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Securities Alert

SEC Adopts Significant Changes to Reg ATS

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On July 18, 2018, the Securities and Exchange Commission (SEC or Commission) voted unanimously to adopt significant amendments to Regulation ATS (Reg ATS).¹ The amendments, which impose heightened public disclosure requirements on alternative trading systems (ATSs) that trade national market system stocks (NMS Stock ATSs), are designed to enhance operational transparency, expand the Commission's oversight and limit potential conflicts of interest relating to these trading venues.

Under the amended rules, NMS Stock ATSs must comply with the heightened disclosure requirements of new Form ATS-N starting January 7, 2019. All NMS Stock ATSs currently operating under a previously filed Form ATS must file a Form ATS-N by February 8, 2019, but no earlier than January 7, 2019. The approaching effective date may pose challenges for certain NMS Stock ATSs in light of the work required.

I. Executive Summary

The recently adopted amendments to Reg ATS and newly adopted Form ATS-N will impose significantly greater regulatory obligations on NMS Stock ATSs. Key changes include the following:

- NMS Stock ATSs must file a Form ATS-N.
- Form ATS-N must be reviewed by the Commission, and becomes effective either through the lapse of a set period of time without Commission action or through affirmative Commission publication of the Form ATS-N, if earlier. This is a significant difference from the notice filing requirement for ATSs under the prior version of Reg ATS.
- In determining whether it is “necessary or appropriate in the public interest, and is consistent with the protection of investors” to declare a Form ATS-N ineffective, the Commission's review will focus on “the completeness and comprehensibility of the Form ATS-N disclosures and [will] not include a review of the merits of the disclosures or whether such trading functionalities meet industry norms.”
- The Commission will review a Form ATS-N amendment for ineffectiveness using the same standard used for its review of an initial Form ATS-N—it will not weigh the merits of a change but will instead focus on the completeness and comprehensibility of the disclosures themselves. Amendments become effective 30 days after filing unless declared ineffective by the Commission.

¹ Regulation of NMS Stock Alternative Trading Systems, Exchange Act Release No. 83663 (July 18, 2018), 83 Fed. Reg. 38,768 (Aug. 7, 2018) (“Adopting Release”), available at <https://www.gpo.gov/fdsys/pkg/FR-2018-08-07/pdf/2018-15896.pdf>.

- 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. It requires detailed discussions about the interaction of orders with an NMS Stock ATS operator and its affiliates, arrangements between an NMS Stock ATS operator and unaffiliated trading centers to access an NMS Stock ATS or its services, products and services offered to subscribers, and the activities of NMS Stock ATS service providers.
- Part III of Form ATS-N substantially enhances disclosures required with respect to the manner of operation of an NMS Stock ATS. Such disclosures include, for example, information related to the types of subscribers, eligibility for and exclusions from ATS services, means of order entry, connectivity and co-location, order types and sizes, conditional orders and indications of interest, liquidity providers, order segmentation, counterparty restrictions, fair access, and market data.
- Among other NMS Stock ATS filings, the Commission will make initial and amended Forms ATS-N public by posting them on its website (via EDGAR).

Each of these topics is discussed in more detail below.

II. Background

Originally adopted in 1998, Reg ATS established a new regulatory framework allowing then-fledgling trading systems that met the definition of an "exchange" but did not regulate the activities of their users as a general matter to choose to be regulated as broker-dealers subject to the new regulatory scheme rather than as national securities exchanges.² Over the past two decades, the equity markets and the significance of ATSs have evolved dramatically, and, driven by advances in technology, ATS operations have grown increasingly complex. Nevertheless, as the Commission noted when it proposed these amendments in 2015, the regulatory requirements applicable to ATSs generally have remained the same.³

The Proposing Release set forth an enhanced regulatory and oversight framework for these venues. Specifically, the SEC proposed to:

- Adopt Form ATS-N, requiring detailed disclosures about the manner of operation of an NMS Stock ATS, the broker-dealer operator of the NMS Stock ATS, and the activities of such broker-dealer operator and its affiliates in connection with the NMS Stock ATS;
- Make Form ATS-N publicly available on the websites of the SEC and the NMS Stock ATS;
- Establish a process for the Commission to review Form ATS-N filings, and to declare such filings effective or ineffective; and
- Require that all ATSs adopt and maintain written safeguards and procedures to protect subscribers' confidential trading information.

The Commission received 32 comment letters on the Proposing Release from industry trade associations, ATSs, broker-dealers, exchanges, institutional investors and other market participants on a broad range of topics. Some commenters expressed concerns regarding the scope of the required disclosures, while others urged the Commission to adopt additional disclosure items. Several commenters urged the Commission to provide more clarity and guidance regarding how it would evaluate Form ATS-N filings and amendments. Some commenters encouraged the Commission to extend proposed Rule 304, including Form ATS-N, to include fixed income ATSs.

² Regulation of Exchanges and Alternative Trading Systems, Exchange Act Release No. 40760 (Dec. 8, 1998), 63 Fed. Reg. 70,844 (Dec. 22, 1998), available at <https://www.gpo.gov/fdsys/pkg/FR-1998-12-22/pdf/98-33299.pdf>.

³ Regulation of NMS Stock Alternative Trading Systems, Exchange Act Release No. 76474 (Nov. 18, 2015), 80 Fed. Reg. 80,998 (Dec. 28, 2015) ("Proposing Release"), available at <https://www.gpo.gov/fdsys/pkg/FR-2015-12-28/pdf/2015-29890.pdf>.

Ultimately, the Commission adopted a rule very similar to the one described in the Proposing Release. In response to the submitted comments and concerns, the Commission:

- Eliminated the requirement that it affirmatively declare Forms ATS-N to be effective;
- Revised questions on Form ATS-N to add more “yes” or “no” prompts and more tailored, direct questions in an attempt to simplify the form and clarify expectations as to the types of expected answers;
- Removed certain questions from Form ATS-N that would have required disclosure of commercially sensitive information; and
- Clarified the process for NMS Stock ATSs to amend Form ATS-N.

Set forth below is a detailed description of the amendments.

III. Amendments to Reg ATS and Rule 3a1-1

The SEC amended or added the following rules to implement the Form ATS-N filing and review processes: (i) Rule 3a1-1(a), exempting entities, now including NMS Stock ATSs, that meet certain conditions from the definition of “exchange” under the Securities Exchange Act of 1934 (the Exchange Act) and the corresponding registration requirements; (ii) Rule 300(k) of Reg ATS, defining NMS Stock ATS; (iii) Rule 301(a)(5), regarding exemptions from compliance with Reg ATS; (iv) Rule 301(b)(2), regarding the filing of Forms ATS; (v) Rule 301(b)(9), regarding the filing of Forms ATS-R; (vi) Rule 303, regarding ATS recordkeeping requirements; and (vii) Rule 304, regarding the filing of, and effectiveness review for, Form ATS-N.⁴

A. Amended Exchange Act Rule 3a1-1(a) and Reg ATS, Rule 300—Definition of NMS Stock ATS, Exemption From Exchange Registration for NMS Stock ATSs

Rule 300(k) of Reg ATS was adopted to define an NMS Stock ATS as an ATS⁵ “that trades NMS stocks.”⁶ Under Section 5 of the Exchange Act, an entity that meets the definition of “exchange” under Section 3(a)(1) is generally required to register as an exchange. However, Rule 3a1-1(a) historically exempted from the definition of “exchange,” and therefore from the exchange registration requirements, any system that is (i) operated by a national securities association, (ii) in compliance with Rules 300 to 303 of Reg ATS or (iii) not required to comply with Rules 300 to 303 of Reg ATS pursuant to Rule 301(a) of Reg ATS.⁷

The SEC amended Rule 3a1-1(a)(2)–(3) to refer to new Rule 304 of Reg ATS instead of Rule 303. Accordingly, for an ATS to be exempt from the definition of “exchange” and the corresponding registration requirements, it must comply with Rules 300 to 304 of Reg ATS or not be required to comply with those rules pursuant to Rule 301(a).

⁴ The SEC also made unrelated changes to Rule 301(b)(10) that require an ATS’s procedures and safeguards to protect subscribers’ confidential trading information and its related oversight procedures—which were already required under existing Reg ATS—to be reduced to writing. Adopting Release, *supra* note 1, at 38,863–64. The new or modified Rules 300 to 304 will be codified with the existing provisions of Reg ATS at Title 17, Sections 242.300-304 of the Code of Federal Regulations.

⁵ Rule 300(a) of Reg ATS defines an “alternative trading system” generally as a system that brings together purchasers and sellers of securities (or otherwise performs the functions of a stock exchange) that does not also act as a self-regulatory organization.

⁶ For purposes of Reg ATS, “NMS stocks” generally include all exchange traded securities other than debt and convertible debt securities. See Reg ATS Rule 300(g).

⁷ Generally, Rule 301(a) provides that certain ATSs that are subject to other appropriate regulations are not required to comply with Regulation ATS. Specifically, an ATS is exempt if it is registered as a national securities exchange; is exempt from national securities exchange registration based on the limited volume of transactions effected; is operated by a national securities association; is registered as a broker-dealer under Sections 15(b) or 15C of the Exchange Act or is a bank, and limits its activities to certain instruments; or is exempted by Commission order after application by such ATS.

Collectively, these Rules impose enhanced disclosure requirements for ATs that trade NMS stocks,⁸ which the SEC believes will promote efficient and effective markets.⁹ The enhanced disclosures are designed to (i) help brokers satisfy best execution obligations to customers by providing more information with which to assess trading venues;¹⁰ (ii) help all market participants make more informed decisions about how to achieve trading and investment objectives, enhance execution quality, and improve efficiency and capital allocation;¹¹ and (iii) equalize the availability of information about NMS Stock ATs relative to national securities exchanges.¹² In approving these amendments, the Commission noted that “[n]early all commenters agree with our stated goal of enhancing operational transparency for NMS Stock ATs.”¹³

B. New Rule 304(a)(1) of Reg ATs—Filing and Commission Review of Initial Form ATs-N

New Rule 304(a)(1) sets forth the process by which Form ATs-N will be filed, reviewed by the Commission, and either become effective (such that the NMS Stock ATs may operate pursuant to the Rule 3a1-1(a) exemption from exchange registration) or be declared ineffective (such that the NMS Stock ATs may not operate pursuant to the exemption and must refile a new Form ATs-N or register as a national securities exchange or seek another exemption to exchange registration).

1. Form ATs-N Filing Process and Commission Review Period for New NMS Stock ATs

For NMS Stock ATs that seek to begin operating after January 7, 2019 (new NMS Stock ATs), Rule 304(a)(1)(i) requires filing with the Commission an initial Form ATs-N and for that Form ATs-N to become “effective.” Only after the Form ATs-N becomes effective may the new NMS Stock ATs begin operating.¹⁴

NMS Stock ATs must file Form ATs-N—including amendments to Form ATs-N as described below—via EDGAR.¹⁵ Once an NMS Stock ATs has filed its initial Form ATs-N, the Commission has 120 days from the date of filing to complete its review.¹⁶ The Commission may extend the review period (i) by 90 days, upon written notice by the Commission to the NMS Stock ATs, in the case of a Form ATs-N that “is unusually lengthy or raises novel or complex issues that require additional time for review”¹⁷ or (ii) for any period of time to which an authorized representative of the NMS Stock ATs agrees in writing.¹⁸

An initial Form ATs-N becomes effective upon the earlier of (i) the completion of the SEC’s review and publication of Form ATs-N¹⁹ or (ii) the expiration of the review period (including any extensions, if applicable).²⁰ The Proposing Release contemplated the Commission being required to declare effective or ineffective an initial Form ATs-N after the applicable review period. As adopted, however, the Commission is not required to declare a Form ATs-N effective. As long as the Form ATs-N is not declared ineffective during the review period, the Form ATs-N automatically becomes effective at the expiration of the review period or the SEC can publish the Form ATs-N early if it completes its review before the expiration of the review period.²¹

⁸ The SEC acknowledged receipt of comments supporting extending the new requirements to all ATs; to ATs that trade fixed income securities, including government securities; and/or to broker-dealers that internalize order flow. Ultimately, the Commission determined to apply the new rules only to NMS Stock ATs and to monitor the implementation of the rules and pursue expansion to other types of ATs through a separate rulemaking process, if at all. See Adopting Release, *supra* note 1, at 38,783.

⁹ See *id.* at 38,780.

¹⁰ See *id.* at 38,778.

¹¹ See *id.*

¹² See *id.* at 38,781.

¹³ *Id.* at 38,777 n.108 and accompanying text.

¹⁴ See *id.* at 38,786.

¹⁵ See *id.* at 38,786 n.249.

¹⁶ See *id.* at 38,911 (to be codified at 17 CFR § 242.304(a)(1)(ii)). References to the adopted rules hereinafter will be referred to by the rule numbers they will have once codified, e.g., Rule 304(a)(1)(ii).

¹⁷ See Rule 304(a)(1)(ii)(A)(1).

¹⁸ See Rule 304(a)(1)(ii)(A)(2).

¹⁹ See Rule 304(a)(1)(iii)(A)(1).

²⁰ See Rule 304(a)(1)(iii)(A)(2).

²¹ See Adopting Release, *supra* note 1, at 38,790.

The Commission, by order, will declare a Form ATS-N ineffective “if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors.”²² The standard by which the Commission conducts its review for ineffectiveness is described *infra* Section III.B.3.

2. Form ATS-N Filing Process and Commission Review Period for Legacy NMS Stock ATSS

Under Rule 301(b)(2)(viii), a Legacy NMS Stock ATS is an NMS Stock ATS “that is operating pursuant to an initial operation report on Form ATS on file with the Commission as of January 7, 2019.” Rule 304(a)(1)(iv)(A) requires Legacy NMS Stock ATSS to file an initial form ATS-N between January 7, 2019, and February 8, 2019 (inclusive). Unlike a new NMS Stock ATS, a Legacy NMS Stock ATS will operate pursuant to the Rule 3a1-1(a) exemption on a provisional basis pursuant to its filed initial Form ATS-N, which supersedes and replaces the entity’s previously filed Form ATS.²³

Once a Legacy NMS Stock ATS has filed its initial Form ATS-N, the Commission has 120 days from the date of filing to review it.²⁴ As is the case for new NMS Stock ATSS, the Commission has the ability to extend the review period. The Commission may extend the review period (i) by 120 days (as compared with the 90-day period for new NMS Stock ATSS), upon written notice by the Commission to the NMS Stock ATS, in the case of a Form ATS-N that “is unusually lengthy or raises novel or complex issues that require additional time for review”²⁵ or (ii) for any period of time to which an authorized representative of the NMS Stock ATS agrees in writing.²⁶

As is the case for new NMS Stock ATSS, an initial Form ATS-N filed by a Legacy NMS Stock ATS is effective as of the earlier of (i) the completion of review by the Commission and publication of Form ATS-N²⁷ or (ii) the expiration of the review period (including any extensions, if applicable).²⁸

The same procedure (notice and opportunity for hearing) and standard (“necessary or appropriate in the public interest, and is consistent with the protection of investors”) as used to declare ineffective Forms ATS-N of new NMS Stock ATSS will apply to Forms ATS-N of Legacy NMS Stock ATSS.²⁹ If the Commission declares the Form ATS-N ineffective, the Legacy NMS Stock ATS would be ineligible for the Rule 3a1-1(a) exemption and would be required to cease operations.³⁰

3. Standard for Commission Review for Ineffectiveness of Form ATS-N

In determining whether it is “necessary or appropriate in the public interest, and is consistent with the protection of investors” to declare a Form ATS-N ineffective, the Commission’s review will focus on “the completeness and comprehensibility of the Form ATS-N disclosures and [will] not include a review of the merits of the disclosures or whether such trading functionalities meet industry norms.”³¹

The Adopting Release provides three examples that would result in the Commission declaring a Form ATS-N ineffective, after notice and opportunity for hearing:³²

²² Rule 304(a)(1)(iii)(B).

²³ This process was modified from the proposed rule, under which the NMS Stock ATS would have operated pursuant to its previously filed Form ATS until the Commission completed its review of the entity’s initial Form ATS-N. This proposal would have required a firm to keep up to date both its Form ATS and its Form ATS-N during the Commission’s review period, which would have been burdensome. See Adopting Release, *supra* note 1, at 38,798–99. The adopted Rule “is designed to facilitate an orderly transition for Legacy NMS Stock ATSS from the Form ATS regime to the Form ATS-N regime while at the same time requiring an appropriate level of disclosure by NMS Stock ATSS.” See *id.* at 38,799.

²⁴ See Rule 304(a)(1)(iv)(B).

²⁵ See Rule 304(a)(1)(iv)(B)(1).

²⁶ See Rule 304(a)(1)(iv)(B)(2).

²⁷ See Rule 304(a)(1)(iv)(A)(1).

²⁸ See Rule 304(a)(1)(iv)(A)(2).

²⁹ See Rule 304(a)(1)(iv)(B) and Rule 304(a)(1)(iii); see also *infra* Section III.B.3.

³⁰ See Adopting Release, *supra* note 1, at 38,795.

³¹ *Id.* at 38,782.

³² See *id.* at 38,795.

- *The Form ATS-N was filed by an entity that does not meet the definition of an NMS Stock ATS.* Because the classification of an entity signals to market participants the functions performed by that entity and the regulatory framework that governs it, Commission review to ensure that an entity is correctly classified as an NMS Stock ATS “will help mitigate concerns that market participants may be confused or misled about whether an entity in fact meets the definition of an NMS Stock ATS.”³³
- *One or more disclosures reveal noncompliance with federal securities laws, or the rules or regulations thereunder, including Reg ATS.* The Commission will conduct a “red flag” review for instances of noncompliance with federal securities laws that seem apparent from the disclosures on the Form ATS-N. The SEC provided two examples of potential red flags in a Form ATS-N:³⁴
 - If an NMS Stock ATS filed a Form ATS-N before becoming registered as a broker-dealer and becoming a member of a self-regulatory organization (SRO), it would not be in compliance with Section 15 of the Exchange Act or Rule 301(b)(1) of Reg ATS.
 - If a Form ATS-N indicated that the NMS Stock ATS would accept orders or indications of interest in sub-penny increments, it would not be in compliance with Rule 612 of Regulation NMS.
- *One or more disclosures on Form ATS-N are materially deficient with respect to their completeness or comprehensibility.* This is a facts-and-circumstances review that “will focus on whether the lack of completeness or comprehensibility in a Form ATS-N disclosure would prevent market participants from understanding an ATS’s operations or the ATS-related activities of its broker-dealer operator or its affiliates.”³⁵ The Adopting Release contained several nonexhaustive examples of disclosures that would be considered materially deficient with respect to their completeness³⁶ or comprehensibility.³⁷

The Commission does not intend to engage in merit-based reviews of Forms ATS-N.³⁸ Examples of a merits-based review include (i) evaluating the strengths and weaknesses of the NMS Stock ATS’s trading platform or protocols;³⁹ (ii) making findings regarding whether the means by which orders will interact on the trading platform are consistent with securities laws;⁴⁰ (iii) comparing the NMS Stock ATS’s services against industry norms;⁴¹ and (iv) approving or disapproving operational aspects of an NMS Stock ATS, such as a new trading functionality, order type or execution protocol.⁴²

The SEC anticipates that, prior to declaring a Legacy NMS Stock ATS’s Form ATS-N ineffective (requiring the Legacy NMS Stock ATS to cease operating pursuant to the Rule 3a1-1(a) exemption), it will have a dialogue with the Legacy NMS Stock ATS that will allow the Legacy NMS Stock ATS to address perceived deficiencies via amendments during the Commission review period and thereby avoid a declaration of ineffectiveness.⁴³ The Legacy NMS Stock ATS could also consent to an extended Commission review period in order to have more time to address

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 38,796.

³⁶ *Id.* at 38,795–96.

³⁷ *Id.* at 38,796.

³⁸ The SEC considered whether requiring Commission review of a Form ATS-N would mislead market participants as to whether the Commission has approved the merits of a Form ATS-N or an NMS Stock ATS’s operations. The SEC stated that it believed the scope of its review was clear and that the change from the Proposing Release to eliminate the need for affirmative Commission determination that the Form ATS-N is effective “will help signal to market participants that the Commission is not passing on the merits of the NMS Stock ATSs’ disclosures regarding their operations.” *Id.* at 38,793.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 38,797.

⁴² *Id.*

⁴³ *Id.*

deficiencies in its Form ATS-N.⁴⁴ If a Form ATS-N is declared ineffective, the Legacy NMS Stock ATS can file a new Form ATS-N, which the Commission will review without prejudice.⁴⁵

C. New Rule 304(a)(2) of Reg ATS—Amending Form ATS-N

NMS Stock ATSs must keep their filed Forms ATS-N up to date. This is, at a high level, accomplished by filing new forms that contain one of four types of amendments: (i) Material Amendments, (ii) Updating Amendments, (iii) Correcting Amendments and (iv) Order Display and Fair Access Amendments. The following sections describe in greater detail the processes for amending (i) an effective Form ATS-N, (ii) an initial Form ATS-N that has been filed but is not yet effective and (iii) a Material Amendment that has been filed but that is not yet effective.⁴⁶

1. Amendments to an Effective Form ATS-N

For each of the four categories of amendments, the following table summarizes (i) when the particular amendment is required, (ii) when it must be filed and (iii) the timeline on which the amendment is made public. The categories are mutually exclusive; when an NMS Stock ATS files an amendment, it must specify the single category under which the amendment falls.⁴⁷

Type of Amendment	Material Amendment	Updating Amendment	Correcting Amendment	Order Display and Fair Access Amendment
Rule	304(a)(2)(i)(A)	304(a)(2)(i)(B)	304(a)(2)(i)(C)	304(a)(2)(i)(D)
Circumstances that Require Amendment	Material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates (except a material change covered by Order Display and Fair Access Amendment)	Information on Form ATS-N has become inaccurate or incomplete and was not required to be reported as one of the other three types of amendments ⁴⁸	Discovery that information previously filed on a Form ATS-N was materially inaccurate or incomplete when filed	Information required to be disclosed in Part III, Items 24 and 25 of Form ATS-N has become inaccurate or incomplete ⁴⁹

⁴⁴ *Id.* at 38,800.

⁴⁵ *Id.*

⁴⁶ See Rule 304(a)(2).

⁴⁷ Adopting Release, *supra* note 1, at 38,802 n.445 and accompanying text.

⁴⁸ As proposed, Updating Amendments would have covered only information that became “inaccurate.” In adopting the rule, the Commission added “incomplete” to ensure that “market participants have access to accurate, current, and complete disclosures on Form ATS-N.” Adopting Release, *supra* note 1, at 38,805. The Adopting Release provided one example of content appropriate for an Updating Amendment: “[I]f an NMS Stock ATS that publishes or otherwise provides to one or more subscribers or persons aggregate platform-wide order flow and execution statistics of the NMS Stock ATS that are not otherwise required disclosures under Rule 605 of Regulation NMS, the NMS Stock ATS could, depending on the facts and circumstances, disclose changes to such statistics in a[n] [U]pdating [A]mendment. . . .” *Id.* at 38,805 n.494 and accompanying text.

⁴⁹ As proposed, amendments to these sections of Form ATS-N would have been considered Material Amendments. However, because an NMS Stock ATS would not necessarily be able to foresee when it would become subject to or exceed order display and execution or fair access thresholds, the 30-days-prior-to-implementation standard for Material Amendments would be impossible to adhere to. Accordingly, the SEC created a new category for Order Display and Fair Access Amendments and provided a different filing timeline in order to balance compliance with Rule 304 and providing market participants with timely notice of material changes. *Id.* at 38,804–05.

Type of Amendment	Material Amendment	Updating Amendment	Correcting Amendment	Order Display and Fair Access Amendment
When to File Amendment	At least 30 calendar days prior to the date of implementation of the material change ⁵⁰	No later than 30 calendar days after the end of each calendar quarter	Promptly after discovery; “promptly” generally means five business days after discovery ⁵¹	No later than 7 calendar days after the information has become inaccurate or incomplete
Public Disclosure (Rule 304(b)(2)(iii))	Cover page to be made public upon filing; entirety to be made public upon expiration of review period, unless declared ineffective ⁵²	Made public upon filing ⁵³	Made public upon filing	Made public upon filing

Commission Review. The Commission will review a Form ATS-N amendment for ineffectiveness using the same standard as for its review of an initial Form ATS-N—it will not weigh the merits of a change but will instead focus on the completeness and comprehensibility of the disclosures themselves.⁵⁴ Pursuant to Rule 304(a)(2)(ii), a Form ATS-N amendment will be deemed effective no later than 30 days after filing unless the Commission declares the form ineffective. An NMS Stock ATS will not be allowed to continue to operate pursuant to an ineffective Form ATS-N amendment. Rather, it would operate pursuant to the Form ATS-N that was previously declared effective (without the changes that were the subject of the amendment). The NMS Stock ATS could then file a new Form ATS-N amendment in an attempt to resolve the deficiency that caused the first amendment to be declared ineffective.

Definition of “Material.” As indicated in the Proposing Release, the SEC will consider a change to be “material” for the purposes of Material and Correcting Amendments “if there is a substantial likelihood that a reasonable market participant would consider the change important when evaluating the NMS Stock ATS as a potential trading venue.”⁵⁵ The Commission received a number of comments seeking clarification on the types of changes the Commission would consider “material.”⁵⁶ Commenters expressed concern that a materiality standard could be subjective and that good-faith decisions that a change is not material could be second-guessed, or that the

⁵⁰ Commenters suggested a carve-out, or exception, from the 30-day advance notice requirement in the case of exigent circumstances that would require an ATS operator to take “decisive action.” *Id.* at 38,785. The Commission noted that such situations could be addressed by Rule 301(a)(5) exemptions. *See infra* Section III.G.1. The Commission also noted that an NMS Stock ATS might be able to avoid the need to apply for an exemption by including in its Form ATS-N backup plans for issues that it anticipates may arise. Adopting Release, *supra* note 1, at 38,785.

⁵¹ Adopting Release, *supra* note 1, at 38,806 n.498.

⁵² As proposed, Material Amendments would have been made public upon filing. In response to comments, the SEC determined to make only the cover page public to avoid being “confusing or misleading to the public, particularly in the event the material amendment is declared ineffective and the related change is never implemented.” Adopting Release, *supra* note 1, at 38,814. A cover page for a Material Amendment will (i) indicate that the NMS Stock ATS has filed a Material Amendment, (ii) provide a brief narrative about the content of the amendment, (iii) indicate the Part and Item number of Form ATS-N that is subject to change, and (iv) state whether such change will apply to all subscribers and the broker-dealer operator.

⁵³ The Commission is making the remaining categories of amendments public upon filing because the amendments reflect the *current* (not prospective, as in the case of a Material Amendment) operation of the NMS Stock ATS, so any risk of confusion of publishing an amendment that might later be declared ineffective is outweighed by market participants’ need for the updated information. *Id.* at 38,815.

⁵⁴ *Id.* at 38,806–07.

⁵⁵ *Id.* at 38,803, 38,806.

⁵⁶ *Id.* at 38,803–04.

Commission could regard every change as material.⁵⁷ Commenters also suggested that certain categories of changes, like non-subscriber-facing changes to software, hardware or other trading infrastructure, could be considered not material.⁵⁸ In the Adopting Release, the Commission adopted the same definition of materiality as in the Proposing Release, and provided the same nonexhaustive list of examples of “scenarios that are particularly likely to implicate a material change”:⁵⁹

- A broker-dealer operator or its affiliates beginning to trade on the NMS Stock ATS;
- A change to the broker-dealer operator's policies and procedures governing the written safeguards and written procedures to protect the confidential trading information of subscribers pursuant to Rule 301(b)(10)(i) of Reg ATS;
- A change to the types of participants on the NMS Stock ATS;
- A change to the available order types (e.g., the introduction or removal of an order type);
- A change to the order interaction and priority procedures;
- A change to the segmentation of orders and participants;
- A change to the manner in which the NMS Stock ATS displays orders or quotes;⁶⁰ or
- A change of a service provider to the operations of the NMS Stock ATS that has access to subscribers' confidential trading information.

In general, in determining whether a change is material, NMS Stock ATSs should consider “whether such change would affect: (1) the competitive dynamics among ATS subscribers; (2) the execution quality or performance of the orders of any subscriber or category of subscribers; (3) the fees that any subscriber or category of subscribers would pay to access and/or use the ATS; (4) the nature or composition of counter-parties with which any subscriber or category of subscribers interact; and (5) the relative speed of access or execution of any subscriber or group of subscribers.”⁶¹ The Commission also encourages NMS Stock ATSs to “generally consider whether the cumulative effect of a series of changes to the operations of the NMS Stock ATS or the activities of the broker-dealer operator or its affiliates with regard to the NMS Stock ATS is material.”⁶²

2. Amendments to an Initial Form ATS-N That Is Not Yet Effective

Under Rule 304(a)(1)(ii), during the Commission review period for an initial Form ATS-N, a new NMS Stock ATS must file any necessary Updating Amendments and Correcting Amendments as described in the table above. Rather than being published upon filing, however, these amendments will be published with the effective Form ATS-N. During the review period for an initial Form ATS-N, a new NMS Stock ATS will not file Material Amendments; instead, it will withdraw and refile its entire Form ATS-N.⁶³

The process for filing an amendment to an initial Form ATS-N for a Legacy NMS Stock ATS during the Commission review period is similar. A Legacy NMS Stock ATS must file any necessary amendments as described in the table above.⁶⁴ Updating, Correcting, and Order Display and Fair Access Amendments will be published with the effective Form ATS-N, not upon filing. Material

⁵⁷ See *id.* at 38,803 nn.471–76.

⁵⁸ See *id.* at 38,803 n.470.

⁵⁹ *Id.* at 38,803.

⁶⁰ In response to a commenter, the Commission noted that “a change to the manner in which the NMS Stock ATS displays orders or trading interest, such as the font size in which orders are displayed, would not be a material change if there would not be a substantial likelihood that a reasonable market participant would consider the change important when evaluating the NMS Stock ATS as a potential trading venue.” *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Rule 304(a)(1)(ii). Withdrawing and refiling Form ATS-N restarts the 120-day Commission review period.

⁶⁴ Rule 304(a)(1)(iv)(C).

Amendments will be published as of the later of publication of the effective Form ATS-N or the expiration of the Commission's 30-day review period.⁶⁵

Regardless of when amendments are published, the Commission has until 30 days after filing (which may extend past the end of the review period for an initial Form ATS-N⁶⁶) to declare them ineffective.⁶⁷

3. Amendments to a Material Amendment That Is Not Yet Effective

Under Rule 304(a)(2)(ii), during the Commission review period for a Material Amendment, an NMS Stock ATS must file Updating and Correcting Amendments as described in the above table, and such amendments will become public with the publication of the Material Amendment. If the NMS Stock ATS is required to file a subsequent Material Amendment, it must withdraw its first Material Amendment and file a new Form ATS-N containing the new Material Amendment.

D. New Rule 304(a)(3) of Reg ATS—Notice of Cessation of Operations

Under Rule 304(a)(3), an NMS Stock ATS shall provide notice that it will cease to operate as an NMS Stock ATS at least 10 business days prior to the date on which operations will cease. Form ATS-N will become ineffective on the date designated by the NMS Stock ATS in its notice.

E. New Rule 304(a)(4) of Reg ATS—Suspension, Limitation and Revocation of the Exemption From the Definition of Exchange

Under Rule 304(a)(4), the SEC will, by order—if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest and is consistent with the protection of investors—suspend for a period not exceeding 12 months, limit or revoke the exemption for an NMS Stock ATS pursuant to Rule 3a1-1. The NMS Stock ATS will then be prohibited from operating pursuant to the exemption (in the case of a suspension or revocation) or operating inconsistently with the Commission's order (in the case of a limitation). Failing to abide by the terms of a revocation, suspension or limitation risks the NMS Stock ATS's operating as an unregistered national securities exchange.⁶⁸

A determination whether to suspend, limit or revoke an exemption will depend on the facts and circumstances.⁶⁹ A revocation would be appropriate “upon the existence of a problem involving the ATS that significantly impacts the public interest and the protection of investors.”⁷⁰ For example: an NMS Stock ATS no longer meets the definition of “NMS Stock ATS” or is no longer a registered broker-dealer;⁷¹ or if the NMS Stock ATS appears to be violating, or to have violated, the antifraud provisions of the federal securities laws.⁷² A limitation would be appropriate if there are specific disclosures or activities that are the cause of the noncompliance with Reg ATS or that violate federal securities laws and it would be more in line with the public interest and protection of investors to limit the scope of an NMS Stock ATS's exemption.⁷³ For example: if an NMS Stock ATS implements a material change to its operations but fails to disclose the material change, the Commission might permit the ATS to continue operating as disclosed on its Form ATS-N but limit it from engaging in the undisclosed activity until its Form ATS-N is properly amended.⁷⁴

F. New Rule 304(b) and (c)—Public Disclosures

Under Rule 304(b)(1), each Form ATS-N constitutes a “report” within the meaning of sections 11A, 17(a), 18(a) and 32(a) of the Exchange Act. Accordingly, “it would be unlawful for any person to willfully or knowingly make, or cause to be made, a false or misleading statement with respect to

⁶⁵ Adopting Release, *supra* note 1, at 38,812 n.564.

⁶⁶ *Id.* at 38,794 n.366, 38,801.

⁶⁷ Rule 304(a)(2)(ii).

⁶⁸ Adopting Release, *supra* note 1, at 38,809.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 38,809 n.534.

any material fact in Form ATS-N.”⁷⁵ The Commission believed defining Form ATS-N as a “report” is important because “market participants will rely on these disclosures when making routing decisions or assessing their brokers’ routing practices” and it “will incentivize NMS Stock ATS operators to make truthful statements on Form ATS-N.”⁷⁶

Under Rule 304(b)(2), the SEC will make the following documents public by posting on its website (via EDGAR):⁷⁷ (i) an effective initial Form ATS-N; (ii) an order of ineffective initial Form ATS-N; (iii) an amendment to an effective Form ATS-N (see above table); (iv) an order of ineffective Form ATS-N amendment; (v) a notice of cessation; and (vi) an order suspending, limiting or revoking the exemption for an NMS Stock ATS from the definition of an “exchange” pursuant to Rule 3a1-1. The Commission stated that making these forms public is important to provide market participants with access to information that allows them to compare and contrast market centers.⁷⁸

G. Amended Rules 301 and 303 of Reg ATS—Exemption From Reg ATS; Filing Requirements; Recordkeeping

In addition to the primary amendments and new Rule 304 described above, the Adopting Release included amendments to existing Rules 301 and 303 of Reg ATS to accommodate Form ATS-N.

1. Rule 301(a)—Exemption From Reg ATS or Particular Requirements of Reg ATS

Rule 301(a) requires an ATS to comply with the requirements in Rule 301(b) (e.g., registration as a broker-dealer, filing the requisite forms, making and preserving records under Rules 302 and 303) unless it is exempted from compliance under one of the enumerated exemptions. Rule 301(b) was amended (see *infra*) and Rule 304(a) was drafted such that Rule 301(a) exemptions would also exempt the ATS from compliance with Rule 304.

Rule 301(a)(5) permits the Commission, after application by an ATS, to exempt an ATS from one or more of the requirements of Rule 301(b) if the exemption is “consistent with the public interest, the protection of investors, and the removal of impediments to, and perfection of the mechanisms of, a national market system.” Rule 301(a)(5) was amended to permit the Commission to exempt an ATS from one or more of the requirements of Rule 301(b) or Rule 304.

2. Rule 301(b)(2) and 301(b)(9)—Filing Requirements

Rule 301(b)(2) sets forth requirements for filing Forms ATS, amendments and notices of cessation for ATSs. Under Rule 304(a), NMS Stock ATSs are exempted from the requirement to file a Form ATS under Rule 301(b)(2)(i)–(vii) (because such NMS Stock ATSs will be required to file a Form ATS-N).⁷⁹ A new subsection, Rule 301(b)(2)(viii), has been added and clarifies that an ATS that trades NMS stocks as well as securities other than NMS stocks is subject to Rule 304 with respect to NMS stocks and all of Rule 301(b) with respect to non-NMS stocks.⁸⁰ In response to comments that maintaining both a Form ATS-N with respect to NMS stocks and a Form ATS with respect to non-NMS-stock securities would be burdensome, the Commission noted that (i) the Form ATS would be easier to maintain because it would no longer include information regarding NMS stocks; and (ii) the Form ATS-N is tailored to NMS stocks, and allowing an ATS to include information regarding securities that are not NMS stocks on Form ATS-N likely would result in incomplete disclosures regarding those securities that are not NMS stocks.⁸¹

⁷⁵ *Id.* at 38,810 & n.545.

⁷⁶ *Id.* at 38,810–11.

⁷⁷ Each NMS Stock ATS must also post, on its website, a link to these documents on the SEC website. Rule 304(b)(3).

⁷⁸ Adopting Release, *supra* note 1, at 38,811.

⁷⁹ A Legacy NMS Stock ATS must comply with Rule 301(b)(2)(i)–(vii) until it files an initial Form ATS-N with the Commission, after which it is subject to the filing and reporting requirements of Rule 304.

⁸⁰ Conforming amendments were made to Rule 301(b)(9)—ATSs must report transaction volume on Form ATS-R separately for NMS stocks and for non-NMS stocks. *Id.* at 38,787. The Commission acknowledged that FINRA’s website already provides some volume information for ATSs that trade NMS stocks, but stated that Form ATS-R provides information that is unavailable on the FINRA website and therefore continues to help the Commission oversee and monitor the trading activity of NMS Stock ATSs. *Id.* Forms ATS-R will be confidential. *Id.* at 38,787 n.256.

⁸¹ *Id.* at 38,785–86.

3. Rule 303—Recordkeeping

Rule 301(b)(8) requires ATSS to make and keep current the records specified in Rule 302 and to preserve the records specified in Rule 303. Rule 303(a)(2)(ii) was amended to require that an NMS Stock ATS preserve copies of any initial Form ATS-N, Form ATS-N amendment, and notice of cessation for the life of the enterprise and of any successor enterprise. Currently, ATSS are subject to the same record preservation requirements with respect to Form ATS reports.⁸²

IV. Form ATS-N Disclosures

Form ATS-N requires an authorized person to certify that the Form ATS-N is “current, true, and complete.” The Commission 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 Commission 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.

A. Cover Page of Form ATS-N

The cover page of Form ATS-N requires entities to identify the type of filing⁸³ 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 Commission 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 Commission is conducting a merit-based review of Form ATS-N disclosures, the cover page will include a legend indicating that the Commission has not passed upon the merits or accuracy of the disclosures in the filing.

B. 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 Commission 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 Commission determined not to adopt the proposed Exhibit 1 requirement.

C. 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,

⁸² The Commission also adopted a correcting amendment to Rule 303(a), which previously stated that, to comply with the condition set forth in paragraph (b)(9) of Rule 301, an ATS needed to preserve the enumerated records. Paragraph (b)(9) related to reporting, not recordkeeping, and the Commission took this opportunity to change the reference to the correct paragraph, (b)(8).

⁸³ 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.

any Person that directly, or indirectly, controls, is under common control with, or is controlled by, the specified Person.”⁸⁴

1. 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 (e.g., quotes, conditional orders or indications of interest) into the ATS (e.g., 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 (e.g., 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 (e.g., 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.

2. 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.

3. Item 4: Arrangements With Trading Centers

Part II, Item 4(a) of Form ATS-N asks whether there are any formal or informal arrangements (e.g., 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.

4. 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 Commission noted that the terms and conditions of such products and services might be of interest because of the way in which they

⁸⁴ *Id.* at 38,818. 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% or more of a class of voting securities or has the power to sell or direct the sale of 25% 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% or more of the capital of the broker-dealer of the alternative trading system.” *Id.*

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 (e.g., fee discounts or access to a faster connection) as compared with a subscriber that does not purchase the service.⁸⁵

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.⁸⁶

5. Item 6: Activities of Service Providers

Part II, Item 6(a) of Form ATS-N asks whether any shared employee (i.e., 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 Commission 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.”⁸⁷

6. 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 (e.g., 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.”⁸⁸

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.⁸⁹

⁸⁵ *Id.* at 38,832, n.779.

⁸⁶ For example, the Commission 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.

⁸⁷ *Id.* at 38,835.

⁸⁸ *Id.* at 38,836.

⁸⁹ *Id.* at 38,837.

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 Commission modified the question to seek only a summary of roles and responsibilities.⁹⁰

D. 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.⁹¹

1. 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.⁹²

2. 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.⁹³ 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 Commission removed from the final form.⁹⁴

3. 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 Commission stressed that it was not changing the fair access provisions in Rule 301(b)(5) of Reg ATS.⁹⁵ Rather, the Commission 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.⁹⁶

4. 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").⁹⁷

⁹⁰ *Id.*

⁹¹ *Id.* at 38,838.

⁹² *Id.* at 38,839.

⁹³ 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.*

⁹⁴ *Id.* at 38,840.

⁹⁵ *Id.* at 38,840–41.

⁹⁶ *Id.*

⁹⁷ *Id.* at 38,842.

5. 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.”⁹⁸ 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.⁹⁹ 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.¹⁰⁰ For example, NMS Stock ATSs need not disclose routing tables or other information about how an SOR may route orders.¹⁰¹ 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.¹⁰²

6. 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.¹⁰³ 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

⁹⁸ *Id.*

⁹⁹ *Id.* at 38,843 & n.879.

¹⁰⁰ *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.*

¹⁰¹ *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.

¹⁰² *Id.* at 38,843–44 & n.889.

¹⁰³ “[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.

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.”¹⁰⁴

7. 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.¹⁰⁵ 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.¹⁰⁶

8. 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.”¹⁰⁷ 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.

9. 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.¹⁰⁸ The Commission 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.”¹⁰⁹

¹⁰⁴ *Id.* at 38,845.

¹⁰⁵ *Id.* at 38,846.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 38,847.

¹⁰⁸ *Id.* at 38,847–48.

¹⁰⁹ *Id.* at 38,848.

10. 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.¹¹⁰

11. 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.¹¹¹ 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.¹¹² 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.¹¹³ 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.

12. 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 (i.e., not orders from a liquidity provider) or to become liquidity providers themselves.¹¹⁴

13. 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

¹¹⁰ *Id.*

¹¹¹ See also Exchange Act Rule 3b-16(a)(1).

¹¹² These disclosures will help the Commission assess compliance with Exchange Act Rule 3b-16 and, therefore, the definition of an NMS Stock ATS. Adopting Release, *supra* note 1, at 38,850; see also Exchange Act Rule 3b-16(a)(2).

¹¹³ 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* note 1, at 38,849–50. Additionally, the NMS Stock ATS's method of compliance with Commission 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.*

¹¹⁴ *Id.* at 38,851.

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 Commission 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.¹¹⁵ 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.¹¹⁶

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.

14. 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.

15. 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, i.e., those employees operating the system. Additionally, in requesting disclosures related to order information and trading interest, the Commission 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.¹¹⁷ 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 (e.g., SOR) or the type of market participant (e.g., institutional investor), or both.

¹¹⁵ *Id.* at 38,852.

¹¹⁶ *Id.* at 38,853 n.971.

¹¹⁷ 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.

16. 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 Commission 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.

17. 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).

18. 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.

19. 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.¹¹⁸ 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.¹¹⁹ Item 19(c) requires the NMS Stock ATS to provide information on rebates and discounts

¹¹⁸ 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.

¹¹⁹ 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.

applied to fees disclosed in Item 19(a) or (b), including the same information as in Item 19(a) (e.g., structure, range).

20. 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.¹²⁰ 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.

21. 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.

22. 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 (e.g., 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.

23. 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.

24. 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% or more in an NMS stock, as reported or disseminated,¹²¹ during four of the preceding six

¹²⁰ 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* note 1, at 38,858–59.

¹²¹ As reported by an effective transaction reporting plan or disseminated through an automated quotation system.

months.¹²² 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.¹²³ In response to comments, the Commission 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).

25. 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% or more in an NMS stock, as reported or disseminated,¹²⁴ during four of the preceding six months.¹²⁵ 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.¹²⁶ In response to comments, the Commission 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).

26. 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 (i) to provide individualized data or custom reports concerning specific clients' usage of the ATS, (ii) to provide trade-specific data that does not include aggregate platform-wide information, (iii) to provide customer communications associated with responsive statistics or (iv) to file a Form ATS-N Updating Amendment each time it receives a request for statistics from a client.

V. 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.

¹²² See Rule 301(b)(3)(i).

¹²³ In particular, the NMS Stock ATS must (i) provide the ticker symbol for each NMS stock displayed during each of the last six months, (ii) explain how it displays the orders in the relevant securities on a national securities exchange or through a national securities association, and (iii) explain how it provides access to such orders.

¹²⁴ As reported by an effective transaction reporting plan or disseminated through an automated quotation system.

¹²⁵ See Rule 301(b)(3)(i).

¹²⁶ In particular, the NMS Stock ATS must (i) provide the ticker symbol for each NMS stock during each of the last six months, and (ii) 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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