



OFFICE OF THE
INVESTOR ADVOCATE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

September 9, 2016

Submitted Electronically

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F St NE
Washington D.C. 20549-1090

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

Dear Mr. Fields:

As you know, the Office of the Investor Advocate is responsible for analyzing the potential impact on investors of proposed regulations of the Commission. We are expected to identify areas in which investors would benefit from changes in the regulations of the Commission, and we are empowered to make recommendations to the Commission.¹ As appropriate, we make formal recommendations and/or utilize the public comment process to help ensure that the interests of investors are fully considered while rulemaking decisions are made.²

As identified in our Report on Objectives for Fiscal Year 2016, we have a strong interest in initiatives involving market structure reforms that may impact investors.³ We appreciate this

¹ 15 U.S.C. § 78d(g)(4). This letter expresses solely the views of the Investor Advocate. It does not necessarily reflect the views of the Commission, the Commissioners, or staff of the Commission, and the Commission disclaims responsibility for this letter and all analyses, findings, and conclusions contained herein.

² To enable our consideration of other commenters' views, we submit this letter after the expiration of the official comment period. However, this letter is intended as a comment letter and should not be construed as a recommendation to the Commission that requires a formal response within three months pursuant to Section 4(g)(7) of the Exchange Act, 15 U.S.C. § 78d(g)(7). The comments set forth herein may be incorporated into a future formal recommendation.

³ See OFF. OF THE INV. ADVOC., REP. ON OBJECTIVES FOR FISCAL YEAR 2016, 5 (June 30, 2015), <http://www.sec.gov/advocate/reportspubs/annual-reports/sec-office-investor-advocate-report-on-objectives-fy2016.pdf>. We will also continue our focus on equity market structure reforms in Fiscal Year 2017. See OFF. OF THE INV. ADVOC., REP. ON OBJECTIVES FOR FISCAL YEAR 2017, 7 (June 30, 2016), <https://www.sec.gov/advocate/reportspubs/annual-reports/sec-office-investor-advocate-report-on-objectives-fy2017.pdf>.

opportunity to provide comments in regard to one of those important initiatives in File No. S-7-23-15, Regulation of NMS Stock Alternative Trading Systems.⁴

In short, we support the Commission's proposed amendments to Regulation ATS that are applicable to alternative trading systems ("ATs") that transact in National Market System stocks, including so-called "dark pools." However, we suggest that the Commission adopt further modifications that would bring greater transparency to ATs that transact in fixed income securities by making current filings on Form ATS public,⁵ and we encourage the Commission to bring this same level of transparency to ATs whose trading is solely in government securities.⁶

I. Introduction

In File No. S7-23-15, Regulation of NMS Stock Alternative Trading Systems ("Proposing Release"), the Commission has proposed to amend Regulation ATS to adopt new Form ATS-N to provide more information about: (1) the broker-dealer that operates an ATS ("broker-dealer operator") that transacts in National Market System stocks ("NMS Stock ATS"); (2) the activities of the broker-dealer operator and its affiliates in connection with the NMS Stock ATS; and (3) information about the manner of operations of the ATS.⁷ Importantly, the Commission has also proposed to make the information submitted in Form ATS-N filings public. In addition, the Commission has proposed to amend Regulation ATS to provide processes for the Commission to: (1) declare an NMS Stock ATS's Form ATS-N either effective or, after notice and opportunity for hearing, ineffective; and (2) suspend, limit, or revoke the exemption from the definition of "exchange" for an NMS Stock ATS after providing notice and opportunity for hearing. Further, the proposal would require all ATs, including NMS Stock ATs, to begin documenting their existing safeguards and other procedures to protect subscribers' confidential trading information.

The Office of the Investor Advocate has reviewed the Proposing Release and the comments received to date. In short, we support the Commission's efforts to enhance the operational transparency of NMS Stock ATs, to provide for a meaningful process of review of the Form ATS-N, and to augment the safeguarding of investors' confidential trading information on all ATs. We would also likely support, in response to comments, limited modifications to enhance the effectiveness of the final regulations, as well as targeted clarifications that provide meaningful guidance in the adopting release.

⁴ Regulation of NMS Stock Alternative Trading Systems, Securities Exchange Act Release No. 76474 (Nov. 18, 2015), 80 Fed. Reg. 80998 (proposed Dec. 28, 2015), <https://www.gpo.gov/fdsys/pkg/FR-2015-12-28/pdf/2015-29890.pdf> [hereinafter Proposing Release].

⁵ See Proposing Release, *supra* note 4, at 81018 (questions 17-21). See also *infra* notes 65-69 and accompanying text.

⁶ See Proposing Release, *supra* note 4, at 81019-20 (questions 22-31). See also *infra* notes 90-97 and accompanying text.

⁷ See Proposing Release, *supra* note 4.

Although the proposal may seem technical and attract few headlines, we believe it is an important rulemaking because it will shine a light on the practices of dark pools. This transparency will likely improve the trading environment for investors by enhancing competition and deterring abusive practices. Accordingly, we encourage the Commission to assign this rulemaking a high priority and adopt it with all deliberate speed.

Significantly, however, we believe that the proposed regulations should be modified to enhance the operational transparency of ATSS that transact in fixed income securities, including government securities, and thereby help to protect investors who use those systems. We agree with commenters, responding to relevant questions in the Proposing Release,⁸ that the proposed Form ATS-N may not be suitable for the fixed income markets, and that the Commission should tailor the Form ATS disclosures to better address the particular needs of those markets.⁹ Nonetheless, we believe that, as an interim step, the Commission should begin requiring the existing Form ATS to be filed by ATSS whose trading is solely in government securities, and that the Commission should make Form ATS public for all ATSS that trade fixed income securities.

II. Background

As described in the Proposing Release, Section 11(a)(2) of the Exchange Act¹⁰ directs the Commission, having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, to use its authority to facilitate the establishment of a national market system in accordance with Congressional objectives.¹¹ In December 1998, the Commission adopted Regulation ATS to advance the goals of the national market system and establish a framework for regulating ATSS.¹²

Prior to 1998, there had been an increase in systems that traded securities and furnished services traditionally provided by registered national securities exchanges. The Commission observed at the time that, among other things, activity on ATSS was not fully disclosed to investors, and that these systems had no obligation to provide investors a fair opportunity to participate on the systems or to otherwise treat their participants fairly.¹³ While ATSS at that time operated in a manner similar to exchanges, each had been subject to different regulatory regimes, and these differences created disparities that affected investor protection and the

⁸ See Proposing Release, *supra* note 4, at 81018-20. See also *infra* notes 65-69, 91-93 and accompanying text.

⁹ See, e.g., Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, (Mar. 7, 2016), <https://www.sec.gov/comments/s7-23-15/s72315-29.pdf>.

¹⁰ 15 U.S.C. § 78k-1(a)(2). See also the Securities Act Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (1975).

¹¹ See Proposing Release, *supra* note 4, at 80999 (citing 15 U.S.C. § 78k-1(a)(1)).

¹² See Regulation of Exchanges and Alternative Trading Systems, Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 Fed. Reg. 70844 (Dec. 22, 1998) (codified at 17 CFR pts. 202, 240, 242 and 249), <https://www.gpo.gov/fdsys/pkg/FR-1998-12-22/pdf/98-33299.pdf> [hereinafter Reg ATS Adopting Release].

¹³ *Id.* at 70845.

operation of the markets as a whole, calling into question the fairness of the then-existing regulatory requirements.¹⁴ In response to these developments, the Commission adopted a regulatory framework that it believed would encourage market innovation, while ensuring basic investor protections, by giving securities markets a choice to register as national securities exchanges or, alternatively, to register as broker-dealers and comply with Regulation ATS.¹⁵

In the nearly 18 years since the Commission adopted Regulation ATS, the equity markets have evolved significantly, resulting in an increased number of trading centers and a reduced concentration of trading activity in NMS stocks.¹⁶ There have been advances in the underlying technology for generating, routing, and executing orders, and there have been significant developments in speed, capacity, and sophistication. Unfortunately, these changes have also presented an opportunity for questionable conduct and investor harm.

NMS Stock ATSS are currently an integral part of the national market system for NMS Stocks, as the volume of executions on ATSS has increased significantly at the expense of registered national securities exchanges over the last decade.¹⁷ Many of these ATSS do not display quotations publicly, and they are commonly referred to as “dark pools” because they seek to complete trades prior to revealing the full extent of trading interest to the broader market.¹⁸ ATSS compete for order flow, however, with market participants on both ends of the regulatory spectrum, including exchanges and also broker-dealers that operate trading venues that are not ATSS. The 38 NMS Stock ATSS represented approximately 15.4% of total dollar volume (15.0% of total share volume) of trading in NMS stocks on all trading venues combined in 2015.¹⁹

Many have expressed concerns about dark pools and whether investors are treated fairly, as NMS Stock ATSS are subject to a much different regulatory regime than are exchanges. Registered national securities exchanges have significant regulatory obligations, but also enjoy significant benefits in their role as self-regulatory organizations (“SROs”) in the market.²⁰ In terms of regulatory and public oversight, under Sections 6 and 19 of the Exchange Act,²¹ an SRO’s proposed rules must be filed publicly with the Commission and must be consistent with the Exchange Act’s statutory requirements, such as providing for the equitable allocation of reasonable fees and not permitting unfair discrimination. ATSS are exempted from the rules

¹⁴ See *id.* at 70845-46.

¹⁵ See *id.* at 70847.

¹⁶ See Proposing Release, *supra* note 4, at 81000.

¹⁷ See *id.* at 81000-01.

¹⁸ See *id.* at 81008.

¹⁹ See *id.*

²⁰ See *id.* at 81000.

²¹ See, e.g., *id.* at 81011.

governing the registration and oversight of exchanges and are not considered SROs. Instead, an ATS need only register as a broker-dealer and comply with Regulation ATS in order to operate a trading venue.²² As additional significant distinctions, the filed Form ATS, unlike an exchange's Form 1 submission, is deemed completely confidential and not subject to a substantive review.²³ On the other hand, broker-dealers operating trading venues that do not meet the Commission's definition of "exchange," or that otherwise offer execution services simply by crossing orders as principal or agent, face no additional regulatory obligations, and therefore their operations may be even less transparent than those of ATSs.²⁴

Over the last five years, a number of significant regulatory settlements against large NMS Stock ATSs have brought to light questionable business activities that have harmed investors and undermined public confidence in the markets.²⁵ These enforcement actions underscore the potential for abuse and the need to bring greater transparency to dark pools because the cases suggest that investors were not always aware of whether the broker-dealer operator was trading ahead of or against subscribers' orders.²⁶ Nor did investors always know whether the broker-dealer operator's smart order router ("SOR") was using their information to make unrelated order routing decisions.²⁷ Investors did not always know that the broker-dealer operators were not policing their pools as advertised, possibly with respect to affiliates trading proprietarily.²⁸ Ultimately, it appears that investors were not always provided with sufficient information by the broker-dealer operator to understand the trading characteristics of the dark pool or the nature of its other participants. Selective disclosure and realized conflicts of interests appear to have harmed investors and have likely had a negative impact on public confidence in the markets.

²² See *id.* at 81001.

²³ See *id.* at 81004-05.

²⁴ See Proposing Release, *supra* note 4, at 81131 ("if multi-service broker-dealers that operate their own NMS Stock ATS cease operating the ATSS, liquidity might move to other trading venues, including both transparent venues, such as national securities exchanges, and less transparent venues, such as non-ATS OTC trading centers").

²⁵ See Proposing Release, *supra* note 4, at n. 374.

²⁶ See, e.g., *In the Matter of ITG Inc. and Alternet Securities Inc.*, Admin Proc. File No. 3-16742 (Aug. 12, 2015), <https://www.sec.gov/litigation/admin/2015/33-9887.pdf>; *In the Matter of Pipeline Trading Systems LLC, Fred J. Federspiel, and Alfred R. Berkeley III*, Admin Proc. File No. 3-14600 (Oct. 24, 2011), <https://www.sec.gov/litigation/admin/2011/33-9271.pdf>.

²⁷ See, e.g., *In the Matter of Lavaflow, Inc.*, Admin. Proc. File No. 3-15985 (July 25, 2014), <http://www.sec.gov/litigation/admin/2014/34-72673.pdf>; *In the Matter of eBX, LLC*, Admin. Proc. File No. 3-15058 (Oct. 3, 2012), <http://www.sec.gov/litigation/admin/2012/34-67969.pdf>.

²⁸ See, e.g., *In the Matter of Barclays Capital Inc.*, Admin Proc. File No. 3-17077 (Jan. 31, 2016), <https://www.sec.gov/litigation/admin/2016/33-10010.pdf>; *In the Matter of Credit Suisse Securities (USA) LLC*, Admin Proc. File No. 3-17078 (Jan. 31, 2016), <https://www.sec.gov/litigation/admin/2016/33-10013.pdf>.

III. Analysis

A. The Commission Should Adopt the Proposed Regulations for ATSS that Trade NMS Stocks

1. The Importance of Operational Transparency for NMS Stock ATSS

As noted above, the Exchange Act directs the Commission to facilitate the establishment of a national market system in accordance with the Congressional findings and objectives set forth in Section 11A(a)(1) of the Exchange Act. Among the findings and objectives in Section 11A(a)(1) are that “[n]ew data processing and communications techniques create the opportunity for more efficient and effective market operations” and “[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure ... the economically efficient execution of securities transactions” and the “practicability of brokers executing investors’ orders in the best markets.”²⁹ Congress recognized that the securities markets dynamically change and, accordingly, granted the Commission broad authority to oversee the implementation, operation, and regulation of the national market system in accordance with Congressional goals and objectives.³⁰

Given the background and enforcement actions discussed above, it is hardly surprising that the Commission would be concerned that regulatory requirements relating to the transparency of ATS operation and conflicts, particularly for NMS Stock ATSS, may no longer fully meet the goals of furthering the public interest and protection of investors. The proposed regulations appear designed to address the overarching concern that market participants routing their orders to NMS Stock ATSS were not fully informed of how the trading systems operated or what other parties were routing orders to the systems and on what terms. In our view, this is a modest proposal that depends largely on greater disclosure, but it will provide important information that will likely drive competition and bring market-based reforms that will benefit investors.

Although commenters differ on some details of the implementation, generally they all support the concept of operational transparency. The chorus of supporters includes ATS operators,³¹ national securities exchange operators,³² institutional investors and their trade

²⁹ See Proposing Release, *supra* note 4, at 80999 (citing Section 11A(a)(1)(B)-(C) of the Exchange Act, 15 U.S.C. § 78k-1(a)(1)(B)-(C)).

³⁰ See *id.* at 81000 (citing S. Rep. No. 75, 94th Cong., 1st Sess. 8 (1975) at 8-9).

³¹ See, e.g., Letter from Timothy J. Mahoney, Chief Exec. Officer, BIDS Trading L.P. (Feb. 26, 2016) [hereinafter BIDS Letter]; Letter from John A. McCarthy, Gen. Counsel, KCG Holdings, Inc. (Mar. 15, 2016) [hereinafter KCG Letter].

³² See, e.g., Letter from Angelo Evangelou, Deputy Gen. Counsel, Chi. Bd. Options Exch., Inc. (Mar. 1, 2016).

associations,³³ retail investor advocates,³⁴ other regulators,³⁵ industry trade associations,³⁶ and various stripes of other market participants.³⁷

2. The Commission Does Not Need to Modify the Proposed Regulations in Response to Comments Suggesting Form ATS-N Should Require Less Information

We understand that the proposal represents a significant increase in the amount of information required to be submitted by NMS Stock ATSs. Several commenters have suggested the level of operational detail requested in the proposed Form ATS-N could be burdensome both to provide³⁸ and to review.³⁹ A number of commenters suggest that, instead, the current Form ATS might provide sufficient information to investors for NMS Stock ATSs.⁴⁰

³³ See, e.g., Letter from Clive Williams, Head of Glob. Equity Trading, Thea N. Williams, Head of Glob. Fixed Income Trading, and Jonathan D. Siegel, Senior Legal Counsel, T. Rowe Price Assoc., Inc., (Feb. 23, 2016) [hereinafter T. Rowe Price Letter]; Letter from Phillip Gillespie, Gen. Counsel and Exec. Vice President, State St. Glob. Advisors (Feb. 26, 2016) [hereinafter State Street Letter]; Letter from David W. Blass, Gen. Counsel Inv. Co. Institute, (Feb. 25, 2016) [hereinafter ICI Letter].

³⁴ See, e.g., Letter from Micah Hauptman, Fin. Services Counsel, Consumer Fed'n of America (Feb. 26, 2016) [hereinafter CFA Letter]; Letter from Kurt N. Schacht, Managing Dir., and James C. Allen, Capital Mkts Policy Head, CFA Institute (Feb. 26, 2016) [hereinafter CFA Institute Letter].

³⁵ See, e.g., Letter from Eric T. Schneiderman, N.Y. Att'y Gen. (Feb. 23, 2016) [hereinafter NYAG Letter]; Letter from Marcia E. Asquith, Senior Vice President and Corp. Sec'y, Fin. Indus. Regulatory Auth., Inc. (Feb. 26, 2016) [hereinafter FINRA Letter].

³⁶ See, e.g., Letter from Theodore R. Lazo, Managing Dir. and Assoc. Gen. Counsel, Sec. Indus. and Fin. Mkts. Ass'n (Mar. 7, 2016) [hereinafter SIFMA Letter]; Letter from John Russell, Chairman, and James Toes, President, Sec. Traders Ass'n, (Feb. 26, 2016) [hereinafter STA Letter].

³⁷ See, e.g., Letter from Venu Palaparthi, Senior Vice President, Virtu Fin., Inc. (Dec. 2, 2015) [hereinafter Virtu Letter]; Letter from Adam C. Cooper, Senior Managing Dir. and Chief Legal Officer, Citadel LLC (Mar. 1, 2016) [hereinafter Citadel Letter].

³⁸ See, e.g., Letter from Jonathan A. Clark, Chief Exec. Officer, and James C. Dolan, Chief Compliance Officer, Luminex Trading & Analytics LLC (Feb. 23, 2016) [hereinafter Luminex Letter] (“The unnecessary and superfluous information required by the rule proposal is likely going to have a chilling effect on firms that currently operate ATSs today and any that would otherwise contemplate launching a new ATS”); Letter from Marc R. Bryant, Senior Vice President and Deputy Gen. Counsel, Fid. Invs., (Feb. 26, 2016) [hereinafter Fidelity Letter] (“We are concerned that the Proposal’s disclosure requirements on NMS Stock ATSs ... will be onerous and potentially unworkable for NMS Stock ATS broker-dealer operators and their affiliates”).

³⁹ See, e.g., T. Rowe Price Letter, *supra* note 33 (“the overwhelming amount of ‘administrative’ information that the SEC is seeking will make it difficult for most market participants to navigate and comprehend the form”); SIFMA Letter, *supra* note 36 (“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”).

⁴⁰ See, e.g., Letter from Kimberly Unger, Chief Exec. Officer and Exec. Dir, Sec. Traders Ass’n of N.Y. (Mar. 4, 2016) [hereinafter STANY Letter] (“Increased transparency could be achieved by clarifying the requests for information on Form ATS and mandating that it be made public”); Fidelity Letter, *supra* note 38 (“We suggest that the Commission first start with a requirement that NMS Stock ATSs make their Form ATS publicly available”);

We believe the proposed new form is appropriate. The current Form ATS, while acceptable on a temporary basis for less complex trading venues for fixed income securities, is not adequate to allow the Commission, investors, and the public to understand how NMS Stock ATSs operate in today's environment, given the complexity and the potential for significant conflicts of interest with the broker-dealer operator.

Some commenters have also suggested that the Commission narrow the scope of its requests for information regarding the activity of affiliates of the broker-dealer operator.⁴¹ While the new disclosures concerning affiliates could impose higher costs on sizable, diversified financial service companies, those costs are not unreasonable in relation to the likely benefits of the disclosure. We are concerned that a narrowing of the universe of affiliates subject to disclosure could result in less relevant information being provided to the Commission and to the public. For example, NMS Stock ATSs may begin structuring their legal affiliations and operations to take advantage of unanticipated gaps in whatever carve-out the Commission were to set by rule. Therefore, we believe that the Commission should not, by rule, carve out or otherwise limit the information required by Form ATS-N for affiliates or for other purposes.

We recognize that, for example, an NMS Stock ATS and its broker-dealer operator may be connected to some affiliates in limited and indirect ways. The information on certain affiliates required by Form ATS-N may have little relevance to the Commission's review of the broker-dealer operator's Form ATS-N or, if the Commission were to declare the broker-dealer operator's Form ATS-N effective, to the Commission's ongoing oversight of the NMS Stock ATS. However, this concern could be addressed without modification to the proposed regulations. Specifically, an NMS Stock ATS could seek relief tailored to its unique facts and circumstances pursuant to Section 36(a)(1) of the Exchange Act.⁴² Section 36(a)(1) permits the Commission to grant both conditional and unconditional exemptions from any provision of a rule, to the extent such exemption is necessary or appropriate in the public interest and consistent with the protection of investors.

This approach would be consistent with the manner in which the Commission generally treats exemptive requests that it receives from its regulated entities, including exchanges with a

Luminex Letter, *supra* note 38 (“The SEC Should Require NMS Stock ATSs to Make Public Their Form ATSs”); and Letter from D. Keith Ross, Chief Executive Officer, and Christopher Meade, Chief Compliance Officer, PDQ Enters., LLC (Feb. 26, 2016) [hereinafter PDQ Letter] (“clarify the specific requests for information on the current Form ATS, and require that Form ATS be publicly available”). Some acknowledge that it would then be appropriate for the Commission to seek additional information on a confidential, one-off basis. *See infra* note 46.

⁴¹ *See, e.g.*, Luminex Letter, *supra* note 38, at 3 (“The rule proposal, if approved in current form, would require extensive public disclosure of the operations of affiliates of the ATS operator, even if those affiliates have nothing to do with the operations of the ATS itself”); Fidelity Letter, *supra* note 38, at 1 (“much of the requested information on affiliates of the NMS Stock ATS broker-dealer operator, in particular, is excessive”); SIFMA Letter, *supra* note 36, at 4 (“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”).

⁴² *See* 15 U.S.C. § 78mm(a)(1).

significant number of indirect and limited affiliates.⁴³ Given the potential risk of undermining the purpose of the Proposing Release regarding the operation of the NMS Stock ATS or the activities of the broker-dealer operator's affiliates, however, we would encourage the Commission to consider providing guidance as to what factors it might consider when evaluating a broker-dealer operator's request for such exemptive relief.

Should the Commission decide to exempt certain affiliate relationships from disclosure, we would encourage the Commission to draw such exemptions very narrowly. Moreover, the Commission should provide "bright lines" in the rule to help ensure that the requirements are clear and unambiguous. We would be concerned if an ATS were permitted to use its own discretion in determining whether or not to disclose an affiliate.

3. The Commission Does Not Need to Modify the Proposed Regulations in Response to Comments Suggesting Certain Information Required by Form ATS-N Remain Non-Public

Several commenters have suggested that certain new exhibits or responses to Form ATS-N should be maintained in confidence rather than disclosed publicly.⁴⁴ Similarly, as noted above, some have argued that only information required by the current Form ATS should be made public for NMS Stock ATSs,⁴⁵ and some have suggested that any additional information requested in Form ATS-N beyond the current Form ATS should be provided confidentially to the Commission as needed, rather than continuously.⁴⁶ Other commenters expressed concerns over specific line items in the proposed Form ATS-N, suggesting full public disclosure of the information may increase security risks without providing significant benefits to the public.⁴⁷

⁴³ See, e.g., Securities Exchange Act Release No. 75867 [Sept. 9, 2015], 80 Fed. Reg. 55395 [Sept. 15, 2015] (Order Granting Application for a Conditional Exemption Pursuant to Section 36(a) of the Exchange Act From Certain Requirements of Rules 6a-1 and 6a-2 Under the Exchange Act), <https://www.gpo.gov/fdsys/pkg/FR-2015-09-15/pdf/2015-23106.pdf>.

⁴⁴ See, e.g., Letter from Howard Meyerson, Gen. Counsel, Liquidnet (Feb. 26, 2016) [hereinafter Liquidnet Letter] ("These documents may contain confidential information ... These documents may contain ... other information that we restrict for security purposes."); Fidelity Letter, *supra* note 38 ("However, we do not believe that NMS Stock ATSs should be required to make publicly available any detailed criteria used to classify subscribers based upon trading characteristics ..."); State Street Letter, *supra* note 33 ("only a selected sub-set of fields would be required to be publicly disclosed ..."); SIFMA Letter, *supra* note 36 ("Exclude sensitive or proprietary information from public disclosure"); STANY Letter, *supra* note 40 ("Commercially sensitive or proprietary information should not be required to be publicly disclosed").

⁴⁵ See *supra* note 40.

⁴⁶ See, e.g., Luminex Letter, *supra* note 38, at 4 ("the information should be viewed as a "point-in-time" disclosure that should not require continual updates"); SIFMA Letter, *supra* note 36, at 4 ("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").

⁴⁷ See, e.g., Fidelity Letter, *supra* note 38, at 8; Letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, and Jiří Król, Deputy Chief Executive Officer and

We urge the Commission to move forward with the regulation as proposed. We observe that the first two broad categories of suggestions by commenters are directly at odds with the Commission's stated goal of operational transparency. The Proposing Release itself notes that transparency "is a hallmark of the U.S. securities market and a primary tool by which investors protect their own interest."⁴⁸ In adopting these regulations, the Commission should recognize that, consistent with its preliminary observations, it is the very lack of transparency that has impeded market participants from adequately protecting their interests when doing business on an ATS.⁴⁹ As expressed by the New York Attorney General, enhanced disclosures could have avoided at least some of the harmful conduct by certain NMS Stock ATSS by ensuring that detailed information was available to subscribers before they traded.⁵⁰ Providing for significant pockets of automatic confidentiality would entrench the risk of future harm to investors without adding any clear benefit. The Commission should not, by rule, provide that particular pieces of information submitted in response to Form ATS-N are to be automatically granted confidential treatment.

If a genuine need for confidentiality exists, it appears that a broker-dealer operator already can obtain confidential treatment pursuant to existing Commission Rule 24b-2 under the Exchange Act⁵¹ without any further modification to the proposed regulations. Rule 24b-2 provides a process to object to the public disclosure of information contained in reports required to be filed with the Commission under the Exchange Act. Thus, the proposed rule appears appropriately tailored to balance the need for broad operational transparency of NMS Stock ATSS against genuine security and confidentiality concerns. This approach would also be consistent with the manner in which the Commission generally treats the filings that it receives from its regulated entities, including exchanges, clearing agencies, and most recently, swap data repositories.⁵²

Given the potential risk of undermining the purpose of the Proposing Release, however, we encourage the Commission to consider providing guidance on the use of this limited exception to operational transparency. For example, staff should be skeptical of confidential treatment requests for information that an NMS Stock ATS makes available upon request to a significant portion of its subscribers and to potential subscribers, given that such participants

Global Head of Government Affairs, Alternative Investment Management Association (Feb. 26, 2016) [hereafter MFA/AIMA Letter] ("disclosure of the positions or titles of persons with access to confidential information would paint a target on such persons and could increase their security risks and risks of receiving phishing attacks").

⁴⁸ See Proposing Release, *supra* note 4, at 81001.

⁴⁹ See *id.*

⁵⁰ See NYAG Letter, *supra* note 35.

⁵¹ See 17 C.F.R. 240.24b-2 (2016).

⁵² See Securities Exchange Act Release No. 14438 [Feb. 11, 2015] 80 Fed. Reg. 14438, 14514 [Mar. 19, 2015] (File No S7-35-10, Final Rule on Security-Based Swap Data Repository Registration, Duties, and Core Principles), <https://www.gpo.gov/fdsys/pkg/FR-2015-03-19/pdf/2015-03127.pdf>.

could pass that information along to others, including its competitors. Thus, it would be useful for the industry to be informed that an NMS Stock ATS should only submit such requests where it has a reasonable and continuing expectation of confidentiality.

4. The Commission Should Retain the Proposed Effectiveness Determination In Order To Enhance Operational Transparency

Several comment letters suggest that the Commission eliminate the proposed effectiveness review⁵³ or move to a more limited “completeness” review,⁵⁴ rather than allowing the Commission to declare an NMS Stock ATS’s Form ATS-N either effective or, after notice and an opportunity for a hearing, ineffective. These suggestions, if adopted, would remove the ability of the Commission to declare the Form ATS-N ineffective if such action were necessary or appropriate in the public interest and consistent with the protection of investors, thereby leaving the Commission’s oversight of NMS Stock ATSs at its current level.⁵⁵

We urge the Commission to move forward with the effectiveness determination as proposed. Market participants will use the information disclosed on Form ATS-N to evaluate whether a particular NMS Stock ATS would be a desirable venue in which to route their orders.⁵⁶ It is therefore important that the detailed information be accurate, current, and complete. Otherwise, there may be significantly less benefit from operational transparency.

It is unclear how NMS Stock ATSs currently obtain a significant level of certainty regarding the substance of disclosures made in Form ATS filings, as those filings are not subject to any effectiveness determination. As proposed, the Commission should be able to conduct a “red-flag” review of the disclosures for apparent non-compliance with the federal securities laws, and avoid having a noncompliant NMS Stock ATS begin operation with such inadequate system operations. While not affording complete certainty, this nevertheless appears to be an improvement over the current review process for Form ATS. In addition, the process by which the Commission proposes to provide for notice and hearings will furnish industry with useful, on-going, public information concerning specific regulatory questions and concerns.

Importantly, we believe that the overall proposal, including the effectiveness review, will enhance competition in several ways. First, to the extent that this increased transparency and

⁵³ See, e.g., Luminex Letter, *supra* note 38 (“The SEC’s Proposed ‘Effective/Ineffective’ Regime for ATSs is Unnecessary...”); KCG Letter, *supra* note 31 (“it may stifle ATS innovation”).

⁵⁴ See, e.g., Fidelity Letter, *supra* note 38 (such review “may result in SEC staff undertaking merit based reviews that may impact innovation.”); CFA Letter, *supra* note 34 (“reevaluate this approach so as to preserve the Commission’s ability to appropriately respond to incomplete or inaccurate Form ATS-N filings in a timely manner while not crippling the agency staff with a burdensome process or improperly signaling to market participants that the Commission’s review process is designed to accomplish something it is not in fact accomplishing.”); SIFMA Letter, *supra* note 36 (“that standard should be only if it is ‘materially deficient with respect to completeness”).

⁵⁵ See Proposing Release, *supra* note 4, at 81003.

⁵⁶ See *id.* at 81025.

investor confidence leads to more investors utilizing NMS Stock ATSs, there will be greater price discovery and lower costs of capital formation. Second, as noted in the Proposing Release, given the level of competition between exchanges and NMS Stock ATSs, this effectiveness determination would better align the Commission's oversight among different types of trading venues.⁵⁷

Of course, there is the danger that the Commission's review process would encourage market complacency. Therefore, the Commission, through guidance in the adopting release and continuing investor education, should help to ensure that: (1) investors understand that such a determination would not constitute a finding that the NMS Stock ATS's operations are necessarily consistent with the Exchange Act; and (2) operators of NMS Stock ATSs understand that the determination would not preclude the Commission from later determining that an NMS Stock ATS has violated the federal securities laws.⁵⁸ Ultimately, public and investor scrutiny of the Form ATS-N filings should be encouraged, as it will likely enhance the overall quality of the filing and review process.

B. The Commission Should Make Public the Form ATS for those ATSs that Trade Fixed Income Securities

The Proposing Release requests comment as to whether the Commission should apply its proposed operational transparency conditions to other, non-NMS stock trading ATSs, including those that trade fixed income securities. The Proposing Release states that most fixed income securities still trade bilaterally, but it also notes that approximately 27 ATSs trade fixed income securities exclusively, two also trade other securities in addition to fixed income,⁵⁹ and two national securities exchanges operate trading venues for fixed income.⁶⁰ The Proposing Release explains the Commission's preliminary view that there currently is no need for any enhanced operational transparency in fixed income ATSs, but asks questions on whether that preliminary view is warranted.⁶¹

In light of the information in the comments received in response to its questions,⁶² we believe that the Commission should reexamine its preliminary view and adopt one of its suggested alternatives – making the current Form ATS public for fixed income ATSs.⁶³ The fact that fixed income ATSs are less complex and compete mainly against each other and the bilateral

⁵⁷ See *id.* at 81030 n. 317.

⁵⁸ See *id.* at 81026.

⁵⁹ See *id.* at 81017.

⁶⁰ See *id.*

⁶¹ See *id.* at 81017-18.

⁶² See *infra* notes 65-68 and accompanying text.

⁶³ See Proposing Release, *supra* note 4, at 81018 (Question 17).

market, rather than with exchanges, does not appear to justify the preservation of the blanket confidential treatment of Form ATS.

In our view, the current lack of transparency impedes market participants from adequately protecting their interests—not just when trading NMS stocks, but also when doing business on a fixed income ATS.⁶⁴ As noted in the Proposing Release, the Commission is aware that market participants have, for years, expressed concern about the lack of transparency in connection with ATSS generally.⁶⁵ However, the Commission has now received additional specific statements from market participants with respect to the fixed income markets in particular. For example:

- Fidelity Investments suggests publicly disclosing Form ATS for fixed income trading venues because investors need increased information in order to evaluate a potential fixed income trading venue and to keep informed as to material amendments;⁶⁶
- The Investment Company Institute (“ICI”) suggests publicly disclosing Form ATS for all non-NMS Stock ATSS, as it would impose little or no additional direct costs on the ATS while benefiting funds and other market participants;⁶⁷ and
- The Securities Industry and Financial Markets Association (“SIFMA”) suggests publicly disclosing Form ATS for all fixed income ATSS as an interim step while the Commission gains more experience with such ATSS.⁶⁸
- Several other commenters recommended going a step further and expanding the application of the full Form ATS-N proposed regulatory regime to fixed income ATSS.⁶⁹

We believe that investors would be better equipped to decide where to route their orders if they had more information about the operations of a fixed income ATS and the activities of the broker-dealer operators and other entities, including affiliates, involved in the operation of the

⁶⁴ See *id.* at 81001.

⁶⁵ See *id.* at 81002, 81012-15. Footnote 40 of the Proposing Release describes the recommendations from the Consumer Federation of America, Citadel, KOR Group, and Liquidnet to require all ATSS to publicly disclose Form ATS. Similarly, the Proposing Release describes ten prior commenters that expressed the view that ATSS and broker-dealers should be required to provide more enhanced disclosures regarding their operations. *Id.* at 81013.

⁶⁶ See Fidelity Letter, *supra* note 38.

⁶⁷ See ICI Letter, *supra* note 33.

⁶⁸ See SIFMA Letter, *supra* note 36.

⁶⁹ See Letter from Dennis M. Kelleher, President and CEO, Stephen W. Hall, Legal Dir. and Sec. Specialist, Allen Dreschel, Attorney, Better Mkts., Inc. (Feb. 26, 2016) [hereinafter Better Markets Letter]; CFA Letter, *supra* note 34; CFA Institute Letter, *supra* note 34; Letter from Dave Lauer, Chairman, Healthy Mkts Ass’n (Feb. 26, 2016) [hereinafter Healthy Markets Letter]; MFA/AIMA Letter, *supra* note 47.

ATS.⁷⁰ The lack of operational transparency around ATSs limits investors' ability to adequately discern how their orders interact, match, and execute on ATSs and to find the optimal market or markets for their orders.⁷¹ Moreover, because NMS Stock ATSs and fixed income ATSs currently are subject to the same non-transparent regulatory regime, it would be inconsistent to suggest that market participants lack sufficient information about the operation of NMS Stock ATSs, but not about the operation of fixed income ATSs.

The Proposing Release highlights several general advantages that would flow to investors from making some version of Form ATS publicly available for NMS Stock ATSs, and all of those advantages would apply similarly to fixed income ATSs. Deeming operational information "confidential" can result in market participants making less informed decisions regarding where to route their orders and, therefore, result in lower execution quality than they would obtain with public disclosure.⁷² Publication of operational information can decrease the search costs for subscribers to identify potential routing destinations.⁷³ Placing the current Form ATS in the public file would increase public scrutiny of those filings, which could improve the quality of the filings relative to the current state of the market.⁷⁴

Publication of Form ATS could also increase competition among fixed income ATSs to the benefit of investors. The Commission has "long recognized that effective competition requires transparency and access across the national market system,"⁷⁵ and it seems likely that operational transparency could increase competition among fixed income trading centers as well. Improved visibility, in turn, could cause market participants "to shift order flow to ... ATSs that provide better opportunities for executions."⁷⁶

Ideally, the Commission should adopt a new form tailored to the fixed income markets. However, we believe this should be done in a subsequent rulemaking, after closer examination of the issues that would need to be addressed. In the interim, however, the Commission should simply make current Form ATS and amendments for fixed income ATSs available publicly.

⁷⁰ Although the method was not specifically addressed in the Proposing Release, it appears from our review that the Commission would only need to modify existing Regulation ATS Rule 301(b)(2), 17 C.F.R. 242.301(b)(2) (2015), which generally states that all reports filed pursuant to the rule are "deemed confidential when filed," to carve out ATSs that transact in debt securities under Regulation ATS Rule 300(d), 17 C.F.R. 242.300(d) (2015). The Commission could also borrow language from the proposed Regulation ATS Rule 304(b) to make clear that Forms ATS filed by such fixed income ATSs will be made public via posting on the Commission's website, starting with the most recent amendment on file with the Commission after the compliance date. This would give fixed income ATSs an opportunity to review their filings and consider whether to amend or seek confidential treatment.

⁷¹ See Proposing Release, *supra* note 4, at 81001.

⁷² See *id.* at 81129.

⁷³ See *id.*

⁷⁴ See *id.* at 81128-29.

⁷⁵ See *id.* at 81002.

⁷⁶ See *id.*

We see no significant regulatory burden if the Commission were to rescind the troubling, blanket confidential treatment for Form ATS. For example, there would be no additional compliance burden, as fixed income ATSs must already complete and file the existing Form ATS. Moreover, a broker-dealer operator's confidential trade secrets could be protected. As noted above, the existing process under Commission Rule 24b-2 could provide, based on appropriate facts and circumstances, protection to confidential information submitted as part of Form ATS by fixed income trading venues. Allowing this rule to address the facts and circumstances presented by information contained in each fixed income ATS's Form ATS should significantly reduce the likelihood that the publication of Form ATS would impose a significant cost from exposure of a particular business model's trade secrets.

The comments received do not appear to provide evidence that it would be costly or burdensome to make Form ATS public for fixed income ATSs. While at least one operator of a fixed income ATS argued that it was not necessary for the Commission to expand the scope of its proposed ATS-N regime to fixed income ATSs,⁷⁷ that commenter's opposition appears to be based upon the potential burdens and costs associated with requiring operators of fixed income ATSs to comply with the proposed Form ATS-N, rather than simply making their current Form ATS public. It is unclear to us how making current Form ATS public would impose those costs or burdens. Moreover, we believe that operational transparency might better attract investors to this "sliver of the secondary market," thereby encouraging investors to move to more efficient electronic platforms and even towards trading bonds on exchange platforms.

Other evidence in the public sphere suggests that existing fixed income ATSs would be able to disclose a significant amount of basic operational information without significant harm. In fact, it appears that many fixed income ATSs view some level of operational transparency as a necessary part of their ongoing business development. For example, in November 2015, the TABB Group prepared an assessment of the electronic trading platforms operated by MarketAxess, Bloomberg, Tradeweb, Liquidnet, TruMid, Electronifie and MTS Bonds Pro.⁷⁸ Unfortunately for the public and investors, the cost of obtaining the assessment is \$5,000 (which could be considered evidence of the market value and benefit of such information to the public). We also note that several of these trading venues, including MarketAxess, Tradeweb Direct, TruMid, Liquidnet, Electronifie and MTS BondsPro, appear to be registered as broker-dealers and comply with Regulation ATS.⁷⁹

⁷⁷ See Letter from Scott Pintoff, Gen. Counsel, Mkt. Axess Corp. (Feb. 24, 2016) [hereinafter Market Axess Letter].

⁷⁸ See Tabb Group, Platform Propagation: A Comparative Guide to E-trading US Corporate Bonds (Nov. 10, 2015), <https://research.tabbgroup.com/report/v13-051-platform-propagation-comparative-guide-e-trading-us-corporate-bonds>; see also E-Trading US Corporates: The Platform Renaissance (Nov. 18, 2015), <http://tabbforum.com/opinions/e-trading-us-corporates-the-platform-renaissance>.

⁷⁹ See Alternative Trading Systems with Form ATS on File with the SEC as of June 1, 2016, <https://www.sec.gov/foia/ats/atlist0616.pdf>.

Similarly, in February 2016, SIFMA published the results of its survey of electronic bond trading platforms for U.S. corporate and municipal securities.⁸⁰ That survey included information from 16 platforms that filed form ATSS.⁸¹ The report provides four to six pages of operational information for each ATS. Unfortunately, this information reflects a snapshot review of only a subset of all fixed income ATSS currently on file with the Commission, and may soon be obsolete. The Commission could significantly reduce the cost to investors of gathering this information in the future and help to ensure that it can be accessed on an on-going basis.

C. The Commission Should Require Trading Systems that Solely Trade Government Securities to Comply with Regulation ATS

The Proposing Release requests comment as to whether the Commission should amend Rule 301(a)(4) of Regulation ATS so that trading systems that solely trade government securities should be required to comply with Regulation ATS. The Proposing Release notes that trading in government securities now occurs in two ways – through traditional bilateral transactions and on modern centralized electronic trading platforms.⁸² Recent rapid evolution of the market has seen the electronic trading grow to involve automated algorithmic trading strategies that rely on speed.⁸³ Perhaps signaling growing pains from this ongoing transformation, on October 15, 2014, the market for U.S. Treasuries experienced an unusually high level of volatility and a rapid round-trip in prices, attracting the attention of the Commission and other financial regulators.⁸⁴ The 2015 report from regulators on the concerning events of October 15, 2014 identified, among other things, the need to review the current regulatory requirements applicable to the government securities market and its participants.⁸⁵ To begin addressing this concern, the Proposing Release asks questions on whether the Commission, as part of its continued cooperation and coordination with other regulators, should include trading venues whose trading activities are solely in government securities within the scope of Regulation ATS.⁸⁶

In light of the information in the comments received in response to its questions,⁸⁷ we believe that the Commission should, at this time, adopt one of its suggested alternatives in this regard – removing the exemption under Rule 301(a)(4)(ii)(A) of Regulation ATS and thereby

⁸⁰ See SIFMA Electronic Bond Trading Report: U.S. Corporate and Municipal Securities (Feb. 17, 2016), <http://www.sifma.org/workarea/downloadasset.aspx?id=8589958906>.

⁸¹ See *id.* at 11.

⁸² See Proposing Release, *supra* note 4, at 81019.

⁸³ See *id.*

⁸⁴ See *id.* (citing Joint Staff Report: The U.S. Treasury Market on October 15, 2014 (July 13, 2015), http://www.treasury.gov/press-center/press-releases/Documents/Joint_Staff_Report_Treasury_10-15-2015.pdf).

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See *infra* notes 91-93 and accompanying text.

requiring these electronic trading systems to file Form ATS.⁸⁸ We also believe that the Commission should make these filings public. The fact that a substantial portion of trading in government securities still occurs in the bilateral market, rather than through centralized electronic trading platforms, does not appear to justify the preservation of the blanket exemption from regulation and oversight of such platforms.

In our view, regulators would be well served by enhanced visibility into government securities trading centers as they continue their overall evaluation of the government securities market.⁸⁹ Regulators have expressed legitimate concern about the need for oversight in this market. Former Commissioner Luis Aguilar suggested last year that “the Commission should consider revising Regulation ATS to make it applicable to alternative trading systems that trade Treasuries exclusively.”⁹⁰ In addition, the Commission has now received additional specific statements from market participants on this need. For example:

- The Managed Fund Association and the Alternative Investment Management Association, in a joint letter, suggest that expanding the application of Regulation ATS to government securities would provide important disclosures to regulators;⁹¹
- Citadel suggests that eliminating the exemption would provide these platforms with the appropriate level of regulatory oversight;⁹² and
- Virtu suggests that including electronic platforms for U.S. government securities in Regulation ATS would provide for enhanced monitoring of trading activity and result in greater confidence with respect to U.S. Treasury markets.⁹³

Market participants have also publicly expressed similar views recently in connection with a 2016 Request for Information from the U.S. Treasury related to the market structure for government securities.⁹⁴ Specifically:

⁸⁸ See Proposing Release, *supra* note 4, at 81020 (Question 23).

⁸⁹ See U.S. Department of the Treasury, Board of Governors of the Federal Reserve System, Federal Reserve Bank of New York, Securities and Exchange Commission, and U.S. Commodity Futures Trading Commission, Statement Regarding Progress on the Review of the U.S. Treasury Market Structure since the July 2015 Joint Staff Report, (Aug. 2, 2016), <https://www.sec.gov/news/pressrelease/2016-155.html>.

⁹⁰ See Public Statement, Commissioner Luis A. Aguilar, *Ere Misery Made Me Wise, The Need to Revisit the Regulatory Framework of the U.S. Treasury Market* (July 14, 2015), <https://www.sec.gov/news/statement/need-to-revisit--regulatory-framework-us-treasury-market.html>.

⁹¹ See MFA/AIMA Letter, *supra* note 47.

⁹² See Citadel Letter, *supra* note 37.

⁹³ See Virtu Letter, *supra* note 37.

⁹⁴ See Notice Seeking Public Comment on the Evolution of the Treasury Market Structure, 81 Fed. Reg. 3928 (Jan. 22, 2016), <https://federalregister.gov/a/2016-01246> (Question 4.5 “What additional information should be available

- The FIA Principal Traders Group stated that it “supports greater transparency from U.S. Treasury trading venues in order to ensure all market participants have the same amount of information regarding their operation and are able to evaluate them on their merits.”⁹⁵
- Nasdaq, as the operator of an electronic trading platform for government securities, suggested that all government securities trading systems should be monitored and required to develop risk controls. “Without consistent rules and oversight of all liquidity pools, including private venues, fragmentation may lead to reduced levels of liquidity and wider spreads for those ineligible” to participate in those venues.⁹⁶
- A joint letter from SIFMA and the American Bankers Association, both bond-dealer trade groups, said “the exemption for Treasury-only platforms may have little to no relevance today.”⁹⁷

We note that one commenter on Regulation ATS-N argued that it would not be appropriate for the Commission to expand the scope of Regulation ATS to trading venues that trade solely government securities.⁹⁸ The commenter argued that the increased requirements would place such venues at a disadvantage compared to non-ATS trading systems that trade government securities but are not subject to any increased obligations. We, however, would not view the burdens of filing current Form ATS as particularly onerous. Regulation ATS, along with Form ATS, was designed to encourage market innovation, while ensuring basic investor protections.⁹⁹ For example, over the past 17 years, ATS trading systems that trade equity securities have managed to compete with non-ATS systems, such as single dealer platforms, that trade equity securities but are not subject to obligations under Regulation ATS.

We understand that electronic trading venues for government securities may actually already raise similar concerns regarding complexity and conflicts as NMS Stock ATSs. Although this could weigh in favor of the Commission instead subjecting such trading venues to

to the public about the operation of trading platforms or trade execution algorithms on trading platforms (for inter-dealer as well as dealer-to-customer platforms)?”).

⁹⁵ See Letter from Joanna Mallers, Secretary, FIA Principal Traders Grp. to Docket No. TREAS-DO-2015-0013 (Apr. 22, 2016) [hereinafter FIA PTF Letter], <https://www.regulations.gov/document?D=TREAS-DO-2015-0013-0025>.

⁹⁶ See Letter from Joan Conley, Senior Vice President and Corp. Sec’y, Nasdaq, Inc., to Docket No. TREAS-DO-2015-0013 (Apr. 22, 2016) [hereinafter NASDAQ Letter], <https://www.regulations.gov/document?D=TREAS-DO-2015-0013-0029>.

⁹⁷ See Letter from Robert Toomey, Managing Dir. and Assoc. Gen. Counsel, SIFMA, and Alison Touhey, Senior Regulatory Adviser, Am. Bankers Ass’n to Docket No. TREAS-DO-2015-0013 (Apr. 22, 2016) [hereinafter SIFMA/ABA Letter], <https://www.regulations.gov/document?D=TREAS-DO-2015-0013-0040>.

⁹⁸ See KCG Letter, *supra* note 31.

⁹⁹ See Reg ATS Adopting Release, *supra* note 12, at 70847.

the more extensive requirements and obligations of proposed Regulation ATS-N, we understand that the Commission and other regulators are still actively evaluating measures to enhance regulation and reporting in the cash Treasury market.¹⁰⁰ Therefore, at this time, we support the interim step in line with what current fixed income ATSs are required to file with the Commission. This will also allow the Commission to further consider many issues, including the commenter's concern regarding the creation of competitive disadvantages compared to non-ATS trading systems.

We also believe that the Commission should make these filings public for many of the same reasons discussed above with respect to other fixed income ATSs. The Commission and other regulators recently noted that “[t]ransparency is vital to maintaining robust markets, and the Commission is actively evaluating measures to enhance regulation and reporting for alternative trading systems and other market participants in the cash Treasury market.”¹⁰¹ The U.S. Treasury Department, in its January 2016 Request for Information on government securities market structure acknowledged that “[g]reater operational transparency also may be desirable with respect to the practices governing trading and access at the various trading venues. Visibility into order types, access rules, and rulebooks may encourage greater competition and a more level playing field for market participants.”¹⁰²

As discussed above, it is clear that market participants want better information about all fixed income trading venues, including those that solely trade in government securities. For example, in their comment to the Commission, the MFA and AIMA confirmed that investors and the public have relatively little information about ATSs that transact in the Treasury cash markets.¹⁰³ Making the filings public would enhance transparency and provide important disclosures to market participants and the public about increasingly important venues of cash trading in U.S. government securities.

IV. Conclusion

In conclusion, we support the Commission's thoughtful proposal, and we encourage the Commission to adopt the proposed rules applicable to ATSs that transact in NMS stocks, including so-called “dark pools.” We also encourage the Commission to modify the proposal applicable to ATSs that transact in fixed income securities, first by requiring ATSs that transact solely in government securities to begin filing the current version of Form ATS, and second, by

¹⁰⁰ See U.S. Department of the Treasury, Board of Governors of the Federal Reserve System, Federal Reserve Bank of New York, Securities and Exchange Commission, and U.S. Commodity Futures Trading Commission, Statement Regarding Progress on the Review of the U.S. Treasury Market Structure since the July 2015 Joint Staff Report, (Aug. 2, 2016), <https://www.sec.gov/news/pressrelease/2016-155.html>.

¹⁰¹ See *id.*

¹⁰² See Notice Seeking Public Comment on the Evolution of the Treasury Market Structure, 81 Fed. Reg. 3928 (Jan. 22, 2016), <https://federalregister.gov/a/2016-01246>.

¹⁰³ See MFA/AIMA Letter, *supra* note 47.

making filings on current Form ATS public for all fixed income ATSs. We believe these changes are vital for investors because they enhance operational transparency and the fairness of our capital markets.

Should you have any questions, please do not hesitate to contact me or Senior Counsel Adam Moore at [REDACTED].

Sincerely,

A handwritten signature in black ink, appearing to read "Rick Fleming", written over a white background.

Rick A. Fleming
Investor Advocate