April 18, 2022

Via E-Mail: rule-comments@sec.gov

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

Re: ***File No. S7-02-22; Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange"; Regulation ATS for ATSs That Trade U.S. Government Securities, NMS Stocks, and Other Securities; Regulation SCI for ATSs That Trade U.S. Treasury Securities and Agency Securities***

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association ("SIFMA")[1] respectfully submits this letter to the U.S. Securities and Exchange Commission ("Commission" or "SEC") to comment on the above-referenced proposal ("Proposal").[2] The Proposal seeks to amend Regulation ATS and Rule 3b-16 under the Securities Exchange Act of 1934 ("Exchange Act") in a number of ways. Most notably, the Commission is proposing to expand the definition of "exchange" in several significant respects, including to require "communication protocol

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly one million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional invests, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] Securities Exchange Act Release No. 94062 (Jan. 26, 2022), 87 Fed. Reg. 15496 (Mar. 18, 2022) (hereinafter "Proposing Release"). The Proposal includes reproposals of certain amendments included in the Commission's 2020 proposed amendments to Regulation ATS. *See* Securities Exchange Act Release No. 90019 (Sept. 28, 2020), 85 Fed. Reg. 87106 (Dec. 31, 2020) ("2020 Proposal").

systems"—a term the Commission does not define—to either register as exchanges or operate as alternative trading systems ("ATSs"). In addition, the Proposal would

(i) require ATSs that trade government securities as defined under Section 3(a)(42) of the Exchange Act or repurchase and reverse repurchase agreements on government securities ("Government Securities ATSs") to comply with Regulation ATS;

(ii) require existing NMS Stock ATSs (as defined in Rule 300(g) of Regulation ATS) to file amendments to their existing disclosures in accordance with a revised Form ATS-N;

(iii) obligate ATSs to file Form ATS and Form ATS-R through the SEC's EDGAR system; and

(iv) amend the fair access provisions in Rule 301(b)(5) of Regulation ATS ("Fair Access Rule").

SIFMA supports the SEC's high-level policy goal of ensuring that rules that govern trading venues keep pace with technological and market developments. To that end, SIFMA has previously supported more narrowly targeted proposed changes to the SEC's rules regarding venue regulation, such as the Commission's 2020 Proposal to extend regulatory requirements to Government Securities ATSs. However, SIFMA members have significant concerns with core aspects of the Proposal, in particular the far-reaching implications of the proposed amendments to Rule 3b-16, which go significantly beyond the perceived regulatory gap identified by the SEC and described below. SIFMA therefore believes the SEC should rethink its approach and separate out the proposed amendments to Rule 3b-16, more clearly articulating the rationale for why additional systems should be subject to the SEC's ATS regulatory program, and issue a concept release regarding potential updates to this definition in keeping with the articulated policy goal.

The Commission's proposed amendments to Rule 3b-16 (which, unlike many of the proposed amendments to Regulation ATS are being subject to public notice and comment for the first time and without the benefit of a concept release that thoroughly evaluates these ideas) would fundamentally change the definition and interpretation of "exchange" under which market participants have been operating for more than two decades. Notably, the undefined concept of "communication protocol systems" could capture a broad range of activity, beyond that which would typically be considered that of, or that actually functions as, an exchange or market place. There is a significant lack of alignment between the Proposal's economic analysis, which estimates that there are 22 communication protocol systems in existence today, and the text of the proposed rule itself. As a result, the effect of the proposed changes would extend far beyond the SEC's stated goal to "extend the benefits of the exchange regulatory framework to investors that use such systems, and reduce regulatory disparities among like markets."[3] Instead, the changes would potentially capture market participants' internal systems and third-party technology platforms that do not, in substance, perform market place functions and for which

[3] Proposing Release at 15498.

registration as a national securities exchange or operation subject to Regulation ATS brings no obvious policy benefit. Furthermore, these proposed changes could directly or indirectly have significant negative impacts on innovation and efficiency of the U.S. capital markets, particularly for those fixed income markets for which electronification continues to develop, by raising barriers to entry and creating disproportionate regulatory burdens without commensurate policy benefits. This would negatively impact growth, innovation and competition.

The Commission has not clearly articulated why it is necessary to make such fundamental changes to the definition of "exchange" to capture systems that would potentially be in scope, nor explained the boundaries of that new definition.[4] In addition, the SEC's economic analysis belies the potentially wide-ranging impact of the undefined "communication protocol systems" concept. SIFMA members are concerned that, taken broadly, the communication protocol system concept could go well beyond the 22 systems noted in the economic analysis and capture multiples of the number of systems anticipated by the SEC's economic analysis.

As more fully described below, SIFMA opposes these proposed amendments to Rule 3b-16 and strongly encourages the Commission to first consider commenters' concerns and then publish a new proposal that specifically addresses Rule 3b-16 and the potential regulation of communication protocol systems in keeping with those comments and after becoming more thoroughly informed about how they function in the marketplace.[5] SIFMA members believe that regulatory changes that would result in a fundamental shift in U.S. market structure deserve far more deliberate and nuanced evaluation and a much clearer articulation of a compelling policy rationale than what has been included as the second item of a single proposing release.

At a minimum, in relation to Rule 3b-16, the SEC should:

- clarify the scope of existing exclusions from Rule 3b-16 (which the SEC has confirmed will continue to apply);

- confirm that systems for which there is no clear benefit from exchange/ATS regulation, such as buy-side and sell-side participants' internal trading systems and single-dealer systems, would not be captured by any revised definition of exchange; and

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4 We note that the Proposal makes some mention of a regulatory disparity or competitive imbalance the Proposal seeks to address ("[t]o the extent that NMS Stock ATSs compete with exchanges in fees to attract order flow, the proposed amendment would promote competition by helping to level the playing field between NMS Stock ATSs and exchanges in terms of the timeframes in which they can initiate and disclose fee changes." Proposing Release at 15637), but such references are oblique and have hardly been articulated clearly as a rationale. Indeed, if this reference presents an animating impetus for the Proposal, it raises serious questions that should be evaluated much more carefully and directly.

5 Such reconsideration should also be informed by the potential interrelations between this Proposal and other proposals that the Commission has published, particularly its recently proposed changes to the definition of "dealer" and "government securities dealer." *See* Securities Exchange Act Release No. 94524 (Mar. 28, 2022).

- adopt an exemption for emerging systems, or systems with limited volume, to ensure that the proposed framework does not harm innovation and ultimately result in increased costs for end investors.

Given that the proposed amendments to Rule 3b-16 have a pervasive impact on commenters' consideration of other aspects of the Proposal, it is extremely difficult to untangle that proposed definition from other aspects of the Proposal. Nonetheless, if the Commission decides to proceed with adopting certain aspects of the Proposal, SIFMA notes the following views on aspects of the Proposal outside of our strong opposition to the proposed amendments to Rule 3b-16. In particular, SIFMA:

- supports rescinding the exemption from Regulation ATS for Government Securities ATSs;[6]

- supports requiring Government Securities ATSs to file a publicly available form, but opposes requiring Government Securities ATSs to file the same Form ATS-N as used by NMS Stock ATSs and suggests returning to the originally proposed Form ATS-G;

- supports reasonable fair access requirements for Government Securities ATSs that reach specified volume thresholds and the application of Regulation SCI for Government Securities ATSs reaching specified volume thresholds;

- opposes requiring ATSs operated by the same or affiliated broker-dealers to aggregate their transaction volume for purposes of calculating fair access volume thresholds;

- supports certain and opposes various other of the proposed amendments to Form ATS-N; and

- opposes requiring that Form ATS and Form ATS-R be filed through the Commission's EDGAR system.

Finally, we note that many of the changes proposed by the Commission, if adopted despite the concerns that we and others raise in our comments, would likely require a significantly extended time period for implementation, particularly for unwitting platforms and systems that will be subject to new regulatory obligations of Regulation ATS.[7] In particular, SIFMA's members estimate that amendments requiring changes to systems or disclosures or substantial reevaluation and implementation of new operations or compliance obligations would need a minimum compliance period of at least 24months – or depending on how clear the guidance in the adopting release, a substantial period after the issuance of FAQ to assist market participants operating under new regulatory requirements. This is particularly so given the wide range of concurrent

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6 Our March 1, 2021 letter indicated our endorsement for "increased operational transparency related to the basic rules of operation of fixed income and government securities ATSs." Letter from Rob Toomey, Chris Killian & Leslie Norwood, SIFMA, to Vanessa Countryman, Secretary, SEC, at 2 (Mar. 1, 2021) ("2021 Letter").

7 Moreover, to the extent the Commission's changes to the scope of Rule 3b-16 require firms to register as broker-dealers, the member registration process with FINRA often itself takes months to accomplish.

regulatory changes that the SEC is currently pursuing, which will impose significant implementation burdens on personnel and systems across firms, including in interrelated areas such as operations, technology, compliance and legal.[8]

In addition to our substantive comments on the Proposal, we note that the comment period provided on this Proposal as well as the multiple overlapping proposals out for comment at the same time creates significant risk that meaningful public input into the rulemaking process is being lost. Sufficient time for meaningful public input into individual proposals and more holistically on the Commission's rulemaking agenda and the possible interconnectedness of these proposals is important and ultimately could have a significant impact on savers, investors, capital formation, and economic growth and job creation.[9]

I. Proposed Amendments to Exchange Act Rule 3b-16 Regarding the Definition of Terms Used in the Definition of "Exchange"

The Commission proposes a number of changes to Exchange Act Rule 3b-16 and the definition of "exchange." Most prominently, the Commission proposes to include certain "communication protocol systems" within the definition of "exchange." In addition, the Commission proposes to amend the definition of an exchange and the important "two-part test" that has been used since 1998 to determine if an activity is exchange-like, replacing bringing together "the orders for securities of multiple buyers and sellers," with bringing together "buyers and sellers of securities using trading interest" and, more generally, replacing the term "orders" with "trading interest" to expand the scope of the definition to include non-firm trading interest that does not meet the definition of "order" (emphasis added). Under the proposed definition, "trading interest" would include an order or "any non-firm indication of a willingness to buy or sell a security that identifies at least the security and either quantity, direction (buy or sell), or price." The Commission also proposes to include within the definition of "exchange" a system that "makes available established, non-discretionary methods (whether by providing a trading facility or communication protocols, or by setting rules) under which buyers and sellers can interact and agree to the terms of a trade" (emphasis added).[10] Finally, the Commission proposes to delete the word "multiple," in reference to "buyers and sellers," from Rule 3b-16(a)(1). SIFMA opposes the proposed changes to Exchange Act Rule 3b-16 and believes they would have a substantial, wide-ranging and material impact on U.S. market structure that the

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8 Among various examples, we note that the Commission proposed security-based swap execution facility (SBSEF) rules on April 6, 2022, a proposal which has potential impacts on SBSEFs and market structure for security-based swaps. The original SBSEF proposal contained an exemption from Reg. ATS but it remains to be evaluated whether the proposed broadening of the definition of "exchange" would create a gap between the exemption in the proposed SBSEF rule and this new definition. This but one potential example of the complex interactions of the many proposed rules that may have potential unintended consequences. *See* fn. 9, *infra*.

9 See letter of 25 associations to the SEC on the importance of appropriate length comment periods, available here: https://www.sifma.org/resources/submissions/importance-of-appropriate-length-of-comment-periods/

10 Under the current rule, systems must "use[] 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" (emphasis added).

Commission has likely dramatically underestimated and has neither adequately articulated a rationale for nor requested sufficient comment on.

SIFMA Urges the Commission to Gather More Information Before Determining Whether to Amend Exchange Act Rule 3b-16

SIFMA opposes the Commission's proposed changes to Rule 3b-16 and strongly encourages the Commission to take a more incremental approach by separating the proposed amendments to Rule 3b-16 from the proposed amendments to Regulation ATS. SIFMA does not believe that the Commission has adequately considered the impact of its proposed changes to Rule 3b-16 either in terms of scope or application.[11] In multiple instances, the Commission expressly states that at the proposal stage it lacks sufficient data on a number of key questions related to this potential new regulatory scheme. This absence of data raises fundamental concerns as to whether the Commission is in a position to evaluate the potential impact these changes could have or to adequately assess whether there even is a need for such an expansive reinterpretation of "exchange." As but one example, these informational deficiencies include data on the use of systems that would qualify as communication protocol systems by non-ATS trading systems operating in the OTC equity market and the data to estimate the number or trading volume of inter-dealer quotation systems or other OTC equity trading systems that operate as communication protocol systems and are not registered as broker-dealers.[12] These data points are critical considerations for the Commission to conduct a thorough cost-benefit analysis of the impact of the Proposal. The idea of proposing a rule that involves a great deal of guess work in the absence of information to shape and inform fundamental policy decisions is at odds with reasoned decision making that has been a cornerstone of the SEC for many years. As such, SIFMA does not believe the Commission has met its burden to demonstrate a need for requiring more systems to be deemed "exchanges" and obliging them either to register as a national securities exchange or to operate subject to Regulation ATS.[13]

In the U.S. securities markets, there are currently 24 registered national securities exchanges (operating 32 equity and options exchange platforms); 16 of these exchanges effect transactions in NMS stocks.[14] In addition to this, there are 34 ATSs registered as NMS Stock ATSs.[15] The U.S. listed equity and options markets already have over 60 regulated trading venues meeting the existing definition of "exchange." The Proposal does not adequately explain why it is necessary to now impose further regulation (either through exchange registration or broker-dealer/ATS registration) to an even wider array of systems and technologies that lack the functionality and historical touchpoints that have been necessary to be considered an "exchange" since 1998. To simply observe that unregistered systems are not registered—which is true by definition—does not itself establish a rationale for *why* these systems should now be deemed to

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11 *See, e.g.*, discussion of CPSs and GUIs below at p. 9 *infra*.

12 *See, e.g.*, Proposing Release at 15613-14.

13 *See NYSE v. SEC*, 962 F.3d 541, 545 (D.C. Cir 2020) (noting that the Commission "did not identify any problems with existing regulatory requirements or propose rules that might rectify any perceived issues").

14 *See* Proposing Release at 15612.

15 *See* Proposing Release at 15611.

be "exchanges" and be required to become registered.[16] Beyond this, we do not see a clearly articulated need for the change contemplated by this Proposal – certainly nothing grounded in data-driven analysis. If the "communication protocol system" concept applies more broadly than the narrow universe of systems noted in the economic analysis, this would represent a momentous change that seems to be in search of a compelling regulatory purpose. This is particularly true when many of the systems that may fall into the proposed definition of exchange do not perform functions traditionally associated with exchange activity (*e.g.*, matching or crossing orders) and therefore do not present the same operational risks or investor protection concerns or require the same degree of oversight as exchanges or ATSs.

The newly developed and undefined "communication protocol system" concept created by the Commission for the first time in the Proposal would create numerous problems and would make initial as well as future compliance exceedingly difficult. Moreover, vague regulatory language increases the risk of differing interpretations by the Commission and its staff and industry members, and often can lead to needless and costly enforcement investigations and actions. At a time when industry members are cautioned to take conservative approaches to regulatory requirements, not knowing where the line is makes such an approach increasingly difficult.[17] Even if the Commission or its staff were to embrace narrower interpretive views now, this provides no comfort that such views would continue in later years when the currently proposed vague language comes to be interpreted differently.

Because of the significant impact this aspect of the Commission's Proposal could have on market structure and market participants, the Commission's proposed amendments to Rule 3b-16 warrant a more thorough review by the SEC—similar to the process that the SEC undertook before adopting Regulation ATS.[18] Thus, SIFMA strongly advocates a re-proposal of this concept after the Commission has had an opportunity to review comments, engage in meaningful discussion with industry participants and the investors they serve, and, in particular, after the Commission reassesses how best to approach the concept of communication protocol systems in light of those comments and its own further consideration. For the reasons set forth above, a reproposal that effectively treats the Proposal as a "concept release" with respect to communication protocol systems is needed here and would be consistent with the Commission's past consideration of such issues. Alternatively, the SEC could propose a separate disclosure regime for communication protocol systems and not amend the definition of "exchange," which may be the more optimal approach to avoid the unintended consequences of a definitional change. SIFMA believes that a more thorough assessment would either result in a more

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16 *See* note 4 above describing oblique references to leveling the competitive playing field between ATSs and exchanges.

17 *See, e.g.*, Gary Gensler, Chair, SEC, *Prepared Remarks At the Securities Enforcement Forum* (Nov. 4, 2021) ("So if you're asking a lawyer, accountant, or adviser if something is over the line, maybe it's time to step back from the line. Remember that going right up the edge of a rule or searching for some ambiguity in the text of a footnote may not be consistent with the law or its purpose."); *see also* Gary Gensler, Chair, SEC, *Remarks at 2021 FINRA Annual Conference* (May 20, 2021).

18 By comparison, before proposing and adopting Regulation ATS in 1998, the Commission published an initial concept release in May 1997 requesting comment on ways to update the regulatory framework for ATSs in light of changes in technological developments. *See* Securities Exchange Act Release No. 38672, 62 FR 30485 (May 23, 1997).

appropriately tailored approach, or might even persuade the Commission that there is a better way of addressing whatever underlying concern the Commission is seeking to address.

SIFMA Opposes Amending Rule 3b-16 to Include Communication Protocol Systems

SIFMA strongly opposes the Commission's proposal to add the concept of "communication protocol" systems into Rule 3b-16 and to classify such systems as "exchanges" under the Exchange Act. As an initial matter, the Commission's expansive approach dramatically (and without the benefit of data) reconceptualizes the normal meaning of "exchange." If the Commission wants to regulate such systems, it should consider creating a new set of rules for them, including public disclosure requirements, rather than define them as "exchanges" and force them into Regulation ATS (or registering as national securities exchanges). Such an approach would better come as a consequence of a more holistic assessment of what regulatory measures are warranted for the activities the Commission seeks to regulate and any broader regulatory purposes the Commission seeks to fulfill. It is not at all clear or convincing from the general descriptions in the Proposal what specific policy goals the Commission is seeking to address or the scope it is establishing for this new concept.[19]

For example, without a clear or narrow problem that the Commission is seeking to solve, amending the definition of exchange by deleting "multiple" and including communication protocols and trading interest ends up creating a circular logic that makes a "conservative approach to regulatory requirements" challenging and fundamentally changes the analysis that broker-dealers have conducted over decades to determine whether certain of their systems meet the existing definition of an exchange and had to therefore operate as ATSs. [20] This is why the Commission should rethink its approach to amending the definition of an exchange and instead repropose a targeted rule that solves a clearly identified issue.

SIFMA believes that the Commission may have in mind a bright line because the Proposal's economic analysis suggests that a relatively small number of systems would be captured by the rule. SIFMA urges the Commission to more concretely identify those systems about which it is concerned (and why it is concerned) and more narrowly scope the expansion of the definition of "exchange" to include only those systems. Because it is not clearly articulated, SIFMA believes that undefined terms such as communication protocol systems and the expansive language used to describe the Commission's intent in bringing communication protocol systems within the definition of "exchange" is in conflict with its economic analysis, which suggests a relatively small number of systems would be captured. The broad concept of communication protocol systems could theoretically capture hundreds, if not thousands, of systems across asset classes, while the SEC's own estimate in the Proposal suggests that it would

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19 For example, the broad definition of concepts included in the Proposal may have an unintended consequence of capturing certain types of self-directed platforms retail customers access online without a financial advisor and that are offered by U.S. broker dealers. A clear exemption should be established for these types of platforms, given they are already subject to significant regulation.

20 The Commission makes the assumption that "removing the term 'multiple' would mitigate confusion and the potential to misconstrue the application of Rule 3b-16(a) to systems with non-firm trading interest, including RFQ systems, and aligns the rule with the statutory definition of 'exchange.'" See Proposing Release at 15506. The Proposal also states that the Rule 3b-16(b) exemption will remain intact.

only capture 22 systems – a significant disconnect between the SEC's intent and scope of the new concept. As presented, given the breadth with which the Commission has described (but not defined) communication protocol systems—and the Commission's statement that it intends to "take an expansive view of what would constitute 'communication protocols' under this prong of Rule 3b-16(a)"[21]—the number of systems the Commission estimates will be affected appears to be troublingly underinclusive.[22] For example, front-end "GUI" software solutions, particularly those carrying pricing/market data and that interoperate with an ATS, run the risk of being characterized as an "exchange"[23] – a circumstance which on its own would greatly increase the number of communication protocol systems well beyond the Commission's estimate of 22 for all of the securities markets and particularly past the estimate of four new venues in the market for NMS stocks.[24] Although estimates provided in the Commission's economic analysis suggest an initial intent to capture relatively few systems, the lack of a definition for "communication protocol systems" and the examples used throughout the Proposal belie those estimates. This is a critical issue, particularly given the Commission's statutory obligation to scope the effect of a proposed regulation and its associated costs.[25]

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21 Proposing Release at 15507.

22 For example, the Commission estimates that there are only four communication protocol systems operating in the market for NMS stocks that may meet the definition of exchange under the proposed changes to Exchange Act Rule 3b-16. *See* Proposing Release at 15613.

23 In defining "passive" bulletin boards as being outside the scope of an ATS, the Commission uses the specific example of workflows from an interactive bulletin board displaying trading interest that allows (or "makes available" through) the launch of a ticket or other means of communicating trading interest to be ATS activity. "Using the term "makes available" will help ensure that the investor protection and fair and orderly markets provisions of the exchange regulatory framework apply to all the activities that consist of the system that meets the criteria of Rule 3b-16(a), *notwithstanding whether those activities are performed by a party other than the organization that is providing the market place*." Proposing Release at 15506 (emphasis added). The Commission thus opens up the possibility that systems interacting with ATSs (*i.e.*, "making available" methods through which buyers and seller can interact) are themselves separate "exchanges." This raises important questions as to when two or more apparently unrelated entities might be viewed as collectively providing the services of an exchange: one entity bringing together conversation around trading interests and another making the trading mechanic available.

24 Significantly underestimating the scope of new registrants also raises questions regarding the Commission's resources to implement and oversee a substantial increase in the number of ATSs. Before the Commission makes significant changes to regulations, it should ensure that it is capable of adequately fulfilling its own obligations under the relevant regulatory regime. For example, SIFMA understands that a number of NMS Stock ATS operators found the review and consultations concerning Form ATS-N to be time consuming and resource intensive for both the operators and the Commission staff that resulted in numerous delays and inefficiencies that were needlessly expensive and harmful to industry participants. The Commission should explain how it has determined that it has sufficient regulatory and examination resources to adequately oversee the potentially dozens of new ATSs that would be required to register under the Proposal. As we discuss on page xx, delays in approving quarterly ATS-R product and system changes, and updating ATS-N disclosures have significant implication of the Commission becoming a bottleneck for innovation and competition.

25 The Commission also has the obligation to set clear policy and not relegate the responsibility to clarify poorly defined basic foundational matters, such as the definition of an "exchange," to staff FAQs or to examiners or enforcement staff instead of the APA-mandated use of notice and comment. This is particularly true where later interpretations may not be consistent with the Commission's regulatory intent and goals.

If the Commission determines to move forward with the amendment to the definition of "exchange," a step SIFMA strongly opposes, guardrails should nevertheless be established in one or more of a variety of ways, including via the provision of numerous examples (similar to how the Commission provided guidance through the use of "systems" A through T in the 1998 Regulation ATS adopting release for systems that would and would not be captured[26]), through defining the term "communication protocol system," defining what it means to "make available for trading," or expanding upon, clarifying and/or adopting additional exemptions from the definition of "exchange" (similar to the exemptions for single-dealer systems and smart order routers in existing Rule 3b-16).

Rule 3b-16(b) already provides that a system is not considered an "exchange" solely because the system routes orders to exchanges or broker-dealers for execution or the system allows persons to enter orders for execution against the bids and offers of a single dealer (which also permits certain other incidental activities). The Commission stated in the Proposal that it "is not proposing to amend Exchange Act Rule 3b-16(b), which excludes from the definition of 'exchange' systems that perform only traditional broker-dealer activities, including: systems that route orders to a national securities exchange, a market operated by a national securities association, a broker-dealer for execution, or systems that allow persons to enter orders for execution against the bids and offers of a single dealer if certain additional conditions are met."[27] In each case, these are systems for which there is no clear benefit from exchange regulation as it relates to investor protection, fair and orderly markets, transparency or oversight. Indeed, when the Commission adopted the exclusion for single-dealer systems, it noted that "the Commission does not believe that a single dealer that automates its means of communicating trading interest to customers is a market"; rather, the Commission stated that "such systems automate functions traditionally performed by dealers."[28] Similarly, the Commission recognized that order routers did not raise the types of concerns for which exchange or ATS/broker-dealer registration is necessary: "all orders entered into a routing system are sent to another execution facility. In addition, routing systems do not establish non-discretionary methods under which parties entering orders interact with each other."[29]

The same rationale for creating the existing exclusions for order routers and single-dealer systems (exemptions the SEC is expressly not amending) apply to other systems that may now fall into the definition of "exchange" under the Commission's proposed amendments to Rule 3b-16. Based on the Commission's prior reasoning for creating the existing exclusions and the Commission's estimates on the number of systems that will be "communication protocol systems" required to register as exchanges or broker-dealer operators of ATSs, SIFMA believes that the systems noted below would be exempt from the definition of "exchange," notwithstanding the proposed expansion of the definition of "exchange" and the breadth with

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[26] *See* Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 Fed. Reg. 70844, 70854-56 (Dec. 22, 1998) (hereinafter "Regulation ATS Adopting Release").

[27] *See* Proposing Release at 15502, n.72.

[28] *See* Regulation ATS Adopting Release at 70854; *see also id.* at 70855 ("System L allows a dealer to disseminate its proprietary quotations to its customers and permits customers to transmit orders to buy from or sell to that dealer at those quoted prices. System L is not included under Rule 3b-16 because it falls within the exclusion in paragraph (b)(2) of Rule 3b-16.").

[29] Regulation ATS Adopting Release at 70854.

which the Commission described "communication protocol systems." Moreover, failure to exclude such systems from the definition of "exchange" would have the unintended effect of harming liquidity and impeding the benefits of automation, electronification and operational efficiencies which have developed in recent years. Accordingly the SEC should specifically clarify, as done through examples in the 1998 Adopting Release or otherwise, that such systems are out of scope from the definition of exchange as proposed to be amended by the Proposal.

Order Routing Systems. *The Commission should clarify that systems that simply route orders elsewhere for handling or execution—to a broker-dealer, an exchange, or an ATS—are excluded from the definition of "exchange." The Commission should make expressly clear that order management systems ("OMSs"), execution management systems ("EMSs"), smart order routers, algorithms, direct market access ("DMA") or sponsored access offerings, and systems routing to liquidity providers and vendors in response to IOIs and RFQs are out of scope and can rely on the existing exclusion from "exchange."* As the Commission recognized when adopting the exclusion for order routers, there is no obvious policy rationale for including order routing systems in the scope of the definition of "exchange" as these systems are merely routing orders to other venues for execution.

Single Dealer Systems. *The Commission should clarify that sell-side broker-dealer systems that provide capital / liquidity in a dealer capacity to their clients are excluded from the definition of "exchange." This would include systems such as single dealer platforms that stream IOIs, automated market making systems, algorithms that provide dealer capital to clients, central risk books, and broker closing cross systems.* Single dealer systems allow dealers to provide liquidity to customers more efficiently and thereby reduce costs for investors. As the Commission acknowledged when adopting Regulation ATS, these systems allow clients to access liquidity from a single-dealer and are therefore not equivalent to systems which bring together multiple buyers and sellers for which the exchange-registration framework was designed. Although, as noted above, existing Rule 3b-16(b) includes an exclusion for single dealer systems, the Commission should provide further guidance, including examples, concerning how the single dealer exclusion works if the amendments to Rule 3b-16 are adopted. A clearly articulated exclusion for single dealer systems is increasingly important if the Commission chooses to adopt the addition of communication protocol systems into the definition of "exchange" as many market participants (not all of which are "dealers" as defined in the Exchange Act) operate systems for their own trading that could otherwise fall into the broad descriptions of communication protocols systems. The Commission should clarify that a single system that automates a dealer's management of customer trading interest by (i) taking trading risk as principal and (ii) utilizing due and customary discretion to set rules to then manage such risk, consistent with regulatory obligations, fits within the single dealer exclusion. Such clarification would also be consistent with the existing regulatory framework and the Commission's intent to continue to distinguish what is bona fide broker-dealer activity (even if in part automated) from exchange activity. Among other things, such clarification would also be in the best interest of the market to allow dealers to continue to innovate ways to automate existing voice process and provide greater efficiency and liquidity to customers and reduce costs.

Buy-Side Systems. *The Commission should make clear that buy-side trading systems are out of scope. SIFMA does not believe that the Commission intended in this Proposal to require institutional investors to register as broker-dealers in order to have to then operate a system of*

theirs as an ATS. SIFMA understands that a number of buy-side firms operate systems that are either developed in-house or purchased from a third-party to facilitate their trading activities. In some instances, these systems include workflow efficiencies that, for example, facilitate communications between a central desk (at an affiliated legal entity) working on behalf of several underlying funds (each a separate legal entity) and one or more sell-side broker-dealers regarding potential trading interest. In some instances, systems may be licensed from third-party software providers that provide code for use by buy-side participants as well as technical support. Buy-side users of such systems are generally not registered as "dealers" under the Exchange Act and thus may not be able to rely on the current exclusion for single dealer systems in existing Rule 3b-16(b). The burden of registration for these systems would be disproportionate given that they are operated only for trading activity by the buy-side firms for the benefit of their underlying investors. In many cases, the buy-side may cease to use such a system were they to face registration requirements under Rule 3b-16, which would reverse the many benefits of these platforms such as automation, workflow efficiency, pre-trade price transparency, and managing transaction costs. There is no clear policy rationale for including such systems within the scope of the definition of "exchange" and subjecting them to regulation as an exchange or ATS. In contrast, doing so would impose disproportionate burdens on buy-side participants, and would limit their ability to automate and optimize their execution management, to the detriment of underlying investors.

Again, SIFMA believes that scoping out buy-side systems and systems that qualify as order routing or single dealer systems from the definition of "exchange" is consistent with (1) the exclusions codified in existing Rule 3b-16(b), (2) the description of such exclusions and the types of systems that would qualify in the adopting release of Regulation ATS, (3) the SEC's own representation of the exclusions in footnote 72 of the Proposal, and (4) SEC's own estimates that fewer systems would be captured by the concept of communication systems (for example, only four (4) systems that trade NMS stocks).

In connection with certain of the categories of exclusions we view as essential to a workable understanding, we offer the following additional considerations and observations:

- Infrastructures. Systems that are providing general connectivity for FIX messages, where the industry/clients have set the standards, should not be considered exchanges. Because these systems often use "protocols" and include "communications" that may relate to securities, they are arguably in scope as communication protocol systems under the Commission's term. Although the Proposal includes language stating that "systems that provide general connectivity for persons to communicate without protocols, such as utilities or electronic web chat providers, would not fall within the definition of exchange," this language is too narrow to exclude systems that have basic "protocols" for use.[30] By way of comparison, VoIP and FIX operate in the same general fashion in terms of transmitting structured packets of information. VoIP does not appear on its face to be

[30] Proposing Release at 15502 n.72. Similarly, the Commission's statement in that same footnote that it is "not proposing to include within the definition of 'exchange' a system that unilaterally displays trading interest without offering a trading facility *or communication protocols* to bring together buyers and sellers" is too narrow to capture most systems that do establish basic requirements for use.

in scope, but it is essentially doing what FIX does. If the SEC wishes to pursue rulemaking it should be technology neutral and activity oriented.

- Pre-Trade Communications. Pre-trade communications, sometimes referred to as "structured inquiry chats," allow potential purchasers and sellers to share general pre-trade color regarding particular symbols or investment opportunities. Although the Commission recognized that very limited pre-trade communication systems should not be considered "exchanges" and noted that "systems that only provide general connectivity for persons to communicate without protocols, such as utilities or electronic web chat providers, would not fall within the communication protocols prong of the proposed rule,"[31] it then stated that "[t]o the extent that such systems are designed for securities and provide communication protocols for buyers and sellers to interact and agree to the terms of a trade, such systems would fall within the criteria of Exchange Act Rule 3b-16(a) as proposed to be revised."[32] With the proposed replacement of "order" with "trading interest" in Rule 3b-16 and the proposed expansion of the rule to include "communication protocols" that are "made available" to buyers and sellers, the Commission has introduced significant uncertainty regarding the extent of pre-trade communications that can be undertaken before a system meets the definition of "exchange." Through the application of these vague terms, the Commission risks shutting down these systems and the benefits they provide to market participants to engage in pre-trade communications while having not clearly articulated a rationale for treating systems that do not provide execution services and do not serve as a source of liquidity as "exchanges."

- Self-Directed Retail Platforms. The broad definition of concepts included in the Proposal may have an unintended consequence of capturing certain types of self-directed platforms retail customers access online without a financial advisor and that are offered by U.S. broker-dealers. A clear exemption should be established for these types of platforms, given they are already subject to significant regulation.

SIFMA Opposes Amending Rule 3b-16 to Change "Order" to "Trading Interest"

The proposed change from "orders" to "trading interest" would, alone, result in numerous systems meeting the "exchange" definition for the first time. Under the current regulatory structure governing the securities markets, regulatory requirements typically key off of orders and trades.[33] For decades, these terms have been widely understood and provide a sound basis on

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31 Proposing Release at 15506; *see also id.* at 15502 n.72.

32 Proposing Release at 15508.

33 For example, Regulation NMS requirements generally involve "orders," which is defined in Rule 300 of Regulation NMS. Although Rule 600 of Regulation NMS also defines the term "actionable indication of interest," the term is clearly and narrowly defined to include an indication of interest that "explicitly or implicitly conveys all of the following information with respect to any order available at the venue sending the indication of interest: (i) Symbol; (ii) Side (buy or sell); (iii) A price that is equal to or better than the national best bid for buy orders and the national best offer for sell orders; and (iv) A size that is at least equal to one round lot." 17 CFR 242.600(b)(1) (emphasis added). This is a significantly more narrow definition than the Commission's proposed definition of "trading interest." The Commission's proposed

which to establish regulatory obligations. The breadth of the term "trading interest" risks capturing information that is too far removed from an order—much less a trade—for purposes of defining "exchange." For example, dealers may provide "bids wanted lists" and indications of interest, sometimes with a firm price, sometimes with a price designed to initiate a discussion, and sometimes without a price. Each of these types of messages, while very different from one another, are likely to include information captured under the term trading interest. Although these types of communications are fundamentally different from communications constituting "orders," the new expanded definition causes concern that these means of providing liquidity would now generally have to be captured under the exchange/ATS rubric. SIFMA believes the Commission has not established a sufficient basis on which to treat these fundamentally different types of communications and systems under the same regulatory regime as systems designed to allow orders to interact.

SIFMA Recommends the Commission Adopt an Exemption for Systems With Limited Volume

SIFMA encourages the Commission to consider a general exemption from the exchange registration requirement for systems facilitating a limited volume of trading. Section 5 of the Exchange Act specifically contemplates that the Commission can exempt a system from registration as an "exchange" on the basis of the "limited volume of transactions effected" on such a system. Specifically, Section 5 provides:

> It shall be unlawful for any broker, dealer, or exchange, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce for the purpose of using any facility of an exchange within or subject to the jurisdiction of the United States to effect any transaction in a security, or to report any such transaction, unless such exchange (1) is registered as national securities exchange under [Section 6 of the Exchange Act], or (2) *is exempted from such registration upon application by the exchange because, in the opinion of the Commission, by reason of the limited volume of transactions effected on such exchange, it is not practicable and not necessary or appropriate in the public interest or for the protection of investors to require such registration*. (emphasis added)

SIFMA believes that, as the Commission seeks to expand the reach of the definition of "exchange," the Commission also should consider developing a clear and robust limited volume exemptive framework, in conjunction with any modification to Rule 3b-16 and Regulation ATS. Should the Commission decline to take such steps, it should explain why, particularly when the Exchange Act specifically contemplates potential exemptive relief for low-volume systems. Notwithstanding that Section 5 itself contemplates an application by a particular exchange to obtain an exemption from registration, the Commission's exemptive authority under the Exchange Act is broad, and the Proposal should acknowledge and engage with the express statutory language regarding the possibility of establishing a limited volume exemption in the

amendments to Rule 3b-16 could thus complicate the long held understanding of terms such as "actionable indication of interest" which market participants have relied upon.

context of the new regulatory requirement it seeks to establish.[34] Such an exemption would also encourage innovation and competition and allow smaller systems an opportunity to enter the market without incurring the substantial upfront regulatory costs associated with operating as a national securities exchange or ATS.

SIFMA Believes Expanding the Definition of "Exchange" as Proposed Is Likely to Result in Numerous Difficult Collateral and Unforeseen Issues

The Commission's proposal to expand the scope of "exchange" to include a variety of systems that have not heretofore been subject to this regime will have a wide variety of negative consequences, including on existing ATSs. The following is an illustrative, but non-exhaustive list.

Potential Effects on Competition and Ability to Innovate

With an increase in the number of forms submitted by ATSs (both as a result of the proposed changes to Regulation ATS to add Government Securities ATSs and the proposed changes to Rule 3b-16), the Commission staff charged with reviewing the material will face a significant increase in materials to review. Thus, as with changes instituted by Form ATS-N a few years ago, there would certainly be a bottleneck and delays for operators, including newly encompassed entities, seeking to have their forms approved. In apparent acknowledgment of the resource constraints, the Commission is re-proposing to amend Rule 304(a)(1)(ii)(A)(1), which currently provides that the Commission may extend the initial Form ATS-N review period for an additional 90 calendar days if the Form ATS-N is unusually lengthy or raises novel or complex issues that require additional time for review, to provide that the Commission may extend the review period if it finds that an extension is appropriate.

Although SIFMA acknowledges that there are certain situations, such as particularly unique or complex systems, that may require more time for Commission review, extensions should be the exception rather than the rule. The Commission should consider imposing a higher standard for issuing extensions. For example, if the Commission staff determines it needs more time, then the Commission should articulate a reason at least two weeks prior to the scheduled end of the review period and include an ability for an ATS operator to appeal the extension. SIFMA is concerned that although the Paperwork Reduction Act cost benefit analysis included in the Proposal focused on the burden to market participants becoming broker-dealers and filing the required forms for Commission approval, the analysis did not address the adequacy of the Commission's resources for the effort, which directly affects the ATS's ability to conduct business.

Throughout the initial implementation of Form ATS-N, it took significant industry and Commission staff resources for filings to become effective. This was due to the number of ATSs filing the forms for the first time and the staff's intensive review of each of them – and nearly all

[34] For example, Exchange Act Section 36 provides the Commission, with certain limited exceptions, with the authority to "conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors." Exchange Act § 36(a)(1).

of them simultaneously. The proposed changes to Form ATS-N would require all existing NMS Stock ATSs to go through an update process at the same time, and these filings will be in addition to standard business as usual filings. Moreover, due to the way many of the proposed changes to Form ATS-N are structured, the changes do not introduce new questions (which would potentially limit the review to certain sections) but rather necessitate that previously approved disclosure be reconsidered, which adds burdens to the ATSs making the filings and increases the strain on Commission resources. The Commission estimates that there will be eight communication protocol systems that will have to file Form ATS-N for the first time as well as 24 new Government Securities ATSs.[35] The Commission estimates there will be 14 communication protocol systems that will have to file Form ATS for the first time.[36] Even assuming the accuracy of the Commission's estimates, this represents a significant number of filings made with the Commission just by new filers.[37] SIFMA believes that a re-proposal should provide some insight into how long the process actually took for the Commission staff, on average, for the 34 NMS Stock ATSs that filed Form ATS-N when the requirement became effective. Transparency on the average total days from submission of the filing to effective date and the average number of resubmissions would provide insight into what would be expected under the Proposal.[38]

More broadly, SIFMA believes the Commission's approach, if adopted as proposed, could have adverse effects on innovation and development of market structure, particularly in the fixed income context. The fixed income market lags behind the equity markets and is still electronifying. Consequently, there is much innovation still ongoing regarding fixed income trading. Even the markets for different fixed income products are at dramatically different stages of development. Although electronic trading platforms for government securities have become a significant source of orders and operate with complexity similar to that of markets that trade stocks in terms of automation and speed of trading, the use of limit order books, order types, algorithms, connectivity and data feeds, these market dynamics are not present in the corporate and municipal bond markets. The effect of the SEC's current approach—which makes no distinctions between the equity and fixed income markets with respect to defining "exchange"—is likely to slow down innovation due to the lengthy regulatory reviews that would become necessary, but also due to the threshold cost-benefit analysis market participants would have to consider. For some systems, when they take into account the significant burden of ATS and broker-dealer registration, buy-side systems and non-financial institution technology providers may simply cease operation. The Commission must carefully consider these potential outcomes as it determines whether and how to proceed with the Proposal. The Commission should

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35 Proposing Release at 15591-92.

36 Proposing Release at 15588-89.

37 Should the Commission choose to move forward, it should consider establishing temporary registrations while it reviews initial forms, similar to the process undertaken by the Commodity Futures Trading Commission for registering swap execution facilities. *See* 17 CFR 37.3(c).

38 SIFMA notes that, according to the information on the Commission's ATS-N web page, 22 ATSs filed their initial Form ATS-N with the Commission between February 1, 2019, and February 13, 2019. All 22 were subject to extension notices. Of those 22, two were approved in July 2019; three were approved in August 2019; five were approved in September 2019; and eleven—representing half—were approved in October 2019. *See* https://www.sec.gov/divisions/marketreg/form-ats-n-filings.htm (last visited 3/24/22).

prioritize providing avenues for the continued growth of electronic platforms in the corporate and municipal bond markets to promote efficient markets and benefit retail investors.[39]

Potential Extra-Territorial Effects

The Proposal does not indicate that the Commission has adequately considered the potential effects of the Commission's proposed changes to the definition of "exchange" with respect to similar non-U.S. regulatory regimes for trading platforms.. What is considered an exchange in the US today is generally consistent with what is considered an exchange in other countries. Many global financial institutions (and their affiliates) that are potentially subject to the proposed new definition of "exchange" are concurrently subject to parallel non-U.S. regulatory/policy initiatives concerning trading platforms. It is not clear that the Commission has considered how the Proposal interacts with non-U.S. policy initiatives concerning regulated trading platforms , and whether there have been consultations to align policy goals and approaches, where appropriate.

The current perspective of what constitutes "exchange" activity has been in place for decades, and the amended definition of exchange could cast a different light on exchanges and ATSs altogether, globally. Generally, non-U.S. regulators view ATSs as a brokerage service offered by a local affiliate. The amended definition could result in a reevaluation of that perspective by non-U.S. regulators. Should the Commission move forward with the proposed amendments, SIFMA strongly urges the Commission to consider the potential effects that could result were a U.S. ATS (or communication protocol system) subjected to regulation as an exchange in a non-U.S. jurisdiction as a result of the Commission's actions.

II. Government Securities ATSs

The Commission proposes to update Regulation ATS by eliminating the exemption for Government Securities ATSs (*i.e.*, ATSs that limit their securities activities to government securities as defined under Section 3(a)(42) of the Exchange Act or repurchase and reverse repurchase agreements on government securities). The Commission proposes to require Government Securities ATSs to file Forms ATS-N (as proposed to be revised), which would be subject to the Commission's review and effectiveness process, and would require a Government Securities ATS to disclose information about its manner of operations and the ATS-related activities of the registered broker-dealer or government securities broker or government securities dealer that operates the ATS and its affiliates. The Commission is also proposing to apply the Fair Access Rule to Government Securities ATSs that meet certain volume thresholds in U.S. Treasury Securities or in a debt security issued or guaranteed by a U.S. executive agency or government-sponsored enterprise ("Agency Securities").

As noted in our prior comment letter on the Commission's 2020 Proposal to amend Regulation ATS to eliminate the exemption from compliance for Government Securities ATSs,

[39] Although the Commission appears to recognize the potential effects its Proposal could have on smaller venues, it dismisses this impact and assumes volume will be absorbed by incumbent or larger platforms. *See* Proposing Release at 15633-34. This view ignores the potential that smaller venues often serve as innovators and bring new and efficient ideas to market.

SIFMA generally supports increased transparency related to the basic rules of operation of fixed income and Government Securities ATSs. As further discussed below, although SIFMA believes that the Commission has suggested a thoughtful framework for the inclusion of Government Securities ATSs in its Proposal, SIFMA's support with respect to Government Securities ATSs cannot be separated from the new conceptual approach to the definition of "exchange" that the Commission has introduced for the first time. That is, SIFMA supports extending Regulation ATS to Government Securities ATSs as proposed by the Commission *without including communication protocol systems within Exchange Act Rule 3b-16 and the definition of* "*exchange*." SIFMA strongly believes that this aspect of the Proposal seeks to move the needle too far both in respect of ATSs that trade government securities as well as other investment products.

SIFMA continues to believe that Regulation ATS should not be applied to all electronic platforms that may facilitate trading between market participants. Our 2021 Letter noted concerns about imposing regulation on firms that serve merely as "informational conduits" – and particularly doing so "without first conducting a study on the impact of additional regulations" on such firms.[40]

SIFMA Supports Rescinding the Exemption from Regulation ATS for Government Securities ATSs

As noted in our prior comment letter on the 2020 Proposal, SIFMA generally supports the Commission's proposals to require Government Securities ATSs to register with the Commission as ATSs and to provide publicly available operational transparency related to the basic rules of operation of Government Securities ATSs.[41] SIFMA's support, however, applies only those Government Securities ATSs that meet the definition of "exchange" as it exists today in Exchange Act Rule 3b-16 and has been previously interpreted by the Commission and without the incorporation of "communication protocol systems." As discussed more fully above, SIFMA opposes adoption of the Commission's proposed amendments to Rule 3b-16.[42]

SIFMA Supports Requiring Government Security ATSs to File a Publicly Available Form But Opposes Requiring Government Security ATSs to File the Same Form ATS-N as Used by NMS Stock ATSs

SIFMA supports requiring Government Securities ATSs to file a publicly available form with the Commission similar to the ATS-N currently filed by NMS Stock ATSs. However, SIFMA does not support combining the filings of Government Securities ATSs and NMS Stock

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40 2021 Letter at 9.

41 *See* 2021 Letter at 2 (indicating SIFMA's endorsement for "increased operational transparency related to the basic rules of operation of fixed income and government securities ATSs").

42 The Commission specifically observed that the proposed amendments to Rule 3b-16, including extending the rule to communication protocol systems, would "include Communication Protocol Systems that make available for trading any type of security, including, among others, government securities, corporate bonds, municipal securities, NMS stocks, equity securities that are not NMS stocks, private restricted securities, repurchase agreements and reverse repurchase agreements, foreign sovereign debt, and options." Proposing Release at 15498.

ATSs into the single combined Form ATS-N as proposed by the Commission. Rather, SIFMA recommends that the SEC revert to a separate Form ATS-G for Government Securities ATSs and maintain Form ATS-N, with enhancements, for NMS Stock ATSs, similar to the approach outlined in the Commission's 2020 Proposal. Although Form ATS-N and Form ATS-G may provide a substantial amount of overlapping questions and disclosure, SIFMA does not believe this fact supports combining the two forms when other sections are more appropriately tailored for specific products.

Changing current Form ATS-N to incorporate disclosures targeted for Government Securities ATSs rather than simply creating a new Form ATS-G would hinder and reduce transparency that the SEC provided with the adoption of Forma ATS-N for NMS Stock ATSs. Both NMS Stock ATS filers and consumers of the information they provide are accustomed to existing Form ATS-N, including the scope of information provided, its location within the form, and its relationship between the questions and information included in other responses. Rearranging and changing Form ATS-N will lead to NMS Stock ATSs and industry users needing to "re-learn" the forms and will require amendments to existing Form ATS-N by NMS Stock ATSs simply to relocate existing disclosure, a burdensome change for filers without concomitant benefits for consumers of that information and one which will also use SEC staff resources to review these amendments. Although SIFMA does not object to certain enhancements to the current disclosure in Form ATS-N as described below, SIFMA opposes amending Form ATS-N for current NMS Stock ATSs solely as a result of changes necessary to the form to accommodate Government Securities ATSs if they are required to submit the same form. Rather, SIFMA would support a new and different form for Government Securities ATSs even if the two forms have significant overlapping questions. Moreover, creating different forms for broker-dealer operators that may have both an NMS Stock ATS and a Government Securities ATS would make relevant information easier for market participants to locate.

As described above, the initial filing and approval process when Form ATS-N was introduced required substantial time and resource commitment by both the firms operating ATSs and the staff of the SEC's Division of Trading and Markets. Consequently, the Commission should carefully weigh the costs associated with amendments to existing Form ATS-N for NMS Stock ATSs, particularly in light of the substantial increase in the number of ATSs that may be required to file forms with the Commission for review by the Commission staff. If firms that have worked to get their Form ATS-N materials approved are unable to amend those statements in a timely fashion due to Commission staff constraints, this could potentially stymie competition and innovation.

In addition, a separation of Form ATS-N and potential Form ATS-G filings posted on the SEC's website would provide more public transparency around the actual number of NMS Stock ATSs versus Government Security ATSs. This would not be readily available information if an amended Form ATS-N were required of both.

III. Proposed Amendments to Form ATS-N

The Commission proposes a wide range of amendments to the disclosure requirements in Form ATS-N. As discussed above, because SIFMA opposes the incorporation of communication protocol systems into Rule 3b-16, SIFMA does not support the proposed amendments to Form

ATS-N reflecting that change (*e.g.*, the changes in Part III, Item 8 (as renumbered) requiring multiple disclosure items on the use of messaging and procedures governing communication protocols).[43] In general, Form ATS-N, in its current form which was only recently updated, has served as a useful tool for firms to assess the operation of NMS Stock ATSs. Although some SIFMA members do not object to minor modifications that improve the information already provided in the form (*e.g.*, enhancements to the list of securities traded and the types of subscribers), SIFMA does not support a wholesale reorganization of Form ATS-N at this time. As a general matter, SIFMA opposes the Commission's proposal to eliminate the Yes/No questions from Form ATS-N as many users find these helpful when reviewing the forms – for example, if one can see that there is a difference in offering to subscribers versus the broker-dealer operator, one knows whether to read further to see how one might be impacted. In particular, SIFMA does not believe the following amendments proposed by the Commission are necessary or would enhance the utility of Form ATS-N and therefore specifically opposes the following proposed amendments to Form ATS-N:

- Part III, Item 9 to require summary disclosure of whether and how an ATS supervises trading activity, including the sources of data the ATS uses and the activities the ATS is attempting to detect, deter or limit. Despite the Commission's position that summary information would be sufficient, SIFMA believes including information on the type of activity surveilled could inadvertently instruct market participants on potential paths for trading activity that may go undetected by the ATS.

- Part III, Item 21 to require additional detail on post-trade processing, clearance and settlement.

- In a number of places, the Commission has proposed to add disclosure related to "Persons whose trading interest is entered into the ATS by a Subscriber or the Broker-Dealer Operator" (*e.g.*, Part II, Items 2, 5, 6; Part III). As a practical matter, the ATS or Broker-Dealer Operator has a relationship with the Subscriber and is not always aware of the Subscriber's underlying clients or the offering a Subscriber may provide to its clients related to the ATS (*e.g.*, segmentation or counterparty selection).

IV. Fair Access Requirements

The Commission proposes two primary changes to the Fair Access Rule. First, the Commission proposes to establish minimum requirements for the written standards required for ATSs that are subject to the Fair Access Rule. Second, the Commission proposes to require firms to aggregate the transaction volume for a security or security category of ATSs that are

[43] Moreover, should the Commission move forward with including communication protocol systems within the definition of "exchange," the Commission should consider whether it is appropriate to require those systems to use Form ATS-N as significant portions of Form ATS-N may not apply to many of the systems.

operated by a common broker-dealer or operated by affiliated broker-dealers for purposes of calculating the volume thresholds of Rule 301(b)(5)(i).

SIFMA Opposes Aggregating the Transaction Volume of ATSs That Are Operated By A Common Broker-Dealer or Affiliated Broker-Dealers for Purposes of Calculating Fair Access Volume Thresholds

SIFMA opposes the Commission's proposed amendments to the Fair Access Rule to require the aggregation of transaction volumes of all ATSs operated by a common broker-dealer or by affiliated broker-dealers for purposes of calculating the rule's volume thresholds. As the Commission is aware, and as is disclosed in many NMS Stock ATSs' Form ATS-Ns, a number of NMS Stock ATSs stop trading in symbols when trading volume approaches certain regulatory thresholds, including the volume thresholds that trigger fair access requirements of Regulation ATS. Each individual ATS presents a different commercial value proposition to market participants – for example, by allowing different participants access, offering different order types, or executing using different matching logic. In the case of affiliated broker-dealer operators, these ATSs may be operated and run by completely different and independent broker-dealer legal entities. Many individual ATSs currently operating could easily trigger the Fair Access Rule's 5% volume threshold in a security for four of the rolling six month period, particularly for illiquid and thinly traded stocks.

SIFMA believes that, among NMS Stock ATSs, no single ATS today is subject to the Fair Access Rule, primarily because broker-dealer operators turn off securities from crossing in the ATS when the ATS approaches the 5% threshold in a particular security. As is clearly disclosed in ATS-N filings, this is standard industry practice and is commonly communicated to ATS subscribers by the broker-dealer operators at the start of every month. The practice of shutting off securities is not to "avoid" the Fair Access Rule, but rather is to ensure compliance with Regulation ATS due to the fact that there is no practical way of providing subscribers with fair access to an individual security or set of securities in an ATS that has exceeded 5% for the time period during which it may be subject to the Fair Access Rule requirements. Moreover, it is unlikely that a market participant would establish connectivity to an ATS solely because of a particular security or set of securities when the ATS could easily cut off trading in the security in order to remain under the threshold the following month. SIFMA does not believe that requiring a broker-dealer operator of multiple ATSs (or affiliated broker-dealer operators) to aggregate the trading volume across multiple ATSs will change this practice. Instead, it will likely have the effect of limiting the securities in which ATSs operated by the same broker-dealer operator or its affiliates will trade.

SIFMA believes that aggregating volume across multiple ATSs of the same broker-dealer operator will not result in more ATSs being subject to the fair access requirements in Rule 301. Rather SIFMA believes that aggregating volume among multiple ATSs will reduce liquidity by leading to fewer available venues as ATS operators will cease trading symbols for multiple ATSs when the volume thresholds are approached, and these thresholds will be reached more quickly if multiple ATS volumes are aggregated. Thus, contrary to the stated goal of fair access to provide more ready access by market participants to key trading venues, SIFMA believes the proposal to aggregate volume across multiple ATSs will reduce liquidity and access.

Expanding aggregation to affiliates also raises legal and operational problems given that those affiliates are different legal entities, likely function as independent businesses potentially on behalf of different customers, and often may operate on wholly different systems. It creates significant operational complexity to seek to coordinate activity in NMS stocks for such a regulatory requirement. Moreover, coordination across otherwise separate affiliates raises the possibility of information leakage across entities and businesses, client confidentiality and information barrier concerns. Should the Commission nevertheless determine that some degree of aggregation is necessary, SIFMA would propose that it be limited to the same broker-dealer operator of multiple ATSs rather than extend to affiliates.

V. Electronic Filing of Form ATS and Form ATS-R Through the Commission's EDGAR System

The Commission proposes to require ATSs that submit Form ATS to the Commission to submit the form through the Commission's EDGAR system. The Commission also proposes to require all ATSs to file Form ATS-R through the Commission's EDGAR system.

SIFMA Opposes the Expanded Use of EDGAR to Include Form ATS and Form ATS-R

The Commission proposes to "modernize" the filing of Form ATS and Form ATS-R by requiring that they be filed through the SEC's EDGAR system. The Commission states that requiring these forms "to be submitted via EDGAR would be the most efficient way to facilitate their electronic filing."[44] SIFMA's members disagree and, in fact, find the current method of filing these forms to be efficient and preferable. As the Commission acknowledges, to submit through EDGAR, the filing must be prepared, formatted, and submitted in accordance with Regulation S–T and the EDGAR Filer Manual.[45] Many broker-dealer had to outsource the ATS-N filings to third-party vendors – at a cost – given the EDGAR requirement. In the event of a formatting or submission error, the filing is rejected and must be reformatted and resubmitted. As a practical matter, most broker-dealer ATS operators do not routinely file documents through EDGAR (other than Form ATS-N and amendments thereto) and therefore use outside vendors to format and submit filings via EDGAR. By requiring Form ATS-R to be filed via EDGAR, the Commission will introduce a new and unnecessary quarterly cost on many broker-dealer ATS operators.

In addition to the technical and expense reasons described above, SIFMA opposes requiring that Form ATS-R be filed via EDGAR due to confidentiality concerns with some of the information included on the form. Specifically, Form ATS-R requires an ATS to provide on Exhibit A a list of all subscribers that were participants of the ATS at any time during the quarter covered by the report. Identified subscribers of an ATS is highly confidential information that an ATS does not disclose publicly. Moreover, there is no public benefit to making Exhibits B and C of Form ATS-R public. Specifically, FINRA already provides more granular information regarding ATS volume in an easily accessible and user-friendly format than the information included on Form ATS-R; consequently, SIFMA believes there is likely no benefit to disclosing Form ATS-R volume data via EDGAR and such information will be of no practical use. For that

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44 Proposal at 15578.

45 *Id.*

reason, SIFMA also suggests that the Commission consider removing this information from Form ATS-R for NMS stocks and that it be phased out and no longer required to be disclosed. In sum, SIFMA believes that the costs of the proposed changes to Form ATS-R in particular achieve no benefits and merely impose additional costs on broker-dealer ATS operators.

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SIFMA greatly appreciates the Commission's consideration of these comments and would be pleased to discuss them in greater detail. If you have any questions or need any additional information, please contact the undersigned at (212) 313-1124 or any of the following colleagues: Joe Corcoran at (202) 962-7383, Ellen Greene at (212) 313-1287, Chris Killian at (212) 313-1126, or our counsel, Jim Burns of Willkie Farr & Gallagher LLP at (202) 303-1241.

Respectfully Submitted,

Robert Toomey
Managing Director and Associate General Counsel

cc: The Honorable Gary Gensler, Chair
The Honorable Allison Herren Lee, Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
Dr. Haoxiang Zhu, Director, Division of Trading and Markets