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By Email

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 205499–1090
rule-comments@sec.gov

Re: File No. S7-30-22; Release No. 34-96494; Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders ("Tick Size Proposal")

Ms. Countryman:

In response to an invitation from staff of the Securities and Exchange Commission ("Commission"), the Securities Industry and Financial Markets Association ("SIFMA")[1] is submitting this letter to provide comments on the Commission's Tick Size Proposal. Commission staff requested that SIFMA consider and provide comments on the "Reasonable Alternatives" part of the Tick Size Proposal. In response to this request, we continue to believe our comments and recommendations from our March 31, 2023 comment letter ("March Comment Letter") on the Commission's four equity market structure proposals, including the Tick Size Proposal, are the right path forward for the Commission as it considers potential changes to the current equity market structure in the U.S.[2] As we noted in that letter on the Tick Size Proposal, the Commission should first come up with a reasonable approach for determining which stocks are tick constrained before proceeding with establishing a minimum quoting tick size for such stocks. SIFMA believes that such a process should involve further rulemaking to allow for an incremental and iterative approach to introducing new tick sizes (and access fee caps) that allows for measurement of whether these changes are beneficial to the market.

The Commission's "Reasonable Alternatives" part of the Tick Size Proposal contains a menu of 15-plus alternative approaches to the Commission's actual proposal to replace the

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

[2] See (https://www.sec.gov/comments/s7-32-22/s73222-20163541-333880.pdf).

current minimum quoting tick size in Rule 612 of Regulation NMS with four separate minimum quoting and trading increments for national market system ("NMS") stocks and to replace the current, single access fee cap in Rule 610 of Regulation NMS with three separate access fee caps. With regard to the Commission's tick proposal, these alternatives include, for example, amending Rule 612 to require trading of all stocks priced equal to or greater than $1.00 to occur in increments of $0.001 regardless of the tick size applicable to quotes, or not mandating a minimum trading increment in Rule 612 (which is currently the case with the rule). With regard to access fees, these alternatives include, for example, establishing a uniform access fee cap of $0.001 for all NMS stocks. For a number of these alternative approaches, the Commission includes only a cursory analysis of potential costs and/or benefits.

As we stated in our March Comment Letter, and as supported by other commenters, SIFMA generally supports a minimum tick size of $0.005 (i.e., as a quotation increment, but not a trading increment) for tick constrained stocks, but is concerned that the Commission has not established the appropriate methodology for determining which stocks are tick constrained. SIFMA believes that a quantitative analysis incorporating, among other considerations, stock liquidity, the potential need to trade deeper into the book, and the robustness of minimum tick sizes to short-term volatility is necessary to determine the appropriate methodology for determining which stocks are tick constrained and what the appropriate quoting tick sizes (and access fee caps) should be to yield the best possible market structure. In addition, SIFMA notes that any changes to the minimum size should not be implemented before the full implementation and operation of the proposed amendments to Rule 605 to allow the Commission and the public to measure the impact of modified tick sizes and/or access fee caps on execution quality. We continue to believe our recommendations from our March Comment Letter should serve as the appropriate roadmap for the Commission as it considers moving forward with potential changes to tick sizes and access fees.

SIFMA, however, is concerned by this latest Commission request in which it appears that the Commission is suggesting that commenters potentially provide support for one or more of the 15-plus "Reasonable Alternatives" in the Tick Size Proposal. While the Commission's own guidance regarding economic analysis directs the Commission to consider reasonable alternatives to the proposed regulatory approach, this guidance contemplates alternatives that "are more or less stringent than the preferred option" or that "include different compliance dates and different requirements for large and small firms."[3] The Commission's internal guidance on economic analysis does not contemplate that the Commission set forth a menu of materially different approaches and expect the commenting public to understand and be able to intelligently comment on the potential consequences of some combination of these alternatives, especially when the Commission has not conducted a full economic analysis of each of these alternatives.

Such an approach is inconsistent with the rulemaking process required under the Administrative Procedure Act ("APA"). It is a bedrock principle of APA notice-and-comment requirements that "[a]mong the information that must be revealed for public evaluation are the 'technical studies and data' upon which the agency relies [in its rulemaking]." *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006) (citation omitted). As the D.C. Circuit has explained, "[b]y requiring the 'most critical factual material' used by the agency be subjected

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[3] See (https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf).

to informed comment, the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment, to afford affected parties an opportunity to present comment and evidence to support their positions, and thereby to enhance the quality of judicial review." *Id.* at 900. The Commission's approach of shifting the burden of supplying this "most critical factual material" in the first instance to commenters deprives other affected parties of the opportunity to "focus on the information relied on by the agency and to point out where that information is erroneous or where the agency may be drawing improper conclusions from it." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (internal quotation marks omitted). SIFMA objects to a process that circumvents APA rulemaking requirements.

If the Commission were to consider an alternative approach, proper rulemaking process dictates that it should issue another proposed rulemaking setting forth the actual proposal and conducting a proper cost-benefit analysis of such proposal. To do otherwise is inconsistent with the language and spirit of the APA and does not facilitate meaningful public comment. While we appreciate the opportunity to provide additional comments on the Tick Size Proposal, we again strongly reject any attempts to circumvent a proper rulemaking process.

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As we have stated in our March Comment Letter, SIFMA believes that a gradual approach to implementing market structure reforms should be the guiding light to mitigate potential unintended consequences and allow time to evaluate the efficacy of reforms. Accordingly, SIFMA urges the Commission to <u>not</u> implement the four equity market structure proposals together and instead adopt amendments to Rule 605 before proceeding with consideration of any other Proposal following industry input and commentary. If you have any questions or require additional information, please do not hesitate to contact us by calling Ellen Greene at (212) 313-1287 or Joe Corcoran at (202) 962-7383.

Sincerely,

Ellen Greene

Ellen Greene
Managing Director, Equities & Options Market Structure

Joseph P. Corcoran

Joseph Corcoran
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Cc: The Hon. Gary Gensler, Chair
The Hon. Hester M. Peirce, Commissioner
The Hon. Caroline A. Crenshaw, Commissioner
The Hon. Mark T. Uyeda, Commissioner
The Hon. Jaime Lizarraga, Commissioner
Mr. Haoxiang Zhu, Director, Division of Trading and Markets