

June 13, 2023

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

Via E-Mail: rule-comments@sec.gov

Re: Supplemental Information and Reopening of Comment Period for Amendments Regarding Definition of “Exchange;” Release No. 34-97309; File No. S7-02-22; RIN 3235-AN45

Dear Ms. Countryman:

MarketAxess Holdings Inc. (“MarketAxess”) appreciates the opportunity to provide the Securities and Exchange Commission (“SEC” or “Commission”) with our comments regarding the reopening of the comment period for the Commission’s proposal to amend the rule under the Securities Exchange Act of 1934 (the “Exchange Act”) that defines certain terms used in the statutory definition of “exchange.”¹ MarketAxess operates the leading institutional electronic trading platform for corporate bonds and other fixed income securities. Through its registered broker-dealer, MarketAxess Corporation, and its global affiliates, more than 2,000 firms traded a record \$8.4 trillion of U.S. investment-grade bonds, U.S. high yield bonds, emerging market debt, Eurobonds, Treasuries, and other fixed income securities on the MarketAxess platform in 2022. MarketAxess’ Open Trading™ marketplace is regarded as the premier all-to-all trading solution in the global credit markets, creating a unique liquidity pool for a broad range of credit market participants.

I. Definition of “Negotiation Protocols.”

In January 2022, the Commission proposed to amend SEC Rule 3b-16 to, among other things, add “communication protocols” as an example of an established, non-discretionary method that an organization, association, or group of persons can provide to bring together buyers and sellers of securities.² In the Reopening Release, the Commission asked whether it should replace the term “communication protocols” with “negotiation protocols” and define this latter term under new Rule 3b-16(f) as “a nondiscretionary method that sets requirements or limitations designed

¹ See Securities Exchange Act Release No. 97309 (April 14, 2023) (the “Reopening Release”).

² See Securities Exchange Act Release No. 34-94062 (January 26, 2022) (the “2022 Proposal”).

for multiple buyers and sellers of securities using trading interest to interact and negotiate terms of a trade.” Thus, under the 2022 Proposal (as modified under the Reopening Release), SEC Rule 3b-16 would provide that an organization will be an “exchange” if it: (1) brings together buyers and sellers of securities using trading interest; and (2) makes available established, non-discretionary methods (whether by providing a trading facility or negotiation protocols or by setting rules) under which buyers and sellers can interact and agree to the terms of a trade.”³

In this context, the proposed definition of “negotiation protocol” appears to raise more questions than answers. As an initial matter, some of terms in proposed Rule 3b-16(f) merely repeat some of terms that are used in Rule 3b-16(a). For example, Rule 3b-16(a) would provide that a negotiation protocol is one type of non-discretionary method. However, since the term “negotiation protocol” is also defined as a non-discretionary method, this formulation appears to be rather circular (i.e., effectively stating that a non-discretionary method is an example of a non-discretionary method) and thus does not provide useful guidance to market participants.

In addition, we note that the Commission proposed to remove the term “multiple” from existing Rule 3b-16(a)(1) in the 2022 Proposal in order to clarify the application of this Rule to systems with non-firm trading interest and to align it more closely with the statutory definition of “exchange.” Therefore, it seems inconsistent for the Commission to remove the term “multiple” from existing Rule 3b-16(a)(1) but then include it in new Rule 3b-16(f). We believe that the Commission should reconcile this inconsistency.

Finally, the multilayered definition of “negotiation protocol” may raise difficult questions of interpretation. Under the Commission’s proposed definition of this term, a “negotiation protocol” would be: (i) a non-discretionary method, (ii) that sets forth limitations or requirements, (iii) that are designed for persons that use trading interest, (iv) to negotiate and interact. It is not clear on its face how a “non-discretionary method” can set “limitations or requirements;” or how “limitations or requirements” can be “designed” for persons to interact. Thus, we believe the Commission should clarify its interpretation of this term, including as the Commission suggests, through the use of examples.

II. Treatment of Bilateral Communication Systems.

In Question 12 of the Reopening Release, the Commission has asked whether it should adopt Rule 3b-16(a)(2), as proposed to be amended under the 2022 Proposal, to include “communication protocols” as an example of a non-discretionary method under which buyers and sellers can interact and agree to the terms of a trade. We believe that it is not possible to fully address this question until the Commission provides more clarity regarding the meaning of this term. However, at a minimum, we believe that the Commission should make it clear that bilateral

³ See Reopening Release at Question 13.

negotiation systems, which never allow more than one buyer and one seller to interact on a particular trade negotiation, do not fall within the scope of this term.

The primary function of an exchange is to promote price discovery, and exchanges provide this service by establishing various trading mechanisms which facilitate the simultaneous interaction of buyers and sellers under a set of trading rules. The 2022 Proposal (as potentially modified by the Reopening Release) updates the concept of an exchange under Rule 3b-16(a) to include trading functionality that is driven by price requests or non-firm trading interest, such as institutional RFQ platforms and other conditional order systems.⁴ MarketAxess supports the inclusion of each of these electronic systems in the concept of an ATS provided that they facilitate price discovery by simultaneously bringing together multiple buyers and sellers for the purpose of executing a transaction.

On the other hand, bilateral negotiation mechanisms that facilitate communications relating to securities transactions are not designed to, and do not, allow more than one buyer and one seller to simultaneously interact.⁵ Instead, these mechanisms essentially enhance the efficiency of the communication process between only two parties who would otherwise communicate via instant message. In our view, the mere fact that bilateral negotiation systems may be designed in such manner is not sufficient to treat them as if they perform the functions of an exchange. Therefore, we do not believe that these systems should fall within the scope of Regulation ATS.⁶ MarketAxess also believes that excluding bilateral negotiation systems is consistent with the 2022 Proposal's treatment of single dealer system under Rule 3b-16(b).

⁴ See letter from Scott Pintoff, General Counsel, MarketAxess to Vanessa Countryman, Secretary, Commission, dated April 18, 2022.

⁵ In the 2022 Proposal, the Commission stated that an entity would be deemed to have established a communication protocol if it makes a chat feature available which requires certain information to be included in a chat message (e.g., price, quantity) and sets parameters and structure designed for participants to communicate about buying or selling securities.

⁶ We also believe that that the inclusion of these systems as ATSs would result in a radical increase in TRACE reported ATS volumes beyond the level that most market participants would consider represents fully electronic trading volumes. We believe this would send misleading signals to fixed income market participants on the true volume and market share of many-to-many electronic trading venues operating in the fixed income markets.

III. Fair Access Rule Considerations.

Item 4 of the Reopening Release raises the issue of whether an ATS that utilizes only non-firm trading interest should be exempt from the fair access rule (hereafter, the “Proposed Exemption”).⁷ In principle, we do not object to the application of a fair access rule to ATSs that utilize non-firm trading interest. However, we would not be in favor of such application if the Commission persists in its interpretation of how the fair access rule should apply to an ATS that permits its participants to select their potential counterparties.

More specifically, in footnote 675 of the 2022 Release, the Commission stated that if an ATS participant can select its potential counterparties, it would need to provide the ATS with its justification for selecting those counterparties, and the ATS would then need to evaluate whether the stated justification comports with the fair access rule, and if so, incorporate this justification into its fair access standards. This position appears to require an ATS to ensure that market participants have a reasonable basis for choosing their RFQ counterparties and to override these decisions if necessary. Such a requirement is clearly unworkable in practice.

The RFQ trading protocol is utilized extensively in the fixed income markets because these markets are not homogenous and have relatively low levels of trading frequency with fairly large transaction sizes. This trading protocol is highly effective in these markets because it permits market participants to aggregate liquidity from multiple counterparties on demand. In our experience, institutional investors utilize the disclosed RFQ trading protocol, whereby the identities of the requestor and responders are known to each other at all relevant times, because this mechanism allows the requestor to leverage its preferred counterparty relationships to source liquidity. Under this protocol, however, the counterparties face each other directly for settlement and clearing. As such, platform participants must retain full control over their counterparty selection in order to manage their direct credit and settlement risk exposures. Requiring an ATS to second guess a market participant’s choice of acceptable trading counterparties would give the ATS the unprecedented ability to control the trading decisions and credit exposure of its participants.⁸ Accordingly, we respectfully request that the Commission reconsider its position on this matter.

Separately, if the Commission adopts the Proposed Exemption, it should expand the scope of this exemption to include ATSs that use a variety of trading protocols (rather than limiting it to ATSs that utilize only non-firm trading interest). For example, institutional investors that utilize the MarketAxess platform may choose from a wide set of trading protocols, including request-for-quote, live order books, sessions-based trading, and portfolio trading solutions. There is no

⁷ See 17 C.F.R. § 242.301(b)(5) (2023).

⁸ We also note that the exercise of such control could impede a market participant’s ability to satisfy its best execution obligations.

obvious reason to require an ATS that utilizes non-firm trading protocols to count transactions effected thereunder against its fair access volume threshold merely because it offers other types of trading protocols as well. Thus, we believe that the Proposed Exemption should be available to all ATSs that utilize non-firm trading interest.

IV. Selective Application of New Rule 3b-16.

The Reopening Release raises the issue of whether SEC Rule 3b-16(a), as proposed to be amended (i.e., to include platforms that offer the use of non-firm trading interest and to include a reference to communication protocols) (hereafter, “New Rule 3b-16”) should only apply to: (x) ATSs that only trade government securities; or (y) ATSs that only trade fixed income securities. As we have previously stated in other contexts, any regulatory framework adopted by the Commission should apply equally to all trading platforms that provide similar services.⁹ Applying different levels of regulatory oversight to otherwise similar trading platforms would complicate efforts to improve the efficiency and resiliency of the electronic trading markets.¹⁰ In our view, harmonization of regulation will help ensure that trading platforms that provide similar services are subject to equal regulation so that one trading platform does not have a competitive advantage over another merely as a result of a disparity in regulation.¹¹ Therefore, we believe that if the Commission adopts New Rule 3b-16, this rule should apply equally to all ATSs regardless of the type of securities that they trade.

⁹ See letter from Scott Pintoff, General Counsel, MarketAxess to Vanessa Countryman, Secretary, Commission, dated March 1, 2021.

¹⁰ See Fixed Income Market Structure Advisory Committee Recommendation for the SEC to Review the Framework for the Oversight of Electronic Trading Platforms for Corporate and Municipal Bonds (July 16, 2018).

¹¹ Section 3(a)(36) of the Exchange Act generally provides that a class of persons or markets is subject to “equal regulation” if no member of the class has a competitive advantage over any other member thereof resulting from a disparity in their regulation which the Commission determines is unfair and not necessary or appropriate in furtherance of the purposes of the Exchange Act.



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MarketAxess appreciates the opportunity to comment on certain of the issues raised in the Reopening Release. We would be happy to discuss our comments with the Commission or its staff. If you have any comments or questions concerning this letter, please feel free to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read 'Scott Pintoff'.

Scott Pintoff

General Counsel, MarketAxess