

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 93938 / January 10, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-20699

In the Matter of

tZERO ATS, LLC,

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS, PURSUANT TO
SECTIONS 15(b) AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (“Exchange Act”) against tZERO ATS, LLC (“Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent’s Offer, the Commission finds¹ that

¹ The findings herein are made pursuant to Respondent’s Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Summary

1. These proceedings arise out of Respondent's operation of an alternative trading system ("ATS"), pursuant to an exemption from registration that required it to comply with Regulation ATS, promulgated under the Exchange Act.² Regulation ATS requires, among other things, that ATSs make certain disclosures to the Commission. In addition, Regulation ATS requires an ATS that has a significant percentage of overall trading volume in a security or category of securities during a certain period of time to comply with a number of heightened requirements, known as the "Fair Access Rule."

2. From approximately December 2014 until at least September 8, 2017, Respondent did not make all required disclosures to the Commission concerning a third party's display of order book information for certain NMS stocks.³

3. From approximately December 2016 until April 24, 2019, Respondent did not make all required disclosures to the Commission concerning its subscriber's display of order book information for certain Digitally Enhanced Securities (defined below) to the Commission.

4. In June 2017, and again from February 2020 until June 12, 2020, Respondent had the requisite percentage of trading activity in one or more non-NMS securities to require that it comply with the Fair Access Rule, but it did not establish written standards for granting access to the ATS.

Respondent

5. Respondent is a broker-dealer registered with the Commission with its principal place of business in New York, New York. It was formerly known as Pro Securities LLC. From at least 2014 through May 2021, it has operated one or more alternative trading systems. Respondent is a wholly owned subsidiary of tZERO Group, Inc., a Delaware corporation with its principal place of business in New York, New York. tZERO Group was formerly known as t0.com, Inc.

FACTS

6. From at least 2014, Respondent has operated at least one alternative trading system. Until approximately October 2019, Respondent operated a single ATS, which offered trading in both NMS stocks and in so-called "blockchain," "digital" or "digitally enhanced"

² An alternative trading system is "any organization, association, person, group of persons, or system: (1) [t]hat constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of [Exchange Act Rule 3b-16]; and (2) [t]hat does not: (i) [s]et rules governing the conduct of subscribers other than the conduct of subscribers' trading on such [ATS]; or (ii) [d]iscipline subscribers other than by exclusion from trading." Regulation ATS, Rule 300(a), 17 C.F.R. § 242.300(a). An "NMS Stock ATS" is an ATS that trades NMS stocks. 17 C.F.R. § 242.300(k).

³ An "NMS stock" is a stock "for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan." *See* 17 C.F.R. 242.600(b)(54)-(55).

securities (“Digitally Enhanced Securities”)⁴ pursuant to a Form ATS. Beginning in October 2019, upon the effectiveness of its initial Form ATS-N, Respondent operated a separate ATS for NMS stock trading, while it continued to offer trading in Digitally Enhanced Securities through its original ATS. Trading in Digitally Enhanced Securities has been offered during regular market hours, while NMS stock trading has been offered after hours. Respondent ceased operating a separate ATS for NMS stock trading in June 2021.

7. Regulation ATS under the Exchange Act provides a regulatory framework for ATSs. An ATS is a trading system that meets the definition of “exchange” under federal securities laws but is not required to register as a national securities exchange if the ATS operates under an exemption provided under Exchange Act Rule 3a1-1(a). To operate under this exemption, all ATSs must comply with the requirements set forth in Rules 300-303 of Regulation ATS. In addition, an NMS Stock ATS must comply with Rule 304 of Regulation ATS.

8. In addition to Regulation ATS, an ATS must comply with other rules, including Regulation NMS, Exchange Act Rule 15c3-5 (known as the market access rule), and other rules and regulations governing the registration and operation of broker-dealers.⁵

9. An ATS may, but is not required to, share information about unfilled orders and trading interest to anyone outside the ATS, such as its subscribers. An ATS that does not display unfilled orders in the public quote is colloquially referred to as “dark.” By contrast, an ATS that does display unfilled orders is referred to as a “lit” or “displayed” market. Most, but not all, ATSs that trade NMS stocks are “dark,” and are referred to as “dark pools.” Registered national securities exchanges are considered “lit” markets.

Form ATS Disclosure Requirements

10. Rule 301(b)(2) of Regulation ATS requires an ATS to file information with the Commission on Forms ATS and ATS-N, as applicable. Among other things, an ATS is required to disclose the operations of the ATS, such as its order entry procedures, the manner in which it displays orders or quotes, and the roles and responsibilities of any entity involved in the operations of the ATS.⁶ Form ATS is a confidential document that an ATS uses to notify and inform the Commission of its operations.

⁴ One of these securities was settled using software and a distributed ledger as the primary record of beneficial ownership, while others have been traditional, uncertificated securities whose ownership is tracked by a transfer agent, with certain additional “technology elements” such as a “digital courtesy carbon copy” of the official stock register. At times, this digital courtesy carbon copy has been publicly available.

⁵ Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70879 (December 22, 1998) (Regulation of Exchange and Alternative Trading Systems) (“Regulation ATS Adopting Release”).

⁶ *See, e.g.*, Form ATS, instructions for Exhibits E (requiring disclosure concerning entities involved in operation of the trading system) and F (requiring disclosure of order entry procedures); *see also* Securities Exchange Act Release No. 83663 (July 18, 2018), 83 FR 38768, 38803 (August 7, 2018) (Regulation of NMS Stock Alternative Trading Systems) (“NMS Stock ATS Adopting Release”) (noting the Commission’s belief that scenarios that are “particularly likely” to implicate a “material change” include, among others, “a change to the manner in which the NMS Stock ATS displays orders or quotes”).

11. Rule 301(b)(2) of Regulation ATS requires an ATS to file an amendment on Form ATS at least 20 calendar days prior to implementing a material change to the operation of the ATS, 30 calendar days after the end of a quarter when information contained in an initial operation report filed on Form ATS becomes inaccurate, and promptly upon discovering that an initial operation report filed on Form ATS or an amendment on Form ATS was inaccurate when filed.

12. Accurate, current, and complete disclosures on Form ATS are critical to the Commission's oversight of ATSs, because they enable the Commission to determine whether an ATS is in compliance with Regulation ATS and other federal securities laws.

13. Whether and how an ATS displays orders and trading interest is fundamental to any ATS's operations, because order display provides buyers and sellers with the expectation of liquidity in the ATS and the potential execution of a participant's orders. In addition, display of orders and trading interest may trigger the application of other federal securities laws to the alternative trading system and its participants.⁷ For example, an NMS Stock ATS that displays orders to any person and has five percent or more of the trading volume in any NMS stock for a certain time period would be required to publicly disseminate the best priced order in those securities pursuant to Rule 301(b)(3) of Regulation ATS. In addition, Form ATS disclosures about the display of orders and trading interest are relevant to determining whether Exchange Act Rule 15c2-11 applies, and whether broker-dealers are permitted to publish quotations for the OTC securities traded on the ATS.

Display of After-Hours NMS Stock Orders

14. From approximately December 2014 until at least September 8, 2017, Respondent's ATS and its affiliated broker-dealer and sole subscriber for trading NMS stocks, Broker Dealer A, had an arrangement with an unregistered entity based in Asia ("the Asian Entity"), to facilitate trading in certain NMS stocks after the U.S. markets closed for the day.

15. According to its website, the Asian Entity provided software that enabled trading of certain ETFs during "Asia Market hours," with transactions confirmed and cleared during U.S. market hours the next trading day.

16. The Asian Entity's website promised "full transparency" and at times represented that its software sat "atop" the ATS, where it served as the "monitor and gateway to all liquidity which goes into the ATS..." At times, the Asian Entity's website stated that it offered "best bid, best offer, and depth of the book" through a password-protected web delivered interface or a direct data feed, during "U.S. Night" and "Asia Day" hours.

17. At times, the Asian Entity's website stated that brokers accessing the Asian Entity's gateway "connect[ed] broker-to-broker to" Broker-Dealer A, an affiliate of Respondent.

18. From at least December 2014 until September 8, 2017, Respondent's ATS shared order information from its after-hours NMS stock order book with Broker-Dealer A and the

⁷ See Form ATS, General Instruction, No. 7.

Asian Entity, and/or with Blue Ocean Technologies, LLC (“Blue Ocean Technologies”) an affiliate of tZERO Group that acquired the assets of the Asian Entity in early 2017, without disclosing on Form ATS that it was doing so.

19. On January 12, 2017, tZERO Group, Respondent’s corporate parent, announced that it had “formed Blue Ocean Technologies, LLC after acquiring the assets” of the Asian Entity. The announcement stated that Blue Ocean Technologies would operate as a division of Respondent and would “offer the first transparent, electronic marketplace for trading U.S.-listed securities during non-U.S. trading hours.”

20. On September 8, 2017, Respondent disclosed for the first time, in an amendment to its Form ATS, that the ATS would “display ATS Subscriber orders to other ATS Subscribers,” and that Broker-Dealer A would display ATS Subscriber orders to its broker-dealer customers. It did not disclose the involvement of Blue Ocean Technologies in the display of order information.

21. The display of order information from its after-hours NMS stock order book was a material change to the operation of the ATS, for which Respondent was required to file an amendment on Form ATS at least 20 calendar days prior to implementation. By failing to update its filings to include this information for more than two years after it began sharing order information with the Asian Entity and Blue Ocean Technologies, Respondent failed to comply with Rule 301(b)(2)(ii).

22. Although Respondent’s ATS disclosed the display of order information on September 8, 2017, it was not until June 8, 2018 that it updated Exhibit E to its Form ATS, which is required to identify and describe any entity “that will be involved in the operation of the alternative trading system.” In the June 8, 2018 amendment, Respondent disclosed that Blue Ocean Technologies owned a website “displaying level 1 trading data during the operation of the ATS.” On December 14, 2018, Respondent further amended Exhibit E to clarify that the level 1 trading data displayed included “bids and offers for NMS stocks on [Respondent’s] ATS....”

23. Pursuant to Rule 301(b)(2)(iii), the ATS had an obligation to amend its Form ATS to correct any information reflected on its Form ATS that became inaccurate, within 30 calendar days after the end of the quarter in which it became inaccurate. By failing to amend Exhibit E of its Form ATS until more than three years after the Asian Entity, and subsequently Blue Ocean Technologies, began displaying orders from Respondent’s ATS, Respondent failed to comply with Rule 301(b)(2)(iii).

Display of Orders for Digitally Enhanced Securities

24. From at least December 2016 to the present, Respondent’s ATS has allowed trading of Digitally Enhanced Securities during U.S. trading hours.

25. From December 2016 through December 14, 2018, Respondent filed several amendments to Form ATS discussing the operations of the ATS with respect to Digitally Enhanced Securities. These amendments discussed issues such as the need for persons wishing to transact in the Digitally Enhanced Securities on Respondent’s ATS to open an account with a subscribing broker-dealer and the fact that the subscribing broker-dealer would license software

from its affiliate, tZERO Group, to “facilitate its role in the trading” of Digitally Enhanced Securities by its customer.

26. In the December 14, 2018 amendment, Respondent disclosed that a broker-dealer subscriber would “provide a front-end interface that allows these customers to submit orders...which are routed...to the ATS.” Nowhere in this description, or in any other part of the Form ATS amendment, did Respondent disclose that its ATS would display order information to the broker-dealer subscriber’s customers.

27. On approximately January 15, 2019, the broker-dealer subscriber for the Digitally Enhanced Securities began entering orders on Respondent’s ATS displaying orders for the Digitally Enhanced Securities to its customers using a software interface provided by tZERO Group.

28. On April 24, 2019, Respondent filed a Form ATS amendment to disclose that customers of the broker-dealer subscriber would be able to see the orders resting in Respondent’s ATS.

29. The display of orders for Digitally Enhanced Securities to the broker-dealer subscriber’s customers was a material change to the operation of Respondent’s ATS, for which Respondent was required to file an amendment on Form ATS at least 20 calendar days prior to implementation. By failing to disclose the fact that the ATS would display orders in Digitally Enhanced Securities to customers of the broker-dealer subscriber before commencing the display of such orders, Respondent failed to comply with Rule 301(b)(2)(ii).

Fair Access Written Standards

30. The Fair Access Rule, Rule 301(b)(5) of Regulation ATS, requires an ATS with at least five percent of the average daily volume for any equity security that is not an NMS stock and for which transactions are reported to a self-regulatory organization (the “fair access threshold”) during four of the preceding six months to comply with “fair access” requirements. Those requirements include a requirement to establish written standards for granting access to trading on its system. The fair access requirements apply on a security-by-security basis.

31. From at least December 2016 through the present, Respondent’s ATS has matched the orders of buyers and sellers for Digitally Enhanced Securities, most of which were issued by affiliates of Respondent’s ATS. Each of these securities was required by its issuer to trade only on Respondent’s ATS. At least five percent of the average daily volume in each of the Digitally Enhanced Securities has taken place on Respondent’s ATS in most months in which transactions in that security occurred.

32. Respondent was subject to the Fair Access Rule with respect to Overstock’s Series A Blockchain Preferred Securities, traded with the ticker symbol OSTKP, in June 2017.

33. Respondent became subject to the Fair Access Rule with respect to tZERO Group’s Preferred Securities, traded with the ticker symbol TZROP, beginning in February 2020.

34. Respondent became subject to the Fair Access Rule with respect to Overstock's Series A Digitally Enhanced Preferred Securities, traded with the ticker symbol OSTKO and distributed to all existing holders of Overstock's common stock as part of a so-called "digital dividend," in March 2020.

35. From at least December 2016 through the present, Respondent has maintained a Written Supervisory Procedures manual ("WSPs") that has addressed certain requirements of the securities laws. The version of the WSPs in effect from December 2016 through November 30, 2017 did not address the Fair Access Rule. A version dated November 30, 2017 added an appendix titled "ATS Procedures," which stated that Respondent "is not subject to the fair access requirements of Regulation ATS." Neither the November 30, 2017 version of the WSPs, nor any other written document in effect at or before the date those WSPs were adopted, established standards for granting access to the ATS as required by the Fair Access Rule.

36. In an October 2019 memorandum written in response to questions from staff in the Commission's Division of Trading and Markets about Respondent's compliance with the Fair Access Rule, Respondent represented to the staff that, when its ATS had been subject to Fair Access with respect to OSTKP in June 2017, it had "had written standards for access to its trading systems." This representation was inaccurate because Respondent's ATS had no written standards in June 2017 that addressed Respondent's obligations under the Fair Access Rule.

37. Also in the October 2019 memorandum, Respondent acknowledged that its ATS for Digitally Enhanced Securities would become subject to the Fair Access Rule with respect to TZROP and/or OSTKO "within the next couple of months," and that it was "prepared to comply with its fair access obligations with respect to those securities."

38. Despite its acknowledgement in October 2019 that the Fair Access requirements would soon apply, when Respondent updated its WSPs on February 5, 2020, the ATS appendix continued to state that Respondent was not subject to the fair access requirements of Regulation ATS. Neither the February 2020 update to the WSPs, nor any other written document in effect from October 2019 through June 11, 2020, set forth standards for granting access to the ATS as required by the Fair Access Rule.

39. It was not until June 12, 2020, after Respondent's ATS had been subject to the Fair Access Rule with respect to TZROP and OSTKO for several months, and after the staff of the Commission's Division of Enforcement specifically requested Respondent's Fair Access standards, that Respondent updated its WSPs to establish standards for granting access to the ATS.

IV.

40. As a result of the conduct described above, Respondent willfully⁸ violated Rules 301(b)(2) and (5) of Regulation ATS, promulgated under the Exchange Act.

⁸ "Willfully," for purposes of imposing relief under Section 15(b) of the Exchange Act, "means no more than that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir.

V.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Respondent tZERO ATS, LLC cease and desist from committing or causing any violations and any future violations of Rules 301(b)(2) and (5) of Regulation ATS, promulgated under the Exchange Act.

B. Respondent tZERO ATS, LLC is censured.

C. Respondent shall, within 14 (fourteen) days of the entry of this Order, pay a civil money penalty in the amount of \$800,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying tZERO ATS, LLC as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Lara S. Mehraban, Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, New York Regional Office, 200 Vesey St., 4th Floor, New York, NY 10281.

D. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor

2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "also be aware that he is violating one of the Rules or Acts." *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965).

Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Vanessa A. Countryman
Secretary