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SEC Adopts Significant Changes to Reg ATS: Part 2 of 2

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This article has been published in two parts. Part 1 was published in the December 2018 issue, and Part 2 is being published in this January 2019 issue. A modified version of the entire article may be accessed at <https://www.wilmerhale.com/en/insights/client-alerts/20180911-sec-adopts-significant-changes-to-regulation-ats>.

Form ATS-N Disclosures

Form ATS-N requires an authorized person to certify that the Form ATS-N is “current, true, and complete.” The Securities and Exchange Commission (SEC) clarified, however, that this would not prevent a broker-dealer from disclosing to subscribers and other market participants additional information not otherwise required by Form ATS-N—for example, by responding to a subscriber’s request for information.

In response to several comments on the general format of the proposed form ATS-N, the SEC standardized the form’s requests and added more “yes” or “no” questions (supplemented by narrative responses) to facilitate comparison of multiple platforms.

The following describes in detail the information requested on Form ATS-N.

Cover Page of Form ATS-N

The cover page of Form ATS-N requires entities to identify the type of filing¹ and to provide a brief narrative indicating the part and item number of the Form ATS-N that is the subject of the change and summarizing the change. Under Rule 304(b)(2)(iii), as discussed above, the SEC will make public the cover page of a filed Form ATS-N Material Amendment upon filing, and subsequently will make public the entirety of the Material Amendment following the expiration of the review period. To avoid any perception that the SEC is conducting a merit-based review of Form ATS-N disclosures, the cover page will include a legend indicating that the SEC has not passed upon the merits or accuracy of the disclosures in the filing.

Part I of Form ATS-N: Identifying Information

Part I of Form ATS-N requires certain registration and contact information for the NMS Stock ATS and its broker-dealer operator, including the primary and secondary (if any) physical street addresses of the NMS Stock ATS matching system. Part I also requires disclosure of the NMS Stock ATS’s website address, as well as copies or a URL

link to Schedule A (direct owners and executive officers) and Schedule B (indirect owners) of the broker-dealer operator's most recently-filed Form BD.

The SEC initially had proposed Exhibit 1 to Form ATS-N, which would have required a copy of any materials currently provided to subscribers or other persons related to the operations of the NMS Stock ATS or the disclosures on Form ATS-N. In response to comments expressing concern that disclosure of such materials would raise confidentiality or competitive concerns, the SEC determined not to adopt the proposed Exhibit 1 requirement.

Part II of Form ATS-N: ATS-Related Activities of the Broker-Dealer Operator and Affiliates

Part II of Form ATS-N is designed to inform subscribers and market participants about possible conflicts of interest for the broker-dealer operator and its affiliates, or the potential leakage of subscribers' confidential trading information. In this regard, Part II requires detailed information about the operation and activities of the NMS Stock ATS and its broker-dealer operator. For purposes of these disclosures, an "affiliate" is defined to mean "with respect to a specified Person, any Person that directly, or indirectly, controls, is under common control with, or is controlled by, the specified Person."²

Items 1 and 2: Broker-Dealer Operator and Affiliate Trading Activities on the NMS Stock ATS

Part II, Items 1 and 2 of Form ATS-N request certain information relating to the broker-dealer operator's business units and affiliates that can trade in the NMS Stock ATS. Set forth below are descriptions of each.

Part II, Item 1(a) requires the NMS Stock ATS to name and describe each type of business unit that enters or directs the entry of orders and trading interest (for example, quotes, conditional orders or indications of interest) into the ATS (for example, NMS

Stock ATS, type of trading desks, market maker, sales or client desk), to provide the applicable MPID for each business unit, and to list the capacity of its orders and trading interest (for example, principal, agency, riskless principal). Item 2(a) requires similar information with respect to each affiliate.

Items 1(b) and 2(b) ask whether the services that the NMS Stock ATS offers and provides to the business units/affiliates disclosed in Items 1(a) and 2(a) are the same for all subscribers. If not, the NMS Stock ATS must explain any differences in detail.

Items 1(c) and 2(c) ask whether any of those business units/affiliates have any formal or informal arrangements with the NMS Stock ATS to provide liquidity (for example, undertaking to buy or sell continuously, or to meet specified thresholds of trading or quoting activity). Items 1(d) and 2(d) ask whether orders and trading interest in the NMS Stock ATS may be routed to a trading center operated or controlled by the broker-dealer operator or affiliate.

Item 3: Order Interaction with Broker-Dealer Operator; Affiliates

Part II, Item 3 of Form ATS-N requests information about the interaction of orders between unaffiliated subscribers and the broker-dealer operator and its affiliates in the NMS Stock ATS. Items 3(a)–(b) require disclosure as to whether a subscriber can opt out of interacting with orders and trading interest of the broker-dealer operator or affiliate in the NMS Stock ATS. If so, the NMS Stock ATS must explain the opt-out process. Item 3(c) requires the NMS Stock ATS to disclose whether the terms and conditions of the opt-out processes for the broker-dealer operator and affiliates identified in 3(a)–(b) are the same for all subscribers. To the extent they are different, the form requires the NMS Stock ATS to identify and explain any differences.

Item 4: Arrangements with Trading Centers

Part II, Item 4(a) of Form ATS-N asks whether there are any formal or informal arrangements (for example, mutual, reciprocal or preferential access

arrangements) between the broker-dealer operator and an unaffiliated trading center to access the NMS Stock ATS services. If yes, the NMS Stock ATS must identify the trading center and the ATS services and provide a summary of the terms and conditions of the arrangement. Item 4(b) requests similar information with respect to affiliates' arrangements. This disclosure is intended to allow market participants to more readily evaluate potential conflicts of interest or sources of information leakage.

Item 5: Other Products and Services

Part II, Item 5 of Form ATS-N requires certain disclosures relating to products and services offered by the broker-dealer operator to subscribers of the NMS Stock ATS in connection with trading on the ATS, such as data feeds or algorithmic trading products. The SEC noted that the terms and conditions of such products and services might be of interest because of the way in which they could impact subscribers' access to or trading on the ATS. For example, a subscriber that purchases a service offered by the broker-dealer operator might be provided with more favorable terms (for example, fee discounts or access to a faster connection) as compared with a subscriber that does not purchase the service.³

Item 5(a) asks whether the broker-dealer operator offers to subscribers any products or services for the purpose of effecting transactions or submitting, disseminating, or displaying orders and trading interest in the NMS Stock ATS. Item 5(c) asks a similar question with respect to the broker-dealer operator's affiliates. Items 5(b) and (d) address any differences between the terms and conditions of the services or products among the broker-dealer operator, affiliates and unaffiliated subscribers.⁴

Item 6: Activities of Service Providers

Part II, Item 6(a) of Form ATS-N asks whether any shared employee (that is, an employee of the broker-dealer operator or its affiliates that services the operations of the NMS Stock ATS, and also services other business units of the broker-dealer

operator or any of its affiliates) has access to confidential trading information on the NMS Stock ATS. The question is designed to allow market participants to evaluate whether the use of shared employees poses a risk of information leakage or potential conflicts.

Item 6(b) asks the NMS Stock ATS to identify any service provider that supports the services or functionalities of the ATS, and to provide a summary of the role and responsibilities of that service provider. Items 6(c)–(d) require the NMS Stock ATS to disclose whether any service provider or its affiliates use the services of the NMS Stock ATS. If so, the ATS is required to identify those service providers, the ATS services used, and whether there is any difference in the services that the ATS offers to the service provider and those it offers to other subscribers.

In this regard, the SEC notes that market participants, when analyzing potential conflicts or information leakage on an ATS, “would find it very useful to understand whether potential counterparties with whom they are trading, and who also service the operation of the NMS Stock ATS, have access to different or unique ATS-related services.”⁵

Item 7: Protection of Confidential Trading Information

Part II, Item 7(a) of Form ATS-N asks the NMS Stock ATS to describe its written safeguards and procedures to protect the confidential trading information of subscribers to the NMS Stock ATS, including written standards governing employees of the ATS who trade for employees' accounts and written oversight procedures to ensure that the safeguards and procedures are implemented and followed. Protection of confidential information is necessary to protect “the advantages or purposes for which a subscriber may choose to send its orders to an ATS (for example, trade anonymously and/or to mitigate the impact of trading in large positions)” and to mitigate the risk that “the broker-dealer operator has invited subscribers to trade on its ATS and

may have abused that relationship to provide itself or its affiliates with a direct competitive advantage over that subscriber.”⁶

Items 7(b) and 7(c) ask whether a subscriber can consent to the disclosure of its confidential trading operation and whether the subscriber can withdraw that consent. If the NMS Stock ATS answers “yes” to either of those questions, it must then describe how and under what conditions the subscriber can consent or withdraw consent. Items 7(b) and 7(c) were modified from the proposed language to carve out “employees of the NMS Stock ATS who are operating the system or responsible for its compliance with applicable rules,” to whom confidential subscriber information must be provided in order for them to perform their jobs.⁷

Item 7(d) requires the NMS Stock ATS to summarize the roles and responsibilities of persons who have access to confidential trading information, what confidential trading information is accessible by them, and the basis for their access. As proposed, this question sought the identity and title of such persons. In response to commenter concerns about the disclosure of personally identifiable information, the SEC modified the question to seek only a summary of roles and responsibilities.⁸

Part III of Form ATS-N: Manner of ATS Operations

Part III of Form ATS-N provides disclosures about operational aspects of NMS Stock ATSs, including how subscribers’ orders and trading interest are handled, matched and executed on NMS Stock ATSs. Compared with the proposed form, the adopted form contains questions that are more specifically targeted and contains more “yes” or “no” questions, with the purpose of helping market participants more efficiently find and compare relevant information.⁹

Item 1: Types of ATS Subscribers

Part III, Item 1 of Form ATS-N seeks information about the types of entities that can subscribe

to the NMS Stock ATS. The adopted version lists checkboxes for 11 types of subscribers, such as retail investors, issuers and brokers, in order to standardize responses.¹⁰

Item 2: Eligibility for ATS Services

Part III, Item 2 of Form ATS-N asks about subscribers’ eligibility for services of the NMS Stock ATS. Item 2(a) asks whether subscribers must be registered as broker-dealers. Item 2(b) asks whether there are any other conditions that a subscriber must meet before accessing ATS services.¹¹ If the NMS Stock ATS selects “yes,” it must then summarize the conditions. Item 2(c) asks whether the conditions are the same for all subscribers. If not, the NMS Stock ATS must identify and describe any differences. Item 2(d) asks whether subscribers must enter into a written agreement to use the ATS’s services. The proposed form included questions about the terms and conditions of any such contractual agreements, which the SEC removed from the final form.¹²

Item 3: Exclusion from ATS Services

Part III, Item 3(a) of Form ATS-N asks whether the NMS Stock ATS can exclude, in whole or in part, a subscriber from the ATS’s service. If so, the NMS Stock ATS must provide a summary of the conditions for excluding a subscriber. Item 3(b) asks whether the conditions for exclusion, if any, are the same for all subscribers, and, if not, for the NMS Stock ATS to identify and explain any differences. In describing this section of the form, the SEC stressed that it was not changing the fair access provisions in Rule 301(b)(5) of Reg ATS.¹³ Rather, the SEC intends for the disclosures to put participants on notice of the types of activity that may cause them to be excluded from using the services of the NMS Stock ATSs.¹⁴

Item 4: Hours of Operations

Part III, Item 4 of Form ATS-N asks for the days and hours of operation of the NMS Stock ATS and whether the hours of operation are the same for all

subscribers and the broker-dealer operator. Unlike the proposed form, the final version seeks the times when orders or trading interest *can* be entered on the ATS, including outside of regular trading hours (rather than the proposed form's questions about when "pre-opening or after-hours trading occurs").¹⁵

Item 5: Means of Entry

Part III, Item 5 of Form ATS-N consolidates multiple questions' from the proposed form and, as finalized, seeks information about how orders and trading interest are entered into the NMS Stock ATS. Item 5(a) asks whether orders and trading interest can be entered directly and, if so, the protocol that can be used. Item 5(b) asks whether the protocols for entering orders and trading interest directly into the NMS Stock ATS are the same for all subscribers and the broker-dealer operator and, if not, for an explanation of any differences. Item 5(c) asks whether there are any other means for entering orders and trading interest into the NMS Stock ATS, such as a smart order router (SOR), algorithm, order management system or sales desk, and, if so, an NMS Stock ATS is required to identify and explain certain aspects of those other means, including the terms and conditions for entering orders or trading interest into the ATS. Item 5(d) asks whether the terms and conditions for indirectly entering orders into the ATS are the same for all subscribers and the broker-dealer operator and, if not, for an explanation of any differences.

In general, these disclosures are intended to inform "subscribers and market participants about the functionalities that its orders and trading interest pass through on their way to the ATS and help them assess any potential advantages that orders sent through the broker-dealer operator may have with respect to other subscribers on the NMS Stock ATS."¹⁶ For example, any relative differences in latency between the alternative ways of entering orders into the NMS Stock ATS should be disclosed in this section of the form.¹⁷ The SEC stated in the Adopting Release that these questions are not

intended to require disclosure of proprietary information about SORs and algorithms or of information that would put the broker-dealer operator of an NMS Stock ATS or its affiliates at a competitive disadvantage relative to other broker-dealers.¹⁸ For example, NMS Stock ATSs need not disclose routing tables or other information about how an SOR may route orders.¹⁹ This item is not limited specifically to functionalities of the NMS Stock ATS's broker-dealer operator; if, for example, an affiliate's SOR or algorithm is used to perform a key function of the NMS Stock ATS—to bring together orders for securities of multiple buyers and sellers using established nondiscretionary methods—it would be considered part of the NMS Stock ATS and must be identified in this section of the form.²⁰

Item 6: Connectivity and Co-location

Part III, Item 6 of Form ATS-N seeks information about connectivity and co-location, in particular about aspects of connecting to the NMS Stock ATS that may speed up or slow down the handling of orders. Item 6(a) asks whether the NMS Stock ATS offers co-location and related services and, if yes, requires a summary of the terms and conditions, including the speed and connection options offered.²¹ Item 6(b) asks whether the terms and conditions for co-location and related services are the same for all subscribers and the broker-dealer operator and, if not, requires a description of any differences. Item 6(c) asks whether the NMS Stock ATS offers any other means to increase the speed of communication with the ATS and, if so, requires an explanation of those means and a summary of the terms and conditions for use. Item 6(d) asks whether the terms and conditions for such other means of increasing the speed of communication with the ATS are the same for all subscribers and the broker-dealer operator and, if not, to identify and describe any differences. Item 6(e) asks whether the NMS Stock ATS offers any means to *reduce* the speed of communication with the ATS and, if so, requires an explanation of those means and a summary of the terms and

conditions for use. Item 6(f) asks whether the terms and conditions for the means of reducing the speed of communication with the ATS are the same for all subscribers and the broker-dealer operator and, if not, requires a description of any differences. The SEC noted that commenters indicated that “latency is an important feature of equity market trading, and market participants are interested in understanding the functionalities employed by NMS Stock ATSs to influence it.”²²

Item 7: Order Types and Attributes

Part III, Item 7 of Form ATS-N asks the NMS Stock ATS to identify and explain each order type offered by the NMS Stock ATS. Sub-parts (a)(i) through (a)(viii) identify the types of information that must be included in the explanation, including information about priority, conditions and time-in-force instructions, among other attributes of the order type. Item 7(b) asks whether the terms and conditions for each order type and attribute are the same for all subscribers and the broker-dealer operator and, if not, requires an explanation of any differences. This requires the NMS Stock ATS to disclose any differences in the order types made available to different subscribers and/or the broker-dealer operator, as well as differences in the order type’s attributes, if any.²³ The SEC is not requiring a specific format for disclosing order type information and invited NMS Stock ATSs to choose a format that best provides market participants with complete and comprehensible information, such as a table with relevant characteristics.²⁴

Item 8: Order Sizes

Part III, Item 8 of Form ATS-N asks, in Item 8(a), whether the NMS Stock ATS requires minimum or maximum sizes for orders or trading interest and, if so, requires specification of those requirements and any related handling procedures. Final Form ATS-N requires firms to include the maximum order size to “help market

participants understand[] the size requirements for trading on the ATS.”²⁵ Item 8(c) asks whether the NMS Stock ATS accepts or executes odd-lot orders and, if so, requires specification of any odd-lot order requirements and related handling procedures. Item 8(e) asks whether the NMS Stock ATS accepts or executes mixed-lot orders and, if so, requires specification of any mixed-lot order requirements and related handling procedures. Items 8(b), 8(d) and 8(f) ask whether the requirements and procedures identified in the other sub-parts are the same for all subscribers and the broker-dealer operator and, if not, requires a description of any differences.

Item 9: Conditional Orders and Indications of Interest

Part III, Item 9(a) of Form ATS-N asks whether the NMS Stock ATS sends or receives any messages indicating trading interest, such as indications of interest (IOIs), actionable IOIs or conditional orders. If yes, the NMS Stock ATS must identify and explain the use of those messages. The form provides a nonexhaustive list of the types of information that must be included in this explanation, such as what information is contained in the messages, how the message is transmitted and the conditions under which the message might result in an execution in the ATS. Item 9(b) asks whether the terms and conditions related to conditional orders and IOIs are the same for all subscribers and the broker-dealer operator and, if not, requires explanation of any differences. Relative to the proposed questions, the adopted Item 9(a) requires more detail about the types of information to be used to “explain the use of the messages,” including examples embedded in the question that can be used as a reference.²⁶ The SEC believes that disclosures regarding conditional orders and IOIs are “relevant to market participants when understanding what information about their orders are communicated to others and assessing potential information leakage.”²⁷

Item 10: Opening and Reopening

Part III, Item 10(a) of Form ATS-N asks the NMS Stock ATS to explain how it opens or reopens following a stoppage of trading, including when and how orders and trading interest are prioritized and executed and what order types are allowed. Item 10(c) asks how unexecuted orders and trading interest are handled at the beginning of regular trading hours or after trading resumes after a stoppage. Items 10(b) and 10(d) ask whether the processes and procedures responsive to Items 10(a) and 10(c) are the same for all subscribers and the broker-dealer operator, and, if not, requires explanation of any differences. Item 10(e) asks whether there are any differences in executions that occur pre-open, following a stoppage of trading during regular trading hours or during regular trading hours and, if yes, requires explanation of the differences. The information disclosed in response to Item 10 is intended to permit market participants to compare NMS Stock ATSs and national securities exchanges so that they can plan and execute their trading strategies during these opening time periods.²⁸

Item 11: Trading Services, Facilities and Rules

Part III, Item 11 of Form ATS-N seeks information about trading services, facilities and rules of the NMS Stock ATS. Item 11(a) seeks a summary of the structure of the NMS Stock ATS marketplace, such as whether it operates as a crossing system, auction market, limit order matching book or otherwise. It also asks the NMS Stock ATS to explain the means and facilities for bringing together the orders of multiple buyers and sellers on the NMS Stock ATS.²⁹ Item 11(b) asks whether the means and facilities identified in Item 11(a) are the same for all subscribers and the broker-dealer operator and, if not, requires a description of the differences. Item 11(c) asks the NMS Stock ATS to explain the established, nondiscretionary rules and procedures of the NMS Stock ATS.³⁰ It provides a number of examples of the types of information that must be disclosed, including priority rules, pricing methodologies, price

improvement functionality and how the NMS Stock ATS will handle execution errors.³¹ Item 11(d) asks whether the rules and procedures identified in Item 11(c) are the same for all subscribers and the broker-dealer operator and, if not, requires a description of the differences.

Item 12: Liquidity Providers

Part III, Item 12 of Form ATS-N asks whether there are any formal or informal arrangements with any subscribers or the broker-dealer operator to provide orders or trading interest to the NMS Stock ATS and, if so, requires a description of the arrangement. The form provides two examples of such arrangements: (i) an undertaking to buy or sell continuously, or (ii) an undertaking to meet specified thresholds of trading or quoting activity. Subscribers may be interested in this information because they may want to provide instructions that their orders only interact with agency orders (that is, not orders from a liquidity provider) or to become liquidity providers themselves.³²

Item 13: Segmentation; Notice

Part III, Item 13(a) of Form ATS-N asks whether orders and trading interest are segmented into categories, classifications, tiers or levels. The form provides a nonexhaustive list of the ways in which an NMS Stock ATS may segment orders—by type of participant, order size, duration, source or nature of trading activity. If orders are segmented, the NMS Stock ATS must explain the segmentation procedures, including, for example, a description of each of the categories of orders, and an explanation of how segmentation can affect order interaction. In response to commenter concerns that providing too much information about the categories could encourage gaming of the categories or require disclosure of confidential information, the SEC clarified that it seeks only a summary of the parameters for each segmented category; it does not require a detailed analysis of the parameters or how they are calculated or any quantitative analysis of the

parameters.³³ The SEC stated that to the extent orders are segmented outside the NMS Stock ATS (presumably by an affiliate or third party) and then sent to the NMS Stock ATS for handling, the functionality and/or entity doing the segmentation may be considered part of the NMS Stock ATS for purposes of this and other requests in Form ATS-N.³⁴

Item 13(b) asks whether the segmentation of orders is the same for all subscribers and the broker-dealer operator and, if not, for an explanation of any differences. Item 13(c) asks whether the NMS Stock ATS identifies orders or trading interest entered by a customer of a broker-dealer as a customer order. Item 13(d) asks whether the NMS Stock ATS discloses to any person the segmentation categories and, if so, requires additional information about those disclosures. Item 13(e) asks whether the disclosures discussed in Item 13(d) are the same for all subscribers and the broker-dealer operator. To the extent they are not the same, the form requires the NMS Stock ATS to identify and explain any differences.

Item 14: Counterparty Selection

Part III, Item 14 of Form ATS-N asks whether orders or trading interest can be designated to interact or not interact with certain other orders or trading interest in the NMS Stock ATS. If so, the NMS Stock ATS must explain the selection procedures and whether they are the same for all subscribers and the broker-dealer operator. If the selection procedures differ among subscribers or the broker-dealer operator, the NMS Stock ATS must identify and explain the differences.

Item 15: Display

Part III, Item 15(a) of Form ATS-N asks whether the NMS Stock ATS operates as an Electronic Communication Network. Item 15(b) asks whether subscriber orders and trading interest, whether directed to the NMS Stock ATS or resting in the NMS Stock ATS, are displayed either on the NMS Stock ATS or outside of the NMS Stock ATS. To address commenters' concerns, this

question excludes employees of the NMS Stock ATS in non-trading-related roles, that is, those employees operating the system. Additionally, in requesting disclosures related to order information and trading interest, the SEC clarified that it does not intend to require disclosures about aspects of market participants' commercial relationships with broker-dealer operators that do not pertain to the NMS Stock ATS and, as such, limited the disclosures to those of "subscriber orders and trading interest." If such subscriber orders or trading interest are displayed, the NMS Stock ATS must explain the display procedures.³⁵ Under Item 15(c), the NMS Stock ATS must state whether the aforementioned display procedures are the same for all subscribers and the broker-dealer operator. To the extent there is a difference in the display procedures, the NMS Stock ATS must explain those differences, including, for example, differences in the latencies associated with displaying such information due to a functionality of the ATS.

Part III, Item 15 does not require the NMS Stock ATS to identify natural persons to whom orders or trading interest may be displayed. As an alternative, the form requires the identification by functionality of the broker-dealer operator (for example, SOR) or the type of market participant (for example, institutional investor), or both.

Item 16: Routing

Part III, Item 16 of Form ATS-N asks whether orders and trading interest in the NMS Stock ATS can be routed outside of the NMS Stock ATS. The SEC clarified that this question is intended to capture only the routing of orders and trading interest by the broker-dealer operator that are routed to or resting in the NMS Stock ATS. If so, the form requires additional information on whether the NMS Stock ATS must obtain affirmative instructions from the subscriber prior to routing away the subscriber's orders or trading interest. If affirmative instructions are required, Item 16(b) requires a description of the affirmative instructions along

with an explanation of how the affirmative instruction is obtained. Alternatively, if such instruction is not required, Item 16(b) requires an explanation of when orders in the NMS Stock ATS may be routed away.

Part III, Item 16 does not require the disclosure of how routing is performed, nor must the NMS Stock ATS explain any differences in how trading interest is routed among subscribers.

Item 17: Closing

Part III, Item 17(a) of Form ATS-N asks whether there are any differences between how the NMS Stock ATS treats orders and trading interest during the close, as compared with regular trading hours. If so, Item 17(a) also requires an explanation of the differences as compared with the information provided in response to Part III of the form in connection with regular trading hours. This information would capture, for example, any special matching procedures (Item 11), different order types (Item 7) or segmentation (Item 13) used during the close. If the NMS Stock ATS treats orders and trading interest during the close differently among subscribers or the broker-dealer operator, the NMS Stock ATS must disclose these differences in response to Item 17(b).

Item 18: Trading Outside of Regular Trading Hours

Part III, Item 18(a) of Form ATS-N asks whether the NMS Stock ATS conducts trading outside of regular trading hours. If so, Item 18(b) requests information on whether there are any differences between trading during and outside of regular trading hours. To the extent there are differences, like Item 17, Item 18(b) requires an explanation of those differences as compared with the information provided in response to Part III. This could include, for example, any special matching procedures (Item 11), different order types (Item 7) or segmentation (Item 13) used outside of regular trading hours. Like Item 17(b), Item 18(c) requires disclosure of any

differences in treatment of orders and trading interest outside of regular trading hours among subscribers or the broker-dealer operator.

Item 19: Fees

Part III, Item 19(a) of Form ATS-N asks the NMS Stock ATS to identify and describe any fees or charges for the use of ATS services.³⁶ As an alternative to providing full fee schedules, the information provided in response to Item 19(a) should include the types of fees, the structure of the fees, any variables that impact the fees, any differentiation in fees among the types of subscribers and the range of the fees. Item 19(a) does not require customer-specific information regarding the fees or terms and conditions that result in the high or low end of the range of fees disclosed, nor does it require the identity or subscriber types in the highest or lowest fee range. Item 19(b) requires the NMS Stock ATS to identify and describe any bundled fees, including a summary of the bundled services and products offered by the broker-dealer operator or its affiliates, the structure of the fee, variables that impact the fee, differentiation among types of subscribers and the range of fees.³⁷ Item 19(c) requires the NMS Stock ATS to provide information on rebates and discounts applied to fees disclosed in Item 19(a) or (b), including the same information as in Item 19(a) (for example, structure, range).

Item 20: Suspension of Trading

Part III, Item 20(a) of Form ATS-N asks for an explanation of any procedures in place concerning suspended or stopped trading, including the suspension of trading of individual NMS stocks.³⁸ Item 20(b) asks whether such procedures and/or arrangements are the same for all subscribers and the broker-dealer operator. To the extent they are not the same, the form requires the NMS Stock ATS to identify and explain any differences.

Item 21: Trade Reporting

Part III, Item 21(a) of Form ATS-N asks for an explanation of any procedures and material

arrangements in place concerning the reporting of transactions executed on the NMS Stock ATS. This explanation should include information on where the transactions are reported and the circumstances under which the NMS Stock ATS makes the reports. Under Item 21(a), the NMS Stock ATS must disclose the SRO to which it reports transactions as well as any other alternative trade reporting destinations. Item 21(b) asks whether such procedures and/or arrangements are the same for all subscribers and the broker-dealer operator. To the extent they are different, the form requires the NMS Stock ATS to identify and explain any differences.

Item 22: Clearance and Settlement

Part III, Item 22(a) of Form ATS-N requires a description of any procedures and material arrangements undertaken to facilitate the clearance and settlement of transactions executed on the NMS Stock ATS. This description is designed to provide information on the measures the NMS Stock ATS takes related to clearance and settlement, including the process through which it clears a trade (for example, as a counterparty to the transaction or by submitting the trade to a registered clearing agency), and any requirements for subscribers to have arrangements with a clearing firm. Item 22(b) asks whether such procedures and/or arrangements are the same for all subscribers and the broker-dealer operator. To the extent they are different, the form requires the NMS Stock ATS to identify and explain any differences.

Item 23: Market Data

Part III, Item 23(a) of Form ATS-N requires the NMS Stock ATS to identify its sources of market data and to identify how the ATS uses such data. Item 23(a) does not request information about the broker-dealer operator's use of market data to route orders and trading interest from the NMS Stock ATS to other destinations. Item 23(a) would, however, require information on (i) the ATS's use of market data to determine when resting orders and trading interest will be removed from inside the NMS Stock

ATS; (ii) how the ATS uses market data to provide the services it offers, including to display, price, prioritize, execute and remove trading interest; (iii) when the ATS may switch between different sources of market data to provide its services; and (iv) how market data is received, compiled and delivered to the matching engine. Item 23(b) asks whether such sources and uses of market data are the same for all subscribers and the broker-dealer operator. To the extent they are different, the form requires the NMS Stock ATS to identify and explain any differences.

Item 24: Order Display and Execution Access

Part III, Item 24(a) of Form ATS-N asks whether the NMS Stock ATS (i) displayed subscriber orders to a person, other than employees of the ATS; and (ii) had an average daily share volume of 5 percent or more in an NMS stock, as reported or disseminated,³⁹ during four of the preceding six months.⁴⁰ Separately, Item 24(b) asks whether the NMS Stock ATS is required to comply with Reg ATS Rule 301(b)(3)(ii) and, if so, the NMS Stock ATS must provide additional information on the relevant NMS stocks and how the NMS Stock ATS displays the relevant orders and provides access to those orders.⁴¹ In response to comments, the SEC clarified that this item would serve to inform the SEC and the public whether the NMS Stock ATS is subject to the display requirements of Rule 301(b)(3), and that NMS Stock ATSs are only required to provide the information requested in subpart (b) if the ATS is subject to Reg ATS Rule 301(b)(3)(ii) and (iii).

Item 25: Fair Access

Part III, Item 25(a) of Form ATS-N asks whether the NMS Stock ATS executed an average daily trading volume of 5 percent or more in an NMS stock, as reported or disseminated,⁴² during four of the preceding six months.⁴³ Separately, Item 25(b) asks whether the NMS Stock ATS is required to comply with Reg ATS Rule 301(5)(ii) and, if so, the NMS Stock ATS must provide additional information on

the relevant NMS stocks and how the NMS Stock ATS grants trading access.⁴⁴ In response to comments, the SEC clarified that this item, similar to Item 24, would serve to inform the SEC and the public whether the NMS Stock ATS is subject to the fair access requirements of Rule 301(b)(5) and that NMS Stock ATSs are only required to provide the information requested in subpart (b) if the ATS is subject to Reg ATS Rule 301(b)(5)(ii).

Item 26: Aggregate Platform Data

Part III, Item 26 of Form ATS-N asks whether the NMS Stock ATS publishes or provides aggregate platform-wide order flow and execution statistics, different from the data required under SEC Rule 605, to one or more subscribers. If so, the NMS Stock ATS must provide such data as Exhibit 4 and an explanation of the statistical categories or metrics as Exhibit 5. The NMS Stock ATS may, alternatively, certify that the relevant data and/or explanations are available on a previously disclosed website and accurate as of the date of the filing.

The SEC clarified that under Item 26, an ATS is not required (1) to provide individualized data or custom reports concerning specific clients' usage of the ATS, (2) to provide trade-specific data that does not include aggregate platform-wide information, (3) to provide customer communications associated with responsive statistics, or (4) to file a Form ATS-N Updating Amendment each time it receives a request for statistics from a client.

Conclusion

The amendments to Reg ATS will significantly enhance the information available to market participants and the SEC regarding the operations of NMS Stock ATSs and their broker-dealer operators (and affiliates). The amendments also take steps toward leveling the regulatory playing field between national securities exchanges and NMS Stock ATSs. The requirement to file and maintain Form ATS-N substantially increases the obligations of NMS Stock ATSs and their broker-dealer operators. Market

participants that sponsor or utilize the services of NMS Stock ATSs should consider the potential impact of these amendments on their respective businesses.

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NOTES

- ¹ Consistent with Rule 304(a), the types of filings include Initial Form ATS-N, Material Amendment, Updating Amendment, Correcting Amendment, and Order Display and Fair Access Amendment.
- ² *Regulation of NMS Stock Alternative Trading Systems*, Exchange Act Release No. 83663 (July 18, 2018), 83 Fed. Reg. 38,768, 38,818 (Aug. 7, 2018) (Adopting Release), available at <https://www.gpo.gov/fdsys/prg/FR-2018-08-07/pdf/2018-15896.pdf>. The term "control" is defined to mean "the power, directly or indirectly, to direct the management or policies of the broker-dealer of an alternative trading system, whether through the ownership of securities, by contract, or otherwise. A Person is presumed to control the broker-dealer of an alternative trading system, if that Person (1) is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); (2) directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities of the broker-dealer of the alternative trading system; or (3) in the case of a partnership, has contributed, or has the right to receive, upon dissolution, 25 percent or more of the capital of the broker-dealer of the alternative trading system."

³ *Id.* at 38,832, n.779.

⁴ For example, the SEC notes that “if a broker-dealer operator offers subscribers alternative algorithms to handle orders, including sending such order to the NMS Stock ATS, and there is a difference in the speed or latency in which each of the alternatives transmits information, such differences in speed or latency would need to be disclosed in Part II, Item 5.” *Id.* at 38,833 n.786.

⁵ *Id.* at 38,835.

⁶ *Id.* at 38,836.

⁷ *Id.* at 38,837.

⁸ *Id.*

⁹ *Id.* at 38,838.

¹⁰ *Id.* at 38,839.

¹¹ The word “conditions” and the language “before accessing the ATS services” were clarifications made in response to commenters who found the proposed language confusing (which used the word “requirements” instead of “conditions” and did not have language about timing). *Id.*

¹² *Id.* at 38,840.

¹³ *Id.* at 38,840–41.

¹⁴ *Id.*

¹⁵ *Id.* at 38,842.

¹⁶ *Id.*

¹⁷ *Id.* at 38,843 & n.879.

¹⁸ *Id.* at 38,843. The SEC accordingly replaced language from the proposed form that would have required more detailed disclosures (“[d]escribe the interaction and coordination”) with a higher-level request (“list and provide a summary description”). *Id.*

¹⁹ *Id.* The NMS Stock ATS would disclose “whether the broker-dealer operator’s SOR is a means for entering client orders and, if so, indicate whether these means are provided by the broker-dealer operator, either by itself or through a third-party contracting with the broker-dealer operator, or through an affiliate of the broker-dealer operator, and list and provide a summary of the terms and conditions for entering orders or trading interest into the ATS through these means.” *Id.* at 38,843 n.876.

²⁰ *Id.* at 38,843–44 & n.889.

²¹ “[F]actors such as the distance of the customer servers from the matching engine, or the use or non-use of ‘coiling’ to its matching engine to equal connection speeds among subscribers” would be required to be disclosed under this item. *Id.* at 38,846.

²² *Id.* at 38,845.

²³ *Id.* at 38,846.

²⁴ *Id.*

²⁵ *Id.* at 38,847.

²⁶ *Id.* at 38,847–48.

²⁷ *Id.* at 38,848.

²⁸ *Id.*

²⁹ *See also* Rule 3b-16(a)(1).

³⁰ These disclosures will help the SEC assess compliance with Exchange Act Rule 3b-16 and, therefore, the definition of an NMS Stock ATS. Adopting Release, *supra* n.2, at 38,850; *see also* Rule 3b-16(a)(2).

³¹ Examples of the types of information to be disclosed in response to this item are as follows: whether the ATS offers price-time priority to match orders (and any exceptions), whether the ATS uses midpoint-only matching with time priority, whether certain classes of subscribers or sources of orders get different priority, and whether conditional orders and other order types have different priority rules. Adopting Release, *supra* n.2, at 38,849–50. Additionally, the NMS Stock ATS’s method of compliance with SEC initiatives, such as the Tick Size Pilot, should be described. *Id.* at 38,850. The NMS Stock ATS is *not* required to disclose antigaming technology and subscriber-related safeguards out of concern that making such information publicly available could make evading such technology and safeguards easier. *Id.*

³² *Id.* at 38,851.

³³ *Id.* at 38,852.

³⁴ *Id.* at 38,853 n.971.

³⁵ Any explanation of the display procedures should include how and when subscriber orders and trading interest are displayed; how long orders and trading interest are displayed; what information about orders and trading interest is displayed (*e.g.*, the exact

content of the information, such as symbol, price, size, attribution or any other information made known); the functionality of the broker-dealer operator and types of market participants that receive the displayed information; and the circumstances under which the ATS might send such information. *Id.* at 38,854, 38,928.

³⁶ This fee information must include fees resulting from the use of ATS services charged by the broker-dealer operator or a third party (*e.g.*, a service provider to the NMS Stock ATS). This does not extend to fees charged by service providers (with no contractual agreement with the NMS Stock ATS) for non-ATS services.

³⁷ If a broker-dealer operator bundles its services with its NMS Stock ATS services and does not charge an explicit fee for the ATS services, a range of fees charged for the bundled services would not be required. If, however, the broker-dealer operator charges an explicit fee for the ATS services, such fee should be factored into the range of fees for the bundled services. Similarly, if the broker-dealer operator occasionally bundles its services and includes the ATS services for certain subscribers, but otherwise charges a separate fee for ATS services, the broker-dealer operator would be required to provide information in response to Item 19(b), including the range for the separate fee for ATS service.

³⁸ This item of the form is intended to provide information on, among other things, whether an NMS Stock ATS “will continue to accept orders after a suspension, whether the NMS Stock ATS routes, holds, or continues to execute orders resting in the system prior to the suspension, and the type of notice provided to market participants during a suspension.” Adopting Release, *supra* n.2, at 38,858–59.

³⁹ As reported by an effective transaction reporting plan or disseminated through an automated quotation system.

⁴⁰ See Rule 301(b)(3)(i).

⁴¹ In particular, the NMS Stock ATS must (1) provide the ticker symbol for each NMS stock displayed during each of the last six months, (2) explain how it displays the orders in the relevant securities on a national securities exchange or through a national securities association, and (3) explain how it provides access to such orders.

⁴² As reported by an effective transaction reporting plan or disseminated through an automated quotation system.

⁴³ See Rule 301(b)(3)(i).

⁴⁴ In particular, the NMS Stock ATS must (1) provide the ticker symbol for each NMS stock during each of the last six months and (2) describe the written standards for granting access to trading on the ATS pursuant to Reg ATS Rule 301(b)(5)(ii)(A).

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