



August 13, 2024

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

Re: File No. S7-30-22; Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders
File No. S7-32-22; Regulation Best Execution
File No. S7-31-22; Order Competition Rule

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”),¹ together with The Asset Management Group of the Securities Industry and Financial Markets Association (“SIFMA AMG”),² respectfully submit this supplemental comment letter to the U.S. Securities and Exchange Commission (the “Commission”) regarding the above-referenced outstanding equity market structure proposals (“EMS Proposals”)³ in light of the Commission’s adoption of

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).

² SIFMA AMG brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG’s members represent U.S. and global asset management firms whose combined assets under management exceed \$45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds.

³ Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, Release No. 34-96494 (Dec. 14, 2022), File No. S7-30-22, 87 FR 80266 (Dec. 29, 2022) (“Tick Size Proposal”); Order Competition Rule, Release No. 34-96495 (Dec. 14, 2022), File No. S7-31-22, 88 FR 128 (Jan. 3, 2023) (“OCR Proposal”); Regulation Best Execution, Release No. 34-96496 (Dec. 14, 2022), File No. S7-32-22, 88 FR 5440 (Jan. 27, 2023) (“Best Execution Proposal”).

amendments to Rule 605 in March 2024.⁴ As stated in SIFMA’s and SIFMA AMG’s initial comment letters on the EMS Proposals, we believe it is imperative for the Commission to analyze the state of execution quality using the updated Rule 605 statistics prior to adopting any changes to the current equity market structure.⁵

The Commission recently updated Rule 605 for the first time in more than 20 years. This decision (which SIFMA and SIFMA AMG supported) evidenced the Commission’s recognition that the information included in the prior disclosures provided under the rule was of limited utility due to significant changes in markets during that time, including “exponential” advances in trading speed.⁶ The Commission also recognized that the scope of broker-dealers required to report Rule 605 statistics was inadequate to monitor the routing decisions of order flow providers.

To address these gaps and make the disclosures more useful, Rule 605 now requires reports by a larger universe of broker-dealers, including large retail firms. Rule 605 also requires broker-dealers subject to the rule and market centers to disclose more granular information about the quality of executions across a wider variety of order sizes, order types, and time-to-execution categories. By making these updates, new Rule 605 is designed to give investors, market participants, and regulators a more meaningful and broader view of execution quality across such broker-dealers and market centers. As a result, Rule 605 will for the first time ever give the Commission and the public the ability to see the outcome of retail broker-dealers’ routing decisions in clear, unambiguous, well-defined metrics. This is critical data to support the open question of whether any further market structure changes are even necessary.

The Commission has also stated that it believes the amendments to Rule 605 will “result in an increase in competition, which, in turn, is expected to improve order execution quality and

⁴ Disclosure of Order Execution Information, Release No. 34-99679 (Mar. 6, 2024), File No. S7-29-22, 89 FR 26428 (Apr. 15, 2024).

⁵ Letter from Ellen Greene, Managing Director, SIFMA to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, at pp. 19-20; 22-23; 25-26; 85-88 (Mar. 31, 2023), *available at* <https://www.sec.gov/comments/s7-32-22/s73222-20163541-333880.pdf>; letter from William C. Thum, Managing Director and Assistant General Counsel, SIFMA AMG to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, at p. 6 (Mar. 31, 2023), *available at* <https://www.sec.gov/comments/s7-31-22/s73122-20162826-332320.pdf>. We note that the Commission received several other comments suggesting the same approach. *See, e.g.*, Letter from NYSE, Charles Schwab, and Citadel Securities to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, at p. 2 (Mar. 6, 2023); Letter from Cboe Global Markets, State Street Global Advisors, T. Rowe Price, UBS Securities LLC, and Virtu Financial, Inc. to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, at p. 2 (Mar. 24, 2023); Letter from Steve Quirk, Chief Brokerage Officer, Robinhood Markets to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, at p. 40 (Mar. 31, 2023); Letter from Chester Spatt, Carnegie Mellon Univ., Thomas Ernst, Univ. of Maryland, Andrey Malenko, Boston College, and Jian Sun, Singapore Management Univ. to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, at p. 5 (Nov. 29, 2023); Letter from Barbara Comstock, Executive Director, American Consumer & Investor Institute to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (May 20, 2024); Letter from Thomas H. Merritt, Deputy General Counsel, Virtu Financial, Inc. to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, at pp. 1-2 (June 21, 2024).

⁶ Disclosure of Order Execution Information, 89 FR at 26430-32.

price efficiency.”⁷ If additional variables are introduced prior to implementation of Rule 605, such as modified tick sizes, the mandatory routing of “segmented orders” to auctions under the proposed Order Competition Rule, or additional routing considerations under proposed Regulation Best Execution, it will not be possible to evaluate whether the amendments to Rule 605 had their intended effect, nor whether any of those changes were ever warranted. Moreover, the Commission expects all three of these other proposals to also impact execution quality.⁸ The improvements in execution quality and competition that the Commission anticipates arising from the amendments to Rule 605 may be sufficient to no longer necessitate one or more of these other rule proposals or may reveal that a different policy prescription is necessary to achieve the Commission’s objectives. The only way this can be determined is if the Commission reevaluates U.S. equity market structure with the benefit of updated Rule 605 information.

We therefore urge the Commission to wait until the updated Rule 605 execution quality statistics are available (at a minimum one year, and ideally two years) before deciding whether any of the market structure changes included in the EMS Proposals are necessary. This approach would be consistent with the Commission’s economic analyses in prior rulemakings, which compare potential rules to the then-current regulatory framework and corresponding market practices to form a baseline to assess the expected “benefits, costs, and effects on efficiency, competition, and capital formation” of the proposed rules.⁹ The adoption of new Rule 605

⁷ *Id.* at 26589. The Commission’s expectation is supported by academic studies documenting improvements in execution quality following the original adoption of Rule 605 in 2000. *See, e.g.,* Kee Chung, *Information Disclosure and Market Quality: The Effect of SEC Rule 605 on Trading Costs*, Journal of Financial and Quantitative Analysis (Sept. 2007), available at https://www.researchgate.net/publication/46543352_Information_Disclosure_and_Market_Quality_The_Effect_of_SEC_Rule_605_on_Trading_Costs (“The Securities and Exchange Commission (SEC) adopted Rule 605 (formerly Rule 11Ac1 5) on November 15, 2000. The Rule requires market centers to make monthly public disclosure of execution quality. The Rule is intended to achieve a more competitive and efficient national market system by increasing the visibility of execution quality. The effective and quoted spreads for our study sample of NYSE, AMEX, and NASDAQ stocks declined significantly after implementation of the Rule. The decline cannot be attributed to a secular trend in spreads, concurrent changes in stock attributes, or the effect of decimal pricing. Although the quoted depth of NYSE stocks also declined, overall market quality is higher after implementation of the Rule. Based on these results, we conclude that the SEC’s goal to improve execution quality through more transparent markets has been achieved.”).

⁸ *See, e.g.,* Tick Size Proposal, 87 FR at 80325 (“the Commission expects that trading venues will continue to compete on providing price improvement and that the harmonization of trading and quoting increments will not mitigate the execution quality improvements from a reduction in the minimum pricing increment.”); Best Execution Proposal, 88 FR at 5525 (“The requirement for a broker-dealer to engage in additional due diligence if it engages in a conflicted transaction for or with a retail customer order could improve execution quality to the extent the requirement promotes competition between broker-dealers to provide best execution to retail broker-dealers that continue to accept PFOF.”); OCR, 88 FR at 205, n.499 (“Although the Proposal is predicted to improve execution quality for individual investors, it is likely that profits for some market participants would be reduced, including some wholesalers and some retail brokers.”).

⁹ *See* OCR Proposal, 88 FR at 179 (“The baseline against which the costs, benefits, and the effects on efficiency, competition, and capital formation of the Proposal are measured consists of the existing routing practices and execution quality for the marketable orders of individual investors, the current state of interactions between institutional investors and the orders of individual investors, and the current business practices of retail brokers. These aspects of the baseline are framed by the statutory and regulatory baseline described above.”); Best Execution

requirements since the Commission issued the EMS Proposals significantly alters the regulatory and market baseline the Commission assessed to support its economic analyses in the EMS Proposals.

Commission statements in adopting Rule 605 make it clear that the baseline has shifted since the economic analyses the Commission conducted in connection with the EMS Proposals. For example, the Commission's proposed Regulation Best Execution would include heightened standards for so-called "conflicted transactions"¹⁰ based on the Commission's stated belief that "a broker-dealer engaging in conflicted transactions for or with retail customers has an incentive to handle those orders in a manner that prioritizes its own interests over its customers' interests."¹¹ However, in adopting the enhancements to Rule 605, the Commission stated that it expects that competition among broker-dealers to increase as a result of more useful and transparent execution quality information, making it less likely that broker-dealers will prioritize their own interests over customer interests in conflicted transactions.¹² Essentially, some of the Commission's purported reasons for the market structure reforms in the EMS Proposals may be addressed through updated Rule 605. Therefore, the Commission should evaluate the new Rule 605 data prior to moving ahead with any of the EMS Proposals.

In addition, the Commission acknowledged in the EMS Proposals that the Rule 605 execution quality information disclosed under the prior rule did not provide a sufficient basis for

Proposal, 88 FR at 5483 ("The baseline against which the costs, benefits, and the effects on efficiency, competition, and capital formation of proposed Regulation Best Execution is measured consists of the current regulatory requirements and SRO guidance for broker-dealers concerning customer best execution, current broker-dealer best execution review processes, the current market structure and broker-dealer practices concerning handling and executing customer orders that may be impacted by proposed Regulation Best Execution, and the structure of the market for broker-dealer services."); Tick Size Proposal, 87 FR at 80305-16; and Disclosure of Order Execution Information, 89 FR at 26503-04. See also SEC Staff Memorandum: Current Guidance on Economic Analysis in SEC Rulemakings (Mar. 16, 2012), *available at* https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

¹⁰ Proposed Rule 1101(b) defines "conflicted transaction" as: "any transaction for or with a retail customer, where the broker or dealer executes an order as principal, including riskless principal; routes an order to, or receives an order from, an affiliate for execution; or provides or receives payment for order flow."

¹¹ Best Execution Proposal, 88 FR at 5465.

¹² See, e.g., Disclosure of Order Execution Information, 89 FR at 26544 ("This increase in market participants' ability to compare execution quality across broker-dealers will increase the extent to which broker-dealers compete on the basis of execution quality when making their order routing decisions. Broker-dealers will increase their competitive position with respect to execution quality by investing in or otherwise adjusting their routing practices to increase the extent to which they route orders to the market centers offering better execution quality and limit the extent to which they route orders for other potential reasons. For example, broker-dealers that face conflicts of interest that arise when their interests are not aligned with their customers' interests may be better incentivized to manage these conflicts as a result of an increase in their need to compete on the basis of execution quality. Specifically, to the extent that broker-dealers lose customer order flow as a result of their offering lower execution quality, these broker-dealers are expected to base more of their routing decisions on the execution quality of market centers, rather than on which market centers are more likely to benefit them (e.g., because of higher PFOF or lower access fees). This is expected to promote the flow of orders to market centers that provide better execution quality.") (emphasis added).

it to fully analyze the EMS Proposals' potential economic impacts.¹³ Nevertheless, the Commission relied on those statistics in its economic analyses to form part of the baseline it used to justify the significant reforms included in the EMS Proposals. For example, in both the Order Competition Rule and Best Execution Proposals, the Commission critically relied on data from old Rule 605 to posit that orders executed by wholesalers experience lower adverse selection costs than orders executed on exchanges. The data the Commission relied on is reflected in Table 5 in both proposals, which is titled "Comparison of Rule 605 Execution Quality Statistics Between Exchanges and Wholesalers for NMS Common Stocks and ETFs in Q1 2022."¹⁴ In relying on the data in Table 5, the Commission stated its conclusion that analysis of the prior Rule 605 statistics "shows that orders in NMS stocks handled by wholesalers are associated with lower price impact compared to those executed on exchanges, indicating that orders handled by wholesalers on average have lower adverse selection costs . . . allow[ing] wholesalers to provide these orders with better execution quality, manifested in lower effective spreads and E/Q ratios compared to exchanges."¹⁵

However, because Rule 605 has now been updated, it is not clear whether the updated data provided under the new rule would continue to support the Commission's conclusions regarding the EMS Proposals. Without an appropriate economic baseline using current information, the Commission cannot properly assess the EMS Proposals' economic impacts, including the expected effects on efficiency, competition, and capital formation. Therefore, instead of proceeding with the EMS Proposals based on conclusions drawn from outdated Rule 605 disclosures, and to properly evaluate the proposals consistent with prior precedent, it is incumbent on the Commission to reevaluate the remaining EMS Proposals *after* it has had a chance to study and digest the updated data provided under new Rule 605. Imposing changes that would significantly and fundamentally upend U.S. equity market structure without the benefit of updated Rule 605 execution quality information risks negatively impacting investors, which is contrary to the Commission's mission.

We further note that the Commission's update to the data provided under Rule 605 calls into question the Commission's reliance on the non-public Consolidated Audit Trail ("CAT") data in the EMS Proposals. The Commission relied on the CAT data to account for the limitations and gaps in the outdated and incomplete Rule 605 data. Specifically, both the Order

¹³ See, e.g., OCR Proposal, 88 FR at 191 ("Because Rule 605 requires market centers to report execution quality statistics only for covered orders that fall within specific order size and type categories, a number of order types and sizes that may be particularly relevant for individual investors are excluded from the above analyses, including orders for less than 100 shares. Additionally, Rule 605 data does not allow us to distinguish between orders that wholesalers execute on a principal basis from those they execute on riskless principal basis, since they are both reported as being executed at the market center. Furthermore, it is not possible in Rule 605 data to distinguish between orders that a wholesaler received from individual investors from those it received from other types of market participants. For example, wholesaler Rule 605 reports may include both individual investor orders that they receive, as well as institutional orders they receive on their SDPs. Lastly, effective and realized spread measures as required to be reported in Rule 605 reports are calculated using a five-minute time horizon, which some academic literature argues has become inappropriate for a high-frequency environment").

¹⁴ OCR Proposal, 88 FR at 189; Best Execution Proposal, 88 FR at 5498.

¹⁵ OCR Proposal, 88 FR at 188.

Competition Rule and Best Execution Proposals contained a table entitled, “Wholesaler CAT Analysis of Exchange Individual Investor Order Execution Quality for Marketable Orders in NMS Common Stocks and ETFs by Type of Stock.”¹⁶ The Commission’s CAT analysis reviewed orders below \$200,000 in value to compare the execution quality of marketable retail orders executed at wholesalers versus exchanges during the first quarter of 2022. Now that Rule 605 has been improved and provides this type of information, the Commission can analyze updated Rule 605 statistics published by retail broker-dealers, wholesalers, and exchanges to make this comparison instead of relying on the CAT data to “supplement” its analysis. The new Rule 605 data will include all of the relevant information for marketable retail orders with values less than \$200,000 to allow the Commission to evaluate whether there are differences in execution quality at these venues for the same stocks. That is, the gaps the Commission’s supplemental, and complex, analysis of private CAT data were designed to address no longer exist. Analyzing updated Rule 605 disclosures, instead of using non-public data to supplement a limited dataset, also would allow for more robust statistical results and enable the Commission (and market participants) to study periods longer than a single quarter.

More importantly, the use of the new public Rule 605 data would actually allow commenters to evaluate the data the Commission used in formulating the EMS Proposals, consistent with the Commission’s obligation under the Administrative Procedure Act (“APA”).¹⁷ As it stands currently, commenters have no access to the CAT data—even in anonymized form—used by the Commission to develop the proposals. Using publicly available data that allows commenters to evaluate the veracity and robustness of the Commission’s analyses is in the public interest and furthers the protection of investors. Relying on non-public CAT data to promulgate rules allows the Commission to adopt far-reaching changes to our market structure based on economic analyses that may contain an inadvertent error or unwarranted assumption.

The Commission’s reliance on publicly unavailable CAT data in the EMS Proposals has been an ongoing point of focus for market participants and commenters on the EMS Proposals, including SIFMA and SIFMA AMG. On February 8, 2023, SIFMA submitted a comment letter on the Proposals in which we requested that the SEC, under the Freedom of Information Act (“FOIA”), make public certain anonymized CAT data and other information that the SEC relied on in formulating the EMS Proposals.¹⁸ As we noted in that request, “[i]t is simply not possible

¹⁶ OCR Proposal, 88 FR at 193; Best Execution Proposal, 88 FR at 5500. In this table and the accompanying explanatory text, the Commission referenced its “CAT Retail Analysis” and “CAT Exchange Analysis, which it conducted to “supplement the analyses using Rule 605 data and test for the robustness of the results that it generated.” 88 FR at 192; 88 FR at 5499.

¹⁷ See Letter from Ellen Greene, SIFMA to FOIA Office, U.S. Securities and Exchange Commission (Feb. 8, 2023), at 8, (citing several cases unambiguously requiring federal agencies to make available data used to support rule proposals, such as *Am. Med. Ass’n v. Reno*, 57 F.3d 1129, 1133 (D.C. Cir. 1995) and *Engine Mfrs. Ass’n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) (“[T]he Administrative Procedure Act requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule.”)), available at <https://www.sifma.org/wp-content/uploads/2023/02/Information-Regarding-the-Data-Relied-upon-by-the-Commission-in-Proposing-Certain-Commission-Rulemaking-Related-to-Market-Structure.pdf>.

¹⁸ See <https://www.sec.gov/comments/s7-31-22/s73122-20156863-325026.pdf>.

for the public to substantively evaluate the purported costs, benefits, effects, and economic baseline on which the Proposals are based if the Commission uses ‘secret data’ that is unavailable to the public.”

Despite numerous SIFMA letters and emails to the SEC regarding our FOIA request over the past year and a half, the SEC has been unwilling to engage with SIFMA regarding a reasonable approach to addressing our request expeditiously and consistent with the publicly-stated imminent timeframe in which the Commission contemplates finalizing the EMS Proposals.¹⁹ Accordingly, we are submitting as an attachment to this letter three of the multiple correspondences we have sent to Commission FOIA staff regarding our FOIA request – our December 21, 2023, June 7, 2024, and June 28, 2024 correspondences to the staff regarding our FOIA request. These letters reflect our repeated attempts to obtain anonymized CAT data used by the Commission (as well as the repeated barriers we encountered) to formulate the EMS Proposals prior to the proposals being finalized to help ensure the Commission’s proposals are appropriately tailored and that the purported benefits and costs are accurate. For example, in our June 28, 2024 letter, we agreed to narrow the scope of the data requested in an effort to expedite production given the SEC’s announced plans to imminently consider adoption of the EMS Proposals.²⁰ Unfortunately, SIFMA has been rebuffed each time it tried to reasonably engage with the staff on our FOIA request.

For all of these reasons, it is critical that the Commission wait until after Rule 605 is fully implemented so that it can evaluate the more granular execution quality statistics available to all market participants, and more importantly, the lack of benefits to investors the EMS Proposals would provide. The Commission’s current trajectory regarding the EMS Proposals risks fundamental damage to the equity markets without a proper consideration of the data the Commission will have at its disposal, which can be corrected with a proper review and evaluation of the new Rule 605 data prior to proceeding with the EMS Proposals.

* * *

For the reasons discussed above, SIFMA and SIFMA AMG urge the Commission to wait until Rule 605 is fully implemented before proceeding with any of the outstanding EMS Proposals. Furthermore, we again ask that the Commission publicly release the CAT data and other information we have requested in our FOIA Request. If you have any questions or need any additional information, please contact Ellen Greene at (212) 313-1287, Joe Corcoran at (202) 962-7383, or William Thum at (202) 962-7381.

¹⁹ See, e.g., <https://kpmg.com/us/en/articles/2023/sec-fall-2023-regulatory-agenda-reg-alert.html> (copy of the Commission’s Fall 2023 Regulatory Agenda, which listed April 2024 as the final rulemaking target for the EMS Proposals).

²⁰ See SEC Agency Rule List – Spring 2024, available at https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode&showStage=active&agencyCd=3235. SEC staff handling the FOIA request responded via email that it was not possible to narrow the scope of the request.

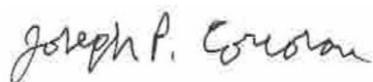
Sincerely,



Ellen Greene
Managing Director
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William C. Thum
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Managing Director and Associate General Counsel
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December 21, 2023

Ms. Carmen L. Mallon
FOIA Branch Chief
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

**Re: *The Securities Industry and Financial Markets Association’s February 8, 2023
Freedom of Information Act (“FOIA”) Request, Tracking Number 23-00976-
FOIA***

Dear Ms. Mallon:

On behalf of the Securities Industry and Financial Markets Association (“SIFMA”), I am writing to respond to your November 15, 2023 letter regarding our February 8, 2023 FOIA request (“February FOIA Request”), tracking number 23-00976-FOIA. In our request, we asked the Securities and exchange Commission (“SEC” or “Commission”) to make public certain anonymized Consolidated Audit Trail (“CAT”) data and other information that the SEC relied upon in formulating the SEC’s four market structure proposals from December 2022 (“Proposals”).²¹

Timeline Related to the February FOIA Request

The timeline of our correspondence with the Commission on this matter to date can be summarized as follows:

²¹ Exchange Act Release No. 96496, 88 FR 5440 (Jan. 27, 2023) (“Regulation Best Execution”); Exchange Act Release No. 96495, 88 FR 128 (Jan. 3, 2023) (“Order Competition Rule”); Exchange Act Release No. 96494, 87 FR 80266 (Dec. 29, 2022) (“Minimum Pricing Increments”); Exchange Act Release No. 96493, 88 FR 3786 (Jan. 20, 2023) (“Order Execution Information”).

- February 8, 2023 FOIA Request – SIFMA submits its FOIA request seeking data used by the SEC to support its market structure proposals to facilitate and inform public comment.²²
- February 9, 2023 SEC Acknowledgment Letter – The SEC sends a letter of acknowledgement, assigns the request the 23-00976-FOIA tracking number, and indicates that the SEC will respond as soon as possible and if no response is received within 30-days, SIFMA may seek dispute resolution services.
- March 31, 2023 SIFMA Comment Letter to the Proposals – SIFMA submitted its comment letter to the Proposals, reiterating its request for and urging the Commission to provide the requested data in accordance with SIFMA’s FOIA request.²³
- April 5, 2023 SEC Letter – The SEC sent a letter to SIFMA noting that there are unusual circumstances that impact the SEC’s ability to quickly process our request, and that the SEC was invoking a 10-day extension in which to respond.²⁴
- August 16, 2023 SEC Email – The SEC emailed SIFMA to inquire whether SIFMA remained interested in having the request processed and asking for SIFMA to respond no later than September 28, 2023.
- September 27, 2023 SIFMA Letter – SIFMA responded to the SEC’s email inquiry with a letter indicating that SIFMA remains interested in the SEC responding to SIFMA’s FOIA request and noting concerns regarding the SEC having failed to respond within the 10-day extension or otherwise engage in a dialogue with SIFMA regarding how much additional time would be necessary.
- November 15, 2023 SEC Letter – The SEC replied to SIFMA with a letter: (i) reiterating that the SEC would be unable to respond within the 20-day statutory time period; (ii) re-invoking the 10-day extension based on the same “unusual circumstances” referenced in the April 5 letter from the SEC; (iii) indicating that the response may take a minimum of 100 hours to complete as well as additional time to review the records for disclosure; (iv) indicating that the request would be processed on the SEC’s “Complex track”; (v) indicating that the SEC would be unable to begin processing the request for 3 years or

²² SIFMA appended its FOIA request to its initial comment letter on the Proposals on February 8, 2023. *See* Letter to Vanessa A Countryman, Secretary, SEC, from Ellen Greene, Managing Director, SIFMA, re: the Proposals, at Appendix A (Feb. 8, 2023), <https://www.sec.gov/comments/s7-31-22/s73122-20156863-325026.pdf>.

²³ *See* Letter to Vanessa A Countryman, Secretary, SEC, from Ellen Greene, Managing Director, SIFMA, re: the Proposals, at 22, <https://www.sec.gov/comments/s7-32-22/s73222-20163541-333880.pdf>.

²⁴ The SEC noted the following unusual circumstances as delaying its ability to respond: “(a) the need to search for and collect records from an organization geographically separated from this office; (b) the potential volume of records responsive to your request; and (c) the need for consultation with two or more other offices having a substantial interest in either the determination or the subject matter of the records.”

more (36 months); (vi) stating that SIFMA is considered a “commercial user” without explanation (or consideration of SIFMA’s statement that the requested records should fall within the public interest exception as set forth on p. 8-9 of the February FOIA Request); and (vii) requesting a response from SIFMA by December 29, 2023.

The SEC’s November Letter

As a threshold matter, we are puzzled by the SEC invoking the ten-day extension beyond FOIA’s initial twenty-day statutory time period to respond to our request given that the SEC already invoked such extension in its April letter. The SEC did not respond within twenty days initially and both the SEC’s April letter and November letter are well beyond the ten-day extension period.

Despite the passage of almost a year, your November letter is the first time since our February FOIA Request in which the SEC has indicated that it has conducted any record searches related to our request. As noted above, your November letter also provides a preliminarily estimate of a “minimum of 100 hours” to retrieve relevant files and review them for responsiveness, plus additional time to review them “for disclosure in accordance with the statutory provisions of the FOIA.” You also assert for the first time that SIFMA would be considered a “Commercial Use” requester under FOIA and therefore would be responsible for paying for the search and review costs associated with our request in accordance with the SEC’s fee schedule. In addition, you assert that because the records are “voluminous,” they will be placed in the SEC’s “Complex track,” subject to “multi-track processing” under the SEC’s rules, and that your initial estimate is that it could take “thirty-six months or more before we can begin to process a request placed in our Complex track.” You close your letter by noting that if we do not respond by December 29, 2023, you will treat our request as being closed.

SIFMA’s Concerns Related to the SEC’s Response to the February FOIA Request

We are disappointed that it has taken the SEC this long to provide any form of substantive response to our February FOIA Request and have several significant concerns with the response that we would like to further discuss with you. Our biggest concern is that your estimated time to begin to respond to our request “thirty-six months or more” from now would be well beyond the current April 2024 date by which the SEC has indicated that it plans to adopt

final rules based on its December 2022 Proposals.²⁵ We view this delay as contrary to the public interest and a significant problem under the Administrative Procedure Act (“APA”)²⁶ that will deny the public the opportunity to evaluate the SEC’s Proposals prior to their adoption. As we noted in our February FOIA Request, “[i]t is simply not possible for the public to substantively evaluate the purported costs, benefits, effects, and economic baseline on which the Proposals are based if the Commission uses ‘secret data’ that is unavailable to the public.” Given the Fifth Circuit’s recent decision in *Chamber of Com. of the U.S. v. SEC*, 85 F.4th 760 (5th Cir. 2023),²⁷ it is especially incumbent on the SEC to provide the requested data to enable the public to provide meaningful comment on the Proposals.

We also are concerned that the SEC’s delay in providing us with any form of substantive response until now has deprived us of the opportunity to seek expedited treatment. If we had known that it would take the SEC almost a year to provide this response and these estimated time frames, we would have considered requesting expedited processing under 17 CFR 200.80(d)(7).

The Data Should All Be Available from the SEC’s Division of Economic and Risk Analysis and Should Not Take 100 Hours to Gather

We fail to understand why it would take the SEC 100 hours or more to respond to our request and why our request is being placed in the “Complex track” given that the data we are requesting was just recently used by the SEC staff in connection with promulgating the Proposals. In other words, it is unclear why this data is not already readily accessible and available to the SEC staff and immediately reviewable to see whether it is responsive to our request given that it was just used.

It is also unclear that the February FOIA Request would, in fact, require you to search for and collect records from an organization geographically separate from the FOIA office or the need to consult with two or more other offices having a substantial interest in either the determination or the subject matter of the records—two of the stated bases for why there has

²⁵ See https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode&showStage=active&agencyCd=3235.

²⁶ 5 U.S.C. 553(b)-(c).

²⁷ See <https://cases.justia.com/federal/appellate-courts/ca5/23-60255/23-60255-2023-10-31.pdf?ts=1698795066>.

been a delay in the SEC's ability to respond within the statutory time period. The February FOIA Request calls for data used as part of the economic analyses of the Proposals and therefore should all be available from the SEC's Division of Economic and Risk Analysis ("DERA"). We understand DERA is located at the SEC's headquarters in Washington D.C. and is therefore not in a geographically separate location from the SEC's FOIA Office, which is also located at the SEC's headquarters.

SIFMA Is Not a Commercial Use Requester and the February FOIA Request Is in the Public Interest

We disagree with your assertion in your letter that we are a "Commercial Use" requester and that we must pay the fees associated with responding to our request. As a trade association, we do not believe that SIFMA should be treated as a "Commercial Use" requester. Unlike SIFMA, this category of requester seems directed at newspapers and other commercial entities that routinely submit FOIA requests as part of gathering information for their businesses

Moreover, as we noted in our February FOIA Request, we are solely asking for data related to the Proposals to allow us and other commenters to more fully understand the data on which the Proposals are based and comment accordingly. Disclosure of the requested records is likely to significantly contribute to the public's understanding of the Proposals because it will be used to help understand and analyze the Commission's rationale behind the Proposals as well as the purported benefits, costs, and effects the Proposals will have on market participants. Courts have long recognized there to be a compelling public interest and requirement under the APA that a federal agency, such as the SEC, identify and make available technical studies and data used in reaching the decisions to propose particular rules.²⁸

²⁸ See, e.g., *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1133 (D.C. Cir. 1995); *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) ("[T]he Administrative Procedure Act requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule."); *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982) ("In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. . . . An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."), *cert. denied*, 459 U.S. 835 (1982); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977) (proposed rule must provide sufficient information to permit informed "adversarial critique"), *cert. denied*, 434 U.S. 829 (1977); *Kern County Farm Bureau v. Allen*, 450 F.3d 1072 (9th Cir. 2006) ("Integral to an agency's notice requirement is its duty to 'identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.'" (citing *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991))).

Because our request is in the public interest (17 CFR 200.80(g)(12)(i)(A)), we reiterate our position from our February FOIA Request that our request qualifies for a fee waiver. Nonetheless, as noted in that request, we also continue to be willing to pay up to \$1,000 in fees related to responding to our request.

* * *

We hope that the SEC staff will engage in a dialogue with us regarding our FOIA request. We plan to reach out to you via telephone to engage in such a dialogue after you have had a chance to review this letter. As we have noted, we are requesting the data to give commenters the opportunity to review and evaluate the CAT data and other information used to formulate the SEC's Proposals prior to their adoption. Failing to provide such data prior to adoption would be inconsistent with the FOIA process as well as the public notice and comment process provided for under the APA.

As we consider other measures that might be available to us, we look forward to finding a way toward the prompt public release of the requested CAT data and other information we have requested in our February FOIA Request.

Sincerely,



Ellen Greene
Managing Director, Equity and Options Market Structure
SIFMA



June 7, 2024

Carmen L. Mallon
Branch Chief
Office of FOIA Services
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

**Re: *The Securities Industry and Financial Markets Association’s February 8, 2023
Freedom of Information Act (“FOIA”) Request, Tracking Number 23-00976-
FOIA***

Dear Ms. Mallon:

On behalf of the Securities Industry and Financial Markets Association (“SIFMA”), I am writing to respond to your April 2, 2024 letter (“April Letter”), as well as your email dated May 6, 2024, to again confirm that we are still interested in a Securities and Exchange Commission (“SEC” or “Commission”) response to our February 8, 2023 FOIA request (“February 2023 FOIA Request”), tracking number 23-00976-FOIA. In our request, we asked the SEC to make public certain anonymized Consolidated Audit Trail (“CAT”) data and other information that the SEC relied upon in formulating the SEC’s four market structure proposals from December 2022 (“Proposals”).²⁹ Your April Letter notes that after further review, your earlier decision noted in your November 15, 2023 letter (“November Letter”) to SIFMA to place our February 2023 FOIA Request in the “Complex track” was appropriate “based on the time necessary to review and evaluate potentially responsive records, and to determine whether those records should be redacted or withheld based on the statutory provisions of the FOIA” and that processing of our request “would not begin for thirty-six months or more.”

²⁹ See Release No. 34-96496, 88 FR 5440 (Jan. 27, 2023); Release No. 34-96495, 88 FR 128 (Jan. 3, 2023) (“Order Competition Proposal”); Release No. 34-96494, 87 FR 80266 (Dec. 29, 2022); Release No. 34-96493, 88 FR 3786 (Jan. 20, 2023).

SIFMA Confirms Its Continued Interest in Receiving the Requested Data and Continues to Object to the Commission's Delays in Making Such Data Available

While SIFMA remains interested in receiving the requested data, we continue to object to the Commission's delays in providing the requested data. As we expressed in our prior December 21, 2023 correspondence ("December 2023 Correspondence") to you responding to your November Letter,³⁰ we strongly disagree with this processing timeframe as it is well beyond the March 7, 2024 date on which the SEC adopted the proposal to amend Rule 605 of Regulation NMS,³¹ as well as the future dates by which the SEC plans to adopt the other three Proposals.³² From a practical perspective, we also disagree with this processing timeframe as the data we are requesting was just recently used by the SEC staff in connection with promulgating the Proposals, and thus should be readily accessible and immediately reviewable. It is also likely that the SEC's economists that originally gathered and prepared the requested data are currently reviewing and/or updating these datasets and analyses as part of the anticipated adopting releases of such proposals, underscoring the availability of these data.

A delay of at least three years before the Commission begins to prepare a response to our request is contrary to the public interest and a significant problem under the Administrative Procedure Act ("APA"),³³ denying the public the opportunity to meaningfully evaluate the SEC's Proposals prior to their adoption. As we noted in our February 2023 FOIA Request, "[i]t is simply not possible for the public to substantively evaluate the purported costs, benefits, effects, and economic baseline on which the Proposals are based if the Commission uses 'secret data' that is unavailable to the public." We find it very troubling that the SEC is moving ahead with the Proposals while continuing to deny the public a meaningful opportunity to evaluate the

³⁰ The December 2023 Correspondence is included as a separate attachment to this letter.

³¹ See Release No. 34-99679 (March 6, 2024), 89 FR 26428 (April 15, 2024) ("Rule 605 Adopting Release").

³² See https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode&showStage=active&agencyCd=3235.

³³ 5 U.S.C. 553(b)-(c).

secret CAT and other data used by the SEC in promulgating the Proposals and doing so is directly contrary to case law under the APA.³⁴

Critical Errors Have Been Identified in the SEC CAT Data Analyses in the Proposals

In addition to the points made in our February 2023 FOIA Request, we also believe that it is critical that the SEC provide the requested data on which the Proposals are based because we understand through meetings with SEC staff regarding the Proposals that there is at least one critical error in the data and analyses used by the SEC.³⁵ Specifically, SEC staff from the Division of Economic and Risk Analysis indicated that the data they used did not account for minimum quantity conditions on orders.³⁶ By ignoring the existence of minimum quantity conditions, many of the SEC's analyses in the Proposals incorrectly assumed that certain liquidity may have been available when it was not. Failing to account for minimum quantity conditions on orders likely caused the SEC to overstate, perhaps even significantly, the benefits of the Proposals. For example, in the Order Competition Proposal, the SEC estimates that the forgone price improvement for retail orders (referred to as "segmented orders" in the proposal) under the current market structure results in a \$1.5 billion "competitive shortfall" based on an analysis of liquidity (such as midpoint orders) the SEC believes might otherwise have been accessible to such retail orders.³⁷ To the extent that this additional midpoint liquidity was subject to a minimum quantity condition, retail/segmented orders could not interact with such liquidity unless those retail/segmented orders met the appropriate size conditions of the midpoint liquidity. Among other things, access to the data on which the Proposals were based is critical to understanding the scope of this mistake and whether it led the SEC to overestimate the purported benefits of the Proposals.

³⁴ See February 2023 FOIA Request at 8 (citing several cases unambiguously requiring federal agencies to make available data used to support rule proposals, such as *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1133 (D.C. Cir. 1995) and *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) ("[T]he Administrative Procedure Act requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule.")).

³⁵ See, e.g., (<https://www.sec.gov/comments/s7-29-22/s72922-20164972-334461.pdf>).

³⁶ For example, assume there is a resting order to sell 500 shares with a minimum quantity of 500, meaning that such order can only interact with a buy order for at least 500 shares. An order for less than 500 shares would not meet the minimum quantity condition of the sell order and could not interact with it.

³⁷ Exchange Act Release No. 96495, 88 FR 128, 130 (Jan. 3, 2023).

The SEC Has Provided Conflicting Statements Regarding Whether the Requested Data Will Be Made Available

We also note that the SEC FOIA Office's April and November Letters responding to our February 2023 FOIA Request indicate that the SEC can respond to our request, albeit in a timeframe that we believe is excessive. These responses conflict with SEC statements made in its Rule 605 Adopting Release. In that release, the Commission stated in response to commenters' requests for access to anonymized CAT data that, "[t]he Commission is not releasing anonymized subsets of CAT data used in connection with the proposals, including CAT data used in connection with data and figures in the Proposing Release."³⁸ This statement directly conflicts with discussions in the April and November Letters from the SEC's FOIA Office, which both indicate that the SEC can process our request but "processing would not begin for thirty-six months or more."³⁹

The Apparent Refusal to Make the Requested Data Available or Available on a Timely Basis Is Inappropriate

Moreover, we strongly disagree with the Commission's apparent refusal to ever provide the requested data as stated in its Rule 605 Adopting Release. Such a position is problematic for a variety of reasons, including that the requested data is nearly two years old (and in some cases over two years old) at this point and thus very likely not a cause for concern for market participants if it were disclosed on an anonymized basis. More importantly, there is no way for the public or anyone outside of the SEC to question or understand the validity of the Commission's assertions here, as the Commission is the only one that has access to the data. This is precisely why courts have made it abundantly clear that "[a]n agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."⁴⁰

The Commission's practice of using the CAT data to issue the Proposals and adopt the updates to Rule 605 continues to demonstrate the significant and pervasive flaws with the

³⁸ See Rule 605 Adopting Release at 26433.

³⁹ For instance, the April Letter notes, that "the Complex track determination is appropriate based on the time necessary to review and evaluate potentially responsive records," and that while the information we have requested "is accessible and reviewable, the review process for these datasets is neither quick, nor easy."

⁴⁰ *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982), cert. denied, 459 U.S. 835 (1982).

Commission's rulemaking process here. The Commission has created a construct in which it is able to rely on secret CAT data to promulgate major rules, yet there is no public transparency or accountability regarding the Commission's use and evaluation of that data. This is completely contrary to the Commission's historical focus on transparency and disclosure in overseeing the securities markets. Despite this historical focus, there appears to be no transparency regarding the data used by the SEC to promulgate the Proposals and adopt the updates to Rule 605.

Finally, we object to the repeated practice of the SEC FOIA Office sending us correspondences, such as the May 6, 2024 email, stating that if we do not respond by a certain date, the SEC will assume we are no longer interested in our request and will administratively close it. As we have noted, we continue to be extremely interested in the data requested in our February FOIA Request and urge the SEC to provide it. If the FOIA Office were to send us such a correspondence in the future, our response will remain the same.

* * *

As we have noted, we are requesting the data to give commenters the opportunity to review and evaluate the CAT data and other information used to formulate the SEC's Proposals prior to their adoption. Failing to provide such data prior to adoption would be inconsistent with the FOIA process as well as the public notice and comment process provided for under the APA.

As we consider other measures that might be available to us, we look forward to finding a way toward the prompt public release of the requested CAT data and other information we have requested in our February FOIA Request.

Sincerely,



Ellen Greene
Managing Director, Equity and Options Market Structure
SIFMA



June 28, 2024

Carmen L. Mallon
Branch Chief
Office of FOIA Services
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: *The Securities Industry and Financial Markets Association’s February 8, 2023 Freedom of Information Act (“FOIA”) Request, Tracking Number 23-00976-FOIA*

Dear Ms. Mallon:

On behalf of the Securities Industry and Financial Markets Association (“SIFMA”), I am writing to respond to the June 17, 2024 email from your colleague Kim Outlaw to confirm yet again that we are still interested in a Securities and Exchange Commission (“SEC” or “Commission”) response to our February 8, 2023 FOIA request (“February 2023 FOIA Request”), tracking number 23-00976-FOIA. In our request, we asked the SEC to make public certain anonymized Consolidated Audit Trail (“CAT”) data and other information that the SEC relied upon in formulating the SEC’s four market structure proposals from December 2022 (“Proposals”).⁴¹ In Ms. Outlaw’s email, she notes that unless we “[a]gree to be placed into [the SEC’s] complex track,” “[n]arrow the scope of [our] request,” or “[a]gree to withdraw [our] request” by July 1, 2024, the SEC will administratively close our request. Under these circumstances, we “agree” to have our request placed in the SEC’s complex track and processed accordingly.

In addition, in an effort to obtain certain documents that are part of our February 2023 FOIA Request as soon as possible given the SEC’s announced plans to imminently consider

⁴¹ See Release No. 34-96496, 88 FR 5440 (Jan. 27, 2023) (“Regulation Best Execution”); Release No. 34-96495, 88 FR 128 (Jan. 3, 2023) (“Order Competition Proposal”); Release No. 34-96494, 87 FR 80266 (Dec. 29, 2022); Release No. 34-96493, 88 FR 3786 (Jan. 20, 2023) (“Minimum Pricing Increments”).

adoption of the Proposals,⁴² we are asking that the SEC immediately provide the following information related to the Regulation Best Execution proposal so that commenters can consider it in connection with their evaluation of the proposal. Specifically, from the CAT data the SEC used to create Table 8 of the Regulation Best Execution proposal,⁴³ we request that the SEC provide a data sample consisting of three days and three symbols for each day of the following:

- All of the CAT records related to the receipt of hidden midpoint-pegged orders by dark pools and exchanges.
 - We are not requesting the entire audit trail; rather we are requesting just the receipt and execution/cancellation of the orders based on “MEOA” (*i.e.*, the CAT code for alternative trading systems) and “EOA” (*i.e.*, the CAT code for exchanges) CAT records.
 - These records contain order IDs that the alternative trading systems and exchanges use to validate the full terms of the order to see if an order has certain terms or conditions (e.g., a minimum quantity condition); and

- All of the CAT records related to execution of the retail orders that the SEC used to make its evaluation in Table 8. This would include MEOF and MEOT records for those orders.

Importantly, we are not requesting the CAT data relating to the identity of any customer or specific broker-dealer that sent a particular order. We also believe that limiting the Table 8 data request to just three symbols over three days would also help mitigate any potential data privacy concerns.

Of course, we would be open to a broader sample of days and symbols but propose the above request to allow for the SEC to provide us with the data immediately (or in a short period of time). As indicated in our recent June 7, 2024 letter to the SEC on this topic, we would like to better understand whether / how the data used by the Commission in the Regulation Best Execution proposal might not have accounted for minimum quantity conditions on orders. We believe that the sample data we are requesting would help shed light on this issue while not burdening the SEC staff in connection with its production.

⁴² See https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode&showStage=active&agencyCd=3235.

⁴³ Release No. 34-96496, 88 FR 5440, 5503 (Jan. 27, 2023).

* * *

As we noted above, we “agree” to place our February FOIA Request in the SEC’s complex track. In addition, we would appreciate an immediate response to our very narrow and targeted request above related to our February FOIA Request. As we have stated, we are requesting the data to give commenters the opportunity to review and evaluate the CAT data and other information used to formulate the SEC’s Proposals prior to their adoption. Failing to provide such data prior to adoption would be inconsistent with the FOIA process as well as the public notice and comment process provided for under the Administrative Procedure Act (“APA”).⁴⁴

In addition, we continue to object to the repeated practice of the SEC FOIA Office sending us correspondences stating that if we do not respond by a certain date, the SEC will administratively close our request. As we have stated, we continue to be extremely interested in the data requested in our February FOIA Request and urge the SEC to provide it.

As we consider other measures that might be available to us, we would be happy to further discuss this response with you.

Sincerely,



Ellen Greene
Managing Director
Equity and Options Market Structure

⁴⁴ 5 U.S.C. 553(b)-(c).