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

Via Email to rule-comments@sec.gov

Re: Comment Letter on Securities Exchange Act Release No. 90019 – Proposed Amendments to Regulation ATS for ATSS that Trade U.S. Government Securities, NMS Stock, and Other Securities; Regulation SCI for ATSS that Trade U.S. Treasury Securities and Agency Securities; and Concept Release on the Regulatory Framework for Electronic Platforms that Trade Corporate and Municipal Debt Securities (File No. S7-12-20)

Dear Ms. Countryman:

The Financial Industry Regulatory Authority, Inc. (“FINRA”) appreciates this opportunity to comment on the Securities and Exchange Commission’s (“Commission” or “SEC”) proposed amendments to Regulation ATS for ATSS that trade government securities (the “ATS-G Proposal”), as well as the Commission’s corresponding concept release on the electronic corporate bond and municipal securities markets (the “Concept Release”).¹

As detailed below, FINRA supports the ATS-G Proposal. In addition, FINRA believes the Concept Release is an important step to help the Commission determine what additional guidance or further regulatory changes would be most appropriate to modernize and harmonize the regulatory framework for fixed income trading platforms.

¹ See Securities Exchange Act Release No. 90019 (September 28, 2020), 85 FR 87106 (December 31, 2020) (“ATS-G Proposal” and “Concept Release”).

I. Support for the ATS-G Proposal

FINRA has consistently supported the Commission's previous measures to enhance oversight and transparency in the ATS marketplace.² Continuing this support, FINRA agrees with the Commission that the extension of Regulation ATS to include Currently Exempted Government Securities ATSS³ will help foster investor protection and market integrity by improving oversight of all Government Securities ATSS by the SEC and FINRA.⁴ FINRA also agrees with the Commission that the proposed public disclosure of the operational aspects of Government Securities ATSS could improve investors' ability to select trading venues and lower trading costs.⁵

As discussed in the ATS-G Proposal, FINRA plays an important role in the supervision of Government Securities ATSS. Nearly all Government Securities ATSS currently are FINRA members⁶ and therefore are subject to FINRA rules including

² See, e.g., Letter from Marcia Asquith, Senior Vice President and Corporate Secretary, FINRA, to Brent J. Fields, Secretary, SEC, dated February 26, 2016 (expressing support for the Commission's proposal to enhance regulation of NMS Stock ATSS).

³ As discussed in detail in the ATS-G Proposal, an ATS that limits its securities activities to government securities or repurchase and reverse repurchase agreements on government securities ("repos"), and registers as a broker-dealer or is a bank, is exempt from exchange registration and is not required to comply with Regulation ATS. The ATS-G Proposal refers to such ATSS as "Currently Exempted Government Securities ATSS." See ATS-G Proposal, *supra* note 1, at 87109-87110. Furthermore, ATSS that also trade other securities, such as corporate bonds or municipal securities, are not currently exempt from Regulation ATS because they do not limit their securities activity solely to government securities or repos; however, these ATSS are not subject to all of the provisions of Regulation ATS, such as the Fair Access Rule, and are not subject to Regulation Systems Compliance and Integrity. See *id.* at 87110.

⁴ See *id.* at 87186-87.

⁵ See *id.* at 87187-88.

⁶ As discussed in the ATS-G Proposal, Government Securities ATSS, if they are not currently exempt from Regulation ATS and choose to comply with Regulation ATS instead of registering as a national securities exchange, must register as a broker-dealer under Section 15 of the Exchange Act. In turn, broker-dealer registration requires membership in a self-regulatory organization ("SRO") such as FINRA. See *id.* at 87111. As further discussed in the ATS-G Proposal, nearly all Currently Exempted Government Securities ATSS are also already subject to broker-dealer registration requirements, see *id.* at 87162, and some of the ATSS eligible for the

transaction reporting requirements in U.S. Treasury Securities (“Treasuries”) and Agency Securities to FINRA’s Trade Reporting and Compliance Engine (“TRACE”).⁷ FINRA creates an audit trail from this information, and publishes weekly aggregated transaction information on Treasuries transactions and publicly disseminates transaction information about Agency Debt Securities immediately upon receipt.⁸ In addition to trade reporting obligations, the ATS-G Proposal highlights other aspects of SRO membership that the Commission believes are important for ATSS, including being subject to SRO examination and surveillance and investor protection rules.⁹

In light of its regulatory role in the markets for government securities, FINRA supports the Commission’s efforts to extend the regulatory framework to include all Government Securities ATSS, including those that currently are exempt from Regulation ATS and SRO membership requirements. The Commission notes, among other things, that this extension of the regulatory framework could improve transaction transparency, which would enhance the Commission’s and FINRA’s regulatory oversight of these markets and help protect investors.¹⁰ Since FINRA initiated its Treasuries reporting program, it has discussed the potential impacts of an incomplete Treasuries audit trail that is limited to transaction reports from FINRA’s members.¹¹ FINRA believes that the ATS-G Proposal,

exemption voluntarily comply with Regulation ATS, *see id.* at 87110 n.49.

However, the Commission estimates that there currently is one Currently Exempted Government Securities ATS that is bank-operated that would newly be subject to broker-dealer registration requirements under the ATS-G Proposal. *See id.* at 87162.

⁷ *See id.* at 87111.

⁸ *See id.*; *see also* FINRA Rule 6750(a) (providing generally for dissemination immediately upon receipt of transaction reports in TRACE-Eligible Securities, including Agency Debt Securities) and FINRA Rule 6750.01 (permitting the publication of weekly aggregated transaction information and statistics on Treasuries).

⁹ *See* ATS-G Proposal, *supra* note 1, at 87115 nn.108-10 (citing relevant FINRA rules).

¹⁰ *See id.* at 87187 (discussing the proposed extension of Regulation ATS to include bank-operated Currently Exempted Securities ATSS).

¹¹ *See* Securities Exchange Act Release No. 78359 (July 19, 2016), 81 FR 48465, 48471-72 (July 25, 2016) (Notice of Filing of File No. SR-FINRA-2016-027) (analyzing the potential impacts of FINRA’s proposal to begin collecting Treasuries transaction reports); Securities Exchange Act Release No. 83393 (June 7, 2018), 83 FR 27643 (June 13, 2018) (Notice of Filing of File No. SR-FINR-2018-023) (analyzing the potential impacts of a requirement for ATSS to identify non-FINRA

coupled with a recent request for comment published by the Board of Governors of the Federal Reserve System to implement transaction reporting requirements for certain non-FINRA member depository institutions,¹² will help mitigate those impacts and enhance the scope and utility of the Treasuries audit trail.¹³

In addition, given the evolving and increasingly important role of Government Securities ATSS discussed in the ATS-G Proposal, FINRA supports the Commission's efforts to improve transparency concerning the operations of Government Securities ATSS. As the Commission notes, the proposed Form ATS-G disclosures are similar to the enhanced disclosures required of NMS Stock ATSS on Form ATS-N, and they are substantially more detailed than the disclosures currently required on the traditional Form ATS. In addition, the proposed Form ATS-G disclosures, like the Form ATS-N disclosures, are categorized in a more standardized manner that allows better comparisons between ATSS. Accordingly, FINRA agrees that the ATS-G Proposal will, like ATS-N, enhance the SEC's and FINRA's regulatory oversight of Government Securities ATSS.¹⁴ FINRA also agrees that the public disclosure of Form ATS-G, like ATS-N, could help equalize information distribution among market participants, lower search costs, and assist market participants in selecting Government Securities ATSS for their orders, which the Commission notes could lower trading costs and improve order execution quality.¹⁵

members in TRACE reports for Treasuries transactions); *Regulatory Notice 20-43* (December 2020) (requesting comment on the anticipated impacts of potential enhancements to the Treasuries transaction information reported to TRACE).

¹² See Proposed Agency Information Collection Activities; Comment Request, Board of Governors of the Federal Reserve System, 86 FR 6329 (January 21, 2021) (FR 2956; OMB No. 7100-NEW).

¹³ The ATS-G Proposal acknowledges that the magnitude of benefits from expanding Regulation ATS to bank-operated Currently Exempted Government Securities ATSS is difficult to estimate because those ATSS are not currently subject to TRACE trade reporting requirements. See ATS-G Proposal, *supra* note 1, at 87187. However, even if these benefits are limited by the Commission's estimate that there is only one bank-operated Currently Exempted Government Securities ATS today, FINRA believes the ATS-G Proposal will also help maintain and promote the integrity of the Treasuries audit trail in the future to the extent it limits the opportunity for trades to be done on non-broker-dealer ATSS to avoid inclusion in the TRACE audit trail.

¹⁴ See ATS-G Proposal, *supra* note 1, at 87188.

¹⁵ See *id.*

II. Support for Concept Release and Further SEC Guidance to Help Harmonize the Regulatory Framework for Corporate Bond Trading Platforms

FINRA appreciates the Commission’s publication of the Concept Release and believes that it is a helpful step to considering potential changes to modernize and harmonize the regulatory framework for fixed income trading platforms. As noted in the Concept Release, a review of the regulatory framework for electronic corporate and municipal bond trading platforms was one of the early issues identified by the SEC’s Fixed Income Market Structure Advisory Committee (“FIMSAC”) in 2018.¹⁶ A core concern of the FIMSAC was its view that there is different regulatory treatment among electronic corporate and municipal bond trading platforms because some are regulated as ATSs while others are regulated as non-ATS broker-dealers, and others are not regulated at all.¹⁷ In particular, the FIMSAC observed that electronic Request for Quote (“RFQ”) platforms represent a large and growing fraction of electronic corporate and municipal bond trading but generally are regulated only as broker-dealers, not ATSs.¹⁸ The FIMSAC also stated that at least one fixed income trading platform with significant volume in municipal and corporate bond trading does not fall under any regulatory oversight in the United States.¹⁹

Subsequent recommendations by the FIMSAC built upon its strong recommendation of comparable regulation of competing platforms. In February 2020, the FIMSAC recommended that once there is a harmonized regulatory framework for all fixed income electronic trading platforms, FINRA should take steps to implement a TRACE flag for “electronic trades,” similar to the TRACE flag for trades executed on an ATS.²⁰ And on October 5, 2020, the FIMSAC recommended, among other things, that the SEC, in coordination with FINRA and the MSRB as appropriate, should clearly define “electronic trading” so that any new regulation or framework comprehensively covers the platforms

¹⁶ See Concept Release, *supra* note 1, at 87156-57.

¹⁷ See *id.*

¹⁸ See FIMSAC, Recommendation for the SEC to Review the Framework for the Oversight of Electronic Trading Platforms for Corporate and Municipal Bonds (July 16, 2018), <https://www.sec.gov/spotlight/fixed-income-advisory-committee/fimsac-electronic-trading-platforms-recommendation.pdf>.

¹⁹ See *id.*

²⁰ See FIMSAC, Recommendation Regarding Additional TRACE Reporting Indicators for Corporate Bond Trades (February 10, 2020), <https://www.sec.gov/spotlight/fixed-income-advisory-committee/fimsac-additional-trace-flags-recommendation.pdf>.

and trading functionality that the SEC intends to cover without reliance on the current ATS definition.²¹

FINRA agrees that there is inconsistent regulatory treatment among electronic and hybrid fixed income trading platforms, as well as potential regulatory gaps. As discussed by the FIMSAC, the current regulatory differences flow in part from the definitions and guidance adopted in 1998 in Regulation ATS, while there may also be regulatory gaps where a platform provides trading services without being subject to Regulation ATS or broker-dealer registration.²² FINRA welcomes the opportunity to further engage on these subjects with the Commission, other regulators, and market participants.

The application of a number of SEC requirements turn on whether a platform meets the SEC's definition of "exchange" under Exchange Act Rule 3b-16(a). For example, platforms that meet the "exchange" definition are subject to Regulation ATS if they choose not to register as national securities exchanges. Among other things, ATSS must register as a broker-dealer and maintain membership in an SRO, meet applicable fair access and capacity, integrity, and security requirements, and establish written safeguards and written procedures to protect subscribers' confidential trading information.²³

Similarly, a number of FINRA requirements apply to member firms that operate ATSS. In particular, a fixed income ATS is a "party to a transaction" in a TRACE-eligible security occurring through its system and has TRACE transaction reporting obligations, unless an exception or exemption applies.²⁴ ATSS are also required to obtain a unique market participant identifier ("MPID") for purposes of reporting trades to TRACE,²⁵ and since 2016, FINRA has disseminated TRACE transactions with an identifier to indicate

²¹ See FIMSAC, Recommendation Regarding Defining "Electronic Trading" For Regulatory Purposes (October 5, 2020), <https://www.sec.gov/spotlight/fixed-income-advisory-committee/fimsac-recommendation-definition-of-electronic-trading.pdf>.

²² FIMSAC, Recommendation for the SEC to Review the Framework for the Oversight of Electronic Trading Platforms for Corporate and Municipal Bonds, *supra* note 18.

²³ See Rule 301 of Regulation ATS, 17 CFR 242.301.

²⁴ See, e.g., *Regulatory Notice 16-15* (April 2016) (discussing the TRACE reporting exemption for fixed income ATSS in FINRA Rule 6732); see also *Regulatory Notice 14-53* (November 2014) (reminding ATSS of their TRACE reporting obligations as a "party to a transaction" under FINRA Rule 6710(e)).

²⁵ See FINRA Rule 6720(c).

when a reporting party or contra-party is an ATS or when a trade that is exempt pursuant to Rule 6732 is executed on an ATS.²⁶

FINRA has tried to acknowledge and, to the extent possible, address the issue of varying treatment for different platform models in the context of its own regulatory fixed income initiatives. For example, in 2019, FINRA requested comment on a proposal to enhance market transparency by publishing volume and trade count information for corporate and agency debt securities, categorized by individual security and ATS, similar to what FINRA has done for equity securities ATSs since 2014.²⁷ FINRA has also requested comment previously on a proposal to collect quotation information from fixed income ATSs for regulatory purposes.²⁸ Both requests for comment used the SEC's ATS classification as a first step towards achieving the proposed regulatory enhancements. However, both of those requests for comment also discussed the potential impacts of applying requirements to ATSs but not RFQ platforms, which account for a significant share of fixed income activity.

Ultimately, FINRA believes it is difficult to harmonize the application of its rules to fixed income trading platforms without updates to the ATS classification framework. In addition, given the Commission's broker-dealer interpretive role, and its supervisory role over the fixed income markets, FINRA believes the SEC should update trading platform classifications in the unified manner recommended by the FIMSAC. FINRA believes there are several steps the SEC could consider, and FINRA would be happy to participate in and support further SEC development of these and related issues.

First, the SEC could consider clarifying the classification of RFQ activity for purposes of Regulation ATS. Some market participants believe RFQ activity falls outside the definition of "exchange" activity, and therefore outside the scope of Regulation ATS.²⁹ However, the terms "RFQ" or "request for quote" are not specifically used in the examples provided in the Regulation ATS Adopting Release that seek to illustrate the types of systems that fall within or outside the "exchange" definition.³⁰ Given the prominent role

²⁶ See *Regulatory Notice 19-22* (July 2019).

²⁷ See *id.*

²⁸ See *Regulatory Notice 15-03* (February 2015).

²⁹ See, e.g. FIMSAC, Recommendation for the SEC to Review the Framework for the Oversight of Electronic Trading Platforms for Corporate and Municipal Bonds, *supra* note 18 (noting that "as a practical matter, electronic RFQ platforms for corporate and municipal bonds are excluded from Regulation ATS based on the characteristics of the RFQ trading protocol").

³⁰ FINRA understands that some market participants may view RFQ activity as non-ATS activity based on the discussion of "System N" in the Commission's 1998

that RFQ platforms have come to play in fixed income trading, FINRA believes it would be beneficial for the Commission to provide guidance that specifically addresses the characteristics of RFQ trading platforms and evaluates whether they meet the “exchange” definition for purposes of Regulation ATS. In addition, given the dramatic evolution of electronic RFQ protocols that has occurred since the Regulation ATS Adopting Release, Commission guidance could further address questions the FIMSAC has raised about the role that automation does or should play when classifying “exchange” activity in the fixed income markets.³¹

Second, the SEC could consider clarifying whether an ATS may voluntarily include non-ATS activity within the ATS. FINRA believes this is especially important if the Commission determines that RFQ activity does not qualify as “exchange” activity that

adopting release. The Commission described “System N” as a system that allows participants to post the names of securities they wish to buy or sell, with other participants able to view this “bids wanted list” or “offers wanted list” and place bids or offers for the specified securities during a defined auction period. System N was described further as allowing the participant who posted the security on the “bids wanted list” or “offers wanted list” to either accept or reject the best bid or offer at the close of the auction. The Commission concluded that System N is not included in the Rule 3b-16 definition of “exchange” because there is only one seller. *See* Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70855-56 (December 22, 1998) (“Regulation ATS Adopting Release”). Market participants may also view RFQ activity as non-ATS activity because they believe RFQ protocols do not involve established, non-discretionary methods for order interaction. *See, e.g.*, FIMSAC, Recommendation for the SEC to Review the Framework for the Oversight of Electronic Trading Platforms for Corporate and Municipal Bonds, *supra* note 18, at pg. 2 n.2 (discussing both the one seller rationale and the trading discretion rationale). In providing updated guidance, the Commission could consider clarifying the extent to which the System N example applies to RFQ activity. Further, if RFQ activity is excluded from the definition of “exchange” activity, the Commission could consider clarifying whether it is excluded because there is only one seller, because the system does not handle firm “orders,” because the trading discretion inherent in an RFQ protocol means the system does not use established, non-discretionary methods for order interaction, or for other reasons.

³¹ For example, FINRA notes that the Regulation ATS Adopting Release discussed how the definition of “exchange” activity “does not turn on automation,” and explained that non-automated systems may still meet the “exchange” definition while other automated systems may be excluded. *See* Regulation ATS Adopting Release, *supra* note 30, at 70849.

generally would be subject to Regulation ATS.³² As discussed by the FIMSAC and in prior FINRA requests for comment, some platforms may include RFQ activity within an ATS, while others may conduct RFQ activity separately outside of an ATS. Notably, for NMS Stock ATSS, and as proposed for Government Securities ATSS, the Commission may declare a Form ATS-N or ATS-G ineffective because an entity does not meet the definition of an NMS Stock ATS or Government Securities ATS.³³ When adopting this requirement for ATS-N, the Commission explained that “[t]he proper classification of an entity would clearly indicate to all market participants, as well as the Commission, the functions that entity performs and the regulatory framework and attendant obligations that attach to the entity.”³⁴ To address the same concerns about confusion regarding whether RFQ activity occurs within or outside an ATS, the Commission could consider applying similar definitional requirements when reviewing filings submitted on the traditional Form ATS. In other words, for platforms that file Form ATS instead of Form ATS-N or ATS-G, the Commission could consider limits so that ATSS include only activity that meets the ATS definition. Taking such an approach would have beneficial downstream impacts for FINRA rules, such as facilitating more accurate identification of the source of TRACE trading volume reported through an MPID assigned to an ATS.

Third, the SEC could consider clarifying the circumstances in which bulletin boards or electronic communication systems operate in a manner that warrants regulation as a non-ATS broker-dealer or as an ATS. Much of the foundational guidance on whether a bulletin board system meets the requirements for broker-dealer registration stems from the 1980s and 1990s,³⁵ and there has been significant market evolution since then. Among other things, the Commission might consider providing updated guidance, with examples, that identifies any determinative factor or mix of factors that require registration as a broker-dealer or constitute “exchange” activity. FINRA believes updated Commission guidance could help address the potential gap identified by the FIMSAC, which stated that at least

³² In this case, in addition to clarifying whether non-ATS RFQ activity may voluntarily be included in an ATS, FINRA believes it may be appropriate to consider whether a separate classification and related reporting framework should apply to non-ATS RFQ activity.

³³ See ATS-G Proposal, *supra* note 1, at 87121 n.166 (discussing both ATS-G and ATS-N filings).

³⁴ See Securities Exchange Act Release No. 83663 (July 18, 2018), 83 FR 38768, 38795 (August 7, 2018) (Regulation of NMS Stock Alternative Trading Systems Adopting Release).

³⁵ See Robert L.D. Colby, Lanny A. Schwartz & Zachary Zweihorn, What is a Broker-Dealer?, Chapter 2, at 2-41 to 2-42 (July 25, 2016) (collecting SEC no action letter guidance and identifying the factors considered in the no action letters).

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one significant system provides trading services that are similar to RFQ and ATS platforms without regulatory oversight.³⁶

FINRA believes that these steps reflect non-exhaustive examples of actions the Commission might consider to help clarify the current classification framework for fixed income trading platforms. While these steps alone may not address all of the concerns that have been raised by the FIMSAC and other market participants, FINRA believes they could promote substantial progress towards more harmonized regulatory treatment where appropriate across fixed income trading platforms.

III. Conclusion

FINRA thanks the Commission for its attention to FINRA's comments on the ATS-G Proposal and Concept Release and looks forward to continued engagement with the SEC and other regulators on these important regulatory matters. If you have any questions or would like to further discuss FINRA's views and comments, please contact Stephanie Dumont, Senior Vice President and Director of Capital Markets Policy, FINRA, at [REDACTED] or Alex Ellenberg, Associate General Counsel, FINRA, at [REDACTED].

Sincerely,



Marcia E. Asquith
Executive Vice President & Corporate Secretary

³⁶ See FIMSAC, Recommendation for the SEC to Review the Framework for the Oversight of Electronic Trading Platforms for Corporate and Municipal Bonds, *supra* note 18.