SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 232, 240, 242, and 249

[Release No. 34–83663; File No. S7–23–15]

RIN 3235–AL66

Regulation of NMS Stock Alternative Trading Systems

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is adopting amendments to regulatory requirements in Regulation ATS under the Securities Exchange Act of 1934 (''Exchange Act'') applicable to alternative trading systems (''ATSs'') that trade National Market System (''NMS'') stocks (hereinafter referred to as ''NMS Stock ATSs''), including so called ''dark pools.'' First, we are adopting new Form ATS–N, which will require NMS Stock ATSs to disclose information about their manner of operations, the broker-dealer that operates the ATS (''broker-dealer operator''), and the ATS-related activities of the broker-dealer operator and its affiliates. Second, as amended, the regulations will require public posting of certain Form ATS–N filings on the Commission's website, which will be accomplished through the Commission's Electronic Data Gathering, Analysis, and Retrieval system (''EDGAR'') and require each NMS Stock ATS that has a website to post on its website a direct URL hyperlink to the Commission's website. Third, the amendments that we are adopting today provide a process for the Commission to review Form ATS–N filings and, after notice and opportunity for hearing, declare an NMS Stock ATS's Form ATS–N ineffective. Fourth, the regulations, as amended, will require all ATSs subject to the regulations to place in writing its safeguards and procedures to protect subscribers' confidential trading information. We are also adopting conforming amendments.

DATES:

Effective Date: October 9, 2018.

Compliance Dates: The applicable compliance dates are discussed in the section of the release titled ''VIII. Effective Date and Compliance Date.''

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SUPPLEMENTARY INFORMATION: We are adopting: (1) Amendments to 17 CFR 242.300 through 242.303 (''Regulation ATS'') to add new 17 CFR 242.304 (''Rule 304'') under the Exchange Act to provide new conditions for NMS Stock ATSs seeking to rely on the exemption from the definition of ''exchange'' provided by 17 CFR 240.3a1–1(a) (''Rule 3a1–1(a)'') of the Exchange Act; (2) new Form ATS–N [1] under the Exchange Act, which NMS Stock ATSs will file to comply with the new conditions provided under Rule 304; and (3) related amendments to 17 CFR 242.300; 17 CFR 242.301, 17 CFR 242.303, and 17 CFR 240.3a1–1 under the Exchange Act (respectively, ''Rule 300,'' ''Rule 301,'' and ''Rule 303'' of Regulation ATS, and ''Rule 3a1–1''). We are also adopting amendments to 17 CFR 242.301(b)(10) and 17 CFR 242.303 (''Rules 301(b)(10) and 303 of Regulation ATS'') under the Exchange Act to require all ATSs to make and keep written safeguards and written procedures to protect subscribers' confidential trading information.

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[1] 17 CFR 249.640.

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I. Introduction

NMS Stock ATSs, including trading centers commonly referred to as dark pools,[2] have become an integral part of the national market system. Since the adoption of Regulation ATS in 1998,[3] the number of these ATSs, and the volume of NMS stocks traded on them, has significantly increased. NMS Stock ATSs, which meet the definition of an exchange but are not required to register as national securities exchanges, compete with, and operate with complexity akin to, national securities exchanges. Many NMS Stock ATSs are operated by multi-service broker-dealers, whose business activities have become increasingly intertwined with those of the ATS, adding further complexity to their operations of NMS Stock ATSs and creating the potential for conflicts between the interests of the broker-dealer operator and the ATS's subscribers.

Despite their role in the equity markets, little information is widely available to market participants about NMS Stock ATSs, which restricts their ability to adequately assess these ATSs as potential routing destinations. On November 18, 2015, we proposed to amend Regulation ATS with the stated goals of enhancing operational transparency for NMS Stock ATSs to enable market participants to make more informed order routing decisions, and to facilitate better Commission oversight of these trading venues.[4] To achieve these goals, we proposed to require NMS Stock ATSs to publicly report on new Form ATS–N information about how the ATS operates and activities of the broker-dealer operator and its affiliates that relate to the ATS; and provide a process for the Commission to determine whether an NMS Stock ATS qualifies for the exemption from the definition of ''exchange,'' in which the Commission would, by order, declare a Form ATS–N effective or, after notice and opportunity for hearing, ineffective.

We received 32 comment letters on the Proposal from a variety of interested persons, including ATSs, a national securities exchange, broker-dealers, institutional investors, industry trade groups, the Commission's Investor Advocate, and the Attorney General of the State of New York.[5] Commenters generally support the goals of the Proposal, although some commenters express concern about various specific elements, and recommend certain modifications or clarifications. We are adopting Form ATS–N and amendments to Regulation ATS and Exchange Act Rule 3a1–1(a) with modifications from the Proposal, as discussed below.[6]

II. Background

A. Role of ATSs in the Current Equity Market Structure

1. Significant Source of Liquidity for NMS Stocks

At the time Regulation ATS was proposed, there were 8 registered national securities exchanges,[7] and the Commission estimated that there were approximately 43 systems that would be eligible to operate as ATSs.[8] As of March 31, 2018, there were 21 registered national securities exchanges and 87 ATSs with a Form ATS on file with the Commission. Of these, there were 12 national securities exchanges that trade NMS stocks and 41 ATSs that had noticed on Form ATS that they expect to trade NMS stocks.[9] Approximately 502.8 billion shares ($25.4 trillion) were traded in NMS stocks during the first quarter of 2018.[10] During this period, the 33 ATSs that reported transactions in NMS stocks [11] accounted for 57.3 billion shares (approximately $2.9 trillion in dollar volume), representing 11.4% of the combined total share trading volume (11.5% of the total dollar volume) in NMS stocks on all national securities exchanges, ATSs, and non-ATS OTC trading centers.[12] By comparison, the number of active dark pools trading NMS stocks in 2002 was approximately 10,[13] and in 2009, dark

[2] The term ''dark pool'' is not used or defined in the Exchange Act or Commission rules. For purposes of this release, the term refers to NMS Stock ATSs that do not publicly display quotations in the consolidated quotation data. *See* Securities Exchange Act Release No. 76474 (Nov. 18, 2015), 80 FR 80998, 81008 n.123 (Dec. 28, 2015) (''Proposal''). Currently, NMS Stock ATSs operate predominantly as dark pools. *See infra* Section II.A.1.

A ''trading center'' means a national securities exchange or national securities association that operates an SRO trading facility, an ATS, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent. 17 CFR 242.600(b)(78). Some trading centers, such as OTC market makers, also offer dark liquidity, primarily in a principal capacity, and do not operate as ATSs. For purposes of this adopting release, these trading centers are not defined as dark pools because they are not ATSs.

[3] Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70863 (December 22, 1998) (Regulation of Exchanges and Alternative Trading Systems) (''Regulation ATS Adopting Release'').

[4] *See* Proposal, *supra* note 2. Section 11A(a)(2) of the Exchange Act (15 U.S.C. 78k–1(a)(2)) enacted as part of the Securities Acts Amendments of 1975 (''1975 Amendments'') (Pub. L. 94–29, 89 Stat. 97 (1975)) directs the Commission, having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, to use its authority under the Exchange Act to facilitate the establishment of a national market system for securities in accordance with the Congressional findings and objectives set forth in Section 11A(a)(1) of the Exchange Act. *See* 15 U.S.C. 78k–1(a)(1). *See also* Regulation ATS Adopting Release, *supra* note 3, at 70858; Proposal, *supra* note 2, at 80999–81000.

[5] Comments received on the Proposal are available on the Commission's website, available at: *https://www.sec.gov/comments/s7-23-15/s72315.shtml. See* Appendix A for a citation key to comment letters cited in this release.

[6] If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

[7] *See* Securities Exchange Act Release No. 39884 (April 21, 1998), 63 FR 23504, 23523 (April 29, 1998) (''Regulation ATS Proposing Release'') at 23543 n.341.

[8] *See id.* at 23540 n.313 and accompanying text.

[9] Data compiled from Forms ATS submitted to the Commission as of March 31, 2018.

NYSE National, Inc. (f.k.a. National Stock Exchange, Inc.) was not trading as of March 31, 2018 but filed a proposed rule change with the Commission for its proposed relaunch. *See* Securities Exchange Act Release No. 82819 (March 7, 2018) 83 FR 11098 (March 13, 2018) (NYSENAT–2018–02) (notice of proposed ruled change). The Commission has approved the proposed rule change. *See* Securities Exchange Act Release No. 83289 (May 17, 2018) 83 FR 23968 (May 23, 2018) (NYSENAT–2018–02) (order approving proposed ruled change).

In contrast to dark pools, an ATS could be an Electronic Communication Network (''ECN''), which are ATSs that provide their best-priced orders for inclusion in the consolidated quotation data, whether voluntarily or as required by Rule 301(b)(3) of Regulation ATS. *See* Rule 600(b)(23) of Regulation NMS, 17 CFR 242.600(b)(23) (definition of ''electronic communications network''); *see also* 2010 Equity Market Structure Release, *supra* note 13, at 3599. In general, ECNs offer trading services (such as displayed or non-displayed order types, maker-taker pricing, and data feeds) that are analogous to national securities exchanges. *See id.* Currently, however, based on Form ATS filings, there are no NMS Stock ATSs operating as ECNs.

[10] *See infra* Table 1—''NMS Stock ATSs Ranked by Dollar Trading Volume—January 1, 2018 to March 30, 2018'' (citing Trade and Quote (TAQ) Data).

[11] Data compiled from Forms ATS and Forms ATS–R filed with the Commission as of the end of, and for the first quarter of 2018.

[12] *See infra* Table 1—''NMS Stock ATSs Ranked by Dollar Trading Volume—January 1, 2018 to March 30, 2018.'' *See id.* (citing Trade and Quote (TAQ) Data).

During the second quarter of 2015, there were 38 ATSs that reported transactions in NMS stocks, accounting for 59 billion shares traded in NMS stocks ($2.5 trillion), which represented approximately 15.0% of total share trading volume (15.4% of total dollar trading volume) on all national securities exchanges, ATSs, and non-ATS OTC trading venues combined. *See* Proposal, *supra* note 2, at 81008 n.121 and accompanying text.

Competitors for listed-equity (NMS) trading services also include several hundred OTC market makers and broker-dealers.

[13] *See* Regulation of Non-Public Trading Interest, Securities Exchange Act Release No. 60997 (November 13, 2009) 74 FR 61208, 61209 n.9 (November 23, 2009) (''Regulation of Non-Public Trading Interest'').

In 2009, there were 32 active dark pools trading in NMS stocks. *See* Securities Exchange Act Release

pools accounted for 7.9% of NMS share volume.[14] Additionally, no individual ATS executed more than 20.1% of the total share volume on NMS Stock ATSs or more than 2.3% of total NMS stock share volume during the first quarter of 2018.[15] Given this dispersal of trading volume in NMS stocks among an increasing number of trading centers, NMS Stock ATSs, with their approximately 11.4% market share, represent a significant source of liquidity in NMS stocks.

2. Operational Complexity; Conflict of Interests

NMS Stock ATSs have grown increasingly complex in terms of the services and functionalities that they offer subscribers, and they have used advances in technology to improve the speed, capacity, and efficiency of the trading functionalities that they offer to execute orders in NMS stocks.[16] Additionally, NMS Stock ATSs today offer a wide range of order types, matching systems to bring together orders and counterparties in NMS stocks, order interaction protocols, or opportunities to customize trading parameters, such as parameters that allow subscribers to preference interaction of their order flow with that of certain other specific subscribers or types of subscribers.[17] A variety of market participants use these ATSs to display or execute orders and trading interest in NMS stocks, including broker-dealers that route customer orders to ATSs for execution and potential price improvement, and asset managers that seek to execute large size orders without suffering adverse price impact.[18]

The relationships between broker-dealer operators [19] and the ATSs they operate have also become more complex and intertwined since the adoption of Regulation ATS.[20] The broker-dealer operator of an NMS Stock ATS controls all aspects of the operation of the ATS, including, among other things: the means of access to the ATS; who may trade on the ATS; how orders are matched and executed; and any differences in access to services among subscribers.[21] The broker-dealer operator, or its affiliate, may also own, and control access to, the technology and systems that support the trading facilities of the NMS Stock ATS, or provide and control the personnel servicing the ATS's trading facilities.[22] Additionally, the broker-dealer operator, or in some cases, its affiliates, determines the means by which orders are entered on the ATS, in many cases, through the use of a smart order router that is owned and operated by the broker-dealer operator or one of its affiliates.[23] The broker-dealer operator, or in some cases, its affiliates, also controls the market data that the ATS uses to match, and execute orders and the transmission of, and access to, confidential order and execution information sent to and from the ATS.[24] The operations of the NMS Stock ATS and the other operations of the broker-dealer operator are usually closely intertwined, and the broker-dealer operator may leverage its information technology, systems, personnel, and market data, and those of its affiliates, to operate the ATS.

Furthermore, ATSs that trade NMS stocks are increasingly operated by multi-service broker-dealers that engage in significant brokerage and dealing activities in addition to operation of their ATS.[25] These other business activities may include, among others, providing algorithmic trading software, agency sales desk support, and automated smart order routing services, often with, or through, their affiliates. As indicated by commenters, the fees charged to subscribers for their use of an NMS Stock ATS operated by a multi-service broker-dealer are generally bundled with other services offered by the broker-dealer operator to subscribers.[26] Multi-service broker-dealers that also operate NMS Stock ATSs may use the ATS as a complement to the broker-dealer's other service lines. For instance, the broker-dealer operator of an NMS Stock ATS, or its affiliate, may also operate an OTC market making desk or principal trading desk,[27] or may have other business units that actively trade NMS stocks on a principal or agency basis in the ATS or at other trading centers.[28] Some of these broker-dealer operators that operate multiple NMS Stock ATSs may use their ATSs as an opportunity to execute orders ''in house'' before seeking contra-side interest at other execution venues. A multi-service broker-dealer may also execute orders in NMS stocks internally (and not within its ATS) by trading as principal against such orders or crossing orders as agent in a riskless principal capacity, before routing the orders to its NMS Stock ATS or another external trading center. Consequently, the non-ATS trading centers operated by the broker-dealer operator of an NMS Stock ATS, or its affiliates, may compete with the ATS for the execution of transactions in NMS stocks.

B. Exemption for Alternative Trading Systems

Exchange Act Rule 3b–16(a) [29] provides a functional test to assess

No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010) (''2010 Equity Market Structure Release'')), at 3598 n.22 and accompanying text.

[14] *See id.* at 3598.

[15] The NMS Stock ATS with the greatest volume executed approximately 20.1% of NMS Stock ATS share volume and 2.3% of the total consolidated NMS stock share trading volume.

The market share percentages were calculated by Commission staff using aggregate trade data reported by ATSs to the FINRA equity trade reporting facilities and made available on FINRA's website and TAQ Data. *See infra* Table 1—''NMS Stock ATSs Ranked by Dollar Trading Volume—January 1, 2018 to March 30, 2018.''

Pursuant to FINRA rules, each ATS is required to use a unique MPID in its reporting to FINRA, such that its volume reporting is distinguishable from other transaction volume reported by the broker-dealer operator of the ATS, including volume reported for other ATSs operated by the same broker-dealer. *See* FINRA Rules 6160, 6170, 6480, and 6720. FINRA aggregates on a weekly basis ATS data reported by ATSs to the FINRA equity trade reporting facilities. The data can be viewed on a security-by-security basis or by ATS. *See* FINRA Rules 6110 and 6610. *See also* Securities Exchange Act Release No. 76931 (January 19, 2016), 81 FR 4076 (January 25, 2016) (SR–FINRA–2016–002) (notice of filing and immediate effectiveness of a proposed rule change relating to ATS volume and trading information) (''FINRA ATS Reporting Notice'').

[16] ATSs that traded NMS stocks prior to the adoption of Regulation ATS did not offer the same services and functionalities that they do today. *See* Proposal, *supra* note 2, at 81009.

[17] *See id.* at 81009–81010.

[18] Market participants may include many different types of persons seeking to transact in NMS stocks, including broker-dealers and institutional or retail investors. *See id.* at 81001 n.28 and accompanying text.

[19] *See* Proposal, *supra* note 2, at 81010, 81041–81043.

[20] *See id.*

[21] *See id.* at 81010.

[22] *See id.* Some technology or functions of an ATS may be licensed from a third party. The broker-dealer operator of the ATS is nonetheless legally responsible for ensuring that all aspects of the ATS comply with applicable laws. *See id.* at 81041 n.362.

[23] *See id.* at 81041.

[24] *See id.* For example, the broker-dealer operator determines the source of market data that the NMS Stock ATS uses to calculate the NBBO and how the NBBO will be calculated.

[25] Throughout the Proposal and this release, broker-dealer operators of NMS Stock ATSs that provide brokerage or dealing services in addition to operating an ATS are referred to as ''multi-service broker-dealers.'' *See id.* at 81001 n.30.

[26] *See infra* Section V.D.19.

[27] These non-ATS, OTC activities in NMS stocks may include operating as an OTC market maker or block positioner or operating an internal broker-dealer system. *See* 2010 Equity Market Structure Release, *supra* note 13, at 3599–3600. Additionally, an affiliate of the broker-dealer operator of an NMS Stock ATS may also operate non-ATS trading centers.

[28] *See id. See also infra* Section V.C (discussing comments on the proposed disclosure requirements of Form ATS–N).

[29] *See* 17 CFR 240.3b-16. *See generally* Regulation ATS Adopting Release, *supra* note 3. *See also* Proposal, *supra* note 2, at 81004 (discussing the current exemption from the definition of exchange available to ATSs).

whether a trading platform meets the definition of exchange, and if so, triggers the requirement to register as a national securities exchange pursuant to Section 5 of the Exchange Act [30] and comply with the requirements applicable to exchanges. Under Rule 3b–16(a), ''an organization, association, or group of persons shall be considered to constitute, maintain, or provide '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,' if such organization, association, or group of persons: (1) Brings together the orders for securities 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.'' [31] Exchange Act Rule 3b–16(b) explicitly excluded certain systems that the Commission believed were not exchanges.[32] Accordingly, a system is not included in the Commission's interpretation of ''exchange'' if: (1) The system fails to meet the two-part test in paragraph (a) of Rule 3b–16; (2) the system falls within one of the exclusions in paragraph (b) of Rule 3b–16; or (3) the Commission otherwise conditionally or unconditionally exempts [33] the system from the definition.

Section 5 of the Exchange Act [34] requires an organization, association, or group of persons that meets the definition of ''exchange'' under Section 3(a)(1) of the Exchange Act,[35] unless otherwise exempt, to register with the Commission as a national securities exchange pursuant to Section 6 of the Exchange Act.[36] Registered national securities exchanges are also SROs,[37] and must comply with regulatory requirements applicable to both national securities exchanges and SROs.[38] Before a national securities exchange may commence operations, the Commission must approve the national securities exchange's application for registration filed on Form 1. Section 6(b) of the Exchange Act requires, among other things, that the national securities exchange be so organized and have the capacity to carry out the purposes of the Exchange Act and to comply, and enforce compliance by its members and persons associated with its members, with the federal securities laws and the rules of the exchange.[39] Both a national securities exchange's registration application and the Commission's order approving the application are public. After registering, a national securities exchange must file with the Commission any proposed changes to its rules.[40] The initial application on Form 1, amendments thereto, and filings for proposed rule changes, in combination, publicly disclose important information about national securities exchanges, such as the trading services they offer and fees they charge for those services.

Exchange Act Rule 3a1–1(a)(2) [41] exempts from the Exchange Act Section 3(a)(1) definition of ''exchange'' an organization, association, or group of persons that complies with Regulation ATS,[42] which requires, among other things, meeting the definition of an ATS and registering as a broker-dealer.[43] As a result of the exemption, an organization, association, or group of persons that meets the definition of an exchange and complies with Regulation ATS is not required by Section 5 of the Exchange Act to register as a national securities exchange pursuant to Section 6 of the Exchange Act, is not an SRO, and, therefore, is not required to comply with regulatory requirements applicable to national securities exchanges and SROs.[44] An ATS that fails to comply with the requirements of Regulation ATS would no longer qualify for the exemption provided under Rule 3a1–1(a)(2), and thus, risks operating as an unregistered exchange in violation of Section 5 of the Exchange Act.[45]

C. Conditions to the ATS Exemption; Confidential Notice Regime

Rule 300(a) of Regulation ATS defines an ATS as: ''any organization, association, person, group of persons, or

[30] *See* 15 U.S.C. 78f.

[31] *See* 17 CFR 240.3b–16(a).

[32] *See* Regulation ATS Adopting Release, *supra* note 3, at 70852. Specifically, Rule 3b–16(b) excludes from the definition of exchange systems that perform only traditional broker-dealer activities, including: (1) systems that route orders to a national securities exchange, a market operated by a national securities association, or a broker-dealer for execution, or (2) systems that allow persons to enter orders for execution against the bids and offers of a single dealer if certain additional conditions are met.

[33] *See* 17 CFR 240.3b–16(e).

[34] 15 U.S.C. 78e.

[35] Pursuant to Section 3(a)(1) of the Exchange Act, the statutory definition of ''exchange'' means ''any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides 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. . . .'' 15 U.S.C. 78c(a)(1).

[36] 15 U.S.C. 78f. A ''national securities exchange'' is an exchange registered as such under Section 6 of the Exchange Act.

A trading platform that meets the definition of ''exchange'' under Section 3(a)(1) of the Exchange and fails to register with the Commission as a national securities exchange pursuant to Section 6 of the Exchange Act, unless exempt, risks operating as an unregistered exchange in violation of Section 5 of the Exchange Act. *See, e.g., Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO,* Securities Exchange Act Release No. 81207 (July 25, 2017) *https://www.sec.gov/litigation/investreport/34-81207.pdf* (''DAO Report'') (finding that certain tokens offered and sold by a ''virtual'' organization were securities, and confirming that issuers of distributed ledger or blockchain technology-based securities must register offers and sales of such securities unless a valid exemption applies, and that securities exchanges providing for trading in these securities must register unless they are exempt). Specifically, we confirmed that a system that meets the criteria of Rule 3b–16(a), and is not excluded under Rule 3b-16(b), must register as a national securities exchange pursuant to Sections 5 and 6 of the Exchange Act or operate pursuant to an appropriate exemption. *See id.* at Section III.D. *See also In the Matter of BTC Trading, Corp. and Ethan Burnside, Respondents,* Securities Exchange Act Release No. 73783 (December 8, 2014), *https://www.sec.gov/litigation/admin/2014/33-9685.pdf* (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order and alleging, among other things, that an operator of two online venues through which account holders could trade securities using virtual currencies violated Section 5 of the Exchange Act by failing to register the trading venues as exchanges).

[37] Section 3(a)(26) of the Exchange Act defines a self-regulatory organization as any national securities exchange, registered securities association, registered clearing agency, or (with limitations) the Municipal Securities Rulemaking Board. *See* 15 U.S.C. 78c(a)(26). *See also* Proposal, *supra* note 2, at 81000–81001 nn. 20–26 and accompanying text (discussing certain differences between certain obligations and benefits applicable to national securities exchanges and those applicable to ATSs).

[38] *See, e.g.,* 15 U.S.C. 78f and 78s.

[39] *See* Section 6(b)(1) of the Exchange Act, 15 U.S.C. 78f(b)(1). The Commission must also find that the national securities exchange has rules that meet certain criteria. *See generally* Exchange Act Section 6(b)(2) through (10), 15 U.S.C. 78f(b)(2) through (10).

[40] *See generally* Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b), and Exchange Act Rule 19b–4, 17 CFR 240.19b–4.

[41] *See* 17 CFR 240.3a1–1(a)(2).

[42] *See id.* Rule 3a1–1 also provides two other exemptions from the definition of ''exchange'' for any ATS operated by a national securities association and any ATS not required to comply with Regulation ATS pursuant to Rule 301(a) of Regulation ATS. *See* 17 CFR 240.3a1–1(a)(1) and (3).

Rule 3a1–1(b) provides an exception to the Rule 3a1–1(a) exemptions pursuant to which the Commission may require a trading system that is a substantial market to register as a national securities exchange, if the Commission finds doing so is necessary or appropriate in the public interest or consistent with the protection of investors. *See* 17 CFR 240.3a1–1(b). *See also* Regulation ATS Adopting Release, *supra* note 3, at 70857–70858.

[43] *See* 17 CFR 242.300(a); 17 CFR 242.301(a); and 242.301(b)(1). In addition to the other requirements of Regulation ATS, to qualify for the Rule 3a1–1(a) exemption, an organization, association, or group of persons must otherwise meet the definition of ''exchange.''

[44] *See generally* Sections 5, 6, and 19 of the Exchange Act, 15 U.S.C. 78e, 78f, and 78s.

[45] *See* 15 U.S.C. 78e.

system: (1) [t]hat constitutes, maintains, or provides 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 within the meaning of [Rule 3b–16]; and (2) [t]hat does not: (i) [s]et rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or (ii) [d]iscipline subscribers other than by exclusion from trading.'' [46] Governing the conduct of or disciplining subscribers are functions performed by an SRO that we believe should be regulated as such.[47] Accordingly, pursuant to the definition in Rule 300(a), a trading system that performs SRO functions, or performs functions common to national securities exchanges, such as establishing listing standards, is precluded from the definition of ATS and would be required to register as a national securities exchange or be operated by a national securities association (or seek another exemption).[48]

Rule 301(b)(1) of Regulation ATS requires that every ATS that is subject to Regulation ATS, pursuant to paragraph (a) of Rule 301,[49] be registered as a broker-dealer under Section 15 of the Exchange Act.[50] As a registered broker-dealer, an ATS must also, in addition to complying with Regulation ATS, comply with broker-dealer filing and conduct obligations, including becoming a member of an SRO, such as the Financial Industry Regulatory Authority (''FINRA''), and comply with SRO rules.[51] An ATS must also comply with Rule 301(b)(2) of Regulation ATS, which currently requires all ATSs to file an initial operation report with the Commission on Form ATS [52] at least 20 days before commencing operations.[53] Form ATS requirements include that an ATS provide information about: Classes of subscribers and differences in access to the services offered by the ATS to different groups or classes of subscribers; securities the ATS expects to trade; any entity other than the ATS involved in its operations; the manner in which the system operates; how subscribers access the trading system; procedures governing order entry; and procedures governing execution, reporting, clearance, and settlement of transactions effected through the ATS.[54] Regulation ATS states that information filed by an ATS on Form ATS is ''deemed confidential when filed'' [55] and ATSs are not otherwise required to publicly disclose such information.[56]

ATSs must notify the Commission of any changes in their operations by filing an amendment to its Form ATS initial operation report. There are three types of amendments to an initial operation report.[57] First, if any material change is made to its operations, the ATS must file an amendment on Form ATS at least 20 calendar days before implementing such change.[58] Second, if any information contained in the initial operation report becomes inaccurate for any reason and has not been previously reported to the Commission as an amendment on Form ATS, the ATS must file an amendment on Form ATS correcting the information within 30 calendar days after the end of the calendar quarter in which the system has operated.[59] Third, an ATS must promptly file an amendment on Form ATS correcting information that it previously reported on Form ATS after discovery that any information was inaccurate when filed.[60] Also, upon ceasing to operate as an ATS, an ATS is required to promptly file a cessation of operations report on Form ATS.[61] As is the case with respect to initial operation reports, Form ATS amendments and cessation of operations reports serve as notice to the Commission of changes to the ATS's operations,[62] and Rule 301(b)(2)(vii) and the Instructions to the form state that Form ATS is ''deemed confidential.'' [63]

Rule 301(b)(9) of Regulation ATS also requires an ATS to periodically report certain information about transactions on the ATS and information about certain activities on Form ATS–R within 30 calendar days after the end of each calendar quarter in which the market

[46] *See* 17 CFR 242.300(a).

[47] *See* Regulation ATS Adopting Release, *supra* note 3, at 70859. As we noted when we adopted Regulation ATS, any system that uses its market power to regulate its participants should be regulated as an SRO. We stated that it would consider a trading system to be ''governing the conduct of subscribers'' outside the trading system if it imposed on subscribers, as conditions of participation in trading, any requirements for which the trading system had to examine subscribers for compliance. In addition, we stated our belief that if a trading system imposed as conditions of participation, directly or indirectly, restrictions on subscribers' activities outside of the trading system, such a trading system should be a registered exchange or operated by a national securities association, but that the limitation would not preclude an ATS from imposing credit conditions on subscribers or requiring subscribers to submit financial information to the ATS. *See id.*

[48] *See id.*

[49] Pursuant to Rule 301(a), certain ATSs that are subject to other appropriate regulations are not required to comply with Regulation ATS. These ATSs include those that are: Registered as a national securities exchange under Section 6 of the Exchange Act; exempt from national securities exchange registration based on the limited volume of transactions effected; operated by a national securities association; Registered as a broker-dealer under Sections 15(b) or 15C of the Exchange Act, or are banks, that limits their activities to certain instruments; or exempted, conditionally or unconditionally, by Commission order, after application by such ATS. *See* 17 CFR 242.301(a).

[50] *See* 17 CFR 242.301(b)(1).

[51] Section 15(b)(8) of the Exchange Act requires a broker or dealer to become a member of a registered national securities association, unless it effects transactions in securities solely on an exchange of which it is a member. 15 U.S.C. 78*o*(b)(8). *See also* Regulation ATS Adopting Release, *supra* note 3, at 70903 (discussing some of the regulatory obligations of registered broker-dealers, such as membership in an SRO and compliance with that SRO's rules). For example, a broker-dealer that is a FINRA member must file an application for approval of a material change to its business operations (as defined in FINRA Rule 1011(k)). *See* FINRA Rule 1017(a). Among other obligations, a broker-dealer operator of an NMS Stock ATS that is a FINRA member is subject to trade reporting requirements pursuant to FINRA rules. *See, e.g., supra* note 15 (discussing FINRA trade reporting requirements applicable to NMS Stock ATSs).

[52] Form ATS and the Form ATS Instructions are available at *http://www.sec.gov/about/forms/formats.pdf.*

[53] *See* 17 CFR 242.301(b)(2)(i). The Commission stated in the Regulation ATS Adopting Release that Form ATS would provide the Commission the opportunity to identify problems that might impact investors before the system begins to operate. *See* Regulation ATS Adopting Release, *supra* note 3, at 70864; Proposal, *supra* note 2, at 81005 n.70 and accompanying text. Unlike a Form 1 filed by a national securities exchange, Form ATS is not approved by the Commission. Instead, Form ATS provides the Commission with notice about an ATS's operations prior to commencing operations. *See* Regulation ATS Adopting Release, *supra* note 3, at 70864.

[54] *See* Proposal, *supra* note 2, at 81005.

[55] 17 CFR 242.301(b)(2)(vii). *See* Form ATS.

[56] As we noted in the Proposal, some ATSs may currently make voluntary public disclosures. *See* Proposal, *supra* note 2, at 81011, n.156. *See also infra* note 559 and accompanying text (discussing comments regarding voluntary postings of Form ATS by NMS Stock ATSs).

[57] Form ATS is used for three types of submissions: Initial operation reports; amendments to initial operation reports; and cessation of operations reports. An ATS designates the type of submission on the form. *See* Form ATS.

[58] *See* 17 CFR 242.301(b)(2)(ii). A ''material change,'' includes, but is not limited to, any change to the operating platform, the types of securities traded, or the types of subscribers. In addition, the Commission has stated that ATSs implicitly make materiality decisions in determining when to notify their subscribers of changes. *See* Regulation ATS Adopting Release, *supra* note 3, at 70864. *See also* infra Section IV.B.1.a.ii (discussing the materiality standard that would apply to the filing of amendments on Form ATS–N).

[59] *See* 17 CFR 242.301(b)(2)(iii).

[60] *See* 17 CFR 242.301(b)(2)(iv).

[61] *See* 17 CFR 242.301(b)(2)(v).

[62] *See* Regulation ATS Adopting Release, *supra* note 3, at 70864.

[63] *See* 17 CFR 242.301(b)(2)(vii); Form ATS at 3, General Instructions A.7. Under the final rules, NMS Stock ATSs that trade only NMS stocks will not be required to file Form ATS in accordance with Rules 301(b)(2)(i) through (vii), but instead will be required to comply with the requirements of new Rule 304 and file Form ATS–N. *See infra* Section III.B.4. *See also infra* Sections IV.A, B, and C.

has operated.[64] Form ATS–R requires quarterly volume information for specified categories of securities, as well as a list of all securities traded on the ATS during the quarter and a list of all subscribers that were participants during the quarter.[65] As with respect to Form ATS, Rule 301(b)(2)(vii) and the instructions to Form ATS–R state that Form ATS–R is ''deemed confidential.'' [66] Under the amendments we are adopting, the requirements of Rule 301(b)(9) will continue to apply to all ATSs, including NMS Stock ATSs, as will the other requirements of Regulation ATS other than the Form ATS reporting requirements of Rule 301(b)(2).[67]

Under Rule 301(b)(3), an ATS that (1) displays subscriber orders in an NMS stock to any person (other than an employee of the ATS) and (2) during at least four of the preceding six calendar months, had an average daily trading volume of 5% or more of the aggregate average daily share volume for that NMS stock, as reported by an effective transaction reporting plan, must comply with certain order display and execution access obligations.[68] An ATS that meets these criteria must comply with Rule 301(b)(3)(ii), which requires the ATS to provide to a national securities exchange or national securities association (each an SRO), for inclusion in the quotation data made available by the SRO to vendors, the prices and sizes of its orders at the highest buy price and lowest sell price for that NMS stock that are displayed to more than one subscriber.[69] An ATS that meets the volume threshold also is required to comply with Rule 301(b)(3)(iii), which sets forth certain access standards regarding the orders that the ATS is required to provide to an SRO pursuant to Rule 301(b)(3)(ii).[70] Under Rule 301(b)(4), an ATS must not charge any fee to broker-dealers that access the ATS through a national securities exchange or national securities association that is inconsistent with the equivalent access to the ATS that is required under Rule 301(b)(3)(iii).[71]

Under Rule 301(b)(5)—and even if the ATS does not display subscribers' orders to any person (other than an ATS employee)—an ATS with 5% or more of the average daily volume in an NMS stock during at least four of the preceding six calendar months, as reported by an effective transaction reporting plan, must: [72] Establish written standards for granting access to trading on its system; not unreasonably prohibit or limit any person in respect to access to services offered by such ATS by applying the above standards in an unfair or discriminatory manner; make and keep records of all grants of access including, for all subscribers, the reasons for granting such access, and all denials or limitations of access and reasons, for each applicant, for denying or limiting access; and report the information required in Exhibit C of Form ATS–R regarding grants, denials, and limitations of access.[73] These requirements are referred to as the ''fair access'' requirements and apply on a security-by-security basis.[74] A denial of access to a market participant after an ATS reaches the 5% fair access threshold in an NMS stock would be reasonable if it is based on objective standards.[75]

Prior to the Commission's adoption of Regulation SCI,[76] NMS Stock ATSs were required to comply with Rule 301(b)(6), which requires certain ATSs trading 20% or more of the volume in any equity security or debt securities to comply with standards regarding the capacity, integrity, and security of their automated systems.[77] Regulation SCI superseded and replaced Rule 301(b)(6)'s requirements with regard to ATSs that trade NMS stocks and equity securities that are not NMS stocks [78] and requires SCI entities,[79] including NMS Stock ATSs that meet the definition of an ''SCI ATS,'' [80] to establish written policies and procedures reasonably designed to ensure that their systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets, and that they operate in a manner that complies with the Exchange Act.[81]

Rule 301(b)(7) [82] requires all ATSs, regardless of the volume traded on their systems, to permit the examination and inspection of their premises, systems, and records, and cooperate with the examination, inspection, or investigation of subscribers, whether such examination is being conducted by

[64] *See* 17 CFR 242.301(b)(9)(i). Form ATS–R and the Form ATS–R Instructions are available at *https://www.sec.gov/about/forms/formats-r.pdf*. In the Regulation ATS Adopting Release, the Commission stated that the information provided on Form ATS–R would permit the Commission to monitor the trading on ATSs. *See* Regulation ATS Adopting Release, *supra* note 3, at 70878.

[65] *See* Form ATS–R at 4, Items 1 and 2 (describing the requirements for Exhibit A and Exhibit B of Form ATS–R). Form ATS–R also requires an ATS that is subject to the fair access obligations under Rule 301(b)(5) of Regulation ATS to provide as Exhibit C, a list of all persons granted, denied, or limited access to the ATS during the period covered by the Form ATS–R and designate for each person (a) whether it was granted, denied, or limited access; (b) the date the ATS took such action; (c) the effective date of such action; and (d) the nature of any denial or limitation of access. ATSs must also complete and file Form ATS–R within 10 calendar days after ceasing to operate. *See* 17 CFR 242.301(b)(9)(ii); Form ATS–R at 2, General Instructions A.2 to Form ATS–R.

[66] *See* 17 CFR 242.301(b)(2)(vii); Form ATS–R at 2, General Instruction A.7.

[67] *See generally infra* Section III. *See also* Section III.B.5.

[68] *See* 17 CFR 242.301(b)(3)(i).

[69] *See* 17 CFR 242.301(b)(3)(ii).

[70] *See* 17 CFR 242.301(b)(3)(iii).

[71] *See* 17 CFR 242.301(b)(4). In addition, if the national securities exchange or national securities association to which an ATS provides the prices and sizes of orders under Rules 301(b)(3)(ii) and 301(b)(3)(iii) establishes rules designed to assure consistency with standards for access to quotations displayed on such national securities exchange, or the market operated by such national securities association, the ATS shall not charge any fee to members that is contrary to, that is not disclosed in the manner required by, or that is inconsistent with any standard of equivalent access established by such rules. *See id.*

[72] 17 CFR 242.301(b)(5)(i).

[73] *See* 17 CFR 242.301(b)(5)(ii). Regulation ATS does not mandate compliance with these requirements when an ATS reaches the 5% trading threshold in an NMS stock if the following conditions are met: The ATS matches customer orders for a security with other customer orders; such customers' orders are not displayed to any person, other than employees of the ATS; and such orders are executed at a price for such security disseminated by an effective transaction reporting plan, or derived from such prices. *See* 17 CFR 242.301(b)(5)(iii).

[74] The fair access requirements also apply for non-NMS stocks when an ATS reaches a 5% trading threshold in certain securities other than NMS stocks, including certain equity securities, municipal securities, and corporate debt securities. *See* 17 CFR 242.301(b)(5)(i).

[75] *See* Regulation ATS Adopting Release, *supra* note 3, at 70874.

[76] *See* Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72251 (December 5, 2014) (adopting final rules for systems compliance and integrity) (''SCI Adopting Release'').

[77] *See* 17 CFR 242.301(b)(6).

[78] Regulation SCI does not apply to ATSs that trade municipal securities or corporate debt securities. *See* SCI Adopting Release, *supra* note 76, at 72262.

[79] Regulation SCI defines ''SCI entity'' to mean ''an SCI self-regulatory organization, SCI alternative trading system, plan processor, or exempt clearing agency subject to [the Commission's Automation Review Policies].'' *See* 17 CFR 242.1000.

[80] Regulation SCI defines ''SCI alternative trading system'' or ''SCI ATS'' to mean an ATS, which during at least four of the preceding six calendar months: (1) Had with respect to NMS stocks (a) five percent (5%) or more in any single NMS stock, and one-quarter percent (0.25%) or more in all NMS stocks, of the average daily dollar volume reported by applicable transaction reporting plans, or (b) one percent (1%) or more in all NMS stocks of the average daily dollar volume reported by applicable transaction reporting plans; or (2) had with respect to equity securities that are not NMS stocks and for which transactions are reported to a self-regulatory organization, five percent (5%) or more of the average daily dollar volume as calculated by the self-regulatory organization to which such transactions are reported. However, an SCI ATS is not required to comply with the requirements of Regulation SCI until six months after satisfying the aforementioned criteria. *See* 17 CFR 242.1000.

[81] *See* SCI Adopting Release, *supra* note 76, 79 FR at 72252.

[82] *See* 17 CFR 242.301(b)(7).

the Commission or by an SRO of which such subscriber is a member. Rule 301(b)(8) [83] requires all ATSs to make and keep current the records specified in Rule 302 of Regulation ATS [84] and preserve the records specified in Rule 303 of Regulation ATS.[85]

Under Rule 301(b)(10), all ATSs must establish adequate safeguards and procedures to protect subscribers' confidential trading information, which includes limiting access to the confidential trading information of subscribers to those employees of the ATS who are operating the system or responsible for its compliance with Regulation ATS or any other applicable rules; and implementing standards controlling employees of the ATS trading for their own accounts.[86]

Furthermore, all ATSs must adopt and implement adequate oversight procedures to ensure that the above safeguards and procedures are followed.[87] Finally, Rule 301(b)(11) [88] expressly prohibits any ATS from using the word ''exchange'' or derivations of the word ''exchange,'' such as the term ''stock market,'' in its name.[89]

D. Concerns Regarding the Lack of Operational Transparency

Despite their role in the equity markets and complexity of their operations, NMS Stock ATSs are not required under Regulation ATS to publicly disclose information about their operations. We are concerned that little information is widely available to market participants about NMS Stock ATSs, and that the lack of, or differential access to, information about operations of NMS Stock ATSs inhibits the ability of market participants to assess NMS Stock ATSs as potential trading venues. These concerns are shared by several commenters.[90] Commenters also concur with our belief that NMS Stock ATSs today play a significant role in equity market structure, and that their role has changed since Regulation ATS was adopted in 1998.[91] In addition, commenters reinforce our belief that NMS Stock ATSs have become more operationally complex, that the potential for conflicts of interest has risen as a result of that complexity, and that the conditions to the exemption for NMS Stock ATSs should be modified.[92] Commenters also express concern about the lack of operational transparency for NMS Stock ATSs.[93] Given the complexities of NMS Stock ATS operations, the lack of information about the ATS's order types, priority rules, segmentation procedures, use of market data, and fees, for example, may impede the ability of market participants to adequately understand how their orders in NMS stocks would interact, match, and execute.

We are also concerned that the lack of available information about the ATS-related activities of the broker-dealer operator and its affiliates may hinder the ability of market participants to evaluate potential conflicts of interest, and thus limit their ability to protect their interests. Because of overlap between a broker-dealer's ATS operations and its other operations, there is a risk of information leakage of subscribers' confidential trading information to other business units of the broker-dealer operator or its affiliates.[94] Several commenters describe NMS Stock ATS operational structures that exemplify the kinds of relationships about which the Commission expressed concern, or otherwise reinforce our belief that the complex relationship between an NMS Stock ATS and its broker-dealer operator, or its affiliates, creates potential conflicts of interest.[95] Further, in recognizing the current potential for conflicts of interest that exist as a result of the complexity of the operations of NMS Stock ATSs, the relationship many have with their broker-dealer operator or its affiliates, and the lack of transparency about those operations and potential conflicts, many commenters also highlight recent enforcement actions brought by the Commission.[96]

[83] *See* 17 CFR 242.301(b)(8).

[84] *See* 17 CFR 242.302.

[85] *See* 17 CFR 242.303. In the Regulation ATS Adopting Release, the Commission stated that these requirements to make, keep, and preserve records are necessary to create a meaningful audit trail and to permit surveillance and examination to help ensure fair and orderly markets. *See* Regulation ATS Adopting Release, *supra* note 3, at 70877–78.

[86] *See* 17 CFR 242.301(b)(10)(i).

[87] *See* 17 CFR 242.301(b)(10)(ii).

[88] *See* 17 CFR 240.301(b)(11).

[89] When we proposed Regulation ATS, we said that ''it is important that the investing public not be confused about the market role [ATSs] have chosen to assume.'' *See* Regulation ATS Proposing Release, *supra* note 7 at 23523. We expressed concern that ''use of the term 'exchange' by a system not regulated as an exchange would be deceptive and could mislead investors that such alternative trading system is registered as a national securities exchange.'' *See id.*

[90] *See, e.g.,* CFA Institute Letter at 2; ICI Letter at 3; Better Markets Letter at 2; Investor Advocate Letter at 14; Luminex Letter at 1.

[91] *See, e.g.,* SIFMA Letter at 2; Investor Advocate Letter at 4; LeveL ATS Letter at 2. Other commenters also recognized that the role of NMS Stock ATSs has changed since the adoption of Regulation ATS. *See, e.g.,* Schneiderman Letter at 1; Virtu Letter at 2; UBS Letter at 1; Fidelity Letter at 1; ICI Letter at 2–3; STANY Letter at 2–3.

[92] *See, e.g.,* Consumer Federation of America Letter at 4; ICI Letter at 2; HMA Letter at 18; Schneiderman Letter at 1–2; Better Markets Letter at 2; CFA Institute Letter at 2; SIFMA Letter at 8. *See also infra* Section V.D (describing comments on proposed disclosures required by Form ATS–N).

[93] *See, e.g.,* CBOE Letter at 1; CFA Institute Letter at 3; Consumer Federation of America Letter at 2; ICI Letter at 3. *See also* Investor Advocate Letter at 14; Luminex Letter at 1; Consumer Federation of America Letter at 4; UBS Letter at 5–7; AI Letter at 2. One commenter critiques both the current regulatory regime for ATSs, as well as the Proposal, but describes issues with the lack of transparency and states that the Proposal represents an important enhancement in the oversight of ATSs. *See* Better Markets Letter at 1–2.

[94] In the Regulation ATS Adopting Release, the Commission recognized the potential for abuse involving a broker-dealer that operates an ATS and offers other traditional brokerage services, and expressed concern about the potential for the misuse of confidential trading information. *See* Regulation ATS Adopting Release, *supra* note 3, at 70879. *See also* Proposal, *supra* note 2, at 81041–81042 n.367 and accompanying text.

[95] *See, e.g.,* Consumer Federation of America Letter at 4; LeveL ATS Letter at 3; Fidelity Letter at 2 n.4. *See also* KCG Letter at 2; Luminex Letter at 3–4; Liquidnet Letter at 11.

Not all NMS Stock ATSs, however, are operated by multi-service broker-dealers. *See, e.g.,* BIDS Letter at 1. This commenter describes itself as the owner and broker-dealer operator of an NMS Stock ATS that does not engage in any proprietary trading and does not have any trading affiliates.

The rules being adopted today would not require a broker-dealer that operates an NMS Stock ATSs to limit it business only to operating the ATS. We believe that the Form ATS–N disclosures will inform market participants about the ATS-related activities of the broker-dealer operator and its affiliates that give rise to potential conflicts between the interests of the broker-dealer operator and subscribers that use the services of the NMS Stock ATS. *See infra* Sections X.D.7 (discussing the alternative of requiring NMS Stock ATSs to operate as limited purpose entities) and V.C.8 (discussing comments stating that the Commission should prohibit conflicts of interest arising from the other business activities of the broker-dealer operator of an NMS Stock ATS, and those of its affiliates, and the Commission's response to those comments).

See also HMA Letter at 3 and attachment The Dark Side of the Pools: What Investors Should Learn from Regulator's Action, September 15, 2015, at 10; Investor Advocate Letter at 8; Better Markets Letter at 2; *infra* Section V.C (discussing comments related to disclosures about the activities of an NMS Stock ATS's broker-dealer affiliate and those of its affiliates).

[96] *See, e.g.,* Schneiderman Letter at 2; Better Markets Letter at 2–3; Consumer Federation of America Letter at 5; and HMA Letter at 12, 16–17. *See also* CFA Institute Letter at 2; Fidelity Letter at 4; Investor Advocate Letter at 5; Citadel Letter at 1–7.

One commenter, however, observes that in the recent settlements cited in the Proposal, there were conflicts of interest related to commercial relationships that had nothing to do with affiliates, and believes that all differential treatment of subscribers should be disclosed and recommends limiting disclosures regarding affiliate relationships. *See* Markit Letter at 8. Under the requirements we are adopting today, NMS Stock ATSs must disclose on Form ATS–N differences in treatment of subscribers and the broker-dealer operator and affiliate, and we have, in response to commenters, revised questions of Form ATS–N to narrow the scope of information related to affiliates to be disclosed. *See infra* Sections V.C and D.

See also Proposal, *supra* note 2, at 81042–81043 n.374 (citing prior settled enforcement actions against ATSs that trade NMS stocks). Since the Proposal, we have entered additional settlements

Continued

NMS Stock ATSs, which meet the definition of ''exchange'' but are not required to register with the Commission as national securities exchanges, compete with national securities exchanges and operate with similar complexity. Unlike national securities exchanges, NMS Stock ATSs are not required to, among other things, publicly disclose their operations and fees.[97] In addition, because we review the rules of national securities exchanges, a process which requires, among other things, that to approve certain rule changes, the Commission find [98] that the national securities exchange's proposed rule changes are consistent with the Exchange Act,[99] each existing national securities exchange has implemented rules that restrict affiliation between the national securities exchange and its members to mitigate the potential for conflicts of interest. We believe that the regulatory differences between NMS Stock ATSs and national securities exchanges with regard to disclosure obligations may create a competitive imbalance between two functionally similar trading centers that trade the same security.

Transparency has long been a hallmark of the U.S. securities markets, and is one of the primary tools used by investors to protect their interests.[100] We believe that one of the most important functions the Commission can perform for investors is to ensure that they have access to the information they need to protect and further their own interests.[101] The amendments that we are adopting to Regulation ATS and Exchange Act Rule 3a1–1 are designed to address the concerns identified above and provide benefits to a wide range of market participants. Public disclosures on Form ATS–N will provide market participants with information about the operations of an NMS Stock ATS, which they can use to understand how orders interact, match, and execute in an NMS Stock ATS and compare to other NMS Stock ATSs and national securities exchanges. Form ATS–N will also provide the public with information about the ATS-related activities of the broker-dealer operator and its affiliates, which can be used by market participants to assess potential conflicts of interest and information leakage.[102] Collectively, the Form ATS–N public disclosures will allow market participants to better evaluate an NMS Stock ATS as a potential trading destination for their orders and help them better protect their interests. The Form ATS–N public disclosures are also designed, in part, to bring the operational transparency requirements for NMS Stock ATSs more in line with the requirements for national securities exchanges. Finally, we believe that our process for reviewing Form ATS–N filings, which provides for Commission review of disclosures for compliance with the requirements of Rule 304 and Form ATS–N, and a potential declaration of ineffectiveness of a Form ATS–N, after notice and opportunity for hearing, will facilitate better Commission oversight of NMS Stock ATSs and thus, better protection of investors.

III. Heightened Regulatory Requirements for NMS Stock ATSs

A. Exchange Act Rule 3a1–1(a) Exemption: New Conditions for NMS Stock ATSs

ATSs that trade NMS stocks operate pursuant to the exemption provided by Exchange Act Rule 3a1–1(a)(2), which exempts from the definition of an ''exchange'' any ATS that complies with Rules 300 through 303 of Regulation ATS.[103] Given our concerns regarding the lack of public transparency around the operations of NMS Stock ATSs and the ATS-related activities of the broker-dealer operator and its affiliates, we proposed to expand the conditions of the Rule 3a1–1(a)(2) exemption to enhance operational transparency and oversight for these ATSs. We are adopting this requirement as proposed.[104] We proposed to require NMS Stock ATSs to comply with proposed Rule 304, in addition to existing Rules 300 through 303 of Regulation ATS (except Rule 301(b)(2)), to be eligible for the exemption.[105] Proposed Rule 304(a)(1)(i) set forth two new fundamental conditions to the Rule 3a1–1(a)(2) exemption: (1) An NMS Stock ATS must file Form ATS–N with the Commission (instead of the current Form ATS), and (2) the Commission must declare the Form ATS–N effective before the NMS Stock ATS can operate pursuant to the exemption. Adopted Rule 304(a)(1)(i) deletes the proposed condition that the Commission declare the Form ATS–N effective, and provides that the Form ATS–N must be effective

regarding NMS Stock ATSs. *See In the Matter of Barclays Capital Inc.,* Securities Exchange Act Release No. 77001 (Jan. 31, 2016), *https://www.sec.gov/litigation/admin/2016/33-10010.pdf* (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order); *In the Matter of Credit Suisse Securities (USA) LLC,* Securities Act Release No. 77002 (Jan. 31, 2016), *https://www.sec.gov/litigation/admin/2016/33-10013.pdf* (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order) (''Crossfinder Settlement''); *In the Matter of Credit Suisse Securities (USA) LLC,* Securities Act Release No. 77003 (Jan. 31, 2016), *https://www.sec.gov/litigation/admin/2016/33-10014.pdf* (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order); *In the Matter of Deutsche Bank Securities Inc.,* Securities Exchange Act Release No. 79576 (Dec. 16, 2016), *https://www.sec.gov/litigation/admin/2016/33-10272.pdf* (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order).

[97] *See infra* notes 34–40 and accompanying text (discussing the regulatory framework applicable to national securities exchanges, including that national securities exchanges are self-regulatory organizations (''SROs'')). *See also* Regulation ATS Adopting Release, *supra* note 3; *infra* Section II.B (discussing the current requirements of Regulation ATS applicable to all ATSs).

[98] *See* Proposal, *supra* note 2, at 81042 n.372 and accompanying text.

[99] *See* 15 U.S.C. 78s(b).

[100] *See id.*

[101] *See* Proposal, *supra* note 2, at 81010.

[102] *See id.* at 81042. We believe that to understand the operations of an NMS Stock ATS, it is necessary to understand the relationship and interactions between the NMS Stock ATS and its registered broker-dealer operator as well as the relationship and interactions between the NMS Stock ATS and the affiliates of its broker-dealer operator.

[103] 17 CFR 240.3a1–1(a)(2).

[104] In Exchange Act Rules 3a1–1(a)(2) and (3), Regulation ATS is currently defined as ''17 CFR 242.300 through 242.303.'' We are amending the references to Regulation ATS to define Regulation ATS as ''17 CFR 242.300 through 242.304.'' We also proposed conforming Rule 3a1–1(a)(3) by changing the reference to Rule 303 to Rule 304 to make clear that an NMS Stock ATS that meets the requirements of Rule 301(a) is not required to comply with Regulation ATS, which would be amended to include proposed Rule 304. No changes were proposed to Rule 3a1–1(a)(1), which exempts any ATS that is operated by a national securities association.

[105] Proposed Rule 304(a) provided that, unless not required to comply with Regulation ATS pursuant to Rule 301(a) of Regulation ATS, an NMS Stock ATS must comply with Rules 300 through 304 of Regulation ATS (except Rule 301(b)(2)) to be exempt from the definition of an ''exchange'' pursuant to Exchange Act Rule 3a1–1(a)(2). We are adopting proposed Rule 304(a) with certain modifications. As adopted, Rule 304(a) will state, ''[u]nless not required to comply with Regulation ATS pursuant to § 242.301(a), an NMS Stock ATS must comply with §§ 242.300 through 242.304 (except §§ 242.301(b)(2)*(i) through (vii)*) to be exempt pursuant to § 240.3a-1(a)(2)'' (emphasis added). The adopted rule text specifies the subparagraphs of Rule 301(b)(2) with which an NMS Stock ATS would not be required to comply. We believe that specifying the applicable subsections of Rule 301(b)(2) provides greater clarity, because Rule 301(b)(2)(viii) will apply to NMS Stock ATSs that also trade non-NMS stocks. The reference to Rule 301(b)(2) in the proposed rule text could be confusing to market participants because it does not make clear that Rule 301(b)(2)(viii) applies to certain NMS Stock ATSs. We believe that the added specificity in the adopted rule clarifies that only Rules 301(b)(2)(i) through (vii) will not be applicable to NMS Stock ATSs. *See infra* Section III.B.4. In addition, to reduce any potential ambiguity and improve readability, the adopted rule text deletes the language that states that the NMS Stock ATS would need to comply with the requirements to be exempt ''from the definition of an 'exchange''' pursuant to Exchange Act Rule 3a1–1(a)(2).

pursuant to Rule 304(a)(1)(iii) or Rule 304(a)(1)(iv)(A). Adopted Rule 304(a)(1)(iii) has been modified to provide that Form ATS–N will become effective if the Commission does not otherwise declare Form ATS–N ineffective—the Commission will not be declaring Form ATS–N filings effective.[106]

We proposed to amend Rules 3a1–1(a)(2) and (3) to require compliance with proposed Rule 304 as a condition to operating pursuant to the Rule 3a1–1(a)(2) exemption.[107] We received several comments on the proposal to expand the conditions of the Rule 3a1–1(a)(2) exemption for NMS Stock ATSs and require these ATSs to comply with Rule 304. We also received comments on the application of the Proposal to ATSs that trade securities other than NMS stocks, and, specifically, requiring these types of ATSs to file a Form ATS–N and operate pursuant to the effectiveness process. Both sets of comments are discussed below.

1. Comments on the Rule 304 Requirements; Effectiveness

Nearly all commenters agree with our stated goal of enhancing operational transparency for NMS Stock ATSs.[108] Several commenters agree that the Commission should adopt the heightened disclosure requirements of proposed Rule 304.[109] In particular, several commenters support enhancing the disclosure and oversight regime for NMS Stock ATSs as progress toward increasing operational transparency in NMS Stock ATSs.[110] Specifically, some commenters express support for NMS Stock ATSs to file Form ATS–N as a tool to improve transparency.[111] Several commenters assert that more transparency regarding ATS operations could help market participants evaluate and compare trading venues so they can determine where to route orders.[112] One commenter states that ''it is good for investors to have access to information on how their orders are handled and with whom they are dealing.'' [113] Several commenters believe that making Form ATS–N filings public would encourage competition among trading venues,[114] and one commenter asserts that the proposed transparency requirements could reduce competitive imbalances between NMS Stock ATSs and national securities exchanges.[115]

With respect to the Commission's effectiveness determination for Form ATS–N, another commenter states that ''given the level of competition between exchanges and NMS Stock ATSs, this effectiveness determination would better align the Commission's oversight among different types of trading venues.'' [116] One commenter, however, believes that ATSs do not add sufficient value to offset the regulatory inequity and market fragmentation they have created.[117] This commenter also states that the Proposal represents ''meaningful progress in the effort to increase the operational transparency of NMS Stock ATSs.'' [118] The Proposal was not designed to eliminate the exemption from the definition of exchange that is currently available to all ATSs, including NMS Stock ATSs. We believe that NMS Stock ATSs play a significant role in equity market structure and provide market participants with a variety of trading models to facilitate the interaction and execution of orders in NMS stocks.

We believe that the current market for NMS stock execution services, consisting of national securities exchanges, NMS Stock ATSs, and other off-exchange venues, has resulted in an improvement to market efficiency.[119] The changes to the requirements for NMS Stock ATSs that we are adopting today will increase operational transparency for these ATSs, bringing it more in line with the operational transparency for national securities exchanges, while continuing to recognize the difference in the business structure of ATSs as registered broker-dealers. We also believe that while the rules adopted today will increase the regulatory burden for NMS Stock ATSs and could result in some NMS Stock ATSs electing to no longer operate as an ATS, those NMS Stock ATSs that remain may compete more heavily with each other and with national securities exchanges, which could ultimately result in improvements to efficiency and capital formation.[120]

Another commenter believes that increased disclosure will aid in developing industry-based standards.[121] Three commenters state that increased disclosure will boost investor confidence,[122] and according to one of these commenters, increased transparency and investor confidence could lead to more investors using NMS Stock ATSs, and result in greater price discovery and lower costs of capital formation.[123]

We believe that a wide range of market participants will benefit from the enhanced operational transparency,

[106] *See infra* Section IV.A.3.

[107] In Exchange Act Rules 3a1–1(a)(2) and (3), Regulation ATS is currently defined as ''17 CFR 242.300 through 242.303.'' We proposed amending these references to Regulation ATS to define Regulation ATS as ''17 CFR 242.300 through 242.304.'' We also proposed conforming Rule 3a1–1(a)(3) by changing the reference to Rule 303 to final Rule 304 to make clear that an NMS Stock ATS that meets the requirements of Rule 301(a) is not required to comply with Regulation ATS, which would be amended to include proposed Rule 304. No changes were proposed to Rule 3a1–1(a)(1), which exempts any ATS that is operated by a national securities association.

[108] *See* SIFMA Letter at 2; Barnard Letter at Public comment on IOSCO's Consultation Report on Issues Raised by Dark Liquidity; Anonymous Letter at 1; Luminex Letter at 1; MFA/AIMA Letter at 1–2; Fidelity Letter at 1; UBS Letter at 1; Markit Letter at 3–4; Schneiderman Letter at 1; ICI Letter at 3; CFA Institute Letter at 3, 6; CBOE Letter at 1; KCG Letter at 1; PDQ Letter at 1; STA Letter at 2; Liquidnet Letter at 1; STANY Letter at 1; FINRA Letter at 1; HMA Letter at 1, 5; Citadel Letter at 1; Better Markets Letter at 3–4; BIDS Letter at 1–2; SSGA Letter at 2; T. Rowe Price Letter at 1; AI Letter at 2–3; Consumer Federation of America Letter at 4; Morgan Stanley Letter at 1; Investor Advocate Letter at 2, 6; LeveL ATS Letter at 1; Virtu Letter at 2; MFA Letter 2 at 30. *But see* Morgan Stanley Letter at 1, 3 (stating that it is important to balance public disclosure with disclosure more suitable for the Commission (*see* discussion below and *infra* note 150 and accompanying text); that certain disclosure requirements, such as any disclosure around broker trading infrastructure and order handling practices beyond ATS operations, should apply to all brokers (*see* discussion *infra* note 217–218and accompanying text and infra Section III.A.2); and that the Proposal treats all ATSs like exchanges and fails to account for distinct ATS models (*see* discussion below and *infra* note 176 and accompanying text)). One commenter commented only on whether the Proposal should apply to ATSs that trade only fixed-income securities. *See* MarketAxcess Letter; *infra* Section III.A.2.

[109] *See generally* Virtu Letter; T. Rowe Price Letter; Schneiderman Letter; ICI Letter; MFA/AIMA Letter; Consumer Federation of America Letter; CBOE Letter; Citadel Letter; Anonymous Letter; Better Markets Letter; Investor Advocate Letter. *See also* CFA Institute Letter at 6; SIFMA Letter at 3.

[110] *See* SIFMA Letter at 3; Virtu Letter at 2; T. Rowe Price at 1; Schneiderman Letter at 1; MFA/AIMA Letter at 2; MFA Letter 2 at 30; CBOE Letter at 1; Citadel Letter at 1; Consumer Federation of America Letter at 6; CFA Institute Letter at 3; Anonymous Letter at 1; KCG Letter at 3; Morgan Stanley Letter at 1; Investor Advocate Letter at 6; Better Markets Letter at 1.

[111] *See* ICI Letter at 4–6; Consumer Federation of America Letter at 6; CFA Institute Letter at 3; Citadel Letter at 3; KCG Letter at 3; STA Letter at 2; MFA/AIMA Letter at 4; CBOE Letter at 1; Investor Advocate Letter at 2, 8.

[112] *See* Luminex Letter at 1; Fidelity Letter at 1; SSGA Letter at 2; KCG Letter at 1; Citadel Letter at 1; ICI Letter at 3; STA Letter at 2; Schneiderman Letter at 2; Consumer Federation of America Letter at 6; Investor Advocate Letter at 11.

[113] *See* Luminex Letter at 1.

[114] *See* STA Letter at 2; Consumer Federation of America Letter at 6; Investor Advocate Letter at 3, 11–12.

[115] *See* Citadel Letter at 1.

[116] *See* Investor Advocate Letter at 12.

[117] *See* CBOE Letter at 1.

[118] *Id.*

[119] *See infra* Section X.B.6 (discussing the effects of NMS Stock ATSs on the market for NMS stock execution services, including fragmentation).

[120] *See infra* Section X.C (discussing the expected economic effects of today's rulemaking, as well as its expected effects on efficiency, competition, and capital formation).

[121] *See* STA Letter at 2.

[122] *See* CFA Institute Letter at 3; Schneiderman Letter at 2; Investor Advocate Letter at 11–12.

[123] *See* Investor Advocate Letter at 11, 12.

including, for example, fund managers and the many brokers that subscribe to NMS Stock ATSs and route their orders, and those of their customers, to NMS Stock ATSs for execution. Five commenters observe, for example, that more transparency regarding ATS operations could assist market participants in achieving best execution.[124] One commenter states that disclosure of material aspects of ATS operations that allow market participants to weigh the costs and benefits of venues is ''particularly important for asset managers who are acting in a fiduciary capacity.'' [125] Another commenter believes that making Form ATS–N filings publicly available would provide a ''valuable tool for funds to use to assess NMS Stock ATSs, make informed routing decisions, and evaluate the performance of their brokers.'' [126]

We believe that the information disclosed on Form ATS–N will help brokers meet their best execution obligations to their customers, as they should be better able to assess the trading venues to which they route orders.[127] We also believe that asset managers and institutional investors, who subscribe to an NMS Stock ATS or whose orders may be routed to an NMS Stock ATS by their brokers, should have more information about how NMS Stock ATSs operate, including how orders and trading interest of the institutional investor may be displayed or made known outside the ATS. This information also will enable asset managers to better evaluate the routing decisions of their brokers, including whether their brokers routed their orders to a venue that best fits their trading interests.

a. Comments on Form ATS–N Requirement

Some commenters, however, believe NMS Stock ATSs should not be required to comply with new Rule 304 and the Commission should instead simply amend Regulation ATS to require making Form ATS public for NMS Stock ATSs.[128] Two of these commenters assert that the Commission should mandate disclosure of current Form ATS as a first step to increase disclosure before considering implementing more burdensome disclosure requirements.[129]

We are not adopting commenters' suggestion to make Form ATS public rather than requiring NMS Stock ATSs to comply with Rule 304 and file Form ATS–N. First, we believe that new Form ATS–N requires important additional disclosures that are not made under existing Form ATS.[130] While Form ATS–N will require NMS Stock ATSs to disclose more information than Form ATS, in response to certain comments, we have reduced the burden of completing Form ATS–N by narrowing the scope of several requests for information and, in some cases, eliminating certain requests from the form.[131] We have also simplified Form ATS–N to make completing and maintaining the form less burdensome and have modified questions so as not to solicit competitively sensitive information.[132] We believe that Form ATS–N disclosures will help market participants compare and evaluate NMS Stock ATSs and make better informed decisions about where to route their orders to achieve their trading or investment objectives, enhance execution quality, and improve efficiency and capital allocation.[133]

Based on Commission staff's experience reviewing disclosures made by ATSs on Form ATS over the past 19 years and as discussed in the Proposal, we have observed that ATSs have often provided minimal, rudimentary, and summary disclosures about their operations on Form ATS. One commenter agrees with our assessment, stating that based on its review of publicly available Forms ATS, the forms ''often provide minimal and often generalized information'' with respect to classification and segmentation of subscribers, means of access to the ATS, matching priority, order interaction, order types, and how the NBBO is calculated, and they are often missing ''critical details'' about their operations.[134] Further, this commenter states that ''[r]arely do Form ATSs provide information relating to their fee structures and potential or actual conflicts of interest.'' [135] According to another commenter, current Form ATS is ''not adequate'' to allow the Commission and market participants to ''understand how NMS Stock ATSs operate in today's environment, given the complexity and the potential for significant conflicts of interest with the broker-dealer operator.'' [136] In addition, one commenter observes that market participants currently receive ''varying levels'' of information about the operations of the NMS Stock ATS.[137] As described in the Proposal,[138] we believe that the complexity of NMS Stock ATS operations has increased substantially and in a manner that causes the current disclosure requirements of Form ATS to result in an insufficient, and inconsistent, level of detail about the operations of NMS Stock ATSs.

Two commenters argue that a new Form ATS–N is unnecessary because most of the fundamental information required in Form ATS–N is currently covered by Form ATS.[139] In addition, three commenters suggest that, as an alternative to requiring NMS Stock ATSs to file and make public Form ATS–N, we should clarify the requests for information on Form ATS and mandate that the revised Form ATS be made public.[140] One of these commenters believes such an approach would help achieve the Commission's goal of operational transparency, while ''maintaining a regulatory structure under which NMS Stock ATSs can continue to innovate.'' [141] Even if we were to ''clarify'' the requests for information on Form ATS to standardize disclosures and make current and past Forms ATS public, Form ATS does not require the

[124] *See* Citadel Letter at 1; Consumer Federation of America Letter at 6; HMA Letter at 10; Luminex at 1; SIFMA Letter at 35.

[125] *See* SSGA Letter at 2.

[126] *See* ICI Letter at 3.

[127] *See, e.g.,* Proposal, *supra* note 2, at 81002 n.36 and accompanying text, 81013 n.187 and accompanying text (discussing that the Consumer Federation of America previously commented that Form ATS should require ATSs to provide ''critical details about an ATS's participants, segmentation, and fee structure'' because the ''information will allow market participants, regulators, and third party analysts to assess whether an ATS's terms of access and service are such that it makes sense to trade on that venue'').

[128] *See* Luminex Letter at 2–3; PDQ Letter at 2; Fidelity Letter at 5; STANY Letter at 3; Morgan Stanley Letter at 2.

[129] *See* Fidelity Letter at 5; STANY Letter at 3.

[130] *See infra* Sections X.C.1 and X.C.2. We have considered any additional burden that may result from completion of Form ATS–N and the benefits of the additional information that will be made available to market participants by requiring NMS Stock ATSs to file Form ATS–N, and making Form ATS–N public. *See id.*

[131] For example, we have narrowed a request for information regarding trading by affiliates of the broker-dealer operator on the NMS Stock ATS by requiring only the disclosures of affiliates that can enter or direct the entry of orders and trading interest into the ATS. *See infra* Section V.C.1. We are not requiring NMS Stock ATSs to provide proposed Exhibit 1 to Form ATS–N. *See infra* Section V.B.2. Exhibit 1 would have required that NMS Stock ATSs provide a copy of any materials currently provided to subscribers or other persons related to the operations of the ATS or the disclosures on Form ATS–N, such as frequently asked questions, manuals, and marketing materials.

[132] *See infra* Section V.C.

[133] *See infra* Section X.C.4.

[134] *See* Consumer Federation of America Letter at 3.

[135] *See id.*

[136] *See* Investor Advocate Letter at 8.

[137] *See* Morgan Stanley Letter at 1.

[138] *See* Proposal, *supra* note 2, at 81011.

[139] *See* Luminex Letter at 2–3; STANY Letter at 3.

[140] *See* STANY Letter at 3; PDQ Letter at 2; Fidelity Letter at 5.

[141] *See* STANY Letter at 3.

disclosure of certain information that will be required by Form ATS–N. For example, Form ATS–N requires NMS Stock ATSs to disclose information about the ATS-related activities of the broker-dealer operator and its affiliates that will allow market participants to assess potential conflicts of interest and information about the NMS Stock ATS's safeguards and procedures to protect confidential trading information. The disclosure requirements of Form ATS are not sufficient to provide market participants with adequate information about the operational complexity of NMS Stock ATSs and the ATS-related activities of the broker-dealer operator and its affiliates that exist today. Form ATS–N is designed to provide market participants with more robust, detailed, and standardized disclosures, and to enable market participants to better understand the operations of NMS Stock ATSs and potential conflicts of interest between ATS operations and the other ATS-related activities of the broker-dealer operator and its affiliates.

One commenter who suggests making Form ATS public as an alternative to requiring Form ATS–N expresses concern that the ''crippling amount of detail'' required to be disclosed under Form ATS–N would not be useful to market participants.[142] We do not believe that Form ATS–N, as modified from the Proposal, will require a ''crippling'' level of detail that will only be useful to the Commission, and several commenters agree that the Form ATS–N disclosures would be useful for market participants in comparing trading venues and assessing conflicts of interest.[143] While Form ATS–N will require NMS Stock ATSs to disclose more information than Form ATS, we have recognized commenters' concerns regarding the burden of completing Form ATS–N by narrowing the scope of several requests, eliminating certain requests altogether, and simplifying its format.[144]

Other commenters discuss how market participants currently glean information about ATSs, and suggest that such methods could serve as alternatives to the requirements of Rule 304, or inform the Rule 304 requirements.[145] One commenter states that it performs periodic due diligence on ATSs because it believes that as a fiduciary, it should only trade on venues or exchanges that further its goals of satisfying ''best execution,'' that protect client information, and generally support principles of fair access.[146] This commenter also states that currently, market participants perform such due diligence by sending ATSs questionnaires.[147] Similarly, another commenter observes that ATSs are incentivized to respond to these questionnaires to attract participants, and therefore, the Commission should not place additional disclosure burdens on ATSs.[148] We do not believe that the practice of some market participants individually soliciting information about the operations of NMS Stock ATSs and conflicts of interest through questionnaires is an adequate alternative to Form ATS–N. We believe that disclosures on Form ATS–N should be easily accessible to all market participants. This is particularly important for NMS Stock ATSs given how orders in NMS stocks may be routed among various trading centers before receiving an execution. Based on the Commission's experience, responses to questionnaires are generally unavailable to non-subscribers, including potential subscribers and customers of current subscribers. Without this information, potential subscribers would be unable to fully assess an NMS Stock ATS as a trading center and customers of subscribers would be inhibited from assessing their broker's routing decisions. In addition, we believe, as indicated by comments,[149] that the publicly available, standardized disclosure regime that will result from Rule 304 and Form ATS–N is critical for all market participants to receive equal information about NMS Stock ATSs.

One commenter suggests that, as an alternative to the proposed Form ATS–N, the Commission should mandate that ATS operators publicly disclose current and historical Form ATS filings and related amendments, and responses to standardized, frequently asked questions (''FAQs'') regarding ATS operations.[150] The commenter believes that this approach would be ''more balanced and appropriate'' and ''less burdensome and faster to implement.'' [151] For the reasons discussed above in this section, we believe that the requests on Form ATS are not designed to produce adequate information for market participants about the operational complexity of NMS Stock ATSs and the ATS-related activities of their broker-dealer operators and their affiliates. We also believe that making public an ATS's responses to standardized, FAQs regarding its operations would not achieve the same level of disclosure that Form ATS–N will require, and would not facilitate our oversight of NMS Stock ATSs. Based on Commission experience, the information required to be disclosed on Form ATS–N exceeds the information provided by NMS Stock ATSs in their responses to FAQs and will provide a greater benefit to market participants. In addition, NMS Stock ATSs must file Form ATS–N disclosures with the Commission, which will be subject to Commission review before they become public. As discussed in the Proposal, the public disclosures on Form ATS–N are designed to standardize the information available to all market participants about NMS Stock ATSs and facilitate their ability to compare and evaluate these trading venues.[152] Finally, we believe that the burden resulting from filing a Form ATS–N would not be significant compared to requiring an NMS Stock ATS to prepare disclosures on Form ATS and responses to FAQs.

We received four comments about the application of Rule 304 to some or all NMS Stock ATSs. We received three comments expressing the importance of the Commission's need to heighten the regulatory requirements for all NMS Stock ATSs.[153] In particular, one commenter states that the Commission's additional disclosure requirements are important for creating a consistent and

[142] *See id.* at 4.

[143] *See supra* notes 109–123 and accompanying text.

[144] *See infra* Section V.

[145] *See* SSGA Letter at 2; PDQ Letter at 2; Morgan Stanley Letter at 2.

[146] *See* SSGA Letter at 2. *See also* Fidelity Letter at 8 (discussing that, from a due diligence perspective, subscribers may require NMS Stock ATS information).

[147] *See* SSGA Letter at 2. *See also* PDQ Letter at 2.

[148] *See* PDQ Letter at 2.

[149] *See* Virtu Letter at 2; Schneiderman Letter at 1; ICI Letter at 3; Consumer Federation of America Letter at 6; and Citadel Letter at 1.

[150] *See* Morgan Stanley Letter at 2 (asserting that ''standardization is the key to concise, comparable and meaningful information regarding ATS operations''). This commenter states that while it supports the Proposal's effort to mandate transparency, it is concerned that proposed Form ATS–N ''will result in more subjective, narrative responses that will not lend themselves to side-by-side comparison.'' *See id.* at 1.

[151] *See id.* at 2.

[152] *See* Proposal, *supra* note 2, at 81123. *See also infra* Section V.A.1. We believe that requiring NMS Stock ATSs to provide only ''yes'' or ''no'' responses would limit ATSs, which provide diverse services and often operate uniquely, from accurately describing their operations and inhibit market participants from fully understanding the operations of the ATS or the ATS-related activities of the broker-dealer operator and its affiliates. *See id.* (discussing the Commission's belief that narrative responses are important for market participants to understand the operations of NMS Stock ATSs given differences across ATSs, and provide NMS Stock ATSs with the flexibility in their responses).

[153] *See* CFA Institute Letter at 3; UBS Letter at 2. *See also* KCG Letter at 1.

fair set of obligations for all NMS Stock ATSs while providing market participants and subscribers with complete information.[154] This commenter observes that although an ATS may have a small share of volume relative to the overall equities trading marketplace, it does not necessarily follow that such ATS has a similarly small share of each subscriber's flow.[155] Another commenter cautions the Commission about allowing exemptions based on metrics such as dollar volume, trading volume, or number of subscribers because allowing such exemptions could increase ''incentives and opportunities'' for regulatory arbitrage, and may result in unintended consequences.[156] On the other hand, one commenter argues that the Commission should take a tiered regulatory approach to NMS Stock ATSs by applying certain of the enhanced requirements only to larger NMS Stock ATSs.[157] This commenter suggests that to foster competitive innovations among NMS Stock ATSs, the Commission should only apply the requirement of prior Commission ''approval'' of changes before they are implemented to ''larger ATSs with a substantial market footprint.'' [158]

We continue to believe that requiring all NMS Stock ATSs to publicly file a Form ATS–N, irrespective of the volume of NMS stocks transacted on the ATS is appropriate, and does not agree that its objectives would be achieved by applying Rule 304 on a tiered basis to NMS Stock ATSs. Given that broker-dealers can route their customers' orders to any NMS Stock ATS for execution, we do not believe that transaction volume in NMS stocks serves as a proxy for whether customers of broker-dealers or subscribers to an ATS should have information about how their orders would be prioritized, matched, or executed on an NMS Stock ATS or understand the ATS-related activities of the broker-dealer operator and its affiliates that may give rise to conflicts of interest.[159] As a result, customers of broker-dealers that route their orders to NMS Stock ATSs with low volume will have the same level of information to assess their broker-dealers' routing decisions as customers of broker-dealers that may route orders to any other NMS Stock ATSs. Amending Exchange Act Rule 3a1–1(a) to apply the requirements of Rule 304 to all NMS Stock ATSs would promote efficient and effective market operations by providing information all market participants can use to evaluate all NMS Stock ATSs that could be potential destinations for their orders. We believe that these requirements, including the requirement that NMS Stock ATSs file amendments to Form ATS–N in advance of adopting material changes,[160] would not place an undue burden on smaller NMS Stock ATSs or their ability to innovate.[161] Smaller NMS Stock ATSs that are not operated by multi-service broker-dealer operators and do not engage in other brokerage or dealing activities in addition to their ATS operations would have a lower burden than other ATSs because certain sections of Form ATS–N (such as several items of Part II) may not be applicable to these NMS Stock ATSs.[162] We believe that the reduction in costs from exempting small NMS Stock ATSs would be minimal as compared to the benefits that would result from requiring the same level of transparency from small NMS Stock ATSs as from other NMS Stock ATSs.[163] Further, under Regulation ATS, every ATS must currently wait 20 calendar days from the date of filing an amendment to Form ATS–N before implementing a material change to its operations.[164] In addition, we believe that the new process for NMS Stock ATSs applicable to filing material amendments is appropriate,[165] and, like the other requirements of Rule 304, should be applied consistently across NMS Stock ATSs, regardless of their size or trading volume. The Commission review process for Form ATS–N amendments is designed to improve operational transparency for all market participants and not only for market participants that use NMS Stock ATSs with significant trading volume as compared to other NMS Stock ATSs.

b. Comments on Effects on ATSs Relative to National Securities Exchanges

We received comments regarding the competitive effect of Rule 304 on ATSs relative to national securities exchanges.[166] Some commenters support public disclosure of Form ATS–N on the grounds that the current differences in transparency requirements for ATSs and national securities exchanges are competitively unfair.[167] On the other hand, other commenters express concern about the competitive burden that the requirements of Rule 304 could place on ATSs.[168] Specifically, one commenter states that not extending the enhanced transparency requirements to national securities exchanges may ''result in a competitive advantage to exchanges.'' [169] We believe that the new disclosure requirements for NMS Stock ATSs are not more rigorous than the disclosure standards for national securities exchanges and will not provide national securities exchanges with a competitive advantage over NMS Stock ATSs. National securities exchanges are required to publicly file proposed rule changes with the Commission to disclose, among other things, their manner of operations and fees.[170] These proposed rules changes are subject to notice and comment from the public, as well as Commission consideration, pursuant to Section 19(b) and 17 CFR 240.19b–4 (Rule 19b–4).[171] This is not the case for NMS Stock ATSs. Furthermore, Form ATS–N is designed to solicit information about ATS-related activities of the broker-dealer operator and its affiliates to help

[154] *See* UBS Letter at 2.

[155] *See id.*

[156] *See* CFA Institute Letter at 3.

[157] *See* STANY Letter at 2. *See also* Luminex Letter at 1.

[158] *See* STANY Letter at 2.

[159] National securities exchanges are subject to the same public rule filing and registration requirements irrespective of the volume transacted on the exchange. While an NMS Stock ATS may not transact significant overall volume in NMS stocks, that ATS may transact a significant volume of orders in certain NMS stocks or orders for certain subscribers. Additionally, we also believe that applying the enhanced regulatory requirements only to larger NMS Stock ATSs could create an opportunity for arbitrage without appropriate benefit, in that an NMS Stock ATS may be incentivized to structure their operations to avoid being subject to enhanced requirements. We believe that the burden of complying with the enhanced regulatory requirements imposed on lower volume NMS Stock ATSs is justified by the benefits. *See infra* Section X.D.4.

[160] One commenter expresses its concern that ''small and innovative ATSs will be frustrated by the requirement that changes to their technology must be approved by the Commission prior to implementation.'' *See* STANY Letter at 2. The Commission will not ''approve'' material amendments, but instead, may declare amendments ineffective if the disclosures filed by an NMS Stock ATS on Form ATS–N are materially deficient with respect to their completeness or comprehensibility. *See infra* Section IV.B.2. In addition, we are requiring that NMS Stock ATSs publicly disclose a brief summary of a material amendment upon filing, and after the Commission has had an opportunity to review the amendment, the material amendment would be made public. This change from the Proposal is in response to commenters who believe that an ATS may be placed at a competitive disadvantage if it is required to publicly file a material change 30 calendar days before implementing the change. *See infra* Section IV.E.2.c.

[161] *See infra* Section X.D.4.

[162] *See infra* Section V.C and Section X.C.4.a.

[163] *See infra* Section X.D.4.

[164] *See supra* note 58 and accompanying text.

[165] *See infra* Section IV.B.1.a.

[166] *See, e.g.,* Anonymous Letter at 1, Citadel Letter at 1; Markit Letter at 4; STANY Letter at 3.

[167] *See* Anonymous Letter at 1; Citadel Letter at 1.

[168] *See* Markit Letter at 4; STANY Letter at 3.

[169] *See* Markit Letter at 4.

[170] *See* Proposal, *supra* note 2, at 81011.

[171] *See id.*

market participants better understand potential conflicts of interest and information leakage. In the context of national securities exchanges, we have expressed concern that the affiliation of a national securities exchange with one of its members raises potential conflicts of interest, and the potential for unfair competitive advantage; and because the Commission reviews the rules of national securities exchanges, a process which requires, among other things, that to approve certain rule changes the Commission find that the proposed rule change is consistent with the Exchange Act, each existing national securities exchange has implemented rules that restrict affiliation between the exchange and its members to mitigate the potential for these types of conflicts of interest.[172] NMS Stock ATSs are not subject to such restrictions with respect to the activities of their broker-dealer operator and its affiliates that may raise conflicts of interests.

Another commenter states its view that requiring public disclosure of Form ATS–N will ''alter the competitive landscape . . . between NMS Stock ATSs and national securities exchanges.'' [173] We continue to believe that since the adoption of Regulation ATS, the market in execution services for NMS stocks has evolved such that trading functions of NMS Stock ATSs have become more functionally similar to those of national securities exchanges.[174] The enhanced transparency requirements for NMS Stock ATSs are designed to allow market participants to compare execution services of NMS Stock ATSs against national securities exchanges, to appropriately calibrate the level of transparency between NMS Stock ATSs and national securities exchanges, and to foster even greater competition for order flow of NMS stocks between those trading centers.[175]

One commenter asserts that the Proposal treats all ATSs as stand-alone, exchange-like price/time priority models and fails to account for distinct ATS models (*e.g.* price/capacity/size priority and interval VWAP crossing) and does not consider that an ATS may be part of a broader, integrated electronic offering available to clients choosing to access the markets through a full-service broker-dealer.[176] This commenter also states that while Regulation ATS recognizes the distinction between exchanges and ATS offerings, the regulatory structure specifically tailored for exchanges can be seen throughout much of the Proposal and proposed Form ATS–N, such as in the Proposal's focus on: Subscribers, in the way an exchange has members; a subscriber manual, in the way an exchange has a rule book; and fees, similar to an exchange fee schedule.[177]

One commenter questions why the Commission has determined that NMS Stock ATSs should be subject to ''essentially similar disclosure requirements'' as national securities exchanges without affording NMS Stock ATSs benefits such as limited immunity and market data revenue that national securities exchanges receive.[178] NMS Stock ATSs, unlike registered national securities exchanges, are registered as broker-dealers and exempt from the requirements of, among other provisions, Sections 6 and 19(b) of the Exchange Act. However, an NMS Stock ATS that desires the benefits afforded to national securities exchanges can choose to register as a national securities exchange under Section 6 of the Exchange Act [179] and be subject to the requirements of, among other provisions, Sections 6 and 19(b) of the Exchange Act. In addition, we do not agree with the commenter's view that the disclosure requirements with which NMS Stock ATSs must comply are ''essentially similar'' to the disclosure requirements imposed on national securities exchanges. For example, a national securities exchange is required to file with the Commission all rule changes establishing or changing a due, fee, or other charge assessed to members, which the Commission reviews for consistency with the Exchange Act.[180] In contrast, an NMS Stock ATS will be required to provide disclosure on the types of fees and charges of the NMS Stock ATS.[181] Further, disclosure is only one of the requirements to which national securities exchanges are subject. Notably, the rules and changes to the rules of national securities exchanges are required to be filed with the Commission and are subject to public notice and comment.[182] NMS Stock ATSs are not subject to these requirements, as well as many others, applicable to national securities exchanges.[183]

While NMS Stock ATSs and national securities exchanges are subject to different regulatory regimes, NMS Stock ATSs are trading centers that perform similar trading functions as national securities exchanges and have evolved to become more like national securities exchanges in their operations. We believe that Form ATS–N, as adopted, accommodates the differences between the regulatory requirements for national securities exchanges and those of NMS Stock ATSs while increasing public operational transparency for NMS Stock ATSs. The Commission does not agree that NMS Stock ATSs are being treated like national securities exchanges and believes that Form ATS–N is designed in a manner that allows ATSs to explain their unique business models. For example, NMS Stock ATSs will be able to explain their trading models, and associated facilities and procedures, in Part III, Item 11 of adopted Form ATS–N (''Trading, Rules and Facilities''). In addition, Part III, Item 19 (''Fees'') requires an NMS Stock ATS to identify and describe the types of fees or charges of the ATS and any differences among subscribers, whereas national securities exchanges are required to publicly post their complete fee schedules and any changes are subject to the SRO rule filing process under Section 19 of the

[172] *See* Proposal, *supra* note 2, at 81042 n. 370–372 and accompanying text. In cases where we have approved exceptions to this prohibition, there have been limitations and conditions on the activities of the national securities exchange and its affiliated member designed to address concerns about potential conflicts of interest and unfair competitive advantage. *See id.* at 81042 n.372.

[173] *See* STANY Letter at 3.

[174] *See supra* Section II.D.

[175] *See infra* Section X.C.2.a (discussing the economic benefits of the new disclosure requirements). *See also* Section X.C.4.a.i.

[176] *See* Morgan Stanley Letter at 3.

[177] *See id.* at 2–3.

[178] *See* Fidelity Letter at 4.

[179] *See* 15 U.S.C. 78f. An ATS is not required to comply with the requirements of Rule 301(b) if it is registered as an exchange under Section 6 of the Exchange Act. *See* 17 CFR 242.301(a)(1).

[180] *See* 17 CFR 240.19b–4(f)(2). Another commenter states that while Regulation ATS recognizes the distinction between national securities exchanges and ATS offerings, the regulatory structure tailored for national securities exchanges can be seen throughout much of the Proposal and proposed Form ATS–N, and included as examples the Proposal's focus on disclosures regarding subscribers, subscriber manuals, and fees, as well as the public posting upon filing of amendments to Form ATS–N. *See* Morgan Stanley Letter at 3–4. This commenter believes this approach is contrary to the objectives of Regulation ATS and urges the Commission to reconsider aspects of the Proposal that have the effect of not recognizing the materially different roles that ATSs and exchanges are intended to play in the U.S. marketplace. *See id* at 4. We agree that registered broker-dealers that operate ATSs should continue to be able to avail themselves of the exemption from the definition of ''exchange'' provided by Exchange Act Rule 3a1–1 and Regulation ATS, but believe that due to changes in the role and operation of NMS Stock ATSs since the adoption of Regulation ATS, it is in the public interest to update the requirements for that exemption applicable to that subset of ATSs. Also many of the disclosure items identified by this commenter are the kinds of disclosures other commenters have described as significant to their understanding of the operation of NMS Stock ATSs.

[181] *See infra* Section V.D.19.

[182] *See generally* 15 U.S.C. 78s(b); 17 CFR 240.19b–4.

[183] *See* 15 U.S.C. 78f(b).

Exchange Act. The Commission also understands that some broker-dealer operators offer their NMS Stock ATSs along with other execution and routing services. We believe that requests on Form ATS–N are appropriately designed, and provide narrative flexibility, to elicit information about the varying NMS Stock ATS models, including those of multi-service broker-dealers.[184]

c. Comments on Effectiveness Requirement

We proposed that to qualify for the exemption from the definition of ''exchange,'' an NMS Stock ATS's Form ATS–N must be declared effective by the Commission; as adopted, a Form ATS–N must be effective for the ATS to qualify for the exemption.[185] Several commenters express their support for requiring that Form ATS–N be subject to Commission review,[186] and some commenters support the proposed requirement that Form ATS–N be declared effective by the Commission,[187] while other commenters raise concerns about requiring that Form ATS–N be declared effective by the Commission.[188] One commenter states that the proposed effective/ineffective process is ''unnecessary'' and ''will have a chilling effect'' on, or stifle innovation of, ATS operations.[189] Another commenter similarly questions the need for the Commission to make a determination of effectiveness for Form ATS–N, and expresses concern that such a process would increase the regulatory risk for new NMS Stock ATSs and stifle innovation in the ATS marketplace by delaying the effectiveness of NMS Stock ATSs whose features, while meeting regulatory requirements, do not meet industry norms.[190]

We do not believe that requiring Form ATS–N to become effective after Commission review is ''unnecessary;'' [191] rather, the review process will facilitate the Commission's oversight of NMS Stock ATSs and help ensure that information required by the form is disclosed in a complete and comprehensible manner. We have modified the proposed effectiveness process for initial Form ATS–N so that the Commission will not declare initial Form ATS–N effective; instead, initial Form ATS–N, as amended, will become effective, unless declared ineffective, upon the earlier of: (1) The completion of review by the Commission and publication pursuant to Rule 304(b)(2), or (2) the expiration of the Commission review period, or, if applicable, the extended review period.[192] Form ATS–N will nevertheless be subject to Commission review, and, as proposed, the Commission may declare a Form ATS–N ineffective if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors.[193] We believe that requiring Form ATS–N to be effective, which would occur only after being subject to Commission review, could incentivize NMS Stock ATSs to make more detailed and informative disclosures than under current Form ATS. While requiring Form ATS–N to be effective may have some impact on innovation,[194] our review of Form ATS–N is designed to mitigate any effect on innovation, and accordingly would focus on, for example, the completeness and comprehensibility of the Form ATS–N disclosures and not include a review of the merits of the disclosures or whether such trading functionalities meet industry norms.[195] We do not believe that requiring Form ATS–N to be effective will unduly increase the ''regulatory risk'' of launching a new NMS Stock ATS as one commenter suggests.[196] We understand that the Commission review process will generate some uncertainty for NMS Stock ATSs as a Form ATS–N could be declared ineffective, which is not currently the case with respect to Form ATS.[197] The Commission review process, however, will not be merit based, and determinations of ineffectiveness will require the Commission to make certain findings after notice to the NMS Stock ATS and opportunity for hearing.[198] In addition, the rule provides that if the Commission does not declare the Form ineffective before the end of a fixed time period, the Form ATS–N will become effective. We believe that these factors will provide NMS Stock ATSs with greater regulatory certainty regarding the effectiveness process.

2. Comments on Extending Rule 304 to Non-NMS Stock ATSs

Rule 304 of Regulation ATS, as proposed and adopted, would apply only to NMS Stock ATSs, as defined in Rule 300(k) of Regulation ATS. We are concerned that, given the significance of NMS Stock ATSs in equity market structure and their operational complexities, the lack of transparency around NMS Stock ATSs operations could inhibit market participants' ability to evaluate NMS Stock ATSs as potential routing destinations for their orders in NMS stocks. As discussed in the Proposal, we did not propose to apply Rule 304 to non-NMS Stock ATSs, which would include ATSs that trade corporate or municipal fixed income securities (''Fixed Income ATSs''), U.S. Government securities (''Government Securities ATSs''),[199] or OTC Equity securities (''OTC Equity Securities ATSs'').[200] We sought comment on whether Rule 304, in whole or in part, should apply to Fixed Income ATSs, Government Securities ATSs, and OTC Equity Securities ATSs.[201] We also did not propose to apply Rule 304 to any other type of trading center besides NMS Stock ATSs,[202] such as non-ATS OTC trading centers [203] or national securities exchanges.

[184] *See, e.g., infra* Section V.D.11 (describing Part III, Item 11 of Form ATS–N, which asks NMS Stock ATSs to provide a summary of their marketplaces and the means and facilities for bringing together the orders of multiple buyers and sellers on the NMS Stock ATS).

[185] *See infra* Section IV.A.1. As adopted, the Commission will not declare initial Form ATS–N filings effective under Rule 304.

[186] *See* Citadel Letter at 3; HMA Letter at 7–8; and Investor Advocate Letter at 11–12.

[187] *See* MFA/AIMA Letter at 4; CFA Institute Letter at 4; and PDQ Letter at 2. Two commenters do not object to the effectiveness process. *See* Liquidnet Letter at 3 *and* STANY Letter at 2.

[188] *See* Luminex Letter at 1; Fidelity Letter at 8–9.

[189] *See* Luminex Letter at 1.

[190] *See* Fidelity Letter at 8–9.

[191] *See supra* note 189 and accompanying text.

[192] *See infra* Sections IV.A.3.c and IV.A.4.a.

[193] *See id.*

[194] *See infra* Section X.C.

[195] *See supra* note 190 and accompanying text. *See also infra* Section IV.A.3.d.

[196] *See supra* note 190 and accompanying text.

[197] *See infra* Section X.C.4.

[198] *See infra* Section IV.A.3.

[199] The term ''U.S. Government securities'' is defined under Section 3(a)(42) of the Exchange Act. *See* 15 U.S.C. 78c(a)(42) (defining ''government securities'' as, among other things, ''securities which are direct obligations of, or obligations guaranteed as to principal or interest by, the United States'').

[200] For purposes of this discussion, we are using the term ''OTC Equity Security'' as it is defined in FINRA's 6400 rule series for quoting and trading in OTC Equity Securities. FINRA defines OTC Equity Security as ''any equity security that is not an 'NMS stock' as that term is defined in Rule 600(b)(47) of SEC Regulation NMS; provided, however, that the term 'OTC Equity Security' shall not include any Restricted Equity Security,'' which FINRA defines as ''any equity security that meets the definition of 'restricted security' as contained in Securities Act Rule 144(a)(3).'' *See* FINRA Rules 6420(f), (k).

[201] *See* Proposal, *supra* note 1, at 81018.

[202] *See* Proposal, *supra* note 2. *See also infra* note 668 and accompanying text (discussing the term ''trading center'').

[203] For purposes of this discussion, references to non-ATS OTC trading centers, as used herein, encompass all executions that occur off a national securities exchange and outside an ATS, including when a broker-dealer is acting as an OTC market maker, block positioner (*i.e.,* any broker-dealer in the business of executing, as principal or agent,

We received several comments generally supporting operational transparency and about whether or not to apply Rule 304 to non-NMS Stock ATSs.[204] Of the commenters generally supporting enhanced operational transparency, several encourage the Commission to make the current Form ATS public for all ATSs.[205] Some commenters urge the Commission to amend Regulation ATS to apply Rule 304 to all ATSs.[206] Two commenters explicitly support applying the Proposal solely to NMS Stock ATSs.[207]

Several commenters specifically argue for extending Rule 304, including Form ATS–N, to Fixed Income ATSs.[208] Several commenters, however, recommend against extending the Proposal requirements for NMS Stock ATSs to Fixed Income ATSs.[209] Several commenters suggest that the Commission require Fixed Income ATSs to make their Forms ATS public.[210]

We also received several comments that specifically address enhancing operational transparency for, or extending Rule 304 to, Government Securities ATSs.[211] Several commenters support applying Rule 304 requirements to Government Securities ATSs,[212] while several state that Regulation ATS should be amended to include electronic platforms for U.S. Government securities.[213] Other commenters believe that the Commission should gather additional information on fixed income markets, which include U.S. Government securities markets, and as an interim step, make the Form ATS filings for these ATSs public.[214] We also received comments that specifically oppose applying the Proposal requirements to Government Securities ATSs,[215] or more generally oppose expanding Rule 304 to non-NMS Stock ATSs.[216]

We also received comments regarding enhancing operational transparency for other non-ATS OTC trading centers—namely broker-dealers that internalize order flow.[217] In general, these commenters point out the discrepancy in disclosure obligations that would result from the Proposal, or the possibility that broker-dealers would route order flow to non-ATS trading centers as a result.[218]

Given the range of commenter views on these questions and our belief that it is appropriate to take an incremental approach by first applying the amended regime to NMS Stock ATSs before considering a further step, we are not amending Rule 3a1–1(a) and Regulation ATS for non-NMS Stock ATSs. We intend to monitor the implementation and effectiveness of Rule 304 to NMS Stock ATSs, and should we decide to take further action with respect to non-NMS Stock ATSs, we would do so in a separate rulemaking and take into account our experience with Rule 304 and NMS Stock ATSs.

The Commission notes that the Fixed Income Market Structure Advisory Committee (''FIMSAC'') was formed in 2017 pursuant to the Commission's authority under the Federal Advisory Committee Act to provide the Commission with diverse perspectives on the structure and operations of the U.S. fixed income markets, as well as advice and recommendations on matters related to fixed income market structure.[219] The FIMSAC recently issued recommendations for the Commission to review the framework for the oversight of electronic trading platforms for municipal securities and corporate bonds. Specifically, the FIMSAC recommended that the Commission form, together with FINRA and the MSRB, a joint working group to review the regulatory framework for oversight of electronic trading platforms used in the municipal securities and corporate bond markets.[220] In light of recent recommendations of the FIMSAC, and comments received, we will review the regulatory framework for fixed income electronic trading platforms, including to consider whether we should propose amendments to Regulation ATS (and any other applicable rules) to account for operational and regulatory differences among electronic trading

block size trades for its customers), or operation of an internal broker-dealer system. *See* 17 CFR 242.600(b)(52) (defining ''OTC market maker'' as any dealer that holds itself out as being willing to buy and sell to its customers, or others, in the United States, an NMS stock for its own account on a regular or continuous basis otherwise than on a national securities exchange in amounts of less than block size); 17 CFR 242.600(b)(9) (defining ''block size'' as an order of at least 10,000 shares or for a quantity of stock having a market value of at least $200,000); and 17 CFR 240.17a–3(a)(16)(ii)(A) (defining ''internal broker-dealer system'' as any facility, other than a national securities exchange, an exchange exempt from registration based on limited volume, or an alternative trading system as defined in Regulation ATS that provides a mechanism, automated in full or in part, for collecting, receiving, disseminating, or displaying system orders and facilitating agreement to the basic terms of a purchase or sale of a security between a customer and the sponsor, or between two customers of the sponsor, through use of the internal broker-dealer system or through the broker or dealer sponsor of such system). *See also* 2010 Equity Market Structure Release, *supra* note 13, at 3599–3600.

[204] *See* Better Markets Letter at 3, 8; CFA Institute Letter; Citadel Letter; Consumer Federation of America Letter at 6–7; Fidelity Letter at 6–7; HMA Letter at 5–6, 10, 12; ICI Letter at 11; Investor Advocate Letter at 2, 12–15; KCG Letter at 12–13; Liquidnet Letter at 3; Luminex Letter at 2, 4; MarketAxess Letter; Markit Letter at 2, 4, 9; MFA/AIMA Letter 2–4; MFA Letter 2 at 30; Morgan Stanley Letter at 5–6; PDQ Letter at 2; SIFMA Letter at 3, 5; STANY Letter at 5; T. Rowe Price Letter at 2; Virtu Letter at 2.

[205] *See* Fidelity Letter at 7; ICI Letter at 11; Luminex Letter at 2; Morgan Stanley Letter 2, 5; Investor Advocate Letter at 2–3; PDQ Letter at 2; STANY Letter at 3; SIFMA Letter at 3–4.

[206] *See* Better Markets Letter at 3, 8; CFA Institute Letter at 3–4; Consumer Federation of America Letter at 6–7; HMA Letter 5–6, 10, 12.

[207] *See* ICI Letter at 11; Liquidnet Letter at 3.

[208] *See* Consumer Federation of America Letter at 6; Better Markets Letter at 8; CFA Institute Letter at 3–4; HMA Letter at 10; MFA/AIMA Letter at 2–3.

[209] *See* Fidelity Letter at 6–7; KCG Letter at 12–13; Liquidnet Letter at 3; MarketAxess Letter at 3–4 ; Markit Letter at 9; SIFMA Letter at 3.

[210] *See* Fidelity Letter at 6; SIFMA Letter at 34–35; Markit Letter at 9; Investor Advocate Letter at 12–16; ICI Letter at 11. *See also* Luminex Letter at 4.

[211] *See* Better Markets Letter at 8; CFA Institute Letter at 3–4; Citadel Letter at 4–5; Investor Advocate Letter at 16–17; KCG Letter; Liquidnet Letter at 3; MFA/AIMA Letter at 2–7; SIFMA Letter at 3, 5, 35–36; Virtu Letter at 2.

[212] Some commenters specifically support operational transparency and enhanced monitoring of trading activity for Government Securities ATSs. *See* Virtu Letter at 2; Better Markets Letter at 8; CFA Institute Letter at 3–4; Citadel Letter at 4–5; MFA/AIMA Letter at 2–7. *See also* Liquidnet Letter at 3 (stating that it does ''not object'' to the requirements of Regulation ATS applying to systems that cross trades in U.S. Government securities).

[213] *See* Citadel Letter at 4–5; Liquidnet Letter at 3; Investor Advocate Letter at 16–19; Virtu Letter at 2. One commenter combined its support for transparency of ATSs that trade U.S. Government securities and Fixed Income ATSs. *See* MFA/AIMA Letter at 3–4

[214] *See* SIFMA Letter at 34–35; Markit Letter at 9; Investor Advocate Letter, at 14. *See also* Fidelity Letter at 6.

[215] *See* KCG Letter at 13; SIFMA Letter at 3, 5, 36.

[216] *See supra* note 209 accompanying text.

[217] *See* ICI Letter at 12; Morgan Stanley Letter at 2–3.

[218] *See id. See also* Fidelity Letter at 11–12. Another commenter recommends that the Commission be required to conduct a review within a designated time-period to assess the effectiveness of the new rules and determine if any refinements should be proposed. *See* T. Rowe Price Letter at 3. In addition, one commenter suggests that regulators periodically monitor the development of the market and technological developments, and take appropriate action as needed. *See* Barnard Letter at 3. In addition to the Commission's ongoing oversight responsibilities under the Exchange Act, Rule 304 provides a process for the Commission to review disclosures filed on Form ATS–N, either through an initial Form ATS–N, Form ATS–N amendment, or cessation of operations.

[219] *See* 5 U.S.C.—App; Securities Exchange Act Release No. 81958 (October 26, 2017), 82 FR 50460 (October 31, 2017) (Notice of Federal Advisory Committee Establishment).

[220] *See* Recommendation for the SEC to Review the Framework for the Oversight of Electronic Trading Platforms for Corporate and Municipal Bonds (July 16, 2018) available on the Commission's website at *https://www.sec.gov/spotlight/fixed-income-advisory-committee/fimsac-electronic-trading-platforms-recommendation.pdf.*

platforms for municipal securities and corporate bonds.

B. Amendments to Existing Regulation ATS Rules for NMS Stock ATSs

To operate pursuant to the Exchange Act Rule 3a1–1a(2) exemption, NMS Stock ATSs will be required to comply with new Rule 304, in addition to the applicable existing Rules 300 through 303 of Regulation ATS. In light of the new requirements of Rule 304, we are adopting, with modifications discussed below, amendments to several existing rules of Regulation ATS.

1. Rule 300(k): Definition of NMS Stock ATS

Proposed Rule 300(k) of Regulation ATS defined ''NMS Stock ATS'' in new paragraph (k) as ''an alternative trading system, as defined in § 242.300(a), that facilitates transactions in NMS stocks, as defined in § 242.300(g).'' We received no comments on the proposed definition of NMS Stock ATS and are adopting Rule 300(k) with modifications. We are replacing ''facilitates transactions in'' with ''trades.'' The term ''trades'' is well understood in the context Regulation ATS [221] and the term ''facilitates'' is not used in the definition of an ATS. This change is non-substantive and will clarify the rule text.[222] Accordingly, Rule 300(k), as adopted, defines an ''NMS Stock ATS'' as ''an alternative trading system, as defined in paragraph (a) of [Rule 300], that trades NMS stocks, as defined in paragraph (g) of [Rule 300].''

2. Rule 301(a): Exemption From Compliance With Regulation ATS

We made explicit in proposed Rule 304(a) that NMS Stock ATSs must comply with Rules 300 through 304, unless not required to comply with Regulation ATS pursuant to Rule 301(a). Pursuant to Rule 301(a), certain ATSs that are subject to other appropriate regulations are not required to comply with Regulation ATS.[223] To the extent that an NMS Stock ATS meets the criteria of the Rule 301(a) exemption, such ATS would not be required to comply with Rules 300 through 304 of Regulation ATS. We received no comments on the application of Rule 301(a) to NMS Stock ATSs and are adopting as proposed this language in Rule 304(a) to make clear that Rules 300 through 303 of Regulation ATS, including Rule 301(a) continue to apply to NMS Stock ATSs, unless otherwise provided by Rule 301(a).

3. Rule 301(a)(5): Exemptions From Certain Requirements of Regulation ATS Pursuant to Application to the Commission

Rule 301(a)(5) of Regulation provides that an ATS shall comply with the requirements of Rule 301(b) unless such ATS is exempted, conditionally or unconditionally, by Commission order after application by such ATS, from one or more of the requirements of Rule 301(b), and that the Commission will grant such exemption only after determining that such an order is consistent with the public interest, the protection of investors, and the removal of impediments to, and perfection of, a national market system.[224]

When adopting Rule 301(a)(5), we stated that while the requirements of Regulation ATS are appropriate for all ATSs, a system may develop in the future for which these requirements may not be appropriate. The Commission expected to issue such an order only under unusual circumstances, and only after making the applicable determination.[225] The requirements of Rule 304 were not part of Regulation ATS at the time the Commission adopted Rule 301(a)(5). We believe that, given the amendments to Regulation ATS that will require NMS Stock ATSs to comply with the filing requirements of Rule 304, including filing Form ATS–N, instead of the Form ATS filing requirements of Rules 301(b)(2)(i)–(vii), it may be appropriate under certain limited, unusual facts and circumstances for the Commission to exempt an NMS Stock ATS, conditionally or unconditionally, by Commission order, from one or more requirements of Rule 304. As such, we are amending Rule 301(a)(5) to include exemptions from the requirements of Rule 304.[226]

In response to the Proposal, we received one comment regarding possible use of the Commission Section 36 exemptive authority in connection with the requirements of Rule 304.[227] This commenter states that instead of modifying the requirements under the Proposal in such a way that could result in less relevant information being provided to the Commission and to the public, certain concerns of other commenters could be addressed through use of the Commission's Section 36 exemptive authority. Specifically, this commenter observes that an NMS Stock ATS could seek relief tailored to its unique facts and circumstances pursuant to Section 36(a)(1) of the Exchange Act, and that Section 36(a)(1) permits the Commission to grant both conditional and unconditional exemptions from any provisions of a rule, to the extent necessary or appropriate in the public interest and consistent with the protection of investors.[228] This commenter also states that using Section 36 exemptive authority would be consistent with the manner in which the Commission generally treats requests it receives from regulated entities, and encourages the Commission to consider providing guidance as to what factors it might consider when evaluating a request for specific exemptive relief.[229] We believe that amendments made to Rule 301(a)(5) make clear that the Commission could

[221] We believe that the concept of NMS Stock ATSs ''trading'' or ''transacting'' in NMS stocks, should be familiar to existing NMS Stock ATSs as Form ATS requires disclosure regarding, among other things ''the types of securities the [ATS] trades'' and ''the name of any entity, other than the [ATS] that will be involved in the operation of the [ATS], including the execution, trading, clearing, and settling of transactions on behalf of the [ATS].'' *See* Form ATS. Additionally, Form ATS requires disclosure regarding ''[t]he procedures governing execution, reporting, clearance and settlement of transactions effected through the [ATS]''; and Form ATS–R requires NMS Stock ATSs to ''[p]rovide the total unit and dollar volume of transactions'' in specified securities categories. *See* Form ATS and Form ATS–R.

[222] As proposed, an NMS Stock ATS would include any ATS that effects transactions in securities that are listed on a national securities exchange (other than options, debt or convertible debt). *See* Proposal, *supra* note 2, at 81015–81016.

[223] ATSs that are not subject to Rule 301(a) include those that are: Registered as an exchange under Section 6 of the Exchange Act; exempt from national securities exchange registration based on limited volume; operated by a national securities association; registered as a broker-dealer, under Sections 15(b) or 15C of the Exchange Act, or that are banks, and that limit their securities activities to certain instruments; or exempted, conditionally or unconditionally, by Commission order, after application by such ATS from one or more of the requirements of Rule 301(b). *See* 17 CFR 242.301(a). *See also* Regulation ATS Adopting Release, *supra* note 3, at 70859–63.

[224] *See* 17 CFR 242.301(a)(5).

[225] Regulation ATS Adopting Release, *supra* note 3, at 70863.

[226] The Commission continues to also have general exemptive authority pursuant to Section 36(a) of the Exchange Act to grant both conditional and unconditional exemptions from any provisions or provisions of the Exchange Act, or any rule or regulation thereunder (including Rule 304 and any other provision of Rule 3a1–1 and Regulation ATS), to the extent necessary or appropriate in the public interest and consistent with the protection of investors. *See* 15 U.S.C. 78mm(a).

[227] *See* Investor Advocate Letter at 8.

[228] *See id. See also infra* notes 723–725 and accompanying text (discussing this comment in the specific context of disclosures regarding affiliates of the broker-dealer operator).

[229] *See* Investor Advocate Letter at 9. For example, in the context of any exemptions from the requirements applicable to disclosures regarding affiliates of the broker-dealer operator of an NMS Stock ATS, the commenter encouraged the Commission to consider providing guidance as to what facts and circumstances it might consider when evaluating a broker-dealer operator's request for exemptive relief. *See id. See also infra* notes 723–725 and accompanying text.

exempt an NMS Stock ATS, conditionally or unconditionally, by order, after application by the ATS from one or more of the requirements of Rule 304 of Regulation ATS provided that the Commission determines that such an exemption is consistent with the public interest, the protection of investors, and removal of impediments to, and perfection of the mechanisms of, a national market system.

We also received other comments regarding specific exceptions from the proposed requirements of Rule 304. Specifically, three commenters suggest providing an exception to the 30-calendar day advance notice requirement for material changes in case of exigent circumstances.[230] One commenter states that unless the Commission narrows the materiality standard for material amendments, the 30-calendar day advance notice requirement could affect an ATS operator's ability to take ''decisive action.'' [231] This commenter further believes that NMS Stock ATS operators often must take decisive action without time for a lengthy review and approval process, given that the speed of response to technical or operational issues (including cybersecurity) often is measured in seconds. This commenter believes there should be a carve-out for exigent circumstances when an NMS Stock ATS must act swiftly.[232] Another commenter states that there could be situations in which it would be difficult for an NMS Stock ATS to meet the 30-calendar day advance notice requirement based on ongoing business changes, and that the Commission should clarify that certain Form ATS–N disclosures may be subject to immediate change without notice.[233] Another commenter states that the Commission should allow for more rapid action (than the 30-day advance notice requirement) in the event of an ''external emergency,'' such as an extreme market event, but that such circumstances should be rare and only granted upon express approval of the Commission, upon a finding that such action is necessary to protect investors and promote fair and efficient markets.[234]

We believe that there may be unusual circumstances under which an NMS Stock ATS may need to seek an exemption from the requirements of Rule 304 or the disclosure requirements of Form ATS–N. For example, under exceptionally rare occasions, an NMS Stock ATS may need to make a material change to its operations on an expedited basis to prevent substantial harm to market participants, such as in response to a significant operational or market-wide event. The amendments to Rule 301(a)(5) are designed to address these concerns.[235] Applications for relief from a requirement of Rule 304 generally should explain why the applicant believes the relief sought is consistent with the public interest, the protection of investors, and the removal and impediments to, and perfection of the mechanism of, a national market system.[236]

As noted by commenters, circumstances may necessitate the implementation of a material change to the operations of an NMS Stock ATS on an expedited basis. We believe that, based on particular facts and circumstances, it may be appropriate to grant such an exemption from the 30-day advance notice requirement of Rule 304(a)(2)(i)(A), for example, in the event of extraordinary, unforeseen circumstances, and if delaying implementation pursuant to the 30-calendar day advance notice requirement would cause substantial harm to subscribers or other markets trading NMS stocks. By comparison, to the extent that an NMS Stock ATS may need to change its operations in response to an operational problem, as suggested by one commenter, an NMS Stock ATS could proactively develop and disclose in the relevant Form ATS–N Item alternative procedures that the ATS would apply if the ATS experiences a systems problem that causes it to be unable to perform a particular function. For example, an NMS Stock ATS that routes orders and trading interest resting in the ATS to destinations outside the ATS could state, for example, that the NMS Stock ATS will either execute or cancel orders and trading interest submitted to the ATS if the ATS is unable to route orders and trading interest away from the ATS due to a systems problem.

4. Rule 301(b)(2): Form ATS Reporting Requirements No Longer Apply to NMS Stock ATSs

We proposed in Rule 304 to except NMS Stock ATSs from complying with Rule 301(b)(2) of Regulation ATS. Existing Rule 301(b)(2) requires an ATS to file with the Commission a Form ATS initial operation report, amendments to the Form ATS initial operation report, and cessation of operations reports on Form ATS, all of which are ''deemed confidential when filed.'' [237] We proposed this exception to make clear that NMS Stock ATSs would not be required to comply with the Form ATS reporting requirements provided in Rule 301(b)(2) because the NMS Stock ATS would file a Form ATS–N pursuant to Rule 304. We also proposed Rule 301(b)(2)(viii) to make clear that NMS Stock ATSs must file with the Commission the reports and amendments required by Rule 304 and that NMS Stock ATSs were not subject to Rule 301(b)(2) of Regulation ATS. We also proposed that ATSs that effect transactions in both NMS stocks and non-NMS stocks would be subject to the requirements of proposed Rule 304, with respect to NMS stocks, and Rule 301(b)(2), with respect to non-NMS stocks.

We received one comment regarding proposed Rule 301(b)(2)(viii).[238] The commenter states that requiring an ATS that transacts in both NMS stocks and non-NMS Stocks to file reports on Form ATS–N with respect to NMS stocks but also file reports on Form ATS with respect to non-NMS stocks could be unduly burdensome.[239] The commenter states that an ATS should have the option to file reports on Form ATS–N

[230] *See* HMA Letter at 10; SIFMA Letter at 31; KCG Letter at 10.

[231] *See* SIFMA Letter at 31.

[232] *See id.*

[233] *See* KCG Letter at 10. The commenter states that, for example, if a broker-dealer operator provides a disclosure that it routes orders to the ATS from its algorithmic business, and the data center from which the algorithmic business operates subsequently experiences systems issues that force it to stop routing orders to the ATS, the disclosure would no longer be accurate and the broker-dealer operator would not be in position to provide 30-calendar day advance notice of the change.

[234] *See* HMA Letter at 10.

[235] As amended, Rule 301(a)(5) will apply to ATSs that have received exemptive relief from one or more requirements of Rule 304. *See* Rule 301(a)(5).

[236] Applications for exemptive relief from the 30-calendar day advance notice requirement of Rule 304(a)(2)(i)(A) generally should, for example, contain a description of the circumstances that necessitate the implementation of the material change on an expedited basis, and why, in the view of the NMS Stock ATS, expedited implementation is necessary or appropriate in the public interest, and consistent with the protection of investors, such as why the expedited implementation is necessary to prevent substantial harm to investors. The Commission will not consider hypothetical or anonymous requests for exemptive relief.

[237] *See* Rule 301(b)(2)(vii).

[238] *See* Liquidnet Letter at 3. We received two comments regarding the application of Rule 301(b)(2)(i) through (vii) to Legacy NMS Stock ATSs that have filed a Form ATS–N that has not yet become effective. *See* Liquidnet Letter at 3; BIDS Letter at 2–3. We are adopting a transitional rule that will not require a Legacy NMS Stock ATS to amend its Form ATS under Rule 301(b)(2) if it has filed a Form ATS–N with the Commission that has not yet become effective. We are instead requiring such Legacy NMS Stock ATS to file amendments on Form ATS–N pursuant to the requirements of Rule 304(a)(2)(i)(A) through (C). Rule 304(a)(1)(v)(C) is discussed below in greater detail. *See infra* Section IV.A.4.c.

[239] *See* Liquidnet Letter at 3.

for all U.S. equities that it trades, whether listed or unlisted because an ATS operator would otherwise have the burden of maintaining two separate ATS filings for what the commenter believes is essentially the same functionality.[240]

We do not believe that requiring an ATS that trades both NMS stocks and non-NMS stocks to file reports on Form ATS–N with respect to NMS stocks, but also file reports on Form ATS with respect to non-NMS stocks, will be unduly burdensome. We recognize the additional burdens for NMS Stock ATSs resulting from the requirement to file disclosures on new Form ATS–N; however, we estimate that the burden for these ATSs to maintain their Forms ATS will decrease, because they will no longer be required to disclose information about their NMS stock operations on Form ATS.[241] We also believe that allowing a broker-dealer operator to choose to disclose information on Form ATS–N about trading in non-NMS stocks, as suggested by the commenter,[242] would likely result in incomplete disclosures about the ATS's non-NMS stock operations that may be confusing or not useful to market participants. Form ATS–N was specifically designed to solicit information about trading in NMS stocks on an ATS to allow market participants to understand the ATS's NMS stock operations and readily compare the ATS against other ATSs and national securities exchanges that trade NMS stocks.[243] While many of the requests on Form ATS–N could apply to Fixed Income ATSs or Government Securities ATSs, the requests are not fully tailored to solicit information about trading in those types of securities and the systems that trade them. For example, transactions in NMS stocks are, in some cases, subject to different federal securities laws and Commission rules than transactions in other securities, such as fixed income securities.[244] Because Form ATS–N is specifically designed for NMS Stock ATSs, subscribers relying on Form ATS–N disclosures to assess a non-NMS Stock ATS, such as one that trades fixed income securities, as a potential trading venue may not receive a complete or comprehensible understanding of the ATS's fixed income operations, or fixed income activities of the broker-dealer operator and its affiliates as such activities relate to the ATS, because Form ATS–N does not solicit such information. We believe that allowing NMS Stock ATSs to choose whether to integrate information about trading in non-NMS stocks on a Form ATS–N could make the disclosures confusing for users and make it difficult for them to compare the operations of an NMS Stock ATS against other NMS Stock ATSs.

Because we are adopting rules that require NMS Stock ATSs to file Form ATS–N pursuant to Rule 304, we are adopting Rule 304(a) with modifications to provide that an NMS Stock ATS would specifically be excepted from compliance with Rules 301(b)(2)(i) through (vii) of Regulation ATS, which govern the filing of Form ATS.[245] An NMS Stock ATS that is operating pursuant to an initial operation report on Form ATS as of January 7, 2019 (''Legacy NMS Stock ATS'') will be required to file a Form ATS–N no earlier than January 7, 2019 and no later than February 8, 2019.[246]

We are also adopting Rule 301(b)(2)(viii) to provide for how Legacy NMS Stock ATSs transition from filing a Form ATS to filing a Form ATS–N. We are defining the term ''Legacy NMS Stock ATS'' to mean an NMS Stock ATS that is operating pursuant to an initial operation report on Form ATS as of January 7, 2019. We are also replacing proposed language that stated that an NMS Stock ATS would not be subject to the requirements of Rule 301(b)(2) with language stating that a Legacy NMS Stock ATS shall be subject to the Form ATS filing requirements of Rule 301(b)(2)(i) through (vii) until the Legacy NMS Stock ATS files an initial Form ATS–N with the Commission pursuant to Rule 304(a)(1)(iv)(A), and that thereafter, the Legacy NMS Stock ATS shall file reports [247] pursuant to Rule 304(a)(1)(iv)(A). We intended in the Proposal to except a Legacy NMS Stock ATS from compliance with Rule 301(b)(2)(i) through (vii) after it filed Form ATS–N, but also intended that a Legacy NMS Stock ATSs be subject to Rule 301(b)(2)(viii), which requires NMS Stock ATSs to file reports required by Rule 304.[248] We believe that this modification will make clear that, until a Legacy NMS Stock ATS files its Form ATS–N with the Commission, the Legacy NMS Stock ATS must amend Form ATS in compliance with Rule 301(b)(2) of Regulation ATS.

We are also including language in Rule 301(b)(2)(viii) stating that as of January 7, 2019, an entity seeking to operate as an NMS Stock ATS shall not be subject to the ATS filing requirements of Rule 301(b)(2)(i) through (vii) and shall file reports pursuant to Rule 304.[249] Rule 301(b)(2)(viii) describes the reporting obligations of Legacy NMS Stock ATSs, and we believe that this additional language will make clear that NMS Stock ATSs must file an initial Form ATS–N, and that they do not need to comply with Rule 301(b)(2)(i) through (vii) and therefore should not file Form ATS.[250]

We recognize that an entity may wish to start operating as an NMS Stock ATS between the time the final rule is adopted and January 7, 2019. During that time, an entity must file an initial operation report on Form ATS and comply with Rule 301(b)(2); after January 7, 2019, the ATS, which would operate as a Legacy NMS Stock ATS, must file an initial Form ATS–N between January 7, 2019 and February 8, 2019 pursuant to Rule 304(a)(1)(iv)(A).[251] As of January 7, 2019, an entity that seeks to operate as an NMS Stock ATS must comply with Rule 304 (and not with Rules 301(b)(2)(i) through (vii)) and file an initial Form ATS–N with the Commission.

We are adopting, with a non-substantive modification, the proposed Rule 301(b)(2)(viii) requirement that an ATS that effects transactions in both NMS stocks and non-NMS stocks be subject to the requirements of new Rule 304 with respect to NMS stocks and

[240] *See id.*

[241] An ATS that trades both NMS stocks and non-NMS stocks will be required to amend its Form ATS, after the ATS files Form ATS–N, by removing information that pertains solely to the ATS's NMS stock operations. Amending Form ATS in this manner should help ensure that the Form ATS accurately describes the ATS's non-NMS stock operations.

[242] *See* Liquidnet Letter at 3.

[243] *See supra* Section III.A.

[244] For example, Rule 611 of Regulation NMS, which requires a trading center to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs on that trading center, subject to certain exceptions, applies only to protected quotations in NMS stocks, and not to non-NMS stocks. *See* 17 CFR 242.611.

[245] *See supra* Section III.A.

[246] *See infra* Section IV.A.4.

[247] To reduce redundancy, we are revising the proposed rule text to state that the Legacy NMS Stock ATS must file ''reports'' (rather than ''the reports and amendments'') required by Rule 304. Rule 304(b)(1) provides that every Form ATS–N, which will include every amendment filed on Form ATS–N, shall constitute a ''report'' within the meaning of sections 11A, 17(a), 18(a), and 32(a) (15 U.S.C. 78k–1, 78q(a), 78r(a), and 78ff(a)), and any other applicable provisions of the Exchange Act.

[248] *See* Proposal, *supra* note 2, at 81022–24, 81027–31. Without this modification, Rule 301(b)(2)(viii) could be interpreted, contrary to the Commission's intention, to except an NMS Stock ATS from compliance with all of Rule 301(b)(2), including Rule 301(b)(2)(viii) itself.

[249] EDGAR will be ready to accept Form ATS–N filings on January 7, 2019, and we have conformed Rule 301(b)(2)(iii) to be consistent with the EDGAR ability to accept Form ATS–N filings.

[250] *See infra* Section IV.A.1 (discussing the filing requirements for new NMS Stock ATSs).

[251] *See infra* Section IV.A.4.a.

Rule 301(b)(2) with respect to non-NMS stocks. We are modifying the requirement to replace ''effects transactions in'' with ''trades.'' As adopted, Rule 301(b)(2)(viii) requires that an ATS that trades both NMS stocks and non-NMS stocks be subject to the requirements of new Rule 304 with respect to NMS stocks and Rule 301(b)(2) with respect to non-NMS stocks.[252] By adopting Rule 304 and Form ATS–N, we believe it has addressed concerns raised by NMS Stock ATSs, as discussed above and in the Proposal, but that applying Rule 304 to the non-NMS Stock ATS operations of ATSs that trade both NMS stocks and non-NMS stocks would impose unequal regulatory burdens across ATSs that transact in non-NMS stocks. Finally, we are adopting as proposed non-substantive amendments to Rule 301(b)(2)(i) and Rule 301(b)(2)(vii) to delete outdated references to dates for phased-in compliance with Regulation ATS for ATSs that were operational as of April 21, 1999, and to update the name of the Division of Trading and Markets, respectively.[253]

5. Rule 301(b)(9): Form ATS–R Quarterly Reports

We also proposed to amend Rule 301(b)(9) of Regulation ATS,[254] which provides that an ATS shall report transaction volume on Form ATS–R on a quarterly basis and within 10 calendar days after it ceases operation,[255] to require an ATS that trades both NMS stocks and non-NMS stocks to separately report its transactions in NMS stocks on one Form ATS–R, and its transactions in non-NMS stocks on another Form ATS–R.[256]

We received two comments regarding Form ATS–R. One commenter states that in light of information on FINRA's website regarding ATSs,[257] and the detailed disclosures in periodic disclosures required by Form ATS–N, the Commission should no longer require an NMS Stock ATS to file Form ATS–R.[258] We are not amending Regulation ATS at this time to remove the requirement for NMS Stock ATSs to file Form ATS–R. Notwithstanding the disclosure on FINRA's website of certain volume information for ATSs that trade NMS stocks, we continue to believe that the form helps the Commission oversee and monitor the trading activity of NMS Stock ATSs, because Form ATS–R provides the Commission with information that is unavailable on the FINRA website.[259] Another commenter states that to alleviate burdens on ATSs and promote more meaningful comparisons across firms and venues, the Commission should significantly revise reporting obligations on Form ATS–R.[260] The commenter does not specify how Form ATS–R should be revised; however, we believe that the role Form ATS–R plays in helping the Commission to oversee and monitor the trading activities of NMS Stock ATSs justifies the burden on NMS Stock ATSs to file Form ATS–R.[261]

6. Rule 303: Recordkeeping Requirements for Form ATS–N

We proposed amending Rules 303(a)(1) and 303(a)(2) of Regulation ATS to reflect the proposed amendments to Rule 301(b)(2)[262] and the addition of Rule 304.[263] In addition, the proposed rules would make minor technical amendments to Rule 303. We received no comments on the proposed amendments to Rule 303 and are adopting these requirements as proposed.

Unless not required to comply with Regulation ATS pursuant to Rule 301(a)[264] of Regulation ATS, an ATS must comply with the recordkeeping requirements of Regulation ATS.[265] Specifically, Rule 301(b)(8)[266] requires an ATS to make and keep current the records specified in Rule 302[267] and to preserve the records specified in Rule 303.[268] Before the adoption of the amendments to Rule 303, Rule 303(a)(1) required an ATS to preserve certain records for at least three years, the first two years in an easily accessible place.[269] Specifically, Rule 303(a)(1)[270] required an ATS to preserve: (1) All records required to be made pursuant to Rule 302; (2) all notices provided to subscribers, including notices addressing hours of operations, system malfunctions, changes to system procedures, maintenance of hardware and software, and instructions pertaining to access to and denials of, or limitations on, access to the ATS; (3) documents made or received in the course of complying with the system capacity, integrity, and security standards in Rule 301(b)(6), if applicable;[271] and (4) if the ATS is subject to the fair access requirements under Rule 301(b)(5),[272] a record of its access standards. Rule 303(a)(2)[273] requires that certain other records must be kept for the life of the ATS and any successor enterprise, including partnership articles or articles of incorporation (as applicable), and copies of reports filed pursuant to Rule 301(b)(2),[274] which includes current Form ATS, and records made pursuant to Rule 301(b)(5).[275] In particular, reports required to be maintained for the life of the ATS, or any successor enterprise, include initial operation reports, amendments, and cessation of operations reports, filed on Form ATS.[276]

We are amending the record preservation requirements of Rule 303 to incorporate the preservation of records that would be created pursuant to the requirements that NMS Stock ATSs file initial Form ATS–N, Form ATS–N amendments, and notices of cessation on Form ATS–N, instead of Form ATS. Specifically, we are amending Rule 303(a)(2)(ii) to require that an ATS shall preserve, for the life of the enterprise and of any successor enterprise, copies of reports filed pursuant to Rule 301(b)(2) or—in the case of an NMS Stock ATS—Rule 304, and records made pursuant to Rule 301(b)(5).[277] As a result, because an NMS Stock ATS will be required to file initial Form ATS–N, Form ATS–N amendments, and notices of cessation on Form ATS–N pursuant to Rule 304,

[252] This modification is being made for clarity and consistency with the Rule 300(k) definition of NMS Stock ATS. *See supra* Section III.B.1.

[253] *See* 17 CFR 242.301(b)(2)(i) and (vii), respectively.

[254] *See* 17 CFR 242.301(b)(9).

[255] *See* Regulation ATS Adopting Release, *supra* note 3, at 70878. The information filed on Form ATS–R permits the Commission to monitor trading on an ATS.

[256] We did not propose any other changes to Rule 301(b)(9). Form ATS–R would continue to be deemed confidential.

[257] *See supra* note 15.

[258] *See* SIFMA Letter at 8 n.16.

[259] Form ATS–R requires ATSs to provide, among other things, trading volumes, a list of all subscribers that were participants of the ATS, and a list of all securities traded. The information on Form ATS–R permits the Commission to monitor ATSs for compliance with the fair access requirements of Rule 301(b)(5), as ATSs subject to those requirements must report quarterly on Form ATS–R the persons to whom they grant, deny, or limit access to the ATS, as well as the date of the action, the effective date of the action, and the nature of the denials of limitations of access. *See* Form ATS–R; *see also* Regulation ATS Adopting Release, *supra* note 3, at 70878.

[260] *See* HMA Letter at 11 n.64.

[261] *See supra* Section X.D.6.

[262] *See supra* Section III.B.4.

[263] *See infra* Section IV.

[264] 17 CFR 242.301(a).

[265] *See* Proposal, *supra* note 2, at 81087.

[266] *See* 17 CFR 242.301(b)(8).

[267] *See* 17 CFR 242.302.

[268] *See* 17 CFR 242.303.

[269] *See* 17 CFR 242.303(a)(1).

[270] *See id.*

[271] *See supra* notes 77–81 and accompanying text.

[272] *See supra* notes 72–75 and accompanying text.

[273] *See* 17 CFR 242.303(a)(2).

[274] *See* 17 CFR 242.301(b)(2).

[275] *See supra* notes 72–75 and accompanying text.

[276] *See* 17 CFR 242.301(b)(2).

[277] *See* 17 CFR 242.303(a)(2)(ii).

instead of on Form ATS pursuant to Rule 301(b)(2), the NMS Stock ATS must preserve those reports for the life of the enterprise and of any successor enterprise pursuant to Rule 303(a)(2) as amended.[278] We are not amending the recordkeeping requirements of Rule 302, or any other amendments to the record preservation requirements of Rule 303(a)(2).

We are also adopting a minor technical amendment to Rule 303(a). Currently, Rule 303(a) references ''paragraph (b)(9) of § 242.301'' when setting forth the record preservation requirements for ATSs; this reference is incorrect, as Rule 301(b)(9) describes the filing requirements, rather than the recordkeeping requirements, for ATSs. We are therefore adopting a change to correct the above reference to ''paragraph (b)(8) of § 242.301.'' In addition, we are adopting an amendment to Rule 303(a)(1) to incorporate amendments to Rule 301(b)(10).[279]

7. Comments Recommending Changes to Other Existing Regulation ATS Rules

In the Proposal, we requested comment on other potential changes to Regulation ATS rules, including the order display and execution access requirement in Rule 301(b)(3) and the fair access requirement in Rule 301(b)(5).[280] We received two comments recommending changes to Rule 301(b)(3) of Regulation ATS.[281] One commenter urges the Commission to consider lowering or eliminating the threshold for the order display requirement.[282] Another commenter states that lowering the threshold for the order display requirement would result in reduced choice and higher trading costs for long-term investors, and urges the Commission to provide a block exemption from the order display requirement.[283]

In addition, the Commission received two comments recommending changes to the fair access requirements in Rule 301(b)(5).[284] One commenter urges the Commission to eliminate the 5% trading volume fair access threshold, in light of the importance of NMS Stock ATSs to equity markets today.[285] Another commenter states that rather than lowering the trading volume threshold that triggers the fair access requirement of Rule 301(b)(5), the Commission should exclude block executions from counting towards the fair access threshold.[286] In addition, one commenter believes that, in connection with Rule 301(b)(3) of Regulation ATS (order display and execution access), it is not appropriate to include actionable indications of interest in the definitions of ''bid'' and ''offer'' under Regulation NMS.[287] Another commenter states that actionable indications of interest should be treated as quotes and should be transparent to the public.[288]

We are not adopting changes to the order display and execution requirement or the fair access requirement at this time. We believe that it is appropriate to take an incremental approach by first applying the amended regime to NMS Stock ATSs before considering a further step and we intend to monitor the effectiveness of Rule 301(b)(3) and Rule 301(b)(5) requirements. Should the Commission decide to take further action with regard to these requirements, such as proposing to amend Regulation ATS, the Commission would do so in a separate rulemaking and take into account its experience with Rule 304 and NMS Stock ATSs.

IV. Form ATS–N Filing Process; Effectiveness Review

A. Initial Form ATS–N

1. Rule 304(a)(1)(i): Filing and Effectiveness Requirement

Rule 304(a)(1)(i) requires that an NMS Stock ATS operate pursuant to an effective initial Form ATS–N to be exempt from the definition of ''exchange.'' Proposed Rule 304(a)(1)(i) (''Filing'') provided that no exemption from the definition of ''exchange'' is available to an NMS Stock ATS pursuant to § 240.3a1–1(a)(2) unless the NMS Stock ATS files with the Commission a Form ATS–N, in accordance with the Instructions therein, and the Commission declares the Form ATS–N effective. Proposed Rule 304(a)(1)(i) also included transitional provisions for Legacy NMS Stock ATSs to file Form ATS–N and operate under Rule 304. These provided that if an NMS Stock ATS is operating pursuant to a previously-filed initial operation report on Form ATS as of the effective date of the final rule, such NMS Stock ATS shall file with the Commission a Form ATS–N, in accordance with the Instructions therein, no later than 120 calendar days after the effective date of the final rule. Further, proposed Rule 304(a)(1)(i) would have provided that an NMS Stock ATS operating as of the effective date of the final rule may continue to operate pursuant to a previously-filed initial operation report on Form ATS pending the Commission's review of the filed Form ATS–N. We are adopting Rule 304(a)(1)(i) (''Filing and Effectiveness Requirement'') with modifications and relocating the provisions applicable to Legacy NMS Stock ATSs to another provision within Rule 304(a)(1). Rule 304(a)(1)(i) sets forth two principal conditions of the Exchange Act Rule 3a1–1(a)(2) exemption for NMS Stock ATSs: (1) The NMS Stock ATS must file an initial Form ATS–N, and (2) the initial Form ATS–N must be effective.[289]

We are relocating the provisions of proposed Rule 304(a)(1)(i) regarding the filing of Form ATS–N by Legacy NMS Stock ATSs during the Commission review period to Rule 304(a)(1)(iv) to better organize the rule text, particularly in light of other changes we are making to the proposed rule in response to comments. In addition, we are making other, non-substantive modifications that we believe will not impact NMS Stock ATSs and will result in a more readable rule text for the public.[290]

We are also changing Rule 304(a)(1)(i) to state that the exemption for NMS Stock ATSs will not be available unless ''the initial Form ATS–N is effective

[278] NMS Stock ATSs that had previously made filings on Form ATS must preserve those filings for the life of the enterprise, as well as filings made going forward on Form ATS–N. *See id.* We believe that the amendments to Rule 303 are necessary to create a meaningful audit trail of an ATS's current and previous written safeguards and procedures pursuant to Rule 301(b)(2) and permit surveillance and examination staff to help ensure fair and orderly markets without imposing any undue burden on ATSs.

[279] *See infra* Section VI.

[280] *See* Proposal, *supra* note 2, at 81058, 81083.

[281] *See* Citadel Letter at 3; Liquidnet Letter at 14–15; *see also supra* Section II.C (discussing the order display and execution access requirements under Rule 301(b)(3) of Regulation ATS).

[282] *See* Citadel Letter at 3.

[283] The commenter believes that the threshold for the order display requirement may prevent it from offering functionalities that may provide market participants flexibility in how they display block orders. *See* Liquidnet Letter at 14–15.

[284] *See* Citadel Letter at 2–3; Liquidnet Letter at 9–12; *see also supra* Section II.C (discussing the fair access requirements under Rule 301(b)(5) of Regulation ATS).

[285] *See* Citadel Letter at 2.

[286] *See* Liquidnet Letter at 10.

[287] *See* UBS Letter at 8. In 2009, the Commission published a proposal to address certain practices with respect to undisplayed liquidity, which is trading interest that is available for execution at a trading center, but is not included in the consolidated quotation data that is widely disseminated to the public. *See* Regulation of Non-Public Trading Interest at 61209 (proposal to amend, among other things, Rule 301(b)(3) of Regulation ATS).

[288] *See* Barnard Letter at 2.

[289] *See supra* Section III.A.1. *See also* Rule 301(a)(1)(i).

[290] We are making the following non-substantive modifications to Rule 304(a)(1)(i): (1) Deleting the phrase ''from the definition of 'exchange';'' (2) changing the phrase ''in accordance with the instructions therein'' to ''in accordance with the conditions of this section;'' and (3) adding the term ''initial'' before ''Form ATS–N.''

pursuant to paragraph (a)(1)(iii) or (a)(1)(iv)(A) of [Rule 304]'' rather than the proposed rule text, which stated that the exemption is available only if ''the Commission declares the Form ATS–N effective.'' This change is made in connection with adopted Rule 304(a)(1)(iii) and Rule 304(a)(1)(iv)(A), which, in response to comments, provide that an initial Form ATS–N for both a non-Legacy NMS Stock ATS and Legacy NMS Stock ATS, as amended, becomes effective, unless declared ineffective, upon the earlier of: (1) The completion of review by the Commission and publication pursuant to Rule 304(b)(2) or (2) the expiration of the Commission review period, or, if applicable, the end of the extended review period. Accordingly, we are adopting Rule 304(a)(1)(i), which provides that no exemption is available to an NMS Stock ATS pursuant to Rule 3a1–1(a)(2) unless the NMS Stock ATS files with the Commission an initial Form ATS–N, in accordance with the conditions of Rule 304 and the initial Form ATS–N is effective pursuant to Rule 304(a)(1)(iii) or Rule 304(a)(1)(iv)(A). Consequently, an NMS Stock ATS that is not a Legacy NMS Stock ATS operating pursuant to an initial operation report on Form ATS as of January 7, 2019, will be required to comply with the requirements of Rule 304 as of that date. [291]

2. Rule 304(a)(1)(ii): Commission Review Period

Rule 304(a)(1)(ii) describes the timing for the Commission's review of initial Form ATS–N for Legacy NMS Stock ATSs. Proposed Rule 304(a)(1)(ii) provided the timing for the Commission's review of initial Form ATS–N as adopted for both Legacy NMS Stock ATSs and non-Legacy NMS Stock ATSs. The timing for the Commission's review of initial Form ATS–N for Legacy NMS Stock ATSs is provided by Rule 304(a)(1)(iv)(B).[292]

Proposed Rule 304(a)(1)(ii)(A) (''Review period and extension of the 120-day review period'') provided that the Commission would declare a Form ATS–N filed by a Legacy NMS Stock ATS effective or ineffective no later than 120 calendar days from filing with the Commission. Proposed Rule 304(a)(1)(ii)(A) also provided that the Commission could extend the review period for Forms ATS–N filed by Legacy NMS Stock ATSs: (1) An additional 120 calendar days if the Form ATS–N is unusually lengthy or raises novel or complex issues that require additional time for review, in which case the Commission will notify the NMS Stock ATS in writing within the initial 120-calendar day review period and will briefly describe the reason for the determination for which additional time for review is required; or (2) any extended review period to which a duly-authorized representative of the NMS Stock ATS agrees in writing.

Proposed Rule 304(a)(1)(ii)(B) would have provided that the Commission would declare a Form ATS–N filed by an non-Legacy NMS Stock ATS effective or ineffective no later than 120 calendar days from filing with the Commission. The proposed rule also would have provided that the Commission may extend the Form ATS–N review period for: (1) An additional 90 days, if the Form ATS–N is unusually lengthy or raises novel or complex issues that require additional time for review, in which case the Commission will notify the NMS Stock ATS in writing within the initial 120-calendar day review period and will briefly describe the reason for the determination for which additional time for review is required; or (2) any extended review period to which a duly-authorized representative of the NMS Stock ATS agrees in writing. We received three comments regarding the length of the Commission review period and extended review period for Form ATS–N filings.[293] One commenter states that the 120-calendar day period for the Commission to review Form ATS–N filings is a reasonable amount of time for the Commission to process each filing, and the 120-day extension of the review period for Form ATS–N filings by Legacy NMS Stock ATSs that are particularly novel or complex is agreeable.[294] Another commenter does not object to the proposed period for reviewing Form ATS–N.[295] We continue to believe that an initial review period of 120 calendar days for Form ATS–N filings would provide the Commission adequate time to carry out its oversight functions with respect to its review of Forms ATS–N filed by both Legacy NMS Stock ATSs and non-Legacy NMS Stock ATSs, including its responsibilities to protect investors and maintain fair, orderly, and efficient markets.[296] We also continue to believe that extended review periods of 120 calendar days for Form ATS–N filings by Legacy NMS Stock ATSs, and 90 calendar days for filings by non-Legacy NMS Stock ATSs, that are unusually lengthy or raise novel or complex issues, are appropriate. As discussed in the Proposal, these time periods will allow the Commission and its staff to conduct a thorough review of certain lengthy, novel, or complex Form ATS–N filings and provide sufficient opportunity to discuss a filing with an NMS Stock ATS if necessary.[297]

One commenter worries the review process may devolve into other market centers seeking to have the Commission preserve their market positions, and urges the Commission to promptly evaluate and act on initial Form ATS–N filings.[298] We believe that the proposed time periods for review of Form ATS–N filings are appropriate. The Commission could, depending on the length and complexity of a Form ATS–N filing, complete the review prior to the expiration of the review period; thus, the Form ATS–N would become effective upon publication, pursuant to Rule 304(b)(2).[299] The review periods and extended review periods combined cannot exceed 240 calendar days for a Legacy NMS Stock ATS or 210 calendar days for a non-Legacy NMS Stock ATS unless the NMS Stock ATS agrees, in writing, to a longer review period.[300]

In addition, one commenter states that the proposed process for determining whether an NMS Stock ATS qualifies for the exemption from the definition of ''exchange'' could, in light of the Commission's SRO rule filing review responsibilities, overwhelm staff by adding potentially hundreds of new NMS Stock ATS filings.[301] This commenter expresses concern that Commission staff may spend too much time reviewing whether an NMS Stock ATS meets its procedural obligations rather than trying to better understand the ''substance, merits, and potential misconduct of ATSs' trading operations and activities, and how they fit into the broader market structure,'' and worries that Commission staff ''might get caught in a procedural morass and miss the

[291] *See* Rule 301(b)(1). An entity seeking to operate as an NMS Stock ATS that has filed an initial operation report on Form ATS prior to January 7, 2019, but has not yet become operational pursuant to Rule 301(b)(2)(i), must file an initial operation report on Form ATS–N, in accordance with the conditions of Rule 304, and the initial Form ATS–N must become effective before the new NMS Stock ATS may commence operations.

[292] *See infra* Section IV.A.4.b.

[293] *See* CFA Institute Letter at 4; Liquidnet Letter at 3; PDQ Letter at 2. *See also infra* note 435.

[294] *See* CFA Institute Letter at 4.

[295] *See* Liquidnet Letter at 3. *See* also PDQ Letter at 2.

[296] *See* Proposal, *supra* note 2, at 81023–81024. *See infra* Section IV.A.4.b for a description of Rule 304(a)(1)(iv)(B), which provides the Commission review period for Legacy NMS Stock ATSs.

[297] *See* Proposal, *supra* note 2, at 81024.

[298] *See* HMA Letter at 7–8.

[299] *See* Rule 304(a)(1)(iii); Rule 304(a)(1)(iv)(A). *See also* Section IV.A.4.b.

[300] *See* Rule 304(a)(1)(ii)(A); 304(a)(1)(iv)(B). *See also infra* Section IV.A.4.b.

[301] *See* Consumer Federation of America Letter at 10.

forest for the trees.'' [302] This commenter compares the proposed review process for Form ATS–N filings to the review and approval process for SRO rule changes, and states that unless the Commission is more willing than it has previously been to challenge applications, the proposed process for reviewing Form ATS–N filings will devolve into an ''unreasonably burdensome exercise for Commission staff while providing little benefit to market integrity or investor protection.'' [303] We do not believe that the review process would be unreasonably burdensome to the Commission or its staff. The Commission's review will not be merit-based; instead, it will focus on the completeness and comprehensibility of disclosures. In addition, under the adopted rules, a Form ATS–N, as amended, will become effective, unless declared ineffective, upon the earlier of the completion of Commission review or the end of the Commission review period. This streamlined process will facilitate efficient Commission review, which is designed to protect investors by allowing the Commission to review disclosures on Form ATS–N for potential deficiencies that might otherwise confuse or mislead market participants about the operations of the NMS Stock ATS or the ATS-related activities of the broker-dealer operator and its affiliates.

We are adopting proposed Rule 304(a)(1)(ii)(B) with modifications, renumbering the proposed rule as Rule 304(a)(1)(ii) (''Commission review period''), and relocating Rule 304(a)(1)(ii)(A), which relates to Legacy NMS Stock ATSs, to Rule 304(a)(1)(iv)(B). We are modifying proposed Rule 304(a)(1)(ii) to state that the Commission ''may,'' ''by order,'' [304] as provided in Rule 304(a)(1)(iii), declare an initial Form ATS–N filed by an NMS Stock ATS ineffective no later than 120 calendar days from the date of filing with the Commission or, if applicable, the end of the extended review period.[305] Proposed Rule 304(a)(1)(iv) (''Order regarding effectiveness'') would have required the Commission to issue an order to declare a Form ATS–N effective or ineffective. We are not adopting the proposed requirement [306] that the Commission issue an order to declare a Form ATS–N effective because, as described below, the Commission will only issue orders of ineffectiveness. In addition, to improve readability, the adopted rule references the ineffectiveness process in Rule 304(a)(1)(iii). The Commission will make public, on its website, any effective initial Form ATS–N, as amended.[307]

We are modifying Rule 304(a)(1)(ii) to add a provision that will allow NMS Stock ATSs to amend their initial Forms ATS–N during the Commission review period. We discussed in the Proposal that during the Commission's review, the Commission staff may provide comments to the entity, and may request that the entity supplement information in the Form ATS–N or revise its disclosures on Form ATS–N.[308] In addition, an NMS Stock ATS may need to update disclosures on its initial Form ATS–N to otherwise reflect changes during the Commission review period. To allow an NMS Stock ATS to correct or update its disclosures on an initial Form ATS–N during the review period, we are modifying Rule 304(a)(1)(ii) to provide that during the review period of the initial Form ATS–N, the NMS Stock ATS shall amend its initial Form ATS–N pursuant to the requirements of Rules 304(a)(2)(i)(B) and (C), which are discussed further below.[309] We believe that updates or corrections to an NMS Stock ATS's disclosures about its intended operations would be properly filed as updating or correcting amendments pursuant to Rules 304(a)(2)(i)(B) and (C).[310] We believe allowing an entity seeking to operate as an NMS Stock ATS to amend its initial Form ATS–N during the Commission review period will promote transparency and facilitate complete and comprehensible disclosures. Once an initial Form ATS–N becomes effective, the Commission will make public the initial Form ATS–N, as amended, which will incorporate any amendments that were filed during the Commission review period. An NMS Stock ATS (other than a Legacy NMS Stock ATS),[311] however, seeking to amend its initial Form ATS–N to make a material change to its Form ATS–N disclosures during the Commission review period must withdraw its initial Form ATS–N and may refile a new, initial Form ATS–N pursuant to Rule 304(a)(1). We believe a material change to the disclosures on an initial Form ATS–N would necessitate a full review period.[312] In addition, we have made several technical, non-substantive modifications to Rule 304(a)(1)(ii) that are designed to improve the readability of the rule, reduce potential ambiguity, or both.[313]

3. Rule 304(a)(1)(iii): Effectiveness; Ineffectiveness Determination

Rule 304(a)(1)(iii) describes the process by which an initial Form ATS–N would become effective, or be declared ineffective by the Commission. Proposed Rule 304(a)(1)(iii) (''Effectiveness'') provided that the Commission will declare effective a Form ATS–N if the NMS Stock ATS qualifies for the Rule 3a1–1(a)(2) exemption and that the Commission will declare ineffective a Form ATS–N if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors.[314] Proposed Rule 304(a)(1)(iv) (''Order regarding effectiveness'')

[302] *See id.*

[303] *See id.* at 2, 10.

[304] We are: (1) Deleting proposed Rule 304(a)(1)(iv), which stated that the Commission would issue an order declaring a Form ATS–N effective or ineffective and (2) adding the words ''by order'' to adopted Rule 304(a)(1)(ii). These changes simplify the rule text without changing the Commission's proposal to inform the public about the ineffectiveness of Form ATS–N by issuing an order.

[305] We are deleting text that states that this provision applies to ''an NMS Stock ATS that was not operating as of [effective date of the final rule]'' as it will be clear that the provisions of Rule 304(a)(1)(ii) apply to the filing of initial Form ATS–N by non-Legacy NMS Stock ATSs and that the provisions of Rule 304(a)(1)(iv) will apply to filings by Legacy NMS Stock ATSs.

[306] *See* proposed Rule 304(a)(1)(iv).

[307] *See* Rule 304(b)(2)(i).

[308] *See* Proposal *supra* note 2, at 81026.

[309] *See infra* Sections IV.B.1.b and IV.B.1.c. Amendments will be subject to Commission review under Rule 304(a)(2)(ii), which states that the Commission will, by order, declare ineffective any Form ATS–N amendment no later than 30 calendar days from filing of such amendment with the Commission if the Commission finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors.

[310] *See id.*

[311] Unlike non-Legacy NMS Stock ATSs, Legacy NMS Stock ATSs will operate during the Commission review period pursuant to a filed, but not yet effective, initial Form ATS–N. Accordingly, Legacy NMS Stock ATSs may file amendments to their Form ATS–N during the Commission review period to make material changes to their operations and introduce new functionalities. *See infra* Section IV.A.4.c.

[312] The Commission could, however, complete its review of a refiled initial Form ATS–N in less than 120 calendar days from the date of filing, and the Form ATS–N would become effective upon publication. *See* Rules 304(a)(1)(ii)-(iii) and 304(b).

[313] We are making additional changes from proposed Rule 304(a)(1)(ii) to: (1) Rename the paragraph from ''Review period and extension of the 120-day review period'' to ''Commission review period;'' (2) add to the end of the first sentence that the Commission may declare an initial Form ATS–N ineffective no later than 120 calendar days from the date of filing with the Commission ''or, if applicable, the end of the extended review period;'' (3) specify that the Commission will declare an initial Form ATS–N ineffective no later than 120 calendar days from ''the date of'' filing with the Commission; (4) add the word ''initial'' before Form ATS–N; and (5) add the word ''calendar'' before ''day'' in the description of the 90-day extension period.

[314] *See* proposed Rule 304(a)(1)(iii).

provided that the Commission will issue an order to declare a Form ATS–N effective or ineffective. Proposed Rule 304(a)(1)(iv) also provided that upon the effectiveness of the Form ATS–N, the NMS Stock ATS may operate pursuant to the conditions of Rule 304, and if the Commission declares a Form ATS–N ineffective, the NMS Stock ATS shall be prohibited from operating as an NMS Stock ATS. Proposed Rule 304(a)(1)(iv) further provided that a Form ATS–N declared ineffective would not prevent the NMS Stock ATS from subsequently filing a new Form ATS–N. We also discussed in the Proposal our preliminary beliefs regarding when it would be necessary or appropriate in the public interest to declare ineffective a Form ATS–N.[315] We received several comments related to proposed Rule 304(a)(1)(iii), proposed Rule 304(a)(1)(iv), and the standard of review for declaring Form ATS–N filings effective or ineffective, which are summarized below.

Pursuant to Rule 304 and Form ATS–N, as adopted and as discussed below, an NMS Stock ATS must provide all the information required by the form and respond to each item, as applicable, and disclose information that is accurate, current, and complete. A Form ATS–N filing that is defective may be rejected. If the filing is accepted for review, it will become effective unless the Commission finds, after notice and opportunity for hearing, that it is necessary or appropriate in the public interest, and consistent with the protection of investors, to declare the filing ineffective. Responsibility for current, complete, and accurate disclosures rests with the NMS Stock ATS.[316] The Commission will consider whether it is necessary or appropriate in the public interest, and consistent with the protection of investors, to declare an initial Form ATS–N filing ineffective because, for example, the Form ATS–N was filed by an entity that does not meet the proposed definition of NMS Stock ATS; one or more disclosures reveal non-compliance with federal securities laws, or the rules or regulations thereunder, including Regulation ATS; or the disclosures are materially deficient with respect to completeness or comprehensibility.

[315] *See* Proposal, *supra* note 2, at 81024–81026.

[316] *See* Rule 304(c); Instructions to Form ATS–N. The Commission's staff may become aware of information, as a result of discussions with the NMS Stock ATS or otherwise, that calls into question, for example, the currency or accuracy of the disclosures on a Form ATS–N, which may result in a determination to begin the process to declare the Form ATS–N ineffective. *See infra* Section IV.A.3.d.

a. Comments on the Standard of Review To Accept Filings of Form ATS–N

The determination of whether to reject a Form ATS–N filing is separate from the Commission's determination to declare a filed Form ATS–N ineffective after Commission review. We received one comment regarding the process pursuant to which a Form ATS–N would be accepted for Commission review.[317] The commenter states that the Commission should not review a Form ATS–N filing for accuracy and completeness in connection with accepting a Form ATS–N filing, but rather that such review should be conducted when the Commission is considering whether to declare the Form ATS–N effective or ineffective.[318] The commenter states that the Commission's standards for accepting a Form ATS–N should be clear and objective, and Form ATS–N should be rejected only for purely ''technical deficiencies.'' [319]

As proposed, the Instructions to Form ATS–N required that ''[a]n NMS Stock ATS must respond to each item, as applicable, in detail and disclose information that is accurate, current, and complete. An NMS Stock ATS must provide all the information required by the form, including the exhibits, and must present the information in a clear and comprehensible manner. A filing that is incomplete or similarly deficient may be returned to the NMS Stock ATS.'' [320] In the Proposal, we stated that ''a Form ATS–N that contains technical deficiencies, such as missing pages or one in which the entity does not respond to all questions, including sub-questions, would not be complete and would be returned to the NMS Stock ATS.'' [321]

We believe that it would be appropriate to reject a Form ATS–N if the filing is defective.[322] For example, a Form ATS–N is defective if it is missing sections or missing responses to any questions, including sub-questions, or does not comply with the electronic-filing requirements. A decision to reject a Form ATS–N filing, and not accept it for review, would be for reasons distinct from Commission review pursuant to Rule 304(a)(1)(iii), as discussed below. The rejection of a Form ATS–N would not prejudice any decision by the Commission regarding ineffectiveness should the NMS Stock ATS resubmit a Form ATS–N.[323] An NMS Stock ATS also may choose to withdraw a filed Form ATS–N.[324] The Commission will apply the same standard when determining whether to accept an amendment to Form ATS–N for review or reject the filing.

b. Comments on the Review for Declarations of Ineffectiveness

We proposed that the Commission will declare effective a Form ATS–N if the NMS Stock ATS qualifies for the Rule 3a1–1(a)(2) exemption, and will declare it ineffective if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors.[325] We discussed in the Proposal that the Commission would use Form ATS–N to evaluate whether an entity qualifies for the exemption, and would evaluate, among other things, whether the entity satisfies the definition of NMS Stock ATS.[326] We also discussed our preliminary beliefs regarding when it would be necessary or appropriate in the public interest to declare ineffective

[317] *See* SIFMA Letter at 28.

[318] *See id.*

[319] *See id.*

[320] *See* proposed Instructions to Form ATS–N. As adopted, the Instructions to Form ATS–N state that: ''An NMS Stock ATS must provide all the information required by Form ATS–N, including responses to each Item, as applicable, and the Exhibits, and disclose information that is accurate, current and complete. . . . A filing that is defective may be rejected and not accepted by the EDGAR system. Any filing so rejected shall be deemed not to have been filed.'' The Instructions to Form ATS–N replace the proposed cite to 17 CFR 240.0–3 under the Exchange Act, which applies to paper filings, with a cite to Regulation S–T, which applies to electronic filings, because the form will be electronically filed via EDGAR. *See* Instructions to Form ATS–N. Because Form ATS–N will be electronically filed, we do not believe it is necessary to return a copy of Form ATS–N filings and are therefore replacing the word ''returned'' with ''rejected'' to specify this.

We are also modifying the Instructions to Form ATS–N to delete the phrase: ''and must present the information in a clear and comprehensible manner.'' *See* Instructions to Form ATS–N. This modification to the Instructions to Form ATS–N will streamline the instructions by removing confusing language relating to the Commission's standard of review, but will not modify an NMS Stock ATS's obligations with respect to Form ATS–N. Additionally, the Commission has reorganized the Instructions to differentiate between an NMS Stock ATS's filing obligations, and the consequences of incompleteness or similar deficiency.

We are modifying our guidance and the rule text for determinations of ineffectiveness, and believe these modifications to the Instructions to Form ATS–N better align them with that guidance and adopted rule text and reduce any potential confusion about the difference between an NMS Stock ATS's obligations with respect to completing Form ATS–N and the standard of review that the Commission will apply when determining whether to declare a Form ATS–N ineffective. *See infra* Section IV.A.3.d. *See also* infra Section V.A.1 (discussing the Form ATS–N disclosure requirements).

[321] *See* Proposal, *supra* note 2, at 81024 n.284.

[322] *See* 17 CFR part 232.

[323] Proposal, *supra* note 2, at 81024 n.284.

[324] *See id.*

[325] *See* proposed Rule 303(a)(1)(iii).

[326] *See* Proposal, *supra* note 2, at 81024.

a Form ATS–N, and provided examples.[327] We stated that it would be necessary and appropriate in the public interest to declare a Form ATS–N ineffective if the Commission finds, after notice and opportunity for hearing, that: An entity does not meet the definition of NMS Stock ATS; one or more disclosures on Form ATS–N are materially deficient with respect to their accuracy, currency or completeness; or one or more disclosures reveal non-compliance with federal securities laws, or the rules and regulations thereunder, including Regulation ATS.[328] We also stated that a declaration of effectiveness would not constitute a finding that the NMS Stock ATS's operations are consistent with the Exchange Act, but rather only address the issue of whether the NMS Stock ATS had complied with the requirements of Form ATS–N.[329]

We received several comments regarding the standard that the Commission would apply to declare a Form ATS–N effective or ineffective. One commenter asserts that it would be helpful to have the Commission review initial Forms ATS–N for completeness and accuracy, and legal and regulatory compliance, and to help standardize the level of disclosure across NMS Stock ATSs.[330] Another commenter urges the Commission to move forward with the effectiveness determination as proposed.[331] This commenter states that market participants will use the information disclosed on Form ATS–N to evaluate whether a particular NMS Stock ATS would be a desirable venue to which to route their orders, and that it is important that the detailed information be accurate, current, and complete.[332] This commenter also states that the Commission should be able to conduct a ''red flag'' review of the disclosures for apparent non-compliance with the federal securities laws, and avoid having a noncompliant NMS Stock ATS begin operation with inadequate system operations; this commenter states that while not affording complete certainty, this review process would be an improvement over the review process for Form ATS.[333] Further, the commenter states that the notice and hearing process will furnish the industry with useful information regarding specific regulatory concerns and questions.[334] One commenter expresses concern that the Commission would lack objective standards to evaluate initial Forms ATS–N and amendments.[335] Another commenter believes that in the Proposal, the Commission did not articulate a ''consistent standard of review'' for declaring a Form ATS–N or Form ATS–N amendment effective or ineffective.[336] The commenter expresses its view that the standard for declaring a Form ATS–N ineffective should be only if the Form ATS–N is ''materially deficient with respect to completeness,'' [337] asserting that criteria such as currency, accuracy, and fair presentation are subjective standards that could make it difficult for NMS Stock ATSs to understand the level of disclosure necessary to satisfy the Commission's review requirements, and therefore require extended discussion with the Commission.[338] Further, the commenter believes that such subjective standards would be difficult to standardize in application from firm to firm, would complicate the Commission's review of Form ATS–N, and are unnecessary to increase the operational transparency of NMS Stock ATSs and to ensure a consistent level of information regarding NMS Stock ATSs is available to market participants.[339] The commenter believes that the rule's directives to consider whether to declare a Form ATS–N ineffective would provide the Commission with flexibility to determine whether declaring a Form ATS–N ineffective is ''necessary or appropriate in the public interest'' and ''consistent with the protection of investors,'' and therefore that including additional subjectivity in the Commission's standard is unnecessary.[340] The commenter believes that NMS Stock ATSs would have other incentives to ensure the accuracy of their Forms ATS–N.[341]

This commenter also states that the Commission should only find a disclosure to be ''materially deficient'' with respect to the accuracy, currency, and completeness in an ''extreme situation, not a circumstance where additional color or language might be viewed as preferable to a disclosure as filed,'' and asserts that a response that is facially responsive to a question on Form ATS–N should be deemed sufficient.[342] This commenter agrees with the examples of ''materially deficient'' disclosures that the Commission provided in the Proposal, but also requests that the Commission provide examples of ''disclosures that would *not* be viewed as materially deficient.'' [343] Additionally, this commenter states that if the Commission declares an initial Form ATS–N or amendment ineffective, it should provide the NMS Stock ATS with a clear written statement of the reasons for the declaration.[344] The commenter urges the Commission to provide clarity and practical guidance around its expectations on declaring Form ATS–N filings effective.[345] Another commenter raises concerns that the process for declaring Form ATS–N effective or ineffective may result in the Commission staff undertaking merit-based reviews of the disclosures on Form ATS–N that could be used to delay the effectiveness of NMS Stock ATSs whose features, ''while meeting regulatory requirements, do not meet current industry norms.'' [346]

We believe that it would be necessary or appropriate in the public interest, and consistent with the protection of investors, to declare ineffective a Form ATS–N if, for example, the Commission finds, after notice and opportunity for hearing, the Form ATS–N was filed by an entity that does not meet the definition of NMS Stock ATS; one or more disclosures reveal non-compliance

[327] *See id.* at 81024–81026.

[328] *See id.*

[329] *See id.* at 81026. With respect to compliance with federal securities laws, we stated that the Commission's evaluation would involve a ''red-flag'' review of the Form ATS–N disclosures. *See id.* at 81025. With respect to whether an entity meets the definition of NMS Stock ATS, we stated our preliminary belief that proper classification of an entity would clearly indicate to market participants, as well as the Commission, the functions that entity performs and the regulatory framework and attendant obligations that attach to that entity. *See id.* at 81024 n.288 and accompanying text.

[330] *See* MFA/AIMA Letter at 4.

[331] *See* Investor Advocate Letter at 11.

[332] *See id.*

[333] *See id.*

[334] *See id.* We agree with the commenter and intend to help market participants understand the reason the Form ATS–N was declared ineffective by explaining the Commission's reasoning for the ineffective declaration in the Commission order. *See supra* Section IV.A.3.d.

[335] *See* LeveL ATS Letter at 8–9.

[336] *See* SIFMA Letter at 32.

[337] *See id.*

[338] *See id.* at 33.

[339] *See id.*

[340] *See id.*

[341] *See id.*

[342] *See id.* at 30.

[343] *See id.* at 30 (emphasis in original). *See also* Proposal, *supra* note 2, at 81025. Another commenter states that it recognizes the difficulty associated with identifying every potential scenario that might cause a Form ATS–N to be declared ineffective, but requests that the Commission provide additional guidance to ensure that NMS Stock ATS operators understand the standard to be applied. *See* LeveL ATS Letter at 9.

[344] *See* SIFMA Letter at 30.

[345] *See id.*

[346] *See* Fidelity Letter at 2, 9. This commenter requests that the Commission implement a ''completeness review'' under which the Commission would review responses to Form ATS–N for completeness and consistency without considering the merits of each answer. The commenter also requests that the Commission provide additional guidance with respect to the process by which it could declare a Form ATS–N ineffective, and questions how review by Commission staff of initial filings will be undertaken to ensure consistency across Form ATS–N filings. *See id.* at 9.

with federal securities laws, or the rules or regulations thereunder, including Regulation ATS; or one or more disclosures on Form ATS–N are materially deficient with respect to their completeness or comprehensibility.[347] We are providing additional examples of when, depending on the facts and circumstances, the Commission may make such a finding.[348] In response to comments regarding the scope of the Commission's review of initial Form ATS–N filings and the standard to be applied for declarations of ineffectiveness, we are making clear that the Commission will not be conducting a merit-based review.[349]

c. Effectiveness, Ineffectiveness Process

The Commission received comments about the proposed process by which a Form ATS–N would become effective or ineffective, including the potential implications of the proposed process. One commenter expresses concern that a declaration of effectiveness may give market participants a false sense of security that the Commission's deeming an NMS Stock ATS's Form ATS–N ''effective'' will be tantamount to the Commission's approval of an ATS's operations on the merits, as market participants may not fully understand that a declaration of effectiveness only implies that the NMS Stock ATS has met the Form ATS–N filing requirements, and that the Commission is not approving the merits of the NMS Stock ATS's operations or conflicts of interest.[350] The commenter believes that such mistaken belief could cause market participants to route orders to venues that are not in their best interests.[351] Another commenter states that there is the danger that the Commission review process would encourage market complacency, and that the Commission, through guidance in this adopting release and continuing investor education, should help to ensure that: (1) Investors understand that such a determination would not constitute a finding that the NMS Stock ATS's operations are necessarily consistent with the Exchange Act; and (2) operators of NMS Stock ATSs understand that the determination would not preclude the Commission from later determining that an NMS Stock ATS has violated federal securities laws.[352]

We also received two comments about an NMS Stock ATS potentially using a declaration of effectiveness to shield itself from potential liability.[353] Both express concern that, although the Proposal explains that a declaration of effectiveness is not an ''approval'' of Form ATS–N, the process could be used to inappropriately inoculate NMS Stock ATS operators from liability.[354] One of these commenters states that its concern is heightened by a recent court decision in which the court found that the Commission's review and approval of exchanges' activities made the activities legal.[355] One commenter believes that a declaration of ineffectiveness will ''sound the death knell'' for an NMS Stock ATS and that the opportunity to file a new Form ATS–N would be of no practical value because the marketplace would not use the ATS.[356]

While we do not believe that providing a process by which Form ATS–N filings will become effective or ineffective [357] would risk misleading market participants about the kind of review that will be undertaken by the Commission,[358] we are modifying the process for initial Form ATS–N filings to become effective, to mitigate any such risk. Accordingly, the Commission will not declare initial Form ATS–N filings effective pursuant to Rule 304(a)(1)(iii). Further, the Commission will only declare ineffective an initial Form ATS–N if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors. An initial Form ATS–N, as amended, will become effective, unless declared ineffective, upon the earlier of completion of review by the Commission and publication pursuant to Rule 304(b)(2), or the expiration of the review period, or, if applicable, the extended review period. Unlike proposed rule changes filed by national securities exchanges, the Commission will not make affirmative findings about Form ATS–N filings with regard to consistency with the Exchange Act in the general course of the review of Form ATS–N filings.[359] As discussed below, the Commission's review will not focus on the merits of the Form ATS–N disclosures, such as determining the strengths and weaknesses of the trading platform or a protocol offered by the NMS Stock ATS, nor is the Commission making findings regarding whether the means by which orders will interact on the trading platform are consistent with certain provisions of the Exchange Act.[360] If disclosures on Form ATS–N reveal non-compliance with federal securities laws or the rules and regulations thereunder, however, the Commission may find that it is appropriate to declare the filing ineffective. We believe that the scope of the Commission's review is clear and that the benefits of the Commission review process for Form ATS–N filings justify any risk that market participants misunderstand that the Commission is not performing a merit review of Form ATS–N. We further believe that adopting a process for initial Form ATS–N filings to become effective without the Commission affirmatively declaring them effective by order will help signal to market participants that the Commission is not passing on the merits of the NMS Stock ATSs' disclosures regarding their operations. Even if we assume that a declaration of ineffectiveness will ''sound the death knell,'' as suggested by a commenter,[361] or result in reputational harm to an NMS Stock ATS, the process for declaring a Form ATS–N filing ineffective will be consistent with the Commission's objective to protect investors and the public interest and will provide NMS Stock ATSs with opportunities to avoid or mitigate such a declaration. An NMS Stock ATS would be given notice and an opportunity for hearing to respond to the Commission's concerns. A non-Legacy NMS Stock ATS would also have the option of withdrawing and subsequently refiling its Form ATS–N. In addition, during the Commission review period, both non-Legacy NMS Stock ATSs and Legacy NMS Stock ATSs can amend their initial Form ATS–N to cure potential deficiencies. Additionally, if the Commission does

[347] *See infra* Section IV.A.3.d.

[348] *See id.*

[349] *See infra* notes 404–407 and accompanying text.

[350] *See* Consumer Federation of America Letter at 2, 10–11.

[351] *See id.* at 11.

[352] *See* Investor Advocate Letter at 12. *See also supra* note 340 and accompanying text. Pursuant to Rule 304(a)(1)(iii) the Commission will issue an order declaring an initial Form ATS–N filing ineffective if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors if, for example, the Form ATS–N was filed by an entity that does not meet the definition of NMS Stock ATS; one or more disclosures reveal non-compliance with federal securities laws, or the rules or regulations thereunder, including Regulation ATS; or the disclosures are materially deficient with respect to completeness or comprehensibility.

[353] *See* HMA Letter at 8; Consumer Federation of America Letter at 11.

[354] *See id.*

[355] *See* HMA Letter at 8.

[356] *See* Fidelity Letter at 9.

[357] *See* Rule 304(a)(1)(iii).

[358] *See* Consumer Federation of America Letter at 2, 10.

[359] *See supra* note 405.

[360] *See infra* notes 404–407 and accompanying text.

[361] *See supra* note 356.

declare an initial Form ATS–N ineffective, the NMS Stock ATS will have an opportunity to revise its disclosures, or change its operations, and subsequently file a new initial Form ATS–N, and such filing could become effective.

In addition, one commenter argues that a Form ATS–N should be considered ineffective upon filing until the Commission affirmatively declares it effective or ineffective.[362] However, this commenter also recommends that if the Commission fails to declare a Form ATS–N effective or ineffective within the 120-calendar day review period, or does not extend the review period, the ''default decision'' should be that the Form ATS–N is declared effective.[363] We believe that it would be appropriate for an initial Form ATS–N to become effective if the Commission does not declare, by order, the filing ineffective during the initial review period, or in the case of an extended review period, during the extended period, to provide certainty about timing of the Commission's review to the NMS Stock ATS and to market participants. Providing for an initial Form ATS–N filed by a Legacy NMS Stock ATS to become effective in this manner will allow the Legacy NMS Stock ATS to continue to operate without disruption to its subscribers (provided the Commission does not declare the Form ATS–N ineffective).[364] Considering an initial Form ATS–N ineffective upon filing, before the Commission has completed the review, as suggested by a commenter, would cause a Legacy NMS Stock ATS to stop operating, which may harm the market participants that currently use the services on the Legacy NMS Stock ATS. Once an initial Form ATS–N is effective, Rule 304(a)(4) provides a process for the Commission to suspend, limit, or revoke the exemption for the NMS Stock ATS. Given this change in the effectiveness determination process, we do not believe that requiring that an initial Form ATS–N filing be considered ineffective upon filing would provide any additional benefit, because an NMS Stock ATS (except for a Legacy NMS Stock ATS) may not operate pursuant to the conditions of the Rule 3a1–1(a)(2) exemption unless its Form ATS–N has become effective, pursuant to Rule 304(a)(1)(iii).

[362] *See* CFA Institute Letter at 5.

[363] *See id.* at 4.

[364] *See* Rule 304(a)(1)(iv)(A). *See also infra* Section IV.A.4.a (discussing the initial Form ATS–N requirements for Legacy NMS Stock ATSs).

d. Effectiveness; Ineffectiveness Determinations Under Rule 301(a)(1)(iii)

We are adopting Rule 304(a)(1)(iii) with modifications, and relocating most of proposed Rule 304(a)(1)(iv), with modifications,[365] to adopted Rule 304(a)(1)(iii) (''Effectiveness; Ineffectiveness determination''). For the reasons described above, we are modifying Rule 304(a)(1)(iii) to provide that an initial Form ATS–N filed by an NMS Stock ATS, as amended,[366] will become effective, unless declared ineffective, upon the earlier of: (1) The completion of review by the Commission and publication pursuant to Rule 304(b)(2)(i), or (2) the expiration of the review period, or, if applicable, the end of the extended review period, pursuant to Rule 304(a)(1)(ii). Rule 304(a)(1)(iii) will further provide that the Commission will, by order, declare ineffective an initial Form ATS–N if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors.[367]

[365] *See infra* note 368 and accompanying text.

[366] We are adopting a process that allows NMS Stock ATSs to file an updating and correcting amendment to an initial Form ATS–N during the Commission review period. *See supra* Section IV.A.2. We are adding to Rule 304(a)(1)(iii) that an initial Form ATS–N ''as amended'' will become effective, which includes any amendments filed to the initial Form ATS–N during the Commission review period. Amendments filed by an NMS Stock ATS to an initial Form ATS–N during the Commission review period are subject to Rule 304(a)(2)(ii), which provides that the Commission will, by order, declare ineffective any Form ATS–N amendment no later than 30 calendar days from filing with the Commission. The Commission will have 30 calendar days to declare any amendments ineffective, including amendments to Form ATS–N that are filed during the Commission review period. For example, if an NMS Stock ATS files an updating or correcting amendment to an initial Form ATS–N on calendar day 110 of the Commission review period, and the initial Form ATS–N becomes effective on calendar day 120, the updating or correcting amendment could be declared ineffective by the Commission up to an additional 20 calendar days after the initial Form ATS–N becomes effective—until the Commission's 30-calendar day review period has expired.

[367] We are also making technical changes to the proposed text of Rule 304(a)(1)(iii) by adding to Rule 304(a)(1)(iii) the word ''initial'' before Form ATS–N and renaming the paragraph as ''Effectiveness; Ineffectiveness determination.''

In the Proposal, we stated that it would be necessary or appropriate in the public interest, and consistent with the protection of investors, to declare ineffective a Form ATS–N if it finds, after notice and opportunity for hearing, that one or more disclosures on Form ATS–N are materially deficient with respect to their accuracy, currency, or completeness. *See* Proposal, *supra* note 2, at 81025. As discussed further below, we are modifying the proposed guidance regarding when it may be necessary or appropriate to declare a Form ATS–N ineffective.

We are also modifying the Instructions to Form ATS–N to better align them with that guidance, and to reduce any potential confusion about the difference between an NMS Stock ATS's obligations with respect to completing Form ATS–N and the standard of review that the Commission will apply when determining whether to declare a Form ATS–N ineffective. *See supra* note 320.

The same standard for declarations of ineffectiveness will apply to filings of both initial Form ATS–N and Form ATS–N amendments. *See infra* Section IV.B.2.

We are also relocating two provisions of proposed Rule 304(a)(1)(iv), with non-substantive modifications,[368] to adopted Rule 304(a)(1)(iii). As a result, Rule 304(a)(1)(iii) states that if the Commission declares an initial Form ATS–N ineffective, the NMS Stock ATS shall be prohibited from operating as an NMS Stock ATS pursuant to § 240.3a1–1(a)(2); and that an initial Form ATS–N declared ineffective does not prevent the NMS Stock ATS from subsequently filing a new Form ATS–N. We believe Rule 304(a)(1)(iii), as modified, clearly explains when an initial Form ATS–N will become effective or declared ineffective, and the consequences of an order of ineffectiveness. Accordingly, an NMS Stock ATS whose initial Form ATS–N has become effective may commence operations and will be required to comply with Rule 304 as well as applicable provisions of Rules 300 through 303 of Regulation ATS. An NMS Stock ATS whose initial Form ATS–N was declared ineffective would be prohibited from operating pursuant

[368] We are deleting the following language, which was part of proposed Rule 304(a)(1)(iv): ''The Commission will issue an order to declare a Form ATS–N effective or ineffective.'' This is addressed in the adopted rule text stating that ''[a]n initial Form ATS–N, as amended, filed by an NMS Stock ATS will become effective, unless declared ineffective, upon the earlier of: (1) [T]he completion of review by the Commission and publication pursuant to paragraph (b)(2)(i) of [Rule 304] or (2) [t]he expiration of the review period, or, if applicable, the end of the extended review period, pursuant to paragraph (a)(1)(ii) of [Rule 304]'' and that ''[t]he Commission will, by order, declare an initial Form ATS–N ineffective if it finds, after notice and opportunity for hearing, that such action is necessary and appropriate in the public interest, and is consistent with the protection of investors.'' *See* Rule 304(a)(1)(iii)(B). In addition, we are not adopting the language that states ''[u]pon the effectiveness of the Form ATS–N, the NMS Stock ATS may operate pursuant to the conditions of this section'' or language that states ''[i]f the Commission declares an initial Form ATS–N effective, the NMS Stock ATS may operate pursuant to the conditions of this section'' for purposes of clarity and readability. Rule 304(a)(1)(i) provides that an initial Form ATS–N must be effective for the NMS Stock ATS to avail itself of the Rule 3a1–1(a)(2) exemption (*see supra* Section IV.A.1), and Rule 304(a)(1)(iii) specifies when an initial Form ATS–N filing will become effective. Rule 304(a)(1)(iii) also states that: (1) if the Commission declares an initial Form ATS–N ineffective, the NMS Stock ATS shall be prohibited from operating as an NMS Stock ATS ''pursuant to § 240.3a1–1(a)(2);'' and (2) an initial Form ATS–N declared ineffective ''does'' not (rather than ''would'' not) prevent the NMS Stock ATS from subsequently filing a new Form ATS–N.

to the Rule 3a1–1(a)(2) exemption. Similarly, a Legacy NMS Stock ATS whose initial Form ATS–N was declared ineffective would no longer be eligible for the Rule 3a1–1(a)(2) exemption and would be required to cease operations.[369] If the Commission declares an initial Form ATS–N ineffective, the NMS Stock ATS that filed the form could subsequently file a new Form ATS–N for Commission consideration.

In the Proposal, we provided certain examples of scenarios in which we believed that it would be necessary or appropriate in the public interest, and consistent with the protection of investors, to declare ineffective a Form ATS–N, after notice and opportunity for hearing.[370] We continue to believe that the examples provided in the Proposal are appropriate for the Commission to declare a Form ATS–N ineffective and will provide NMS Stock ATSs and market participants with clarity with respect to when the Commission could find, after notice and opportunity for hearing, it necessary or appropriate in the public interest, and consistent with the protection of investors, to declare ineffective a Form ATS–N. We are also providing additional clarity with respect to this guidance.

Several commenters request additional guidance and clarity regarding the Commission's review of initial Form ATS–N filings and Form ATS–N amendments and the circumstances under which the Commission may declare a Form ATS–N ineffective.[371] We believe that it would be necessary or appropriate in the public interest, and consistent with the protection of investors, to declare ineffective a Form ATS–N if the Commission finds, for example, after notice and opportunity for hearing, the Form ATS–N was filed by an entity that does not meet the definition of NMS Stock ATS; one or more disclosures reveal non-compliance with federal securities laws, or the rules or regulations thereunder, including Regulation ATS; or one or more disclosures on Form ATS–N are materially deficient with respect to their completeness or comprehensibility. Given that the objective of Rule 304 is to provide market participants with information about NMS Stock ATSs through Form ATS–N disclosures, our review is designed to focus on the Form ATS–N disclosures and is not a merit-based review of the operations of the NMS Stock ATS or the ATS-related activities of the broker-dealer operator.[372]

We believe[373] that it would be necessary to declare ineffective a Form ATS–N if the Form ATS–N was filed by an entity that does not satisfy the definition of ATS, and more specifically, the definition of NMS Stock ATS.[374] The proper classification of an entity would clearly indicate to market participants, as well as the Commission, the functions that entity performs and the regulatory framework and attendant obligations that attach to that entity.[375] We believe that the review of Form ATS–N disclosures will help mitigate concerns that market participants may be confused or misled about whether an entity in fact meets the definition of an NMS Stock ATS. If an entity does not meet the definition, market participants may hold false expectations about how their orders may interact or be matched with other orders or they may not fully understand whether the entity with which they are doing business is required to comply with Regulation ATS.

We believe that it would be necessary to declare Form ATS–N ineffective if one or more disclosures reveal non-compliance with federal securities laws, including Regulation ATS. As discussed in the Proposal,[376] the Commission will conduct a ''red-flag'' review for instances of non-compliance with federal securities laws that seem apparent from the disclosures on Form ATS–N. For example, as a condition to the Rule 3a1–1(a)(2) exemption, Rule 301(b)(1) of Regulation ATS requires that an ATS register as a broker-dealer under Section 15 of the Exchange Act.[377] Section 15(b)(8) of the Exchange Act[378] prohibits a registered broker or dealer from effecting a transaction unless the broker or dealer is a member of a securities association registered pursuant to Section 15A of the Exchange Act[379] or effects transactions solely on a national securities exchange of which it is a member. Therefore, to comply with Regulation ATS, and thus qualify for the Rule 3a1–1(a)(2) exemption, an ATS must become a member of an SRO and comply with the rules of the SRO, including obtaining approval by the SRO to operate an ATS in accordance with applicable SRO rules. If an entity were to file a Form ATS–N before registering as a broker-dealer under Section 15 of the Exchange Act, the entity would not be in compliance with Rule 301(b)(1) of Regulation ATS.[380] Moreover, if the entity were to file a Form ATS–N before becoming a member of an SRO, the entity would not be in compliance with Rule 301(b)(1) of Regulation ATS because Section 15(b)(1) of the Exchange Act provides that a Commission order granting registration is not effective until the broker-dealer has become a member of a national securities association registered pursuant to Section 15A of the Exchange Act,[381] and the Commission's order granting broker-dealer registration would not be effective.[382] As another example, if the Form ATS–N reveals non-compliance with Regulation NMS, including, among other provisions, Rule 612, known as the ''Sub-Penny Rule,'' which prohibits market participants, including ATSs, from displaying, ranking, or accepting orders, quotations, or indications of interest in NMS stock priced in an increment smaller than $0.01,[383] the Form ATS–N would not be consistent with Rule 304 because the NMS Stock ATS would operate in a manner that may violate the federal securities laws.

We believe that it would be necessary to declare Form ATS–N ineffective if one or more disclosures are materially deficient with respect to their completeness and comprehensibility. The following are non-exhaustive examples of Form ATS–N disclosures that may be deficient with respect to

[369] The initial filing of Form ATS–N by Legacy NMS Stock ATSs is discussed further below. *See infra* Section IV.A.4.a.

[370] *See* Proposal, *supra* note 2, at 81024–26.

[371] *See supra* notes 343, 345, and 346 and accompanying text. *See also supra* notes 335–340 and accompanying text discussing commenter concerns regarding whether the Commission articulated an objective or consistent standard of review.

[372] *See infra* notes 404–407 and accompanying text.

[373] *See* Proposal, *supra* note 2, at 81024–81025.

[374] *See* Rule 300(k).

[375] For example, an ATS that is not an NMS Stock ATS would be subject to different conditions under Regulation ATS to be eligible for the Rule 3a1–1(a)(2) exemption. Similarly, depending on the facts and circumstances, an entity that is not an ATS may be subject to requirements as a broker-dealer, but not the conditions of Regulation ATS, or may be required to register as a national securities exchange. *See* Proposal, *supra* note 2, at 81024 n.288 and accompanying text.

[376] *See* Proposal at 81025–26.

[377] 17 CFR 242.301(b)(1).

[378] 15 U.S.C. 78*o*(b)(8).

[379] 15 U.S.C. 78*o*–3.

[380] *See* 17 CFR 301(b)(1). Rule 301(b)(1) of Regulation ATS requires an ATS to register as a broker-dealer under Section 15 of the Exchange Act.

[381] *See* 15 U.S.C. 78*o*(b)(1).

[382] *See* 17 CFR 242.301(b)(1).

[383] Specifically, Rule 612(a) of Regulation NMS provides that ''no national securities exchange, national securities association, alternative trading system, vendor, or broker or dealer shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock priced in an increment smaller than $0.01 if that bid or offer, order, or indication of interest is priced equal to or greater than $1.00 per share.'' *See* 17 CFR 242.612(a).

their completeness: [384] an NMS Stock ATS discloses an order type on Form ATS–N but does not describe the key attributes of the order type, such as time-in-force limitations that can be placed on the ability to execute the order, the treatment of unfilled portions of orders, or conditions for cancelling orders in whole or in part; [385] an NMS Stock ATS describes some of its priority rules, but fails to describe conditions or exceptions to its priority rules, or fails to describe any priority overlays; [386] an NMS Stock ATS, in response to Part II, Item 1 of adopted Form ATS–N, discloses that a principal trading desk of the broker-dealer operator trades on the NMS Stock ATS, but does not explain advantages the broker-dealer operator receives compared to other subscribers; an NMS Stock ATS, in response to Part III, Item 19 of adopted Form ATS–N, fails to provide complete information about fees and rebates charged for use of the NMS Stock ATS; an NMS Stock ATS discloses that it has only one class of subscribers but the Commission or its staff learns through discussions (during the review period) with the NMS Stock ATS or otherwise that the ATS in fact has several classes of subscribers; or an NMS Stock ATS discloses that it has two classes of subscribers that are charged the same trading fees, but the Commission or its staff learns through discussions with the ATS or otherwise that in fact one class receives more favorable fees than the other.[387]

The following are non-exhaustive examples of Form ATS–N disclosures that may be deficient with respect to their comprehensibility: [388] Form ATS–N includes inconsistent information among the disclosures, such as a statement by the NMS Stock ATS in one part of the form that the ATS uses private feeds to calculate the NBBO but in another part of the form indicates that it uses the SIP; [389] the NMS Stock ATS states in one part of Form ATS–N that it does not segment its orders but provides a description in another part of the Form ATS–N that indicates that the ATS offers a functionality that allows institutional investors to limit their trading activity to interactions with other institutional investors; the Form ATS–N disclosures indicate that the NMS Stock ATS uses time/price priority to execute orders but provides an example that demonstrates an order received before an identically priced order does not receive priority over the later order; or the NMS Stock ATS states in one part of the Form ATS–N that it provides certain order types, transacts in certain types of securities, or provides access to certain classes of subscribers, and there is contrary disclosure in other parts of the Form ATS–N.

We do not agree with the commenter that believes that the term materially deficient should be understood to represent only ''extreme situation[s].'' [390] The Commission review will focus on whether the lack of completeness or comprehensibility in a Form ATS–N disclosure would prevent market participants from understanding an ATS's operations or the ATS-related activities of its broker-dealer operator or its affiliates. We believe that subscribers and market participants will rely on Form ATS–N disclosures to understand and evaluate the operations of the NMS Stock ATS and conflicts of interest that may arise from the ATS-related activities of the broker-dealer operator and its affiliates and use this information to help determine where to route their orders, or the orders of their customers. We believe that a disclosure on Form ATS–N that is materially deficient with respect to its completeness or comprehensibility could mislead market participants or impede their ability to understand an NMS Stock ATS's operations, or the ATS-related activities of its broker-dealer operator, which would frustrate the purpose of the transparency goals of this rulemaking. We do not believe that it would be practical, as one commenter suggests,[391] to provide examples of disclosures that the Commission would not view as materially deficient because the context of each disclosure is crucial to determining whether a disclosure is complete and comprehensible. Whether a disclosure deficiency is material depends on the facts and circumstances, as does whether the deficiency would support a finding that the deficiency is such that a declaration of ineffectiveness would be in the public interest and consistent with the protection of investors.

As discussed above, one commenter questions how the Commission's review will be undertaken to help ensure consistency across filings when initial Form ATS–N filings are made ''without any prior knowledge of the detail the Commission expects,'' [392] and another states that it ''would be helpful'' to have the Commission review initial filings to, among other things, help ''standardize the level of disclosure across NMS Stock ATSs.'' [393] We have revised Form ATS–N in a number of ways in response to comments. For instance, we added more ''yes'' or ''no'' questions, separated questions into distinct subject matter categories, provided additional examples as guidance, and made requests more explicit for more targeted responses.[394] These changes to Form ATS–N are designed to better inform NMS Stock ATSs of the requirements of Form ATS–N and to solicit more consistent responses from NMS Stock ATSs. However, NMS Stock ATSs operate differently, and with different complexities, and use different terms to describe their systems. While this could lead to different levels of disclosures among ATSs, we believe that the combination of refinements to the form, and the Commission's review of all Forms ATS–N filed by Legacy NMS Stock ATSs during the same period of time, will assist the Commission in providing a consistent level of comment on the forms that will help facilitate a more consistent and standard level of information disclosed across NMS Stock ATSs.

[384] These are some, but not all, of the types of circumstances that could result in the Commission declaring a Form ATS–N ineffective due to being materially deficient with respect to completeness. We also provided some of these examples in the Proposal as examples of disclosures that could cause the Commission to declare a Form ATS–N ineffective because it contains one or more disclosures that appear to be materially deficient. *See* Proposal, *supra* note 2, at 81025. Because we are modifying the standard of review to focus on completeness and comprehensibility, some of the examples discussed in the Proposal are also discussed below to show application of the standard the Commission is adopting to the same scenarios.

[385] This example was discussed in the Proposal as an example of a disclosure that may be materially deficient because it may not be sufficiently detailed. *See* Proposal, *supra* note 2, at 81025.

[386] *See id.* Another example would be if the NMS Stock ATS fails to describe which order would receive priority where two or more orders are otherwise on par, such as a situation in which a customer and non-customer order are at the same price in a price priority system.

[387] These examples were discussed in the Proposal as examples of disclosures that may be materially deficient because they would not be accurate. *See* Proposal, *supra* note 2, at 81025.

[388] These are some, but not necessarily all, of the types of circumstances that could result in the Commission declaring a Form ATS–N ineffective due to being materially deficient with respect to comprehensibility.

[389] In the Proposal, this was provided as an example of a disclosure that may be materially deficient because it may not be accurate; however, inconsistent disclosures in a Form ATS–N also may render disclosures unclear as to which rule or procedure, for example, controls and how the NMS Stock ATS intends to operate. *See* Proposal, *supra* note 2, at 81025. Depending on the facts and circumstances, inconsistent or contradictory disclosures in a Form ATS–N may be materially deficient with respect to comprehensibility.

[390] *See supra* note 342 and accompanying text.

[391] *See supra* note 343 and accompanying text.

[392] *See* Fidelity Letter at 9. *See also* supra note 346.

[393] *See* MFA/AIMA Letter at 4. *See also supra* note 330 and accompanying text.

[394] *See infra* Section V (discussing modifications to Proposed Form ATS–N).

Any order declaring a Form ATS–N ineffective will require the Commission to find that such action is necessary or appropriate in the public interest, and consistent with the protection of investors. Rule 304(a)(1)(iii) provides that the Commission must provide notice to the NMS Stock ATS and provide an opportunity for a hearing. As such, an NMS Stock ATS will have the opportunity to be heard before the Commission declares its Form ATS–N ineffective.

As discussed above, we do not agree with a commenter's suggestion that a Form ATS–N be considered ineffective upon filing.[395] We also do not agree with the comment that a declaration of ineffectiveness of a Form ATS–N will prejudice an entity such that a revised filed Form ATS–N will have no practical value.[396] We anticipate a dialogue between Commission staff and the NMS Stock ATS regarding the Form ATS–N disclosures and an NMS Stock ATS will have the opportunity to amend its initial Form ATS–N during the Commission review period. If a Form ATS–N is declared ineffective by the Commission, the Commission's order will provide the basis for the declaration of ineffectiveness, and the NMS Stock ATS will have the opportunity to file another Form ATS–N that addresses the basis for the ineffectiveness determination. To the extent that the NMS Stock ATS files a revised initial Form ATS–N or Form ATS–N amendment that no longer contains, for example, material deficiencies with respect to its completeness or comprehensibility, the Form ATS–N would become effective, assuming no other basis for an ineffectiveness determination. Regarding the comment that the Commission should provide an NMS Stock ATS with a clear written statement of the reasons for a declaration of ineffectiveness,[397] the Commission intends to provide the basis for declaring a Form ATS–N ineffective in an order declaring a Form ATS–N ineffective, which will help the NMS Stock ATS address disclosure deficiencies if the ATS decides to refile an initial Form ATS–N and help market participants understand the reason the Form ATS–N was declared ineffective.

We also received three comments regarding whether the Commission should add a requirement to make available Form ATS–N filings for public notice and comment before the Commission declares a Form ATS–N effective or ineffective. One commenter notes that the rule filings of national securities exchanges are made publicly available and subject to notice and comment before approval, and that Form ATS–N should be the same.[398] Another commenter expresses the view that it would be helpful for the Commission to receive feedback from market participants regarding Form ATS–N filings, and supports harmonizing the process with the application and filing process for national securities exchanges.[399] One commenter, however, expresses the view that Form ATS–N should not be subject to a public notice and comment process.[400] This commenter states that the Commission has long recognized several fundamental differences between national securities exchanges and ATSs, and that imposing a public notice and comment period on ATSs would not be equitable and would impede dynamic market structure advances because the Commission has fostered competition among different types of trading venues.[401]

We believe that it would not be appropriate to subject Form ATS–N filings to public notice and comment, as some commenters suggest. The Commission did not propose to subject Form ATS–N filings to a public notice and comment process. As discussed above,[402] the Commission is not performing a review of the merits of initial Form ATS–N disclosures, such as determining the strengths and weaknesses of the trading platform or a protocol offered by the NMS Stock ATS. The Commission also is not making findings regarding whether the means by which orders will interact on the trading platform are, or are not, consistent with the Exchange Act, as is the case with respect to certain SRO rule filings.[403] Rather the Commission's review of Form ATS–N disclosures will focus on the completeness and comprehensibility of the disclosures, which does not lend itself to public notice and comment. We do not believe that public comment would facilitate the review of Form ATS–N, and are not subjecting Form ATS–N filings to a process similar to SROs' proposed rule change filings, which are subject to notice and comment, and consideration by the Commission.

The standard of review for ineffectiveness of Form ATS–N filings that we are adopting does not include an evaluation of the merits of the services that an NMS Stock ATS offers to subscribers. As discussed above, some commenters raise concerns about whether the Commission review process will result in imposing substantive standards on NMS Stock ATSs.[404] Rule 304 and Form ATS–N are designed to enhance operational transparency for NMS Stock ATSs, and therefore, the standard of review undergirding the Commission review will focus on the disclosures on Form ATS–N, as described above, and not the manner in which the NMS Stock ATS operates. Unlike proposed rule changes filed by national securities exchanges, the Commission will not make affirmative findings about Form ATS–N filings with regard to consistency with the Exchange Act.[405] Regulation ATS was designed to encourage innovation [406] and provide enough flexibility to accommodate the business objectives of, and benefits provided by, alternative trading systems.[407] As follows, the standard of review for ineffectiveness of Form ATS–N is designed to enhance the transparency objectives of the new disclosure requirements in a manner consistent with allowing NMS Stock ATSs to continue to innovate and provide benefits to the market. The Commission review is not intended to evaluate an NMS Stock ATS's services against industry norms, nor approve or disapprove aspects of the NMS Stock ATS's operations, for example, a new trading functionality, order type, or execution protocol.

[395] *See supra* notes 362–363 and accompanying text.

[396] *See supra* note 356 and accompanying text.

[397] *See supra* note 344 and accompanying text.

[398] *See* CBOE Letter at 2.

[399] *See* Citadel Letter at 3.

[400] *See* UBS Letter at 4.

[401] *See id.* Another commenter, in expressing the view that Form ATS–N amendments should not be made public upon filing, states that doing so would risk turning the effectiveness process into an extended review, notice, and comment period, which the commenter believes would be inappropriate and unwarranted. *See* SIFMA Letter at 31–32.

[402] *See supra* Section IV.A.3.c.

[403] *See supra* note 359 and accompanying text.

[404] *See, e.g., supra* note 346 and accompanying text.

[405] Proposed rule changes filed by national securities exchanges pursuant to Section 19 of the Exchange Act must be consistent with the Exchange Act. In addition, filings made pursuant to Section 19(b)(2) require the Commission to approve a proposed rule change if it finds the proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder, or it must disapprove the proposed rule change. While a disclosure that reveals non-compliance with the federal securities laws or the rules and regulations thereunder may be a basis for the Commission finding that a declaration of ineffectiveness would be in the public interest and consistent with the protection of investors, Regulation ATS is a disclosure regime, and the Commission will not be making findings on consistency with the Exchange Act with respect to disclosures on Form ATS–N.

[406] *See* Regulation ATS Adopting Release, *supra* note 3, at 70910.

[407] *See id.* at 70847.

4. Rule 304(a)(1)(iv): Transition for Legacy NMS Stock ATSs

a. Rule 304(a)(1)(iv)(A): Initial Filing Requirements

Rule 304(a)(1)(iv) describes the process through which Legacy NMS Stock ATSs would file their initial Form ATS–N. We are adopting Rule 304(a)(1)(iv) (''Transition for Legacy NMS Stock ATSs'') to provide a process for a Legacy NMS Stock ATS to file its initial Form ATS–N, and to continue to operate while its initial Form ATS–N is under Commission review.[408] Adopted Rule 304(a)(1)(iv)(A) (''Initial Form ATS–N filing requirements'') requires that a Legacy NMS Stock ATS shall file with the Commission an initial Form ATS–N, in accordance with the conditions of Rule 304(a)(1)(iv), no earlier than January 7, 2019, and no later than February 8, 2019. Further, adopted Rule 304(a)(1)(iv)(A) provides that an initial Form ATS–N filed by a Legacy NMS Stock ATS shall supersede and replace for purposes of the exemption the previously-filed Form ATS (including any amendments to Form ATS) of the Legacy NMS Stock ATS.[409] The Legacy NMS Stock ATS may operate, on a temporary basis, pursuant to the filed initial Form ATS–N, and any amendment thereto, during the review of the initial Form ATS–N by the Commission.[410] In addition, adopted Rule 304(a)(1)(iv)(A) provides that an initial Form ATS–N filed by a Legacy NMS Stock ATS, as amended, will become effective, unless declared ineffective, upon the earlier of: (1) The completion of review by the Commission and publication pursuant to Rule 304(b)(2) or (2) the expiration of the review period, or, if applicable, the end of the extended review period, pursuant to Rule 304(a)(1)(iv)(B).

Adopted Rule 304(a)(1)(iv) modifies proposed Rule 304(a)(1)(i) to address certain commenter concerns, as described below. Under the proposed rule, an NMS Stock ATS operating as of the effective date of the final rule would continue to operate pursuant to its previously filed initial operation report on Form ATS, pending the Commission's review of the filed Form ATS. We modified this proposed process in response to comments. In the Proposal, we asked whether the Commission should allow a Legacy NMS Stock ATS to continue operations pursuant to Form ATS pending the Commission's review of Form ATS–N.[411] Two commenters express support for certain aspects of the proposed transition process for Legacy NMS Stock ATSs (including that the Commission allow Legacy NMS Stock ATSs to operate during the Commission review period).[412] One commenter states that it supports requiring Legacy NMS Stock ATSs to file an initial Form ATS–N.[413]

A Legacy NMS Stock ATS will be required to file an initial Form ATS–N to continue to operate pursuant to the Rule 3a1–1(a)(2) exemption with respect to its Rule 3b–16 activity in NMS stocks beyond January 7, 2019. This provision will allow a Legacy NMS Stock ATS to continue its current operations without disruptions to the ATS or its current subscribers and provide the Legacy NMS Stock ATS with sufficient time to make an orderly transition from compliance under the current Regulation ATS requirements to compliance with Rule 304.

Under the adopted rule, both Legacy NMS Stock ATSs and non-Legacy NMS Stock ATSs will be required to file an initial Form ATS–N. We believe that market participants should have access to the same level of information disclosed by both Legacy NMS Stock ATSs and non-Legacy NMS Stock ATSs as market participants will consider routing orders to both types of NMS Stock ATS. Allowing Legacy NMS Stock ATSs to file Form ATS instead of Form ATS–N would limit the amount of information available to market participants about these ATSs' operations and the ATS-related activities of their broker-dealer operators, and would thereby make it difficult for market participants to assess Legacy NMS Stock ATSs as potential routing destinations for their orders.

We believe that a Legacy NMS Stock ATS should be permitted to continue to operate during the Commission review period for initial Form ATS–N.[414] Therefore, we are adopting Rule 304(a)(1)(iv)(A) to transition Legacy NMS Stock ATSs from operating pursuant to Form ATS to operating pursuant to Form ATS–N without interruption. As noted above, the transition for Legacy NMS Stock ATSs will benefit Legacy NMS Stock ATSs and their subscribers, as subscribers will be able to continue to send their orders to Legacy NMS Stock ATSs without disruption.

Two commenters request clarification about the process for a Legacy NMS Stock ATS to file an initial Form ATS–N and its obligations to update its Form ATS on file with the Commission while the Commission reviews its initial Form ATS–N.[415] One commenter expresses concerns about the regulatory and legal uncertainties that could result from a Legacy NMS Stock ATS operating while having filed with the Commission both a Form ATS and a Form ATS–N.[416] Similarly, another commenter requests clarification about how a Legacy NMS Stock ATS should handle material changes to the NMS Stock ATS's Form ATS.[417] This commenter also asks the Commission to clarify whether a Legacy NMS Stock ATS should amend its Form ATS to avoid potential liability caused by the NMS Stock ATS submitting the additional information required in Form ATS–N.[418]

These commenters suggest processes that they believe will address these concerns.[419] One commenter suggests that the Commission deem effective a Legacy NMS Stock ATS's Form ATS–N upon filing but nevertheless subject it to a review and comment period by the Commission.[420] We are not adopting this suggestion because labeling an initial Form ATS–N ''effective'' before the Commission has completed the review could mislead market participants. Another commenter suggests that a Legacy NMS Stock ATS that makes changes to its operations during the 120-calendar day review period or extended review period should only be required to amend its Form ATS, and that the Legacy NMS Stock ATS should not be required to

[408] We are adopting Rule 304(a)(1)(iv) to delineate the initial filing process applicable to Legacy NMS Stock ATSs from the initial filing process applicable to non-Legacy NMS Stock ATSs. This differs from the proposed rule text, which integrated the requirements applicable to Legacy NMS Stock ATSs within the requirements applicable to all NMS Stock ATSs set forth in proposed Rule 304(a)(1)(i) through (iii). Providing these requirements in a separate section of the rule better organizes the rule text so filers can more easily understand the initial Form ATS–N filing process that is applicable to Legacy NMS Stock ATSs and is responsive to comments, which are discussed below.

[409] Although the Form ATS for a Legacy NMS Stock ATS will no longer have any legal effect for purposes of the exemption after the ATS files a Form ATS–N, a Form ATS will nevertheless continue to be subject to the federal securities laws and the regulations thereunder, including Regulation ATS, as a Form ATS previously filed with the Commission will constitute a ''report'' within the meaning of sections 11A, 17(a), 18(a), and 32(a), and any other applicable provisions of the Exchange Act. *See* 17 CFR 242.301(b)(2)(vi).

[410] *See* Rule 304(a)(1)(iv)(A).

[411] *See* Proposal, *supra* note 2, at 81026.

[412] *See* CFA Institute Letter at 5; BIDS Letter at 3.

[413] *See* CFA Institute Letter at 4.

[414] *See also supra* note 412 and accompanying text.

[415] *See* BIDS Letter at 2–3; SIFMA Letter at 29.

[416] *See* BIDS Letter at 2.

[417] *See* SIFMA Letter at 29.

[418] *See id.*

[419] *See* BIDS Letter at 2–3; SIFMA Letter at 29.

[420] *See* BIDS Letter at 2.

also amend its initial Form ATS–N until the Commission declares it effective, and that the NMS Stock ATS could then file a ''clean-up'' amendment to its initial Form ATS–N.[421] We are not adopting this approach because, as discussed below, our adopted approach to require a Legacy NMS Stock ATS to amend Form ATS–N would be less burdensome for the ATS than requiring the Legacy NMS Stock ATS to amend its Form ATS during the Commission review period and Form ATS–N after the Form ATS–N becomes effective.

In response to these commenters, and after considering their alternative suggestions, we are adopting Rule 304(a)(1)(iv)(A), which is modified from proposed Rule 304(a)(1)(i), to provide that a filed Form ATS–N shall supersede and replace for purposes of the exemption a Legacy NMS Stock ATS's previously-filed Form ATS. After considering the comments, we acknowledge that if the Commission were to require a Legacy NMS Stock ATS to file and amend both Form ATS and Form ATS–N during the Commission review period for an initial Form ATS–N, the Legacy NMS Stock ATS could incur additional legal and regulatory risks, as it would be required to make changes to two forms and ensure that the information on the two forms is consistent. The disclosures on an initial Form ATS–N would include the vast majority of information provided to the Commission on Form ATS that pertains to the ATS's NMS stock operations. Therefore, we believe that the modifications to the proposed rule would alleviate the burden on Legacy NMS Stock ATSs of filing two separate documents with the Commission that would likely contain significantly overlapping information. In addition, to address the commenters' concerns, and facilitate the ability of a Legacy NMS Stock ATS to maintain only one filing for a limited time during the transition, we are also modifying proposed Rule 304(a)(1)(i), and adopting as Rule 304(a)(1)(iv)(A), to provide that the Legacy NMS Stock ATS may operate, on a provisional basis, pursuant to the filed Form ATS–N, and any amendments thereto,[422] during the Commission review period of the filed initial Form ATS–N. This provision is designed to facilitate an orderly transition for Legacy NMS Stock ATSs from the Form ATS regime to the Form ATS–N regime while at the same time requiring an appropriate level of disclosure by NMS Stock ATSs.

In addition, we are adopting a provision in Rule 304(a)(1)(iv)(A) that provides that an initial Form ATS–N filed by a Legacy NMS Stock ATS, as amended, will become effective, unless declared ineffective, upon the earlier of: (1) The completion of review by the Commission and publication pursuant to Rule 304(b)(2) or (2) the expiration of the review period, or, if applicable, the end of the extended review period, pursuant to Rule 304(a)(1)(iv)(B). We are adding this provision to reflect changes to the effectiveness process; this provision is designed to replace parts of proposed Rule 304(a)(1)(iii). In addition, because we are adopting a process that allows a Legacy NMS Stock ATS to amend its initial Form ATS–N during the Commission review period, we are adding to Rule 304(a)(1)(iv)(A) that a Legacy NMS Stock ATS's Form ATS–N ''as amended'' will become effective, which will include any amendments made to an initial Form ATS–N during the Commission review period.

Finally, proposed Rule 304(a)(1) would have required Legacy NMS Stock ATSs to submit their initial Form ATS–N filings within 120 days of the effective date of this rulemaking. We received one comment supporting the requirement that Legacy NMS Stock ATSs file Form ATS–N within 120 calendar days of the effective date of the final rule, ''given the reasonable assumption that the operators of the ATS should be very familiar with the operational structure of said ATS.'' [423] We are modifying proposed Rule 304(a)(1)(i) (as part of adopted Rule 304(a)(1)(iv)(A)) to require Legacy NMS Stock ATSs to file an initial Form ATS–N no earlier than January 7, 2019, and no later than February 8, 2019 and making additional technical modifications.[424] We believe that this will provide adequate time following the date that the enhanced disclosure requirements under Rule 304 become effective and for NMS Legacy NMS Stock ATSs to prepare and file an initial Form ATS–N with the Commission. NMS Stock ATSs will file Form ATS–N via EDGAR, which will be ready to accept Form ATS–N filings on January 7, 2019. We agree with the commenter that a Legacy NMS Stock ATSs should be knowledgeable of the operations of its system and the ATS-related activities of the broker-dealer operator and its affiliates and believes that requiring Legacy NMS Stock ATSs to file their initial Form ATS–N between January 7, 2019 and February 8, 2019 provides these with reasonable time to prepare and file their disclosures on Form ATS–N.[425] We note that, until a Legacy NMS Stock ATS files its initial Form ATS–N with the Commission, the Legacy NMS Stock ATS must provide notice of changes to its operations by amending its Form ATS on file with the Commission pursuant to Rule 301(b)(2) of Regulation ATS.[426]

b. Rule 304(a)(1)(iv)(B): Commission Review Period; Ineffectiveness Determination

Rule 304(a)(1)(iv)(B) provides the process and timing for the Commission to review a Legacy NMS Stock ATS's initial Form ATS–N, and, if applicable, declare such initial Form ATS–N effective. We are adopting Rule 304(a)(1)(iv)(B) (''Commission review period; Ineffectiveness determination''), which provides that the Commission may, by order, as provided in Rule 304(a)(1)(iii), declare an initial Form ATS–N filed by a Legacy NMS Stock ATS ineffective no later than 120 calendar days from the date of filing with the Commission, or, if applicable, the end of the extended review period. The Commission may extend the initial Form ATS–N review period for a Legacy NMS Stock ATS for: (1) An additional 120 calendar days if the initial Form ATS–N is unusually lengthy or raises novel or complex issues that require additional time for review, in which case the Commission will notify the

[421] *See* SIFMA Letter at 29.

[422] A Legacy NMS Stock ATS may file amendments pursuant to Rule 304(a)(1)(iv)(C) during the Commission review period. A change subject to a material amendment filed by a Legacy NMS Stock ATS within 30 calendar days of the end of the 240-calendar day extended review period, as provided by Rule 304(a)(1)(iv)(B)(*1*), or other period to which the Legacy NMS Stock ATS agrees in writing described in Rule 304(a)(1)(iv)(B)(*2*), may only be implemented by the Legacy NMS Stock ATS after the expiration of the 30-calendar day period provided by Rule 304(a)(2)(i)(A), and the Commission may declare such an amendment ineffective, as appropriate, until the 30-calendar day review period expires.

[423] *See* CFA Institute Letter at 5.

[424] This provision, which was proposed as the second sentence of proposed Rule 304(a)(1)(i) is now the first sentence of adopted Rule 304(a)(1)(iv)(A). In the adopted rule, we are making technical, non-substantive modifications to the proposed rule text, including: (1) Referring to ''an'' NMS Stock ATS rather than ''the'' NMS Stock ATS; (2) defining an NMS Stock ATS operating pursuant to an initial operation report on Form ATS as of the effective date as a ''Legacy NMS Stock ATS;'' (3) revising the definition of Legacy NMS Stock ATS to state that it operates pursuant to ''an initial operation report'' rather than a ''previously filed'' initial operation report; and (4) adding to Rule 304(a)(1)(i) the term ''initial'' before Form ATS–N. We are also changing the term ''in accordance with the instructions therein'' to ''in accordance with the conditions of this section'' because we intended for NMS Stock ATSs to comply with all of the applicable provisions of Rule 304, including any procedural provisions, in addition to the Instructions on Form ATS–N.

[425] *See* Proposal, *supra* note 2, at 81023.

[426] *See* 17 CFR 242.301(b)(2). *See supra* notes 57–63 and accompanying text.

Legacy NMS Stock ATS in writing within the initial 120-calendar day review period and will briefly describe the reason for the determination for which additional time for review is required; or (2) any extended review period to which a duly-authorized representative of the Legacy NMS Stock ATS agrees in writing.

As discussed above, we received comments on the 120-calendar day review period and extended review periods that either support or do not object to the time frames proposed for both non-Legacy NMS Stock ATSs and Legacy NMS Stock ATSs.[427] We continue to believe that 120 calendar days typically would provide the Commission adequate time to carry out its oversight functions with respect to the review of Forms ATS–N filed by Legacy NMS Stock ATSs, including its responsibilities to protect investors and maintain fair, orderly, and efficient markets, and that the extended review period for filings that are unusually lengthy or raise novel or complex issues will allow the Commission and its staff to conduct a thorough review and provide sufficient opportunity to discuss the filing with the NMS Stock ATS if necessary.[428] We are adopting Rule 304(a)(1)(iv)(B), which was proposed as part of Rule 304(a)(1)(ii)(A), with modifications, consistent with and for the reasons discussed above with respect to the Commission review period for Form ATS–N filings by non-Legacy NMS Stock ATSs.[429]

One commenter suggests that if the Commission declares a Legacy NMS Stock ATS's initial Form ATS–N ineffective, the NMS Stock ATS should have the opportunity to amend its Form ATS–N so that the form would be effective before the NMS Stock ATS is required to cease operating.[430] During the review process, we expect to engage in dialogue with the Legacy NMS Stock ATSs about their Form ATS–N disclosures. To the extent any deficiencies exist with the Form ATS–N disclosures, we expect that the Legacy NMS Stock ATSs typically will have an opportunity to understand and cure deficiencies in the filing before the Commission declares the Form ATS–N ineffective. If, after discussion with Commission staff, a Legacy NMS Stock ATS determines that it needs more time to address deficiencies in its initial Form ATS–N to avoid a Commission declaration of ineffectiveness, a Legacy NMS Stock ATS could consent to an extended Commission review period under Rule 304(a)(1)(iv)(B)(*2*). Prior to declaring a Legacy NMS Stock ATS's Form ATS–N ineffective, the Commission will provide the ATS with notice and opportunity for hearing about the Commission's intention to declare the form ineffective. After the Commission declares a Form ATS–N ineffective, however, the Legacy NMS Stock ATS will not have an opportunity to amend its Form ATS–N.[431] Upon its Form ATS–N being declared ineffective, a Legacy NMS Stock ATS must cease operating pursuant to the Rule 3a1–1(a) exemption,[432] and to the extent that the ATS does continue to operate, the Commission could find it to be an unregistered national securities exchange, and thus operating in violation of Section 5 of the Exchange Act.

This commenter also states that a declaration of ineffectiveness should remain confidential until the Legacy NMS Stock ATS has amended the Form ATS–N and the amended form is ''approved.'' [433] We do not agree with the commenter's suggestion. As discussed immediately above, there will be an opportunity during the review process for the ATS to supplement its filing. Once its initial Form ATS–N is declared ineffective, a Legacy NMS Stock ATS would not be able to operate pursuant to the Rule 3a1–1(a)(2) exemption and would not be able to amend its Form ATS–N after it is declared ineffective. It could file a new Form ATS–N, which the Commission will review without prejudice. We believe that it is in the public interest for the Commission to make an order of ineffectiveness for a Legacy NMS Stock ATS publicly available so that market participants have notice of the operating status of the NMS Stock ATS and can make appropriate adjustments to their routing strategies.[434]

Two commenters request clarification about whether amending an initial Form ATS–N as a result of a material change during the Commission review period would toll the review period, and suggest that the review period should not restart with every amendment.[435] The filing of a Form ATS–N material amendment by a Legacy NMS Stock ATS, even if filed within 30 days of the expiration of the Commission's extended review period, would not toll the review period for the Form ATS–N; initial Form ATS–N will become effective in accordance with the timeframes set forth in Rule 304(a)(1)(iv)(A). However, a change reflected in a material amendment that is filed within 30 days of the expiration of the Commission review period could not be implemented until the end of the Commission's 30-calendar day review period pursuant to Rule 304(a)(2)(i)(A).

c. Rule 304(a)(1)(iv)(C): Amendments to Initial Form ATS–N

Rule 304(a)(1)(iv)(C) describes the process through which Legacy NMS Stock ATSs would amend their initial Form ATS–N during the Commission review period. We are adopting Rule 304(a)(1)(iv)(C) (''Amendments to initial Form ATS–N''), which requires that during the review period of the initial Form ATS–N filed by a Legacy NMS Stock ATS, the Legacy NMS Stock ATS shall amend its initial Form ATS–N pursuant to the requirements of Rule 304(a)(2)(i)(A) through (D). The adopted rule differs from the Proposal. As proposed, during the Commission review period for an initial Form ATS–N filed by a Legacy NMS Stock ATS, the Legacy NMS Stock ATS would have been required to continue operating pursuant to its existing Form ATS initial operation report and file amendments on Form ATS to provide notice of changes to the operations of its

[427] *See supra* notes 294–295 and accompanying text.

[428] *See* Proposal, *supra* note 2, at 81023–24. *See also supra* notes 296–297 and accompanying text.

[429] *See supra* Section IV.A.3. We added language to the proposed rule text, and created a separate paragraph (B) of Rule 304(a)(1)(iv) to address the Commission review period for Legacy NMS Stock ATS amendments including: (1) Specifying, consistent with the proposed rule text, that the Commission will declare ''by order'' an initial Form ATS–N ineffective and referencing the paragraphs under the rule that delineate the process pursuant to which the Commission will do so; (2) specifying that the Commission will declare an initial Form ATS–N ineffective no later than 120 calendar days from ''the date of'' filing with the Commission; (3) adding to the first sentence that the Commission may declare an initial Form ATS–N ineffective no later than 120 calendar days from the date of filing with the Commission, ''or, if applicable, the end of the extended review period'' to reduce ambiguity regarding the length of the Commission review period; (4) specifying that the Commission will notify the Legacy NMS Stock ATS of any extension of the review period within the 120 ''calendar day'' review period; (5) specifying that the Commission review period described in this section applies to ''initial'' Form ATS–N; and (6) using the defined term ''Legacy NMS Stock ATS'' throughout the paragraph.

[430] *See* SIFMA Letter at 29.

[431] Because its initial Form ATS–N supersedes and replaces a Legacy NMS Stock ATS's Form ATS for purposes of the exemption and the initial Form ATS–N can be amended, a Legacy NMS Stock ATS may not withdraw its initial Form ATS–N. *See infra* Section V.B.1.

[432] *See infra* note 434.

[433] *See* SIFMA Letter at 29.

[434] The Commission could also, in the case of a Legacy NMS Stock ATS, provide in its order of ineffectiveness a period of time for the NMS Stock ATS to wind down its operations. Because Commission orders of ineffectiveness would be made public, market participants would also have notice of any wind down period.

[435] *See* BIDS Letter at 3; SIFMA Letter at 29.

system.[436] Because adopted Rule 304(a)(1)(iv)(A) states that a filed Form ATS–N will supersede and replace for purposes of the exemption a Legacy NMS Stock ATS's previously-filed Form ATS, a Legacy NMS Stock ATS will no longer file Form ATS amendments once it files an initial Form ATS–N. Instead, a Legacy NMS Stock ATS will be required to update Form ATS–N during the Commission review period.[437] If the ATS trades both NMS stocks and non-NMS stocks, such ATS would update its Form ATS with respect to its non-NMS stock operations.

As discussed above, two commenters request that the Commission clarify the process for filing amendments during the Commission review period for Legacy NMS Stock ATSs [438] and suggest alternative approaches.[439] The modifications in adopted Rule 304(a)(1)(iv)(C) are designed to address the comments requesting clarification about the process for reporting material changes during the time the Commission reviews the initial Form ATS–N of a Legacy NMS Stock ATS.[440] Adopted Rule 304(a)(1)(iv)(C) also addresses the alternative approaches that the commenters suggest by requiring a Legacy NMS Stock ATS to update its Form ATS–N (rather than Form ATS), and operate pursuant to its Form ATS–N (rather than Form ATS).[441] We believe that Rule 304(a)(1)(iv)(C) will relieve any unnecessary burden from maintaining two forms and ease the transition to the Form ATS–N regime.

In addition, one commenter asked the Commission to adopt a process that would allow Legacy NMS Stock ATSs to introduce a new functionality or make changes during the 120-calendar day review period for the initial Form ATS–N.[442] We agree with the commenter that Legacy NMS Stock ATSs should have a method to make changes to their operations and introduce new functionalities during the Commission review period. In accordance with Rule 304(a)(1)(iv)(C), during the Commission review period, the Legacy NMS Stock ATSs may make changes to the operations of the ATS and shall file amendments to reflect those changes pursuant to the requirements of Rule 304(a)(2)(i)(A) through (D). For example, during the period of Commission review of its initial Form ATS–N, a Legacy NMS Stock ATS may make a material change to its operations, provided that it files with the Commission an amendment to its Form ATS–N describing such change at least 30 calendar days prior to the date of implementation of such change, pursuant to Rule 304(a)(2)(i)(A). A change subject to a material amendment filed by a Legacy NMS Stock ATS may be implemented by the Legacy NMS Stock ATS after the expiration of the 30-calendar day period provided by Rule 304(a)(2)(i)(A).

Rule 304(a)(1)(iv)(C) provides that a Legacy NMS Stock ATS shall amend its initial Form ATS–N pursuant to the requirements of Rule 304(a)(2)(i)(A) through (D), which govern the process for filing amendments to Form ATS–N. Amendments will be subject to Commission review and could be declared ineffective under Rule 304(a)(2)(ii). Filed Form ATS–N amendments will not be made public until the Legacy NMS Stock ATS's initial Form ATS–N becomes effective and publicly available. Once a Legacy NMS Stock ATS's initial Form ATS–N becomes effective, the Commission will make public the Form ATS–N, as amended, which will incorporate any amendments that the Legacy NMS Stock ATS filed to the initial Form ATS–N during the Commission review period, except for any material amendments still subject to the 30-calendar day Commission review period.[443] In connection with the changes described above, we are adopting Rule 304(a)(1)(iv)(C), which provides that a Legacy NMS Stock ATS shall amend its filed Form ATS–N during the Commission review pursuant to the requirements of Rule 304(a)(2)(i)(A) through (D).

B. Rule 304(a)(2): Form ATS–N Amendments

1. Rule 304(a)(2)(i): Filing Requirements

Rule 304(a)(2)(i) describes the types of amendments that NMS Stock ATSs would be required to file to their Form ATS–N. We proposed Rule 304(a)(2)(i) (''Form ATS–N amendment filing requirements'') to require an NMS Stock ATS to update information disclosed on Form ATS–N concerning its manner of operations and the ATS-related activities of its broker-dealer operator and its affiliates. Proposed Rule 304(a)(2)(i) would have required an NMS Stock ATS to amend an effective Form ATS–N in accordance with the Instructions therein: (A) at least 30 calendar days prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS–N; (B) within 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate for any reason and has not been previously reported to the Commission as a Form ATS–N amendment; or (C) promptly, to correct information in any previous disclosure on Form ATS–N, after discovery that any information filed under proposed Rule 304(a)(1)(i) or (a)(2)(i)(A) or (B) was inaccurate or incomplete when filed.

We are adopting Rule 304(a)(2)(i) with modifications. As adopted, Rule 304(a)(2)(i) requires an NMS Stock ATS to amend a Form ATS–N in accordance with the conditions of Rule 304: [444] (1) At least 30 calendar days, except as provided by Rule 304(a)(2)(i)(D), prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS–N; (2) no later than 30 calendar days after the end of each calendar quarter to correct information that has become inaccurate or incomplete for any reason and was not required to be reported to the Commission as a Form ATS–N amendment pursuant to Rules 304(a)(2)(i)(A), (C), or (D); (3) promptly, to correct information in any previous disclosure on Form ATS–N, after

[436] *See* Proposal, *supra* note 2, at 81023; *see also* 17 CFR 242.301(b)(2)(ii) through (iv). The Commission is modifying the proposed rule by creating a new paragraph (C) of Rule 304(a)(1)(iv), which provides a process for reporting changes during the Commission review period for Legacy NMS Stock ATSs.

[437] *See supra* note 409.

[438] *See supra* note 415 and accompanying text.

[439] *See supra* notes 420 and 421 and accompanying text.

[440] *See supra* note 415 and accompanying text.

[441] *See id.*

[442] *See* Liquidnet Letter at 4.

[443] *See infra* note 587 and accompanying text.

[444] The proposed rule text required that an NMS Stock ATS amend ''an effective'' Form ATS–N in accordance with the ''instructions therein.'' We have modified this requirement in the Rule 304(a)(2)(i) as adopted by deleting the word ''effective'' because, as discussed in Section IV.A.4.c, we are adopting Rule 304(a)(1)(ii) and Rule 304(a)(1)(iv)(C), which allow an NMS Stock ATS to amend a Form ATS–N that has not yet become effective.

In addition, we are replacing the rule text that stated that an NMS Stock ATS shall amend Form ATS–N in accordance with ''the instructions therein'' with text requiring an NMS Stock ATS to amend Form ATS–N in accordance with ''the conditions of this section'' because we intended for NMS Stock ATSs to comply with all of the applicable provisions of Rule 304, including any procedural provisions, in addition to the Instructions on Form ATS–N.

We are also adding a separate amendment filing process for changes to information disclosed in Part III, Item 24 and 25 of Form ATS–N. *See infra* Sections IV.B.1.a.iii. Because in Rule 304(a)(2)(i)(D) we are specifying treatment for order display and fair access amendments, which generally would be material changes, we are also adding that Rule 304(a)(2)(i)(A) applies ''except as provided by'' Rule 304(a)(2)(i)(D). *See infra* Sections IV.B.1.a.iii.

discovery that any material information previously filed on Form ATS–N was inaccurate or incomplete when filed; and (4) no later than seven calendar days after information required to be disclosed in Part III, Items 24 and 25 on Form ATS–N has become inaccurate or incomplete. Form ATS–N requires an NMS Stock ATS filing an amendment to ''select one'' of the four types of amendments; each amendment type is mutually exclusive.[445]

a. Material Changes

(i) Comments on Advance Notice

We proposed that an NMS Stock ATS would be required to amend an effective Form ATS–N at least 30 calendar days prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS–N.[446] In the Proposal, we stated that a 30-calendar day advance notice period would give the Commission the opportunity to clarify any questions that might arise or to take action, if appropriate, regarding problems that may impact market participants, before the NMS Stock ATS implemented the change.[447] We also stated that such advance notice would allow market participants to evaluate the changes before implementation and assess the NMS Stock ATS as a continued, or potential, trading venue.[448]

We received several comments relating to the proposed 30-calendar day advance notice requirement for material changes in proposed Rule 304(a)(2)(i)(A). One commenter states that it supports the requirement that an NMS Stock ATS file a material amendment to Form ATS–N 30 days in advance of implementing a material change to the operations of the NMS Stock ATS, or the activities of the broker-dealer operator or its affiliates.[449] Another commenter states that although advance notice of 20 calendar days before implementing a material change may be adequate, it believes that the 30-calendar day advance notice requirement strikes an appropriate balance between an NMS Stock ATS's ability to innovate, while also providing market participants and regulators adequate time to evaluate and respond to the intended change.[450]

Two commenters suggest that instead of requiring 30 calendar days of advance notice, the Commission should require NMS Stock ATSs to file an amendment on Form ATS–N at least 20 calendar days in advance of implementing a material change, which is the same as the current requirement for filing amendments to Form ATS.[451] One commenter believes the 30-calendar day advance notice period would provide minimal benefit for the Commission because the Commission may at any time object to an NMS Stock ATS's functionality or require clarification.[452] This commenter also states that lengthening the advance notice period would create an unnecessary delay for NMS Stock ATSs in introducing new functionality and improving existing functionality and processes.[453] The other commenter supports retaining the 20-calendar day advance notice period, stating that due to the breadth of disclosures on Form ATS–N and the fact that Form ATS–N disclosures will be made public, market participants will have access to a much greater level of information about ATS operations and changes than in the past.[454] Another commenter states that a process for reviewing Form ATS–N amendments that extends beyond 30 days could have a significant impact on NMS Stock ATS operations, particularly with regard to the launch of new technologies.[455]

We are adopting Rule 304(a)(2)(i)(A) with modifications. We do not agree with commenters who believe that the current 20-calendar day advance notice period for material amendments to be filed on Form ATS would be more appropriate for NMS Stock ATSs than a 30-calendar day period. We believe that a 30 calendar day advance notice period for a material change would allow the Commission sufficient time to review the amendment and determine, if necessary, whether the filing should be declared ineffective. Although we agree with the commenter that states that market participants will have access to more information regarding NMS Stock ATS operations than in the past,[456] given the complexity of NMS Stock ATSs today and the breadth of disclosures required on Form ATS–N, the 10 additional calendar days provides the Commission with the necessary time to review, and communicate with the NMS Stock ATS about, the Form ATS–N disclosures. We believe that the benefits of a longer advance notice period justify any potential burden on an NMS Stock ATS and any potential delay to the introduction of a new technology. We believe that a 30-calendar day review period will benefit subscribers and market participants as the time will allow the Commission to help ensure that disclosures made available to the public are complete and comprehensible.

One commenter states that the advance notice requirement for material changes would be close to an ''advance notice and approval'' approach that may effectively result in a merit review process of NMS Stock ATS operations.[457] As discussed above with respect to the Commission's review of an initial Form ATS–N pursuant to Rule 304(a)(1)(iii),[458] the Commission's review of a Form ATS–N amendment does not weigh the merits of a change that is the subject of a Form ATS–N amendment. Rather, the Commission's review is focused on the completeness and comprehensibility of the disclosures themselves.

Another commenter expresses concern regarding situations in which it files a material amendment to Form ATS–N but needs to modify a functionality based on customer feedback or unanticipated workflows or scenarios.[459] The commenter states that it would be beneficial for an NMS Stock ATS to have the flexibility to make modifications without delay, as long as any modifications were disclosed in advance to customers, would not adversely impact customers, and do not change the key elements of the new functionality that had been previously described in a Form ATS–N amendment.[460] In addition to providing advance notice to the public about a potential material change to the NMS Stock ATS, the advance notice period allows the Commission to review the disclosures on Form ATS–N, and we believe that the review will help ensure that market participants receive complete and comprehensible disclosures. We are providing guidance for determining whether a change is material.[461] In deciding whether to implement a modification to a functionality without delay in response to customer feedback or unanticipated workflows or scenarios, an NMS Stock ATS is required to determine if, in light of all relevant facts and circumstances,

[445] *See* cover page to Form ATS–N.

[446] *See* proposed Rule 304(a)(2)(i)(A).

[447] *See* Proposal, *supra* note 2, at 81027–28.

[448] *See id.* at 81028.

[449] *See* MFA/AIMA Letter at 4.

[450] *See* HMA Letter at 9.

[451] *See* Liquidnet Letter at 4; KCG Letter at 5.

[452] *See* Liquidnet Letter at 4.

[453] *See id.*

[454] *See* KCG Letter at 5.

[455] *See* Fidelity Letter at 10.

[456] *See* KCG Letter at 5.

[457] *See* KCG Letter at 4.

[458] *See supra* Section IV.A.3.

[459] *See* Liquidnet Letter at 5.

[460] *See id.*

[461] *See infra* Section IV.B.1.a.ii.

the modification constitutes a material change. If the modification does not constitute a material change, the NMS Stock ATS could implement the change and file an updating amendment. However, if the modification is material, the NMS Stock ATS must file a material amendment and wait 30 calendar days before implementing the change.[462]

(ii) Comments on Materiality

In the Proposal, we stated our belief that a change to the operations of an NMS Stock ATS, or the disclosures regarding the activities of the broker-dealer operator and its affiliates, would be material if there is a substantial likelihood that a reasonable market participant would consider the change important when evaluating the NMS Stock ATS as a potential trading venue.[463] We continue to believe that this standard of materiality is appropriate. This standard of materiality is similar to materiality standards applied in the context of securities disclosures made pursuant to other rules.[464]

Some commenters agree that materiality is an appropriate standard for requiring advance notice.[465] One commenter states that it agrees with the guidance regarding materiality set forth in the Proposal [466] but notes that facts and circumstances could determine whether the scenarios the Commission provided in the Proposal would likely constitute material changes, and states that although the scenarios set forth in the Proposal are helpful examples, they are broadly written.[467] We continue to believe that scenarios that are particularly likely to implicate a material change would include: (1) A broker-dealer operator or its affiliates beginning to trade on the NMS Stock ATS; (2) a change to the broker-dealer operator's policies and procedures governing the written safeguards and written procedures to protect the confidential trading information of subscribers pursuant to Rule 301(b)(10)(i) of Regulation ATS; (3) a change to the types of participants on the NMS Stock ATS; (4) the introduction or removal of a new order type on the NMS Stock ATS; (5) a change to the order interaction and priority procedures; (6) a change to the segmentation of orders and participants; (7) a change to the manner in which the NMS Stock ATS displays orders or quotes; and (8) a change of a service provider to the operations of the NMS Stock ATS that has access to subscribers' confidential trading information.[468] This list is not intended to be exhaustive, and we do not mean to imply that other changes to the operations of an NMS Stock ATS or the activities of the broker-dealer operator or its affiliates could not constitute material changes. Further, the NMS Stock ATS should generally consider whether the cumulative effect of a series of changes to the operations of the NMS Stock ATS or the activities of the broker-dealer operator or its affiliates with regard to the NMS Stock ATS is material. In addition, in determining whether a change is material, an ATS generally should consider whether such change would affect: (1) The competitive dynamics among ATS subscribers; (2) the execution quality or performance of the orders of any subscriber or category of subscribers; (3) the fees that any subscriber or category of subscribers would pay to access and/or use the ATS; (4) the nature or composition of counter-parties with which any subscriber or category of subscribers interact; and (5) the relative speed of access or execution of any subscriber or group of subscribers.

Some commenters ask that we provide greater clarity with respect to the types of changes that would be material changes.[469] One commenter states that we should provide examples of types of changes that would not be considered material or would be excluded from being considered ''material'' given the impracticality of the 30-calendar day amendment period, and states that changes that are not subscriber-facing (*e.g.,* changes to software, hardware, or other trading infrastructure) should not be deemed to be material changes.[470] This commenter also states that NMS Stock ATSs should not be required to make a good-faith decision that a change is not material ''only to be informed that the Commission has decided the change is material based on an unpublished standard.'' [471] Another commenter states that the ''standard'' for determining material changes is one of the most difficult and potentially unworkable obligations under the Proposal.[472] Another commenter states that the Commission should provide ''clear and objective standards'' on what triggers the requirement for an NMS Stock ATS to file a Form ATS–N amendment; this commenter states that if the Commission staff regards every change as material, then it means nothing to provide that amendments are required only for material changes.[473] In addition, one commenter states that a clearer ''definition'' of what is considered a ''material amendment'' is critical to NMS Stock ATS broker-dealer operators due to the fact that NMS Stock ATSs must provide advance notice before implementing a material change.[474] Another commenter observes that NMS Stock ATSs have operations, offerings, and interactions that regularly evolve and states that it is ''essential'' for NMS Stock ATSs to have ''clear and specific expectations'' on what types of changes would be deemed material and what level of detail should be included in the disclosures.[475] Another commenter states that without descriptive and informative commentary from the Commission, there will be uncertainty and disparity as to which changes are actually filed by NMS Stock ATS operators as material changes, and suggests that the Commission provide a clear set of standards that would trigger a Form ATS–N amendment.[476]

We continue to believe that the Proposal's guidance regarding whether a change is material is appropriate. In addition, we agree with the comment that a change that falls in one of the categories set forth in the Proposal, including a change to the manner in which the NMS Stock ATS displays orders or trading interest, such as the font size in which orders are displayed,[477] would not be a material change if there would not be a substantial likelihood that a reasonable market participant would consider the change important when evaluating the NMS Stock ATS as a potential trading venue. We also do not believe that market participants should be concerned, as suggested by one commenter,[478] that the Commission staff may regard ''every change'' as material and thereby render

[462] In the event that it is appropriate for the Commission to exempt an NMS Stock ATS, conditionally or unconditionally, by Commission order, after application by the ATS, from the advance filing requirement, the Commission will be able to issue exemptions. *See supra* note 226 and accompanying text.

[463] *See* Proposal, *supra* note 2, at 81028.

[464] *See id.* at 81028 n.309.

[465] *See* BIDS Letter at 3; SIFMA Letter at 30–31.

[466] *See infra* note 468 and accompanying text.

[467] *See* Liquidnet Letter at 4.

[468] *See* Proposal, *supra* note 2, at 81028.

[469] *See* BIDS Letter at 3–4; Fidelity Letter at 10; UBS Letter at 3; SIFMA Letter at 31.

[470] *See* SIFMA Letter at 31.

[471] *See id.*

[472] *See* KCG Letter at 5.

[473] *See* SIFMA Letter at 30–31.

[474] *See* Fidelity Letter at 10.

[475] *See* SIFMA Letter at 5.

[476] *See* UBS Letter at 3.

[477] *See* Liquidnet Letter at 4.

[478] *See* SIFMA Letter at 30–31.

meaningless the Commission's materiality guidance.

One commenter notes that NMS Stock ATSs may over-file material amendments to avoid risk, and that over-filing would cost substantial time and resources for NMS Stock ATSs, as well as burden the Commission staff that will be processing and reviewing the submissions.[479] Another commenter expresses concern that the requirements for amending Form ATS–N would create a reporting regime that is ''overly voluminous'' and may be less effective for market participants seeking transparency.[480]

The Commission does not believe that its materiality standard will result in overreporting or underreporting of information by an NMS Stock ATS or create an overly time-consuming and voluminous Form ATS–N amendment filing process for NMS Stock ATSs or the Commission. The Commission recognizes that Form ATS–N will require an NMS Stock ATS to provide more information about its operations and ATS-related activities of the broker-dealer operator and its affiliates than Form ATS. The Commission also recognizes that the structure and complexities of NMS Stock ATS operations have significantly changed since Regulation ATS was adopted, and believes that these changes require enhanced disclosures for subscribers to better understand how NMS Stock ATSs operate. Given the technology advancements and the proclivity for NMS Stock ATSs to enhance the operations of their ATSs, and the fact that market participants search for the best trading venue for their orders, we believe that it is important for an NMS Stock ATS to amend its Form ATS–N as required to ensure disclosures on Form ATS–N are complete and comprehensible. Based on the Commission experience with Form ATS filings, we believe that we have provided reasonable estimates of the time and resources that NMS Stock ATSs will need to expend to ensure that disclosures on amended Form ATS–N are accurate, current, and complete.

With regard to the commenter that asks for more specificity about the level of detail that amendments to Form ATS–N require,[481] we have revised Parts II and III of adopted Form ATS–N to make requests more explicit and clear about information that would be responsive to form requirements, and in some questions, we are requiring NMS Stock ATSs to provide a ''summary'' or a ''list'' of information.[482] These changes are designed to provide an NMS Stock ATS with more specificity about the level of detail that is required by the form and to alleviate the burden on NMS Stock ATSs. Further, we revised Form ATS–N to remove certain terms that commenters believe are vague and, in some cases, reduced the scope of information requested, and revised requests in adopted Form ATS–N to make more explicit what we meant by these terms. We believe that the requests in adopted Form ATS–N, as revised from the Proposal, provide NMS Stock ATSs the appropriate level of specificity for them to understand the information that is required by the form. In addition, the Commission will apply the same standard of review for declaring ineffective a Form ATS–N amendment as it will apply for declaring ineffective an initial Form ATS–N.

One commenter states that it may be worth considering an approach that leverages the Regulation SCI framework of major changes determined to be material because such an approach would help ensure consistency between different Commission regulations that impact and govern ATSs.[483] We are declining to adopt the commenter's suggestion to apply the Regulation SCI framework for materiality. Regulation SCI does not define material systems changes but requires an SCI entity to establish written criteria for identifying a change to its SCI systems and the security of indirect SCI systems as material and to report to the Commission those changes the SCI entity identified as material in accordance with such criteria.[484] Additionally, Form ATS–N is a public reporting form, and we believe the materiality guidance for material amendments to Form ATS–N is more appropriate than the Regulation SCI framework because it provides NMS Stock ATSs, market participants, and the Commission a clearer standard for determining whether a change would be material in the context of public reporting.

In addition, one commenter states that because consumers of ATS disclosures vary widely in business models and sophistication, the Commission should not create ''tiers'' of materiality, and states that although the Commission has always understood that some ''material'' factors may be more or less important to different market participants, it should not substitute its priorities and relative rankings of importance for those of diverse market participants.[485] We are not adopting ''tiers'' of materiality or using our own priorities or other relative ''rankings'' to determine whether a change to an NMS Stock ATS's operations is material. The materiality of any change is dependent on the specific facts and circumstances, and we believe that creating tiers of materiality would add unnecessary complexity and would be inconsistent with the Commission's approach to materiality in other contexts.

(iii) Order Display and Fair Access Amendments

In the Proposal, we stated that if an NMS Stock ATS triggers the Rule 301(b)(3)(i) order display and execution access volume thresholds after commencing operations pursuant to an effective Form ATS–N, the Commission generally would consider this to be a material change to the operations of the NMS Stock ATS.[486] We also stated in the Proposal that if an NMS Stock ATS triggers the Rule 301(b)(5)(i) fair access volume thresholds after commencing operations pursuant to an effective Form ATS–N, the Commission would generally consider this to be a material change to the operations of the NMS Stock ATS.[487]

Under Rule 304(a)(i)(2)(A), an NMS Stock ATS is required to file a material amendment at least 30 calendar days prior to the date of implementation of a material change. We continue to believe that it generally would be a material change to the operations of an NMS Stock ATS if the ATS were to exceed the order display and execution access threshold or become subject to the order display and execution access requirements under Rule 301(b)(3). Likewise, we continue to believe that it generally would be a material change to the operations of an NMS Stock ATS if the ATS were to exceed the fair access threshold or become subject to the order display and execution access requirements under Rule 301(b)(5). We recognize, however, that an NMS Stock ATS may not be able to comply with the 30-calendar day advance notice period for material amendments because the ATS may not be able to foresee when it will exceed the order display and execution access or fair access volume thresholds. To provide market participants with information about when an NMS Stock ATS becomes subject to, or no longer is subject to, the

[479] *See* BIDS Letter at 3–4.

[480] *See* STA Letter at 5.

[481] *See supra* note 475 and accompanying text.

[482] *See* Part II, Items 4, 5, 6, and 7 of adopted Form ATS–N; Part III, Items 2, 3, 5, 6, 11, 13, and 19 of adopted Form ATS–N.

[483] *See* UBS Letter at 3.

[484] *See* Regulation SCI Adopting Release, *supra* note 76, 79 FR at 72341–42.

[485] *See* HMA Letter at 9–10.

[486] See Proposal, *supra* note 2, at n.500.

[487] See *id.* at n.506.

order display and execution access and fair access requirements, while not placing an undue burden on the NMS Stock ATS, we are adding to Rule 304(a)(2)(i) new subparagraph (D) to require an NMS Stock ATS to amend its Form ATS–N no later than seven calendar days after a change to the information required to be disclosed in Part III, Items 24 and 25 on Form ATS–N by an NMS Stock ATS (''order display and fair access amendments'').[488] We believe that requiring NMS Stock ATSs to disclose changes to the information required to be disclosed in Part III, Items 24 and 25 of adopted Form ATS–N no later than seven calendar days from such changes will provide sufficient time for NMS Stock ATSs to comply with the requirement, while providing market participants with timely notice.

b. Updating Amendments

We proposed in Rule 304(a)(2)(i)(B) that an NMS Stock ATS is required to update its Form ATS–N within 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate for any reason and has not been previously reported to the Commission as a Form ATS–N amendment.

We are amending Rule 304(a)(2)(i)(B) to expand the circumstances under which ''updating amendments'' [489] would be filed. As proposed, NMS Stock ATSs would have been required to file updating amendments to correct information that has become ''inaccurate.'' [490] We are amending Rule 304(a)(2)(i)(B) also to require that NMS Stock ATSs file updating amendments to correct information that has become ''incomplete.'' Although we received no comments directly on proposed Rule 304(a)(2)(i)(B), one comment on the amendment process in general expresses the view that an ATS must have the ability to update its filing to address ambiguities in how its rules would apply to different scenarios or uses.[491] The commenter also states that if an ATS determines that it can ''make its disclosure clearer, add detail, or improve the organization of the disclosure, the ATS should be encouraged to do so.'' [492] We are modifying proposed Rule 304(a)(2)(i)(B) to specify that an NMS Stock ATS will be required to file an updating amendment to revise disclosures that become ''inaccurate or incomplete.'' Although, as proposed, Rule 304(a)(2)(i) did not explicitly require an NMS Stock ATS to disclose changes (other than material changes under Rule 304(a)(2)(i)(A)) that would render its Form ATS–N incomplete, the Commission stated its intent for Rule 304(a)(2)(i)(B) to provide a ''a mechanism for NMS Stock ATSs to disclose changes to their operations or to update information that does not constitute a material change.'' [493] We continue to believe that it is important that market participants have access to accurate, current, and complete disclosures on Form ATS–N. Accordingly, the Commission is requiring that an NMS Stock ATS disclose, no later than 30 calendar days after the end of the calendar quarter, changes that would render its Form ATS–N inaccurate or incomplete, but would not be required to be filed as correcting, material, or order display and fair access amendments.

We also are revising Rule 304(a)(2)(i)(B) to provide that an updating amendment shall be filed ''no later than'' 30 calendar days after the end of the calendar quarter. This change allows, but does not require, an NMS Stock ATS to file amendments required by Rule 304(a)(2)(i)(B) earlier than the 30 calendar day window at the end of each calendar quarter.

In addition, proposed Rule 304(a)(2)(i)(B) would have required an NMS Stock ATS to file an amendment to correct ''any other'' information that has not been previously reported as a Form ATS–N amendment. We believe that, as proposed, the phrase ''any other'' information could be vague and therefore, it could have been unclear when it would be permitted for an NMS Stock ATS to file an updating amendment, as opposed to a material or correcting amendment. To distinguish between what information may be filed pursuant to Rule 304(a)(2)(i)(B), rather than as a material amendment under Rule 304(a)(2)(i)(A), correcting amendment under Rule 304(a)(2)(i)(C), or order display and fair access amendment under Rule 304(a)(2)(i)(D), we are making a change to provide that updating amendments shall be filed to correct information that ''was not required to be reported to the Commission as a Form ATS–N amendment pursuant to paragraphs 304(a)(2)(i)(A), (C), or (D) of this section.''

We believe that requiring NMS Stock ATSs to correct information that has become inaccurate or incomplete for any reason (and was not required to be reported to the Commission as a material amendment, correcting, or order display and fair access amendment) no later than 30 calendar days after the end of each calendar quarter would tailor the reporting burden for filing amendments on NMS Stock ATSs to the degree of significance of the change in a manner that does not compromise the Commission's oversight of NMS Stock ATSs or its ability to protect investors and the public interest. For example, if an NMS Stock ATS that publishes or otherwise provides to one or more subscribers or persons aggregate platform-wide order flow and execution statistics of the NMS Stock ATS that are not otherwise required disclosures under Rule 605 of Regulation NMS, the NMS Stock ATS could, depending on the facts and circumstances, disclose changes to such statistics in a updating amendment no later than 30 calendar days after the end of the calendar quarter in which the changes occurred.[494]

We continue to believe that allowing NMS Stock ATSs to implement non-material changes immediately would allow NMS Stock ATSs to make updating changes to their operations and disclosures without delay, while at the same time provide disclosure about those changes to market participants and the Commission within an appropriate time frame. Updating amendments, like all amendments to Form ATS–N, will be subject to Commission review pursuant to Rule 304(a)(2)(ii) and could be declared ineffective if the Commission makes the required findings.

c. Correcting Amendments

We proposed in Rule 304(a)(2)(i)(C) to require an NMS Stock ATS to amend its Form ATS–N promptly to correct information in any previous disclosure on Form ATS–N after discovery that any information previously filed on Form ATS–N was inaccurate or incomplete when filed. We proposed that such amendments will be subject to

[488] Because order display and fair access amendments generally would be material changes, we are also adding to Rule 304(a)(2)(i)(A) that such amendments must be filed under Rule 304(a)(2)(i)(A) ''except as provided by'' Rule 304(a)(2)(i)(D).

[489] In the Proposal, we referred to these amendments as ''periodic amendments.'' *See* Proposal, *supra* note 2, at 81029. We believe that calling these amendments ''updating amendments'' reduces any potential ambiguity regarding the timing and purpose of these amendments, which is discussed below.

[490] Proposed Rule 304(a)(2)(i)(B).

[491] *See* Liquidnet Letter at 7.

[492] *See id.*

[493] *See* Proposal, *supra* note 2, at 81029.

[494] *See* Proposal, *supra* note 2 at 81084 (stating that to comply with the requirements of Part IV, Item 16 (adopted Part III, Item 26), an NMS Stock ATS would file a Form ATS–N amendment within 30 calendar days after the end of each calendar quarter). *See also infra* Section V.D.26.a.

Commission review pursuant to Rule 304(a)(2)(ii).[495]

We received one comment regarding proposed Rule 304(a)(2)(i)(C) that supports allowing an NMS Stock ATS to file a Form ATS–N amendment to correct information in a previous Form ATS–N disclosure that was inaccurate or incomplete when filed.[496]

Another commenter is generally concerned about the amount and types of amendment filings required under the Proposal, and the burden that filing such amendments could impose on NMS Stock ATSs.[497] To address this concern, we are modifying proposed Rule 304(a)(2)(i)(C) to require that NMS Stock ATSs file correcting amendments after discovery that any information previously filed on Form ATS–N was materially inaccurate or incomplete when filed.[498] We believe that it is appropriate to require NMS Stock ATSs to promptly file an amendment only when the information previously filed was materially inaccurate or incomplete because such information is likely to be important to current subscribers and market participants and could impact their decision to use the NMS Stock ATS's services. Corrections of immaterial inaccuracies and completeness can be made by updating amendments. In determining whether previously filed information is materially inaccurate or incomplete, an NMS Stock ATS should consider the factors it would consider in determining whether a change would require a material amendment.[499]

2. Rule 304(a)(2)(ii): Commission Review Period; Ineffectiveness Determination

Rule 304(a)(2)(ii) provides the process through which the Commission would review and declare Form ATS–N amendments to Form ATS–N. Proposed Rule 304(a)(2)(ii) (''Commission review period; Ineffectiveness determination'') provided that the Commission will, by order, if it finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, declare ineffective any Form ATS–N amendment filed pursuant to Rule 304(a)(2)(i)(A) through (C) no later than 30 calendar days from filing with the Commission. The proposed rule also provided that if the Commission declares a Form ATS–N amendment ineffective, the NMS Stock ATS shall be prohibited from operating pursuant to the ineffective Form ATS–N amendment. Under proposed Rule 304(a)(2)(ii), the NMS Stock ATS could have, however, continued to operate pursuant to a Form ATS–N that was previously declared effective. In addition, the proposed rule provided that a Form ATS–N amendment declared ineffective would not prevent the NMS Stock ATS from subsequently filing a new Form ATS–N amendment that resolves the disclosure deficiency that resulted in the declaration of ineffectiveness. We are adopting Rule 304(a)(2)(ii) with modifications to provide that the Commission will, by order, declare ineffective any Form ATS–N amendment filed pursuant to Rule 304(a)(2)(i)(A) through (D), no later than 30 calendar days from filing with the Commission, if the Commission finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors.[500]

We stated in the Proposal that the Commission could declare ineffective a Form ATS–N amendment if one or more disclosures on an amended Form ATS–N are materially deficient with respect to its accuracy, currency, completeness, or fair presentation.[501] We also stated that it could declare ineffective a Form ATS–N amendment if it finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, because the amendment disclosures reveal that, under a ''red flag'' review, the activity described would not comply with the federal securities laws or the rules or regulations thereunder, including Regulation ATS.[502] We further stated that like the review of an initial Form ATS–N, the Commission's review of a Form ATS–N amendment would focus on the disclosures made on Form ATS–N, and that the Commission would not be precluded from later determining that an NMS Stock ATS had violated the federal securities laws or the rules and regulations thereunder.[503] As discussed above in the context of initial Form ATS–N filings, we are not performing a review of the merits of the disclosures on Form ATS–N amendments, such as determining the strengths and weaknesses of the trading platform or a protocol offered by the NMS Stock ATS. The Commission also is not making findings regarding whether the means by which orders will interact on the trading platform are, or are not, consistent with the Exchange Act, as is the case with respect to certain SRO rule filings.[504] As with respect to initial filings of Form ATS–N, the Commission could declare a Form ATS–N amendment ineffective if the Commission finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors. The Commission notes that this process will be similar to the review process for initial Form ATS–N. Accordingly, the examples provided above to illustrate scenarios that would cause the Commission to declare an initial Form ATS–N ineffective (*e.g.,* materially deficient disclosures with respect to completeness or comprehensibility) would equally apply in the context of a Form ATS–N amendment filed with the Commission.[505]

[495] *See* Proposed Rule 304(a)(2)(ii).

[496] *See* Liquidnet Letter at 7.

[497] *See* Fidelity Letter at 10.

[498] In addition, we are adopting Rule 304(a)(2)(i)(C) with technical modifications. The rule text of proposed Rule 304(a)(2)(i)(C) stated that an NMS Stock ATS must amend Form ATS–N upon discovery that any information ''filed under paragraphs (a)(1)(i) or (a)(2)(i)(A) or (B)'' was inaccurate or incomplete when filed. This inadvertently excluded applying the requirement to inaccurate or incomplete information filed under paragraph (a)(2)(i)(C). We believe that deleting the cross-references and simply stating that an NMS Stock ATS must file an amendment when ''any previous disclosure on Form ATS–N'' was materially inaccurate or incomplete when filed would require that an NMS Stock ATS correct materially incomplete or inaccurate information on initial Form ATS–N and any amendment thereto (including any amendment previously required by Rule 304(a)(2)(C)). We are making this change to correct this error, and to specify that an NMS Stock ATS would have an obligation to promptly correct a materially inaccurate or incomplete disclosure on any initial Form ATS–N or amendment thereto.

Generally, we will consider a correcting amendment to be filed ''promptly,'' if it is filed within five business days after discovery that any material information previously filed on Form ATS–N was materially inaccurate or incomplete when filed.

In addition, we are making a technical change by defining the type of amendment described in Rule 304(a)(2)(i)(C) as a ''correcting amendment.''

[499] *See supra* Section IV.B.1.a.

[500] We are also making several other changes to Rule 304(a)(2)(ii): (1) Reordering some of the language of Rule 304(a)(2)(ii) from the proposed rule text; (2) changing the heading of the paragraph from ''Commission review period'' to ''Commission review period; Ineffectiveness determination''; (3) revising the proposed rule text that stated ''If the Commission declares a Form ATS–N Amendment ineffective, the NMS Stock ATS shall be prohibited from operating pursuant to the ineffective Form ATS–N'' to simply state ''A Form ATS–N amendment declared ineffective shall prohibit the NMS Stock ATS from operating pursuant to the ineffective Form ATS–N amendment''; (4) deleting references to the defined term ''Form ATS–N Amendment''; (5) stating that a Form ATS–N amendment declared ineffective ''does'' not (rather than ''would'' not) prevent the NMS Stock ATS from subsequently filing a new Form ATS–N amendment; and (6) referring to amendments filed pursuant to Rule 304(a)(2)(i)(A) ''through (D)''.

[501] *See* Proposal, *supra* note 2, at 81029.

[502] *See id.* at 81030.

[503] *See id.*

[504] *See supra* note 359 and accompanying text.

[505] *See supra* Section IV.A.3.

We received comments regarding the proposed process for reviewing Form ATS–N amendments. One commenter expresses support for the proposal not to require the Commission to affirmatively declare material amendments effective, and states that such a requirement might serve as an impediment to NMS Stock ATSs seeking to introduce a new functionality, would unnecessarily burden Commission staff, and would discourage NMS Stock ATSs from filing changes more than 30 days in advance of implementation.[506] This commenter expresses concern that requiring pre-approval of changes to Form ATS–N would inhibit informal communication between an NMS Stock ATS and the Commission staff in cases where an ATS may otherwise be willing to share information with the Commission staff in advance of filing.[507] We are not adopting a rule to declare a Form ATS–N amendment effective. The Commission's oversight function of NMS Stock ATSs will be preserved because the Commission will be able to declare ineffective a Form ATS–N if it finds that such action is necessary or appropriate in the public interest and consistent with the protection of investors. This process will be similar to the review process for initial Form ATS–N.[508] Accordingly, the examples provided above to illustrate scenarios that would cause the Commission to declare an initial Form ATS–N ineffective (*e.g.,* materially deficient disclosures with respect to completeness or comprehensibility) would equally apply in the context of a Form ATS–N amendment filed with the Commission.

One commenter does not object to the Commission having the ability to declare a material amendment ineffective, but hopes the Commission would identify concerns as soon as practical during the review period so an NMS Stock ATS could address any issues.[509] The Commission intends to engage in dialogue with an NMS Stock ATS regarding its Form ATS–N amendment disclosures and communicate to the NMS Stock ATS any concerns so the ATS may amend its disclosures, as appropriate or necessary to avoid an ineffective declaration. Such dialogue will benefit market participants by creating more effective disclosures in Form ATS–N amendments that will help enable them to make more informed routing decisions. To facilitate this, we are adopting a process for an NMS Stock ATS to file, during the Commission's review of a material amendment, a correcting or updating amendment pursuant to Rule 304(a)(2)(i)(B) through (C) to the material amendment.[510] This process is designed to promote transparency and facilitate complete and comprehensible disclosure. Any updating or correcting amendments to a material amendment filed during the Commission review period will be subject to Commission review under Rule 304(a)(2)(ii).[511] Although a correcting or updating amendment is not subject to an implementation delay, Rule 304(a)(2)(i)(A) requires that the NMS Stock ATS delay the implementation of the change subject to the material amendment until 30 calendar days following filing of the material amendment; therefore, any correcting or updating amendment that amends a material amendment during the Commission review could not be implemented before the material amendment that it is amending is effective.

In contrast, we believe a material change to a Form ATS–N material amendment could reflect a significant change to the intended operations of the ATS or the ATS-related activities of its broker-dealer operator, which would necessitate a full review period. Therefore, we are modifying Rule 304(a)(a)(2)(ii) to specify that an NMS Stock ATS making material changes to a filed material amendment during the Commission review period shall withdraw its filed material amendment and, if the NMS Stock ATS chooses to pursue the change, must file a new material amendment pursuant to Rule 304(a)(2)(i)(A).

Another commenter suggests that similar to the current process for reviewing Form ATS amendments, the Commission should require advanced notice of material changes, but not impose a review process for ineffectiveness.[512] The commenter states that requiring NMS Stock ATSs to provide advance notice and receive Commission ''approval'' before an NMS Stock ATS can implement a material change could incent an NMS Stock ATS to err on the side of submitting ''vague'' disclosures, which are less helpful to market participants, so that it has ''sufficient operational flexibility'' to make future changes, or could stifle ATS innovation as NMS Stock ATSs may be reluctant to make changes that would be subject to the ''approval/disapproval'' review process.[513] The commenter further states that NMS Stock ATS operators should be allowed to furnish universal operations and systems material via a web link, and updates to such materials should not be subject to advance notice and Commission review because requiring an NMS Stock ATS to provide advance notice of changes to operations and systems ''would cause lengthy delays and stifle NMS Stock ATS technical innovation.'' [514] Another commenter observes that ''approval'' of Form ATS–N amendments ''would require positive response from the Commission instead of the current passive approval after a certain period of time.'' [515]

We are declining to adopt the commenter's suggestion to not review Form ATS–N amendments for ineffectiveness because the review process allows the Commission to better fulfill its oversight responsibilities of NMS Stock ATSs and to help ensure that Form ATS–N amendments contain disclosures that are complete and comprehensible. We also disagree with the commenter's view that the Commission review process will incentivize NMS Stock ATSs to make vague disclosures to allow for operational flexibility. Rather, we believe that without a process to declare ineffective a Form ATS–N amendment, an NMS Stock ATS may have less incentive to provide complete and comprehensible disclosures.

While the review process for Form ATS–N amendments may have some

[506] *See* Liquidnet Letter at 5–6.

[507] *See id.* at 6.

[508] *See supra* Section IV.A.3.

[509] *See* Liquidnet Letter at 5.

[510] Although we acknowledged in the Proposal that the Commission staff would likely engage in discussions with NMS Stock ATSs during the review period, we did not propose a process for NMS Stock ATSs to amend a material amendment during the Commission review period. *See* Proposal, *supra* note 2, at 81035. The adopted process is similar to the process we are adopting to allow non-Legacy NMS Stock ATSs to amend initial Form ATS–N during the Commission review period. *See supra* Section IV.A.2.

[511] Rule 304(a)(2)(ii) states that the Commission will, by order, declare ineffective any Form ATS–N amendment no later than 30 calendar days from filing of such amendment with the Commission. We will have 30 calendar days to declare any amendment ineffective, including updating or correcting amendments to material amendments that are filed during the Commission review period. For example, if an NMS Stock ATS files an updating or correcting amendment to a material amendment on calendar day 25 of the Commission review period of the material amendment, the updating or correcting amendment could be declared ineffective by the Commission up to 25 calendar days after the Commission review period for the material amendment expires—until the Commission's 30-calendar day review period for the updating or correcting amendment has expired.

[512] *See* KCG Letter at 5.

[513] *See id.*

[514] *See id.* at 7–8.

[515] *See* PDQ Letter at 1.

impact on innovation by ATSs,[516] under the rules adopted today and consistent with proposed Rule 304(a)(2)(ii), the Commission will not be declaring Form ATS–N amendments ''effective;'' if the 30-calendar day review period elapses and the Commission has not declared an amendment ineffective, the NMS Stock ATS may commence operating pursuant to the Form ATS–N amendment. Further, Form ATS–N amendments will not be approved by the Commission and the amendment review process, like the review process for initial Form ATS–N, will not be a merit-based review, but rather will focus on the completeness and comprehensibility of the disclosures. We are declining to adopt the commenter's suggestion to allow an NMS Stock ATS to change its operations and systems without a review process and by furnishing a web link.[517] We believe that it is important that subscribers have advance notice of material changes and that the Commission has the opportunity to review material amendments to the Form ATS–N disclosures. If the NMS Stock ATS makes changes that are not material, the NMS Stock ATS can implement such changes and report them by way of an updating amendment.[518]

Other commenters express the same concerns with regard to the review process for Form ATS–N amendments as they did for the review process for initial Form ATS–N. These comments are addressed above.[519] With respect to determining whether to declare an amendment to Form ATS–N ineffective, the Commission will apply the same standard of review that will be applied to initial filings.

C. Rule 304(a)(3): Notice of Cessation

Rule 304(a)(3) provides the requirement for NMS Stock ATSs to provide notice if they plan to cease to operate. Proposed Rule 304(a)(3) (''Notice of cessation'') provided that an NMS Stock ATS shall notice its cessation of operations on Form ATS–N at least 10 business days before the date the NMS Stock ATS ceases to operate as an NMS Stock ATS. Proposed Rule 304(a)(3) also provided that a notice of cessation shall cause the Form ATS–N to become ineffective on the date designated by the NMS Stock ATS.

We received no comments regarding proposed Rule 304(a)(3). We believe that 10 business days is a reasonable period within which an NMS Stock ATS will provide notice that it intends to cease operations and will give market participants sufficient time to seek alternative routing destinations for their orders.[520] We are adopting Rule 304(a)(3) with non-substantive modifications.[521]

D. Rule 304(a)(4): Suspension, Limitation, or Revocation of the Exemption From the Definition of Exchange

Paragraph (i) of proposed Rule 304(a)(4) (''Suspension, limitation, and revocation of the exemption from the definition of exchange'') provided that the Commission will, by order, if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, suspend for a period not exceeding twelve months, limit, or revoke an NMS Stock ATS's exemption from the definition of ''exchange'' pursuant to Rule 3a1–1(a)(2). Further, proposed Rule 304(a)(4)(ii) provided that if an NMS Stock ATS's exemption is suspended or revoked pursuant to proposed Rule 304(a)(4)(i), the NMS Stock ATS would be prohibited from operating pursuant to the exemption from the definition of an ''exchange'' pursuant to Rule 3a1–1(a)(2). In addition, proposed Rule 304(a)(4)(i) provided that if an NMS Stock ATS's exemption is limited pursuant to proposed Rule 304(a)(4)(i), the NMS Stock ATS shall be prohibited from operating in a manner otherwise inconsistent with the terms and conditions of the Commission order. We are adopting Rule 304(a)(4) with minor modifications.[522]

We received four comments regarding proposed Rule 304(a)(4).[523] One commenter supports the Commission's proposal to introduce a mechanism for the suspension for a period not exceeding 12 months, limitation, or revocation of the exemption provided under Rule 3a1–1(a)(2) because it believes that there must be a clear mechanism for removing non-compliant trading venues from ''the exchange-waiver regime rather than relying on more general enforcement powers.'' [524] This commenter asserts that considering whether an NMS Stock ATS has accurately and timely filed Form ATS–N in determining whether the ATS qualifies for an exemption ''is necessary to ensure the credibility of these public disclosure documents and the accountability of the entities seeking the exemption.'' [525]

In addition, one commenter states that the Commission ''should be empowered to suspend, limit, or revoke an ATS's exemption from the definition of an 'exchange', irrespective of the assets traded on the ATS.'' [526] We have determined to apply the additional conditions to the Exchange Act Rule 3a1–1(a) exemption, including Rule 304(a)(4), only to NMS Stock ATSs [527] and are not adopting Rule 304(a)(4) to apply to non-NMS Stock ATSs at this time. We will consider the comment if we propose in the future to apply Rule 304, including Rule 304(a)(4), to non-NMS Stock ATSs. We intend to monitor the implementation of Rule 304 to NMS Stock ATSs, and should we decide to take further action with applying Rule 304, including Rule 304(a)(4), to non-NMS Stock ATSs, we would do so in a separate rulemaking and take into account our experience with Rule 304 and NMS Stock ATSs.

One commenter is concerned that the process to suspend, limit, or revoke an NMS Stock ATS's exemption provided under Rule 3a1–1(a)(2) could result in a sanction (such as suspension or revocation of its exemption) that is ''disproportionate to the alleged violation,'' and asks the Commission to reconsider such requirement.[528] The Rule 304(a)(4) process for the suspension, limitation, or revocation of the Rule 3a1–1(a)(2) exemption is designed in part to help prevent failure by an NMS Stock ATS to adhere to the conditions for the exemption. The conditions of the Rule 3a1–1(a) exemption are designed to, among other things, protect investors.[529] We believe

[516] *See infra* Section X.C.

[517] *See supra* note 514 and accompanying text.

[518] *See* Rule 304(a)(2)(i)(B).

[519] Several commenters address our proposed review process for all Form ATS–N filings, rather than specifically addressing the review of Form ATS–N amendments. *See supra* Section IV.A.3.

[520] After ceasing operations, the broker-dealer operator of an NMS Stock ATS will be required to file Form ATS–R within 10 calendar days as required by Rule 301(b)(9) of Regulation ATS.

[521] As proposed, Rule 304(a)(3) states that an NMS Stock ATS shall notice its cessation at least 10 business days ''before'' the date it ''ceases'' to operate. As adopted, Rule 304(a)(3) states that an NMS Stock ATS shall notice its cessation at least 10 business days ''prior to the date'' it ''will cease'' to operate. We believe these changes enhance the readability of the rule.

[522] We made technical, non-substantive changes from the proposed rule by: (1) Replacing references to an ''NMS Stock ATS's exemption'' to ''the exemption for an NMS Stock ATS'' throughout Rule 304(a)(4); and (2) deleting the reference to ''the definition of an 'exchange' '' in Rule 304(a)(4).

[523] *See* CFA Institute Letter at 4; Liquidnet Letter at 7–8; HMA Letter at 5–6; Better Markets Letter at 7.

[524] *See* CFA Institute Letter at 4.

[525] *See id.*

[526] *See* HMA Letter at 5.

[527] *See supra* Section III.A.2.

[528] *See* Liquidnet Letter at 7–8.

[529] In the Regulation ATS Adopting Release, we stated our belief that the enhanced regulation of alternative trading systems that choose to remain registered broker-dealers under Regulation ATS provides more protection for the investors who use

that it is important to provide a process tailored to the regulatory structure for NMS Stock ATSs for the Commission to use in the event an NMS Stock ATS does not meet the conditions of the exemption as investor protections may be at risk. As proposed, prior to issuing an order suspending, limiting, or revoking an NMS Stock ATS's exemption pursuant to Rule 304(a)(4)(i), the Commission would provide notice and opportunity for hearing to the NMS Stock ATS, and make the findings specified in Rule 304(a)(4)(i), that, in the Commission's opinion, the suspension, limitation, or revocation is necessary or appropriate in the public interest, and is consistent with the protection of investors. We believe that this process will provide an NMS Stock ATS with adequate opportunity to respond before Commission action, and will provide the Commission with an appropriate tool, subject to notice and hearing safeguards, to protect the public from an NMS Stock ATS that fails to comply with Regulation ATS or otherwise violates any provision of the federal securities laws.

The exemption from the definition of ''exchange'' provided under Rule 3a1–1(a)(2) is conditional upon initial and ongoing compliance with Regulation ATS. As a result of this rulemaking, the conditions of the Rule 3a1–1(a)(2) exemption are being expanded for NMS Stock ATSs. An ATS that fails to comply with those conditions would fall outside the scope of the exemption. We believe that it is appropriate to provide a process by which the Commission may, by order, suspend, limit, or revoke an NMS Stock ATS's exemption provided under Rule 3a1–1(a)(2) if the NMS Stock ATS is operating or has operated in a manner such that the exemption for the NMS Stock ATS is not necessary or appropriate in the public interest, or is inconsistent with the protection of investors,[530] and are adopting Rule 304(a)(4) substantially as proposed.[531] We believe that a determination as to whether to suspend, limit, or revoke an NMS Stock ATS's exemption would depend on the particular facts and circumstances; however, we believe that revocation of the exemption would be appropriate upon the existence of a problem involving the ATS that significantly impacts the public interest and the protection of investors.

Pursuant to Rule 304(a)(4)(ii), an NMS Stock ATS whose exemption has been suspended or revoked would be prohibited from operating pursuant to the Rule 3a1–1(a)(2) exemption; if an NMS Stock ATS were to continue to engage in Rule 3b–16 activity in NMS stocks without the exemption, it would be operating as an unregistered national securities exchange because it would no longer qualify for the exemption.[532] If an NMS Stock ATS's exemption were limited pursuant to Rule 304(a)(4)(i), the NMS Stock ATS would be prohibited from operating in a manner otherwise inconsistent with the terms and conditions of the Commission order, and if it operated in a manner inconsistent with the terms and conditions of the order, it would risk operating as an unregistered national securities exchange. The exemption provided under Rule 3a1–1(a)(2) is conditional upon initial and ongoing compliance with Regulation ATS. We believe that the process for suspending, limiting, or revoking an NMS Stock ATS's exemption, if necessary or appropriate in the public interest, and consistent with the protection of investors, will protect investors in the event of non-compliance by an NMS Stock ATS with the conditions with which the NMS Stock ATS must adhere to continue to qualify for the exemption.

We also continue to believe that providing a process by which the Commission can determine to suspend, limit, or revoke an NMS Stock ATS's exemption will provide appropriate flexibility to address the specific facts and circumstances of an NMS Stock ATS's failure to comply with Regulation ATS.[533] This process will also allow the Commission to consider the nature of the violation of federal securities laws and the potential harm to investors as a result of the non-compliance or violation. The process for the Commission to limit the exemption in Rule 3a1–1(a)(2) will allow flexibility to address specific disclosures or activities that are the cause of the non-compliance with Regulation ATS or that violate federal securities laws.[534] We believe that, depending on the facts and circumstances, it may be more appropriate in the public interest, and consistent with the protection of investors, to limit the scope of an NMS Stock ATS's exemption, instead of revoking or suspending the exemption and causing the NMS Stock ATS to cease operating as an ATS.[535] By comparison, we believe it would be more appropriate to revoke the exemption of an NMS Stock ATS that no longer meets the definition of NMS Stock ATS or is no longer a registered broker-dealer, as these conditions are fundamental to the exemption.[536] Additionally, we believe that it could be necessary or appropriate in the public interest, and consistent with the protection of investors, to revoke the exemption of an NMS Stock ATS if, for example, the NMS Stock ATS appears to be violating, or to have violated, the antifraud provisions of the federal securities laws.[537] Nonetheless, the entry of an order revoking an NMS Stock ATS's exemption would not prohibit the broker-dealer operator of the NMS Stock ATS from continuing its other broker-dealer operations.[538]

Another commenter requests clarification regarding the process for revoking, suspending, or limiting an NMS Stock ATS's exemption. The commenter asks the Commission to clarify how an ATS could reestablish its exemption provided under Rule 3a1–1(a)(2) after it has been revoked. This commenter also questions whether there

these systems. *See* Regulation ATS Adopting Release, *supra* note 3, at 70857.

[530] *See* Proposal, *supra* note 2, at 81032.

[531] *See supra* note 522 and accompanying text. In the Proposal, we provided examples of when it would be appropriate to provide for the suspension, limitation, or revocation of an NMS Stock ATS's exemption pursuant to Rule 3a1–1(a)(2). *See* Proposal, *supra* note 2 at 81032.

[532] If the Commission revoked or suspended the exemption of an NMS Stock ATS, the Commission could provide in its order a period of time for the NMS Stock ATS to wind down its operations. Because Commission orders revoking or suspending the exemption would be made public, market participants would also have notice of any wind down period. Additionally, if the Commission revoked the exemption of an NMS Stock ATS and the entity wished to continue operations, the entity could do so only if it were registered as a national securities exchange pursuant to Section 6 of the Exchange Act or were exempted by the Commission from such registration based on the limited volume of transactions effected on such exchange, or seeks another exemption. *See* 17 CFR 242.301(a)(1)–(2). The entity would not be prohibited from filing a new Form ATS–N, pursuant to Rule 304(a)(1)(i). An NMS Stock ATS that has had its exemption suspended or limited may, depending on the facts and circumstances, be able to file a Form ATS–N amendment or revise its operations to come into compliance with the conditions of the exemption or the provision of any other federal securities law that may have been the basis of the Commission's findings.

[533] *See* Proposal, *supra* note 2, at 81033.

[534] *See id.* If the Commission finds that an NMS Stock ATS implemented a material change to its operations, but failed to disclose the material change on its Form ATS–N, the Commission could determine to allow the ATS to continue to operate as disclosed on its Form ATS–N, but prohibit the ATS from engaging in the undisclosed activity until the ATS properly amends its Form ATS–N in accordance with Rule 304(a)(2). Or, if the Commission finds that an NMS Stock ATS offers an order type that resulted in violations of the Commission's rules restricting the acceptance and ranking of orders in impermissible sub-penny increments, the Commission could allow the ATS to continue to operate but prohibit the ATS from offering the order type, if it finds that doing so is necessary or appropriate in the public interest, and consistent with the protection of investors.

[535] *See* Proposal, *supra* note 2, at 81033.

[536] *See id.*

[537] *See id.*

[538] *See id.*

will be penalties for non-compliance or whether the Commission's deliberations on the re-submitted Form ATS–N would in any way differ from those on initial Form ATS–N.[539] An NMS Stock ATS whose exemption has been revoked cannot operate pursuant to the Rule 3a1–1(a)(2) exemption, and if such entity were to continue to engage in Rule 3b–16 activity, it could be determined to be an unregistered national securities exchange in violation of Section 5 of the Exchange Act.[540] To operate as an NMS Stock ATS after revocation, the entity would need to file a new initial Form ATS–N with the Commission. The Commission would review the Form ATS–N without prejudice and would not apply a different standard than it would to any other entity filing Form ATS–N pursuant to Rule 304(a)(1).

One commenter also requests clarification regarding the procedure that the Commission will follow for an NMS Stock ATS that has had its exemption suspended for the maximum 12 months.[541] Upon the expiration of the suspension period, an NMS Stock ATS could operate pursuant to its initial Form ATS–N, as long as its exemption is not otherwise limited or revoked and the NMS Stock ATS is otherwise in compliance with Rule 304. The suspension period is not to exceed 12 months, and the Commission could order a suspension period of less than 12 months. During the suspension period, the Commission could reevaluate the status of the NMS Stock ATS's exemption and determine, pursuant to Rule 304(a)(4), to revoke or limit the Rule 3a1–1(a) exemption if the Commission finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors.

An additional commenter questions what action the Commission would take in the event that there are ''ambiguous, seemingly incomplete, or otherwise questionable disclosures that do not rise to the level of material deficiency,'' and suggests that the Commission apply ''intermediate'' sanctions, such as monetary fines and the temporary suspension of the right to operate as an NMS Stock ATS without notice or hearing.[542] The purpose of Rule 304(a)(4) is to prohibit the NMS Stock ATSs from operating in a manner inconsistent with the Rule 3a1–1(a)(2) exemption, which we believe is necessary or appropriate in the public interest and consistent with the protection of investors. We do not believe it is appropriate to impose monetary fines or temporarily suspend an NMS Stock ATS's exemption without such due process, as suggested by the commenter. Any suspension, limitation, or revocation of an NMS Stock ATS's exemption provided by Rule 3a1–1(a)(2) would not preclude the Commission from using its enforcement authority if the NMS Stock ATS fails to comply with the federal securities laws.[543]

E. Rule 304(b): Public Disclosure of Form ATS–N and Related Commission Orders

1. Rule 304(b)(1): Form ATS–N ''Report''

Rule 304(b)(1) provides that every Form ATS–N would constitute a report under the Exchange Act. Paragraph (1) of proposed Rule 304(b) (''Public disclosures'') provided that every Form ATS–N filed pursuant to Rule 304 shall constitute a ''report'' within the meaning of Sections 11A, 17(a), 18(a), and 32(a) and any other applicable provisions of the Exchange Act. Because proposed Form ATS–N is a report that is required to be filed under the Exchange Act, it would be unlawful for any person to willfully or knowingly make, or cause to be made, a false or misleading statement with respect to any material fact in Form ATS–N. Proposed Rule 304(b)(1) is nearly identical to current Rule 301(b)(2)(vi),[544] which provides that every notice or amendment filed pursuant to Rule 301(b)(2), including Form ATS, shall constitute a ''report'' within the meaning of Sections 11A, 17(a), 18(a), and 32(a), and any other applicable provisions of the Exchange Act.[545]

We received two comments on proposed Rule 304(b)(1).[546] One commenter supports that Form ATS–N shall constitute a ''report'' within the meaning of applicable provisions of the Exchange Act.[547] The other commenter expresses concern regarding the potential liability and consequences of the provision that Form ATS–N would constitute a ''report'' within the meaning of Sections 11A, 17(a), 18(a), and 32(a) of the Exchange Act in light of the increased disclosure requirements under Form ATS–N.[548] This commenter states that although this same standard applies to current Form ATS, the potential for an NMS Stock ATS to unknowingly but willfully file a statement that turns out to be false is heightened by the increased amount and scope of disclosure contemplated under Form ATS–N.[549]

We do not believe that the fact that Form ATS–N requires more detailed disclosures than Form ATS would justify reducing the potential liability for false or misleading statements made in Form ATS–N disclosures. The information required on Form ATS–N is designed to provide the public with transparency into an NMS Stock ATS's operations and the ATS-related activities of the broker-dealer operator and its affiliates. Although the commenter does not directly object to Rule 304(b)(1), the commenter argues that the Commission should narrow the scope of disclosures and standardize the Form ATS–N format in light of the potential liability this presents.[550] In response to the comments, we have modified certain requests on Form ATS–N to remove language that some commenters believe is vague, and in many cases, changed questions to solicit more general information.[551] Further, given that Form ATS–N will be made public, we expect that market participants will rely on these disclosures when making routing

[539] *See* CFA Institute Letter at 5.

[540] *See infra* note 532 and accompanying text.

[541] *See* CFA Institute Letter at 5.

[542] *See* Better Markets Letter at 7.

[543] *See generally* Exchange Act Section 21C. The use of the process whereby the Commission could suspend, limit, or revoke an NMS Stock ATS's Rule 3a1–1(a)(2) exemption would not preclude the Commission from using its enforcement authority, such as, for example, pursuant to Sections 10(b), 15(b)(4), and 15(c) (15 U.S.C. 78(j)(b), 15 U.S.C. 78o(b)(4); 15 U.S.C. 78o(c)). Rather, it would provide an additional means of helping to ensure that NMS Stock ATSs that no longer qualify for the Rule 3a1–1(a)(2) exemption are unable to take advantage of the exemption. For example, if an NMS Stock ATS failed to file a Form ATS–N amendment to disclose material changes to the operation of the ATS, the Commission could invoke the process to suspend, limit, or revoke the ATS's exemption, but would not be precluded from bringing an action against the broker-dealer operator of the ATS for failing to comply with Rule 304(a)(2), or violating the antifraud provisions of the federal securities laws.

[544] *See* 17 CFR 301(b)(2)(vi).

[545] 15 U.S.C. 78k–1, 78q(a), 78r(a), and 78ff(a). *See* 17 CFR 242.301(b)(2)(vi). Section 17(a) of the Exchange Act imposes recordkeeping requirements on national securities exchanges and registered securities associations; Section 18(a) of the Exchange Act imposes liability for false or misleading statements with respect to a material fact in applications, reports, or documents filed pursuant to the Exchange Act or any rule or regulation thereunder; and Section 32(a) of the Exchange Act provides for penalties against any person that willfully violates any provision of, or that willfully and knowingly makes, or causes to be made, any false or misleading statements with respect to a material fact in any application, report, or document required to be filed under the Exchange Act or any rule or regulation thereunder.

[546] *See* Better Markets Letter at 7; SIFMA Letter at 33.

[547] *See* Better Markets Letter at 7.

[548] *See* SIFMA Letter at 33.

[549] *See id.*

[550] *See id.*

[551] *See infra* Section V.

decisions or assessing their brokers' routing practices, so it is critical that the disclosures constitute a ''report'' and are subject to the applicable consequences. We also believe that making Form ATS–N disclosures subject to liability as a ''report'' under the Exchange Act further will incentivize NMS Stock ATS operators to make truthful statements on Form ATS–N. We are adopting Rule 304(b)(1) as proposed.

2. Rule 304(b)(2): Making Public Form ATS–N Filings and Commission Orders.

Rule 304(b)(2) provides which Form ATS–N filings and related orders the Commission would make public. Proposed Rule 304(b)(2) provided that we would make public, via posting on the Commission's website, each (1) order of effectiveness of a Form ATS–N; (2) order of ineffectiveness of a Form ATS–N; (3) effective Form ATS–N; (4) filed Form ATS–N amendment; (5) order of ineffectiveness of a Form ATS–N amendment; (6) notice of cessation; and (7) order suspending, limiting, or revoking the exemption from the definition of an ''exchange'' pursuant to Exchange Act Rule 3a1–1(a)(2). We are adopting Rule 304(b)(2) with modifications discussed below.[552] In addition, as proposed, we specify that we will make NMS Stock ATS filings public via posting on the Commission's website.

As discussed above, many commenters support making Form ATS–N public, observing that market participants do not currently have access to sufficient, standardized information about the operations and ownership of NMS Stock ATSs.[553] Nearly all commenters agree with the Commission's stated goal of enhancing transparency.[554] Although many commenters express general support for public disclosure of Form ATS–N, many commenters recommend certain modifications or clarifications.

We continue to believe that making Form ATS–N filings publicly available is important because most market participants have limited access to information that permits them to adequately compare and contrast how an NMS Stock ATS would handle its orders with how a national securities exchange or other NMS Stock ATS would handle its orders.[555] Currently, a Form ATS filed with the Commission by an ATS that trades NMS stocks is ''deemed confidential when filed'' under Rule 301(b)(2)(vii) of Regulation ATS,[556] whereas a national securities exchange is required to both (1) make available to the public its entire rulebook and (2) publicly file all proposed rule changes pursuant to Section 19(b) of the Exchange Act.[557] The only information the Commission currently makes publicly available regarding ATSs is a list of the names and locations of ATSs with a Form ATS on file with the Commission, which is updated monthly.[558] Unless an NMS Stock ATS voluntarily publicizes how its functionalities operate, market participants have limited information to adequately compare and contrast the operation of the ATS with that of a national securities exchange or another NMS Stock ATS. And when NMS Stock ATSs voluntarily make their Forms ATS–N public, the lack of uniformity or standardization makes it difficult to compare disclosures across ATSs. Currently, approximately 20 NMS Stock ATSs voluntarily post a Form ATS on their website. Some commenters, however, observe that in the absence of mandatory and uniform disclosure requirements, Forms ATS vary in content and the level of detail disclosed, and are therefore difficult to compare.[559] Accordingly, through Form ATS–N, we are adopting disclosures that will provide information that market participants can use to perform these comparisons as they evaluate the ATS as a potential destination for their orders.

We are adopting Rule 304(b)(2), with the modifications to address commenters' concerns, to mandate greater public disclosure of NMS Stock ATS operations through the publication of Form ATS–N. Adopted Rule 304(b)(2) provides that the Commission will make Form ATS–N and related filings available via posting on the Commission's website. NMS Stock ATS broker-dealer operators will submit Form ATS–N filings via EDGAR, and the Commission will make such filings available on its website.

a. Public Disclosure of Effective Initial Form ATS–N, As Amended

Several commenters express support for proposed Rule 304(b)(2)(iii), which would make public an effective Form ATS–N.[560] Four commenters agree with the Commission's approach of making initial Forms ATS–N publicly available once the Commission declared such forms effective.[561] One commenter asserts that publishing a filing that is not yet effective, and may ultimately not be ''approved,'' will cause confusion among market participants regarding the manner of operation of the NMS Stock ATS.[562] Another commenter states that requiring disclosure of Forms ATS–N that the Commission has declared ineffective ''may place undue suspicion from market participants on ATSs that fail to gain exemption status on the first

[552] To conform to changes that provide that we will not issue orders of effective initial Form ATS–N, we have eliminated proposed Rule 304(b)(2)(i) from adopted Rule 304(b)(2). *See supra* Section IV.A.1. In addition, the Commission made the following technical, non-substantive modifications to the proposed text of Rule 304(b)(2): (1) Renumbered proposed Rule 304(b)(2)(ii) through (vii); (2) reordered proposed Rule 304(b)(2)(iii) so that ''Effective Form ATS–N'' is adopted Rule 304(b)(2)(i); (3) changed the proposed language stating that the Commission ''would'' make public the documents specified in Rule 304(b)(2)(i)–(vii) to the Commission ''will'' make public the documents specified in Rule 304(b)(2)(i) through (vi); (4) specified that the Commission will publish ''initial'' Form ATS–N, as amended, under adopted Rule 304(b)(2)(i); (5) changed the proposed language that the Commission will make public each ''Order of ineffectiveness of a Form ATS–N'' to ''Order of ineffective initial Form ATS–N''; (6) changed references to uppercase ''Amendment'' in adopted Rule 304(b)(2)(iii) and (iv) to lowercase; (7) changed the language in adopted Rule 304(b)(2)(iv) from describing an ''Order of ineffectiveness of a'' Form ATS–N amendment to a ''Order of ineffective'' Form ATS–N amendment; and (8) modified language in the rule to state that the order suspending, limiting, or revoking the exemption in adopted Rule 304(b)(2)(vi) will apply to the exemption for an ''NMS Stock ATS.'' We are adopting these changes to simplify and improve the clarity of the rule text and we do not believe that these changes impact the operation of the proposed rules. Because we are providing a process for NMS Stock ATSs to amend their initial Forms ATS–N during the Commission review period, we are also revising proposed Rule 304(b)(2)(iii) (renumbered as Rule 304(b)(2)(i)) to state that the Commission will publish initial Form ATS–N, ''as amended,'' to specify that the initial Form ATS–N will reflect amendments made during the Commission review period. *See supra* Section IV.A.2 and Section IV.A.4.b. In addition, in response to comments, we are adopting a modified requirement that for material amendments, the cover page of the material amendment will be made public upon filing and the entirety of the material amendment, as amended, will be made public upon the expiration of the Commission review period. *See infra* Section IV.E.2.c. We are also adding to Rule 304(b)(2)(iii)(B) that the Commission will make public each updating or correcting amendment filed to a material amendment following the expiration of the review period for the material amendment pursuant to Rule 304(a)(2)(ii). *See id.* We are also adopting Rule 304(b)(2)(iii)(B) to provide that the Commission will make the entirety of order display and fair access amendments, as well as updating amendments and correcting amendments, public upon filing. *See id.* We are also adopting Rule 304(b)(2)(iii)(A) to specify that the Commission will not make public the entirety of a material amendment that it declares ineffective. *See id.*

[553] *See supra* note 93 and accompanying text.

[554] *See supra* note 108.

[555] *See* Proposal, *supra* note 2, at 81035.

[556] *See* 17 CFR 240.301(b)(2)(vii).

[557] *See* 15 U.S.C. 78s(b).

[558] *See* Alternative Trading System (''ATS'') List, *http://www.sec.gov/foia/docs/atslist.htm.*

[559] *See, e.g.,* Consumer Federation of America Letter at 3; HMA Letter at 2; Morgan Stanley Letter at 1.

[560] *See supra* notes 110–123 and accompanying text.

[561] *See* CFA Institute Letter at 6; BIDS Letter at 3; UBS Letter at 3; LeveL ATS Letter at 7.

[562] *See* LeveL ATS Letter at 7.

attempt.'' [563] The Commission will make only effective Forms ATS–N public because this would be less confusing for market participants. We expect that in the course of reviewing an initial Form ATS–N, Commission staff would likely engage in discussions with the entity regarding its disclosures and could request the entity to revise or augment its disclosures to cure deficiencies and provide market participants with greater clarity regarding the entity's operations. Accordingly, we continue to believe that it would be premature to make publicly available an initial Form ATS–N filing before it becomes effective because of the potential confusion that may result from making public disclosures on an initial Form ATS–N that is not effective. Therefore, under adopted Rule 304(b)(2)(i), the Commission will make public an effective initial Form ATS–N, as amended.

Adopted Rule 304(a)(1)(ii)(B) and Rule 304(a)(1)(iv)(C) provide processes for NMS Stock ATSs to amend their initial Forms ATS–N during the Commission review period. If, for example, the Commission staff provides comments to a broker-dealer operator suggesting modifications designed to enhance the completeness and comprehensibility of its initial Form ATS–N disclosures, the NMS Stock ATS would have the opportunity to file an amendment to respond to such comments during the Commission review period. We believe that it is appropriate to make public initial Form ATS–N, as revised by any such amendments (except for material amendments during the Commission review period),[564] when the initial Form ATS–N becomes effective. Accordingly, we are revising proposed Rule 304(b)(2)(iii) (renumbered as Rule 304(b)(2)(i)) to state that the Commission will publish initial Form ATS–N, ''as amended.''

Some commenters express concerns regarding the timing of publicly disclosing a filed Form ATS–N.[565] One commenter states its view that for Legacy NMS Stock ATSs that are filing Form ATS–N for the first time, the Commission should not make any Forms ATS–N public until the date on which the Commission has completed the review of the initial Form ATS–N filings for all Legacy NMS Stock ATSs, so that a Legacy NMS Stock ATS is not disadvantaged by making its Form ATS–N public prior to other Legacy NMS Stock ATSs.[566] As we stated in the Proposal, and as many commenters have agreed,[567] the public has a strong interest in public disclosure about the operations of NMS Stock ATSs. For some Legacy NMS Stock ATSs, the review period may be extended pursuant to Rule 304(a)(1)(iv)(B). We believe that disclosure of all Legacy NMS Stock ATSs' Forms ATS–N should not be delayed during any extended review period that may be necessary for the Commission to review any Legacy NMS Stock ATS's initial Form ATS–N that raises novel or complex issues and therefore requires additional time for review.[568] Additionally, some NMS Stock ATSs may not wish to delay public disclosure once their Forms ATS–N become effective, and it is neither in the public interest nor in the interest of those NMS Stock ATSs to withhold effective Forms ATS–N from the public.

Several commenters suggest that the Commission should make certain information required by Form ATS–N available only to the Commission.[569] Some commenters state that the scope of items required for public disclosure, particularly those related to the administration of the ATS, is too detailed and may not be helpful to market participants in making routing decisions.[570] We believe that Form ATS–N, as adopted, solicits the appropriate level of information about NMS Stock ATSs that would be useful to subscribers and market participants.[571] In response to commenters, we have revised proposed Form ATS–N to remove certain requests that commenters believe are not relevant to subscribers, limited the scope of certain requests that commenters believe to be too broad, and narrowed certain requests to only require summary information or specific information to avoid the disclosure of commercially sensitive information.[572] We nevertheless believe that responses to Form ATS–N requests must be sufficiently detailed for subscribers and market participants to adequately understand the operations of an NMS Stock ATS and the ATS-related activities of the broker-dealer operator and its affiliates.

Other commenters express concern that publicly disclosing Form ATS–N could result in the disclosure of an NMS Stock ATS's proprietary or commercially sensitive information.[573] In particular, and as discussed further below, commenters express concern about disclosing information regarding classification of subscribers,[574] details about administrative operations of broker-dealer operators,[575] and contractual agreements between broker-dealer operators and their clients,[576] and NMS Stock ATSs and their vendors.[577] One commenter raises concern about customer confidentiality.[578] We have determined not to adopt the proposed Exhibit 1 requirements [579] and have revised the Form ATS–N requests to not seek disclosure of certain information that could be proprietary or commercially sensitive, such as routing tables or numerical order flow segmentation metrics.[580] We do not believe that the vast majority of information responsive to adopted Form ATS–N would be proprietary or commercially sensitive. Furthermore, we do not believe that the requests of adopted Form ATS–N, as modified, would require NMS Stock

[563] *See* CFA Institute Letter at 6.

[564] Material amendments filed by Legacy NMS Stock ATSs during the Commission review period are subject to Rule 304(b)(2)(iii)(A), which provides that the entirety of a material amendment will not be made public until the expiration of the Commission's 30-calendar day review period. Therefore, under Rule 304(b)(2)(iii)(A), material amendments filed during the final 30 calendar days of the Commission review period would not be made public until the 30-calendar day Commission review period for such amendments has expired. For example, if an NMS Stock ATS files a material amendment on calendar day 230 of the Commission review period, and the Form ATS–N becomes effective on calendar day 240, the material amendment would remain subject to the Commission's review, and not publicly disclosed, for an additional 20 calendar days—until the Commission's 30-calendar day review period has expired. Under Rule 304(b)(2)(iii)(A), the cover page for any material amendments during the Commission review would be made public when the initial Form ATS–N becomes effective.

[565] *See* Liquidnet Letter at 3; SSGA Letter at 2; Fidelity Letter at 7–8; STANY Letter at 3; UBS Letter at 6–8; Luminex Letter at 2,4; PDQ Letter at 2; SIFMA Letter at 4.

[566] *See* Liquidnet Letter at 3.

[567] *See, e.g.,* MFA/AIMA Letter at 2; Schneiderman Letter at 2; ICI Letter at 1; CFA Institute Letter at 3; Consumer Federation of America Letter at 6.

[568] *See* Rule 304(a)(1)(ii).

[569] *See* SSGA Letter at 2; Fidelity Letter at 7–8; STANY Letter at 3; UBS Letter at 6–8; Luminex Letter at 2,4; PDQ Letter at 2; SIFMA Letter at 4.

[570] *See* Luminex Letter at 2; SIFMA Letter at 4; KCG Letter at 6.

[571] *See infra* Section V.

[572] *See id.*

[573] *See* Fidelity Letter at 8; UBS Letter at 7; Luminex Letter at 2–4; SIFMA Letter at 16.

[574] *See* Fidelity Letter at 8; UBS Letter at 7.

[575] *See* Fidelity Letter at 4; Luminex Letter at 2–4.

[576] *See* UBS Letter at 7.

[577] *See* SIFMA Letter at 16.

[578] *See* PDQ Letter at 2.

[579] *See infra* Section V.B.2. Exhibit 1 would have required NMS Stock ATSs to attach a copy of any materials currently provided to subscribers or other persons related to the operations of the NMS Stock ATS or the disclosures on Form ATS–N. The determination not to adopt this proposed requirement renders irrelevant the comment regarding allowing NMS Stock ATSs to post updated marketing materials on their websites. *See infra* note 705 and accompanying text.

[580] *See infra* Sections V.D.5, V.D.13, V.D.16.

ATSs to compromise customer confidentiality when making thorough and accurate disclosures.

Some commenters that believe that Form ATS–N disclosures may be too detailed to be helpful to market participants [581] or that they may disclose proprietary or commercially sensitive information suggest that the Commission make only parts of Form ATS–N public, or delay public disclosure of certain parts of Form ATS–N.[582] Specifically, one commenter suggests that the Commission require NMS Stock ATSs to submit a full Form ATS–N to the Commission, but only provide that a selected sub-set of fields be publicly disclosed.[583] We are not adopting the commenters' suggestions to limit public disclosures because the vast majority of adopted Form ATS–N will not require the disclosure of proprietary or commercially sensitive information.[584] In addition, not making certain items public would undercut the transparency that is the primary purpose of this rulemaking.[585] Another commenter suggests that the Commission should consider ''tiering'' proprietary information by first making it only available to the Commission and subscribers, and after a ''reasonable'' time lag, further disseminating such information to the general public.[586] In response to commenter concerns, the cover page of the filed material amendment will be made public by the Commission upon filing and, unless the Commission declares the material amendment ineffective, the entirety of the material amendment, as amended, will be made public by the Commission following the Commission's 30-calendar day review period.[587]

Another commenter states that, although the Commission should not address commenters' concerns regarding disclosure of sensitive or proprietary information,[588] by automatically making any portion of Form ATS–N confidential, if a ''genuine need for confidentiality exists,'' the broker-dealer can obtain confidential treatment under Commission Rule 24b–2, and suggests that the Commission provide guidance around the use of this limited exception.[589] We believe that questions on adopted Form ATS–N, as modified, do not solicit the type of information that typically would constitute confidential information.[590] The existing processes for obtaining confidential treatment will remain available to broker-dealer operators.[591] Furthermore, the purpose of Form ATS–N is to create a public transparency regime for NMS Stock ATSs, with commensurate benefits, and allowing disclosures to be made only to the Commission would be contrary to the purposes of this rulemaking.

In addition, FINRA requests that the Commission require NMS Stock ATSs to file duplicate copies of Form ATS–N submissions with FINRA so that FINRA has access to these filings before they become effective, or in the event that they are deemed ineffective and thus never made public.[592] Requiring an NMS Stock ATS to provide Form ATS–N filings to the SRO of which the ATS is a member before the filings become effective or are declared ineffective would place additional administrative burdens on the NMS Stock ATS, particularly in the event the NMS Stock ATS amends its Form ATS–N during discussion with the Commission staff. We continue to believe that making Form ATS–N public will enhance the information available to market participants and benefit the marketplace, and therefore are adopting Rule 304(b)(2)(i), to provide that the Commission will make public each effective initial Form ATS–N, as amended.[593]

b. Public Disclosure of Orders of an Ineffective Initial Form ATS–N

Because the Commission will not issue orders of effective initial Forms ATS–N, adopted Rule 304(b)(2) does not include each ''Order of effectiveness of a Form ATS–N.'' We continue to believe that it is appropriate to make public each order of ineffective Form ATS–N, substantially as proposed,[594] to provide the public with notice regarding the regulatory status of potential trading venues; if a Form ATS–N is declared ineffective, the ATS may not operate pursuant to the exemption from the definition of ''exchange,'' and the public should be aware of such regulatory status.

Other than the comment about orders of ineffectiveness relating to a Legacy NMS Stock ATS's initial Form ATS–N, which is discussed above,[595] we received no comments on making public orders of effective or ineffective Form ATS–N. We continue to believe that it is necessary to make public an order of ineffective Form ATS–N for market participants to be informed of the operating status of an NMS Stock ATS. Therefore, we are adopting Rule 304(a)(2)(ii) to provide that orders of ineffective initial Form ATS–N will be made public, with modifications to reduce any potential ambiguity and improve readability of the rule text.[596]

c. Public Disclosure of Form ATS–N Amendments

We proposed, in Rule 304(a)(2)(iv), making all filed amendments to Form ATS–N public; as proposed, Form ATS–N amendments would have been public during the Commission review period and prior to the Commission's determination of whether a Form ATS–N amendment should be declared ineffective.

In the Proposal, we asked whether commenters believe that the Commission should make public on its website upon filing a Form ATS–N amendment for a material change, and whether there should be a delay in when the Form ATS–N for a material change is made public.[597] We received several comments on this aspect of the Proposal.[598] Although one commenter agrees with our proposal to make Form ATS–N amendments public upon filing because it would keep market participants informed about changes to

[581] *See* SSGA Letter at 2.

[582] *See* T. Rowe Price Letter at 2.

[583] *See* SSGA Letter at 2.

[584] *See infra* Sections V.C.6, V.D.6, V.D.13, V.D.23.

[585] One commenter believes that an ATS should have the ability to file supplemental materials with the Commission that are not part of the public filing as long as the ATS's public filing accurately responds to all questions on the Form ATS–N. *See* Liquidnet Letter at 9. We have determined not to adopt a formal process through which broker-dealer operators can disclose supplemental information for Commission review alone. We believe that the primary purpose of Form ATS–N is to provide the public with critical information regarding NMS Stock ATS operations and affiliate relationships.

[586] *See* T. Rowe Price Letter at 2.

[587] *See* Section IV.E.2.c.

[588] *See supra* notes 574–578 and accompanying text.

[589] *See* Investor Advocate Letter at 10–11.

[590] *See supra* note 584 and accompanying text.

[591] *See* 17 CFR. 240.24b–2.

[592] *See* FINRA Letter at 2–3.

[593] *See supra* note 552.

[594] We proposed this requirement as Rule 304(b)(2)(i) and are adopting this requirement as Rule 304(b)(2)(ii).

[595] *See supra* note 433 and accompanying text.

[596] Adopted Rule 304(b)(2)(ii) states that this provision applies to each ''[o]rder of ineffective initial Form ATS–N'' instead of the proposed language, which stated that the provision would apply to each ''[o]rder of ineffectiveness of a Form ATS–N.'' As discussed above, the Commission will, by order, declare ineffective an *initial* Form ATS–N if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors. *See supra* Section IV.A.3. We believe that the revised rule text reduces any potential ambiguity by specifying that the public disclosure requirement applies to orders related to ''initial'' Form ATS–N and simplifying the rule language.

[597] *See* Proposal, *supra* note 2, at 81028.

[598] *See* ICI Letter at 3; Liquidnet Letter at 6; SIFMA Letter at 31; UBS Letter at 3; BIDS Letter at 4; STA Letter at 5; STANY Letter at 2; CFA Institute Letter at 6; LeveL ATS Letter at 7.

potential trading venues,[599] several other commenters express concerns about making Form ATS–N amendments public upon filing or argue that the Commission should make amendments public only once the related changes are operative.[600] Some of these commenters state that public disclosure of changes to ATS operations at least 30 calendar days before such changes are implemented may burden the ability of NMS Stock ATSs to act competitively, or may reduce the competitive advantage associated with being the first to innovate.[601] In addition, commenters assert that making public Form ATS–N amendments that may never be implemented could be confusing or misleading to market participants; [602] one commenter states that publicly disclosing material changes in advance of implementation could cause market participants to not understand current operations of an NMS Stock ATS versus its proposed, future operations.[603] One commenter asserts that immediate publication of amendments would stifle dialogue between the NMS Stock ATS and Commission staff.[604] Another commenter states that it does not believe that making Form ATS–N amendments public upon filing would provide a benefit to market participants as ''existing documents'' should be adequate for market participants considering whether to use a particular NMS Stock ATS.[605]

We are modifying the proposed rules for making Form ATS–N amendments to an effective Form ATS–N public. In response to commenters' concerns, we are adding new subparagraph (b)(2)(iii)(A) to Rule 304 to provide that, for material amendments (as defined by Rule 304(a)(2)(i)(A)) to an effective Form ATS–N, the cover page of the filed material amendment will be made public by the Commission upon filing and, unless the Commission declares the material amendment ineffective, the entirety of the material amendment, as amended, will be made public by the Commission following the Commission's 30-calendar day review period. In addition, we are adding new subparagraph (b)(2)(iii)(B) to Rule 304 to provide that, for updating, correcting, and order display and fair access amendments (as defined by Rule 304(a)(2)(i)(B), (C), and (D), respectively) to an effective Form ATS–N, the entirety of the updating, correcting, or order display and fair access amendment will be made public by the Commission upon filing. We are also adding to subparagraph (b)(2)(iii)(B) that an updating or correcting amendment filed to a material amendment will be made public by the Commission following the expiration of the review period for such material amendment pursuant to paragraph (a)(2)(ii) of Rule 304.

We share the commenters' concerns that making public Form ATS–N material amendments before expiration of the Commission's 30-day calendar review period could be confusing or misleading to the public, particularly in the event the material amendment is declared ineffective and the related change is never implemented. One commenter asserts that advance disclosure of Form ATS–N amendments may burden market participants who feel obligated to review premature disclosures for possible effects on them and their underlying customers.[606] We believe that publicly disclosing the cover page to a Form ATS–N material amendment during the review period, and disclosing the entire material amendment following the expiration of 30-calendar day Commission review period, when the related changes can be implemented, will reduce any potential for confusion and will not pose an undue burden on market participants.

In addition, we share the commenters' concerns that providing advance public notice of material changes to NMS Stock ATSs could burden ATSs, which would be required to provide at least 30-calendar day advance notice of material changes to all market participants, including their competitors. Requiring such advance public notice of material changes before they are implemented could reduce incentives for NMS Stock ATSs to innovate.

However, we continue to believe that market participants that are planning routing strategies would benefit from advance notice that the NMS Stock ATS is planning changes to its operations or conflicts of interest. To minimize the potential competitive harm of advance public notice, while also providing the benefits of immediate public transparency, the Commission will make public the cover page of a material amendment to an effective Form ATS–N upon filing of such amendment. The cover page will indicate that the NMS Stock ATS has filed a material amendment and provide a brief narrative about the content of the amendment. An NMS Stock ATS is required to indicate the part and item number of Form ATS–N that is subject to the change, state whether or not such change will apply to all subscribers and the broker-dealer operator, and provide a brief summary of the changes. For example, if an NMS Stock ATS is introducing a new order type, the brief narrative might state: ''The ATS is amending Part III, Item 7(a) of Form ATS–N to include a new order type, which will be available to all subscribers.''

In addition, we are adding, in new subparagraph (b)(2)(iii)(A) to Rule 304, that the Commission will, following the expiration of the 30-calendar day Commission review period pursuant to Rule 304(a)(2)(ii), make public the entirety of the material amendment ''as amended.'' We are providing a process, under Rule 304(a)(2)(ii), for NMS Stock ATSs to file updating and correcting amendments under Rule 304(a)(2)(i)(B) and (C), respectively, to material amendments during the Commission review period. In addition, Rule 304(b)(2)(iii)(B) provides that an updating or correcting amendment filed to a material amendment will be made public by the Commission following the expiration of the review period for such material amendment pursuant to Rule 304(a)(2)(ii). We believe that disclosing updating and correcting amendments to material amendments before expiration of the Commission's 30-day calendar review period for the material amendment (and before the material amendment is made public) could be confusing or misleading to the public as the underlying material amendment would not yet be public or operative. We will make public material amendments ''as amended;'' material amendments will reflect any updating and correcting amendments filed during the Commission review period. Such amended disclosures could provide market participants with more complete and comprehensible information about NMS Stock ATS operations and the activities of their broker-dealer operators and affiliates. Accordingly, Rule 304(b)(2)(iii)(B) provides that an updating or correcting amendment filed to a material amendment will be made public by the Commission following the

[599] *See* ICI Letter at 3, n.3.

[600] *See* Liquidnet Letter at 6; SIFMA Letter at 31; UBS Letter at 3; BIDS Letter at 4; STA Letter at 5; STANY Letter at 2; CFA Institute Letter at 6; LeveL ATS Letter at 7. Some commenters state that an amendment to Form ATS–N should not be made public until it is declared effective. *See, e.g.,* SIFMA Letter at 31; UBS Letter at 3. We, however, did not propose, and are not adopting, a process for declaring amendments to Form ATS–N effective. The Commission will have a 30-calendar day review period to declare amendments to Form ATS–N ineffective. *See supra* Section IV.B.2.

[601] *See* LeveL ATS Letter at 7–8. *See also* SIFMA Letter at 31; STANY Letter at 2.

[602] *See* BIDS Letter at 4; UBS Letter at 3; LeveL ATS Letter at 7.

[603] *See* UBS Letter at 3.

[604] *See* Liquidnet Letter at 6–7.

[605] *See* BIDS Letter at 4.

[606] *See* SIFMA Letter at 32.

expiration of the review period for such material amendment pursuant to Rule 304(a)(2)(ii), and Rule 304(b)(2)(iii)(A) provides that a material amendment will be made public, as amended, which would incorporate any amendments that were filed to the material amendment during the Commission review period.

The change to delay making the entirety of Form ATS–N material amendments, as amended, public until after the Commission has completed the review will not impact the manner in which we proposed to make public updating, correcting, and order display and fair access amendments. Form ATS–N updating amendments require NMS Stock ATSs to, no later than 30 calendar days after the end of a calendar quarter, correct information that has become inaccurate or incomplete for any reason and was not required to be reported to the Commission as a Form ATS–N amendment pursuant to Rules 304(a)(2)(i)(A), (C), or (D).[607] NMS Stock ATSs are required to correct information in any previous disclosure on Form ATS–N through a correcting amendment after discovery that any material information previously filed on Form ATS–N was inaccurate or incomplete when filed.[608] Order display and fair access amendments are required to be filed no later than seven calendar days after information required to be disclosed in Part III, Items 24 and 25 on Form ATS–N has become inaccurate or incomplete.[609] We proposed that all amendments, which include Form ATS–N updating and correcting amendments (as well as material amendments), be made public upon filing. Two commenters assert that publicly disclosing changes that the Commission could later declare ineffective could create confusion among market participants.[610] Although, as adopted, the Commission would not make the entirety of material amendments public until after its 30-calendar day review period expires, because correcting, updating, and order display and fair access amendments would be made public upon filing, the Commission could declare such an amendment ineffective after it has been made public. We continue to believe that, even with the risk of some confusion if updating, correcting, and order display and fair access amendments later were declared ineffective, it is appropriate to make updating, correcting, and order display and fair access amendments to an effective Form ATS–N public upon filing because the related changes, any inaccurate or incomplete disclosures about the operation of the NMS Stock ATS, or triggering of the order display and execution access and fair access thresholds, may have been implemented at or before the time of filing, and we believe that it is crucial that market participants have updated information about current NMS Stock ATS operations.[611]

With respect to amendments declared ineffective, one commenter states that such amendments should be returned to the NMS Stock ATS and not be made publicly accessible.[612] Under Rule 304(b)(2)(iii)(A), as adopted, the Commission is specifying that it will not make public the entirety of a material amendment that it declares ineffective. The Commission would, however, upon filing, make public on its website the cover page of the material amendment, and subsequently, any order of ineffectiveness related to such material amendment. In addition, because the Commission will make public updating, correcting, and order display and fair access amendments to an effective Form ATS–N upon filing, such amendments will be publicly available even if the Commission declares such amendments ineffective during its 30-calendar day review period. We believe that it is appropriate to make public updating, correcting, and order display and fair access amendments upon filing, even if the Commission could later declare them ineffective, because, unlike material amendments, the disclosures included in updating, correcting, and order display and fair access amendments have been implemented and reflect an NMS Stock ATS's *current* operations and affiliate relationships. If the Commission later declares an updating, correcting, or order display and fair access amendment ineffective, it will issue an order of ineffectiveness, which the Commission will make public to notify market participants that such change is no longer in effect.

Three commenters state that by making pending amendments public, the Commission may incidentally turn the process into a review, notice, and comment period.[613] Under the adopted rule, the Commission will not make material amendments to Form ATS–N public until the Commission review period has expired. Further, the Commission does not believe that publicly disclosing the brief description of a material amendment on the cover page of Form ATS–N or publicly disclosing correcting, updating, and order display and fair access amendments upon filing will create a public notice, comment, and review period, as the Commission is not soliciting public comments on amendments.[614] This process will be distinct from the proposed rule filing process for national securities exchanges, in which the Commission solicits comment for proposed rule changes and considers whether rule changes are consistent with the Exchange Act.

Two commenters suggest that material amendments should be made public after the Commission has completed its review, but prior to implementation.[615] We are not adopting this suggestion because doing so would require that, to provide additional time for public disclosure after the end of the Commission review period, either the Commission truncate the period for Commission review from the entire 30-calendar day advance notice period, which we believe is necessary for the review,[616] to a shorter segment of the total 30-calendar day advance notice period, or require that NMS Stock ATSs disclose changes further in advance, which could potentially be burdensome for NMS Stock ATSs.

In addition, we received comments asking for clarification regarding the process for a Legacy NMS Stock ATS to file amendments to its Form ATS while the Commission is reviewing the ATS's initial Form ATS–N.[617] In response, we are requiring that a Legacy NMS Stock ATSs amend only its initial Form ATS–N, and not its Form ATS, during the Commission review period.[618] Further, a Legacy NMS Stock ATS's Form ATS–N will not be made public until the end of the Commission review period under Rule 304(a)(1)(iv)(B). Rule 304(b)(2)(iii) provides that amendments to an *effective* Form ATS–N will be made public. Accordingly, amendments to a Form ATS–N filed by a Legacy NMS Stock ATS during the Commission review period will not be made public until after the Commission review period has ended and the Form ATS–N

[607] *See* Rule 304(a)(2)(i)(B) and *supra* Section IV.B.1.b.

[608] *See* Rule 304(a)(2)(i)(C).

[609] *See* Rule 304(a)(2)(i)(D).

[610] *See* LeveL ATS Letter at 7; UBS Letter at 3.

[611] An updating or correcting amendment to a material amendment during Commission review will not be made public until the material amendment that is amended becomes public. We believe this is appropriate because updating and correcting amendments to a material amendment during Commission review would amend a material amendment that is not yet public or operative.

[612] *See* SIFMA Letter at 31.

[613] *See* SIFMA Letter at 32; Morgan Stanley Letter at 4; KCG Letter at 4.

[614] *See supra* Section IV.B.2.

[615] *See* UBS Letter at 3; STA Letter at 5.

[616] *See supra* Section IV.A.2.

[617] *See supra* note 438 and accompanying text.

[618] *See supra* Section IV.A.4.

becomes effective. We believe that making Form ATS–N amendments public before the initial Form ATS–N is public would provide little utility, and would likely only confuse market participants. At the end of the Commission review period, a Legacy NMS Stock ATS's initial Form ATS–N will be made public, along with all filed correcting, updating, and order display and fair access amendments, material amendments for which the Commission's 30-calendar day review period has expired, and the cover pages to any material amendments during the Commission review period.

d. Public Disclosure of Orders of Ineffective Form ATS–N Amendment

Under Rule 304(b)(2)(iv), the Commission will make public each order of ineffective Form ATS–N amendment. This would provide notice to market participants that the Commission had declared a Form ATS–N amendment ineffective. We received no comments on making public orders of ineffective Form ATS–N amendments. We are adopting proposed Rule 304(b)(2)(v) as adopted Rule 304(b)(2)(iv).[619]

e. Public Disclosure of Notices of Cessation

Under Rule 304(b)(2)(v) (which was proposed as Rule 304(b)(2)(vi)),[620] the Commission will make public each notice of cessation of a Form ATS–N filed pursuant to Rule 304(a)(3). One commenter states that it supports our proposal to make notices of cessation publicly available.[621] No commenters express opposition to such requirement. We continue to believe that making public each properly filed Form ATS–N notice of cessation will provide the public with notice that the NMS Stock ATS will cease operations and that the organization, association, or group of persons no longer operates pursuant to the exemption provided under Exchange Act Rule 3a1–1(a)(2). The notice of cessation will provide market participants with the date that the NMS Stock ATS will cease operations, as designated by the NMS Stock ATS, and allow them to make arrangements to select alternative routing destinations for their orders. Therefore, we are adopting as proposed the requirement for public disclosure of notices of cessation.

f. Public Disclosure of Each Order Suspending, Limiting, or Revoking the Rule 3a1–1(a)(2) Exemption

Under proposed Rule 304(b)(2)(vii), the Commission would make public each order suspending, limiting, or revoking the exemption provided pursuant to Rule 3a1–1(a)(2). We did not receive any comments on this requirement. We believe that it is important for market participants to be aware of whether an NMS Stock ATS is subject to an order suspending, limiting, or revoking the exemption from the definition of ''exchange'' when they are making their routing decisions because such an order could prevent an NMS Stock ATS from operating, or it could limit its functionality. Therefore, we are adopting substantially as proposed the requirement that the Commission make public each order suspending limiting, or revoking the exemption from the definition of ''exchange,'' as renumbered Rule 304(b)(2)(vi).[622]

3. Rule 304(b)(3): Disclosure of Form ATS–N on the NMS Stock ATS's Website

Proposed Rule 304(b)(3) required each NMS Stock ATS to make public via posting on its website a direct URL hyperlink to the Commission's website that contains the documents enumerated in proposed Rule 304(b)(2).

We received two comments on proposed Rule 304(b)(3).[623] One commenter supports adding a requirement for NMS Stock ATSs to post the effective Forms ATS–N on their own websites and not simply provide links to the Commission's website.[624] Another commenter requests that rather than requiring materials to be posted centrally through the Commission, the Commission should allow an NMS Stock ATS to post its disclosure materials on its public website.[625] We are not adopting a requirement that an NMS Stock ATS post its filings on its own website because it believes that requiring each NMS Stock ATS to provide a link to the Commission's website, which will link to Form ATS–N filings in EDGAR, will provide market participants easy and uniform access to Form ATS–N filings. The link to the Commission website would provide users with access to all new filings available in EDGAR.

We are adopting, with modifications, the requirement that each NMS Stock ATS make public via posting on its website a direct URL hyperlink to the Commission's website that contains the documents enumerated in proposed Rule 304(b)(2). We continue to believe that the requirement of posting on the NMS Stock ATS's website a direct URL hyperlink to the Commission's website would make it easier for market participants to review an NMS Stock ATS's Form ATS–N filings by providing an additional means for market participants to locate Form ATS–N filings that are made available through the Commission's website.[626]

V. Form ATS–N Disclosures

A. Form ATS–N Disclosure Requirements and Definitions

1. Rule 304(c): Disclosure Requirements

Proposed Rule 304(c)(1) required NMS Stock ATSs to respond to each item on Form ATS–N, as applicable, in detail, and disclose information that is accurate, current, and complete. Unlike proposed Rule 304(c)(2), reports required under Rule 304 must be filed electronically on Form ATS–N, include all information as prescribed in Form ATS–N and the Instructions thereto, and contain an electronic signature that is authenticated by manual signature. Further, proposed Rule 304(c)(2) required that such document be executed before or at the time Form ATS–N is electronically filed and be retained by the NMS Stock ATS in accordance with Rule 303.[627] The proposed Form ATS–N required the signator to represent that the information and statements in the applicable Form ATS–N, including exhibits, schedules, or other documents attached to the Form ATS–N, and other information filed with the Form ATS–N, are current, true, and complete.[628]

We are adopting Rule 304(c)(2), with technical and non-substantive modifications to reduce redundancy and reduce potential ambiguity about the filing requirements for Form ATS–N.[629]

[619] *See supra* note 552.

[620] *See id.*

[621] *See* ICI Letter at 11.

[622] *See supra* note 552. We are making one modification to specify that this applies to the exemption ''for an NMS Stock ATS.''

[623] *See* CFA Institute Letter at 6; UBS Letter at 3.

[624] *See* CFA Institute Letter at 6.

[625] *See* UBS Letter at 3.

[626] *See* Proposal, *supra* note 2, at 81035.

[627] *See id.*

[628] *See* Proposed Form ATS–N, Part V.

[629] The Commission is deleting the word ''electronically'' and the language ''and contain an electronic signature'' in the first sentence of proposed Rule 304(c)(2). All NMS Stock ATSs are required to file Form ATS–N through EDGAR. Therefore, we believe that referencing the term ''electronic'' and ''electronic signature'' is redundant because all filings are electronically submitted through EDGAR. We are deleting the second sentence (regarding manually signing a signature page or document) and instead adding a reference to 232.302 of Regulation S–T, which includes the general rules for electronic filings, including rules governing electronic signatures. We are also modifying the third sentence of Rule 304(c)(2) to state that any report filed under Rule

In the Proposal, the Commission stated that Regulation ATS requires NMS Stock ATSs to register as broker-dealers with the Commission, which entails becoming a member of an SRO, such as FINRA, and fully complying with the broker-dealer regulatory regime.[630] The Commission requested comment on whether the certification under FINRA Rule 3130 would help ensure an NMS Stock ATS's compliance with proposed Rule 304, including the requirement that disclosures on Form ATS–N be accurate, current, and complete.[631] The Commission received two comment letters regarding the requirement that an authorized person certify that the form is ''current, true, and complete.'' [632] One commenter supports the certification requirement.[633] Another commenter expresses concern about immaterial errors being a basis for liability.[634]

The Commission continues to believe that it is appropriate to require authorized persons to certify that the Form ATS–N is ''current, true, and complete.'' We believe that market participants will rely on Form ATS–N disclosures to understand the operations of an NMS Stock ATS and ATS-related activities of the broker-dealer operator, and decide whether that trading center would be a desirable venue for their orders. The information contained on Form ATS–N will also be available for Commission use, including as part of its oversight functions. Further, existing Form ATS also requires authorized persons to certify that the information and statements in the form, exhibits, schedules and other documents attached are ''current, true, and complete.'' [635] In addition, Form 1, the application for registration or exemption from registration as a national securities exchange, requires a similar certification.[636] Neither of these certifications includes a materiality qualifier, and the Commission does not believe that it would be appropriate to include a materiality qualifier in Form ATS–N.

We are adopting Rule 304(c)(1) with certain modifications.[637] Specifically, adopted Rule 304(c)(1) requires that ''[a]n NMS Stock ATS must file a Form ATS–N in accordance with the Instructions therein.'' [638] The adopted Instructions to Form ATS–N require, among other things, that ''[a]n NMS Stock ATS must provide all the information required by Form ATS–N, including responses to each Item, as applicable, and the Exhibits, and disclose information that is accurate, current, and complete.'' [639] Similar to the Instructions of proposed Form ATS–N, the Instructions to adopted Form ATS–N asks an NMS Stock ATS to respond to each item ''in detail.'' In response to comments, we revised some of the requests on Form ATS–N to solicit ''a summary of information'' to tailor further, as appropriate, the required disclosure or avoid requiring the disclosure of personal or commercially sensitive information.[640] Accordingly, we are revising the Instructions to require that ''unless otherwise provided'' (*i.e.,* where the request indicates that the ATS is required to disclose ''summary'' information), the NMS Stock ATS respond to each request in detail.[641]

One commenter suggests that an NMS Stock ATS should be permitted to disclose additional information to its subscribers and potential customers, outside of the Form ATS–N process, or respond to requests for information from market participants.[642] Similarly, one commenter states that NMS Stock ATSs should be allowed to separately disclose information, upon request, regarding order segmentation to subscribers who require such information from a ''due diligence perspective'' and who, due to the nature of their trading, would not present gaming concerns.[643] We believe that it would be inconsistent with the goals of this rulemaking were its adoption to chill communication between broker-dealer operators and subscribers about the NMS Stock ATS. The adopted enhanced disclosure requirements do not prohibit broker-dealer operators from communicating with subscribers and other market participants about information not otherwise required by Form ATS–N in a manner that is consistent with federal securities laws and the rules or regulations thereunder. A broker-dealer operator responding to a request for information from a subscriber or market participant generally should evaluate whether the information provided in response to these requests must be disclosed on Form ATS–N if the information does not already appear in its Form ATS–N.

The Commission received several comments on the general format of the Form ATS–N. Several commenters suggest that the Commission modify Form ATS–N so that the requests for information result in disclosures that are more standardized and allow market participants to more easily compare Form ATS–N filings.[644] Some commenters express concern that requesting what they characterize as ''extraneous'' information could obscure the information that market participants would find the most relevant.[645] Some of these commenters also express concern that the volume of data that NMS Stock ATSs would provide in response to questions that require narrative responses would make it difficult for participants to understand ATS operations [646] or conduct due diligence.[647]

Although one commenter expressly agrees with the Commission's approach of requiring summaries of amendments,[648] several commenters state that narrative responses on Form ATS–N are likely to vary widely, and could make comparing multiple platforms difficult.[649] Multiple commenters advocate for replacing some of the proposed narrative responses to Form ATS–N with ''yes'' or ''no'' responses.[650] One commenter states that requiring ATSs to respond in a ''yes'' or ''no'' format would support

304 shall be executed ''at, or prior to,'' the time the Form ATS–N is filed (instead of ''before or at''). We are also adding a reference to the Instructions in Form ATS–N, which includes the requirement for NMS Stock ATSs to maintain a paper copy with original manual signatures, instead of including a reference to retaining Form ATS–N in accordance with § 242.303, as proposed.

[630] *See* Proposal, *supra* note 2, at 81005.

[631] *See id.* at 81037.

[632] *See* SIFMA Letter at 33; Better Markets Letter at 7.

[633] *See* Better Markets Letter at 7.

[634] *See* SIFMA Letter at 33.

[635] *See* Form ATS at 1.

[636] *See* Form 1 at 1.

[637] We changed the heading of proposed Rule 304(c) from ''Form ATS–N filing requirements'' to ''Form ATS–N disclosure requirements,'' which we believe more accurately describes the purpose and content of the paragraph.

[638] *See* Rule 304(c)(1).

[639] *See* Instructions to Form ATS–N.

[640] *See, e.g.,* Form ATS–N Part III, Item 13(a) (instructing NMS Stock ATS to provide a summary of the parameters for each segmented order category).

[641] In addition, to avoid potential confusion, we are removing ''in detail'' from Rule 304(c)(1) and instead, specifying that the Form ATS–N must be filed ''in accordance with the instructions therein.'' *See* Rule 304(c)(1).

[642] *See* T. Rowe Price Letter at 2.

[643] *See* Fidelity Letter at 8.

[644] *See* SSGA Letter at 2–3; BIDS Letter at 4–5; Fidelity Letter at 5; STANY Letter at 5; UBS Letter at 2–3; KCG Letter at 8–9, 11; Morgan Stanley Letter at 1; STA Letter at 2; SIFMA Letter at 9; LeveL ATS Letter at 6–7.

[645] *See* STANY Letter at 3; Luminex Letter at 4; KCG Letter at 4; SSGA Letter at 2; SIFMA Letter at 7.

[646] *See* STA Letter at 2; KCG Letter at 3–4; SIFMA Letter at 9.

[647] *See* SSGA Letter at 2.

[648] *See* Liquidnet Letter at 18.

[649] *See* SSGA Letter at 2; Fidelity Letter at 5; STA Letter at 2; BIDS Letter at 4–5; KCG Letter at 8–9; Morgan Stanley Letter at 1.

[650] *See* SSGA Letter at 2; BIDS Letter at 4; STANY Letter at 5; STA Letter at 2; UBS Letter at 2–3; KCG Letter at 8–11; SIFMA Letter at 9; LeveL ATS Letter at 6.

more fulsome disclosure and create a universal standard of review, as allowing narrative responses may allow ATSs to disclose only the information that they deem appropriate.[651] Some commenters recognize that ''yes'' or ''no'' information may need to be supplemented by short narrative responses.[652] One commenter suggests introducing a tabular format, where reasonable, to capture the disclosures required by Forms ATS–N would facilitate comparison of Forms ATS–N.[653]

The Commission has revised the format of proposed Form ATS–N to further standardize the form's requests, better organize questions by subject matter, reduce redundancy, reduce ambiguity, make more explicit requests on Form ATS–N to facilitate complete responses, and achieve the appropriate balance between yes/no and narrative responses. For instance, the adopted format of Form ATS–N changes several questions from proposed Form ATS–N for certain subject matters (*e.g.,* order display, co-location services, and segmentation) to require ''yes'' or ''no'' responses with further narrative disclosure required in connection with ''yes'' responses. We believe that adding more ''yes'' or ''no'' questioning in Form ATS–N will help standardize responses and address commenters' concerns about facilitating market participants' review and comparisons of Form ATS–N disclosures. We continue to believe, however, that narrative responses enable market participants to understand the operations of the NMS Stock ATS and the ATS-related activities of the broker-dealer operator, particularly in light of the different trading functionalities, options, and procedures that are offered across NMS Stock ATSs, and provide NMS Stock ATSs with the flexibility to communicate required information to the public that is required by the form.

Also, certain requests have been amended to only require summary information. We believe that requiring summaries for certain disclosures could help reduce potential extraneous information.

2. Terminology

a. Definitions for Form ATS–N

(i) Proposed Defined Terms

As proposed, Form ATS–N would have set forth definitions of the following terms: (1) Affiliate; (2) alternative trading system; (3) broker-dealer operator; (4) control; (5) NMS security; (6) NMS Stock; (7) NMS Stock ATS; (8) order; (9) person; and (10) subscriber.

The Commission received several comments regarding the proposed definitions of ''affiliate.'' The Commission is adopting the definition of the term ''affiliate,'' with a technical change,[654] to mean ''with respect to a specified Person, any Person that directly, or indirectly, controls, is under common control with, or is controlled by, the specified Person.'' One commenter states that the proposed definition of ''affiliate'' would include, among others, owners of the ATS operator, without regard for whether the affiliate is separately registered as a broker-dealer and therefore subject to the Commission's jurisdiction.[655] The commenter notes that the definition of ''affiliate'' would include persons ''under common control with'' the NMS Stock ATS operator, with control meaning at least 25% ownership, such that the threshold would capture entities that operate independently from one another.[656] Similarly, another commenter points out that although the Proposal contains a customary definition of the term ''affiliate,'' the definition is not limited in any way that focuses on direct interactions or relationships with the NMS Stock ATS.[657]

We do not believe that the status of an affiliate's registration with the Commission should limit the scope of the disclosures about that affiliate in Form ATS–N. However, the adopted Form ATS–N conflicts-of-interest disclosures are tailored to inform market participants about how affiliates of the broker-dealer operator trade on the NMS Stock ATS and how the use of the ATS by affiliates may affect the handling and execution of orders from unaffiliated parties. While the definition of ''affiliate'' in Form ATS–N may encompass a large number of entities for some ATSs, Form ATS–N is designed to solicit information that is relevant to a market participant's evaluation of an NMS Stock ATS as a potential trading venue. Therefore, while we have not amended the proposed definition of ''affiliate,'' the disclosures about affiliate activity on an NMS Stock ATS are not designed to require information about affiliates that the Commission and commenters believe would be extraneous to a market participant's evaluation of conflicts of interest and information leakage on the ATS.

We received two comments regarding the proposed definition of ''control.'' After carefully considering these comments, we are adopting the definition of ''control,'' as proposed, to mean:

> the power, directly or indirectly, to direct the management or policies of the broker-dealer of an alternative trading system, whether through the ownership of securities, by contract, or otherwise. A Person is presumed to control the broker-dealer of an alternative trading system, if that Person (1) is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); (2) directly or indirectly has the right to vote 25% or more of a class of voting securities or has the power to sell or direct the sale of 25% or more of a class of voting securities of the broker-dealer of the alternative trading system; or (3) in the case of a partnership, has contributed, or has the right to receive, upon dissolution, 25% or more of the capital of the broker-dealer of the alternative trading system.

One commenter expresses support for the Commission's proposal that the definition of control contain a 25% ownership threshold that the commenter states currently serves as a presumption of control and is consistent with that used in other areas of the securities laws.[658] Another commenter states, however, that the proposed definition of ''control'' provides that certain persons are presumed to control the broker-dealer operator of an NMS Stock ATS, but that there is no corresponding safe harbor whereby persons are presumed not to control an NMS Stock ATS.[659] Accordingly, the commenter opines that an NMS Stock ATS operator may feel obligated to provide overly broad disclosures, which could confuse subscribers regarding potential conflicts.[660]

Disclosures related to affiliates extend to persons that control, are controlled by, or are under common control with the broker-dealer operator, and, as a result, parallel the disclosures related to ''control affiliates'' that broker-dealer

[651] *See* LeveL ATS Letter at 7.

[652] *See* BIDS Letter at 4; SIFMA Letter at 12; LeveL ATS Letter at 7.

[653] *See* BIDS Letter at 5.

[654] The Commission is making one technical change to the proposed term ''affiliate'' by capitalizing the defined term ''Person.'' This change is meant to identify the term Person as a defined term for purposes of the Form ATS–N.

[655] *See* LeveL ATS Letter at 3, n.5.

[656] *See id.* at 4, n.7.

[657] *See* UBS Letter at 4. This commenter states that the broker-dealer operator of its ATS has well over 300 global affiliates under the definition set forth in the Proposal, and that not all such affiliates are users of the ATS; only orders routed by a small number of affiliates end up in its ATS. *See id.* The commenter also points out that as proposed, it would need to disclose every affiliate regardless of whether it has any interactions with the ATS. *See id.*

[658] *See* HMA Letter at 15.

[659] *See* LeveL ATS Letter at 3, n.6.

[660] *See id.*

operators must make on Form BD.[661] The Commission disagrees that an NMS Stock ATS operator may feel obligated to provide unnecessarily broad disclosures regarding potential conflicts of interest due to the proposed definition of ''control.'' The presumed control tests set forth in the adopted definition of ''control'' are meant to provide clarity to NMS Stock ATSs as to when an entity and the broker-dealer operator are defined as ''affiliated,'' which would trigger the NMS Stock ATSs' disclosure duties under Part II of adopted Form ATS–N. We believe that the enumerated circumstances under which there is presumed control involve factors (such as a shared executive or 25% ownership) that would likely result in one entity or person having the power, directly or indirectly, to direct the management or policies of the broker-dealer operator of an ATS. Therefore, in such situations, a presumption of control is appropriate. On the other hand, because control can manifest itself in several ways under the adopted definition, the Commission does not feel that there are certain facts that would warrant a presumption of no control. For example, the unique facts and circumstances of several different ownership structures could result in different conclusions regarding control, even though the various structures contain some similarities. Accordingly, the Commission has not added provisions setting forth circumstances under which there would be a presumption of no control.

The Commission is adopting as proposed the changes to the definition of ''control'' under Rule 300(f) in Regulation ATS. The definition of the term control being adopted herein contains the additional phrase ''the broker-dealer of'' before the two instances of the phrase ''an alternative trading system'' and before the phrase ''the alternative trading system'' in subsections (2) and (3) of the definition.[662] As discussed in the Proposal, the purpose of this difference is to make clear that, because an ATS must register as a broker-dealer, control of the broker-dealer of the ATS is control of the ATS, and that the broker-dealer operator is legally responsible for all operational aspects of the ATS and for ensuring that the ATS complies with applicable federal securities laws and the rules and regulations thereunder, including Regulation ATS.[663]

The disclosures of ATS-related activities of the broker-dealer operator's affiliates in Part II of adopted Form ATS–N are designed to provide subscribers and market participants with a comprehensive understanding of the conflicts of interest that may arise from the broker-dealer operator's other business activities and its operation of the NMS Stock ATS. Under the adopted definitions of ''affiliate'' and ''control,'' any affiliate of the broker-dealer operator of the NMS Stock ATS would be an affiliate of the NMS Stock ATS. These definitions are designed to cover entities that have a close relationship with the broker-dealer operator and whose activities could raise conflicts of interest concerns, or could otherwise be relevant to market participants when evaluating an NMS Stock ATS.

Furthermore, in Part III, Item 1 of proposed Form ATS–N, the Commission used the term ''non-ATS trading center.'' A commenter requests that the Commission define the term ''non-ATS trading center'' so that broker-dealer operators can better focus on making proper disclosures.[664] As further explained below, in response to comments, the Commission is reorganizing and changing Part III, Item 1 of proposed Form ATS–N to request information about the trading activities of the broker-dealer operator and its affiliates, irrespective of whether the broker-dealer operator's business units and/or affiliates are non-ATS trading centers.[665] Given the revisions the Commission is making to Part III, Item 1, we believe that the defined term is no longer necessary, and the Commission is, therefore, eliminating the term from adopted Form ATS–N.

Another commenter agrees with the goal of highlighting potential conflicts of interest faced by broker-dealer operators of NMS Stock ATSs and their affiliates in connection with the ATS.[666] The commenter endorses the proposed requirement to identify non-ATS trading centers managed by the ATS operator or its affiliates that interact with the ATS. The commenter also states that disclosures related to non-ATS trading centers should be limited to non-ATS trading centers that interact with or exchange information with the ATS.[667] The Commission also believes that public disclosure of non-ATS trading centers managed by the broker-dealer operator or its affiliates that interact with the ATS furthers the stated goal of helping market participants evaluate potential conflicts of interest on an NMS Stock ATS. The requests in Part II of adopted Form ATS–N are tailored to elicit such information without burdening NMS Stock ATSs with a requirement to list the non-ATS trading centers of the broker-dealer operator or its affiliates that do not interact with the NMS Stock ATS.

(ii) New Defined Terms

The Commission is adding the term ''trading center'' to the definitions set forth in the Instructions to adopted Form ATS–N to define that term for purposes of its use in Part II and Part III of adopted Form ATS–N. The term ''trading center'' was used in proposed Form ATS–N with regard to arrangements with other trading centers—Part III, Item 4 of proposed Form ATS–N—and is used in adopted Form ATS–N's requests regarding the routing of orders from the NMS Stock ATS to business units or affiliates of the broker-dealer operator (adopted Part II, Items 1 and 2) and the NMS Stock ATS's arrangements with other trading centers (adopted Part II, Item 4).

The definition of the term ''trading center'' used for purposes of adopted Form ATS–N is the same as that currently set forth in Regulation NMS Rule 600(b)(78).[668] The adopted definition is ''a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.'' While we believe that the scope of the term ''trading center'' in Form ATS–N would likely be understood by NMS Stock ATSs, we believe that adding a definition to the Form ATS–N will reduce any potential ambiguity with regard to those requests in Part II, Items 1, 2, and 4 of adopted Form ATS–N.

One commenter states that the Commission should add additional definitions for certain terms to promote consistency throughout Forms ATS–N, which the commenter believes could ultimately facilitate comparison among

[661] *See* Form BD at 2 (defining ''control affiliate'').

[662] 17 CFR 242.300(f).

[663] *See* Proposal, *supra* note 1, at 81044.

[664] *See* SIFMA Letter at 10.

[665] *See infra* Section V.C.1.

[666] *See KCG* Letter at 8.

[667] *See id.* at 8–9. This commenter also asserts that it is imperative for the Commission to clarify that the interaction between the NMS Stock ATS and any non-ATS trading center may be subject to change and the ATS operator does not need file and receive Commission approval before implementation. *See id.* We note that the materiality of any changes to the interaction and coordination between non-ATS trading centers and the NMS Stock ATS that would require disclosure on Form ATS–N should be evaluated based on the facts and circumstances related to each change.

[668] *See* 17 CFR 242.600(b)(78).

Forms ATS–N.[669] Another commenter emphasizes that the Commission should establish fundamental uniformity in the way information is defined and disclosed.[670] We have structured adopted Form ATS–N to allow market participants to better compare disclosures among NMS Stock ATSs. We do not, however, believe that it should establish standardized terms to be used by NMS Stock ATSs when completing their disclosures on Form ATS–N. We do not desire to impose substantive standards for how disclosures should be written by adopting and defining terms to be used by all NMS Stock ATSs to describe the functionalities, operations, or procedures of their systems. The operations of NMS Stock ATSs vary, and, apart from some common terms, many NMS Stock ATSs use different terminology to describe their operations and functionalities. Based on our review of Form ATS filings, we believe that NMS Stock ATSs may use differing terms and definitions to describe functionalities, operations, or procedures, even if a particular function, operation, or procedure on one ATS may resemble that on another. We do not believe that it would be very helpful to define terms for functionalities, operations, or procedures across NMS Stock ATSs because doing so may not result in complete or comprehensible disclosures due to these substantive and semantical differences in the operations of NMS Stock ATSs. We believe that adopting standardized, substantive terms for Form ATS–N disclosures may limit the ability of an NMS Stock ATS to completely and clearly describe its system, which we believe could reduce the utility of Form ATS–N disclosures for market participants. We also believe that such defined terminology would limit the flexibility of NMS Stock ATSs to name or market new services of the ATS.

b. Comments on the Definition of ''Subscriber''

When seeking disclosures regarding how an NMS Stock ATS operates and the ATS-related activities of the broker-dealer operator and its affiliates, proposed Form ATS–N used the terms ''subscriber'' and ''person(s).'' One commenter believes that Form ATS–N should instead focus on the term ''user'' rather than ''subscriber.''[671] This commenter states that the term ''subscriber'' can be disparately interpreted and applied by broker-dealer operators of ATSs and would inhibit uniform application across ATSs in terms of disclosure, access, priority, and other purposes. This commenter further states that the current definition in Regulation ATS fails to adequately define ''subscriber'' in the case of an ATS that is part of a larger broker-dealer operation, leading to inconsistencies in the application of the requirements applicable to subscribers across ATSs. The commenter believes that disclosures in Form ATS–N should not depend on whether a broker-dealer operator has a contractual agreement with a user for accessing the ATS, but should be consistent for all users that access an ATS whether such users are internal or external and whether such users access the ATS directly or indirectly.

Similarly, another commenter believes the phrase ''subscriber orders or other trading interest'' as used in proposed Part III, Item 1—which would have required the NMS Stock ATS to disclose information about the interaction and coordination between non-ATS trading centers operated by the broker-dealer operator or its affiliates and the NMS Stock ATS—should be read as ''subscriber orders or subscriber trading interest.''[672] This commenter believes that the alternative reading would potentially capture all trading interest sent to the broker-dealer operator of the NMS Stock ATS.

We agree that responses to questions in Form ATS–N should be uniformly applied by NMS Stock ATSs regardless of the source of orders (*e.g.,* principal trading desks of the broker-dealer operator, third parties using direct connectivity, affiliates of the broker-dealer operator, customers of the broker-dealer operator whose orders are submitted to the ATS through a functionality of the broker-dealer operator, such as a smart order router (''SOR'')). We have revised several requests on proposed Form ATS–N to help facilitate a uniform application of responses by NMS Stock ATSs and, in response to commenters' concerns, are providing guidance regarding the definition of ''subscriber'' under Regulation ATS and in the context of Form ATS–N disclosures.

First, we believe that the term ''subscriber'' sufficiently captures the vast majority of market participants whose orders or trading interest are submitted to and executed in an NMS Stock ATS. Regulation ATS defines subscriber ''[a]s any person that has entered into a contractual agreement with an ATS to access such ATS for the purpose of effecting transactions in securities or submitting, disseminating, or displaying orders on such ATS, including a *customer, member, user,* or *participant* in an ATS.''[673] In the Proposal, as the Commission discussed, the broker-dealer operator of an NMS Stock ATS is legally responsible for, and controls all aspects of, the ATS operation, including, among other things, providing access to the ATS.[674] Based on our experience, persons seeking to use an ATS's services enter into agreements with the broker-dealer operator, and these agreements could cover services in addition to the ATS services. These agreements may take a variety of forms, and may or may not be written.[675] If a market participant has an agreement—written or unwritten—with a broker-dealer that allows the market participant to enter orders directly into an ATS operated by the broker-dealer, that market participant is a subscriber of the ATS for purposes of Regulation ATS and Form ATS–N.

Another example of a subscriber would include a customer of the broker-dealer operator whose orders are submitted to the ATS by the broker-dealer operator. Many NMS Stock ATSs are operated by broker-dealers that offer their customers a wide range of order handling and execution services in addition to the execution services of their NMS Stock ATSs.[676] These services typically involve functionality such as an SOR or other types of trading algorithms. In cases where a customer uses this wider range of services of the broker-dealer, the customer would not

[669] *See* BIDS Letter at 5.

[670] *See* UBS Letter at 2.

[671] *See* Morgan Stanley Letter at 4.

[672] *See* UBS Letter at 5.

[673] 17 CFR 242.300(b) (emphasis added). Additionally, the definition of the term ''subscriber'' under Regulation ATS states that a subscriber shall not include a national securities exchange or national securities association. *See id.*

[674] *See* Proposal, *supra* note 2, at 81041 (discussing the relationship between the broker-dealer operator's operation of the NMS Stock ATS and its other operations).

[675] For example, third-party market participants—including, potentially, affiliates and non-affiliates of the broker-dealer operator—may enter into subscriber agreements or some other form of contract with the broker-dealer operator to connect directly to the ATS to submit or display orders. We note that a determination as to who may be a ''subscriber'' to the ATS would depend upon the facts and circumstances of the relationship between the ATS and the broker-dealer operator, so the preceding examples are not exhaustive.

[676] *See* UBS Letter at 5 (noting that market participants may maintain a commercial relationship with the broker-dealer operator for purposes other than accessing the broker-dealer operator's ATS, such as to use the broker-dealer's high touch block trading desk or to use the broker-dealer's trading algorithms); Morgan Stanley Letter at 1–2 (explaining that full service broker-dealers may provide clients with a broad, integrated electronic offering of trading services, which might include ATS services).

send its orders directly to the ATS, but rather, send its orders to some functionality external to the ATS, which could be the SOR or algorithm itself or a client service desk that submits the customer orders into the broker-dealer's SOR or trading algorithms. A SOR or trading algorithm typically has the capability to route customer orders to a number of execution venues, including the broker-dealer operator's own ATS. We note that such commercial relationships may be governed by formal or informal agreements. To the extent a person enters into a contract, written or unwritten, to use the broker-dealer operator's order routing and execution services, and those services could include routing to and executing in the broker-dealer operator's own ATS, that agreement would fall within the contractual agreements under the definition of ''subscriber'' under Regulation ATS and the person would be a subscriber to the ATS. On the other hand, a customer's order routed by the broker-dealer operator's SOR or trading algorithm to an external market for execution would not be a subscriber order because the order was not destined or entered into the ATS.[677]

Second, as noted above, a commenter believes that Regulation ATS does not adequately define the term ''subscriber'' in the case of an ATS that is part of a larger broker-dealer operation, which the commenter believes could lead to inconsistencies in the application of the requirements applicable to subscribers across ATSs.[678] While we believe that the term ''subscriber'' sufficiently captures the vast majority of market participants whose orders or trading interest are submitted to and executed in an NMS Stock ATS, we also acknowledge that business units of multi-service broker-dealer operators, in many cases, participate in the ATS of that broker-dealer operator and submit principal orders to the ATS. Despite participating in the ATS, these business units might not always meet the definition of ''subscriber'' because an ATS may not have a contractual agreement with a business unit that is part of the same entity.

Adopted Form ATS–N uses the term ''subscriber'' throughout, and, in certain Items, specifically states the type of ATS-related activities of, or information about, the broker-dealer operator that must be disclosed. For example, Part III, Item 5(b) of adopted Form ATS–N requires the NMS Stock ATS to state whether the terms and conditions to directly enter orders and trading interest into the NMS Stock ATS are the same for all subscribers and the broker-dealer operator. We believe that drafting the Form ATS–N requests in this manner will help ensure that the scope of information solicited encompasses all relevant users of the ATS services (*i.e.,* subscribers, and to the extent such users do not meet the definition of ''subscriber,'' the business units of the broker-dealer operator). We believe that adopted Form ATS–N is not designed to solicit disparate disclosures among NMS Stock ATS due to varying interpretations of the term ''subscriber'' by individual ATSs.

B. Cover Page and Part I of Form ATS–N: Identifying Information

1. Cover Page

In response to concerns from commenters that the public may be led to believe that the Commission is conducting a merit-based review of Form ATS–N disclosures filed with the Commission, we are including on the cover page of Form ATS–N a legend stating that the Commission has not passed upon the merits or accuracy of the disclosures in the filing.

On the cover page of adopted Form ATS–N, the responding entity is required to identify the type of filing[679] by marking the appropriate checkbox.[680] We are also adopting, as proposed, a requirement that NMS Stock ATSs file a notice of cessation of operations on Form ATS–N and provide the date that the NMS Stock ATS will cease to operate. We are also adopting a check box that allows a Form ATS–N filer to withdraw a previously filed Form ATS–N filing.[681] The Instructions to Form ATS–N state that an NMS Stock ATS may withdraw an initial Form ATS–N or an amendment before the end of the applicable Commission review period. Because its initial Form ATS–N supersedes and replaces a Legacy NMS Stock ATS's Form ATS for purposes of the exemption and the initial Form ATS–N can be amended, a Legacy NMS Stock ATS may not withdraw its initial Form ATS–N at any time. Once the Commission review period has expired or a Legacy NMS Stock ATS has filed its initial Form ATS–N, the Legacy NMS Stock ATS cannot withdraw the filing and must file a notice of cessation pursuant to Rule 304(a)(3) if it intends to cease to operate or file an amendment to its Form ATS–N, as appropriate. In addition, an NMS Stock ATS may withdraw a notice of cessation of operations at any time before the date that the NMS Stock ATS had indicated it intended to cease operating.

In the cover page of proposed Form ATS–N, the Commission sought a brief narrative description for Form ATS–N amendments so market participants could quickly understand the nature of the amendment.[682] We are modifying this requirement to be more specific as to what information is required in this narrative. Adopted Form ATS–N requires the NMS Stock ATS to indicate

[677] We do not intend for Form ATS–N to require disclosures about aspects of a market participant's other commercial relationships with a broker-dealer operator that do not pertain to the NMS Stock ATS. We believe that the adopted Form ATS–N disclosure requests are tailored so that operations of the broker-dealer operator not housed within the NMS Stock ATS—and that do not otherwise pertain to the functions of the ATS—would not be subject to disclosure on Form ATS–N.

[678] *See* Morgan Stanley Letter at 4.

[679] Proposed Form ATS–N would have required NMS Stock ATSs to check the ''Submission Type.'' Adopted Form ATS–N requires NMS Stock ATSs to check the ''Type of Filing.'' This is a non-substantive change.

[680] Adopted Form ATS–N's cover page provides that a filing may be an initial Form ATS–N, or a Form ATS–N material amendment, updating amendment, correcting amendment, or order display and fair access amendment. Proposed Form ATS–N included a check box above the ''Submission Type'' menu, where an NMS Stock ATS could indicate if the filing was an ''Initial Form Filing.'' In addition, in the proposed Form ATS–N ''Submission Type'' menu, an NMS Stock ATS could check whether its submission was a ''Form ATS–N.'' Adopted Form ATS–N does not include a check box to indicate whether the filing is an ''Initial Form Filing,'' and revises the proposed check box under the ''Type of Filing'' menu to state ''*Initial* Form ATS–N'' (emphasis added).

[681] Proposed Form ATS–N included a check box, above the ''Submission Type'' menu, where an NMS Stock ATS could indicate that a filing was a ''Withdrawal of Initial Form Filing.'' Adopted Form ATS–N relocates this check box to the ''Type of Filing'' menu and revises it to say ''Withdrawal of Form ATS–N filing'' so that such check box can accommodate withdrawals of different types of filings, and not just a withdrawal of an initial Form ATS–N. Adopted Form ATS–N provides a space for the EDGAR accession number for the Form ATS–N filing to be withdrawn, which will enable market participants to identify the prior filing that is being withdrawn.

[682] An NMS Stock ATS is required to attach a document marked to indicate changes for a Form ATS–N amendment to Form ATS–N Part, I, Part II, and Part III, as applicable, and to highlight changes to ''yes'' or ''no'' answers or additions or deletions from its prior Form ATS–N filing. We believe that marked documents will help market participants and the Commission review Form ATS–N amendments in an efficient manner. We have changed the marked document requirement that was proposed. In the proposal the marked document was referred to a redline. We proposed for an NMS Stock ATS to submit two redlines—Exhibit 3A to show changes to Part III of proposed Form ATS–N and Exhibit 4A to show changes to Part IV of proposed Form ATS–N. We are adopting a requirement that ATSs provide a single exhibit, Exhibit 3, that contains a marked document to indicate changes to Parts I, II, and III. We believe that only requiring a single document may reduce the filing burden on ATSs. We believe that the marked documents will be helpful for market participants to review changes to Part I. In addition, to reflect the use of ''yes'' or ''no'' questions in adopted Form ATS–N, we are specifying that the marked document would be required to indicate changes in ''yes'' or ''no'' answers.

the part and item number of the Form ATS–N that is the subject of the change, provide a brief summary of the changes, and state whether or not the changes apply to all subscribers and the broker-dealer operator.[683] In addition, the NMS Stock ATS is required to provide the EDGAR accession number for the Form ATS–N filing to be amended, which will allow market participants to identify the filing that is being amended.

Furthermore, in response to comments, we are adopting Rule 304(b)(2)(iii), which provides that it will make public the cover page of a filed Form ATS–N material amendment upon filing and then make public the entirety of the material amendment following the expiration of the review period pursuant to Rule 304(a)(2)(ii).[684] In connection with this change, we are adopting Instructions that we believe will better solicit information that will notify market participants of the general subject matter of a Form ATS–N amendment, as well as the subscribers that would be affected by the amendment. For updating and correcting amendments, which will be made public upon filing, we believe that the information in the narrative can assist market participants in understanding the general nature of the change that the NMS Stock ATS is implementing.

In addition, we are making a technical change to relocate the check box indicating whether an initial Form ATS–N is being filed by a Legacy NMS Stock ATS operating pursuant to a Form ATS.[685]

2. Part I of Form ATS–N: Identifying Information

a. Part I: Identifying Information

Part I of adopted Form ATS–N combines the requests set forth in Parts I and II of proposed Form ATS–N, which covered, among other things, the name of the NMS Stock ATS and the NMS Stock ATS's broker-dealer operator's registration and contact information.[686] We are adding to Part I, Item 1 of adopted Form ATS–N, a new requirement, which was not proposed, that the filer check a box indicating whether the filer is a registered broker-dealer with the Commission to readily notify the Commission whether the filer is eligible to operate as an NMS Stock ATS pursuant to Regulation ATS.

To assist the Commission in more easily assessing whether the NMS Stock ATS has registered as a broker-dealer pursuant to Rule 301(b)(1) of Regulation ATS, we are adopting the proposed requirement that the NMS Stock ATS provide the name of the registered broker-dealer for the NMS Stock ATS (*i.e.,* the broker-dealer operator), as it is stated on Form BD, in Part I, Item 2 of adopted Form ATS–N. To the extent that a commercial or ''DBA'' (doing business as) name or names[687] are used to identify the NMS Stock ATS to the public, the Commission, or its SRO, or if a registered broker-dealer operates multiple NMS Stock ATSs, adopted Form ATS–N would require the full name(s) of the NMS Stock ATS under which business is conducted, if different,[688] in Part I, Item 3 of adopted Form ATS–N. We are also adopting Part II, Items 2 and 3 of proposed Form ATS–N as Part I, Item 4[689] of adopted Form ATS–N to require the NMS Stock ATS to provide the broker-dealer operator's SEC File Number and Central Registration Depository (''CRD'') Number.

We are not, however, including in adopted Part I the proposed requests that the NMS Stock ATS provide the effective date of its broker-dealer operator's registration with the Commission, the broker-dealer operator's legal status (*e.g.,* sole proprietorship, corporation), information about its date and place of formation if the broker-dealer operator is other than a sole proprietor, and the mailing address of the NMS Stock ATS (if not the same as the physical address). This identifying information is disclosed on Form BD or otherwise made available to the public and the Commission.[690] We do not believe that it is necessary to require the NMS Stock ATS to provide this information on Form ATS–N because other information requests about the registration status of the broker-dealer operator will inform the Commission about whether the NMS Stock ATS has met the condition of Rule 301(b)(1) of Regulation ATS.

We are adopting Part II, Item 4 of proposed Form ATS–N as Part I, Item 5 of adopted Form ATS–N to require the NMS Stock ATS to provide the full name of the national securities association of the broker-dealer operator and the effective date of the broker-dealer operator's membership with the national securities association. We are adding to Part I, Item 4 of adopted Form ATS–N the proposed requirement for an NMS Stock ATS to provide its Market Participant Identifier (''MPID'').[691] Providing the name of the NMS Stock ATS or DBAs and its MPID would identify the ATS to the public and Commission. One commenter states that the name, identity of the broker-dealer operator, any ''doing business as'' name, and the ATS's MPID are basic information critical to market participants and should be disclosed.[692]

Also, as was proposed, adopted Form ATS–N requires the NMS Stock ATS to provide a URL address for the website of the ATS, and in the signature block in Part IV of adopted Form ATS–N, the representative of the broker-dealer operator will also be required to provide his or her business contact information, including the person's name and title, telephone number, email address, and primary street address and mailing address (if different) of the NMS Stock ATS.[693] This information will facilitate

[683] Accordingly, the adopted Instructions have been enhanced from the proposed Instructions so that they provide more guidance to an NMS Stock ATS drafting the narrative. The proposed Instructions would have asked an NMS Stock ATS to ''[p]rovide a brief narrative description of the Amendment.'' *See* Proposal, *supra* note 2, at 81138.

[684] *See supra* Section IV.E.2.c.

[685] Proposed Form ATS–N set forth this check box in Part I, Item 4, whereas adopted Form ATS–N sets forth this check box on the cover page.

[686] The subsequent sections of adopted Form ATS–N have been renumbered accordingly. The disclosures regarding the ATS-related activities of the broker-dealer operator and its affiliates on the NMS Stock ATS are contained in Part II, the manner of operations disclosures are contained in Part III, and the contact information, signature block, and consent to service are contained in Part IV of adopted Form ATS–N.

[687] In some instances, an NMS Stock ATS may have several commercial or doing-business-as names, such as a name the ATS uses in its filings to the Commission, or to FINRA pursuant to FINRA Rule 6110. Adopted Form ATS–N requires the ATS to list all names under which it conducts business in Part I, Item 2.

[688] Part I, Item 2 of proposed Form ATS–N would have required an NMS Stock ATS to disclose the full name of the NMS Stock ATS under which its business is conducted, ''if any.'' Part I, Item 3 of adopted Form ATS–N only requires this disclosure ''if different.''

[689] The requirements of Part II, Items 2 and 3 of proposed Form ATS–N are consolidated into Part I, Item 4 of adopted Form ATS–N, and divided into two subparts.

[690] The mailing address for registered broker-dealers is available to the Commission via EDGAR. The mailing address, type of entity, and date when established for each broker-dealer is available to the public through FINRA.

[691] This requirement was previously a stand-alone request and has been moved to Part I, Item 5 of adopted Form ATS–N, which asks the NMS Stock ATS to disclose its national securities association, which would issue the MPID to the ATS. An MPID, or other mechanism or mnemonic, is used to identify a market participant for the purposes of electronically accessing a national securities exchange or an ATS. *See, e.g.,* Securities Exchange Act Release No. 63241 (November 3, 2010), 75 FR 69792 (November 15, 2010). ATSs are required to use a unique MPID when reporting trade information to FINRA. *See* FINRA ATS Reporting Approval, *supra* note 15.

[692] *See* HMA Letter at 10.

[693] Contact information of the broker-dealer operator's representative in Part IV of Form ATS–N will not be made public. In addition, consistent with the requirements of proposed Form ATS–N, the signature block in Part IV of adopted Form ATS–N requires the NMS Stock ATS to consent that

communication with the broker-dealer operator during the Commission review period of a Form ATS–N and later as necessary as part of the Commission's ongoing monitoring of the NMS Stock ATS.

We are modifying the proposed request for the physical street address of the NMS Stock ATS to also require the ATS to provide the physical street address, if any, of a secondary location for the ATS that may be used in the event that the primary physical location is not available. The location of an NMS Stock ATS, including its matching system, may differ from the main physical or mailing address of the broker-dealer operator. We believe that it is important for both the Commission and market participants to know where the NMS Stock ATS is located in the event of, for instance, a natural disaster that could impact market participants' ability to trade on the ATS and potential latency that could be experienced due to the location of the secondary site of the NMS Stock ATS. Also, we are concerned that market participants could be harmed from systems problems that necessitate a suspension or halt to trading at an NMS Stock ATS. Thus, we believe it is important to fully understand what, if any, trading procedures an NMS Stock ATS would follow if trading is suspended or stopped, which would be disclosed under Part III, Item 20 of adopted Form ATS–N. We believe that knowing any secondary location(s) for the NMS Stock ATS would be relevant to both the Commission's and market participants' understanding of how the ATS handles certain contingencies.

The main physical address and mailing address of the broker-dealer operator are provided on Form BD, so we do not believe it is necessary to publicly disclose this information on Form ATS–N.[694] Part II, Item 6 of proposed Form ATS–N provided that the NMS Stock ATS could indicate by check box that the broker-dealer operator is a sole proprietor and that the physical street address is a private residence, and that in such case, the private residential address would not be included in the publicly available version of the form.[695] One commenter asserts that Form ATS–N should require disclosure of all relevant addresses, and states its view that we should eliminate the proposed exception for NMS Stock ATSs out of a personal residence.[696] In light of this comment, we are not including in adopted Form ATS–N the proposed check box noting that the physical address of the matching system is at a sole proprietor's private residence. We agree that market participants should be aware of the physical addresses of the matching systems for all NMS Stock ATSs, regardless of whether they are at a sole proprietor's private residence. In addition, based on Commission experience, NMS Stock ATSs generally do not operate out of a sole proprietor's residence, and the Commission does not believe that the exception is necessary. We will therefore make the physical address of the matching system available for every Form ATS–N.[697]

Also, as was proposed, the Part I, Items 8 and 9 require an NMS Stock ATS to attach its most recently filed or amended Schedule A of the broker-dealer operator's Form BD disclosing information related to direct owners and executive officers, and its most recently filed or amended Schedule B of the broker-dealer operator's Form BD disclosing information related to indirect owners as Exhibits 1 and 2, respectively. In lieu of attaching those schedules, the NMS Stock ATS can indicate, via a checkbox, that the information under those schedules is available on its website and is accurate as of the date of the filing of the Form ATS–N. We continue to believe that these exhibits will help market participants identify the persons and entities that directly and indirectly own the broker-dealer operator and any potential associated conflicts of interest. We are requiring the NMS Stock ATS to provide this information on Form ATS–N, even though the same information is provided on Form BD, because information about ownership of the broker-dealer operator will enable market participants to better understand conflicts of interest that may arise therefrom, which is one of the central purposes of the form. As such, an NMS Stock ATS must file this information on Form ATS–N. We also continue to believe that it is appropriate for an NMS Stock ATS to provide this information using a URL address for these documents in lieu of attaching the actual documents to their Form ATS–N filings because the ATS's disclosures on Form ATS–N will provide the public with the required information. Part I, Item 10 of adopted Form ATS–N requires the NMS Stock ATS, for filings made pursuant to Rule 304(a)(2)(i) (*i.e.,* Form ATS–N amendments), to attach as Exhibit 3 a marked document to indicate changes to ''yes'' or ''no'' answers or additions or deletions from any item in Part I, Part II, Part III, as applicable.

b. Comments on Proposed Exhibit 1

We proposed to require that NMS Stock ATSs provide, in Exhibit 1 to Form ATS–N, a copy of any materials currently provided to subscribers or other person related to the operations of the NMS Stock ATS or the disclosures on Form ATS–N (*e.g.,* FIX protocol procedures, rules of engagement/manuals, frequently asked questions, marketing materials). We received several comments regarding Exhibit 1.[698] We are not adopting the proposed Exhibit 1 requirements to Form ATS–N.

Commenters express concerns that the requirements of Exhibit 1 are broad,[699] not relevant for purposes of facilitating ATS comparisons by market participants,[700] and would require unnecessarily cumbersome amount of disclosure.[701] Three commenters express concern about the requirement to make subscriber materials attached to Form ATS–N as exhibits public on the grounds that such documents may include confidential information.[702] Commenters propose that as an alternatives to the Exhibit 1 requirements, the Commission could make exhibits public only when they are responsive to certain categories of documents made available to users (such as FIX protocol procedures, rules of engagement, user manuals, frequently asked questions, and marketing materials) or are required to accurately respond to the questions on Form ATS–N,[703] or not make public certain

service of any civil action brought by, or notice of any proceeding before, the Commission or a SRO in connection with the ATS's activities may be given by registered or certified mail to the contact employee at the primary street address or mailing address, if different, of the NMS Stock ATS, or via email, at the addresses provided on this Form ATS–N.

[694] Part IV of adopted Form ATS–N, which will not be made public, requires the primary street address and mailing address of the NMS Stock ATS in order to facilitate the Commission contacting the NMS Stock ATS. *See supra* note 693.

[695] *See* Part II, Item 6 of proposed Form ATS–N.

[696] *See* HMA Letter at 11.

[697] Part I, Item 7 of adopted Form ATS–N.

[698] *See* SIFMA Letter at 7; Liquidnet Letter at 8; KCG Letter at 6; HMA Letter at 11; STANY Letter at 3; UBS Letter at 3; Level ATS Letter at 5.

[699] *See* SIFMA Letter at 7; Liquidnet Letter at 8; KCG Letter at 6.

[700] *See* KCG Letter at 6.

[701] *See* SIFMA Letter at 7.

[702] *See* Liquidnet Letter at 8; KCG Letter at 6; Level ATS Letter at 5. One of these commenters also expresses concern that the proposed requirement would require disclosure of subscriber agreements, which are individually negotiated and confidential. *See* Level ATS Letter at 5–6. Another one of these commenters is concerned that NMS Stock ATS operators would limit the amount of information shared with subscribers in order to avoid sharing that information with the public and its competitors. *See* Liquidnet Letter at 8.

[703] *See* Liquidnet Letter at 8.

information (such as electronic trading protocols or other customer agreements) and provide other ''proprietary'' information only to regulators upon request.[704] Another commenter suggests that rather than requiring formal amendments to Form ATS–N every time an ATS wishes to change or enhance marketing materials and similar disclosures, the Commission should allow an NMS Stock ATS to post the most recent versions of its marketing materials on its website.[705]

We are not adopting the proposed requirement that NMS Stock ATSs provide a copy of any materials currently provided to subscribers or other persons related to the operations of the NMS Stock ATS or the disclosures on Form ATS–N. We recognize that some of such materials could contain proprietary or other information that NMS Stock ATSs would not wish to make public due to confidentiality or competitive concerns. With respect to the comments in support of requiring subscriber materials to be made public,[706] or in support of a limited version of the Exhibit 1 requirements,[707] we believe that Form ATS–N is designed to elicit meaningful disclosures about how the NMS Stock ATS operates and the ATS-related activities of the broker-dealer operator and its affiliate. We believe that the vast amount of information that would have been contained in the Exhibit 1 materials will be disclosed in response to the request in Form ATS–N and that no longer requiring NMS Stock ATSs to produce these materials will reduce their burden and the potential disclosure of redundant information to the public.

One commenter states that while it does not support a requirement for public filing of exhibits, it supports requiring these exhibits to be filed with the Commission.[708] We are not adopting this suggestion. As discussed above, the purpose of this rulemaking is to expand the public transparency of NMS Stock ATSs; providing the proposed Exhibit 1 information to only the Commission would not serve this purpose.

Another commenter states that to the extent that ATSs would disclose statistics or data that had been requested by firms to help with their cost and best execution analysis, such an approach would be less helpful than a greatly enhanced, comprehensive disclosure for this information.[709] The commenter states that this information is essential. However, this commenter expresses concern that as a consequence of the Exhibit 1 requirements, NMS Stock ATSs may cease to provide subscribers with information and statistics to avoid having to make such information public. This commenter suggests that Exhibit 1 be revised to include all marketing materials, manuals, and fee information, but not customized statistics and information, provided that such statistics and information are otherwise publicly disclosed. We are not expanding market statistics that NMS Stock ATSs are currently required to disclose as part of this rulemaking.

c. ATS Governance Structure and Compliance Programs and Controls

In the Proposal, we asked if NMS Stock ATSs should be required to provide disclosure about their governance structure and compliance programs and controls to comply with Regulation ATS.[710] In response, we received one comment, which states that governance structures are likely to vary materially among ATSs, and that the Commission's goals in this area would best be served through the Commission's Office of Compliance Inspections and Examination's regular examination efforts.[711] We did not receive comments supporting a request for such information. We believe that it is appropriate to take an incremental approach to this topic and intends to monitor the effectiveness of the disclosures on adopted Form ATS–N. Should the Commission decide to take further action with regard to Form ATS–N's disclosure requirements, including adding requests about NMS Stock ATS governance structure and compliance programs and controls, the Commission would do so in a separate rulemaking in the future.

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

We believe that the interests of the broker-dealer operator or its affiliates sometimes compete against the interest of those that use the ATS's services. These competing interests, at times, may give rise to conflicts of interests for the broker-dealer operator and its affiliates or the potential for information leakage of subscribers' confidential trading information. As such, Part II of Form ATS–N is designed to provide subscribers and market participants with information about these competing interests, and in doing so, inform them about: (1) The operation of the NMS Stock ATS—regardless of the corporate structure of the NMS Stock ATS—and of its broker-dealer operator, or any arrangements the broker-dealer operator may have made, whether contractual or otherwise, pertaining to the operation of its NMS Stock ATS; and (2) ATS-related activities of the broker-dealer operator and its affiliates that may give rise to conflicts of interest for the broker-dealer operator and its affiliates or the potential for information leakage of subscribers' confidential trading information.

Commenters generally support disclosing information about potential conflicts of interest and information leakage, and we did not receive any comments opposing the principle that information related to conflicts of interest or information leakage on an NMS Stock ATS should be publicly disclosed.[712] Several commenters, however, state general concerns that the scope of the requests in Part III of proposed Form ATS–N is too broad.[713] A number of commenters believe that the requests regarding affiliates should be limited to descriptions of how the broker-dealer operator and its affiliates or business units directly interact with or affect the operations of the NMS Stock ATS.[714] For example, one commenter argues that proposed Form ATS–N would have required disclosures that are not meaningful to market participants and could possibly inhibit useful comparison of NMS Stock ATSs.[715]

Furthermore, a commenter argues that the proposed conflicts of interest requests regarding affiliates of the broker-dealer operator would have placed a significant burden on multi-service broker-dealers with a large number of affiliates, sometimes numbering in the hundreds.[716] Similarly, another commenter states that an NMS Stock ATS's broker-dealer operator may not be privy to certain

[704] *See* SIFMA Letter at 7–8.

[705] *See* UBS Letter at 3.

[706] *See* HMA Letter at 12 (supporting the adoption of a revised Exhibit 1 because it would enhance consistency of information to subscribers and the public and would be valuable to those seeking to evaluate NMS Stock ATSs). *See infra* note 709.

[707] *See* KCG Letter at 5–6 (supporting a requirement that information be made available to all market participants, and not selectively disclosed, but asserting that as drafted, Exhibit 1 is overly broad).

[708] *See* Liquidnet Letter at 9.

[709] *See* HMA Letter at 12.

[710] *See* Proposal, *supra* note 2, at 81041.

[711] *See* UBS Letter at 4.

[712] As discussed further below, several commenters suggest how to refine the specific requests proposed for Part III of Form ATS–N.

[713] *See, e.g.,* STA Letter at 4; KCG Letter at 8–9; SIFMA Letter at 4–8; Luminex Letter at 2–3; Fidelity Letter at 5; STANY Letter at 5; UBS Letter at 6; Morgan Stanley Letter at 5.

[714] *See* Fidelity Letter at 2 and 4; UBS Letter at 2–4; SIFMA Letter at 4, 8; Luminex Letter at 3; Markit Letter at 7–8.

[715] *See* Morgan Stanley Letter at 5.

[716] *See* UBS Letter at 2–5.

information about its affiliates for valid compliance reasons.[717]

As outlined below in more detail—and in response to both these general commenter concerns and commenter concerns that are more specific to particular disclosure requests, which are explained below—we are modifying the conflicts of interest requests to focus on: (1) The ability of business units or affiliates of the broker-dealer operator to enter, or direct the entry of, orders into the NMS Stock ATS and whether such business units or affiliates actually trade on the NMS Stock ATS; and (2) whether those business units and affiliates that do trade on the NMS Stock ATS receive any preferential treatment with respect to the services offered by the NMS Stock ATS.

We continue to believe that disclosures regarding the ATS-related activities of the broker-dealer operator and its affiliates will help enable market participants to assess potential conflicts of interest that may impact their trading on the ATS and assess the potential for information leakage. At the same time, we also believe that Form ATS–N should not require public disclosure of activities or affiliate relationships of the broker-dealer operator that do not relate to the NMS Stock ATS and thus, do not present a potential conflict of interest. We believe that the revisions to the proposed disclosure requests are responsive to commenters' concerns about the scope of the form's affiliate disclosures.

Furthermore, the burden of responding to the affiliate requests has been reduced from that which was proposed. First, the adopted affiliate disclosure requests focus on substantive information about how affiliated entities interact with the ATS and differences in how the ATS treats affiliates' orders. As such, frequent updates to Part II for ministerial or minor administrative changes by the ATS would not normally be necessary.[718] To the extent a ministerial or administrative change affects a disclosure on Form ATS–N in a non-material way, the NMS Stock ATS would, in most instances, only be required to file a quarterly updating amendment. Additionally, an NMS Stock ATS likely already has the necessary information about the services that it offers affiliates that trade on the ATS because of its current recordkeeping requirements,[719] and we believe that maintaining up-to-date Part II disclosures is justified by the benefit to market participants from public disclosure of conflicts of interest information.

Another commenter expresses concern that the proposed conflicts of interest requests would seek public disclosure of proprietary or confidential information that would pose unintended consequences or security risks to ATS operators.[720] We are sensitive to concerns about the burden of providing disclosures of potentially commercially sensitive information. In response to these commenter concerns, we have revised the wording of relevant requests to mitigate such concerns or provided guidance regarding the scope of certain disclosure requests, as further explained below.[721] We believe that in the vast majority of cases, the level of detail required by Form ATS–N should not require the public disclosure of commercially sensitive information. In the Proposal, we did not intend to require NMS Stock ATSs to publicly disclose such information.

We also note that the disclosure requests on Form ATS–N seek information that the Commission and some commenters believe to be important to market participants when evaluating an NMS Stock ATS as a potential trading venue. We believe that the disclosures on adopted Form ATS–N will provide market participants with information necessary to evaluate potential conflicts of interest and information leakage while not requiring NMS Stock ATSs to provide granular details about aspects of the ATS that it might consider to be commercially sensitive. Accordingly, to the extent an NMS Stock ATS believes that Form ATS–N requires the disclosure of what it believes to be commercially sensitive information, we believe that such disclosure is justified by the public benefit of the information required on Form ATS–N becoming publicly available.

On the other hand, one commenter expresses a specific concern that narrowing the universe of affiliates subject to disclosure could result in less relevant information being provided to the Commission and the public, as NMS Stock ATSs could structure their legal affiliations and operations to take advantage of unanticipated gaps in the rule.[722] This commenter states that the Commission should draw exemptions for certain affiliate relationships very narrowly and provide ''bright lines'' to help ensure that the requirements are clear and unambiguous, so that ATSs would not be permitted to determine whether to disclose an affiliate. This commenter also states that it recognizes that information on certain affiliates required by Form ATS–N may have little relevance to the Commission's review of the broker-dealer operator's Form ATS–N.[723] This commenter believes that rather than modifying the Proposal, this issue could be addressed by an NMS Stock ATS seeking relief tailored to its unique facts and circumstances pursuant to Section 36(a)(1) of the Exchange Act,[724] which permits the Commission to grant exemptions from any provision of a rule, to the extent such exemption is necessary or appropriate in the public interest and consistent with the protection of investors.[725]

We agree with this commenter that Form ATS–N requests regarding the ATS-related activities of the broker-dealer operator and its affiliates should provide clear and unambiguous requirements for NMS Stock ATSs. We also agree that Form ATS–N should be comprehensive enough to preclude an NMS Stock ATS from finding ''unanticipated gaps'' in the language to avoid disclosing critical aspects of its operations. We believe that the refinements to adopted Form ATS–N, as outlined above and further explained below, strike the appropriate balance between providing market participants with relevant information about potential conflicts of interest information and information leakage and the burden that Form ATS–N will place on NMS Stock ATSs. We do not believe that it is necessary to adopt all of the conflicts of interest requests as proposed and require NMS Stock ATSs to seek exemptive relief from certain disclosure requirements. Furthermore, the adopted definitions of ''affiliate'' and ''control'' are intended to encompass all relevant affiliate relationships between the broker-dealer operator and other entities that we believe would help market participants' evaluation of potential conflicts of interest.

1. Broker-Dealer Operator and its Affiliate Trading Activities on the NMS Stock ATS

a. Proposed Requests and Response to Comments

Part III, Item 1 of proposed Form ATS–N would have required disclosures

[717] *See* Fidelity Letter at 4.

[718] Updating amendments for non-material changes may be required, as appropriate.

[719] *See* 17 CFR 242.302.

[720] *See* SIFMA Letter at 6, 9.

[721] For example, in the request under Part II, Item 5 of adopted Form ATS–N, an NMS Stock ATS is only required to provide a summary of the terms and conditions for the use of products or services offered by the ATS.

[722] *See* Investor Advocate Letter at 8.

[723] *See id.* at 9.

[724] *See* 15 U.S.C. 78mm(a)(1).

[725] *See* Investor Advocate Letter at 9.

regarding non-ATS trading centers operated or controlled by the NMS Stock ATS's broker-dealer operator or any of its affiliates. Part III, Item 2 of proposed Form ATS–N would have required disclosures about the operation of any other NMS Stock ATSs operated by the broker-dealer operator or any of its affiliates. Part III, Item 5 of proposed Form ATS–N would have required disclosures regarding the broker-dealer operator's and its affiliates' trading activity on the NMS Stock ATS.

As discussed above, we received general comments on Part III of proposed Form ATS–N.[726] Additionally, we received comments specifically addressing the requests in Part III, Items 1, 2, and 5, of proposed Form ATS–N. In this section, we outline and address these more specific comments not previously outlined above. In Section V.C.1.b., we outline how we have consolidated much of the subject matter set forth in in Part III, Items 1, 2, and 5 of proposed Form ATS–N into Part II, Items 1 and 2 of adopted Form ATS–N.[727]

First, in addition to the general comments regarding the scope of the affiliate disclosure requests that are explained above, some commenters provide comments specific to proposed Part III, Item 1 and Part III, Item 5.[728] One of these commenters states that the scope of the proposed requests in Part III, Item 1 with regard to non-ATS trading centers of the broker-dealer operator or its affiliates could have prejudiced commercial strategy.[729] We believe that a list containing business units or affiliates of the broker-dealer operator that do not use the trading services of the NMS Stock ATS would not be as helpful to market participants as would a list of only those that trade on, or otherwise use the trading services of, the ATS.[730] Accordingly, we have revised these disclosures so that Part II, Items 1(a) and 2(a) of adopted Form ATS–N ask whether business units of the broker-dealer operator or its affiliates, respectively, are permitted to enter or direct the entry of orders into the ATS. This disclosure is designed to inform market participants about whether the ATS permits the broker-dealer operator or its affiliates to trade on the NMS Stock ATS. If the ATS permits the broker-dealer operator or its affiliates to trade on the ATS, the NMS Stock ATS will be required to only list the business units or affiliates that actually enter or direct the entry of orders into the NMS Stock ATS.

Furthermore, with regard to Part III, Item 5 of proposed Form ATS–N, one commenter states that affiliates or business units that indirectly send orders to an NMS Stock ATS through another entity or through services provided by another entity are not 'enter[ing]' orders ''on the NMS Stock ATS.'' [731] We believe that if a business unit or affiliate of the broker-dealer operator enters or directs the entry of orders into the ATS, market participants would find it useful to know that they may be trading against those business units, affiliates, or client orders entered by those entities. For example, if a principal trading desk of the broker-dealer operator or an affiliate uses a direct connection to the NMS Stock ATS or the broker-dealer operator's SOR to submit orders or trading interest into the ATS, the NMS Stock ATS must list that desk or affiliate on adopted Form ATS–N under Part II, Item 1(a) or 2(a), respectively. Likewise, if an affiliated asset manager of the broker-dealer operator uses the services of a third-party broker-dealer to route directed orders to the NMS Stock ATS (*i.e.,* the asset manager instructs the third-party broker-dealer to send its orders to the NMS Stock ATS), the NMS Stock ATS would be required to list that affiliated asset manager under Item 2(a). However, if that affiliated asset manager submits orders to a third-party broker-dealer, and that third-party broker-dealer using its own discretion, routes the orders of the asset manager into the affiliated NMS Stock ATS (*e.g.,* the third-party broker-dealer's SOR decides where to route the affiliated asset manager's orders using its routing table), the NMS Stock ATS would not be required to list the affiliated asset manager under Item 2(a); under such circumstances, the affiliate would not be ''directing'' orders to the ATS because the third-party broker-dealer is using its discretion to route the affiliate's orders and thus, not required to be listed under Item 2(a).

The adopted requests also specify the type of information that must be provided with regard to business units or affiliates of the broker-dealer operator. Specifically, Item 1(a) requires the NMS Stock ATS to name and describe each type of business unit of the broker-dealer operator that enters or directs the entry of orders and trading interest into the ATS (*e.g.,* NMS Stock ATS, type of trading desks, market maker, sales or client desk) and, for each business unit, to provide the applicable MPID and list the capacity of its orders and trading interest (*e.g.,* principal, agency, riskless principal). Item 2(a) requires the NMS Stock ATS to name and describe each type of affiliate that enters or directs the entry of orders and trading interest into the ATS (*e.g.,* broker-dealers, NMS Stock ATS, investment company, hedge fund, market maker, principal trading firm) and, for each of those affiliates, provide the applicable MPID and list the capacity of its orders and trading interest (*e.g.,* principal, agency, riskless principal). We believe that market participants will find it more relevant to know both the types of broker-dealer operator business units and affiliates that can trade in the NMS Stock ATS, and their trading activities, rather than, as proposed, having a potentially voluminous list of entities that might include some that cannot send or direct orders or trading interest to the ATS.

We also believe that the revised requests will reduce the burden on NMS Stock ATSs when completing the form because they will only require the NMS Stock ATS to list entities that trade on the ATS. The narrative responses to Items 1(a) and 2(a) could typically be kept up-to-date via Updating Amendments to Form ATS–N, which the ATS could file on a quarterly basis. However, we also note that in most cases, if the ''yes'' or ''no'' response to Items 1(a) or 2(a) changes (*e.g.,* the NMS Stock ATS changes its operations to allow affiliates to trade whereas they could not do so prior, or vice versa), the NMS Stock ATS would be required to file a material amendment. Accordingly, we believe that the scope of the requests in Part II, Items 1(a) and 2(a) of adopted Form ATS–N present a reasonable disclosure requirement for NMS Stock ATSs, particularly multi-service broker-dealers with many affiliates, without eliminating the requirements for the NMS Stock ATS to provide information about the NMS Stock ATS-related trading activities of broker-dealer operator and its affiliates, which we believe will be helpful for market participants.

Another commenter recommends that the Commission take a progressive approach of ''yes'' or ''no'' questioning for disclosures concerning affiliates of the broker-dealer operators that initially targets whether the affiliate directly

[726] *See supra* notes 712–715 and accompanying text.

[727] We also note that because Parts I and II of proposed Form ATS–N have been consolidated into a single section of adopted Form ATS–N, the disclosure requests about the ATS-related activities of the broker-dealer operator and its affiliates on the NMS Stock ATS are set forth in Part II of adopted Form ATS–N.

[728] *See* STA Letter at 4–5; UBS Letter at 5; SIFMA Letter at 10; LeveL ATS Letter at 4.

[729] *See* UBS Letter at 5.

[730] In the Proposal, the term ''non-ATS trading center'' was a defined term, but as explained above, adopted Form ATS–N will not use the term ''non-ATS trading center.'' *See supra* Section V.A.2.a.

[731] *See* UBS Letter at 6.

routes orders to the NMS Stock ATS.[732] The commenter recommends that the Commission require NMS Stock ATSs to state whether the ATS directly receives any order flow from an affiliated party, and if so, if the affiliated party is treated exactly the same as every other party with access to the ATS.[733] If the ATS answers in the affirmative, the commenter suggests that the ATS be required to identify the affiliated parties with access and the procedure for treatment of their orders, and if the ATS answers in the negative, the ATS would be required to identify parties with access and specifically articulate differences in treatment. The disclosure requests in Part II of adopted Form ATS–N are all structured in a ''yes'' or ''no'' format with follow-on narrative (as necessary), and we believe that the information this commenter recommends to be included in Form ATS–N is presented in a format that resembles that recommendation.[734]

Several commenters also opine that terms such as ''describe,'' ''any interaction or coordination,'' ''circumstances,'' and ''otherwise made known'' in the conflicts of interest requests might result in overbroad or lengthy responses that contain information which would not be helpful for market participants.[735] Another commenter cites Part III, Item 5 of proposed Form ATS–N as an example of a request that should be tailored to elicit information based on which ATS users can make informed decisions.[736] This commenter states that full-service broker-dealers often have hundreds of affiliates and business units that meet the definition of entities that may trade on the subject ATS, and that keeping such information current and accurate on an ongoing basis would bring additional burden with very little, if any, benefit to ATS users; the commenter believes that the request regarding trading on the ATS by the broker-dealer operator or its affiliates should be focused on whether they receive any preferential or differentiated treatment.

In response to these comments, we are eliminating the terms ''interaction and coordination,'' ''circumstances,'' and ''otherwise made known'' from these requests to reduce any potential ambiguity.[737] The adopted requests are closely tailored to solicit information that market participants find relevant to evaluating potential conflicts of interest on an NMS Stock ATS.[738] Further, both Part II, Items 1(a) and 2(a) of adopted Form ATS–N enumerate the type of information that an NMS Stock ATS must provide if it answers in the affirmative that the broker-dealer operator or its affiliates, respectively, is permitted to trade on the NMS Stock ATS.[739]

Furthermore, while the term ''describe'' is still used in Items 1(a) and 2(a), we are adding specific examples to each respective request to better explain the type of description that would necessary, such as ''NMS Stock ATS,'' ''trading desks,'' ''market maker,'' ''sales'' or ''client desk.'' Also, Items 1(b)–(d) and 2(b)–(d) specifically state that the NMS Stock ATS must explain (1) any differences between the treatment of those business units or affiliates of the broker-dealer operator and other subscribers regarding services offered and provided by the NMS Stock ATS; (2) whether any of those business units or affiliates of the broker-dealer operator have formal or informal arrangements with the NMS Stock ATS to provide liquidity to the NMS Stock ATS; and (3) how orders and trading interest in the NMS Stock ATS can be routed to a trading center of the broker-dealer operator or affiliate.[740]

Additionally, a commenter expresses concern that it may not be privy to some the information that proposed Form ATS–N would have required.[741] We note that ATSs are currently obligated to make and keep records of, among other things, subscribers to the ATS and daily summaries of trading, including the identity of the parties to the transactions.[742] We believe that the specific information sought in these requests with regard to affiliate trading activity on the ATS in adopted Form ATS–N should be maintained as part of the ATS's recordkeeping obligation without the ATS having to breach any information barriers or other compliance protections. To the extent that a business unit or affiliate of the broker-dealer operator triggers a disclosure obligation on Form ATS–N by directing the entry of orders into the NMS Stock ATS through a third-party broker-dealer, we believe that the broker-dealer operator should have—or be able to obtain—such information through appropriate internal compliance procedures to be responsive to Form ATS–N.

[732] *See* Fidelity Letter at 5.

[733] *See id.* at 5–6.

[734] Specifically, Item 2(a) requires the NMS Stock ATS to answer ''yes'' or ''no'' as to whether affiliates of the broker-dealer operator are permitted to enter or direct the entry of orders and trading interest into the NMS Stock ATS, and if the answer is ''yes'', the ATS must provide specific information about those affiliates and the capacity of the orders and trading interest that the affiliates enter onto the ATS. Item 2(b) then requires the NMS Stock ATS to answer ''yes'' or ''no'' as to whether the services that the NMS Stock ATS offers and provides to the affiliates identified in Item 2(a) are the same for all subscribers, and if the NMS Stock ATS answers no, it must explain any differences. We also note that the requests in Item 1(a) of adopted Form ATS–N with regard to trading activity of the broker-dealer operator on the NMS Stock ATS follow the same format as that in Item 2 of adopted Form ATS–N.

[735] *See* KCG Letter at 8–9; STA Letter at 4; SIFMA Letter at 10–11; 14. *See also* SIFMA Letter at 4, 8.

[736] *See* Morgan Stanley Letter at 5.

[737] While the terms ''interaction and coordination'' are no longer used in this disclosure request, many, if not all, Form ATS–N requests are designed to provide insight into how the broker-dealer operator, its affiliates, or third-parties interact or coordinate their activities with the NMS Stock ATS. Two examples of this include Part II, Items 3 and 5 of adopted Form ATS–N. Part II, Item 3 of adopted Form ATS–N requests specific information about how subscribers can opt out from interacting with orders of the broker-dealer operator or its affiliates. Likewise, Item 5 of adopted Form ATS–N requests specific information about how the ATS interacts with affiliates by requiring certain disclosures about products and services offered by the broker-dealer operator.

[738] Because we are replacing the term ''interaction and coordination'' with these enumerated points of information, aspects of the requests set forth in Part III, Items 1(b)(ii)–(iii) and 2(b)(i), (iii) of proposed Form ATS–N—which addressed the transmission of subscriber orders to other trading centers operated by the broker-dealer operator or its affiliates—are being either narrowed or eliminated from adopted Part II, Items 1 and 2. As explained further below, to the extent information that would have been required by Part III, Items 1(b)(ii)–(iii) and 2(b)(i), (iii) of proposed Form ATS–N is responsive to Part II, Item 4 of adopted Form ATS–N—which requests information about the NMS Stock ATS's arrangements with unaffiliated or affiliated trading centers—the NMS Stock ATS is required to provide that information in response to Item 4. *See infra* Section V.C.3.

[739] Another commenter suggests that the Commission's goals would be served more simply by requiring ATSs to categorize and disclose to their subscribers the nature of a counterparty (*i.e.,* agent, principal (including affiliates of the broker-dealer operator)) rather than using the term ''proprietary'' in the disclosures regarding trading activities of the broker-dealer operator and its affiliates. *See* UBS Letter at 6. The commenter believes that this type of disclosure would succinctly inform a subscriber about what type of counterparty was on the other side of a trade. *See id.* This commenter also notes that in the Proposal, the Commission discussed disclosures and potential additional regulations related to ''proprietary trading.'' *See id.* The commenter states that federal regulators have encountered challenges in defining this term as part of the ''Volcker Rule'' under the Dodd Frank Act. *See id.* In response to this comment, the Commission has, in the language of Part II, Items 1 and 2, listed several examples of the capacity in which the broker-dealer operator and its affiliates enter or direct the entry of orders (principal, agency, or riskless principal) to provide more guidance about the type of information sought by Form ATS–N. The Commission has also removed references to ''proprietary trading'' from Form ATS–N, and the adopted form's disclosure requirements refer to, when applicable, ''principal trading'' of the broker-dealer operator and its affiliates.

[740] With regard to the latter two of these items, adopted Form ATS–N requests that the description be provided in the applicable Part III item to reduce redundancy on the Form ATS–N, as further explained below.

[741] *See supra* note 717 and accompanying text.

[742] *See* 17 CFR 242.302.

We have also revised the requests in proposed Form ATS–N to reduce redundant disclosure requirements. First, Part II, Items 1 and 2 of adopted Form ATS–N now require the NMS Stock ATS to provide any narratives about differences in treatment between the broker-dealer operator, its affiliates, and other subscribers in Part III of the adopted form, and only cross reference those narratives in Part II (as opposed to providing a separate, likely redundant narrative in Part II). Second, Part II, Items 1 and 2 of adopted Form ATS do not require the NMS Stock ATS to disclose whether subscriber orders or other trading interest sent to the NMS Stock ATS are displayed or otherwise made known to a non-ATS trading center or another NMS Stock ATS operated by the broker-dealer operator or an affiliate.[743] Rather, any narrative with regard to order display (including a description about differences in services) is only required to be set forth in Part III, Item 15 of adopted Form ATS–N, which contains the order display requests of adopted Form ATS–N.

Finally, Part II, Items 1 and 2 of adopted Form ATS–N do not require the NMS Stock ATS to disclose how the business units and affiliates of the broker-dealer operator connect to the ATS, such as through a Financial Information Exchange (''FIX'') protocol.[744] Rather, any narrative about order entry in the NMS Stock ATS (including a description about differences in services) is only required by Part III, Item 5 of adopted Form ATS–N (Means of Entry). Accordingly, Part II of adopted Form ATS–N is designed to provide market participants with information about how the NMS Stock ATS interacts with the business units and affiliates of the broker-dealer operator so they can assess potential conflicts of interest, while minimizing disclosure requests that would be redundant with those contained in Part III.[745]

Another commenter believes that the information requested under proposed Part III, Item 5 of proposed Form ATS–N was too granular, duplicative of information required by Form BD, and that some of the prompts (*e.g.,* ''business unit,'' ''describe the circumstances'') were too open-ended, which could lead to non-standardized responses that would not be helpful to market participants.[746] This commenter recommends: (i) Eliminating proposed Item 5 and replacing the proposed disclosure requirements with yes/no prompts or short-answer responses that are more focused or narrowly tailored and (ii) eliminating or further clarifying and limiting the request for information of affiliates and business units.

As explained above, Part II, Items 1(a) and 2(a) of adopted Form ATS–N provide more specificity about the information requested about the ATS-related activities of business units and affiliates of the broker-dealer operator by providing examples of what we intend to solicit from these requests. To the degree that some information solicited by adopted Form ATS–N is duplicative of information sought on Form BD, the duplicative information is straightforward for the broker-dealer to reproduce on Form ATS–N, and we believe that market participants will derive greater benefit from this information being disclosed on a single form (Form ATS–N) as opposed to being spread across multiple forms filed with the Commission.

Similarly, another commenter cites the proposed requirement to provide the names of specific business units and algorithms that trade in NMS Stock ATS as an example of requested information that it believes is unnecessary to risk assessment.[747] We believe that some market participants may find it very helpful to know the identities and number of the broker-dealer operator's business units or affiliates that trade on the NMS Stock ATS. As indicated by commenters, some market participants may, for example, view trading on an ATS by a principal trading desk of the broker-dealer operator as presenting a potential conflict of interest for the broker-dealer operator, even if the ATS does not give any preference to the orders from that desk.[748]

We also received comments supporting the original requests under Part III, Items 1, 2, and 5 of proposed Form ATS–N. One commenter believes that these proposed disclosure requests are essential to alerting market participants about potentially significant advantages of the broker-dealer operator and its affiliates and to allow market participants to obtain a reasonable understanding of the conflicts of interest posed by the broker-dealer operator's or its affiliates' trading activities on the ATS.[749] In addition, a commenter states that the requests under Part III, Item 5 of proposed Form ATS–N would help investors better understand the relationship between the NMS Stock ATS, its broker-dealer operator, and any affiliates.[750] One commenter asserts that market participants would want to know the specific advantages afforded to the ATS operator or its affiliate, and urges the Commission to adopt proposed Part III, Item 5.[751] While we have refined the scope of certain subject matter in response to comment, we still believe that the disclosure requests in adopted Form ATS–N about the trading activities of the broker-dealer operator and its affiliates will allow for a high degree of transparency by capturing information that these commenters believe is important to market participants.

In addition, one commenter states that it supports the disclosure of potential trading activity on the NMS Stock ATS by the broker-dealer operator and its affiliates, but asserts that the disclosure requirement should be revised to allow for a series of progressive ''yes'' or ''no'' responses.[752] The commenter also notes that as proposed, it would be difficult for NMS Stock ATSs to maintain this disclosure on an on-going basis. As is

[743] This information would have been required under Part III, Item 1(b)(i) and 2(b)(ii) of proposed Form ATS–N.

[744] This information would have been required under Part III, Item 5(c) of proposed Form ATS–N.

[745] One commenter also recommends limiting the requests related to order routing from proposed Part III, Item 2 (Multiple NMS Stock ATS Operations) to the functions of ATS operation, as distinguished from other algorithmic or routing functions housed within the broker-dealer operator or an affiliate, which the commenter states appear to be addressed in Part III, Item 3 of proposed Form ATS–N, as well as asking what it means to ''remove'' an order. *See* SIFMA Letter at 11. *See infra* Section V.D.7. for a discussion of the required disclosures related to the removal of trading interest. Furthermore, this commenter recommends that Commission state whether the ATS operator should distinguish between parent and child orders for the disclosures related to Part III, Item 2 of proposed Form ATS–N. *See id.* Adopted Part III, Item 16(b) requires the NMS Stock ATS to either describe the affirmative instructions from a subscriber that must be obtained to route outside of the NMS Stock ATS or, if no instructions are required, the ATS must explain when orders in the ATS can be routed from the NMS Stock ATS. If the NMS Stock ATS breaks up a parent order into child orders or otherwise uses the fact that an order is a parent order or child order to make routing decisions, such information must be disclosed under Item 16(b).

[746] *See* SIFMA Letter at 14.

[747] *See* STANY Letter at 5.

[748] *See* Consumer Federation of America Letter at 7–8; HMA Letter at 13.

[749] *See* HMA Letter at 15–18. Another commenter states its support for the goal of a fulsome disclosure of circumstances where subscriber orders or other trading interest could leave an NMS Stock ATS and be made available to other areas of the broker-dealer operator. *See* UBS Letter at 5. The commenter states that market participants are entitled to know such information, but also states that the Commission's goal could be achieved through simplified disclosures. The commenter states that the proposed requirement to list the non-ATS trading centers controlled by the broker-dealer operator or its affiliates should only be required if orders are routed to the NMS Stock ATS from such trading centers or from the NMS Stock ATS to those trading centers.

[750] *See* MFA/AIMA Letter at 5.

[751] *See* HMA Letter at 16.

[752] *See* KCG Letter at 10.

explained above, we do not believe that maintaining up-to-date disclosures regarding the ATS-related trading activities of the broker-dealer operator and its affiliates will impose an unreasonable administrative burden on the NMS Stock ATS.

b. Adopted Part II, Item 1 and 2 of Form ATS–N; ATS-Related Trading Activities of the Broker-Dealer Operator and its Affiliates

As noted above, we reorganized and relocated the subject matter requested in Part III, Items 1, 2, and 5 of proposed Form ATS–N to Part II, Items 1 (''Broker-Dealer Operator ATS Trading Activities'') and 2 (''Affiliates ATS Trading Activities'') of adopted Form ATS–N. We have also revised the content of the proposed disclosure requests in response to public comment.[753]

Part II, Item 1(a) of adopted Form ATS–N requires the NMS Stock ATS to disclose whether business units of the Broker-Dealer Operator are permitted to enter or direct the entry of orders and trading interest (*e.g.,* quotes, conditional orders, or indications of interest) into the NMS Stock ATS. This request will be in the form of a ''yes'' or ''no'' question, and if the NMS Stock ATS answers ''yes,'' it will be required to name and describe each type of business unit of the Broker-Dealer Operator that enters or directs the entry of orders and trading interest into the ATS (*e.g.,* NMS Stock ATS, type of trading desks, market maker, sales or client desk) and, for each type of business unit, it must provide the applicable MPID and list the capacity of its orders or trading interest (*e.g.,* principal, agency, riskless principal). This request is designed to encompass the information request in Part III, Items 5(a) and (b) of proposed Form ATS–N and capture elements of Part III Items 1(a) and (b) and Items 2(a) and (b) of proposed Form ATS–N.

The subject matter covered by Part III, Item 1(b)(i) and (ii) is no longer included in the disclosure request contained in Part II, Item 1 of adopted Form ATS–N.[754] Likewise, the subject matter covered by Part III, Item 2(b)(i) and (ii) is no longer included in the disclosure request contained in Part II, Item 1 of adopted Form ATS–N.[755] Part II, Item 1 of adopted Form ATS–N focuses on the trading activity of the broker-dealer operator in the NMS Stock ATS, so those proposed disclosure requests are outside the scope of adopted Part II, Item 1. However, to the extent that information about the subjects in those proposed disclosure requests are responsive to other disclosure requests in adopted Form ATS–N—such as Part II, Item 3 (''Arrangements With Trading Centers) and Part III, Item 15 (''Display'')—the NMS Stock ATS must respond to those items accordingly.

Next, Part II, Item 1(b) of adopted Form ATS–N requires an NMS Stock ATS to disclose whether the services that the NMS Stock ATS offers and provides to the business units required to be identified in Item 1(a) are the same for all subscribers. This request will be in the form of a ''yes'' or ''no'' question, and if the NMS Stock ATS answers ''no,'' it will be required to explain any differences in response to the applicable Item number(s) in Part III of adopted Form ATS–N and list the applicable Item number(s). If there are differences that are not applicable to Part III of adopted Form ATS–N, the NMS Stock ATS must explain those differences in detail under Part II, Item 1.

Next, Part II, Item 1(c) of adopted Form ATS–N requires NMS Stock ATSs to disclose the broker-dealer operator's role as a liquidity provider on the NMS Stock ATS, if applicable.[756] This item requires the NMS Stock ATS to disclose—in the form of a ''yes'' or ''no'' question—whether there are any formal or informal arrangements with any of the sources of orders or trading interest of the broker-dealer operator identified in Item 1(a) to provide orders or other trading interest to the NMS Stock ATS (*e.g.,* undertaking to buy or sell continuously, or to meet specified thresholds of trading or quoting activity). If the NMS Stock ATS answers ''yes,'' it must identify the business unit(s) and respond to the request in Part III, Item 12, which sets forth the requests for liquidity providers on the NMS Stock ATS.[757] We believe that highlighting, in Part II of adopted Form ATS–N, whether the broker-dealer operator acts as a liquidity provider on the NMS Stock ATS will be helpful to market participants when evaluating the potential for conflicts of interest or information leakage on the trading platform. However, to reduce duplicative requests on adopted Form ATS–N, we are not requiring the NMS Stock ATS to provide a narrative in Part II of adopted Form ATS–N regarding the broker-dealer operator's liquidity provider activities because that information will be disclosed under Part III, Item 12 of adopted Form ATS–N.

Finally, Part II, Item 1(d) of adopted Form ATS–N requires the NMS Stock ATSs to disclose information about the routing of orders and trading interest to trading centers operated or controlled by the broker-dealer operator. This Item will require the NMS Stock ATS to disclose—in the form of a ''yes'' or ''no'' question—whether orders and trading interest in the NMS Stock ATS can be routed to a trading center of the broker-dealer operator. If the NMS Stock ATS answers ''yes,'' it must respond to the requests in Part III, Item 16 of adopted Form ATS–N, which sets forth the requests for disclosures about routing orders and trading interest out of the NMS Stock ATS. We continue to believe that disclosures regarding the routing of orders will provide subscribers with information about how their orders would be handled if they are not executed on the ATS and allow them to assess whether such routing could result in the leakage of confidential information, particularly if those orders are being routed to a trading center of the broker-dealer operator. Similar to Part II, Item 1(c) of adopted Form ATS–N, the request in Part II, Item 1(d) will not require a narrative because Part IV, Item 16 of adopted Form ATS–N requires disclosures about routing.[758]

Part II, Item 2(a) of adopted Form ATS–N requires an NMS Stock ATS to disclose whether affiliates of the broker-dealer operator are permitted to enter or direct the entry of orders and trading interest into the NMS Stock ATS. This request will be in the form of a ''yes'' or ''no'' question, and if the NMS Stock ATS answers ''yes,'' it must name and describe each type of affiliate that enters or directs the entry of orders and trading interest in the ATS (*e.g.,* broker-dealers, NMS Stock ATS, mutual fund, hedge fund, market maker) and, for each affiliate that trades on the NMS Stock ATS, the NMS Stock ATS must provide the applicable MPID and list the capacity(ies) of its orders and trading interest (*e.g.,* principal, agency, riskless

[753] The subject matter covered in Part III, Item 5.d of proposed Form ATS is now addressed in Part II Item 3 of adopted Form ATS–N. *See infra* Section V.C.2.

[754] These proposed requests would have required disclosures regarding the display of subscriber orders to a non-ATS trading center operated by the broker-dealer operator (proposed Part III, Item 1(b)(i)) and the execution of subscriber orders in a non-ATS trading center operated by the broker-dealer operator (proposed Part III, Item 1(b)(ii)), respectively.

[755] These proposed requests would have required disclosures about sending subscriber orders to another NMS Stock ATS operated by the broker-dealer operator in lieu of the NMS Stock ATS filing the form (proposed Part III, Item 2(b)(i)) and the display of subscriber orders to another NMS Stock ATS operated by the broker-dealer operator (proposed Part III, Item 2(b)(ii)), respectively.

[756] The requirement to disclose liquidity providers and the terms and condition of any arrangements with liquidity providers was set forth under Part IV, Item 1(d) of proposed Form ATS–N.

[757] *See infra* Section V.D.12.

[758] *See id.*

principal). As with Item 1, these requests are designed to encompass the information that would have been required under Part III, Items 5(a) and (b) of proposed Form ATS–N and is designed to capture elements of Part III Item 1(a) and Item 2(a) of proposed Form ATS–N.[759]

Next, Part II, Item 2(b) of adopted Form ATS–N requires an NMS Stock ATS to disclose whether the services that the NMS Stock ATS offers and provides to the affiliates required to be identified in Item 2(a) are the same for all subscribers. This request is in the form of a ''yes'' or ''no'' question, and if the NMS Stock ATS answers ''no,'' it will be required to explain any differences in response to the applicable Item number(s) in Part III of adopted Form ATS–N, as required, and list the applicable Item number(s). If there are differences that are not applicable to Part III of adopted Form ATS–N, the NMS Stock ATS must explain those differences in detail under Part II, Item 2.[760]

Part II, Item 2(c) of adopted Form ATS–N requests information about the role of the broker-dealer operator's affiliates as liquidity providers on the NMS Stock ATS, if applicable. This item requires the NMS Stock ATS to disclose—in the form of a ''yes'' or ''no'' question—whether there are there any formal or informal arrangements with affiliates of the broker-dealer operator identified in Item 2(a) to provide orders or other trading interest to the NMS Stock ATS (*e.g.,* undertaking to buy or sell continuously, or to meet specified thresholds of trading or quoting activity). If the NMS Stock ATS answers ''yes,'' it must identify the affiliates and respond to the request in Part III, Item 12, which sets forth the required disclosures for liquidity providers on the NMS Stock ATS.

Finally, Part II, Item 2(d) of adopted Form ATS–N requires an NMS Stock ATS to disclose information about routing orders and trading interest out of the NMS Stock ATS to a trading center operated and controlled by affiliates of the broker-dealer operator. This item will require the NMS Stock ATS to disclose—in the form of a ''yes'' or ''no'' question—whether orders and trading interest in the NMS Stock ATS can be routed to a trading center operated or controlled by an affiliate of the broker-dealer operator. If the NMS Stock ATS answers ''yes,'' it must respond to request in Part III, Item 16, which sets forth the required disclosures for routing orders and trading interest out of the NMS Stock ATS.

2. Order Interaction With Broker-Dealer Operator; Affiliates

Part II, Item 3 of adopted Form ATS–N requests information about the interaction of orders of between unaffiliated subscribers to the ATS and orders of the broker-dealer operator and its affiliates in the NMS Stock ATS. Part II, Item 3(a) of adopted Form ATS–N requires an NMS Stock ATS to disclose whether a subscriber can opt out of interacting with orders and trading interest of the broker-dealer operator in the NMS Stock ATS, and Part II, Item 3(b) requires an NMS Stock ATS to disclose whether a subscriber can opt out of interacting with the orders and trading interest of an affiliate of the broker-dealer operator in the NMS Stock ATS.[761] Part II, Item 3(c) of adopted Form ATS–N requires the NMS Stock ATS to disclose whether the terms and conditions of the opt-out processes for the broker-dealer operator and affiliates required to be identified in Items 3(a) and (b) are the same for all subscribers. The content of these requests are intended to cover the subject matter contained in Part III, Item 5(d) of proposed Form ATS–N.[762]

We believe that is helpful to market participants for the subject matter covered by proposed Part III, Item 5(d) to be a stand-alone question in adopted Form ATS–N. Such information is important to unaffiliated market participants trading on an ATS because some unaffiliated subscribers may not wish to interact with the order flow of the broker-dealer operator or its affiliates. This disclosure will help market participants understand whether and how they may avoid trading with the broker-dealer operator and its affiliates should they elect to use the services of the NMS Stock ATS.

As explained above, we received several comments about the proposed requests addressing ATS-related activities of the broker-dealer operator and its affiliates, including the request set forth in Part III, Item 5. In addition to these comments, one commenter opines that if a subscriber desires to opt out of trading with the broker-dealer operator's principal orders, the broker-dealer operator should be obliged to follow and implement the stated instruction.[763] This rulemaking addresses enhanced disclosure requirements for NMS Stock ATSs, and not regulations to require certain actions by NMS Stock ATSs outside of the disclosures and other requirements specifically enumerated herein.

3. Arrangements With Trading Centers

Part III, Item 4 of proposed Form ATS–N requested disclosures about arrangements the broker-dealer operator, or any of its affiliates, has with unaffiliated trading centers. The subject matter covered in Part III, Item 4 of proposed Form ATS–N is under Part II, Item 4 of adopted Form ATS–N.

The Commission received several comments regarding disclosure requests about arrangements with unaffiliated trading centers. Three commenters support the public disclosure of preferential arrangements with third parties.[764] One of these commenters, while supporting the disclosure of preferential arrangements in principle, believes the requests in Part III, Item 4 of proposed Form ATS–N could be too exhaustive and should be narrowed to focus on preferential arrangements.[765] Similarly, another commenter believes the central concern around affiliate relationships should focus on whether a third-party entity has differentiated or unique access to an ATS.[766] Another commenter believes that the broker-dealer operators of NMS Stock ATSs should not be required to provide proprietary information to the public under this disclosure, stating that in instances where SORs operate outside of the NMS Stock ATS and make routing decisions independent of the NMS Stock ATS, the appropriate source of information sought by the Commission

[759] Also like Part II, Item 1(a) of adopted Form ATS–N, Item 2(a) does not contain the subject matter covered by Part III, Item 1(b)(i) and (ii) and Part III, Item 2(b)(i) and (ii) of proposed Form ATS–N, but to the extent that information about the subjects in those proposed requests are responsive to other requests in adopted Form ATS–N, the NMS Stock ATS must respond to those items accordingly.

[760] We have incorporated the requests of proposed Part III, Item 9 of proposed Form ATS–N into individual Part II requests in adopted Form ATS–N, and thus, there is no longer a stand-alone question addressing differences among the services provided to the broker-dealer operator or its affiliates and other subscribers. *See supra* Section V.C.7.

[761] For example, if a broker-dealer operator uses its SOR or algorithms to submit subscriber orders into the ATS, any steps that either the broker-dealer operator or the subscriber would have to take so that those orders are opted-out of trading with the broker-dealer operator or its affiliates would be required disclosures under Items 3(a) and 3(b), respectively.

[762] Part III, Item 5(d) of proposed Form ATS–N would have required the NMS Stock ATS to describe any means by which a subscriber can be excluded from interacting or trading with orders or other trading interest of the broker-dealer operator or its affiliates on the NMS Stock ATS.

[763] *See* UBS Letter at 6.

[764] *See* HMA Letter at 16; UBS Letter at 5; SIFMA Letter at 13.

[765] *See* SIFMA Letter at 13.

[766] *See* UBS Letter at 5.

is the operator of the SOR, not the operator of the NMS Stock ATS.[767]

We have not limited the disclosures required under adopted Part II, Item 4 of adopted Form ATS–N to preferential arrangements or other unique access given to unaffiliated third parties, as suggested by these commenters. We believe that some market participants may consider other arrangements with third parties relevant to their evaluations of an NMS Stock ATS as a potential trading venue. For example, if an NMS Stock ATS has a mutual access agreement with another ATS, a market participant may take into account the fact that its order may eventually route to another ATS, even if orders from the other ATS do not receive preferential treatment on the ATS.

The disclosure requests in Part II, Item 4 of adopted Form ATS–N will provide market participants with information necessary to evaluate potential conflicts of interest or sources of information leakage. For example, Part II, Item 4 of adopted Form ATS–N requires the disclosure of an arrangement between the NMS Stock ATS and an unaffiliated NMS Stock ATS under which the NMS Stock ATS would route orders or other trading interest to the unaffiliated NMS Stock ATS for possible execution before routing to any other destination. By way of further example, Item 4 also requires disclosure of an arrangement pursuant to which any subscriber orders routed out of the unaffiliated NMS Stock ATS would be routed first to the NMS Stock ATS before any other trading center; it also requires a summary of the terms and conditions of the arrangement such as, for example, whether the NMS Stock ATS is providing monetary compensation or some other brokerage service to the unaffiliated NMS Stock ATS.

In response to the above commenter concerns, however, Part II, Item 4 of adopted Form ATS–N includes some modifications. First, the adopted disclosure request in Part II, Item 4 replaces the proposed phrase ''describe the terms of the arrangement'' with the phrase ''provide a summary of the terms and conditions of the arrangement.'' We believe that replacing the term ''describe'' with a requirement to ''provide a summary'' will make it clear that the scope of the adopted request should not typically require the NMS Stock ATS to provide granular details about its arrangements that the ATS might consider to be commercially sensitive.

Second, Part II, Item 4 of adopted Form ATS–N does not use the phrase ''*person(s), or affiliate(s) of such person(s)* that operates a trading center'' when establishing the scope of the request, as was proposed. Rather, the adopted request focuses on arrangements with trading centers themselves. One commenter argues that to the extent a third-party entity solely has access to functionality disclosed elsewhere in proposed Form ATS–N, proposed Part III, Item 4 would not be necessary.[768] We did not intend for the proposed request to encompass, for example, a subscriber agreement between a third-party broker-dealer, who happens to also operate a trading center, and the NMS Stock ATS under which the third-party broker-dealer submits orders to the ATS in the same manner as all other subscribers. Rather, the purpose of the request in Part II, Item 4 is to publicly disclose any arrangement with another trading center that may be relevant to a conflicts of interest analysis, such as one under which the NMS Stock ATS and a third-party NMS Stock ATS send their respective subscriber orders to one another.

Additionally, we are including in Part II, Item 4 of adopted Form ATS–N examples of the types of arrangements that would be responsive to the disclosure request, such as mutual or reciprocal access arrangements[769] and preferential access arrangements[770] to clarify that the disclosures required by Part II, Item 4 of adopted Form ATS are not so broad as to require the NMS Stock ATS to list each unaffiliated subscriber that accesses its system. We are also revising the request in Part III, Item 4 of proposed Form ATS–N to only require disclosures about arrangements with trading centers to access the NMS Stock ATS's services in adopted Form ATS–N. For example, an NMS Stock ATS must provide details about how it disseminates orders or trading interest submitted by a trading center under a unique arrangement with that trading center such a reciprocal access agreement; these types of arrangements would typically be different than the ATS's standard contract with subscribers to access the services of the ATS. We believe that this change will better define the scope of information responsive to the Part II, Item 4 of adopted Form ATS–N while not removing any proposed disclosure requirements.

Likewise, the Commission is modifying the wording of the proposed disclosure requests to require the NMS Stock ATS to disclose formal or informal arrangements for a trading center ''to access the NMS Stock ATS services.'' Adding the word ''services'' clarifies that the disclosure must explain the services provided to the unaffiliated trading center after it connects to the ATS. An NMS Stock ATS can provide various types of services to subscribers and the request, as revised, is tailored for those ATSs services that a subscriber may use.

Next, the scope of Part III, Item 4 of proposed Form ATS–N only encompassed arrangements with unaffiliated trading centers, but Part II, Item 4 of adopted Form ATS–N encompasses arrangements with both unaffiliated and affiliated trading centers. As explained above, the requests set forth in Part III, Items 1(b)(ii)–(iii) and 2(b)(i), (iii) of proposed Form ATS–N—which addressed the transmission of subscriber orders to other trading centers operator by the broker-dealer operator or its affiliates—have either been narrowed or eliminated from Part II, Items 1 and 2 of adopted Form ATS–N. However, to the extent that an NMS Stock ATS has an arrangement with a trading center operated by the broker-dealer operator or an affiliate, we believe that market participants are still likely to consider information about such arrangements relevant to their evaluation of an NMS Stock ATS as a potential trading venue and such an arrangement may raise concerns about conflicts of interest or information leakage.[771]

Additionally, Part III, Item 4 of proposed Form ATS–N would also have required the disclosure of mutual access arrangements between an NMS Stock

[767] *See* STANY Letter at 4.

[768] *See* UBS Letter at 5.

[769] Mutual or reciprocal access arrangements may be, for example, an NMS Stock ATS that allows another broker-dealer operator to access its ATS for liquidity in return for the ability to access the liquidity of the other broker-dealer's ATS.

[770] Preferential routing arrangements may be, for example, an NMS Stock ATS being the first routing destination on the routing table of a third party's algorithm.

[771] For example, a potential conflict of interest could arise where an NMS Stock ATS has a preferred routing arrangement with an affiliated, non-ATS trading center wherein all orders sent to the NMS Stock ATS would first be routed to the affiliated, non-ATS trading center before entering the NMS Stock ATS in exchange for monetary compensation. Such an arrangement could also pose a risk of information leakage because the non-ATS trading center would know that any unexecuted orders would then be routed to the NMS Stock ATS. Alternatively, if an arrangement between the NMS Stock ATS and affiliated trading center provides that any subscriber orders routed out of the NMS Stock ATS would be first routed to the affiliated, non-ATS trading center, the NMS Stock ATS may have an incentive to remove subscribers' orders from the NMS Stock ATS and allow the affiliated non-ATS trading center the opportunity to execute those orders.

ATS and other trading centers whereby, for example, a broker-dealer operator, or its affiliate, may offer access to the broker-dealer operator's NMS Stock ATS in exchange for access to another NMS Stock ATS of operated by another broker-dealer. Accordingly, Part II, Item 4 of adopted Form ATS–N is designed to inform subscribers about these arrangements as such information may impact a subscriber's experience on the NMS Stock ATS and allow them to evaluate potential conflicts of interest of the broker-dealer operator and its affiliates.[772]

Finally, in Part II, Item 4 of adopted Form ATS–N, the Commission has divided the request into two subparts—one subpart addressing the broker-dealer operator's arrangements, and another subpart addressing its affiliates' arrangements. This is a technical edit so that the format of Part II, Item 4 of Form ATS–N is consistent with the format of Part II, Items 1–3 above.

4. Other Products and Services

Part III, Item 3 of proposed Form ATS–N would have required disclosures about products and services offered to subscribers used in connection with trading on the NMS Stock ATS. We are adopting Part III, Item 3 of proposed Form ATS–N as Part II, Item 5 of adopted Form ATS–N; however, we are modifying the proposed disclosure request in response to commenter concerns.

One commenter states that the proposed requests would have helped investment funds assess an NMS Stock ATS as a potential execution venue by improving their ability to understand all functionality offered by the broker-dealer operator and whether the broker-dealer operator makes all services available in a fair and impartial manner.[773] Some commenters, while not opposing the general category of disclosure requested in proposed Part III, Item 3, believe the scope of the requests regarding products and services should be narrowed.[774] One commenter agrees with the Commission's approach, but states that the disclosure requirement should be refined to cover products or services used in connection with trading NMS stocks, not just trading on the NMS Stock ATS.[775] Another commenter believes that distinct products and services provided by an affiliate of the broker-dealer operator to a client—who happens to be an ATS subscriber—but which are not directly linked to the ATS subscription should not be captured by this requirement, particularly, when the client/subscriber ultimately may or may not use those services to trade on the ATS.[776] Another commenter suggests only requiring an ATS to list or outline broad categories of products or services rather than requiring the NMS Stock ATS to ''describe'' its products or services.[777] Another commenter states that each relationship and customer experience is different and free-standing in certain respects, and believes that the proposed request would potentially require the disclosure of a whole array of products or services, the enumeration of which would add little value and be burdensome to maintain/update.[778]

Broker-dealer operators of NMS Stock ATSs may, directly or indirectly through an affiliate, offer products or services to subscribers for the purpose of, for example, submitting orders, or receiving information about displayed interest, in the ATS.[779] We continue to believe that subscribers would want to know the products or services that the broker-dealer operator or its affiliates may offer for the purpose of effecting transactions, or submitting, disseminating, or displaying orders and trading interest on the NMS Stock ATS because such products or services may impact the subscribers' access to, or trading on, the ATS.

We note that many broker-dealer operators are multi-service broker-dealers and provide routing and execution services in NMS stocks separate from their ATS services. We further note that customers of a broker-dealer operator could be both subscribers to its ATS and customers of the broker-dealer operator that use trading products and services outside of the ATS. To the extent that a customer is a subscriber to the NMS Stock ATS and is offered use of products and services by the broker-dealer operator or its affiliate for the purpose of effecting transactions or submitting, disseminating, or displaying orders and trading interest in the NMS Stock ATS, Part II, Item 5 of adopted Form ATS–N would require disclosures about those products or services. However, the adopted requests in Part II, Item 5 would not encompass trading products or services offered by the broker-dealer operator to customers that are not for the purpose of effecting transactions or submitting, disseminating, or displaying orders and trading interest in the NMS Stock ATS.

Two commenters express opinions about how the scope of the proposed requests relate to the scope of an NMS Stock ATS's operations. One commenter states that the Proposal does not draw sufficient distinction between the operations of the NMS Stock ATS and other products and services of the broker-dealer operator, including agency execution services, market making and algorithms.[780] Another commenter states that the Commission should clarify the terminology used in this item because it appears to conflate the NMS Stock ATS itself with routing and algorithmic functions.[781] Whether a product or service is part of the ATS requires a facts and circumstances analysis. Based on Commission experience, broker-dealers generally offer various products and services to customers, which include execution and routing services, such as a SOR. These products and services are generally independent of each other, and how such products and services may be used by a subscriber to an NMS Stock ATS varies. However, to the extent that a SOR (or similar functionality) or algorithm performs a function of the ATS by bringing together the orders for securities of multiple buyers and sellers using established nondiscretionary methods, the SOR (or similar functionality) or algorithm may be part of the NMS Stock ATS.[782]

Another commenter states that Form ATS–N should only require disclosure

[772] *See* Proposal, supra note 2, at 81049. Furthermore, as discussed in the Proposal, an NMS Stock ATS would not be prohibited from establishing arrangements with other trading centers, provided that such arrangements comply with other applicable laws and rules, including applicable federal securities laws and Regulation ATS. A broker-dealer operator may have valid business reasons for it or its affiliates to have formal or informal arrangements with an unaffiliated person(s), or affiliate(s) of such person that operates a trading center regarding access to the NMS Stock ATS. *See id.* at 81049, n.401.

[773] *See* ICI Letter at 7.

[774] *See* HMA Letter at 16; KCG Letter at 9; SIFMA Letter at 11–13; UBS Letter at 5; STANY Letter at 4.

[775] *See* HMA Letter at 16.

[776] *See* KCG Letter at 9. The commenter states that, in many cases, an ATS operator may be unaware of products and services separately provided by an affiliate to a customer that are entirely independent from and may pre-exist the client's ATS subscription. *See id.*

[777] *See* SIFMA Letter at 12.

[778] *See* UBS Letter at 5. The commenter also states that a forced public listing of a broker-dealer's products and services may be inconsistent with the broker-dealer's traditional approach and preferences for marketing. *See id.*

[779] *See* Proposal, *supra* note 2 at 81048. For example, if a subscriber purchases a service offered by the broker-dealer operator of an NMS Stock ATS, the broker-dealer operator might also provide that subscriber more favorable terms for its use of the NMS Stock ATS than other subscribers who do not purchase the service. Such favorable terms could include fee discounts or access to a faster connection to the NMS Stock ATS.

[780] *See* STANY Letter at 4.

[781] *See* SIFMA Letter at 12–13.

[782] For a further discussion about when a broker-dealer operator's SOR (or similar functionality) or algorithm may operate as part of its NMS Stock ATS, see Section V.D.5 below.

of products or services at a high level and that commercially sensitive or proprietary information should not be required to be publicly disclosed.[783] As noted above, we are sensitive to concerns about the potential disclosure of commercially sensitive information. The proposed request stated that NMS Stock ATSs must ''[d]escribe the products or services.'' To address commenter concerns regarding the potential disclosure of commercially sensitive information in this disclosure request, the adopted disclosure request requires the NMS Stock ATS to provide only a summary of the terms and conditions for the products and services disclosed and to explain how the product or service is used with the ATS in the applicable Item number in Part III of adopted Form ATS–N. As explained above, we believe that requiring only a summary narrative would normally not require the broker-dealer operator to disclose commercially sensitive information.[784]

To reduce redundancy and streamline disclosures, we are requiring NMS Stock ATSs to provide a narrative explaining the use of the product or service required to be disclosed in Part II, Item 5 in the relevant item in Part III of adopted Form ATS–N. We are also adding to Part II, Item 5 of adopted Form ATS–N the language ''for the purpose of'' before effecting transactions, or submitting, disseminating, or displaying orders and trading interest on the NMS Stock ATS to make clear that this Item requests information about those products or services offered by the broker-dealer operator or its affiliate that have a nexus to the ATS services. We believe that the disclosure requests in Part III of adopted Form ATS–N are limited to information that we believe is necessary for market participants to understand the operation of the ATS, without requiring a level of detail that would normally require the disclosure of commercially sensitive information.

In summary, we are modifying the proposed requests being adopted as Part II, Item 5 of Form ATS–N to clarify that the NMS Stock ATS is only required to provide information about products and services offered to subscribers for the purpose of effecting transactions, or submitting, disseminating, or displaying orders and trading interest on the NMS Stock ATS. Specifically, we have modified the proposed language to state that the broker-dealer operator must disclose any products or services offered to subscribers for the purpose of effecting transactions or for submitting, disseminating, or displaying orders and trading interest in the NMS Stock ATS (*e.g.,* algorithmic trading products that send orders to the ATS, order management or order execution systems and market data feeds). We believe that this language makes a sufficient distinction between products and services that relate to the functions of the ATS and those that do not; disclosures about the latter would not be required.[785]

In addition, we have divided the disclosure requests into four subparts: (i) One subpart addresses the products or services that the broker-dealer operator offers to subscribers for the purpose of effecting transactions or for submitting, disseminating, or displaying orders and trading interest in the NMS Stock ATS; (ii) another subpart addresses products or services that the broker-dealer operator's affiliates offer to subscribers for the purpose of effecting transactions or for submitting, disseminating, or displaying orders and trading interest in the NMS Stock ATS; and (iii) the other two subparts address any differences between the terms and conditions of the services or products required to be identified in Item 5 among the broker-dealer operator, affiliates, and unaffiliated subscribers.[786] This is a technical edit to the proposed disclosures so that the format of Part II, Item 5 is consistent with the format of Part II, Items 1–4 above.

5. Activities of Service Providers

a. Shared Employees

Part III, Item 7 of proposed Form ATS–N would have required disclosures about employees of the broker-dealer operator that service the operations of the NMS Stock ATS and also service other business units of the broker-dealer operator or any of its affiliates (''shared employees''). We received several comments on Part III, Item 7 of proposed Form ATS–N. We are adopting Part III, Item 7 of proposed Form ATS–N with modifications in response to commenters' concerns, as further explained below, and we are also renumbering Part III, Items 7 of proposed Form ATS–N as Part II, Item 6(a) of adopted Form ATS–N.

One commenter recommends eliminating the requests related to shared employees because the commenter believes that keeping the item up-to-date would be too burdensome and unnecessary as employee roles and responsibility shift periodically.[787] Similarly, another commenter believes that while accountability for the safeguarding of customer information is essential, the commenter is uncertain as to why the disclosures regarding shared employees under Part III, Item 7 of proposed Form ATS–N need to be public, particularly in light of the proposal's other reforms regarding the safeguarding of customers' confidential information.[788] We continue to believe that disclosures about shared employees with access to confidential trading information from the NMS Stock ATS would help market participants evaluate circumstances under which a conflict of interest may arise for the NMS Stock ATS or when there is the potential for information leakage involving shared employees. For example, we believe that market participants would likely want to know if an employee of the broker-dealer operator that is responsible for the operations of a system containing confidential subscriber trading information from the NMS Stock ATS is also responsible for supporting the principal trading activity of the broker-dealer operator. As discussed further below, however, we are modifying the proposed request about shared employees on Form ATS–N to more narrowly tailor the request in response to comments, which should reduce the proposed reporting burden.

Some commenters believe that the Commission should narrow the scope of the shared employee request to shared employees who may have access to or knowledge of confidential subscriber information or orders.[789] One commenter states that market participants would need to dedicate resources to determine which employees actually could pose risks of information leakage without limiting the disclosure in this manner.[790] Another commenter also opines that it would be more useful to limit the information

[783] *See* STANY Letter at 4.

[784] We note that, as part of our review of Form ATS–N responses, we intend to monitor the level of summary information provided on the form for completeness to help ensure that such information is responsive to the form and is not designed to avoid meaningful disclosure.

[785] The revised wording for this request also provides examples of the types of services that would be encompassed by this question, such as algorithmic trading products that send orders to the ATS, order management or order execution systems, and market data feeds.

[786] For example, if a broker-dealer operator offers subscribers alternative algorithms to handle orders, including sending such order to the NMS Stock ATS, and there is a difference in the speed or latency in which each of the alternatives transmits information, such differences in speed or latency would need to be disclosed in Part II, Item 5 of adopted Form ATS–N.

[787] *See* SIFMA Letter at 16.

[788] *See* HMA Letter at 17.

[789] *See* ICI Letter at 5–6; STANY Letter at 4.

[790] *See* ICI Letter at 5–6.

about shared employees to those with access to confidential information.[791] We acknowledge that for some broker-dealer operators—particularly multi-service broker-dealers for which the NMS Stock ATS is one of many business units—some employees provide purely administrative services or other support services to multiple business units that would not make them privy to confidential subscriber trading information of the NMS Stock ATS. In response to these comments, the adopted request requires disclosures only about shared employees with access to confidential trading information on the ATS.

Furthermore, some commenters state that information about shared employees should not contain certain personal information about the employee, such as the employees name, title, or position.[792] Several of these commenters believe that such public disclosures would provide little benefit to market participants because, for example, titles change frequently, lack standard meaning across firms and businesses, and do not provide meaningful information about potential information leakage on the ATS.[793] In response to these comments, we have eliminated the requirement that the NMS Stock ATS identify the name and position or title of shared employees because we agree that any benefit to providing personally identifiable information about shared employees would not be justified by the potential negative effects to the individual whose personally identifiable information has been posted. We also agree that such information could become stale or change frequently, resulting in an increased burden on NMS Stock ATSs to keep that information up-to-date.

One of the above commenters also states that, while it supports disclosure to the Commission of relevant information concerning individuals responsible for ATS functions, it believes that the request concerning shared employees should be limited to ''categories of service'' as opposed to individual positions and titles.[794] As explained above, we have removed the proposed requirement that the disclosures regarding shared employees contain the name and position or title of all shared employees, and Form ATS–N only requires a summary of the role and responsibilities of a shared employee that has access to confidential trading information.[795] While these changes reduce the proposed burden on filers, disclosures responsive to Part II, Item 6(a) of adopted Form ATS–N should also provide market participants with sufficient information to evaluate whether a shared employee's role with the NMS Stock ATS may create a potential for information leakage. We do not believe that market participants would benefit from even broader, or more general, disclosures, such as ''categories of service'' for shared employees because such information would likely not provide market participants with relevant information to assess the potential for information leakage.

Two commenters express support for Part III, Item 7 of proposed Form ATS–N by noting that current Form ATS Exhibit E calls for the disclosure of other entities relevant to the operation of the ATS, which the commenters believe would be helpful in determining whether there are apparent conflicts of interest that could come into play in terms of how orders are executed in the ATS.[796]

Another commenter recommends that the Commission ensure that the requests provide meaningful narrative information about the role and duties of each shared employee, both at the NMS Stock ATS and the other business unit or affiliate of the broker-dealer operator.[797] This commenter states that, to better equip funds and other market participants to assess the roles and expertise of shared employees, an NMS Stock ATS should also disclose whether any shared employees are registered with the Commission or the Financial Industry Regulatory Authority and whether they hold one or more securities licenses.[798] Because we have amended the proposed requests to reduce the potential for the public disclosure of personally identifiable information, we will not incorporate this commenter's recommendation to require an NMS Stock ATS to disclose whether any shared employees are registered with the Commission or FINRA and whether they hold one or more securities licenses. The details solicited in Part II, Item 6(a) of adopted Form ATS–N are designed to provide market participants with information to assess whether an NMS Stock ATS's use of shared employees poses a risk of information leakage or other conflicts of interest that could affect a market participant's decision of whether or not to trade on the ATS. Requiring an NMS Stock ATS to disclose information about a shared employee's credentials would be contrary to the Commission's intent to limit the amount of personally identifiable information that is required by Form ATS–N.

b. Third-Party Service Providers

Part III, Item 8 of proposed Form ATS–N would have required disclosures about third-party service providers to the NMS Stock ATS. The Commission received several comments on Part III, Item 8 of proposed Form ATS–N. The Commission is adopting Part III, Item 8 of proposed Form ATS–N with modifications in response to commenters' concerns, as further explained below, and is renumbering Part III, Item 8 of proposed Form ATS–N as Part II, Items 6(b), 6(c), and 6(d) of adopted Form ATS–N.

Two commenters support the Commission's proposal to require the disclosure of information related to third-party service providers because such disclosures would provide information related to potential information leakage on the NMS Stock ATS.[799] One of those commenters further opines that while shared employees are likely subject to increased oversight and it supports the proposed requests related to shared employees, the oversight of third-parties is significantly less formidable and may result in greater risk for information leakage.[800] As they did for Part III, Item 7 of proposed Form ATS–N, two other commenters express support for Part III, Item 8 of proposed Form ATS–N by noting that current Form ATS Exhibit E calls for the disclosure of other entities relevant to the operation of the ATS, which the commenters believe would be helpful in determining whether there are apparent conflicts of interest that could come into play in terms of how orders are executed in the ATS.[801]

Several commenters believe that aspects of the request under Part III, Item 8 of proposed Form ATS–N related to third-party service providers are unnecessary to evaluating an NMS

[791] *See* STANY Letter at 4.

[792] *See* ICI Letter at 5–6; STANY Letter at 4–5; Liquidnet Letter at 9; STANY Letter at 4–5; UBS Letter at 6.

[793] *See* ICI Letter at 5–6; STANY Letter at 4–5; UBS Letter at 6–7.

[794] *See* UBS Letter at 6.

[795] As guidance for this request, the summary of the shared employees' role and responsibilities generally should include sufficient detail to provide market participants with a comprehensive understanding of the full range of the shared employee's responsibilities with the NMS Stock ATS and each relevant entity, including responsibilities that could enable the employee to view confidential trading information of the NMS Stock ATS.

[796] *See* Luminex Letter at 2; *see also* PDQ Letter at 1 (agreeing with Luminex's letter).

[797] *See* ICI Letter at 5–6.

[798] *See id.*

[799] *See* HMA Letter at 17; ICI Letter at 5.

[800] *See* HMA Letter at 17.

[801] *See* Luminex Letter at 2; *see also* PDQ Letter at 1 (agreeing with Luminex's letter).

Stock ATS as a potential trading venue. Two commenters state that information about certain shared personnel for vendors or certain support functions, such as back-office or technology resources, are not necessary for risk assessment of an ATS.[802] Similarly, another commenter believes that the disclosures could, in fact, inhibit useful comparison of ATSs and create unnecessary and burdensome disclosure obligations.[803] Specifically, this commenter cites the proposed requirements to provide detailed information regarding persons, including natural persons, providing services for the ATS, but who are unaffiliated with the broker-dealer.

We disagree that the proposed request regarding third party service providers to the NMS Stock ATS is unnecessary, would not be meaningful to market participants, or, when compared to the current requirements on Form ATS, would be overly burdensome. As noted in the Proposal,[804] the request related to service providers is intended to expand on the current disclosure requirement of Exhibit E of Form ATS, which requires ATSs to disclose the name of any entity other than the ATS that will be involved in the operation of the ATS, including the execution, trading, clearing, and settling of transactions on behalf of the ATS; and to provide a description of the role and responsibilities of each entity.[805] We continue to believe that subscribers and market participants would be interested in whether services performed by a third-party may or may not be under the control of the broker-dealer operator for the purposes of evaluating the potential information leakage.

Some commenters recommend clarifying or more narrowly tailoring the scope of the requests in Part III, Item 8 of proposed Form ATS–N related to service providers so as not to capture information about vendors that only provide administrative services to the ATS or other overhead, such as utility companies.[806] We believe that the scope of the third-party service provider requests should not encompass purely administrative items—such as human resources support—or basic overhead items—such as phone services and other utilities. The information solicited in this disclosure is meant to provide information about the extent to which a third-party may be able to influence or control the operations of the ATS through involvement with its operations (such as operating the ATS's proprietary data feeds sent to subscribers). As indicated by commenters, information about the roles and responsibilities of service providers to the ATS is important because it could inform market participants about the potential information leakage on the NMS Stock ATS.

A commenter also states that it is very difficult for a broker-dealer to know the structure of all of its vendors, much less whether the vendor has an affiliate that may enter orders in the subject ATS.[807] This commenter believes that requiring an ATS to disclose information regarding whether any such persons, or any of their affiliates, may enter orders or other trading interest on the NMS Stock ATS would be unduly burdensome. We believe that the benefit to market participants from the public disclosure of information concerning the use of ATS services by third-party service providers and their affiliates justifies the potential burden on the NMS Stock ATS to provide those disclosures in Form ATS–N. Service providers have business relationships outside of simple subscriber-ATS arrangements, which may give those service providers or their affiliates access to confidential trading information of other subscribers. As such, market participants should be aware of how those service providers utilize the ATS as a trading venue or for any other services.

Furthermore, the adopted requests under Part II, Items 6(c)–(d) require the NMS Stock ATS to disclose whether any service providers or their affiliates use the services of the NMS Stock ATS and if they do, the ATS is required to identify the service providers, the service(s) used, and whether there is any disparate treatment between those service providers and other subscribers. Thus, an NMS Stock ATS would only be required to obtain and disclose information about third-party vendors and their affiliates that actively use the services of the ATS; the ATS should be aware of all parties the use its services under its current recordkeeping obligations.[808] Additionally, because the ATS has already established a relationship with its service providers, we do not believe that it would impose a significant burden on ATSs to require its service providers to inform them about any affiliates that use the services of the ATS. Accordingly, to the extent that an affiliate of a service provider uses the services of the ATS, we believe that the burden to obtain the information required by Form ATS–N is justified by the above-explained benefits to market participants from these disclosures.

This commenter also states that if the Commission's concern is whether a service provider is receiving preferential treatment from an ATS, the Proposal should have mandated disclosure of whether there is any preferential and/or differentiated treatment.[809] We believe market participants would find it very useful to understand whether potential counterparties with whom they are trading, and who also service the operation of the NMS Stock ATS, have access to different or unique ATS-related services when analyzing potential conflicts of interest or information leakage on the venue. We have added a request to Part II, Item 6 of adopted Form ATS–N to expressly require the ATS to identify and explain any differences in ATS services to a service provider and all other subscribers.

One commenter questions the feasibility of providing ''a detailed description of information technology services, including both hardware and software'' in Part III, Item 8 of proposed Form ATS–N, which the commenter opines can be taken to the extreme of requiring an ATS operator to disassemble a server to enumerate the manufacturer of various components. The commenter believes that a general—but thorough—description of the information technology services would be more practical.[810] We did not intend for the adopted disclosures to require the level of granular detail to which this commenter cites in its comment letter. To clarify the scope of the required disclosure about services provided by third parties, adopted Form ATS–N no longer requires the NMS Stock ATS to ''describe'' the operation, service, or function provided by the third party service provider. Instead, it requires an NMS Stock ATS to provide a ''summary'' of the service provider's role and responsibilities.[811]

[802] *See* Luminex Letter at 4; STANY Letter at 5.

[803] *See* Morgan Stanley Letter at 5.

[804] *See* Proposal, *supra* note 2, at 81055.

[805] *See* Item 7 of Form ATS (describing the requirements for Exhibit E of Form ATS).

[806] *See* ICI Letter at 6; UBS Letter at 6; SIFMA Letter at 16.

[807] *See* Morgan Stanley Letter at 5.

[808] *See supra* note 742 and accompanying text.

[809] *See* Morgan Stanley Letter at 5.

[810] *See* UBS Letter at 7.

[811] As guidance for this request, the Commission would view, for example, an NMS Stock ATS simply stating that a third-party provides technology or hardware to the ATS as insufficient. *See* Proposal, *supra* note 2, at 81055. In this example, the summary generally should provide market participants with an understanding of the types of technology or hardware provided, and how that hardware or technology is used by the NMS Stock ATS. This information is meant to provide market participants with a better understanding about whether the service provider could access confidential trading information.

As guidance for this request, we would view, for example, an NMS Stock ATS simply stating that a third-party provides technology or hardware to the ATS as not responsive to the required summary of the service provider's role. But we would not expect the ATS to provide information about the manufacturer of certain components of its hardware. This request for summary information is designed to provide market participants with a general understanding of the types of technology or hardware provided by the service provider as part of its responsibilities, and how that hardware or technology is used by the NMS Stock ATS. The purpose of this disclosure is to provide market participants with information to better understand whether the service provider might be able to access confidential trading information, so NMS Stock ATSs should draft its disclosure with the goal of conveying such information.

Furthermore, to reduce redundant disclosures on Form ATS–N, adopted Form ATS–N will only require this in Part III, unless there are no disclosure requests in Part III that would encompass these types of services. The disclosure requests in Part III will likely require the NMS Stock ATS to describe the services provided by third-parties, and we believe that a summary narrative about the roles and responsibilities of third-party service providers will likely be included in that description of the services. We do not believe that it is not necessary to also provide a redundant summary narrative of the roles and responsibilities of service providers in Part II.

A commenter also recommends eliminating the disclosures of third-party service providers from the publicly available Form ATS–N and requiring that the information requested be made available only to the Commission on a confidential basis.[812] We are not changing the nature of the third-party service provider request to require the disclosures to be filed on a confidential basis with the Commission. We have narrowed the scope of the request so that the information provided is tailored to address the concerns of market participants and NMS Stock ATSs clarify the level of detail required by these disclosures. We believe that requiring only a summary description of the roles and responsibilities of third-party service providers would not require the type of details that could be subject to confidentiality concerns or otherwise put either the NMS Stock ATS or the service provider at a competitive disadvantage.

Finally, we are replacing the proposed word ''person'' with the word ''entity'' in Part II, Item 6(b) of adopted Form ATS–N. The Commission does not believe that an NMS Stock ATS is likely to contract with a natural person who is not associated with a legal entity (*e.g.,* a corporation or an LLC) to provide services to the ATS. Furthermore, the Commission does not intend for the service provider request to disclose details about natural persons providing services to the ATS when those natural persons are employees of, or independent contractors hired by, a third party.

6. Protection of Confidential Trading Information

Part III, Item 10 of proposed Form ATS–N would have required an NMS Stock ATS to provide disclosures about its confidential treatment of trading information. One commenter states its belief that the proposed requests under Part III, Item 10 of proposed Form ATS–N seemed appropriate given the risk of misuse of confidential information.[813] This commenter believes the requests fit well within the framework of the new requirement that all ATSs maintain written safeguards and procedures to protect confidential trading information. We are adopting Part III, Item 10 of proposed Form ATS–N with modifications in response to commenter concerns, as further explained below, and renumbering the proposed request as Part II, Item 7 of adopted Form ATS–N.

Part II, Item 7(a) of adopted Form ATS–N requires an NMS Stock ATS to describe its written safeguards and written procedures to protect the confidential trading information of subscribers to the NMS Stock ATS, including: (i) Written standards controlling employees of the ATS that trade for employees' accounts; and (ii) written oversight procedures to ensure that the safeguards and procedures described above are implemented and followed. The protection of confidential trading information is a bedrock component of the regulation of ATSs and is essential to ensuring the integrity of ATSs as an execution venue. If such information is not protected, many of the advantages or purposes for which a subscriber may choose to send its orders to an ATS (*e.g.,* trade anonymously and/or to mitigate the impact of trading in large positions) are eliminated. In cases where the confidential trading information of a subscriber is impermissibly shared with the personnel of the broker-dealer operator or any of its affiliates (*e.g.,* persons who are not responsible for the operation of the ATS or compliance with applicable rules), such an abuse is also compounded by the conflicting interests of the broker-dealer operator. That is, in such a case, the broker-dealer operator has invited subscribers to trade on its ATS and may have abused that relationship to provide itself or its affiliates with a direct competitive advantage over that subscriber. Accordingly, we believe that disclosures informing market participants about broker-dealer operators' written safeguards and procedures to protect confidential trading information are necessary so market participants can independently evaluate the robustness of the safeguards and procedures that are employed by the NMS Stock ATS to protect subscriber confidential trading information and decide for themselves whether they wish to do business with a particular NMS Stock ATS.[814]

We are adopting Part II, Items 7(b) and (c) to require an NMS Stock ATS to disclose whether a subscriber can consent and withdraw consent, respectively, to the disclosure of its confidential trading information to any person (not including those employees of the NMS Stock ATS who are operating the system or responsible for its compliance with applicable rules). Subscribers should be able to give consent if they so choose to share their confidential trading information.[815] ATSs that transact in NMS stocks vary in terms of what types of orders, indications of interests, or other forms of trading interest are confidential on their systems and what information about such trading interest may be shared. For example, an ATS might provide that no IOIs submitted by subscribers will be considered confidential, but may provide subscribers with the option to restrict the information in the IOI message to just the symbol and side (*i.e.,* buy or sell).[816] For this example, Part II, Items 7(b) and 7(c) of adopted Form ATS–N

[812] *See* SIFMA Letter at 16.

[813] *See* HMA Letter at 18.

[814] If an NMS Stock ATS has disclosed information on its Form ATS–N about the written safeguards and procedures that it has established to protect the confidential trading information of subscribers, including oversight procedures to ensure that such safeguards and procedures are followed, but those disclosures materially differ from the actual means by which the NMS Stock ATS protected the confidential trading information of subscribers, the ATS would be required to file an amendment pursuant to Rule 304(a)(2) to revise its Form ATS–N to accurately describe such safeguards and procedures.

[815] *See* Regulation ATS Adopting Release, *supra* note 3, at 70879.

[816] *See* Proposal, *supra* note 2, at 81058.

would require the NMS Stock ATS to describe the means by which a subscriber could control some of the information contained in the IOI message by providing consent or withdrawing such consent for the sharing of its confidential trading information.[817]

Part II, Items 7(b) and 7(c) contain requests similar to those in Part III, Item 10(a) of proposed Form ATS–N, but we are modifying the format of these requests so that they are in the form of a ''yes'' or ''no'' question, and if the NMS Stock ATS answers ''yes,'' the NMS Stock ATS must explain how and under what conditions consent can be given and withdrawn. We are also adding the phrase ''not including those employees of the NMS Stock ATS who are operating the system or responsible for its compliance with applicable rule'' to Part II, Item 7(b) of adopted Form ATS–N. This change is to clarify that the request does not cover such employees that may need access to such information in the course of their responsibilities to service the system. As noted above, Regulation ATS requires that access to confidential subscriber information be available only to those employees of the ATS that operate the ATS's system or are responsible for the ATS's compliance with applicable rules.[818]

Finally, we are adopting Part II, Item 7(d) to require an NMS Stock ATS to provide a summary of the roles and responsibilities of any persons that have access to confidential trading information, the confidential trading information that is accessible by them, and the basis for the access. Part III, Item 10(b) of proposed Form ATS–N would have required the NMS Stock ATS to identify the position or title of any person who has access to confidential trading information, describe the confidential information to which the person has access, and describe the circumstances under which the person can access confidential trading information. Some commenters express concerns regarding the potential disclosure of personally identifiable information under proposed Part III, Item 10(b).[819] We have eliminated the proposed requirement to publicly disclose the positions or titles of persons with access to confidential trading information and part II, Item 7(d) of adopted Form ATS–N requires only a summary of the roles and responsibilities of any persons that have access to confidential trading information, the confidential trading information that is accessible by them, and the basis for the access. We believe that any benefit of providing personally identifiable information is not justified by the potential negative effects of publicly posting personally identifiable information; a summary of the information required under Item 7(d) will buttress the existing obligations on ATSs to restrict access only to permitted personnel (*e.g.,* those responsible for its operation or compliance).[820]

7. Differences in Availability of Services, Functionalities, or Procedures

Part III, Item 9 of proposed Form ATS–N would have required an NMS Stock ATS to disclose information regarding the differences in the availability of services, functionalities, or procedures of the NMS Stock ATS that are available or apply to the broker-dealer operator or its affiliates that are not available or do not apply to other subscribers.

In general, several commenters support requests for information about differences between subscribers and the broker-dealer with respect to their use of the NMS Stock ATS.[821] A commenter also states that the proposed requests in Part III, Item 9 of proposed Form ATS–N are reasonable.[822] One commenter, however, expresses concern that the proposed disclosures that would have been required under Part III, Item 9 of proposed Form ATS–N were too broad and could result in the disclosure of either proprietary information or other information that could pose a cybersecurity risk.[823]

We continue to believe that the disclosure about differences in treatment are important to market participants and will better allow them to decide whether submitting order flow to that NMS Stock ATS aligns with their trading or investment objectives. To more closely tailor the Form ATS–N disclosures about differences in treatment to the subject matter covered in relevant conflicts-of-interest requests, we are removing Part III, Item 9 of proposed Form ATS–N as a stand-alone question and incorporating the request into Part II, Items 1, 2, 3, and 6 of adopted Form ATS–N. We believe that under this format, disclosures regarding the differences in the availability of services, functionalities, or procedures of the NMS Stock ATS will relate to the specific subject matter covered by each of the aforementioned disclosure requests that relate to services, functionalities, or procedures that may differ among subscribers or the broker-dealer operator and subscribers.

The requests in Part II of adopted Form ATS–N focus on the ATS-related activities of the broker-dealer operator and its affiliates and are designed to inform market participants about the competing interests between the broker-dealer operator or its affiliates and other subscribers and the potential for information leakage of subscribers' confidential trading information. In response to a commenter's concern,[824] we note that we did not intend for these requests to require descriptions of technologies or other aspects of the NMS Stock ATS that could pose a cybersecurity risk or are otherwise disclose commercially sensitive information.

8. Other Recommendations From Commenters

The Commission received comments recommending additional regulation or disclosures for NMS Stock ATSs related to conflicts of interests. In the Proposal, the Commission considered alternatives to address conflicts of interests between the broker-dealer operator and the NMS Stock ATS. One alternative the Commission considered was to eliminate any potential conflicts of interest by requiring the NMS Stock ATS to operate with a single business function—operating the NMS Stock ATS—and by eliminating any other function of the broker-dealer, such as principal trading.[825] The Commission also considered continuing to allow broker-dealer operators to act as a broker-dealer operator of an NMS Stock ATS and engage in non-ATS functions while imposing new requirements designed to limit potential conflicts of

[817] *See id.* We believe that there may be some NMS Stock ATSs that might not offer any means by which a subscriber could consent to the dissemination of its confidential trading information. An NMS Stock ATS would be required to disclose this fact pursuant to Item 7(a). *See id.,* n.437.

[818] *See* Regulation ATS Adopting Release, *supra* note 3, at 70879; 17 CFR 242.301(b)(10)(i)(A).

[819] *See* MFA/AIMA Letter at 6 (expressing concern that requiring disclosure of the positions or titles of persons who have access to confidential trading information would paint a target on such persons and could increase their security risks and risks of receiving phishing attacks); SIFMA Letter at 17–18 (stating that the public disclosure of information under Part IV, Item 10 of proposed Form ATS–N would have raised privacy, security, and proprietary information concerns).

[820] *See* Regulation ATS Adopting Release, *supra* note 3, at 70879; 17 CFR 242.301(b)(10)(i)(A).

[821] *See* SIFMA Letter at 6; Consumer Federation of America Letter at 9–10. *See also* Fidelity Letter at 5 (stating it should be disclosed when subscribers are not treated the same way); UBS Letter at 7 (suggesting the Commission request should highlight differences among subscribers).

[822] *See* HMA Letter at 17–18.

[823] *See* SIFMA Letter at 17.

[824] *See id.*

[825] *See* Proposal, *supra* note 2, at 81043.

interest.[826] In the Proposal, the Commission requested comment about whether certain conflicts of interest arising out of the broker-dealer's operation of the NMS Stock ATS should be prohibited.[827]

Several commenters recommend that the Commission prohibit conflicts of interest altogether on NMS Stock ATSs, which would include a prohibition on trading on the NMS Stock ATS by the broker-dealer operator and its affiliates, rather than simply increasing the disclosure requirements for conflicts of interest.[828] However, we continue to believe that prohibiting conflicts of interest for the broker-dealer operator related to its operation of an NMS Stock ATS would be significantly more intrusive relative to requiring additional disclosures about the operations of the broker-dealer operator and its affiliates, and therefor did not propose these alternatives.[829] We also believe that such a prohibition would substantially affect or limit the current operations of ATSs that trade NMS stocks. Part II of adopted Form ATS–N is designed to provide disclosures to market participants about ATS-related activities of a broker-dealer operator and its affiliates that might give rise of potential conflicts of interest or information leakage, and thus, should better enable market participants to evaluate whether they want to use the services of that NMS Stock ATS.

Also, one commenter recommends that, for any conflicts of interest that are permitted, at a minimum Form ATS–N should include clear disclosures of conflicts of interest under a section titled ''conflicts of interest.'' [830] We decline the commenter's request to title Part II ''conflicts of interest.'' We believe that it is more helpful to market participants for Form ATS–N to provide the information market participants need to individually evaluate whether there is a conflict of interest on a given NMS Stock ATS rather than relying on the ATS to determine when a conflict exits.

We also received a comment requesting the Commission to require NMS Stock ATSs to disclose in Part II of Form ATS–N any proceeding within the last 10 years against the NMS Stock ATS, the broker-dealer operator or officers or employees of the broker-dealer operator that relates to the handling of equity orders or the operation of the NMS Stock ATS.[831] Form ATS–N is designed to provide market participants with public disclosures about the current operations of an NMS Stock ATS and the current ATS-related activities of the broker-dealer operator and its affiliates. We believe that this information will help market participants assess the NMS Stock ATS as potential venue for their orders. We believe that disclosures about past proceedings, or other disciplinary matters, of the NMS Stock ATS, its broker-dealer operator, or officers and employees of the broker-dealer operator—even those that relate to the handling of equity orders or the operation of the NMS Stock ATS—would not provide additional transparency into the *current* operations of the NMS Stock ATS. To the extent that such information is publicly available, a market participant may review details about past and pending proceedings involving the NMS Stock ATS, its broker-dealer operator, or the officers and employees of the broker-dealer operator via, for example, public databases maintained by the Commission or FINRA.

D. Part III Form ATS–N: Manner of ATS Operations

Part III of adopted Form ATS–N is designed to provide public disclosures to help market participants understand, among other things, how subscribers' orders and trading interest are handled, matched, and executed on the NMS Stock ATS. In response to comments, we are revising the format of several requests in Part IV of proposed Form ATS–N (renumbered as Part III in the adopted Form) to help NMS Stock ATSs provide disclosures that would be useful to market participants. For example, in response to commenters that believe the Commission's use of the term ''describe'' is vague and would lead to discursive disclosures and obscure key information, we are revising requests to be more explicit, adding specificity to clarify the meaning of the requests, and providing non-exhaustive examples for NMS Stock ATSs to better understand what would be responsive to the Form ATS–N.[832] In addition, we have added ''yes'' or ''no'' questions, and converted proposed Items into ''yes'' or ''no'' questions, throughout Part III of Form ATS–N, which we believe will allow market participants to find information more efficiently and facilitate their comparisons across NMS Stock ATSs.[833] Moreover, we have separated the requests for information in Part III of adopted Form ATS–N into more items (and renumbered the items) and discrete topics to help readers more easily find information and compare that information among NMS Stock ATSs. In addition, we are combining or removing certain requests to reduce redundancy within Part III, and between Parts II and III, and separating certain requests for information into new items or subparts that focus the information required in response to commenter suggestions and concerns. Finally, we are adding a requirement to identify and explain any differences in the treatment of subscribers and the broker-dealer operator to several items that did not require this information as proposed.[834] We intended that these differences be explained for all of the subject matter covered by Form ATS–N, and several commenters support requests for information about differences between subscribers and the broker-dealer operator with respect to their use of the NMS Stock ATS.[835] Differences in the treatment among subscribers and the broker-dealer operator and its affiliates

[826] *See id.*

[827] *See id.*

[828] *See* Consumer Federation of America Letter at 7–8 (asserting that certain conflicts of interest are so acute and pernicious that they cannot be mitigated or absolved merely by disclosing them; the commenter provides principle trading by the broker-dealer operator as an example); HMA Letter at 13–18 (advocating for: (1) The Commission to prohibit what the commenter considers to be the deeply troubling conflicts of interest attendant with allowing an ATS operator or affiliate to trade in the ATS; or (2) alternatively if the Commission would not adopt such a prohibition, for the Commission to affirmatively restrict how the broker-dealer operator or its affiliates interact with the ATS); Better Markets Letter at 5–6 (advocating that the Commission ban material conflicts of interest rather than relying on disclosure alone).

[829] *See* Proposal, *supra* note 2, at 81043.

[830] *See* Better Markets Letter at 6.

[831] *See* ICI Letter at 6, n.14.

[832] The topics and examples provided on Form ATS–N are designed to help NMS Stock ATS consider the scope of the request and information potentially responsive to the form requirements. While we use the term ''including'' to denote topics responsive to an Item and have provided examples in many of the requests, these topics or examples are not an exhaustive list of what may be responsive to a Form ATS–N request. *See, e.g.,* Items 4, 6, 7, 9, 10, 11, 13, 19, 21, and 23 of Part III of adopted Form ATS–N.

[833] *See e.g.,* SSGA Letter at 2; SIFMA Letter at 9; STANY Letter at 5; LeveL ATS Letter at 6–7; KCG Letter at 10. *See also* Section V.A.1. (discussing the format of items in Part II and III of Form ATS–N).

[834] Specifically, this requirement is being added to Items 10, 14, 17, 18, and 23 of adopted Form ATS–N. In the Proposal, the Commission required a description of any differences between subscribers and persons in Part IV, Items 1(b), 1(e), 2(b), 3(b)–(d), 4, 5(a), 5(b), 6(a), 7, 8, 10(b), 12(b), and 13 of proposed Form ATS–N. *See* Proposal, *supra* note 2, at 81146–81152.

[835] *See, e.g.,* SIFMA Letter at 5–6 (stating whether all subscribers have access to the same suite of products and services is particularly appropriate and useful); Fidelity Letter at 5 (calling for disclosure when subscribers are not treated the same way); UBS Letter at 7 (suggesting the Commission request should highlight differences in subscriber access that may impact other users of the ATS). *See also* Consumer Federation of America Letter at 9–10 (discussing how to address potential advantages of the broker-dealer operator and its affiliates).

will help market participants discern any benefit or disadvantage they may receive in comparison to other market participants or the broker-dealer operator.

1. Types of ATS Subscribers

Part IV, Item 1(c) of proposed Form ATS–N would have required disclosures about types of subscribers to the NMS Stock ATS. We are adopting Part IV, Item 1(c) of proposed Form ATS–N with modifications as Part III Item 1 (''Types of Subscribers'') of adopted Form ATS–N.[836] Part III, Item 1 of adopted Form ATS–N is designed to provide market participants with information about the type of order flow in the NMS Stock ATS. NMS Stock ATSs may design their system for trading by retail, institutional, or any other type of market participant.

One commenter recommends that the Commission consider eliminating or consolidating this request because it is redundant to the request in Part IV, Item 5 of proposed Form ATS–N regarding segmentation.[837] In response to this comment, we are removing the requirement from Part IV, Item 1(c) of proposed Form ATS–N to ''describe any criteria for distinguishing among types of subscribers, classes of subscriber, or other persons.'' To the extent that an NMS Stock ATS distinguishes among ATS subscribers, the ATS will be required to discuss such information in Part III, Item 13 of adopted Form ATS–N, which relates to segmentation.

Another commenter believes that the phrase ''types of subscribers'' should be specifically defined.[838] In response to this comment, we are providing a list of market participants in Part III, Item 1 of adopted Form ATS–N that, in the Commission's experience, are commonly used. The revised list includes: Retail investors, issuers, asset managers, brokers, dealers, NMS Stock ATSs, investment companies, hedge funds, market makers, principal trading firms, and banks. The list is non-exhaustive and an NMS Stock ATS is required to list any type of subscriber that can use the NMS Stock ATS services. Also, in response to this comment, we are revising Part IV, Item 1(c) of proposed Form ATS–N, by removing the request to *describe* the type of subscribers and other persons and instead, are only requesting that the NMS Stock ATS select the checkbox for the types of subscribers that can use the NMS Stock ATS services (and identify any other types of subscribers not listed in a checkbox). We are also revising the Item to require the selection of the types of subscribers that ''can'' use the NMS Stock ATS services, rather than solely those types of subscribers that in fact use the NMS Stock ATS as was proposed.

Furthermore, in response to general comments that the Form ATS–N should be formatted to facilitate comparisons across NMS Stock ATSs,[839] we are relocating Part IV, Item 1(c) of proposed Form ATS–N into a separate Item in Part III, Item 1 of adopted Form ATS–N and naming it ''Types of ATS Subscribers.'' [840]

2. Eligibility for ATS Services

Part IV, Item 1(a) of proposed Form ATS–N would have required disclosures about eligibility requirements of the NMS Stock ATS.[841] We are adopting Part IV, Item 1(a) of proposed Form ATS–N with certain modifications described below, naming the Item ''Eligibility for ATS Services,'' and relocating the request as Part III, Item 2 of adopted Form ATS–N.[842]

We also received comment seeking modifications to the proposed Item. One commenter suggests that the term ''eligibility requirements'' under Part IV, Item 1(a) of proposed Form ATS–N is unclear and suggests using eligibility ''standards'' as a more accurate way to capture the various subscriber criteria an ATS might evaluate.[843] In response to this comment, we are replacing the reference to ''eligibility requirements'' in Part IV, Item 1(a) of proposed Form ATS–N with a reference to ''*conditions*'' the NMS Stock ATS requires a person to satisfy before accessing the ATS services. We believe that the term ''conditions'' provides the NMS Stock ATS with more flexibility to describe the relevant criteria.

Also, commenters express confusion over the difference between Part IV, Item 1(a) and 1(e) (adopted as Part III, Items 2 and 3, respectively) of proposed Form ATS–N and whether they overlapped.[844] In response to these commenters, we are clarifying the request by adding the phrase ''before accessing the ATS services'' in Part III, Item 2(b) of adopted Form ATS–N. On the other hand, Part III, Item 3 of adopted Form ATS–N, as discussed *infra,* requires disclosures about any conditions that would exclude a subscriber, in whole or in part, from using the services of the NMS Stock ATS *after* the person, as a subscriber, is permitted to use or submit orders to the NMS Stock ATS, such as for certain subscriber behavior while actively participating in the ATS.[845]

We are not imposing new requirements for NMS Stock ATSs to have certain eligibility requirements, either by implicating the fair access rule under Rule 301(b)(5) (as suggested by a commenter), or otherwise.[846] The ''yes'' or ''no'' questions of Part III, Item 2(b) of adopted Form ATS–N ask whether there are any conditions that the NMS Stock ATS requires a person to satisfy before accessing the ATS services. If an NMS Stock ATS marks ''yes,'' the ATS is indicating that it has such conditions and must list and provide a summary of the conditions. We believe that these revisions make clear that we are not requiring any eligibility requirements.

In Part III, Item 2(a) of adopted Form ATS–N, we are requiring the NMS Stock ATS to state whether it requires subscribers to be registered broker-dealers. This request is similar to the

[836] As also discussed under Section V.D.2., commenters state with regard to the entirety of Part IV, Item 1 of proposed Form ATS–N that the Commission should adopt a ''yes'' or ''no'' format for the item instead of requests for descriptions. *See* SIFMA Letter at 19; KCG Letter at 11.

[837] *See* SIFMA Letter at 20.

[838] *See* KCG Letter at 12. The proposed Item required the NMS Stock ATS to describe the types of subscribers and other persons that use the services of the NMS Stock ATS.

[839] *See e.g.,* SSGA Letter at 2; SIFMA Letter at 9; STANY Letter at 5; LeveL ATS Letter at 6–7; KCG Letter at 10.

[840] *See* Section V.D.2 for a discussion of changes to the requirement under Part IV, Item 1(c) of proposed Form ATS–N that NMS Stock ATSs state whether they accept non-broker-dealers as subscribers to the NMS Stock ATS.

[841] As discussed in the Proposal, the eligibility process and requirements to access an NMS Stock ATS may vary, and the requirements may differ depending on whether a potential subscriber is a customer of the broker-dealer operator of the ATS. For instance, some ATSs may require that a potential subscriber be a broker-dealer to submit orders in the ATS, while other ATSs may not. Some NMS Stock ATSs may require potential subscribers to submit financial information as a pre-requisite to subscribing to, or maintaining their subscriber status on, the NMS Stock ATS. *See* Proposal, *supra* note 2, at 81060.

[842] One commenter supports the proposed disclosures stating that funds and other market participants would find this information valuable because it would facilitate the efficient comparison of eligibility processes and requirements across all NMS Stock ATSs and describe the types of participants that may dominate order flow on a particular NMS Stock ATS. *See* ICI Letter at 8.

[843] *See* SIFMA Letter at 19.

[844] *Id.* at 20 (stating it cannot distinguish between the requested information in proposed Items 1(a) and 1(e)); KCG Letter at 11–12 (noting an apparent overlap between the information requested under proposed Item 1(a) and proposed Item 1(e) and recommending that the Commission revisit and clarify the request).

[845] For example, if an NMS Stock ATS has a practice of excluding subscribers that do meet certain percentage thresholds for submitting firm-up orders in response to receiving a conditional order sent to them by the NMS Stock ATS, then this practice would be subject to disclosure under Part III, Item 3 of adopted Form ATS–N (''Exclusion from Services'') and not Part III, Item 2 (''Eligibility Requirements'').

[846] *See infra* notes 855–857 and accompanying text.

proposed request in Part IV, Item 1(c) of proposed Form ATS–N but asked in a ''yes'' or ''no'' format. Part III, Items 2(c) and 2(d) of adopted Form ATS–N are requirements proposed in Part IV, Item 1(a)[847] and 1(b), respectively, of proposed Form ATS–N, that the Commission is formatting as ''yes'' or ''no'' questions.

If the NMS Stock ATS indicates that it does have conditions that a person must satisfy before accessing the ATS services, the request, as modified, requires an NMS Stock ATS to list and provide a ''summary'' of those conditions. We believe a summary of those conditions would provide sufficient disclosure (in conjunction with Part III, Item 1 of adopted Form ATS–N) for market participants to discern the type of order flow that they are likely to interact with on the NMS Stock ATS, while at the same time, not impairing the ATS's ability to reasonably control the activities and quality of flow on its platform.[848] One commenter acknowledges that it already discloses the general requirements for becoming a user of its ATS,[849] which is analogous to the summary of conditions we are adopting in this Item. Moreover, we believe that requiring additional disclosures about differences in treatment among persons is important to market participants.[850]

We also received comment unfavorable to Part IV, Item 1(b) of proposed Form ATS–N.[851] The proposed Item would have required an NMS Stock ATS to describe the terms and conditions of any contractual agreements for granting access to the NMS Stock ATS for the purpose of effecting transactions in securities or for submitting, disseminating, or displaying orders on the NMS Stock ATS, and to state whether these contractual agreements are written and if the terms and conditions of any contractual agreements were not the same for all subscribers and persons, the NMS Stock ATS would be required to describe any differences.

We are not adopting the provision requiring the disclosure of the terms and conditions of any contractual agreements in Part IV, Item 1(b) of proposed Form ATS–N.[852] We believe that the Form ATS–N, as adopted, requires comprehensive disclosure on the principal aspects of the operations of NMS Stock ATSs and any differences in the treatment of subscribers and the broker-dealer operator. We believe that a description of the terms of any contractual agreements is unlikely to provide much, if any, further information about the ATS's operations that is not already required to be disclosed in the other items of Form ATS–N and would likely impose a significant burden.

3. Exclusion From ATS Services

Part IV, Item 1(e) of proposed Form ATS–N would have required disclosures about limitation and denial of ATS services. We are adopting Part IV, Item 1(e) of proposed Form ATS–N, with certain modifications discussed below, including adopting a ''yes'' or ''no'' format to questions, as Item 3 of adopted Form ATS–N, and naming the request ''Exclusion from ATS Services.''

One commenter states that requiring an NMS Stock ATS to disclose additional details about why the ATS would limit or deny ATS services could affect the ATS's ability to reasonably control the activities and quality of flow on its platform; the commenter suggests, therefore, that such disclosure remain confidential with the Commission.[853] In response to this comment, we are adopting Part III, Item 3(a) of adopted Form ATS–N, as modified, to require the NMS Stock ATS to provide a list and ''summary'' of the conditions for excluding (or limiting) a participant from using the ATS, and are removing the requirement to describe the procedures or standards of the NMS Stock ATS that are used to determine whether to exclude a subscriber. We believe that these changes would protect sensitive information and prevent participants from using the disclosures to potentially misuse or game its system while ensuring that participants have the information necessary to understand when they may be excluded.

Another commenter suggests that it is unclear whether Part IV, Item 1(e) of proposed Form ATS–N requests disclosure of instances where a subscriber requests not to interact with certain counterparties.[854] We are not requiring in Part III, Item 3 of adopted Form ATS–N that the NMS Stock ATS disclose instances where a subscriber requests not to interact with certain counterparties. Information regarding counter-party selection procedures on the NMS Stock ATS, including where a subscriber requests not to interact with certain counterparties, is required to be disclosed, as applicable, in Part III, Item 14 of adopted Form ATS–N.

This commenter also expresses concern about the implications for fair access raised by Part IV, Item 1(e) of proposed Form ATS–N.[855] The commenter assumes that the Commission intends that Part IV, Item 1(e) should apply only to entities subject to the fair access threshold, and believes that entities not subject to the fair access rule can deny access for any reason. The commenter further believes that it is important to note that unless an ATS exceeds the fair access threshold, the ATS should be able to deny access for any reason (*e.g.,* credit risk). This commenter requests clarification from the Commission if this interpretation is wrong to avoid later misunderstanding or interpretive conflicts. The commenter also suggests that Part IV, Item 1(e) of proposed Form ATS–N goes beyond the fair access requirements (to keep records of all grants, denials, and limitations of access, and to report that information), and states that if the Commission intends to replace the fair access rule with a different regulatory and disclosure regime, the Commission should address this issue directly.

We are not implicating or changing Rule 301(b)(5) of Regulation ATS, the so-called fair access rule, by requiring NMS Stock ATSs to disclose information about when the ATS can exclude, in whole or in part, a subscriber from the services of the ATSs. Pursuant to Rule 300(a)(2) of Regulation ATS, an ATS cannot set rules governing the conduct of subscribers other than the conduct of subscribers' trading on the system and cannot discipline subscribers other than by exclusion from trading.[856] NMS Stock ATSs are not required to establish rules for excluding subscribers from

[847] We are removing the reference to 'subscriber' from the Item, as proposed, because Part III, Item 2 of adopted Form ATS–N relates to eligibility requirements of persons before they become subscribers.

[848] *See* UBS Letter at 7. *See infra* note 853 and accompanying text.

[849] *See id.*

[850] *See, e.g.,* SIFMA Letter at 5–6 (stating whether all subscribers have access to the same suite of products and services is particularly appropriate and useful); Fidelity Letter at 5 (stating it should be disclosed when subscribers are not treated the same way); UBS Letter at 7 (suggesting the Commission request should highlight differences in subscriber access that may impact other users of the ATS). *See also* Consumer Federation of America Letter at 9–10 (discussing how to address potential advantages of the broker-dealer operator and its affiliates).

[851] *See* Liquidnet Letter at 12; UBS Letter at 7; SIFMA Letter at 19.

[852] We are moving the provision in Part IV, Item 1(b) of proposed Form ATS–N, which would have required that the NMS Stock ATS state whether the contractual agreements for granting access to the NMS Stock ATS were written, to Part III, Item 2(d) of adopted Form ATS–N. Part III, Item 2(d) asks a ''yes'' or ''no'' question on whether subscribers are required to enter a written agreement to use the services of the NMS Stock ATS.

[853] *See* UBS Letter at 7.

[854] *See* SIFMA Letter at 20.

[855] *Id.* at 19–20.

[856] *See* 17 CFR 242.300(a)(2).

using the ATS. Nevertheless, based on the Commission's experience, ATSs that trade NMS stocks often have rules governing subscribers' participation on the ATS, and if a subscriber fails to comply with these rules, the ATS may limit or deny access to the ATS.[857] Part III, Item 3 of adopted Form ATS–N is designed to provide subscribers with information about when the NMS Stock ATS can exclude, in whole or in part, a subscriber from the services of the ATSs and help them reasonably expect the types of activities that may cause them to be excluded (or limited) from using the services of the NMS Stock ATS.

One commenter requests guidance about the ability of an ATS to deny access pursuant to Rule 301(b)(5) of Regulation ATS when such ATS has not exceeded the fair access threshold requirements under Rule 301(b)(5)(i).[858] This commenter expresses concern that Part IV, Item 1(a) (''Eligibility'') and Item 1(e) (''Limitations and Denial of Services'') of proposed Form ATS–N raises the specter of fair access and that if the Commission is seeking to change regulatory expectations relating to fair access, the Commission should do so in a straight forward manner and not by way of requiring disclosures around ''eligibility requirements.'' We did not propose and are not adopting any change to the fair access rule under Rule 301(b)(5) of Regulation ATS. The commenter appears to misconstrue the requirements and application of the fair access rule in the context of the proposed disclosure requirements of Part IV, Item 1 of proposed Form ATS–N, and we believe it is important, in response to the commenter's request for clarification if its interpretation is wrong, to further explain the operation of the fair access rule ''to avoid later misunderstanding or interpretive conflicts. ''[859] In the Proposal, we discussed that a significant difference between national securities exchanges and NMS Stock ATSs is the extent to which each trading center allows access to its services by its users.[860] Section 6(b)(2) of the Exchange Act generally requires national securities exchanges to allow any qualified and registered broker-dealer to become a member of the national securities exchange—a key element in assuring fair access to national securities exchange services.[861] In contrast, the access requirements that apply to ATSs are much more limited. Because NMS Stock ATSs are exempt from the definition of an ''exchange'' so long as they comply with Regulation ATS, and thus, are not required to register as a national securities exchange pursuant to Section 6 of the Exchange Act, NMS Stock ATSs are not required to provide fair access unless they reach a 5% trading volume threshold in a stock, which almost all NMS Stock ATSs currently do not.[862] As a result, ATSs may treat subscribers differently with respect to the services offered by the ATS unless prohibited by applicable federal securities laws or the rules and regulations thereunder. Furthermore, even if an ATS is not subject to the fair access requirements, inaccurate or misleading disclosures about an ATS's operations could result in violations of the antifraud provisions of the federal securities laws.[863]

In this rulemaking, we are requiring NMS Stock ATSs to identify and explain on Form ATS–N any instances where the ATS differs in how it treats subscribers and the broker-dealer operator so market participants can have additional information to consider when evaluating an ATS. More favorable service or pricing for certain ATS subscribers necessarily implies less favorable service or pricing for others.[864] We believe that it is consistent with the goals of operational transparency for subscribers that receive less favorable service or pricing than other subscribers to know that fact. These subscribers will thus have better information to assess whether they should continue to trade on the ATS despite their different treatment or, if they do continue to trade on the ATS, whether they should alter their behavior in any way to better protect their interests. Part III, Items 2 and 3 of adopted Form ATS–N do not limit an NMS Stock ATS's ability to discriminate among different subscribers. To the extent that an NMS Stock ATS is subject to the fair access rule under Rule 301(b)(5) and treats subscribers differently, the NMS Stock ATS must comply with the requirements of Rule 301(b)(5) with respect to its treatment of subscribers. If an NMS Stock ATS elects to treat subscribers differently by creating types or levels of eligibility and exclusion requirements, Part III, Items 2 and 3 of adopted Form ATS–N require an NMS Stock ATS to ''identify and explain any differences,'' which is similar to the vast majority of items on Form ATS–N.

We are adopting Part III, Item 3 of Form ATS–N with certain language to reduce potential confusion with the application of Rule 301(b)(5) of Regulation ATS. As indicated above, to meet the definition of an ATS, a system

[857] *See* Proposal, *supra* note 2, at 81063. These limitations can result in some subscribers having different levels of functionality or more favorable terms of access than others. For example, in the Commission's experience, some ATSs exclude subscribers that have a high percentage of not responding with firm-up orders after receiving an IOI or conditional order.

[858] *See* SIFMA Letter at 19–20.

[859] *Id.*

[860] *See* Proposal, *supra* note 2, at 81057.

[861] 15 U.S.C. 78f(b)(2).

[862] *See* 17 CFR 242.301(b)(5). *See also supra* notes 72–75 and accompanying text (discussing the fair access requirements of Regulation ATS). For example, an ATS with at least 5% of the average daily volume for any covered security during four of the preceding six months is required to comply with fair access requirements under Rule 301(b)(5) of Regulation ATS, which, among other things, require an ATS to establish written standards for granting access to trading on its system and not unreasonably prohibit or limit any person with respect to access to services offered by the ATS by applying the written standards in an unfair or discriminatory manner. Thus, for example, an ATS that discloses a service to one class of subscribers (or makes the associated functionality available to only one class of subscribers) could not, if it were subject to the fair access requirements, discriminate in this manner unless it adopted written standards and applied them in a fair and non-discriminatory manner.

[863] *See, e.g., In the Matter of ITG Inc. and Alternet Securities Inc.,* Securities Exchange Act Release No. 75672 (Aug. 12, 2015), *https://www.sec.gov/litigation/admin/2015/33-9887.pdf* (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order); *In the Matter of UBS Securities LLC,* Securities Exchange Act Release No. 74060 (Jan. 15, 2015), *http://www.sec.gov/litigation/admin/2015/33-9697.pdf* (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order) (''UBS Settlement''); *In the Matter of Liquidnet, Inc.,* Securities Exchange Act Release No. 72339 (Jun. 6, 2014), *http://www.sec.gov/litigation/admin/2014/33-9596.pdf* (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order); *In the Matter of Pipeline Trading Systems LLC, Fred J. Federspiel, and Alfred R. Berkeley III,* Securities Exchange Act Release No. 9271 (Oct. 24, 2011) (order instituting administrative and cease-and-desist proceedings, making findings, and imposing remedial sanctions and a cease-and-desist order), *https://www.sec.gov/litigation/admin/2011/33-9271.pdf;* 48718 (Oct. 30, 2003), *http://www.sec.gov/litigation/admin/34-48718.htm* (all settling violations of Section 17(a)(2) of the Securities Act, which prohibits, directly or indirectly, in the offer or sale of securities, obtaining money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.) 15 U.S.C. 77q(a)(2).

[864] *See, e.g.,* UBS Settlement, *supra* note 864 (noting that UBS did not disclose the existence of a sub-penny order type to all ATS subscribers and that ''nearly all of the subscribers'' who received notice of the order type ''were market makers and/or HFT firms'') and at 10 (noting that certain orders—those entered on behalf of UBS clients that paid to use UBS-developed order-routing algorithms—had the ability to avoid executing in the ATS against orders entered by subscribers that UBS had deemed ''non-natural'' and no other subscribers had the ability to use this natural-only crossing restriction) *and* Crossfinder Settlement *supra* note 96 (noting the ATS did not permit all subscribers to receive IOIs from the IOI server).

must not discipline subscribers other than by *exclusion* from trading. [865] The language in Part III, Item 3 of adopted Form ATS–N now uses ''exclude, in whole or in part,'' which is similar to language used in the definition of ATS in Rule 300(a)(2), rather than using the term ''limitations and denials of services,'' as used in Part IV, Item 1(e) of proposed Form ATS–N. We recognize that exclusions from services, in whole or in part, are functionally equivalent to limitations and denials of services; however, we believe that the elimination of these terms from Part III, Item 3 of adopted Form ATS–N should mitigate any potential confusion that we are implicating Rule 301(b)(5) in the request.[866]

4. Hours of Operations

Part IV, Item 2 of proposed Form ATS–N would have required disclosures about the hours of operations. We did not receive comment on Part IV, Item 2 of proposed Form ATS–N. We are adopting the Item with modifications as Part III, Item 4 (''Hours of Operations'') of adopted Form ATS–N, as discussed below. We continue to believe that it is important for market participants and the Commission to understand when an NMS Stock ATS operates and when orders can be entered, including when an NMS Stock ATS will accept orders outside of regular trading hours. Making such information publicly available would enable market participants to more easily compare when trading interest can be entered on NMS stock trading centers. We are modifying the example provided in this Item by replacing references in the Proposal to hours when ''pre-opening or after-hours *trading* occurs'' (emphasis added) with ''hours of operation outside of regular trading hours.'' Our intent is to provide market participants with information about when the NMS Stock ATS is operating, whether trading or performing another function, such as accepting orders, and not simply when *trading* is occurring.[867]

5. Means of Entry

In Part III, Item 6 of proposed Form ATS–N we proposed a similar request to Part IV, Item 4(a) of proposed Form ATS–N that focused on the activities of the broker-dealer operator and its affiliates. Part III, Item 6 of proposed Form ATS–N would have required disclosures about the broker-dealer operator's, or any of its affiliates', use of a SOR(s) (or similar functionality) or an algorithm. Part IV, Item 4(a) of proposed Form ATS–N would have required disclosures about connectivity and order entry to the NMS Stock ATS. We are adopting both requests with modifications and combining them into Part III, Item 5 (''Means of Entry'') of adopted Form ATS–N.

One commenter asserts that the information sought in Part III, Item 6 of proposed Form ATS–N is generally duplicative of the requests in Part III, Item 3 (''Products or Services Offered to Subscribers'') and Part III, Item 5 (''Trading Activities on the NMS Stock ATS'') of proposed Form ATS–N and that the requests in Part III, Item 6 of proposed Form ATS–N (''Smart Order Router ('SOR') (or Similar Functionality of Algorithm)'') should be either consolidated into those requests or eliminated altogether.[868] To reduce redundancy, we are combining the proposed requests for information as explained above.

With regard to Part IV, Item 4(a) of proposed Form ATS–N, one commenter states that the requirement to ''describe'' the means of connectivity by ''other persons'' is potentially overbroad—particularly for ATSs with affiliated broker-dealers or other business units that may connect directly or indirectly to the ATS.[869] This commenter suggests that Part IV, Item 4(a) conflates the identities of market participants (subscribers and other persons) with the means of connectivity. The commenter submits that end users would be better served by a table identifying the various means of connectivity without respect to the identities of who connects and in which fashion.

In response to this comment, Part III, Item 5 of adopted Form ATS–N first requires an NMS Stock ATS to identify and explain the protocol that can be used to directly enter orders and trading interest into the ATS. In a separate subpart to Part III, Item 5 of adopted Form ATS–N, the NMS Stock ATS must identify and explain any other means for entering orders and trading interest into the NMS Stock ATS (*e.g.,* smart order router, algorithm, order management system, sales desk) and indicate whether these means are provided by the broker-dealer operator, either by itself or through a third-party contracting with the broker-dealer operator, or any affiliate of the broker-dealer operator. Both of these subparts are followed, respectively, by a request to identify and explain any differences in the terms and conditions for these means of entry among subscribers and the broker-dealer operator. We believe that these changes will better distinguish subject matter regarding means of entry from subject matter regarding the identity of any party offering access to such means of entry.

We note that subscribers may submit orders or trading interest to the NMS Stock ATS both directly and indirectly.[870] A direct method of sending orders or trading interest to an ATS that trades NMS stocks, for example, may include the use of the FIX Protocol. The FIX Protocol allows subscribers to enter orders or trading interest into the ATS without an intermediary. An example of an indirect method of submitting orders or trading interest to an NMS Stock ATS would include the use of the broker-dealer operator's SOR (or similar functionality) or algorithm. SORs (or similar functionalities) and algorithms are discussed further below. The means of order entry into an ATS (*e.g.,* direct or indirect) could impact the speed in which a subscriber's order is handled and potentially executed and potentially increases the risk of information leakage.[871] We believe that the disclosures regarding the direct or indirect means of order entry would inform subscribers and market participants about the functionalities that its orders and trading interest pass through on their way to the ATS and help them assess any potential advantages that orders sent through the broker-dealer operator may have with respect to other subscribers on the NMS Stock ATS.

We also received several other comments on the request for information in Part III, Item 6 of proposed Form ATS–N, which as

[865] *See* 17 CFR 242.300(a).

[866] *See supra* note 855 and accompanying text. Part III, Item 25 of adopted Form ATS–N (''Fair Access'') is specifically designed to require an NMS Stock ATS, as applicable, to provide information in connection with Rule 301(b)(5) of Regulation ATS. *See also* Section V.D.25.

[867] We are also modifying this request to require the times when trading interest *can be* entered on the ATS, as opposed to identifying the times trading interest *is* entered, so as to more precisely indicate when the ATS is available for the entry of trading interest. We are replacing references to pre-opening and after-hours with the more general reference to hours of operation ''outside of regular trading hours.''

[868] *See* SIFMA Letter at 15.

[869] *See id.* at 22.

[870] *See* Proposal, *supra* note 2, at 81068.

[871] To the extent that a subscriber connects to the NMS Stock ATS by way of a FIX connection and an order sent by that subscriber passes through an intermediate application or functionality on its way to the ATS, the ATS must identify the application or functionality and provide a description of its purpose. In this example, given that the intermediate application or functionality has access to a subscriber's order information, the NMS Stock ATS must take appropriate measures to protect the confidentiality of such information pursuant to Rule 301(b)(10) of Regulation ATS.

explained above, have been incorporated into Part III, Item 5 of adopted Form ATS–N. Many commenters express general support for public disclosures about an NMS Stock ATS's use of the broker-dealer operator's or its affiliates' SORs or algorithms.[872]

Some commenters, however, express concern that Part III, Item 6 of proposed Form ATS–N would require the NMS Stock ATS to publicly disclose proprietary information about its SOR and/or algorithms.[873] Two commenters believe that disclosing the information required under proposed Part III, Item 6 would harm broker-dealers that operate an NMS Stock ATS to the benefit of broker-dealers that do not, who would not be required to disclose what the commenter considers to be proprietary information.[874] Similarly, another commenter believes that it is not necessary to require disclosure of how the SOR or algorithm interacts with any ATS operated by third-party operators; the commenter states that requiring that type of disclosure would impose a disclosure obligation on ATS operators that is not imposed on competing broker-dealers that do not operate an ATS.[875]

We did not intend for the proposed requests regarding SORs (or other functionalities) and algorithms used by the broker-dealer operator or its affiliates to enter orders or trading interest into an NMS Stock ATS to mandate the public disclosure of information that could place the broker-dealer operator or its affiliates at a competitive disadvantage with other broker-dealers. To clarify the scope of the adopted disclosure requirements, Part III, Item 5(c) of adopted Form ATS–N no longer contains the proposed language ''[d]escribe the interaction and coordination.'' Rather, Part III, Item 5(c) only requires the NMS Stock ATS to ''list and explain'' sources of order flow other than those used for direct entry into the ATS, which could include SORs or algorithms offered by the broker-dealer operator. Furthermore, the adopted disclosure requirements only require the NMS Stock ATS to ''list and provide a summary description of the terms and conditions for entering orders or trading interest into the ATS'' through these sources. This revised language is intended to clarify that the NMS Stock ATS need not provide a detailed description of the programming for its SOR (or other similar functionality), algorithms, or other non-direct means for entering order and trading interests that could put the ATS at a competitive disadvantage with competitors. For example, NMS Stock ATSs need not disclose their SORs' routing tables or other information about how the SOR may route orders.[876]

Another commenter states that there are numerous questions in the proposed Form ATS–N that would require ATS operators ''to act as de facto agents of the SEC'' by asking the ATS operators to seek information relating to the operations of certain trading algorithms or SORs that the ATS operators have nothing to do with and may be blocked via firm information barriers from knowing anything about.[877] This commenter opines that ATS operators should properly be asked about how their ATSs work, and that information should be made available to all market participants, but if the Commission wants ATS operators to disclose whether they give preferential treatment to orders from affiliates at the expense of other ATS customers, or if they give preferential treatment to anyone else that isn't an affiliate over other ATS customers, then the Commission should pose that specific question and require a specific answer.[878] This commenter continues to state that anything beyond that which is of regulatory interest to the Commission with respect to how trading algorithms or smart order routers interact with ATSs generally or with other market centers should be asked of the firms that own or operate those algorithms or smart order routers.

We agree that it is outside of the scope of this rulemaking for us to require NMS Stock ATSs to obtain detailed information about how the SORs and algorithms of third parties operate when such information does not pertain to the operation of the ATS. However, if an affiliate of the broker-dealer operator provides a means of entry into the ATS for its customers or its principal orders, we believe that market participants should understand certain details about the interaction between that affiliate and the ATS, which are solicited in Part III, Item 6, to properly evaluate potential conflicts of interest and information leakage on the ATS.

For example, among the advantages and disadvantages that market participants should be able to discern from the disclosure of Part III, Item 5(b) is any differences in the latency of the alternative means for entering orders and trading interest into the NMS Stock ATS. We understand that alternative means of entering orders and trading interest may have different latencies associated with each alternative. For instance, in some cases, a direct connection to the NMS Stock ATS may have reduced latencies as compared to indirect means where orders and trading interest pass through an intermediate functionality. Alternatively, a broker-dealer operator could, for example, configure the NMS Stock ATS to provide reduced latencies for certain means of order entry used by itself or its affiliates, such as through a SOR or algorithm.[879]

We also believe that it is important for subscribers and market participants to understand a means of entry provided by an affiliate, such as the use of an affiliate's SOR, even if it does not provide an advantage to a particular entity. Specifically, we continue to believe that disclosures about a broker-dealer operator's use of its or an affiliate's SOR (or similar functionality) or algorithms to enter orders into the NMS Stock ATS are important to market participants when evaluating NMS Stock ATSs.[880] Today, most broker-dealers that operate an NMS Stock ATS use some form of SOR (or similar functionality) in connection with the NMS Stock ATS.[881] A SOR (or similar functionality) can generally be understood as an automated system used to route orders or trading interest among trading centers, including trading centers other than the NMS Stock ATS operated by the broker-dealer operator, to carry out certain trading instructions or strategies of a broker-dealer.[882] SORs (or similar

[872] *See* Schneiderman Letter at 1; HMA Letter at 17; STA Letter at 5; Liquidnet Letter at 9; KCG Letter at 10.

[873] *See* STA Letter at 5; Liquidnet Letter at 9; STANY Letter at 4; SIFMA Letter at 15.

[874] *See* STA Letter at 5; STANY Letter at 4.

[875] *See* Liquidnet Letter at 9.

[876] For example, a broker-dealer operator that uses its SOR to both enter customer orders into its ATS and send customer orders to external trading venues would not be required to disclose how its SOR is programmed to decide how to route those orders. The NMS Stock ATS would be required to disclose whether the broker-dealer operator's SOR is a means for entering client orders and, if so, indicate whether these means are provided by the broker-dealer operator, either by itself or through a third-party contracting with the broker-dealer operator, or through an affiliate of the broker-dealer operator, and list and provide a summary of the terms and conditions for entering orders or trading interest into the ATS through these means.

[877] *See* Luminex Letter at 3.

[878] *See id.* at 4.

[879] The Commission is not requiring a reporting regime with precise latencies calculated for each means of entry. *But see* Healthy Markets Letter at 19–20 (requesting that the Commission adopt annual reporting requirements regarding the latency of certain data on ATSs). Rather, the response to Item 5(b) would provide market participants with an appreciation of relative differences in the speed of order entry through the alternative means offered.

[880] *See* Proposal, *supra* note 2 at 81052.

[881] *See id.*

[882] *See id.*

functionalities) have become an integral part of the business of many multi-service broker-dealers, given the increase in the speed of trading in today's equity markets and the large number of trading centers, including national securities exchanges, ATSs, and non-ATS trading centers, that have emerged since the adoption of Regulation ATS.[883] In addition to the SOR (or similar functionality), orders or trading interest may be entered on an NMS Stock ATS through the use of a trading algorithm, which is a computer assisted trading tool that, for instance, may be used by or on behalf of institutional investors to execute orders that are typically too large to be executed all at once without excessive price impact, and divide the orders into many small orders that are fed into the marketplace over time.[884]

As discussed in the Proposal, we believe that market participants would benefit from increased disclosures about the use of a SOR(s) (or similar functionality) or algorithm(s) by the broker-dealer operator or its affiliates in connection with the NMS Stock ATS because of the potential for information leakage.[885] As also discussed in the Proposal, broker-dealer operators of NMS Stock ATSs or their affiliates may use SORs (or similar functionality) or algorithms in a variety of ways.[886] For example, the broker-dealer operator may use the SOR (or similar functionality) to route their agency and principal orders to different trading venues, or the broker-dealer operator may use the SOR as the primary means of routing subscriber orders or trading interest to or from the NMS Stock ATS. We understand that for some ATSs that currently transact in NMS stocks, the SOR (or similar functionality) or algorithm of the broker-dealer operator or its affiliates is the only means of access (*i.e.,* all orders or trading interest entered on, or removed from, the ATS, must pass through the SOR (or similar functionality) or algorithm). A broker-dealer operator may also use a SOR (or similar functionality) or algorithm to handle all order flow received by the broker-dealer operator (or its affiliates), including both orders that a subscriber has specifically directed to the NMS Stock ATS and orders that may not be sent to the NMS Stock ATS, as well as the broker-dealer's own principal orders and those of its affiliates. For many orders, the SOR (or similar functionality) or algorithm determines whether to route the order to the NMS Stock ATS, another ATS or a non-ATS trading center operated by the broker-dealer operator, another broker-dealer, an unaffiliated NMS Stock ATS, or a national securities exchange. The SOR (or similar functionality) may obtain knowledge of subscriber orders or trading interest that have been routed to the NMS Stock ATS (and may now be resting on the NMS Stock ATS) and subscriber orders that have been routed out of the NMS Stock ATS. Similarly, the system operating an algorithm used by the broker-dealer operator to enter subscriber orders based on the algorithm's trading strategy may obtain information about subscriber orders sent to the NMS Stock ATS. The broker-dealer operator (or its affiliates) programs and operates the SOR (or similar functionality) and/or algorithm(s), unless the broker-dealer operator contracts such functions to a third-party vendor, in which case the broker-dealer operator or third-party vendor may have access to information that passes through the SOR(s) (or similar functionality), algorithm(s) or both. We continue to believe that the high likelihood that a SOR (or similar functionality) or algorithm could access subscribers' confidential trading information necessitates disclosure of certain information to subscribers about the use of a SOR (or similar functionality) or algorithm by the broker-dealer operator or its affiliates to route subscriber orders to or out of the NMS Stock ATS.

A system may consist of various functionalities, mechanisms, or protocols that operate collectively to bring together the orders for securities of multiple buyers and sellers using non-discretionary methods under the criteria of Rule 3b–16(a). In some circumstances, the various functionalities, mechanisms, or protocols may be offered or performed by another business unit of the broker-dealer operator or by a separate entity.[887] As discussed in the Proposal, broker-dealer operators that use a SOR (or similar functionality) or algorithm may operate the SOR (or similar functionality) or algorithm separate and apart from their ATS.[888] However, to the extent that a SOR (or similar functionality) or algorithm performs a function of the NMS Stock ATS to bring together the orders for securities of multiple buyers and sellers using established nondiscretionary methods, the SOR (or similar functionality) or algorithm may be considered part of the NMS Stock ATS.[889] We believe that information provided on Form ATS–N about the use of a SOR (or similar functionality) or algorithm in Part III, Item 5 of adopted Form ATS–N will allow the Commission to better understand the operations and scope of the NMS Stock ATS. That is, the disclosures would assist the Commission in determining if a SOR (or similar functionality) or algorithm is performing a function of the NMS Stock ATS to bring together the orders for securities of multiple buyers and sellers using established nondiscretionary methods, and would consequently be part of the NMS Stock ATS for the purposes of Regulation ATS.

Finally, some commenters suggest reducing the level of detail solicited in the proposed disclosures about the use of SORs (or other functionalities) or algorithms. One commenter suggests reframing the proposed requests regarding the use of SORs (or other functionality) or algorithms to ''yes'' or ''no'' questions or attestations of ''no advantage,'' and in situations where the broker-dealer operators or its affiliates does have an advantage, the NMS Stock ATS should disclose that advantage publicly and in similar detail to what was proposed in Part III, Item 6.[890] Another commenter states that if the Commission does not eliminate or consolidate Part III, Item 6 of proposed Form ATS–N, the commenter

[883] *See id.*

[884] *See id. See also* Staff of the Division of Trading and Markets, Commission, ''Equity Market Structure Literature Review, Part II: High Frequency Trading,'' at 5 (March 18, 2014), *http://www.sec.gov/marketstructure/research/hft_lit_review_march_2014.pdf.*

[885] *See* Proposal, *supra* note 1, at 81052.

[886] *See id.* Broker-dealer operators are likely to vary in their organizational structures. Accordingly, Part III, Item 5 of adopted Form ATS–N will include third parties that contract with the broker-dealer operator and affiliates of the broker-dealer operator that may operate a SOR(s) (or similar functionality) or algorithm to help ensure that SORs (or similar functionalities) or algorithms used with the NMS Stock ATSs are disclosed regardless of whether the SOR(s) (or similar functionality) or algorithm(s) is operated by a third-party contracting with the broker-dealer operator or an affiliate of the broker-dealer operator.

[887] We stated in adopting Regulation ATS that we ''will attribute the activities of a trading facility to a system if that facility is offered by the system directly or indirectly'' and ''if an organization arranges for separate entities to provide different pieces of a trading system, which together meet the definition contained in paragraph (a) of Rule 3b–16, the organization responsible for arranging the collective efforts will be deemed to have established a trading facility.'' *See* Regulation ATS Adopting Release, *supra* note 3, at 70852.

[888] *See* Proposal, *supra* note 2, at 81053.

[889] In this example, if the SOR(s) (or similar functionality) or algorithm(s) were operated by an affiliate of the NMS Stock ATS or an entity unaffiliated with the NMS Stock ATS, the SOR(s) (or similar functionality) or algorithm(s) could still be considered a part of the NMS Stock ATS depending on the facts and circumstances.

[890] *See* STA Letter at 5.

recommends focusing the requests on the controls within the ATS (as opposed to the attributes of the algorithm or SOR) and asking whether the algorithm or SOR possesses information about the ATS by virtue of its affiliation with the ATS that other algorithms or SORs do not possess.[891] Likewise, a commenter states that a more granular requirement than progressive ''yes'' or ''no'' answers for Part III, Item 6 of proposed Form ATS would pose challenges to maintain up-to-date disclosures.[892] This commenter recommends that Form ATS–N disclosures about potential trading activity on the ATS should be formatted as progressive ''yes'' or ''no'' questions and that certain Form ATS–N disclosures may be subject to immediate change without notice.[893]

We do not believe that the requests about the means for entering orders and trading interests on the NMS Stock ATS will be overly burdensome to keep up-to-date on Form ATS–N because the requests do not require a level of detail that would mandate an amendment for every programming change to these services, such as an update to the routing table. Furthermore, to the extent that an NMS Stock ATS is unable to use a means for entering order and trading interests due to unexpected circumstances, such as a power failure or act of nature, the NMS Stock ATS could state in its Form ATS–N information about the alternative procedures that the ATS would use for the entry of orders and trading interests into the NMS Stock ATS under such exigent circumstances; this would obviate the need for an amendment when such alternative procedures are used. Finally, as explained in detail above, we believe that the information solicited in adopted Form ATS–N about the use of SORs (or similar functionalities) or algorithms by the ATS is very important for market participants when evaluating potential conflicts of interest on the ATS, so we do not think it would be helpful to reduce the level of detail required by the adopted form as suggested by these commenters.

6. Connectivity and Co-Location

Part IV, Item 4(b) of proposed Form ATS–N would have required disclosures about co-location. We are adopting Part IV, Item 4(b) of proposed Form ATS–N, with modifications, and renumbering the request as Part III, Item 6 (''Connectivity and Co-location'') of adopted Form ATS–N.

A commenter recommends that the Part IV, Item 4(b) co-location request could be reworded as two ''yes'' or ''no'' questions, provides recommended questions, and states that any further information requested should be as simple and direct as possible without requiring detailed, idiosyncratic information in the form.[894] In response to this comment, we have circumscribed the description of terms and conditions of co-location services and are requiring ''a summary'' of the terms and conditions for co-location and related services, including the speed and connection (*e.g.,* fiber, copper) options offered. We believe a summary would provide market participants with the necessary information to consider and evaluate the co-location and related services the NMS Stock ATS is offering without requiring overly burdensome disclosure. We do not believe that solely asking ''yes'' or ''no'' questions (with no obligation to provide additional detail) would provide market participants with sufficient information to evaluate the co-location services the NMS Stock ATS is offering. For example, a price-sensitive market participant may not want to participate on an ATS that offers co-located subscribers certain, more expensive, high-speed connectivity options that the market participant may perceive as providing an advantage to other subscribers that are willing to pay for the service. Such information would not be disclosed by ''yes'' or ''no'' questions.

We are reformatting the question regarding connectivity and co-location in Part III, Item 6 of adopted Form ATS–N to provide two sub-items that relate to speed of communication with the ATS, which were requested in Part IV, Item 4(b) of proposed Form ATS–N. As adopted, Part III, Item 6(c) of Form ATS–N requires an NMS Stock ATS to indicate whether it provides any other means besides co-location and related services described in the Item to increase the speed of communication with the ATS, and if so, to explain the means and offer a summary of the terms and conditions for its use.[895] We separated the proposed request for information related to means to increase the speed of communication with the ATS into its own separate sub-item (*i.e.,* Part III, Item 6(c)) to improve readability, make the information easier to locate, and facilitate comparisons across NMS Stock ATSs.[896] We believe the request is necessary to account for advances in technology.

We also are adopting a request in Part III, Item 6(e) for the NMS Stock ATS to indicate whether it offers any means to reduce the speed of communication with the ATS and provide a summary of the terms and conditions for its use. As indicated by commenters,[897] latency is an important feature of equity market trading, and market participants are interested in understanding the functionalities employed by NMS Stock ATSs to influence it. There have been recent developments in equity market structure for trading centers to employ mechanisms to increase the latency or the length of time for orders, trading interest, or other information to travel from a user to the system.[898] Part IV, Item 7(a) of proposed Form ATS–N required an NMS Stock ATS to disclose information about the means or facilities used by the ATS to bring together the orders of multiple buyers and sellers, as well as the established, non-discretionary methods that dictate the terms of trading on the ATS. To the extent that an NMS Stock ATS applied a functionality or means for the ATS or a subscriber to decrease speed of communications with the NMS Stock ATS, the ATS would have been required to disclose that functionality in response to Part IV, Item 7(a) of proposed Form ATS–N. In adopted

[891] *See* SIFMA Letter at 15. The commenter also states that it would like the Commission to define ''Person'' as used in proposed Part III, Item 6(b). *See id.* The term ''Person'' is defined in Form ATS–N. *See supra* Section V.A.2.

[892] *See* KCG Letter at 10.

[893] *See id.*

[894] The commenter suggests the following two questions in place of proposed Item 4(b): (i) Do you offer co-location to the ATS matching engine, and (ii) do all clients have the same access to co-location services? *See* SIFMA Letter at 22.

[895] Question 347 of the Proposal asks if Part IV, Item 4(b) of Form ATS–N captures the information that is most relevant to understanding the operations of the NMS Stock ATS related to co-location services or any other means by which any subscriber or other persons may enhance the speed by which to send or receive orders, trading interest, or messages to or from the NMS Stock ATS. *See* Proposal, *supra* note 2, at 81069.

[896] *See supra* note 839. Part IV, Item 4(b) of proposed Form ATS–N would have required an NMS Stock ATS to describe ''any other means by which any subscriber or other persons may enhance the speed by which to send or receive orders, trading interest, or messages to or from the NMS Stock ATS.'' Part III, 6(c) of adopted Form ATS–N would require similar information as Part IV, Item 4(b) of proposed Form ATS–N. The language revisions are intended to simplify and improve readability of the request.

[897] *See infra* note 1037 and accompanying text.

[898] *See* In the Matter of the Application of Investors' Exchange, LLC for Registration as a National Securities Exchange, 81 FR 41142, 41154 (June 23, 2016) (explaining the use of the IEX coil and an additional distance to the IEX trading system that results in an equivalent 350 microseconds of latency) (''IEX Exchange Registration''); Securities Exchange Act Release No. Release No. 80700 (May 16, 2017), 82 FR 23381 (May 22, 2017) (Order Approving Proposed Rule Change Amending Rules 7.29E and 1.1E to Provide for a Delay Mechanism) (approving rule change on NYSE MKT LLC to provide for an intentional delay of 350 microseconds of latency to inbound and outbound order messages).

Form ATS–N, because of commenters' concerns regarding communication latencies with NMS Stock ATSs and the impact they may have on how the subscriber's orders and trading interest are executed on the NMS Stock ATS, we are making this request a separate sub-part for market participants to more readily find information related to how a subscriber communicates with the NMS Stock ATS. For Part III, Items 6(c) and 6(e), the Item requires a summary of the terms and conditions of the services offered if applicable. We believe a summary would provide subscribers and market participants with relevant information about the NMS Stock ATS to consider and evaluate its services without requiring overly burdensome disclosure.

We are also providing examples in Part III, Item 6 of adopted Form ATS–N to clarify the types of services and connection options related to co-location that an NMS Stock ATS may offer. We believe that providing these examples will help NMS Stock ATSs better understand the type of information that would be responsive to the Form ATS–N requests.

We are providing further guidance as to what is required of NMS Stock ATSs when disclosing any differences in the terms and conditions among subscribers and the broker-dealer operator related to co-location and related services. Subscribers of co-location services can experience faster or slower connection speeds to an NMS Stock ATS depending on factors such as the distance of the customer servers from the matching engine, or the use or non-use of ''coiling'' to its matching engine to equal connection speeds among subscribers, among others. Such differences in connection speed or latency would be required to be disclosed under Part III, Item 6(a).

7. Order Types and Attributes

Part IV, Item 3(a) of proposed Form ATS–N would have required disclosures about order types and modifiers.[899] We received comments on Part IV, Item 3 of proposed Form ATS–N expressing general support for the Commission's aim to provide disclosure for order types that could benefit market participants' understanding how their orders may be handled by the NMS Stock ATS and that could help optimize order routing practices by market participants.[900]

We continue to believe that all market participants should have full information about the operations of order types available on an NMS Stock ATS for market participants to comprehensively understand how their orders and trading interest will be handled and executed on the ATS. Accordingly, we are adopting Part IV, Item 3(a) of proposed Form ATS–N with certain modifications described below, naming the Item ''Order Types and Attributes,'' and relocating the request as Part III, Item 7 of adopted Form ATS–N. Order types are a primary means by which users of an NMS Stock ATS communicate their instructions for handling their trading interest to the NMS Stock ATS. Moreover, order types can be complex and operate in various ways. Given the importance of order types and their complex nature, we are requiring NMS Stock ATSs to disclose the information called for by Part III, Item 7 on adopted Form ATS–N.

One commenter suggests that Part IV, Item 3 of proposed Form ATS–N would require excessive information that would be unnecessarily burdensome and duplicative, and offers several suggestions on how to streamline the Item, including defining a set of order type terminology for completing the form, allowing a table template for responses, and suggested ''yes'' or ''no'' questions.[901]

We do not believe that it would be practical to define or standardize order types because the operation and naming of order types is not consistent across NMS Stock ATSs or trading centers, and broadly similar order types can have many permutations.[902] We believe that Part III, Item 7 of adopted Form ATS–N provides NMS Stock ATSs with necessary flexibility to describe the order types that the ATS offers subscribers while still providing the necessary information for market participants to understand how an order type will function.

For similar reasons, we are declining to adopt the commenter's suggestions that Part IV, Item 3(a)(vi) of proposed Form ATS–N could be simplified to a ''yes'' or ''no'' question asking whether each order type is available to all subscribers. This Item specifically relates to whether every order type is available across all forms of connectivity, not to all subscribers.[903] A ''yes'' or ''no'' format would not allow an NMS Stock ATS to explain any differences in order types available across all forms of connectivity, if any.

An NMS Stock ATS can choose a format that it finds best to provide market participants with complete and comprehensible information, such as, for instance, a table with the relevant characteristics of each order type.

We have made several edits to remove duplicative requirements, improve readability and specificity, and remove unnecessary language.[904] We are removing references to the ranking of order types and time in force instructions to avoid duplication. We are revising the language of the Item to require information on order types that ''can be'' entered on the NMS Stock ATS, because we intended for NMS Stock ATSs to disclose to market participants the services that the ATS offers. We are also removing superfluous language that is already captured by the instruction to ''identify and explain.'' [905] We are also removing the language from proposed Part IV, Item 3(b) requiring the NMS Stock ATS to describe any differences among subscribers in the ''availability of order types'' because the request to describe any differences in the terms and conditions of order types among subscribers and the broker-dealer operator in Part III, Item 7(b) encompasses any differences in availability.

We are adding in Part III, Item 7(a)(i) of adopted Form ATS–N that the NMS Stock ATS provide not only whether an order type can receive a new time stamp, but also, when, so that market

[899] Part IV, Item 3(c) of proposed Form ATS–N would have required an NMS Stock ATS to describe any requirements and handling procedures for minimum order sizes, odd-lot orders, or mixed-lot orders. The NMS Stock ATS would also have been required to describe any differences if the requirements and handling procedures for minimum order sizes, odd-lot orders, or mixed-lot orders were not the same for all subscribers and persons. As discussed further below, minimum order sizes, odd-lot orders, and mixed-lot orders are addressed in Part III, Item 8 of adopted Form ATS–N.

[900] *See* ICI Letter at 7 (stating that disclosure would end the practice of some ATSs of disclosing the existence of certain order types to only favored subscribers and provide long term benefits by allowing funds to optimize their order routing practices); SIFMA Letter at 6 (suggesting the proposed Item requires useful information for market participants, whose investments may be traded indirectly on ATSs via their third-party broker-dealers). *See also* Citadel Letter at 1; Better Markets Letter at 5; Morgan Stanley Letter at 1; Markit Letter at 4; KCG Letter at 7.

[901] *See* SIFMA Letter at 20–21.

[902] *See also* Consolidated Audit Trail, Final Rule, Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722, 45742 (August 1, 2012) (declining under Rule 613 to enumerate specific order types or prescribing the format or nature of how this information would be represented to allow flexibility for the future when new order types may be introduced and added).

[903] *See supra* note 901.

[904] *See* SIFMA Letter at 20–21.

[905] Specifically, we are removing language that NMS Stock ATS describe the ''characteristics, operations, and how [order types] are handled on the NMS Stock ATS.'' As indicated in the text, we do not view this as a substantive change, and the information requested using the deleted language is captured by the instruction to identify and explain each order type.

participants can better understand how their orders or trading interest will be handled by the NMS Stock ATS. We are also removing the prompt in the proposed Item that would have required information on whether an order type can be used with any routing services offered because these services are usually provided by the broker-dealer operator.

Finally, the Commission is providing further guidance with regard to the prompt in Item 7(a)(vii) that the NMS Stock ATS describe the circumstances under which orders types may be removed from the NMS Stock ATS as the information required relates to the disclosures required under Part III, Item 16 (Routing). While we are not requiring broker-dealers to disclose information about their handling of customer orders when such orders are not routed to the NMS Stock ATS, we believe that market participants should be aware of how a subscriber order or trading interest that has been received by and rests in the NMS Stock ATS can be subsequently removed from the ATS. Such circumstances may be as simple as the broker-dealer cancelling a customer order that it is handling from the ATS, or such circumstances could include the broker-dealer operator removing a third-party subscriber's order at its own discretion. To the extent that this information about removal of orders overlaps with the disclosures regarding routing of orders under Part III, Item 16, the NMS Stock ATS need only provide the information in Part III, Item 7 of adopted Form ATS–N. Additionally, the Part III, Item 7 requests regarding removal of orders and trading interest from the ATS will not require the broker-dealer operator to publicly disclose its routing table or other information about where the order is sent once it is removed from the NMS Stock ATS.

8. Order Sizes

Part IV, Item 3(c) of proposed Form ATS–N would have required disclosures about order size requirements and odd-lot orders. We did not receive any comments directed at Part IV, Item 3(c) of proposed Form ATS–N; however, in response to commenters' general request for the Commission to use more ''yes'' or ''no'' questions to navigate information and facilitate comparisons, we are relocating Part IV, Item 3(c) of proposed Form ATS–N to Part III, Item 8 (''Order Sizes'') of adopted Form ATS–N and adopting a ''yes'' or ''no'' format.[906] In addition, we are requiring that the NMS Stock ATS identify and explain any differences in the treatment of subscribers and the broker-dealer operator, as applicable, in separate sub-items 8(b), 8(d), and 8(f), respectively.

In addition, we are adding to Part III, Item 8(a) of adopted Form ATS–N a request for the NMS Stock ATS to provide information about any maximum order or trading interest size requirements.[907] Adding a request regarding a cap or maximum limit on an order size in the Part III, Item 8 of adopted Form ATS–N would help streamline an NMS Stock ATS's response to Form ATS–N and help market participants understand, the size requirements for trading on the ATS.

Furthermore, we are providing examples in a parenthetical indicating that ATSs state whether or not odd-lot and mix-lot orders and trading interest are treated the same as round lot orders and trading interest. Information regarding the treatment of odd-lot and mixed-lot orders and trading interest compared to round lot orders and trading interest could influence whether market participants submit odd-lot or mixed-lot orders to the NMS Stock ATS.

9. Conditional Order and Indications of Interest

Part IV, Item 3(d) of proposed Form ATS–N would have required disclosures about conditional orders and indications of interest. We received one comment regarding Part IV, Item 3(d) of proposed Form ATS–N contending that providing additional disclosure regarding order types and handling (including the use of IOIs) is useful information for subscribers and the investing public, whose investments may be traded indirectly on ATS platforms via their third-party broker-dealers.[908]

We are adopting Part IV, Item 3(d) of proposed Form ATS–N with modification and relocating the request to Part III, Item 9 (''Conditional Orders and Indications of Interest'') of adopted Form ATS–N. Part III, Item 9 of adopted Form ATS–N is designed to provide specific information about the use of messages on the NMS Stock ATS, in particular, IOIs, actionable IOIs, conditional orders, and similar functionalities.[909] As stated in the Proposal,[910] NMS Stock ATSs use IOIs to convey trading interest available on those trading centers. Some NMS Stock ATSs also transmit ''actionable'' IOIs to selected market participants for the purpose of attracting contra-side order flow to the ATS. In general, an actionable IOI is an IOI containing enough information to effectively alert the recipient about the details of the NMS Stock ATS's trading interest in a security.[911] While an actionable IOI may not specify the price and/or size of the trading interest, the practical context in which it is submitted implicitly or explicitly conveys information about the symbol, side (buy or sell), size (minimum of a round lot of trading interest), and price (at or better than the NBBO, depending on the side of the order).[912]

Conditional orders are also messages indicating trading interest on a trading venue, and conditional orders generally function in a similar manner to IOIs. A conditional order may contain the same attributes as other order types when a subscriber enters it onto the trading venue (*e.g.,* side, price, and size), but NMS Stock ATSs will generally not transmit those details to other subscribers or market participants.[913] Rather, the NMS Stock ATS will tentatively match the conditional order with contra side interest and then alert the subscriber that entered the conditional order of the potential match. That subscriber may then either accept or decline the execution (*i.e.,* ''firm up'' the conditional order).[914] As discussed in the Proposal, NMS Stock ATSs may only permit conditional orders to execute against other conditional orders, but some ATSs allow conditional orders to interact with other order types.[915] Understanding the manner in which NMS Stock ATSs use messages that convey trading interest, such as IOIs, actionable IOIs, conditional orders, and similar functionalities could be useful to market participants in analyzing the potential execution of a subscriber's trading interest.

In response to comment,[916] we are removing the word ''circumstances''

[906] *See supra* note 839.

[907] As proposed, Part IV, Item 3(b) requested information about minimum order size requirements. Also, Part IV, Item 7(b) of proposed Form ATS–N would have required NMS Stock ATS to disclose information about the ''established, non-discretionary methods that dictate the terms of trading . . . on the NMS Stock ATS.'' To the extent that an NMS Stock ATS established a cap or a limit on the size of orders or trading interest that the ATS would accept from subscribers, this cap or limit would be a procedure governing the trading on the ATS and would have been responsive to proposed Form ATS–N (specifically, proposed Part IV, Item 7(b)).

[908] *See* SIFMA Letter at 6.

[909] *See* Proposal, *supra* note 1, at 81067 for additional discussion of IOIs, actionable IOIs, conditional orders, and similar functionalities.

[910] *See* Proposal, *supra* note 2, at 81067.

[911] *See id.*

[912] *See id.*

[913] *See id.*

[914] *See id.*

[915] *See id.*

[916] *See, e.g.,* SIFMA Letter at 9; BIDS Letter at 4; STA Letter at 4.

from the request and adding more detail to the request to aid NMS Stock ATSs in responding.[917] The Commission is adding ''price or size minimums'' as examples of information that could be contained in the messages and ''order management system, smart order router and FIX'' to illustrate the types of mechanisms that could transmit messages, such as IOIs and conditional orders. In the Commission's experience, the information that NMS Stock ATS include in IOIs and conditional orders can vary, including different combinations of symbol, size and/or price, and we believe that this information would be relevant to market participants when understanding what information about their orders are communicated to others and assessing potential information leakage. Second, we are adding a requirement that the NMS Stock ATS identify the type of persons that receive the message[918] (*e.g.,* subscriber, trading center), and the possible responses to conditional orders or IOIs (*e.g.,* submission to firm-up conditional orders). These two factors could help market participants understand when a message, such as a conditional order or IOI, would result in an execution and provide market participants important information to understand how the market participant can use the ATS, who will see its trading interest, how its trading interest will be executed, and the potential for information leakage.[919] Finally, we are including ''response time parameters, interaction and matching'' as examples of topics to discuss when disclosing the conditions under which the conditional order or IOI might result in an execution in the ATS.

10. Opening and Reopening

Part IV, Item 9(a) of proposed Form ATS–N would have required disclosures about opening and reopening processes. We received one comment on Part IV, Item 9(a) of proposed Form ATS–N stating that Part IV of proposed Form ATS–N, including requests relating to the opening and reopening procedures, is essential for investors or routing brokers who are seeking to understand how the ATS works.[920] We are adopting Part IV, Item 9(a) of proposed Form ATS–N with certain modifications, as described below in this section, and relocating the request as Part III, Item 10 (''Opening and Reopening'') of adopted Form ATS–N. The Commission is separating proposed Part IV, Items 9(b) (''Closing Process'') and 9(c) (''After-Hours Trading'') of proposed Form ATS–N, which were previously part of the same Item as Opening and Reopening Processes (Part IV, Item 9(a)), into separate items on the adopted Form ATS–N to facilitate locating information and making comparisons across NMS Stock ATSs.[921]

As stated in the Proposal,[922] Part III, Item 10 of adopted Form ATS–N is designed to inform market participants about whether an NMS Stock ATS uses any special procedures to match orders at the opening, or to set a single opening or reopening price to, for example, maximize liquidity and accurately reflect market conditions at the opening or reopening of trading. The disclosures under this Item would allow for comparisons between NMS Stock ATSs and national securities exchanges, which conduct opening and closing auctions and permit members to enter orders specially designated to execute on the opening. We continue to believe that market participants would likely want to know about any special opening or reopening processes employed by an NMS Stock ATS, including if any order types participate in an NMS Stock ATS's opening or reopening processes.

Furthermore, to provide additional guidance about what needs to be included in the description of the opening and reopening process, we are adding to Part III, Item 10 of adopted Form ATS–N that the ATS describe: When and how such orders and trading interest are ''priced [and] prioritized'' and ''any order types allowed'' during the opening and reopening processes. Specifically requesting information about when orders and trading interest will be priced and prioritized during the opening or reopening of the ATS will provide market participants with the information they need to plan and execute their trading strategies during these periods. The Item would also, for example, require disclosure of any procedures to match orders to set a single opening or reopening price to maximize liquidity and accurately reflect market conditions at the opening or reopening of trading.[923] We believe most participants consider important the rules and procedures surrounding the pricing and priority of orders and trading interest, and the order types allowed because these rules and procedures can directly impact their execution price.

In the Proposal, we would have required the information related to the pricing and priority of orders during the opening and reopening processes and any order types allowed during that time period under Part IV, Items 9(a) (''Opening and Reopening Process''), 7(b) (''Order Interaction Rules'') and Item 3 (''Types of Orders''). Part IV, Item 9(a) of proposed Form ATS–N required, in part, a description of ''how orders or other trading interest are matched and executed'' during an opening or reopening. In order to fully describe the matching and execution of orders during an opening or reopening in response to the Item, the NMS Stock ATS would necessarily have needed to disclose the pricing, priority, and order types allowed. Moreover, Part IV, Item 7(b) of proposed Form ATS requested information about the established non-discretionary methods that dictate terms of trading among multiple buyers and sellers, which included rules and procedures for priority and pricing. In addition, Part IV, Item 3 of proposed Form ATS–N would have required disclosure of ''any types of orders that are entered on the NMS Stock,'' which would have included any order types during an opening or reopening.

We are adding a specific question about the rules and procedures for the opening and reopening process in Part III, Item 10 of adopted Form ATS–N to help streamline responses to Form ATS–N requests and help market participants locate and understand information about the opening and reopening process on the ATS.[924] In Part III, Item 10, we are formatting the information requested, which parallels the Item in the Proposal, into three subparts (adopted Items 10(a), 10(c) and 10(e)) and adding a ''yes'' or ''no'' question to Item 10(e).

11. Trading Services, Facilities and Rules

Part IV, Item 7 of proposed Form ATS–N would have required disclosures regarding the trading services of the

[917] We also believe the more explicit requests address commenters' concerns that prompts like ''describe the circumstances'' would not allow NMS Stock ATSs to know whether the disclosure ''meets the Commission's expectation until after the Form ATS–N itself or an amendment is filed.'' *See, e.g.,* SIFMA Letter at 19.

[918] We are requiring the ''type of Persons'' that receives the message in this Item and are not requesting the names of individual recipients in the case of natural persons.

[919] The information required by the prompts to disclose the type of recipient and possible responses to conditional orders or IOIs would have been required in Part III, Item 3(d) of proposed Form ATS–N in response to the request for ''circumstances in which [the messages] may result in an execution on the NMS Stock ATS.'' Because commenters requested more specificity, we are making more explicit the information required in Part III, Item 9(a) of adopted Form ATS–N. *See supra* note 917.

[920] *See* HMA Letter at 18.

[921] *See supra* note 839.

[922] *See* Proposal, *supra* note 2, at 81077.

[923] *See* Proposal, *supra* note 2, at 81077 n. 485, 486 and accompanying text.

[924] *See supra* note 839.

NMS Stock ATS, including matching methodology, order interaction rules, and other trading procedures. We are adopting Part IV, Item 7, with modifications, as Part III, Item 11 of adopted Form ATS–N and renaming it ''Trading Services, Facilities, and Rules.'' Part III, Item 11 is designed to inform market participants and the Commission about the type of marketplace the NMS Stock ATS operates (*e.g.,* crossing system, auction market, limit order matching book). In addition, Part III, Item 11 is designed to solicit disclosures about the facilities, functionalities, and mechanisms that the NMS Stock ATS uses to match the orders and trading interest of counterparties and facilitate transactions on the ATS. As discussed in the Regulation ATS Adopting Release and restated in the Proposal,[925] we explained that an ATS brings together orders when orders entered into the system for a given security have the opportunity to interact with other orders entered into the system for the same security.[926] An ATS can bring together orders through various methods. For instance, a system brings together orders if it displays, or otherwise represents, trading interests entered on the system, such as a consolidated quote screen, to system users.[927] A system also brings together orders if it receives subscribers' orders centrally for future processing and execution, such as part of a limit order matching 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.[928] As explained above, to qualify for the Rule 3a1–1(a)(2) exemption from the statutory definition of ''exchange,'' an ATS must, among other things, bring together the orders of *multiple buyers and sellers.*[929]

As discussed in the Proposal, ATSs that trade NMS stocks may offer subscribers various types of trading mechanisms.[930] For example, many ATSs bring together multiple buyers and sellers using limit order matching systems. Other ATSs use crossing mechanisms that allow participants to enter unpriced orders to buy and sell securities, with the ATS's system crossing orders at specified times at a price derived from another market.[931] Some ATSs use an auction mechanism that matches multiple buyers and sellers by first pausing execution in a certain security for a set amount of time, during which the ATS's system seeks out and/or concentrates liquidity for the auction; after the trading pause, orders will execute at either a single auction price or according to the priority rules for the auction's execution. Furthermore, some ATSs use a blotter scraping functionality, which may inform the ATS's system about the orders placed on a participant's order management system, but not yet entered into the ATS; the ATS or broker-dealer operator oftentimes can automatically generate those orders and enter them into the ATS on behalf of the subscriber, in accordance with the relevant terms and conditions, when certain contra-side trading interest exists in the ATS.

We continue to believe that it would be useful to market participants to be availed information about the trading facilities, functionalities, and mechanisms offered by an NMS Stock ATS to evaluate whether the operations of the NMS Stock ATS comports with their trading and investment strategies. Part III, Item 11(a) of adopted Form ATS–N is consistent with Part IV, Item 7(a) of proposed Form ATS–N; however, we are limiting the request to require NMS Stock ATSs to provide only a summary of the structure of the NMS Stock ATS marketplace.[932] The summary is designed to provide market participants with a brief overview of the type of market the ATS operates, such as a limit order book, auction market, or crossing system, in a more concise manner. This Item requires more detailed responses when explaining the means and facilities for bringing together the orders of multiple buyers and sellers on the NMS Stock ATS. We also separated the requested information on whether the means and facilities are the same for all subscribers and the broker-dealer operator into subpart Part III, 11(b) and formatted the subpart request as a ''yes'' or ''no'' question in response to comment.[933]

Part III, Item 11(c) is designed to inform market participants about the rules and procedures used to determine how orders and trading interest may interact on an NMS Stock ATS upon being entered into the system.[934] We previously explained in the Regulation ATS Adopting Release that use of established, non-discretionary methods could include operation of a trading facility or the setting of rules governing subscribers' trading.[935] For example, we consider the use of an algorithm by an electronic trading system, which sets trading procedures and priorities, to be a trading facility that uses established, non-discretionary methods.[936] Similarly, the Commission has previously stated that rules imposing execution priorities, such as time and price priority rules, would be ''established, non-discretionary methods.'' [937]

As discussed in the Proposal, NMS Stocks ATSs may employ various terms and conditions under which orders interact and match.[938] Some NMS Stock ATSs may offer price-time priority to determine how to match orders (potentially with various exceptions), while other NMS Stock ATSs may offer midpoint-only matching with time priority. Some NMS Stock ATSs might also take into account other factors to determine priority. For example, an NMS Stock ATS may assign either a lower or higher priority to an order entered by a subscriber in a certain class (*e.g.,* orders of proprietary traders or retail investors) or routed from a particular source (*e.g.,* orders routed by the broker-dealer operator's SOR (or similar functionality) or algorithm) when compared to an equally priced order entered by a different subscriber or via a different source. Furthermore, in the Commission's experience, an NMS Stock ATS might elect to apply

[925] *See* Proposal, *supra* note 2, at 81073.

[926] *See* Regulation ATS Adopting Release, *supra* note 3, at 70849.

[927] *See id.*

[928] *See id.*

[929] *See id.* In the Regulation ATS Adopting Release, systems in which there is only a single seller, such as systems that permit issuers to sell their own securities to investors, would not be included within Rule 3b–16. *See* Regulation ATS Adopting Release, *supra* note 3, at 70849. The Commission emphasized in the Regulation ATS Adopting Release that the mere interpositioning of a designated counterparty as riskless principal for settlement purposes after the purchasing and selling counterparties to a trade have been matched would not, by itself, mean that the system does not have multiple buyers and sellers. *See id.*

[930] *See* Proposal, *supra* note 2, at 81073.

[931] *See* Regulation ATS Adopting Release, *supra* note 3, at 70849 n.37.

[932] In the Proposal under Part IV, Item 7(a), we proposed that the NMS Stock ATS describe the means or facilities used by the NMS Stock ATS to bring together the orders of multiple buyers and sellers, including ''the structure of the market.''

[933] *See supra* note 839.

[934] One commenter states that, when discussing electronic trading platforms for corporate bonds, ''as the Commission knows, a bond trading platform that utilizes an RFQ [request for quote] trading protocol is not an ATS.'' *See* MarketAxess Letter at 2. Whether a platform that trades securities is an ATS depends on whether that platform meets the definition of an ''exchange'' pursuant to the criteria of Exchange Act Rule 3b–16(a) which requires a facts and circumstances analysis. A platform that uses an RFQ protocol to trade securities would be subject to the Rule 3b–16(a) analysis, and depending on its design, activities, and rules, an RFQ platform may or may not meet the criteria of Rule 3b–16(a).

[935] *See* Regulation ATS Adopting Release, *supra* note 3, at 70851–52.

[936] *See id.* at 70851.

[937] *See id.* at 70852.

[938] *See* Proposal, *supra* note 2, at 81074.

different priority rules for matching conditional orders than it does for matching other order types. Part III, Item 11 of adopted Form ATS–N will allow the Commission to better evaluate whether the entity that filed a proposed Form ATS–N meets the criteria of Exchange Act Rule 3b–16 and the definition of an NMS Stock ATS.

In Part III, Item 11(c) of adopted Form ATS–N, we are combining the requests in Part IV, Items 7(b) (''Order Interaction Rules'') and 7(c) (''Other Trading Procedures'') of proposed Form ATS–N. Part IV, Items 7(b) and 7(c) of proposed Form ATS–N were intended to solicit information about the ATS's established non-discretionary methods that dictate the terms of trading among the multiple buyers and sellers entering orders and trading interest. In addition to a trading facility, non-discretionary methods include rules and procedures.[939] Adopted Part III, Item 11(c) combines the requests in Part IV, Items 7(b) and 7(c) of proposed Form ATS–N and is designed to communicate the rules and procedures that govern how their orders will be executed on the NMS Stock ATS. We are revising the language in adopted Item 11(c) to recognize this overlap by requiring the NMS Stock ATS to ''explain the established, non-discretionary rules and procedures of the NMS Stock ATS, including order interaction rules,'' which requires the same information as the proposed subparts. As another component of an NMS Stock ATS's non-discretionary methods, we are moving the trading procedures in proposed Item 7(c) into adopted Item 11(c) and including the examples of the trading procedures of an NMS Stock ATS (*e.g.,* price protection mechanisms, shorts sales, locked-cross markets) into adopted Item 11(c) as well.

A description of the ''established non-discretionary rules and procedures'' of the NMS Stock ATS is a principal requirement of Item 11(c) and we are requiring that any differences among subscribers and the broker-dealer operator related to these methods be identified and explained. This request was moved to Part III, 11(d) and formatted as a ''yes'' or ''no'' question in response to comment.[940]

We seek to provide additional guidance regarding the procedures that need to be discussed in this Item.[941] Specifically, in response to various initiatives (*e.g.,* pilot programs, national market system plans, rules and regulations), NMS Stock ATSs have designed and/or modified the design of their systems and trading procedures to comply with these initiatives, including, for example, Regulation NMS,[942] and more recently, the Tick Size Pilot.[943] To be fully informed about the trading procedures of the NMS Stock ATS, we believe that market participants would need to understand the operations and procedures that NMS Stock ATSs adopt in response to these initiatives as the responses could affect the decision of a market participant to use the NMS Stock ATS.[944] To the extent an NMS Stock ATS has designed trading procedures to operate consistently with Commission initiatives, the NMS Stock ATS would need to disclose these procedures in response to this Item (Part III, Item 11 of adopted Form ATS–N). Furthermore, this information required on trading procedures resulting from Commission initiatives was encompassed under Part IV, Items 7(b) and 7(c) of proposed Form ATS–N, which proposed requiring comprehensive information on order interaction rules and trading procedures, including all of the established non-discretionary methods that dictate the terms of trading on the NMS Stock ATS.

Another commenter suggests that disclosure of certain additional trading services should be required, specifically whether the NMS Stock ATS employs technology designed to detect and deter price manipulation and other disruptive trading practices, *i.e.,* anti-gaming technology, and if so, to include a description of this technology in the form.[945] Another commenter states that anti-gaming technology and other subscriber-related safeguards are among the core attributes of ATSs that are of particular importance to buy-side institutions.[946] We, however, are not adopting a request related to anti-gaming technology and subscriber-related safeguards because such descriptions made in a publicly available document could serve to undermine those safeguards by disclosing information that makes evading those safeguards easier.

One commenter states that Part IV, Item 7 of proposed Form ATS–N had ''the potential to become quite technical and granular'' and thus perhaps of limited use to end-readers, and suggests the Commission consider ''requesting

[939] The Commission recognized the intersection of ''established, non-discretionary methods that dictate the terms of trading'' and ''trading procedures'' in the Regulation ATS Adopting Release when it stated that the second essential element of what constitutes an exchange is that trading on the exchange takes place according to ''established, non-discretionary rules or procedures.'' *See* Regulation ATS Adopting Release, *supra* note 3, at 70900. The Commission is adopting this formulation in Part III, Item 11(c), which we believe encompasses the information proposed to be required in Part IV, Items 7(b) and 7(c) of proposed Form ATS–N.

[940] *See supra* note 839.

[941] *See* SIFMA Letter at 24 (stating item as proposed could result in discursive disclosures of limited use to market participants).

[942] For example, Rule 611 of Regulation NMS, which requires a trading center to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs on that trading center, subject to certain exceptions. *See* 17 CFR 242.611.

[943] *See* Securities Exchange Act Release No. Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) (File No. 4–657) (Order Approving the National Market System Plan to Implement a Tick Size Pilot Program [(''Tick Size Pilot'')] by BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc., as Modified by the Commission, For a Two-Year Period) (modifying the definition of ''block-size'' for purposes of the Tick Size Pilot to an order (1) of at least 5,000 shares or (2) with a market value of at least $100,000).

[944] As discussed in the Proposal, NMS Stock ATSs apply various trading procedures to determine an execution price based on the circumstances of the match. *See* Proposal, *supra* note 2, at 81074. For example, an ATS may price an execution of a midpoint pegged order with a limit or market order at the midpoint of the NBBO. An ATS executing a match of two limit orders, or a limit and market order, might price the execution at or within the NBBO, with the possibility of offering the limit order(s) price improvement. On the other hand, an ATS that operates a block crossing network, with specialized size discovery mechanisms, might calculate a volume-weighted average price after the final size of the execution has been determined.

In the Commission's experience, NMS Stock ATSs have trading procedures for executing orders that include price protections to re-price orders or prevent their execution under certain circumstances, such as Limit Up Limit Down price bands pursuant to the National Market System Plan to Address Extraordinary Market Volatility (''LULD Plan''), or short sales to be executed on its system. Thus, an NMS Stock ATS would be required to configure its system to comply with federal securities laws related to short sales, including Regulation SHO, rules and procedures governing and/or precluding the execution of orders in a locked or crossed market, or procedures governing the handling of execution errors, such as the use of an error account by the NMS Stock ATS.

Other trading procedures include protocols for time-stamping orders and executions to ensure compliance with the Exchange Act and the rules and regulations thereunder and any execution procedures related to price improvement. For example, an NMS Stock ATS may have procedures to reprice orders under its price protection mechanisms, to reprice short sale orders to ensure compliance with Regulation SHO, or to reprice orders due to price-sliding order types (such as certain pegged order types); it would be required to explain when it creates new timestamps for such re-priced orders. Trading procedures include any functionality or mechanism available on the NMS Stock ATS that allows for price improvement.

[945] *See* ICI Letter at 9–10. *See also* Memorandum from the Office of Commissioner Kara Stein regarding a July 26, 2016 meeting with representatives of Morgan Stanley (including in a presentation that whether an ATS has anti-gaming controls is among the frequently asked questions by clients).

[946] *See* State Street Letter at 2–3.

high-level generalized descriptions or converting these prompts to a more narrow set of focused, ''yes'' or ''no'' or short-answer questions with more detail available to regulators as needed for surveillance or other purposes.'' [947] The commenter also indicates that prompts to ''describe'' require extensive disclosures that would be difficult to maintain current. Part III of adopted Form ATS–N requests information about common operational attributes of NMS Stock ATSs, which are organized by subject matter to facilitate market participants' understanding and evaluation of an NMS Stock ATS. The Commission recognizes that requests in Part III, Item 11 could be more expansive than other requests in Part III; however, Part III, Item 11 of adopted Form ATS–N is designed to solicit information about the unique rules and procedures that are tailored for the trading activities and interaction of orders of subscribers on the NMS Stock ATS. National securities exchanges make public similar information in their rule books, in detail, which are designed to provide their members with information about how they should expect their orders to be handled by the exchange. It would be impractical to posit ''yes'' or ''no'' to NMS Stock ATSs without allowing NMS Stock ATSs to explain how their trading mechanisms or trading procedures operate. We also believe that ''yes'' or ''no'' questions, in this case, have the potential to quickly become outdated as practices in the securities industry evolve and new developments emerge. As the industry and NMS Stock ATS operations change, NMS Stock ATS can better provide market participants with complete and comprehensive disclosures if they are able to describe how their system operates in their own words. We also are not discounting that certain items may only require a short answer depending on the complexity of the trading rules and procedures of the NMS Stock ATS. In addition, the commenter's suggestion that more detail could be given to regulators as needed does not address the need for market participants to have full information about the ATS's trading rules, procedures, and facilities to determine whether to route orders to the system for execution.

We do not believe, as suggested by a commenter, that Part III, Item 11 of adopted Form ATS–N will require ''discursive disclosures'' [948] that would make maintaining a current Form ATS–N challenging. Although the item requires substantial information depending on the complexity of the NMS Stock ATS, Rule 304(a)(2)(i)(A)–(C) of Regulation ATS provides a mechanism for an NMS Stock ATS to file amendments to Form ATS–N that allows for both material changes to the operations of an ATS and updating amendments. We believe that an NMS Stock ATS may keep current its Form ATS–N without the obligation to file continuous updates for non-material changes by filing an updating amendment under Rule 304(a)(2)(i)(B).

Another commenter suggests that both Part IV, Item 7 and Item 8 (relating to suspensions of trading, system disruptions or malfunctions) of proposed Form ATS–N would be better suited as a required disclosure to subscribers that could be included in contractual agreements or systematically available to subscribers on ATS operators' websites, rather than formally filed with the Commission.'' [949] We, however, believe that this information could be useful to potential subscribers to evaluate an NMS Stock ATS as a potential destination for its orders.

One commenter suggests that the Commission require NMS Stock ATSs to disclose precise, mathematically analyzable specifications of their algorithms to enable the Commission and financial firms to leverage formal verification techniques to automatically analyze the specifications for potential violations of regulations, and allow market participants to automatically test their connectivity and verify their routing algorithms (for best execution principles).[950] We believe that requiring disclosure of mathematically analyzable specifications, which would be used to conduct compliance checks by the Commission, is outside of the scope of this rulemaking.[951] While we will review Form ATS–N filings, the Commission's review is not designed to verify the accuracy of the disclosures nor designed as an independent investigation of whether all aspects of the NMS Stock ATS operations or the ATS-related activities of the broker-dealer operator are disclosed on Form ATS–N.[952] At this time, we believe that the Commission's compliance oversight of NMS Stock ATSs would best be served through the Commission's and the SRO's examination and inspection efforts.[953]

12. Liquidity Providers

Part IV, Item 1(d) of proposed Form ATS–N would have required disclosures regarding liquidity providers to the NMS Stock ATS. The Commission is adopting Part IV, Item 1(d) of proposed Form ATS–N as Part III, Item 12 (''Liquidity Providers'') of adopted Form ATS–N with certain modifications, which are discussed below. As discussed in the Proposal,[954] we believe that an NMS Stock ATS may want to ensure that there is sufficient liquidity in a particular NMS stock to incentivize market participants to send order flow in that NMS stock to the ATS. Some ATSs that trade NMS stocks may engage certain subscribers to provide liquidity to the NMS Stock ATS and perform similar functions to that of a market maker on a national securities exchange.[955] The obligations required of liquidity providers and the benefits that they provide vary across NMS Stock ATSs. We believe that information about liquidity providers would be useful to subscribers and market participants who, for example, may want their orders to only interact with agency orders (and not with those of a liquidity provider), or, conversely, may themselves want to become liquidity providers on the NMS Stock ATS.

One commenter suggests that the term ''liquidity provider'' should be specifically defined; however, the commenter did not suggest a definition.[956] While we are not adopting a specific definition of liquidity provider, the Commission is providing examples of the functions a liquidity provider could perform on the NMS Stock ATS in Part III, Item 12 of adopted Form ATS–N. We believe that such arrangement could take many forms and the function of the liquidity provider on an ATS could depend on the structure and trading protocols of the ATS. Furthermore, as explained above,[957] we

[947] *See* SIFMA Letter at 24.

[948] *See supra* note 941 and accompanying text.

[949] *See* SIFMA Letter at 24–25.

[950] *See* AI Letter at 1–3.

[951] We did not propose compliance checks for NMS Stock ATSs and the commenter's recommendation is not currently required of other trading centers, such as national securities exchanges.

[952] *See* Section IV.A.3.

[953] The commenter also suggests that we adopt a test that would only require NMS Stock ATSs to disclose information necessary to write an observationally-equivalent simulator of the venue. *See* AI Letter at 2. As we are not adopting the commenter's suggestion to require NMS Stock ATSs to disclose operational details in a mathematically-analyzable format, we do not believe that such a test would be appropriate.

[954] *See* Proposal, *supra* note 2, at 81062–63.

[955] These liquidity providers may quote in a particular NMS stock on the ATS during trading hours and may receive a benefit for performing this function, such as discounts on fees, rebates, or the opportunity to execute with a particular type of segmented order flow.

[956] *See* KCG Letter at 12.

[957] *See supra* Sections V.C.1 and V.C.2.

intend for this Item to cover, for example, arrangements or agreements between the broker-dealer operator and another party to trade on the NMS Stock ATS. We do not intend this to cover agreements with a subscriber that has no obligation to buy or sell NMS stocks on the system.

Another commenter states that the Commission should consider eliminating or consolidating Part IV, Items 1(c) and 1(d) of proposed Form ATS–N and suggests these subparts are redundant with information about segmentation sought in Part III of proposed Form ATS–N.[958] Part III, Item 12, however, requests information about subscribers or the broker-dealer operator or its affiliates that are obligated in some way to buy, sell, or both, NMS stocks on the ATS; while Part III, Item 13 pertains to disclosure about categorization of orders and trading interest submitted to the NMS Stock ATS.[959]

After considering whether Part IV, Item 1(d) of proposed Form ATS–N may overlap with any other items on the form, we require ATSs in Part II, Items 1(c) and 2(c) of adopted Form ATS–N to indicate whether there are any formal or informal arrangements with the broker-dealer operator and affiliate of the broker-dealer operator, respectively. As discussed above, if the answer is ''yes'' to any of these items, the NMS Stock ATS must identify the broker-dealer operator (*e.g.,* business unit) or the affiliate in Part II, Items 1(c) and 2(c).[960] In addition, the NMS Stock ATS would be required to complete Part III, Item 12 of adopted Form ATS–N regarding the arrangements with the broker-dealer operator or affiliate.

13. Segmentation; Notice

Part IV, Items 5(a) and 5(b) of proposed Form ATS–N would have required disclosures regarding segmentation of order flow and notice of segmentation. We are adopting Part IV, Item 5 with certain modifications. We are also renumbering the request as Part III, Item 13 of adopted Form ATS–N and renaming it ''Segmentation; Notice.'' As discussed in the Proposal, some NMS Stock ATSs elect to segment order flow entered in the NMS Stock ATS according to various categories.[961] An NMS Stock ATS could elect to segment trading interest by type of participant (*e.g.,* buy-side or sell-side firms, principal trading firms, agency-only firms, firms above or below certain assets under management thresholds). In addition, buy-side or institutional subscribers might seek to trade only against other buy-side or institutional order flow, or might seek to avoid trading against principal trading firms or so-called high frequency trading firms. When segmenting order flow in the system, an NMS Stock ATS might elect to look to the underlying source of the trading interest such as the trading interest of retail customers. Some NMS Stock ATSs segment by the nature of the trading activity, which could include segmenting by patterns of behavior, time horizons of traders, or the passivity or aggressiveness of trading strategies. NMS Stock ATSs might elect to use some combination of these criteria or other criteria altogether.

Several commenters express support for the Commission requiring information about order segmentation.[962]

The Commission also received comments recommending changes to aspects of Part IV, Item 5 of proposed Form ATS–N. One commenter suggests that the Item should be converted to a series of ''yes'' or ''no'' questions and that the Item overlaps with Part IV, Item 1 of proposed Form ATS–N.[963] The Commission is adding a ''yes'' or ''no'' question to Part III, Item 13 of adopted Form ATS–N for ATSs to convey, and so market participants can readily understand, whether the NMS Stock ATS segments orders and trading interest and whether the ATS discloses to any Person the designated segmented category, classification, tier, or level of orders and trading interest of a subscriber or person. We believe that a response to a request that includes solely ''yes'' or ''no'' questions would not provide the necessary detail for market participants to understand and evaluate how the NMS Stock ATS segments trading interest and against whose order flow their trading interest could match. Moreover, the Commission has revised Part IV, Item 1 of proposed Form ATS–N (Part III, Item 1 of adopted Form ATS–N) to eliminate overlap.[964]

Several commenters express concern that Part IV, Item 5 of proposed Form ATS–N would have required the publication of precise metrics used to segment trading interest that could result in the gaming of those metrics to the detriment of order flow on the ATS.[965] The Commission recognizes the concerns of commenters that believe describing the precise criteria used to segment trading interest could result in potential gaming of those criteria and thus, the reduction of the effectiveness of segmentation as a control. On the other hand, we believe that market participants are interested in understanding how their orders and trading interest are categorized on the ATS and the types of market participants that would interact with those orders and trading interest. We believe that Part III, Item 13 of adopted Form ATS–N appropriately balances these competing interests by soliciting a *summary* of the parameters for each segmented category and length of time each segmented category is in effect.[966] Requiring NMS Stock ATSs to provide a summary of these parameters on Form ATS–N, rather than a detailed analysis of those parameters and how they are calculated, is designed to avoid responses that could allow the gaming of segmentation criteria, as suggested by commenters.[967]

Commenters suggest that the information requested by Part IV, Item 5 of proposed Form ATS–N could be provided to the Commission confidentially,[968] or the ATS be allowed to redact classification criteria that is based upon trading characteristics from Form ATS–N prior to its release.[969] We believe that allowing NMS Stock ATSs to provide summary information in response to Part III, Item 13 on adopted Form ATS–N addresses the concerns

[958] *See* SIFMA Letter at 20. *See supra* Section V.D.1 for discussion of proposed Item 1(c) and comments thereto, and comments applicable to Part IV, Item 1 of proposed Form ATS–N as a whole.

[959] *See* Section V.D.13 (Segmentation; Notice).

[960] *See supra* Section V.C.1 (discussing the requirements of Part II, Items 1(c) and 2(c)).

[961] *See* Proposal, *supra* note 2, at 81070.

[962] *See* ICI Letter at 9 (stating it would inform funds of the possibility of order segmentation and allow funds to determine whether to avoid trading with certain types of market participants). *See also* UBS Letter at 7; Fidelity Letter at 8; SIFMA Letter at 23.

[963] *See* SIFMA Letter at 22–23.

[964] *See supra* Section V.D.1.

[965] *See* UBS Letter at 7; Fidelity Letter at 8. *See also* SIFMA Letter at 23 (stating that disclosing proprietary or sensitive information as required by this item is not necessary or appropriate).

[966] In the Commission's experience, NMS Stock ATSs can vary the lengths of time that a segmented category is in force, such as one day, week, or monthly. The NMS Stock ATS must disclose in responding to this Item if any such time period applies to its segmentation parameters. We proposed requiring this information in Part IV, Item 5 of proposed Form ATS–N by proposing to require that the NMS Stock ATS disclose any procedures for evaluating and changing segmented categories, which may be affected by the length of time a subscriber is placed in a category. We are specifying here that the length of time that a segmented category is in force is responsive to facilitate responding to the Item.

[967] We note that, as part of our review of Form ATS–N responses, we intend to monitor the level of summary information provided on the form for completeness to help ensure that such information is responsive to the form and is not designed to avoid meaningful disclosure.

[968] *See* UBS Letter at 7 (stating that if the Commission continues to believe the information is necessary, then access should be restricted solely to the Commission); SIFMA Letter at 23.

[969] *See* Fidelity Letter at 8.

underlying the commenters' suggestions.

Another commenter suggests that information barriers between the ATS and other affiliates would ''make it challenging or inappropriate for the ATS itself to seek some of this information.'' [970] The ATS has no need to seek information from affiliates to respond to this Item as it relates solely to the segmentation of orders and trading interest in the NMS Stock ATS and how such orders and trading are segmented for purposes of order interaction and execution in the NMS Stock ATS.[971]

Another commenter recommends that an NMS Stock ATS should be required to disclose whether it identifies customer orders of broker-dealers as customer orders (which it views as a form of segmentation).[972] The commenter states disclosing the origin of a particular order can contribute to information leakage and adverse selection of fund orders. We agree with the commenter's concerns and are adding a ''yes'' or ''no'' question to solicit information regarding whether the NMS Stock ATS identifies orders or trading interest entered by a customer of a broker-dealer on the NMS Stock ATS as a customer order. We agree with the commenter that disclosing the origin of a customer order of a broker-dealer is a form of segmentation because it can facilitate users restricting their trading to only certain types of market participants, and that it can contribute to information leakage and adverse selection of fund orders.[973]

Another commenter states that Part IV, Item 5 of proposed Form ATS–N would be more meaningful if there was a quantitative component, such as the percentage of orders and trades per segmented class.[974] We are not requiring that NMS Stock ATSs provide quantitative information on each segmented class at this time. We believe that providing market participants with narrative disclosures about the operations of the NMS Stock ATS, which oftentimes is not publicly available, will allow market participants to understand the nature of order flow in the ATS. Nevertheless, we intend to monitor the quality of responses and information received through Form ATS–N and will continually assess in the future whether quantitative information would facilitate operational transparency for NMS Stock ATSs.

We also are modifying certain components of Part IV, Item 5 proposed Form ATS–N (as adopted in Part III, Item 13). First, we are adding the terms ''classifications, tiers, or levels'' in addition to ''categories'' to describe the groupings into which an NMS Stock ATS elects to segment subscriber orders to better reflect the language used by commenters and in existing Form ATS disclosures. Second, we are providing two additional examples, order size and duration,[975] of criteria whereby an NMS Stock ATS might elect to segment subscribers' orders and trading interest. We are providing these examples to provide additional guidance on some of the types of segmentation that would be responsive to the Item and allow NMS Stock ATSs to focus their responses accordingly. Third, we are providing additional specificity around what ''changing segmented categories'' means by requiring NMS Stock ATSs to provide a discussion of procedures for overriding a determination of segmented category. Subscribers would likely want to know of any such procedures, which could affect the trading interest against which their orders trade.[976] Fourth, we are requiring a description of how segmentation affects order interaction in Part III, Item 13 of adopted Form ATS–N. We proposed that an NMS Stock ATS provide information about its order interaction rule in Part IV, Item 7 of proposed Form ATS–N, but believe that it would be more relevant and efficient to request that information here.

Finally, we are requiring under Part III, Item 13(d) of adopted Form ATS–N that the NMS Stock ATS describe ''whether and how [a designated segmented category] can be contested'' (if applicable). This request is generally consistent with Part IV, Item 5 of proposed Form ATS–N which would have required information on the changing or overriding of segmented categories, as well as notice provided to subscribers of their segmented category.

14. Counter-Party Selection

Part IV, Item 5(c) of proposed Form ATS–N would have required disclosures regarding order preferencing. The Commission did not receive specific comment on Part IV, Item 5(c) of proposed Form ATS–N.[977] We are adopting Part IV, Item 5(c) as Part III, Item 14 (''Counter-Party Selection'') of adopted Form ATS–N and adding examples of counter-party selection in a parenthetical in the Item. Market participants have an interest in knowing whether—and how—they may designate their orders or trading interest to interact or avoid interacting with specific orders, trading interest, or persons on an NMS Stock ATS. For instance, the disclosures required under this Item would allow a market participant to know whether it could designate an order submitted to the NMS Stock ATS to interact with specific orders resting in the NMS Stock ATS.

15. Display

Part IV, Item 6(a) of proposed Form ATS–N would have required disclosures about the display of order and trading interest, including recipients. We received several comments on Part IV, Item 6(a) of proposed Form ATS–N. We are adopting Part IV, Item 6(a) of proposed Form ATS–N with modifications, as discussed more fully below, and renumbering the request as Part III, Item 15 (''Display'') of adopted Form ATS–N. The display of subscriber orders and trading interest can occur in a number of ways. For instance, as

[970] *See* SIFMA Letter at 23.

[971] To the extent that orders or trading interest are segmented outside the NMS Stock ATS and then sent to the NMS Stock ATS for handling and execution, the functionality or entity segmenting order or trading interest could be considered part of the NMS Stock ATS, and information about its activity may be responsive to the Form ATS–N requests. *See supra* note 888 and accompanying text.

[972] *See* ICI Letter at 9.

[973] Part IV, Item 5(a) of proposed Form ATS–N would have required an NMS Stock ATS to describe any segmentation of orders and other trading interest on the ATS. In the Proposal, we provided ''classification by type of participant'' or ''source'' as examples of forms of segmentation. We consider identifying the orders of customers of broker-dealers (*i.e.,* the source or type of participant) a form of segmentation and providing a separate request on the form would facilitate market participants' understanding of the ATS's segmentation categories.

[974] *See* MFA/AIMA Letter at 5. The commenter states that a quantitative component would provide investors with information on the extent to which a broker-dealer operator or its affiliate transacts on the NMS Stock ATS. However, Part II, Items 1, 2, and 3 of adopted Form ATS are designed to provide disclosures about the nature of trading by the broker-dealer operator and its affiliates in the ATS.

[975] Duration can refer to segmenting trading interest according to how long it has rested on the book of a trading system.

[976] Thus, if an NMS Stock ATS has established automated and empirical tests for segmenting subscribers into different categories—which would require the ATS to respond ''yes'' to Item III, 13(a) of adopted Form ATS–N and to explain how the segmentation procedures are applied—but allows any kind of override of those automated and empirical tests (such as an ad hoc determination by a member of the ATS's staff), the NMS Stock ATS would have to respond ''no'' to Item III, 13(b) (''Are the segmentation procedures the same for all subscribers and the broker-dealer operator?'') and explain any differences in how its segmentation procedures are applied.

[977] One commenter states that it is unclear whether Part IV, Item 1(e) of proposed Form ATS–N requests disclosure of instances where a subscriber requests not to interact with certain counterparties. *See* SIFMA Letter at 20. As discussed in Part III, Item 3 of adopted Form ATS–N above, any procedures related to counter-party selection would be responsive to this item (Part III, Item 14 of adopted Form ATS–N).

discussed in the Proposal,[978] when an NMS Stock ATS sends electronic messages outside of the ATS that expose the presence of orders or other trading interest on the ATS, it is displaying or making known orders or other trading interest on the NMS Stock ATS. An NMS Stock ATS also might elect to display subscriber order and trading interest through a direct data feed from the NMS Stock ATS that contains real-time information about current quotes, orders, or other trading interest in the NMS Stock ATS. Also, it would be responsive to this adopted Item for the NMS Stock ATS to disclose the circumstances under which the ATS would send these messages, the types of market participants that received them, and the information contained in the messages, including the exact content of the information, such as symbol, price, size, attribution, or any other information made known.[979] In addition, an NMS Stock ATS would need to disclose arrangements, whether formal or informal (oral or written) to the extent they exist, with third parties to display the NMS Stock ATS's trading interest outside of the NMS Stock ATS, such as IOIs from the subscribers being displayed on vendor systems, or arrangements with third parties to transmit IOIs between subscribers.[980] We continue to believe that subscribers that use the services of the NMS Stock ATSs, including customers of the broker-dealer operator, have limited information about the extent to which their orders and trading interest sent to the NMS Stock ATS could be displayed outside the ATS.[981] For example, subscriber orders or trading interests directed to the NMS Stock ATS could pass through the broker-dealer operator's systems or functionality before entering the ATS. Such systems and functionalities, which could include a common gateway function, algorithm, or smart order router, could be used to support the broker-dealer operator's other business units, including any trading centers.[982]

One commenter supports this item.[983] Other comments raise certain concerns about Part IV, Item 6(a) of proposed Form ATS–N. One commenter states that the proposed Item would cover ''order information or other trading interest'' rather than ''subscriber order information or other trading interest'' and could entangle the ordinary situation where a multi-service broker-dealer that operates an ATS uses a tool to manage child orders across multiple trading venues.[984] Another commenter suggests that the Commission draw a clearer distinction between the actions and operations of an ATS operator and those of affiliated broker-dealers, technical support teams, or others external to the ATS, and instead emphasize disclosures relating to the ATS operator itself.[985]

In response to these commenters' suggestions, we are changing the request to ''subscriber orders and trading interest.'' We did not intend for the Proposal to, in the commenter's words, entangle the ordinary situation where a multi-service broker-dealer uses a tool to manage child orders across multiple trading venues.[986] Consistent with the discussion above regarding the definition of subscriber, a subscriber order directed to the ATS would be a subscriber order for purposes of display. For a subscriber order routed out of the NMS Stock ATS to a third-party trading venue, for example, that order in the third-party venue would not be considered a subscriber order for purposes of display.[987] As explained above,[988] we do not intend for Form ATS–N to require disclosures about aspects of a market participant's commercial relationships with a broker-dealer operator that do not pertain to the NMS Stock ATS.

A commenter suggests a better way of phrasing Part IV, Item 6(a) of proposed Form ATS–N would be to ask whether orders or IOIs are ever displayed in external venues, with which venues, and what information is shared.[989] However, the form of this request is broader, as just discussed, and limiting the request for information to orders and trading interest displayed in external venues would not capture all of the relevant locations where subscriber orders and trading interest can be displayed.

One commenter suggests that the Commission revise this Item to distinguish between orders or other trading interest displayed in external venues with real-time access to systems designed to take advantage of this information, such as liquidity providers and SORs, and orders or other trading interest displayed in external venues *without* real-time access to systems designed to take advantage of this information, such as vendors (where no further information is needed or possibly not required).[990] The final disclosure requirement does not draw a distinction between these orders and trading interests. Market participants can be very sensitive to precisely how and when their orders and trading interest are displayed or otherwise made known, and the Commission remains concerned that subscribers to NMS Stock ATSs might not know the full extent to which their orders and trading interest are displayed.[991] While the display of orders or trading interest at venues in real time that have systems designed to take advantage of such information may raise the most acute concerns, we believe that market participants should have a full understanding about how and when an ATS displays their orders or trading interest.

Differences in the latencies associated with the NMS Stock ATS displaying subscriber orders and trading interest due to a functionality of the ATS would be responsive to the request in Part III, Item 15(c).[992] For example, if an NMS Stock ATS transmits and displays its proprietary data feed to certain subscribers faster than other subscribers as a result of the alternative means offered by the ATS to connect, such information would be responsive.

Part IV, Item 6(b) of proposed Form ATS–N, requested the identity of any individuals in responding to whom the order and trading interest would be displayed or made known. One commenter raises confidentiality concerns with the requirement to publicly identify the position and title of the natural person to whom orders or other trading interest are displayed, because it believes that it would be relatively easy through social media to reverse engineer certain identities, and such information would require frequent updates with little market utility.[993]

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[978] *See* Proposal, *supra* note 2, at 81072.

[979] *See id.*

[980] *See id.*

[981] *See id.*

[982] The broker-dealer operator typically controls the logic contained in these systems or functionality that determines where an order that the broker-dealer receives will be handled or sent.

[983] *See* HMA Letter at 18.

[984] *See* UBS Letter at 8.

[985] *See* SIFMA Letter at 23.

[986] *See* UBS Letter at 8.

[987] *See supra* Section V.A.2.b.

[988] *See id.*

[989] *See* SIFMA Letter at 23. The commenter also states the need for frequent filing of amendments and the demand for specificity will diminish the readability, comparability and ultimately the usefulness of the form for subscribers and other end readers. *See id.* at 24.

[990] *See* Fidelity Letter at 8.

[991] *See* Proposal, *supra* note 2, at 81072.

[992] *See supra* note 850. We proposed to require an NMS Stock ATS to disclose differences among subscribers regarding the display of orders and trading interest in Part IV, Item 6(a) of proposed Form ATS–N.

[993] *See* Fidelity Letter at 8. *See also* SIFMA Letter at 23 (suggesting that identifying individuals by title or more specific identifying characteristics would present security and privacy issues, as well as client confidentiality issues).

We have revised the request so that Part III, Item 15 of adopted Form ATS–N does not require the NMS Stock ATS to identify natural persons. We understand commenters' potential confidentiality concerns and had modified the request to make clear that the request does not seek the names of natural persons or their identity. Instead, it requires the NMS Stock ATS to only identify the recipient of displayed information, by functionality of the broker-dealer operator or the type of market participant, or both.[994] For example, if orders bound for the NMS Stock ATS pass through the broker-dealer operator's common gateway, SOR, or algorithm, the NMS Stock ATS would need to disclose these functionalities as the order was displayed to a functionality of the broker-dealer operator that would likely be outside the NMS Stock ATS. If orders resting in the NMS Stock ATS are displayed to certain subscribers or one or more of the broker-dealer operator business units, the NMS Stock ATS would need to identify these subscribers and business units of the broker-dealer operator by type of market participant (*e.g.,* institutional investors, principal trading firms, market makers, affiliates, trading desks at the broker-dealer operator, market data vendors, clearing entities, and potential subscribers, among others). We believe this modification addresses commenters' concerns, obviates the need for any redaction of information, and reduces the frequency of updates necessary as compared to responses identifying individual persons as proposed.

We are revising Part III, Item 15 of adopted Form ATS–N to address another commenter's concern that certain persons at the ATS in technical or quality assurance roles would need to be disclosed even though they may not be involved with trading activity.[995] Part III, Item 15 now specifies that the request does not include ''employees of the NMS Stock ATS who are operating the system.'' so that employees of the NMS Stock ATS in non-trading related roles, such as technical, quality assurance, compliance or accounting roles, among others, that support the ATS's operations would not be captured under the adopted Item.[996]

Finally, we are adding a ''yes'' or ''no'' questions in Part III, Item 15(a) that asks if the NMS Stock ATS operates as an ECN as defined in Rule 600(a)(23) of Regulation NMS. In the Proposal, the Commission noted that NMS Stock ATSs that are also ECNs may differ in how and where orders or other trading interest are displayed, and that Part IV, Item 6 of proposed Form ATS–N was designed inform market participants about how ECN display orders.[997] We believe that adding this ''yes'' or ''no'' question would allow the NMS Stock ATS to identify itself to market participants as an ECN. An ATS that indicates ''yes'' to Part III, Item 15(a) would also be required to provide information in response to Part III, Item 15(b) and 15(c).

16. Routing

Part IV, Item 10(a) of proposed Form ATS–N would have required disclosures about outbound routing. We are adopting Part IV, Item 10(a) of proposed Form ATS–N with modifications, renaming the request as ''Routing,'' and renumbering the request as Part III, Item 16 of adopted Form ATS–N.

One commenter sought to understand whether the description of outbound routing required by the Item was limited to outbound routing performed as a functionality of the ATS itself rather than routing of client orders by the broker-dealer operator to third-party execution venues.[998] The commenter believes that if this Item also applies to routing performed by the broker-dealer operator, all broker-dealers, whether or not they operate an ATS, should be required to publicly disclose routing information. Furthermore, the commenter also argues for ''required disclosure of routing by a broker-dealer to any affiliate ATS'' and of ''the method by which a broker-dealer interacts with the ATSs that it operates. '' [999]

As the commenter points out above, order handling and the routing of orders by the broker-dealer operator in its capacity as a broker-dealer may be separate from routing of orders in the ATS to other execution venues. As noted above,[1000] we did not intend to require broker-dealer operators to disclose information about their handling of customer orders when such orders are not routed to or residing in the NMS Stock ATS. In response to the commenter's concerns, the adopted Item does not request information about routing of orders and trading interest by the broker-dealer operator that are not routed to or residing in the NMS Stock ATS.

We made several changes to Part IV, Item 10(a) of proposed Form ATS–N in response to comments (and adopted as Part III, Item 16). First, we are requiring an NMS Stock ATS to indicate whether orders and trading interest in the ATS can be routed to a destination outside the ATS, and if the answer to that question is ''yes,'' whether affirmative instructions from a subscriber must be obtained before their orders or trading interest is routed from the ATS. If the NMS Stock ATS indicates that ''yes'' instructions from a subscriber must first be obtained, the NMS Stock ATS will be required to describe the affirmative instruction and how the affirmative instruction is obtained. If instructions from a subscriber need not be first obtained, the NMS Stock ATS will be required to explain when orders in the NMS Stock ATS can be routed from the NMS Stock ATS (*e.g.,* at the discretion of the broker-dealer operator).[1001]

In Part III, Item 16 of adopted Form ATS–N, we are removing the proposed requirement to ''describe the circumstances'' of outbound routing more broadly, and instead, are now requiring, as applicable, that the NMS Stock ATS ''describe the affirmative instruction'' of the subscriber and ''explain how the affirmative instruction is obtained.'' This change is consistent with the instruction in the Proposal to ''describe the circumstances,'' but provides more specific instruction. Moreover, if trading interest can be routed away from the NMS Stock ATS without the affirmative instruction of the subscriber, we are no longer limiting the alternative to be when it happens at the discretion of the broker-dealer, as proposed, but instead, are requiring an explanation of when orders can be routed from the NMS Stock ATS. We

[994] *See* Part III, Item 1 of adopted Form ATS–N (providing examples of types of market participants).

[995] *See* SIFMA Letter at 23.

[996] The NMS Stock ATS would still be subject to the requirements of Rule 301(b)(10) and required to establish adequate safeguards and procedures to protect subscribers' confidential trading information, which must include: Limiting access to the confidential trading information of subscribers to those employees of the ATS who are operating the system or responsible for its compliance with these or any other applicable rules; and implementing standards controlling employees of the ATS trading for their own accounts. *See* 17 CFR 242.301(b)(10).

[997] *See* Proposal, *supra* note 2, at 81072.

[998] *See* Liquidnet Letter at 12.

[999] *Id.* We note that adopted Form ATS–N requires disclosure on both subjects. Part II, Item 1(a) of adopted Form ATS–N solicits information about the entry of orders and trading interest by the broker-dealer operator, including its business unit(s), into the NMS Stock ATS. Part II, Item 1(d) of adopted Form ATS–N solicits information about orders and trading interest in the NMS Stock ATS that can be routed to a trading center of the broker-dealer operator, which would include affiliates of the NMS Stock ATS, and if so, the NMS Stock ATS must provide information that is required in response to Part III, Item 16 of adopted Form ATS–N.

[1000] *See supra* Section V.D.15.

[1001] We have consolidated the discussion of how orders can be removed from the NMS Stock ATS in Part III, Item 7(a)(vii) of adopted Form ATS–N.

believe that phrasing the request this way reflects that trading interest can be routed from the NMS Stock ATS in different ways and better accommodates potential future developments in the industry. We believe that the information in this Item will provide a subscriber with the necessary information to authorize routing and understand how its orders in the ATS can be routed from the ATS, and help prevent the subscriber from unknowingly agreeing to the routing of their trading interest.

We are not adopting in Part III, Item 16 of Form ATS–N the proposed requirements that the NMS Stock ATS explain the means by which routing is performed, or that the NMS Stock ATS explain any differences among subscribers in the means by which trading interest is routed, as this could expand the scope of Form ATS–N beyond ATS activity and into the other broker-dealer functions of the broker-dealer operator.

17. Closing

Part IV, Item 9(b) of proposed Form ATS–N would have required disclosures about the NMS Stock ATS's closing process. We did not receive specific comment on Part IV, Item 9(b) of proposed Form ATS–N. We are adopting Part IV, Item 9(b) with certain modifications discussed below, and renumbering the request as Part III, Item 17 (''Closing'') of adopted Form ATS–N. Part III, Item 17 is designed to inform market participants about whether an NMS Stock ATS uses any special procedures to match orders at the close of regular trading. The Item is designed to provide market participants with information about any special closing processes used by the NMS Stock ATS, particularly whether there are any order types used during the close.

The vast majority of requests in Part III of adopted Form ATS–N relate to trading during regular hours. Therefore, when discussing differences between trading during the close and during regular hours, the NMS Stock ATS must discuss differences as compared to relevant information disclosed in Part III Items, including, among others, order types (Item 7), order interaction, priority, matching, and execution procedures (Item 11), segmentation (Item 13), and display (Item 15). We believe this information will be important for market participants to understand in evaluating whether participating in the closing process is consistent with their trading objectives.[1002]

18. Trading Outside of Regular Trading Hours

Part IV, Item 9(c) of proposed Form ATS–N would have required disclosures regarding after-hours trading. The Commission did not receive any comments regarding the substance of Part IV, Item 9(c) of proposed Form ATS–N. The Commission is adopting Part IV, Item 9(c) of proposed Form ATS with certain modifications, as discussed below, and relocating the request as Part III, Item 18 (''Trading Outside of Regular Trading Hours'') of adopted Form ATS–N.

The Commission is merging requests from Part IV, Item 9(a), which requested information about pre-opening executions,[1003] and Part IV, Item 9(c), which requested information about after-hours trading. We believe that the potential for redundant disclosures, as observed by commenters,[1004] would be reduced by merging these two requests.

This Item will require NMS Stock ATSs to indicate in Part III, Items 18(a) and 18(b) whether the ATS conducts trading outside regular trading hours, and indicate whether there are any differences between trading outside of regular trading hours and trading during regular hours. To the extent that there are differences, the NMS Stock ATS must describe those differences. Similar to Item 17 (requesting differences between the closing and regular trading hours), an NMS Stock ATS must discuss differences in trading outside of regular trading hours as compared to the relevant information disclosed in Part III Items, including, among others, order types (Item 7), order interaction, priority, matching, and execution procedures (Item 11), segmentation (Item 13), and display (Item 15). Many of the disclosures discussed elsewhere in Form ATS–N will relate to regular trading hours so the ATS can simply discuss any differences between trading during regular hours and trading outside regular trading hours in Part III, Item 18(b).

19. Fees

Part IV, Item 12 of proposed Form ATS–N would have required disclosures about fees. We are adopting Part IV, Item 12 of proposed Form ATS–N with modifications, which are discussed below, and renumbering the request as Part III, Item 19 (''Fees'') of adopted Form ATS–N. Some commenters suggest that the Commission exercise restraint in the area of fees given that they are the product of negotiations between sophisticated financial institutions and leave to market competition the setting of appropriate fees.[1005] Another commenter suggests that NMS Stock ATSs be allowed to voluntarily report their fee structure.[1006]

The Commission continues to believe that disclosures regarding fees on Form ATS–N are necessary and important, and should not be voluntary for NMS Stock ATSs. Fee disclosures on Form ATS–N are designed to allow all market participants to analyze the fee structures across NMS Stock ATSs in an expedited manner and decide which ATS offers them the best pricing according to the characteristics of their order flow, the type of participant they are (if relevant), or any other aspects of an ATS's fee structure that serves to provide incentives or disincentives for specific market participants or trading behaviors. As NMS Stock ATSs have become a significant source of liquidity in NMS Stocks,[1007] we believe that disclosures about their fees are warranted as, in the Commission's experience, fees can be a primary factor for market participants in deciding where to route their orders and trading interest. Several commenters express support, on behalf of different types of market participants, for fee disclosures on Form ATS–N.[1008]

In addition, given commenters' concerns that the use of the term ''describe'' in Form ATS–N is vague and would lead to discursive disclosures and obscure key information,[1009] the

[1002] As discussed in the Proposal, the Item would, for example, require disclosure of any procedures to match orders to set a single closing price to maximize liquidity and accurately reflect market conditions at the close of trading. *See* Proposal, *supra* note 2, at 81077 (discussing closing auctions and orders designed to execute at the close of trading).

[1003] Part IV, Item 9(a) of proposed Form ATS–N requested the NMS Stock ATS describe any differences between pre-opening executions, executions following a stoppage of trading in a security during regular trading hours, and executions during regular trading hours.

[1004] *See, e.g.,* SIFMA Letter at 20.

[1005] *See* UBS Letter at 8; LeveL ATS at 6 (stating that ATS subscribers are sophisticated counterparties that have a keen sense of the market for the services provided and are not in need of the fee disclosures proposed).

[1006] *See* STA Letter at 3–4.

[1007] *See supra* Section II.A.1.

[1008] *See* ICI Letter at 10; HMA Letter at 18 (suggesting that disclosure of the details regarding fees (among other topics in part III) is essential for investors or routing brokers seeking to understand how the ATS works). *See also* SIFMA Letter at 25 (stating that a broad description of compensation mechanisms is appropriate and a description of the mechanisms and categories of fee structure would offer an appropriate level of clarity and transparency); KCG Letter at 7 (stating the Commission should require standard documents, including pricing schedules).

[1009] *See supra* note 941 and accompanying text.

Commission is providing additional specificity on the Item's requirements and more examples in the text of the Item. The Commission is adding to Part III, Item 19 requests that NMS Stock ATSs include in their descriptions: The structure of the fee, variables that impact the fee, and differentiation among types of subscribers, along with examples of responsive information included in a parenthetical in the text of each subpart.[1010] The Item also would still require a range of fees as proposed.

One commenter recommends that the Commission require that any description of a differential fee structure contain enough information for a market participant to understand exactly which, or which level, of fees/rebates/charges apply to each type of subscriber or other person and the criteria that the NMS Stock ATS uses to sort subscribers into different fee categories so that market participants can assess eligibility requirements for different fee tiers.[1011]

The Commission recognizes that the fee structures of NMS Stock ATSs can vary and that not all NMS Stock ATSs apply set tiers or categories of fees for subscribers; [1012] however, the Commission agrees with the commenter that a market participant should have sufficient information to understand the fees for using the services of the NMS Stock ATS. Recognizing the various fees that can be charged by NMS Stock ATSs, the Commission is specifying in the fee request the types of information that an NMS Stock ATS must provide in response to the Commission's proposed request to describe its fees (*e.g.,* the structure of the fees, variables that impact each fee, differentiation among types of subscribers, and the range of fees). These disclosures are designed to provide market participants with more insight regarding the fees charged so that they can better understand how fees may apply to them and assess how such fees may impact their trading strategies. This approach does not require NMS Stock ATSs to provide comprehensive fee schedules but still gives subscribers meaningful information about the fees the NMS Stock ATS charges.[1013] Although the fees charged for NMS Stock ATS services may be individually negotiated between the broker-dealer operator and the subscriber, the disclosures about the type of fees charged by the NMS Stock ATS are designed to help market participants discern how an NMS Stock ATS's fees are organized and compare that information across NMS Stock ATSs, which could reduce the search costs of market participants in deciding where to send their orders and trading interest. Relatedly, the Commission recognizes that a requirement to disclose the complete fee schedule for each subscriber may provide more information, but this would not be desirable or preferable given the fees for NMS Stock ATSs can be highly bespoke and specific to each subscriber.[1014]

One commenter suggests that a description of the mechanisms and categories of fee structures would offer an appropriate level of clarity and transparency, and that the disclosure of the existence of rebates or commission relating to volume is workable, but a high/low range of fees or more client-specific descriptions affect registrants' ability to negotiate custom agreements with subscribers.[1015] Part III, Item 19 of adopted Form ATS–N does not require or reveal customer-specific information regarding the fees or terms and conditions of fee agreements that result in the high or low in the range of fees disclosed. Part III, Item 19 of adopted Form ATS–N requests the range of fees and does not require the NMS Stock ATS to disclose the name of the customer, or even the types of subscriber, who is the highest or lowest in the range.

A commenter states that the Commission also should require an NMS Stock ATS to explain whether it discriminates among different types of subscribers in establishing fees, rebates, or other charges.[1016] In Part IV, Item 12(b) of proposed Form ATS–N, we proposed that NMS Stock ATSs describe any differences if the fees, rebates, or other charges of the NMS Stock ATS were not the same ''*for all subscribers and persons.*'' We continue to believe that NMS Stock ATSs should be required to disclose differences in the treatment of subscribers; however, the Commission is changing Part III, Item 19 to require a description of any differentiation among ''*types of subscribers*'' because the Commission did not intend to require fee differences among individual subscribers. Rather, we believe that differences in fees, rebates and other charges among ''types of subscribers'' would be more informative to market participants about the fee structure of the ATS than disclosures of individual differences between subscribers, which could result from particular negotiations with individual subscribers. This information would allow subscribers to observe whether an NMS Stock ATS is offering preferential treatment among types of subscribers with regards to fees, and therefore, the information could aid them in deciding where to route their trading interest.

Another commenter suggests that the Commission should require NMS Stock ATSs to provide complete information about their sources of revenue, including revenue arrangements the ATS may have with other trading centers.[1017] The commenter suggests funds and other market participants would use these disclosures to evaluate the potential for information leakage attendant to routing orders to a particular NMS Stock ATS or whether these arrangements may disadvantage subscribers of the ATS, including funds. We do not believe that disclosure of all of an ATS's sources of revenue would likely contribute more to subscribers' understanding of conflicts of interest than the combination of the disclosures in this Item and the disclosures in Part II of adopted the Form ATS–N, which include disclosures regarding ATS-related activities of the broker-dealer operator and its affiliates, such as Part II, Item 4.[1018]

Other commenters express various reasons for why they believe the Commission should not require some or all of the disclosures on fees of Part IV, Item 12 of proposed Form ATS–N. Commenters state that NMS Stock ATSs, and especially NMS Stock ATSs of multi-service broker-dealers, may establish fees based on a number of factors, including the depth and breadth of a client relationship, or the full suite of brokerage services made available to

[1010] We are including examples of responsive information in parentheticals in the text of the item. For instance, for descriptions of the structure of the fee, the Commission is providing as examples a fixed fee, volume-based and transaction-based fee structures. For the description of variables that may impact the fee, the Commission is providing as examples: The types of securities traded, block orders, and the form of connectivity to the ATS. For the description of the differentiation among types of subscribers for the fee, the Commission is providing as examples of the types of subscribers: Broker-dealers, institutional investors, and retail.

[1011] *See* ICI Letter at 10.

[1012] *See* Liquidnet Letter at 12 (stating it has in place over 1,500 subscriber agreements).

[1013] *See* SIFMA Letter at 25–26 (stating a description of the mechanisms and categories of fee structures would offer an appropriate level of clarity and transparency).

[1014] One commenter notes that it agrees with the Commission on this point, and states that the concept of a fixed fee schedule would not be practical or appropriate in this context. *See* Liquidnet Letter at 13.

[1015] *See* SIFMA Letter at 25–26.

[1016] *See* ICI Letter at 10 (recommending NMS Stock ATSs explain whether they discriminate among different types of subscribers in establishing fees, rebates, or other charges).

[1017] *See id.*

[1018] *See supra* Section V.C.4 (discussing any formal or informal arrangements between the Broker-Dealer Operator and a Trading Center to access the NMS Stock ATS services).

the client.[1019] The commenters believe that because fees are set taking into account these other factors, any disclosures on the range of fees on the NMS Stock ATS would be misleading.[1020] As discussed in the Proposal, the types of fees charged to use an NMS Stock ATS's services could influence whether a market participant subscribes to, or the extent to which it participates on, the NMS Stock ATS.[1021] The Commission recognizes, as indicated by commenters, that fees charged for the use of the NMS Stock ATS services can be bundled with non-ATS services that the broker-dealer operator offers to subscribers of the ATS. While Part IV, Item 12 of proposed Form ATS–N request did not explicitly identify bundled service fees, the proposed request did require a description of any fees, rebates, or other charges of the NMS Stock ATS. As a type of fee for use of the services of the NMS Stock ATS, bundled service fees would have been responsive to Part IV, Item 12 of proposed Form ATS–N.

To avoid potential confusion about fees charged by an NMS Stock ATS, and to account for bundled service fees charged to a subscribers by multi-service broker-dealer operators of NMS Stock ATSs, the Commission is adding a separate and specific request to Part III, Item 19(b) of adopted Form ATS–N. Specifically, the Commission is requiring that the NMS Stock ATS describe any bundled fees, including a summary of the bundled services and products offered by the broker-dealer operator or its affiliates, the structure of the fee, variables that impact the fee (including, for example, whether the particular broker-dealer services selected would impact the fee), differentiation among types of subscribers, and range of fees. Part III, Item 19(b) is designed to allow market participants to better evaluate fees for bundled services that include access to the NMS Stock ATS. NMS Stock ATSs will be required to provide information, including the relevant services and products offered by the broker-dealer operator and its affiliates for each bundled fee offered, that will provide context to market participants with which to assess how fees could apply to them as subscribers.

Another commenter states its understanding that the disclosures required would relate only to the fees that the ATS charges for its services, and not include brokerage services, because otherwise, it believes there would be unfair discrimination relative to broker-dealers that do not operate an ATS.[1022] To the extent that a broker-dealer operator bundles its services with its NMS Stock ATS services, and the ATS services do not have an explicit fee, then the broker-dealer operator would not be required to provide a range of fees charged for the bundled services. On the other hand, if a broker-dealer operator bundles its services with its NMS Stock ATS services and charges an explicit fee for the ATS services, then the fee for the ATS services should be taken into account for determining the range of fees under this Item. Further, if a broker-dealer operator sometimes bundles its services with its NMS Stock ATS services for certain subscribers, but charges a separate fee for ATS services, it would be required to provide the information responsive to this Item, including the range, for the separate fee for ATS services.

A commenter also suggests the Item be expressly limited to fees set by the ATS operator and not include fees from other affiliates or third parties (*e.g.,* related to co-location).[1023] Part III, Item 19(a) of adopted Form ATS–N covers charges to subscribers for their ''use of the NMS Stock ATS services.'' [1024] The fee information disclosed in Part III, Item 19 of adopted Form ATS–N must include fees resulting from a subscriber's use of the NMS Stock ATS services that are charged by the broker-dealer operator, or a third party, such as a service provider to the NMS Stock ATS. The Item's required disclosures are not limited by the entity charging the fee; rather, if the fee is for use of the NMS Stock ATS services, then the Item's requests apply regardless of the entity charging the fee. Many broker-dealer operators today outsource some or all of the operations of the NMS Stock ATS to third parties (*e.g.,* such as the matching engine). To the extent that subscribers are charged a fee by the third-party service provider of the NMS Stock ATS, the NMS Stock ATS would be required to disclose such fees in Part III, Item 19(a) of Form ATS–N.

On the other hand, Part III, Item 19(a) of adopted Form ATS–N does not request information on fees charged for non-ATS services by a third party not in contract with the broker-dealer operator. If, for example, the NMS Stock ATS is located in a facility owned by a third party, and in order to co-locate to the NMS Stock ATS a subscriber would be required to lease physical space from the third-party facility owner, a fee for the space rental would not be required to be disclosed on Form ATS–N by the NMS Stock ATS. On the other hand, if an NMS Stock ATS provides co-location services for subscribers and charges a fee to those subscribers for the co-location services, such fee would be responsive to Part III, Item 19 of Form ATS–N. In addition, to the extent that a broker-dealer operator enters into an agreement or arrangement with a third party for that third party to provide a service of the NMS Stock ATS to subscribers and charge a fee that is passed back to the broker-dealer operator in any form, the broker-dealer operator would be required to disclose that fee in response to Part III, Item 19 of Form ATS–N. In such a case, to prevent an NMS Stock ATS from circumventing disclosure otherwise responsive to Part III, Item 19(b) of adopted Form ATS–N, the pass-backed fee by the third party is a fee ''for the use of NMS Stock ATS services.''

Another commenter suggests that clients are highly interested in understanding whether an ATS offers rebates to subscribers and would support the inclusion of this question.[1025] In response to the commenter, the disclosure requests under Item 19 will contain a stand-alone Item—Item 19(c)—which requests information about rebates and discounts of fees that are identified in subparts (a) and (b) of Item 19. Item 19(c) requires information about rebates and discounts that is similar to that which is required for fees (*e.g.,* the structure of the rebate or discount, variables that impact the rebate or discount, differentiation among types of subscribers, and range of rebate or discount).

20. Suspension of Trading

Part IV, Item 8 of proposed Form ATS–N would have required disclosures regarding any procedures governing trading during a suspension of trading, disruption or malfunction. The Commission is adopting Part IV, Item 8 with certain modifications, renaming it ''Suspension of Trading,'' and renumbering the request to Part III, Item 20 in adopted Form ATS–N. Part III, Item 20 is designed to, for example, inform market participants of whether, among other things, an NMS Stock ATS

[1019] *See* UBS Letter at 8; Morgan Stanley Letter at 4; STA Letter at 3–4; LeveL ATS Letter at 6.

[1020] *See* UBS Letter at 8; STA Letter at 3–4; Morgan Stanley Letter at 4.

[1021] *See* Proposal, *supra* note 2, at 81080.

[1022] *See* Liquidnet Letter at 12.

[1023] *See* SIFMA Letter at 26.

[1024] The NMS Stock ATS services generally include those services used for the purpose of effecting transactions in NMS Stock, or for submitting, disseminating or displaying orders on the ATS. *See* 17 CFR 242.300(b).

[1025] *See* UBS Letter at 8. We proposed in Part IV, Item 12(a) of proposed Form ATS–N that the NMS Stock ATS describe ''any fees, rebates, or other charges'' of the NMS Stock ATS.

will continue to accept orders after a suspension, whether the NMS Stock ATS routes, holds, or continues to execute orders resting in the system prior to the suspension, and the type of notice provided to market participants during a suspension. Furthermore, as discussed in the Proposal,[1026] one of the primary concerns of the Commission is that given the speed and interconnected nature of the U.S. securities markets, a seemingly minor systems problem at a single entity can quickly create losses and liability for market participants, and spread rapidly across the national market system, potentially creating widespread damage and harm to market participants and investors. Accordingly, it is important to fully understand what, if any, trading procedures an NMS Stock ATS would follow when trading is suspended or stopped. Consistent with the Proposal, we are adding the phrase ''including the suspension of trading in individual NMS stocks'' to Item 20(a) to make clear that the procedures to suspend trading in an NMS stock by an NMS Stock ATS are required by this request.[1027]

We received two comments regarding Part IV, Item 8 of proposed Form ATS–N. One commenter suggests that this information would be better suited as a disclosure to subscribers rather than formally filed with the Commission and publicly disclosed.[1028] We do not agree and believe that this information would allow non-subscribers to better evaluate their brokers' order routing practices and whether the routing of their orders to an NMS Stock ATS would achieve their trading or investment strategies.

Another commenter requests that the Commission consider harmonizing any definitions used in the Item with those found in Regulation SCI.[1029] As discussed in the Proposal, the Commission does not intend to alter or amend the requirements of Regulation SCI with this Item, nor does it intend to require NMS Stock ATSs to adopt specific procedures during a system disruption as it did in Regulation SCI.[1030] Instead, we are requiring an NMS Stock ATS to disclose what procedures, if any, it follows when suspending or stopping trading so that market participants can better understand how their orders will be handled under those circumstances.

21. Trade Reporting

Part IV, Item 13(a) of proposed Form ATS–N would have required disclosures regarding trade reporting. We are adopting Part IV, Item 13(a) of proposed Form ATS–N with certain modifications discussed below, and renumbering the request as Part III, Item 21 of adopted Form ATS–N. One commenter suggests that the prompt to disclose ''any arrangements'' is broad and poses challenges to keep current and recommends it would be more useful to limit the requested arrangements to those that are material to or a core feature of the operations of the ATS.[1031] In response to this comment, we are revising the request to focus on ''material'' arrangements for reporting transactions on the NMS Stock ATS. We recognize that there could be arrangements relevant to trade reporting, such as the specific software used to report, that play a minor role in the ATS's trade reporting and need not be disclosed. We believe that this change clarifies the Form ATS–N requirement and reduces potential burdens on NMS Stock ATSs while providing market participants with sufficient information to understand how their trade information will be reported.

In addition, we are adding a phrase to the Item to make clear that the explanation of procedures or material arrangements required includes ''where an ATS reports transactions and under what circumstances.'' We believe this language will help NMS Stock ATSs better understand what would be responsive to Part III, Item 21 of adopted Form ATS–N and focus their responses accordingly, and is consistent with the request in Part IV, Item 13(a) of proposed Form ATS–N. For example, the NMS Stock ATS will be required to disclose the SRO to which it reports transactions, and any alternative trade reporting destinations, if applicable. Information about where an NMS Stock ATS reports transactions and under what circumstances would have been responsive to Part IV, Item 13(a) of proposed Form ATS–N, which required the NMS Stock ATS to ''describe any arrangements or procedures for reporting transactions on the NMS Stock ATS.'' The addition of the phrase to Item 21(a) clarifies those procedures that would be responsive to the request. Finally, we are revising the proposed Item to clarify that the NMS Stock ATS explain any ''procedures *and* material arrangements'' (emphasis added), instead of ''procedures *or* material arrangements'' (emphasis added). We intended that a description of both procedures and material arrangements would provide a complete and comprehensive disclosure of the most important aspects of the NMS Stock ATS's trade reporting.

22. Clearance and Settlement

Part IV, Item 13(b) of proposed Form ATS–N would have required disclosures regarding clearance and settlement. The Commission is adopting Part IV, Item 13(b) of proposed Form ATS–N with certain modifications discussed below, and renumbering it as Part III, Item 22 of adopted Form ATS–N. The integrity of the trading markets depends on the prompt and accurate clearance and settlement of securities transactions.[1032] Part III, Item 22 is designed to help market participants understand the measures the NMS Stock ATS takes to facilitate clearance and settlement of transactions, including the process through which an NMS Stock ATS clears a trade (*e.g.,* whether the NMS Stock ATS becomes a counterparty to a transaction, interposing itself between two counterparties to a transaction, or whether the NMS Stock ATS submits trades to a registered clearing agency for clearing) and any requirements an NMS Stock ATS places on its subscribers, or other persons whose orders are routed to an NMS Stock ATS, to have clearance and settlement systems and/or arrangements with a clearing firm.[1033]

One commenter suggests that the prompt to disclose ''any arrangements'' is broad and poses challenges to keep current and recommends it would be more useful to limit the requested arrangements to those that are material to or a core feature of the operations of the ATS.[1034] In response to this comment, and for similar reasons to those stated above for Part III, Item 21 (''Trade Reporting''), we are revising this request to focus the Item on ''material'' arrangements to facilitate the clearance and settlement of transaction on the NMS Stock ATS. For example, an arrangement under which a third party would have a role in clearance and settlement on the NMS Stock ATS may constitute a material arrangement that could trigger the disclosure requirement under Part III, Item 22. Limiting the explanation required to material arrangements will reduce the burden on

[1026] *See* Proposal, *supra* note 2, at 81076.

[1027] Based on Commission experience, an NMS Stock ATS's procedures may include the suspension of trading in an NMS stock security to not trigger the requirements of Rule 301(b)(3) or Rule 301(b)(5) of Regulation ATS. *See* Proposal, *supra* note 2, at 81104.

[1028] *See* SIFMA Letter at 24–25.

[1029] *See* UBS Letter at 8.

[1030] *See* Proposal, *supra* note 2, at 81076. We are removing references to ''system disruptions'' to mitigate any confusion with Regulation SCI. We believe this technical change does not change the substantive information required.

[1031] *See* SIFMA Letter at 26.

[1032] *See* Proposal, *supra* note 2, at 81081.

[1033] *Id.*

[1034] *See* SIFMA Letter at 26.

NMS Stock ATSs while at the same time still allowing market participants to understand and more easily compare clearing arrangements required across NMS Stock ATSs.

For similar reasons as stated above for Part III, Item 21 (''Trade Reporting''), we are revising this request to state that the NMS Stock ATS describe any ''procedures *and* material arrangements'' (emphasis added), instead of ''procedures *or* material arrangements'' (emphasis added). In addition, we are removing the phrase ''undertaken by the NMS Stock ATS'' from the proposed requirement. NMS Stock ATSs may engage a third party to facilitate the clearance and settlement of transactions on the NMS Stock ATS, and we do not intend to limit the procedures and material arrangements explained to only those specifically performed by the NMS Stock ATS.

23. Market Data

Part IV, Item 11 of proposed Form ATS–N would have required disclosures regarding market data. The Commission is adopting Part IV, Item 11 of proposed Form ATS–N with certain modifications and renumbering the request as Part III, Item 23 of adopted Form ATS–N. Market data is a critical component to understanding the operations of an NMS Stock ATS. For instance, the market data received by an NMS Stock ATS might affect the price at which orders and trading interest is prioritized and executed in the ATS, including orders that are pegged to an outside reference price. The source of an NMS Stock ATS's market data could impact the execution price received by a subscriber. Disclosures about the NMS Stock ATS's sources of market data, and how the ATS uses such data, can help to inform market participants about how their orders would be handled and executed by the NMS Stock ATS.

One commenter recommends the elimination of prompts that it suggests request proprietary, sensitive, or duplicative information. The commenter instead recommends a general, high-level description regarding the determination of NBBO and pricing.[1035] As routing is a function performed by a broker-dealer and outside the ATS, the Commission is revising the request to make clear that an NMS Stock ATS would not be required to provide information about the market data that the broker-dealer operator uses to route orders and trading interest from the NMS Stock ATS to away destinations. Part III, Item 23 would require information, however, about the ATS's use of market data to determine when resting orders and trading interest will be removed from inside the NMS Stock ATS because these orders and trading interest reside inside the ATS and the data used to act on them could impact their execution.

An NMS Stock ATS would also be required to provide information about how the ATS uses market data to provide the services it offers. Among other things, for example, the NMS Stock ATS would need to disclose in response to Part III, Item 23, of adopted Form ATS–N, its use of market data to display, price, prioritize, execute, and remove trading interest. As part of its explanation for how the NMS Stock ATS uses market data, the ATS would be required to specify, if applicable, when the ATS may change between its use of different sources of market data to provide its services.

Given commenters' concerns that the use of the term ''describe'' in Form ATS–N is vague and would lead to discursive disclosures and obscure key information,[1036] the Commission is providing additional examples in the text of the Item to give NMS Stock ATSs more guidance on the types of information that would be responsive to the request, including how the ATS determines the NBBO and protected quotes in the Item.

One commenter believes that the form should require annual disclosures of an NMS Stock ATS's approximate latency (in microseconds) to receive market data feeds, assemble the NBBO, and deliver the updated NBBO to the matching engine.[1037] As discussed elsewhere in relation to comments requesting quantitative data,[1038] the Commission is not adopting ongoing reporting requirements for NMS Stock ATSs to report performance metrics of their system and therefore not requiring NMS Stock ATS to disclose this information. The information above could be important to market participants because they could be concerned, for example, about price impacts on their trading interest if the NMS Stock ATS compiles the NBBO slower than other trading venues, or that they would trade on stale prices, as well as the potential for information leakage. To address the commenter's concern, the Commission is providing guidance to NMS Stock ATSs that, in response to Part III, Item 23, the NMS Stock ATS should explain how market data is received by the ATS, compiled, and delivered to the matching engine. For example, among other possible arrangements, the NMS Stock ATS could explain in response to the Item that market data is received by the broker-dealer operator and assembled there, and subsequently delivered to the matching engine, or that market data is sent directly to the matching engine, which normalizes the data for its use.

24. Order Display and Execution Access

Part IV, Item 14 of proposed Form ATS–N would have required disclosures regarding order display and execution access pursuant to Rule 301(b)(3). The Commission is adopting Part IV, Item 14 in proposed Form ATS–N, with certain modifications, and renumbering this Item as Part III, Item 24 in adopted Form ATS–N.

One commenter recommends eliminating this request altogether on the grounds that it is unclear how subscribers would benefit from the detailed information under this Item or how it would be used.[1039] The Commission does not agree. As noted in the Proposal, under the current regulatory regime for ATSs, there is no mechanism under which an ATS must notify the Commission, its SRO, or market participants after it has triggered the order display requirements.[1040] Thus, the commenter's suggestion that the Item is more appropriate in the context of a Commission examination would not remedy the current lack of notice to the public once the NMS Stock ATS triggers the order display requirement. This notice would inform the Commission and the public whether an NMS Stock ATS is subject to Rule 301(b)(3). Removing Part IV, Item 14 (adopted as Part III, Item 24) would forego the benefit to market participants of knowing when an NMS Stock ATS has become a significant source of liquidity in an NMS stock and how they can access applicable quotations of that ATS. The commenter maintains, but does not describe how, the required disclosure would undermine the NMS Stock ATS's subscriber access criteria, and we do not agree that the required disclosure would do so.

We recognize that an NMS Stock ATS may not be subject to Rule 301(b)(3)(ii) of Regulation ATS even if the ATS displays subscriber orders in an NMS stock to any person (other than employees of the ATS) (Rule 301(b)(3)(i)(A)), and executes 5% or

[1035] *See* SIFMA Letter at 25.

[1036] *See supra* note 941.

[1037] *See* HMA Letter at 19.

[1038] *See* Section V.D.13 (discussing why the Commission is requiring narrative responses instead of a quantitative component, such as the percentage of orders and trades per segmented class), and V.D.26 (discussing why the Commission is requiring narrative responses instead of quantitative data from NMS Stock ATSs).

[1039] *See* SIFMA Letter at 27.

[1040] *See* Proposal, *supra* note 2, at 81082.

more of the average daily trading volume in that NMS stock as reported by an effective transaction reporting plan during at least four of the preceding six calendar months (Rule 301(b)(3)(i)(B)).[1041] If an NMS Stock ATS satisfies the Rule 301(b)(3)(i) threshold, the ATS must also meet the criteria of Rule 301(b)(3)(ii) to be subject to the requirements of Rules 301(b)(3)(ii) and (iii). As proposed, Part IV, Item 14 of Form ATS–N would have required that an NMS Stock ATS that meets the threshold requirements of Rule 301(b)(3)(i), but is not subject to Rules 301(b)(3)(ii) and (iii), to provide information about how they display and provide execution access. This was not the Commission's intended result. Rather, the Commission intended for an NMS Stock ATS that is subject to Rule 301(b)(3)(ii) and (iii) to provide the information that the Commission proposed in Part IV, Item 14(a)–(c) of proposed Form ATS–N. Therefore, the Commission is modifying the disclosure requirement of this Item and relocating it to Part III, Item 24 of Form ATS–N. As adopted, Part III, Item 24(a) of Form ATS–N asks if the NMS Stock ATS meets the threshold requirements of Rule 301(b)(3)(i) of Regulation ATS, and, if so, whether the NMS Stock ATS is required to comply with Rule 301(b)(3)(ii) of Regulation ATS (*i.e.,* does the ATS display to more than one person in the system). If the NMS Stock ATS is required to comply with Rule 301(b)(3)(ii), Part III, Item 24(b) requires the NMS Stock ATS to provide the information that the Commission proposed in Part IV, Item 14(a)–(c) of proposed Form ATS–N (*i.e.,* the ticker symbol of the NMS stocks displayed, information about how the ATS displays such orders, and information about how the ATS provides access to such orders).[1042]

To ensure consistency with Rule 301(b)(3) of Regulation ATS, the Commission is making minor modifications to the request to better comport with requirements of Rule 301(b)(3), and in response to the commenter's concerns regarding proposed Form ATS–N's disclosure requirements for NMS Stock ATSs that meet the threshold requirements of Rule 301(b)(3)(i), but may not be subject to Rules 301(b)(ii) and (iii).[1043]

25. Fair Access

Part IV, Item 15 of proposed Form ATS–N would have required disclosures regarding the fair access requirement of Rule 301(b)(5). The Commission is adopting Part IV, Item 15 of proposed Form ATS–N, with certain modifications, and renumbering this Item as Part III, Item 25 in adopted Form ATS–N. The Commission received comment recommending the elimination of the request altogether on the grounds that it is unclear how subscribers would benefit from the detailed information under the Item or how it would be used.[1044]

The Commission does not agree for the same reason discussed above in connection with Part III, Item 24. As noted in the Proposal, although triggering the fair access provision requires the NMS Stock ATSs to provide certain information confidentially to the Commission under Exhibit C of Form ATS–R,[1045] there is no mechanism under which an ATS must notify market participants after it has triggered the fair access threshold under the current regulatory regime for ATSs.[1046] Removing Part IV, Item 15 of proposed Form ATS–N (adopted Part III, Item 25) as suggested by the commenter, would forego the benefit to market participants of knowing when an NMS Stock ATS has become a significant source of liquidity in an NMS stock and must comply with fair access requirements of Rule 301(b)(5). We believe that the information that an NMS Stock ATS will be required to disclose pursuant to Part III, Item 25 will allow market participants to assess whether fair access is in fact being granted by NMS Stock ATSs that meet the fair access threshold of Rule 301(b)(5), in part by making publicly available a description of the NMS Stock ATS's written standards for granting access. In addition, the commenter mentions that, but does not describe how, the required disclosure would undermine the NMS Stock ATS's subscriber access criteria.

Similar to Part IV, Item 14 of proposed Form ATS–N as discussed above,[1047] Part IV, Item 15 of proposed Form ATS–N would have applied to an NMS Stock ATS that meets the threshold requirements of Rule 301(b)(5)(i), but is not required to comply with Rule 301(b)(5)(ii). The Commission intended for an NMS Stock ATS to provide this information only if it is required to comply with Rule 301(b)(5)(ii). Therefore, the Commission is modifying the disclosure requirement of this Item and relocating it to Part III, Item 25 of adopted Form ATS–N. As adopted, Part III, Item 25(a) of Form ATS–N asks if the NMS Stock ATS meets the threshold requirements of Rule 301(b)(5)(i)(A) of Regulation ATS and if so, whether the NMS Stock ATS is required to comply with Rule 301(b)(5)(ii) of Regulation ATS (*i.e.,* the ATS does not meet the exception set forth in Rule 301(b)(5)(iii)). If the NMS Stock ATS is required to comply with Rule 301(b)(5), Part III, Item 25(b) requires the NMS Stock ATS to provide the information that the Commission proposed in Part IV, Item 15(a) and 15(b) of proposed Form ATS–N (*i.e.,* the ticker symbol of each NMS stock and a description of the ATS's written standards for granting access to trading on the ATS).[1048]

To ensure consistency with Rule 301(b)(5) of Regulation ATS, the Commission is making minor modifications to the request to better comport with requirements of Rule 301(b)(5), and for consistency with the modifications the Commission is making to Part III, Item 24 described above.

26. Aggregate Platform-Wide Data; Trading Statistics

a. Disseminated Aggregated Platform-Wide Data

Part IV, Item 16 of proposed Form ATS–N would have required disclosures regarding market quality statistics published or provided to subscribers. The disclosure requests in Part IV, Item 16 of proposed Form ATS–N are now contained in Part III, Item 26 of adopted Form ATS–N.

We received several comments on Part IV, Item 16 of proposed Form ATS–N. Some commenters express concerns about the potential effects that the public disclosure of the information under Part IV, Item 16 would have on the flow of information to

[1041] *See* Liquidnet Letter at 13–14 (stating that the ''order display requirement of [Rule 301(b)(ii)] only applies where orders are 'displayed to more than one person in the [ATS]'' such that the disclosure obligation of proposed Part IV, Item 14 would only apply where an ATS displays orders to more than one subscriber in securities where it has exceeded the applicable 5% threshold).

[1042] If the NMS Stock ATS responds ''no'' to Part III, Item 24(a) it will not be required to respond to Item 24(b), and if it responds ''yes'' to Item 24(a) but ''no'' to Item 24(b), it will not be required to provide any additional information in response to Item 24.

[1043] *See* Liquidnet Letter at 13–14.

[1044] *See* SIFMA Letter at 27.

[1045] *See* Proposal, *supra* note 2, at 81082, n.502. An ATS that meets any of the trading volume thresholds set forth in Rule 301(b)(5)(i), must comply with the requirements of Rule 301(b)(5)(ii) (including the requirement to disclose to the Commission on Form ATS–R the information required by Rule 301(b)(5)(ii)(D)), unless it meets the exception set forth in Rule 301(b)(5)(iii).

[1046] *See* Proposal, *supra* note 2, at 81082.

[1047] *See supra* Section V.D.24.

[1048] If the NMS Stock ATS responds ''no'' to Part III, Item 25(a), it will not be required to respond to Item 25(b), and if it responds ''yes'' to Item 25(a) but ''no'' to Item 25(b), it will not be required to provide any additional information in response to Item 25.

subscribers.[1049] One commenter expresses concern that the proposed requirements of Part IV, Item 16 would have made the process of providing information requested by customers more difficult, noting that it receives information requests on an ongoing basis from traders at more than 800 firms.[1050] Another commenter questions the value that the snapshot disclosed under Part IV, Item 16 would have for the general public, and states that adopting Part IV, Item 16 as proposed would cause NMS Stock ATSs to stop sharing some categories of information with clients.[1051]

We continue to believe that it is appropriate to require an NMS Stock ATS to make public aggregate, platform-wide order flow and execution statistics it already otherwise collects and publishes or provides to one or more subscribers to the NMS Stock ATS. We believe that an NMS Stock ATS may choose to create and publish or provide to one or more subscribers or persons information concerning order flow and execution quality for different reasons. Certain performance metrics and statistics may be important factors for market participants in comparing and selecting an ATS that is most appropriate for their investment objectives.

We acknowledge a commenter's point that that these disclosures might limit communication between NMS Stock ATSs and their participants to the extent that an NMS Stock ATS chooses to cease providing such statistics to subscribers due to the Form ATS–N requirements.[1052] However, we believe that only a few NMS Stock ATSs would take this type of action because such ATSs would have already chosen to distribute such statistics to outside persons, thus triggering the requirements of Item 26. Furthermore, we believe that the benefits of this disclosure—requiring that all market participants have an equal opportunity to analyze aggregate platform-wide order flow and execution data that is distributed by an NMS Stock ATS—justify the potential cost of some ATSs choosing to no longer distribute such statistics to select subscribers on their platforms.

Another commenter believes this request should not require the disclosure of ''bespoke'' statistics for a subscriber.[1053] The commenter is concerned that if an NMS Stock ATS has to amend its Form ATS–N each time it receives a subscriber's request for additional information, it will not provide investors with additional information; accordingly, the commenter suggests revising Part IV, Item 16 in a way that would not discourage an NMS Stock ATS from providing additional market quality information to investors. We share the concern that if an NMS Stock ATS is compelled to amend its Form ATS–N each time it receives a request for additional information from a market participant, it will not provide investors with this information. Item 26, however, would not require an NMS Stock ATS to amend its Form ATS every time it receives a data request. As explained in the Proposal, to comply with this request, an NMS Stock ATS would only be required to file a Form ATS–N updating amendment on a quarterly basis.[1054] We are not modifying the language or substantive requirements in adopted Form ATS–N. Rather, to provide greater clarity regarding when and how NMS Stock ATSs are required to respond to Item 26(a), we are adding an instruction to Form ATS–N to state that an NMS Stock ATS shall file a Form ATS–N amendment pursuant to Rule 304(a)(i)(2)(B) of Regulation ATS to provide information in response to Item 26(a). Furthermore, as explained above, the benefits of this disclosure justify the potential cost of some ATSs choosing to no longer distribute such statistics to select subscribers on their platforms.

In addition, one commenter believes that broker-dealer operators and their affiliated broker-dealers should be permitted to respond to individualized questions from subscribers and to continue to provide customized reports in the course of responding to those individualized questions without attendant Form ATS–N revisions or amendment requirements.[1055] This commenter states that without clarification regarding how individualized or custom reports are to be treated, this disclosure requirement could potentially introduce misleading or skewed information into the public arena, which could undermine the transparency goals of the proposed rules.[1056] Similarly, one commenter states that the Commission should clarify that Part IV, Item 16 would not apply when an NMS Stock ATS provides data to a customer relating to that customer's specific usage of the ATS.[1057] The commenter states that institutions must have access to this type of information to fulfill their best execution obligations, but making this type of information public could compromise an institution's anonymity.[1058] We note that Part III, Item 26 of adopted Form ATS–N requires only aggregate platform-wide data and, thus, would not apply when an NMS Stock ATS provides a participant with individualized or custom reports containing data relating to that participant's specific usage of the ATS.

Commenters also recommend changes and/or other clarifications to the requests under Part IV, Item 16 of proposed Form ATS–N. One of these commenters recommends that the Commission eliminate the public disclosure requirements under Item 16 and instead propose a revised report on aggregate order flow and execution that is to be filed on an annual and confidential basis with the Commission as an exhibit to Form ATS–N.[1059] As noted above, we are adopting the proposed disclosure requests, as the public disclosure of the material encompassed by Part IV, Item 16 of proposed Form ATS–N will benefit market participants.

Another commenter recommends revising Part IV, Item 16 of proposed Form ATS–N to only mandate the disclosure of the required market quality statistics when the NMS Stock ATS publishes or otherwise provides such statistics to a substantial portion of its subscribers (*e.g.,* 10% or more).[1060] As explained above, we believe that there is a strong policy objective behind ensuring that the information encompassed by Part III, Item 26 of adopted Form ATS–N is available to a wide array or market participants. We believe that setting a threshold for when these disclosure requirements are

[1049] *See* SIFMA Letter at 27; Liquidnet Letter at 15.

[1050] *See* Liquidnet Letter at 15.

[1051] *See* SIFMA Letter at 27.

[1052] *See id.*

[1053] *See* MFA/AIMA Letter at 5.

[1054] *See* Proposal, *supra* note 2, at 81084. As also explained in the Proposal, if, for example, an NMS Stock ATS publishes or provides a particular statistic on a daily basis, the NMS Stock ATS would include in Exhibit 4 of adopted Form ATS–N the statistic that was published or provided to one or more subscribers on the last trading day of the calendar quarter (*e.g.,* the statistic published or provided on June 30th or last trading day prior to June 30th). *See id.* at n.512. If an NMS Stock ATS publishes or provides a particular statistic weekly, the NMS Stock ATS would be required to include in Exhibit 4 of adopted Form ATS–N the statistic that was published or provided to one or more subscribers at the end of the week prior to the end of the calendar quarter (*e.g.,* the statistic published for the last full week of June). *See id.*

[1055] *See* SIFMA Letter at 27.

[1056] *See id.*

[1057] *See* Liquidnet Letter at 16.

[1058] *See id.*

[1059] *See* SIFMA Letter at 28.

[1060] *See* MFA/AIMA Letter at 5; *see also* 17 CFR 242.605 (requiring market centers, which include ATSs, to make available for each calendar month an electronic report on certain categories of order execution information).

triggered would not advance this policy objective because an NMS Stock ATS would be able to limit distribution of the statistics encompassed by Part II, Item 26 of adopted Form ATS–N to a select number of participants on the ATS.

As an alternative to the proposed requirements for the disclosure of aggregate platform-wide statistics on Form ATS–N, a commenter recommends that the Commission designate specific execution statistics for *all* ATSs to provide.[1061] However, if the Commission were to adopt the requests of Part IV, Item 16 as proposed, the commenter believes that the Commission should clarify that trade-specific data would not be subject to this filing requirement, including pre-trade and post-trade transaction cost analyses. The commenter also requests clarification that this disclosure request only covers execution quality statistics and that other types of statistics are not included. By way of example, the commenter believes that disclosing the percentage of customers that have used a specific product or product feature would not trigger the requirements of Part III, Item 26 because that information would not be considered a market quality statistic. Finally, the commenter believes that NMS Stock ATSs should be permitted to file the relevant statistics under Part III, Item 26 without filing any associated communication to a specific customer (such as the other contents of an email containing these statistics or a questionnaire submitted by the customer), as this could compromise customer anonymity.

We confirm that Part III, Item 26 of adopted Form ATS–N only requires the disclosure of order flow and execution statistics, and that trade-specific data that does not include aggregate, platform-wide information would not be covered by this request. We note, however, that whether or not a specific type of statistic should be categorized as an order and execution statistic or considered aggregate, platform-wide data will depend on the nature of the specific statistics being compiled by the NMS Stock ATS. An NMS Stock ATS should independently evaluate any statistics that it compiles and distributes to determine whether they are responsive to this disclosure request. We also agree that protecting customer anonymity should be a priority with any public disclosure under this Item, and thus, an ATS would not be required to publicly file customer communications associated with the responsive statistics.

While we are not changing the substance of the proposed data request being adopted in Part III, Item 26, we are making technical modifications to improve the means by which the disclosures are filed on Form ATS–N. We believe that these modifications will make it easier for market participants to review and compare the filed information. In addition to changing the proposed request into a ''yes'' or ''no'' question in adopted Form ATS–N, Part III, Item 26 requires the NMS Stock ATS to attach both the responsive statistics and its explanation of the categories or metrics of those statistics as Exhibits 4 and 5, respectively, rather than including such information as part of the form, as was proposed. We believe it will be easier for market participants to review the disclosures as stand-alone documents than it would be if they were filed and publicly posted as narratives in the form. Also, in lieu of filing Exhibits 4 and 5, the NMS Stock ATS may certify that the information requested under Exhibits 4 and 5 is available at the website provided in Part I, Item 5 of the form and is accurate as of the date of the filing.

b. Other Standardized Statistical Disclosures

In the Proposal, we solicited comment on whether other standardized statistical disclosures should be required from NMS Stock ATSs and the nature and extent of any such metrics or statistics that commenters believe should be disclosed.[1062] Several commenters believe that the Commission should add additional public statistical disclosure requirements to the ATS regulatory regime.[1063] We believe that it is appropriate to take an incremental approach to the disclosure of additional market statistics. At this time, we believe it is appropriate to only require NMS Stock ATSs to provide to all market participants—via public disclosure on Form ATS–N—aggregate, platform wide order flow and execution statistics that they already collect and distribute and that would be encompassed by adopted Item 26. Accordingly, we are not adopting rules to require NMS Stock ATSs or national securities exchanges to report quantitative data above what these trading centers are already required to report under current federal securities laws.[1064]

We also received comments advocating that this rulemaking include amendments to Rule 605 of Regulation NMS.[1065] Other commenters recommend enhancing the disclosure requirement of Rule 606 of Regulation NMS.[1066] Should we decide to take action with respect to the reporting of additional market quality data under Rule 605, we would do so in a separate rulemaking. Additionally, a separate rulemaking has been proposed to amend Rule 606 by requiring additional disclosures by broker-dealers to customers about the routing of their institutional orders.[1067] We are currently considering the proposal and comments received.

VI. Amendments to Rule 301(b)(10) and Rule 303(a)(1) for Written Safeguards and Written Procedures To Protect Confidential Trading Information

Current Rule 301(b)(10) of Regulation ATS [1068] requires every ATS to have in place safeguards and procedures to protect subscribers' confidential trading information and to separate ATS functions from other broker-dealer functions, including proprietary and customer trading.[1069] Rule 301(b)(10), however, does not currently require that the safeguards and procedures

[1061] *See* Liquidnet Letter at 15. We are not expanding the regulatory regime of Regulation ATS to require the public disclosure of specific, standardized statistics for ATSs. *See also infra* Section V.D.26.b.

[1062] *See* Proposal, *supra* note 2, at 81084–85.

[1063] *See, e.g.,* T. Rowe Price Letter at 1 (recommending that ATSs be required to collect and disclose statistics about the percentage of volume executed in block and demi-block sizes, percentage of volume executed relative to national best bid/offer (*i.e.,* near, far, midpoint, and intra-spread), trade size and market cap distribution, and aggregate statistics regarding counterparties); Citadel Letter at 4 (advocating for the Commission to require the reporting of end-of-day trade information that the commenter believes would bring greater transparency to market participants); HMA Letter at 22 (recommending that ATSs be required to collect and disclose statistics about Order Trading and Descriptive Statistics, Subscriber Characteristics, and ATS Relationship and Trading Statistics); Anonymous at 1 (stating that the same data produced by national securities exchanges should also be provided by ATSs, including transactional short sale data); and Liquidnet Letter at 16 (recommending that ATSs be required to publicly report all individual ATS executions on an attributed basis, which could be subject to a suitable delay period, such as 30 days).

[1064] *See* 17 CFR 242.605 and 17 CFR 242.606.

[1065] *See* 17 CFR 242.605. Rule 605 generally requires a market center that trades NMS stocks to make available to the public monthly electronic execution reports that include uniform statistical measures of execution quality. *See* HMA Letter at 20; Consumer Federation of America Letter at 7; Markit Letter at 5–6.

[1066] 17 CFR 242.606. Rule 606 of Regulation NMS requires every broker or dealer to make publicly available for each calendar quarter a report on its routing of non-directed orders in NMS securities during that quarter. *See* Markit Letter at 6–7; ICI Letter at 8.

[1067] *See* Securities Exchange Act Release No. 78309 (July 13, 2016), 81 FR 49432 (July 27, 2016).

[1068] *See* 17 CFR 242.301(b)(10).

[1069] *See* Regulation ATS Adopting Release, *supra* note 3, at 70879.

mandated under Rule 301(b)(10) be memorialized in writing.

We proposed to amend Rule 301(b)(10)(i) to require that all ATSs (including both NMS Stock ATSs and non-NMS Stock ATSs) adopt written safeguards and written procedures that limit access to the confidential trading information of subscribers to those employees of the ATS who are operating the system or are responsible for its compliance with Regulation ATS or any other applicable rules,[1070] and implement written standards controlling employees of the ATS trading for their own accounts.[1071] In addition, proposed Rule 301(b)(10)(ii) would require that the oversight procedures, which an ATS adopts and implements to ensure that the above safeguards and procedures are followed, be in writing.[1072]

We received five comments on the proposed amendment to Rule 301(b)(10).[1073] Four commenters indicate that they support the requirement that ATSs memorialize safeguards and procedures in writing as proposed.[1074] An additional commenter does not object to the Commission's proposal to require that an ATS's procedures to protect confidential information be memorialized in writing.[1075]

We are adopting the amendments to Rule 301(b)(10) as proposed. We continue to believe that safeguards and procedures to ensure the confidential treatment of ATS subscribers' trading information are important, and that the potential for misuse of such information continues to exist. We also continue to believe that requiring an ATS to reduce to writing those safeguards and procedures, as well as its oversight procedures to ensure that such safeguards and procedures are followed, will strengthen the effectiveness of the ATS's safeguards and procedures and will better enable the ATS to protect confidential subscriber trading information and implement and monitor the adequacy of, and the ATS's compliance with, its safeguards and procedures.[1076] The proposed revisions would aid investors, market participants, and regulators by consolidating written safeguards and procedures into one place for easy review and evaluation.[1077] Further, we agree with the comment that asserts that the process of consolidating these safeguards and procedures may facilitate ATS operators' identification of gaps or opportunities for improvement of these measures.[1078] In addition, we believe that reducing ATSs' safeguards and procedures under Rule 301(b)(10) to writing will help the Commission and its staff, and the staff of the SRO of which an ATS's broker-dealer operator is a member, evaluate whether an ATS has established such procedures and safeguards, whether the ATS has implemented and is abiding by them, and whether they comply with the requirements of Rule 301(b)(10). This should assist the Commission, and the applicable SRO(s), to exercise more effective oversight of ATSs regarding the ATSs' compliance with Rule 301(b)(10) and other federal securities laws, rules, and regulations. Furthermore, we believe that the amendments we are adopting to Rule 301(b)(1) will benefit market participants because they will be able to better evaluate the implementation of such safeguards and procedures, once they are reduced to writing.

We also proposed to amend the record preservation requirements of Rule 303(a)(1) to incorporate the amendments to Rule 301(b)(10).[1079] We received no comments on the proposed change to Rule 303(a)(1).[1080] We are adopting, as proposed, Rule 303(a)(1)(v), which requires that an ATS, for a period of not less than three years, the first two years in an easily accessible place, preserve at least one copy of the written safeguards and written procedures to protect subscribers' confidential trading information and the written oversight procedures created in the course of complying with Rule 301(b)(10).[1081]

VII. EDGAR Filing Requirements; Structured Data

Form ATS–N would be filed electronically in a structured format through EDGAR. By filing in EDGAR, NMS Stock ATSs will be given the option of filing using a web-fillable Form ATS–N which will render into XML in EDGAR, or to file directly in XML using the XML schema for NMS Stock ATSs as published on the Commission's website. With both options, the Commission will receive the Form ATS–N information in XML format. For those NMS Stock ATSs that would prefer to manually key in all of their Form ATS–N responses, as had been originally proposed by us, those NMS Stock ATSs can do so using the Commission's web-fillable Form ATS–N, which will render into XML in EDGAR. For those NMS Stock ATSs that would prefer to map the information in their existing systems so that filing of Form ATS–N can be more automated and more efficient for them, those NMS Stock ATS can file in XML using the XML schema as published on the Commission's website. The Commission's XML schema and the Commission's web-fillable Form ATS–N both reflect the same set of custom XML tags and XML restrictions designed by the Commission to submit the disclosures in Form ATS–N.

As we proposed, all effective Forms ATS–N and all properly filed Form ATS–N amendments will be made publicly available. Because Form ATS–N will be filed in an XML format (either using the Commission's web-fillable form or as an XML file submitted according to the Commission's XML schema) in EDGAR, once effective, all Forms ATS–N will be centrally located on EDGAR for the public to access in the same XML format in which the Form ATS–N was received by the Commission.

The XML format is a text-searchable format that does not require the use of optical character recognition and will enhance the Commission's and the public's abilities to better gather, analyze, aggregate, compare, and use the Form ATS–N data. Requiring XML should result in the Form ATS–N data being provided in a consistent, structured format. XML is an open

[1070] *See* Rule 301(b)(10)(i)(A).

[1071] *See* Rule 301(b)(10)(i)(B).

[1072] *See* Rule 301(b)(10)(ii).

[1073] *See* ICI Letter at 10; MFA/AIMA Letter at 6; HMA Letter at 23; STANY Letter at 2; Liquidnet Letter at 17. *See also* Investor Advocate Letter at 2.

[1074] *See* ICI Letter at 10; MFA/AIMA Letter at 6; HMA Letter at 23; STANY Letter at 2.

[1075] *See* Liquidnet Letter at 17. In addition, this commenter expresses concern that the requirements of Regulation ATS relating to protection of confidential information could be interpreted in a manner that would be harmful to long-term investors by prohibiting broker-dealers that operate ATSs from providing information to customers that the customers can use to evaluate and enhance their trading performance, such reports of participants' positive action rates and the positive action rates of the contras with which they match. *See id.* The commenter is concerned that if Rule 301(b)(10) is interpreted to restrict the distribution of this type of information, this would harm long-term investors. *See id.* Proposed and adopted amendments to Rule 301(b)(10) to require an ATS to maintain written procedures to protect confidential trading information neither (i) change the standard for what constitutes adequate safeguards and procedures to protect subscribers' confidential trading information nor (ii) narrow or expand the scope of what is considered to be confidential trading information under that rule. In general, the determination of what constitutes subscribers' confidential trading information is a facts and circumstances analysis, but it is also outside of the scope of this rulemaking to provide interpretive guidance about the scope of Rule 301(b)(10).

[1076] In addition, we are requiring public disclosure related to such safeguards and procedures. *See supra* Section V.C.6.

[1077] *See* HMA Letter at 23.

[1078] *See id.*

[1079] *See supra* Section V.C.8.

[1080] *See supra* Section III.B.6.

[1081] *See* proposed Rule 303(a)(1)(v).

standard that defines, or ''tags,'' data using standard definitions. The tags establish a consistent structure of identity and context. This consistent structure can be automatically recognized and processed by a variety of software applications such as databases, financial reporting systems, and spreadsheets, and then made immediately available to the end user to search, aggregate, compare, and analyze.

In addition, XML is an open standard that is maintained by a consensus based market standards organization, rather than the Commission, and undergoes constant review. As updates to XML or industry practice develop, the Commission's XML schema and web-fillable XML architecture may also have to be updated to reflect the updates in technology. If that occurs, the supported version of the XML schema would be made available on the Commission's website and the outdated version of the schema would be removed in order to maintain data quality and consistency with the standard, while the web-fillable Form ATS–N would be updated in EDGAR to reflect the same changes in technology as the Commission's XML schema.

The Commission's XML schema and architecture for the web-fillable Form ATS–N would also incorporate certain validations to help ensure consistent formatting and completeness among all Forms ATS–N, in other words, to help ensure data quality. Validations are restrictions placed on the formatting for each data element so that comparable data is presented comparably. However, these validations would not be designed to ensure the underlying accuracy of the data. Any Form ATS–N filed in EDGAR would have to comply with validations that are incorporated within the XML schema, otherwise the Form ATS–N will not be accepted by EDGAR.

We believe that requiring Form ATS–N be provided in an XML format would provide the Commission and the public with data about NMS Stock ATSs in a format that facilitates search capabilities, and comparative analyses across NMS Stock ATSs and across filings, including more advanced text analytics for the more narrative responses of Form ATS–N. Absent this requirement, users of the Form ATS–N data that wanted to aggregate the data or search across filings or filers would need to spend additional time transferring the data into a consistent format before it could be analyzed, or incur the cost of a service provider that specializes in this data aggregation and comparison process. Further, unrestricted manual entry of data may lead to errors, thereby potentially reducing data quality and usability.

We understand that there are costs associated with structuring and that these costs may vary depending on the filer and the type of structuring. By offering two options for filers to submit Form ATS–N in EDGAR, filers will be able to select the method best suited to their situation. Overall, the we believe that the XML format of Form ATS–N will have enhanced benefits for the Commission's and the public's use of Form ATS–N while minimizing costs relative to filers having to file Form ATS–N using other structured formats.[1082] Requiring the Commission's XML schema with its incorporated validations (whether submitted as XML or in the web-fillable form) will help ensure that the data that filers submit is complete and appropriately formatted so that additional time will not have to be spent on subsequent Form ATS–N filings to correct for those errors. By comparison, the EFFS system originally proposed does not support the open-source XML format, but rather a proprietary XML implementation called XFDL. As a result, the EFFS system has fewer validation capabilities and cannot test for consistency and completeness as broadly as the XML format, and in particular, at the element level. In addition, as proposed, filers would have been required to individually upload each narrative response as a separate exhibit, whereas the XML format permits filers to provide all their narrative responses in one structured XML file, which will slightly diminish their time spent in filing in the Form ATS–N narrative information.

End users will be able to download the consistently structured information directly into databases and analyze it using various software. This would enhance their ability to conduct large-scale analysis and immediate cross-filing comparisons of NMS Stock ATSs, as well as comparisons across reporting periods within the same and among different NMS Stock ATSs. Moreover, as an open standard, XML is widely available to the public at no cost. By comparison, viewing information in the current EFFS system requires a license of a commercial proprietary viewer, which currently is not separately available to every member of the public without licensing.

Commenters who supported the standardization of Form ATS–N information also underscored the importance of making the information comparable.[1083] While the commenters did not make specific reference to the structured format, having the Form ATS–N information submitted using the Commission's XML schema or the web-fillable form will enhance the comparability of the Form ATS–N data by ensuring that the information has been submitted completely and consistently. Two commenters addressed the importance of completeness to Form ATS–N filings.[1084] With the Commission's XML schema, the restrictions incorporated into the schema (and consequently, also reflected in the web-fillable form) will help test for completeness of the data before submission and reduce filer uncertainty on the completeness and consistency of their filing. One commenter recommends that we consider ways to present information that would improve the readability and navigability of disclosure through the use of technology such as hyperlinks and/or XBRL technology.[1085] The XML format is a technology format that presents the data consistently, which improves the readability and navigability of the data. In fact, XBRL is an XML-based technology, but, as discussed later, we do not think that XBRL is the appropriate format for this form.[1086] While hyperlinks may be useful in some situations to cross-reference information, hyperlinks do not by themselves enhance the comparability of the underlying data, but can be incorporated within the XML format, as permitted.

Because Form ATS–N filings will be submitted electronically,[1087] we are revising Rule 101 of Regulation S–T [1088] to add paragraph (a)(1)(xxi) to the list of mandated electronic submissions. Specifically, paragraph (a)(1)(xvii) adds to this list Form ATS–N.

VIII. Effective Date and Compliance Date

We did not receive any comments about the effective date for the amendments. The rules being adopted today will become effective 60 days after the date of publication in the **Federal Register**.

With regard to the adopted amendments to Rules 301(b)(10) and 303(a)(1)(v) of Regulation ATS,[1089] we

[1082] *See infra* Section X.D.11.

[1083] *See* Fidelity Letter at 1; Morgan Stanley Letter at 2; SIFMA Letter at 3; UBS Letter at 2–3.

[1084] *See* MFA/AIMA Letter at 4; SIFMA Letter at 32–33.

[1085] *See* Fidelity Letter at 5.

[1086] *See infra* Section X.D.11.

[1087] *See supra* Section V.A.1.

[1088] 17 CFR 232.101.

[1089] *See supra* Section VI.

believe the 60 day effective date provides sufficient time for ATSs to memorialize in writing their safeguards and procedures to protect subscribers' confidential trading information (to the extent that those safeguards and procedures are not currently maintained in written form). Current Rule 301(b)(10) of Regulation ATS [1090] requires every ATS to have safeguards and procedures that limit access to the confidential trading information of subscribers to those employees of the ATS who are operating the system or are responsible for its compliance with Regulation ATS or any other applicable rules,[1091] and implement standards controlling employees of the ATS trading for their own accounts.[1092] We note that the adopted amendments to Rules 301(b)(10) and 303(a)(1)(v) do not modify that requirement other than to require that those safeguards and procedures be written, pursuant to Rule 301(b)(1) and preserved pursuant to Rule 303(a)(1)(v). Accordingly, we believe that the 60 days after the final rule is published in the **Federal Register** is reasonable for the amendments to Rules 301(b)(10) and 303(a)(1)(v) to become effective, and for ATSs to comply with those rules.

We believe that the compliance dates provided in Rules 304 and 301(b)(2)(viii) provide sufficient time for NMS Stock ATSs to prepare and file Form ATS–N disclosures with the Commission. Rule 304(a)(1)(iv)(A) requires a Legacy NMS Stock ATS to file with the Commission an initial Form ATS–N, in accordance with Rule 304, no earlier than January 7, 2019, and no later than February 8, 2019.[1093] Rule 301(b)(2)(viii) provides that a Legacy NMS Stock ATS that is operating pursuant to an initial operation report on Form ATS on file with the Commission as of January 7, 2019 shall be subject to the requirements of Rule 301(b)(2)(i) through (vii) until the Legacy NMS Stock ATS files an initial Form ATS–N with the Commission pursuant to Rule 304(a)(1)(iv)(A).[1094] In addition, pursuant to Rule 301(b)(2)(viii), as of January 7, 2019, an entity seeking to operate as a new NMS Stock ATS shall also be subject to Rule 304 and the rules amended in relation.[1095]

[1090] *See* 17 CFR 242.301(b)(10).

[1091] *See* Rule 301(b)(10)(i)(A).

[1092] *See* Rule 301(b)(10)(i)(B).

[1093] *See supra* Section IV.A.4.a. *See also* Rule 304(a)(1)(iv)(A).

[1094] *See supra* Section III.B.4.

[1095] *See supra* Section III.B.4; IV.A.1. *See also supra* note 291 and accompanying text.

IX. Paperwork Reduction Act

Certain provisions of the proposal contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[1096] The titles of these requirements are:

- Requirements for Alternative Trading Systems That Are Not National Securities Exchanges—Rule 301, Form ATS and Form ATS–R, 17 CFR 242.301 (OMB Control No. 3235–0509);
- Rule 303 (17 CFR 242.303) Record Preservation Requirements for Alternative Trading Systems (OMB Control No. 3235–0505); and
- Rule 304 and Form ATS–N (a new collection of information).

In accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11, we submitted these requirements to the Office of Management and Budget (''OMB'') for review and approval in accordance with the PRA and its implementing regulations.[1097] The title for the new collection of information in Rule 304 and Form ATS–N is ''Rule 304 and Form ATS–N.'' We have applied for a new OMB Control Number for this collection in accordance with 44 U.S.C. 3507(j) and 5 CFR 1320.13. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number.

In the Proposal, we solicited comments on the proposed collection of information burdens and asked whether commenters agree with our estimate of the number of respondents and burdens of the Proposal. We received one comment on our estimates of the collection of information burden included in the Proposal, which is addressed below.[1098]

A. Summary of Collection of Information

The amendments to Regulation ATS include two new categories of obligations that require a collection of information within the meaning of the PRA. The first category relates to Rule 301(b)(10) and Rule 303 of Regulation ATS [1099] and applies to all ATSs, while the second category relates to Form ATS–N and applies only to NMS Stock ATSs.

[1096] 44 U.S.C. 3501 *et seq.*

[1097] 44 U.S.C. 3507; 5 CFR 1320.11.

[1098] *See infra* note 1235 and accompanying text.

[1099] 17 CFR 242.301(b)(10); 17 CFR 242.303.

1. Requirements Relating to Rule 301(b)(10) and 303(a)(1) of Regulation ATS

The amendments to Regulation ATS will require an ATS to place in writing the safeguards and procedures required by Rule 301(b)(10) to protect subscribers' confidential trading information and oversight procedures to ensure that the safeguards and procedures are followed. In addition, we are amending Rule 303(a)(1) [1100] of Regulation ATS to require an ATS to preserve at least one copy of written safeguards and written procedures, and written oversight procedures created in the course of complying with Rule 301(b)(10) for a period of not less than three years, the first two years in an easily accessible place.[1101]

2. Requirements Relating to Rules 301(b)(2)(viii) and 304 of Regulation ATS, Including Form ATS–N

Any ATS that meets the definition of an NMS Stock ATS is required to complete an initial Form ATS–N, file it with the Commission via EDGAR, and make public via posting on its website a direct URL hyperlink to the Commission's website that contains the documents enumerated in Rule 304(b)(2).[1102]

Form ATS–N requires that the entity submitting the filing would indicate whether the NMS Stock ATS currently operates pursuant to a Form ATS, and the type of Form ATS–N filing—whether the Form ATS–N is an initial Form ATS–N, a Form ATS–N amendment (whether a material amendment, updating amendment, correcting amendment, or order display and fair access amendment), a notice of cessation, and if it is a notice of cessation, the date the NMS Stock ATS will cease to operate, or if it is a withdrawal. If the filing is a Form ATS–N amendment, the NMS Stock ATS is also required to provide a brief summary of the amendment and the EDGAR accession number for the Form ATS–N filing to be amended. If the filing is a withdrawal, the NMS Stock ATS is required to provide the EDGAR accession number for the Form ATS–N filing to be withdrawn.

Part I requires information about the broker-dealer operator.[1103] Part II of Form ATS–N requires an NMS Stock ATS to disclose information about the ATS-related activities of the broker-dealer operator and its affiliates.[1104] Part

[1100] 17 CFR 242.303(a)(1).

[1101] *Id.*

[1102] *See generally* Section IV.

[1103] *See* Section V.B.2.

[1104] *See* Section V.C.

III of Form ATS–N requires an NMS Stock ATS to provide certain information about the manner of operations of the NMS Stock ATS.[1105] Part IV of Form ATS–N requires an NMS Stock ATS to provide contact information. In addition, Form ATS–N will require NMS Stock ATSs to file the form electronically via EDGAR with a typed signature.[1106]

We are also amending Rule 303(a)(2)(ii) to require that an NMS Stock ATS preserve, for the life of the enterprise and of any successor enterprise, copies of reports filed pursuant to Rule 304.[1107]

Furthermore, an ATS that trades both NMS stocks and non-NMS stocks will be required to file both a Form ATS–N with respect to its trading of NMS stocks and a revised Form ATS that removes discussion of those aspects of the ATS related to the trading of NMS stocks. The ATS will also be required to file two Forms ATS–R filings—one to report its trading volume in NMS stocks and another to report its trading volume in non-NMS stocks.

B. Proposed Use of Information

1. Amendments to Rule 301(b)(10) and 303(a)(1) of Regulation ATS

We continue to believe that both the Commission and the SRO of which the ATS's broker-dealer operator is a member will use the written safeguards and written procedures required by the amendments to Rule 301(b)(10) to better understand how each ATS protects subscribers' confidential trading information from unauthorized disclosure and access. We continue to believe that the information contained in the records required to be preserved by Rule 303(a)(1)(v) will be used by examiners and other representatives of the Commission, state securities regulatory authorities, and SROs to evaluate whether ATSs are in compliance with Regulation ATS as well as other applicable rules and regulations. We also believe that the requirement to memorialize in writing the safeguards and procedures to protect subscribers' confidential trading information will help assist ATSs in more effectively complying with their existing legal requirements under Regulation ATS; in particular, the requirements to protect the confidentiality of subscribers' trading information under Rule 301(b)(10) of Regulation ATS.

2. Rules 301(b)(2)(viii), 304 of Regulation ATS, Including Form ATS–N, and 301(b)(9)

We believe that market participants will use the information publicly disclosed on Form ATS–N to compare and evaluate NMS Stock ATSs when making their routing decisions.[1108] In addition, we believe we will use the information disclosed on Form ATS–N, Form ATS, and Form ATS–R to oversee the growth and development of NMS Stock ATSs.[1109] We believe that the information contained in the records required to be preserved by the amendment to Rule 303(a)(2)(ii) will be used by examiners and other representatives of the Commission, state securities regulatory authorities, and SROs to evaluate whether ATSs are in compliance with Regulation ATS as well as other applicable rules and regulations.

C. Respondents

The ''collection of information'' requirements under the amendments to Regulation ATS relating to Rule 301(b)(10) and Rule 303(a)(1)(v) would apply to all ATSs, including NMS Stock ATSs. The ''collection of information'' requirements under the amendments to Regulation ATS relating to Rule 304, Form ATS–N, and the amendments to Rule 303(a)(2)(ii) would apply only to NMS Stock ATSs, and the ''collection of information'' requirements under the amendments to Rule 301(b)(9) would apply to NMS Stock ATSs that also transact in both NMS stocks and non-NMS stocks. Currently, there are 87 ATSs that have filed Form ATS with us. Of these 87 ATSs, 41 would meet the definition of an NMS Stock ATS.[1110] Accordingly, the we estimate that 87 entities would be required to comply with the amendments related to Rule 301(b)(10) of Regulation ATS and 41 entities would be required to complete Form ATS–N.[1111]

In addition, there are currently 10 ATSs that trade, or have indicated in Exhibit B to their Form ATS that they expect to trade, both NMS stocks and non-NMS stocks on the ATS.[1112] Under the amendments to Regulation ATS, these 10 entities would be required to file a Form ATS–N to disclose information about their NMS stock activities and file a Form ATS to disclose information about their non-NMS stock activities. Consequently, these 10 ATSs would have to amend their Forms ATS to remove information regarding operations related to the trading of NMS stocks and on an ongoing basis, file separate Forms ATS–R to report trading volume in NMS stocks and trading volume in non-NMS stocks.[1113]

With respect to Form ATS–N, we recognize there may be entities that might file a Form ATS–N to operate an NMS Stock ATS in the future. From January 2014 through March 2018, an average of 2 new ATSs per year disclose that they trade or expect to trade NMS stocks on their Form ATS initial operation reports, and would therefore fall within the definition of an NMS Stock ATS. Similarly, some ATSs that currently trade NMS stocks may choose to cease operations rather than comply with the amendments requiring them to file Form ATS–N. Other ATSs may choose to cease operations in the normal course of business. From January 2014 through March 2018, an average of 9 ATSs that trade NMS stocks have ceased operations each year.[1114]

We believe that most ATSs that currently trade NMS stocks would continue to operate notwithstanding the amendments to Regulation ATS. For the purposes of this analysis of the paperwork burden associated with the amendments to Regulation ATS, we assume that there will be 41 respondents. This number assumes that most ATSs that currently trade NMS

[1105] *See* Section V.D.

[1106] *See* Section V.A.1.

[1107] *See* Rule 303(a)(2)(ii).

[1108] *See supra* Section III.A.1.a.

[1109] *See id.*

[1110] As of March 31, 2018, 41 ATS have disclosed on their Form ATS that they trade or expect to trade NMS stock.

[1111] We recognize that there may be new entities that will seek to become ATSs, or NMS Stock ATSs, that would be required to comply with the proposed amendments to Rule 301(b)(10). From January 2014 through the first half of 2017, an average of 12 Form ATS initial operation reports were filed each year with us. Similarly, some ATSs may cease operations in the normal course of business or possibly in response to the proposed amendments to Regulation ATS. From January 2014 through the March 31, 2018, an average of 9 ATSs, including those that trade NMS stocks have ceased operations. For the purposes of this paperwork burden analysis, we assume that 87 respondents would be required to comply with the proposed amendments to Rule 301(b)(10), if adopted. We are estimating that the number of entities that may file a Form ATS initial operation report would generally offset any ATSs that may file a Form ATS cessation of operations report.

[1112] Data compiled from Forms ATS and ATS–R submitted to us as of March 31, 2018. These 10 ATSs are included within the 41 NMS Stock ATSs.

[1113] Pursuant to Rule 301(b)(9), all ATSs are required to file Form ATS–R within 30 calendar days after the end of each calendar quarter in which the market has operated, and within 10 calendar days after the ATS ceases to operate. An ATS that trades both NMS stocks and non-NMS stocks would report its transactions in NMS stocks on one Form ATS–R, and its transaction volume in other securities on a separate Form ATS–R.

[1114] In the Proposal, we cited the average number of new ATSs and ATSs that ceased operations from 2012 through the first half of 2015, which were 2 and 6, respectively. *See* Proposal, *supra* note 2, at 81092.

stocks would file a Form ATS–N with the Commission. We acknowledge that some ATSs may cease operations altogether and other entities that may commence operations as an NMS Stock ATS. Based on the current number of initial operation reports and cessation of operations reports on current Form ATS for ATSs that trade NMS stocks described above, we estimate that 2 to 3 new entities will file initial Form ATS–N to become an NMS Stock ATS and 7 to 9 NMS Stock ATSs will cease operations in each of the next three years.

D. Total Initial and Annual Reporting and Recordkeeping Burdens

1. Rules 301(b)(10) and 303(a)(1)(v) of Regulation ATS

a. Baseline Measurements

We believe that ATSs—in particular, ATSs whose broker-dealer operators are large, multi-service broker-dealers—generally have and maintain in writing their safeguards and procedures to protect subscribers' confidential trading information, as well as the oversight procedures to ensure such safeguards and procedures are followed.[1115] However, neither Rule 301(b)(10) nor Rule 303(a)(1) of Regulation ATS currently requires that an ATS have and preserve those safeguards and procedures in writing. For ATSs that currently have and preserve in written format the safeguards and procedures to protect subscribers' confidential trading information under Rule 301(b)(10) of Regulation ATS, we estimate that the average annual burden they voluntarily undertake to update and preserve those written safeguards and written procedures is 4 hours.[1116] Because neither current Rule 301(b)(10) nor current Rule 303(a)(1) requires an ATS to have and preserve its safeguards and procedures to protect subscribers' confidential trading information in writing, this burden is not reflected in the current PRA baseline burdens for Rules 301 and 303.[1117] In accordance with the below analysis, we are modifying the current PRA burdens for Rules 301 and 303 to account for the new requirement that ATSs have and preserve in written format the safeguards and procedures to protect subscribers' confidential trading information.[1118]

b. Burdens

We recognize that Rules 301(b)(10) and 303(a)(1)(v) of Regulation ATS would impose certain burdens on respondents. For ATSs that currently have and preserve in written format the safeguards and procedures to protect subscribers' confidential trading information and written oversight procedures to ensure such safeguards and procedures are followed, we believe that there will be no increased burden under the amendments to Rules 301(b)(10) and 303(a)(1)(v) of Regulation ATS. We believe that the current practices of those ATSs would already be in compliance with the rules and the amendments should not require these ATSs to take any actions in addition to those currently undertaken.

For ATSs that have not recorded in writing their safeguards and procedures to protect subscribers' confidential trading information and oversight procedures to ensure such safeguards and procedures are followed, there will be an initial, one-time burden to memorialize them in a written document(s). In the Proposal, we estimated that an ATS's initial, one-time burden to put in writing its safeguards and procedures to protect subscribers' confidential trading information and the oversight procedures to ensure such safeguards and procedures are followed would be 8 hours.[1119] We did not receive any comment on the preliminary estimates. Because ATSs are already required to have safeguards and procedures to protect subscribers' confidential trading information and to have oversight procedures to ensure such safeguards and procedures are followed, we believe that recording these items in a written format would not impose a substantial burden on ATSs and would rely on internal staff to record the ATS's Rule 301(b)(10) procedures in writing. Therefore, we estimate that an ATS's initial, one-time burden to put in writing its safeguards and procedures to protect subscribers' confidential trading information and the oversight procedures to ensure such safeguards and procedures are followed would be approximately 8 hours,[1120] but we estimate that the burden could range between 5 and 10 hours.[1121] We estimate that, of the 87 current ATSs, 15 ATSs might not have their safeguards and procedures to protect subscribers' confidential trading information or oversight procedures to ensure such safeguards and procedures are followed in writing, and would therefore be subject to this one-time initial burden.[1122] Accordingly, we estimate that the aggregate initial, one-time burden on all ATSs would be 120 hours based on our highest approximation of the additional burden per ATS.[1123]

We estimate that the average annual, ongoing burden per ATS to update and preserve written safeguards and written procedures to protect subscribers' confidential trading information, as well as to update and preserve the written standards controlling employees of the ATS trading for their own account and the written oversight procedures, would be 4 hours.[1124] As a result, we estimate that the total aggregate, ongoing burden per year for all ATSs would be 348 hours,[1125] and thus, we are modifying the current PRA burden estimates for Rules 301 and 303 to account for this increased burden on ATSs.

2. Rules 301(b)(2)(viii) and 304 of Regulation ATS, Including Form ATS–N

a. Baseline Measurements

Currently, Rule 301(b)(2)(i) of Regulation ATS [1126] requires an ATS to file an initial operation report on current Form ATS at least 20 days prior to commencing operation as an alternative trading system. Current Form ATS requires information regarding the operation of the ATS, including, among other things, classes of subscribers, the types of securities traded, the outsourcing of operations of the ATS to other entities, the procedures governing the entry of orders, the means of access to the ATS, and procedures governing execution and reporting. Regarding amendments to an existing Form ATS, Rule 301(b)(2)(ii) of Regulation ATS [1127] requires an ATS to file amendments to its current Form ATS at least 20

[1115] *See infra* Section VI.

[1116] Attorney at 2 hours + Compliance Clerk at 2 hours = 4 burden hours. For ATSs that do not have their safeguards and procedures or oversight procedures in a written format, these firms would incur a one-time initial burden to record their safeguards and procedures as well as their oversight procedures in a written format as described below.

[1117] *See* FR Doc. 2014–02143, 79 FR 6236 (February 3, 2014) (Request to OMB for Extension of Rule 301 and Forms ATS and ATS–R; SEC File No. 270–451; OMB Control No. 3235–0509) (hereinafter ''Rule 301 PRA Update''); FR Doc. 2013–17474, 78 FR 43943 (July 22, 2013) (Request to OMB for Extension of Rule 303; SEC File No. 270–450; OMB Control No. 3235–0505) (hereinafter ''Rule 303 PRA Update'').

[1118] *See infra* note 1125 and accompanying text.

[1119] *See* Proposal, *supra* note 2, at 81094.

[1120] Attorney at 7 hours + Compliance Clerk at 1 hour = 8 burden hours.

[1121] Attorney at 4–9 hours + Compliance Clerk at 1 hour = 5–10 burden hours.

[1122] It is likely that most, if not all, ATSs already fulfill their Rule 301(b)(10) obligations in writing, given the practical difficulty in ensuring such safeguards and procedures, as well as oversight procedures, are ''adequate,'' as required under Rule 301(b)(10), and contain all necessary components.

[1123] (Attorney at 7 hours + Compliance Clerk at 1 hour) x (15 ATSs) = 120 burden hours.

[1124] *See supra* note 1116 and accompanying text.

[1125] (Attorney at 2 hours + Compliance Clerk at 2 hours) × 87 ATSs = 348 burden hours.

[1126] 17 CFR 242.301(b)(2)(i).

[1127] 17 CFR 242.301(b)(2)(ii).

calendar days prior to implementing a material change to its operations. Rule 301(b)(2)(iii) of Regulation ATS [1128] requires an ATS to file amendments to its current Form ATS within 30 calendar days after the end of each calendar quarter if any information contained in its initial operation report becomes inaccurate and has not been previously reported to the Commission.[1129] Regarding shutting down an ATS, Rule 301(b)(2)(v) of Regulation ATS [1130] requires an ATS to promptly file a cessation of operation report on current Form ATS upon ceasing operations as an ATS.

Our currently approved estimate for an initial operation report on current Form ATS is 20 hours to gather the necessary information, provide the required disclosures in Exhibits A through I, and submit the Form ATS to the Commission.[1131] With respect to Form ATS amendments, we understand, based on the review of Form ATS amendments by the Commission and its staff, that ATSs that trade NMS stocks typically amend their Form ATS on average twice per year.[1132] The frequency and scope of Form ATS amendments vary depending on whether the ATS is implementing a material change or an updating change. Some ATSs may not change how they operate or anything else that might require an amendment to Form ATS in a given year while others may implement a number of changes during a given year that require Form ATS amendments. Our currently approved estimated average compliance burden for each amendment to Form ATS is approximately 6 hours.[1133] Accordingly, the estimated average annual ongoing burden of updating and amending Form ATS is approximately 12 hours per NMS Stock ATS.[1134] With respect to ceasing operations, the currently approved average estimated compliance burden for an ATS to complete a notice of cessation is 2 hours to check the appropriate box on Form ATS and send the notice of cessation to the Commission.[1135] Our currently approved estimate for the average compliance burden for each Form ATS–R filing is 4 hours.[1136]

b. Burdens

We recognize that Rules 301(b)(2)(viii) and 304 of Regulation ATS, including Form ATS–N, would impose certain burdens on respondents.[1137] Although many of the disclosures required by Form ATS–N are currently required by Form ATS, Form ATS–N requires an NMS Stock ATS to provide significantly more detail in those disclosures than currently required by Form ATS. Form ATS–N also requires additional disclosures not currently mandated by current Form ATS such as those contained in Part II of adopted Form ATS–N. Under the amendments to Regulation ATS, NMS Stock ATSs will be required to complete and file the enhanced and additional disclosures on Form ATS–N.[1138] Section IX.D.2.b.i below provides the estimated burden above the current Form ATS baseline of each item of Form ATS–N. Many of the disclosure items on Form ATS–N are already required disclosures by respondents in whole or in part on current Form ATS, while other disclosure items on Form ATS–N are novel (*i.e.,* current Form ATS does not require some form of the disclosure). Section IX.D.2.b.ii aggregates these new burdens and the additional burdens above the current Form ATS baseline that will be imposed by Form ATS–N.

(i) Analysis of Estimated Additional Burden for Form ATS–N

(a) Part I

In the Proposal, we estimated that preparing Parts I and II for a Form ATS–N would add 0.5 hours to the current baseline for an NMS Stock ATS to prepare an initial operation report on current Form ATS.[1139] Part I of adopted Form ATS–N contains substantially the same information as Parts I and II of proposed Form ATS–N. However, adopted Form ATS–N does not include several proposed disclosure requirements and contains several new requests. Overall, we estimate that the burden for Part I of adopted Form ATS–N will be the same as that which was estimated for proposed Form ATS–N. Accordingly, we estimate that Part I of adopted Form ATS–N will add an additional 0.5 hours above the baseline of current Form ATS.

(b) Part II

As explained above, Part II, Items 1 and 2 contain disclosure requests about the broker-dealer operator's and affiliates', respectively, trading activity on the NMS Stock ATS. For Part II, Item 1(a), to the extent that the broker-dealer operator is not permitted to enter or direct orders and trading interest to the NMS Stock ATS, the NMS Stock ATS would only be required to check ''no.'' In addition, to the extent the broker-dealer operator enters or directs the entry of orders and trading interest into the NMS Stock ATS, but such orders and trading interest is treated the same as trading interest from other subscribers and persons, Part II, Item 1(b) would require that the NMS Stock ATS check ''no.''

Part II, Item 1(a) of adopted Form ATS–N incorporates aspects of several proposed disclosures that addressed the activity of the broker-dealer operator's trading activity on the NMS Stock ATS. First, Part II, Item 1(a) of adopted Form ATS–N incorporates requirements of Part III, Items 1 and 2 of proposed Form ATS–N, which would have requested disclosures about the non-ATS trading centers and other NMS Stock ATSs operated by the broker-dealer operator and its affiliates. In the Proposal, we estimated that preparing Part III, Item 1 for proposed Form ATS–N would add 10 hours to the current baseline of Form ATS and Part III, Item 2 would add 4 hours to the current baseline of Form ATS, for a total estimated burden of 14 hours for Part III, Items 1 and 2.

Adopted Part II, Item 1(a) more narrowly tailors those proposed requests by focusing on the actual trading activities of the broker-dealer operator on the NMS Stock ATS and its use of the ATS's services. Primarily, the request under adopted Item 1(a): (i) Does not require an NMS Stock ATS to list all non-ATS trading centers and NMS Stock ATSs operated by the broker-dealer operator, regardless of whether those entities trade on the NMS Stock ATS; and (ii) replaces what some commenters perceived as potentially broad narrative requests to describe the ''interaction and coordination'' between

[1128] 17 CFR 242.301(b)(2)(iii).

[1129] In addition, Rule 301(b)(2)(iv) requires an ATS to promptly file an amendment on current Form ATS after the discovery that any information previously filed on current Form ATS was inaccurate when filed. 17 CFR 242.301(b)(2)(iv).

[1130] 17 CFR 242.301(b)(2)(v).

[1131] Attorney at 13 hours + Compliance Clerk at 7 hours = 20 burden hours. *See* Rule 301 PRA Update, *supra* note 1117, 79 FR 6237.

[1132] *See id.*

[1133] Attorney at 4.5 hours + Compliance Clerk at 1.5 hours = 6 burden hours. *See id.*

[1134] 2 Form ATS amendments filed annually × 6 burden hours per Form ATS amendment = 12 burden hours per ATS.

[1135] Attorney at 1.5 hours + Compliance Clerk at 0.5 hours = 2 burden hours. *See* PRA Update, *supra* note 1117, 79 FR 6237.

[1136] Attorney at 3 hours + Compliance Clerk at 1 hour = 4 burden hours. *See id.*

[1137] In establishing the estimates below with respect to Form ATS–N, we have considered its estimate of the burden for an SRO to amend a Form 19b–4. Specifically, we estimated that 34 hours is the amount of time required to complete an average rule filing and 129 hours is the amount of time required to complete a complex rule filing, and three hours is the amount of time required to complete an average amendment to a rule filing. *See* Securities Exchange Act Release No. 50486 (October 4, 2004), 69 FR 60287, 60294 (October 8, 2004).

[1138] These disclosures will be provided on Form ATS–N and may have to be amended periodically as provided in proposed Rule 304.

[1139] *See* Proposal, *supra* note 2, at 81095.

the NMS Stock ATS and those non-ATS trading centers and other NMS Stock ATSs. Instead, the NMS Stock ATS is now required to name and describe each type of business unit of the broker-dealer operator that enters or directs the entry of orders and trading interest into the NMS Stock ATS, and we have replaced the term ''interaction and coordination'' with specific, enumerated data points and narratives that the NMS Stock ATS must provide. Furthermore, the corresponding affiliate disclosures for Part III, Items 1 and 2 of proposed Form ATS–N are now encompassed by Part II, Item 2(a) of adopted Form ATS–N, so Part II, Item 1(a) of adopted Form ATS–N will not impose the entire burden that was estimated for proposed Part III, Items 1 and 2. It will impose the burden from those proposed items that would have been imposed by the disclosure requirements related to the broker-dealer operator itself, which we believe is a small fraction of the proposed estimate relevant to the requirements related to affiliates of the broker-dealer operator. Accordingly, out of the 14-hour estimate for proposed Part III, Items 1 and 2, we estimate that Part II, Item 1(a) of adopted Form ATS–N would add approximately 2.75 hours to the baseline estimate to complete an initial operation report on Form ATS.

Second, the request under Part II, Items 1(a) of adopted Form ATS–N also incorporates aspects of the disclosures proposed under Part III, Item 5(a) of proposed Form ATS–N. We estimated that preparing proposed Part III, Item 5(a) would add 5 hours to the current baseline.[1140] While we did not provide estimates for each individual subpart of Part III, Item 5 of proposed Form ATS–N, the aspects of Part III, Item 5 that are incorporated into Part II, Item 1(a) of adopted Form ATS–N (*i.e.,* information about the broker-dealer operator's trading activity on the ATS, other than the information covered by proposed Item 5(d)) accounted for approximately 1.5 hours of the 5 hour estimate. We believe that the aspects of proposed Part III, Item 5 that are incorporated into Part II, Item 1(a) of adopted Form ATS–N would still add approximately 1.5 hours to the baseline for an initial operation report on current Form ATS.[1141] Adopted Form ATS–N requires the NMS Stock ATS to identify business units of the broker-dealer operator that enter or direct the entry of orders, whereas proposed Form ATS–N would have required the NMS Stock ATS to identity all business units that may enter orders or other trading interest. However, we believe that it would impose approximately the same burden for the broker-dealer operator to compile both lists because both would involve the collection of information about internal units of the broker-dealer operator.[1142] Accordingly, we estimate that the adopted requests under Part II, Item 1(a) would add a total of approximately 4.25 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 174.25 hours above the baseline for all NMS Stock ATSs to complete Part II, Items 1(a) and (b) of Form ATS–N.[1143]

The information sought under Part II, Item 1(b) of adopted Form ATS–N would have been requested under Part III, Item 9 of proposed Form ATS–N. We estimated that completing Part III, Item 9 of proposed Form ATS–N would add 2 hours to the current baseline of Form ATS.[1144] In most cases, Part II, Item 1(b) of adopted Form ATS–N will require the NMS Stock ATS to answer ''yes'' or ''no'' and list applicable item numbers in Part III of adopted Form ATS–N. An NMS Stock ATS will need to provide a narrative under Item 1(b) only if there are differences that are not applicable to Part III. But we believe that the subject matter covered by Part III is very comprehensive, and therefore, we do not believe that an NMS Stock ATS typically will need to provide additional narratives about differences in treatment that are not otherwise covered by Part III. Accordingly, we estimate that Part II, Item 1(b) of adopted Form ATS–N would add 0.25 hours out of the proposed 2-hour estimate for Part III, Item 9 to the current baseline for an initial operation report on Form ATS because in most instances, the NMS Stock ATS will be required to check the ''yes'' or ''no'' box and provide a list of relevant requests in Part III. This would result in an aggregate initial burden of 10.25 hours above the baseline for all NMS Stock ATSs to complete Part II, Item 1(b) of Form ATS–N.[1145]

Similarly, Part II, Items 1(c) and 1(d) of adopted Form ATS–N include requests for information that are intended to highlight disclosures about conflicts of interests and potential information leakage in Part III, Items 12 and 16, respectively, of adopted Form ATS–N. Part IV, Item 1(d) of proposed Form ATS–N set forth the proposed disclosure requirements regarding liquidity providers on the NMS Stock ATS. This request for information is now set forth in Part III, Item 12 of adopted Form ATS–N. In Part II, Item 1(c) of adopted Form ATS–N, we have now added the additional disclosure requirements for the NMS Stock ATS to answer a ''yes'' or ''no'' question and provide a list of any internal business units that trade on the NMS Stock ATS as liquidity providers in order to highlight information about potential conflicts of interest that might be disclosed in Part III, Item 12 of adopted Form ATS–N. We therefore estimate that, on average, preparing Part II, Item 1(c) for a Form ATS–N would add 1 hour to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 41 hours above the baseline for all NMS Stock ATSs to complete Part II, Item 1(c) of Form ATS–N.[1146]

Part III, Items 1(b)(iii) and 2(b)(iii) of proposed Form ATS–N would have required the NMS Stock ATS to explain the circumstances under which subscriber orders or trading interest received by the NMS Stock ATS may be removed from the NMS Stock ATS and sent to non-ATS trading centers or other NMS Stock ATSs operated or controlled by the broker-dealer operator, respectively. These disclosures are now incorporated into Part III, Item 16 of adopted Form ATS–N. However, we believe that information about the routing or removal of orders from the NMS Stock ATS to a trading center operated or controlled by the broker-dealer operator may include information that market participants find necessary to evaluate potential conflicts of interest or information leakage on the NMS Stock ATS, so we have added Part II, Item 1(d) to Part II of adopted Form ATS–N. Part II, Item 1(d) of adopted Form ATS–N requires the NMS Stock ATS to answer a ''yes'' or ''no'' question. The narrative associated with this disclosure will be set forth in Part III, Item 16. We therefore estimate that, on average, preparing Part II, Item 1(d) for a Form ATS–N would add 0.5 hour to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial

[1140] *See* Proposal, *supra* note 2, at 81097.

[1141] The estimated burden hours for proposed Part III, Item 5(a) related to affiliate trading on the ATS are now allocated to Part II, Item 2(a) of adopted Form ATS–N.

[1142] As noted below with regard to Part II, Item 2(a) of adopted Form ATS–N, however, the analogous change in scope for affiliate trading activity on the NMS Stock ATS will reduce the burden on NMS Stock ATSs relative to that which was proposed.

[1143] (Attorney at 3.75 + Compliance Manager at 0.5) × 41 NMS Stock ATSs = 174.25 burden hours.

[1144] *See* Proposal, *supra* note 2, at 81098.

[1145] Attorney at 0.25 hours × 41 NMS Stock ATSs = 10.25 burden hours.

[1146] Compliance Manager at 1.0 hours × 41 NMS Stock ATSs = 41 burden hours.

burden of 20.5 hours above the baseline for all NMS Stock ATSs to complete Part II, Item 1(d) of Form ATS–N.[1147]

The requests under Part II, Item 2 of adopted Form ATS–N mirror those of Part II, Item 2 of adopted Form ATS–N, except that the former requires disclosures about the trading activity of the broker-dealer operator and the latter require disclosures about the trading activities of affiliates.[1148] As with Item 1, to the extent no affiliate of the broker-dealer operator can enter or direct the entry of orders and trading interest into the NMS Stock ATS, the NMS Stock ATS would be required to check ''no'' under Part II, Item 2(a). In addition, to the extent that there are no differences between treatment of affiliates that can enter or direct the entry of orders and trading interest into the ATS and other subscribers and persons regarding services offered and provided by the NMS Stock ATS, the NMS Stock ATS would \ be required to check ''no'' under Part II, Item 2(b).

Likewise, as with Part II, Item 1(a) of adopted Form ATS–N, the disclosure requests in Part II, Item 2(a) of adopted Form ATS–N are more narrowly tailored than those which were proposed, and the disclosure requests about trading activities of the broker-dealer operator are no longer contained in the same questions as those regarding affiliate trading in adopted Form ATS–N. Most significantly, we believe that the burden for an NMS Stocks ATS to provide information about each of its broker-dealer operator's affiliates that trades on the NMS Stock ATS will be less than it would have been to provide: (i) A comprehensive list of all non-ATS trading centers and NMS Stock ATSs operated by affiliates, as was proposed under Part III, Items 1 and 2, respectively; and (ii) a list of each affiliate that may enter orders or other trading interest on the NMS Stock ATS, as was proposed under Part III, Item 5(a). Under their current disclosure requirements pursuant to Regulation ATS, ATSs must compile a list of subscribers that were participants on the ATS for its quarterly reports on current Form ATS–R.[1149] On the other hand, there is no current requirement for an ATS to maintain a list of its broker-dealer operator's affiliates' non-ATS trading centers or NMS Stock ATSs, as was proposed. To the extent that an NMS Stock ATS must dedicate resources to determine whether any of its affiliates direct the entry of orders or trading interest into the ATS through a third-party broker-dealer in order to be responsive to Part II, Item 2(a) of adopted Form ATS–N, we believe that burden will also be less than it would have been to compile—and keep up-to-date—a list of all non-ATS trading centers and NMS Stock ATSs operated by its affiliates.

Additionally, the burden to complete Item 2(a) will likely vary significantly among NMS Stock ATSs because the number of affiliates of each broker-dealer operator—and the number of those affiliates that trade on the NMS Stock ATS—may vary significantly among ATSs. However, even though the wording of the disclosure requests are almost identical, Part II, Item 2(a) of adopted Form ATS–N will likely impose a greater burden than that of Part II, Item 1(a) because we believe it will take an NMS Stock ATS longer to compile the necessary information about affiliated third-party entities than it will to compile that information for internal business units of the broker-dealer operator. Accordingly, we estimate that, on average, preparing adopted Part II, Item 2(a) would add approximately 6.25 hours to the current baseline for an initial operation report on current Form ATS. This will result in an aggregate initial burden of 256.25 hours above the baseline for all NMS Stock ATSs to complete Part II, Item 2(a) of Form ATS–N.[1150]

Like Part II, Item 1(b) of adopted Form ATS–N, the disclosure request in Part II, Item 2(b) will usually require the NMS Stock ATS to answer ''yes'' or ''no'' and list applicable item numbers in Part III of adopted Form ATS–N. An NMS Stock ATS must provide a narrative under Item 2(b) only if there are differences that are not applicable to Part III. Accordingly, we estimate that Part II, Item 2(b) of adopted Form ATS–N would add .25 hours out of the proposed 2 hours for Part III, Item 9 to the current baseline for an initial operation report on Form ATS because in most instances, the NMS Stock ATS will be required to check the ''yes'' or ''no'' box and provide a list of relevant requests in Part III. This would result in an aggregate initial burden of 10.25 hours above the baseline for all NMS Stock ATSs to complete Part II, Item 1(b) of Form ATS–N.[1151]

Furthermore, as is the case with Part II, Item 1 of adopted Form ATS–N, Part II, Items 2(c) and 2(d) of adopted Form ATS–N includes requests for information that are intended to highlight potential conflicts of interests and information leakage that will be disclosed in Part III, Items 12 and 16, respectively, of adopted Form ATS–N. Accordingly, similar to Part II, Item 1(c), we estimate that, on average, preparing Part II, Item 2(c) for a Form ATS–N would add 1 hour to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 41 hours above the baseline for all NMS Stock ATSs to complete Part II, Item 1(c) of Form ATS–N.[1152] Similar to Part II, Item 1(d), we estimate that, on average, preparing Part II, Item 2(d) for a Form ATS–N would add 0.5 hour to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 20.5 hours above the baseline for all NMS Stock ATSs to complete Part II, Item 2(d) of Form ATS–N.[1153]

As explained above, Part II, Item 3 of adopted Form ATS–N contains disclosure requests about order interaction with the broker-dealer operator and its affiliates. To the extent that the NMS Stock ATS does not allow subscribers to opt out of interacting with the broker-dealer operator, the NMS Stock ATS must check ''no'' to Part II, Item 3(a). Similarly, to the extent that the NMS Stock ATS does not allow subscribers to opt out of interacting with the broker-dealer operator, the NMS Stock ATS must check ''no'' to Part II, Item 3(b). In addition, to the extent that the terms and conditions of the opt out processes are the same for all subscribers, the NMS Stock ATS must check ''no'' to Part II, Item 3(c).

The requirements under Part II, Items 3(a) and (b) of adopted Form ATS–N are intended to cover the subject matter originally proposed under Part III, Item 5(d) of proposed Form ATS–N.[1154] In the Proposal, we estimated that all of the items of Part III, Item 5 of proposed Form ATS–N would add 5 hours to the current baseline for an initial operation report on current Form ATS.[1155] While we did not provide estimates for each individual subpart of Part III, Item 5 of proposed Form ATS–N, subpart (d) of Part III, Item 5 of proposed Form ATS–N accounted for approximately 1 hour of the 5 hour estimate. We believe that the requests under Part II, Items 3(a)

[1147] Compliance Manager at 0.5 hours × 41 NMS Stock ATSs = 20.5 burden hours.

[1148] *See supra* Section V.C.1.

[1149] *See* Exhibit A of Form ATS–R.

[1150] (Attorney at 5.75 hours + Compliance Manager at 0.5 hours) × 41 NMS Stock ATSs = 256.25 burden hours.

[1151] Attorney at 0.25 hours × 41 NMS Stock ATSs = 10.25 burden hours.

[1152] (Compliance Manager at 1.0 hours) × 41 NMS Stock ATSs = 41 burden hours.

[1153] (Compliance Manager at 0.5 hours) × 41 NMS Stock ATSs = 20.5 burden hours.

[1154] Other requirements of Part III, Item 5 of proposed Form ATS–N are incorporated in adopted Part II, Item 1.

[1155] *See* Proposal, *supra* note 2, at 81097.

and (b) would still add approximately 1 hour to the baseline for an initial operation report on current Form ATS. As described in the Proposal, the broker-dealer operator should already know whether subscribers can opt out of interacting with the orders and trading interests of the broker-dealer operator and its affiliates.[1156]

In addition, we have incorporated the disclosure request from Part III, Item 9 regarding differentiated and preferential treatment into the disclosure request under Part II, Item 3(c) of adopted Form ATS–N. We estimate that Item 3(c) would add approximately .5 hours out of the proposed 2 hours for Part III, Item 9 to the baseline for an initial operation report on Form ATS. To the extent there are such differences, the NMS Stock ATS would be required to provide a narrative under Part II, Item 3(c) regarding services or functionalities of the NMS Stock ATS in addition to the narratives about manner of operations required under Part III. Accordingly, we estimate that, on average, preparing Part II, Item 3 for adopted Form ATS–N would add 1.5 hours to the baseline for an initial operation report on current Form ATS. This will result in an aggregate initial burden of 61.5 hours above the baseline for all NMS Stock ATSs to complete Part II, Item 3 of adopted Form ATS–N.[1157]

As explained above, Part II, Item 4 of adopted Form ATS–N contains disclosure requests about arrangements with other trading centers. In the Proposal, we estimated that the requirements of Part III, Item 4 of proposed Form ATS–N—which set forth the proposed requests regarding arrangements with unaffiliated trading centers—would add 4 hours to the current baseline for an initial operation report on current Form ATS.[1158] We have revised the proposed disclosure to clarify the scope of requested information and to add a requirement to disclose any arrangements with affiliated trading centers.[1159] As we stated in the Proposal, depending on the extent to which the broker-dealer operator or any affiliate of the broker-dealer operator has any formal or informal arrangement with a trading center to access the services of the NMS Stock, the hourly burden related to completing Part II, Item 4 would likely vary.[1160] While the scope of Part III, Item 4 of proposed Form ATS–N only encompassed arrangements with unaffiliated trading centers, Part II, Item 4 of adopted Form ATS–N encompasses arrangements with both unaffiliated and affiliated trading centers. However, we still believe that the hourly burden for the adopted disclosure request will vary depending on the extent to which a broker-dealer operator enters into arrangements with its affiliates and on the number of the broker-dealer operator's affiliates. We therefore, estimate that, on average and consistent with the proposed disclosure requirement, preparing Part II, Item 4 for a Form ATS–N would still add approximately 4 hours, on average, to the current baseline for an initial operation report on current Form ATS. This results in an aggregate initial burden of 164 hours above the current baseline for all NMS Stock ATSs to complete Part II, Item 4 of adopted Form ATS–N.[1161]

As explained above, Part II, Item 5 of adopted Form ATS–N contains disclosure requests about other products or services. To the extent that that the broker-dealer operator or any of its affiliates does not offer subscribers any products or services for the purpose of effecting transactions or for submitting, disseminating, or displaying orders and trading interest in the NMS Stock ATS, the NMS Stock ATS would need to check ''no'' on Part II, Items 5(a) and 5(b) and Items 5(c) and 5(d), respectively.

Part II, Item 5 of adopted Form ATS–N adopts, with modifications, the disclosure requests in Part III, Item 3 of proposed Form ATS–N, which would have required an NMS Stock ATS to disclose whether the broker-dealer operator, or any of its affiliates, offers subscribers any products or services used in connection with trading on the NMS Stock ATS (*e.g.,* algorithmic trading products, market data feeds). In the Proposal, we estimated that it would take an average of 3 hours for an NMS Stock ATS to disclose this information.[1162] As noted in the Proposal, we believe that depending on the extent to which the broker-dealer operator or any of its affiliates offers subscribers or persons any products or services for the purpose of effecting transactions or for submitting, disseminating, or displaying orders and trading interest in the NMS Stock ATS, the hourly burden related to completing Part II, Item 5 would likely vary.[1163] We have modified the proposed disclosures to require a summary of the terms and conditions for use and a cross-reference to the applicable Item number(s) in Part III of adopted Form ATS–N where the use of the product or service is explained. Only if there is no applicable Item in Part III would the NMS Stock ATS be required to include a narrative of the use of the product or service with the ATS under Part II, Item 5. While we have revised the wording of the adopted disclosure request to reduce the potential of NMS Stock ATSs unnecessarily disclosing commercially sensitive information,[1164] we do not believe that the estimated burden of the proposed disclosure request should change. It was not our intent to require NMS Stock ATSs to provide granular details that might constitute commercially sensitive information in response to the proposed disclosure requests. We therefore, estimate that, on average and consistent with the estimate in the Proposal, preparing Part II, Item 5 for a Form ATS–N would add 3 hour to the current baseline for an initial operation report on current Form ATS. This results in an aggregate initial burden of 123 hours above the current baseline for all NMS Stock ATSs to complete Part II, Item 5 of Form ATS–N.[1165]

As explained above, Part II, Item 6 of adopted Form ATS–N contains disclosure requests about the activities of service providers. Part II, Item 6(a) is similar to the request contained in Part III, Item 7 of proposed Form ATS–N, and Part II, Items 6(b) and (c) of adopted Form ATS–N are similar to the requests in Part III, Item 8 of proposed Form ATS–N. In the Proposal, we estimated that, on average, preparing Part III, Item 7 of proposed Form ATS–N would add 4 hours to the current baseline for an initial operation report on current Form ATS.[1166] Part II, Item 6(a) of adopted Form ATS–N asks for information about shared employees like proposed Part III, Item 7, but does not require the NMS Stock ATS to disclose the identity and titles of such employees, as was proposed. In addition, Part II, Item 6(a) requires a summary of such information, which results in a reduced filing burden relative to that which was proposed.

Part III, Item 8 of proposed Form ATS–N would have required an NMS Stock ATS to disclose information about whether any operation, service, or function of the NMS Stock ATS is

[1156] *See* id. at 81096.

[1157] (Attorney at 1 hours + Compliance Manager at 0.5 hours) × 41 NMS Stock ATSs = 61.5 burden hours.

[1158] *See* Proposal, *supra* note 2, at 81096.

[1159] *See supra* Section V.C.3.

[1160] *See* Proposal, *supra* note 2, at 81096.

[1161] (Compliance Manager at 3 hours + Senior Marketing Manager at 1 hour) × 164 NMS Stock ATSs = 164 burden hours.

[1162] *See* Proposal, *supra* note 2, at 81096.

[1163] *See id.*

[1164] *See supra* Section V.C.4.

[1165] (Compliance Manager at 2 hours + Senior Marketing Manager at 1 hour) × 41 NMS Stock ATSs = 123 burden hours.

[1166] *See* Proposal, *supra* note 2, at 81097.

performed by any person(s) other than the broker-dealer operator of the NMS Stock ATS. We had estimated that, on average, preparing Part III, Item 8 for proposed Form ATS–N would add 3 hours to the current baseline for an initial operation report on current Form ATS.[1167] Like Part II, Item 6(a), Part II, Item 6(b) of adopted Form ATS–N only requires a summary of the role and responsibilities of service providers to the ATS. As with Part II, Item 6(a) of adopted Form ATS–N, we estimate that only requiring a summary narrative for the service provider request in adopted Form ATS–N would result in a reduced filing burden relative to that which was proposed. Additionally, Item 6(c) requires the NMS Stock ATS to identify service providers and their affiliates that use the services of the ATS and list the services used; Part III, Item 8(c) of proposed Form ATS–N would have required the NMS Stock ATS to describe the circumstances and means by which service providers enter orders or trading interest on the ATS. Due to the reduced filing burden of adopted Part II, Items 6(a)–(c) relative that which was proposed, we estimate that, on average, Part II, Items 6(a)–(c) of adopted Form ATS–N would add 4.5 hours to the current baseline for an initial operating report on Form ATS.

Furthermore, as with Part II, Items 1, 2, and 3 of adopted Form ATS–N, we have incorporated aspects of Part III, Item 9 of proposed Form ATS–N regarding differentiated and preferential treatment into Part II, Item 6(d) of adopted Form ATS–N.[1168] We estimate that Item 3(c) would add approximately .5 hours out of the proposed 2-hour burden estimate for Part III, Item 9 to the current baseline for an initial operation report on current Form ATS because the NMS Stock ATS would be required to provide a narrative in Item 6(d) in additional to narratives about the manner of operations under Part III of adopted Form ATS–N. Accordingly, we estimate that on average, Part II, Item 6 of adopted Form ATS–N will add approximately 5 hours to the burden for an initial operation report on current Form ATS. This results in an aggregate initial burden of 205 hours above the current baseline for all NMS Stock ATSs to complete Part II, Item 6 of Form ATS–N.[1169]

As explained above, Part II, Item 7 of adopted Form ATS–N contains disclosure requests about the NMS Stock ATS's protection of confidential subscriber trading information. Part II, Item 7 of adopted Form ATS–N is similar to Part III, Item 10 of proposed Form ATS–N, which would have required certain disclosures related to the NMS Stock ATS's written safeguards and written procedures to protect the confidential trading information of subscribers pursuant to Rule 301(b)(10) of Regulation ATS.[1170] As previously discussed, NMS Stock ATSs will now be required to have and maintain written policies and procedures under Rule 301(b)(10) of Regulation ATS.[1171] Part II, Item 7(a) of adopted Form ATS–N requires a description of these policies and procedures, and the request in Item 7(a) will contain the information requested in Part III, Items 10(c) and (d) of proposed Form ATS–N. Part II, Item 7(b)–(c) of adopted Form ATS–N requests the same information as Part III, Item 10(a) of proposed Form ATS–N. Lastly, Part II, Item 7(d) is similar to Part III, Item 10(b) of proposed Form ATS–N, but the adopted request only requires a summary of roles and responsibilities, rather than identification of the positions or titles of all persons that have access to confidential trading information and a description of the circumstances of such access as was proposed. We continue to believe that NMS Stock ATSs should, pursuant to their existing obligations under Rule 301(b)(10), be aware of all persons that can access the confidential trading information of subscribers, the circumstances under which such persons can access that information, and what information they can access. As such, we believe that this change to proposed Part II, Item 10(b) of adopted Form ATS–N does not increase the proposed burden estimate. Rather, because the adopted request in Part II, Item 7(d) reduces the level of detail from that which was proposed and the other requests from proposed Part III, Item 10 are unchanged in adopted Form ATS–N, we estimate that the burden for Part II, Item 7 of adopted Form ATS–N is less than that which was proposed by 0.5 hours. In the Proposal, we estimated that Part III, Item 10 would add 2 hours to the baseline for an NMS Stock ATS to complete this item.[1172] Accordingly, we estimate that, on average, preparing Part II, Item 7 for a Form ATS–N would add 1.5 hours above the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 61.5 hours above the current baseline for all NMS Stock ATSs to complete Item 7 of Part II of Form ATS–N.[1173]

(c) Part III

Part III, Item 1 of adopted Form ATS–N is based on Part IV, Item 1(c) of proposed Form ATS–N, although certain information from the proposed item is not required to be disclosed in this item. Specifically, the requirement to describe any criteria for distinguishing among types of subscribers, classes of subscribers, or other persons is being removed from the item because such information is covered under Part III, Item 13 of adopted Form ATS–N on ''Segmentation; Notice.'' [1174] Moreover, the required information on whether the NMS Stock ATS accepts non-broker-dealers as subscribers to the ATS is being converted to a ''yes'' or ''no'' question and placed in Part III, Item 2 of adopted Form ATS–N.

Part IV, Item 1 of proposed Form ATS–N is, in large part, already required under current Form ATS.[1175] We estimated all of Part IV, Item 1 of proposed Form ATS–N, which includes subparts (a)–(e), would add 6 hours to the to the current baseline for an initial operation report on current Form ATS.[1176] We now estimate that Part III, Item 1 as adopted would add 0.5 hours of burden to the current baseline. The current requirement of Exhibit A on Form ATS to describe the classes of subscribers on the ATS should oftentimes have substantial overlap with the requirement in Part III, Item 1 to select the types of subscribers from a list of checkboxes and identify any other types of subscribers. The additional 0.5 hours of burden is meant to account for identifying and listing any types of

[1167] *See id.*

[1168] Other requirements of Part III, Item 5 of proposed Form ATS–N are incorporated in adopted Part II, Item 1.

[1169] (Attorney at 3 hours + Compliance Manager at 2 hours) × 41 NMS Stock ATSs = 205.

[1170] Specifically, an NMS Stock ATS would be required to: (1) Describe the means by which a subscriber may consent or withdraw consent to the disclosure of confidential trading information to any persons (including the broker-dealer operator and any of its affiliates); (2) identify the positions or titles of any persons that have access to confidential trading information, describe the confidential trading information to which the persons have access, and describe the circumstances under which the persons can access confidential trading information; (3) describe the written standards controlling employees of the NMS Stock ATS that trade for employees' accounts; and (4) describe the written oversight procedures to ensure that the safeguards and procedures are implemented and followed.

[1171] *See supra* Section VI.

[1172] *See* Proposal, *supra* note 1 at 81098.

[1173] (Attorney at 1.0 hour + Compliance Manager at 0.5 hour) × 41 NMS Stock ATSs = 61.5 burden hours.

[1174] *See supra* Section V.D.1.

[1175] *See* Proposal, *supra* note 2, at 81098–81099.

[1176] The requirements related to subparts (a)–(e) of Item 1 of proposed Form ATS–N have been broken out into separate questions with the exception of subpart (b) which is being eliminated. We did not provide estimates for each individual subpart of Part IV, Item 1 of proposed Form ATS–N.

subscribers that are not already captured by the classes of subscribers identified in Exhibit A of Form ATS. We therefore estimate that, on average, preparing Part III, Item 1 for a Form ATS–N would add 0.5 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 20.5 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 1 of adopted Form ATS–N.[1177]

Part III, Item 2 of adopted Form ATS–N requires similar information to that required under Part IV, Items 1(a) and 1(b) of proposed Form ATS–N.[1178] In the Proposal, we estimated all of Part IV, Item 1 of proposed Form ATS–N, which includes subparts (a)–(e), would add 6 hours to the to the current baseline for an initial operation report on current Form ATS.[1179] However, a number of provisions of Part IV, Item 1 of proposed Form ATS–N either have been eliminated or moved to other Items in the adopted Form. Depending on the complexity of the NMS Stock ATS, the disclosure burden related to Part III, Item 2 of Form ATS–N would likely vary. For example, an NMS Stock ATS with two sets of conditions for different persons to satisfy before accessing the ATS services would likely have less of a burden than an NMS Stock ATS with five groups of persons that have to satisfy varying conditions. Accordingly, we estimate that, on average, preparing Part III, Item 2 for a Form ATS–N would add 1.0 hour to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 41 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 2 of adopted Form ATS–N.[1180]

Part III, Item 3 of adopted Form ATS–N requires similar information to that required under Part IV, Item 1(e) of proposed Form ATS–N, with certain clarifications to reduce potential confusion with the application of Rule 301(b)(5) of Regulation ATS. First, Item 3(a) as adopted asks for a summary description of the conditions for excluding, in whole or in part, a subscriber from the ATS's services rather than the more detailed proposed requirement that the NMS Stock ATS describe the circumstances by which access for a subscriber or other person may be limited or denied. Second, we are no longer requiring that the NMS Stock ATS describe its procedures or standards to determine whether to exclude. Third, we are changing the language in the request to correspond closely with the definition of ATS in Regulation ATS.[1181] In the Proposal, we estimated all of Part IV, Item 1 of proposed Form ATS–N, which includes subparts (a)–(e), would add 6 hours to the current baseline for an initial operation report on current Form ATS.[1182] Although ATSs are not required to establish conditions for excluding subscribers from using the ATS, as stated in the Proposal,[1183] in our experience, ATSs often have rules governing subscribers' participation on the ATS, and if a subscriber fails to comply with these rules, the ATS may limit or deny access to the NMS Stock ATS. The burden associated with the request would likely vary depending on the complexity of the ATS, whether it has conditions for excluding subscribers, and whether those conditions differ among subscribers. For some NMS Stock ATSs, the information required by Part III, Item 3 would require gathering information on its practices for excluding subscribers that previously may have been ad hoc decisions in order to prove the summary of conditions for excluding subscribers required by the Item. Accordingly, we estimate that, on average, preparing Part III, Item 3 for a Form ATS–N would add 1 hour to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 41 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 3 of adopted Form ATS–N.[1184]

Part III, Item 4 of adopted Form ATS–N is substantially similar to Part IV, Item 2 of proposed Form ATS–N, except that we are modifying the example provided in this item by replacing references in the Proposal to hours when ''pre-opening or after-hours *trading* occurs'' (emphasis added) with ''hours of operation outside of regular trading hours'' and the format of the item is being changed to a ''yes'' or ''no'' question. In the Proposal, we estimated that, on average, preparing Part IV, Item 2 for a Form ATS–N would add 0.5 hours to the current baseline for an initial operation report on current Form ATS, and we believe this estimate is still accurate for the adopted Item.[1185] The NMS Stock ATS is aware of the hours during which it operates, including any hours of operation outside of regular trading hours. Based on the experience of the Commission and its staff reviewing Form ATS and ATS–R filings, we believe that most ATSs that currently trade NMS stocks do not provide for after-hours or pre-opening trading of NMS stock. For NMS Stock ATSs for which the times when orders or trading interest may be sent to the NMS Stock ATS are not the same for all subscribers and the broker-dealer operator, the disclosure burden related to Part IV, Item 2 would likely be greater. Considering the foregoing, we continue to believe that, on average, preparing Part III, Item 4 for a Form ATS–N would add 0.5 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 20.5 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 4 of adopted Form ATS–N.[1186]

Part III, Item 5 of adopted Form ATS–N is based on Part IV, Item 4(a) of proposed Form ATS–N, although we have made modifications to the proposed item, and also are incorporating Part III, Item 6 proposed Form ATS–N. First, we are separating the requests regarding direct and indirect means of entry for orders and trading interest into the NMS Stock ATS so that information regarding direct means of entry will be disclosed in Part III, Item 5(a) of adopted Form ATS–N and information about other means of entry for orders and trading interest will be disclosed in adopted Part III, Item 5(c) of adopted Form ATS–N. Also, the information required by Part III, Item 5(a) on the direct means of order entry is being revised from the Proposal to be in a ''yes'' or ''no'' format. We are also moving and revising Part III, Item 6 of proposed Form ATS–N to adopted Part III, Item 5(c) regarding the means available for entering orders other than entering orders directly.[1187] Part III, Item 5(c) of adopted Form ATS–N would not require a broker-dealer operator to disclose its SOR's routing table or other information about how the SOR may route orders. Part III, Item 5(b) of adopted Form ATS–N no longer contains the proposed language ''[d]escribe the interaction and coordination,'' which was contained in

[1177] Attorney at 0.5 hours × 41 NMS Stock ATSs = 20.5 burden hours.

[1178] Adopted Part III, Item 2 removed some of the provisions in Part IV, Items 1(a) and 1(b) of proposed Form ATS–N and formatted the item to ''yes'' or ''no'' questions.

[1179] *See* Proposal, *supra* note 2, at 81098–81099.

[1180] (Attorney at 0.7 hours + Compliance Manager at 0.3 hours) × 41 NMS Stock ATSs = 41 burden hours.

[1181] *See* 17 CFR 242.300(a).

[1182] *See* Proposal, *supra* note 2, at 81098–81099.

[1183] *See* Proposal, *supra* note 2, at 81063.

[1184] (Attorney at 0.7 hours + Compliance Manager at 0.3 hours) × 41 NMS Stock ATSs = 41 burden hours.

[1185] *See* Proposal, *supra* note 2, at 81099.

[1186] Compliance Manager at 0.5 hours × 41 NMS Stock ATSs = 20.5 burden hours.

[1187] *See supra* Section V.D.5.

Part III, Item 6(b) of proposed Form ATS–N. Rather, Part III, Item 5(b) requires the NMS Stock ATS to ''identify and explain'' sources of order flow other than those used for direct entry into the ATS. Furthermore, the adopted disclosure requirements of Part III, Item 5(c) require the NMS Stock ATS to ''list and provide a summary description of the terms and conditions for entering orders or trading interest into the ATS'' through these sources.

In the Proposal, we estimated that, on average, preparing Part IV, Item 4, which includes both subparts (a) (related to order entry) and (b) (related to co-location) would add 5 hours to the current baseline for an initial operation report on current Form ATS.[1188] While we did not provide estimates for each individual subpart, each subpart of Part IV, Item 4 of proposed Form ATS–N accounted for half of the 5 hour estimate (*i.e.,* 2.5 hours each for subparts (a) and (b)). Furthermore, we estimated that, on average, preparing Part III, Item 6 of proposed Form ATS–N would add 10 hours to the current baseline for an initial operation report on current Form ATS. We estimate that the burden hours for adopted Part III, Item 5 that correspond to the information required in Part IV, Item 4(a) of proposed Form ATS–N would be substantially similar (*i.e.,* 2.5 hours). Therefore, we estimate Part III, Item 4 would add 2.5 hours to the current baseline for an initial operation report on current Form ATS.[1189] The disclosure requirements that were proposed in Part III, Item 6 of proposed Form ATS–N have been revised and moved to this Item 5(c) as adopted. We expect that the associated burden would be reduced as we are allowing the NMS Stock ATS to ''list and provide a summary description of the terms and conditions for entering orders or trading interest into the ATS,'' as opposed to the ''interaction and coordination'' language used in the Proposal. Therefore, we estimate this requirement would add 8.0 hours to the current baseline for an initial operation report on current Form ATS [1190] Thus, in total, we estimate that, on average, preparing Part III, Item 5 for a Form ATS–N would add 10.5 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 430.5 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 5 of adopted Form ATS–N.[1191]

We have made various revisions to the proposed item in adopted Part III, Item 6 of adopted Form ATS–N. Part III, Item 6(a) is limiting the proposed request by allowing for a ''summary'' of the terms and conditions for co-location and related services. We are also converting the information required by Part IV, Item 4(b) of proposed Form ATS–N into a series of ''yes'' or ''no'' questions, with accompanying explanations as applicable, in Part III, Item 6 of adopted Form ATS–N. [1192] We are also separating the requests for disclosure into separate sub-parts.

In the Proposal, the we estimated that, on average, preparing Part IV, Item 4 of proposed Form ATS–N, which included subparts (a) (connectivity and order entry) and (b) (co-location), would add 5 hours to the current baseline for an initial operation report on current Form ATS.[1193] We intended that each subpart of Part IV, Item 4 accounted for half of the 5 hour estimate (*i.e.,* 2.5 hours each for subparts (a) and (b)). We have reduced the burden compared to the proposed item by allowing for a summary of the terms and conditions related to co-location and related services in Part III, Item 6(a). On the other hand, the information required in Part III, Item 6(e) of Form ATS–N was previously proposed under a different item (Part IV, Item 7 of proposed Form ATS–N), and therefore, the burden related to responding to this item is now being added to Item 6(e) as adopted. Therefore, as we have revised Part III, Item 6 to both reduce the associated burden (by allowing for a summary) and increase the associated burden (by moving information required in proposed Part IV, Item 7 of proposed Form ATS–N), we believe that the burden hours for Part III, Item 6 will remain the same as the proposed estimate for Part IV, Item 4(b), 2.5 hours above the current baseline for an initial operation report. This would result in the aggregate initial burden of 95 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 6 of adopted Form ATS–N.[1194]

The disclosure requirements in Part III, Item 7 of adopted Form ATS–N are substantially the same as those set forth in Part IV, Item 3(a) and(b) of proposed Form ATS–N. ATSs that currently trade NMS stocks vary in the depth of their disclosures related to order types. We estimated in the Proposal that, on average, preparing Part IV, Item 3 of proposed Form ATS–N, which also included Items 3(c) and 3(d) that have been moved to other items in the adopted form,[1195] would add 6 hours to the current baseline for an initial operation report on current Form ATS.[1196] Because the requirements in Part III, Item 7 of adopted Form ATS–N are substantially the same as the corresponding requirements set forth in subparts (a) and (b) of Part IV, Item 3 of proposed Form ATS–N, we estimate that the burden hours will also be substantially similar. While we did not provide estimates for each individual subpart of Part IV, Item 3 of proposed Form ATS–N, subparts (a) and (b) of Part IV, Item 3 of proposed Form ATS–N, accounted for 4 hours (of the 6 burden hours estimated for Part IV, Item 3). Consequently, we estimate that adopted Part III, Item 7 will also add 4 hours above the current baseline for an initial operation report on current Form ATS, resulting in the aggregate initial burden of 164 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 7 of adopted Form ATS–N.[1197]

Part III, Item 8 of adopted Form ATS–N is based on Part IV, Item 3(c) of proposed Form ATS–N. In adopted Form ATS–N, Part III, Item 8, we separated the requests proposed under Item 3(c) into six sub-parts. However, the requirements have not changed significantly.[1198] Additionally, we are adding to Part III, Item 8(a) of adopted Form ATS–N a request for the NMS Stock ATS to provide information about any maximum order or trading interest size requirements. Because the requirements in Part III, Item 8 of adopted Form ATS–N are substantially the same as the corresponding

[1188] *See* Proposal, *supra* note 2, at 81101–02.

[1189] (Attorney at 0.5 hours + Compliance Manager at 1 hours + Senior Systems Analyst at 1 hours) × 41 NMS Stock ATSs = 102.5 burden hours.

[1190] (Attorney at 3 hours + Compliance Manager at 2 hours + Senior Systems Analyst at 3 hours) × 41 NMS Stock ATSs = 328 burden hours.

[1191] (Attorney at 3.5 hours + Compliance Manager at 3 hours + Senior Systems Analyst at 4 hours) × 41 NMS Stock ATSs = 430.5 burden hours.

[1192] *See supra* note 839.

[1193] *See* Proposal, *supra* note 2, at 81101–02. The requirements related to subparts (a) and (b) of Item 4 of proposed Form ATS–N have been broken out into separate items in the adopted form. Item 4(a) is being adopted as Part III, Item 5, as modified. *See supra* notes 1188- 1191 and accompanying text.

[1194] (Attorney at 1 hour + Compliance Manager at 1 hour + Senior Systems Analyst at .5) × 41 NMS Stock ATSs = 102.5 burden hours.

[1195] Item 3(c) of proposed Form ATS–N is being adopted with modifications as Item 8 of adopted Form ATS–N. Item 3(d) is being adopted with modifications as Item 9 of adopted Form ATS–N.

[1196] *See* Proposal, *supra* note 2, at 81099.

[1197] (Attorney at 1.0 hours + Compliance Manager at 2 hours + Senior Systems Analyst at 1) × 41 NMS Stock ATSs = 164 burden hours.

[1198] We are relocating Part IV, Item 3(c) of proposed Form ATS–N to Part III, Item 8 of adopted Form ATS–N and adopting a ''yes'' or ''no'' format. We are requiring that the NMS Stock ATS identify and explain any differences in the treatment of subscribers and the broker-dealer operator, as applicable, in separate sub-items 8(b), 8(d), and 8(f), respectively, which is the same as required in Part IV, Item 3(c) of the Proposal.

requirements set forth in Part IV, Item 3 of proposed Form ATS–N, we estimate that the burden hours in adopted Part III, Item 8 that correspond to the information required in proposed Part IV, Item 3 would be substantially similar. While we did not provide estimates for each individual subpart of Part IV, Item 3 of proposed Form ATS–N, subpart (c) of Part IV, Item 3 of proposed Form ATS–N, would have accounted for 1 hour (of the 6 burden hours estimated for Part IV, Item 3). Consequently, we estimate that the burden hours in adopted Part III, Item 8 would add 1 hour to the current baseline for an initial operation report on current Form ATS, resulting in the aggregate initial burden of 41 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 8 of adopted Form ATS–N.[1199]

Part III, Item 9 of adopted Form ATS–N is based on Part IV, Item 3(d) of proposed Form ATS–N. We separated Part IV, Item 3(d) of proposed Form ATS–N into two sub-parts in adopted Part III, Item 9. However, the requirements have not changed substantially. We are adding ''price or size minimums'' as examples of information that could be contained in the messages and ''order management system, smart order router and FIX'' to illustrate the types of mechanisms that could transmit messages, such as IOIs and conditional orders. Because the requirements in Part III, Item 9 of adopted Form ATS–N are substantially the same as the corresponding requirements set forth in Part IV, Item 3(d) of proposed Form ATS–N, we estimate that the burden hours in adopted Part III, Item 9 that correspond to the information required in Part IV, Item 3(d) of proposed Form ATS–N are substantially similar. While we did not provide estimates for each individual subpart of Part IV, Item 3 of proposed Form ATS–N, subpart (d) would have accounted for 1 hour (of the 6 burden hours estimated for Part IV, Item 3). Accordingly, we estimate that the burden hours in adopted Part III, Item 9 would add 1 hour to the current baseline for an initial operation report on current Form ATS, resulting in the aggregate initial burden of 41 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 9 of adopted Form ATS–N.[1200]

Part III, Item 10 of adopted Form ATS–N corresponds with Part IV, Item 9(a) of proposed Form ATS–N. We separated what was proposed in Part IV, Item 9(a) into five sub-parts in adopted Part III, Item 10. We are adding to Part III, Item 10(a) of adopted Form ATS–N requirements regarding ''when'' and how such orders and trading interest are ''priced [and] prioritized'' and ''any order types allowed'' during the opening and reopening processes.[1201] Additionally, we are formatting the requests that parallel the information requested in the Proposal into three sub-parts (adopted Items 10(a), 10(c) and 10(e)) and adding a ''yes'' or ''no'' question to Item 10(e) to improve readability and facilitate comparisons of the information for market participants. Also, we are adding a new requirement to identify and explain any differences in the treatment of subscribers and the broker-dealer operator in the opening and reopening processes, if applicable, in the form of ''yes'' or ''no'' questions in adopted Part III, Items 10(b) and 10(d). We estimate that the overall burden hours for adopted Part III, Item 10 will be slightly more than Part IV, Item 9(a) because while the adopted subparts that parallel the information requested in the proposed item (adopted Items 10(a), 10(c) and 10(e)) result in a similar burden, we expect that the new subparts (adopted Items 10(b) and 10(d)) will impose an additional burden on some NMS Stock ATSs that treat subscribers and the broker-dealer operator differently. While we did not provide an estimate for each individual subpart of Part IV, Item 9 of proposed Form ATS–N, subpart (a) would have accounted for 1 hour (of the 3 burden hours estimated for Part IV, Item 9).[1202] Consequently, we estimate that the burden hours in adopted Part III, Item 10 would add 1.25 hours to the current baseline for an initial operation report on current Form ATS, resulting in the aggregate initial burden of 51.25 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 9 of adopted Form ATS–N.[1203]

Part III, Item 11 of adopted Form ATS–N is substantively similar to Part IV, Item 7 of proposed Form ATS–N, but we are making various revisions to the Item. We are limiting the request to require NMS Stock ATSs to provide a summary of the structure of the NMS Stock ATS marketplace instead of describing the means or facilities used by the NMS Stock ATS to bring together the orders of multiple buyers and sellers. In Part III, Item 11(c) of adopted Form ATS–N, we are combining the requests in the Proposal in Part IV, Items 7(b) (''Order Interaction Rules'') and 7(c) (''Other Trading Procedures''). Part IV, Items 7(b) and 7(c) of proposed Form ATS–N were intended to solicit information about the ATS's established non-discretionary methods that dictate the terms of trading among the multiple buyers and sellers entering orders and trading interest. In addition to a trading facility, non-discretionary methods include rules and procedures. We are revising the language in adopted Item 11(c) to recognize this overlap by requiring the NMS Stock ATS to ''explain the established, non-discretionary rules and procedures of the NMS Stock ATS, including order interaction rules,'' which requires the same information as the proposed subparts. As another component of an NMS Stock ATS's non-discretionary methods, we are moving the trading procedures description required in proposed Item 7(c) into adopted Item 11(c) and including the examples of the trading procedures of an NMS Stock ATS (*e.g.,* price protection mechanisms, shorts sales, locked-cross markets) in adopted Item 11(c) as well. Finally, we are converting the prompts in Part IV, Item 7(a), 7(b) and 7(c) of proposed Form ATS–N to identify and explain any differences among subscribers and persons into ''yes'' or ''no'' questions in Items 11(b) and 11(d) of adopted Form ATS–N.

Consistent with the estimate in the Proposal, we estimate that, on average, preparing Part III, Item 11 for a Form ATS–N will add 6 hours to the current baseline for an initial operation report on current Form ATS to provide a description of the NMS Stock ATS's trading services. This will result in an aggregate initial burden of 246 hours

[1199] (Attorney at .25 hours + Compliance Manager at .25 hours + Senior Systems Analyst at .5) × 41 NMS Stock ATSs = 41burden hours.

[1200] (Attorney at .25 hours + Compliance Manager at 0.25 hours + Senior Systems Analyst at 0.5) × 41 NMS Stock ATSs = 41 burden hours. As noted above, we estimate the burden for Part III, Item 7 of adopted Form ATS–N to be 4 hours above the baseline and the burden for Part III, Item 8 to be 1 hour above the baseline. Accordingly, we estimate that the total burden hours above the baseline for Part III, Items 7, 8, and 9 of adopted Form ATS–N is 6 hours, which is the same as that which was proposed for Part IV, Item 3.

[1201] The words in quotes in this sentence represent new text from that proposed in Item 9(a), adopted as Item 10(a). The requirement to explain *when* orders and trading interest are priced, prioritized, matched and executed when the NMS Stock ATS opens or re-opens for trading is not expected to change significantly the burden on the ATS given that Form ATS–N requires disclosure of the hours of operations under Part III, Item 4 of adopted Form ATS–N.

[1202] Part IV, Item 9(b) of proposed Form ATS–N is being adopted with modifications as Item 17 of adopted Form ATS–N. Part IV, Item 9(c) of proposed Form ATS–N is being adopted with modifications as Item 18 of adopted Form ATS–N. We are estimating 1.25 burden hours for Item 17 and 1.25 burden hours for Item 18 of adopted Form ATS–N.

[1203] (Attorney at .5 hours + Senior Systems Analyst at .75) × 41 NMS Stock ATSs = 51.25 burden hours.

above the current baseline for all NMS Stock ATSs to complete Part III, Item 11 of adopted Form ATS–N.[1204]

The requirements of Part III, Item 12 were proposed as Part IV, Item 1(d) of proposed Form ATS–N. In the Proposal, we estimated that the entire Part IV, Item 1 (which also would have addressed eligibility, terms and conditions of use, types of subscribers, and liquidity providers) [1205] would add 6 hours to the current baseline for an initial operation report on current Form ATS. The requirements related to eligibility, terms and conditions of use, types of subscribers, and liquidity providers have been broken out into separate questions, and Part III, Item 12 of adopted Form ATS–N solely relates to formal and informal arrangements with subscribers or the broker-dealer operator to provide orders or trading interest to the NMS Stock ATS. We believe that Part III, Item 12 of adopted Form ATS–N will add 1 hour to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 41 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 12 of adopted Form ATS–N.[1206]

Part III, Item 13 of adopted Form ATS–N corresponds with Part IV, Item 5(a) and (b) of proposed Form ATS–N. The requirements of Part III, Item 13 of adopted Form ATS–N cover the requirements proposed under Part IV, Items 5(a) and 5(b), although we have modified the proposed requirements.[1207] We are adding ''yes'' or ''no'' questions to Part III, Item 13(a), 13(b), 13(d) and 13(e) of adopted Form ATS–N to facilitate responses to the items and to facilitate market participants finding the information.

We are also modifying certain components of Part IV, Item 5 of proposed Form ATS–N. First, we are adding the terms ''classifications, tiers, or levels'' to adopted Part III, Item 13(a) through (e) in addition to ''categories'' to describe the groupings that an NMS Stock ATS may segment subscriber orders. Second, we are providing two additional examples, order size and duration, of criteria for segmentation of subscribers' orders and trading interest. Third, we are providing additional specificity around what ''changing segmented categories'' means by requiring NMS Stock ATSs to provide a discussion around overriding a determination of segmented category. Fourth, we are requiring a description of how segmentation affects order interaction on Part III, Item 13 of adopted Form ATS–N. Finally, we are requiring under Part III, Item 13(d) of adopted Form ATS–N that the NMS Stock ATS describe ''whether and how such designation can be contested.''

In the Proposal, we estimated that, on average, preparing Part IV, Item 5 for a Form ATS–N would add 7 hours to the current baseline for an initial operation report on current Form ATS to provide a detailed description of how, if at all, the NMS Stock ATS segments order flow, provides any notice to those trading on the NMS Stock ATS regarding segmentation, and allows order preferencing. The proposed requirement regarding order preferencing is broken out into a separate item, Part III, Item 14 of adopted Form ATS–N, which is described below. We also are adding a ''yes'' or ''no'' question in adopted Part III, Item 13(b) regarding identifying orders by a customer of a broker-dealer as a customer order. We believe the aforementioned minor modifications to the proposed question will slightly increase the burden for the adopted item. Therefore, we believe that Part III, Item 13 of adopted Form ATS–N will add 6 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 205 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 13 of adopted Form ATS–N.[1208]

Part III, Item 14(a) is substantially similar to Part IV, Item 5(c) of proposed Form ATS–N. However, we have added a requirement in Item 14(b), that if counter-party selection functionality is not the same for all subscribers and the broker-dealer operator, that the NMS Stock ATS identify and explain any differences. The burden associated with this change is likely to vary among NMS Stock ATS depending on their complexity and the extent to which they treat all subscribers and the broker-dealer operator the same or differently. We estimated that, on average, preparing all of Part IV, Item 5 (including subparts (a), (b), and (c)) for a Form ATS–N would add 7 hours to the current baseline for an initial operation report on current Form ATS to provide a detailed description of how, if at all, the NMS Stock ATS segments order flow, provides any notice to those trading on the NMS Stock ATS regarding segmentation, and allows counter-party selection.[1209] We understand that most, but not all, ATSs that currently trade NMS stocks allow subscribers to enter some type of counter-party selection criteria. These ATSs vary in the depth of their description as to how they allow counter-party selection. We believe that Part III, Item 14 of adopted Form ATS–N, which solely relates to counter-party selection, will add 2 hours to the current baseline for an initial Form ATS. This will result in an aggregate initial burden of 82 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 14 of adopted Form ATS–N.[1210]

Part III, Item 15 is modified from a similar requirement of Part IV, Item 6 of proposed Form ATS–N, which asked about order display and the subscribers and persons to which orders and trading interest are displayed or otherwise made known. We are changing the language in this item from ''order information or other trading interest'' to ''subscriber orders and trading interest.'' We are also revising the proposed requests to make clear that it only applies to the display of the NMS Stock ATS's subscriber orders and trading interest as opposed to non-ATS orders and trading interest handled or otherwise displayed to the broker-dealer operator. Accordingly, the disclosure of non-ATS orders by affiliates of the NMS Stock ATS and others external to the ATS of non-ATS orders would not have to be disclosed. However, if for example, an affiliate of the NMS Stock ATS is displaying an order that is simultaneously bound for or resting in the NMS Stock ATS, then Item 15 would apply. In addition, we have revised the request so that Part III, Item 15(b) of adopted Form ATS–N makes clear that the request does not

[1204] Attorney at 1.0 + Compliance Manager at 2.0 + Senior Systems Analyst at 3.0) × 41 NMS Stock ATSs = 246 burden hours.

[1205] Proposed Part IV, Item 1(a) (''eligibility'') is being adopted with modifications as Part III, Item 2 of adopted Form ATS–N. Proposed Part IV, Item 1(b) (''terms and conditions'') is not being adopted, except for the request to state whether contractual agreements are written, which is being adopted with modifications as Part III, Item 2(d) of adopted Form ATS–N. Proposed Part IV, Item 1(c) (''Types of Subscribers'') is being adopted with modifications as Part III, Item 1 and Item 2(a) of adopted Form ATS–N. Proposed Part IV, Item 1(e) (''Limitation and Denial of Services'') is being adopted with modifications as Part III, Item 3 of adopted Form ATS–N.

[1206] (Attorney at 0.7 hours + Compliance Manager at 0.3 hours) × 41 NMS Stock ATSs = 41 burden hours.

[1207] *See supra* Section V.D.13.

[1208] (Attorney at 2.0 hours + Compliance Manager at 2.25 hours + Senior Systems Analyst at 1.75 hours) × 41 NMS Stock ATSs = 205 burden hours.

[1209] *See* Proposal, *supra* note 2, at 81100. Proposed Part IV, Items 5(a) and 5(b) are being adopted with modifications as Part III, Item 13 of adopted Form ATS–N. We are estimating 5 burden hours for Part III, Item 13 of adopted Form ATS–N.

[1210] (Attorney at 0.5 hours + Compliance Manager at 0.75 hours + Senior Systems Analyst at 0.75 hours) × 41 NMS Stock ATSs = 82 burden hours.

require the NMS Stock ATS to identify employees of the ATS who are operating the system. Finally, we are adding a ''yes'' or ''no'' questions in Part III, Item 15(a) that asks if the NMS Stock ATS is an ECN as defined in Rule 600(a)(23) of Regulation NMS.

Depending on the variety of trading interest that shares some trading information outside of the NMS Stock ATS and the complexity of such information sharing, the disclosure burden in responding to Part III, Item 15 would likely vary among NMS Stock ATSs. In the Proposal, we estimated that, on average, preparing Part IV, Item 6 of proposed Form ATS–N would add 5 hours to the current baseline for an initial operation report on current Form ATS, depending on such factors as described above. Although we are revising the item text to provide more specificity so NMS Stock ATSs better understand the requirements and scope of the request and provide sufficient information to market participants in Part III, Item 15 of adopted Form ATS–N, we are also simplifying responses to the item by no longer requiring NMS Stock ATSs to identify the subscriber or person to whom order and trading interest is displayed and instead requiring disclosure of the types of market participants that receive the information. Thus, we believe these changes would, in total, provide no additional burden from proposed Form ATS–N. We therefore believe that preparing Part III, Item 15 of adopted Form ATS–N will add 5 hours to the current baseline for an initial Form ATS. This will result in an aggregate initial burden of 205 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 15 of adopted Form ATS–N.[1211]

Part III, Item 16(a) relates to disclosures surrounding orders and trading interest in the NMS Stock ATS being routed to a destination outside the ATS. We understand, based on disclosures in Form ATS submissions, that some ATSs that currently trade NMS stocks do not route orders out of the ATS. Consequently, the disclosure burden related to Part III, Item 16 of adopted Form ATS–N will likely vary among NMS Stock ATSs depending on whether they route orders at all. In the Proposal, we estimated that, on average, preparing Part IV, Item 10 for proposed Form ATS–N would add 6 hours to the current baseline for an initial operation report on current Form ATS, depending on such factors as described above. We, however, are substantially simplifying the item as adopted by converting subpart (a) into a ''yes'' or ''no'' question that no longer requires a description of the circumstances under which orders are routed, and also removes the requirement to describe the means by which routing is performed and the requirement to describe any differences among subscribers and persons. We therefore estimate that Part III, Item 16 of adopted Form ATS–N will add 2 hours to the current baseline for an initial operation report, depending on the extent to which the ATS routes orders and trading interest. This will result in an aggregate initial burden of 82 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 16 of adopted Form ATS–N.[1212]

The requirements of Part III, Item 17(a) are similar to those proposed in Part IV, Item 9(b) of the proposed Form ATS–N.[1213] We estimated that, on average, preparing all of Part IV, Item 9, including subparts (a)–(c), for proposed Form ATS–N would have added 3 hours to the current baseline for an initial operation report on current Form ATS to describe its opening, reopening, or closing processes, and after-hours trading procedures.[1214] While we did not provide an estimate for each individual subpart of Part IV, Item 9 of proposed Form ATS–N, subpart (b) would have accounted for 1 hour (of the 3 burden hours estimated for Part IV, Item 9). As we stated in the Proposal, current Form ATS, Exhibit F requires an ATS to describe its closing processes. Therefore, we continue to believe that Part III, Item 17 of adopted Form ATS–N will not impose a significant additional requirement. We are newly requiring, as Part III, Item 17(b) of adopted Form ATS–N, that if the treatment of orders and trading interest during the close is not the same for all subscribers and the broker-dealer operator, the NMS Stock ATS identify and explain such differences. The burden associated with this change is likely to vary among NMS Stock ATS depending on their complexity and the extent to which they treat all subscribers and the broker-dealer operator the same or differently. Therefore, we believe that it would add 1.25 hours to the current baseline for an initial operation report on Form ATS–N. This would result in an aggregate initial burden of 51.25 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 17 of adopted Form ATS–N.[1215]

Subparts (a) and (b) of Part III, Item 18 of adopted Form ATS–N are substantially similar to Part IV, Item 9(c) of proposed Form ATS–N. We estimated that, on average, preparing all of Part IV, Item 9 for a proposed Form ATS–N would add 3 hours to the current baseline for an initial operation report on current Form ATS to describe its opening, reopening, or closing processes, and after-hours trading procedures.[1216] While we did not provide an estimate for each individual subpart of Part IV, Item 9 of proposed Form ATS–N, subpart (c) would have accounted for 1 hour (of the 3 burden hours estimated for Part IV, Item 9). In the Proposal, we stated that Exhibit F of current Form ATS requires an ATS to describe after-hours trading procedures. These procedures may vary widely across different ATSs. Therefore, we continue to estimate that the additional requirements will not impose a significant additional burden above the current baseline for an initial operation report on current Form ATS. Unlike Part IV, Item 9(c) of proposed Form ATS–N, an ATS that has trading outside of regular hours that follows the same procedures as trading within regular trading hours would need to check the boxes to indicate it conducts trading outside of its regular trading hours and to indicate that its trading procedures do not differ between regular and outside of regular trading hours; it would not need to describe any after-hours trading procedures. We, however, also added the requirement that the NMS Stock ATS describe, as applicable, the treatment of orders and trading interest outside of regular trading hours if it is not the same for all subscribers and broker-dealer operator as Item 18(c) of adopted Form ATS–N. In light of these changes, we believe that Part III, Item 18 of adopted Form ATS–N would add 1.25 hours to the current baseline for an initial operation report on Form ATS–N. This would result in an

[1211] (Attorney at 1 hour + Compliance Manager at 2 hours + Senior Systems Analyst at 2 hours) × 41 NMS Stock ATSs = 205 burden hours.

[1212] (Attorney at 0.5 hours + Compliance Manager at 0.5 hours + Senior Systems Analyst at 1 hours) × 41 NMS Stock ATSs = 82 burden hours.

[1213] Although we are revising the item text to provide more specificity so NMS Stock ATSs better understand the requirements and scope of the request and provide sufficient information to market participants, we believe these revisions should not change the burden of the required disclosure.

[1214] Part IV, Items 9(a) and 9(c) of proposed Form ATS–N are being adopted with modifications as Part III, Items 10 and 18 of adopted Form ATS–N, respectively. We are estimating 1.25 burden hours for Item 10 and 1.25 burden hours for Item 18 of adopted Form ATS–N.

[1215] (Compliance Manager at .75 hours + Senior Systems Analyst at 0.50 hour) × 41 NMS Stock ATSs = 51.25 burden hours.

[1216] Part IV, Items 9(a) and 9(b) of proposed Form ATS–N are being adopted with modifications as Part III, Items 10 and 17 of adopted Form ATS–N, respectively. We are estimating 1.25 burden hours for Item 10 and 1.25 burden hours for Item 17 of adopted Form ATS–N.

aggregate initial burden of 51.25 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 18 of adopted Form ATS–N.[1217]

Part III, Item 19 of adopted Form ATS–N is similar to Part IV, Item 12 of proposed Form ATS–N. In the Proposal, we estimated that, on average, preparing Part IV, Item 12 for a Form ATS–N would add 5 hours to the current baseline for an initial operation report on current Form ATS to describe the NMS Stock ATS's fee structure and any differences among subscribers relating to fees, rebates, or other charges. As discussed in the Proposal,[1218] current Form ATS does not require an ATS to disclose and explain its fee structure, and few, if any, do so in their current Form ATS filings. We recognize that, like national securities exchanges, NMS Stock ATSs may adopt a variety of fee structures that may include rebates, incentives for subscribers to bring liquidity to the NMS Stock ATS, more traditional transaction-based fee structures, and other fees such as a monthly subscriber access fee. Depending on the complexity and variety of an NMS Stock ATS's fee structure and the extent to which these fees are not the same for all subscribers, the disclosure burden related to Part III, Item 19 of adopted Form ATS–N will likely vary.

However, we are requiring additional specificity related to the description of fees of the NMS Stock ATS that are based on or bundled with the use of non-ATS services or products offered by the broker-dealer operator or its affiliates. These were not previously explicitly specified by Part IV, Item 12 of proposed Form ATS–N, and the adopted item will likely require additional burden hours for NMS Stock ATSs that are operated by multi-service broker-dealers that bundle their ATS fees with other non-ATS services or products. In contrast, we are narrowing the request for NMS Stock ATSs to describe any differences in fees or rebates charged to different ''subscribers,'' and instead asking for NMS Stock ATSs to disclose any differentiation between fees and/or rebates charged among ''types'' of subscribers, which should reduce the burden of responding as differences among individual subscribers need not be explained. Accordingly, we estimate that, on average, preparing Part III, Item 19 of Form ATS–N would add 6 hours to the current baseline for an initial operation report on current Form ATS. This will result in an aggregate initial burden of 246 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 19 of Form ATS–N.[1219]

Part III, Item 20 of adopted Form ATS–N is substantially similar to Part IV, Item 8 of proposed Form ATS–N with certain modifications. We are renaming the item ''Suspension of Trading,'' converting the prompt in Part IV, Item 8(a) of proposed Form ATS–N to identify and explain any differences among subscribers and persons into a ''yes'' or ''no'' question in Part III, Item 20(b) of adopted Form ATS–N, revising the language to refer to procedures for stopping trading, and clarifying that suspensions of trading in an NMS stock are responsive. In the Proposal, we estimated that, on average, preparing Part IV, Item 8 for a Form ATS–N would add 2.5 hours to the current baseline for an initial operation report on current Form ATS to provide a detailed description of the NMS Stock ATS's procedures for system disruptions, malfunctions, or other suspensions.

We believe that NMS Stock ATSs should be able to provide the disclosures in Part III, Item 20 of adopted Form ATS–N as they should already be aware of how the ATS operates, handles system disruptions, malfunctions or other suspensions based on the information required in Exhibits G and F of current Form ATS. We recognize, however, that Part III, Item 20 is significantly more specific and detailed in its disclosure requirements than current Form ATS.

Accordingly, we estimate that respondents would incur an additional burden above the current baseline when preparing the disclosures required under Part III, Item 20 of Form ATS–N, consistent with the estimated burden for proposed Item IV, Part 8. We estimate that, on average, preparing Part III, Item 20 for a Form ATS–N would add 2.5 hours to the current baseline for an initial operation report on current Form ATS to provide a detailed description of the NMS Stock ATS's procedures for suspending or stopping trading on the NMS Stock ATS. This would result in an aggregate initial burden of 102.5 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 20 of proposed Form ATS–N.[1220]

Part III, Item 21 is substantially the same as Part IV, Item 13(a) of proposed Form ATS–N with certain modifications. We are limiting the description of any arrangements for reporting transactions on the NMS Stock ATS to only ''material arrangements'' in the adopted item, and converting the prompt in the proposed Part IV, Item 13(a) to describe any differences among subscribers and persons into a ''yes'' or ''no'' question in Part III, Item 21(b) of adopted Form ATS–N.

Part III, Item 22 is substantially the same as Part IV, Item 13(b) of proposed Form ATS–N with certain modifications. We are limiting the description of any arrangements to facilitate the clearance and settlement of transactions on the NMS Stock ATS to only ''material arrangements'' in the adopted item, and converting the prompt in Part IV, Item 13(b) of proposed Form ATS–N to describe any differences among subscribers and persons into a ''yes'' or ''no'' question in Part III, Item 22(b) of adopted Form ATS–N. In addition, we are removing the phrase ''undertaken by the NMS Stock ATS'' from the proposed requirement to describe any procedures or arrangements by the NMS Stock ATS to facilitate clearance and settlement on the ATS.

In the Proposal, we estimated that, on average, preparing Part IV, Item 13 for a Form ATS–N would add 0.5 hours to the current baseline for an initial operation report on current Form ATS.[1221] We believe that preparing Part III, Items 21 and 22 for a Form ATS–N will impose a lesser burden as compared to the proposed items because the adopted items only require that ''material'' arrangements related to reporting and clearance and settlement of transactions be disclosed (as opposed to ''any arrangements'' in the Proposal). Therefore, we estimate that, on average, preparing Part III, Item 21 and 22 for a Form ATS–N would add 0.5 hours to the current baseline for an initial operation report on current Form ATS to provide a more detailed description of the NMS Stock ATS's trade reporting, clearance, and settlement arrangements or procedures. This will result in an aggregate initial burden of 20.5 hours above the current baseline for all NMS Stock ATSs to complete Part III, Items 21 and 22 of adopted Form ATS–N.[1222]

Part III, Item 23 of adopted Form ATS–N is substantially the same as Part IV, Item 11 of proposed Form ATS–N with certain modifications. We are revising the request to make clear that an NMS Stock ATS would not be

[1217] (Compliance Manager at .75 hours + Senior Systems Analyst at 0.50 hour) × 41 NMS Stock ATSs = 51.25 burden hours.

[1218] *See id.* at 81103.

[1219] (Attorney at 2 hour + Compliance Manager at 3 hours + Senior Systems Analyst at 1 hour) × 41 NMS Stock ATSs = 246 burden hours.

[1220] (Attorney at 1 hour + Compliance Manager at .5 hours + Senior Systems Analyst at 1 hour) × 41 NMS Stock ATSs = 102.5 burden hours.

[1221] *See* Proposal, *supra* note 2, at 81103.

[1222] Compliance Manager at 0.50 hours × 41 NMS Stock ATSs = 20.5 burden hours.

expected to provide information about the market data that the broker-dealer operator uses to route orders and trading interest from the NMS Stock ATS to away destinations by removing from the item the prompt to describe how the ATS uses market data to determine routing destinations. As discussed above in Section V.D.23, we believe, however, that it would be responsive to Part III, Item 23 for the NMS Stock ATS to provide information about the ATS's use of market data to determine when resting orders and trading interest will be removed from inside the NMS Stock ATS as such orders and trading interest reside inside the ATS. Accordingly, the NMS Stock ATS should disclose, in response to this request, the market data that is used to remove resting orders and trading from the NMS Stock ATS. Because the adopted Item is removing the requirement from the proposed Item for information related to using market data to determine routing destinations, and the adopted Item is adding a requirement to explain how market data is used to determine when resting orders will be removed from the NMS Stock ATS, we believe that the resulting overall burden for the adopted Item will remain the same. In addition, we are adding a requirement that if the use of market data is not the same for all subscribers and the broker-dealer operator, that the NMS Stock ATS must identify and explain any differences.

We believe that the disclosures under Part III, Item 23 will not impose any significant additional burden on NMS Stock ATSs, which should already be aware of the market data that they use and the manner in which they use it. The information requested in Part III, Item 23 of adopted Form ATS–N is similar to that required by Part IV, Item 11 of proposed Form ATS–N. In the Proposal, we estimated that, on average, preparing Part IV, Item 11 for a Form ATS–N would add 4 hours to the current baseline for an initial operation report on current Form ATS to describe the sources of market data and the manner in which the NMS Stock ATS uses market data.[1223] However, unlike Part IV, Item 11 of proposed Form ATS–N, Part III, Item 23 also requests information regarding differences in treatment between subscribers and the broker-dealer operator. We believe that this requirement would add to the total additional burden; however, we believe that such information should be readily available to the NMS Stock ATS. Therefore, we believe that preparing Part IV, Item 11 for a Form ATS–N will add 5 hours to the current baseline for an initial operation report on current Form ATS. This would result in an aggregate initial burden of 205 hours above the current baseline for all NMS Stock ATSs to complete Part IV, Item 11 of adopted Form ATS–N.[1224]

Part III, Items 24 and 25 of adopted Form ATS–N correspond with of Part IV, Item 14 and 15 of proposed Form ATS–N. Current Form ATS does not require an ATS to disclose the information that would be required under Part III, Items 24 and 25 of Form ATS–N. However, based on the experience of the Commission and its staff, we continue to believe that no ATSs currently executed 5% or more of the average daily volume in an NMS Stock as reported by an effective transaction reporting plan for four of the preceding six calendar months, and we believe that most—if not all—ATSs that currently trade NMS stocks already have procedures in place to prevent that threshold from being crossed on the ATS's system. Historically, ATSs have crossed these thresholds very rarely, with at most three ATSs that trade NMS stocks crossing either of the thresholds in any given year.

If, however, an NMS Stock ATS were to cross these 5% thresholds, a disclosure burden related to amending a Form ATS–N to complete Part III, Items 24 and 25 of Form ATS–N may result. Because Items 24 and 25 of Part III are tied to existing obligations that arise pursuant to Rule 301(b)(3) and Rule 301(b)(5) of Regulation ATS, respectively, we believe that NMS Stock ATSs should already be generally aware of the procedures they would follow pursuant to those rules, which should reduce the burden associated with the disclosures that would be required under Items 24 and 25. An NMS Stock ATS would only have to respond to Part III, Items 24 or 25 of a Form ATS–N if the NMS Stock ATS previously operated as an ATS, triggered the applicable 5% thresholds, and was subject to Rules 301(b)(3) and 301(b)(5). Further, NMS Stock ATSs would be less likely to have to complete Item 24 as compared to Item 25 because Item 24 requires as an additional precondition that the NMS Stock ATS displays orders in an NMS stock to more than one person in the system (other than employees of the NMS Stock ATS). For new NMS Stock ATSs (*i.e.,* NMS Stock ATSs that did not previously operate as an ATS), the NMS Stock ATS would not have been in operation for at least four months to trigger the applicable thresholds, meaning that such NMS Stock ATSs would only be required to complete Item 24 or 25 (or both) in a Form ATS–N Amendment. In the Proposal, we estimated that completion of Part IV, Item 14 or 15 in a Form ATS–N amendment (or in a Form ATS–N in the case of an NMS Stock ATS that previously operated as an ATS), would be 5 hours per item. We believe that the requirements in Part III, Items 24 and 25 remain substantially unchanged, and that the burden should remain the same. Therefore, we continue to believe that completion of Part III, Item 24 or 25 would be 5 hours per item.

Triggering the 5% threshold, a precondition necessary to require completion of Part III, Items 24 and 25 of Form ATS–N, currently occurs, and we estimate would continue to occur, very infrequently. Based on the review of Form ATS and Form ATS–R disclosures by the Commission and its staff, we estimate that 1 NMS Stock ATS would have to complete Item 24, and 2 NMS Stock ATSs would have to complete Item 25 in any given year. Accordingly, we estimate that the disclosures that would be required under Part III, Items 24 and 25 of adopted Form ATS–N would result in an aggregate initial burden of 15 hours above the current baseline.[1225]

Part III, Item 26 of adopted Form ATS–N corresponds with of Part IV, Item 16 of proposed Form ATS–N. An NMS Stock ATS will not be required to develop or publish any new statistics for purposes of making the required disclosures under Item 26. It is only be required to make the disclosures for statistics it already otherwise publishes or provides in the course of its operations. Thus, NMS Stock ATSs that do not publish or otherwise provide aggregate platform-wide market quality statistics, other than those currently required under Rule 605 of Regulation NMS, would not incur any additional burden due to the adopted disclosure request under Item 26. For NMS Stock ATSs that do publish or provide such statistics, Item 26 imposes an additional burden above the baseline because current Form ATS does not require the disclosure of market quality statistics. In the Proposal, we estimated that preparing Part IV, Item 16 of proposed Form ATS–N would add 7 hours to the current baseline for an initial operation report on current Form ATS.[1226] Part III, Item 26 of adopted Form ATS–N is substantially the same as Part IV, Item

[1223] *See* Proposal, *supra* note 2, at 81103.

[1224] (Compliance Manager at 2.5 hours + Senior Systems Analyst at 2.5 hours) × 41 NMS Stock ATSs = 205 burden hours.

[1225] (Attorney at 2 hours + Compliance Manager at 1 hour + Senior Systems Analyst at 2 hours) × 3 NMS Stock ATSs = 15 burden hours.

[1226] *See* Proposal, *supra* note 2, at 81104.

16 of proposed Form ATS–N. Therefore, as adopted, we still estimate that preparing Part III, Item 26 will add 7 hours to the current baseline for an initial operation report on current Form ATS. This will result in an aggregate initial burden of 287 hours above the current baseline for all NMS Stock ATSs to complete Part III, Item 26 of adopted Form ATS–N.[1227]

(ii) Estimated Burden Above the Current Baseline for an Initial Form ATS–N, Form ATS–N Amendment, and Notice of Cessation on Form ATS–N

(a) Initial Form ATS–N

Based on the above analysis, we estimate that an initial Form ATS–N will, on average, require approximately 107.4 burden hours above the baseline for an initial operation report on current Form ATS. This results in an estimated 127.4 hours in total, including the current baseline.[1228] ATSs that trade NMS stocks vary in terms of their structure, the manner in which they operate, and the depth and extent of their disclosures on Form ATS. Consequently, we believe that the estimated hour burden regarding Form ATS–N will likely vary among NMS Stock ATSs, depending on such factors as the extent of their current disclosures on Form ATS, the complexity and structure of their system, and the extent of their other broker-dealer or affiliate activities.

(b) Form ATS–N Amendments

As previously noted, we estimate that ATSs that trade NMS stocks submit 2 amendments on Form ATS, on average, each year.[1229] In the Proposal we estimated that the 46 respondents would file 3 Form ATS–N amendments each year, for an estimated total of 138 Form ATS–N amendments.[1230]

We currently estimate that the hourly burden related to an amendment to Form ATS is 6 hours.[1231] In the Proposal, we estimated that the average hourly burden above this current baseline of 6 hours for each Form ATS–N amendment would be 3 hours—for a total of 9 hours—to accommodate the more voluminous and detailed disclosures required by Form ATS–N as compared to Form ATS.[1232]

Rule 304(a)(2) of Regulation ATS will contain the same three general categories of required amendments for Form ATS–N as Rule 301(b)(2) of Regulation ATS currently requires for current Form ATS; [1233] in addition, Form ATS–N requires two additional types of amendments—order display and fair access amendments. However, due to the greater detail and number of disclosures required by Form ATS–N, we believe that respondents will likely file more amendments to Form ATS–N than NMS Stock ATSs currently do for Form ATS. For example, adopted Form ATS–N requests information about the ATS-related activities of the broker-dealer operator and its affiliates in Part III of Form ATS–N, and these requests are not contained in current Form ATS. To the extent information provided in response to these requests changes, an NMS Stock ATS must file a Form ATS–N amendment. We are mitigating some of the additional burden by requiring that NMS Stock ATSs file correcting amendments only to correct ''material'' information that was inaccurate or incomplete when filed.[1234] Current Form ATS requires ATSs to promptly file amendments upon discovery that any information was inaccurate when filed. As adopted, filers instead would correct any immaterial information when they file updating amendments, which could potentially reduce the frequency with which NMS Stock ATSs would need to file amendments.

With respect to Form ATS–N amendments, one commenter expresses concern that due to the breadth of Form ATS–N disclosures, the estimated amount of time and resources required to keep Form ATS–N ''evergreen'' is ''daunting,'' and asserts that the Commission did not fully consider in the Proposal the amount of time and resources that would be required to keep Form ATS–N current.[1235] We fully considered the burden for each question on the Form ATS–N by indicating the estimated burden hour for each item. After consideration of comments, we made changes to adopted Form ATS–N, which we believe will alleviate some of the potential burdens of Form ATS–N, including, among other things, requiring correcting amendments only for ''material'' information,[1236] narrowing the scope of the required disclosures related to affiliates that can enter or direct the entry of orders and trading interest into the ATS,[1237] and eliminating the proposed requirement to attach a copy of any materials currently provided to subscribers or other persons related to the operations of the NMS Stock ATS or the disclosures on Form ATS–N.[1238] However, as with amendments to Form ATS, the burden on NMS Stock ATSs associated with updating Form ATS–N to reflect current ATS functionality will vary depending on the frequency and scope of changes made by the NMS Stock ATSs. Making complete and comprehensible disclosures of material changes to the NMS Stock ATS's operations, such as the introduction of a new order type and its attributes or changes to segmentation procedures and parameters, would likely require more time and resources from an NMS Stock ATS than providing complete and comprehensible disclosures of a simple change to the NMS Stock ATS's physical or website address. We believe that the frequency with which an NMS Stock ATS files Form ATS–N amendments in a given year may vary greatly, as some NMS Stock ATSs may make infrequent changes to their operations and functionality, but other NMS Stock ATSs, such as those that publish or otherwise provide to one or more subscribers or person aggregate platform-wide market quality statistics, may file several Form ATS–N amendments annually.

Therefore, we continue to believe that the requirements for Form ATS–N amendments will add 3 hours above the current baseline of 6 hours for amendments to Form ATS, as set forth in the Proposal. We estimate that the 41 respondents will file 3 Form ATS–N amendments each year, for a total of 123

[1227] (Attorney at 1 hour + Compliance Manager at 1 hour + Senior Systems Analyst at 5 hours) × 41 NMS Stock ATSs = 287 burden hours. Unlike the proposed requirement under Part IV, Item 16, the adopted requirement will allow the NMS Stock ATS to make certifications in lieu of filing Exhibits 4 and 5, which we believe will significantly reduce the burden imposed by this request for information.

[1228] (Current Baseline at 20 hours) + (Part I at 0.5 hour) + (Part II at an average of 29 hours) + (Part III at an average of 77.5 hours) + (Access to EDGAR at 0.15 hours, *see infra* Section IX.D.2.b.iv) = 127.4 burden hours. The aggregate totals by professional, including the baseline, are estimated to be approximately 54.1 hours for an Attorney, .5 hours for a Chief Compliance Manager, 33.9 hours for a Compliance Manager, 30.25 hours for a Senior Systems Analyst, 1 hour for a Senior Marketing Manager, and 7.65 hours for a Compliance Clerk. This estimated burden for a Form ATS–N includes the hour burden associated with completing Part III, Items 24 and 25 of proposed Form ATS–N. We believe that the majority of NMS Stock ATSs would not be required to complete those items of the proposed form.

[1229] *See supra* note 1132 and accompanying text. During the fiscal year of 2017, we received 85 amendments from ATSs that trade NMS stocks, of which there were approximately 38 at any given time during 2017. Some ATSs that trade NMS stocks filed as many as 7 amendments while others did not file any amendments in 2017.

[1230] *See* Proposal, *supra* note 2, at 81105.

[1231] *See supra* note 1133 and accompanying text.

[1232] Attorney at 1 hour + Compliance Manager at 2 hours = 3 burden hours above the baseline.

[1233] *See* 17 CFR 242.301(b)(2). *See also supra* Section IV.B.1.

[1234] *See supra* note 498 and accompanying text.

[1235] *See* Fidelity Letter at 10.

[1236] *See supra* note 498 and accompanying text.

[1237] *See* supra Section V.C.

[1238] *See supra* Section V.B.2.

Form ATS–N amendments.[1239] In addition, an NMS Stock ATS must provide a brief summary of the amendment at the top of Form ATS–N.[1240] As proposed, an NMS Stock ATS would have been required to submit two redlines—Exhibit 3A to show changes to Part III of proposed Form ATS–N and Exhibit 4A to show changes to Part IV of proposed Form ATS–N. We estimated that the requirement would create an additional burden of 0.5 hours to draft the summary and create the redline(s).[1241] Adopted Form ATS–N requires NMS Stock ATSs to submit as Exhibit 3 one marked document that indicates changes to ''yes'' or ''no'' answers or additions to or deletions to both Part I, Parts II, and III. We believe that requiring a single marked document rather than two separate documents will reduce the filing burden on ATSs, and that requiring a marked document for changes to Part I would impose minimal burden, and therefore we estimate that this requirement would add an additional burden of 0.4 hours to draft the summary and prepare the marked documents showing the amendments the NMS Stock ATS is making.[1242] This would result in a total estimated hourly burden, including the baseline, of 9.4 hours for a Form ATS–N amendment,[1243] and an aggregate annual burden on all NMS Stock ATSs of 1,156.2 hours.[1244]

Under the Proposal, a Legacy NMS Stock ATS would have continued to operate pursuant to its existing Form ATS initial operation report pending our review of the Legacy NMS Stock ATS's filed Form ATS–N and would have been required to continue filing amendments on Form ATS to provide notice of changes to the operations of its system.[1245] Adopted Rule 304(a)(1)(iv)(C) requires a Legacy NMS Stock ATS to amend its Form ATS–N to notify the Commission of operational changes during the review period.[1246] We believe that if a Legacy NMS Stock ATS had been required to file amendments to Form ATS during the Commission review period, the Legacy NMS Stock ATS would have also complied with the requirements of Rule 304 by amending its Form ATS–N to reflect such changes disclosed in such Form ATS amendments. During the Commission review period, the Legacy NMS Stock ATS would have, therefore, submitted amendments to both Form ATS and Form ATS–N. Although we are now requiring that a Legacy NMS Stock ATS amend its Form ATS–N during the review period rather than its Form ATS, this requirement does not change our estimates of the aggregate burden hours for filing amendments. Although a Legacy NMS Stock ATS will be required to amend Form ATS–N, which requires greater detail and a larger number of disclosures than Form ATS, the Legacy NMS Stock ATS will no longer need to file a Form ATS amendment during the review period and a Form ATS–N amendment to reflect changes disclosed in such Form ATS–N amendments.

(c) Notice of Cessation on Form ATS–N

From January 2014 through March 2018, an average of 9 ATSs that trade NMS stocks ceased operations each year.[1247] Although it is unclear how many NMS Stock ATSs might cease operations each year going forward, for purposes of providing a PRA burden estimate, we are estimating that this average would generally remain the same for NMS Stock ATSs using Form ATS–N because economic conditions, business reasons, and other factors may cause some NMS Stock ATSs to cease operations. Accordingly, we estimate that 9 respondents may file a cessation of operation report on Form ATS–N each year. In the Proposal, we estimated that the average compliance burden for each cessation of operations filing would be 2 hours.[1248] We received no comments on this estimate, and continue to believe that the burden for filing a notice of cessation on Form ATS–N will not be significantly greater than that for filing a cessation of operations report on current Form ATS. Both Form ATS and Form ATS–N require the ATS to check the appropriate box indicating that the ATS is ceasing operations; however, Form ATS–N also requires that the NMS Stock ATS provide the date that the NMS Stock ATS expects to cease operating. Accordingly, we estimate that the average compliance burden for each respondent will be 2 hours.[1249] This will result in an aggregate annual burden of 18 hours for all NMS Stock ATSs that choose to cease operations and submit a cessation of operation report on Form ATS–N.[1250]

(iii) ATSs That Trade Both NMS and Non-NMS Stocks

ATSs that trade both NMS stocks and non-NMS stocks would incur: (1) The above baseline burdens related to filing a Form ATS–N and Form ATS–N amendments; [1251] (2) the additional burden of filing a new Form ATS to only disclose information related to non-NMS stock trading activity on the ATS; [1252] and (3) the burden of completing and filing two Forms ATS–R. We received no comment on the estimated burden set forth in the Proposal for ATSs to separately file a Form ATS for its non-NMS stock trading activity and Form ATS–N for its NMS stock trading activity.[1253] We continue to believe that the average estimated burden set forth in the Proposal is a reasonable estimate of the additional burden. Accordingly, we estimate that the total hourly burden for an ATS to separately file a Form ATS for its non-NMS stock trading activity and Form ATS–N for its NMS stock trading activity will be 20 burden hours to amend its initial operation report on Form ATS for its non-NMS stock trading activity and 127.4 burden hours to file its initial Form ATS–N. The estimated hour burden related to the initial operation report submission on Form ATS for non-NMS stock trading activity may be less than the estimated 20 burden hours, as, to the extent the NMS Stock ATS in question is currently operating, the description of its non-NMS stock trading activity should already be contained in its existing Form ATS.[1254] As previously noted, there are currently 10 ATSs that trade, or have indicated that they expect to trade, in Exhibit B to their Form ATS, both NMS stocks and non-NMS stocks on the ATS. Consequently, we estimate that the aggregate initial burden on ATSs to file these separate forms would be 1,774 hours, and the aggregate annual

[1239] 41 respondents × 3 Form ATS–N amendments per year = 123 Form ATS–N amendments per year.

[1240] *See* Exhibit 3 to Form ATS–N.

[1241] *See* Proposal, *supra* note 2, at 81105.

[1242] Compliance Clerk at 0.4 hours. Most word processing software provides for this functionality.

[1243] Attorney at 5.5 hours + Compliance Manager at 2 hours + Compliance Clerk at 1.9 hours = 9.4 burden hours.

[1244] 123 amendments per year × 9.4 hours = 1,156.2 aggregate burden hours. Therefore, the aggregate burden hours equals 1,156.2 hours.

[1245] *See* Proposal, *supra* note 2, at 81023; *see also* proposed Rule 304(a)(1)(i).

[1246] *See* 17 CFR 242.304(a)(1)(iv)(C).

[1247] *See supra note* 1114.

[1248] *See* Proposal, *supra* note 2, at 81105.

[1249] Attorney at 1.5 hours + Compliance Clerk at 0.5 hours = 2 burden hours. *See supra* note 1135, and accompanying text.

[1250] 2 burden hours × 9 NMS Stock ATSs = 18 aggregate annual burden hours.

[1251] *See supra* Sections IX.D.2.b.ii.A and B.

[1252] *See supra* Section IX.D.2.a and accompanying text for the baseline estimates for submitting an IOR for Form ATS and amendments to Form ATS.

[1253] *See supra* note 1136 and accompanying text for the baseline estimate for submitting a Form ATS–R.

[1254] The hourly burden related to amendments to its Form ATS and Form ATS–N would remain unchanged: 6 estimated burden hours for amendments to Form ATS, and 9.4 estimated burden hours for Form ATS–N amendments. *See supra* notes 1231–1232, 1240–1243 and accompanying text.

burden for filing amendments to both forms would be 402 hours.[1255]

We estimate that the total burden for completing and filing two Forms ATS–R would be 4.5 hours, which is 0.5 hours [1256] above the current baseline burden of 4 hours for filing a Form ATS–R.[1257] We believe that ATSs required to file two Forms ATS–R will incur an additional burden above the baseline because they would be required to divide their trading statistics between two forms and file each form separately. We do not believe that those ATSs will incur any additional burden to collect the required information because they currently assemble that information when preparing their current Form ATS–R filings. As previously noted, there are currently 10 ATSs that trade, or have indicated that they expect to trade in Exhibit B to their Form ATS, both NMS stocks and non-NMS stocks on the ATS; those ATSs would be required to file a pair of Forms ATS–R four times annually. Consequently, we estimate that the aggregate annual burden of filing two Forms ATS–R for those ATS that effect transactions in both NMS stocks and non-NMS stocks would be 180 hours.[1258]

(iv) Access to EDGAR

The Proposal contemplated the use of an online filing system, the EFFS, but the adopted amendments to Regulation ATS will require NMS Stock ATSs to submit certain Form ATS–N filings through the Commission's EDGAR system. Based on the widespread use and availability of the internet, we believe that filing Form ATS–N in an electronic format will be a less burdensome and more efficient filing process for NMS Stock ATSs and the Commission, as it is likely to be less expensive and cumbersome than mailing and filing paper forms to the Commission.[1259]

For a Form ATS–N filer to gain access to make filings on the EDGAR system, the filer must submit a Form ID as required by Regulation S–T Rule 11 (B) and submit the Form ID following the processes detailed in Volume I of the EDGAR Filer Manual. Once a Form ID has been successfully completed and processed, EDGAR will establish a Central Index Key (''CIK'') number which enables each authorized user to create EDGAR access codes, which will enable the NMS Stock ATS to use EDGAR. We estimate that the burden associated with receiving access to EDGAR by submitting a Form ID is 0.15 burden hours per response. All registered broker-dealers have been assigned a CIK number and do not need to submit a Form ID to access EDGAR.[1260] Because all ATSs, regardless of whether they trade NMS stocks, are operated by registered broker-dealers, we estimate that there will be no burden associated with gaining access to EDGAR for Legacy NMS Stock ATSs or non-NMS Stock ATSs that later decide to trade NMS stocks. Based on the number of initial filings and cessation of operations reports on current Form ATS for ATSs that trade NMS stocks, we estimate that, 2 to 3 new entities will file Form ATS–N to become an NMS Stock ATS in each of the next three years. We estimate that among these new entities, 1 new entity per year will be operated by an entity that has not previously registered as a broker-dealer or that does not otherwise already have access to EDGAR. The total estimated hourly burden and aggregate initial burden for gaining access to EDGAR is therefore 0.15 hours.[1261]

v. Public Posting on NMS Stock ATS's Website

Rule 304(b)(3) will require each NMS Stock ATS to make public via posting on the NMS Stock ATS's website, a direct URL hyperlink to the Commission's website that contains the documents enumerated in Rule 304(b)(2). We estimate that each NMS Stock ATS will incur an initial, one-time burden to program and configure its website to post the required direct URL hyperlink pursuant to Rule 304(b)(3). We estimate that this initial, one-time burden would be approximately 2 hours, in part because many broker-dealer operators currently maintain a website for their NMS Stock ATSs.[1262] This is unchanged from the estimate set forth in the Proposal.[1263] We estimate that the aggregate initial, one-time burden will be approximately 82 hours.[1264]

(v) Recordkeeping Requirements

Because NMS Stock ATSs that solely trade NMS stocks will file Form ATS–N in lieu of Form ATS, we believe that the amendment to Rule 303(a)(2)(ii) will not result in any burden for those ATSs that are not already accounted for under the current baseline burden estimate for Rule 303.[1265] The estimated burden under amended Rule 303(a)(2)(ii) for each ATS is the same as in the Proposal.[1266] For the 10 ATSs that transact in, or have indicated in Exhibit B to their Forms ATS that they expect to trade both NMS stock and non-NMS stock on their respective ATSs, we estimate that the burden above the current baseline estimate for preserving records relating to compliance with the amendment to Rule 303(a)(ii) will be, consistent with the estimate in the proposing release, approximately 3 hours annually per ATS for a total annual burden above the current baseline burden estimate of 30 hours for all respondents.[1267] Accordingly, we are modifying the PRA burden estimate for Rule 303 to account for the increased burden on ATSs that trade both NMS stock and non-NMS stock.

E. Collection of Information Is Mandatory

All collections of information pursuant to the amended rules and Form ATS–N are mandatory for entities that meet the definition of NMS Stock ATS.

[1255] (Form ATS initial operation report at 20 hours + Form ATS–N at 127.4 hours) × 10 respondents = 1,774 aggregate burden hours. Using the estimates of 2 amendments each year to Form ATS, *see supra* Section IX.D.2.a, and 3 amendments each year to Form ATS–N, *see supra* Section IX.D.2.b.ii.B, the ongoing aggregate burden for these bifurcated ATSs would be ((2 Form ATS amendments per year × 6 hours) + (3 Form ATS–N amendments per year × 9.4 hours)) × 10 respondents = 402 aggregate ongoing burden hours per year relating to amendments.

[1256] Attorney at 0.5 hours = 0.5 burden hours.

[1257] *See supra* note 1136 and accompanying text for the baseline estimate for submitting a Form ATS–R.

[1258] ((Attorney at 3.5 hours + Compliance Clerk at 1 hour) × (4 filings annually)) × 10 ATSs = 180 aggregate burden hours.

[1259] All estimated burden hours with regard to completing Parts I–V of proposed Form ATS–N, which are explained above and herein, include the estimated burden associated with the requirement that NMS Stock ATSs file Form ATS–N in a structured XML format on EDGAR, including narrative responses that are block-text tagged, or use the web-fillable form.

[1260] A broker-dealer that has never used EDGAR to make electronic submissions may use its assigned CIK number to receive access codes that will allow the broker-dealer operator to submit Form ATS–N filings on EDGAR without needing to apply for a Form ID.

[1261] Compliance Manager at 0.15 hours × 41 NMS Stock ATSs = 6.15 burden hours.

[1262] Senior Systems Analyst at 2 burden hours.

[1263] *See* Proposal, *supra* note 2, at 81106–07.

[1264] Senior Systems Analyst at 2 hours × 41 NMS Stock ATSs = 82 burden hours.

[1265] To comply with all of the record preservation requirements of Rule 303, we currently estimate that ATSs spend approximately 1,305 hours per year (87 respondents at 15 burden hours per respondent). *See* Rule 303 PRA Update, *supra* note 1613, 78 FR 43943. At an average cost per burden hour of $111.32, the resultant total related cost of compliance is $145,272.60 per year (1,305 burden hours × $111.32/hour). *See id.* The cost per burden hour is adjusted for an inflation rate of 6.8% based on the Bureau of Labor Statistics data on CPI–U between July 2013 and March 2018.

[1266] *See* Proposal, *supra* note 2, at 81107.

[1267] 3 additional burden hours × 10 ATSs = 30 aggregate burden hours.

F. Confidentiality of Responses to Collection of Information

With respect to the amendments to Rules 301(b)(2)(viii) and 304 of Regulation ATS, including Form ATS–N, the Commission will make publicly available on its website all effective Forms ATS–N, all properly filed Form ATS–N amendments to effective Forms ATS–N, and notices of cessation on Form ATS–N. The Commission will not make publicly available on its website initial Forms ATS–N that the Commission has declared ineffective, but these forms will be available for examination and inspection by the Commission and its staff, state securities authorities, and self-regulatory organizations. Form ATS–N amendments also require each NMS Stock ATS that has a website to post on the NMS Stock ATS's website a direct URL hyperlink to the Commission's website that contains the documents enumerated in Rule 304(b)(2). The collection of information required by the amendments to Rules 301(b)(10), 303(a)(1)(v), 301(b)(9), and 303(a)(2)(ii) will not be made public, but would be used for regulatory purposes by the Commission and the SRO(s) of which the ATS's broker-dealer operator is a member. In Part II, Item 7 of Form ATS–N, however, NMS Stock ATSs must describe the written safeguards and written procedures to ensure confidential treatment of trading information that will be required under Rule 301(b)(10) as amended. To the extent that the Commission receives confidential information pursuant to this collection of information, such information will be kept confidential, subject to the provisions of applicable law.

G. Retention Period for Recordkeeping Requirements

All reports required to be made under Rules 301(b)(2)(viii), 301(b)(9), and 304 of Regulation ATS, including Form ATS–N, will be required to be preserved during the life of the enterprise and any successor enterprise, pursuant to the amendment to Rule 303(a)(2) of Regulation ATS. In addition, ATSs will be required to preserve a copy of their written safeguards and written procedures to protect subscribers' confidential trading information under Rule 301(b)(10) of Regulation ATS for not less than 3 years, the first 2 years in an easily accessible place, pursuant to Rule 303(a)(1)(v) of Regulation ATS.

X. Economic Analysis

A. Background

We are concerned that the current regulatory requirements relating to operational transparency for NMS Stock ATSs may no longer fully meet the goals of furthering the public interest and protecting investors.[1268] We are concerned that the limited and differential level of operational transparency around NMS Stock ATSs impedes market participants' ability to adequately discern how their orders interact, match, and execute on NMS Stock ATSs, which impedes their ability to evaluate whether submitting order flow to a particular NMS Stock ATS aligns with their business interests and would help them achieve their investing or trading objectives. In addition, we are concerned that the current lack of transparency around the potential conflicts of interest that arise from the ATS-related activities of the broker-dealer operator and its affiliates hinders market participants' abilities to protect their interests when doing business on NMS Stock ATSs.

We are adopting amendments to Regulation ATS to require NMS Stock ATSs to publicly file Form ATS–N, which would require NMS Stock ATSs to provide detailed disclosures about their trading operations and the ATS-related activities of their broker-dealer operators and their affiliates. In addition, we are adopting new Rule 304 as part of Regulation ATS, which provides a process for the Commission to review Form ATS–N filings and declare an NMS Stock ATS's initial Form ATS–N, after notice and opportunity for hearing, ineffective.[1269] Finally, we are adopting amendments to Rule 301(b)(10) of Regulation ATS to require that all ATSs memorialize in writing their procedures and safeguards to protect subscribers' confidential trading information.[1270]

The adopted amendments and Form ATS–N seek to make information regarding the operations of NMS Stock ATSs available to market participants, which will increase the operational transparency for NMS Stock ATSs, bringing it more in line with the operational transparency for national securities exchanges. The amendments also seek to improve the quality of information regarding different NMS Stock ATSs' operations and the ATS-related activities of their broker-dealer operators and their affiliates. As discussed in more detail below, we believe that this would help market participants make better-informed decisions about where to route their orders in order to achieve their trading or investment objectives, thereby improving the efficiency of capital allocation and enhancing execution quality. Additionally, we believe that requiring NMS Stock ATSs to memorialize their safeguards and written procedures in writing will improve Commission oversight by helping it better understand, monitor, and evaluate how each ATS protects subscribers' confidential trading information from unauthorized disclosure and access, which in turn could increase investor protection. On the other hand, creation of responses to aid disclosure of Form ATS–N and the possibility that we may declare the Form ATS–N ineffective would entail costs to NMS Stock ATSs, which could result in some of them ceasing to operate as ATSs. If some NMS Stock ATSs cease operating as ATSs, it could impact the competitive dynamics between NMS Stock ATSs and national securities exchanges, as well as the competitive dynamics among NMS Stock ATSs and between NMS Stock ATSs and broker-dealers who trade NMS stocks but do not operate an ATS.

We are sensitive to the economic consequences and effects, including the costs and benefits, of our rules. The following economic analysis identifies and considers the costs and benefits—including the effects on efficiency, competition, and capital formation—that would result from new Rule 304, Form ATS–N and the amendments to Rule 3a1–1(a) and Regulation ATS. These costs and benefits are discussed below and have informed the policy choices described throughout this release.[1271]

[1268] *See supra* Section I. *See also supra* Sections II.A and D.

[1269] Rule 304 also provides a process for the Commission to declare amendments to Form ATS–N ineffective.

[1270] Current Rule 301(b)(10) requires all ATSs establish procedures and safeguards to protect subscribers' confidential trading information, but it does not expressly require that such procedures and safeguards must be maintained in writing.

[1271] Exchange Act Section 3(f) requires the Commission, when it is engaged in rulemaking pursuant to the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. *See* 15 U.S.C. 78c(f). In addition, Exchange Act Section 23(a)(2) requires the Commission, when making rules pursuant to the Exchange Act, to consider among other matters the impact that any such rule would have on competition and not to adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. *See* 15 U.S.C. 78w(a)(2).

B. Baseline

The numerous parties that would be affected by new Rule 304, Form ATS–N, and the amendments include: Existing NMS Stock ATSs; potential new NMS Stock ATSs; current and potential subscribers of NMS Stock ATSs; broker-dealers that are affiliated with NMS Stock ATSs and their customers; non-ATS affiliated broker-dealers and their customers; broker-dealers that do not operate NMS Stock ATSs but send order flow to NMS Stock ATSs; institutional investors that periodically transact large trades on NMS Stock ATSs; other persons that seek to transact in NMS stocks on ATSs; and national securities exchanges that compete for order flow with NMS Stock ATSs and other OTC trading systems.

We recognize that the economic effects of Rule 304, Form ATS–N, and the amendments, including costs and benefits and effects on efficiency, competition and capital formation, should be compared to a baseline that accounts for the current market and regulatory framework for trading NMS stocks. The baseline includes: Statistics on the number of NMS Stock ATSs; current reporting requirements for NMS Stock ATSs; the lack of public disclosure of NMS Stock ATSs' operations, as well as disparate levels of information available to market participants about NMS Stock ATSs' operations and the ATS-related activities of their broker-dealer operators and their affiliates; and the competitive environment between national securities exchanges and NMS Stock ATSs, among NMS Stock ATSs, and between broker-dealers that operate NMS Stock ATSs and broker-dealers that do not operate NMS Stock ATSs.

1. Current NMS Stock ATSs

As of March 31, 2018 there are 41 ATSs that have noticed on their Form ATS that they expect to trade NMS stocks.[1272] During the first quarter in 2018, 33 ATSs, all of which operated as dark pools, traded NMS stocks and accounted for approximately 57 billion shares traded in NMS stocks (approximately $2.9 trillion in dollar volume), representing approximately 11.4% of total share trading volume (11.5% of total dollar trading volume) on all registered national securities exchanges, ATSs, and non-ATS OTC trading venues in the first quarter of 2018.[1273] Based on their market share, NMS Stock ATSs represent a significant source of liquidity in NMS stocks.

2. Current Reporting Requirements for NMS Stock ATSs

Even though ATSs directly compete for order flow in NMS stocks with national securities exchanges, ATSs are exempt from the definition of ''exchange'' and therefore are not required to register as national securities exchanges with the Commission.[1274] A system that meets the criteria of Rule 3b–16(a) may operate as an ATS on the condition that the ATS complies with Regulation ATS, which requires, among other things, that the ATS make filings with the Commission on Form ATS and Form ATS–R,[1275] which are ''deemed confidential when filed,'' as well as adhere to other reporting requirements under Regulation ATS.[1276] Furthermore, ATSs must register as broker-dealers and become members of an SRO. Accordingly, the ATS must comply with rules applicable to a broker-dealer and the SRO's rules applicable to broker-dealers. In addition, FINRA Rules 6160 and 6170 require each NMS Stock ATS to use a single, unique MPID for trade reporting purposes.[1277] FINRA uses the trade data reported by ATSs to publish aggregated weekly trading volume and trade count information on its website for each ATS on a security-by-security basis.[1278]

3. Lack of Standardized Public Disclosure

As described in detail in the Proposal,[1279] the level of information about the operations of NMS Stock ATSs and the ATS-related activities of the NMS Stock ATSs' broker-dealer operators and their affiliates vary across NMS Stock ATSs and across subscribers. Although Regulation ATS states that information on Form ATS is ''deemed confidential when filed,'' [1280] some NMS Stock ATSs voluntarily make their filings publicly available.[1281] NMS Stock ATSs that either voluntarily make their Form ATS publicly available, or publish summary information of their operations, provide market participants more information about their operations than do NMS Stock ATSs that do not make their Forms ATS or information about their operations publicly available.[1282] However, market participants cannot always use these voluntary disclosures to systematically compare NMS Stock ATSs, because the disclosures are not standardized.[1283] Additionally, subscribers might have access to more information about the NMS Stock ATSs to which they subscribe than they might about others, and also might have more information about their NMS Stock ATSs than might non-subscribers. For example, subscribers might have access to the NMS Stock ATS's subscriber manual, other subscriber quotes, and, potentially, certain market quality statistics an NMS Stock ATS may publish or otherwise disclose to subscribers in addition to what is currently publicly disclosed under Exchange Act Rule 605.[1284]

Subscribers to an NMS Stock ATS might have varying access to the different services of the NMS Stock

[1272] *See supra* note 9 and accompanying text.

[1273] *See infra* Table 1, ''NMS Stock ATSs Ranked by Dollar Trading Volume (January 1, 2018–March 30, 2018)'' Total dollar trading volume on all exchanges and off-exchange trading in the first quarter of 2018 was approximately $25.4 trillion and approximately 503 billion shares.

[1274] *See supra* Section II.B (discussing the conditions to the exemption from the definition of ''exchange'' for an ATS).

[1275] *See supra* Section II.C (discussing the Form ATS filing requirements). See also *supra* note 65 and accompanying text (discussing the Form ATS–R filing requirements).

[1276] *See supra* Section II.C (discussing the requirements of Regulation ATS); *see also* 17 CFR 242.301(b).

[1277] *See* FINRA Rules 6160 and 6170. *See also supra* note 15.

[1278] FINRA computes the aggregated statistics from trade data reported by ATSs to the FINRA equity trade reporting facilities (*i.e.,* the Alternative Display Facility, the Trade Reporting Facilities, and the OTC Reporting Facility). For trade data prior to February 1, 2016, FINRA publishes aggregated trade data reported by ATSs pursuant to former FINRA Rule 4552. FINRA publishes the information regarding NMS stocks in the S&P500 Index or the Russell 1000 Index and certain exchange-traded products on a two-week delayed basis, and the information on all other NMS stocks and OTC equity securities on a four-week delayed basis. *See* FINRA OTC Transparency Data at *https://otctransparency.finra.org/. See also supra* note 15.

[1279] *See* Proposal, *supra* note 2, at 81110–11.

[1280] *See* 17 CFR 242.301(b)(2)(vii).

[1281] *See supra* note 56.

[1282] On the other hand, some ATSs not only provide current Form ATS on their public websites, they also provide more information regarding their ATS operations. For instance, one commenter asks all their subscribers to consent to having their names publicly disclosed on their website so that all their subscribers know the universe of entities that they could be executing against. *See* Luminex Letter at 1.

[1283] The level of detail and the format in which information is presented on Form ATS varies among the NMS Stock ATSs. Several commenters agree with us that either there is a lack of disclosure about the operations of NMS Stock ATSs or that there is a need to standardize disclosures made by NMS Stock ATSs. *See* Fidelity Letter at 1; ICI Letter at 1; SIFMA Letter at 3. One commenter specifically states that opacity of venue matching logic ''increases costs for brokers connecting to venues, and they in turn pass these costs to clients.'' *See* AI Letter at 2.

[1284] Exchange Act Rule 605(a) requires every market center, including ATSs, to make publicly available for each calendar month a report containing standardized data on the covered orders in NMS stocks that it receives for execution from any market participant. Data on execution quality required under Exchange Act Rule 605(a) includes order sizes, execution sizes, effective spreads, price improvement, and quarterly volume of shares traded. *See* Rule 605(a)(8) for the definition of a covered order.

ATS.[1285] Those subscribers with greater access might obtain more knowledge and information about the operations of NMS Stock ATSs than the subscribers with less access. With this additional information, subscribers with greater access can make more nuanced decisions about which trading venue suits their trading purposes, and thus possess an informational advantage over other subscribers.

Even if having greater access to the services of an NMS Stock ATS yields additional information about the operations of the NMS Stock ATS to certain subscribers, subscribers that do not have full access to services of the NMS Stock ATS, and the resulting additional information, might still want to trade on NMS Stock ATSs in spite of their relative informational disadvantage. Had these subscribers possessed more detailed information about the operations of the NMS Stock ATS, they might have been able to make more informed—and therefore potentially different—decisions about where to route their orders for execution.

4. NMS Stock ATS Treatment of Subscriber Confidential Trading Information

Under current Rule 301(b)(10) of Regulation ATS,[1286] all ATSs must establish adequate safeguards and procedures to protect subscribers' confidential trading information, and, to ensure that those safeguards and procedures are followed, must also establish adequate oversight procedures.[1287] Furthermore, all ATSs are required to preserve certain records pursuant to Rule 303(a)(1).[1288] However, neither Rule 301(b)(10) nor Rule 303(a)(1) of Regulation ATS currently requires that an ATS maintain and preserve their safeguards and procedures to protect subscribers' confidential trading information, or their related oversight procedures in writing.

As discussed in the Proposal,[1289] we believe that ATSs—in particular, ATSs whose broker-dealer operators are large, multi-service broker-dealers—currently have and maintain in writing their safeguards and procedures to protect subscribers' confidential trading information, as well as the oversight procedures to ensure such safeguards and procedures are followed. One commenter agrees that significant ATSs have largely reduced to writing their safeguards and procedures to protect subscribers' confidential trading information.[1290] Additionally, this commenter also states these written safeguards and procedures are likely to occur in multiple formats and in different forms within the same broker-dealer. We acknowledge that, to the extent an ATS broker-dealer operator currently maintains written safeguards and written procedures to protect subscribers' confidential trading information, the written safeguards and written procedures might exist in multiple formats or differing forms within the same broker-dealer operator. Nevertheless, under the current regulatory environment for ATSs, absent specific questions in an examination by the Commission or its staff, we are not able to determine whether all ATSs currently have written safeguards and written procedures to protect subscribers' confidential trading information or, if an ATS does possess written safeguards and written procedures, to what extent they exist in multiple formats or differing forms.

5. Competition

The current market for trading NMS stocks is served by national securities exchanges, ATSs, and liquidity providers (including broker-dealers who internalize), who compete to supply investors with execution services at efficient prices. These trading venues, which compete to match orders, provide a framework for price negotiation and disseminate trading information. The sections below discuss the current state of competition between NMS Stock ATSs and national securities exchanges; competition among NMS Stock ATSs; and competition between broker-dealers that operate NMS Stock ATSs and broker-dealers that do not operate NMS Stock ATSs.

a. Competition Between NMS Stock ATSs and Registered National Securities Exchanges

In the market for NMS stock execution services, NMS Stock ATSs not only compete with other NMS Stock ATSs, they also compete with national securities exchanges. As discussed in the Proposal,[1291] NMS Stock ATSs have grown in complexity and sophistication. Some NMS Stock ATSs now offer features similar to those offered by national securities exchanges, including, among other things, anonymous order submission, limit order book matching systems, a wide range of order types, and high-speed connectivity options. However, unlike national securities exchanges, most NMS Stock ATSs have adopted a dark trading model, and do not display any quotations in the consolidated quotation data.[1292] Two commenters state that NMS Stock ATSs also compete with national securities exchanges for order flow by offering features that are not readily available on national securities exchanges.[1293] For example, while most national securities exchanges match trades via a price/time priority limit order book, some NMS Stock ATSs may match trades via auctions or block crossing mechanisms.[1294]

As discussed above and explained in more detail in the Proposal,[1295] NMS Stock ATSs and national securities exchanges are subject to different regulatory regimes, including different obligations to disclose information about their trading operations and activities. This has resulted in differences in operational transparency between national securities exchanges and NMS Stock ATSs, which limits the ability of market participants to compare the operations and execution quality of NMS Stock ATSs and national securities exchanges.

In addition to the burdens discussed above,[1296] and as discussed in more detail in the Proposal,[1297] national securities exchanges and other SROs also have regulatory obligations, such as enforcing their rules and the federal securities laws with respect to their members, which do not apply to ATSs.[1298] However, national securities exchanges also enjoy certain benefits that are not afforded to NMS Stock ATSs, such as establishing norms regarding conduct, trading, and fee structures. ATSs, on the other hand, are regulated as broker-dealers, and must comply with the rules of FINRA. Trading venues that elect to register as national securities exchanges can gain

[1285] *See* Proposal, *supra* note 2, at 81111 (discussing the differential access of subscribers to NMS Stock ATSs).

[1286] 17 CFR 242.301(b)(10).

[1287] 17 CFR 242.301(b)(10).

[1288] *See* Proposal, *supra* note 2, at 81087; *see also supra* Section III.B.6 (discussing amendments to Exchange Act Rule 303).

[1289] *See* Proposal, *supra* note 2, at 81111.

[1290] *See* HMA Letter at 23.

[1291] *See* Proposal, *supra* note 2, 80 FR at 81009.

[1292] See id.

[1293] *See* Consumer Federation of America Letter at 4; ICI Letter at 3.

[1294] *See* Proposal, *supra* note 2, 80 FR at 81009; *see also* ICI Letter at 3.

[1295] *See supra* Sections II.B–C (discussing the different mix of obligations and benefits applicable to ATSs and registered national securities exchanges). *See also* Proposal, *supra* note 2, at 81111–12.

[1296] *See supra* Section II.B.

[1297] *See* Proposal, *supra* note 2, at 81111–12

[1298] *See, e.g.,* Section 19(g) of the Exchange Act, 15 U.S.C. 78s(g), and Section 6(b) of the Exchange Act, 15 U.S.C. 78f(b). For further discussion of the costs and benefits of registering as a national securities exchange, *see* Proposal, *supra* note 2, at 81111–12.

added prestige by establishing listing standards for their securities. Additionally, national securities exchanges can be direct participants in NMS plans, which provide additional sources of revenue and input into the operation of the national market system that is not available to NMS Stock ATSs.[1299]

As discussed in more detail in the Proposal, since the adoption of Regulation NMS in 2005, the market for NMS stock execution services has become more fragmented and the number of national securities exchanges and NMS Stock ATSs has increased.[1300] Over the past decade, with the increase in fragmentation in the market for execution services, there has been a shift in the market share of trading volume in NMS stocks across trading venues.[1301] The number of active dark pools trading NMS stocks has increased from approximately 10 in 2002,[1302] to 33 today.[1303] The market share of total NMS stock share volume that is attributable to dark pools has increased from 7.9% in 2009 [1304] to 11.4% during the first quarter of 2018.[1305] Thus, greater fragmentation in the market for NMS stock execution services over the past decade has resulted in trading volume being executed on different venues, some of which include NMS Stock ATSs, particularly NMS Stock ATSs that operate as dark pools.[1306]

Several commenters state that since the inception of Regulation ATS, ATSs have operated at a competitive advantage relative to national securities exchanges, because they operate with lower transparency and greater opacity relative to national securities exchanges.[1307] Another commenter states that ''ATSs are competitors to exchanges, but do not have the same oversight, transparency requirements or responsibilities.'' [1308] This commenter also states that ''It is clearly unfair competition for ATSs to be subject to far less requirements than exchanges while executing a large percentage of the market volume.'' [1309] We agree that NMS Stock ATSs face lower regulatory burdens than national securities exchanges, including differences in the obligations to publicly disclose information about their trading operations and activities. This has resulted in differences between the operational transparency of NMS Stock ATSs and national securities exchanges and made it more difficult for market participants to evaluate how their orders interact, match, and execute on the NMS Stocks ATSs than on national security exchanges. As discussed in the Proposal,[1310] the growth in the number of NMS Stock ATSs may be driven by these less stringent regulatory obligations. However, national securities exchanges also enjoy certain advantages which are not available to NMS Stock ATSs, such as the ability to list securities and share in market data revenue generated by the CTA.

b. Competition Among NMS Stock ATSs

NMS Stock ATSs also compete with each other in a niche in the market for NMS stock execution services. The rise in the number of NMS Stock ATSs has not only affected competition between national securities exchanges and ATSs for order flow of NMS stocks, it has also impacted competition among NMS Stock ATSs.

Table 1, which is based on aggregated trade data reported by ATSs to the FINRA equity trade reporting facilities for 13 weeks of trading from January 1, 2018, to March 30, 2018, depicts the market share of total dollar volume for NMS stocks, and the total share volume for NMS stocks for individual ATSs.[1311] Even though there are many NMS Stock ATSs, much of the NMS stock dollar volume on ATSs is transacted by only a handful of venues. Table 1 shows that the top 7 NMS Stock ATSs ranked by dollar volume accounted for 63.4% of total dollar volume transacted on ATSs and 59.2% of total share volume transacted on ATSs from January 1, 2018, to March 30, 2018.

[1299] *See* Regulation ATS Adopting Release, *supra* note 3, at 70880, 70902–70903 (Section discussing generally some of the obligations and benefits of registering as a national securities exchange).

[1300] *See* Proposal, *supra* note 2, at 81112. For a list of current national securities exchanges, see *https://www.sec.gov/rules/sro.shtml.*

Although there are 12 national securities exchanges that trade NMS stocks, they are currently controlled by 5 exchange groups, namely, CBOE Global Markets, Inc. (which controls BZX, BYX, EDGA, and EDGX), CHX Holdings, Inc. (which controls CHX), Intercontinental Exchange, Inc. (which controls NYSE American, NYSE, and NYSE Arca), IEX Group Inc. (which controls IEX), and NASDAQ, Inc. (which controls Nasdaq, BX, and PHLX).

[1301] For further discussion *see* Proposal, *supra* note 2, at 81112.

[1302] *See* Regulation of Non-Public Trading Interest at 61209 n.9, and accompanying text (proposing rules and amendment to joint industry plans describing the term dark pool).

[1303] *See supra* notes 11–12 and accompanying text.

[1304] *See supra* notes 13–14 and accompanying text.

[1305] *See supra* Section X.B.1.

[1306] Several commenters also stated that ever since the inception of Regulation ATS, the market for trading NMS stocks has become more fragmented, and the number of NMS Stock ATSs and the trading volume executed on these venues has increased, but they did not provide quantitative estimates of the number of ATSs or the fraction of trading volume executed on different venues. *See* CFA Institute Letter at 2; Consumer Federation of America Letter at 4; Fidelity Letter at 3; LeveL ATS Letter at 2; Schneiderman Letter at 1, SIFMA Letter at 2.

[1307] *See* CBOE Letter at 1; CFA Institute Letter at 2; Consumer Federation of America Letter at 1–2, 4; ICI Letter at 3.

[1308] *See* Anonymous at 1.

[1309] *See id.*

[1310] *See* Proposal, *supra* note 2, at 81112.

[1311] *See supra* note 15.

MPID	ATS Description	Trades	Share Volume	Dollar Volume	% of ATS Dollar Volume	% of ATS Share Volume
UBSA	UBSA UBS ATS	74,684,445	11,558,612,209	$585,889,392,203	20.09%	20.17%
CROS	CROS CROSSFINDER	37,641,434	6,131,230,224	$313,552,657,406	10.75%	10.70%
DLTA	DLTA DEALERWEB	2,931	1,054,776,222	$249,121,940,370	8.54%	1.84%
EBXL	EBXL LEVEL ATS	20,531,738	4,036,471,200	$190,153,787,751	6.52%	7.04%
DBAX	DBAX SUPERX	21,670,068	4,030,627,076	$187,716,264,486	6.44%	7.03%
JPMX	JPMX JPM-X	16,794,978	3,240,235,070	$162,460,422,536	5.57%	5.65%
MSPL	MSPL MS POOL (ATS-4)	16,362,217	3,895,161,690	$158,860,162,674	5.45%	6.80%
LATS	LATS BARCLAYS ATS ("LX")	18,958,278	3,453,162,482	$153,009,689,163	5.25%	6.03%
BIDS	BIDS BIDS TRADING	2,278,461	2,719,614,540	$138,314,125,883	4.74%	4.75%
SGMT	SGMT SIGMA X2	15,631,833	2,462,502,574	$117,351,332,288	4.02%	4.30%
MLIX	MLIX INSTINCT X	10,332,918	2,214,264,890	$91,627,093,262	3.14%	3.86%
ICBX	ICBX INSTINET CONTINUOUS BLOCK CROSSING SYSTEM (CBX)	7,999,595	1,674,461,755	$72,977,944,819	2.50%	2.92%
ITGP	ITGP POSIT	5,530,164	1,607,349,782	$70,746,876,812	2.43%	2.81%
IATS	IATS IBKR ATS	3,666,527	1,003,205,415	$55,267,583,627	1.89%	1.75%
MSTX	MSTX MS TRAJECTORY CROSS (ATS-1)	7,255,670	1,211,480,500	$50,735,772,680	1.74%	2.11%
KCGM	KCGM KCG MATCHIT	6,339,584	1,146,037,324	$48,307,303,306	1.66%	2.00%
XSTM	XSTM CROSSSTREAM	2,392,943	804,362,651	$43,043,777,453	1.48%	1.40%
LQNA	LQNA LIQUIDNET H2O	45,824	790,199,400	$37,624,716,045	1.29%	1.38%
JPBX	JPBX JPB-X	5,795,286	618,955,773	$32,750,591,702	1.12%	1.08%
BLKX	BLKX BLOCKCROSS	55,655	618,438,688	$29,325,877,352	1.01%	1.08%
LQNT	LQNT LIQUIDNET ATS	16,107	587,409,900	$28,969,691,786	0.99%	1.03%
CXCX	CXCX CITI CROSS	3,072,427	622,238,237	$26,086,669,766	0.89%	1.09%
MSRP	MSRP MS RETAIL POOL (ATS-6)	1,542,721	318,863,430	$18,883,547,120	0.65%	0.56%
PDQX	PDQX PDQ ATS	1,510,480	323,599,205	$14,660,290,727	0.50%	0.56%
XIST	XIST INSTINET CROSSING	86,037	306,502,028	$14,542,535,261	0.50%	0.53%
LMNX	LMNX LUMINEX TRADING & ANALYTICS	5,286	174,025,591	$10,605,959,459	0.36%	0.30%
CBLC	CBLC CitiBLOC	7,957	124,141,506	$6,991,467,423	0.24%	0.22%
CIOI	CIOI CIOI	1,498	88,912,991	$3,996,712,694	0.14%	0.16%
WDNX	WDNX XE	15,435	16,415,697	$1,171,806,975	0.04%	0.03%
AQUA	AQUA AQUA	2,808	24,689,596	$836,854,096	0.03%	0.04%
USTK	USTK USTOCKTRADE SECURITIES	742,620	442,665,109	$632,171,698	0.02%	0.77%
PROS	PROS PRO SECURITIES ATS	4,799	2,196,731	$320,539,924	0.01%	0.00%
BCDX	BCDX BARCLAYS DIRECTEX	1	18,000	$451,536	0.00%	0.00%
	Total (NMS Stock ATS)	**280,978,725**	**57,302,827,486**	**$2,916,536,010,284**	**100.00%**	**100.00%**
	Total Consolidated Volume (NMS stock)[1312]	**2,299,893,482**	**502,830,180,407**	**$25,423,538,264,351**	-	-
	NMS Stock ATS as a Fraction of Total Consolidated Volume	**12.22%**	**11.40%**	**11.47%**	-	-
	Dark Pools as a Fraction of Total Consolidated Volume[1313]	**12.22%**	**11.40%**	**11.47%**	-	-

Table 1: NMS Stock ATSs Ranked by Dollar Trading Volume

(January 1, 2018—March 30, 2018) [1314]

This table shows the 33 ATSs that effected transactions in NMS stocks from January 1, 2018—March 30, 2018, ranked in descending order by dollar volume transacted. ATS data is reported weekly, and these dates approximately correspond to the first quarter of 2018. Dollar volume transacted on an ATS is calculated by multiplying the share volume for a given NMS stock on the ATS in a given week by the average trade price for that week. Dollar volume for each NMS stock is then aggregated across all NMS stocks that traded on the given ATS in that week. Also reported in this table is the number of trades, share volume, each NMS Stock ATS's market share of all NMS Stock ATS dollar volume and NMS Stock ATS share volume in that quarter.

Table 2, which is based on aggregated trade data reported by ATSs to the FINRA equity trade reporting facilities

[1312] Total Consolidated Volume includes all trading in NMS stocks on all national securities exchanges, ATSs, and non-ATS OTC trading.

[1313] *See supra* note 2 for definition of ''dark pool''.

[1314] Table 1 Data Sources: (1) FINRA Alternative Trading System (ATS) Transparency Data is aggregated trade data reported by ATSs to the FINRA equity trade reporting facilities and made available on FINRA's website as part of the OTC Transparency Data. The OTC Transparency Data is provided via *http://www.finra.org/industry/OTC-Transparency* and is copyrighted by FINRA 2018. (2) NYSE Trade and Quote Database (TAQ).

for 13 weeks of trading from January 1, 2018, to March 30, 2018, shows the average trade size, which is share volume divided by the number of trades on each of the NMS Stock ATSs. The table reveals marked differences in the average trade size of transactions executed on the various NMS Stock ATSs. Eight NMS Stock ATSs had average trade sizes in excess of 10,000 shares. This suggests that some NMS Stock ATSs receive large block orders and execute large trades.[1315] One of the advantages for market participants of trading on block crossing networks is the ability to execute large block orders while minimizing the movement of prices against their trading interest.[1316]

While these NMS Stock ATSs on average execute large size trades, the combined market share of these NMS Stock ATSs is only 12.6% when measured in dollar volume, and 6.0% when measured in share volume. The vast majority of NMS Stock ATSs have average trade sizes between 100 and 460 shares. The average trade size across all 33 NMS Stock ATSs is 204 shares, while the two NMS Stock ATSs with the highest market shares (measured either in dollar volume or share volume) have average trade sizes of 155 and 163 shares, respectively. These trade sizes are not significantly different from the average trade size of 146 shares on national securities exchanges,[1317] which suggests that the niche market NMS Stock ATSs serve is not very different from the market as a whole.[1318]

[1315] For purposes of this analysis we considered block orders as orders of more than 10,000 shares, which is the traditional definition for block orders. *See* Proposal, *supra* note 2, at 81008. *See also* Rule 600(b)(9) of Regulation NMS (defining block size with respect to an order), 17 CFR 242.600(b)(9).

[1316] *See* Proposal, *supra* note 2, at 81008 n.126, 127.

[1317] Tuttle (2013) also found that trade sizes on ''lit'' national securities exchanges are similar to those taking place on ''dark ATSs.'' However, Tuttle (2013) did not include odd lot trades when calculating trade sizes for ''lit'' national securities exchanges or ''dark ATSs.'' *See* Laura Tuttle, *Alternative Trading Systems: Description of ATS Trading in National Market System Stocks* (October 2013), *http://www.sec.gov/marketstructure/research/alternative-trading-systems-march-2014.pdf* (''Tuttle: ATS Trading in NMS Stocks''). Unlike ''lit'' national securities exchanges, dark ATSs do not publicly disseminate top of the limit-order book information. *See id.*

Table 2 in the Proposal reports that between March 30, 2015, and June 26, 2015, the average trade size on NMS Stock ATSs was 214 shares and the average trade size on national securities exchanges was 181 shares. Calculations for both of the average trade size metrics reported in the Proposal include odd lots trades. However, calculations for the average trade size on national securities exchanges reported in the Proposal also include TAQ trade volume reported from bulk trades, opening and closing trades, and intraday crosses. *See* Proposal, *supra* note 2, at 81114.

[1318] One commenter conducted similar analysis, computing average trade sizes in ''top volume ATSs'' for three time periods: May 12, 2014–May 16, 2014; March 30–June 26, 2015; and January 11, 2016–January 15, 2016 and reached similar conclusions. *See* Anonymous Letter at 4.

MPID	ATS Description	Trades	Share Volume	Dollar Volume	Average Trade Size	% of ATS Dollar Volume	% of ATS Share Volume
DLTA	DLTA DEALERWEB	2,931	1,054,776,222	$249,121,940,370	359,869	8.54%	1.84%
CIOI	CIOI CIOI	1,498	88,912,991	$3,996,712,694	59,354	0.14%	0.16%
LQNT	LQNT LIQUIDNET ATS	16,107	587,409,900	$28,969,691,786	36,469	0.99%	1.03%
LMNX	LMNX LUMINEX TRADING & ANALYTICS	5,286	174,025,591	$10,605,959,459	32,922	0.36%	0.30%
BCDX	BCDX BARCLAYS DIRECTEX	1	18,000	$451,536	18,000	0.00%	0.00%
LQNA	LQNA LIQUIDNET H2O	45,824	790,199,400	$37,624,716,045	17,244	1.29%	1.38%
CBLC	CBLC CitiBLOC	7,957	124,141,506	$6,991,467,423	15,602	0.24%	0.22%
BLKX	BLKX BLOCKCROSS	55,655	618,438,688	$29,325,877,352	11,112	1.01%	1.08%
AQUA	AQUA AQUA	2,808	24,689,596	$836,854,096	8,793	0.03%	0.04%
XIST	XIST INSTINET CROSSING	86,037	306,502,028	$14,542,535,261	3,562	0.50%	0.53%
BIDS	BIDS BIDS TRADING	2,278,461	2,719,614,540	$138,314,125,883	1,194	4.74%	4.75%
WDNX	WDNX XE	15,435	16,415,697	$1,171,806,975	1,064	0.04%	0.03%
USTK	USTK USTOCKTRADE SECURITIES	742,620	442,665,109	$632,171,698	596	0.02%	0.77%
PROS	PROS PRO SECURITIES ATS	4,799	2,196,731	$320,539,924	458	0.01%	0.00%
XSTM	XSTM CROSSSTREAM	2,392,943	804,362,651	$43,043,777,453	336	1.48%	1.40%
ITGP	ITGP POSIT	5,530,164	1,607,349,782	$70,746,876,812	291	2.43%	2.81%
IATS	IATS IBKR ATS	3,666,527	1,003,205,415	$55,267,583,627	274	1.89%	1.75%
MSPL	MSPL MS POOL (ATS-4)	16,362,217	3,895,161,690	$158,860,162,674	238	5.45%	6.80%
MLIX	MLIX INSTINCT X	10,332,918	2,214,264,890	$91,627,093,262	214	3.14%	3.86%
PDQX	PDQX PDQ ATS	1,510,480	323,599,205	$14,660,290,727	214	0.50%	0.56%
ICBX	ICBX INSTINET CONTINUOUS BLOCK CROSSING SYSTEM (CBX)	7,999,595	1,674,461,755	$72,977,944,819	209	2.50%	2.92%
MSRP	MSRP MS RETAIL POOL (ATS-6)	1,542,721	318,863,430	$18,883,547,120	207	0.65%	0.56%
CXCX	CXCX CITI CROSS	3,072,427	622,238,237	$26,086,669,766	203	0.89%	1.09%
EBXL	EBXL LEVEL ATS	20,531,738	4,036,471,200	$190,153,787,751	197	6.52%	7.04%
JPMX	JPMX JPM-X	16,794,978	3,240,235,070	$162,460,422,536	193	5.57%	5.65%
DBAX	DBAX SUPERX	21,670,068	4,030,627,076	$187,716,264,486	186	6.44%	7.03%
LATS	LATS BARCLAYS ATS ("LX")	18,958,278	3,453,162,482	$153,009,689,163	182	5.25%	6.03%
KCGM	KCGM KCG MATCHIT	6,339,584	1,146,037,324	$48,307,303,306	181	1.66%	2.00%
MSTX	MSTX MS TRAJECTORY CROSS (ATS-1)	7,255,670	1,211,480,500	$50,735,772,680	167	1.74%	2.11%
CROS	CROS CROSSFINDER	37,641,434	6,131,230,224	$313,552,657,406	163	10.75%	10.70%
SGMT	SGMT SIGMA X2	15,631,833	2,462,502,574	$117,351,332,288	158	4.02%	4.30%
UBSA	UBSA UBS ATS	74,684,445	11,558,612,209	$585,889,392,203	155	20.09%	20.17%
JPBX	JPBX JPB-X	5,795,286	618,955,773	$32,750,591,702	107	1.12%	1.08%
	Total (NMS Stock ATS)	**280,978,725**	**57,302,827,486**	**$2,916,536,010,284**	-	**100.00%**	**100.00%**
	Average Trade Size (NMS Stock ATS)	-	-	-	**204**	-	-
	Average Trade Size (Registered National Exchanges[1319])	-	-	-	**146**	-	-

Table 2: NMS Stock ATSs Ranked by Average Trade Size

(January 1, 2018–March 30, 2018) [1320]

This table shows 33 ATSs that effected transactions in NMS stocks from January 1, 2018–March 30, 2018, ranked in descending order by average trade size. ATS data is reported weekly, and these dates correspond approximately to the fourth quarter of 2017. Also reported in this table is the raw number of trades, share volume, dollar volume, and each NMS Stock ATS's market share of all NMS Stock ATS dollar volume and NMS Stock ATS share volume. Dollar volume transacted on an ATS is calculated by multiplying the share volume for a given NMS stock on the ATS in a given week by the average trade price for that week. Dollar volume for each NMS stock is then

[1319] National securities exchanges that transacted in NMS stocks during the period January 1, 2018 to March 30, 2018 included NYSE MKT LLC, Cboe BZX Exchange, Inc.; Cboe BYX Exchange, Inc.; Cboe EDGA Exchange, Inc.; Cboe EDGX Exchange, Inc.; Chicago Stock Exchange, Inc.; The Investors Exchange LLC; NASDAQ OMX BX, Inc.; NASDAQ OMX PHLX, Inc.; The Nasdaq Stock Market LLC; New York Stock Exchange LLC; and NYSE Arca, Inc. NYSE National, Inc. (f.k.a. National Stock Exchange, Inc.) was not trading, but on May 17, 2018 the Commission approved a proposed rule change in connection with its relaunch. *See supra* note 9.

[1320] Table 2 *Sources:* (1) FINRA Alternative Trading System (ATS) Transparency Data is aggregated trade data reported by ATSs to the FINRA equity trade reporting facilities and made available on FINRA's website as part of the OTC Transparency Data. The OTC Transparency data is provided via *http://www.finra.org/industry/OTC-Transparency* and is copyrighted by FINRA 2018. (2) NYSE Trade and Quote Database (TAQ).

aggregated across all NMS stocks that traded on the given ATS in that week. Average trade size on national securities exchanges is calculated from TAQ data using intraday trades that took place between 9:30 a.m. and 4:00 p.m. Bulk trades and trades during the opening and close and intraday crosses are excluded from the calculation.

One commenter mentions that because the difference in average trade size between national securities exchanges and NMS Stock ATSs is small, this is evidence that ''these venues are no longer beneficial for executing block size trades between large traders.'' [1321] We do not agree with the comment that NMS Stock ATSs are no longer beneficial for executing block size trades. As can be seen in Table 2, eight ATSs have average trade sizes in excess of 10,000 shares, indicating that these ATSs are attractive venues for crossing block orders. Based on this, we believe that some ATSs—particularly ones which have average trade sizes in excess of 10,000 shares—are beneficial for certain market participants wanting to trade large block sizes.

As discussed in more detail in the Proposal,[1322] while many NMS Stock ATSs operating today are similar with respect to the limited transparency they provide with respect to their trading model, we understand that the services offered vary significantly across NMS Stock ATSs.[1323] Even though NMS Stock ATSs may not be privy to detailed information about the operations of other NMS Stock ATSs, they are able to garner information about the differential services offered by their competitors through various means,[1324] enabling ATSs to modify their products and services to better compete within the market for NMS stock execution services. Thus, as explained in more detail in the Proposal,[1325] an NMS Stock ATS may not be incented to fully reveal how orders interact, match and execute on its platform, because revealing such information adversely impacts the ATS's position within the market by also informing its competitors.

c. Competition Between Broker-Dealers That Operate NMS Stock ATSs And Broker-Dealers That Do Not Operate NMS Stock ATSs

As explained in more detail in the Proposal, competition for NMS stock order flow also exists between the broker-dealers that operate NMS Stock ATSs and broker-dealers that do not operate NMS Stock ATSs but otherwise effect transactions in NMS stocks.[1326] Some broker-dealers who operate their own NMS Stock ATS(s) may provide their affiliates with access to certain services that are not afforded to broker-dealers that do not have their own ATS platform,[1327] which may result in trading advantages.[1328]

6. Effect of NMS Stock ATSs on the Current Market for NMS Stock Execution Services

As discussed above, the current market for NMS stock execution services consists of competition for order flow among national securities exchanges, NMS Stock ATSs, and broker-dealers who operate or control non-ATS trading centers.[1329] This section specifically discusses the impact that this current market structure for NMS stock execution services has on trading costs to market participants; the process by which the price of NMS stocks are determined in the market (''price discovery''); and market efficiency.

a. Trading Costs

As described in detail in the Proposal,[1330] some academic research has suggested that the decline in trading costs since the adoption of Regulation ATS in 1998 and Regulation NMS in 2005 could, in part, be driven by the rising fragmentation of trading volume and competition for order flow, through the proliferation of new trading venues such as NMS Stock ATSs.[1331] Trading on NMS Stock ATSs may also benefit institutional investors [1332] by providing a useful tool whereby they may be able to reduce the ''price impact'' of their trades and obtain enhanced execution quality for their orders.[1333] Five commenters also express the belief that the increase in trading on ATSs has contributed to a competitive marketplace that has led to improved costs and liquidity, and that this has benefitted both retail and institutional investors.[1334]

Another element that may affect trading costs is order internalization by broker-dealers. As described detail in the Proposal,[1335] some academic literature has found that internalization of order flow increases trading costs and reduces market depth and price informativeness. In the current operational environment of NMS Stock ATSs, subscribers' orders or other trading interests could be removed from the broker-dealer's NMS Stock ATS and routed to, among other destinations, another trading center operated by the broker-dealer operator for internalization. Thus, the fact that some broker-dealers operate their own NMS Stock ATSs, and yet internalize some order flow rather than executing it on their own NMS Stock ATS, may have a deleterious effect on market quality.

The current market for NMS stock execution services—which includes NMS Stock ATSs—provides value to market participants. If all NMS Stock ATSs were to cease operating as ATSs, market participants might incur costs associated with not being able to find an adequate trading venue that offers benefits similar to those that NMS Stock ATSs provide. To the extent that market participants value these ATS-specific features, the decision of certain NMS

[1321] *See* Anonymous Letter at 3.

[1322] Proposal, *supra* note 2, at 81115.

[1323] Two commenters agree with us. These commenters mention that some ATSs offer subscribers the ability to customize trading parameters, including price instructions and counterparty selection, while others offer subscribers different methods of accessing the ATS, such as FIX connections or trading through the broker-dealer's smart order router. *See* Consumer Federation of America Letter at 4; ICI Letter at 2–3.

[1324] These are discussed in more detail in the Proposal. *See* Proposal, *supra* note 2, at 81115.

[1325] *See id.*

[1326] *See id.*

[1327] A number of commenters state that broker-dealer operators and their affiliates may have access to certain features of an ATS that are not available to other subscribers. *See* Better Markets Letter at 4–6; Consumer Federation of America Letter at 7–10; HMA Letter at 13–15; Liquidnet Letter at 11. One of these commenters states that broker-dealer operators and their affiliates may receive preferential treatment or access to the ATS, such as faster or more direct access to the ATS, priority status to execute their orders over those of other subscribers, or the ability to further customize with whom their order flow interacts. *See* Consumer Federation of America Letter at 8.

[1328] For further explanation, *see* Proposal, *supra* note 2, at 81115.

[1329] *See supra* Section X.B.5.

[1330] *See* Proposal, *supra* note 2, at 81115–16.

[1331] Other academic literature has suggested that the increase in fragmentation has had a counteracting effect and has increased bid-ask spreads. This literature, however, has focused on small stocks, and fragmentation across exchanges, rather than fragmentation across exchanges and between exchanges and NMS Stock ATSs. *See* Haslag, Peter and Matthew Ringgenberg, 2016, ''The Causal Impact of Market Fragmentation on Market Liquidity,'' working paper, *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591715*; Baldauf, Markus and Joshua Mollner, 2017, ''Trading in Fragmented Markets,'' working paper, *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2782692.*

[1332] *See* Proposal, *supra* note 2, at 81115 (discussing the impact of NMS Stock ATSs on institutional investor trading costs).

[1333] One commenter agreed that NMS Stock ATSs, specifically dark pools, serve a ''useful purpose to those wishing to trade large blocks of shares at lower cost without moving the public price as a result of other market participants identifying and trading ahead of their interest.'' Barnard Letter at 1.

[1334] *See* Fidelity Letter at 3; LeveL ATS Letter at 2; Morgan Stanley Letter at 4; STANY Letter at 2; UBS Letter at 8.

[1335] *See* Proposal, *supra* note 2, at 81117.

Stock ATSs to cease operating as ATSs could increase the trading costs of these market participants and impact whether and how they affect certain trading strategies.

While the existence of NMS Stock ATSs has reduced the trading costs on average for market participants, the lack of transparency regarding ATS operations and the ATS-related activities of the ATS broker-dealer operator and its affiliates has contributed to higher search costs for market participants to find a trading venue that serves their investing or trading objectives. A by-product of these higher search costs is uncertainty pertaining to how their orders will be handled, particularly for subscribers to NMS Stock ATSs that have not made their Form ATS public.[1336]

b. Price Discovery

While the increased fragmentation of trading volume associated with the current market for NMS stock execution services has been a factor in lowering trading costs for market participants, the academic literature has found that it has had a mixed impact on price discovery.

As described in more detail in the Proposal,[1337] some academic studies have suggested that the market segmentation caused by the coexistence of national securities exchanges and NMS Stock ATSs can improve price discovery.[1338] They suggest that price discovery can improve either as a result of more aggressive competition among market participants in providing liquidity or as a result of the segmentation of informed and uninformed market participants.[1339] These academic studies predict that because the orders of informed market participants are more likely to execute on national securities exchanges, they will be more likely to trade on national securities exchanges and uninformed market participants will be more likely to trade on NMS Stock ATSs.[1340] Because informed market participants have better knowledge about the value of a security than uninformed market participants, this segmentation can improve price discovery on national securities exchanges.[1341]

Other academic studies suggest that the presence of NMS Stock ATSs in the current trading environment can harm price discovery.[1342] These studies have suggested that because some NMS Stock ATSs are crossing networks and often derive their prices from national securities exchanges, price impact costs that result from trading on a national securities exchange harm prices on NMS Stock ATSs, resulting in less trading and harming price discovery.[1343] When trading, informed market participants often balance two types of costs, namely price impact costs and execution costs. In comparison to NMS Stock ATSs, on national securities exchanges an informed market participant's order experiences lower execution risk but higher price impact costs. However, since NMS Stock ATSs often match orders at prices derived from national securities exchanges, and if trading on national securities exchanges generates worse prices due to price impact, this could spill over and affect a market participant's profit on trades executed on the NMS Stock ATS. This spillover could result in informed market participants trading less aggressively, which could in turn reduce price discovery.[1344] One academic study finds, while low levels of trading on NMS Stock ATSs are not harmful, price discovery is harmed when levels of trading on NMS Stock ATSs are high (*i.e.,* they estimate that this occurs when trading on NMS Stock ATSs in a given NMS stock exceeds approximately 10% of dollar volume).[1345]

c. Market Efficiency

Currently, the coexistence of national securities exchanges and NMS Stock ATSs seems to have beneficial effects on market efficiency. One academic study suggests that while not all trades that execute on NMS Stock ATSs are large block trades, those that are have been beneficial to market efficiency.[1346] If NMS Stock ATSs were not a viable trading venue for market participants, some market participants might not execute large orders at all because of the price impact costs of executing on a national securities exchange. Therefore, the ability for market participants to execute large trades on NMS Stock ATSs generates liquidity, which can improve market efficiency.[1347] The same study also suggests that small trades that execute on NMS Stock ATSs are beneficial in that they also generate market efficiency.[1348]

Several commenters assert that the lack of transparency of NMS Stock ATSs has resulted in a decrease in market efficiency because more order flow executed on NMS Stock ATSs increases the difficulty investors face when identifying which venues offer them the best execution quality.[1349] As discussed above, increased market fragmentation could increase search costs by making it more difficult for market participants to find liquidity to execute their orders.[1350] Increased search costs could reduce competition between liquidity suppliers, which could increase trading costs.[1351] These increased trading costs could reduce the incentives for market participants to acquire costly information, which could in turn result

[1336] Several commenters agree with our analysis that the differences have resulted in higher search costs for market participants. *See* Better Markets Letter at 2; CFA Institute Letter at 2; Consumer Federation of America Letter at 2–4.

[1337] *See* Proposal, *supra* note 2, at 81116–17.

[1338] *See* Boulatov, Alex, and Thomas George, 2013, ''Hidden and Displayed Liquidity in Securities Markets with Informed Liquidity Providers,'' *Review of Financial Studies* 26, 2095–2137; Comerton-Forde, Carole and Talis Putnins, 2015, ''Dark Trading and Price Discovery,'' *Journal of Financial Economics* 118, 70–92.; and Zhu, Haoxiang, 2014, ''Do Dark Pools Harm Price Discovery?'' *Review of Financial Studies* 27, 747–789. Comerton-Forde and Putnins (2015) and Zhu (2014) specifically examine dark pools.

[1339] Uninformed market participants trade for non-informational reasons. In some cases, they are termed ''noise traders,'' since their trades are based on their beliefs and sentiments, and are not grounded on fundamental information. *See* Vishwanath, Ramanna and Chandrasekhar Krishnamurti, 2009, ''Investment Management: A Modern Guide to Security Analysis and Stock Selection,'' Springer Publishing.

[1340] *See* Proposal, *supra* note2, at 81116 (discussing the segmentation of trading by informed and uninformed market participants between national securities exchanges and ATSs).

[1341] *See* Comerton-Forde and Putnins (2015) and Zhu (2014), *supra* note 1338.

[1342] *See* Ye, Mao, 2011, ''A Glimpse into the Dark: Price Formation, Transaction Cost and Market Share of the Crossing Network,'' working paper, *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1521494*; Degryse, Hans, Frank de Jong and Vincent van Kervel, 2015, ''The Impact of Dark Trading and Visible Fragmentation on Market Quality,'' *Review of Finance* 19, 1587–1622; Comerton-Forde and Putnins (2015), *supra* note1338. These studies specifically examine dark pools.

[1343] One commenter agrees with the conclusions from these studies and remarked that trading on NMS Stock ATSs ''reduces the information that could assist the transparent market in determining an accurate fair price'' and that prices quoted on transparent markets may no longer be efficient or informative. *See* Barnard Letter at 1–3.

[1344] *See* Ye (2011), *supra* note1342.

[1345] *See* Comerton-Forde and Putnins (2015), *supra* note 1338.

[1346] *See id.*

[1347] A number of academic studies have found that increased liquidity can improve market efficiency by reducing the limits to arbitrage or increasing the incentives to produce costly information. *See* Chordia, Tarun, Richard Roll and Avanidhar Subrahmanyam, 2008, ''Liquidity and market efficiency,'' *Journal of Financial* Economics 97, 249–268; Kyle, Albert, 1984, ''Market structure, information, futures markets, and price formation,'' Gary G. Storey, Andrew Schmitz, and Alexander H. Sarris (Editors.), International Agricultural Trade: Advanced Readings in Price Formation, Market Structure, and Price Instability, Westview Press, Boulder and London (1984), pp. 45–64.

[1348] *See* Comerton-Forde and Putnins (2015), *supra* note 1338.

[1349] *See* Barnard Letter at 1–3; Better Markets Letter at 2.

[1350] *See supra* Section X.B.6.a.

[1351] *See* Yin, Xiangkang, 2005, ''A Comparison of Centralized and Fragmented Markets with Costly Search,'' *Journal of Finance,* 60, 1567–1590.

in a reduction in market efficiency.[1352] However, as discussed above, the increased market fragmentation caused by NMS Stock ATSs could also improve market efficiency by allowing institutional investors a viable way to trade and reduce price impact costs.[1353] The commenters did not provide any analysis to support their claims that the increase in order flow executed on NMS Stock ATSs has decreased market efficiency. As such, we continue to believe that the current market for NMS stock execution services, consisting of national securities exchanges, ATSs and other off-exchange venues, has together resulted in an improvement to market efficiency.

C. Economic Effects and Effects on Efficiency, Competition, and Capital Formation

We have considered the economic effects of new Rule 304, Form ATS–N and the amendments to Rule 3a1–1(a) and Regulation ATS. This section provides an overview of the economic effects of new Rule 304, Form ATS–N, and the amendments to Rule 3a1–1(a) and Regulation ATS, including the costs, benefits, and the effects on efficiency, competition, and capital formation. This section also discusses additional economic effects, including benefits and costs related to specific requirements of new Rule 304, Form ATS–N and the amendments to Rule 3a1–1(a) and Regulation ATS.

We believe that the amendments will improve Commission oversight and thereby improve investor protection and generate greater transparency about the operations of NMS Stock ATSs and the ATS-related activities of their broker-dealer operators and their affiliates.[1354] As explained below, through these effects, the adopted amendments may promote greater competition for order flow, which could result in enhanced execution quality, and we believe that this could result in improvements to efficiency and capital formation.

We have attempted, where possible, to quantify the benefits and costs and impacts on efficiency, competition, and capital information that may result from new Rule 304, Form ATS–N, and the amendments to Rule 3a1–1(a) and Regulation ATS. However, as we discussed in the Proposal and as explained more fully below,[1355] it is difficult to quantify many of the economic effects of the new rule and amendments due to the complexity of the market for NMS execution services and our lack of certain relevant information. For instance, it is difficult to determine what fraction of order flow will be internalized or routed to national securities exchanges or to non-ATS trading centers if NMS Stock ATSs are required to publicly disclose information about their operations on Form ATS–N. Additionally, we do not have certain information, such as information on market participant routing agreements or fee arrangements that may influence future order routing decisions.

As we further noted in the Proposal, it is similarly difficult to determine whether NMS Stock ATSs will continue or cease operating as ATSs in light of the new rule and amendments,[1356] as that decision depends on numerous factors and we lack information about many of those factors. For example, we do not have information on the extent to which existing NMS Stock ATSs or potentially new ATSs rely on a competitive advantage, such as a unique matching methodology or other operational characteristics, to attract order flow, or the extent to which the new disclosure requirements will impact those competitive advantages and thus drive decisions on operating status. Moreover, we lack information on how many NMS Stock ATSs may decide to register as national securities exchanges, as some ECNs have in previous years, as a result of new Rule 304, Form ATS–N and the amendments to Rule 3a1–1(a) and Regulation ATS.[1357]

Commenters did not provide any additional information or analysis that would allow us to estimate the impacts on order flow or the continued operation of NMS Stock ATSs under the new rule and amendments. In light of the complexities of the market and the lack of currently available information, we are unable to quantify many of the economic effects of new Rule 304, Form ATS–N, and the amendments to Rule 3a1–1(a) and Regulation ATS. Therefore, much of the discussion below is qualitative in nature, although we try to describe, where possible, the direction of these effects.

1. Economic Effects of Enhanced Filing Requirements of Form ATS–N

As discussed above, we are amending Rule 3a1–1(a) and Regulation ATS to require ATSs that transact in NMS stocks to comply with the requirements of Rule 304 to operate pursuant to the exemption from the definition of ''exchange.'' [1358] The amendments would require an NMS Stock ATS to file reports pursuant to Rule 304, which includes the requirement to file Form ATS–N, in lieu of current Form ATS, to disclose information about its operations and the ATS-related activities of its broker-dealer operator and its affiliates.[1359] We believe that these disclosures will help market participants assess whether the ATS's mode of operation is consistent with their ability to obtain the best executions and also help them assess potential conflicts of interest that might adversely impact their trading on the NMS Stock ATS.

Rule 304 will also provide a process by which the Commission will review initial Forms ATS–N and Form ATS–N amendments and declare them ineffective if it finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors. We are also adopting a process by which the Commission could suspend, limit, or revoke an NMS Stock ATS's exemption from the definition of an ''exchange'' under Rule 3a1–1(a)(2).[1360] An NMS Stock ATS could not operate pursuant to the exemption from the definition of ''exchange'' unless the NMS Stock ATS files Form ATS–N with the Commission and the Form ATS–N has become effective.[1361]

a. Benefits

As described in detail in the Proposal,[1362] we believe that new Rule 304, Form ATS–N and the amendments to Rule 3a1–1(a) and Regulation ATS would result in better regulatory oversight of NMS Stock ATSs and increased investor protection by providing the Commission and relevant SROs with information about NMS Stock ATSs that currently may only be available during an examination process. In comparison to Form

[1352] See Kyle, Albert, 1989, ''Information speculation with imperfect competition,'' *Review of Economic Studies* 56, 317–356.

[1353] *See supra* Section X.B.6.a.

[1354] *See supra* Sections V.C–D.

[1355] *See* Proposal, *supra* note 2, at 81118.

[1356] For the purposes of the PRA, we estimate the annual average number of NMS Stock ATSs that file Cessation of Operation notices on Form ATS–N. *See supra* Section IX.D.2.b.ii.C. This estimate is based on the historical number of cessations per year and, while recognizing that the amendments may result in cessations, does not attempt to predict the effect of the amendments on the number of cessations.

[1357] *See* Proposal, *supra* note 2, at 81109 (discussing ATSs that previously operated as ECNs and subsequently registered as national securities exchanges).

[1358] *See supra* Section III.A. *See also* Rules 3a1–1(a)(2) and (3), 300, 301, and 304.

[1359] *See supra* Section V for information disclosed on Form ATS–N.

[1360] *See supra* Section IV.E (discussing the public posting requirements of Form ATS–N).

[1361] *See supra* Section IV.A.3.

[1362] *See* Proposal, *supra* note 2, at 81119–20.

ATS,[1363] Form ATS–N will contain more detailed information about the operations of NMS Stock ATSs, including information about the ATS-related activities of the broker-dealer operator and its affiliates.[1364] The Commission and SROs could utilize this information to help prioritize examinations and possibly help identify potential issues. Additionally, the enhanced disclosure requirements under Form ATS–N will provide market participants with significantly more detailed information with which to analyze and evaluate how orders are handled and executed on NMS Stock ATSs, which could allow them to better assess an NMS Stock ATS as a potential trading venue.[1365]

We are also adopting a requirement that Form ATS–N and Form ATS–N amendments be filed electronically in a XML text-searchable format. We believe that requiring Form ATS–N and Form ATS–N amendments to be filed in a XML text-searchable format, coupled with the enhanced disclosure requirements, will facilitate a more effective and thorough review and analysis of NMS Stock ATSs by regulators, which should yield greater insights into the operations of NMS Stock ATSs and the ATS-related activities of their broker-dealer operators and their affiliates. Such benefits could increase investor protection by improving the effectiveness and efficiency of the examination process.

We believe that the process of reviewing an initial Form ATS–N or Form ATS–N amendments will allow the Commission to evaluate, among other things, the completeness and comprehensibility of the NMS Stock ATSs' disclosures and, if necessary, declare the Form ATS–N ineffective.[1366] We believe that the review and public disclosure process will improve the quality of information the Commission receives from NMS Stock ATSs, which will allow the Commission to better protect investors from potentially incomprehensible or incomplete disclosures that would misinform market participants about the operations of an NMS Stock ATS or the ATS-related activities of its broker-dealer operator.[1367]

We received several comment letters regarding whether the proposed amendments would adequately protect investors. One commenter was optimistic, stating the amendments are aimed at ''bolstering transparency in capital markets, which should enable and enhance investor protections.'' [1368] Three commenters were not as optimistic. One commenter states that the Commission review process for Form ATS–N ''will very quickly devolve into an unreasonably burdensome exercise for Commission staff while providing little benefit to market integrity or investor protection.'' [1369] Another commenter mentions that ''no amount of required public disclosure can cure the problem presented by an ATS that makes inaccurate disclosures to subscribers.'' [1370] A third states that no amount of disclosure can provide the necessary protection against broker-dealer conflicts of interest, and that more needs to be done to protect investors.[1371] We continue to believe that increased regulatory oversight and disclosure of NMS Stock ATS operations and activities would help protect investors. We expect that the quality of the information the Commission receives from NMS Stock ATSs will improve as a result of the incentives created by the procedure to review their filings and declare them ineffective, if necessary, and that the incidences of incomplete and incomprehensible disclosures would be mitigated. As market participants will not be able to trade on NMS Stocks ATSs that do not comply with Form ATS–N requirements, the review process will protect investors from events that may have transpired if ATSs, whose Forms ATS–N have been declared ineffective, were allowed to trade NMS stocks. Additionally, we continue to believe that the disclosure of broker-dealer conflicts of interest will allow market participants to better assess an NMS Stock ATS as a potential trading venue and thus better protect their interests.[1372]

b. Costs

As described in detail in the Proposal,[1373] we believe that the filing requirements of Form ATS–N could impose costs on NMS Stock ATSs. We recognize that an ineffectiveness declaration could impose costs on an NMS Stock ATS—such as costs from having to cease operations, roll back a change in operations, or delay the start of operations—and could impose costs on individual market participants and the overall market for NMS stock execution services resulting from a potential reduction in competition or the removal of a sole provider of a niche service within the market.[1374] However, NMS Stock ATSs and market participants would not incur these costs unless the Commission declares a Form ATS–N or a Form ATS–N amendment ineffective. We believe that NMS Stock ATSs would be incentivized to comply with the requirements of Form ATS–N, as well as federal securities laws, including the other requirements of Regulation ATS, to avoid an ineffectiveness declaration, which produces benefits to the market. Therefore, we believe that NMS Stock ATSs would be incentivized to submit Form ATS–N disclosures that are complete and comprehensive to avoid bearing the costs of resubmitting a Form ATS–N filing or of having their Form ATS–N declared ineffective.

We also understand that both new and existing NMS Stock ATSs will incur implementation costs in order to comply with the amendments to Regulation ATS. NMS Stock ATSs will need to develop internal processes to ensure correct and complete reporting on Form ATS–N, which can be viewed as a fixed setup cost, which NMS Stock ATSs may have to incur, regardless of the amount of trading activity that takes place on them. As a result, these implementation costs will fall more heavily on lower-dollar volume NMS Stock ATSs (as opposed to ATSs transacting greater dollar volume), because these ATSs have a smaller revenue base to accommodate the largely fixed implementation costs. However, smaller NMS Stock ATSs that are not operated by multi-service broker-dealer operators and do not engage in other brokerage or dealing activities in addition to their NMS Stock ATSs will likely incur lower implementation costs because certain sections of Form ATS–N (such as

[1363] *See supra* Section II.C (discussing the Form ATS filing requirements).

[1364] *See supra* Section V for information disclosed on ATS–N.

[1365] Three commenters agreed with our assessment that the enhanced disclosure requirements under Form ATS–N would result in improved regulatory oversight by the Commission. *See* Fidelity Letter at 1; SIFMA Letter at 3; Virtu Letter at 2.

[1366] *See supra* Section IV.A.4 (describing the effectiveness process for initial Form ATS–N filings).

[1367] One commenter agrees that our enhanced regulatory oversight can help ensure consistency of disclosures provided by ATSs and their broker-dealer operators. *See* Fidelity Letter at 1.

[1368] *See* CFA Institute Letter at 6.

[1369] *See* Consumer Federation of America Letter at 10.

[1370] *See* Fidelity Letter at 4.

[1371] *See* Better Markets Letter at 1, 5–6.

[1372] *See infra* Section X.C.2.a (''Economic Effects of Public Disclosure of Form ATS–N—Benefits'').

[1373] *See* Proposal, *supra* note 2, at 81120–21.

[1374] *See infra* Section X.C.4.a (''Impact on Efficiency, Competition, and Capital Formation—Competition'').

several items of Part II) will not be applicable to these NMS Stock ATSs.

In addition to affecting NMS Stock ATSs, the implementation costs could also indirectly affect market participants by potentially causing some NMS Stock ATSs to alter or reduce the services they offer to certain subscribers. For example, the adopted amendments might cause some NMS Stock ATSs to reduce or stop offering customized reports to certain subscribers in order to redirect resources to support the standardized reports.

Relative to the baseline, the amendments to Regulation ATS will also impose implementation costs for all NMS Stock ATSs, including Legacy NMS Stock ATSs, in that they will require NMS Stock ATSs to adhere to heightened disclosure and reporting requirements regarding their operations. Legacy NMS Stock ATSs should already comply with the current requirements of Regulation ATS. Therefore, the compliance costs of the amendments should be incremental relative to the costs associated with the existing requirements. Specifically, we believe that the incremental costs will consist largely of providing new disclosures and updating records and retention policies necessary to comply with the amendments. Based on the analysis for purposes of the PRA,[1375] we estimate that the amendments to Regulation ATS relating to Rules 301(b)(2)(viii) and 304 of Regulation ATS, including Form ATS–N, will result in a one-time burden of 127.4 hours for each NMS Stock ATS,[1376] which will result in an estimated one-time paperwork compliance cost to an NMS Stock ATS of approximately $41,689.10.[1377] This will result in an aggregate estimated initial hour burden for all NMS Stock ATSs to complete Form ATS–N and comply with Rules 301(b)(2)(viii) and 304 of Regulation ATS of 5,223.4 hours at an estimated cost of $1,709,253.10.[1378]

In addition to the implementation costs mentioned above, there are also expected ongoing costs for NMS Stock ATSs to comply with the amendments to Rule 3a1–1(a) and Regulation ATS. For instance, NMS Stock ATSs will incur ongoing costs associated with amending their Form ATS–N prior to material changes in their operations, or to correct any material information that has become inaccurate. Regardless of the reason for filing a Form ATS–N amendment, we estimate for the purposes of the PRA that it will take an NMS Stock ATS approximately 28.2 hours annually [1379] to prepare and file its Form ATS–N amendments at an estimated annual cost of $8,898.60 per ATS.[1380] This will result in an estimated aggregate ongoing hour burden for all NMS Stock ATSs to amend their Forms ATS–N and comply with Rules 301(b)(2)(viii) and 304 of Regulation ATS of 1,156.2 hours at an estimated cost of $364,842.60 annually.[1381]

Some existing NMS Stock ATSs that also trade non-NMS stocks might incur additional costs due to the amendments. As discussed above,[1382] pursuant to the amendments to Regulation ATS, an ATS that trades both NMS stocks and non-NMS stocks will be subject to the requirements of Rule 304 with respect to its NMS stock trading operations and Rule 301(b)(2) with respect to its non-NMS stock trading operations. Accordingly, NMS Stock ATSs that also transact in non-NMS stocks will incur additional implementation costs when compared to ATSs that only trade NMS stocks, because the former group will be required to file both Form ATS–N and a revised Form ATS that removes discussion of those aspects of the ATS related to the trading of NMS stocks. Those NMS Stock ATSs will also be required to file a pair of Forms ATS–R four times annually. For the purposes of the PRA, we estimate that the aggregate initial burden for those ATSs to separately file an initial Form ATS–N in regard to their NMS stock trading activity and a current Form ATS in regard to their non-NMS stock trading activity will be 1,774 hours [1383] at an aggregate estimated cost of $474,431.[1384] We also estimate that the aggregate annual burden to file separate Forms ATS–R for those ATSs that effect transactions in both NMS stocks and non-NMS stocks will be 180 hours [1385] at an aggregate estimated cost of $59,560.[1386] Furthermore, we estimate that these ATSs that facilitate transactions in both NMS stocks and non-NMS stocks will incur an additional estimated recordkeeping burden of 3 hours annually per ATS, resulting in an estimated cost of $333.96 per ATS [1387] and an aggregate estimated hour burden of 30 hours at an estimated cost of $3,339.60, due to the amendments to Rule 303(a)(2)(ii).[1388]

The amendments to Regulation ATS will require Form ATS–N be filed electronically in a structured format

[1375] *See supra* Section IX (estimating burden hours). We estimate the wage rate associated with these burden hours based on salary information for the securities industry compiled by SIFMA. The estimated wage figure for attorneys, for example, is based on published rates for attorneys, modified to account for a 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, yielding an effective hourly rate for 2013 of $380 for attorneys. *See* Securities Industry and Financial Markets Association, Management & Professional Earnings in the Securities Industry—2013, *available at: https://www.sifma.org/resources/research/management-and-professional-earnings-in-the-securities-industry-2013/*. These estimates are adjusted for an inflation rate of 6.85% based on the Bureau of Labor Statistics data on CPI–U between October 2013 and March 2018. Therefore, the current inflation-adjusted effective hourly wage rates for attorneys are estimated at $406 ($380 × 1.0685). We discuss other costs of compliance with the proposed rule below.

[1376] *See supra* note 1228 and accompanying text.

[1377] (Attorney at $406 × 54.1 hours) + (Chief Compliance Manager at $518 × 0.5 hours) + (Compliance Manager at $302 × 33.9 hours) + (Senior Systems Analyst at $278 × 30.25 hours) + (Senior Marketing Manager at $298 × 1 hour) + (Compliance Clerk at $68 × 7.65 hours) = $41,689.10. This compliance cost estimate for a Form ATS–N includes the estimated costs associated with completing Part III Items 24 and 25 of Form ATS–N, but as explained above, we believe that the majority of NMS Stock ATSs would not be required to complete those items of the form. *See supra* Section IX.D.2.b.i.C.

[1378] 127.4 burden hours × 41 NMS Stock ATSs = 5,223.4 burden hours. $41,689.10 × 41 NMS Stock ATSs = $1,709,253.10. This preliminary aggregate compliance cost estimate assumes that all NMS Stock ATSs would be required to complete Part III Items 24 and 25 of Form ATS–N. However, as noted above, we estimate that 1 NMS Stock ATS would be required to complete Part III, Item 24, *see supra* Section IX.D.2.b.i.C, and 2 NMS Stock ATSs would be required to complete Part III, Item 25, *see id.*

[1379] *See supra* Section IX.D.2.b.ii.B. As explained above, we estimate that each NMS Stock ATS would file 3 Form ATS–N amendments per year, and the hourly burden per amendment would be 9.4 hours.

[1380] (Attorney at $406 × 16.5 hours) + (Compliance Manager at $302 × 6 hours) + (Compliance Clerk at $68 × 5.7 hours) = $8,898.60.

[1381] 28.2 hours × 41 NMS Stock ATSs = 1,156.2 hours. $8.898.60 × 41 NMS Stock ATSs = $364,842.60.

[1382] *See supra* Section IX.D.2.b.iii.

[1383] *See supra* note 1255 and accompanying text.

[1384] ((Attorney for Form ATS at $406 × 13 hours) + (Attorney for Form ATS–N at $406 × 54.1 hours) + (Chief Compliance Manager for Form ATS–N at $518 × 0.5 hours) + (Compliance Manager for Form ATS–N at $302 × 33.9 hours) + (Senior Systems Analyst for Form ATS–N at $278 × 30.25 hours) + (Senior Marketing Manager for Form ATS–N at $298 × 1 hour) + (Compliance Clerk for Form ATS at $68 × 7 hours) + (Compliance Clerk for Form ATS–N at $68 × 7.65 hours)) × 10 ATSs = $474,431. This aggregate compliance cost estimate includes the estimated costs associated with completing Part III, Items 24 and 25 of Form ATS–N, but as explained above, we believe that the majority of NMS Stock ATSs would not be required to complete those items of the form. *See supra* Section IX.D.2.b.i.C.

[1385] *See supra* note 1258 and accompanying text.

[1386] ((Attorney at $406 × 3.5 hours) + (Compliance Clerk at $68 × 1 hours) × (4 filings annually)) × 10 ATSs = $59,560.

[1387] At an average cost per burden hour of $111.32, *see supra* note 1265, the resultant total related cost of compliance for each ATS would be $333.96 ((3 burden hours) × $111.32/hour).

[1388] 3 hours × 10 ATSs = 30 burden hours. $333.96 × 10 ATSs = $3,339.60. *See supra* Section IX.D.2.b.vi.

through EDGAR.[1389] Based on the widespread use and availability of the internet, we believe that filing Form ATS–N in an electronic format will be less burdensome and a more efficient filing process than the current paper process for NMS Stock ATSs and the Commission, as it is likely to be less expensive and cumbersome than mailing and filing paper forms to the Commission.

In order to electronically file a Form ATS–N, a broker-dealer operator of an NMS Stock ATS will need to access the EDGAR system. As discussed above,[1390] a broker-dealer that has not previously received access to EDGAR would need to submit a Form ID.[1391] For the purposes of the PRA, we estimate that each ATS that needs to submit a Form ID to gain access to EDGAR will incur a one-time burden of 0.15 hours, which would result in each ATS incurring a one-time estimated cost of $45.30.[1392] Based on analysis in the PRA, we estimate that each year 1 new NMS Stock ATS will be operated by an entity that needs to submit a Form ID to gain access to EDGAR.[1393] This would result in an aggregate estimated initial burden of 0.15 hours at an estimated cost of $45.30.[1394]

Rule 304(b)(3) will require each NMS Stock ATS to make public via posting on the NMS Stock ATS's website, a direct URL hyperlink to the Commission's website that contains the documents enumerated in Rule 304(b)(2). For the purposes of the PRA, we estimate that each NMS Stock ATS will incur an initial, one-time burden of approximately 2 hours to program and configure its website in order to post the required direct URL hyperlink pursuant to Rule 304(b)(3),[1395] which will result in each NMS Stock ATS incurring an estimated one-time cost of approximately $556.[1396] This will result in an aggregate estimated initial, one-time hour burden for all NMS Stock ATSs to comply with Rule 304(b)(3) of approximately 82 hours at an estimated cost of approximately $22,796.[1397]

2. Economic Effects of Public Disclosure of Form ATS–N

We believe that the amendments requiring public disclosure of Form ATS–N will improve the information available to market participants and make that information consistent, which would assist market participants in evaluating and choosing the NMS Stock ATSs to which they may route orders or become a subscriber due to the enhanced disclosure requirements. Requiring such public disclosure will increase the operational transparency requirements of NMS Stock ATSs to bring those requirements more in line with the operational transparency requirements of national securities exchanges.[1398]

a. Benefits

We believe that the public disclosure of Form ATS–N will generate greater transparency about the operations of NMS Stock ATSs and the ATS-related activities of their broker-dealer operators and their affiliates. This will aid market participants by reducing search costs when evaluating potential NMS stock trading venues to decide which venue best suits their trading purposes. This section discusses specific economic benefits of the public disclosure of Form ATS–N including: The economic benefits of public disclosure of standardized information about the operations of NMS Stock ATSs; the economic benefits of public disclosure of the ATS-related activities of the broker-dealer operator and its affiliates; the economic benefits of public disclosure of aggregate platform-wide order flow and execution statistics regarding the NMS Stock ATS; and the economic benefits of filing Form ATS–N in a structured format.

(i) Benefits of Public Disclosure of Standardized Information of Operations of NMS Stock ATSs

We believe that requiring detailed, public disclosures about the operations of NMS Stock ATSs will, among other things, better standardize the type of information market participants receive about those operations. As a result, search costs for market participants will be lower relative to the baseline, as homogenous disclosure requirements for all NMS Stock ATSs as part of the amendments to Regulation ATS should facilitate market participants' comparison of NMS Stock ATSs when deciding which venue most suits their trading purposes. Accordingly, as described in detail in the Proposal,[1399] we believe the enhanced operational transparency resulting from the public disclosures on Form ATS–N should aid market participants when evaluating potential trading venues, and that the requirement for NMS Stock ATSs to disclose whether and how they segment their order flow, any criteria used to assign order flow, and their fee structures should provide market participants with a better understanding of the operating environment for NMS Stock ATSs.[1400] Beyond providing benefits to market participants, the enhanced disclosure requirements for NMS Stock ATSs could provide benefits to certain NMS Stock ATSs or national securities exchanges.[1401] Since the establishment of Regulation ATS, the market for order execution services for trading NMS stocks—particularly on ATSs—has flourished. The number of ATSs that trade NMS stocks has increased substantially since the inception of Regulation ATS, and as of the end of the first quarter of 2018, trading volume of NMS stocks on ATSs accounted for 11.4% of total share volume.[1402] As they are expected to calibrate the level of transparency between NMS Stock ATSs and national securities exchanges, the amendments could foster greater competition for order flow of NMS stocks between these trading platforms. This greater competition for order flow could in turn incentivize NMS Stock ATSs to innovate—particularly in terms of their technology—so that they can attract more trading volume to their venue.

One commenter states that ''[f]ailing to extend enhanced transparency requirements to Exchanges for activities commensurate with those of ATSs would result in an incomplete picture of market quality, making it difficult for investors to conduct meaningful comparisons to inform their decisions and protect their own interests.'' [1403] As discussed above,[1404] national securities exchanges are already subject to more stringent public disclosure requirements than NMS Stock ATSs. For example,

[1389] *See supra* Section VII (Section in the front-end which specifically discusses structured disclosure aspects of Form ATS–N).

[1390] *See supra* Section IX.D.2.b.iv.

[1391] *See id* (discussing Central Index Key (''CIK'') numbers).

[1392] Compliance Manager at $302 × 0.15 hours = $45.30.

[1393] Because all ATSs, regardless of whether they trade NMS stocks, are operated by registered broker-dealers who have been assigned a CIK number, for the purposes of the PRA, we estimate that Legacy NMS Stock ATSs or non-NMS Stock ATSs that later decide to trade NMS stocks will not incur any costs associated with gaining access to EDGAR. *See supra* Section IX.D.2.b.iv.

[1394] 0.15 burden hours × 1 NMS Stock ATS = 0.15 burden hours. $45.30 × 1 NMS Stock ATS = $45.30.

[1395] *See supra* Section IX.D.2.b.v.

[1396] Senior Systems Analyst at $278 × 2 hours = $556.

[1397] 2 hours × 41 NMS Stock ATSs = 82 hours. $556 × 41 NMS Stock ATSs = $22,796.

[1398] *See supra* Section III.A.

[1399] *See* Proposal, *supra* note 2, at 81123–24.

[1400] *See* Proposal, *supra* note 2, at 81123 (discussing the effects of the increased public disclosures about the operations of NMS Stock ATSs on market participant search costs).

[1401] *See id* (discussing the effects of the increased public disclosures about the operations of NMS Stock ATSs on certain NMS Stock ATSs).

[1402] *See supra* Section X.B.1.

[1403] *See* Markit Letter at 4.

[1404] *See supra* Section X.B.5.a.

national securities exchanges are required to publicly file proposed rule changes with the Commission to disclose, among other things, their manner of operations and fees.[1405] These proposed rules changes are subject to notice and comment from the public, as well as Commission consideration, pursuant to Section 19(b) and Rule 19b–4.[1406] Therefore, we continue to believe that the adopted amendments would reduce the discrepancy in the level of transparency between NMS Stock ATSs and national securities exchanges, thereby assisting market participants in making more informed trading decisions and providing them with a clearer understanding about where to route their orders in order to receive best execution.

The adopted amendments modify the process for publicly disclosing a material amendment to a Form ATS–N from the process originally detailed in the Proposal.[1407] We proposed in Rule 304(b)(2)(iv) making all amendments to Form ATS–N, including material amendments, public upon filing.[1408] In response to commenters' concerns that making public Form ATS–N material amendments before expiration of the Commission's 30-day calendar review period could stifle innovation or be confusing or misleading to the public,[1409] we are modifying the proposed rules for making Form ATS–N material amendments public. Under the adopted amendments, the cover page of the filed material amendment will be made public by the Commission upon filing and, unless the Commission declares the material amendment ineffective, the entirety of the material amendment, as amended, will be made public by the Commission following the expiration of the Commission's 30-calendar day review period.[1410] The cover page would provide a brief narrative about the content of the amendment including: The Part and Item number of Form ATS–N that is subject to the change, whether or not such change will apply to all subscribers and the broker-dealer operator, and a brief summary of the change. Although the adopted process for material amendments would not provide market participants with as much transparency about a forthcoming material change to the operations of the NMS Stock ATS as the proposed process, we believe that the adopted process will provide increased transparency, relative to the baseline, to market participants about a material change during the Commission review period.

(ii) Benefits of Public Disclosure of the ATS-Related Activities of the Broker-Dealer Operator and Its Affiliates

Most NMS Stock ATSs are operated by broker-dealers that also engage in other brokerage and dealing activities.[1411] A broker-dealer operator of an NMS Stock ATS, or its affiliates, could have business interests that conflict with the interests of its ATS's subscribers,[1412] or customers of its subscribers.[1413] As described in more detail in the Proposal,[1414] we believe that public disclosure of detailed information about the ATS-related activities of the broker-dealer operator and its affiliates on Form ATS–N will allow market participants to better evaluate any conflicts of interest that may arise from such activities, allowing market participants to better determine whether submitting order flow to a particular NMS Stock ATS aligns with their business interests.[1415] Further, the enhanced disclosure requirements could discourage broker-dealer operators from trading internally as principal in their NMS Stock ATS under circumstances where the trading might raise conflict of interest concerns, because those operations will be subject to public scrutiny by market participants.[1416]

The adopted amendments modify the requests for information on Form ATS–N regarding the activities of the NMS Stock ATS broker-dealer operator and its affiliates from those in Proposed Form ATS–N.[1417] In response to commenters' concerns that the scope of the requests in Part III of proposed Form ATS–N are too broad (especially for large, multiservice broker-dealers) and might require information about the broker-dealer operator's and its affiliates' activities that do not directly relate to the NMS Stock ATS, we are modifying certain requests on proposed Form ATS–N to solicit information from NMS Stock ATSs that focus on (1) the ability of the business units or affiliates of the broker-dealer operator to enter, or direct the entry of, orders into the NMS Stock ATS; and (2) whether those business units and affiliates receive any preferential treatment with respect to the services offered by the NMS Stock ATS, including any special access to information about trading interest.[1418] This differs from the Proposal primarily with regard to the proposed requests for information about the trading centers of the broker-dealer operator and its affiliates that did not transact on the NMS Stock ATS. For example, Part III, Item 1 of proposed Form ATS–N would have required an NMS Stock ATS to disclose whether the broker-dealer operator or any of its affiliates operate or control any non-ATS trading center(s) that is an OTC market maker or executes orders in NMS stocks internally by trading as principal or crossing orders as agent (''non-ATS trading centers''), and if so, to (1) identify the non-ATS trading center(s); and (2) describe any interaction or coordination between the identified non-ATS trading center(s) and the NMS Stock ATS.[1419] We have modified this disclosure to omit from Form ATS–N a list of non-ATS trading centers of the broker-dealer operator or its affiliates that cannot trade on the NMS Stock ATS.

This modification means that, relative to the disclosures on proposed Form ATS–N, market participants will receive less information concerning the non-ATS related operations of the NMS Stock ATS broker-dealer operator and its affiliates. However, we believe that the disclosures in adopted Form ATS–N concerning the ATS-related activities of the broker-dealer operator or its affiliates will still allow market participants to better evaluate any potential conflicts of interest that may arise on the NMS Stock ATS. Therefore, we do not believe that the benefits from the public disclosure of the ATS-related

[1405] *See* Proposal, *supra* note 2, at 81011.

[1406] *See id.*

[1407] *See supra* Section IV.B.1.a (discussing Form ATS–N material amendments).

[1408] *See* Proposal, *supra* note 2, at 81034.

[1409] *See supra* Section IV.E.2.c.

[1410] *See id.*

[1411] *See supra* Section II.A.2.

[1412] Based on information provided on Form ATS, a small number of ATSs solely limit their broker-dealer business to the operation of an ATS.

[1413] One commenter states that unavoidable conflicts of interest arise if an operator (or its affiliates) engages in principal trading activities within the ATS or if it is informed by others' trading activities within the ATS. *See* HMA Letter at 13. Another commenter states ''conflicts of interest arising from the operational complexities of ATSs, including the dual roles of the broker-dealer as ATS operators and as brokers, proliferated, all while remaining invisible to investors.'' Better Markets Letter at 2.

[1414] *See* Proposal, *supra* note 2, at 81124–25.

[1415] A number of commenters generally agree with us that increased standardized information about the manner of operations of the broker-dealer that operates the NMS Stock ATS and potential conflicts of interest that may arise with its affiliates may better enable market participants to evaluate the extent to which individual trading venues align with their investment and trading decisions. *See* Fidelity Letter at 1; ICI Letter at 3; KCG Letter at 1; MFA/AIMA Letter at 2; PDQ Letter at 2; SIFMA Letter at 4–8.

[1416] *See* Proposal, *supra* note 2, at 81124 (discussing the effects of the public disclosure of the ATS-related activities of the broker-dealer operator and its affiliates).

[1417] *See* Proposal, *supra* note 2, at 81043.

[1418] *See supra* Section V.C.

[1419] *See* Proposal, *supra* note 2, at 81045.

activities of the broker-dealer operator or its affiliates on adopted Form ATS–N will vary significantly from the benefits described in the Proposal.[1420]

(iii) Benefits of Public Disclosure of Aggregate Platform-Wide Order Flow and Execution Statistics

Part III, Item 26 of adopted Form ATS–N requests that an NMS Stock ATS explain and provide the most recent disclosure of aggregate platform-wide order flow and execution statistics regarding the NMS Stock ATS that are not otherwise required disclosures under Exchange Act Rule 605 of Regulation NMS and that the NMS Stock ATS provided to one or more subscribers by the NMS Stock ATS at the end of calendar quarter. As described in detail in the Proposal, this disclosure request could benefit market participants.[1421]

NMS Stock ATSs that currently provide these aggregate platform-wide order flow and execution statistics to one or more subscribers could continue to provide their subscribers with these market quality statistics, in which case, the NMS Stock ATS will publicly disclose these statistics and how they are calculated in Form ATS–N, and all market participants, not just subscribers, would have access to the information. We believe this would reduce the discrepancy in information that subscribers receive and provide the opportunity for more market participants to benefit from this information which may be useful to market participants when evaluating an NMS Stock ATS as a possible venue to which to route orders in order to accomplish their investing or trading objectives.[1422] Further, to the extent that subscribers that receive those market quality statistics currently do not know how the NMS Stock ATS calculates the market quality statistics, adopted Form ATS–N would help these subscribers better understand the statistics.

Two commenters agree with us that the requirement to disclose aggregate platform-wide order flow and execution statistics on Form ATS–N, if they are otherwise disclosed to subscribers, could cause NMS Stock ATSs to stop providing these statistics to their subscribers.[1423] If some NMS Stock ATSs cease disclosing these market quality statistics to subscribers, it could reduce transparency to the detriment of the subscribers who currently benefit from the receipt of certain market quality statistics regarding an NMS Stock ATS, which could in turn result in spill-over effects on the market. One commenter agrees and states the elimination of this flow of information from the NMS Stock ATSs would have a deleterious effect on subscriber knowledge and understanding of a given ATS's operations, and negatively affect the availability of information that some subscribers consider important for their best execution determinations.[1424]

(iv) Benefits of Filing Form ATS–N in a Structured Format

We believe that benefits will accrue to both the Commission and market participants as a result of having a structured format for Form ATS–N. Specifically, having Form ATS–N filed in the XML text-searchable format will allow the Commission and its staff and market participants to efficiently review and analyze information provided on Form ATS–N. In particular, the XML format will allow the Commission and the public to better gather, analyze, aggregate, compare, and use the Form ATS–N data. Requiring XML should result in the Form ATS–N data being provided in a consistent, structured format. XML is an open standard that defines, or ''tags,'' data using standard definitions. The tags establish a consistent structure of identity and context. This consistent structure can be automatically recognized and processed by a variety of software applications such as databases, financial reporting systems, and spreadsheets, and then made immediately available to the end user to search, aggregate, compare, and analyze.

We believe that requiring Form ATS–N be provided in an XML format will provide the Commission and the public with data about NMS Stock ATSs in a format that facilitates search capabilities, and comparative analyses across NMS Stock ATSs and across filings, including more advanced text analytics for the more narrative responses of Form ATS–N. Absent this requirement of a specified format, users of the Form ATS–N data that wanted to aggregate the data or search across filings or filers would need to spend additional time transferring the data into a consistent format before it could be analyzed, or incur the cost of a service provider that specializes in this data aggregation and comparison process. Further, unrestricted manual entry of data could lead to errors, thereby potentially reducing data quality and usability.

Commenters who supported the standardization of Form ATS–N information also underscored the importance of making the information comparable.[1425] While the commenters did not make specific reference to the structured format, having the Form ATS–N information submitted using the Commission's XML schema will enhance the comparability of the Form ATS–N data by ensuring that the information has been submitted completely and consistently. Two commenters addressed the importance of completeness to Form ATS–N filings.[1426] With the Commission's XML schema, the restrictions incorporated into the schema (and consequently, also reflected in the web-fillable form) will help test for completeness of the data before submission and reduce filer uncertainty on the completeness and consistency of their filing. One commenter recommended that we consider ways to present information that would improve the readability and navigability of disclosure through the use of technology such as hyperlinks and/or XBRL technology.[1427] The XML format selected by us is a technology format that presents the data consistently, which improves the readability and navigability of the data. In fact, XBRL is an XML-based technology, but, as discussed later, we do not think that XBRL is the appropriate format for this form.[1428] While hyperlinks may be useful in some situations to cross-reference information, it does not by itself enhance the comparability of the underlying data, but can be incorporated within the XML format, as permitted.

b. Costs

We recognize that the filing and public disclosure of Form ATS–N and Form ATS–N amendments could impose costs on NMS Stock ATSs as well as costs on market participants. This section discusses specific costs associated with the filing and public disclosure of Form ATS–N including: the costs to NMS Stock ATSs; the effects of public disclosure of Form ATS–N on

[1420] *See* Proposal, *supra* note 2, at 81122.

[1421] *See* Proposal, *supra* note 2, at 81124.

[1422] *See id* (discussing how the disclosure of aggregate platform-wide order flow and execution statistics might help NMS Stock ATSs attract order flow).

[1423] *See* MFA/AIMA Letter at 5; SIFMA Letter at 27. One of these commenters suggests that these NMS Stock ATSs could begin to direct parties requesting statistics and analysis to order information available on FINRA's website or through third-party vendors. *See* SIFMA Letter at 27.

[1424] *See* SIFMA Letter at 27.

[1425] *See* Fidelity Letter at 1; Morgan Stanley Letter at 2; SIFMA Letter at 3; UBS Letter at 2–3.

[1426] *See* MFA/AIMA Letter at 4; SIFMA Letter at 32–33.

[1427] *See* Fidelity Letter at 5.

[1428] *See infra* Section X.D.11.

the price impact costs of market participants; and the costs associated with filing Form ATS–N and Form ATS–N amendments in a structured format.

(i) Costs to NMS Stock ATSs

We recognize that there would be costs that accrue to NMS Stock ATSs as a result of the adopted amendments. For NMS Stock ATSs, disclosure of previously non-public information could have some impact on the direction of order flow in the market. If this previously non-public information is valuable to certain NMS Stock ATSs—to the extent that it drives its revenues—disclosure of this information on Form ATS–N could be costly for these NMS Stock ATSs. For instance, disclosure of an NMS Stock ATS's innovations could potentially result in other ATSs implementing similar methodologies, which could cause the NMS Stock ATS to lose its technological advantage. Such an ATS may need to engage in costly research in order to develop new innovations to stay profitable in the market. If an ATS cannot innovate fast enough to regain its competitive advantage in the market, order flow may then potentially migrate to other NMS Stock ATSs, broker-dealers that operate non-ATS trading centers, or to national securities exchanges.[1429] Additionally, some order flow could be directed away from an NMS Stock ATS and towards one of these other trading centers if the disclosure of previously non-public information, such as aggregate platform-wide order flow and execution statistics or information about the ATS related activities of the broker-dealer operator and its affiliates, causes some market participants to discover that their orders would have a greater likelihood of receiving lower execution quality on the NMS Stock ATS relative to these other trading centers. As such, this may result in lower revenues for some NMS Stock ATSs. These ATSs may then find it unprofitable to continue operating as ATSs and could exit the market for stock execution services or switch their business strategies to increase market share or profitability, possibly by continuing to operate as non-ATS OTC execution venues, such as OTC trading venues in which the broker-dealer operator internalizes order flow.[1430]

However, as discussed above,[1431] we lack certain information necessary to quantify the extent to which entities that operate as ATSs for NMS Stocks would be dissuaded from doing so. Specifically, as discussed in the Proposal,[1432] the decision for an NMS Stock ATS to continue operating or to cease operating as an ATS depends on numerous factors and we lack information about many of those factors. Commenters did not provide any additional information or analysis that would allow us to quantify the impact on Legacy NMS Stocks ATSs or other entities that may otherwise seek to operate a new NMS Stock ATS. Therefore, while we continue to believe that the costs of the adopted amendments could cause some Legacy NMS Stock ATSs to cease operating as ATSs and could dissuade some entities who would seek to operate as ATSs for NMS Stocks from doing so, we remain unable to quantify that impact. Furthermore, we do not have information to make reasonable assumptions about the fraction of displaced volume—from NMS Stock ATSs that would cease operations—that would be internalized by broker-dealer operator or its affiliates or directed towards national securities exchanges, NMS Stock ATSs, or non-ATS OTC trading centers.

(ii) Price Impact Costs

We recognize that heightened disclosure requirements pertaining to the public disclosure of Form ATS–N could increase market participants' trading costs relative to the baseline if some ATSs cease operating as ATSs or if there is reduced entry of new NMS Stock ATSs. Institutional investors can elect to use NMS Stock ATSs in an attempt to minimize the price impact of their trades. Even though the size of the average order on NMS Stock ATSs has been shown to be roughly equivalent to that on national securities exchanges, smaller orders on NMS Stock ATSs can be the result of shredding larger orders.[1433] Preventing information regarding those orders from becoming public can minimize adverse price moves that may occur when proprietary traders learn that there may be large buyers or sellers in the market. Thus, NMS Stock ATSs represent a tool for institutional investors to help control information leakage.

If there is reduced entry of new NMS Stock ATSs or some NMS Stock ATSs cease operating as ATSs and shut down their ATSs as a result of the amendments, there could be a reduction in the number of trading platforms that allow institutional investors to control their price impact costs. Institutional investors who would have traded on these NMS Stock ATSs, might now have to trade on other trading venues, such as other NMS Stock ATSs, non-ATS OTC execution venues, or national securities exchanges. If institutional investors execute their orders on a national securities exchange, they might have to absorb price impact costs, because national securities exchanges may not offer a means for reducing these costs.

Additionally, if some NMS Stock ATSs cease operating as ATSs and begin operating as non-ATS OTC execution venues, such as an OTC trading venue in which the broker-dealer operator internalizes order flow, there could be an increase in the internalization of order flow. Increased internalization could reduce market depth and price informativeness and increase spreads and price impact costs.[1434] However, as discussed above,[1435] we do not know the extent to which the adopted amendments would affect an NMS Stock ATS's decision to continue operations or cease operating as an ATS, and, therefore, cannot estimate the number of ATSs that would cease operating as ATSs. Nor do we have information in order for us to make reasonable assumptions about the fraction of displaced volume—from NMS Stock ATSs that would cease operations—that would be internalized by a broker-dealer operator or its affiliates or directed towards national securities exchanges, NMS Stock ATSs, or non-ATS OTC trading centers. Commenters did not provide any additional information or analysis that would allow us to quantify the number of Legacy NMS Stocks ATSs that would cease operating as ATSs or estimate the impacts on internalization or order flow. Therefore, we cannot estimate the impact that the adopted amendments would have on an NMS Stock ATS's price impact costs.

As described in detail in the Proposal,[1436] the price impact cost institutional investors face on a national securities exchange is related to the depth of the market, and the depth of the market is often related to the market capitalization of a stock and its liquidity.[1437] Because NMS Stock ATSs

[1429] *See infra* Section X.C.4.a for a discussion of the competitive effects of these costs (''Impact on Efficiency, Competition, and Capital Formation—Competition'').

[1430] *See infra* Section X.C.4.a.i.

[1431] *See supra* Section X.C and *supra* note 1356.

[1432] *See* Proposal, *supra* note 2, at 81118.

[1433] *See* Tuttle: ATS Trading in NMS Stocks, *supra* note 1317.

[1434] *See supra* Section X.B.6.a.

[1435] *See supra* Section X.C and *supra* note 1356.

[1436] *See* Proposal, *supra* note 2, at 81127–28.

[1437] A deep market is one in which larger orders do not have a much greater impact on prices than smaller orders. *See* Foucault, Pagano and Roell, 2013, ''Market Liquidity,'' *Oxford University Press.*

trade larger dollar volume in small capitalization, low-priced stocks, the price impact costs for institutional investors that trade in such stocks could in fact increase significantly if many NMS Stock ATSs decide to exit the market. However, as discussed above,[1438] we cannot estimate what price market participants would receive in these stocks and, thus, we cannot estimate the price impact costs associated with the adopted amendments.

(iii) Filing in Structured Format

We understand that there are also costs associated with varying degrees of structuring Form ATS–N. By offering two options for filers to submit Form ATS–N in EDGAR, filers will be able to select the method best suited to their situation.[1439] We believe that the XML format of Form ATS–N has enhanced benefits for the Commission's and market participants' use of Form ATS–N while minimizing costs relative to filers having to file Form ATS–N using other structured formats.[1440] By requiring the XML format, the Form ATS–N data must be structured to conform to incorporated validations. As stated previously, the validations will not test for the underlying accuracy of the data, but it will test for consistency and completeness.[1441] For the NMS Stock ATSs that file Form ATS–N, the validations will help ensure that the form they submit is complete and appropriately formatted so that additional time will not have to be spent on subsequent Form ATS–N filings to correct for those errors. By comparison, the EFFS system originally proposed does not support the open-source XML format, but rather a proprietary XML implementation called XFDL. As a result, the EFFS system has fewer validation capabilities and cannot test for consistency and completeness as broadly as the XML format, in particular, at the element level. In addition, as proposed, filers would have been required to individually upload each narrative response as a separate exhibit, whereas EDGAR permits filers to provide all of their narrative responses within one structured XML file, which will slightly diminish their time spent in filing in the Form ATS–N information.

3. Economic Effects of Written Safeguards and Written Procedures To Protect Subscribers' Confidential Trading Information, and Recordkeeping Requirements

a. Benefits

As explained above, we believe that the amendments to Rules 301(b)(10) [1442] and 303(a)(1) [1443] of Regulation ATS could increase investor protection by strengthening the effectiveness of NMS Stock ATSs' safeguards and procedures to better protect confidential subscriber trading information and improving those ATSs' ability to implement and monitor the adequacy of, and the ATSs' compliance with, their safeguards and procedures.[1444] Furthermore, as discussed above,[1445] we believe that requiring ATSs to memorialize their safeguards and procedures in writing will improve Commission oversight by helping the Commission better understand, monitor, and evaluate how each NMS Stock ATS protects subscribers' confidential trading information from unauthorized disclosure and access, which in turn could increase investor protection.[1446] We also expect that this requirement will help oversight by the SRO of which the NMS Stock ATS's broker-dealer operator is a member.

b. Costs

We believe that there would be implementation costs for NMS Stock ATSs that have not preserved in writing their safeguards and procedures to protect subscribers' confidential trading information and their oversight procedures to ensure that those safeguards and procedures are followed, which are required under Rule 301(b)(10) of Regulation ATS.[1447] Based on the analysis for purposes of the PRA, we estimate that, in order to comply with the amendments to Rules 301(b)(10) and 303(a)(1)(v) of Regulation ATS,[1448] it could take up to 87 ATSs an estimated one-time burden of up to 8 hours each, resulting in an estimated one-time paperwork cost of $2,910 for each ATS.[1449] This would result in an aggregate estimated initial hour burden of 696 hours at an estimated cost of $253,170.[1450]

Furthermore, the amendments to Rules 301(b)(10) and 303(a)(1)(v) relating to written safeguards and written procedures to protect subscribers' confidential trading information would impose ongoing costs for all NMS Stock ATSs. For the purposes of the PRA, we estimate it could take approximately 4 hours annually for each ATS to update and maintain these safeguards and procedures,[1451] resulting in an estimated annual paperwork cost for each ATS of $948.[1452] This would result in an estimated aggregate ongoing hour burden for all ATSs to maintain and update their safeguards and procedures pursuant to Rules 301(b)(10) and 303(a)(1)(v) of 348 hours at an estimated cost of $82,476 annually.[1453]

We are also amending the recordkeeping rules relevant to the amendments to Rule 301 and new Rule 304. NMS Stock ATSs shall preserve Form ATS–N, Form ATS–N amendments, and a Form ATS–N notice of cessation for the life of the enterprise and any successor enterprise pursuant to Rule 303(a)(2) [1454] of Regulation ATS.[1455] We are also amending Rule 303(a)(1) [1456] so that ATSs must preserve for a period of not less than three years, the first two in an easily accessible place, the written safeguards and procedures that would be required under the amendments to Rule 301(b)(10). We understand that these amendments regarding recordkeeping requirements will require NMS Stock ATSs to set up systems and procedures, and these are expected to account for a portion of the implementation costs

[1438] *See supra* Section X.C and *supra* note 1356.

[1439] *See supra* Section VII.

[1440] *See infra* Section X.D.11.

[1441] *See supra* Section VII (discussing structured disclosure aspects of Form ATS–N).

[1442] 17 CFR 242.301(b)(10).

[1443] 17 CFR 242.303(a).

[1444] *See supra* Section VI.

[1445] *See id.*

[1446] Three commenters agree with us that requiring ATSs to adopt written safeguards and written procedures would be beneficial to Commission oversight by helping the Commission better understand, monitor, and evaluate how each ATS protects subscribers' confidential trading information from unauthorized disclosure and access. *See* HMA Letter at 17–18; ICI Letter at 10–11; MFA/AIMA Letter at 6.

[1447] 17 CFR 242.301(b)(10).

[1448] *See supra* Section VI.

[1449] (Attorney at $406 × 7 hours) + (Compliance Clerk at $68 × 1 hour) = $2,910. As explained in the PRA, we believe that the majority of ATSs already maintain their written safeguards and procedures in writing, so most ATSs would not incur this initial cost. *See supra* Section IX.D.1.b. For purposes of this economic analysis, however, we assume that the initial cost of this new requirement would be imposed on all ATSs.

[1450] 8 hours × 87 ATSs = 696 hours. $2,910 × 87 ATSs = $253,170.

[1451] *See supra* note 1116 and accompanying text.

[1452] (Attorney at $406 × 2 hours) + (Compliance Clerk at $68 × 2 hours) = $948 annual paperwork cost per ATS.

[1453] 4 annual burden hours × 87 ATSs = 348 annual burden hours. $948 annual paperwork cost per ATS × 87 NMS Stock ATSs = $82,476 aggregate annual paperwork cost.

[1454] 17 CFR 242.303(a)(2).

[1455] An NMS Stock ATS that had previously made filings on Form ATS would be required to preserve those filings for the life of the enterprise, as well as filings made going forward on Form ATS–N.

[1456] 17 CFR 242.303(a)(1).

related to Rules 301(b)(2)(viii) and 304 of Regulation ATS [1457] and the amendments to Rules 301(b)(10) and 303(a)(1)(v) of Regulation ATS discussed above.

4. Impact on Efficiency, Competition, and Capital Formation

We have considered the effects of the amendments on efficiency, competition, and capital formation. We believe that the amendments will help market participants make better informed decisions about where to route their orders in order to achieve their trading or investment objectives, enhance execution quality, and improve efficiency and capital allocation.

We understand that the amendments to Regulation ATS could affect the competitive dynamics in the market for NMS stock execution services.[1458] These disclosure requirements for NMS Stock ATSs could create a disincentive for entities to become ATSs in the market for NMS stock execution services and also result in some stand-alone ATSs exiting the market and some multi-service broker-dealers electing to cease operating their NMS Stock ATSs and instead initiate or increase operations as non-ATS OTC execution venues. However, in spite of these costs, and as discussed in more detail below, we believe that the NMS Stock ATSs that remain may propagate greater interaction between buyers and sellers who trade on these venues, fostering not only trading between one and another, but also facilitating the price discovery process and capital formation. The consistent set of information that will be disclosed in Form ATS–N will impact how market participants react in terms of their trading, which could improve market efficiency.[1459]

Moreover, increased transparency regarding the operations of NMS Stock ATSs could impact competition between broker-dealers that operate NMS Stock ATSs and broker-dealers who trade NMS stocks but do not operate an NMS Stock ATS, such as internalizers. Because broker-dealers who transact in NMS stocks but do not operate ATSs are not subject to the operational transparency requirements, these broker-dealers could obtain a competitive advantage and attract and internalize order flow that would otherwise be entered and executed on NMS Stock ATSs. Furthermore, greater operational transparency of NMS Stock ATSs could also impact competition between NMS Stock ATSs and national securities exchanges, resulting in a larger amount of order flow being executed on national securities exchanges.

a. Competition

The adopted amendments could impact the competitive dynamics in the market for NMS stock execution services, which includes competition between national securities exchanges and NMS Stock ATSs, among NMS Stock ATSs themselves, and between broker-dealers that operate NMS Stock ATSs and those that do not.

As discussed above,[1460] we believe that the public disclosure of Form ATS–N could appropriately calibrate the level of transparency between NMS Stock ATSs and national securities exchanges, which could foster even greater competition for order flow of NMS stocks between those trading platforms. However, the increased public disclosure requirements associated with adopted Form ATS–N along with the uncertainty as to whether a Form ATS–N will be declared ineffective may raise the barriers to entry for new entities seeking to act as ATSs in the market for NMS stock execution services and may cause some existing Legacy NMS Stock ATSs to cease operating as ATSs. This could affect competition in the market for NMS stock execution services, which could in turn affect market participants. Additionally, the public disclosure of some previously non-public information about the manner of operations of the ATS, such as information on certain matching methodologies or order types, along with the greater competition for order flow, could affect the incentives of NMS Stock ATSs to innovate.

The sections below discuss specific impacts of the adopted amendments on the competitive dynamics in the market for NMS stock execution services, including: Their impact on the entry of new NMS Stock ATSs and the continuation of existing Legacy NMS Stock ATSs, the impact of changes in the number of NMS Stock ATSs on market participant trading costs, and their impact on the incentives of ATSs to innovate.

(i) Entry of New and Continuation of Legacy NMS Stock ATSs

We believe that the adopted amendments could potentially raise the barriers to entry for new entities seeking to act as ATSs in the market for NMS stock execution services and could also affect the decision of Legacy NMS Stock ATSs to continue operating as ATSs. As discussed in more detail below, the uncertainty surrounding whether Form ATS–N and Form ATS–N amendment filings will be declared ineffective, the increased implementation and ongoing compliance costs associated with the adopted amendments, and the effects of public disclosure of previously non-public information required on Form ATS–N might dissuade some potential new ATSs from entering the market and could cause some Legacy NMS Stock ATSs to cease operating as ATSs.[1461]

If the costs of the adopted amendments make it unprofitable for the broker-dealer operator of a Legacy NMS Stock ATS to continue operating the ATS,[1462] the broker-dealer operator could sell the ATS to another broker-dealer or shut down the ATS. Alternatively, a multi-service broker-dealer operator could cease operating the Legacy NMS Stock ATS as an ATS and instead initiate operations as a non-ATS OTC execution venue, such as an OTC trading venue in which the broker-dealer operator internalizes order flow.[1463] If a Legacy NMS Stock ATS that ceases operations is operated by a multi-service broker-dealer operator that also operates, or has affiliates that operate, other non-ATS OTC execution venues, the multi-service broker-dealer operator or its affiliates could increase operations at one of these venues instead of choosing to operate the Legacy NMS Stock ATS as a non-ATS OTC execution venue. If a Legacy NMS Stock ATS ceases to operate as an ATS, the broker-dealer operator or its affiliates might internalize the order flow that would have typically been sent to the ATS or they might send that order flow to a third-party broker-dealer to internalize.[1464] Alternatively, the displaced order flow could be sent to one of the remaining NMS Stock ATSs

[1457] *See supra* Section X.C.1.b.

[1458] *See infra* Section X.C.4.a (''Impact on Efficiency, Competition, and Capital Formation—Competition'').

[1459] *See infra* Section X.C.4.b (''Impact on Efficiency, Competition, and Capital Formation—Efficiency'').

[1460] *See supra* Section X.C.2.a.

[1461] Several commenters agreed that the disclosure requirements associated with Form ATS–N could act as a barrier to entry for new NMS Stock ATSs in the market; dissuade some existing ATSs from continuing to operate as ATSs; and force some smaller NMS Stock ATSs out of business. *See* Fidelity Letter at 10; Luminex Letter at 1–2; STANY Letter at 2.

[1462] *See supra* Section X.C.1.b, Section X.C.2.b, and Section X.C.3.b.

[1463] One commenter said that the disclosure obligations that only apply to broker-dealer ATS operators may incentivize broker-dealer ATS operators to seek alternatives other than operating an ATS. *See* Morgan Stanley Letter at 3.

[1464] One commenter said the disclosure requirements could result in ATSs closing down their NMS Stock ATS operations and increase the use of broker-dealer internalized executions. *See* Fidelity Letter at 4, 5, 9, 10–11.

or to a national securities exchange for execution.

If increased barriers to entry cause fewer ATSs to enter the market or the increased costs of the adopted amendments cause some unprofitable Legacy NMS Stock ATSs to shut down operations, there could be fewer trading venues in the market for NMS Stock execution services. We believe that if the adopted amendments result in fewer trading venues in the market or cause some Legacy NMS Stock ATSs to operate as non-ATS OTC execution venues, it could affect market participants by reducing the number of NMS stock trading venues and, thus, reducing a market participant's opportunities to minimize its trading costs by sending orders to different trading platforms.[1465]

While we believe that the adopted amendments could act as a barrier to entry or dissuade some existing ATSs from continuing to operate as ATSs, we reiterate that we lack certain information necessary to quantify the extent to which entities that otherwise would seek to operate as ATSs for NMS Stocks would be dissuaded from doing so.[1466] Specifically, as discussed in the Proposal,[1467] the decision for an NMS Stock ATS to continue operating or to cease operating as an ATS depends on numerous factors and we lack information about many of those factors. For example, we do not have information on the extent to which existing NMS Stock ATSs or potentially new ATSs rely on a competitive advantage, such as a unique matching methodology, to attract order flow or the extent to which the new rule and amendments would impact that competitive advantage. Furthermore, the decision to cease operating as an ATS is idiosyncratic to the particular NMS Stock ATS and we cannot ascertain the extent to which small (or in fact large) ATSs may be more prone to cease operating as ATSs.[1468]

Commenters did not provide any additional information or analysis that would allow us to quantify the impact on Legacy NMS Stocks ATSs or other entities that might otherwise seek to operate a new NMS Stock ATS. Therefore, while we continue to believe that the costs of the adopted amendments could cause some Legacy NMS Stock ATSs to cease operating as ATSs and could dissuade some entities who would seek to operate as ATSs for NMS Stocks from doing so, we remain unable to quantify that impact.

The subsections below discuss how various elements of the adopted amendments could potentially affect the barriers to entry for new entities seeking to act as ATSs and the decision of Legacy NMS Stock ATSs to continue or cease operating as ATSs in the market for NMS stock execution services, including: The enhanced filing requirements of Form ATS–N, the implementation and ongoing compliance costs associated with the adopted amendments, and the public disclosure of previously non-public information required on Form ATS–N.

(a) Enhanced Filing Requirements of Form ATS–N

The filing requirements of Form ATS–N will impose costs on NMS Stock ATSs. An ineffectiveness declaration would impose costs on an NMS Stock ATS—such as costs from having to cease operations, roll back a change in operations, or delay the start of operations—and could impose costs on the overall market for NMS stock execution services resulting from a potential reduction in competition or the removal of a sole provider of a niche service within the market. The adopted amendments to Regulation ATS might beget uncertainty as to whether an NMS Stock ATS's Form ATS–N will be declared ineffective.[1469] Greater uncertainty surrounding this process might act as a deterrent for potential ATSs wishing to effect transactions in NMS stocks, which could raise barriers for potential new entrants to the market for NMS stock execution services.

The amendments we are adopting permit a Legacy NMS Stock ATS to continue its operations, on a provisional basis, pursuant to the filed initial Form ATS–N, and any amendments thereto, during the Commission's review of its initial Form ATS–N. However, if after notice and opportunity for hearing, the Commission declares the Form ATS–N filed by a legacy NMS Stock ATS ineffective, the ATS would be required to cease its activities relating to NMS stocks. The NMS Stock ATS would then have the opportunity to address deficiencies in the previously filed form by filing a new Form ATS–N.[1470]

The Commission could also declare amendments to an effective Form ATS–N ineffective. In particular, the adopted amendments require an NMS Stock ATS to file amendments on Form ATS–N to notice a material change to its operations at least 30 days prior to implementing that material change.[1471] If the Commission declares a material amendment ineffective before this advance notice period has expired, the NMS Stock ATS would be required to unwind the material change if it has already been implemented on the ATS or be precluded from proceeding to implement the change if it was not already implemented. The NMS Stock ATS could, however, continue to operate pursuant to a Form ATS–N that had become effective.[1472] Given the additional uncertainty introduced by the possibility that the Commission could declare a Form ATS–N or a Form ATS–N amendment ineffective, coupled with the number and complexity of the new disclosures that would be required under Form ATS–N, some broker-dealer operators of Legacy NMS Stock ATSs might find that the costs of compliance outweigh the benefits of continuing to operate their NMS Stock ATS, particularly if the operation of the ATS does not constitute a significant source of profit for a broker-dealer operator. As such, some NMS Stock ATSs might elect to cease operating as an ATS.

The adopted amendments might also potentially raise the barriers to entry for new entities seeking to act as ATSs in the market for NMS stock execution service by delaying the start of operations for new NMS Stock ATSs. Currently, to comply with Regulation ATS, an entity seeking to operate as an ATS must, among other things, file an initial operation report with the Commission on Form ATS at least 20 days before commencing operations.[1473] Under the adopted amendments, an entity seeking to operate as an ATS in the market for NMS stock execution services could not commence operations until its initial Form ATS–N became effective, which could occur 120 calendar days after initially filing Form ATS–N with the Commission or at the end of the extended Commission review period.[1474] Additionally, the disclosures required by Form ATS–N would be more comprehensive and require

[1465] *See infra* Section X.C.4.a.ii.

[1466] *See supra* Section X.C and *supra* note 1356.

[1467] *See* Proposal, *supra* note 2, at 81118.

[1468] *See id.*

[1469] *See supra* Section X.C.1.b.

[1470] *See supra* Section IV.A.3.

[1471] The amendments to Rule 301(a)(5) could, under exceptional circumstances such as to prevent substantial harm to market participants, allow an NMS Stock ATS to implement a material change more quickly by seeking an exemption from the Commission from the 30-calendar day advance notice requirements of Rule 304(a)(2)(i)(A). *See supra* Section III.B.3.

[1472] Nothing would preclude the NMS Stock ATS from later submitting a new or revised Form ATS–N amendment for consideration by the Commission.

[1473] *See supra* Section II.C.

[1474] Our review period could last less than 120 days. Alternatively, we could extend the review period 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. *See supra* Section IV.A.2.

significantly more detail than those required on current Form ATS, which in turn could also delay the start of operations for new NMS Stock ATSs.

(b) Implementation and Ongoing Compliance Costs

As explained above, NMS Stock ATSs will incur both implementation and ongoing costs to meet the regulatory requirements under Rule 304.[1475] On the margin, if these costs outweigh the benefits of operating an NMS Stock ATS, they could act as a deterrent for potential ATSs wishing to effect transactions in NMS stocks or cause some Legacy NMS Stock ATSs to cease operating as an ATS. However, we do not believe that the implementation and ongoing costs are significant enough to make this a likely possibility.

The implementation and ongoing costs associated with filing Form ATS–N could also differentially affect small and large NMS Stock ATSs. As Table 1 shows, there is a significant degree of difference in the size of NMS Stock ATSs, when measured by dollar or share volume. We believe that the estimated implementation cost is a fixed cost that would be roughly similar across NMS Stock ATSs, regardless of their dollar volume size; this implies that implementation costs will represent a larger fraction of revenue generated on a small NMS Stock ATS relative to that percentage on a large NMS Stock ATS. If the costs associated with filing Form ATS–N become disproportionately greater for smaller volume NMS Stock ATSs, some of these Legacy NMS Stock ATSs might be more likely to cease operating as ATSs. However, if the NMS Stock ATSs that decide to cease operating as ATSs due to this fixed implementation cost only transact small dollar (or share) volume, there may not be a large impact on the overall competitive structure for remaining NMS Stock ATSs. Moreover, the order flow that was being traded on these small NMS Stock ATSs might be absorbed and redistributed amongst these larger remaining NMS Stock ATSs. On the other hand, if the implementation costs cause a small NMS Stock ATS that is the sole provider of a niche service to cease operating as an ATS, it could affect market participants by requiring them to seek execution on other NMS stock trading venues that do not minimize their trading costs to the same extent.[1476]

(c) Public Disclosure of Form ATS–N

Once an NMS Stock ATS's initial Form ATS–N has become effective, the information disclosed on Form ATS–N will be made available to the broader investing public.[1477] Updating and correcting amendments to Form ATS–N, as well as the cover page of material amendments, would be made public upon filing and the entirety of material amendments to Form ATS–N would be made public following the expiration of the review period.[1478]

While the information elicited on Form ATS–N is similar to the information that national securities exchanges are required to publicly disclose, we believe that the disclosure of this previously non-public information could have some impact on the competition for order flow in the market. For instance, to the extent that an NMS Stock ATS's competitive advantage in the market is driven by its matching methodology, other operational characteristics that are currently confidential, or the non-public disclosure of certain aggregate platform-wide market quality statistics provided to subscribers, the disclosure of this information could result in other NMS Stock ATSs implementing similar methodologies, which might cause market participants to direct more order flow to those other NMS Stock ATSs. In addition, some order flow might be directed away from NMS Stock ATSs and towards national securities exchanges or broker-dealers that operate non-ATS trading centers if market participants discover that their orders would have a greater likelihood of receiving lower execution quality on an NMS Stock ATS relative to these other trading centers. As such, this could result in lower revenues for some NMS Stock ATSs. Those ATSs might then find it unprofitable to continue operating as ATSs. This might cause the broker-dealer operator to sell the ATS to another broker-dealer or shut down the ATS. It could also cause the broker-dealer operator to switch its business strategies to increase market share or profitability, possibly by continuing to operate as a non-ATS OTC execution venue, such as OTC trading venue in which the broker-dealer operator internalizes order flow. The disclosure of previously non-public operational information required under initial Form ATS–N could erode a new NMS Stock ATS's competitive advantage and prevent it from attracting order flow. This could potentially raise the barriers to entry for new entities seeking to act as ATSs in the market for NMS stock execution services and dissuade some entities that would potentially seek to operate as ATSs for NMS stocks from doing so. We believe that a reduction in the entry of new ATSs or some Legacy NMS Stock ATSs electing to cease operating as ATSs could affect competition in the market for NMS Stock execution services, which could in turn affect market participants.

Not only could an NMS Stock ATS's competitive advantage be driven by its current matching methodology or other operational characteristics, it could also be driven by the NMS Stock ATS's ability to improve these methodologies through technological innovation or enhancements.[1479] We believe that the disclosure of an NMS Stock ATS's innovations in Form ATS–N amendments could potentially result in certain NMS Stock ATSs losing their technological advantage. If NMS Stock ATSs cannot innovate fast enough to regain their competitive advantage in the market, orders may also flow away from those NMS Stock ATSs, and as a result, those trading venues may choose to cease operating as ATSs if operating the ATS becomes unprofitable for the broker-dealer operator.

Both large and small NMS Stock ATSs could be affected by the detailed disclosures required under Rule 304 and Form ATS–N, though, the adopted amendments could affect the ability of each type of ATS to stay in the market differently. As noted above, to the extent that an ATS's dominance in the market—in terms of being able to attract substantial NMS stock trading volume—is driven by its matching methodology or other operational characteristics that are currently confidential, the public disclosure of this information might result in lower revenue for the NMS Stock ATS. If public disclosure reduces revenue for a small NMS Stock ATS, or a large ATS without a substantial profit margin, the broker-dealer operator might no longer view the ATS as being profitable and cease operating it as an ATS. The broker-dealer operator of a large ATS that ceases operating as an ATS might be more likely to continue to operate the system as a non-ATS OTC execution venue. However, the broker dealer of a small ATS that ceases to operate as an ATS could potentially shutdown the ATS altogether. Alternatively, if public disclosure reduces revenue for a large NMS Stock ATS or a smaller NMS Stock ATS with large profit margins, such an ATS may

[1475] *See supra* Section X.C.1.b (''Economic Effects of Enhanced Filing Requirements of Form ATS–N—Costs'').

[1476] *See infra* Section X.C.4.a.ii.

[1477] *See supra* Section V for information contained on Form ATS–N.

[1478] *See supra* Section IV.E. *See also* Rule 304(b)(2).

[1479] *See infra* X.C.4.a.iii.

continue operating as an ATS but may need to engage in costly research in order to develop new methodologies or enhancements that are less likely to be affected by the public disclosure requirements in order to stay profitable in the market. Further, if revenue and earnings margins for operating an NMS Stock ATS are below the average for the entire market, the NMS Stock ATS risks being squeezed out by its competitors and could potentially cease operating as an ATS.[1480] As discussed in detail above,[1481] the effect on market participants if an ATS ceases operating as an ATS could vary based on the size (dollar volume) of the ATS. If the NMS Stock ATSs that cease operating as ATSs transact only small dollar (or share) volumes, we might not expect to see a large impact on the overall competitive structure of the NMS Stock ATSs that would remain in the market. Many smaller NMS Stock ATSs might not engage in other brokerage or dealing activities in addition to the operation of their NMS Stock ATS. Therefore, certain aspects of Form ATS–N (such as several items of Part II) might not be applicable to smaller NMS Stock ATSs, which would reduce the burdens and mitigate the effects of the disclosure requirements on these smaller NMS Stock ATSs.

The increased transparency regarding the operations of NMS Stock ATSs might impact competition between broker-dealers that operate NMS Stock ATSs and broker-dealers who trade NMS stocks but do not operate an NMS Stock ATS, such as internalizers. Because broker-dealers who transact in NMS stocks but do not operate ATSs are not subject to the operational transparency requirements, these broker-dealers could be at a competitive advantage and attract and internalize order flow that would otherwise be entered and executed on NMS Stock ATSs.[1482] These disclosure requirements could also influence a broker-dealer operator's decisions with respect to its operations of the NMS Stock ATS. Given the disclosure requirements regarding the ATS-related activities of broker-dealer operators and their affiliates, a multi-service broker-dealer operator of an NMS Stock ATS might cease operating its NMS Stock ATS as an ATS and instead internalize the order flow or send that order flow to a third-party broker-dealer that executes it.[1483] Alternatively, the broker-dealer operator might send the order flow to a non-affiliated NMS Stock ATS that is operated by a non-multi-service broker-dealer, which would likely not encounter the same potential conflicts of interest as a multi-service broker-dealer that operates an NMS Stock ATS. Finally, the broker-dealer operator could also send its order flow to national securities exchanges for execution. While we cannot quantify how much order flow from these displaced multi-services broker-dealers that operate NMS Stock ATSs would be routed back to national securities exchanges,[1484] we believe that routing order flow to lit venues could potentially have some positive effects on price discovery and transparency.[1485]

In response to commenters' concerns that proposed Form ATS–N would have required the public disclosure of proprietary or commercially sensitive information, we have revised the adopted Form ATS–N requests to not seek disclosure of certain information that could be proprietary or commercially sensitive, such as routing tables or numerical order flow segmentation metrics.[1486] Additionally, we have revised the disclosures concerning the broker-dealer operator and its affiliates to focus on (1) the ability of the business units or affiliates of the broker-dealer operator to enter, or direct the entry of, orders into the NMS Stock ATS; and (2) whether those business units and affiliates receive any preferential treatment with respect to the services offered by the NMS Stock ATS, including any special access to information about trading interest.[1487] We believe these changes should reduce the costs of the public disclosure of Form ATS–N for a NMS Stock ATS relative to what they were in the Proposal.[1488] Additionally, these changes, because of the decreased costs of public disclosure relative to the Proposal, should reduce the barriers to entry and also reduce the likelihood that a Legacy NMS Stock ATS ceases operating as an ATS compared to the Proposal.

(ii) Effects of Changes in Number of NMS Stock ATSs on Market Participant Trading Costs

Overall, we believe that the possible decision of entities that currently are NMS Stock ATSs to cease operating as ATSs, or the reduced entry of new NMS Stock ATSs, due to the requirements under Rule 304 and Form ATS–N could affect competition in the market for NMS stock execution services and could impact market participants by reducing the number of entities that are willing to act as NMS Stock ATSs and publicly disclose how they operate. If there is a reduction in the number of trading venues, either from some Legacy NMS Stock ATSs shutting down their operations or reduced entry into the market by prospective NMS Stock ATSs, it could impact market participants by reducing the number of NMS stock trading venues and, thus, reducing market participants' opportunities to minimize its trading costs by sending orders to different trading platforms. Additionally, if some Legacy NMS Stock ATSs cease operating as ATSs and begin to operate as non-ATS OTC execution venues, there might be an increase in the internalization of order flow. Increased internalization could reduce market depth and price informativeness and increase spreads,[1489] which could increase market participant trading costs. Therefore, the possible decision of NMS Stock ATSs to cease operating as ATSs and lower rate of entry for new NMS Stock ATSs could result in greater costs relative to the baseline cost savings that NMS Stock ATSs currently afford market participants.

However, as discussed above and in the Proposal,[1490] we lack information to determine the extent to which the increased public disclosure requirements associated with adopted Form ATS–N or the uncertainty as to whether a Form ATS–N will be declared ineffective would affect a Legacy NMS Stock ATS's decision to continue operations or cease operating as an ATS or the decision of potential ATSs to enter the market. Therefore, we cannot

[1480] *See* Singhvi, Surrendra S. and Harsha B. Desai, 1971, ''An Empirical Analysis of the Quality of Corporate Financial Disclosure,'' *Accounting Review* 46, 129–138.

[1481] *See supra* Section X.C.4.a.i.B.

[1482] Four commenters assert that the enhanced filing requirements under the amendments to Regulation ATS would disproportionately impact multi-service broker-dealers who operate NMS Stock ATSs relative to other broker-dealers. These commenters state that these broker-dealers are held to a higher disclosure standard than broker-dealers that do not operate ATSs. *See* Fidelity Letter at 4, 9, 11; Liquidnet Letter at 9; Morgan Stanley Letter 2; STA Letter at 2.

[1483] One commenter agrees that the enhanced disclosure requirements may incentivize multi-service broker-dealer ATS operators to seek alternatives other than operating an ATS. *See* Morgan Stanley Letter at 3. Another commenter states that the enhanced disclosure requirements could result in ATSs closing down their NMS Stock ATS operations and increase the use of broker-dealer internalized executions. *See* Fidelity Letter at 4, 9, 10–11.

[1484] *See supra* Section X.C.

[1485] *See infra* Section X.4.b (''Impact on Efficiency, Competition, and Capital Formation—Efficiency'').

[1486] *See supra* Section IV.E.2.a.

[1487] *See supra* Section V.C.

[1488] *See* Proposal, *supra* note 2, at 81125.

[1489] *See supra* Section X.A.6.a.

[1490] *See supra* Section X.C and *supra* note 1356; *see also* Proposal, *supra* note 2, at 81118.

estimate the number of ATSs that would cease operating as ATSs or the number of potential new ATSs that would be dissuaded from entering the market. Furthermore, we do not have information in order for us to make reasonable assumptions about the fraction of displaced volume—from NMS Stock ATSs that would cease operating as ATSs—that would be internalized by a broker-dealer operator or its affiliates or directed towards national securities exchanges, NMS Stock ATSs, or non-ATS OTC trading centers. Commenters did not provide any additional information or analysis that would allow us to estimate the impacts on order flow or the continued operation of NMS Stock ATSs under the new rule and amendments. Therefore, we cannot quantify the ultimate effect that this will have on competition and market participant trading costs.

(iii) Innovation

As discussed above, the public availability of effective Form ATS–N and Form ATS–N amendments could result in the disclosure of an NMS Stock ATS's previously non-public operational information.[1491] These disclosures could potentially affect the incentives of NMS Stocks ATSs to innovate.

The disclosure of an NMS Stock ATS's innovations in its Form ATS–N or Form ATS–N amendments could potentially result in certain NMS Stock ATSs losing their technological advantage. For example, to the extent that an NMS Stock ATS's competitive advantage in the market is driven by its matching methodology, the disclosure of this information could result in other NMS Stock ATSs implementing similar methodologies. On the one hand, this could potentially reduce the incentives for ATSs to innovate. For instance, if publicly disclosing an NMS Stock ATS's new technological innovations results in the ATS earning less revenue from new innovations it develops, relative to the baseline, the ATS might lose its incentives to innovate.

On the other hand, the increase in transparency resulting from the public disclosure of Form ATS–N could foster greater competition for order flow in the market for NMS Stock ATS execution services. This greater competition for order flow could in turn incentivize NMS Stock ATSs to innovate—particularly in terms of their technology—so that they can attract more trading volume to their venue. For example, if the public disclosure of technology giving an NMS Stock ATS a competitive advantage results in the ATS losing that competitive advantage, the ATS could be forced to innovate and develop new technology or enhancements in order to attract more trading volume to its venue. However, if some NMS Stock ATSs cannot innovate fast enough to regain their competitive advantage in the market, orders might also flow away from these NMS Stock ATSs, and as a result, these ATSs may choose to cease operating as ATSs.[1492]

We do not have information on the extent to which existing NMS Stock ATSs or potentially new ATSs rely on a technological advantage, such as a unique matching methodology, to attract order flow. Nor do we have information regarding the ability of NMS Stock ATSs to innovate and replace a competitive advantage it might lose. Additionally, commenters did not provide any further information or analysis that would allow us to estimate at what rate NMS Stock ATSs innovate. Therefore, we cannot quantify the ultimate effect the adopted amendments will have on innovation.

As discussed above, we have revised the adopted Form ATS–N requests to not seek disclosure of certain information that could be proprietary or commercially sensitive, such as routing tables or numerical order flow segmentation metrics.[1493] Additionally, in response to commenters' concerns that making Form ATS–N material amendments public before the expiration of the Commission's 30-day calendar review period, at which point material changes could be implemented, could reduce the incentives for ATSs to innovate or be confusing or misleading to the public,[1494] we are modifying the proposed rules for making Form ATS–N material amendments public. Under the adopted amendments, the entirety of the material amendment, as amended, will be made public by the Commission following the Commission's 30-calendar day review period.[1495] We believe that these changes, relative to the Proposal, will reduce the likelihood that details concerning an NMS Stock ATS's technological innovations are disclosed to competitors before the ATS has a chance to implement them. Relative to the Proposal, the ATS might be able to derive greater benefits from new innovations, which could increase the incentives for NMS Stock ATSs to innovate.

Four commenters state that the proposed process for declaring a Form ATS–N ineffective would reduce the incentives to develop new technological innovations.[1496] One of these commenters expresses concern that the process will be used to delay the effectiveness of NMS Stock ATSs whose features, while meeting regulatory requirements, do not meet current industry norms.[1497] The Commission's review process for declaring a Form ATS–N ineffective could affect the incentives of an existing or potentially new NMS Stock ATS to innovate. As discussed above,[1498] an ineffectiveness declaration could impose costs on an NMS Stock ATS—such as costs from having to cease operations, roll back a change in operations, or delay the start of operations. The uncertainty regarding whether a Form ATS–N featuring a new innovation will be declared ineffective could discourage or delay existing and potentially new NMS Stock ATSs from developing or introducing new technological innovations. Additionally, the extended review for an initial Form ATS–N could raise the barriers to entry for new NMS Stock ATSs and reduce the incentives for potentially new ATSs to bring new innovations to the market.[1499] However, as discussed in detail above,[1500] the Commission's review of Form ATS–N disclosures will not focus on the merits of the Form ATS–N disclosures. Therefore, to the extent the disclosures are complete and comprehensible, the Commission's review process for a Form ATS–N filing that contains innovative features that do not meet current industry norms should not take longer or result in an increased chance of the Form ATS–N being declared ineffective.

b. Efficiency

As discussed above, the heightened disclosure requirements for NMS Stock ATSs might cause some NMS Stock ATSs to cease operating as ATSs and either shut down their operation or instead operate as non-ATS OTC execution venues, such as an OTC trading venue in which the broker-dealer operator internalizes order flow. This could affect competition in the market for NMS Stock execution services.[1501] If it is the case that the NMS Stock ATSs that cease operating as

[1491] *See supra* Section X.C.2.

[1492] *See supra* Section X.C.4.a.i.

[1493] *See supra* Section IV.E.2.a.

[1494] *See supra* Section IV.E.2.c.

[1495] The cover page of the filed material amendment will be made public by the Commission upon filing. *See id.*

[1496] *See* Fidelity Letter at 2–3, 8; KCG Letter at 5, 8; Luminex Letter at 1; STANY Letter at 2.

[1497] *See* Fidelity Letter at 9.

[1498] *See supra* Section X.C.1.b.

[1499] *See supra* Section X.C.4.a.i.A.

[1500] *See supra* Section IV.A.3.b.

[1501] *See supra* Section X.C.4.a (''Impact on Efficiency, Competition, and Capital Formation—Competition'').

ATSs are the ones that have worse execution quality, the surviving NMS Stock ATSs might enhance execution quality and allow market participants to transact at lower prices. If more order flow is directed towards these remaining NMS Stock ATSs, there could be a higher likelihood that the orders of buyers and sellers on an NMS Stock ATS would interact and execute, which could improve liquidity. It is also possible that the enhanced disclosure from NMS Stock ATSs might result in more order flow migrating towards national securities exchanges, which might foster greater order interaction between buyers and sellers on a national securities exchange, thereby improving price discovery. Moreover, because some NMS Stock ATSs operate as crossing networks and derive their prices from national securities exchanges, greater price discovery on a national securities exchange could spill over to affect the execution prices on the surviving NMS Stock ATSs and thereby potentially reduce market participants' trading costs. Additionally, given the fairly standardized set of information that will be publicly disclosed on Form ATS–N and that trading in the market by NMS Stock ATSs might in fact be concentrated on fewer NMS Stock ATSs as a result of the amendments, market participants might process, and react more quickly to, information pertaining to changes in an NMS Stock ATS's operations when evaluating potential trading venues. As such, the amendments to Regulation ATS might improve market efficiency.

c. Capital Formation

Under the adopted amendments, market participants would be aware of which NMS Stock ATSs offer better execution services or better protection against the dissemination of their non-public trading information, and as a result, these NMS Stock ATSs could attract even more order flow. Furthermore, to the extent the adopted amendments appropriately calibrate the level of transparency between NMS Stock ATSs and national securities exchanges, this would foster greater competition for order flow of NMS stocks between those trading platforms. Even if some NMS Stock ATSs cease operating as ATSs, we believe the enhanced disclosure requirements of the adopted amendments will assist market participants in obtaining best execution of their orders. This could lead to lower spreads and thereby foster greater capital formation and increased market liquidity relative to the baseline.

D. Reasonable Alternatives

1. Require NMS Stock ATSs to Publicly Disclose Current Form ATS

We could allow NMS Stock ATSs to continue to describe their operations on current Form ATS, but make Form ATS public either by posting it on the Commission's website or requiring NMS Stock ATSs to publicly disclose their initial operation reports, amendments, and cessation of operations on Form ATS. Non-NMS Stock ATSs' Form ATS filings would continue to remain confidential.

As described in detail in the Proposal, this alternative would lower the cost of compliance for current and future NMS Stock ATSs compared to the adopted amendments, but market participants would continue to receive limited information regarding how orders interact, match, and execute on NMS Stock ATSs and the ATS-related activities of NMS Stock ATSs' broker-dealer operators and their affiliates.[1502] Public disclosure of Form ATS could have some harmful effects on the competitive dynamics of NMS Stock ATSs; however, such effects would likely be smaller than those expected under the adopted amendments. Regulators' oversight of NMS Stock ATSs under this alternative would not be improved compared to the baseline, as it would under the adopted amendments.

Six commenters disagree with our analysis of this alternative.[1503] These commenters suggest that we could achieve our transparency goals by requiring all ATS operators to publicly disclose Form ATS. For the reasons discussed above and in the Proposal, we continue to believe that this alternative would reduce the benefits that would accrue to market participants as compared to the adopted amendments.

2. Require Form ATS–N But Deem Information Confidential

We could require NMS Stock ATSs to file Form ATS–N with the Commission, but not make it publicly available. Form ATS–N would include detailed disclosures about the NMS Stock ATS's operations and the ATS-related activities of its broker-dealer operator and its affiliates, and the Commission could declare filings on Form ATS–N ineffective. As described in detail in the Proposal,[1504] we believe that this alternative would improve the quality of NMS Stock ATSs' disclosures and strengthen the Commission's oversight of NMS Stock ATSs. However, this alternative would not make NMS Stock ATSs' operations more transparent for market participants.

No commenters directly remarked on this alternative, and we continue to believe that this alternative would entail fewer benefits to market participants as compared to the adopted amendments, because it would not make NMS Stock ATSs' operations more transparent for market participants. However, a number of commenters suggest we take a tiered public disclosure approach and not publicly disclose certain information on Form ATS–N that is potentially sensitive and of a proprietary nature.[1505] We believe that a tiered public disclosure system for Form ATS–N would still produce the benefits from the improved quality of NMS Stock ATSs' disclosures and the information about the ATS-related activities of the broker-dealer operator and its affiliates described above. Additionally, the public disclosure of a portion of Form ATS–N could improve transparency and provide market participants with more information about an NMS Stock ATS's operations, which would lower search costs relative to the baseline. Because all of the information on Form ATS–N would not be made public, the benefits of increased transparency could be lower under a tiered public disclosure approach than they would be under the adopted amendments. Therefore, search costs may be higher and market participants may make less informed decisions regarding where to route their orders and therefore result in lower execution quality under a tiered public disclosure approach than they would obtain under the adopted amendments. However, the public disclosure costs to ATSs may be lower under a tiered public disclosure approach, which could result in lower barriers to entry for new NMS Stock ATSs and fewer Legacy NMS Stock ATSs ceasing to operate at ATSs than under the adopted amendments.

3. Require NMS Stock ATSs to Publicly Disclose Form ATS–N But Not Declare Form ATS–N Ineffective

We could require NMS Stock ATSs to file Form ATS–N and make it public, but continue to use the current notice regime instead of the process for declaring Form ATS–N ineffective. As described in detail in the Proposal,[1506]

[1502] *See* Proposal, *supra* note 2, at 81128–29.

[1503] *See* Luminex Letter at 2–5; MFA/AIMA Comment Letter at 2; Morgan Stanley Letter at 2; PDQ Letter at 2; SIFMA Comment Letter at 3; STANY Letter at 3.

[1504] *See* Proposal, *supra* note 2, at 81129.

[1505] *See* Liquidnet Letter at 8; Luminex Letter at 2; Morgan Stanley at 2; SSGA Letter at 2; STANY Letter at 3; UBS Letter at 7.

[1506] *See* Proposal, *supra* note 2, at 81129.

relative to the adopted rule, the alternative of maintaining the current notice regime would lower demand for Commission and staff resources, could reduce costs for NMS Stock ATSs, and could lower the barriers to entry for new NMS Stock ATSs. However, it would be more difficult for the Commission to exercise its oversight responsibilities and the alternative would not provide the same level of protection to market participants as the adopted amendments.

Two commenters disagree with our analysis of this alternative, and expressed concerns that the effectiveness determination of Form ATS–N would be a burdensome process for the Commission.[1507] They suggest that these potential costs outweigh the benefits of the review process under the adopted amendments. We believe that the review process will contribute towards costs in terms of Commission resources. However, for the reasons discussed above, we continue to believe that the review process will provide benefits in terms of mitigating inaccurate and incomplete disclosures, which could improve investor protection.[1508]

4. Initiate Differing Levels of Public Disclosure Depending on NMS Stock ATS Characteristics

We could require different levels of disclosure among NMS Stock ATSs based on dollar trading volume. As described in detail in the Proposal,[1509] this could reduce compliance costs relative to the adopted amendments. However, because a portion of the implementation costs are fixed and because certain sections of Form ATS–N would not be applicable to smaller NMS Stock ATSs that are not operated by multi-service broker-dealer operators and do not engage in other brokerage or dealing activities, any reduction in compliance costs smaller NMS Stock ATSs might experience under this alternative could be small.

At the same time, this alternative could result in a competitive advantage for small NMS Stock ATSs, because it could give them more time to innovate without having to disclose such innovation to competitors.[1510] This could give small NMS Stock ATSs an advantage in attracting order flow relative to large NMS Stock ATSs, which could spill over to market participants that execute on these ATSs, by increasing the execution quality of their trades. Nonetheless, because broker-dealer operators could have the incentive to allocate order flow to multiple NMS Stock ATSs to avoid reaching threshold volumes, this alternative could create some information opacity in the market, which could lead to lower execution quality for market participants relative to the adopted amendments.

One commenter expressed concerns about applying different levels of disclosure based on metrics such as trading volume, mentioning that Form ATS–N is not sufficiently onerous relative to Form ATS to justify small-scale exemptions.[1511] Contrary to this concern, another commenter stated that the disclosure requirements should apply to larger ATSs with a ''substantial market footprint'' to avoid discouraging competitive innovations among NMS Stock ATSs.[1512] Although compliance costs may be lessened if small stock ATSs are required to provide less disclosure on Form ATS–N, (*i.e.,* ATSs with lower trading volume), this reduction in compliance costs could be small.

Requiring less disclosure from small NMS Stock ATSs might also result in greater innovation relative to the adopted amendments. However, we continue to believe that requiring less disclosure from low-volume NMS Stock ATSs could reduce the benefits market participants receive from the greater transparency about the operations of NMS Stock ATSs and the ATS-related activities of their broker-dealer operators and their affiliates. This could increase market participant search costs when evaluating potential NMS stock trading venues, which could result in market participants making less informed decisions about which trading venue aligns with their investing or trading objectives.

5. Require NMS Stock ATSs To Register as National Securities Exchanges and Become SROs

We could eliminate the exemption from the definition of ''exchange'' for NMS Stock ATSs under Exchange Act Rule 3a1–1(a) so that an NMS Stock ATS would be required to register as a national securities exchange and become an SRO. While commenters did not remark on this alternative, we continue to believe that, as described in detail in the Proposal,[1513] this alternative would provide market participants with more information about priority, order interaction, display, and execution procedures, which would help them make better informed decisions about where to route their orders for best execution. Competition among and between trading venues could increase, leading to greater market liquidity and market efficiency. Further, this alternative could strengthen Commission oversight, thus benefitting market participants.

However, this alternative would create high startup costs and high ongoing operational costs for NMS Stock ATSs compared to the adopted amendments.[1514] We continue to believe that these costs to NMS Stock ATSs would be significant.

6. Discontinue Quarterly Volume Reports on Form ATS–R

We could amend Regulation ATS so that NMS Stock ATSs would no longer be required to file quarterly volume reports on Form ATS–R. As described in detail in the Proposal,[1515] we believe this alternative could result in reduced costs for NMS Stock ATSs, because they would no longer be required to prepare a quarterly Form ATS–R in addition to their Form ATS–N. However, some competitively sensitive information contained on Form ATS–R, such as the ATS's subscriber list and the list of persons granted, denied, or limited access during the reporting period—which is not solicited under adopted Form ATS–N, would be made public on Form ATS–N. Making such information public could harm the NMS Stock ATS as well as persons denied access.

One commenter suggested that in light of information on FINRA's website regarding ATSs,[1516] and the detailed disclosures in periodic disclosures that would be required by proposed Form ATS–N, we should no longer require an NMS Stock ATS to file Form ATS–R.[1517] However, this commenter did not suggest that the information that is contained on Form ATS–R and not included on FINRA's website or Form ATS–N,[1518] such as the ATS's subscriber list and the list of persons granted, denied, or limited access during the reporting period, should be

[1507] *See* Consumer Federation of America Letter at 2, 10–11; Fidelity Letter at 9.

[1508] *See supra* Section IV.A.2 (''Rule 304(a)(1)(ii): Commission Review Period'')

[1509] *See* Proposal, *supra* note 2, at 81129.

[1510] *See id.*

[1511] *See* CFA Institute Letter at 3.

[1512] *See* STANY Letter at 2.

[1513] *See Proposal, supra* note 2, at 81129–30.

[1514] Newly registered national securities exchanges must establish appropriate surveillance and disciplinary mechanisms, and as a result incur start-up costs associated with such obligations, such as writing a rule book. *See* Regulation ATS Adopting Release, *supra* note 3, at 70907. Furthermore, the cost of acquiring the necessary assets and the operating funds to carry out the day-to-day functions of a national securities exchange are significant.

[1515] *See Proposal, supra* note 2, at 81130.

[1516] *See supra* note 15.

[1517] *See* SIFMA Letter at 8 n.16.

[1518] *See supra* note 259.

included in Form ATS–N. If ATSs were no longer required to file Form ATS–R and this information was not made available in Form ATS–N, then the Commission could lose efficient access to information available in the form that helps it oversee and monitor the trading activity of NMS Stock ATSs.[1519] This loss of efficiency could reduce the benefits of Commission oversight, which could reduce investor protection relative to today.

7. Require NMS Stock ATSs To Operate as Limited Purpose Entities

We could amend Regulation ATS to require an NMS Stock ATS to operate as a ''stand-alone'' entity, which would exist only to operate the ATS and have no affiliation with any broker-dealer that seeks to execute proprietary or agency orders on the NMS Stock ATS. Under this alternative, NMS Stock ATSs would be required to publicly disclose Form ATS–N, Form ATS–N amendments, and notices of cessation on Form ATS–N, and would be limited purpose entities that could not engage in any activities other than operation of the ATS. This alternative would prohibit the broker-dealer operator of the NMS Stock ATS from engaging in any other broker-dealer activity, and would consequently prohibit the operation of an NMS Stock ATS by a multi-service broker-dealer.

While commenters did not remark on this alternative, we continue to believe that, as described in detail in the Proposal,[1520] the benefit of this alternative would be to eliminate potential conflicts of interest, but that this alternative might discourage broker-dealers from creating and operating innovative NMS Stock ATS platforms, and instead drive them to execute their own proprietary trades internally on their other broker-dealer systems. In addition, many broker-dealers might choose to file a cessation of operations report and shut down the operations of their NMS Stock ATS,[1521] resulting in similar (though potentially more severe) effects on the competitive dynamics of the ATS market as under the adopted amendments.

8. Prohibit Broker-Dealer Operators and Affiliates From Trading on the NMS Stock ATS

Several commenters believe that the increased disclosure requirements on Form ATS–N concerning the ATS-related activities of the broker-dealer operator and its affiliates do not do enough to reduce conflicts of interest and suggested that we prohibit conflicts of interest altogether on NMS Stock ATSs.[1522] Under this alternative, the broker-dealer operator could continue to act as a broker-dealer operator of an NMS Stock ATS and engage in non-ATS functions, but would be subject to new requirements designed to limit potential conflicts of interest. These requirements would include a prohibition on trading on the NMS Stock ATS by the broker-dealer operator and its affiliates.

We believe that banning conflicts of interest, as opposed to increasing disclosure of relationships between the ATS and the broker-dealer operator and the broker-dealer operator's affiliates, could be potentially harmful. Multi-service broker-dealers, that is, broker-dealers who have operations and activities in addition to the ATS may be more prone to having conflicts of interest, and therefore, banning conflicts of interest could result in these broker-dealers ceasing to operate their ATSs.[1523] Therefore, we believe that this approach suggested by these commenters could have substantially deleterious effects on liquidity provision, and for this reason, we are maintaining our approach in the adopted amendment.

9. Lower the Fair Access Threshold for NMS Stock ATSs

NMS Stock ATSs are not required to provide fair access to the services of the NMS Stock ATS unless the ATS reaches the 5% trading volume threshold in a stock under Rule 301(b)(5) of Regulation ATS.[1524] We could lower the fair access threshold under Rule 301(b)(5) of Regulation ATS [1525] for NMS Stock ATSs to a level sufficiently low that most NMS Stock ATSs would be prohibited from engaging in many discriminatory practices.[1526]

As described in detail in the Proposal,[1527] we believe that there would be fewer benefits under this alternative because the fair access requirements would apply only to the NMS stocks for which the NMS Stock ATS had crossed the fair access threshold. We could address that situation by proposing further amendments to the fair access requirements. However, we believe that the disclosures that would be required by Form ATS–N requirements would be a cost effective and simpler approach than proposing fundamental revisions to the fair access requirements that would achieve the aim of providing market participants with information to better assess NMS Stock ATSs as potential trading venues.

No commenters directly commented on this alternative, and we continue to believe it would result in fewer benefits than the adopted amendments. However, one commenter recommended as an alternative that, in addition to the adopted amendments, we should also eliminate the 5% fair access threshold for NMS Stock ATSs, *i.e.,* reduce the fair access threshold to zero, because the current volume threshold creates a competitive imbalance between exchanges—which are subject to fair access requirements—and NMS Stock ATSs.[1528] Under the commenter's alternative, if the fair access threshold were eliminated, then all NMS Stock ATSs would need to meet the requirements of Rule 301(b)(5) that prohibit or limit discriminatory practices of ATSs.[1529] Because the commenter's alternative would include the adopted amendments and the public disclosure of Form ATS–N, the operational transparency for NMS Stock ATSs would still increase, bringing it more in line with the operational transparency for national securities exchanges. In addition, imposing fair access requirements on all NMS Stock ATSs could further reduce conflicts of interest on ATSs, relative to the adopted amendments, because an ATS might not be able to offer preferential treatment to certain subscribers. However, the increased costs of fair access compliance could cause more ATSs to cease operating as ATSs. More ATSs ceasing to operate as ATSs may cause an increase in the internalization of order flow, which could reduce price informativeness and increase trading costs.[1530]

[1519] *See supra* Section III.B.5 (''Rule 301(b)(9): Form ATS–R Quarterly Reports'').

[1520] *See* Proposal, *supra* note 2, at 81130.

[1521] Alternatively, current broker-dealer operators of ATSs that trade NMS stocks may choose to spin-off or sell their ATS rather than cease operations. The expected number of broker-dealer operators selling their ATSs at once could affect the value the broker-dealer operator could receive from the sale and, as such, could factor into the decision of whether to spin-off, sell, or fold their ATS.

[1522] *See* Better Markets Letter at 5–6; Consumer Federation of America Letter at 7–8; HMA Letter at 1.

[1523] *See supra* Section X.C.4.a.i.

[1524] *See supra* Section II.C.

[1525] 17 CFR 242.301(b)(5).

[1526] As discussed above in Section II.C, the requirements of Rule 301(b)(5) that prohibit or limit discriminatory practices of ATSs only apply to NMS Stock ATSs that cross the fair access threshold, and then, apply only with respect to the NMS stocks in which an ATS crosses the threshold.

[1527] *See* Proposal, *supra* note 2, at 81131.

[1528] *See* Citadel Letter at 2–3.

[1529] *See supra* Section II.C.

[1530] *See supra* Section X.B.6.a.

10. Requirements To Disclose Aggregate Platform-Wide Order Flow and Execution Statistics to all Subscribers

We could eliminate the requirement for NMS Stock ATSs to disclose aggregate platform-wide order flow and execution statistics that the ATS publishes or otherwise provides to one or more subscribers that are not disclosed pursuant to Rule 605 of Regulation NMS from Form ATS–N. An advantage of this approach is that NMS Stock ATSs may be motivated to continue to provide order flow and execution statistics to subscribers under this alternative.[1531] However, relative to the adopted amendments, this approach may fail to mitigate the problem of differential access to information about ATS operations and activities across market participants, resulting in some market participants making less-informed decisions about how to obtain best execution for themselves and their clients.

11. Specify Alternative Structured Formats for Form ATS–N

We could specify alternative structured formats such as Inline XBRL, or FIXML.[1532] The benefit of Inline XBRL is that it provides more sophisticated validation, presentation and reference features for filers and users. However, we do not believe that Inline XBRL is yet in common use by all entities that would be filing Form ATS–N. To use Inline XBRL with Form ATS–N, the Commission would have to design a new Commission-specific taxonomy for the Form ATS–N disclosures. While the Inline XBRL, FIXML, and XML formats would all require the use of an XML-based schema, Inline XBRL would require the additional familiarity with the Commission-specific taxonomy that is not necessary for the relatively simple disclosure requirements of Form ATS–N. FIXML is a format designed and used for expressing trading information, and while familiar to NMS Stock ATSs, it is not widely used by the public. The end users of Form ATS–N data will likely incur upfront costs to learn and use FIXML, unlike the widely used and freely available XML format. For these reasons, we believe that the XML format would minimize costs relative to filers having to file Form ATS–N using these other structured formats.

12. Specify Other Filings Methods for Form ATS–N

We could require NMS Stock ATSs to use the EFFS/SRTS system currently used for other NMS filings instead of EDGAR. While commenters did not remark on this alternative, the primary benefit of this alternative approach would be that ATSs would likely be familiar with the web fillable forms and related filing process on EFFS/SRTS. Relative to the adopted amendments, learning the EDGAR filing process may pose an initial transition burden, although the larger NMS Stock ATSs may already be familiar with the EDGAR filing process, and the completion of web fillable forms in EDGAR would be very similar to the EFFS/SRTS experience without the additional burden of an annual digital signature certification. Finally, the time and effort of filing as proposed would be incrementally more costly to NMS Stock ATSs because each narrative response would have to be individually uploaded as a separate exhibit, as opposed to providing all of their narrative responses within one structured XML file or completing all narrative responses in one web-fillable form. Moreover, because the EFFS system does not support the open-source XML format, but rather a proprietary XML implementation called XFDL, the EFFS system has fewer validation capabilities than EDGAR, particularly at the element level. As a result, some NMS Stock ATSs might inadvertently submit incomplete or inconsistently formatted information that is not discovered until after Commission staff review, which would then require the NMS Stock ATS to spend additional time to refile the information. We believe this would result in extra costs in filing Form ATS–N through EFFS/SRTS relative to requiring NMS Stock ATSs to filing Form ATS–N through EDGAR.

[1531] Two commenters agree with our assessment under this alternative that eliminating the requirement for NMS Stock ATSs to disclose aggregate platform-wide order flow and execution statistics that the ATS publishes or otherwise provides to one or more subscribers that are not disclosed pursuant to Rule 605 of Regulation NMS could be beneficial to subscribers because it may motivate NMS Stock ATSs to continue to provide order flow and execution statistics to subscribers. *See* MFA/AIMA Letter at 5; SIFMA Letter at 27.

The same commenters also suggest that eliminating these requirements could result in ATSs continuing to send customized reports and bespoke statistics to their clients. *See* MFA/AIMA Letter at 5; SIFMA Letter at 27. Under the adopted amendments disclosure requirements under Part III, Item 26 would not apply when an NMS Stock ATS provides a participant with individualized or custom reports containing data relating to that participant's specific usage of the ATS.

[1532] One commenter recommends that we structure Form ATS–N so that it breaks out the required information on NMS Stock ATS operations in a format that is comparable across ATSs. It also suggests we might also consider ways to present information that would improve the readability and navigability of disclosure through the use of technology such as hyperlinks and/or XBRL technology. *See* Fidelity Letter at 5.

XI. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''RFA'') [1533] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. We certified in the Proposal, pursuant to Section 605(b) of the RFA,[1534] that the amendments to Regulation ATS would not, if adopted, have a significant economic impact on a substantial number of small entities. We included this certification in Section XV of the Proposing Release. Although we encouraged written comments regarding this certification, no commenters responded to this request.

For purposes of Commission rulemaking in connection with the RFA,[1535] a small entity includes a broker or dealer that: (1) Had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) under the Exchange Act,[1536] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[1537]

All ATSs, including NMS Stock ATSs, would continue to have to

[1533] 5 U.S.C. 601 *et seq.*

[1534] 5 U.S.C. 605(b).

[1535] Although Section 601(b) of the RFA defines the term ''small entity,'' the statute permits agencies to formulate their own definitions. We have adopted definitions for the term ''small entity'' for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this rulemaking, are set forth in Rule 0–10 under the Exchange Act, 17 CFR 240.0–10. *See* Exchange Act Release No. 18451 (January 28, 1982), 47 FR 5215 (February 4, 1982) (File No. AS–305).

[1536] 17 CFR 240.17a–5(d).

[1537] *See* 17 CFR 240.0–10(c). *See also* 17 CFR 240.0–10(i) (providing that a broker or dealer is affiliated with another person if: such broker or dealer controls, is controlled by, or is under common control with such other person; a person shall be deemed to control another person if that person has the right to vote 25 percent or more of the voting securities of such other person or is entitled to receive 25 percent or more of the net profits of such other person or is otherwise able to direct or cause the direction of the management or policies of such other person; or such broker or dealer introduces transactions in securities, other than registered investment company securities or interests or participations in insurance company separate accounts, to such other person, or introduces accounts of customers or other brokers or dealers, other than accounts that hold only registered investment company securities or interests or participations in insurance company separate accounts, to such other person that carries such accounts on a fully disclosed basis).

register as broker-dealers.[1538] We examined recent FOCUS data for the 41 broker-dealers that currently operate ATSs that trade NMS stocks and concluded that no more than 5 of the broker-dealer operators of ATSs that currently trade NMS stocks had total capital of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter) and were not affiliated with any person that is not a small business or small organization. Three of these five entities, however, never reported transactions in any security, including NMS stocks, to the Commission since filing an initial operations report on Form ATS. Therefore, we believe that it is unlikely that these three entities would complete a Form ATS–N to operate as an NMS Stock ATS pursuant to Rule 304.

The remaining two entities include one broker-dealer that operates an ATS pursuant to an active Form ATS on file with the Commission and has reported transactions in NMS stocks to the Commission. The other broker-dealer has filed an initial operation report on Form ATS with the Commission and noticed its intention to trade NMS stocks; however, this ATS has not yet commenced operations. We do not believe that Rule 304, including the requirement for NMS Stock ATSs to file a Form ATS–N, will represent a significant economic impact on these two entities. Stand-alone broker-dealers that operate an ATS, such as these two entities, will have less complex ATS operations than multi-service broker-dealers that operate an ATS. For example, we believe that these two entities would not need to respond to all requests in Part II of Form ATS–N because they are not likely to engage in the same ATS-related activities as multi-service broker-dealers that operate an ATS. As a result, we expect that the burden associated with completing the form would be substantially lower for these two ATS.[1539] In addition, because we believe that the two ATSs are operationally less complex than ATSs operated by multi-service broker-dealer operators, the burden to respond to the items under Part III of Form ATS–N (Manner of ATS Operations) [1540] would be lower than for the average NMS Stock ATS operated by a multi-service broker-dealer operator.[1541]

We are also amending Rule 301(b)(10) to require that all ATSs reduce to writing their safeguards and procedures to protect subscribers' confidential trading information and their oversight procedures to ensure that such safeguards and procedures are followed. The amendment to Rule 301(b)(10) would thus apply to the 15 small entities that are ATSs (including NMS Stock and non-NMS Stock ATSs), but we believe that there would not be significant economic impact on these entities because, based on our experience, most of these ATSs already maintain their Rule 301(b)(10) safeguards and procedures in writing, and to the extent they do not, any resulting burden is small.[1542]

Consequently, for these reasons, for purposes of the RFA, we certify that the amendments to Regulation ATS would not have a significant economic impact on a substantial number of small entities.

XII. Statutory Authority and Text of Amendments

Pursuant to Exchange Act, 15 U.S.C. 78a *et seq.,* and particularly Sections [3(b), 5, 6, 11A, 15, 17(a), 17(b), 19, 23(a), and 36 thereof (15 U.S.C. 78c, 78k–1, 78*o,* 78q(a), 78q(b), 78w(a), and 78mm)], the Commission adopts Form ATS–N under the Exchange Act, to amend Rule 3a1–1(a) and Regulation ATS under the Exchange Act, and to amend 17 CFR 200.30–33.

List of Subjects in 17 CFR Parts 232, 240, 242 and 249

Brokers, Confidential business information, Fraud, Reporting and recordkeeping requirements, Securities.

For the reasons stated in the preamble, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 1. The general authority citation for part 232 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l,* 78m, 78n, 78o(d), 78w(a), 78*ll,* 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 2. Amend § 232.101 by adding paragraph (a)(1)(xxi) to read as follows:

§ 232.101 Mandated electronic submissions and exceptions.

(a) * * *

(1) * * *

(xxi) Form ATS–N (§ 249.640 of this chapter).

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1934

■ 3. The general authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78*o,* 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.;* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111–203, 939A, 124 Stat. 1887 (2010); and secs. 503 and 602, Pub. L. 112–106, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

[1538] 17 CFR 242.301(b)(1).

[1539] As estimated in the PRA, we estimate an average total cost of $41,689.10 for the initial hour burden of complying with Rules 301(b)(2)(viii) and 304 of Regulation ATS (including completing Form ATS–N). The burden hours associated with Part II of Form ATS–N is 29 hours. *See supra* note 1228. We estimate that ATSs that are small entities would likely need to complete approximately half of Part II. Thus, the reduction of 14.5 burden hours (29 hours × 0.5 = 14.5 hours) would result in a cost savings of $5,155 for each small entity compared to the average total cost estimate. (Attorney 7.5 hours × $406) + (Compliance Manager 6.0 hours × $302) + (Senior Marketing Manager 1 hour × $298) = $5,155.

[1540] For example, based on Commission experience, less operationally complex ATS may not need to respond to all or part of the requests in Part III of Form ATS–N, such as Item 5 (Means of Entry), Item 6 (Connectivity and Co-location), Item 7 (Order Types and Attributes), Item 9 (Conditional Orders and Indications of Interest), Item 13 (Segmentation; Notice), Item 14 (Counter-Party Selection), among others. In addition, a smaller NMS Stock ATS is unlikely to exceed the volume thresholds that would subject the ATS to the requirements of Rule 301(b)(3) and 301(b)(5) of Regulation ATS, and therefore, Part III, Items 24 and 25 would be inapplicable. These items represent 36 burden hours above the current baseline for an initial operation report on current Form ATS. These 36 burden hours represent a cost of approximately $11,846 for each ATS that would likely be substantially reduced for these two small entities. (Attorney 12.25 hours × $406) + (Compliance Manager 11.25 hours × $302) + (Senior Systems Analyst 12.5 hours × $278) = $11,846. As noted above, the we estimate an average total cost of $41,689.10 for the initial hour burden of complying with Rules 301(b)(2)(viii) and 304 of Regulation ATS (including completing Form ATS–N).

[1541] If the three inactive ATSs discussed above in this section (which we expect would not complete a Form ATS–N) were to complete a Form ATS–N, they would experience a substantially reduced burden in completing Form ATS–N given that they also are not multi-service broker-dealers, and their systems are less complex than other NMS Stock ATSs.

[1542] In the Proposal, we estimated that 15 of the 84 ATS at that time might *not* have these procedures in writing. *See* Proposal, *supra* note 2, at 81093. We did not receive any comments on this estimate. The PRA burden for an ATS to put in writing its procedures protect subscribers' confidential trading information, and the oversight procedures to ensure such safeguards and procedures are followed, would be approximately 8 hours, which represents $2,910 in costs for each ATS. (Attorney 7 hours × $406) + (Compliance Clerk 1 hour × $68) = $2,910.

§ 240.3a1–1 [Amended]

■ 4. Amend § 240.3a1–1 by removing ''242.303'' from paragraphs (a)(2) and (3) and adding in its place ''242.304''.

PART 242—REGULATIONS M, SHO, ATS, AC, NMS, AND SBSR AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 5. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78*l,* 78m, 78n, 78*o*(b), 78*o*(c), 78*o*(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

■ 6. Amend § 242.300 by:

■ a. In paragraph (f) introductory text, adding the phrase ''the broker-dealer of'' before the phrase ''an alternative trading system'' wherever it occurs;

■ b. In paragraphs (f)(2) and (3), adding the phrase ''the broker-dealer of'' before the phrase ''the alternative trading system''; and

■ c. Adding paragraph (k) to read as follows:

§ 242.300 Definitions.

* * * * *

(k) *NMS Stock ATS* means an alternative trading system, as defined in paragraph (a) of this section, that trades NMS stocks, as defined in paragraph (g) of this section.

■ 7. Amend § 242.301 by:

■ a. In paragraph (a)(5), adding the phrase ''or § 242.304'' after the phrase ''paragraph (b) of this section'';

■ b. In paragraph (b)(2)(i), removing the phrase '', or if the alternative trading system is operating as of April 21, 1999, no later than May 11, 1999'';

■ c. In paragraph (b)(2)(vii), removing the phrase ''Market Regulation, Stop 10–2'' and in its place adding ''Trading and Markets'';

■ d. Adding paragraph (b)(2)(viii);

■ e. In paragraph (b)(9)(i), adding the word ''Separately'' before the word ''File'' and changing the first letter of the word ''File'' to lower case and adding the phrase ''for transactions in NMS stocks, as defined in paragraph (g) of this section, and transactions in securities other than NMS stocks'' after the phrase ''(§ 249.638 of this chapter)'';

■ f. In paragraph (b)(9)(ii), adding the word ''Separately'' before the word ''File'' and changing the first letter of the word ''File'' to lower case and adding the phrase ''for transactions in NMS stocks and transactions in securities other than NMS stocks'' after the phrase ''required by Form ATS–R'';

■ g. In the heading of paragraph (b)(10), adding the word ''Written'' before the phrase ''Procedures to ensure the confidential treatment of trading information'' and changing the first letter of the word ''Procedures'' to lower case;

■ h. In paragraph (b)(10)(i) introductory text, adding the word ''written'' before the word ''safeguards'' in both instances and adding the word ''written'' before the word ''procedures'' in both instances; and

■ i. In paragraph (b)(10)(ii), adding the word ''written'' before the word ''oversight'' and adding the word ''written'' before the word ''safeguards''.

The addition reads as follows:

§ 242.301 Requirements for alternative trading systems.

* * * * *

(b) * * *

(2) * * *

(viii) An NMS Stock ATS that is operating pursuant to an initial operation report on Form ATS on file with the Commission as of January 7, 2019 (''Legacy NMS Stock ATS'') shall be subject to the requirements of paragraphs (b)(2)(i) through (vii) of this section until that ATS files an initial Form ATS–N with the Commission pursuant to § 242.304(a)(1)(iv)(A). Thereafter, the Legacy NMS Stock ATS shall file reports pursuant to § 242.304. An alternative trading system that trades NMS stocks and securities other than NMS stocks shall be subject to the requirements of § 242.304 of this chapter with respect to NMS stocks and paragraph (b)(2) of this section with respect to non-NMS stocks. As of January 7, 2019, an entity seeking to operate as an NMS Stock ATS shall not be subject to the requirements of paragraphs (b)(2)(i) through (vii) of this section and shall file reports pursuant to § 242.304.

* * * * *

■ 8. Amend § 242.303 by:

■ a. In paragraph (a) introductory text, removing ''(b)(9)'' and adding in its place ''(b)(8)'';

■ b. Adding paragraph (a)(1)(v); and

■ c. In paragraph (a)(2)(ii), adding the phrase ''or § 242.304'' after the phrase ''paragraph (b)(2) of § 242.301''.

The addition reads as follows:

§ 242.303 Record preservation requirements for alternative trading systems.

(a) * * *

(1) * * *

(v) At least one copy of the written safeguards and written procedures to protect subscribers' confidential trading information and the written oversight procedures created in the course of complying with paragraph (b)(10) of § 242.301.

* * * * *

■ 9. Add § 242.304 under the undesignated center heading Regulation ATS—Alternative Trading Systems to read as follows:

§ 242.304 NMS Stock ATSs.

(a) *Conditions to the exemption.* Unless not required to comply with Regulation ATS pursuant to § 242.301(a), an NMS Stock ATS must comply with §§ 242.300 through 242.304 (except § 242.301(b)(2)(i) through (vii)) to be exempt pursuant to § 240.3a1–1(a)(2).

(1) *Initial Form ATS–N.* (i) *Filing and effectiveness requirement.* No exemption is available to an NMS Stock ATS pursuant to § 240.3a1–1(a)(2) unless the NMS Stock ATS files with the Commission an initial Form ATS–N, in accordance with the conditions of this section, and the initial Form ATS–N is effective pursuant to paragraph (a)(1)(iii) or (a)(1)(iv)(A) of this section.

(ii) *Commission review period.* (A) The Commission may, by order, as provided in paragraph (a)(1)(iii) of this section, declare an initial Form ATS–N filed by an NMS Stock ATS ineffective no later than 120 calendar days from the date of filing with the Commission, or, if applicable, the end of the extended review period. The Commission may extend the initial Form ATS–N review period for:

(*1*) 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, in which case the Commission will notify the NMS Stock ATS in writing within the initial 120-calendar day review period and will briefly describe the reason for the determination for which additional time for review is required; or

(*2*) Any extended review period to which a duly authorized representative of the NMS Stock ATS agrees in writing.

(B) During review by the Commission of the initial Form ATS–N, the NMS Stock ATS shall amend its initial Form ATS–N pursuant to the requirements of paragraphs (a)(2)(i)(B) and (C) of this section. To make material changes to its initial Form ATS–N during the Commission review period, the NMS Stock ATS shall withdraw its filed initial Form ATS–N and may refile an initial Form ATS–N pursuant to paragraph (a)(1) of this section.

(iii) *Effectiveness; Ineffectiveness determination.* (A) An initial Form ATS–N, as amended, filed by an NMS Stock ATS will become effective, unless declared ineffective, upon the earlier of:

(*1*) The completion of review by the Commission and publication pursuant to paragraph (b)(2)(i) of this section; or

(*2*) The expiration of the review period, or, if applicable, the end of the extended review period, pursuant to paragraph (a)(1)(ii) of this section.

(B) The Commission will, by order, declare an initial Form ATS–N ineffective if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors. If the Commission declares an initial Form ATS–N ineffective, the NMS Stock ATS shall be prohibited from operating as an NMS Stock ATS pursuant to § 240.3a1–1(a)(2). An initial Form ATS–N declared ineffective does not prevent the NMS Stock ATS from subsequently filing a new Form ATS–N.

(iv) *Transition for Legacy NMS Stock ATSs.* (A) *Initial Form ATS–N filing requirements.* A Legacy NMS Stock ATS shall file with the Commission an initial Form ATS–N, in accordance with the conditions of this section, no earlier than January 7, 2019, and no later than February 8, 2019. An initial Form ATS–N filed by a Legacy NMS Stock ATS shall supersede and replace for purposes of the exemption the previously filed Form ATS of the Legacy NMS Stock ATS. The Legacy NMS Stock ATS may operate, on a provisional basis, pursuant to the filed initial Form ATS–N, and any amendments thereto, during the review of the initial Form ATS–N by the Commission. An initial Form ATS–N filed by a Legacy NMS Stock ATS, as amended, will become effective, unless declared ineffective, upon the earlier of:

(*1*) The completion of review by the Commission and publication pursuant to paragraph (b)(2)(i) of this section; or

(*2*) The expiration of the review period, or, if applicable, the end of the extended review period, pursuant to paragraph (a)(1)(iv)(B) of this section.

(B) *Commission review period; Ineffectiveness determination.* The Commission may, by order, as provided in paragraph (a)(1)(iii) of this section, declare an initial Form ATS–N filed by a Legacy NMS Stock ATS ineffective no later than 120 calendar days from the date of filing with the Commission, or, if applicable, the end of the extended review period. The Commission may extend the initial Form ATS–N review period for a Legacy NMS Stock ATS for:

(*1*) An additional 120 calendar days if the initial Form ATS–N is unusually lengthy or raises novel or complex issues that require additional time for review, in which case the Commission will notify the Legacy NMS Stock ATS in writing within the initial 120-calendar day review period and will briefly describe the reason for the determination for which additional time for review is required; or

(*2*) Any extended review period to which a duly-authorized representative of the Legacy NMS Stock ATS agrees in writing.

(C) *Amendments to initial Form ATS–N.* During review by the Commission of the initial Form ATS–N filed by a Legacy NMS Stock ATS, the Legacy NMS Stock ATS shall amend its initial Form ATS–N pursuant to the requirements of paragraphs (a)(2)(i)(A) through (D) of this section.

(2) *Form ATS–N amendment.* (i) *Filing requirements.* An NMS Stock ATS shall amend a Form ATS–N, in accordance with the conditions of this section:

(A) At least 30 calendar days, except as provided by paragraph (a)(2)(i)(D) of this section, prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the broker-dealer operator or its affiliates that are subject to disclosure on Form ATS–N (''Material Amendment'');

(B) No later than 30 calendar days after the end of each calendar quarter to correct information that has become inaccurate or incomplete for any reason and was not required to be reported to the Commission as a Form ATS–N amendment pursuant to paragraphs (a)(2)(i)(A), (C), or (D) of this section (''Updating Amendment'');

(C) Promptly, to correct information in any previous disclosure on Form ATS–N, after discovery that any information previously filed on Form ATS–N was materially inaccurate or incomplete when filed (''Correcting Amendment''); or

(D) No later than seven calendar days after information required to be disclosed in Part III, Items 24 and 25 on Form ATS–N has become inaccurate or incomplete (''Order Display and Fair Access Amendment'').

(ii) *Commission review period; Ineffectiveness determination.* The Commission will, by order, declare ineffective any Form ATS–N amendment filed pursuant to paragraphs (a)(2)(i)(A) through (D) of this section, no later than 30 calendar days from filing with the Commission, if the Commission finds that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors. A Form ATS–N amendment declared ineffective shall prohibit the NMS Stock ATS from operating pursuant to the ineffective Form ATS–N amendment. A Form ATS–N amendment declared ineffective does not prevent the NMS Stock ATS from subsequently filing a new Form ATS–N amendment. During review by the Commission of a Material Amendment, the NMS Stock ATS shall amend the Material Amendment pursuant to the requirements of paragraphs (a)(2)(i)(B) through (C) of this section. To make material changes to a filed Material Amendment during the Commission review period, an NMS Stock ATS shall withdraw its filed Material Amendment and must file the new Material Amendment pursuant to (a)(2)(i)(A) of this section.

(3) *Notice of cessation.* An NMS Stock ATS shall notice its cessation of operations on Form ATS–N at least 10 business days prior to the date the NMS Stock ATS will cease to operate as an NMS Stock ATS. The notice of cessation shall cause the Form ATS–N to become ineffective on the date designated by the NMS Stock ATS.

(4) *Suspension, limitation, and revocation of the exemption from the definition of exchange.* (i) The Commission will, by order, if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest, and is consistent with the protection of investors, suspend for a period not exceeding twelve months, limit, or revoke the exemption for an NMS Stock ATS pursuant to § 240.3a1–1(a)(2) of this chapter.

(ii) If the exemption for an NMS Stock ATS is suspended or revoked pursuant to paragraph (a)(4)(i) of this section, the NMS Stock ATS shall be prohibited from operating pursuant to the exemption pursuant to § 240.3a1–1(a)(2) of this chapter. If the exemption for an NMS Stock ATS is limited pursuant to paragraph (a)(4)(i) of this section, the NMS Stock ATS shall be prohibited from operating in a manner otherwise inconsistent with the terms and conditions of the Commission order.

(b) *Public disclosures.* (1) Every Form ATS–N filed pursuant to this section shall constitute a ''report'' within the meaning of sections 11A, 17(a), 18(a), and 32(a) (15 U.S.C. 78k–1, 78q(a), 78r(a), and 78ff(a)), and any other applicable provisions of the Act.

(2) The Commission will make public via posting on the Commission's website, each:

(i) Effective initial Form ATS–N, as amended;

(ii) Order of ineffective initial Form ATS–N;

(iii) Form ATS–N amendment to an effective Form ATS–N:

(A) *Material Amendments:* The cover page of the Material Amendment will be made public by the Commission upon filing and, unless the Commission declares the Material Amendment

ineffective, the entirety of the Material Amendment, as amended, will be made public by the Commission following the expiration of the review period pursuant to paragraph (a)(2)(ii) of this section.

(B) *Updating, Correcting, and Order Display and Fair Access Amendments:* The entirety of Updating, Correcting, and Order Display and Fair Access Amendments will be made public by the Commission upon filing. Notwithstanding the foregoing, an Updating or Correcting Amendment filed to a Material Amendment will be made public by the Commission following the expiration of the review period for such Material Amendment pursuant to paragraph (a)(2)(ii) of this section.

(iv) Order of ineffective Form ATS–N amendment;

(v) Notice of cessation; and

(vi) Order suspending, limiting, or revoking the exemption for an NMS Stock ATS from the definition of an ''exchange'' pursuant to § 240.3a1–1(a)(2) of this chapter.

(3) Each NMS Stock ATS shall make public via posting on its website a direct URL hyperlink to the Commission's website that contains the documents enumerated in paragraph (b)(2) of this section.

(c) *Form ATS–N disclosure requirements.* (1) An NMS Stock ATS must file a Form ATS–N in accordance with the instructions therein.

(2) Any report required to be filed with the Commission under this section shall be filed on Form ATS–N, and include all information as prescribed in Form ATS–N and the instructions thereto. Such document shall be executed at, or prior to, the time Form ATS–N is filed and shall be retained by the NMS Stock ATS in accordance with §§ 242.303 and § 232.302 of this chapter, and the instructions in Form ATS–N.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 10. The general authority citation for part 249 continues to read as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* 18 U.S.C. 1350; Sec. 953(b), Pub. L. 111–203, 124 Stat. 1904; Sec. 102(a)(3), Pub. L. 112–106, 126 Stat. 309 (2012); Sec. 107, Pub. L. 112–106, 126 Stat. 313 (2012), and Sec. 72001, Pub. L. 114–94, 129 Stat. 1312 (2015), unless otherwise noted.

* * * * *

■ 11. Add § 249.640 to subpart G to read as follows:

§ 249.640 Form ATS–N, information required of NMS Stock ATSs pursuant to § 242.304(a) of this chapter.

This form shall be used by every NMS Stock ATS to file required reports under § 242.304(a) of this chapter.

Note: The text of Form ATS–N will not appear in the Code of Federal Regulations.

BILLING CODE 8011–01–P

THE SECURITIES AND EXCHANGE COMMISSION HAS NOT PASSED UPON THE MERITS OR ACCURACY OF THE DISCLOSURES IN THIS FILING.

United States Securities and Exchange Commission

Washington, DC

FORM ATS-N

Intentional Misstatements or Omissions of Facts May Constitute Criminal Violations

See 18 U.S.C.1001 and 15 U.S.C. 78ff(a)

File No:

{NMS Stock ATS} is making this filing pursuant to the
Rule 304 under the Securities Exchange Act of 1934

- Does the NMS Stock ATS currently operate pursuant to a Form ATS?

Yes☐ No☐

Type of Filing (select one)

☐ Initial Form ATS-N	Rule 304(a)(1)(i)
☐ Material Amendment	Rule 304(a)(2)(i)(A)
☐ Updating Amendment	Rule 304(a)(2)(i)(B)
☐ Correcting Amendment	Rule 304(a)(2)(i)(C)
☐ Order Display and Fair Access Amendment	Rule 304(a)(2)(i)(D)

- Statement about the Form ATS-N Amendment pursuant to Instruction A.7(g) of this form:

- Provide the EDGAR accession number for the Form ATS-N filing to be amended:

☐ Notice of Cessation Rule 304(a)(3)

- Date the NMS Stock ATS will cease to operate: mm/dd/yyyy

☐ Withdrawal of Form ATS-N filing

Provide the EDGAR accession number for the Form ATS-N filing to be withdrawn:

Part I: Identifying Information

1. Is the organization, association, Person, group of Persons, or system filing the Form ATS-N a broker-dealer registered with the Commission?

   Yes□ No□

2. Full name of registered broker-dealer of the NMS Stock ATS ("Broker-Dealer Operator") as stated on Form BD:

3. Full name(s) of NMS Stock ATS under which business is conducted, if different:

4. Provide the SEC file number and CRD number of the Broker-Dealer Operator:

   a. SEC File No.:
   b. CRD No.:

5. Provide the full name of the national securities association of the Broker-Dealer Operator, the effective date of the Broker-Dealer Operator's membership with the national securities association, and Market Participant Identifier ("MPID") of the NMS Stock ATS:

   a. National Securities Association:
   b. Effective Date of Membership:
   c. MPID of the NMS Stock ATS:

6. Provide, if any, the website URL of the NMS Stock ATS:

7. Provide the primary, and if any, secondary, physical street address(es) of the NMS Stock ATS matching system:

8. Attach as Exhibit 1, the most recently filed or amended Schedule A of Form BD for the Broker-Dealer Operator disclosing information related to direct owners and executive officers.

   □ Select if, in lieu of filing, {NMS Stock ATS} certifies that the information requested under this Exhibit is available at the website above and is accurate as of the date of this filing.

9. Attach as Exhibit 2, the most recently filed or amended Schedule B of Form BD for the Broker-Dealer Operator disclosing information related to indirect owners.

   □ Select if, in lieu of filing, {NMS Stock ATS} certifies that the information requested under this Exhibit is available at the website above and is accurate as of the date of this filing.

10. For filings made pursuant to Rule 304(a)(2)(i)(A) through (D) (i.e., Form ATS-N Amendments), attach as Exhibit 3 a document marked to indicate changes to "yes" or "no" answers or additions to or deletions from any Item in Part I, II, and Part III, as applicable. Do not include in Exhibit 3 Items that are not changing.

Part II: Activities of the Broker-Dealer Operator and its Affiliates

Item 1: Broker-Dealer Operator Trading Activities on the ATS

a. Are business units of the Broker-Dealer Operator permitted to enter or direct the entry of orders and trading interest (*e.g.,* quotes, conditional orders, or indications of interest) into the NMS Stock ATS?

Yes☐ No☐

If yes, name and describe each type of business unit of the Broker-Dealer Operator that enters or directs the entry of orders and trading interest into the ATS (e.g., NMS Stock ATS, type of trading desks, market maker, sales or client desk) and, for each business unit, provide the applicable MPID and list the capacity of its orders and trading interest (*e.g.,* principal, agency, riskless principal).

b. If yes to Item 1(a), are the services that the NMS Stock ATS offers and provides to the business units required to be identified in Item 1(a) the same for all Subscribers?

Yes☐ No☐

If no, explain any differences in response to the applicable Item number in Part III of this form, as required, and list the applicable Item number here. If there are differences that are not applicable to Part III, explain those differences here.

c. Are there any formal or informal arrangements with any of the business units required to be identified in Item 1(a) to provide orders or trading interest to the NMS Stock ATS (e.g., undertaking to buy or sell continuously, or to meet specified thresholds of trading or quoting activity)?

Yes☐ No☐

If yes, identify the business unit and respond to the request in Part III, Item 12 of this form.

d. Can orders and trading interest in the NMS Stock ATS be routed to a Trading Center operated or controlled by the Broker-Dealer Operator?

Yes☐ No☐

If yes, respond to request in Part III, Item 16 of this form.

Item 2: Affiliates Trading Activities on the ATS

a. Are Affiliates of the Broker-Dealer Operator permitted to enter or direct the entry of orders and trading interest into the NMS Stock ATS?

Yes☐ No☐

If yes, name and describe each type of Affiliate that enters or directs the entry of orders and trading interest into the ATS (e.g., broker-dealer, NMS Stock ATS, investment company, hedge fund, market maker, principal trading firm), and, for each Affiliate, provide the applicable MPID and list the capacity of its orders and trading interest (*e.g.,* principal, agency, riskless principal).

b. If yes, to Item 2(a), are the services that the NMS Stock ATS offers and provides to the Affiliates required to be identified in Item 2(a) the same for all Subscribers?

Yes☐ No☐

If no, explain any differences in response to the applicable Item number in Part III of this form, as required, and list the applicable Item number here. If there are differences that are not applicable to Part III, explain those differences.

c. Are there any formal or informal arrangements with an Affiliate required to be identified in Item 2(a) to provide orders or trading interest to the NMS Stock ATS (e.g., undertaking to buy or sell continuously, or to meet specified thresholds of trading or quoting activity)?

Yes☐ No☐

If yes, identify the Affiliate and respond to the request in Part III, Item 12 of this form.

d. Can orders and trading interest in the NMS Stock ATS be routed to a Trading Center operated or controlled by an Affiliate of the Broker-Dealer Operator?

Yes☐ No☐

If yes, respond to the request in Part III, Item 16 of this form.

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

a. Can any Subscriber opt out from interacting with orders and trading interest of the Broker-Dealer Operator in the NMS Stock ATS?

Yes☐ No☐

If yes, explain the opt-out process.

b. Can any Subscriber opt out from interacting with the orders and trading interest of an Affiliate of the Broker-Dealer Operator in the NMS Stock ATS?

Yes☐ No☐

If yes, explain the opt-out process.

c. If yes to Item 3(a) or 3(b), are the terms and conditions of the opt-out processes required to be identified in Item 3(a), 3(b), or both, the same for all Subscribers?

Yes☐ No☐

If no, identify and explain any differences.

Item 4: Arrangements with Trading Centers

a. Are there any formal or informal arrangements (e.g., mutual, reciprocal, or preferential access arrangements) between the Broker-Dealer Operator and a Trading Center to access the NMS Stock ATS services (e.g., arrangements to effect transactions or to submit, disseminate, or display orders and trading interest in the ATS)?

Yes☐ No☐

If yes, identify the Trading Center and the ATS services and provide a summary of the terms and conditions of the arrangement.

b. If yes to Item 4(a), are there any formal or informal arrangements between an Affiliate of the Broker-Dealer Operator and a Trading Center to access the NMS Stock ATS services?

Yes☐ No☐

If yes, identify the Trading Center and ATS services and provide a summary of the terms and conditions of the arrangement.

Item 5: Other Products and Services

a. Does the Broker-Dealer Operator offer Subscribers any products or services for the purpose of effecting transactions or submitting, disseminating, or displaying orders and trading interest in the NMS Stock ATS (e.g., algorithmic trading products that send orders to the ATS, order management or order execution systems, data feeds regarding orders and trading interest in, or executions occurring on, the ATS)?

Yes☐ No☐

If yes, identify the products or services offered, provide a summary of the terms and conditions for use, and list here the applicable Item number in Part III of this form where the use of the product or service is explained. If there is no applicable Item in Part III, explain the use of the product or service with the ATS here.

b. If yes to Item 5(a), are the terms and conditions of the services or products required to be identified in Item 5(a) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

c. Does any Affiliate of the Broker-Dealer Operator offer Subscribers, the Broker-Dealer Operator, or both, any products or services for the purpose of effecting transactions or

submitting, disseminating, or displaying orders or trading interest in the NMS Stock ATS?

Yes☐ No☐

If yes, identify the products or services offered, provide a summary of the terms and conditions for use, and list here the applicable Item number in Part III of this form where the use of the product or service is explained. If there is no applicable item in Part III, explain the use of the product or service with the ATS here.

d. If yes to Item 5(c), are the terms and conditions of the services or products required to be identified in Item 5(c) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 6: Activities of Service Providers

a. Does any employee of the Broker-Dealer Operator or its Affiliate that services both the operations of the NMS Stock ATS and any other business unit or any Affiliate of the Broker-Dealer Operator ("shared employee") have access to confidential trading information on the NMS Stock ATS?

Yes☐ No☐

If yes, identify the business unit, Affiliate, or both that the shared employee services, and provide a summary of the role and responsibilities of the shared employee at the ATS and the business unit, Affiliate, or both that the shared employee services.

b. Does any entity, other than the Broker-Dealer Operator, support the services or functionalities of the NMS Stock ATS ("service provider") that are required to be explained in Part III of this form?

Yes☐ No☐

If yes, both identify the service provider and provide a summary of the role and responsibilities of the service provider in response to the applicable Item number in Part III of this form, as required. List the applicable Item number here. If there are services or functionalities that are not applicable to Part III, identify the service provider, the services and functionalities, and also provide a summary of the role and responsibilities of the service provider here.

c. If yes to Item 6(b), does the service provider, or any of its Affiliates, use the NMS Stock ATS services?

Yes☐ No☐

If yes, identify the service provider, or the Affiliate as applicable, and the ATS services that the service provider or its Affiliates use.

d. If yes to Item 6(c), are the services that the NMS Stock ATS offers and provides to the entity required to be identified in Item 6(c) the same for all Subscribers?

Yes☐ No☐

If no, identify and explain any differences.

Item 7: Protection of Confidential Trading Information

a. Describe the written safeguards and written procedures to protect the confidential trading information of Subscribers to the NMS Stock ATS, including:

i. written standards controlling employees of the ATS that trade for employees' accounts; and
ii. written oversight procedures to ensure that the safeguards and procedures described above are implemented and followed.

b. Can a Subscriber consent to the disclosure of its confidential trading information to any Person (not including those employees of the NMS Stock ATS who are operating the system or responsible for its compliance with applicable rules)?

Yes☐ No☐

If yes, explain how and under what conditions.

c. If yes to Item 7(b), can a Subscriber withdraw consent to the disclosure of its confidential trading information to any Person (not including those employees of the NMS Stock ATS who are operating the system or responsible for its compliance with applicable rules)?

Yes☐ No☐

If yes, explain how and under what conditions.

d. Provide a summary of the roles and responsibilities of any Persons that have access to confidential trading information, the confidential trading information that is accessible by them, and the basis for the access.

Part III: Manner of Operations

Item 1: Types of ATS Subscribers

Select the type(s) of Subscribers that can use the NMS Stock ATS services:

☐ Investment Companies ☐ Retail Investors ☐ Issuers ☐ Brokers

☐ NMS Stock ATSs ☐ Asset Managers ☐ Principal Trading Firms

☐ Hedge Funds ☐ Market Makers ☐ Banks ☐ Dealers

☐ Other

If other, identify the type(s) of subscriber.

Item 2: Eligibility for ATS Services

a. Does the NMS Stock ATS require Subscribers to be registered broker-dealers?

Yes☐ No☐

b. Are there any other conditions that the NMS Stock ATS requires a Person to satisfy before accessing the ATS services?

Yes☐ No☐

If yes, list and provide a summary of the conditions.

c. If yes to Item 2(b), are the conditions required to be identified in Item 2(b) the same for all Persons?

Yes☐ No☐

If no, identify and describe any differences.

d. Does the NMS Stock ATS require Subscribers to enter a written agreement to use the ATS services?

Yes☐ No☐

Item 3: Exclusion from ATS Services

a. Can the NMS Stock ATS exclude, in whole or in part, any Subscriber from the ATS services?

Yes☐ No☐

If yes, list and provide a summary of the conditions for excluding, in whole or in part, a Subscriber from the ATS services.

b. If yes to Item 3(a), are the conditions required to be identified in Item 3(a) the same for all Subscribers?

Yes☐ No☐

If no, identify and explain any differences.

Item 4: Hours of Operations

a. Provide the days and hours of operation of the NMS Stock ATS, including the times when orders or trading interest can be entered on the ATS, and any hours of operation outside of regular trading hours.

b. Are the hours of operations the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 5: Means of Entry

a. Does the NMS Stock ATS permit orders and trading interest to be entered directly into the ATS (e.g., via Financial Information eXchange ("FIX") protocol, Binary)?

Yes☐ No☐

If yes, explain the protocol that can be used to directly enter orders and trading interest into the ATS.

b. If yes to Item 5(a), are the protocols required to be identified in Item 5(a) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

c. Are there any other means for entering orders and trading interest into the NMS Stock ATS (e.g., smart order router, algorithm, order management system, sales desk)?

Yes☐ No☐

If yes, identify and explain the other means for entering orders and trading interest, indicate whether the means are provided through the Broker-Dealer Operator, either by itself or through a third-party contracting with the Broker-Dealer Operator, or through an Affiliate of the Broker-Dealer Operator, and list and provide a summary of the terms and conditions for entering orders or trading interest into the ATS through these means.

d. If yes to Item 5(c), are the terms and conditions required to be identified in Item 5(c) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 6: Connectivity and Co-location

a. Does the NMS Stock ATS offer co-location and related services (*e.g.,* cabinets and equipment, cross-connects)?

Yes☐ No☐

If yes, provide a summary of the terms and conditions for co-location and related services, including the speed and connection (*e.g.,* fiber, copper) options offered.

b. If yes to Item (6)(a), are the terms and conditions required to be identified in Item 6(a) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

c. Does the NMS Stock ATS offer any other means besides co-location and related services required to be explained in this Item 6(a) to increase the speed of communication with the ATS?

Yes☐ No☐

If yes, explain the means to increase the speed of communication with the ATS and provide a summary of the terms and conditions for its use.

d. If yes to Item 6(c), are the terms and conditions required to be identified in Item 6(c) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

e. Does the NMS Stock ATS offer any means to reduce the speed of communication with the ATS (e.g., speed bumps)?

Yes☐ No☐

If yes, explain the methods to reduce the speed of communication with the ATS and provide a summary of the terms and conditions for its use.

f. If yes to Item 6(e), are the terms and conditions required to be identified in Item 6(e) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 7: Order Types and Attributes

a. Identify and explain each order type offered by the NMS Stock ATS. In your explanation, include the following:

i. priority, including the order type's priority upon order entry and any subsequent change to priority (if applicable); whether and when the order type can receive a new time stamp; the order type's priority vis-à-vis other orders on the book due to changes in the NBBO or other reference price; and any instance in which the order type could lose execution priority to a later arriving order at the same price;

ii. conditions, including any price conditions (e.g., how price conditions affect the rank and price at which it can be executed; conditions on the display or non-display of an order; or conditions on executability and routability);

iii. order types designed not to remove liquidity (e.g., post-only orders), including what occurs when such order is marketable against trading interest on the NMS Stock ATS when received;

iv. order types that adjust their price as changes to the order book occur (*e.g.,* price sliding orders or pegged orders) or have a discretionary range, including an order's rank and price upon order entry and whether such prices or rank may change based on the NBBO or other market conditions when using such order type; when the order type is executable and at what price the execution would occur; whether the price at which the order type can be executed ever changes; and if the order type can operate in different ways, the default operation of the order type;

v. whether an order type is eligible for routing to other Trading Centers;

vi. the time-in-force instructions that can be used or not used with each order type;

vii. the circumstances under which order types may be combined with another order type, modified, replaced, canceled, rejected, or removed from the NMS Stock ATS; and

viii. the availability of order types across all forms of connectivity to the NMS Stock ATS and differences, if any, in the availability of an order type across those forms of connectivity.

b. Are the terms and conditions for each order type and attribute the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 8: Order Sizes

a. Does the NMS Stock ATS require minimum or maximum sizes for orders or trading interest?

Yes☐ No☐

If yes, specify any minimum or maximum order or trading interest size requirements and any related handling procedures.

b. If yes to Item 8(a), are the requirements and procedures required to be identified in Item 8(a) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

c. Does the NMS Stock ATS accept or execute odd-lot orders?

Yes☐ No☐

If yes, specify any odd-lot order requirements and related handling procedures (e.g., odd lot treated the same as round lot).

d. If yes to Item 8(c), are the requirements and procedures required to be identified in Item 8(c) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

e. Does the NMS Stock ATS accept or execute mixed-lot orders?

Yes☐ No☐

If yes, specify any mixed lot order requirements and related handling procedures (*e.g.,* mixed lot treated the same as round lot).

f. If yes, to Item 8(e), are the requirements and procedures required to be identified in 8(e) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 9: Conditional Orders and Indications of Interest

a. Does the NMS Stock ATS send or receive any messages indicating trading interest (*e.g.,* IOIs, actionable IOIs, or conditional orders)?

Yes☐ No☐

If yes, identify and explain the use of the messages, including information contained in messages (e.g., price or size minimums), how the message is transmitted (e.g., order management system, smart order router, FIX), when the message is transmitted (e.g., automatically by the ATS, or upon the sender's request), the type of Persons that receive the message (e.g., Subscribers, Trading Centers), responses to conditional orders or IOIs (e.g., submission to firm-up conditional orders), and the conditions under which the message might result in an execution in the ATS (e.g., response time parameters, interaction, and matching).

b. If yes to Item 9(a), are the terms and conditions governing conditional orders and indications of interest the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 10: Opening and Reopening

a. Explain how the NMS Stock ATS opens or re-opens for trading, including when and how orders and trading interest are priced, prioritized, matched, and executed, and identify any order types allowed prior to the start of regular trading hours or following a stoppage of trading in a security during regular trading hours.

b. Are the processes and procedures governing opening and re-opening the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

c. Explain how unexecuted orders and trading interest are handled at the time the NMS Stock ATS begins regular trading at the start of regular trading hours or following a stoppage of trading in a security during regular trading hours.

d. Are the processes or procedures governing unexecuted orders and trading at the time the NMS Stock ATS begins regular trading at the start of regular trading hours, or following a stoppage of trading in a security during regular trading hours, the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

e. Are there any differences between pre-opening executions, executions following a stoppage of trading in a security during regular trading hours, and/or executions during regular trading hours?

Yes☐ No☐

If yes, identify and explain the differences.

Item 11: Trading Services, Facilities and Rules

a. Provide a summary of the structure of the NMS Stock ATS marketplace (e.g., crossing system, auction market, limit order matching book) and explain the means and facilities for bringing together the orders of multiple buyers and sellers on the NMS Stock ATS.

b. Are the means and facilities required to be identified in Item 11(a) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

c. Explain the established, non-discretionary rules and procedures of the NMS Stock ATS, including order interaction rules for the priority, pricing methodologies, allocation, matching, and execution of orders and trading interest, and other procedures governing trading, such as price improvement functionality, price protection mechanisms, short sales, locked-crossed markets, the handling of execution errors, and the time-stamping of orders and executions.

d. Are the established, non-discretionary rules and procedures required to be identified in Item 11(c) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 12: Liquidity Providers

Are there any formal or informal arrangements with any Subscriber or the Broker-Dealer Operator to provide orders or trading interest to the NMS Stock ATS (e.g., undertaking to buy or sell continuously, or to meet specified thresholds of trading or quoting activity)?

Yes☐ No☐

If yes, describe the arrangement, including the terms and conditions.

Item 13: Segmentation; Notice

a. Are orders and trading interest in the NMS Stock ATS segmented into categories, classifications, tiers, or levels (e.g., segmented by type of participant, order size, duration, source, or nature of trading activity)?

Yes☐ No☐

If yes, explain the segmentation procedures, including (i) a description for how orders and trading interest are segmented; (ii) identify and describe any categories, classification, tiers, or levels and the types of orders and trading interest that are included in each; (iii) provide a summary of the parameters for each segmented category and length of time each segmented category is in effect; (iv) any procedures for overriding a determination of segmented category; and (v) how segmentation can affect order interaction.

b. If yes to Item 13(a), is the segmentation of orders and trading interest the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

c. Does the NMS Stock ATS identify orders or trading interest entered by a customer of a broker-dealer on the NMS Stock ATS as a customer order?

Yes☐ No☐

d. If yes to Item 13(a), does the NMS Stock ATS disclose to any Person the designated segmented category, classification, tier, or level of orders and trading interest?

Yes☐ No☐

If yes, provide a summary of the content of the disclosure, when and how the disclosure is communicated, who receives it, and whether and how such designation can be contested.

e. If yes to Item 13(d), are the disclosures required to be identified in 13(d) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 14: Counter-Party Selection

a. Can orders or trading interest be designated to interact or not interact with certain orders or trading interest in the NMS Stock ATS (e.g., designated to execute against a specific Subscriber's orders or trading interest or prevent a Subscriber's order from executing against itself)?

Yes☐ No☐

If yes, explain the counter-party selection procedures, including how counter-parties can be selected, and whether the designations affect the interaction and priority of trading interest in the ATS.

b. If yes to Item 14(a), are the procedures for counter-party selection required to be identified in Item 14(a) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 15: Display

a. Does the NMS Stock ATS operate as an Electronic Communication Network as defined in Rule 600(a)(23) of Regulation NMS?

Yes☐ No☐

b. Are Subscriber orders and trading interest bound for or resting in the NMS Stock ATS displayed or made known to any Person (not including those employees of the NMS Stock ATS who are operating the system)?

Yes☐ No☐

If yes, explain the display procedures, including how and when Subscriber orders and trading interest are displayed, how long orders and trading interest are displayed, what information about orders and trading interest is displayed, and the functionality of the Broker-Dealer Operator and types of market participants that receive the displayed information.

c. If yes to Item 15(b), are the display procedures required to be identified in 15(b) the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 16: Routing

a. Can orders and trading interest in the NMS Stock ATS be routed to a destination outside the NMS Stock ATS?

Yes☐ No☐

b. If yes to Item 16(a), must affirmative instructions from a Subscriber be obtained before its orders or trading interest can be routed from the NMS Stock ATS?

Yes☐ No☐

If yes, describe the affirmative instruction and explain how the affirmative instruction is obtained. If no, explain when orders in the NMS Stock ATS can be routed from the ATS (e.g., at the discretion of the Broker-Dealer Operator).

Item 17: Closing

a. Are there any differences between how orders and trading interest are treated on the NMS Stock ATS during the close and how orders and trading interest are treated during regular trading hours?

Yes☐ No☐

If yes, identify and explain the differences as compared to the information provided in the relevant Part III Items of this form.

b. Is the treatment of orders and trading interest during the close the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 18: Trading Outside of Regular Trading Hours

a. Does the NMS Stock ATS conduct trading outside of its regular trading hours?

Yes☐ No☐

b. If yes to Item 18(a), are there any differences between trading outside of regular trading hours and trading during regular trading hours in the NMS Stock ATS?

Yes☐ No☐

If yes, identify and explain the differences.

c. If yes to Item 18(a), is the treatment of orders and trading interest outside of regular trading hours the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 19: Fees

a. Identify and describe any fees or charges for use of the NMS Stock ATS services, including the type of fees (e.g., subscription, connectivity), the structure of the fees (e.g., fixed, volume-based, transaction-based), variables that impact the fees (e.g., types of securities traded, block orders, form of connectivity to the ATS), differentiation among types of Subscribers (e.g., broker-dealers, institutional investors, retail) and range of fees (e.g., high and low).

b. Identify and describe any fees or charges for use of the NMS Stock ATS services that are bundled with the Subscriber's use of non-ATS services or products offered by the Broker-Dealer Operator or its Affiliates, including a summary of the bundled services and products, the structure of the fee, variables that impact the fee, differentiation among types of Subscribers, and range of fees.

c. Identify and describe any rebate or discount of fees or charges required to be identified in Items 19(a) and 19(b), including the type of rebate or discount, structure of the rebate or discount, variables that impact the rebate or discount, differentiation among types of Subscribers, and range of rebate or discount.

Item 20: Suspension of Trading

a. Explain any procedures for suspending or stopping trading on the NMS Stock ATS, including the suspension of trading in individual NMS stocks.

b. Are the procedures for suspending or stopping trading the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 21: Trade Reporting

a. Explain any procedures and material arrangements for reporting transactions on the NMS Stock ATS, including where an ATS reports transactions and under what circumstances.

b. Are the procedures and material arrangements for reporting transactions on the NMS Stock ATS the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 22: Clearance and Settlement

a. Describe any procedures and material arrangements undertaken to facilitate the clearance and settlement of transactions on the NMS Stock ATS (e.g., whether the ATS becomes a counterparty, whether it submits trades to a registered clearing agency, or whether it requires Subscribers to have arrangements with a clearing firm).

b. Are the procedures and material arrangements undertaken to facilitate the clearance and settlement of transactions on the NMS Stock ATS the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 23: Market Data

a. Identify the sources of market data used by the NMS Stock ATS (e.g., proprietary feed from a national securities exchange, feed from the securities information processor ("SIP")), and how the ATS uses market data from these sources to provide the services that it offers, including how the ATS uses market data to determine the NBBO and protected quotes, and display, price, prioritize, execute, and remove orders and trading interest on the ATS.

b. Are the sources of market data and how the NMS Stock ATS uses market data for the services that it offers the same for all Subscribers and the Broker-Dealer Operator?

Yes☐ No☐

If no, identify and explain any differences.

Item 24: Order Display and Execution Access

a. Has the NMS Stock ATS displayed Subscriber orders to any Person (other than NMS Stock ATS employees) and had an average daily share volume of 5% or more in that NMS stock as reported by an effective transaction reporting plan or disseminated through an automated quotation system during four of the preceding six calendar months?

Yes☐ No☐

b. If yes to Item 24(a), is the NMS Stock ATS required to comply with Rule 301(b)(3)(ii) of Regulation ATS?

Yes☐ No☐

If yes,

i. Provide the ticker symbol for each such NMS stock displayed during each of the last 6 calendar months;

ii. Explain how the ATS displays such orders on a national securities exchange or through a national securities association; and

iii. Explain how the ATS provides access to such orders displayed in the national market system equivalent to the access to other orders displayed on that national securities exchange or through a national securities association pursuant to Rule 301(b)(iii) of Regulation ATS.

Item 25: Fair Access

a. Has the NMS Stock ATS executed 5% or more of the average daily trading volume in an NMS stock as reported by an effective transaction reporting plan or disseminated through an automated quotation system during four of the preceding six calendar months?

Yes☐ No☐

b. If yes to Item 25(a), is the NMS Stock ATS required to comply with Rule 301(b)(5)(ii) of Regulation ATS?

Yes☐ No☐

If yes,

i. Provide the ticker symbol for each such NMS stock during each of the last 6 calendar months; and

ii. Describe the written standards for granting access to trading on the ATS pursuant to Rule 301(b)(5)(ii)(A) of Regulation ATS.

Item 26: Aggregate Platform Data

Does the NMS Stock ATS publish or otherwise provide to one or more Subscribers aggregate platform-wide order flow and execution statistics of the ATS that are not otherwise required disclosures under Rule 605 of Regulation NMS?

Yes☐ No☐

If yes,

i. Attach, as Exhibit 4, the most recent disclosure of aggregate platform-wide order flow and execution statistics of the ATS that are not otherwise required disclosures under Rule 605 of Regulation NMS and that the ATS provided to one or more Subscribers as of the end of each calendar quarter.

☐ Select if, in lieu of filing, {NMS Stock ATS} certifies that the information requested under Exhibit 4 is available at the website provided in Part I, Item 6 of this form and is accurate as of the date of this filing.

ii. Attach, as Exhibit 5, a list and explanation of the categories or metrics for the aggregate platform-wide order flow and execution statistics provided as Exhibit 4 and explain the criteria or methodology used to calculate aggregate platform-wide order flow and execution statistics.

☐ Select if, in lieu of filing, {NMS Stock ATS} certifies that the information requested under Exhibit 5 is available at the website provided in Part I, Item 6 of this form and is accurate as of the date of this filing.

Part IV: Contact Information, Signature Block, and Consent to Service

Provide the following information of the Person at {NMS Stock ATS} prepared to respond to questions for this submission:

First Name: Last Name:

Title:

E-Mail: Telephone:

Primary Street Address of the NMS Stock ATS:

Mailing Address of the NMS Stock ATS (if different):

The {NMS Stock ATS} consents that service of any civil action brought by, or notice of any proceeding before, the SEC or a self-regulatory organization in connection with the alternative trading system's activities may be given by registered or certified mail to the contact employee at the primary street address or mailing address (if different) of the NMS Stock ATS, or via email, at the addresses provided on this Form ATS-N. The undersigned, being first duly sworn, deposes and says that he/she has executed this form on behalf of, and with the authority of, said alternative trading system. The undersigned and {NMS Stock ATS} represent that the information and statements contained herein, including exhibits, schedules, or other documents attached hereto, and other information filed herewith, all of which are made a part hereof, are current, true, and complete.

Date {auto fill} {NMS Stock ATS}

By: _____ Title_____

FORM ATS–N INSTRUCTIONS

A. FILING FORM ATS–N:

1. Form ATS–N is a public reporting form that is designed to provide market participants and the Commission with information about the operations of the NMS Stock ATS and the ATS-related activities of its Broker-Dealer Operator and its Affiliates. Among other things, an NMS Stock ATS must file Form ATS–N to be exempt from the definition of ''exchange'' pursuant to Exchange Act Rule 3a1–1(a)(2).

2. A separate Form ATS–N is required for each NMS Stock ATS operated by the same Broker-Dealer Operator.

3. An NMS Stock ATS must provide all the information required by Form ATS–N, including responses to each Item, as applicable, and the Exhibits, and disclose information that is accurate, current, and complete.

4. An NMS Stock ATS must respond to each request in detail unless otherwise provided (*i.e.,* where the request indicates that the ATS is required to disclose ''summary'' information).

5. Any report required to be submitted pursuant to Rule 304 of Regulation ATS shall be prepared, formatted, and submitted in accordance with Regulation S–T and the EDGAR Filer Manual. Filers have the option of submitting the information to EDGAR using the most recent version of the XML schema for Rule 304 as specified by the EDGAR Filer Manual, or submitting the information using the web-fillable form for Rule 304 in EDGAR.

6. Initial Form ATS–N: Prior to commencing operations, an NMS Stock ATS shall file an initial Form ATS–N and the initial Form ATS–N must become effective. If an NMS Stock ATS is currently operating pursuant to a Form ATS it must indicate such on the Form ATS–N. If the NMS Stock ATS is operating pursuant to a previously filed initial operation report on Form ATS as of January 7, 2019, such NMS Stock ATS shall file with the Commission a Form ATS–N no earlier than January 7, 2019, and no later than February 8, 2019.

7. Form ATS–N Amendment

a. An NMS Stock ATS shall amend a Form ATS–N in accordance with the conditions of Rule 304.

b. A Material Amendment, except as provided by Rule 304(a)(2)(i)(D) for an

Order Display and Fair Access Amendment, must be filed at least 30 calendar days prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the Broker-Dealer Operator or its Affiliates that are subject to disclosure on Form ATS–N.

c. An Updating Amendment must be filed no later than 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate or incomplete for any reason and was not previously required to be reported to the Commission as a Form ATS–N Amendment pursuant to Rule 304(a)(2)(i)(A), Rule 304(a)(2)(i)(C), or Rule 304(a)(2)(i)(D).

d. A Correcting Amendment must be filed promptly to correct information in any previous disclosure on Form ATS–N, after discovery that any information previously filed on Form ATS–N was materially inaccurate or incomplete when filed.

e. An Order Display and Fair Access Amendment must be filed no later than seven calendar days after information required to be disclosed in Part III, Items 24 and 25 on Form ATS–N has become inaccurate or incomplete.

f. An NMS Stock ATS must select only one ''Type of Amendment'' for each Form ATS–N Amendment filed with the Commission.

g. For each Amendment, indicate the Part and Item number of the Form ATS–N that is the subject of the change, provide a brief summary of the changes, and state whether or not the changes apply to all Subscribers and the Broker-Dealer Operator.

h. For each Amendment, provide the EDGAR accession number for the filing that is being amended.

8. Notice of Cessation: An NMS Stock ATS shall notice its cessation of operations on Form ATS–N at least 10 business days prior to the date the NMS Stock ATS will cease to operate as an NMS Stock ATS.

9. Withdrawal: If an NMS Stock ATS determines to withdraw a filing, it must check the ''Withdrawal of Form ATS–N filing'' check box for the type of filing and provide the EDGAR accession number of the Form ATS–N filing that is being withdrawn. An NMS Stock ATS may withdraw an initial Form ATS–N or an Amendment before the end of the applicable Commission review period. An NMS Stock ATS may withdraw a notice of cessation of operations at any time before the date that the NMS Stock ATS had indicated it intended to cease operating. A Legacy NMS Stock ATS may not withdraw its initial Form ATS–N at any time.

10. A filing that is defective may be rejected and not be accepted by the EDGAR system. Any filing so rejected shall be deemed not to have been filed. *See generally* Regulation S–T (17 CFR part 232).

B. CONTACT INFORMATION

• The individual listed on the NMS Stock ATS's response to Part IV of Form ATS–N as the contact representative must be authorized to receive all incoming communications and be responsible for disseminating that information, as necessary, within the NMS Stock ATS. The contact information provided in Part IV of Form ATS–N will not be made public.

C. RECORDKEEPING

• A copy of this Form ATS–N must be retained by the NMS Stock ATS in accordance with the EDGAR Filer Manual and Rule 303 of Regulation ATS and must be made available for inspection upon a regulatory request.

D. PAPERWORK REDUCTION ACT DISCLOSURE

• Form ATS–N requires an NMS Stock ATS to provide the Commission with certain information regarding: (1) the operation of the NMS Stock ATS and the ATS-related activities of the Broker-Dealer Operator and its Affiliates; (2) material and other changes to the operations and disclosures of the NMS Stock ATS; and (3) notice upon ceasing operation of the NMS Stock ATS. Form ATS–N is designed to provide the public with information to, among other things, help them make informed decisions about whether to participate on the NMS Stock ATS. In addition, the Form ATS–N is designed to provide the Commission with information to permit it to carry out its market oversight and investor protection functions.

• The information provided on Form ATS–N will help the Commission to determine whether an NMS Stock ATS is in compliance with the federal securities laws and the rules or regulations thereunder, including Regulation ATS. An NMS Stock ATS must:

○ File an initial Form ATS–N prior to commencing operations.

○ File a Form ATS Amendment: (1) At least 30 calendar days prior to the date of implementation of a material change to the operations of the NMS Stock ATS or to the activities of the Broker-Dealer Operator or its Affiliates that are subject to disclosure on Form ATS–N (Material Amendment); (2) no later than 30 calendar days after the end of each calendar quarter to correct any other information that has become inaccurate or incomplete for any reason and was not previously required to be reported to the Commission as a Form ATS–N amendment pursuant to Rule 304(a)(2)(i)(A), Rule 304(a)(2)(i)(C), or Rule 304(a)(2)(i)(D) (Updating Amendment); (3) promptly, to correct information in any previous disclosure on Form ATS–N, after discovery that any information previously filed on Form ATS–N was materially inaccurate or incomplete when filed (Correcting Amendment); or (4) no later than seven calendar days after information required to be disclosed in Part III, Items 24 and 25 on Form ATS–N has become inaccurate or incomplete (Order Display and Fair Access Amendment). During the Commission review period of an initial Form ATS–N filing, an NMS Stock ATS that is operating as of January 7, 2019 shall amend its filed Form ATS–N pursuant to these requirements, and an NMS Stock ATS that was not operating as of January 7, 2019 shall amend its filed Form ATS–N pursuant to the requirements for Updating and Correcting Amendments. During the Commission review period of an initial Form ATS–N filing, an NMS Stock ATS shall amend a filed Material Amendment pursuant to the requirements for Updating and Correcting Amendments.

○ Notice its cessation of operations at least 10 business days before the date the NMS Stock ATS ceases to operate as an NMS Stock ATS.

• This collection of information will be reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. 3507. An agency may not conduct or sponsor, and a Person is not required to respond to, a collection of information unless it displays a currently valid control number. We estimate that an NMS Stock ATS will spend approximately 127.4 hours completing the Form ATS–N, approximately 9 hours preparing each amendment to Form ATS–N, and approximately 2 hours preparing a notice of cessation on Form ATS–N. Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden.

E. EXPLANATION OF TERMS

The following terms are defined for purposes of Form ATS–N.

• **AFFILIATE:** Shall mean, with respect to a specified Person, any Person that, directly or indirectly, controls, is under common control with, or is controlled by, the specified Person.

• **ALTERNATIVE TRADING SYSTEM:** Shall mean any organization, association, Person, group of Persons, or system: (1) that constitutes, maintains, or provides 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 within the meaning of Rule 3b-16 under the Exchange Act; and (2) that does not (i) set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, Person, group of Persons, or system, or (ii) discipline subscribers other than by exclusion from trading. 17 CFR 242.300(a).

• **BROKER-DEALER OPERATOR:** Shall mean the registered broker-dealer of the NMS Stock ATS pursuant to 17 CFR 242.301(b)(1).

• **CONTROL:** Shall mean the power, directly or indirectly, to direct the management or policies of the broker-dealer of an alternative trading system, whether through ownership of securities, by contract, or otherwise. A Person is presumed to control the broker-dealer of an alternative trading system if that Person: (1) is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); (2) directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities of the broker-dealer of the alternative trading system; or (3) in the case of a partnership, has contributed, or has the right to receive upon dissolution, 25 percent or more of the capital of the broker-dealer of the alternative trading system. 17 CFR 242.300(f).

• **NMS SECURITY:** Shall mean any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options. 17 CFR 242.600(b)(46).

• **NMS STOCK:** Shall mean any NMS security other than an option. 17 CFR 242.600(b)(47).

• **NMS STOCK ATS:** Shall mean an alternative trading system, as defined in Rule 300(a) under the Exchange Act, that trades NMS stocks, as defined in Rule 300(g) under the Exchange Act. 17 CFR 242.300(k).

• **ORDER:** Shall mean any firm indication of a willingness to buy or sell a security as either principal or agent, including any bid or offer quotation, market order, limit order, or other priced order. 17 CFR 242.300(e).

• **PERSON:** Shall mean a natural person or a company. 15 U.S.C. 80a-2(a)(28).

• **SUBSCRIBER:** Shall mean any Person that has entered into a contractual agreement with an alternative trading system to access an alternative trading system for the purpose of effecting transactions in securities, or for submitting, disseminating or displaying orders on such alternative trading system, including a customer, member, user, or participant in an alternative trading system. A subscriber, however, shall not include a national securities exchange or association. 17 CFR 242.300(b).

• **TRADING CENTER:** Shall mean a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent. 17 CFR 242.600(b)(78).

By the Commission.

Dated: July 18, 2018

Brent J. Fields,

Secretary.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix A

Key to Comment Letters Cited in Regulation of NMS Stock Alternative Trading Systems (File No. S7–23–15

Letter from Venu Palaparthi, Senior Vice President, Virtu Financial to Brent J. Fields, Secretary, Commission, dated December 2, 2015 (''Virtu Letter'')

Letter from Clive Williams, Head of Global Equity Trading, Thea N. Williams, Head of Global Fixed Income Trading, and Jonathan D. Siegel, Senior Legal Counsel, T. Rowe Price Associates, Inc. to Brent J. Fields, Secretary, Commission, dated February 23, 2016 (''T. Rowe Price Letter'')

Letter from Jonathan A. Clark, Chief Executive Officer, and James C. Dolan, Chief Compliance Office, Luminex Trading & Analytics LLC to Brent J. Fields, Secretary, Commission, dated February 23, 2016 (''Luminex Letter'')

Letter from Eric T. Schneiderman, Attorney General, State of New York, to the Honorable Mary Jo White, Chair, and Brent J. Fields, Secretary, Commission, dated February 23, 2016 (''Schneiderman Letter'')

Letter from Scott Pintoff, General Counsel, MarketAxess Corporation, to Secretary, Commission, dated February 24, 2016 (''MarketAxess Letter'')

Letter from David W. Blass, General Counsel, Investment Company Institute, to Brent J. Fields, Secretary, Commission, dated February 25, 2016 (''ICI Letter'')

Letter from Chris Barnard, to the Commission, dated February 25, 2016 (''Barnard Letter'').

Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, Managed Funds Association and Jiří Król, Deputy Chief Executive Officer, Global Head of Government Affairs, Alternative Investment Management Association, to Brent J. Fields, Secretary, Commission, dated February 26, 2016 (''MFA/AIMA Letter'')

Letter from Marcia E. Asquith, Senior Vice President and Corporate Secretary, Financial Industry Regulatory Authority, Inc., to Brent J. Fields, Secretary, Commission, dated February 26, 2016 (''FINRA Letter'')

Letter from Phillip S. Gillespie, General Counsel and Executive Vice President, State Street Global Advisors, to Brent J. Fields, Secretary, Commission, dated February 26, 2016 (''SSGA Letter'')

Letter from John Russell, Chairman of the Board and James Toes, President and Chief Executive Office, Securities Traders Association, to Brent J. Fields, Secretary, Commission, dated February 26, 2016 (''STA Letter'')

Letter from D. Keith Ross, Chief Executive Officer, PDQ Enterprises, LLC and Christopher Meade, Chief Compliance Officer, PDQ ATS, Inc., to Brent J. Fields, Secretary, Commission, dated February 26, 2016 (''PDQ Letter'')

Letter from Howard Meyerson, General Counsel, Liquidnet, Inc., to Brent J. Fields, Secretary, Commission, dated February 26, 2016 (''Liquidnet Letter'')

Letter from Denis Ignatovich, Co-Founder, and Grant Passmore, Ph.D., Co-Founder, Aesthetic Integration Ltd. (''AI Letter'')

Letter from Dave Lauer, Chairman, Healthy Markets Association, to Brent J. Fields, Secretary, Commission, dated February 26, 2016 (''HMA Letter'')

Letter from Kurt N. Schacht, CFA, Managing Director, Standards & Advocacy, CFA Institute, and James C. Allen, CFA, Head, Capital Markets Policy, CFA Institute, to Brent J. Fields, Secretary, Commission, dated February 26, 2016 (''CFA Institute Letter'')

Letter from Micah Hauptman, Financial Services Counsel, Consumer Federation of America, to Brent J. Fields, Secretary, Commission, dated February 26, 2016 (''Consumer Federation of American Letter'')

Letter from Timothy J. Mahoney, Chief Executive Office, BIDS Trading L.P., to Brent J. Fields, Secretary, Commission, dated February 26, 2016 (''BIDS Letter'')

Letter from Marc B. Bryant, Senior Vice President, Deputy General Counsel, Fidelity Investments, to Brent J. Fields, Secretary, Commission, dated February 26, 2016 (''Fidelity Letter'')

Letter from Angelo Evangelou, Deputy General Counsel, Legal Division, Chicago Board Options Exchange, Incorporated, to Brent J. Fields, Secretary, Commission, dated March 1, 2016 (''CBOE Letter'')

Letter from Adam C. Cooper, Senior Managing Director and Chief Legal Officer, Citadel LLC, to Brent J. Fields, Secretary,

Commission, dated March 1, 2016 (''Citadel Letter'')

Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Brent J. Fields, Secretary, Commission, dated March 7, 2016 (''SIFMA Letter'')

Letter from Kimberly Unger, Chief Executive Officer & Executive Director, The Security Traders Association of New York, Inc., to Brent J. Fields, Secretary, Commission, dated March 4, 2016 (''STANY Letter'')

Letter from Mark Holder, Managing Director, UBS Securities LLC, to Brent J. Fields, Secretary, Commission, dated March 21, 2016 (''UBS Letter'')

Letter from Anonymous to Commission, dated February 26, 2016 (''Anonymous Letter'')

Letter from Dennis M. Kelleher, President and Chief Executive Officer, Stephen W. Hall, Legal Director & Securities Specialist, and Allen Dreschel, Attorney, Better Markets, Inc., to Brent J. Fields, Secretary, Commission, dated February 26, 2016 (''Better Markets Letter'')

Letter from John A. McCarthy, General Counsel, KCG Holdings, Inc., to Brent J. Fields, Secretary, Commission, dated March 15, 2016 (''KCG Letter'')

Letter from David Weisberger, Managing Director, Markit, to Brent J. Fields, Secretary, Commission, dated April 15, 2016 (''Markit Letter'')

Letter from William Neuberger and Andrew F. Silverman, Managing Directors and Global Co-Heads, Morgan Stanley Electronic Trading, to Brent J. Fields, Secretary, Commission, dated May 19, 2016 (''Morgan Stanley Letter'')

Letter from John F. Linares, General Counsel, LeveL ATS, to Brent J. Fields, Secretary, Commission, dated September 7, 2016 (''LeveL ATS Letter'').

Letter from Rick A. Fleming, Investor Advocate, Office of the Investor Advocate, Commission, to Brent J. Fields, Secretary, Commission, dated September 9, 2016 (''Investor Advocate Letter'')

Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, Managed Funds Association, to the Honorable Walter J. Clayton, Chairman, Commission, dated May 18, 2017 (''MFA Letter 2'')

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