

Securities Law Developments

ALTERNATIVE TRADING SYSTEMS: THE SEC'S FINAL RULES

On December 8, 1998, the Securities and Exchange Commission ("Commission" or "SEC") adopted an elaborate regulatory structure, imposing new requirements for trading systems that account for a significant portion of trading volume.^{1/} The new structure both materially changes the definition of the term "exchange" and significantly expands the quote display requirements for certain publicly traded equity securities. With some exceptions, the Commission's new rules comprising the regulation of alternative trading systems ("ATSs") will become effective on *April 21, 1999*.

The Adoption Release represents the culmination of the Commission's re-assessment of existing market practices in light of rapid technological innovations affecting markets and market participants.^{2/} As adopted, the new system of rules governing how ATSs are classified and regulated under the Securities Exchange Act of 1934 ("Exchange Act") closely tracks the approach discussed in the Proposal Release. Based on the large number of comment letters submitted in response to the Proposal Release, the implications of the Adoption Release are expected to be far-reaching.

I. New Interpretation of "Exchange"

The Commission's new regulatory framework rests on two critical definitions: "ATS" and "exchange." An ATS is defined as any organization, association, person, group of persons or system that (1) constitutes, maintains, or provides a marketplace or facilities for bringing together purchasers or seller of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange under Rule 3b-16; and (2) does not set rules governing

^{1/} Exchange Act Release No. 40760 (Dec. 8, 1998), 63 Fed. Reg. 70844 (Dec. 22, 1998) ("Adoption Release").

^{2/} In May 1997, the Commission published a concept release exploring ways to respond to the "significant challenges for the existing regulatory framework" stemming from technological developments. Exchange Act Release No. 38672 (May 23, 1997), 62 Fed. Reg. 30485 (June 4, 1997) ("Concept Release"). The Concept Release was followed by the proposal for regulating ATSs in April 1998. Exchange Act Release No. 39884 (Apr. 17, 1998), 63 Fed. Reg. 23504 (Apr. 29, 1998) ("Proposal Release").

the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system, or discipline subscribers other than by exclusion from trading.¹ The term "ATS" encompasses some systems that previously were known as proprietary trading systems,² broker-dealer trading systems,³ or electronic communication networks ("ECNs").⁴

As structured, the ATS definition must be read together with the Commission's new interpretation of the term "exchange" under Rule 3b-16. As a comprehensive elaboration of the statutory definition under Section 3(a)(1) of the Exchange Act,⁵ Rule 3b-16 defines an exchange as any organization, association, or group of persons that (1) brings together the orders of multiple buyers and sellers; and (2) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade. As adopted, this definition represents an express rejection of the earlier interpretation of the same term issued by the Commission in the so-called "Delta Release."⁶

A system "brings together" orders when orders entered in the system for a given security have the opportunity to interact with other orders entered into the system for the same security. Examples include (1) a system which displays or otherwise represents trading interest entered on the system to system users, like consolidated quote screens; (2) a system which receives subscribers' orders centrally for future processing and execution, like a limit order book that allows subscribers to display buy and sell orders in particular securities and to obtain execution against matching orders contemporaneously entered or stored in the system; and (3)

interdealer brokers, regardless of their level of automation.

Note that the system must bring together orders of multiple buyers *and* multiple sellers. Single seller systems, like those that permit issuers to sell their own securities to investors (*e.g.*, CP

¹ Rule 300(a). Under this definition, any trading system that performs self-regulatory functions will not be considered an ATS. For the reasons described below, this means that such a system must register as an exchange and assume the responsibilities of being a self regulatory organization ("SRO") because it will not be able to register as a broker-dealer and comply with Regulation ATS.

² See Exchange Act Release No. 26708 (Apr. 13, 1989), 54 Fed. Reg. 15429 (Apr. 18, 1989) (re-proposal of Rule 15c2-10 to regulate proprietary trading systems).

³ See Rule 17a-23 (b)(2) under the Exchange Act.

⁴ See Rule 11Ac1-1(a)(8) under the Exchange Act.

⁵ The term "exchange" is defined by the statute to include a "market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange."

⁶ Exchange Act Release No. 27611 (Jan. 12, 1990), 55 Fed. Reg. 1980 (Jan. 19, 1990).

Direct, in which an issuer can offer to sell its commercial paper to the customers of CS First Boston) do not meet this requirement. Similarly, systems where a single counterparty that buys and sells securities through a system, where other parties entering orders only execute against the single designated counterparty, would not satisfy the definition of an “exchange.” The use of a designated counterparty as riskless principal for settlement purposes, *after* the purchasing and selling counterparties to a trade have been matched, however, would not by itself mean that the system does not have multiple buyers and sellers.

A system uses “established non-discretionary methods” either by providing a trading facility or by setting rules governing trading among subscribers. As interpreted by the Commission, “established, non-discretionary methods” include any methods that dictate the terms of trading among the multiple buyers and sellers entering orders into the system, including those that (1) set procedures or priorities under which open terms of a trade may be determined or (2) determine the trading price at some designated future date on the basis of pre-established criteria (*e.g.*, the weighted average trading price for the security on the specified date in a specified market). Traditional exchanges’ rules of priority, parity and precedence thus constitute “established non-discretionary methods,” as do the trading algorithms of electronic systems. Examples of systems that do *not* involve “established, non-discretionary methods” include traditional block trading desks.⁷

The Commission will attribute the activities of a trading facility to a system if that facility is offered by the system directly or indirectly (such as where a system arranges for a third party or parties to offer the trading facility). Therefore, if a system that brings together the orders of multiple parties arranges for a third party vendor to distribute software that establishes non-discretionary methods under which orders interact, that system falls within Rule 3b-16.⁸ Similarly, if an organization arranges for separate entities to provide different pieces of a trading system, which together meet the exchange definition, the organization responsible for arranging the collective efforts will be deemed to have established a trading facility.⁹ In this regard, whether or not the actual execution of the order takes place on the system is not a determining factor. A

⁷ These desks generally retain some discretion in determining how to execute a customer’s order, and frequently commit capital to satisfy their customer’s needs. For example, a block positioner may shop the order around in an attempt to find a contra-side interest with another investor. In some cases, the block positioner may take the other side of the order, keeping the block as a proprietary position.

⁸ For example, if a bulletin board operator contracted with another party to provide execution facilities for the bulletin board users, the bulletin board will be deemed to have established a trading facility because it took affirmative steps to arrange for the necessary exchange functions for its users.

⁹ For example, the historical (though not the current) arrangement between the Delta Government Options Corporation, RMJ Options Trading Corporation and Security Pacific National Trust Company as described in the Delta Release would together meet the definition of an exchange.

trading system that comes within the new exchange definition still will be considered an exchange, even if it matches two trades and routes them to another system or registered exchange for execution.

As mentioned above, “established, non-discretionary methods” may be provided by setting “rules.” Examples of this would include a system which imposes affirmative quote obligations on its subscribers, such as obligations to post two-sided quotations or to post quotations no worse than the quotes subscribers post on other systems, as well as rules imposing execution priorities, such as time and price priority rules. In this regard, Nasdaq would satisfy the new definition of an “exchange,” because it imposes affirmative obligations on market makers in Nasdaq NM and SmallCap securities, including obligations to post firm and two-sided quotes, and operates SOES and SelectNet which require market makers to accept executions or orders for execution in those securities.

II. Systems Excluded from Definition of Exchange

Rule 3b-16(b) explicitly excludes certain systems from the definition of an exchange. For instance, systems that only route orders to a national securities exchange, a market operated by a national securities association or a broker-dealer for execution are specifically excluded from the definition of exchange. Similarly, systems that display a single dealer’s quotes and allow persons to enter orders for execution against the bids and offers of a single dealer are excluded from the exchange definition.¹⁰

In general, the Commission does not believe that a market maker engaging principally in the business of trading for its own account should be included within Rule 3b-16 solely because it is complying with the Commission’s order handling rules. Therefore, the Commission has excluded from the definition of an exchange, a registered market maker that displays its own quotes and customer limit orders and allows its customers and other broker-dealers to enter orders for execution against the displayed orders. The exclusion also allows such a registered market maker, as an incidental activity resulting from its market maker status, to match or cross orders for securities in which it makes a market, even if those orders are not displayed.

III. Exemptions from the Exchange Definition

Using its new exemptive authority under the National Securities Markets Improvement Act of 1996, the Commission exempts the following ATSs from the definition of exchange:

- **ATSs Operated by a National Securities Association.** Because national securities associations are subject to requirements virtually identical to those applicable to national securities exchanges, any ATS operated by an national securities association is exempted from the exchange definition and may continue to operate as it does today.

¹⁰ In this regard, if a dealer executes a customer order at the national best bid or offer (“NBBO”), rather than at its displayed bid or offer, the Commission will consider the NBBO as the dealer’s quote for purposes of that trade.

- **ATSS in Compliance with Regulation ATS.** Any ATS that registers as a broker-dealer and complies with newly adopted Regulation ATS is exempted from the exchange definition.
- **ATSS Which Need Not Comply with Regulation ATS.** Any ATS which pursuant to Rule 301(a) of Regulation ATS is not required to comply with Regulation ATS is exempted from the exchange definition, including the following: (1) ATSS registered as an exchange; (2) ATSS exempted by the Commission from exchange registration based on limited volume; (3) ATSS operated by a national securities association; and (4) ATSS registered as a broker-dealer or bank, which trade only government securities and other related securities.¹¹

IV. Regulation of ATSS — Basic Requirements

By and large, most ATSS that currently operate as broker-dealers are expected to be exempted from the exchange definition by complying with Regulation ATS. The following summarizes the requirements applicable to ATSS subject to Regulation ATS:¹²

- **Register as Broker-Dealer.** ATSS must register as broker-dealers and be subject to traditional broker-dealer regulation. As such, ATSS must become members of a self-regulatory organization (“SRO”).¹³ The Commission expects SROs to effectively surveil trading that occurs on ATSS by integrating ATS trading data into the SRO’s existing surveillance system.
- **Notice of Operation as an ATS and Amendments.** ATSS must file an initial operation report on Form ATS at least 20 days prior to commencing operation, or *if the ATS is operating as of April 21, 1999, no later than May 1, 1999.*¹⁴ Because Form ATS is a notice, not an application, the Commission need not approve it.¹⁵ An

¹¹ Rule 301(a)(4) excludes from Regulation ATS trading systems that are registered as broker-dealers or are banks which limit their securities activities to the following instruments: (1) government securities; (2) repurchase and reverse repurchase agreements involving government securities; (3) any put, call, straddle, option, or privilege on a government security, other than a put, call, straddle, option, or privilege that is traded on one or more national securities exchanges or for which quotations are disseminated through an automated quotation system operated by a registered securities association; and (4) commercial paper.

¹² In unusual circumstances, the Commission may, upon application by an ATS, exempt by order such ATS from one or more of the requirements of Regulation ATS, consistent with the public interest and national market system goals. Rule 301(a)(5).

¹³ Rule 301(b)(1).

¹⁴ Rule 301(b)(2).

¹⁵ Form ATS requests information about the ATS, including a detailed description of how it will operate, its prospective subscribers, and the securities it intends to trade. Most of this information is currently required under Rule 17a-23, which the Commission has repealed. Certain

ATS is required to notify the Commission of material changes to its operation by filing an amendment to Form ATS at least 20 calendar days prior to implementing such changes.¹⁶ In addition, ATSs are required to notify the Commission in quarterly amendments of *any* changes to the information in the initial operation report that have not been reported in a previous amendment. If an ATS ceases operation, it is required to promptly file a notice with the Commission. The initial operation report, any amendments and the report upon ceasing operation will be kept confidential.

- **Examination, Inspection and Investigation of Subscribers.** The exemption of an ATS from exchange registration is conditioned on its cooperation with the Commission's or an SRO's inspection, examination or investigation of the ATS or any of its subscribers.¹⁷ The Commission requires this because neither the Commission nor any of the SROs has the authority to directly inspect non-broker-dealer subscribers of an ATS.
- **Recordkeeping.** ATSs must make and keep the records necessary to create a meaningful audit trail.¹⁸ These records include (1) trading records¹⁹ (daily summaries of trading and time-sequenced records of order information, including the date and time the order was received, the date, time and price at which the order was executed and the identity of the parties to the transaction); (2) record of subscribers (including a record of any affiliations between subscribers and the ATS); and (3) notices to subscribers (including notices about system malfunctions, changes to system procedures and instructions pertaining to access). The above-referenced records must be kept for at least three years, the first two years in an easily accessible place.
- **Form ATS-R.** ATSs must file transaction reports within 30 calendar days of the end of each calendar quarter on Form ATS-R and file Form ATS-R within 10 days after an ATS ceases to operate.²⁰ Form ATS-R requires ATSs to report total volume in terms of number of units traded and dollar value for various categories of securities, including equity securities that are eligible for resale pursuant to Rule 144A, penny stocks, other equity securities, rights and warrants, listed options and unlisted options. ATSs also must report the total settlement value in US dollars for corporate

recordkeeping requirements in Rule 17a-23 as they apply to broker-dealers that do not qualify as ATSs are being moved to other recordkeeping rules, Rules 17a-3 and 17a-4.

¹⁶ A material change would include any change to the operating platform, the types of securities traded, or the types of subscribers.

¹⁷ Rule 301(b)(7).

¹⁸ Rule 301(b)(8).

¹⁹ An ATS is not required to duplicate trading records already required under Rules 17a-3 or 17a-4, provided that system records can be sorted and retrieved separately upon request.

²⁰ Rule 301(b)(9).

debt securities, government securities, municipal securities, mortgage related securities, and other debt securities.

- **Protection of Confidential Trading Information.** ATSS must establish adequate safeguards and procedures to protect subscribers' confidential trading information, including (1) limiting access to confidential trading information to those employees who are operating the system or responsible for its compliance; (2) implementing standards controlling employees of the ATS for their own accounts; and (3) adopting and implementing adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this section are followed.²¹

V. *ATSS with 5% or More of Trading Volume in Covered Securities*

In addition to the requirements for all ATSS described above, ATSS with 5% or more of trading volume in "covered securities" (*i.e.*, exchange-listed, Nasdaq NM and Nasdaq SmallCap securities) must (1) publicly disseminate their best priced orders; (2) provide equivalent access to such orders for members of the SRO with which it is linked; and (3) limit access fees to amounts consistent with the principle of equivalent access.²² The affected ATSS will comply with the public display rule on a phase-in basis: 50% of the securities subject to the requirement will be phased-in on *April 21, 1999* and the remainder of the securities will be phased-in on *August 30, 1999*.

Under the new public display rule, the ATS is required to provide to a national securities exchange or national securities association the prices and sizes of the orders at the highest buy price and the lowest sell price, displayed to *more than one person* in the ATS,²³ for inclusion in the public quotation data.²⁴ This requirement is applied on a security-by-security basis. That is, the ATS is not required to publicly display orders for any covered security in which its trading volume accounted for less than 5% of the total volume for such security. To apply the 5% volume test for any given security, the ATS must determine whether, during at least 4 of the preceding 6 calendar months, it had an average daily trading volume of 5% or more of the aggregate average daily share volume as reported by an effective transaction reporting plan or disseminated through an automated quotation system.

²¹ Rule 301(b)(10).

²² These requirements imposed under Regulation ATS are accompanied by an amendment relating to the so-called "ECN Display Alternative" in Rule 11Ac1-1, which is now expanded to include ATSS that comply with Regulation ATS.

²³ If an ATS, by its design, does not disseminate any orders to other subscribers or if it only displays a portion of a subscriber's order, the display rule is not applicable to any such non-disseminated orders or the hidden portion of the order. In addition, the display rule is not applicable to orders shown to only one other ATS subscriber, such as through use of the negotiation feature.

²⁴ Rule 301(b)(3)(2). The public display requirement will be satisfied by the ATS by identifying itself rather than the subscriber that placed the order.

With respect to any security subject to the public display requirement, the ATS must provide for members of the SRO with which it is linked the requisite ability to effect a transaction with the orders displayed by the ATS. Such ability must be equivalent to the ability of the SRO members to effect a transaction with other orders displayed on the exchange or by the association.²⁵ In addition, because reasonable fees are a component of equal access, the ATS is prohibited from setting fees that are inconsistent with the principle of equivalent access to the ATS quotes. The access rule also requires an ATS to comply with the standards governing fees established by the national securities exchange or association through which non-subscribers have access.²⁶

VI. Requirements for ATSs with 20% or More of Trading Volume

ATSs with 20% or more of the trading volume in equity securities and certain debt securities must comply with the additional requirements involving fair access, capacity, integrity and security requirements. In general, these requirements are triggered when the ATS has had, during at least 4 of the preceding 6 calendar months, 20% or more of the average daily volume in equity securities and in the following categories of debt securities: municipal securities, investment grade corporate debt securities, and non-investment grade corporate debt securities. Note that because volume data for investment grade and non-investment grade corporate debt is not currently compiled or published, the fair access and systems capacity, integrity and security provisions with respect to these securities will not become effective until *April 1, 2000*.

An ATS subject to the fair access requirement must establish written standards for access to its system.²⁷ The ATS must apply these standards fairly and is prohibited from unreasonably prohibiting or limiting any person with respect to access to the ATS's services.²⁸ Denial of access may be reasonable if it is based on objective standards, such as minimum capital, credit requirements or disciplinary history, provided that these or other standards were applied consistently to all subscribers.²⁹ If an ATS requires subscribers to open an account with another broker-dealer with which the ATS has a clearing arrangement, the ATS is responsible for ensuring that the clearing broker-dealer does not unfairly deny access to any person. The Commission

²⁵ The ATS is not required to provide access to a security until the public display requirement is effective for that security.

²⁶ Rule 301(b)(4).

²⁷ Note that the fair access requirement will not apply to some types of ATSs, even if they crossed the requisite volume threshold. Specifically, the Commission is excluding from the fair access requirement those ATSs that match customer orders for securities with other customer orders, at prices for those same securities established outside such system; provided that such customers' orders are not displayed to any person, other than employees of the ATS. Rule 301(b)(5)(3).

²⁸ Rule 301(b)(5)(2)(B).

²⁹ If an ATS grants, denies or limits access to trading to any person, the ATS is required to make and keep records of each action and the reasons therefor.

intends to enforce the fair access rule by reviewing various reports filed by ATSs and investigating any possible violation of the rule.

ATSs trading 20% or more of the volume in any equity security or in the specified categories of debt securities must comply with standards regarding capacity, integrity, and security of their automated systems. Like the fair access requirements discussed above, the volume thresholds are applied on a security-by-security basis. Any ATS which is subject to the capacity, integrity and security standards must undertake specified actions for all its systems that support order entry, order routing, order execution, transaction reporting, and trade comparison in the particular security, including (1) periodic capacity stress tests of critical systems to determine such system's ability to process transactions; (2) development of adequate contingency and disaster recovery plans; and (3) an annual independent system review by competent, independent audit personnel.³⁰

VII. Registration as a National Securities Exchange

Trading systems that meet the exchange definition may register as national securities exchanges. At this time, the Commission has determined that those trading systems that choose to register as exchanges should satisfy all requirements that apply to national securities exchanges, including the following:

- **Self-Regulatory Responsibilities.** An ATS registered as an exchange must be able to enforce compliance by its members and persons associated with its members, with the federal securities laws and the rules of the exchange.
- **Fair Representation.** Under Section 6(b)(3) of the Exchange Act, registered exchange must have rules that (1) appoint one or more directors who are representative of issuers and investors and not associated with a member of the exchange or with any broker-dealer and (2) “assure a fair representation of its members in the selection of its directors and administration of its affairs.” Any trading system applying for registration as an exchange is expected to have public representation on its board of directors. The Commission, however, intends to allow some flexibility in satisfying the fair representation requirement. Although the Commission does not specify in detail what types of structures would be acceptable, the Adoption Release discusses several examples of ways in which the fair representation requirements may be met.³¹

³⁰ If internal audit personnel are used, these auditors should comply with the standards of the Institute of Internal Auditors and the Electronic Data Processing Auditors Association (“EDPAA”). If external auditors are used, they should comply with the standards of the American Institute of Certified Public Accountants and the EDPAA. Rule 301(b)(6)(2).

³¹ Examples include PCX electronic members, who do not have voting rights and are therefore not represented on the board of the exchange. The merger of the American Stock Exchange (“Amex”) with the National Association of Securities Dealers, Inc. (“NASD”) also illustrates how

- **Exchange Membership.** Just as current registered exchanges are required to limit membership to broker-dealers, ATSS that choose to register as exchanges would be prohibited from extending membership to non-broker-dealers. Although membership will continue to be limited to registered broker-dealers and persons associated with registered broker-dealers, institutions would be able to obtain access to ATSS registered as exchanges through a registered broker-dealer member of such a trading system, including an affiliate of an institution.
- **Fair Access and Fair Competition.** Section 6(b)(2) and 6(c) of the Exchange Act prohibit registered exchanges from denying access to, or discriminating against, members. An ATS registered as an exchange must ensure fair access of registered broker-dealers. Similarly, under Section 6(b)(8) of the Exchange Act, any trading system registered as an exchange is prohibited from adopting any anti-competitive rules.
- **Registration of Securities.** Under the Exchange Act, securities traded on a national securities exchange must be registered with the Commission and approved for listing on the exchange. In addition, national securities exchanges are permitted to trade securities listed on other exchanges and Nasdaq pursuant to the Unlisted Trading Privilege (“UTP”). ATSS registered as exchanges must comply with these requirements and would be required to have rules for trading the class or type of securities it seeks to trade pursuant to UTP.
- **National Market System Participation.** Any ATS registering as an exchange must become a participant in the market-wide transaction and quotation reporting plans currently operated by registered exchanges and the NASD, including the Consolidated Quotation System (“CQS”), Consolidated Tape Association (“CTA”), and Intermarket Trading System (“ITS”). The precise arrangements for inclusion of new exchanges will depend on the structure of these exchanges and will be addressed when registration as an exchange is sought.

VIII. Pilot Trading System Exemption from SRO Rule Filings

Currently, pursuant to Rule 19b-4 under the Exchange Act, SROs generally must submit a rule filing to the Commission and undergo a public notice, comment and approval process before they operate any new trading system. The new pilot trading system rule, Rule 19b-5, exempts an SRO from the foregoing rule filing process for certain new systems that qualify as pilot trading systems, subject to specified ceilings on trade volume. The SRO may begin operation of such a system shortly after submitting new Form PILOT, an informational filing that does not require prior approval of the Commission. During the operation of the pilot trading system, the sponsoring SRO

the fair representation requirement can be applied in a flexible manner. Note that the composition of the New Amex Board provides the Amex membership with the opportunity to nominate four Amex floor governors, while the inclusion of one New Amex floor governor on the NASD Board allows New Amex to have input on the parent NASD Board.

must file quarterly reports as well as amendments to Form PILOT concerning any material changes to the system. Before two years expire, the SRO must submit a rule filing to obtain permanent approval of the Commission or cease operation of the system.

While the new regulatory framework seeks to accomplish a comprehensive overhaul of traditional distinctions between broker-dealers and markets in response to technological developments, its practical impact in the near future is not clear. Many ATSS, though not all, are expected to remain as broker-dealers. In this regard, given the differential regulatory treatment of ATSS based on their size, the potential competitive impact of Regulation ATS on larger ATSS may be significant. Over the long run, the new regulatory framework will pave the way for the emergence of electronic proprietary exchanges competing directly with traditional floor-based exchanges. Further guidance from the Commission on the operation of such exchanges, however, might be needed, to the extent that trading systems with “captive” market makers seek registration as exchanges in the future.³²

If you would like to receive a copy of the Adoption Release or have any questions, please contact Brandon Becker (202-663-6979), Soo J. Yim (202-663-6958), Cherie Macauley (202-663-6855), or Mark S. Shelton (202-663-6277).

³² The Adoption Release does not address how a proprietary exchange would resolve the potential conflicts of interest raised by the participation of an affiliated broker-dealer providing a source of liquidity.

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