



September 7, 2016

Via Electronic Mail

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

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

Dear Secretary Fields,

eBX, LLC (“Level ATS” or the “Firm”)¹ appreciates this opportunity to provide comment to the Securities and Exchange Commission (the “SEC” or “Commission”) regarding its proposal to amend the regulatory requirements for alternative trading systems (“ATSs”) that trade NMS stocks (“NMS Stock ATSs”).² As discussed below, Level ATS generally supports the SEC’s efforts to provide additional transparency regarding the operation of ATSs. We believe, however, that certain elements of the Proposed Rule will have an adverse effect on operators of NMS Stock ATSs, their affiliates and absent uniform and objective disclosure requirements amongst all NMS Stock ATSs, the intended benefit sought by mandating additional disclosure will have the unintended consequence of creating opaqueness in the equities market.

Level ATS

By way of background, Level ATS is an independently operated ATS designed to facilitate fast and efficient executions for U.S. equity securities in a dark pool environment.

¹ eBX LLC, a registered-broker dealer, owns and operates the Level ATS alternative trading system.

² Regulation of NMS Stock Alternative Trading Systems, Release No. 34-76474, File No. S7-23-15, (Nov. 18, 2015), 80 Fed. Reg. 80998 (Dec 28, 2015) (“Proposing Release”).

Launched in 2006, LeveL ATS provides a continuous crossing platform designed to provide its subscribers a stable trading environment while minimizing information leakage and market impact.

Introduction

When the SEC adopted Regulation ATS, its stated goal was to “strengthen the public markets for securities, while encouraging innovative new markets.”³ There can be no question that Regulation ATS achieved these goals. In the 18 years since Regulation ATS was adopted, there has been a dramatic increase in both the number of ATSs and the volume of securities transactions effected through these systems. Competition among and between ATSs and other market centers has spurred innovation and provided investors with faster and more economically expedient methods to effect securities transactions.

Given the important role that ATSs play in U.S. market structure, LeveL ATS generally supports the Commission’s efforts 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.”⁴ We are, however, concerned that certain elements of the proposed rule could have a negative effect on the equities markets. Specifically, certain disclosures required under the proposed rule are overly broad, would not significantly advance the Commission’s stated policy goals and would effectively stifle the innovation and competition that Regulation ATS was adopted to foster.

Affiliate Disclosures Under Part III of Proposed Form ATS-N

In the Adopting Release, the Commission expresses its preliminary view “that to understand the operations of an NMS Stock ATS, it is necessary to understand the relationship

³ See Regulation of Exchange and Alternative Trading Systems, Release No. 34-40760 (Dec. 8, 1998), 63 Fed. Reg. 70,844 (Dec 22, 1998) (“Regulation ATS Adopting Release”).

⁴ See 80 Fed. Reg. 80998 at 81003.

and interactions between the NMS Stock ATS and its registered broker-dealer operator as well as the relationship and interactions between the NMS Stock ATS and the affiliates⁵ of its broker-dealer operator.” The Commission also addresses potential conflicts of interest, stating its belief that “[d]ue to the frequent overlap between the operations of the broker-dealer operator or its affiliates...and the operations of ATSs...the interests of the broker-dealer operator or its affiliates sometimes compete with the interests of an ATSs subscribers.” The Commission goes on to identify a range of potential conflicts of interest that may exist between ATSs operators and their affiliates (in particular, operators or affiliates that are multi-service broker-dealers) and NMS Stock ATS subscribers. While Level ATS supports the Commission’s efforts to advise NMS Stock ATS subscribers of potential conflicts of interest between NMS Stock ATS operators and their subscribers, the one size fits all disclosure regime currently proposed is overly broad, burdensome and neither necessary nor necessarily helpful to subscribers.

For Level ATS, which is not a multi-service broker-dealer, but is owned by a consortium of multi-service broker-dealers, a fulsome response to Part III would essentially require the Firm to describe the businesses in which its owners are engaged without regard for whether those businesses are related to the operation of Level ATS.⁶ While some of the Part III disclosures are demonstrably relevant to the operation of the NMS Stock ATS and are limited to NMS Stock ATS operations, others are not. For example, Item 5, which requires the NMS Stock ATS operator to disclose whether the operator or any affiliate enters orders into the system, is both

⁵ The disclosures proposed in Part III of proposed Form ATS-N require ATS operators to provide detailed information regarding not only the ATS operator, but its affiliates as well. The Commission proposes to define the term “affiliate” to include “with respect to a specified person, any person that directly, or indirectly, controls, is under common control with, or is controlled by, the specified person.” Under the proposed definition, the term affiliate would include, among others, owners of the ATS operator, without regard for whether the affiliate is separately registered as a broker-dealer and therefore subject to the Commission’s jurisdiction.

⁶ While Section G of the proposed Form ATS-N Instructions notes that certain persons are *presumed* to control the broker-dealer operator of an NMS Stock ATS, there is no corresponding safe harbor whereby persons are presumed *not* to control an NMS Stock ATS. Accordingly, an NMS Stock ATS operator may feel obligated to provide overly broad disclosures that succeed solely in confusing subscribers regarding potential conflicts.

narrow and relevant. This is information that the NMS Stock ATS operator would reasonably be expected to have and, more importantly, that an NMS Stock ATS subscriber might find valuable. In contrast, however, Item 1 requires an NMS Stock ATS operator to disclose whether “the broker-dealer operator, or any of its affiliates, operate or control any non-ATS trading center(s) that is an OTC market maker or executes orders in NMS stocks internally by trading as principal or crossing orders as agent,” which is a much broader request, going well beyond operations relevant to the NMS Stock ATS subscribers. At the very least, affiliate disclosure should be limited to information with a direct impact on the operations of the NMS Stock ATS or its subscribers.

It is also not the case that an NMS Stock ATS operator and its affiliates are necessarily partners in their respective businesses. The information required to be provided for affiliates by the proposed rule is likely to be considered by the affiliate to be confidential, and the affiliate is not under any enforceable obligation to provide such information to the NMS Stock ATS operator.⁷ Furthermore, the operator of an NMS Stock ATS would be required to publicly file a Form ATS-N amendment notifying the Commission at least 30 days prior to a material change to the business operations *of its affiliates*. If the Commission adopts this disclosure requirement as proposed, ATS operators will be in the unenviable position of being required to collect what will undoubtedly be massive amounts of information from entities that are under no obligation to provide it.

LevelL ATS believes that the Commission should limit the required disclosures regarding affiliates of the operator of an NMS Stock ATS to (i) a statement declaring whether affiliates

⁷ The definition of "Affiliate" under the proposed Form ATS-N Instructions includes any person "under common control with" the NMS Stock ATS operator, with "control" being presumed where a common parent owns, directly or indirectly, as little as 25% of each person. This threshold would capture a number of entities that operate independently from one another.

access the system and (ii) a description of how the affiliates access the system (*i.e.*, FIX directly, access indirectly via SOR or directed order from brokerage services offered by operator via directed order to operator). While LevelL ATS believes that NMS Stock ATS operators should also be required to disclose differences in functionality available to affiliates, such information would be disclosed separately in Part IV/Exhibit IV of the Form ATS-N.

LevelL ATS is not alone in this view. Narrowing information required to be disclosed by an NMS Stock ATS operator's affiliates to only the most relevant information is a view that is shared by a myriad of market participants representing various sectors of the equities market.⁸ Accordingly, we respectfully request that the Commission reconsider the full ramifications and potential unintended consequences of this aspect of the proposed rule.

Disclosure of Subscriber Agreement Terms and Fees

Part II, Item 1 of Form ATS-N requires an NMS Stock ATS to submit “any materials provided to subscribers or other persons related to the operations of the NMS Stock ATS or the disclosures on Form ATS-N.” Insofar as this includes subscriber agreements, the Firm does not believe that such disclosure is necessary or appropriate. The terms and conditions of a subscriber agreement are negotiated with each subscriber individually and may vary based upon many factors. Both LevelL ATS and its subscribers view the subscriber agreement as a confidential document reflecting this negotiation. Disclosing subscriber agreements will prevent an ATS from being able to effectively negotiate its terms, robbing it of its ability to conduct arms-length negotiations regarding its relationship with each subscriber. If firms are to maintain the ability to

⁸ See, e.g., Letter to Brent J. Fields, Secretary, SEC, from Phillip S. Gillespie, Executive Vice President and General Counsel, State Street Global Advisors, dated Feb. 26, 2016, p. 2; Letter to Brent J. Fields, Secretary, SEC, from Marc R. Bryant, Senior Vice President and Deputy General Counsel, Fidelity Investments, dated Feb. 26, 2016, pp. 3-7; Letter to Brent J. Fields, Secretary, SEC, from John A. McCarthy, General Counsel, KCG Holdings, Inc., dated Mar. 15, 2016, pp. 8-9; and Letter to Brent J. Fields, Secretary, SEC, from Mark Holder, Managing Director, UBS Securities LLC, dated Mar. 21, 2016, pp. 2, 4-5.

negotiate terms and conditions under which they are willing to provide access to subscribers, those terms and conditions must remain confidential.

Similarly, fees paid by customers of broker-dealers have been subject to negotiation since the Commission ended fixed brokerage fees on May 1, 1975. Fees charged by broker-dealers, including those charged to subscribers by ATS operators, are confidential. These fees may vary based upon many factors including, but not limited to, the nature and volume of orders sent and other fees paid by subscribers to the ATS or to third parties. Part IV, Item 12 of Form ATS-N requires NMS Stock ATS operators to “[d]escribe any fees, rebates, or other charges of the NMS Stock ATS...and provide the range (*e.g.*, high and low) of such fees, rebates, or other charges.” Item 12 goes on to require disclosure of any differences in fees, rebates, or other charges if such fees, rebates, or other charges are not the same across all subscribers. We do not believe that fee ranges and an explanation for differences in fees among subscribers is appropriate for disclosure. It is well known that these fees are subject to negotiation. Mandating disclosure of an arm’s length negotiation between two commercial entities would effectively render any such negotiation meaningless. ATS subscribers are sophisticated counterparties that have a keen sense of the market for the services provided. They are simply not in need of any perceived benefit that such disclosure may provide.

Uniform Disclosures

The Firm also suggests that the Commission adopt a revised approach to the required disclosures in Form ATS-N to promote uniformity. The Firm submits that a “yes/no” response format rather than a narrative response format would better serve the Commission’s ultimate goal of transparency. Specifically, more uniform responses to disclosures required in Form ATS-N will allow current and potential subscribers to better compare and contrast various NMS

Stock ATSs. This response format also supports more fulsome disclosure and creates a universal standard of review, as the current practice allows NMS Stock ATSs to disclose only the information that it deems appropriate. While the Firm acknowledges that this response format is insufficient to capture all of the information sought by the Form ATS-N, the “yes/no” format may be supplemented with short-form responses. The Firm shares this view with not only NMS Stock ATS operators, but other market participants as well.⁹

Publication of Form ATS-N and Amendments

The Firm supports the Commission’s proposed rule 304(b), which provides that the Commission shall publish, among other things, Form ATS-N and amendments to Form ATS-N. As the Commission staff is aware, many firms already either publish their Form ATS or otherwise provide them to subscribers. Requiring publication of Form ATS-N would level the playing field among NMS Stock ATS operators and provide subscribers with needed transparency regarding the operations of NMS Stock ATSs.

The Firm does not agree, however, that publishing a firm's initial Form ATS-N and amendments prior to their effectiveness is necessary or appropriate. Publishing a Form ATS-N, whether it be an initial Form ATS-N filing or an amendment thereto, that is not yet effective, and may ultimately not be approved, will cause confusion among market participants regarding the manner of operation of the NMS Stock ATS at any point in time. Further, publication in advance provides the NMS Stock ATS’s competitors with advance notice of pending changes to the operator's system, reducing the competitive advantage associated with being the first to

⁹ See, e.g., SSGA Comment Letter at 2; KCG Comment Letter at 8-9; UBS Comment Letter at 2-3; Letter to Brent J. Fields, Secretary, SEC, from John Russell, Chairman of the Board, Security Traders Association, dated Feb. 26, 2016, p. 5; and Letter to Brent J. Fields, Secretary, SEC, from Timothy J. Mahoney, Chief Executive Officer, BIDS Trading, L.P., dated Feb. 26, 2016, pp. 4-5.

innovate. The Firm believes that inadvertently creating disincentives for innovation is contrary to the Commission's goal of encouraging innovation in the equities market.

Review and Approval of Form ATS-N Filings

In proposed rule 304(a)(1)(i), the Commission proposes to change the nature of filings under Regulation ATS from notice filings to those that require approval. Pursuant to proposed rule 304(a), no NMS Stock ATS may operate pursuant to an exemption from the definition of the term "exchange" unless it files with the Commission a Form ATS-N and the Commission declares it effective. ATSs that are operating as of the effective date of the rule pursuant to a previously filed Form ATS must file Form ATS-N within 120 days of the effective date for the Regulation ATS amendments. Such ATSs will be permitted to operate pending the Commission's review of Form ATS-N.

Pursuant to proposed rule 304(a)(2)(i)(A), amendments to Form ATS-N relating to material changes in business operations must be filed 30 calendar days prior to the implementation date for the proposed change. Proposed rule 304(a)(2)(ii), however, provides that amendments will, by Commission order, be declared ineffective if such action is "necessary or appropriate in the public interest, and is consistent with the protection of investors."

While the Firm generally supports the Commission's proposal, it is concerned about the lack of objective standards by which Form ATS-N and related amendments will be evaluated. In the Proposing Release, the Commission states that, in reviewing Form ATS-N, it will, among other things, evaluate the NMS Stock ATS's disclosures to determine whether they are "materially deficient." In its discussion, the Commission provides "non-exhaustive examples...to illustrate various [reasons]...that could cause the Commission to declare a Form

ATS-N ineffective because it contains one or more disclosures that are materially deficient.”¹⁰

While the Firm appreciates the difficulty associated with identifying every potential scenario that might cause a Form ATS-N to be declared ineffective, we respectfully request that the Commission provide additional guidance in this area to ensure that NMS Stock ATS operators understand what standards are applied in reviewing Form ATS-N.

Conclusion

In closing, while Level ATS is largely supportive of the Commission’s proposed amendments to Regulation ATS, the Firm believes that the Commission should revisit disclosure requirements relating to the operations of affiliates that are not related to the operation of the NMS Stock ATS and publication of fee and subscriber agreement related information. Such disclosures do not meaningfully address the Commission’s policy goals of increasing transparency regarding operation of an NMS Stock ATS or addressing conflicts of interest and, as such, should not be the subject of the proposed amendments to Regulation ATS.

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If you have any questions, please call me at [REDACTED] or our counsel David Sieradzki or Julian Rainero of Schulte Roth & Zabel LLP, at [REDACTED].

Regards,

John F. Linares

John F. Linares

General Counsel

¹⁰ Regulation ATS Adopting Release at 115-116.