



AMERICAN CONSUMER & INVESTOR INSTITUTE

May 20, 2024

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Order Competition Rule (File No. S7-31-22); Regulation Best Execution (File No. S7-32-22); Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders (S7-30-22); Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers (File No. S7-12-23)

Dear Ms. Countryman,

The American Consumer and Investor Institute (ACII) submits this letter in further response to the Securities and Exchange Commission’s (“Commission” or “SEC”) requests for comment on new rules concerning the *Order Competition Rule*,¹ *Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders*,² *Regulation Best Execution*,³ and *Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers*⁴ (collectively, the “Proposed Rules”).

ACII’s mission is to advocate on behalf of American consumers and investors for more choice and access to U.S. financial markets, products and services, including in the areas of consumer banking, securities and cryptocurrencies – all accompanied by robust financial education. ACII believes that every American should enjoy broad, affordable access to U.S. financial markets so that they can build a better future for themselves and their families.

ACII writes to address a recent development, which necessitates (at a minimum) re-proposal of the Proposed Rules. On April 15, 2024, the Commission published in the *Federal Register* final amendments to Rule 605 under Regulation National Market System to update the disclosure of order execution quality statistics.⁵ The Rule 605 update undermines the Proposed Rules in two fundamental respects.

First, in updating Rule 605, the Commission acknowledged that pre-existing Rule 605 metrics were incomplete and had “not kept up with the substantial changes in equity markets since the initial

¹ 88 Fed. Reg. 128 (Jan. 3, 2023).

² 87 Fed. Reg. 80,266 (Dec. 29, 2022).

³ 88 Fed. Reg. 5440 (Jan. 27, 2023).

⁴ 88 Fed. Reg. 53,960 (Aug. 9, 2023).

⁵ *Disclosure of Order Execution Information*, 89 Fed. Reg. 26,428 (Apr. 15, 2024).

adoption of Rule 605’s predecessor in 2000.”⁶ The problem for the Commission is that the economic analyses underlying many of the Proposed Rules are based, in substantial part, on those exact metrics; the Order Competition and Best Execution proposals cite to pre-existing Rule 605 metrics more than 150 times. It is not reasoned decisionmaking under the Administrative Procedure Act (“APA”) to continue to “trudge through” a rulemaking “based on information that is now incontestably antique.”⁷

As the Commission admits, the new and improved Rule 605 metrics likely tell a very “different story than that told by the earlier data.”⁸ For example, in each of the Proposed Rules, the Commission asserted, often citing pre-existing Rule 605 metrics,⁹ that new rulemaking is warranted to improve order execution quality.¹⁰ But existing Rule 605 data “does not necessarily capture”¹¹ “important aspect[s] of the problem,”¹² such as “whether orders received an execution of more than the displayed size at the quote, *i.e.*, ‘size improvement.’”¹³ Incorporating that information into Rule 605, as the recent update to Rule 605 does, “would more than *double* estimates of price improvement for internalized orders.”¹⁴ It would “make a mockery”¹⁵ of the Commission’s special “statutory obligation to determine as best it can the economic implications” of its rules to proceed with these massively consequential rulemakings without first considering this new information.¹⁶ The Commission should withdraw the Proposed Rules and then – using the improved Rule 605 data – evaluate, at an appropriate time, whether additional reforms are necessary. Without giving serious consideration to this “update[d] and improve[d]” data,¹⁷ the Commission cannot reasonably conclude that there are “genuine problem[s]” in need of regulation.¹⁸

Second, the Commission predicted that its updates to Rule 605 “will result in improvements in execution quality, for several reasons.”¹⁹ According to the Commission, the new Rule 605 metrics “will be more relevant and easier to access.”²⁰ This will allow “investors and their broker-dealers [to] be able to make better informed decisions about where to route their orders to achieve better quality

⁶ *Id.* at 26,502/1.

⁷ *Nat. Res. Defense Council v. Herrington*, 768 F.2d 1355, 1408 (D.C. Cir. 1985).

⁸ *Sierra Club v. EPA*, 671 F.3d 955, 965 (9th Cir. 2012).

⁹ *See, e.g., Order Competition*, 88 Fed. Reg. at 207.

¹⁰ *See, e.g., Predictive Data Analytics*, 88 Fed. Reg. at 54,012/2 (asserting that the “elimination or neutralization of the effects of certain harmful conflicts of interest in firms’ use of covered technologies could enhance capital formation if ... execution quality is improved”);

¹¹ *Disclosure of Order Execution Information*, 89 Fed. Reg. at 26,535/3.

¹² *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Aut. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹³ *Disclosure of Order Execution Information*, 89 Fed. Reg. at 26,535/3.

¹⁴ *Id.* at 26,536/1 n.1253 (emphasis added).

¹⁵ *Herrington*, 768 F.2d at 1408.

¹⁶ *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

¹⁷ *Disclosure of Order Execution Information*, 89 Fed. Reg. at 26,429/3.

¹⁸ *Chamber of Com. v. SEC*, 85 F.4th 760, 778 (5th Cir. 2023).

¹⁹ *Disclosure of Order Execution Information*, 89 Fed. Reg. at 26,543/3.

²⁰ *Id.*

execution.”²¹ The improved information, moreover, will “increase the extent to which broker-dealers compete on the basis of execution quality in order to attract and retain customers, as well as the extent to which market centers must compete on the basis of execution quality to attract and retain order flow.”²² “The Commission expects that this increase in competition will lead to improvements in execution quality as a result of improvements to broker-dealer routing practices and improvements to market centers’ execution practices.”²³

There has never been justification for the Proposed Rules, as ACII explained previously. The significant enhancements to Rule 605 are yet more reason those proposals should proceed no further. “Rules are not adopted in search of regulatory problems to solve; they are adopted to correct problems with existing regulatory requirements that an agency has delegated authority to address.”²⁴ If the amendments to Rule 605 significantly improve execution quality, as the Commission anticipates, there is “no rational basis” for further action.²⁵

At a minimum, the Commission should withdraw the Proposed Rules and evaluate, after the amendments to Rule 605 have gone into effect, whether additional reforms are necessary at all. The APA, in fact, *requires* the Commission to, at the very least, re-propose the Proposed Rules. The economic impact of the amendments to Rule 605 is “unquestionably an important aspect of the problem” that the Commission must consider.²⁶ But that impact is entirely missing from the economic analyses underlying the Proposed Rules. That is not a defect the Commission can fix on its own. Rather, before proceeding to a final rule, the Commission must update its economic analysis and then “expose[]” that updated analysis to “informed comment” and possible “refutation.”²⁷ Only by “test[ing]” its analysis “through exposure to public comment”²⁸ could the Commission even plausibly claim to have evaluated the “economic implications of the rule[s] it has proposed” “as best it can.”²⁹

For all of these reasons and more, the Commission should withdraw the Proposed Rules and reassess its approach in light of the significant changes it has already adopted.

Respectfully submitted,

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²¹ *Id.* at 26,543/3-26,544/1.

²² *Id.* at 26,544/1.

²³ *Id.*

²⁴ *NYSE LLC v. SEC*, 962 F.3d 541, 556-57 (D.C. Cir. 2020).

²⁵ *Chamber of Com.*, 85 F.4th at 777.

²⁶ *All. For Hippocratic Med. v. FDA*, 78 F.4th 210, 246 (5th Cir.), *cert. granted*, 144 S. Ct. 537 (2023).

²⁷ *Chamber of Com. v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006).

²⁸ *Id.*

²⁹ *Chamber of Com. v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005).