



April 26, 2022

Vanessa A. Countryman  
Office of the Corporate Secretary  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090  
Rule-comments@sec.gov

Re: File Number S7-02-22 - Amendments Regarding the Definition of “Exchange” and Alternative Trading Systems (ATs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities (the “Proposal”)<sup>1</sup>

Dear Ms. Countryman:

Intercontinental Exchange, Inc. (“ICE”) appreciates the opportunity to respond to the Proposal issued by the U.S. Securities and Exchange Commission (“Commission”) soliciting comment on proposed amendments to Rule 3b-16 under the Securities Exchange Act of 1934, as amended (“Exchange Act”) and to Regulation ATS.

ICE is a Fortune 500 company and provider of marketplace infrastructure, data services and technology solutions to a broad range of customers including financial institutions, corporations and government entities. It operates regulated marketplaces, including the New York Stock Exchange, for the listing, trading and clearing of a broad array of derivatives contracts and financial securities across major asset classes.

ICE’s regulated marketplaces include two broker-dealer operators of alternative trading systems (“ATS”), ICE Bonds Securities Corporation (“ICE Bonds”) and Archipelago Trading Services, Inc. (“ATSI”). ICE Bonds is a broker-dealer registered with the Commission under the Exchange Act, is a member of the Financial Industry Regulatory Authority (“FINRA”) and the Municipal Securities Rulemaking Board, and is registered with the National Futures Association as an introducing broker pursuant to the provisions of the Commodity Exchange Act. ICE Bonds is the operator of three ATs (ICE BondPoint, ICE Credit Trade and ICE TMC) for the trading of fixed income products, including corporate, municipal, and U.S. Treasury and agency securities. ATSI is a broker-dealer registered with the Commission and a member of FINRA. ATSI operates the alternative trading system known as Global OTC for the trading of over-the-counter (*i.e.*, non-exchange listed) equity securities.

ICE Bonds commented on the Commission’s September 2020 proposed amendments to Regulation ATS for Government Securities ATs and concept release on the regulatory framework for electronic platforms that trade corporate debt and municipal securities and is encouraged that the Commission continues to review whether its current rules appropriately

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<sup>1</sup> Exchange Act Release No. 94062 (Jan. 26, 2022), 87 FR 15496 (March 18, 2022).



cover the myriad fixed income electronic trading platforms that perform core marketplace exchange functions.<sup>2</sup>

## I. Proposed Amendments to Exchange Act Rule 3b-16

As previously stated in the ICE Bonds' Concept Release Letter, ICE supports amending Exchange Act Rule 3b-16 ("**Rule 3b-16**") to regulate fixed income electronic trading platforms performing marketplace exchange functions. ICE believes that the Commission's Proposal would improve transparency and foster fair competition in the fixed income markets. The Commission proposes to amend Rule 3b-16 to include systems that offer the use of non-firm trading interest and communication protocols to bring together buyers and sellers of securities ("**Communication Protocol Systems**").<sup>3</sup> ICE generally agrees with the Commission's characterization of systems, such as request-for-quote and stream axes, as Communication Protocol Systems that should be subject to regulation as "exchanges."

## II. Consequences of Expanding the Definition of "Exchange"

ICE believes that the Commission's proposed amendments to Rule 3b-16 would include the type of systems that the Commission correctly identifies as currently being outside of the Commission's regulation of exchanges and ATSS. ICE further agrees with the Commission's conclusion that, following a final rule, most of these systems would choose to be regulated as broker-dealers and ATSS.<sup>4</sup> Expanding the application of Rule 3b-16 to such systems and their protocols would affect the application of other Commission rules. For this reason, ICE requests that the Commission provide guidance as to the applicability of the following rules:

- a. Rule 15c3-5.<sup>5</sup> It is unclear what expectations the Commission has relating to the financial risk management control requirements of Rule 15c3-5 to systems that permit non-firm trading interest to be displayed on their system. This uncertainty is particularly problematic in light of the Commission's proposed Rule 300(q), which defines "trading interest" as only requiring the identity of the security and either the quantity, direction or price.<sup>6</sup>

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<sup>2</sup> Exchange Act Release No. 90019 (Sep. 28, 2020), 85 FR 87106 (Dec. 31, 2020) (proposed amendments to Regulation ATS and concept release). See Letter from Robert Laorno, General Counsel, ICE Bonds Securities Corporation, to Ms. Vanessa Countryman, Secretary, Commission, dated March 8, 2021 ("Government ATS Letter"), and Letter from Robert Laorno, General Counsel, ICE Bonds Securities Corporation, to Ms. Vanessa Countryman, Secretary, Commission, dated March 15, 2021 ("Concept Release Letter").

<sup>3</sup> See Proposal at 15496 n.5.

<sup>4</sup> See *id.* at 15508.

<sup>5</sup> 17 CFR 240.15c3-5 (Risk Management Controls for Brokers or Dealers with Market Access).

<sup>6</sup> See Proposal at 15504.



- b. Confirmation and Statement Delivery. With respect to transactions effected through the use of a Communication Protocol System, ICE believes the Commission needs to clarify the confirmation and statement delivery obligations of broker-dealer operators of Communication Protocol Systems when a transaction is negotiated on a Communication Protocol System, but ultimately executed away from such system.

### **III. Application of Rule 304 Should be Limited**

Rule 304 of Regulation ATS (“**Rule 304**”) establishes the requirements for an NMS Stock ATS to file an initial Form ATS-N, amendments to Form ATS-N, and public disclosure of such Forms. In the Proposal, the Commission requests comment as to whether an NMS Stock ATS or a Government Securities ATS operated by a broker-dealer that is a registered broker-dealer for more than one ATS should be subject to Rule 304 independent of any other ATS operated by its broker-dealer.<sup>7</sup>

ICE believes that Rule 304 should be limited to just the NMS Stock ATS or, as proposed, the Government Securities ATS, and not extended to any other ATS operated by the same broker-dealer. Rule 304 has generally been applied to mature markets, such as those that trade NMS securities. Extending the requirements of Rule 304 to less mature markets, such as non-equity markets, would place unnecessary barriers to future innovation in these markets.

Moreover, it appears that the Commission is suggesting that only broker-dealers that operate an NMS Stock ATS or a Government Securities ATS would be subject to Rule 304 for other ATSs it operates, but that a broker-dealer that does not operate an NMS Stock ATS or Government Securities ATS would not be subject to Rule 304. Such an approach would create an unlevel playing field among ATSs that directly compete with each other. It is unclear to ICE what benefit the Commission expects to achieve by a filing requirement dependent solely on whether or not an ATS is operated by the same broker-dealer as an NMS Stock ATS or Government Securities ATS.

In addition, the Commission requests comment as to whether an ATS that trades equity securities other than NMS stocks, corporate debt securities, municipal securities, or any other category of securities should be required to comply with Rule 304. ICE does not believe the Commission has explained why it is necessary to expand the application of Rule 304 to ATSs that trade securities other than NMS stocks. The Commission’s 2018 amendments to Regulation ATS imposing heightened public disclosure requirements on ATSs that trade NMS stocks were appropriate given their impact on the national market system.<sup>8</sup> However, imposing Rule 304 obligations on ATSs that trade other than NMS stocks would place unnecessary barriers to entry and burdens on ATSs that do not trade exchange-listed securities.

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<sup>7</sup> See Proposal at 15521.

<sup>8</sup> Regulation of NMS Stock Alternative Trading Systems, Exchange Act Release No. 83663 (July 18, 2018), 83 Fed. Reg. 38768 (Aug. 7, 2018).



#### **IV. Form ATS-R Considerations**

Rule 301(b)(9) of Regulation ATS establishes the requirements for an ATS to file Form ATS-R at the end of each calendar quarter in which the market has operated. In the Proposal, the Commission requests comment on whether a broker-dealer that operates more than one ATS should be required to file a separate Form ATS-R for each ATS that it operates, rather than allowing the broker-dealer to file a single, consolidated Form ATS-R.<sup>9</sup>

ICE encourages the Commission to seek ways to minimize the number of forms that need be filed by broker-dealer operators of ATSs. Permitting the filing of a single, consolidated Form ATS-R, notwithstanding the number of ATSs that a broker-dealer may operate, reduces the costs and the time associated with such filings. The benefit created by increasing the number of filings made by an ATS by requiring that reported information be deconsolidated is unclear. Current Form ATS-R has line items for both equity and Government Securities, so the Commission is familiar with the information being provided in its current format. Requiring a separate Form ATS-R be submitted for each ATS operated by the broker-dealer unnecessarily adds burdens and costs on the filer, without any additional benefits.

#### **V. Government Securities ATS Considerations**

As previously stated in the ICE Bonds' Government ATS Letter, ICE supports rules designed to improve transparency in the fixed income markets, provide for investor protection, and facilitate the electronic trading markets of Government Securities.<sup>10</sup> To that end, ICE supports the Commission's proposal to eliminate the exemption under Rule 301(a)(4)(ii)(A)-(C) of Regulation ATS for ATSs that trade Government Securities.

In the Proposal, the Commission requests comment on whether a Legacy Government Securities ATS or a Covered Newly Designated ATS should be allowed to continue operations during the Commission's review of its initial Form ATS-N.<sup>11</sup> Following the effective date of any final rule, the Commission proposes to provide 90 calendar days for a Legacy Government Securities ATS and a Covered Newly Designated ATS to file its initial Form ATS-N, which ICE believes is sufficient time for the filing. Thereafter, the Commission proposes an initial review period of 180 calendar days (not including any extensions), which ICE also believes is sufficient for both a Legacy Government Securities ATS and Covered Newly Designated ATS to complete the filing process. To avoid unnecessarily disrupting the marketplace for government securities, ICE believes that Legacy Government Securities ATSs and Covered Newly Designated ATSs should be permitted to continue their operations during the Commission's review of initial Forms ATS-N.

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<sup>9</sup> *See id.*

<sup>10</sup> Government ATS Letter, *supra* note 2, at 1.

<sup>11</sup> *See* Proposal at 15537.



## VI. Form ATS-N Considerations

- a. The Commission should not expand disclosure requirements to services offered by affiliates that are unrelated to transacting on the Covered ATS

In the Proposal, the Commission requests comment on whether to expand Part II, Item 5 of Form ATS–N to require disclosure of products or services offered by the broker-dealer operator or its affiliates to subscribers, but not necessarily offered in connection with transacting on the Covered ATS.<sup>12</sup>

Current Form ATS-N, as well as the Commission’s proposed amendments, is very comprehensive in its disclosure requirements and designed to provide the public with relevant information regarding the operation of an ATS. These disclosures are generally intended to enhance transparency, enhance the Commission’s oversight, and identify potential conflicts of interest between the broker-dealer operator of the ATS and its subscribers. Expanding Part II, Item 5 of Form ATS-N to require disclosure of unrelated products or services offered to subscribers by the broker-dealer operator of the ATS *or its affiliates* would substantially expand the information required to be disclosed to include information that is, by definition, not related to the services offered by the Covered ATS. Such a requirement to disclose products and services offered by the affiliates of a broker-dealer that is part of a large global organization would be extraordinarily costly and extremely burdensome to ensure complete and accurate disclosure nor is it clear what purpose providing this information to the public would serve.

As noted, many ATS operators have numerous affiliates who provide a wide variety of unrelated products and services, ranging across different industries. Information about such unrelated products and services would not provide any clarity about the Covered ATS or its broker-dealer operator. Additionally, expanding Part II, Item 5 of Form ATS–N to require disclosure of products or services offered by the broker-dealer operator that are unrelated to transacting on the Covered ATS would not provide additional relevant information to market participants considering whether to subscribe to the ATS. Any service offered by a broker-dealer that is tied or connected to transacting on the ATS is already required to be disclosed on Form ATS-N; it is thus unclear what relevant information the Commission believes is currently not being disclosed. Requiring this superfluous information about the broker-dealer operator and its affiliates' products and services would devalue the relevant information about the ATS disclosed on Form ATS-N, provide no further value to the public in relation to the Covered ATS, and increase costs significantly for ATSS.

- b. The Commission should not require disclosure of ATSS’ written safeguards and written procedures to protect the confidential trading information of subscribers

The Commission requested comment on whether a Covered ATS should be required to disclose on Form ATS-N the entirety of its written safeguards and written procedures to protect

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<sup>12</sup> See Proposal at 15548.



the confidential trading information of subscribers.<sup>13</sup> Consistent with the views expressed in the ICE Bonds' Government ATS Letter, ICE believes that the Rule 301(b)(10) requirement to maintain written safeguards and procedures to protect confidential subscriber information is sufficient protection without requiring a public posting of the documents.<sup>14</sup>

Publication of compliance procedures/processes is not commonplace and risks requiring disclosure of proprietary information, as well as information that could make it easier for a bad actor to accomplish its goals. It is unclear what benefit would be accomplished by such a potentially counterproductive requirement. Further, as proposed Part II, Item 7 of Form ATS-N would require the ATS to provide a narrative description of the written safeguards and written procedures relating to the protection of confidential trading information, requiring the entirety of such safeguards and procedures to be published is unnecessary to achieve the Commission's goals relating to transparency.

c. Confidential subscriber information

In the Proposal, the Commission requests comment as to whether it should prohibit disclosure of confidential subscriber information in some circumstances.<sup>15</sup> The Commission's question is unclear whether it is asking for comment on whether to prohibit sharing of information, even when subscribers consent to it being shared, or whether the Commission is requesting comment on whether to prohibit public disclosure of such information.

Notwithstanding, and consistent with the views expressed in the ICE Bonds' Government ATS Letter, ICE does not believe the Commission should impose on subscribers its view of what is confidential subscriber information.<sup>16</sup> Moreover, the Commission has not provided any explanation as to why prohibiting disclosure would benefit subscribers. A subscriber to an ATS is currently able to agree to the treatment of its information by the ATS operator.

## **VII. ATS Volume Threshold Considerations**

a. Fair Access Threshold

In the Proposal, the Commission requests comment on whether the proposed fair access volume threshold should be applied to all types of U.S. Treasury Securities or to subset categories of U.S. Treasury Securities.<sup>17</sup> Consistent with the views expressed in the ICE Bonds'

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<sup>13</sup> See Proposal at 15550.

<sup>14</sup> Government ATS Letter, supra note 2, at 6.

<sup>15</sup> See Proposal at 15550.

<sup>16</sup> Government ATS Letter, supra note 2, at 6.

<sup>17</sup> See Proposal at 15524.



Government ATS Letter, ICE believes that it is appropriate for the Fair Access Rule to apply based on an ATSS trading volume in U.S. Treasury Securities in the aggregate.<sup>18</sup> This approach would be consistent with the current treatment of both corporate debt securities and the municipal securities.

b. Thresholds for application of Fair Access Rule and Regulation SCI

The Commission asks for comment on whether ATSS should be allowed or required to use sources of data other than published data provided by the SRO to which trades are reported in determining the applicability of the Fair Access Rule or Regulation SCI. ICE believes that reliance on a single source of data for all ATSS is important to ensure consistency in the application of these requirements. ICE further believes that published data provided by an SRO is likely the best source of reliable data when calculating whether an ATS has met volume thresholds.

c. Aggregation of activity across affiliated ATSS

In the Proposal, the Commission asks whether it should adopt rules to amend Rule 301(b)(5)(ii) (Fair Access), Rule 301(b)(3) (Order and Execution Display) and Rule 301(b)(6) (Capacity, Integrity and Security Rule) to aggregate the volume threshold with respect to each rule across ATSS that are operated by a common broker-dealer, or ATSS that are operated by affiliated broker-dealers.<sup>19</sup>

ICE does not believe it would be appropriate to calculate the volume thresholds across multiple ATSS operated by the same broker-dealer or across affiliated broker-dealers. Each respective volume threshold should be determined at an individual ATS level and not aggregated across commonly controlled ATSS. The ATSS are not fungible, and should not be treated as such. A broker-dealer may operate separate ATSS, based on distinct business units within the broker-dealer, that utilize different technology infrastructure, and offer different types of functionality, such as anonymous or fully disclosed order books, request-for-quote or auction-based offerings. In addition, each ATS may have its own unique set of subscribers who trade securities for very different purposes and the aggregation of volume to meet the volume thresholds runs contrary to the purpose of operating these distinct ATSS.

d. Requiring consolidation of business activity

In the Proposal, the Commission asks whether it should amend Regulation ATS to require that a broker-dealer only operate one ATS for a category of security.<sup>20</sup> It is unclear what policy objective would be achieved by the Commission in limiting subscriber choice and

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<sup>18</sup> Government ATS Letter, *supra* note 2, at 5.

<sup>19</sup> *See* Proposal at 15577.

<sup>20</sup> *See id.*



reducing the flexibility a broker-dealer has in organizing its business structure. For example, as described at the start of this letter, ICE Bonds currently operates three alternative trading systems for the trading of fixed income products, including corporate bonds and municipal securities. Through the operation of three distinct ATSS, ICE Bonds is able to provide its subscribers with multiple trading protocols including click-to-trade, auction and request-for-quote, while enabling both anonymous and disclosed counterparty interactions and trading from odd-lots to blocks.

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ICE hopes these comments are constructive to the Commission as it considers further changes to the regulatory framework for the electronic trading systems that trade fixed income securities. To the extent the Commission staff has any questions relating to this letter please feel free to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Laorno', with a stylized flourish at the end.

Robert Laorno  
General Counsel  
ICE Bonds Securities Corporation