

XIV. Rise in SEC Dark Pool Fines

A. Introduction

Dark pools—a type of “alternative trading system” (ATS)¹—are external trading forums that provide subscribers access to liquidity beyond the constraints of a regulated exchange’s public quotes.² These dark pools allow subscribers to trade stocks outside of public view.³ Dark pools were largely created to allow institutional investors to execute large volume trades without creating an unfavorable impact on market prices.⁴ These trading venues benefit participants by creating trading opportunities that are unavailable to the general investing public.⁵ An important advantage of dark pools is their ability to conceal their subscribers’ trading activities. Robert Khuzami, the Securities and Exchange Commission’s (SEC) Director

¹ See Luis A. Aguilar, Comm’r, Sec. & Exch. Comm’n, *Shedding Light on Dark Pools* (Nov. 18, 2015), *available at* <http://www.sec.gov/news/statement/shedding-light-on-dark-pools.html> [<https://perma.cc/S9TX-V4MT>].

² Erik R. Sirri, Dir., Div. of Trading & Mkts., *Keynote Speech at the SIFMA 2008 Dark Pools Symposium* (Feb. 1, 2008), *available at* <http://www.sec.gov/news/speech/2008/spch020108ers.htm> [<http://perma.cc/3UFR-YSFM>].

³ See HEALTHY MARKETS, *THE DARK SIDE OF THE POOLS: WHAT INVESTORS SHOULD LEARN FROM REGULATORS’ ACTIONS* 6 (2015), *available at* <http://www.healthymarkets.org/s/DarkSideofthePoolsReport.pdf> [<https://perma.cc/BRW7-3XR6>] [hereinafter *THE DARK SIDE OF THE POOLS*] (“Dark pools are generally thought of as venues with no pre-trade price transparency, unlike Exchanges or other venues where orders of specific size and price are public.”).

⁴ Elvis Picardo, *An Introduction To Dark Pools*, INVESTOPEDIA, <http://www.investopedia.com/articles/markets/050614/introduction-dark-pools.asp> [perma.cc/BRW7-3XR6]; Sam Mamudi, *Dark Pool Not Dark Enough in SEC Enforcement Complaint*, BLOOMBERG BUS. (June 6, 2014), <http://www.bloomberg.com/news/articles/2014-06-06/dark-pool-not-dark-enough-in-sec-enforcement-complaint> [<http://perma.cc/RS38-MEKB>].

⁵ Press Release, Sec. & Exch. Comm’n, *SEC Charges Boston-Based Dark Pool Operator For Failing to Protect Confidential Information* (Oct. 3, 2012), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171485204#.Uj-7_BZD3ww [<http://perma.cc/5E25-EM25>] [hereinafter *SEC 2012 Press Release*].

of Enforcement said, “Dark pools are dark for a reason: buyers and sellers expect confidentiality of their trading information.”⁶ There are currently approximately forty of these trading venues run by brokers and competing with the traditional stock exchanges for business.⁷ Dark pools were originally intended to service large block trades; however, the average order size has fallen to around 200 shares, which is relatively close to the average on public exchanges.⁸ In recent years, the percentage of trades on ATSSs has risen from around sixteen percent of total trades in 2008 to approximately forty percent in 2014,⁹ with sixteen to eighteen percent of those occurring in dark pools.¹⁰ Some critics have expressed the concern that “so much trading is now happening away from exchanges that publicly quoted prices for stocks on exchanges may no longer properly reflect where the market is.”¹¹ SEC Chairwoman Mary Jo White believes that the growth of dark pools is harmful to markets and has pledged to address the issue.¹²

In the U.S., all dark pools are considered and regulated as ATSSs.¹³ Because broker-dealers typically run ATSSs, dark pools fall

⁶ Justin Grant, *SEC Fines Boston-Based Dark Pool For Not Protecting User Info*, INFO. WEEK (Oct. 3, 2012, 12:25 PM), <http://www.wallstreetandtech.com/exchanges/sec-fines-boston-based-dark-pool-for-not-protecting-user-info/d/d-id/1267069?> [<http://perma.cc/3S64-S4M8>].

⁷ John McCrank, *ITG Dark Pool Volume Fell by Nearly Half Following Record Fine*, REUTERS (Aug. 24, 2015, 1:13 PM), <http://www.reuters.com/article/2015/08/24/invest-tech-grp-darkpool-idUSL1N10Z1G920150824> [<http://perma.cc/9RXW-BASY>].

⁸ John McCrank & Sarah Lynch, *Dark Markets May Be More Harmful Than High-Frequency Trading*, REUTERS (Apr. 7, 2014), <http://www.reuters.com/article/2014/04/07/us-markets-darkpools-analysis-idUSBREA3605M20140407> [<http://perma.cc/A92B-GHBB>].

⁹ *Id.*; see Bradley Hope et al., *Credit Suisse, Barclays in Talks to Settle ‘Dark Pool’ Allegations*, WALL ST. J. (Aug. 11, 2015, 11:09 PM), <http://www.wsj.com/articles/credit-suisse-nearing-record-settlement-tied-to-wrongdoing-at-dark-pool-1439315166> [<http://perma.cc/ZPL7-3BWU>].

¹⁰ See THE DARK SIDE OF THE POOLS, *supra* note 3.

¹¹ McCrank & Lynch, *supra* note 8.

¹² See Sam Mamudi, *SEC Pokes Hole in Argument It’s Too Slow to Get Grip on Markets*, BLOOMBERG BUS. (Jan. 16, 2015, 12:01 AM), <http://www.bloomberg.com/news/articles/2015-01-16/sec-pokes-hole-in-argument-it-s-too-slow-to-get-grip-on-markets> [<http://perma.cc/YLU7-3FSJ>].

¹³ See Aguilar, *supra* note 1.

under the Financial Industry Regulatory Authority's (FINRA) regulatory oversight, as well as the SEC's.¹⁴ Banks operate the largest dark pools: "Credit Suisse Group AG's Crossfinder dark pool is the largest, followed by Barclays's LX and UBS AG's ATS."¹⁵

In recent years, many subscribers who have utilized dark pools for their trading benefits have found themselves being manipulated by dark pool operators or other traders.¹⁶ Many believe that regulators have been too slow to address the rise in dark pool trading they believe threatens financial markets.¹⁷ However, regulators have demonstrated through a recent string of enforcement actions that they are up to task and are willing to bring more cases against dark pools operators who violate the securities laws.¹⁸

This article reviews recent fines levied against dark pool operators by the SEC, FINRA, and the New York Attorney General (NY AG), many of which revolve around violations of subscriber confidentiality or preferential treatment of certain subscribers. Part B gives an overview of recent fines against Pipeline Trading Systems. Part C reviews the SEC's case against eBX, LLC. Part D looks at the case against Liquidnet. Part E reviews the settlement between Goldman Sachs and FINRA. Part F reviews the settlement between ITG and the SEC. Part G reviews the settlement between UBS and the SEC. Part H reviews the pending cases against Credit Suisse Group AG and Barclays PLC. Finally, part I explores a few possible areas of dark pool regulation.

B. Pipeline Trading Systems

In 2011, the SEC fined dark pool operator Pipeline Trading Systems (Pipeline) \$1 million for failing to disclose to customers that the vast majority of its customer orders were executed by an

¹⁴ THE DARK SIDE OF THE POOLS, *supra* note 3, at 36.

¹⁵ Bradley Hope, *Goldman Agrees to \$800,000 Fine Over Dark Pool*, WALL ST. J. (July 1, 2014), <http://www.wsj.com/articles/finra-fines-goldman-dark-pool-trading-unit-800-000-1404224624> [<http://perma.cc/RX57-D7TD>].

¹⁶ See Sviatoslav Rosov, *Investors Beware: New Dark Pools Report Issues Warning*, CFA INST. (Sept. 30, 2015), <https://blogs.cfainstitute.org/marketintegrity/2015/09/30/investors-beware-new-dark-pools-report-issues-warning/> [<https://perma.cc/27HJ-5FVN>].

¹⁷ See Mamudi, *supra* note 12.

¹⁸ See *id.*

affiliated trading operation, rather than Pipeline itself.¹⁹ This enforcement action marked the first time that the SEC pursued a case of this type against a dark pool operator.²⁰ Pipeline advertised that it “matched customers orders with those from other clients,” providing “natural liquidity.”²¹ However, Pipeline’s parent company owned a trading entity that filled more than 80 percent of subscribers’ orders.²² Pipeline also failed to disclose its affiliate’s role in fulfilling orders in its ATS filings with the SEC.²³ Pipeline also concealed that its affiliate’s purpose was to create liquidity in the pool.²⁴ While Pipeline’s expressed purpose for the affiliate was to create liquidity,²⁵ in 2008, 2009, and 2010 the affiliate profited from trades executed with Pipeline subscribers.²⁶ Pipeline disclosures to regulators and subscribers maintained that it did not have a proprietary trading desk and was predator-proof, but the affiliate used various “predatory tactics”²⁷ that subscribers sought to avoid by trading within a dark pool.²⁸

In addition to the \$1 million in fines, the SEC found that Pipeline violated Rules 301(b)(10) and 301(b)(2) of Regulation ATS, which require safeguarding the confidentiality of subscriber pre-trade information and filing disclosure forms, respectively.²⁹ The SEC also found violations of Section 17(a)(2) of the Securities Act, which prohibits, “in the offer or sale of any securities . . . obtain[ing] 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

¹⁹ See Grant, *supra* note 6.

²⁰ *Id.*

²¹ See Joshua Gallu & Nine Mehta, *Pipeline Settles With U.S. SEC Over Dark Pool Claims*, BLOOMBERG BUS. (Oct. 24, 2011, 9:04 PM), <http://www.bloomberg.com/news/articles/2011-10-24/pipeline-agrees-to-pay-1-million-over-sec-dark-pool-claims> [<http://perma.cc/GQU3-TU3S>].

²² Pipeline Trading Systems LLC, Securities Act Release No. 9271, Exchange Act Release No. 65609, 102 SEC Docket 1062 (Oct. 24, 2011) [hereinafter Pipeline Trading Systems LLC].

²³ See Kiersten Zaza, *A Fiduciary Standard as a Tool for Dark Pool Subscribers*, 18 STAN. J. L. BUS. & FIN. 319, 339 (2013).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Pipeline Trading Systems LLC, *supra* note 22.

²⁷ See Zaza, *supra* note 23.

²⁸ See *id.* at 338.

²⁹ Pipeline Trading Systems LLC, *supra* note 22.

statements made, in light of the circumstances under which they were made, not misleading³⁰

C. eBX, LLC

In 2012, the Boston-based dark pool operator eBX, LLC (eBX) agreed to pay an \$800,000 penalty³¹ for failing to disclose in required SEC filings that it allowed subscribers' unexecuted order information to be shared outside of its Level ATS platform.³² In 2010, eBX's Level saw an average of nearly 70 million shares traded daily, comprising approximately 7.2 percent of total dark pool trading activity.³³ eBX assured its subscribers that their trading information would be kept confidential, however, "eBX instead allowed an outside technology firm to use information about Level subscribers' unexecuted orders for its own business purposes."³⁴ The SEC found that eBX violated Rules 301(b)(10)³⁵ and 301(b)(2) of Regulation ATS.³⁶

The SEC found that eBX failed to protect subscriber trading information by entering into an agreement with a third party, which allowed the third party to retain subscribers' unexecuted trade information and to use that information for its own benefit.³⁷ The outside firm used the information to determine whether the order should be directed to Level or to another venue depending on which offered a more favorable price for its own customers' orders.³⁸ The SEC also found that eBX twice failed to file the required disclosures when it entered into an agreement with a third party vendor and allowed the vendor to retain subscribers' information.³⁹ As a result of the settlement, some of eBX's subscribers stopped using the Level

³⁰ Zaza, *supra* note 23, at 341.

³¹ SEC 2012 Press Release, *supra* note 5.

³² *Id.*

³³ Jenny Strasburg & Scott Patterson, 'Dark Pool,' *SEC Settle*, WALL ST. J. (Oct. 4, 2012), <http://www.wsj.com/articles/SB10000872396390444223104578034413566549332> [<http://perma.cc/XY9Z-54JR>].

³⁴ SEC 2012 Press Release, *supra* note 5.

³⁵ EBX, LLC, Exchange Act Release No. 67969, 104 SEC Docket 2844 (Oct. 3, 2012).

³⁶ *Id.*

³⁷ *See id.*

³⁸ SEC 2012 Press Release, *supra* note 5.

³⁹ *See* EBX, LLC, *supra* note 35.

platform.⁴⁰ Through August 2012, “trading volume at Level had dropped to 44 million shares a day on average,” resulting in bank-owned dark pools capturing business from independent firms.⁴¹

D. Liquidnet Holdings

In 2014, Liquidnet Holdings Inc. (Liquidnet) consented to a \$2 million fine for failing to maintain a firewall to prevent employees in its Equity Capital Markets Desk (ECM)⁴² from accessing its confidential dark pool subscribers’ trading information, which was used in marketing materials and other communications.⁴³ ECM employees used subscriber information to advise securities issuers about subscriber interest in their stock, and to let issuers know which institutional investor subscribers they should make connections with at networking events.⁴⁴ ECM also used subscriber trading activity to educate their customers on the ideal times to execute transactions, thereby gaining an advantage over subscribers.⁴⁵ The SEC also found that, among other things, Liquidnet improperly used confidential subscriber data in two dark pool sales tools.⁴⁶ The SEC determined that Liquidnet violated Section 17(a)(2) of the Securities Act of 1933.⁴⁷ Similar to Pipeline and eBX, Liquidnet also violated Rules 301(b)(2) and 301(b)(10) of Regulation ATS.⁴⁸ The settlement marked a significant increase in the overall size of penalties.⁴⁹ Liquidnet consented to the SEC’s cease and desist order and agreed to pay the \$2 million fine but did not admit or deny any of the alleged wrongdoing.⁵⁰

⁴⁰ Zaza, *supra* note 23, at 338.

⁴¹ Strasburg & Patterson, *supra* note 33.

⁴² Press Release, Sec. & Exch. Comm’n, SEC Charges New York-Based Dark Pool Operator With Failing to Safeguard Confidential Trading Information (June 6, 2014), *available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542011574> [<http://perma.cc/36NH-S5EU>] [hereinafter SEC 2014 Press Release].

⁴³ See Mamudi, *supra* note 4.

⁴⁴ See SEC 2014 Press Release, *supra* note 42.

⁴⁵ See *id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Mamudi, *supra* note 4.

⁵⁰ SEC 2014 Press Release, *supra* note 42.

E. Goldman Sachs

In 2014, Goldman Sachs agreed to pay an \$800,000 fine stemming from pricing errors in its dark pool called SIGMA-X, which caused nearly 400,000 mispriced trades.⁵¹ “Trading centers” like dark pools are required to either “trade at the best-quoted prices or route orders to the trading centers quoting the best prices”⁵² under an SEC rule known as the “Order Protection Rule” or the “Trade-through Rule.”⁵³ The mispriced trades were due to SIGMA-X’s matching engine’s inability to keep up with high market volatility, causing processing delays that were not detected within a reasonable amount of time.⁵⁴ Trades in SIGMA-X over a period of eight days were executed “at a price inferior to the best bid or offer in the markets at the time.”⁵⁵ The trade-throughs were identified by customers who noticed issues in their own execution reports, which they then reported to Goldman Sachs.⁵⁶ Of the millions of trades executed each week, Goldman Sachs only checked 20 transactions per week to ensure the accuracy of trades occurring in SIMGA-X.⁵⁷ FINRA found that from November 2008 through August 2011, “Goldman Sachs failed to establish, maintain, and enforce written policies and procedures that were reasonably designed to prevent trade-throughs of protected quotations,” as well as failing to ensure the proper implementation of procedures designed to prevent such trade-throughs.⁵⁸ Prior to incurring the fine, Goldman had already reimbursed clients \$1.67 million to compensate them for the trades.⁵⁹

⁵¹ Hope, *supra* note 15.

⁵² See FIN. INDUS. REGULATORY AUTH., DISCIPLINARY AND OTHER FINRA ACTIONS 38 (Sept. 15, 2014).

⁵³ *Responses to Frequently Asked Questions Concerning Rule 611 and Rule 610 of Regulation NMS*, SEC. & EXCH. COMM’N, <https://www.sec.gov/divisions/marketreg/nmsfaq610-11.htm> [<https://perma.cc/5LPC-FA7A>].

⁵⁴ See Hope, *supra* note 15.

⁵⁵ *Id.*

⁵⁶ See Matt Levine, *Goldman Sachs Got Lost in Its Own Dark Pool*, BLOOMBERG VIEW (Jul. 1, 2014 1:06 PM), <http://www.bloombergvew.com/articles/2014-07-01/goldman-sachs-got-lost-in-its-own-dark-pool> [<http://perma.cc/KQ83-J4CB>].

⁵⁷ See *id.*

⁵⁸ FIN. INDUS. REGULATORY AUTH., *supra* note 52.

⁵⁹ See Hope, *supra* note 15.

In honoring the penalty, Goldman Sachs did not admit or deny the allegations.⁶⁰

F. ITG

In 2014, Investment Technology Group Inc. (ITG), operator of the POSIT dark pool, admitted to wrongdoing and agreed upon a penalty of \$18 million, disgorgement of \$2.1 million, and prejudgment interest of \$250,000.⁶¹ The ITG fine was the largest levied against a dark pool operator at that time, exceeding the UBS penalty, discussed *infra*.⁶² In 2010, an ITG employee violated ITG policy by unlawfully accessing “information regarding orders flowing into ITG’s trading algorithms and . . . executions by all customers in markets away from its dark pool that was not otherwise available to ITG clients.”⁶³ Over an eight-month period of time, ITG’s proprietary trading unit used the live trading activity of POSIT’s subscribers to “implement high-frequency algorithmic trading strategies,” one of which actually traded against POSIT subscribers.⁶⁴ The SEC’s order charged ITG with violating 17(a)(2) and (3) of the Securities Act by defrauding clients and failing to make required disclosures to subscribers.⁶⁵ ITG also violated Rules 301(b)(2) and 301(b)(10) of Regulation ATS.⁶⁶ In the two weeks

⁶⁰ FIN. INDUS. REGULATORY AUTH., *supra* note 52.

⁶¹ John McCrank, *ITG Sets Aside \$20.3 Million Related to Dark Pool Investigation*, REUTERS (July 29, 2015), <http://www.reuters.com/article/us-invest-tech-grp-sec-fine-idUSKCN0Q32QD20150729> [<https://perma.cc/85MU-WA89>] (“Based on the terms of the potential settlement with the SEC, ITG would pay a fine of \$18 million, disgorgement of around \$2.1 million in trading revenues, and prejudgment interest of around \$250,000.”).

⁶² See Sam Mamudi, *ITG Drops a Record 24% After Citing Rule Violations at Dark Pool*, BLOOMBERG BUS. (July 29, 2015 5:05 PM), <http://www.bloomberg.com/news/articles/2015-07-29/itg-says-it-may-pay-a-record-20-3-million-dark-pool-fine> [<http://perma.cc/LL3T-NLSD>].

⁶³ *Id.*

⁶⁴ See Press Release, Sec. & Exch. Comm’n, SEC Charges ITG with Operating Secret Trading Desk and Misusing Dark Pool Subscriber Trading Information (Jan. 15, 2015), *available at* <http://www.sec.gov/news/pressrelease/2015-164.html> [<http://perma.cc/77H9-4LWM>] [hereinafter ITG Press Release].

⁶⁵ *Id.*

⁶⁶ *Id.*

following the announcement of the fine, POSIT's trading volume fell by nearly forty-five percent.⁶⁷

G. UBS

In January 2015, the SEC charged a UBS subsidiary, UBS ATS, with disclosure failures and other securities laws violations related to its dark pool.⁶⁸ UBS Securities LLC paid a \$12 million penalty, the SEC's largest against an ATS at that time.⁶⁹ UBS did not inform all subscribers of its "PrimaryPegPlus" (PPP) option, an order type that permitted trades in increments of less than one cent,⁷⁰ thus violating an SEC rule governing minimum pricing increments.⁷¹ This allowed PPP users—primarily high-frequency traders and market makers—to have their orders take precedence over other legal orders that used whole-penny increments.⁷² The SEC determined that between 2010 and 2011, UBS violated Section 17(a)(2) of the Securities Act by failing to disclose the PPP option to all of its UBS ATS subscribers and instead only pitching the product to certain investors.⁷³ Furthermore, from 2010 to 2012, UBS violated this same provision of the Securities Act by failing to offer to all subscribers a feature called "natural-only cross restriction," which would prevent certain orders from executing against the orders of high-frequency traders and market makers.⁷⁴ UBS violated Rule 301(b)(2) of Regulation ATS through its disclosure failures, as well as Rule 301(b)(10) for allowing information technology personnel to

⁶⁷ John McCrank, *ITG Dark Pool Volume Fell by Nearly Half Following Record Fine*, REUTERS (Aug. 24, 2015, 1:13 PM), <http://www.reuters.com/article/2015/08/24/invest-tech-grp-darkpool-idUSL1N10Z1G920150824> [<http://perma.cc/B4Y2-NZTM>].

⁶⁸ Press Release, Sec. & Exch. Comm'n, SEC Charges UBS Subsidiary with Disclosure Violations and Other Regulatory Failures in Operating Dark Pool (Jan. 15, 2015), *available at* <http://www.sec.gov/news/pressrelease/2015-7.html> [<http://perma.cc/NQT6-TLUX>] [hereinafter SEC 2015 Press Release].

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ UBS Sec. LLC, Securities Act Release No. 9697, Exchange Act Release No. 74060 (Jan. 15, 2015).

⁷² SEC 2015 Press Release, *supra* note 68.

⁷³ UBS Sec. LLC, *supra* note 71.

⁷⁴ SEC 2015 Press Release, *supra* note 68.

access UBS ATS subscriber information.⁷⁵ UBS also violated multiple additional securities laws and regulations by failing to maintain required data pertaining to UBS ATS orders.⁷⁶ UBS neither admitted nor denied the findings of the SEC, but consented to the entry of the SEC's order.⁷⁷

H. Credit Suisse Group AG and Barclays PLC

Credit Suisse Group AG is currently negotiating with the NY AG and the SEC to resolve allegations of unlawful conduct related to its dark pool operations.⁷⁸ The SEC alleges that Credit Suisse made misrepresentations regarding the management of its dark pool.⁷⁹ Credit Suisse “will pay more than \$50 million in fines and disgorgement in what would be a record dark-pool settlement with the [SEC], as well as around \$30 million to the [NY AG]”.⁸⁰ The settlement would mark the first since NY AG Eric Schneiderman launched an investigation into whether improper advantages were accruing to high-frequency traders through dark pools.⁸¹

Schneiderman is also negotiating a possible settlement with Barclays in relation to its LX dark pool.⁸² The complaint alleges that Barclays illegally provided high-frequency traders with preferential treatment while simultaneously downplaying the extent to which these traders were active in LX.⁸³ Barclays initially denied the

⁷⁵ UBS Sec. LLC, *supra* note 71.

⁷⁶ *See id.*

⁷⁷ *Id.*

⁷⁸ Bradley Hope et al., *Credit Suisse, Barclays in Talks to Settle 'Dark Pool' Allegations*, WALL ST. J. (Aug. 11, 2015, 11:09 PM), <http://www.wsj.com/articles/credit-suisse-nearing-record-settlement-tied-to-wrongdoing-at-dark-pool-1439315166> [<http://perma.cc/ZPL7-3BWU>].

⁷⁹ *See* Keri Geiger & Sam Mamudi, *Credit Suisse Said Nearing \$80 Million Dark Pool Settlement*, BLOOMBERG BUS. (Sept. 14, 2015 12:25 PM), <http://www.bloomberg.com/news/articles/2015-09-14/credit-suisse-said-nearing-80-million-settlement-over-dark-pool> [<http://perma.cc/WV9D-FKZU>].

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *See id.*

⁸³ Scott Patterson & Andrew R. Johnson, *New York Attorney General Sues Barclays Over Stock-Trading Business*, WALL ST. J. (June 25, 2014), <http://www.wsj.com/articles/new-york-attorney-general-plans-lawsuit-against-barclays-1403723283> [<https://perma.cc/3JRE-7G6R>] (“The suit

allegations, but recently decided to enter into settlement talks with regulators.⁸⁴ Though a settlement has yet to be finalized, preliminary agreements indicate that Credit Suisse would owe \$85 million to the SEC and the NY AG, with Barclays's liability totaling nearly \$65 million.⁸⁵ If these settlement agreements are consummated, they would result in "the two biggest penalties to date for alleged wrongdoing at bank-operated private-trading venues."⁸⁶

I. Regulatory Reform

Some believe the recent enforcement actions will "give rise to significantly greater examinations of dark pool operations and disclosures going forward, as well as the exploration of a number of market structure reforms."⁸⁷ Even if regulatory reforms are proposed and approved, it would likely be years before such reforms were effectively implemented.⁸⁸ The SEC is reportedly working on revisions to Rules 605⁸⁹ and 606,⁹⁰ and ATS reporting

alleges that Barclays' dark pool, known as LX, has favored high-frequency traders . . . while playing down the degree to which such traders use the venue.").

⁸⁴ Christopher M. Matthews & Bradley Hope, *Credit Suisse, Barclays Could Pay up to \$150 Million to Settle 'Dark Pool' Claims*, WALL ST. J. (Oct. 22, 2015), <http://www.wsj.com/articles/credit-suisse-barclays-could-pay-up-to-150-million-to-settle-dark-pool-claims-1445536853> [<https://perma.cc/2949-YSFJ>] ("Barclays has denied it defrauded customers and fought to have the case dismissed, but in recent months the bank has entered negotiations with regulators and has signaled it would like to settle the case.").

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ THE DARK SIDE OF THE POOLS, *supra* note 3, at 31.

⁸⁸ *Id.* at 37.

⁸⁹ SEC Rule 605 requires "FINRA to make available certain order execution information, facilitating the uniform public disclosure of order execution information by all market centers." *SEC Rule 605 of Regulation NMS*, FIN. INDUS. REGULATORY AUTH., <http://www.finra.org/industry/sec-rule-605> [<http://perma.cc/T4UE-H86L>].

⁹⁰ SEC Rule 606 states that "broker-dealers that route customer orders in equity and option securities are required to make publicly available quarterly reports that, among other things, identify the venues to which customer orders are routed for execution. Broker-dealers also are required to disclose to customers, on request, the venues to which their individual orders were routed." Kathy H. Rocklen & Benjamin J. Catalano, *Public Disclosure of Order Execution and Routing Practices*, PROSKAUER ROSE

requirements.⁹¹ Some critics opine that the current versions of these rules are insufficient to meet the demands of modern marketplaces, where trades are often placed and executed in less than a second.⁹² Given this increasingly important role of timing in trade execution, some suggest that synchronized clocks across all exchanges and dark pools would help level the playing field and facilitate subsequent order audits.⁹³

Many suggested regulations involve enhanced disclosure by dark pool operators, which would allow for regulators and investors to better understand these obscured marketplaces.⁹⁴ Following the recent enforcement actions, some dark pool operators have already improved their disclosure efforts.⁹⁵ SEC Chairwoman Mary Jo White has expressed concern that the lack of transparency that accompanies dark pool trading is detrimental to the fair and efficient operation of off-exchange trading forums.⁹⁶ Given the SEC's enforcement efforts and transparency issues related to dark pools, disclosure rules to keep investors and regulators better informed are likely forthcoming.⁹⁷

J. Conclusion

With dark pool trading activity occupying a growing portion of our modern marketplace, it is no surprise that regulators are intensifying their scrutiny accordingly.⁹⁸ This recent string of

LLP 1 (Oct. 2011), <http://www.proskauer.com/files/uploads/broker-dealer/Public-Disclosure-Order-Execution-Routing-Practices.pdf> [<http://perma.cc/V6N7-Q8LU>].

⁹¹ THE DARK SIDE OF THE POOLS, *supra* note 3, at 37.

⁹² *See id.* at 36.

⁹³ *Id.* at 37.

⁹⁴ *See, e.g., id.* at 4.

⁹⁵ Nicole Bullock et al., *Momentum Builds for Dark Pool Reform*, FIN. TIMES (June 26, 2014), <http://www.ft.com/cms/s/0/6ec5f93e-fd47-11e3-96a9-00144feab7de.html#axzz3vpzU6mIT> [<https://perma.cc/NRY9-L63S>] (“In recent months, some dark pools have begun voluntarily publishing more information on how they work.”).

⁹⁶ *Id.* (“In June, SEC chairwoman Mary Jo White signalled [sic] concern about the lack of transparency in dark venues and suggested new rules to increase disclosure would follow. ‘Transparency is one of the primary tools used by investors to protect their own interests, yet investors know very little about many trading venues that handle their orders,’ she said.”).

⁹⁷ *See id.*

⁹⁸ *See* Aguilar, *supra* note 1.

enforcement actions reflects a deepening commitment to ensuring that dark pools, despite their characteristic opacity, remain a reliable trading venue for all investors, rather than just a select few.⁹⁹ Though future regulations may facilitate this goal, some caution that “market-driven reforms” may not be effective without “thoughtful regulatory protections” and trustworthy data.¹⁰⁰ Regardless of potential regulatory reform, industry overseers hope that a more aggressive enforcement approach will achieve similar transparency, fairness, and efficiency goals.¹⁰¹ As the dark markets continue to evolve and transform, regulators will have to persist in taking a more active role in policing these venues to ensure dark pools’ continued viability.

Matthew S. Freedman¹⁰²

⁹⁹ See generally *id.*

¹⁰⁰ THE DARK SIDE OF THE POOLS, *supra* note 3, at 36.

¹⁰¹ See, e.g., Charlie Gasparino, *NY AG Preps Case Against Credit Suisse Dark Pool*, FOX BUS. (July 27, 2015), <http://www.foxbusiness.com/industries/2015/07/27/ny-ag-preps-case-against-credit-suisse-dark-pool/> [https://perma.cc/RR89-VK3L] (“The New York attorney general’s office has launched the most wide-ranging investigation into dark pools. In June of 2014, Schneiderman told FOX Business that . . . his inquiry will ‘change the dark pool business.’”).

¹⁰² Student, Boston University School of Law (J.D. 2017).