



Thomas Tesauro

President

Fidelity Capital Markets

155 Seaport Blvd, ZW11A, Boston MA 02210
212.335.5312 THOMAS.TESAURO@FMR.COM

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Via e-mail: rule-comments@sec.gov

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Amendments Regarding the Definition of “Exchange” and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities; File No. S7-02-22

Dear Ms. Countryman,

Fidelity Investments¹ (“Fidelity”) appreciates the opportunity to comment on the Securities and Exchange Commission’s (“SEC” or “Commission”) proposed amendments to Rule 3b-16 under the Securities Exchange Act of 1934 (“Exchange Act”) that would, among other items, (1) significantly expand the current definition of “exchange”; (2) eliminate certain existing exemptions under Regulation ATS for systems that exclusively trade government securities; and (3) make related changes to certain filing and operational requirements for Alternative Trading Systems (“ATS”).²

The SEC has proposed significant and broad reaching changes to the current definition of “exchange” to include systems that offer the use of non-firm trading interest and communication protocols to bring together buyers and sellers of securities. Under the Proposal, systems that fall under the revised definition of “exchange” could either register as a national securities exchange or register as a broker-dealer and comply with the Commission’s Regulation ATS.

¹ Fidelity and its affiliates are one of the world’s leading providers of financial services, including investment management, retirement planning, portfolio guidance, brokerage, benefits outsourcing and other financial products and services to more than 30 million individuals and institutions, as well as through 13,500 financial intermediaries. Fidelity’s carrying broker-dealer, National Financial Services LLC, currently operates the CrossStream ATS, an NMS Stock ATS. Fidelity generally agrees with the views expressed by the Securities Industry and Financial Markets Association (“SIFMA”), Securities Traders Association, and Investment Company Institute (“ICI”) in their comment letters and Fidelity submits this letter to supplement their views on specific issues.

² Securities Exchange Act Release No. 94062 (Jan. 26, 2022), 87 FR 15496 (March 18, 2022) (“Proposed Amendments”, “Proposal”, or “Proposing Release”). Capitalized terms have the meaning ascribed to them in the Proposal.

The Commission's proposed revised definition of "exchange" fundamentally changes the current definition of "exchange" which has provided clear guidance to the marketplace for more than twenty years. We are concerned that the Commission has not clearly articulated its reasoning for this significant change nor explained key terms in the proposed revised definition. We anticipate that the proposed revised definition of "exchange" will impact many more systems than the Commission has identified and, if adopted, will be costly, cause confusion, impact liquidity and stifle innovation.

Moreover, associated changes to Government Securities ATS and ATS filing and operational requirements are premised on the Commission's proposed revised definition of "exchange". That is, market participants cannot fully analyze whether they are subject to new requirements without further clarity on the SEC's proposed revised definition of "exchange". We suggest that any changes to Government Securities ATS and ATS filing and operational requirements await a final determination on any revised definition of "exchange". Our comments that follow address the following points.

EXECUTIVE SUMMARY

- The SEC should provide a longer comment period on significant rule proposals;
- The Proposal is overly broad, unwieldy, and does not promote fair and orderly markets. SEC should rescind the Proposal, consider comments received, and in its place issue three distinct and revised proposals on: 1) the definition of "exchange"; 2) Government Securities ATS; and 3) ATS disclosures;
- The SEC should not adopt the proposed revised definition of "exchange";
- The SEC should apply Regulation ATS to Government Securities ATS, but only after a final determination on the definition of "exchange";
- The SEC should require Government Securities ATS to file a publicly available document on their operations and broker dealer-operator, but Government Securities ATS and NMS Stock ATS should not use the same form to disclose this information;
- The SEC should not require ATSS operated by affiliated broker-dealers to aggregate their transaction volume data for purposes of calculating Regulation ATS fair access volume thresholds; and
- The SEC should not adopt certain Proposed Amendments to Form ATS-N and ATS-R.

Each of these points are discussed in further detail below.

I. The SEC should provide a longer comment period on significant rule proposals.

The Proposal covers multiple topics and runs over 650 pages with more than 224 enumerated comments, many of which contain multiple questions. The SEC provided a 30-day comment period for the Proposal. We re-iterate our concern³ and concerns of others⁴ that because

³ See Letter from Thomas Tesaro, Fidelity Investments to Vanessa Countryman, Secretary, SEC, "Reporting of Securities Loans" (Jan.7, 2022).

of truncated comment periods, the Commission has not provided the public a meaningful opportunity to comment on complex rule proposals that significantly impact the financial markets. Market participants should be entitled to a reasonable amount of time to review major rule changes, consider their implications, and gather both internally and with other market participants to exchange ideas and reactions.

A reasonable comment period is particularly important when numerous proposals are issued at the same time so that market participants can consider the impact of proposed rules on other proposed rules, and their iterative effect on the markets. During Q1 2022, the SEC has issued fourteen (14) new rule proposals, including a proposed rule that references a new term that appear for the first time in this Proposal, which has not yet been approved.⁵ While the industry was ultimately permitted slightly more time to respond to the Proposal due to a time delay between when the Proposal was posted to the SEC's website (January 26, 2022) and when the Proposal appeared in the Federal Register (March 18, 2022), rule proposals that result in a significant change to the marketplace are typically afforded a significantly longer comment period of sixty, ninety or even one hundred and twenty days.

Given the short comment period provided, and our concerns with the Proposal in its current form, we urge the SEC to rescind the Proposal, consider comments received, and in its place, re-issue three separate proposals for further industry comment.

II. The SEC should rescind the Proposal and, in its place, separately issue three distinct rule proposals covering the following topics: 1) the definition of "exchange"; 2) Government Securities ATS; and 3) ATS disclosures.

The SEC previously proposed a rulemaking to extend Regulation ATS and Regulation SCI regulatory requirements to Government Securities ATS.⁶ The 2020 Proposal was largely well

⁴ See Letter by Alternative Credit Council (ACC); Alternative Investment Management Association (AIMA); American Bankers Association (ABA); American Council of Life Insurers (ACLI); American Investment Council (AIC); Banking Policy Institute (BPI); Bond Dealers of America (BDA); FIA Principal Traders Group (FIA PTG); Financial Services Forum (FSF); Institute of International Bankers (IIB); Institute for Portfolio Alternatives (IPA); Investment Adviser Association (IAA); Investment Company Institute (ICI); Loan Syndications and Trading Association (LSTA); Managed Funds Association (MFA); National Association of Corporate Treasurers (NACT); National Association of Investment Companies (NAIC); National Venture Capital Association (NVCA); Real Estate Roundtable (RER); Risk Management Association (RMA); Securities Industry and Financial Markets Association (SIFMA); Securities Industry and Financial Markets Association Asset Management Group (SIFMA AMG); Security Traders Association (STA); Small Business Investor Alliance (SBIA); and U.S. Chamber of Commerce (the Chamber) Center for Capital Markets (CCMC) (collectively, the Associations), "Importance of Appropriate Length of Comment Period" (April 5, 2022).

⁵ The SEC has proposed rulemaking that would further define the terms "Dealer" and "Government Securities Dealer" and that uses the term "Communication Protocol Systems", a term introduced in this Proposal. See Securities Exchange Act Release No. 94524 (Mar. 28, 2022).

⁶ Securities Exchange Act Release No. 90019 (Sept. 28, 2020), 85 FR 87106 (Dec. 31, 2020) ("2020 Proposal").

received⁷ and the industry anticipated that the SEC would issue a final rule on this topic. Instead, unexpectedly, the SEC has proposed extensive changes to the definition of “exchange” under Rule 3b-16 of the Exchange Act and changes to ATS disclosures, in part, in connection with proposed changes to Government Securities ATS. Combining multiple proposals into a single release adds unnecessary confusion, particularly when multiple regulatory obligations are premised on terms, such as the definition of “exchange”, that are proposed to be revised.

To alleviate confusion, we recommend that the SEC rescind the Proposal, consider comments received, and re-propose three distinct rulemakings concerning 1) the definition of “Exchange”; 2) Government Securities ATS; and 3) ATS disclosures. Because the SEC’s proposed revised definition of “exchange” impacts which systems will be considered an “exchange” subject to new registration and disclosure requirements, the SEC should provide clarity on this term first, before requiring new obligations on a system that meets the definition of an “exchange”. This proposed rulemaking sequence would allow market participants to evaluate whether their systems meet any new definition of “exchange” and allow this new definition to be incorporated into the marketplace, prior to additional regulatory requirements that rely on this term. Separating the Proposal into three distinct rulemakings would also allow new rules to be incorporated into the market in an orderly manner, before subsequent new rules are added.

III. The SEC should not adopt the Proposed Amendments to Rule 3b-16 that would significantly expand the current definition of “exchange”.

The SEC has unexpectedly proposed a significant change to the current definition of what is considered an “exchange” that would broadly impact existing systems. Exchange Act Rule 3b-16(a) currently defines an “exchange” as a marketplace that (1) brings together the orders for securities of multiple buyers and sellers; and (2) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade.

The SEC proposes to amend Exchange Act Rule 3b-16(a) to define an “exchange” as “systems that bring together buyers and sellers of securities using trading interest and makes available established, non-discretionary methods (whether by providing a trading facility or communication protocols or by setting rules) under which buyers and sellers can interact and agree to the terms of the trade.” While such systems would be deemed an “exchange” under Rule 3b-16(a), the system would be able to operate as an ATS that is exempt from exchange regulation by meeting certain conditions such as registering as a broker-dealer and complying with Regulation ATS.

The 2020 Proposal sought to revise the definition of “exchange” under Rule 3b-16 to include certain fixed income ATS in the definition of “exchange”. Thus, a large portion of the SEC’s commentary in the Proposal regarding why a change is needed to the current definition of “exchange” is in the context of the fixed income markets. However, the proposed revised

⁷ See Letter from Rob Toomey, Chris Killian and Leslie Norwood, SIFMA, to Vanessa Countryman, Secretary, SEC (Mar. 1, 2021) and Letter from Sarah A. and Nhan Nguyen, ICI, to Vanessa Countryman, Secretary, SEC (Mar. 1, 2021).

definition of “exchange” applies to systems of any security type. While the Commission requests data from commenters on several key components of the Proposal, these data requests are outside of the fixed income context and indicate that a proposed revised definition of “exchange” may be premature. That is, the SEC appears to not yet know if problems exist under the current definition of “exchange” the proposed rule is designed to address. For example, many of the systems that the SEC intends to regulate as ATS under the proposed revised definition of “exchange” are already regulated and routinely examined as broker-dealer systems. Thus, it is not clear why classifying these systems as an “exchange” and subject to ATS regulation, a heightened form of broker-dealer regulation, is necessary. Moreover, certain key terms in the proposed revised definition of “exchange” are either not defined or too broad. As such, we anticipate the proposed revised definition of “exchange” will incorporate many more systems than the SEC estimates in the Proposal. Our views on these terms are explained below.

Communication Protocol Systems

The definition of a “communication protocol systems” (“CPS”) is a critical component of the proposed revised definition of an “exchange”, but the SEC has not defined this key term in the Proposal, Rule 3b-16 or elsewhere in the Exchange Act. Instead, in the Proposing Release, the SEC provides several examples of what it considers to be, and what it does not consider to be, a CPS. For example, the SEC notes that it considers: (1) RFQ systems; (2) “stream axes”; (3) conditional order systems; and (4) negotiation systems that “scrape” information from a participant’s order management or execution management system to inform other participants of trading interest, to fall within the proposed revised definition of “exchange”. The SEC also notes that it would not consider: (1) systems that passively display trading interest but do not provide a means for buyers and sellers to interact such as bulletin boards and (2) web chat providers that allow market participants to communicate but do not offer trading protocols to fall within the definition of an “exchange”. However, the Commission adds that to the extent that any of these systems are designed for securities and provide communication protocols for buyers and sellers to interact and agree to the terms of a trade, such systems would fall within the proposed revised definition of “exchange”. Similarly, although the Commission notes that traditional broker-dealer activities such as order routing and single dealer platforms remain out of scope of the proposed revised definition of “exchange”, the SEC’s description of these activities in the Proposal could be construed to include them in the definition of “exchange” by future SEC administrations and examiners.

While the marketplace is confused over what may, or may not be, a CPS, the SEC itself appears to have a clear understanding of what systems it intends to capture within the term. For example, in the cost benefit analysis of the Proposed Rule, the SEC estimates that there are twenty-two (22) current systems in the marketplace that would be classified as a CPS.⁸ It is not clear why

⁸ Proposal at 15586. The Commission subsequently estimates the following CPS exist that may meet the definition of “exchange” under the proposed changes to Exchange Act Rule 3b-16: CPS operating in the market for government securities (3); CPS trading corporate bonds (8); CPS operating in the municipal debt market (3); CPS operating in the market for NMS stocks (4); CPS operating in the OTC equity market (1); CPS operating in the market for restricted shares (10); CPS trading in listed options(1); CPS facilitating trading in repurchase and reverse repurchase agreements (3); and CPS trading in asset backed securities (3). The SEC’s inclusion of the un-defined term “CPS”, which will

the SEC believes these systems would be classified as CPS because the SEC has not shared what specific attributes these systems possess that justifies their classification as a CPS. Information on why these 22 identified systems would be considered a CPS by the SEC would be helpful to the marketplace's understanding of the term.

Based on the SEC's examples of what is, and is not, considered to be a CPS, we believe that there will be a far larger number of systems classified as CPS that are not currently subject to the definition of "exchange" today. That is, the SEC has significantly underestimated the number of systems that will be classified as an "exchange" under the proposed revised definition of the term.⁹ For example, given the low number of CPS that the SEC estimates would fall under the definition of "exchange", we assume that the SEC did not mean to capture (1) order and execution management systems used by investment advisers and buy-side market participants to manage their portfolio investments on behalf of regulated funds and other clients¹⁰ or systems that facilitate internal cross trading among funds or clients managed under an investment adviser, in a manner consistent with SEC Rule 17a-7 under the Investment Company Act of 1940, Commission exemptive relief, or SEC staff no-action relief or systems used by investment advisers to receive indications of interest. We do not believe that the Commission intended to require institutional asset managers to register as broker-dealers to operate systems for their own use, or to outsource this activity to broker-dealers.

The importance of a clear definition of a CPS is not simply an academic exercise. As the SEC notes in the Proposal, there are significant regulatory repercussions if an entity engages in activities that fall under the definition of "exchange" but fails to register as either a national securities exchange or as a broker-dealer and complies with Regulation ATS. Market participants need a clear explanation of what is considered a CPS to understand what systems might meet the definition of "exchange" and comply with applicable rules under the short compliance implementation timeline the SEC has proposed. Because the new definition of "exchange" would apply to all asset classes, this is not simply an analysis for systems that interact with equity and fixed income securities, but systems for any type of security.

As a matter of good rulemaking market participants should be able to clearly understand whether they are, or are not, subject to a rule.¹¹ Lack of regulatory clarity stifles innovation,

broadly render many systems "exchanges" under the SEC's proposed revised definition of "exchange", appears to conflict with the limited number of CPS that the Commission identifies in the Proposal.

⁹ Based on our experiences in completing our initial Form ATS-N for CrossStream and, separately, opening a new broker-dealer, we also believe that the SEC's estimated ATS implementation costs and other compliance costs for each Proposed Amendment are significantly under reported. Proposal at 15624.

¹⁰ For example, if an asset manager has a proprietary request for quote ("RFQ") system we believe the proposed rule would not intend that the asset manager register as a broker-dealer and run the RFQ as an ATS or outsource this activity. This rationale is analogous to the SEC's proposed exemption in Rule 3(b)-16 for systems used by issuers to sell their own securities.

¹¹ By way of example, we point to recent market confusion regarding the application of Rule 15c2-11 to fixed income securities. On September 16, 2020, the SEC adopted a final rule amending Rule 15c2-11 under the Exchange Act which addresses disclosures in the OTC markets and imposes requirements upon broker-dealers who publish

competition, and liquidity as market participants become hesitant to offer services without a solid understanding of the regulatory status of their offering. Moreover, lack of clear definition regarding what is, and what is not, a CPS allows regulators to alter their interpretation of this term over time through inspections, examinations, and guidance all of which are outside of the established rule making process and not reflected in the cost benefit analysis considered as part of the current Proposal. For these reasons, Fidelity strongly recommends the SEC not include CPS in a proposed revised definition of “exchange”.

Trading Interest

The proposed revised definition of “exchange” would also replace the term “order” with “trading interest” which the SEC proposes to define as “an order... or any non-firm indication of a willingness to buy or sell a security, that identifies at least the security and either quantity, direction (buy or sell) or price.”

As proposed, “trading interest” would be an incredibly broad term that would classify as an “exchange” a system on which a single potential buyer and a single potential seller communicate certain high-level terms of a potential trade. If approved as proposed, we believe that the revised definition of “trading interest” would cover all indications of interest (“IOI”) submitted to any system, thus, any system to which an IOI is submitted could fall within the definition of “exchange” if it meets the other conditions of the Proposal. We believe that the proposed broad definition of “trading interest” will capture interactions far removed from an actual trade, will impact many more systems than the SEC anticipates, will impact liquidity, and will add regulatory requirements to broker-dealers who will be required to conduct a significant amount of activity under the ATS regulatory regime, a heightened regulatory regime to an already heavily regulated broker-dealer regulatory regime. For these reasons, the SEC should not adopt the proposed revised definition of “trading interest” and not include this term in a revised definition of “exchange”.

Elimination of ‘Multiple’ Buyers and Sellers

The proposed revised definition of “exchange” would also eliminate the term “multiple” so that there would not need to be multiple buyers and sellers on each side of a system, as is the case today, to be considered an “exchange”. Deleting the word “multiple” would also mean that a single seller and multiple buyers would constitute an exchange, as well as a single seller and a single buyer, assuming other conditions of the proposed revised definition were met.

The Commission believes that “removing the term ‘multiple’ would support its proposed revised definition of the term “exchange” to include systems with non-firm trading interest. However, the deletion of the term “multiple” causes confusion in that the Proposal also states that

quotations in such markets. Rule 15c2-11 was promulgated in 1971 and had generally been understood by market participants to apply to the OTC equity markets. On September 2021, SEC staff issued a No-Action Letter noting that they would apply Rule 15c2-11 to fixed income securities and that they would begin enforcing the Rule with respect to fixed income securities starting on January 3, 2022. This Staff No-Action Letter made significant changes to long-standing regulatory interpretation, without a rulemaking process, without analysis of the costs and benefits of the action, and without public comment on this topic. See also Commissioner Hester Peirce *Statement on Staff No-Action Letter Regarding Amended Rule 15c2-11 in Relation to Fixed Income Securities* (Sept. 24, 2021).

the existing Rule 3b-16(b) exemptions for traditional broker-dealer activities, such as order routing and single dealer platforms, will remain intact. Because the Commission has not clearly articulated why a change to the definition of “exchange” is necessary, amending the definition of exchange by deleting the term “multiple” is not justified. Moreover, eliminating the term “multiple” causes confusion with regard to existing exemptions that the SEC intends to keep under the revised definition of an “exchange”. For these reasons, the SEC should not remove the term “multiple” from the proposed revised definition of “exchange”.

III. The SEC should apply Regulation ATS to Government Securities ATS, but only after a final determination on any revised definition of “exchange”.

Today, an ATS that solely trades government securities (as defined under Section 3(a)(42) of the Exchange Act) or repurchase and reverse repurchase agreements on government securities (“Government Securities ATS”) is exempted from compliance with Regulation ATS. Among other items, the 2020 Proposal sought to eliminate the Regulation ATS exemption for Government Securities ATS.¹²

We support rescinding the exemption in Regulation ATS for Government Securities ATS. Requiring Government Securities ATS to register with the SEC as ATS and to provide publicly available information on its operations and its broker-dealer operator will: (1) help market participants better understand the operations of the ATS and its broker-dealer operator; (2) facilitate market surveillance and increase regulatory consistency of ATS by extending broker-dealer registration requirements of Reg ATS to Government Securities ATS¹³; and (3) increase market transparency as trades executed on these venues would be reported to TRACE.

Our support for rescinding the exemption in Regulation ATS for Government Securities ATS is conditioned on the existing definition of the term “exchange” under the Exchange Act. As discussed above, the SEC’s proposed revised definition of “exchange” is expansive, unclear, and impacts which systems trading government securities will be considered an “exchange” subject to new registration requirements for Government Securities ATS. Without a clear understanding of the definition of “exchange”, market participants are challenged in their analysis of whether the systems they operate do, or do not, constitute a Government Security ATS. This lack of clarity is particularly problematic given that firms may need to establish a new ATS and ATS compliance regime, and complete required Form ATS disclosures within a condensed implementation timeframe after the Effective Date of the Proposed Amendments.

It is thus critical that the SEC provides a final definition of the term “exchange” prior to making any changes to the registration status of Government Securities ATS. This rulemaking sequence would allow market participants to evaluate whether their systems meet any new

¹² See footnotes 6 and 7 *infra*.

¹³ We also support eliminating the current exemption from ATS registration for banks that operate Government Securities ATS. Eliminating this exemption will promote regulatory parity as all Government Securities ATS will be operated by broker-dealers and subject to the same regulatory regime.

definition of “exchange” and allow this new definition to be incorporated into the marketplace, prior to the SEC imposing further regulatory requirements on these systems.

- IV. The SEC should require Government Securities ATS to file a publicly available document on their operations and their broker dealer-operator, but Government Securities ATSs and NMS Stock ATS should use different forms to disclose this information.

Government Securities ATS

For investor protection and operational transparency reasons, the Proposal would require Government Securities ATS to file a more expansive Form ATS-N disclosure document which currently applies only to NMS Stock ATS. We recommend that the SEC develop separate ATS disclosure documents for NMS Stock ATS and Government Securities ATS, rather than use a combined form for both types of ATS. This approach would give the SEC more flexibility to update the document in the future, as we anticipate that some disclosures may be more relevant to a Government Securities ATS than an NMS Stock ATS. This alternative approach would also help broker-dealer operators provide more targeted disclosure for one type of ATS versus another and help market participants quickly identify disclosure forms for a particular type of ATS (*i.e.*, NMS Stock ATS or Government Security ATS).

NMS Stock ATS

The SEC proposes a wholesale revision to Form ATS-N that will require all NMS Stock ATS with currently effective forms to significantly revise their current forms, disclose new content and file amendments with the SEC under a condensed timeframe. NMS Stock ATS have already undertaken significant work and dialogue with the SEC on their current Form ATS-Ns over the past four (4) years. For efficiency purposes, we recommend that the SEC maintain its existing Form ATS-N construct for NMS Stock ATS and develop a new disclosure document for Government Securities ATS, rather than use a combined form for both types of ATS. If the SEC wishes to propose new disclosures for NMS Stock ATS, these disclosures could be added to the existing Form ATS-N without the wholesale revisions to the document as proposed. In addition to the benefits of this approach for Government Securities ATS as described above, this approach would minimize changes to NMS Stock ATS’ Form ATS-Ns.

- V. The SEC should not require ATSs operated by affiliated broker-dealers to aggregate their transaction volume data for purposes of calculating Regulation ATS fair access volume thresholds.

The Commission proposes to require firms to aggregate the transaction volume for a security or security category of ATSs that are operated by a common broker-dealer or operated by affiliated broker-dealers for purposes of calculating the volume thresholds of Rule 301(b)(5)(i). We oppose requiring ATSs operated by affiliated broker-dealers to aggregate their transaction volume data for purposes of calculating fair access volume thresholds. In the case of affiliated broker-dealers, the affiliation may be at a distant corporate level with the ATSs operated by distinct and independent broker-dealer operators. Aggregating transaction volume data for

purposes of calculating fair access volume thresholds would not be useful in these circumstances. Moreover, it may be difficult for these independent broker-dealer operators to coordinate their transaction volume activity for regulatory purposes. Similarly, providing information on aggregate transaction volumes in advance of its public dissemination may be in-appropriate in certain circumstances as it may breach certain information barriers, or confidentiality provisions, established between entities. For these reasons we do not see the utility of aggregating transaction volume for purpose of calculating fair access volume thresholds and suggest the SEC not adopt this provision of the Proposal.

VI. The SEC should not adopt certain Proposed Amendments to Form ATS-N and ATS-R.

The SEC also proposes a variety of amendments to certain existing disclosure requirements on current Form ATS-N. NMS Stock ATS and Government Securities ATS, including those using CPS, would be required to comply with these enhanced disclosure requirements. Currently operating NMS Stock ATS would be required to file amendments to their existing Form ATS-N to address the new disclosure requirements. Our comments on the Proposed Amendments follow below.

- 1) Form ATS-R Amendments. Form ATS-R is the form on which ATS report quarterly certain transaction volume information, subscriber lists, and securities traded. Under the Proposal, Form ATS-R submissions would be filed via EDGAR and would no longer be “deemed confidential when filed”. Instead Form ATS-R and Form ATS submissions would be “accorded confidential treatment subject to applicable law”.

Form ATS-R requires an ATS to provide a list of all subscribers that were participants of the ATS at the time of the quarter covered on the report. The names of subscribers to an ATS is highly confidential information that neither an ATS, not its broker-dealer operator currently discloses publicly. For competitive and client confidentiality reasons, we recommend the SEC not require this information to be publicly disclosed. Similarly, Proposed Amendments to Form ATS-R would require an ATS to report to the SEC certain volume data of the ATS. We do not see the utility of disclosing this information publicly, particularly when FINRA already publishes over-the-counter (OTC) trading information for each ATS and member firm with a trade reporting obligation under FINRA rules.¹⁴

- 2) Part I, Item 8 Types of Securities Traded. To inform market participants about the types of securities that a Covered ATS makes available for trading, the Commission proposes to require a Covered ATS to disclose in Part I, Item 8 of Form ATS-N the types of securities it trades. Part I, Item 8(a) would require an NMS Stock ATS to indicate whether the ATS makes available for trading all NMS stocks. If not, the ATS would identify the securities or types of securities that it does not make available for trading.

¹⁴ See FINRA OTC (ATS & Non-ATS) Transparency site available here: <https://www.finra.org/filing-reporting/otc-transparency>

The Commission also notes in footnote 509 that “If the NMS Stock ATS suspends trading in securities under certain circumstances, the ATS should indicate so under Part III, Item 19.”

The Commission should clarify footnote 509 in the context of new requirements in Part I, Item 8 (a). That is, the Commission should explain how an NMS Stock ATS should identify the securities or types of securities that it does not make available for trading for purposes of Item 8, if it suspends trading in securities in certain circumstances.

- 3) Part II, Item 2(a) Affiliate Trading Activities in the ATS. The Commission proposes to require a Covered ATS to explain any circumstance when the broker-dealer operator or an affiliate, respectively, would be a counterparty to an ATS trade.

The Commission should clarify how it would classify certain affiliate trades for purposes of this disclosure requirement. For example, we seek confirmation that if an order of a broker-dealer operator’s affiliated registered investment adviser is routed to the broker-dealer operator through a third-party broker-dealer, the third-party broker-dealer would be considered the counterparty to the trade, not the affiliated registered investment adviser.

- 4) Part II Item 2 (b) Affiliate Trading Activities in the ATS. The Commission proposes to specifically ask about the treatment of persons whose trading interest is entered into the ATS by a subscriber or the broker-dealer operator. In the Commission’s experience, ATS services could vary among not only subscribers, but also non-subscriber participants to the ATS. The Commission is therefore proposing to broaden the scope of these questions to apply to differing treatment among non-subscriber participants whose trading interest is entered into the ATS by a subscriber or the broker-dealer operator.

We note that as a practical matter, neither the ATS nor the ATS’ broker-dealer operator has a relationship with the clients of the subscriber to the ATS and is not always aware of the offering the subscriber may provide to its underlying clients.

- 5) Part II, Item 5 Other Product and Services. The Commission proposes to add “post-trade processing” as an example of products or services for the purpose of effecting transactions or submitting, disseminating, or displaying trading interest in a Covered ATS, and which could be particularly relevant to Government Securities ATSS. “Post-trade processing” would include any functionality that could be used by subscribers in connection with post-trade processing to manage routing, enrichment, allocations, matching, confirmation, affirmation, or notification of ATS trades.

The Commission should provide further examples of what it considers to be “post trade processing” for purposes of this disclosure. For example, the Commission should clarify the status of “single ticket clearing” in the context of “post trade processing” and whether this information should be included as a product or service for the purpose of effecting transactions or submitting, disseminating, or displaying trading interest in a Covered ATS.

- 6) Part III, Item 1 Types of ATS Subscribers. The Commission proposes to modify the checkboxes listing types of subscribers to add insurance companies, pension funds, and corporations. The Commission believes that adding these checkboxes will provide more granular information on the types of subscribers participating on an ATS in an easier-to-read format.

While we do not object to these additional checkboxes, the Commission should provide a definition for the term “Corporations” as it is proposed to be used on Form ATS-N.

- 7) Part III Item 8 Order Sizes. The Commission proposes to revise Form ATS-N to disclose whether they make available communication protocols for buyers and sellers to communicate non-firm trading interest, solicit interest to buy or sell a security, discover prices

The Commission’s proposed revised definition of “exchange” includes, but does not define, the term “communication protocol”. The Commission has not clearly articulated why a change to the definition of “exchange” is necessary and, for reasons discussed earlier in this letter, should not adopt the proposed revised definition of “exchange”. Because we do not support the Commission’s proposed revised definition of “exchange”, we do not support this corollary disclosure to Form ATS-N.

- 8) Part III, Item 9 Monitoring and Surveillance. The Commission proposes to require a Covered ATS to disclose information about the activities the ATS undertakes to supervise the trading activity that occurs on or through the ATS (e.g., supervisory systems and procedures to detect, deter, or limit potentially disruptive, manipulative, or non-bona fide quoting and trading activities that occur on or through its system and to ensure that they are reasonably designed to achieve compliance with applicable SRO rules and the Federal securities laws) and to provide a summary of any supervision activities that occur on or through the ATS, the sources of data the ATS uses to supervise trading activity (e.g., internal or external sources), and the activities that the ATS intends to detect, deter, or limit.

As the Commission notes in the Proposal, a similar requirement related to anti-gaming technology and subscriber-related safeguards proposal was raised in the original Regulation ATS proposal, but not adopted at that time because the Commission believed that such descriptions made in a publicly available document could serve to undermine those safeguards by disclosing information that makes evading those safeguards easier.

We agree with the Commission’s prior decision to keep ATS monitoring, surveillance, and anti-gaming information confidential. If adopted, this disclosure will undermine the ATS’s surveillance and monitoring activities by publicizing these processes to allow bad actors to evade such tools and controls. Moreover, if the Commission seeks to minimize this risk by requiring broker-dealer operators to provide only summary information on this topic, such summary information will be of limited use to subscribers. If this information is of limited use to

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subscribers, the risk of disclosing this information to the public does not outweigh its benefits, and the SEC should not adopt this proposed change to Form ATS-N.

- 9) Part III, Item 16 Routing. The Commission is proposing to require Covered ATSS to disclose whether “trading interest” (rather than the current language of “orders”) can be routed or otherwise “sent” outside of the ATS. If the Covered ATS permits trading interest to be routed or sent to a destination outside of the ATS, the ATS would be required to indicate whether affirmative instructions from a subscriber must be obtained before its trading interest can be routed or sent from the ATS and provide a description of the affirmative instruction and explain how the affirmative instruction is obtained.

The SEC should not replace the term “orders” with the term “trading interest” in this disclosure based on the reasons identified earlier in our letter. We also recommend the SEC clarify the difference between “route” and “send” in this context. We are not clear if there is a technical difference between these two terms.

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Fidelity would be pleased to provide further information, participate in any direct outreach efforts the Commission undertakes, or respond to questions the Commission may have about our comments.

Sincerely,



Thomas Tesauro

cc:

The Honorable Gary Gensler, Chair
The Honorable Hester M. Pierce, Commissioner
The Honorable Allison Herren Lee, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner

Mr. Haoxiang Zhu, Director of the Division of Trading and Markets
Mr. David Saltiel, Assistant Director, Division of Trading and Markets
Mr. Tyler Raimo, Assistant Director, Division of Trading and Markets