TO: SECURITIES AND EXCHANGE COMMISSION
FROM: SARAH HAMMITTE
PROPOSED RULE: REGULATION BEST EXECUTION [FILE # S7-32-22]
DATE: MARCH 31, 2023

DISCLAIMER: This comment is submitted as a part of a classroom assignment in my Administrative Law course at Cumberland School of Law. For purposes of this comment, I only attempted to respond to specific questions prompted under the proposal, namely the efficiency and economic feasibility of certain aspects of the Proposed Rules. I fully support the SEC's Rules that increase transparency and better enforce issues of conflict of interest as it relates to the duty of best execution.

Proposed Rule: Regulation Best Execution
Agency: Securities and Exchange Commission

I. Introduction

The Commission of the Securities and Exchange Commission ("SEC") is proposing a new rule under the Securities and Exchange Act of 1934, titled Regulation Best Execution. This new rule would establish a best execution standard and require detailed policies and procedures for brokers, dealers, government securities broker-dealers, and municipal securities dealers (collectively "broker-dealers.") Specifically, the best execution standard would require broker-dealers to use reasonable diligence to ascertain the best market for the security and buy or sell in such a market so that the resultant price to the customer is as favorable as possible under prevailing market conditions. In addition, Proposed Rule Regulation Best Execution would require broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to comply with the best execution standard.

This comment will primarily address three key Proposed Rules within the Commission's proposal, namely: Rule 1101, Rule 1101(a), and Rule 1101(c). These particular Proposed Rules identify the new policies and procedures requirements, as well as the review and reporting requirements as it relates to Regulation Best Execution. Below, I will analyze the ways in which these Proposed Rules could potentially have an adverse economic impact on broker-dealers' compliance expenditures. In addition, I will discuss the efficiency of these Proposed Rules as it relates to the existing Best Execution rules that broker-dealers are currently required to comply with under established regulation from other agencies. I will conclude this comment with my suggestions as to a reasonable alternative relative to these particular Proposed Rules.

II. Legislative, Regulatory, and Judicial History

The Securities and Exchange Commission's purpose is straightforward:
to promote fair dealing, ensure proper disclosures of market information, and to prevent fraud by overseeing securities exchanges, securities broker-dealers, investment advisors, and mutual funds.[1] After the stock market crash of 1929, Congress created the SEC to essentially "restore the

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[1] See generally, *Securities & Exchange Commission*, (last visited, Mar. 27, 2023), https://www.usa.gov/federal-agencies/securities-and-exchange-

country's faith in the economy"[2] through two significant reforms: the Securities Act of 1933 and the Securities Exchange Act of 1934. At its core, the 1933 Act was created to better protect investors by increasing financial transparency by requiring certain financial statement disclosures by corporations.[3] Likewise, the Exchange Act of 1934, of which the Commission's Proposed Rule is grounded in, was created by Congress to ensure investors were treated with fairness and honesty by increasing structure and oversight to the securities market.[4]

The Commission's Proposed Rule, "Regulation Best Execution," is designed to further the SEC's goal to better protect investors and prevent fraudulent practices within the securities market by enhancing existing policies and procedures requirements that govern broker-dealers. While the Securities and Exchange Commission have not yet established its own rules addressing best execution, the duty of best execution is addressed by the Financial Industry Regulatory Authority ("FINRA") and the Municipal Securities Rulemaking Board ("MSRB").

FINRA operates under the SEC, acting as a "Self-Regulatory Organization" ("SRO")[5] that oversees broker-dealers throughout the United States.[6] As an extension of the SEC, FINRA's mission is to protect investors and promote market integrity through writing and enforcing rules and regulations and examining broker-dealers for compliance with its rules, federal securities laws, and the rules of the MSRB.[7] Likewise, Congress established the MSRB in 1975,[8] which is also overseen by the SEC, and charged it with the responsibilities to prevent fraud and protect investors by establishing rules for municipal securities dealers and municipal advisors.[9] However, unlike FINRA and the SEC, the MSRB lack enforcement capabilities. The MSRB instead provides support to FINRA and the SEC who share the primary regulatory authority, enforcement and compliance responsibilities over broker-dealers.[10]

Currently, both FINRA and the MSRB have established rules regarding the duty of best execution and provide general guidance and requirements concerning compliance and procedures as it relates to the broker-dealers quality of best execution. Specifically, the duty of best execution is addressed and described identically in FINRA Rule 5310(a)(1) and MSRB Rule G-18 and which both provide that a broker-dealer "shall use reasonable diligence to ascertain the best market for

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commission#:~:text=The%20Securities%20and%20Exchange%20Commission,information%2C%20and%20to%20prevent%20fraud.

[2] John H. Matheson, *Securities and Exchange Commission*, THE FIRST AM. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/819/securities-and-exchange-commission#:~:text=SEC%20was%20created%20after%201929%20stock%20market%20crash&text=To%20restore%20the%20country's%20faith,oversight%20to%20the%20securities%20market.

[3] *The Role of the SEC*, U.S. SEC. AND EXCH. COMM'N, https://www.investor.gov/introduction-investing/investing-basics/role-sec.

[4] See generally https://www.sec.gov/about/about-securities-laws; 15 U.S.C. 78d.

[5] See *Self-Regulatory Organization*, CFI, (Jan. 16, 2023) https://corporatefinanceinstitute.com/resources/wealth-management/self-regulatory-organization-sro/ (defining a Self-Regulatory Organization or SRO as an "organization that is formed to regulate certain professions or industries. They are usually non-governmental organizations, established with the aim of creating rules to promote order among businesses and organizations").

[6] FINRA, https://www.finra.org/about.

[7] *Oversight of the Financial Industry Regulatory Authority, Hearing Before Subcomm. On Sec. and Invest. of the Comm. On Fin. Services*, 115TH CONG. 1 (2017).

[8] *See* Securities Exchange Act of 1934 § 15b.

[9] *THE ROLE AND JURISDICTION OF THE MSRB*, (2021), https://www.msrb.org/sites/default/files/2022-09/Role-and-Jurisdiction-of-MSRB.pdf.

[10] *Id*.

the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions."[11]

However, a broker-dealer's legal duty to seek best execution of customer orders is derived from an *implied representation* that a broker-dealer makes to its customers. Predating the federal securities law, the duty of best execution is rooted in "common law agency obligations" requiring broker-dealers to obtain "the most favorable terms reasonably available under the circumstances."[12]

Despite an established best execution rule under the Commission, Congress has authorized the SEC pursuant to the Exchange Act of 1934 to adopt rules that prescribe means reasonably designed to prevent fraudulent, deceptive, or manipulative acts and practices.[13] More specifically, the Exchange Act gives the SEC authority to identify areas in which investors would benefit from changes in the regulations of the Commission or the rules of self-regulatory organizations.[14]

The Commission and federal courts of appeal have consistently defined the duty of best execution and interpreted its application in various contexts. Evidenced by prior statements and Commission opinions, the duty of best execution is best depicted as a legal duty on behalf of the broker-dealer to execute trades at the most favorable terms reasonably available under the circumstances.[15] For example, the duty of best execution requires broker-dealers to execute trades for its customers "at the best reasonably available price."[16] In assessing what constitutes the "best reasonably available price," the Commission has provided a list of relevant factors to guide broker-dealers in the best execution analysis. Such factors include the size of the order, speed of execution, clearing costs, and the availability of technological aids to process such information.[17]

Additionally, the Commission has addressed in prior statements what best execution means in various market practices and circumstances. For example, for broker-dealers that handle large volumes of customer orders, the Commission has recognized the difficulty of making individual determinations on where to direct the orders, thus best execution in this context requires a periodic assessment of the quality of competing markets to ensure the orders are directed to the markets with the most beneficial terms.[18]

Overall, the current regulatory framework regarding the duty of best execution primarily consists of general rulemaking authority, enforcement guidelines, and various interpretations of what it means to practice best execution in the broker-dealer context. Specifically, the current regulatory framework helps protect investors in a setting of imperfect markets. The duty of best execution serves to address market failures that result from the economic principle known as the principal-agent problem. Principal-agent problems arise when a broker-dealer has different incentives than an investor, and the investor is not in a position to monitor the agent. For example, the broker-dealer may be required to take costly actions on behalf of the investor to achieve best execution of that particular trade or transaction. Customarily, the investor is unaware of these

[11] See Best Execution, FINRA 5310(a)(1); MSRB G-18.
[12] Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 F .3d 266, 270 (3d Cir.), cert denied, 525 U.S. 811 (1998).
[13] 15 U.S.C. 78o(c)(2)(D).
[14] 15 U.S.C. 78d(g)(3)(4)(B).
[15] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37538 (June 29, 2005) ("Regulation NMS Adopting Release").
[16] Newton, 135 F .3d 266, 270 (3d Cir. 1998).
[17] See Securities Exchange Act Release No. 43590 (Nov. 17, 2000), 65 FR 75414, 75422.
[18] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37538 (June 29, 2005) ("Regulation NMS Adopting Release").

actions. Therefore, this creates a financial incentive for the broker-dealer to take or not take certain actions to reduce its costs or increase its profits.

The Proposed Rule aligns with the Commission's prior statements on the duty of best execution by establishing its own rule that provides a mechanism to "modernize" and enhance best execution practices.[19] In a recent press release, SEC Chair Gary Gensler stated that "a best execution standard is too important, too central to the SEC's mandate to protect investors, to not have on the books as Commission rule text." The Commission believes that by establishing its own best execution rule that requires *specific* standards to be addressed in a broker-dealer's policies and procedures, these enhancements to current SRO rules on best execution will provide more protection to the investor when principal-agent problems arise.

Although FINRA and MSRB have well-established best execution rules, the SEC's policies and procedures-based Proposed Rule would enhance the current regulatory framework and codify at the Commission level what it means to seek best execution when trading securities.

III. Proposed Rule 1100, 1101(a), & 1101(c) – Best Execution Policies and Procedures & Regular Review of Execution Quality

Below I will address the SEC's Proposed Rules that I believe are the most likely to impose economic and regulatory burdens upon the affected broker-dealers mainly as a result of duplicative examination requirements that already exist under FINRA AND MSRB best execution rules and guidelines. In addition, I will highlight a few of the key differences and similarities between these Proposed Rules and the best execution rules addressed by FINRA and the MSRB to show how these heightened requirements could undercut the Commission's commitment to implementing the most efficient regulation.

Under Proposed Rule 1100, the Commission would require broker-dealers to use "reasonable diligence" to ascertain the best market for a security and buy or sell in such a market so that the resultant price is as favorable as possible under current market conditions.[20] Rule 1100 provides the general standard of best execution as it relates to broker-dealers. In addition, 1101 would require a broker-dealer to establish and maintain written policies and procedures reasonably designed to comply with the proposed standard. Rule 1101(a) would require these policies and procedures to address how the broker-dealer would comply with the best execution standard and how the broker-dealer would determine the best market for the customer orders that it receives. Furthermore, Proposed Rule 1101(a)(1) would establish a set of specific elements to be included in the broker-dealer's best execution policies and procedures to affirmatively address *how* it will comply with the best execution standard. Finally, 1101(c) would require broker-dealers to review, revise, and report the execution quality of their customer transactions at least quarterly.

i. Proposed Rule 1101(a)(1) - Elements to be Addressed in Best Execution Policies and Procedures

Under Regulation Best Execution, specifically Rule 1101(a)(1), the SEC would now require specific elements such as best displayed prices, opportunities for price improvement including midpoint executions, attributes of particular customer orders, and the trading

[19] *Id.*
[20] This is consistent with the common law agency duty of best execution which requires broker-dealers to seek to obtain the most favorable terms reasonably available under the circumstances.

characteristics of the security to be included within the broker-dealer's policies and procedures.[21] In addition, Rule 1101(a) would require that *all* customer orders be covered by the broker-dealer's best execution policies and procedures and enforced.

Currently, FINRA's best execution rule does not require such detailed policies and procedures. Rather, FINRA Rule 3110(b)(1)[22] only requires broker-dealers to have policies and procedures to ensure compliance with FINRA rules and federal securities laws and regulations. In addition, MSRB Rule G-28[23] also has a rule in place which requires broker-dealers to have procedures for compliance with MSRB rules and the Exchange Act. While the Commission recognizes broker-dealers have existing policies and procedures regarding compliance with their duty of best execution, the Proposed Rule seeks to include more specific elements that broker-dealers must address in order to enhance investor confidence that are otherwise not required under current FINRA rules. The SEC believes each proposed element plays a critical role in the best execution analysis and that by requiring such detailed elements to be considered, not merely suggested in guidelines under FINRA and MSRB, this will serve to better resolve the "principal-agent" problem discussed above.[24]

More specifically, under Proposed Rule 1101(a)(1), a broker-dealer's best execution policies and procedures would be required to address compliance with the duty of best execution standard by: (i) obtaining and assessing reasonably accessible information, including information about price, volume, and execution quality, concerning the markets trading the relevant securities; (ii) identifying markets that may be reasonably likely to provide "material potential liquidity sources;" and (iii) incorporating these sources into handling practices and ensuring efficient access. For example, the Commission believes that the ability of markets to attract trading interest, as measured by trading volume, is relevant to a broker-dealer's best execution analysis. This is because trading volume is a good indicator of whether sufficient trading interest exist to execute customer orders.

Currently, FINRA Rule 5310(a)(1) and MSRB Rule G-18(a) set forth similar factors regarding the character of the market, price, trading volume, and relative liquidity; however, they are not required to be included in a broker-dealer's policies and procedures, and therefore not required to be considered when determining compliance with its best execution duties.

The Commission believes that these factors are particularly relevant to a broker-dealer's best execution analysis, thus necessary to include in the policies and procedures meant to ensure compliance with the duty of best execution. Specifically, the Commission believes these specific factors must be continuously reviewed and modified as the market constantly evolves. Additionally, while FINRA Rule 5310(a)(1) provides similar factors relevant to the best execution analysis, FINRA rules do not *explicitly* require any relevant factors recognized by the Commission to be included in a broker-dealer's best execution policies and procedures. Rather, both FINRA and MSRB merely provide factors they believe to be relevant to achieving best execution for broker-dealers as guidance, not as a requirement.

ii. Proposed Rule 1101(c) – Regular Review of Execution Quality

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[21] Regulation Best Execution, 88 Fed. Reg. 5440, 5455 (proposed Jan. 27, 2023) (to be codified at 17 C.F.R pts. 240, 242).
[22] See Supervision, FINRA Rule 31101(b)(1).
[23] See Transactions with Employees and Partners of Other Municipal Securities Professionals, MSRB Rule G-28.
[24] See infra, Part II Regulatory and Legislative History.

In addition to Proposed Rule 1101(a), the Commission in Proposed Rule 1101(c) would require a broker-dealer, no less than quarterly, to review the execution quality of its transactions for or with its customers of another broker-dealer. Notably, Rule 1101(c) would also require broker-dealers to revise and document the results of its best execution policies and procedures accordingly. Although execution quality reviews are currently conducted pursuant to FINRA's and MSRB's best execution rule, the Commission's Proposed Rule is broader in scope, and would apply to all broker-dealers that are not "introducing brokers" that transact for or with customers. The Exchange Act defines introducing brokers as broker-dealers that "clears all transactions with and for customers on a fully disclosed basis with a clearing broker or dealer, who promptly transmits all customer funds and securities to the clearing broker."[25]

Additionally, the Proposed Rule 1101(c) would also require a review and report of the execution quality at least quarterly. While FINRA rules also require "at least quarterly" execution quality reviews, MSRB Rule G-18 only requires a broker-dealer to, at a minimum, conduct annual reviews of its best execution policies and procedures.[26] However, the Commission recognizes that aside from the difference in scope and frequency of execution quality reviews, Proposed Rule 1101(c) is entirely consistent with FINRA Rule 5310.09.[27]

The Commission believes such a Proposed Rule that requires a "regular" and more frequent review of best execution quality and compliance to Regulation Best Execution would benefit customers to a broader range of broker-dealers, that under the current regulatory framework, is not accounted for. Although there are existing regulations under FINRA and MSRB regarding best execution that require "regular and rigorous review," the Commission believes it is retrospective in nature, and that its Proposed Rule offers a prospective mechanism to enforce best execution practices upfront. Furthermore, it is of the Commission's belief that by also requiring thorough documentation of the results of its execution quality reviews, this will allow regulators to more efficiently and effectively oversee the broker-dealer's efforts to meet the proposed best execution standard.

Overall, the Commission's Proposal, specifically the Proposed Rules discussed above, seeks to enhance the Commission's ability to enforce best execution by imposing detailed policies and procedures requirements in addition to the existing regulatory requirements.

IV. The SEC Should Adopt FINRA 5310 and MSRB G-18 Best Execution Rules

The SEC's proposed "Regulation Best Execution" demonstrates a thorough understanding of the importance of executing trades and securities at the most favorable terms to the customer under the prevailing market conditions. Likewise, the Proposed Rule reflects the significance in maintaining, as well as enforcing, relevant policies and procedures through its heightened requirements found in Proposed Rule 1101(a)(1). Although I agree with the SEC's underlying justifications for establishing its *own* rules regarding the duty of best execution, I believe the reasonable alternative is to affirmatively adopt existing Best Execution FINRA Rule 3510 and

[25] 17 C.F.R. § 240.15c3-3.
[26] See e.g., 2022 Report on FINRA's Examination and Risk Monitoring Program; see FINRA Rule 5310.09; See MSRB Rule G-18.01(a).
[27] See FINRA Rule 5310.09(b) (providing that, in reviewing and comparing the execution quality of its current order routing and execution arrangements to the execution quality of other markets, a member should consider: (1) price improvement opportunities; (2) differences in price disimprovement; (3) the likelihood of execution of limit orders; (4) the speed of execution; (5) the size of execution; (6) transaction costs; (7) customer needs and expectations; and (8) the existence of internalization or payment for order flow arrangements).

MSRB G-18. Compared to the current proposal, I believe the adoption of the existing Best Execution rules and guidance would minimize compliance costs, create greater consistency between the agencies of which it oversees, while still effectively maintaining the SEC's mission to protect investors in the most efficient manner.

The SEC itself recognizes the potential economic burdens that these Proposed Rules impose on the securities industry. The Commission has stated that it estimates an aggregated compliance cost of $165.4 million in "one-time" costs and $128.9 million in "annual" costs on broker-dealers to either regularly update or establish their policies and procedures to comply with the execution of customer orders.[28] This number is significant because it only reflects the compliance costs associated with its Proposed Rule of Regulation Best Execution. Although the Commission's estimated costs are based on the assumption that all broker-dealers will need to implement or update their policies and procedures to be consistent with the Proposed Rules, the Proposed Rules will have an economic impact on broker-dealers and its customers regardless of their current policies and procedures practices.

For the last decade, the securities industry has experienced a significant increase in legislative and regulatory initiatives that directly and adversely impact a firm's compliance spending. In 2018, the Competitive Enterprise Institute found that for large firms in the financial industry, the average costs to maintain compliance with various regulations, totaled to an average of $10,000 per employee.[29] Here, the SEC has estimated that the average costs to maintain compliance with its Proposed Rules would total to $47,298 per broker-dealer for one-time costs, and $36,843 per broker-dealer annually.[30] It is also important to note that the Commission believes and logic follows that these costs, although felt by the broker-dealers, would ultimately pass to the customers, i.e., the investors through higher commission fees.[31]

The frustration within the financial services and securities industries regarding the increase in compliance costs resulting from the ever-increasing legislative and regulatory mandates is nothing new to the 21st century. To add to this frustration, it has notoriously been difficult for federal agencies, including the SEC, to accurately measure costs and benefits, which in turn make it that much more difficult to assess the extent to which regulations may be unduly burdensome to the relevant U.S. firms when proposing rules like this one.[32] Most notably, it is even more difficult to separate the costs of complying with regulation from other costs. Because of this, it is challenging for regulators, like the SEC and FINRA, to determine conclusively the true costs, thus the potential regulatory burdens, when implementing rules like "Regulation Best Execution."[33]

Despite the historical challenges of measuring costs and benefits, especially compliance costs, the SEC makes a genuine attempt to calculate the potential costs and resulting burdens of its implementation in its proposal. The SEC also proposes rules that they believe will minimize at

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[28] Regulation Best Execution, 88 Fed. Reg. 5440, 5482 (proposed Jan. 27, 2023) (to be codified at 17 C.F.R pts. 240, 242).
[29] Lone Shakeel, *The Creeping Cost of Compliance*, FORBES (Oct. 21, 2021), https://www.forbes.com/sites/servicenow/2021/10/21/the-creeping-cost-of-compliance/?sh=6d5d880d56cc; See also Crews, Clyde, Ten Thousand Commandments, Competitive Enterprise Institute (2018 ed.) https://cei.org/sites/default/files/Ten_Thousand_Commandments_2018.pdf#page=18.
[30] Regulation Best Execution, 88 Fed. Reg. 5440, 5482, n. 571 (proposed Jan. 27, 2023) (to be codified at 17 C.F.R pts. 240, 242).
[31] *Id.* at 5529.
[32] See U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-32, Financial Regulation: Industry Trends Continue to Challenge the Federal Regulatory Structure (2007), https://www.gao.gov/assets/a267961.html.
[33] *Id.*

least some of the potential burdens of implementation and costs of compliance. For example, the SEC believes that smaller-broker dealers would have fewer requirements to implement under the Proposed Rules which would mitigate the burden of implementation relative to larger broker-dealers.[34] Additionally, the Commission believes that because smaller broker-dealer firms would likely outsource their policies and procedures review requirements under the Proposed Rule, this would mitigate any implementation burdens on its current staff.[35] However, I believe the SEC fails to see the bigger picture. For both the large *and* small broker-dealers, whether the firms utilize in-house compliance teams or external parties to review, update, and enforce its regulatory requirements, there will be additional compliance spending on top of the existing and expensive compliance costs. This is because, as with any new rule, it will take time to ensure the policies and procedures comply with the SEC's requirements regarding best execution. In addition, the SEC's Proposed Rules will require continuous review, examination, and updating to its best execution policies and procedures, which the firms, no matter the size, will have to account for as ongoing compliance expenditures.

The Securities Industry Association, the leading trade association for broker-dealers, investment banks, and asset managers, released a report in 2006 addressing the costs of compliance in a concerted effort to better understand the "day-to-day" impact the regulatory and legislative initiatives have on industry firms.[36] Although this report reflects data collected from over ten years ago, this is the most recent report available that I believe provides relevant analytical information that the Commission should consider before implementation of Regulation Best Execution. I encourage the SEC to review this report in its entirety when considering the adoption of their Proposed Rules, and other reasonable alternatives. However, for the purpose of this comment, I will highlight some of the results that are most relevant to the SEC's Proposed Rules. In the report, the results showed that the securities industries are spending 13.1% of their net revenue on compliance-related activities.[37] Specifically, the report revealed that the largest component of compliance spending within industry firms were "staff-related"[38] expenditures, totaling to 93.3%.[39] Thus, although the SEC estimates that the Proposed Rules will not affect the amount of compliance spending within *smaller* broker-dealer firms as much as large broker-dealers, the larger broker-dealers can be expected to fork out a chunk of their expenditures in order to comply with its Proposed Rules.

In fact, the Commission estimates that under the Proposed Rule, these large broker-dealers would annually expect an internal "staff-related" burden of 40 hours to conduct its annual reviews, and 8 hours to actually prepare the annual report.[40] These estimates are significant because, as I have mentioned above, they are in addition to the *current* amount of hours and dollars spent within the industry firms on existing compliance-related activities.

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[34] Regulation Best Execution, 88 Fed. Reg. 5440, 5540 (proposed Jan. 27, 2023) (to be codified at 17 C.F.R pts. 240, 242).
[35] *Id.*
[36] SECURITIES INDUSTRY ASS'N., *The Costs of Compliance in the U.S. Securities Industry*, 2 (2006) https://www.sifma.org/wp-content/uploads/2017/06/costofcompliancesurveyreport1.pdf.
[37] *Id.*
[38] See *id.* at 5 (defining staff-related expenditures to include "[p]ersonnel in the traditional compliance, internal audit, risk-management, and legal departments).
[39] See *id.* at 7.
[40] Regulation Best Execution, 88 Fed. Reg. 5440, 5548 (proposed Jan. 27, 2023) (to be codified at 17 C.F.R pts. 240, 242).

Furthermore, in its report, the Securities Industry Association asked firms to identify the aspects of the legislative and regulatory process that have had the most adverse impact on staff-related compliance spending.[41] The survey revealed that the "sheer volume of new rules, rule changes, examinations, sweeps, and inquiries" places enormous strain on their staff-related spending. Most notably, the firms within the securities industry reported that overlap and duplication of examinations by various regulators, with no coordination among the agencies, contributed to the rapid increase in compliance-related spending.[42] When asked to identify specific examples of duplicative examinations, the firms reported the various ways this occurs, including: "different regulators reviewing the same or similar issues and regulators conducting different examinations, but much of the substantive information is the same or similar."[43]

The firms within the securities industry reported that often, the duplication results from "minor differences in the criteria" used by each regulator, but neither regulator shares the information collected.[44] This directly results in unnecessary and unduly burdensome duplications of efforts by multiple agencies and regulators with common goals and similar administrative responsibilities. The report listed several specific examples of the most burdensome legislative and regulatory initiatives which included the SEC Books and Records requirement,[45] email review and retention, Investment Advisory regulations,[46] inconsistency among regulators, and lack of clarity in rules and guidance.[47] Although these firms understood the underlying value and justification for these burdensome initiatives, they seek a less burdensome approach to their implementation that will minimize compliance expenditures and create consistency among the various regulators.[48]

It is important to note that this particular survey was conducted in 2004 and released in 2006, and the costs of compliance spending in the securities industry has only increased as new legislative and regulatory mandates have continued to be amended, enacted, and enhanced. Recently, a 2021 report by Thomson Reuters expected the cost of compliance staff to increase by 47% and regulatory information to increase by 78% in the coming year.[49]

In light of the aforementioned data and the realities of the ever-evolving legislative and regulatory climate, I encourage the Commission to simply adopt FINRA Rule 5310 and MSRB Rule G-18 rules and associated guidance regarding Best Execution. Although I believe in the underlying goals the SEC is attempting to achieve by establishing its own rules regarding the duty of best execution, I think an adoption of FINRA's and the MSRB's rules is the more efficient method. By adopting this reasonable alternative, it would significantly lower the compliance costs

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[41] SECURITIES INDUSTRY ASS'N., *The Costs of Compliance in the U.S. Securities Industry*, 8 (2006) https://www.sifma.org/wp-content/uploads/2017/06/costofcompliancesurveyreport1.pdf.
[42] *Id.* at 9.
[43] *Id.* at 17.
[44] *Id.*
[45] See 17 C.F.R. § 240.17a-3 (2003) ("The amendments clarify and expand recordkeeping requirements with respect to purchase and sale documents, customer records, associated person records, customer complaints, and certain other matters. In addition, the amendments expand the types of records that broker-dealers must maintain and require broker-dealers to maintain or promptly produce certain records at each office to which those records relate. These amendments are specifically designed to assist securities regulators when conducting sales practice examinations of broker-dealers, particularly examinations of local offices").
[46] FINRA and MSRB are examples of Investment Advisory Regulations.
[47] SECURITIES INDUSTRY ASS'N., *The Costs of Compliance in the U.S. Securities Industry*, 18 (2006) https://www.sifma.org/wp-content/uploads/2017/06/costofcompliancesurveyreport1.pdf.
[48] *Id.*
[49] Susannah Hammond and Mike Cowan, *Cost of Compliance 2021: Shaping the Future*, THOMSON REUTERS, 3-4, (2021), https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/reports/shaping-the-future.pdf.

compared to the SEC's proposal. There would be virtually no need to spend upwards to $48,000 per broker-dealer because these member firms already have existing policies and procedures aimed at ensuring compliance with its duty of best execution under FINRA and the MSRB.

Furthermore, Proposed Rule 1101(a)(1) and Rule 1101(c), the policies and procedures-based parts of its Proposed Rules, are ultimately identical to FINRA Rule 5310 and MSRB G-18. The main difference between Proposed Rule 1101(a)(1) and FINRA 5310(a)(1) is that the SEC would *require* certain factors mentioned in Part II above to be included in a broker-dealer's best execution policies and procedures. While FINRA and MSRB rules do not *explicitly* require these factors to be included, they are highly encouraged to be considered when conducting a best execution analysis. I agree with the Commission that these factors should be required to be included in broker-dealer's policies and procedures because it would offer clear and consistent guidance for compliance officials when conducting their quarterly review of execution quality.

Additionally, the SEC's Proposed Rule 1101(c) would require a review and report of all broker-dealers best execution quality at least quarterly, which is entirely consistent with the existing review procedures identified in FINRA 5310.09. I fear the SEC, by establishing its own more enhanced, yet similar version of the best execution rules will only result in unduly burdensome regulation that has already been established and implemented within the securities industry. It is my opinion that the Commission's proposal fails to address and resolve the concerns and challenges revealed by industry firms in the 2006 Securities Industry Association survey. For example, Proposed Rules 1101(a)(1) and 1101(c) would impose yet another layer of regulatory review over the same issue of best execution that is already overseen and enforced by FINRA.

The Commission itself recognizes the similarities between its Proposed Rules and existing SRO rules that specifically address how broker-dealers are to comply with its duty of best execution. Simply put, the difference is in the details. My suggestion to the Commission is to simply adopt FINRA's and MSRB's rules on best execution. In addition, I suggest that the Commission affirmatively require the specific factors found in Proposed Rule 1101(a)(1), and that all agencies agree to be relevant to the best execution analysis, to be included in the policies and procedures. I believe this to be a more cost-effective solution and more sufficient method of implementation. From the Rules I have discussed, FINRA and MSRB seem to adequately address the concerns of the principal-agent problem from the simple fact that the Proposed Rules virtually reiterate the existing regulations.

I believe that adoption of the Best Execution FINRA Rule 5310 and the MSRB G-18 rule, and associated guidance is a less burdensome approach, both regulatory and economically speaking compared to the Commission's proposals. A consolidation of this sort would remove unnecessary duplicative examinations on best execution policies and procedures, as well as create consistency among the regulatory agencies tasked with the common goal to protect investors.

V. Conclusion

There are many aspects of the Commission's Proposed Rule Regulation Best Execution that I fully support but did not discuss. However, for the purposes of this Comment and as the result of comprehensive research, I believe that the particular Rules I have mentioned above, namely the policies and procedures and examination-based Rules, could potentially impose unduly regulatory and economic burdens on broker-dealers that are otherwise unnecessary in light of the current regulatory framework surrounding best execution. Although I fully appreciate the Commission's dedication to modernizing and enhancing the best execution practices, I feel that

adopting FINRA and MSRB’s Best Execution standards and establishing the Commission’s proposed enhanced set of factors in addition to the existing rules, to be the most efficient method of implementation. Overall, I believe this alternative to be reasonable and sufficient to address the concerns of best execution violations and compliance procedures and requirements.