



June 13, 2023

VIA ELECTRONIC DELIVERY

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

**RE: Supplemental Information and Reopening of Comment Period for  
Amendments Regarding the Definition of “Exchange”, Release No. 34-97309;  
File No. S7-02-22 (April 14, 2023)**

Dear Ms. Countryman:

Virtu Financial, Inc. (“Virtu”)<sup>1</sup> respectfully submits this letter in response to the above-referenced reopening release issued by the Securities and Exchange Commission (the “SEC” or “Commission”) on April 14, 2023 related to the Commission’s proposal issued to amend the rules under the Securities Exchange Act of 1934 that define certain terms used in the statutory definition of “exchange” (the “Reopening Release”).<sup>2</sup>

The SEC first announced its intention to significantly broaden the definition of an “exchange” in a proposal issued in January 2022 (the “Proposal”).<sup>3</sup> The Proposal was met with overwhelming opposition and criticism from investors and market participants who registered concerns that the Commission was vastly overstepping its statutory authority in an effort to seize jurisdiction over a wide swath of the marketplace previously commonly understood to be neutral tools and technology products. Commenters also expressed concerns about *inter alia* the short comment period to respond to the Proposal, the Commission’s failure to identify a market failure

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<sup>1</sup> Virtu is a leading financial firm that leverages cutting edge technology to deliver liquidity to the global markets and innovative, transparent trading solutions to its clients. Virtu operates as a market maker across numerous exchanges in the U.S. and is a member of all U.S. registered stock exchanges. Virtu’s market structure expertise, broad diversification, and execution technology enables it to provide competitive bids and offers in over 25,000 securities, at over 235 venues, in 36 countries worldwide. As such, Virtu broadly supports innovation and enhancements to transparency and fairness which enhance liquidity to the benefit of all marketplace participants.

<sup>2</sup> U.S. Securities and Exchange Commission, *Supplemental Information and Reopening of Comment Period for Amendments Regarding the Definition of “Exchange”*, Release No. 34-97309; File No. S7-02-22 (April 14, 2023), available at <https://www.sec.gov/rules/proposed/2023/34-97309.pdf>.

<sup>3</sup> U.S. Securities and Exchange Commission, *Proposed Rule, 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*, Release No. 34-94062; File No. S7-02-22 (Jan. 26, 2022), available at <https://www.sec.gov/rules/proposed/2022/34-94062.pdf>.



warranting a change in the regulatory definition of an exchange, and the Proposal’s failure to identify any benefit to investors that would flow from the contemplated changes.

We were among those who expressed significant concerns. In our comment letter dated April 18, 2022,<sup>4</sup> we contended that the Commission had failed to meet its burden in justifying why the proposed changes are needed or the benefits of the proposed changes, and in doing so the Commission had deviated from its mission and statutory authority. Most notably, we argued:

- 1. The Commission has exceeded its statutory authority by failing to conduct an adequate economic analysis in recommending the Proposal. Specifically, the Proposal:**
  - 1. Fails to Clearly Identify the Justification for the Proposed Rule**
  - 2. Fails to Calculate a Baseline**
  - 3. Fails to Consider Alternatives**
  - 4. Fails to Consider Economic Consequences of the Proposal (Both Benefits and Costs)**
- 2. The Commission has exceeded its statutory authority in expanding the definition of “exchange” to include marketplaces that “make available” non-discretionary methods for buyers and sellers to agree to the terms of a trade (including a new term, so-called “Communication Protocol Systems” (“CPS”) that utilize investors’ trading interest)**
- 3. The proposed amendments to Reg ATS and Reg ATS-N are unwarranted, will harm the marketplace, and will result in unnecessary costs and burdens that are harmful to investors**

When we saw the announcement that the Commission was planning to issue a supplemental release and reopen the comment period for the misguided Proposal, we were optimistic that the Commission had thoughtfully considered the robust comments from a wide range of investors, market participants, and others and decided to revise the Proposal to address them. Unfortunately, our optimism was naively misplaced. Not only does the Reopening Release fail to address the defects in the original proposal – it compounds them and makes them worse.

For example, despite an overwhelming number of comments registering concerns that the term “CPS” was undefined in the Proposal, the Commission once again neglected to resolve the term’s ambiguity in the Reopening Release. As usual, Commissioner Peirce hit the nail squarely

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<sup>4</sup> Letter from Doug Cifu, Virtu CEO, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (Apr. 18, 2022), available at <https://virtu-www.s3.amazonaws.com/uploads/documents/Virtu-Financial-Regulation-ATS-Comment-Letter-20220418.pdf>. Virtu incorporates by reference all of the information and arguments included in our April 18, 2022 letter.



on the head in her dissent in questioning why the Commission chose not to resolve the term's ambiguity when it had a prime opportunity to do so.

*“The release does not propose to define the ambiguous term, ‘Communication Protocol System’.* Numerous commenters asked us to define ‘Communication Protocol System,’ but this release demurs. In contrast to the extensive examples the Commission provided in 1998 when it initially adopted Rule 3b-16 and Regulation ATS, the Commission still declines to list examples that fall within or outside the definition. Instead, it asks commenters whether the Commission should provide additional examples and, if so, what examples it should provide. Asking commenters to resolve the ambiguity in a novel term of our own creation is inappropriate, particularly given that many commenters have no idea what we are trying to achieve with the proposal. Perhaps the Commission finds value in keeping the term ambiguously broad. This flexibility comes at the cost of unnecessary increased regulatory risk, particularly for new and small firms which may not even realize they have tripped over the hazy communications protocol system threshold.”<sup>5</sup>

Instead of defining CPS, the Reopening Release includes a series of questions asking whether different terminology would help in resolving the ambiguity of what systems would be encompassed under the amended definition. For example, the Reopening Release introduces the new term “negotiation protocols” as a potential replacement for CPS. However, the Reopening Release’s description of this new term is equally, if not more, vague and ambiguous as the description of CPS in the original Proposal. As Commissioner Peirce noted in her dissent

*“[T]he Commission still provides no examples to help clarify what it might mean by this term. Moreover, like ‘communications protocol,’ ‘negotiation protocols’ standing alone do not immediately appear to constitute a ‘stock exchange as that term is generally understood.”*<sup>6</sup>

It was telling that, when Commissioner Peirce specifically asked during the Open Meeting why the Commission neglected to include a definition of CPS in the regulatory text of the Reopening Release, the lead Trading & Markets staffer declined to directly answer and instead simply noted that the release included additional requests for comment on that topic.<sup>7</sup> The fact that the Commission felt compelled to ask numerous questions in the Reopening Release concerning potential amendments to the terminology in the Proposal is a tacit acknowledgment by

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<sup>5</sup> Commissioner Hester Peirce, U.S. Securities and Exchange Commission, *Rendering Innovation Kaput: Statement on Amending the Definition of Exchange* (Apr. 14, 2023), available at <https://www.sec.gov/news/statement/peirce-rendering-innovation-2023-04-12>.

<sup>6</sup> *Id.* at n. 14.

<sup>7</sup> SEC Open Meeting Webcast Archive at 31:42 – 33:45 (Apr. 14, 2023), available at <https://www.youtube.com/watch?v=vAXg989sN1k>.



the Commission that its approach in the Proposal was defective and unsupported. Unfortunately, the Reopening Release fails to clear up the vast uncertainty left by the Proposal and, in fact, leaves investors and market participants even more confused about what the Commission is trying to accomplish in its efforts to broaden the definition of an exchange.

Like Commissioner Peirce, we suspect that the Commission's refusal to offer precise definitions that would allow market participants to know with certainty whether their activities and/or systems fall with the definition of exchange is no accident. Vague and ambiguous rules make the job of SEC enforcement lawyers easier and facilitate the Commission's ability to shape the law outside of the APA process in the form of regulation by enforcement. The Commission had a chance to redeem the many defects of its original Proposal but chose instead to further compound them.

For all of the reasons articulated in our April 18, 2022 letter, which we incorporate by reference herein, we were unable to support the original Proposal. The Reopening Release offers nothing that would address our concerns and we therefore remain firmly opposed. The Commission should abandon the Proposal in its entirety and instead focus on "good government" initiatives that would further its tripartite mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation

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Virtu has long been a vocal proponent of smart, data-driven regulation that supports the goals of enhancing transparency, fostering robust competition among market participants, and ensuring the high quality of the retail investor experience. Unfortunately, like the original Proposal, the Commission’s Reopening Release does none of these things. Instead, the Reopening Release represents yet another step in the Commission’s unsubstantiated attempt to impermissibly expand its regulatory authority to include neutral technology products and service providers, and, in the process, impose substantial and needless burdens and costs on market participants which will ultimately be borne by end investors.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Thomas M. Merritt". The signature is fluid and cursive, with a prominent horizontal stroke at the end.

Thomas M. Merritt  
Deputy General Counsel

cc: The Honorable Gary Gensler, Chair  
The Honorable Hester M. Peirce, Commissioner  
The Honorable Caroline A. Crenshaw, Commissioner  
The Honorable Mark T. Uyeda, Commissioner  
The Honorable Jaime E. Lizarraga, Commissioner  
Dr. Haoxiang Zhu, Director, Division of Trading and Markets