under which” it may execute its client orders or

While we believe that there is great value to clients in operating an ATS, disclosure obligations that are only applicable to broker-dealer ATS operators may incentivize broker-dealers to seek alternatives other than operating an ATS. Such an outcome would result in less transparency about broker order handling and routing practices, contrary to the objectives of the Proposal and Regulation ATS.⁷ As a policy matter, disclosure of order handling practices is relevant to the investing public regardless of whether such activity is effected by a broker-dealer that happens to operate an ATS. In the same vein, disclosure of order handling practices of exchange brokers should also be mandated.

We recommend that any disclosure around broker trading infrastructure and order handling practices beyond ATS operations is more appropriate for the SEC's expected proposal modifying broker order handling disclosures, which should apply to all brokers.⁸

2. Proposal Does Not Account for Distinct ATS Models and Treats ATSS Like Exchanges

The Proposal treats all ATSS as standalone, exchange-like price/time priority models, fails to account for distinct ATS models (e.g., price/capacity/size priority and interval VWAP crossing) and does not consider that an ATS may be part of a broader, integrated electronic offering available to clients choosing to access the markets through a full-service broker-dealer.

As the SEC is aware, ATSS are not exchanges. The ATS regulatory structure created under Regulation ATS serves a different public policy objective and allows for innovative models to be operated by broker-dealers to provide distinct liquidity offerings to meet client needs. ATSS are an evolution and automation of a fundamental broker-dealer function to find contra-side liquidity for its clients' orders. While certain ATSS may actively compete with exchanges by offering standalone, price/time priority models and soliciting order flow to maximize their own market share, we cannot lose sight of the original objective of Regulation ATS and the benefits that the availability of different ATS models provide to market participants.

While Regulation ATS recognizes the distinction between exchanges and ATS offerings (and among ATS offerings),⁹ the regulatory structure specifically tailored for exchanges can be seen throughout much of the Proposal and proposed Form ATS-N. For example, the Proposal focuses on (1) "subscribers", much in the formal way that an exchange has members;¹⁰ (2) a "subscriber manual", much

orders of its affiliates "internally by trading as principal or [by] crossing [such] orders as agent." Proposing Release at 196-200; see also Part III, Item 1(b)(ii) of proposed Form ATS-N.

⁷ See, e.g., Regulation ATS Adopting Release at 70,847, text accompanying n. 18. "The Commission . . . determined that this [ATS] exemption is in the public interest and will promote efficiency, competition, and capital formation because it has the effect of providing alternative trading systems with the option of positioning themselves in the marketplace as either registered exchanges or as broker-dealers[, which] will continue to encourage the development of new and innovative trading facilities." *Id.* at text following n. 92.

⁸ In the public meeting proposing new Form ATS-N, SEC Chair White discussed disclosures to be made by all broker-dealers: "The staff is preparing a recommendation that would give an investor new disclosures tailored to how the investor's trades are routed and executed – including information about order and execution sizes, price improvement, midpoint executions, and the use of indications of interest." Chair White, Statement at Open Meeting on Regulation of NMS Stock Alternative Trading Systems (Nov. 18, 2015), available at <http://www.sec.gov/news/statement/white-open-meeting-111815.html>.

⁹ See Reg ATS Adopting Release at 70,856. "The Commission believes that allowing alternative trading systems to make a business decision about how to register with the Commission will continue to encourage the development of new and innovative trading facilities."

¹⁰ See Part III, Items 1(b), 2(b), 3, 5(d), 6, 9 and 10, and Part IV, Items 1, 2(b), 3(b)-(d), 4-8 of proposed Form ATS-N.

in the same way an exchange has a rulebook;¹¹ (3) “fees of the NMS Stock ATS”, in the same way as a formal, public exchange fee schedule;¹² (4) identifying persons that access ATSs, similar to the identification of exchange members;¹³ and (5) making amendments to Form ATS-N public at the time of filing rather than upon approval, like when an exchange’s rule filings are made public (and subject to notice and comment, as would effectively and inappropriately be the case for a Form ATS-N amendment under the Proposal) pursuant to Section 19(b) under the Securities Exchange Act of 1934.¹⁴ This approach is contrary to the objectives of Regulation ATS, which did not intend to hold ATSs to exchange standards.¹⁵

These are not just semantic differences. The requirement to disclose the fees “of the NMS Stock ATS” is a clear example of this point. This proposed requirement contemplates a formal fee schedule for all participants accessing standalone ATSs and exchanges. A full-service broker-dealer providing variety of services and products often negotiates commission rates with each client based upon the full suite of brokerage services made available to that client. It may not be possible to isolate such a broker-dealer’s charges applicable solely to the ATS and, therefore, such disclosure would not result in meaningful disclosure that would allow market participants to compare ATSs to each other.

We urge the Commission to reconsider the aspects of the Proposal that have the effect of not recognizing the materially different roles that ATSs and exchanges are intended to play in the U.S. marketplace and the public policy that led to the creation of ATSs.¹⁶

3. Proposal Focuses on “Subscribers” Instead of “Users” of an ATS

The Proposal focuses on the term “subscriber” (instead of “user”), which is a term that can be disparately interpreted and applied by broker-dealer operators of ATSs and would inhibit uniform application across ATSs in terms of disclosure, access, priority and other purposes.

Rule 300(b) of Regulation ATS defines a subscriber as a customer, member, user or participant of an ATS who “has entered into a contractual agreement with an alternative trading system to access an alternative trading system...”, a definition which presumes that the ATS is a standalone entity with which an agreement is made. This definition fails to adequately define subscriber in the case of an ATS that is part of a larger broker operation, leading to inconsistencies in the application of the requirements

¹¹ See Proposing Release at 175, 426, 460-62 (discussing the availability of and proposed Form ATS-N requirement to disclose subscriber manuals). It should be noted that many ATSs, unlike the exchanges, do not maintain a subscriber manual or rulebook. See also Part II, Exhibit 1 of proposed Form ATS-N.

¹² See Part IV, Item 12 of proposed Form ATS-N.

¹³ See Part III, Items 4-5, and Part IV, Items 1(d) and 6(b) of proposed Form ATS-N.

¹⁴ See Proposing Release at 123-36, 154-55. Making proposed Form ATS-N amendments public while SEC approval is pending will effectively solicit comment from market participants (who may not even be clients/users of the subject ATS) regarding the substance of the proposed amendment. Broker-dealer ATS operators should be free to effect changes to their ATSs subject to consultation and communication with the Commission staff. It is important to note that, unlike with exchanges, no market participant is required to access any particular ATS, and, so if they do not like how an ATS operates, they have sole discretion not to access it.

¹⁵ See *id.* at 70,846 (“The Commission believes that its regulation of markets should both accommodate traditional market structures and provide sufficient flexibility to ensure that new markets promote fairness, efficiency, and transparency.”).

¹⁶ See Reg ATS Adopting Release at 70,845-847. ATSs “are private, available only to chosen subscribers, and are regulated as broker-dealers, not in the way registered exchanges ... are regulated.” *Id.* at 70,845. See *supra* notes 4, 9 and accompanying text.

applicable to “subscribers” across ATSS. Disclosures should not depend on whether a broker-dealer operator has a contractual agreement with a user for accessing the ATS, but should be consistent for all users that access an ATS whether such users are internal or external and whether such users access the ATS directly or indirectly.

Morgan Stanley therefore urges the SEC to apply the disclosure requirements of the Proposal and proposed Form ATS-N to all “users” of the ATS (and not limit them to just those who have entered into a contractual agreement with the ATS to access that ATS).¹⁷

4. Certain Proposal Requirements Are Not Meaningful to Clients and Create Burdensome Disclosure Obligations

The Proposal requires certain disclosures that are not meaningful to ATS users and could, in fact, inhibit useful comparison of ATSS and create unnecessary and burdensome disclosure obligations. These disclosures should be tailored such that the information elicited would provide information on which ATS users can make informed decisions.

For example, proposed Form ATS-N requests that a broker-dealer list all affiliates and business units that *may* trade on the subject ATS.¹⁸ Full-service broker-dealers often have hundreds of affiliates and business units meeting this definition and keeping such information current and accurate on an ongoing basis would bring additional burden with very little, if any, benefit to ATS users. Rather than a laundry list of hundreds of affiliates, what likely would be important to an ATS user is whether an operator’s affiliates may trade in the ATS, and, if so, whether they get any preferential and/or differentiated treatment.

Proposed Form ATS-N also requests detailed information regarding persons, *including natural persons*, providing services for the ATS, but who are unaffiliated with the broker-dealer.¹⁹ Additionally, the proposed form seeks information regarding whether any such persons, or any of *their* affiliates, “may enter orders or other trading interest on the NMS Stock ATS.”²⁰ It is very difficult for a broker-dealer to know the structure of all of its vendors, much less whether the vendor has an affiliate that may enter orders in the subject ATS. The issue with this disclosure is, again, that it would require disclosure of every service provider (and its affiliates who may enter orders) regardless of whether such relationship involves preferential and/or differentiated treatment. If the SEC’s concern is whether a service provider is receiving preferential treatment from an ATS, then, similar to our perspective on affiliates and business units above, we suggest that the Proposal mandate disclosure of whether there is any preferential and/or differentiated treatment.

¹⁷ In addition, proposed Form ATS-N currently uses different terminology, sometimes referencing “subscribers” and sometimes referencing “subscriber orders or other trading interest”. It is not clear whether such different references are intentional, but we would urge the Commission to consider a more general *user*-based disclosure so that responses to the various questions capture all the various types of behaviors of each broker-dealer, regardless of how any particular user is identified and regardless of whether such users have contracts with the ATS for accessing the ATS. Part III, Item 3(b) and Item 5(d) of proposed Form ATS-N, as well as Part III, Item 1(b)(iii), Item 3(b), and Item 6 of proposed Form ATS-N.

¹⁸ Part III, Item 5 of proposed Form ATS-N.

¹⁹ Part III, Item 8 of proposed Form ATS-N.

²⁰ Part III, Item 8 of proposed Form ATS-N.

Conclusion

Morgan Stanley commends the Commission on its initiatives to increase transparency in connection with order handling practices of broker-dealers. As Morgan Stanley has discussed with the SEC on several occasions, clients are entitled to concise, meaningful information about how their orders are being handled.

We urge the Commission to reevaluate the breadth of some of the proposed disclosures as set forth above. We believe that our suggested alternative approach will lead to a more meaningful, comparable and standardized disclosure regime and is a more balanced and practical transparency solution benefiting all market participants and the marketplace generally. Morgan Stanley welcomes the opportunity to discuss these issues further with the SEC.

Respectfully submitted,



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cc: Mary Jo White, Chair
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