

June 13, 2023

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

RE: Supplemental Information and Reopening Comment Period for Amendments to Exchange Act Rule 3b-16 Regarding the Definition of “Exchange” (File Number S7-02-22, RIN 3235-AM45)

Dear Ms. Countryman;

Symphony Communication Services, LLC (“**Symphony**” or the “**Company**”) respectfully submits this letter to comment and respond to questions presented by the Securities and Exchange Commission (“**Commission**”) in its supplemental information and reopening of the comment period (the “**Supplemental Release**”) for the proposed amendments to Rule 3b-16 (“**Rule 3b-16**”) under the Securities Exchange Act of 1934 (“**Exchange Act**”)¹.

Symphony had previously commented on April 18, 2022 (the “**Prior Comment Letter**”) on the Commission’s proposal to make certain amendments to the interpretation of the definition of “exchange” in Rule 3b-16 (the “**Proposal**”)² and is now submitting this additional comment letter in response to the Supplemental Release. Symphony thanks the Commission for its continued commitment to open dialogue with technology providers and its desire to ensure that the Proposal properly applies to the appropriate market participants. Symphony specifically appreciates the Commission’s acknowledgment of certain points we had made in our Prior Comment Letter and the Commission’s proposal of potential solutions to certain concerns that we had raised. We are grateful for the opportunity to comment on the Supplemental Release, and this letter serves to respond to questions posed by the Commission in the Supplemental Release.

The Company continues its support of the Commission’s efforts to modernize its approach to oversight while fostering an environment where markets and the technology industry can thrive. To that end, we offer the following comments to the Supplemental Release.

¹ Supplemental Information and Reopening of Comment Period for Amendments Regarding the Definition of “Exchange”, SEC Release No. 34-97309 (April 14, 2023) 88 Fed. Reg. 29448 (May 5, 2023).

² Further Definition of “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer, SEC Release No. 34-94524 (Mar. 28, 2022), 87 Fed. Reg. 23054 (April 18, 2022).

Comments on the Supplemental Release

Makes Available Non-Discretionary Methods

We had raised in our Prior Comment Letter the point that the Commission’s proposed replacement of the phrase “uses established, non-discretionary methods” with “makes available established, non-discretionary methods” in Rule 3b-16 could inadvertently capture technology services providers to the financial sector, such as Symphony, that provide modular and open architecture platforms that can connect with third party applications, thus creating a bridge and providing interoperability between technology and financial services platforms. As we described in the Prior Comment Letter, such technology service providers do not set minimum requirements or the parameters for communications on such financial service platforms. Rather, such parameters are set and controlled by the operators of the financial services platforms. The technology services provider simply provides an environment that supports financial services infrastructures through an open, modular and flexible design. In the Supplemental Release, the Commission acknowledges this point in our Prior Comment Letter as well as similar comments received from other commenters.³

Separately, the Commission acknowledges that in situations where a firm engages a technology provider in order to operate an exchange, as long as the firm “oversees the activities of the [technology] provider” and the technology provider does not exercise or share control over how the exchange is operated, the firm itself, not the technology provider, is responsible for compliance with federal securities laws.⁴

The Commission raises a potential alternative to the initial proposed “makes available established, non-discretionary methods” language within its questions in the Supplemental Release. Specifically, the Commission proposes to replace such language with “*establishes non-discretionary methods (whether by providing, directly or indirectly, a trading facility or...)*” (emphasis added).⁵ Symphony submits that the this proposed alternative is preferable and will clarify that technology service providers such as Symphony will continue to be permitted to provide a modular, open platform and interoperable architecture which can be used by financial industry participants, without being deemed to act as an “exchange”. This modified language would make clear that the financial service provider that is utilizing Symphony’s technology services, and that is controlling and setting the relevant parameters of the relevant financial services platform, would be required to register under the Exchange Act to the extent that such platform brings together buyers and sellers of securities using trading interest. This alternative language would also be consistent with the Commission’s observation in the Supplemental Release that a vendor that is utilized in connection with the operation of an exchange, but that does not itself control an exchange, should not be required to register as an exchange. Finally, we believe that this alternative language would be more consistent with the statutory definition

³ *Supra* note 1 at 29450.

⁴ *Supra* note 1 at 29455.

⁵ *Supra* note 1 at 29459.

of an “exchange” under Section 3(a)(1) of the Exchange Act, which does not include a reference to “making available,” but rather requires “constitut[ing], maintain[ing], or provid[ing] a marketplace or facilities for bringing together purchasers and sellers of securities.”

This alternative language would allow continued growth in the financial technology industry, where many technology providers, including Symphony, do not set minimum requirements or the parameters for communications. Rather, such platforms merely provide an environment that supports financial services infrastructures through an open modular and flexible design. Financial services participants would thus be permitted to leverage technology services provided by vendors such as Symphony to increase efficiency and reduce communication errors. Requiring such technology service providers to register as alternative trading systems could ultimately make such technology services unavailable to financial service providers and thus negatively impact this sector. Many of the Commission’s registrants operate in multiple jurisdictions or have customers who do so. The alternative language would, in the Company’s view, also have the benefit of being more akin to the approach taken by ESMA in its final opinion on the trading venue perimeter.⁶ A broadly consistent approach increases efficiency and compliance for internationally operational registrants, their customers and the technology industry as a whole.

Finally, the Company would submit to the Commission that this is a time of technological innovation, and as such, explicit language that is not over-broad is necessary to provide a guiding framework for future progress. The increased use of artificial intelligence (“AI”), for example, will create new opportunities for the technology industry, but appropriate implementation of AI will rely on clarity from regulators. As this new technology continues to evolve and is leveraged by technology providers and financial service providers, more questions will arise as to such firm’s involvement in setting minimum requirements or parameters for communication when artificial intelligence is leveraged. The more ambiguous the language around who “controls” or sets the protocols, the less clear guidance provided to the industry as to whether the person who established the AI, rather than the AI itself (as the system that makes such methods available), is captured by regulation. As a result, we assert that the increased clarity derived from use of the term “establishes” provides important guidance that will preempt some of the questions soon to arise in the industry as AI becomes more widely utilized.

Non-Discretionary Method: Communication Protocols

In the Proposal, the Commission did not specifically define a “communication protocol system” except to note that they “offer the use of protocols and non-firm trading interest to bring together buyers and sellers of securities.”⁷ The Commission did provide examples, explaining that a

⁶ Final Report on ESMA’s Opinion on the Trading Venue Perimeter, ESMA70-156-6360 (2 Feb. 2023)

⁷ 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, SEC Release No. 34-94062, 87 Fed. Reg. 15496, 15498 (March 18, 2022).

communication protocol system can “offer the use of non-firm trading interest and establish protocols to prompt and guide buyers and sellers to communicate, negotiate, and agree to the terms of the trade...”.⁸ In the Proposal, the Commission stated that where an entity would provide a chat feature that requires certain information be included in a chat message (e.g., price, quantity) and set parameters and structure designed for participants to communicate about buying and selling securities, that entity would be deemed to have established a “communications protocol”. However, the Commission stated that “systems that only provide general connectivity for persons to communicate without protocols” would not meet the “communications protocols prong” of the exchange analysis under the proposed amendment to Rule 3b-16 because they “are not specifically designed to bring together buyers and seller[s] of securities or provide procedures or parameters for buyers and sellers for securities to interact.”⁹

Symphony shares the view of other commenters that the term “communication protocol” is too broad and vague and could thus be inadvertently construed to capture certain features on technology platforms. The Company submits that a more specific definition of “communication protocol”, or potentially the use of a different term entirely, would help avoid uncertainty as to what entities are affected by the Proposal. Specifically, technology services providers such as Symphony that do not establish any protocols with respect to securities transactions, but rather provide modular and open software architecture whereby financial industry participants can communicate with each other should not be deemed to be acting as an “exchange”.

The Company agrees with the Commission’s suggestion in the Supplemental Release that the term “negotiation protocol” would better convey the Commission’s intent to regulate entities that establish and control platforms that utilize non-discretionary methods whereby market participants can negotiate and agree to the terms of a trade in securities.¹⁰ Symphony would also submit the term “transaction protocol” as another alternative. The Company would view either of these terms as more precise, and therefore more helpful for technology platforms as they continue to innovate in the financial services industry. Moving from the term “communication protocol” makes clearer the type of transaction-based activity the Proposal aim to capture.

Conclusion

Symphony does not believe it advances any public policy objective to designate a technology platform like ours as an alternative trading system. Our customers are highly regulated financial services market participants, registered with and regulated by a wide range of regulatory authorities with various types of recordkeeping and information sharing obligations. Having the same regulatory requirement imposed on technology platforms that do not actively set the rules

⁸ *Supra* note 6 at 15500.

⁹ *Supra* note 6 at Proposal at 15507-8.

¹⁰ *Supra* note 1 at 29460.

or protocols for interaction amongst market participants would only serve to stifle innovation for the financial services industry.

Symphony thanks the Commission for its continued commitment to open dialogue by reopening the comment period for the Proposal, and hope this submission is viewed as constructive.

Respectfully Submitted,

Corinna Mitchell

Corinna Mitchell
General Counsel
Symphony Communication Services, LLC