DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

85 Willow Road
Menlo Park, CA 94025
robinhood.com

March 31, 2023

Via Electronic Mail (rule-comments@sec.gov)

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

Re: File No. S7-32-22: Regulation Best Execution

Dear Ms. Countryman:

Robinhood Financial, LLC and Robinhood Securities, LLC[1] (together, "Robinhood") submit this letter in response to the U.S. Securities and Exchange Commission's ("Commission" or "SEC") recent proposal to adopt a series of best execution rules under the Securities Exchange Act of 1934 ("Proposed Reg Best Ex" or "Proposal").[2] This is one of four rules the SEC has simultaneously proposed to completely restructure the U.S. securities markets (collectively, the "Proposals"). Together, these four rules would transform retail investing by having the government and self-regulatory organizations ("SROs") mandate and then micromanage what fees can be charged, what prices retail investors must receive, where retail investors' trades must be executed, and what information must be provided to investors. The breadth and complexity of these Proposals is unprecedented and unworkable. Moreover, in many areas, the Proposals are based on scant data, secret data, or no data at all. And, in several instances, the SEC openly concedes that they could result in worse prices and more expensive transactions for retail investors and cause retail investors to leave the securities markets.[3]

---

[1] Both of these FINRA-member broker-dealers are wholly owned subsidiaries of Robinhood Markets, Inc.

[2] Proposing Release, Regulation Best Execution, Exchange Act Release No. 96496 (Dec. 14, 2022), 88 Fed. Reg. 5440 (Jan. 27, 2023) ("Reg Best Ex Proposing Release").

[3] *E.g.*, Proposing Release, Order Competition Rule, Exchange Act Release No. 96495 (Dec. 14, 2022), 88 Fed. Reg. 128, 221 (Jan. 23, 2023) ("OCR Proposing Release") ("[I]f the Proposal results in the elimination of zero-commission trading, retail trading volume could decline and the overall pool of liquidity could shrink …."); Reg Best Ex Proposing Release, 88 Fed. Reg. at 5534 (potential for worse prices in illiquid securities); Reg Best Ex Proposing Release, 88 Fed. Reg. at 5530, 5533, 5536 (retail investors may be required to pay commissions due to increased transaction costs); Proposing Release, Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, Exchange Act Release No. 96494 (Dec. 14, 2022), 87 Fed. Reg. 80,266, 80,280 (Dec. 29, 2022) ("Tick Size Proposing

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

Due to the scope and complexity of the Proposals and the dearth of supporting evidence, the Commission has made it difficult for the public to understand or meaningfully assess the collective impact of the rules, including their costs and negative effects on the marketplace. But one thing is certain: If adopted, they will push us backwards, towards a time when investing was less efficient, less accessible, and less fair. The SEC's Proposals will reverse a recent retail investor revolution, which Robinhood is proud to have facilitated, that allows everyday Americans to build long-term wealth through investing. Robinhood's model has transformed retail investing for the better and saved investors billions of dollars and counting. The innovations we spearheaded in the market, such as commission-free trading, no account minimums, fractional shares, and the first non-employer IRA with a match were possible because for the last fifty years, the SEC did what Congress authorized it to do—it encouraged competitive, innovative, and efficient markets. We now have a highly competitive system that facilitates innovation and is accessible to any individual who wants to participate. As a result, we no longer have a marketplace dominated by the "haves." The historical "have nots"—blue collar workers, women and people of color, young Americans and first-time investors, people from rural communities and inner cities alike, gig economy workers and freelancers—now participate in unprecedented numbers in the U.S. stock market.

Today, Robinhood has over 23 million customers, many of whom are younger and more diverse than yesterday's investors.[4] Our customers hail from every state in the country and are a representative cross-section of America. We're proud of our customer base, but we're not unique. Across the industry, retail-focused broker-dealers followed Robinhood's lead—dropping costly commissions and account minimums—and in the process opened nearly 70 million more accounts by late 2021 as compared to the number open in late 2017.[5] This is truly revolutionary progress. As policymakers on both sides of

---

Release") (pricing increments that are too small can lead to decreased displayed liquidity, added complexity, and increased risk of stepping ahead).

[4] Press Release, Robinhood, Robinhood Markets, Inc. Reports February 2023 Operating Data (Mar. 13, 2023), https://investors.robinhood.com/news/news-details/2023/Robinhood-Markets-Inc.-Reports-February-2023-Operating-Data/default.aspx (23.1 million total funded accounts); Gretchen Howard, *Latinx Investors Are Part of the New Wall Street*, Robinhood: Blog (Oct. 12, 2021), https://blog.robinhood.com/news/2021/10/12/latinx-investors-are-the-new-face-of-wall-street-and-crypto ("We see more than double the industry average of Latinx and Black investors on our platform, and we know that new investors in 2020 were younger and more diverse than experienced investors."); SEC, *Staff Report on Equity and Options Market Structure Conditions in Early 2021*, at 9 (2021), https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf ("Robinhood reported that its average customer is 31 years old and has a median account balance of $240.").

[5] Staff of H.R. Comm. on Fin. Servs., 117th Cong., *Game Stopped: How the Meme Stock Market Event Exposed Troubling Business Practices, Inadequate Risk Management, and the Need for Legislative and Regulatory Reform* 6 fig.1 (Comm. Print 2022).

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

the aisle have long recognized, participating in the securities markets is the best way for individual Americans to generate long-term wealth, reduce our country's persistent income and investing diversity gaps, and drive economic growth. In recent decades, the U.S. securities markets have transformed from a marketplace wholly dominated by a handful of broker-dealers and exchanges that stifled competition, where most Americans could not afford to participate, to today's markets where the cost of trading has never been lower, stock prices have never been better, competition is thriving, and market participation has never been more widespread.

The Commission has historically recognized the importance of investor participation in the markets and taken steps to encourage more efficient markets that work better for the retail investor. Until now. Out of a misguided sense that government mandates should dictate where, how, and at what prices trades may occur, the Commission now proposes to upend the entire structure of today's securities markets with these four proposed rules. While we all agree that the markets must work for the benefit of retail investors, the SEC's complex and unsupported Proposals would not advance this goal. Instead, the Proposals are collectively regressive and would unwind much of the significant progress that has been made to drive costs down and encourage retail investor participation over the past half century. As altered by the Proposals, the customer experience in our markets will be slower, pricier, and less competitive; capital formation will be more difficult for smaller issuers; and increasing costs will likely expel from the market many of those investors who have only recently begun to participate. In other words, the Commission is trying to fix a market that isn't broken—and will break it in the process. For the above and other reasons, certain of the Proposals should be withdrawn in their entirety, and the others must be clarified, modified, and harmonized before they can be adopted.

The SEC's proposed rules can be ranked in order of most reckless and harmful to least intrusive:

- First, with its experimental so-called ***Order Competition Rule*** (or "Proposed OCR"), the SEC would—for retail investors only—revert to the exchange oligopolies that Congress directed it to abolish fifty years ago. The Proposed OCR would force retail orders to a single type of venue (a subset of exchanges) and a single order execution method ("qualified auctions") purportedly because the SEC is concerned that in today's market, retail customers may not get the benefit of *all* market participants (particularly large institutional investors) competing for their orders. But the SEC admits it does not know whether or which parties will participate in these auctions—in fact, it admits that large institutions may *not*

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

participate.[6] The SEC also admits that auctions could result in worse prices for retail investors.

This radical proposal would cut off retail investors' access (through retail broker-dealers) to the well-developed system of venues that vigorously compete for their order flow and provide best execution and other services. That competition drives venues to improve prices, lower costs, and improve services for retail investors. The upshot of the Proposed OCR would be that retail investors' orders will be forced into government-mandated, centralized marketplaces that, while residing within for-profit corporations, effectively operate as public utilities with regulatory immunity and limited liability if they have technology problems, i.e., there is little recourse if investors are unhappy with the prices they receive due to errors. Indeed, the SEC acknowledges that retail investors could experience slower and less certain trading at worse prices while institutional investors and professional traders will continue to benefit from the competition provided by off-exchange venues and market makers. And that, in turn, will likely breed confusion and frustration, causing many retail investors to lose faith in the markets and stop participating altogether. These extreme, negative consequences are not mere speculation; the SEC admits that the Proposed OCR may drive retail investors out of the market. Further, our review of the Commission's economic analysis demonstrates that instead of saving investors $1.5 billion (which the Commission estimates), the Proposed OCR is likely to cost investors between $2.5 and $3 billion. This rule should be rejected in its entirety.[7]

- Through its ***Proposed Reg Best Ex***, the SEC would create unnecessary regulatory obligations that are, at best, redundant because there is already a comprehensive set of best execution standards in place. Existing best execution rules of SROs (including the Financial Industry Regulatory Authority ("FINRA")) not only require broker-dealers to achieve the best price reasonably available for customers, they also require broker-dealers to regularly and rigorously test whether they have done so and subject broker-dealers to SRO examinations for compliance with those rules. While neither articulating any weakness in the current regulatory

[6] *See* Letter from David Howson, Executive Vice President & Global President, Cboe Global Markets, et al., to Vanessa Countryman, Sec'y, SEC (Mar. 24, 2023), https://www.sec.gov/comments/s7-32-22/s73222-20161714-330556.pdf (group of commenters including institutional investors object to the Proposed OCR and instead support improvements that come from "competitive forces" and "innovative, market-driven solutions").

[7] Notably, one of the exchanges that would be eligible to host qualified auctions has also recommended the Commission not adopt a prescriptive requirement to send retail orders to auctions and instead argued for market-driven innovations and enhancements. Letter from Hope M. Jarkowski, General Counsel, NYSE, to Vanessa Countryman, Sec'y, SEC, at 9 (Mar. 13, 2023), https://www.sec.gov/comments/s7-31-22/s73122-20159561-327567.pdf.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

structure nor materially changing the fundamental best execution standard that broker-dealers are already required to follow, Proposed Reg Best Ex makes compliance with those obligations so onerous and expensive that the natural result, as the SEC expressly acknowledges, could change firms' business models, result in fewer retail broker-dealers, and increase fees and costs to retail investors with no evidence of any material additional benefit. This rule should be rejected in its entirety.

- The proposed ***Minimum Pricing Increment (Tick Size), Access Fee, and Transparency Rule*** ("Tick Size Proposal") would (among other things) harmonize and reduce the minimum price increment at which exchanges and other market participants can quote and trade exchange-listed stocks, restricting the increments at which investors can trade. We support sensible changes to tick size, access fees, and market data infrastructure, but believe the current proposal lacks support for the significant changes to market structure that the SEC proposes. The SEC should take a more incremental, data-driven approach and, first, fully implement the Market Data Infrastructure ("MDI") Rules, which will make additional information regarding orders available to the marketplace (e.g., new round lot sizes, odd-lot information, and auction information), and therefore help to fill key gaps in publicly available market data, encourage further price improvement, and make more data accessible to investors at lower prices by introducing competition into an otherwise monopolistic data market. Then, the SEC should repropose reasonable and incremental changes to minimum pricing increments. We believe a thoughtful approach would be to: (a) reduce the minimum pricing increments to $0.005 for tick-constrained stocks that would more clearly benefit from narrower tick sizes; (b) allow for a six-to-12-month period to study the effects of these changes on market quality; and, then (c) if warranted after further analysis, consider additional reductions to the minimum pricing increments as well as larger minimum pricing increments for less liquid stocks with naturally wider spreads, providing a mechanism to roll back any changes that, after analysis, decrease market quality. The SEC should also adopt exchange access fee caps that are proportional to the minimum pricing increments based upon existing access fee caps (30% of the tick size). Changes beyond those contemplated here risk increasing price volatility and confusion on the part of investors who may find that they are not receiving the prices they thought they would when they submitted their orders due to rapidly changing quotations.

- Finally, with its proposed ***Disclosure of Order Execution Information*** rule ("Proposed Rule 605"),[8] the Commission would expand reporting entities and

[8] Proposing Release, Disclosure of Order Execution Information, Exchange Act Release No. 96493 (Dec. 14, 2022), 88 Fed. Reg. 3786 (Jan. 20, 2023) ("Rule 605 Proposing Release").

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

expand or modify the types of data that must be disclosed so that broker-dealers and their retail customers can better assess the quality of the execution prices they receive. We believe this proposal should be refined, but support adoption of a modified version of the proposal.

The Proposals are also problematic because they overlap in ways that are contradictory, redundant, and mutually exclusive. If the Proposals are implemented and some successfully meet their objectives, others would be unnecessary. For these reasons, none of the Proposals may properly become law without being clarified and reproposed. And while there are certainly opportunities to improve on an already well-functioning marketplace, adopting a complex and interdependent suite of rules that would upend almost every aspect of trading for retail investors would be rash and unsupportable. Instead of proposing a thoughtful, incremental, and data-driven approach to reforming market structure inefficiencies and competitive imbalances, the SEC has taken a "Rube Goldberg machine" approach to rulemaking. This approach appears to be designed to experiment with the retail market—at the expense of retail investors—by implementing multiple solutions to the same alleged problem at once, rushing headlong into unknowable consequences without a plan (or even the ability) to measure the impact of different rules or recalibrate its approach as the market responds.

Because each individual proposal must be considered as both a standalone rule *and* a changeable aspect of a larger structural transformation, we set forth below in **Section I** our comments on the totality of the Commission's plan, including the cumulative effects of adopting multiple rules simultaneously and how each proposed rule would affect and be affected by the others. We then set forth in **Section II** a specific discussion regarding Proposed Reg Best Ex. Our comments are organized as follows.

I. THE COLLECTIVE IMPACT OF THE PROPOSALS

- A. Today's Securities Markets Work Well For Retail Investors.
- B. The Proposals Would Upend The Current Industry Practices That Have Worked Well For Investors And Issuers In Multiple Interrelated Ways.
- C. The Proposals Violate Federal Law.
- D. The SEC Shouldn't Experiment With Retail Investors' Financial Futures: Rulemaking Must Be Data-Driven, Supportable, And Incremental.

II. PROPOSED REG BEST EX SHOULD BE WITHDRAWN BECAUSE IT IS CONTRARY TO GOOD POLICY AND VIOLATES THE SEC'S RULEMAKING AUTHORITY AND STATUTORY MANDATE

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

A. The Proposal Is Inconsistent With The SEC's Rulemaking Authority Because It Is Duplicative And Therefore Unnecessary And Inappropriate.

B. Proposed Reg Best Ex Will Harm Retail Investors By Making It More Difficult For Them To Receive Best Execution And Increasing Their Transaction Costs.

C. The Proposal Supplants Industry Expertise With Government Mandates That Are Overly Prescriptive And Uninformed With Respect To Non-Equity Products.

D. The SEC Has Failed To Conduct A Proper Economic Analysis.

We provide our comments with a number of caveats.

First, it is impossible for us—or anyone—to comment on all the possible permutations that may arise depending on how the Commission chooses to reject, modify, or proceed with the Proposals. Integral to the public's ability to participate in the rulemaking process is the agency's obligation to "reveal the agency's views 'in a concrete and focused form'"[9]—to tell the public what it is *actually* proposing. When an agency's proposal is too nebulous or "open-ended,"[10] "interested parties will not know what to comment on" and will be unable to meaningfully critique the proposal.[11] Here, the Commission's proposals fail to provide the basic notice required by the Administrative Procedure Act because they do not inform the public what the Commission *is actually proposing to adopt*. Even without considering eventual changes that might be made to any individual proposals, given the inconsistencies between the proposals themselves, the Commission cannot conceivably adopt each rule as proposed at the same time. The net effect is that the Commission has failed, at this time, to give the public notice of what combination of rules it reasonably expects to adopt. For this reason alone, the Commission must repropose the rules. The Commission's failure to provide proper notice is exacerbated here by the difficulty of reasonably estimating the compound effect of these interconnected rules in this brief comment period, particularly where the Proposals may overlap, result in contradictory or unpredictable outcomes, or obviate each other.

Second, the Commission consistently underestimates costs and overstates benefits in its flawed economic analyses, often relying on assumptions instead of real data and never providing (or even attempting to provide) a coherent and unified statement about the

---

[9] *United Church Bd. for World Ministries v. SEC*, 617 F. Supp. 837, 839 (D.D.C. 1985) (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 548 (D.C. Cir. 1983)).

[10] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011).

[11] *United Church Bd.*, 617 F. Supp. at 839 (quoting *Small Refiner Lead*, 705 F.2d at 549).

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

collective costs and benefits of the total proposed rule set. Furthermore, the Commission fails to adequately incorporate and offset the benefits that the already approved MDI Rules will have once implemented, while simultaneously introducing new costs by scaling back data content and substantially delaying the introduction of competition into the data market relative to the MDI Rules' adopted implementation table. The suite of rules the Commission has proposed as a whole is more complicated, more expensive, and more burdensome than the sum of its parts. If the Commission proposes to change any individual proposal, it is imperative that the industry have another opportunity to comment on how the adjustments or revisions would collectively affect market structure.

Third, the short time frame for comment, as well as the lack of transparency around significant CAT data used by the Commission to support its proposals, has precluded market participants like Robinhood from fully testing the Proposals with data, which is particularly necessary given the lack of empirical support the Commission itself has provided. Given that it is impossible for even market professionals to comprehensively study and comment on the rules, certainly retail investors—our customers—cannot be expected to engage meaningfully in this process despite Chair Gensler's calls for retail investor input.[12] We object and request that, after Commission staff work through the voluminous comment file anticipated on these proposals, a more reasonable, incremental and integrated proposal be reproposed with a manageable comment period so that firms and customers can assemble and evaluate the requisite data and meaningfully participate in this process.

In short, for the public to have the notice and opportunity to comment guaranteed by the securities laws and the Administrative Procedure Act, the Commission must put forward a coherent, cohesive proposal. If the requisite data is secret and available only to the Commission, a reasonable period of time must be allowed for others to assemble the requisite data to construct and run the regression analyses and simulations required to reasonably assess this hodgepodge of proposed changes. Further, the Commission does not appear to have considered the market instability it would introduce by requiring financial institutions to implement so many new and confusing infrastructure and

[12] The SEC's Proposals are a marked departure from its rulemaking process relating to Regulation Best Interest, for example, where the SEC first conducted a study, solicited industry and investor input, proposed a rule with a lengthy comment period, and made adjustments based on those comments. Similarly, when the SEC adopted its last significant market structure changes—Regulation NMS—it first spent five years undertaking "a broad and systematic review to determine how best to keep NMS up-to-date." Final Rule, Regulation NMS, Exchange Act Release No. 51808 (June 9, 2005), 70 Fed. Reg. 37,496, 37,497 (June 29, 2005). Prior to even proposing Regulation NMS, the SEC's review "included multiple public hearings and roundtables, an advisory committee, three concept releases, the issuance of temporary exemptions intended in part to generate useful data on policy alternatives, and a constant dialogue with industry participants and investors." *Id.* This is the type of careful, data-driven approach the SEC should take here.

technical changes. The Commission's willingness to indulge in widespread experimentation is reckless and directly contrary to decades of Commission action. Since its inception 90 years ago, the Commission has thoughtfully and continuously assessed the fairness and competitiveness of U.S. markets and calibrated its rules based on data and experience.[13] It has never before thrown a large plate of rulemaking spaghetti up against a wall to see what sticks. It should not do so now.

I. THE COLLECTIVE IMPACT OF THE PROPOSALS

The Proposals must be considered collectively as well as individually. To do that, we address in this Section the collective impact of the Commission's Proposals including:

- How the SEC's efforts, as directed by Congress, have historically encouraged competition and innovation among diverse venues and, as a result of these opportunities to compete for retail order flow, the markets have become more fair and efficient (**Section I.A**);
- How the Commission's four proposed rules would collectively upend the current industry practices that have worked well, resulting in harm to retail investors, smaller issuers, and the U.S. securities markets as a whole (**Section I.B**);
- How the Proposals exceed the SEC's statutory mandate and fail to provide a reasonable or comprehensive economic analysis, and the ways in which federal law prohibits the Commission from taking these discriminatory, anti-competitive, and unsupportable actions (**Section I.C**); and
- How the Commission's Proposals dangerously depart from traditional rulemaking, and why the SEC should continue to adhere to its time-honored incremental, data-driven approach instead of experimenting with the U.S. securities markets and the financial futures of retail investors (**Section I.D**).

A. Today's Securities Markets Work Well For Retail Investors.

Robinhood's mission is to "democratize finance for all" and make the securities markets work better for retail investors. In many ways, this mission has become a reality. The current U.S. market structure model "has delivered significant benefits for retail

[13] *See, e.g.*, Chair Arthur Levitt, SEC, Speech, Dynamic Markets, Timeless Principles (Sept. 23, 1999), https://www.sec.gov/news/speech/speecharchive/1999/spch295.htm ("The Commission believed then, as we do now, that our role is not to impose or dictate the ultimate structure of markets. Rather, it is to establish, monitor, and uphold the framework that gives competition the space and sustenance to flourish. Markets can then develop according to 'their own genius' for the ultimate benefit of investors.").

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

investors,"[14] as Chair Gensler acknowledged in his swearing-in testimony in 2021.[15] Today:

- Retail investors pay dramatically less in commission costs (in most cases, zero) and execution fees than they have in the past, saving investors over $17 billion in the last two years and counting.[16]

- Spreads are tighter than ever.[17] This results in retail investors receiving better prices, more price improvement, and higher investment returns.[18] Robinhood alone has provided $8 billion in price improvement over the past two years.[19]

---

[14] Comm'r Mark T. Uyeda, SEC, *Statement on Proposed Rule Regarding Order Competition* (Dec. 14, 2022), https://www.sec.gov/news/statement/uyeda-order-competition-20221214; *see also infra* notes 16-20 and accompanying text.

[15] *Nominations of Gary Gensler and Rohit Chopra: Hearing Before the S. Comm. on Banking, Housing & Urban Affairs*, 117th Cong. 8 (2021) (statement of Gary Gensler, Nominee), https://www.banking.senate.gov/imo/media/doc/Gensler%20Testimony%203-2-21.pdf.

[16] S.P. Kothari et al., *Commission Savings and Execution Quality for Retail Trades* 1-2 (Dec. 2, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3976300 (finding that "[s]ince the industry adopted Robinhood's zero-commission model in late 2019, retail investors have saved tens of billions in trading commissions, with Robinhood customers alone saving $11.9 billion during 2020-2021"); Samuel Adams & Connor Kasten, *Retail Order Execution Quality under Zero Commissions* 7-8 (Jan. 7, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3779474 ("Based on the commission rate for Charles Schwab before the commission cut, $4.95 per trade, and an estimated trade size of 200 shares … the average commission payment per hundred shares was $2.475. … The average payment per hundred shares of marketable and marketable limit orders by Citadel Securities to TD Ameritrade, Charles Schwab, and E*TRADE in January 2020 was $0.14.").

[17] Charles Schwab, *U.S. Equity Market Structure: Order Routing Practices, Considerations, and Opportunities* 6 ex.2 (2022) (bid-ask spread was ~90bps in 1994; now in single digit bps).

[18] OCR Proposing Release, 88 Fed. Reg. at 133 ("The narrower the spreads, the lower the prices at which they will buy and the higher the prices at which they will sell, which translate into lower trading costs and higher investment returns."). *See also* Douglas Chu, CEO, Virtu Financial, Measuring Real Execution Quality, Benefits to Retail are Significantly Understated 2 (Aug. 27, 2021), https://virtu-www.s3.amazonaws.com/uploads/documents/virtu-real-pi_20210827.pdf ("Virtu alone provided over $3B in Real Price Improvement to retail investors in 2020").

[19] S.P. Kothari et al., *Commission Savings and Execution Quality for Retail Trades* 1 (Dec. 2, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3976300 (finding that "[d]uring 2020-2021, Robinhood customers benefited from more than $8 billion in price improvement compared to the national best bid and offer prices").

- Innovation in product offerings and technology have made the securities markets more accessible than ever to retail investors. Retail brokers, and Robinhood in particular, have rolled out products and services that meet the needs and wants of today's retail investors and removed barriers to retail participation in the stock market, such as high-quality, user-friendly trading apps; fractional share trading; accounts with no minimum balances; jargon-free financial education; and access to tools and information previously available only to professional investors.[20]

As a result of broker-dealers like Robinhood focusing on increased retail access to the markets, today's retail investors are younger, have smaller account balances, and are more racially and ethnically diverse than they have been in the past.[21] Retail investors opened accounts at record rates in 2020-2021, and today, almost 150 million Americans (approximately 60%) own stocks.[22] Today, there are no wealth or income barriers to opening a brokerage account; investors do not need to maintain an account minimum or pay high upfront fees to a broker to invest and trade. A retail investor can invest without paying a commission, and she can do it all on her mobile phone, with a user-friendly interface that demystifies the financial markets. She can invest any time of day, including after business hours. And the investor has all the information she needs within reach—she doesn't need to hire an expensive broker or adviser who will charge for recommendations or investment advice. Retail investors are able to easily invest because today's markets are fair, fast, transparent, low-cost, and liquid. A retail investor's order generally gets filled immediately in the amount she seeks, at or better than the price she sees on her screen at the time she places her trade.[23]

---

[20] *See* Shane Swanson, *The Impact of Zero Commissions on Retail Trading and Execution* 4 (2020), https://www.greenwich.com/equities/impact-zero-commissions-retail-trading-and-execution ("On the whole, Greenwich Associates finds that retail investors, in fact, have never had it better. Not only have their commission costs come down to zero, but the services they receive have never been more advanced.").

[21] *See* Mark Lush et al., *Investing 2020: New Accounts and the People Who Opened Them, FINRA Consumer Insights: Money and Investing*, Feb. 2021, at 2, https://www.finrafoundation.org/sites/finrafoundation/files/investing-2020-new-accounts-and-the-people-who-opened-them_1_0.pdf ("[N]ew investment platforms began addressing some of the traditional barriers to investing, such as not knowing how to open an account, limited access to a financial professional, the perception that large sums of money are required to enter the market, and sensitivity to the costs of investing.").

[22] Lydia Saad & Jeffrey M. Jones, *What Percentage of Americans Own Stock?*, Gallup (May 12, 2022), https://news.gallup.com/poll/266807/percentage-americans-owns-stock.aspx.

[23] Market makers often provide retail brokers additional liquidity above and beyond the amount available at the best quoted price. For example, if a retail investor places an order to purchase 300 shares and the best quoted price is 100 shares, market makers provide retail

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

Due to this increased retail participation in the markets and the emergence of new, lower-cost products and services, retail investors have saved billions for their retirement and other financial goals.[24] This is something policymakers on both sides of the aisle have long desired.[25] But these benefits for retail investors should not be taken for granted; they are a modern phenomenon and the product of decades of private sector innovation and incremental change guided by Congress and the SEC. Fifty years ago, there were much higher trading costs and much lower levels of retail investor participation. Only about 25 million Americans (12%) owned stock in 1975.[26] Even when a retail investor

brokers with size improvement and often will fill the 300-share order in its entirety, generally at, or most likely better than, the best quoted price.

[24] For example, investors have had billions of dollars in savings, just by trading lower-cost index products. Sam Potter, *The Indexing Boom Has Saved S&P Investors a Cool $357 Billion*, Bloomberg (July 29, 2021, 11:18 AM), https://www.bloomberg.com/news/articles/2021-07-29/the-indexing-boom-has-saved-s-p-investors-a-cool-357-billion#xj4y7vzkg.

[25] *See, e.g.*, *Oversight of the U.S. Securities and Exchange Commission: Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs*, 117th Cong. 1 (2021) (testimony of Chair Gary Gensler, SEC), https://www.banking.senate.gov/imo/media/doc/Gensler%20Testimony%209-14-21.pdf ("We keep our markets the best in the world through efficiency, transparency, and competition. These features lower the cost of capital for issuers, raise returns for investors, reduce economic rents, and democratize markets."); *Appropriations for Fiscal Year 2020: Hearing before the Subcomm. on Fin. Servs. & Gen. Gov't of S. Comm. on Appropriations*, 116th Cong. 6 (2019) (statement of Chair Jay Clayton, SEC), https://www.govinfo.gov/content/pkg/CHRG-116shrg19104901/pdf/CHRG-116shrg19104901.pdf ("Other countries want to replicate [U.S. retail investor participation] because such broad investor participation in our capital markets is a significant competitive advantage for our economy, and participation in our capital markets has made many Americans' lives better and their retirements more secure."); Chair Mary Jo White, SEC, Speech, Opening Remarks at the Fintech Forum (Nov. 14, 2016), https://www.sec.gov/news/statement/white-opening-remarks-fintech-forum.html ("There is relatively widespread agreement that fintech innovations have the potential to transform key parts of the securities industry—and to do so in ways that could significantly benefit investors and our capital markets."); Chair Mary L. Schapiro, SEC, Speech, Remarks at the Stanford University Law School Directors College (June 20, 2010), https://www.sec.gov/news/speech/2010/spch062010mls.htm ("[I]n an area very near to my heart, how can we increase voter participation by retail investors?"); Chair Arthur Levitt, SEC, Speech, Plain Talk About Online Investing (May 4, 1999), https://www.sec.gov/news/speech/speecharchive/1999/spch274.htm ("All of us are participants in an extraordinary social phenomena. The democratization of our markets is a desirable development which regulators should not frustrate. Our mission is not to prevent losers or to modulate the sometimes mercurial movement of our markets.").

[26] Richard Phalon, *Owners of Stocks Decline by 18.3 Percent Since 1970*, N.Y. Times (Dec. 10, 1975), https://www.nytimes.com/1975/12/10/archives/owners-of-stocks-decline-by-183-percent-since-1970-shareholders.html (25 million Americans owned stock); Bureau of the Census, U.S. Dep't of Com., Series P-25, No. 601, *Current Population Reports: Projections of the Population of the United States: 1975 to 2050* 2 (1975), https://www.census.gov/content/

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

could access the markets (overcoming obstacles such as minimum account balance requirements), trading itself was expensive due to high broker commissions and high exchange fees.[27] Those commissions and fees were high because of the uncompetitive nature of the industry. Before 1975, broker-dealers were generally required to execute trades for their customers on exchanges.[28] The exchanges operated much like public utilities because of the oligopoly they enjoyed. Without competition or with limited competition, exchanges and broker-dealers could impose high costs. And because exchanges are SROs that enjoy immunity from private claims under federal law and rule-based limitations on liability, broker-dealers had limited ability to hold them accountable when retail investors suffered substantial losses due to exchange problems.

1. The Benefits That Retail Investors Enjoy Today Are The Result Of The SEC Encouraging Venue Competition And Eschewing A Centralized Model For Order Execution.

As with any industry that relies on a public utility model for underlying infrastructure, the securities industry was long characterized by lack of incentive to innovate or increase efficiency.[29] Trading in listed securities occurred primarily on the New York Stock Exchange ("NYSE") and, to a lesser extent, the American Stock Exchange ("AMEX").[30] This centralized model (or oligopoly) led to complacency. And this complacency led Congress to conclude in 1975 that "[r]ather than responding to changing investor needs and striving for more efficient ways to perform their essential functions, the principal stock exchanges and the majority of established securities firms appear to have resisted industry

dam/Census/library/publications/1975/demo/p25-601.pdf (total population of approximately 212 million).

[27] *See, e.g.*, Charles M. Jones, *A Century of Stock Market Liquidity and Trading Costs* 2 (May 23, 2002), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=313681 (finding that "average proportional commissions on NYSE stocks climbed steadily from 1925 to the late 1960's and early 1970's to a high of almost 1%").

[28] Jason Zweig, *Lessons of May Day 1975 Ring True Today*, Wall St. J. (Apr. 30, 2015, 11:20 PM), https://www.wsj.com/articles/lessons-of-may-day-1975-ring-true-today-the-intelligent-investor-1430450405; Fred Tomczyk, *Lessons from 40 Years of Mayday on Wall Street: Column*, USA Today (May 1, 2015, 6:32 AM), https://www.usatoday.com/story/opinion/2015/05/01/mayday-anniversary-wall-street-investment-column/26463281/.

[29] Jason Zweig, *Lessons of May Day 1975 Ring True Today*, Wall St. J. (Apr. 30, 2015, 11:20 PM), https://www.wsj.com/articles/lessons-of-may-day-1975-ring-true-today-the-intelligent-investor-1430450405.

[30] In 1972, NYSE accounted for 71.4 percent of trading volume; AMEX accounted for 17.5 percent of trading volume, and smaller regional exchanges and over-the-counter trading collectively accounted for 11.1 percent. H.R. Rep. No. 94-123, at 49-50 (1975).

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

modernization and to have been unable or unwilling to respond promptly and effectively to radically altered economic and technological conditions."[31]

Congress addressed the "lack of venue competition" problem by empowering the Commission to facilitate the development of an equity market structure that was more flexible and competitive, and that would be driven by "changing economic circumstances consistent with the public interest" rather than "unnecessary and artificial restraints on competition."[32] Congress conducted extensive hearings, reviewed reports from the SEC, Department of Justice, and industry participants, and recorded over 4,600 pages of testimony from almost 100 witnesses.[33] Coming out of these extensive proceedings, the Securities Acts Amendments of 1975 ("1975 Amendments") laid the groundwork for major market structure changes that occurred over the next several decades. The 1975 Amendments authorized the Commission to facilitate the development of a national market system ("NMS") with the goals of assuring economically efficient trading and fair competition among broker-dealers, exchanges, and other market centers. Most notably, one of the first changes the SEC recognized that it needed to make under its new authority was to eliminate exchanges' oligopoly on order execution by eliminating prohibitions against off-exchange trading. That paved the way for more competition and the emergence of off-exchange markets and market makers.

The Commission did not stop there. The Commission pursued changes and improvements to the NMS, over time and incrementally through studies, pilots, and rulemaking. Many of the changes it made were designed to further enhance competition and break up the virtual oligopoly of the primary exchanges. The Commission's 1996 order handling rules opened the door for quote-based competition between exchanges and off-exchange venues like emergent alternative trading systems ("ATSs"), then known as electronic communications networks, or ECNs.[34] The Commission also eliminated NYSE's prohibition on off-exchange trading in NYSE-listed stocks. At each turn, the Commission's actions increased competition and therefore increased incentives to innovate, drive efficiencies, reduce commissions and fees, and enhance the retail investor's overall experience.

This was not always a certain outcome. There have been instances in the past where the SEC has also considered centralizing the U.S. securities markets. But each time the Commission considered this type of model, it has wisely abandoned such efforts. One such instance was in the early 2000s, when the SEC explored the creation of a centralized

---

[31] S. Rep. No. 94-75, at 1 (1975).

[32] H.R. Rep. No. 94-123, at 44.

[33] *Id.* at 45.

[34] Adopting Release, Order Execution Obligations, Exchange Act Release No. 37619A (Sept. 6, 1996), 61 Fed. Reg. 48,290 (Sept. 12, 1996).

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

limit order book or "CLOB." This centralized framework for market structure, which has troubling similarities to the Commission's Proposed OCR, was never adopted because it reduced the opportunity for markets to compete and failed to strike "the appropriate balance of market competition and order competition."[35] Even the then-Chairman of the Federal Reserve weighed in, noting the dangers when policymakers micromanage the markets:

> We would do well to borrow the advice offered to the medical profession and, first, do no harm. It has never proved wise for policymakers to try to direct the evolution of markets, and it strikes me as especially problematic at this juncture. The structure of our equity markets is extraordinarily dynamic; hardly a week goes by that a new trading venue is not announced or an enhancement to an existing system is not trumpeted …. Given the pace of change in our markets, it is difficult to contemplate how a government mandate could be implemented; systems might well be obsolete before we were half-way through the planning process.[36]

The SEC's Division of Market Regulation also recognized in its Market 2000 report the dangers of doing what the SEC is proposing to do today. There, the Division correctly stated that imposing a centralized order execution facility on the markets was not only inconsistent with the SEC's historic approach to rulemaking, but also bad policy:

> The determination to refrain from imposing a single structure on the equity markets … is, in many respects, the same judgment the Commission made following enactment of the 1975 Amendments. The Commission could have required the creation of a single order-execution facility or the abrogation of all restraints on competition. Implicitly, the Commission rejected both approaches and, instead, pursued discrete, incremental market improvements. The strength and size of the U.S. equity markets today are testament to the fundamental soundness of the Commission's judgment at that time. The Division continues to believe that the vitality and variability of

[35] *Regulation NMS: The SEC's View: Hearing Before the Subcomm. on Cap. Mkts., Ins. & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 109th Cong. (2005) (testimony of Chair William H. Donaldson, SEC), https://www.sec.gov/news/testimony/ts031505whd.htm.

[36] *Evolution of Our Equity Markets: Hearing Before the S. Comm. on Banking, Hous. & Urban Affs.*, 106th Cong. (2000) (testimony of Chair Alan Greenspan, Federal Reserve Board), https://www.federalreserve.gov/boarddocs/testimony/2000/20000413.htm (cautioning against a CLOB).

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

> private-sector solutions to market structure issues justifies a limited Commission role.[37]

When the SEC eventually adopted and then implemented Regulation NMS in 2007, it chose a framework for connecting exchanges and off-exchange market centers together with market data and a trade-through rule. The SEC wisely avoided micromanaging where and how orders could be executed and at what price, and sought to strike a balance between order-by-order competition and venue competition.[38] The result was dramatic. NYSE saw its market share in its listed securities decrease from nearly 80% to approximately 20% as a result of the increased competition from Nasdaq, ECNs, and broker-dealers.[39] These new participants have contributed to lower fees, tighter spreads, better prices, and better services for retail customers. They should not now be painted as villains by policymakers, including by Chair Gensler.[40]

2. *Today's Market Structure Enhances Competition Between Market Venues, To The Benefit Of Investors.*

As described above, under the Commission's stewardship, the market has evolved from mandated trading on utility-like exchanges to a competitive landscape in which exchanges compete with each other and with other trading venues. Like most retail brokers, Robinhood can send trades directly to exchanges to be executed or to other broker-dealers called off-exchange market makers or wholesalers, which can directly execute the customer orders or, consistent with their own best execution obligations, send them to

---

[37] Div. of Mkt. Regul., SEC, *Market 2000: An Examination of Current Equity Market Developments* 15 (1994) https://www.sec.gov/divisions/marketreg/market2000.pdf.

[38] Final Rule, Regulation NMS, 70 Fed. Reg. at 37,498-99.

[39] Memorandum from SEC Div. of Trading & Markets, to SEC Market Structure Advisory Comm. 11 tbl.2 (April 30, 2015), https://www.sec.gov/spotlight/emsac/memo-rule-611-regulation-nms.pdf; *id.* at 12 tbl.4 (percentage of off-exchange executions increased by 21.6% for NYSE-listed stocks and 9.2% for Nasdaq-listed stocks after Rule 611 of Reg NMS was implemented).

[40] *See, e.g.*, *Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Part III: Hearing Before the H. Comm. on Fin. Servs.*, 117th Cong. 92 (2021) (testimony of Chair Gary Gensler, SEC) https://www.govinfo.gov/content/pkg/CHRG-117hhrg44837/pdf/CHRG-117hhrg44837.pdf ("The high concentration of retail orders routed to a small number of wholesalers raises a number of questions about market structure. In essence, does this segmentation and related sector concentration best promote fair, orderly, and efficient markets?"); *Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide: Hearing Before the H. Comm. on Fin. Servs.*, 117th Cong. 91 (2021) https://www.govinfo.gov/content/pkg/CHRG-117hhrg43966/pdf/CHRG-117hhrg43966.pdf (statement of Rep. Maxine Waters, Chairwoman, H. Comm. on Fin. Servs.) ("I'm more concerned than ever that some investors are being fleeced, and massive market makers … may pose a systemic threat to the entire system.").

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

exchanges or ATSs or other liquidity providers. Chair Gensler has demonized off-exchange trading[41] and the Commission's Proposals would marginalize or eliminate the role of wholesalers and other off-exchange sources of liquidity. Wholesalers and other off-exchange venues were born, grew, and thrived primarily due to the exchanges' historical failure to innovate and compete. As the market has evolved, off-exchange venues have developed innovations and services to compete against exchanges and other market centers including the following:

- ***Price Improvement.*** When a wholesaler "internalizes" a customer trade (that is, trades directly with the customer from its own inventory), it will provide the retail customer at least the best published price that any member of any exchange is willing to pay—the national best bid and/or offer ("NBBO"). But wholesalers typically go beyond that and provide an even better price. That's known as "price improvement." When Robinhood evaluates where to send new customer orders, it analyzes a number of factors including, most importantly, how much price improvement its customers have received from each wholesaler.[42] Wholesalers provide more price improvement in order to compete with exchanges and other venues for more order flow from retail broker-dealers.

- ***Size Improvement and Certain Executions.*** Wholesalers also provide "size improvement" by executing the full size of customers' orders at the best available price, even when the customer's order is larger than the best displayed bid or offer. For example, if a customer wants to buy 150 shares, the best price displayed in the market could be limited to 100 shares. To purchase the remaining 50 shares, the customer would typically have to pay a higher price. But wholesalers often execute the entire 150-share order at the best price displayed in the market, in order to provide "size improvement" and remain competitive with other market venues.

- ***Guaranteed Executions in All Stocks, Including Thinly Traded Stocks.*** Because wholesalers compete with each other and with exchanges, they are incentivized to invest in their relationships with broker-dealers by executing and providing favorable pricing to *all* of the retail broker-dealer's customer orders. When orders for thinly traded or less liquid stocks are sent to exchanges, they may not get executed because there are no willing counterparties to the trade. If they do get executed, they are more likely to experience price "disimprovement," that is, an investor buying a thinly traded stock will pay prices increasingly higher than

---

[41] *See, e.g.*, Chair Gary Gensler, SEC, *Statement on Proposal to Enhance Order Competition* (Dec. 14, 2022), https://www.sec.gov/news/statement/gensler-order-competition-20221214.

[42] Robinhood does not consider the amount of payment for order flow ("PFOF") as one of these factors because it receives the same PFOF rate from every wholesaler to which it routes.

> the NBO as the few counterparties in the market become less and less willing to sell. To compete for order flow, wholesalers are incentivized to internalize orders that would not otherwise get executed or would get executed at deteriorating prices because they are particularly difficult to trade and generally not profitable, such as orders in thinly traded stocks in which fewer market participants want to trade.[43]

This execution model helps explain why Robinhood's customers (and customers at other broker-dealers that route orders to wholesalers for execution) receive the NBBO or better on the vast majority of their orders.[44] In short, off-exchange trading venues provide benefits to retail broker-dealers and their customers that exchanges do not in order to compete with each other and with exchanges to execute retail investors' trades. These benefits relate not only to price and size improvement but also to speed, certainty, and consistency in executions as well as services like trade corrections for orders entered erroneously by retail customers. And, unlike exchanges, off-exchange venues do not have rule-based limited liability to investors when something goes wrong, such as the "trading glitch" on the NYSE earlier this year, which affected hundreds of stocks.[45] The current market structure incentivizes both order competition and venue competition, as envisioned by the 1975 Amendments and as solidified in Regulation NMS, and retail investors enjoy the benefits of being able to invest easily and at a low cost. The Proposals would upend today's equity markets and reverse much of the progress that the Commission has made in facilitating a competitive, efficient market structure.

B. The Proposals Would Upend The Current Industry Practices That Have Worked Well For Investors And Issuers In Multiple Interrelated Ways.

1. The Proposals Will Harm Retail Investors And Small Companies With Less Actively Traded Securities.

The Proposals ignore the economic realities that govern on- and off-exchange trading and would dismantle the current system of healthy venue competition, which has benefited retail investors and U.S. securities markets more generally. While the full cumulative

---

[43] Ironically, the SEC calls this a "valuable service." *See* OCR Proposing Release, 88 Fed. Reg. at 186 ("[W]holesalers receive order flow from retail brokers that contains variation in quoted spreads and adverse selection risk, wholesalers can target an average level of price improvement across this heterogeneous order flow, resulting in a relatively consistent degree of execution quality.").

[44] *Our Execution Quality*, Robinhood, https://robinhood.com/us/en/about-us/our-execution-quality/ (last visited Mar. 27, 2023) (84.79% of orders receive the NBBO or better).

[45] *NYSE Says Manual Error Triggered Major Trading Glitch*, Reuters (Jan. 25, 2023, 11:52 AM), https://www.reuters.com/markets/us/nyse-says-sell-short-restriction-was-triggered-erroneously-2023-01-25/.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

effect of these four inconsistent and changeable proposed rules is unclear, one thing is certain: Retail investors and issuers, particularly small companies with less actively traded securities, will be worse off than they are today. We summarize these harms below and describe them more fully in our individual letters regarding each of the proposed rules.

As a result of both the ***Proposed OCR*** and ***Proposed Reg Best Ex***, retail investors will:

- Experience delay and uncertainty when placing orders to buy stock;[46]
- Frequently receive worse pricing as a result of delayed order executions and/or the curtailment of broker-dealer judgment on how to execute an order;[47]
- Receive even worse pricing for stock trades, especially those stocks of smaller companies that are traded less frequently due to the reduced competition among venues executing retail orders;[48] and
- Experience new or higher costs and other fees to invest and trade, including potentially paying commissions, and have less access to innovative products and services as compliance and transaction costs across the industry rise and some broker-dealers' revenue sources, including payment for order flow ("PFOF") are reduced or eliminated.[49]

[46] The SEC acknowledges that qualified auctions will undermine prompt and certain executions of retail orders by making retail order execution "less streamlined" and introducing "a new layer of intermediation" that indisputably will slow down execution of customer orders. OCR Proposing Release, 88 Fed. Reg. at 226.

[47] To be sure, the SEC concedes in the OCR Proposing Release that some orders will receive worse executions due to slippage and price disimprovement. The SEC acknowledges that there is no guarantee that a retail order will be filled in full or in part during a qualified auction and, at the same time, slippage may occur because there is the "potential that the NBBO could change while the qualified auction was in process." *Id.* at 214. The SEC also acknowledges that "a segmented order would not have certainty of an execution in a qualified auction at a price equal to the NBBO or better." *Id.* at 147.

[48] *Id.* at 215.

[49] Notably, the SEC acknowledges throughout the release that commissions may return or increase for retail customers as a result of the implementation of Proposed Rule 615. *E.g.*, *id.* at 179 ("The Proposal could also result in costs to individual investors, such as some retail brokers potentially resuming charging commissions for NMS stock trades, although the likelihood of this may be low."); *id.* at 216 ("An additional concern is that if the Proposal results in a significant or complete loss of PFOF, then retail brokers would be forced to start charging commissions again for online NMS stock and ETF trades."); *id.* at 218 ("One concern is that the loss of PFOF would cause PFOF brokers, and potentially other discount brokers, to resume charging commissions for online NMS stock trades. Just as PFOF brokers led discount brokers

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

The SEC acknowledges that investors generally receive *worse* executions on exchanges than they do today from off-exchange market makers.[50] By marginalizing or eliminating the role of off-exchange market makers, the Proposed OCR and Proposed Reg Best Ex will reduce meaningful competition with exchanges for retail investor order flow and trigger these harmful effects.

Today, broker-dealers like Robinhood are *not* required to send every customer order directly to an exchange. Rather, broker-dealers are required to seek "best execution" for their customers' orders, no matter which venue ultimately executes the order. This discretion to choose the best place to execute a customer's order ultimately benefits the retail customer because it means that broker-dealers like Robinhood can choose among different competing venues—including off-exchange market makers, ATSs, and exchanges—to find the place that will provide the best price reasonably available. The flight of retail orders from exchanges to wholesalers was driven by a multitude of competitive factors as described above, and the primary reason that retail order flow has not returned to exchanges is that exchanges have failed to win back that order flow through competitive pricing, innovation, and service (including protection on errors).

The equity market structure that exists today in the U.S. is the reason why retail investors enjoy exceptional executions and the U.S. securities markets are the most liquid, transparent, and fair markets in the world. Under the SEC's Proposals, this current framework will disappear as retail orders are redirected to newly contrived, experimental auctions operated by SROs. The result is predictable: (1) there will be fewer brokers competing to provide the best executions and services to retail customers; (2) retail investors will no longer be guaranteed speedy and certain executions at the best available price or better; (3) retail investors will no longer be assured of having disputes promptly resolved if there is a glitch or erroneous price; and (4) retail investors will pay more to trade.

There are also numerous flaws in the ***Tick Size Proposal*** that could make the stock market worse for retail investors. First, the SEC's proposal to narrow tick sizes to tenths and fifths of a cent ($0.001 and $0.002, respectively) would likely decrease the available orders (liquidity) at the best displayed bid and offer. Among other things, the Tick Size Proposal could cause "flickering quotations" (where a stock quote rapidly switches back and forth between prices) that would frustrate and confuse investors, who may find that they are not receiving the prices they thought they would when they submitted their orders. This problem will only be made worse by reducing incentives to display trading interest and

into zero-commission trading in 2019, it is possible they too could lead discount brokers back to charging commissions if they stopped receiving PFOF."); *id.* at 225 ("If wholesalers reduce PFOF or begin charging a fee for routing services, PFOF retail brokers would have to absorb this cost and earn lower profits and/or pass on a share of this cost to their customers.").

[50] *E.g.*, *id.* at 198 tbl.14.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

increasing incentives to engage in "pennying"—whereby quicker market participants can gain trading queue priority and snatch up better-priced orders before other investors by adjusting their bid and offer prices by an economically insignificant amount—increasing trading costs for investors. Second, the proposed changes could harm investors and U.S. markets by forcing them into overall worse execution prices. In particular, the harmonization of quoting and trading increments could leave retail investors with fewer price increments at which market participants are willing to interact with their order flow. Stated differently, by reducing liquidity providers' flexibility to execute investors' orders at prices that are better than their quotes, the Tick Size Proposal would deprive investors of additional price improvement, a stated goal of both the Proposed OCR and Proposed Reg Best Ex. Notwithstanding the harms that the Tick Size Proposal would cause to the markets, it also has the potential to create operational challenges for market participants and to confuse retail investors by unnecessarily complicating how stock trading works.

2. The Proposals Are Both Duplicative And Contradictory.

In addition to harming retail investors and the securities markets overall, the Proposals are problematic from a fundamental rulemaking and process perspective. Each rule, if implemented, would change the landscape in ways that could make the other rules unnecessary or redundant. At the same time, the Proposals are contradictory.

For example, the Proposed OCR would—for retail investors only—revert to the exchange utility model that Congress directed the SEC to abolish fifty years ago. Off-exchange market makers would no longer be permitted to immediately execute a customer order at any price at or better than the NBBO unless they can offer the government-mandated midpoint price or better.[51] The "problem" the SEC claims it is trying to solve with the Proposed OCR is that retail investors are not receiving as much price improvement as they theoretically could. As discussed above, this so-called problem may be mitigated at least in part after the SEC's MDI Rules are implemented. The SEC also believes that Proposed Rule 605 would improve execution quality for both individual and institutional investors, in terms of execution prices, speed of execution, size improvement, and fill rates, by increasing competition between firms handling customer orders.[52] This so-called price improvement "problem" also may be moot if the SEC's Tick Size Proposal is implemented. That proposal would substantially reduce the trading increment (by a tenth, a fifth, and a half) which would "enhance the opportunity for [retail investor] orders to receive more favorable prices than they receive in the current market structure," also a key objective in the Proposed OCR. The Tick Size Proposal would also require off-exchange and exchange venues to quote and trade at the same price increments, which could result in greater parity in execution quality. Furthermore, the obligation to route orders to one of

---

[51] As another example of the Proposals' engaging in price-setting by mandating midpoint executions, *see* Reg Best Ex Proposing Release, 88 Fed. Reg. at 5460.

[52] Rule 605 Proposing Release, 88 Fed. Reg. at 3832.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

the OCR auctions only if a broker is unable to achieve a midpoint price becomes extreme and unrealistic in a market where the minimum tick size is $0.001. In effect, for nearly half of market volume, the combined proposals would require executions at an effective increment of $0.0005. Notably, the Commission does not comment on whether the drastic changes required by the Proposed OCR would still be necessary if more order information is made publicly available after the MDI Rules, Proposed Rule 605, and/or Tick Size Proposal are implemented.

The very same arguments could apply to Proposed Reg Best Ex. Increased disclosure and changes to pricing increments could improve execution quality and render this rule unnecessary. At the same time, the Proposed OCR also could render Proposed Reg Best Ex unnecessary because the Proposed OCR virtually eliminates any discretion a broker-dealer has to handle a retail customer order (and thus any potential conflicts); rather than seeking the best market for a customer order (as Proposed Reg Best Ex would require), broker-dealers would be required to send all retail orders in NMS stocks to a qualified exchange. Through its Proposed Reg Best Ex, the SEC also would change how broker-dealers use the NBBO and measure price improvement to assess execution quality. It would require retail broker-dealers that receive PFOF to incorporate extensive new data into their decision-making and transform how they decide where to route customer orders. While these decisions by broker-dealers would presumably be significantly impacted by the imposition of mandatory qualified auctions, the SEC fails to analyze or explain how changes to the Proposed OCR would affect Proposed Reg Best Ex, or vice versa.

At the same time, the Proposed OCR is inconsistent with Proposed Reg Best Ex and Proposed Rule 605. For example, both proposed rules identify speed of execution as important criteria for execution quality. However, the Proposed OCR devalues speed as an important metric because this rule would intentionally slow down the execution of retail customer orders and force these orders to venues (i.e., qualified auctions) where there is no certainty that they will be executed at all.

In sum, out of misplaced concern that off-exchange trading and PFOF somehow deprive retail investors of potential price improvement, the Commission's Proposals attempt to do everything, everywhere, all at once. The SEC would try to improve investors' ability to analyze off-exchange trading and vote with their feet (Proposed Rule 605), while also changing how off-exchange venues are required to price customer trades (the Tick Size Proposal), while also making compliance more expensive for certain broker-dealers routing customer orders to off-exchange venues (Proposed Reg Best Ex), while also prohibiting certain types of off-exchange trading with retail investors (the Proposed OCR). Each proposal seeks to address the same alleged problem in a different way, creating multiple redundancies and conflicts. It is not clear where the impact of any one rule might begin and end, making it impossible for the public to make sense of the incoherent set of Proposals and undermining the Commission's attempts at rulemaking. This leaves one to

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

suspect that the Commission itself does not reasonably expect to adopt all of these rules and is effectively hedging its bets or potentially anticipating that one proposal could draw comments that would indirectly be supportive of another. For investors and market participants, this process is needlessly complex, confusing, and possibly misleading.

C. The Proposals Violate Federal Law.

The SEC's Proposals to abruptly and fundamentally transform the structure of the U.S. securities markets are not only bad policy, but they are unlawful because they (1) lack any meaningful cost-benefit analysis and are therefore inconsistent with the SEC's statutory duty to consider their effects; (2) exceed the SEC's statutory authority; and (3) are arbitrary and capricious.

1. The Proposals Independently And Cumulatively Fail To Provide A Reasonable Cost-Benefit Analysis.

The SEC's economic analysis is woefully insufficient. Under Sections 3(f), 11A(a)(1)(c), and 23(a)(2) of the Exchange Act, the SEC has a statutory duty to consider the effect of a new rule on efficiency, competition, and capital formation. More specifically, the SEC is required to "consider or determine whether an action is necessary or appropriate in the public interest" and "in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."[53] The SEC is not permitted to adopt any rule that "would impose a burden on competition not necessary or appropriate" in furtherance of its mandate.[54] Its "failure to 'apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation' makes promulgation of the rule arbitrary and capricious and not in accordance with law."[55] The SEC's analysis falls short in a number of significant ways.

First, the Commission fails to meaningfully grapple with existing regulatory protections and other regulatory initiatives that have already been adopted, but not yet implemented. The SEC cannot accurately assess any potential increase or decrease in competition, capital formation, or efficiency without fully considering the existing baseline.[56] That baseline includes rules already adopted and slated to be implemented, yet the Commission fails to account for the anticipated impact of pending market infrastructure enhancements. Without doing so, it cannot accurately assess the relative benefit of additional initiatives that might prove to be redundant or even

---

[53] 15 U.S.C. § 78c(f).

[54] *Id.* § 78w(a)(2).

[55] *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (quoting *Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (2005)).

[56] *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 178 (D.C. Cir. 2010).

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

counterproductive after the changes it has already adopted have taken effect. Specifically, the SEC adopted its MDI Rules more than two years ago to enhance the quality and accessibility of market data and address gaps in existing publicly available market data, such as the fact that it only includes pricing information for certain types of orders (e.g., orders of 100 shares or more). The MDI Rules are intended to ameliorate these flaws. Among other things, they would revise the NBBO to redefine round lot, establish a data field for the best available orders smaller than a round lot ("odd lots"), add orders priced outside an exchange's best bid and offer (called "depth of book"), and add orders participating in auctions. These changes are anticipated to inform the Proposals' analyses regarding price improvement for retail customers (including differences in price improvement between on- and off-exchange executions).

The MDI Rules are now law. They are part of the baseline and are intended and expected to improve market data in a manner that, among other things, leads to additional price improvement—something each proposal individually seeks to achieve. Chair Gensler has stated, "The NBBO is designed to aggregate information across different exchanges. I believe there are signs, however, that the NBBO is not a complete enough representation of the market."[57] Chair Gensler criticizes the NBBO for, among other things, failing to reflect odd lots and being priced (by legal requirement) in pennies and not smaller increments. But these structural deficiencies in existing market data may prevent the NBBO from more fully reflecting market interest, and therefore make it more difficult for broker-dealers and their customers to assess whether they actually received "best" execution. Since the MDI Rules are intended to improve market data to better reflect available trading interest in the market, this might change trading behavior in a way that obviates the need to impose more costly and onerous structural and technical changes on market participants. The Commission cannot assess these potential new rules until the MDI Rules are fully implemented. But the SEC is leapfrogging over the MDI Rules, ignoring how they will improve the NBBO, to remake the entire structure of the equities market. Without even assessing the extent to which the proposed rules would still be necessary after the MDI Rules are fully implemented, the Commission would require market participants to implement extensive technology changes, subscribe to new forms of data, dilute or eliminate the value of off-exchange venues, and introduce the risk of unknowable and unintended consequences.

Second, the Commission does not even attempt to analyze the cumulative costs and benefits of its overlapping and sometimes inconsistent Proposals. The Commission provides its cost-benefit analysis for each specific proposal, but it has not provided a comprehensive analysis. For example, the Commission estimates that Proposed Reg Best Ex will *increase* competition between venues, but its Proposed OCR would *decrease* venue

---

[57] Chair Gary Gensler, SEC, Speech, Prepared Remarks at the Global Exchange and FinTech Conference (June 9, 2021), https://www.sec.gov/news/speech/gensler-global-exchange-fintech-2021-06-09.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

competition by redirecting retail orders to "qualified auctions," which are likely to be run by a small handful of exchanges. Ironically, the Commission would reinstate a centralized model that forces orders to exchanges after Congress and the SEC spent a quarter of a century dismantling a structure that required orders to be executed on exchanges.

Third, the Commission significantly overstates potential benefits and underestimates costs within each rule proposal. For example, the Commission's Proposed OCR estimates that investors could gain $1.5 billion or more in potential price improvement.[58] Not only does this amount to a paltry sum per investor that does not outweigh the costs of the proposal (let alone the cumulative costs of the other proposals), the Commission's premise for this purported $1.5 billion savings is fundamentally flawed. The SEC incorrectly presumes that all money paid to broker-dealers as PFOF will be redirected to retail customers in the form of greater price improvement. This presumption lacks any merit. By the SEC's own admission, there is no guarantee that market participants will participate in qualified auctions and, if they do not participate, investors could receive worse prices.[59] The $1.5 billion also assumes that orders sent to qualified auctions will experience slippage, i.e., the offer rising before a buy order can be executed or the bid falling before a sell order can be executed, at the same rate and to the same degree as orders executed off-exchange. This is an exceedingly unlikely assumption; orders executed in or following exchange auctions are more likely to experience a higher degree of slippage,[60] due to both inevitable execution delays and the lack of any obligation by auction participants to interact with retail orders, unlike the guarantees provided by wholesalers. Indeed, our analysis estimated that rather than a $1.5 billion benefit to customers, the Proposed OCR would *cost* customers an estimated $2.5 to $3 billion.[61]

Moreover, the $1.5 billion in *potential, speculative* price improvement is also not a "benefit" when one considers that, today, investors receive a greater amount of certain, predictable price improvement with no commissions. Over the last two years, Robinhood alone has provided $8 billion and counting in price improvement to its retail customers. If the price improvement provided by all other broker-dealers is added with Robinhood's and considered over time, it easily dwarfs $1.5 billion.[62] It is not a "benefit" to retail investors or U.S. markets if the SEC forces them to forfeit a predictable amount of price

[58] OCR Proposing Release, 88 Fed. Reg. at 130.

[59] *Id.* at 214.

[60] *Id.* at 214-15.

[61] *See* Appendix A to the letter we submitted regarding Proposed OCR (File No. S7-31-22).

[62] For example, a study by one wholesaler indicates that they alone provided $3 billion in price and size improvement to retail investors in 2020. Douglas Chu, CEO, Virtu Financial, Measuring Real Execution Quality: Benefits to Retail Are Significantly Understated 2 (Aug. 27, 2021), https://virtu-www.s3.amazonaws.com/uploads/documents/virtu-real-pi_20210827.pdf.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

improvement so that they could, theoretically, sometimes receive a marginally higher amount on certain trades. The SEC's analysis also assumes that the "benefits" of the Proposed OCR will be *on top of* existing price improvement that retail investors receive; it does not sufficiently consider that its Proposals would disrupt the market structure so much that existing price improvement cannot be relied upon to continue at the same levels. It is also not clear how much additional benefit would result from the Proposed OCR's qualified auctions after the implementation of the MDI Rules, Proposed Rule 605, and the Tick Size Proposal.

In its eagerness to vilify off-exchange trading and PFOF, the Commission also significantly underestimates the costs of its Proposals. The Proposals are fueled by a perceived urgency to enhance price improvement because the Commission believes, without support for that belief, that retail customers are being cheated out of additional price improvement opportunities. The Commission is focused, in particular, on why wholesalers do not *always* provide more price improvement—and the Commission has blamed PFOF. However, the Commission already has reviewed this practice numerous times, including recently in 2000, 2010, and 2016. Each time, based on data and analysis, the Commission repeatedly decided that PFOF should not be eliminated because of its potential benefits.[63] Rather, PFOF—like trading commissions—may be a conflict that can and should be managed, as with other conflicts, through disclosure and regulation.[64] In fact, a substantial body of research has shown that PFOF does not have a material economic impact on execution quality[65] and, by reducing customer transaction costs, it

[63] *See, e.g.*, Memorandum from SEC Div. of Trading & Mkts., to Equity Mkt. Structure Advisory Comm. (Jan. 26, 2016), https://www.sec.gov/spotlight/equity-market-structure/issues-affecting-customers-emsac-012616.pdf; Concept Release on Equity Market Structure, Exchange Act Release No. 61358 (Jan. 14, 2010), 75 Fed. Reg. 3593 (Jan. 21, 2010); Off. of Compliance Inspections and Examinations & Off. of Econ. Analysis, SEC, *Special Study: Payment for Order Flow and Internalization in the Options Markets*, https://www.sec.gov/news/studies/ordpay.htm#SUMMARY (Dec. 19, 2000); Final Rule, Payment for Order Flow, Exchange Act Release No. 34902 (Oct. 27, 1994), 59 Fed. Reg. 55,006 (Nov. 2, 1994).

[64] PFOF creates conflicts of interest that must be disclosed and managed—it would not be appropriate for a broker-dealer to route a customer order to a venue that provides worse executions for customers but pays higher PFOF rates to the broker-dealer. *See, e.g.*, Exchange Act Rule 10b-10(d)(8). Robinhood, consistent with industry practice across retail broker-dealers, receives the same PFOF rates from every wholesaler to whom it routes orders. *See also* Jim Swartwout, *Demystifying Payment for Order Flow*, Robinhood (Mar. 4, 2021), https://robinhood.engineering/demystifying-payment-for-order-flow-119581544210.

[65] *See, e.g.*, Christopher Schwarz et al., *The "Actual Retail Price" of Equity Trades* (Sept. 14, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4189239 (finding that "[a]cross brokers, variation in PFOF cannot explain the large variation in price execution"); Samuel Adams & Connor Kasten, *Retail Order Execution Quality under Zero Commissions* (Jan. 7, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3779474 (suggesting that "the elimination of commissions for retail investors improved execution quality for orders directed

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

also can improve execution quality. Notably, the Commission acknowledges that PFOF is a cost to the wholesaler, but "is not a cost to investors."[66]

Fourth, although the SEC repeatedly claims that its Proposals "may" have certain effects, the SEC fails to substantiate those predictions "beyond mere speculation."[67] The SEC's claimed "benefits" are unknown. The costs of the Proposals are also wholly unknown to the SEC by its own admission. And where the SEC has recognized costs, its assessment does not fully or accurately factor in all costs. For example, one impact of the Proposals will likely be to eliminate certain widespread, well-functioning market arrangements, such as PFOF, entirely. The SEC's economic analysis, however, does not sufficiently acknowledge, let alone account for the impacts of, such changes.[68] If the SEC wants to eliminate PFOF or other order execution practices that are called into question by the

---

to third-party market makers"); Pankaj K. Jain et al., *Trading Volume Shares and Market Quality: Pre- and Post-Zero Commissions* (Dec. 2, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741470 (finding that "effective spreads decline[d]" after the introduction of zero-commission trading); James J. Angel et al., *Equity Trading in the 21st Century: An Update* (2015), https://www.worldscientific.com/doi/10.1142/S2010139215500020 (stating that "the revenues that brokers obtain from their order flows may be competed away as they lower their commissions and offer greater service to their customers in an attempt to attract their orders. Indeed, evidence exists that suggests that competition among brokers to obtain customer order flow has driven a significant portion of these payments [for order flow] back to retail customers"); Robert H. Battalio et al., *To Pay or Be Paid? The Impact of Taker Fees and Order Flow Inducements on Trading Costs in U.S. Options Markets* (Nov. 3, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1954119 (In comparing options exchanges that use a maker-taker model to exchanges that use a PFOF model, researchers found that "[f]ocusing solely on execution prices, we find that the cost of liquidity on exchanges utilizing the PFOF model is 80 bps higher than on exchanges utilizing maker-taker pricing. Nevertheless, when taker fees are incorporated into the analysis, the cost of liquidity on the PFOF exchanges is 74 bps lower." (emphasis added)).

[66] OCR Proposing Release, 88 Fed. Reg. at 206 n.520 ("The Commission does not adjust wholesaler realized spreads for the PFOF they pay to retail brokers because PFOF, while a cost to wholesalers, is not a cost to investors.").

[67] *Bus. Roundtable*, 647 F.3d at 1150. For example, the Commission's economic analysis in the OCR Proposing Release is replete with highly speculative language. *E.g.*, OCR Proposing Release, 88 Fed. Reg. at 178 ("While acknowledging there is substantial uncertainty in the eventual outcome, the Commission estimates that qualified auctions as designed by the Proposal would result in additional price improvement for the marketable orders of individual investors that could reduce the average transactions costs of these orders by 0.86 basis points ('bps') to 1.31 bps."); *id.* ("Given this estimate, the Commission preliminarily estimates that the Proposal could potentially result in a total average annual savings").

[68] Proposed Reg Best Ex acknowledges that many broker-dealers may choose to "de-conflict" by ceasing to pay or accept PFOF or other remuneration, but the impact of this is not fully considered by the SEC.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

Proposals, like off-exchange execution, it must own up to it and factor those changes into its analysis.

2. *The Proposals Exceed The SEC's Statutory Authority.*

The Proposals fail at the outset because they exceed the SEC's statutory authority. Like other federal agencies, the SEC "'literally has no power to act … unless and until Congress confers power upon it.'"[69] Here, Congress instructed the SEC to "facilitate" the "establishment of a [NMS] for securities."[70] The Commission, under this authority, is not an "'economic czar' for the development of a national market system,"[71] nor may it "dictate the ultimate configuration of the [NMS] or, through regulatory fiat, force all trading into a particular mold."[72] Congress envisioned a more limited role. As Section 11A of the Exchange Act provides, the Commission, in facilitating the establishment of an NMS, may issue certain specific rules to govern the interconnectedness of the various preexisting trading venues—for example, by regulating the "distribution" of "quotations."[73] Neither Section 11A nor any other provision has granted the SEC an unlimited license to rework almost every facet of the equity market's structure, from root to branch. Indeed, if Congress *had* granted the SEC a power of such "vast economic and political significance," it would have said so "clearly,"[74] not scattered that authority across the nearly dozen ancillary provisions the Commission cites throughout its proposals.[75] The SEC's assertion of "unfettered authority" to redraw the U.S. market structure raises serious constitutional concerns, as the Constitution "provides strict rules to ensure that Congress," not a federal agency, "exercises the legislative power."[76] The SEC's authority must be read to avoid unnecessarily triggering such serious constitutional concerns.

According to the Proposals, the SEC states that it is primarily basing its authority on Section 11A of the Exchange Act, but the Commission misapplies Section 11A. The Commission often cites as the source of its authority the general statement of policy objectives in Section 11A(a), but policy objectives do not convey rulemaking authority.

---

[69] *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 553 (D.C. Cir. 2020) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)) (alteration in original).

[70] 15 U.S.C. § 78k-1(a)(2).

[71] S. Rep. No. 94-75, at 12 (1975).

[72] Development of a National Market System, Exchange Act Release No. 15871 (Mar. 29, 1979), 44 Fed. Reg. 20,360, 20,360 (Apr. 4, 1979).

[73] 15 U.S.C. § 78k-1(c)(1)(A).

[74] *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022) (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

[75] *See, e.g.*, OCR Proposing Release, 88 Fed. Reg. at 242.

[76] *Jarkesy v. SEC*, 34 F.4th 446, 459 (5th Cir. 2022).

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

The Commission must look to Section 11A(c) for specific delegations of rulemaking authority; however, as already noted, none of those specific grants authorize the market-structure remake the Commission envisions here. This is not to say that the policy objectives are *irrelevant* to the analysis; Congress explicitly constrained the Commission's rulemaking authority by requiring the Commission to exercise that authority "in accordance with [Section 11A's] findings" and "objectives,"[77] but that is just another reason why the Commission's proposals are unlawful. Specifically, Section 11A bars the Commission from taking regulatory action unless it furthers (1) fair competition among broker-dealers, exchanges, and other market centers, and (2) the economically efficient execution of securities transactions. The Proposals contravene both of these objectives. Rather than encourage competition, the Proposals would establish an anti-competitive framework for handling retail orders, picking winners and losers among execution venues, intermediaries, investors, and issuers. Also, rather than encouraging efficient securities transactions, the Proposals would create a system where retail orders could languish unexecuted in auctions, or be executed at an inferior price due to delay and quote volatility, as opposed to receiving immediate executions at or better than the best available price, like they do today. U.S. equity markets work so well for investors of all types today precisely because the SEC has (at least until now) endeavored to strike the appropriate balance between venue competition and order competition.

The Proposals also have the cumulative effect of preferencing exchanges over other venues and market participants. In particular, the Proposed OCR mandates that all broker-dealers route what the SEC considers "profitable order flow" away from off-exchange market makers to qualified auctions. Wholesalers would be prohibited from executing retail investors' orders as principal unless they comply with the limited and impractical exception in that rule—executing orders at a government-set price of the midpoint between the best bid and ask. The Tick Size Proposal's reduction of the minimum pricing increments would make this proposition all the more difficult by spreading trading interest among too many ticks and reducing the available liquidity at the midpoint. The Commission has unabashedly admitted the anticompetitive nature of its proposal: "Qualified auctions could reduce wholesaler market share for the execution of the orders of individual investors, <u>which could result in the transfer of revenue and</u>

[77] 15 U.S.C. § 78k-1(a)(2).

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

profit from wholesalers to other market participants" (specifically, exchanges).[78] This admission alone should render the proposal illegitimate.[79]

By forcing retail orders to exchange auctions where there is no liquidity backstop, the SEC's proposal would inflict significant harm on retail investors and create inefficient executions, which is further inconsistent with the Commission's mandate. Rather than recalibrating the delicate balance of power between exchanges and off-exchange venues in a targeted fashion, the SEC would stifle competition from off-exchange trading by dictating that retail order flow be sent to exchanges' qualified auctions.[80] These centralized auctions would likely be run by a small number of exchanges that would be largely unaccountable to the retail investors whose orders they handle. Off-exchange market centers would be prohibited from competing for retail investors' orders unless they complied with government price-setting terms. The SEC's *de facto* mandate to route to exchanges would reestablish exchanges as quasi-utilities that lack incentive to innovate or compete.[81]

The SEC's Proposed Reg Best Ex also tilts the market in favor of exchanges. Under this rule, nearly every order a wholesaler touches, whether it routes an order to an ATS as riskless principal or internalizes it, will be considered a "conflicted transaction" and subjected to heightened procedures, compliance costs, and evaluation. In contrast, exchanges are not subject to any best execution obligation with regard to retail investors' orders. Orders executed on exchanges will not be considered "conflicted transactions," even though the exchanges also may provide PFOF in the form of rebates and pricing tiers, which raise similar conflicts of interest concerns.

---

[78] OCR Proposing Release, 88 Fed. Reg. at 179. In addition to discriminating against broker-dealers, the SEC would discriminate against certain exchanges by putting up barriers to competition to new entrants that may want to receive retail order flow: "[t]he 1% threshold also would impose a hurdle for a new entrant that wished to register as a national securities exchange to become an open competition trading center." *See id.* at 152.

[79] *Cf.* Comm'r Luis A. Aguilar, SEC, Speech, An Insider's View of the SEC: Principles to Guide Reform (Oct. 15, 2010), https://www.sec.gov/news/speech/2010/spch101510laa.htm ("[A]nother guiding principle is that we must resist creating two-tiered markets or separate standards of protection. This means that we should not carve out areas where, it is thought, certain protections are not necessary, depending upon the investor, the intermediary, or the investment. The fact is there is only one capital market and it is highly integrated.").

[80] Instead of sending orders to exchanges, market makers could execute retail orders at the midpoint of the NBBO but doing so is not practical or economical in all instances.

[81] In the past, when exchanges were largely government utilities, they were mutualized, not-for profit entities. The idea of quasi-utilities is all the more egregious in today's world where exchanges are generally for-profit, publicly traded companies.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

Exchanges are already competitively advantaged today, relative to off-exchange venues. For example, only exchanges can sell and set prices for proprietary data products and related technical infrastructure that broker-dealers must pay for in order to meet their regulatory obligations. The Commission's Proposed OCR would exacerbate this issue by driving all retail trading to exchanges and therefore consolidating all retail market data with the exchanges. The Tick Size Proposal would also increase the exchanges' market power with respect to market data. Combined with the MDI Rules, the Tick Size Proposal would increase the need for broker-dealers to access the exchanges' proprietary depth-of-book market data feeds. The Commission's Proposals do not consider how this monopoly over data and connectivity could affect costs for broker-dealers, but it is plausible that exchanges would exploit this advantage by raising costs. Exchanges are publicly traded companies with a responsibility to make decisions in their shareholders' best interest by increasing profits. As former Commissioner Robert Jackson noted: "[W]e at the SEC have far too often continued to treat the exchanges with the same kid gloves we applied to their not-for-profit ancestors. The result is that, even while one of our fundamental mandates is to encourage competition, the SEC has stood on the sidelines while enormous market power has become concentrated in just a few players."[82] The Commission's Proposals would only further augment exchanges' market power.

Exchanges, to be sure, face some constraints on their ability to compete with off-exchange execution venues. For example, off-exchange market centers and exchanges are generally subject to the same rule prohibiting them from accepting, ranking, or displaying orders in increments smaller than a penny.[83] Yet, in practice, while off-exchange venues frequently execute orders in price increments smaller than one penny, exchanges often do not because it is, in the SEC's words, "impractical."[84] It has been argued that this impracticality limits exchanges' ability to compete in terms of providing price improvement; however, this imbalance can be easily corrected through a tailored approach—including changes to existing exchange rules—without throwing the baby out with the bathwater. A tailored approach to addressing these concerns would increase competition and improve market quality by empowering exchanges to compete at the same level as off-exchange market centers rather than reducing off-exchange market centers' ability to compete by imposing unnecessary restrictions or costs. Concentrating more market power at exchanges is particularly anti-competitive because exchanges are protected from liability when there is a problem, as there was earlier this year at the NYSE.

[82] Comm'r Robert J. Jackson Jr., SEC, Speech, Unfair Exchange: The State of America's Stock Markets (Sept. 19, 2018), https://www.sec.gov/news/speech/jackson-unfair-exchange-state-americas-stock-markets.

[83] Some limited exceptions have been made for exchanges' Retail Liquidity Programs to permit them to accept and rank orders in subpenny increments. *Cf.* OCR Proposing Release, 88 Fed. Reg. at 144 & n.151 (citing the SRO rule change approvals for RLPs).

[84] Tick Size Proposing Release, 87 Fed. Reg. at 80,271-72.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

On January 24, a technical issue at the NYSE caused wild price swings in its opening auction, resulting in erroneous prices for hundreds of stocks.[85] When events like these occur, investors whose trades were executed at erroneous prices have little recourse against exchanges, which have limited liability to investors whose orders are sent there. When Nasdaq experienced "glitches" during Facebook's 2012 IPO, trading for as many as 30 million shares was affected.[86] By one estimate, Nasdaq's glitch cost investors $500 million, yet it repaid only $62 million when all was said and done.[87] While investors have little recourse against national securities exchanges, non-exchange market centers like market makers are directly accountable to retail broker-dealers because they are incentivized to compete for order flow. Therefore, when a "glitch" impacts a retail investor's order, both the off-exchange market maker and the customer's broker-dealer typically take responsibility for the glitch and make the customer whole. The SEC's anti-competitive Proposals would marginalize both broker-dealers and off-exchange venues, ultimately harming retail investors.

3. The Proposals Are Arbitrary And Capricious.

Even apart from the absence of statutory authority, the SEC's Proposals are arbitrary and capricious because they are (1) unnecessary, (2) ineffective and counterproductive, and (3) afford the public no meaningful ability to comment.

First, the SEC proposes these changes without any evidence they are necessary or even supportable. In particular, Proposed OCR and Proposed Reg Best Ex are unnecessary because they are solutions in search of a problem. Retail investors have never had it better; millions of investors trade today with no commissions and no account minimums, have a wider selection of investment opportunities than ever before (for example, through products like fractional shares and access to IPOs), and manage their own finances with intuitive, easy-to-use platforms. The evidence clearly shows that commission-free trading has saved retail investors billions of dollars; that the current markets create opportunities to trade stocks that would otherwise likely be too expensive for retail investors; and that for all types of stocks, retail investors are able to buy lower and sell higher than ever before.[88] The SEC tries to rebut that data only with admissions

---

[85] Alexander Osipovich, *NYSE Glitch Causes Erroneous Prices in Hundreds of Stocks*, Wall St. J. (Jan. 24, 2023, 7:26 PM), https://www.wsj.com/articles/dozens-of-nyse-stocks-halted-in-opening-minutes-after-wild-price-swings-11674585962.

[86] Jenny Strasburg et al., *Nasdaq's Facebook Problem*, Wall St. J. (May 21, 2012, 8:02 AM), https://www.wsj.com/articles/SB10001424052702303610504577416530447015656.

[87] Josh Constine, *NASDAQ's Glitch Cost Facebook Investors ~$500M. It Will Pay Out Just $62M. IPO Elsewhere*, TechCrunch (Mar. 25, 2013, 2:49 PM), https://techcrunch.com/2013/03/25/ip-oh-my-gosh-all-that-money-just-disappeared.

[88] *See, e.g.*, S.P. Kothari et al., *Commission Savings and Execution Quality for Retail Trades* 1 (Dec. 2, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3976300 ("PFOF has

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

that it does not know what impact its proposed market transformation would have, cannot predict those impacts, and has no evidence to support the cost-benefit analysis it is required to conduct. Moreover, existing rules and regulations, like existing FINRA best execution Rule 5310, as well as the extensive SEC and FINRA guidance that has developed around best execution, *already* address the topics Proposed Reg Best Ex purportedly attempts to fix. Stated another way, the SEC has not and cannot identify any market failure that cannot be addressed by the existing rule set.

Second, not only are the Proposals unnecessary, they will create harmful, counterproductive consequences, as the combined impact of the rules will introduce delay and uncertainty into retail order execution, and drive up costs for retail investors. The combined costs of the proposed rules are extensive. The Proposals will make markets less competitive, investing more expensive, and capital formation more difficult for smaller issuers. Market competition will decrease as a result of the combined impact of the proposed best execution and order competition rules which will, among other things, impose the Commission's politicized view on what is best for retail customers, rather than allowing competitive forces to reveal, as they already have, what customers actually value—low-cost trading through retail broker-dealers that are able to offer superior services and consistent, high quality executions as a result of the current market structure.

The Proposed OCR and Proposed Reg Best Ex also threaten capital formation, especially for less actively traded securities, which tend to be the securities of smaller companies, by reducing customers' ability to have orders in those securities executed at advantageous prices, thus further draining liquidity for these companies, as described above. And the markets will be less efficient because, among other reasons: (1) many of the currently proposed rules are duplicative of or substantially overlap with existing rules; (2) the proposed auctions intentionally introduce delay and an additional layer of intermediation into the execution of retail orders; and (3) the rules threaten the role of off-exchange trading, which has contributed to huge efficiencies for retail investors in recent decades.

---

saved retail investors billions in unnecessary fees by allowing broker-dealers like Robinhood to eliminate trading commissions. We also find that retail investors, and especially Robinhood customers, have enjoyed substantial price improvements on trades executed off-exchange and that off-exchange retail trades generally experience better execution quality than trades of similar sizes on public exchanges."); James Angel et al., *Equity Trading in the 21st Century* 5 (USC Marshall Sch. Bus., Working Paper FBE 09-10, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1584026 (finding that virtually every measurable dimension of U.S. equity market quality has improved—generally finding that execution speeds and retail commissions have fallen; bid-ask spreads have fallen and remain low; and market depth has increased).

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

Finally, and as noted above, the Proposals fail to afford the public proper notice and a meaningful ability to comment. The issues reflected in the SEC's proposal are not just ones of substance, but of process. The SEC is doing too much too quickly, leaving neither the public nor the SEC itself the time needed to develop thoughtful, data-driven, and properly tailored proposed rules. The overlapping, interlocking and foundational nature of all of the changes the SEC proposes to make—coupled with the uncertainty as to which provisions will or will not make the final cut—exacerbates the problem, as no one reasonably knows what the final suite of rules will look like and how they will interact in an already interconnected and complex market structure environment. The SEC needs to return to the drawing board, work with the industry and investors on developing a more concrete, reasonable proposal, and then reopen the comment period.

D. The SEC Shouldn't Experiment With Retail Investors' Financial Futures: Rulemaking Must Be Data-Driven, Supportable, And Incremental.

Robinhood stands with retail investors and is always in favor of enhancing the markets for their benefit. We pioneered zero-commission, no-account-minimums trading, as well as other products and services that have opened the markets up to millions of new investors. We provide high quality education and training. We are committed to the democratization of finance for all, not just the wealthy. But the Proposals, as a whole and in some cases individually, would not make the market better for retail investors. The specific flaws in each rule are set forth below and in our separate letters regarding each of the other Proposals. Apart from these substantive flaws, there are process flaws, as discussed above, that make the Proposals unlawful. Rather than taking the necessary time to engage in rulemaking based on a methodical, data-driven approach, the SEC's rulemaking appears to be based on a political agenda, unsupported speculation and theories.

This is not surprising based on the Inspector General's report on the SEC's recent management and performance challenges. As that report observed, the aggressive agenda that has characterized *this* SEC has had a negative effect on rule proposals:

> We met with managers from the SEC's divisions of Trading and Markets, Investment Management, Corporation Finance, and Economic and Risk Analysis, some of whom raised concerns about increased risks and difficulties managing resources and other mission-related work because of the increase in the SEC's rulemaking activities. For example, some reported … difficulties hiring individuals with rulemaking experience. In the interim, managers reported relying on detailees, in some cases with little or no experience in rulemaking. Others told us that they may have not received as much feedback during the rulemaking process, either as a result of shortened timelines during the drafting process or because

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

> of shortened public comment periods. … [S]ome believed that the more aggressive agenda—particularly as it relates to high-profile rules that significantly impact external stakeholders—potentially (1) limits the time available for staff research and analysis, and (2) increases litigation risk.[89]

This is not acceptable and shouldn't be the case. The SEC historically has been data-driven and methodical. This is a basic tenet of SEC rulemaking that has been long recognized by SEC Commissioners and should not be controversial.[90] As aptly noted by Commissioner Aguilar, when it comes to rulemaking and market structure, "[k]nowledge is always better than speculation."[91] The carelessness with which the SEC has proposed this massive transformation, cloaked in 1,600 pages of technical jargon, is antithetical to sound public policy. Rather than rushing to implement multiple, significant rule changes with unknown and likely severe consequences, we join commenters representing a variety of market participants in urging the SEC to take a thoughtful and incremental approach to market

---

[89] Off. of Inspector Gen., SEC, *The Inspector General's Statement on the SEC's Management and Performance Challenges* 3 (2022), https://www.sec.gov/files/inspector-generals-statement-sec-mgmt-and-perf-challenges-october-2022.pdf (emphasis added).

[90] *See, e.g.*, Comm'r Luis A. Aguilar, SEC, Speech, Exemplifying Fundamentals—Back to Basics (Mar. 28, 2011) https://www.sec.gov/news/speech/2011/spch032811laa.htm ("A regulator must possess expertise that is informed by current, accurate data and must exercise judgment that is grounded in the mission of the institution and service to the public at large."); Chair Mary Jo White, SEC, Keynote Address: Securities Traders Association 83rd Annual Market Structure Conference, Equity Market Structure in 2016 and for the Future (Sept. 14, 2016), https://www.sec.gov/news/speech/white-equity-market-structure-2016-09-14 (touting the Commission's "deliberate, data-driven process to assess … more fundamental changes to equity market structure" because "[b]road changes to this market structure—especially those executed precipitously or without adequate data—can have serious unintended consequences for investors and issuers as their impact is fully realized, sometimes years down the road"); Comm'r Robert J. Jackson, Jr., SEC, *Statement on the Proposed Transaction Fee Pilot for NMS Stocks* (Mar. 14, 2018), https://www.sec.gov/news/statement/statement-johnson-open-meeting-nms-2018-03-14 ("More broadly, targeted pilot programs—particularly in complex areas like this one [i.e., how fees and rebates affect order routing], where intuitions are strong but evidence is scant—are and should continue to be a critical part of our rulemaking effort. They allow us to generate valuable data to determine whether and how rulemakings might benefit investors—and to carefully tailor them to investors' needs.").

[91] Comm'r Luis A. Aguilar, SEC, *U.S. Equity Market Structure: Making Our Markets Work Better for Investors* (May 11, 2015), https://www.sec.gov/news/statement/us-equity-market-structure.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

structure reform.[92] Anything different would be an irresponsible and unlawful experiment with retail investors' finances.

At Robinhood, we agree that the markets have evolved for the better for retail investors, thanks to greater competition among market centers and trading venues that have flourished since Congress and the SEC eliminated the exchange oligopoly 50 years ago. This elimination has allowed market makers and other trading venues to compete against exchanges to provide the best executions for retail investors. Notwithstanding these gains, we agree there are certain improvements that can be made to further benefit retail investors and allow exchanges to better compete with off-exchange execution venues. Accordingly, we support the following, data-driven approach to enhancing market structure:

- First, fully implement the MDI Rules.

- Second, enhance the current order execution disclosures required by SEC Rules 605 and 606. Our comment letter regarding Proposed Rule 605 identifies specific changes the SEC should make to its proposed rule.

- Third, repropose the Tick Size Proposal with a minimum pricing increment of $0.005 for tick-constrained stocks, and adopt exchange access fee caps that are proportional to the minimum pricing increments based upon existing access fee caps, as outlined in our letter on this proposal.

These are improvements that can and should be made through a methodical, study-backed and data-driven approach. Unfortunately, the changes that the SEC has proposed are neither methodical nor driven by study or data, resulting in serious flaws. Rather, the SEC's sweeping Proposals, based on speculation and theory rather than data and analysis, will harm investors and the markets by introducing an unprecedented level of instability and uncertainty into the world's largest, most stable, and most accessible markets. As former Commissioner Aguilar aptly stated, "new regulatory regimes and rules promulgated by the SEC must have real and verifiable investor protections."[93] These Proposals do not come close to that standard.

---

[92] *E.g.*, Letter from Hope M. Jarkowski, General Counsel, NYSE, to Vanessa Countryman, Sec'y, SEC (Mar. 13, 2023), https://www.sec.gov/comments/s7-31-22/s73122-20159561-327567.pdf; Letter from David Howson, Executive Vice President & Global President, Cboe Global Markets, et al., to Vanessa Countryman, Sec'y, SEC (Mar. 24, 2023), https://www.sec.gov/comments/s7-32-22/s73222-20161714-330556.pdf.

[93] Comm'r Luis A. Aguilar, SEC, Speech, An Insider's View of the SEC: Principles to Guide Reform (Oct. 15, 2010), https://www.sec.gov/news/speech/2010/spch101510laa.htm.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

II. PROPOSED REG BEST EX SHOULD BE WITHDRAWN BECAUSE IT IS CONTRARY TO GOOD POLICY AND VIOLATES THE SEC'S RULEMAKING AUTHORITY AND STATUTORY MANDATE

Robinhood supports regulatory and industry efforts that make our markets work better for retail investors. But we are concerned that the Proposal will have the opposite effect and harm retail investors by causing worse trade executions and more expensive transactions. The SEC has not demonstrated any problem with the longstanding FINRA and Municipal Securities Rulemaking Board ("MSRB") best execution rules that would be ameliorated by Proposed Reg Best Ex that cannot be addressed in the existing regulatory framework. The existing SRO standards are principles-based and permit broker-dealers to use their expertise to handle customers' orders under a variety of market conditions and with a variety of order types. By contrast, Proposed Reg Best Ex would undercut the very standard of best execution that it purports to establish by eliminating the discretion of market and industry professionals to determine the best markets in which to execute a customer's order and supplanting the experts' best judgment with a static, government-mandated checklist.

In addition to being bad policy, Proposed Reg Best Ex is unlawful. More specifically, it violates the SEC's rulemaking authority in Exchange Act Sections 3(f) and 23(a) and the SEC's statutory mandate in Section 11A. The SEC's economic analysis fails to reasonably assess the purported benefits of Proposed Reg Best Ex and associated costs. First, the SEC acknowledges that it does not currently have the data necessary to evaluate any potential benefits from implementing Proposed Reg Best Ex, but makes no effort to obtain that data. Second, the SEC fails to identify any problem with best execution that cannot be fixed under the current framework or to quantify any benefit that it expects would arise from Proposed Reg Best Ex. As discussed herein, any discussion of purported benefits is highly speculative and conditional and, as acknowledged by the SEC, "may be small."[94] For example, the SEC posits that Proposed Reg Best Ex could "improve retail customer order execution quality *to the extent that* the proposal improves broker-dealers' order handling practices"[95]—but the SEC does none of the work to try to evaluate whether the rule *would* improve order handling. Outside of the Proposal, Chair Gensler has stated that the duty of best execution is so important that it must also be "on the books of the Commission,"[96] but this is not a sufficient basis to justify such a problematic rulemaking. Third, the Proposal severely underestimates the costs of Proposed Reg Best

---

[94] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5525.

[95] *Id.* at 5523.

[96] U.S. SEC, *Office Hours with Gary Gensler: SEC's Best Execution Proposal* (Jan. 24, 2023), https://www.sec.gov/news/sec-videos/office-hours-gary-gensler-secs-best-execution-proposal.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

Ex—which the SEC acknowledges will be "borne by customers"[97]—including the immediate costs of connecting to new markets and longer-term costs to evaluate and access new markets, and to adjust practices and policies in response to new interpretations of Proposed Reg Best Ex in later examinations and settlements. These transaction and compliance costs, particularly for the SEC's new category of so-called "conflicted transactions," may result in fewer retail orders receiving the benefits of executions at off-exchange market makers; the reduction or elimination of PFOF (which may very well be the true purpose of the proposed rule); and decreased competition for retail orders, all of which jeopardize the quality of retail order executions.[98] Finally, the Proposal's economic analysis fails to consider the impact of the MDI Rules and the other three pending market structure proposals on Proposed Reg Best Ex.

We discuss in more detail below: (A) that the Proposal is unnecessary and inappropriate in light of existing rules and practices; (B) how the Proposal will harm retail investors, including by decreasing competition for retail investor orders; (C) how it undercuts the objective of best execution by substituting government checklists for the judgment of industry experts; and (D) how it fails to provide a reasonable economic analysis. All of these shortcomings amount to a rule that is unnecessary, inappropriate, inefficient, and anticompetitive, and the Proposal must therefore be withdrawn.

A. The Proposal Is Inconsistent With The SEC's Rulemaking Authority Because It Is Duplicative And Therefore Unnecessary And Inappropriate.

The Commission's proposal to adopt its own best execution standard exceeds the Commission's legal authority in a number of ways. As we noted above in Section I, Exchange Act Section 3(f) requires the SEC to "consider or determine whether an action is necessary or appropriate in the public interest" and "in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." The Proposal, however, fails these rulemaking requirements—it is duplicative of existing regulatory efforts and, therefore, is unnecessary and inappropriate. First, the Proposal is unnecessary because the industry is already subject to a well-established best execution standard, which the SEC itself approved pursuant to Exchange

---

[97] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5529.

[98] *Cf.* Comm'r Hester M. Peirce, SEC, *Is This the Best Execution We Can Get?* (Dec. 14, 2022), https://www.sec.gov/news/statement/peirce-best-execution-20221214 ("These changes, however, may require it to alter its business model in other ways, such as by relying more heavily on other revenue sources, including commissions, paid by the customer. … [A]ny estimate of execution quality, particularly in a rulemaking like this, should take the per-share cost of commissions into account. At some points in the release, the discussion hints that a broker-dealer, to meet its requirements under the rule, should convert PFOF into price improvement. Why is withholding price improvement from the customer worse than charging the customer a (likely higher) commission?").

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

Act Section 19(b), which includes public notice and comment. If the SEC has an issue with these standards, it has the authority to require that they be changed.[99] Second, it is a waste of the SEC's valuable and limited taxpayer-funded resources to examine and enforce compliance with a rule that, according to Congress and by the Commission's own admission, an SRO like FINRA is better positioned to oversee.[100] Congress authorized creation of FINRA's predecessor entity, the National Association of Securities Dealers ("NASD"), via statute in 1938.[101] The SEC oversees FINRA in order to ensure, among other items, that its rules "protect investors and the public interest," "promote just and equitable principles of trade," and "remove impediments to and perfect the mechanism of a free and open market and a national market system."[102] FINRA is perfectly capable, given these conditions, of overseeing the best execution regulatory framework. Further, the Exchange Act does not grant the SEC authority to set its own best execution standards; rather, as we just noted, it requires the SEC to determine that the rules of registered national securities exchanges and national securities associations are designed to promote just and equitable principles of trade, which include the requirement of best execution.[103]

1. Proposed Reg Best Ex Is Duplicative And Unnecessary.

Proposed Reg Best Ex would create a best execution standard that is entirely duplicative and unnecessary. The Proposal would establish an SEC best execution standard for broker-dealers and require them to establish, maintain and enforce written policies and procedures reasonably designed to comply with that standard. But the SEC has provided no valid reason why this change is necessary. Broker-dealers are already required to comply with the same best execution standard that the SEC is proposing.

Proposed Rule 1100 sets forth the best execution standard that the SEC would implement: It would require a broker-dealer to "use reasonable diligence to ascertain the best market for the 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."[104] This is materially identical to the standard in current FINRA Rule 5310 and MSRB Rule G-18, which require

---

[99] 15 U.S.C. §78s(c) ("The Commission, by rule, may abrogate, add to, and delete from … the rules of a self-regulatory organization … as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter ….").

[100] *See infra* notes 121-130 and accompanying text.

[101] Maloney Act, Pub. L. No. 719, 52 Stat. 1070 (1938).

[102] 15 U.S.C. § 78o-3(b)(6).

[103] *Id.* §§ 78o-3(b)(6), 78f(b)(5).

[104] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5555.

broker-dealers to "use reasonable diligence to ascertain the best market for the subject security and to buy or sell in [such/that] market so that the resultant price to the customer is as favorable as possible under prevailing market conditions."[105] The best execution standard in Proposed Reg Best Ex not only mirrors FINRA's standard, it includes materially the same factors as those that broker-dealers must already consider to evaluate their compliance with FINRA's best execution standard, as shown in Appendix A.[106]

FINRA's best execution standard is time-tested: it has been in place since 1968.[107] It is also flexible enough to evolve and remain effective as products and markets evolve. To this end, FINRA has spent decades refining its rule and providing interpretive guidance on it as markets continually evolve—all with the knowledge and oversight of the SEC.[108] FINRA's best execution rule addresses all securities products but municipal securities; those are addressed in MSRB Rule G-18, which establishes the same best execution standard for transactions in municipal securities. The MSRB implemented its rule and now continually issues updated interpretive guidance, again with the full knowledge and oversight of the SEC.[109] Notably, the FINRA and MSRB rules have proven flexible enough to accommodate developments in the industry, such as increasing automation, the changing role of wholesalers, and the corresponding rise in retail investor participation.

As the SEC acknowledges, the high-level requirements in the SEC's Proposal are very similar to these existing regulatory requirements. For example:

- Proposed Rule 1101(a) would require a broker-dealer to "establish, maintain, and enforce written policies and procedures reasonably designed to comply with the best execution standard as set forth in [Proposed Rule 1100]." Under the FINRA Rules, broker-dealers are already required to "establish, maintain, and enforce written procedures to supervise the types of business in which it engages and the activities of its associated persons that are reasonably designed to achieve

---

[105] FINRA Rule 5310(a); MSRB Rule G-18(a).

[106] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5450, 5463.

[107] *E.g.*, Chair Gary Gensler, SEC, *Statement on Best Execution Proposal* (Dec. 14, 2022), https://www.sec.gov/news/statement/gensler-best-execution-20221214 (initial iteration of FINRA best execution rule (then an "interpretation") implemented in 1968).

[108] *E.g.*, FINRA Regulatory Notices 21-23 (June 23, 2021), 21-12 (Mar. 18, 2021), 18-29 (Sept. 12, 2018), 15-46 (Nov. 2015), and 09-58 (Oct. 2009); NASD Notices to Members 01-22 (Apr. 2001), 00-42 (June 2000), and 99-12 (Feb. 1999).

[109] Implementation Guidance on MSRB Rule G-18, on Best Execution (last updated Feb. 7, 2019).

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

compliance with applicable securities laws and regulations, and with applicable FINRA rules," including Rule 5310.[110]

- Similarly, Proposed Rule 1101(b) would require heightened procedures for "conflicted transactions," including transactions that involve the payment or receipt of PFOF (*see infra* Section II.B).[111] But FINRA and SEC guidance already require that broker-dealers pay increased attention to best execution obligations when engaging in transactions that involve order routing inducements, including PFOF and the opportunity to act principally with the order.[112]

- Proposed Rule 1101(c) would require broker-dealers to conduct a quarterly execution quality review and to update their order handling practices accordingly.[113] Firms are already required to do this under FINRA Rule 5310.[114]

- Proposed Rule 1102 requires an annual review of best execution and associated order handling practices. FINRA already requires a periodic risk-based assessment of broker-dealers' policies and procedures, including those related to best execution and order handling.[115]

Accordingly, broker-dealers are already required to have policies and procedures reasonably designed to meet the best execution standard, which includes heightened sensitivity to inducements that may create conflicts of interest.

As discussed further below, the main difference between the Proposal and existing best execution rules is the SEC's use of detailed prescriptive requirements for specific transactions, rather than the risk-based approach that has allowed FINRA and the MSRB to remain nimble as the markets evolve. But the SEC's prescriptive approach creates unnecessary redundancy. If the SEC believes there is a deficiency in the SROs' principles-based best execution rules or the enforcement of those rules, it could require the SROs to update their rules.[116] The SROs do not develop their rules in a vacuum, but rather do

[110] FINRA Rule 3110.

[111] *E.g.*, Reg Best Ex Proposing Release, 88 Fed. Reg. at 5465.

[112] *E.g.*, Payment for Order Flow, Exchange Act Release No. 34902 (Oct. 27, 1994), 59 Fed. Reg. 55,006, 55,009-10 (Nov. 2, 1994); FINRA Regulatory Notice 21-23, at 4 (June 23, 2021).

[113] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5450.

[114] FINRA Rule 5310, Supplementary Material .09.

[115] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5450.

[116] 15 U.S.C. § 78s(c).

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

so with SEC oversight and approval. As FINRA's President and CEO Robert Cook has explained:

> All of FINRA's governance and regulatory operations are extensively overseen by the SEC, which has broad authority to audit FINRA's programs and direct remedial actions. For example, <u>with limited exceptions, FINRA must obtain SEC approval for all of its rules</u>, and FINRA's adjudicatory decisions ultimately may be appealed to the SEC and federal courts. FINRA must comply with SEC regulations and is subject to frequent SEC oversight examinations. In addition, <u>the SEC has broad authority to add, delete or amend FINRA rules</u>.[117]

Moreover, the SEC can, and has, brought best execution cases for violations of the same standard that it is now proposing for Rule 1100: a failure to use reasonable diligence to ascertain the best market for the 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.[118]

In short, the SEC's Proposed Reg Best Ex would create a new, unnecessary regulation with requirements that overlap existing SRO requirements. This overlapping regulation would have no discernible benefit but would most certainly create additional costs to both retail investors and their broker-dealers, as described in Sections II.B-D. The SEC has not provided a valid reason why it is necessary. Instead, Chair Gensler has simply repeated the vague claim that the duty of best execution is so important that it must also be "on the books of the Commission," and not left solely to an SRO (i.e., FINRA) to interpret and enforce.[119] We agree the duty of best execution is central to protecting investors, but it still doesn't follow that the SEC needs its own rule. If the SEC had an issue with the SROs' current rules, the solution would not be for the Commission to enact overlapping rules. Rather, it should instruct the SROs to add to, delete, or amend their rules, consistent with its authority. And yet the SEC's consideration of potential alternatives to Proposed Reg Best Ex did not even consider this highly reasonable approach of leaving the SRO-driven

---

[117] Robert Cook, FINRA President & CEO, Remarks: New Special Study Conference (Mar. 24, 2017, updated Apr. 18, 2017), https://www.finra.org/media-center/speeches-testimony/remarks-new-special-study-conference.

[118] *See, e.g.*, *Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266, 270 (3d Cir.) (en banc), *cert. denied*, 525 U.S. 811 (1998); *Knight Sec. L.P.*, Exchange Act Release No. 50867, n.3 (Dec. 16, 2004). The proposed standard is the same as how "the Commission and the courts have described the duty of best execution over the years." Reg Best Ex Proposing Release, 88 Fed. Reg. at 5452.

[119] U.S. SEC, *Office Hours with Gary Gensler: SEC's Best Execution Proposal* (Jan. 24, 2023), https://www.sec.gov/news/sec-videos/office-hours-gary-gensler-secs-best-execution-proposal.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

best execution framework in place, with additional oversight or amendment from the SEC.[120]

2. The Proposal Is Inappropriate Because There Is No Justification For The Costs Associated With Duplicative Regulatory Efforts.

The Proposal is unwarranted because there is no need for the SEC to perform duplicative oversight of a standard that is within FINRA's expertise and capacity to examine and enforce. FINRA is currently the primary organization responsible for interpreting, examining, and enforcing broker-dealers' compliance with best execution rules and guidance, and for good reason. FINRA has the resources and expertise to examine and enforce compliance with evolving products, market centers, and technology.[121] FINRA has more flexibility and more resources to devote to a nuanced understanding of how broker-dealers operate, as well as to enforce broker-dealer compliance.[122] Indeed, complex trading issues such as best execution are exactly the reason SROs exist and play a fundamental role in market protection. There is no need for the SEC to engage in

[120] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5537-40.

[121] *E.g.*, Chair Mary Jo White, Statement at Open Meeting on Rule 15b9-1 and Reg A+ (Mar. 25, 2015), https://www.sec.gov/news/statement/statement-open-meeting-rule-15b9-1-and-reg ("[The SRO] model of regulation enables the Commission to better leverage its resources, draw on extensive market expertise, and build an oversight program that is deeper and broader."); Concept Release Concerning Self-Regulation, Exchange Act Release No. 50700 (Nov. 18, 2004), 69 Fed. Reg. 71,256, 71,282 (Dec. 8, 2004) ("An SEC-only approach would also have numerous problems. The SEC would be responsible for detailed regulation and interpretation of complex areas previously the province of SROs, without the aid of direct industry involvement and with a significant lessening of industry input in rulemaking. … Direct Commission regulation would be governed by the limitations and rules addressing federal rulemaking and would be undertaken in a political environment and the cost of carrying out all of the duties of the SROs would be extensive."); *Oversight of the Financial Industry Regulatory Authority: Hearing Before the Subcomm. on Cap. Mkts., Sec. & Investment of the H. Comm. on Fin. Servs.*, 115th Cong. 36 (2017) (statement of Robert W. Cook, President & CEO, FINRA), https://www.govinfo.gov/content/pkg/CHRG-115hhrg29540/pdf/CHRG-115hhrg29540.pdf ("As an SRO, FINRA can involve its member firms more directly in its deliberations and thus benefit from their expertise on relevant matters, such as the different business models of those member firms and how they operate in practice, the complex and rapidly evolving securities markets in which they trade, and the wide range of investors they serve. Like other SROs, FINRA can use what it learns from its members to enrich our regulatory programs and develop solutions that are more practical, tailored, and effective than what could be developed without such input. … FINRA provides these benefits without any cost to taxpayers, since we are funded by fees assessed on regulated entities, among other sources.").

[122] *E.g.*, H.R. Rep. No. 98-106, at 6-7 (1983).

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

duplicative rulemaking efforts, particularly where the taxpayer-funded SEC does not have the resources or in-house expertise to do so in the same way that FINRA does.

In the past, Congress and the SEC have shifted oversight of broker-dealers away from SEC Staff to SROs that are, in turn, subject to SEC scrutiny. This is due to both deference to SRO expertise with respect to broker-dealer operations and constraints on SEC resources.[123] For example, in October 2016, the SEC's Office of Compliance Inspections and Examinations ("OCIE")[124] launched the FINRA and Securities Industry Oversight office to further its oversight over FINRA operations. OCIE launched this program because, due to its heavy burden in examining a large number of investment advisers (now over 15,000[125]), it did not have the resources to inspect all broker-dealers (now approximately 3,500[126]) and therefore increasingly relied on FINRA for this function. As noted by the Director of OCIE at that time, as "a result of OCIE's resource allocation, OCIE is working to enhance our oversight of FINRA because we will be somewhat more dependent on them for broker-dealer exams in the first instance."[127] Even earlier, Congress and the SEC deliberately shifted primary responsibility for broker-dealer oversight from the SEC to FINRA, noting that SEC oversight of broker-dealers "was unnecessarily costly and diverted the SEC's limited resources away from areas of major concern, merely to duplicate the functions of the NASD [now FINRA]."[128] In connection with this change, the House of Representatives Committee on Energy and Commerce explained that the SEC's oversight was not "on a par with that provided by the NASD" and bringing it up to that standard "would require significant expenditures by the Commission for additional staff and administrative costs."[129] Even the SEC has acknowledged it is not as good at direct, detailed regulation of broker-dealers as FINRA is: "It is important to note that the Commission has attempted to undertake direct SRO level regulatory duties in the past. …

---

[123] *E.g.*, H.R. Rep. No. 94-123, at 48 (1975) (Congressional view that direct industry regulation by SEC would be "ineffective" led to unique framework of SROs enforcing legal and ethical requirements and SEC supervising SROs' exercise of regulatory power).

[124] OCIE is now the Division of Examinations.

[125] U.S. SEC, Information About Registered Investment Advisers and Exempt Reporting Advisers, Registered Investment Advisers, March 2023, SEC: Data, https://www.sec.gov/help/foiadocsinvafoia (Feb. 3, 2023).

[126] U.S. SEC, Company Information About Active Broker Dealers, Mar. 2023, SEC: Data, https://www.sec.gov/help/foiadocsbdfoia (Mar. 1, 2023).

[127] Marc Wyatt, Director, Office of Compliance Inspections and Examinations, Keynote Address: National Society of Compliance Professionals 2016 National Conference, Inside the National Exam Program 2016 (Oct. 17, 2016), https://www.sec.gov/news/speech/inside-national-exam-program-2016.

[128] Concept Release Concerning Self-Regulation, 69 Fed. Reg. at 71,267.

[129] *Id.* (internal quotation marks and citation omitted).

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

[T]he Commission could not effectively carry out the detailed responsibilities required."[130]

Keeping oversight of best execution with FINRA also keeps costs down for U.S. taxpayers. FINRA rulemaking and enforcement is not a cost to the U.S. taxpayer; FINRA earns revenue from assessments and fees paid by member broker-dealers and their customers. FINRA uses these funds to hire and train personnel with the appropriate specialized experience to oversee broker-dealer activity, and to engage with the industry it regulates. SEC Staff who would be examining and enforcing Proposed Reg Best Ex, by contrast, would be funded by taxpayer dollars. The SEC should not squander the U.S. taxpayer's hard-earned money by proposing unnecessary regulation, particularly where there are specialized staff at FINRA who already have developed on-point rules and regulatory guidance, and have been examining for compliance with best execution requirements for half a century.

In short, the SEC has provided no compelling arguments for why it should, suddenly, seek to supplant FINRA's expertise by proposing unnecessary, overlapping regulation that would result in duplication of regulatory efforts with respect to subject matters that have historically been the purview of the SROs. If the SEC believes that FINRA's current rulemaking or oversight of best execution is not sufficient, the SEC has the means to require FINRA to address these shortcomings.

3. The Commission Does Not Have Authority To Unilaterally Set Its Own Best Execution Standards.

The Exchange Act assigns to the SROs, *not to the Commission*, responsibility for crafting rules to "promote just and equitable principles of trade"[131]—principles that have long been understood to include the requirement of providing best execution.[132] The Commission, to be sure, has a role to play in *supervising* the best execution rules of the SROs,[133] but that limited supervisory power does *not* include the power to rewrite those rules in its own—the Commission's—name.

The Commission claims to have found authority to promulgate its own best execution rule in Sections 15(c)(2)(A) and 11A(a) of the Exchange Act, but neither provision grants the

---

[130] *Id.* at 71,282.

[131] 15 U.S.C. §§ 78o-3(b)(6), 78f(b)(5).

[132] *See, e.g.*, Order Granting Approval of Proposed Rule Change To Adopt NASD Rule 2320, Exchange Act Release No. 65895 (Dec. 5, 2011), 76 Fed. Reg. 77,042, 77,043 (Dec. 9, 2011) ("The Commission believes that the proposed rule change clarifies the existing best execution requirements, and that these changes … promote just and equitable principles of trade.").

[133] *See* 15 U.S.C. §§ 78o-3(b), 78s(c).

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

Commission such authority.[134] Section 15(c) concerns *fraud*,[135] and the Commission does not even attempt to explain how Proposed Reg Best Ex would combat fraud. Further, Section 11A(a) identifies various policy objectives of the Act,[136] but it is well-established that an agency action "*cannot* rest merely on the 'policy objectives of the Act.'"[137] The Commission asserts that Section 11A(a)(2) granted the Commission "rulemaking authority to further the section 11A [policy] objectives,"[138] but that is not accurate. Section 11A(a)(2) instructs the Commission "to use its authority *under this chapter*"[139]; the chapter, the Exchange Act, contains specific grants of rulemaking authority.[140] It is to those specific grants that the Commission must look for authority, but none of them authorizes a best execution standard.[141] And, as apparently overlooked by the SEC, Congress expressly stated in Section 11A(a)(3)(B) that the Commission is allowed "to authorize or require self-regulatory organizations to act jointly with respect to matters as to which they share authority … in planning, developing, operating, or regulating a national market system."

B. Proposed Reg Best Ex Will Harm Retail Investors By Making It More Difficult For Them To Receive Best Execution And Increasing Their Transaction Costs.

Rather than using the risk-based approach that the SROs have successfully employed for decades, Proposed Reg Best Ex would create a new category of so-called "conflicted transactions" and impose burdensome requirements for firms engaging in those transactions, while providing no tangible benefit or protections to retail customer orders. This approach will harm retail investors in three significant ways. First, it will make it more difficult and expensive for retail broker-dealers to send orders to off-exchange market makers. In doing so, the Proposal would impede an important source of competition for retail investors' orders that, according to the SEC's own statistics, currently provides better execution quality than other market participants, such as exchanges.[142] Second, the SEC's Proposal will make it more difficult, if not impossible, for retail broker-dealers to receive PFOF, which may very well be the true purpose of the proposed rule. The SEC

---

[134] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5442.

[135] *See* 15 U.S.C. § 78o(c).

[136] *See id.* § 78k-1(a)(1).

[137] *Georgia v. President of the United States*, 46 F.4th 1283, 1298 (11th Cir. 2022) (emphasis added) (citation omitted).

[138] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5442 & n.14.

[139] 15 U.S.C. § 78k-1(a)(2) (emphasis added).

[140] *See, e.g.*, *id.* § 78k-1(c)(1).

[141] *Cf. Georgia*, 46 F.4th at 1298.

[142] *E.g.*, OCR Proposing Release, 88 Fed. Reg. at 189 tbl.5.

has expressly acknowledged that the reduction or elimination of PFOF may increase transaction costs for retail investors. Third, it will decrease competition for retail orders, which jeopardizes the quality of retail order executions.

"Conflicted transactions" are broadly defined under Proposed Rule 1101(b) to include, among other things, transactions for or with a retail investor where (1) the order is executed in a principal or riskless principal capacity, or (2) the broker-dealer provides or receives payment for order flow. For non-conflicted transactions, Proposed Rule 1101(a) would require broker-dealers to have policies and procedures describing how they: (1) obtain and assess "reasonably accessible information" about the markets trading the relevant securities; (2) identify "markets that may be reasonably likely to provide the most favorable prices for customer orders" ("material potential liquidity sources"); and (3) incorporate "material potential liquidity sources into [] order handling practices, and ensuring that the broker or dealer can efficiently access each such material potential liquidity source."[143] As discussed *infra* Section II.C, this is already a burdensome effort. However, if a transaction is a "conflicted transaction," broker-dealers will need to have policies, procedures, and other documentation regarding how they: (1) obtain and assess information *beyond* the already required "reasonably accessible" information, and (2) identify a broader range of markets *beyond* those identified as material potential liquidity sources, including "a broader range of order exposure opportunities and markets that may be smaller or less accessible than those identified as material potential liquidity sources."[144]

This new requirement to go "beyond" regular best execution practices is not only onerous, it is unnecessary. FINRA rules already require broker-dealers to consider conflicts such as PFOF and principal executions in their best execution analysis. But what FINRA rules do not do—that the Proposal would do—is create a *presumption* that certain market venues (i.e., off-exchange market makers) and certain practices (i.e., PFOF) are not consistent with regular best execution standards and require a "better than best execution" standard. Before this Proposal came out, Chair Gensler had spoken out against the idea that you could be providing "best execution" if there were something "better" out there,[145] but nevertheless the SEC has now proposed this illogical and impossible "better than best" standard by requiring broker-dealers to go *beyond* reasonably accessible information and material liquidity sources. The SEC itself estimates that this proposed standard is so onerous and impractical that approximately 90% of retail

[143] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5555.

[144] *Id.* at 5555-56.

[145] Chair Gary Gensler, SEC, Speech, Prepared Remarks at the Global Exchange and FinTech Conference (June 9, 2021), https://www.sec.gov/news/speech/gensler-global-exchange-fintech-2021-06-09 ("Broker-dealers are obligated to seek the best execution for their customers' orders—not just better execution. … Again, it's best execution—not just better execution.").

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

broker-dealers will be forced to eliminate conflicted transactions to avoid complying with Rule 1101(b).[146] Despite these drastic effects, the SEC does nothing to demonstrate how retail orders would benefit from requiring retail broker-dealers and/or market makers to jump through the various hoops laid out in Proposed Reg Best Ex for conflicted transactions. This lack of analysis leads us to believe that the primary purpose of the heightened "conflicted transactions" standard is to destroy specific business models—such as retail broker-dealer receipt of PFOF—not to protect investors. This is not an appropriate role for the government, and it flies in the face of the SEC's mandates.

1. The Proposal Will Make It More Difficult To Send Retail Orders To Market Venues That Provide The Best Execution To Retail Orders.

Off-exchange market makers or wholesalers, by definition, buy and sell securities on a riskless principal or principal basis.[147] As discussed above, the Proposal would establish a presumption that transactions that are executed on a principal or riskless principal basis (essentially all orders handled by an off-exchange market maker) require a "better than

[146] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5533 ("While the Commission cannot predict how many retail broker dealers will terminate PFOF arrangements, the Commission preliminarily believes that under the proposal, retail broker-dealers are likely to reduce their use of PFOF agreements for both NMS stocks and listed options because engaging in such agreements would cause the broker dealer to incur heightened best execution obligations under the proposal and satisfying those obligations may cause broker-dealers to incur costs in excess of their PFOF revenue."); *id.* at 5530 ("The Commission is able to preliminarily estimate an upper bound on potential implementation costs from these broker-dealers by assuming that all 2,440 retail broker-dealers would remain conflicted after implementation of the proposal, but the Commission preliminarily believes the implementation costs for many broker-dealers are likely to be lower than this estimate because some conflicted broker-dealers receive payments from their conflicted order flow that are less than the implementation costs they would incur under the proposed rule; consequently, the Commission preliminarily believes that some broker-dealers will choose to de-conflict to avoid incurring these costs. For purposes of its analysis, the Commission assumes that broker-dealers with less than $100MM in total assets will comply with the proposal by removing their conflicts."); *id.* at 5520 tbl.19 (2,215 of 2,440 retail broker-dealers with under $100 million in total assets); *id.* at 5533 ("The Commission preliminarily believes this is likely to reduce the share of retail investor order flow that is internalized because some broker-dealers that currently receive PFOF are likely to stop receiving it to become de-conflicted, and some broker-dealers that pay PFOF will internalize fewer of the orders they receive to comply with the proposal."); *id.* at 5524 ("In response to this proposed requirement, the Commission believes that some broker-dealers that route to executing broker dealers that engage in conflicted transactions could seek to remove such conflicts, for example by no longer accepting payment for order flow or selecting executing brokers that do not execute on a principal basis.").

[147] Section 3(a)(38) of the Exchange Act.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

best ex" standard, which will be so onerous that firms will refrain from sending retail orders to off-exchange market makers.

There is no valid basis for subjecting this class of market participants to this heightened standard. By the SEC's own statistics and admission, off-exchange market makers have had a positive effect on the execution of retail orders. The SEC's own economic analysis reflects that marketable orders routed to wholesalers have higher fill rates, lower effective spreads, and lower E/Q ratios.[148] These orders are also more likely to receive price improvement, and receive greater amounts of price improvement than orders routed to exchanges.[149] But price improvement is not the only benefit provided by wholesalers. Wholesalers also provide enhanced customer service and highly consistent execution quality as compared to other market participants.[150] Retail investors further benefit from principal or riskless principal transactions with wholesalers because wholesalers can provide consistent executions and size improvement, as discussed above in Section I.

Despite the substantial benefits that wholesalers provide in executing retail orders, Proposed Reg Best Ex would dramatically reduce the number of orders that wholesalers could execute and thereby dramatically reduce the benefits that retail investors receive today. The SEC acknowledges this outcome, stating that Proposed Reg Best Ex would cause wholesalers to internalize fewer retail orders to reduce the number of "conflicted transactions" they handle.[151] The SEC also acknowledges that disrupting the current off-exchange market maker model of retail order execution will jeopardize retail investors' ability to execute orders in less liquid securities.[152] As we described above in Section I, market makers are generally willing to execute—and even provide price improvement on—orders in less liquid securities as part of their overall relationship with retail broker-dealers. If the Proposals, including Proposed Reg Best Ex, create artificial burdens on that overall relationship, market makers will likely be less willing to accommodate unprofitable orders in illiquid securities. These orders will, therefore, be executed at prices less favorable for retail investors when they are routed to auctions or exchanges and need to "walk the book" to find enough volume to fill them.

---

[148] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5496.

[149] *Id.* at 5496.

[150] *Id.* As we discussed *supra* Section I with respect to Nasdaq's "glitch" during the 2012 Facebook IPO and NYSE's "trading glitch" earlier this year, exchanges have less accountability to retail investors and/or retail broker-dealers and limited liability for problems like these that can affect investors' trades.

[151] *Id.* at 5533.

[152] *Id.* at 5534.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

2. The Proposal Will Increase Retail Investors' Transactions Costs, As The SEC Acknowledges.

The Proposal would harm retail investors by increasing transaction costs. The PFOF that market makers pay to retail broker-dealers enables retail broker-dealers to offer customers key products and services, such as no-commission trading. To this end, the SEC has acknowledged that limiting or eliminating PFOF could increase the likelihood of higher commissions and increased costs for retail investors.[153] The Proposal would also increase transaction costs by increasing compliance costs for broker-dealers. The Proposal's onerous and exacting requirements for "conflicted transactions" would dramatically increase the amount of data broker-dealers must purchase and collect, require broker-dealers to establish multiple new legal relationships and technical capabilities, and necessitate costly design and programming changes to existing analytical frameworks and order routing practices—all costly endeavors without any evidence that such efforts would better protect investors.

Notably, the SEC expressly acknowledges that costs to retail investors will likely increase as a result of Proposed Reg Best Ex. It acknowledges multiple times throughout Proposed Reg Best Ex that it may become more common for retail investors to pay commissions, as broker-dealer revenues go down and the costs of executing orders goes up.[154] Retail investors may also pay for other services that are currently free.[155] The SEC further acknowledges that smaller broker-dealers may not survive the introduction of Proposed Reg Best Ex. As a result, investors would lose access to the specialized services and innovations they offer. This would appear inconsistent with the SEC's statutory mandate and the Chair's statements calling for more competition. Moreover, investors would spend time and money searching for "alternative broker-dealers that offer the same services; those services may be offered at inferior prices by remaining competitors," if they are offered at all.[156] Despite acknowledging that costs associated with implementing Proposed Reg Best Ex will likely be passed through to retail investors and retail investors' transaction costs will increase, the Proposing Release does nothing either to estimate what that impact will look like (and the extent to which it might offset any potential benefit from the rule) or to ameliorate the impact.

---

[153] *Id.* at 5467.

[154] *Id.* at 5530, 5533, 5536.

[155] *Id.* at 5533 ("If this occurs, broker-dealers that reduce their reliance on PFOF arrangements would also be likely to see commensurate decreases in their revenue. This increase in costs to execute customer orders may be passed on to retail investors as additional fees to trade, or in the form of commissions.").

[156] *Id*.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

Given the predictable harm and costs to retail investors, which the SEC has acknowledged, it is not clear how the SEC squares Proposed Reg Best Ex with its investor protection mandate. Surely Proposed Reg Best Ex is not being proposed to enhance retail investors' execution quality because it would have the opposite result, for the reasons discussed above. So why does the SEC want to make it more difficult for retail orders to receive best execution? One obvious answer is that Proposed Reg Best Ex is a way for the SEC to dramatically reduce or eliminate PFOF and force more order flow away from off-exchange market makers and to exchanges. As Commissioner Peirce aptly observed, "A retail broker can eliminate the conflict if it stops receiving payments or rebates or develops systems to pass those payments and rebates on to customers. These changes, however, may require it to alter its business model in other ways, such as by relying more heavily on other revenue sources, including commissions, paid by the customer."[157]

If the SEC's true goal was to ensure that broker-dealers provide better executions than they do today for "conflicted transactions," the SEC would have analyzed and presented in the Proposal data regarding questions such as: (1) What sources of information exists today beyond "readily accessible information" and how much does it cost to access this information? (2) How many broker-dealers are already accessing this additional information? (3) Is their execution quality better for retail orders than that of broker-dealers who do not access this information? (4) What are the potential sources of liquidity *beyond* material sources of liquidity and how much does it cost to access them? (5) How many broker-dealers already route orders to these types of liquidity providers and how does their execution quality differ from broker-dealers who do not route to such markets? (6) When does a potential market become so small or so expensive to access that a broker-dealer is not required to access it?

The SEC has not asked these basic questions and presents *no analysis* of these issues, as described further in Section II.D. None of its quantitative economic analysis considers what broker-dealers currently do to mitigate the potential conflict of interest caused by PFOF, what the SEC thinks the shortcomings of those efforts are, or what opportunities for more favorable executions might exist. Rather, the SEC's analysis is focused on making the political point that PFOF is "bad" and seeking to eliminate it, without explicitly stating that is their motivation. If the SEC wants to ban PFOF, the SEC should straightforwardly propose that ban, with a thorough analysis of the costs and benefits of doing so, and give the public an opportunity to comment on it, rather than forcing an outcome through backdoor regulation.

---

[157] Comm'r Hester M. Peirce, SEC, *Is This the Best Execution We Can Get?* (Dec. 14, 2022), https://www.sec.gov/news/statement/peirce-best-execution-20221214.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

3. *Proposed Reg Best Ex Also Violates The SEC's Rulemaking Authority Because It Does Not Promote Competition.*

Competition for retail order flow results in better prices for retail orders. In addition, as described in Section I above, Section 23(a) of the Exchange Act requires the SEC to determine "that any burden on competition imposed by [a] rule or regulation is necessary or appropriate." Proposed Reg Best Ex is harmful to retail investors and unlawful because it is anticompetitive and discriminates against certain types of market participants, such as off-exchange market makers and retail broker-dealers that accept and use PFOF to reduce customer costs.

Through its additional, onerous requirements for so-called "conflicted transactions," the SEC would disadvantage, and likely reduce, the number of broker-dealers and market makers that are able and willing to handle retail orders. For example, the Proposal favors exchanges and ATSs over retail broker-dealers and off-exchange market makers. Exchanges and ATSs might receive orders intended for their continuous limit order books at the same time that another exchange or ATS has midpoint liquidity. Exchanges and ATSs can execute those orders without first researching other market centers that may have midpoint liquidity, evaluating the likelihood of executing against that midpoint liquidity if they were to route orders there, structuring their order execution practices accordingly, and documenting their policies and procedures for and compliance with the above. In contrast, the Proposal suggests that if a broker-dealer adopted this model, it would be inconsistent with Proposed Reg Best Ex.[158] Exchanges and ATSs can also charge fees and/or pay rebates or offer discounts, resulting in the equivalent of "conflicted transactions." But by imposing stringent rules (and their associated costs) on retail broker-dealers and off-exchange market makers but not other market participants, the SEC is creating an unequal playing field in favor of exchanges and ATSs.

The SEC also acknowledges that compliance costs will be higher for broker-dealers that choose not to "de-conflict" rather than broker-dealers that choose to eliminate PFOF

[158] The Proposing Release suggests that, under the Proposal, to the extent a wholesaler transacts with a customer order in a principal capacity, it must do so at the midpoint of the NBBO. If it does not want to internalize an order at the midpoint, it must send the order to an exchange for execution. Reg Best Ex Proposing Release, 88 Fed. Reg. at 5460 ("For customer orders that a wholesaler intends to execute at prices worse than the midpoint, its policies and procedures could provide for an assessment of whether those orders would best be executed with midpoint liquidity that may be available on an exchange, ATS, or other market. A wholesaler's policies and procedures would also need to address how it will consider other opportunities for price improvement, which could include liquidity available on exchanges or other markets priced between the best bid and offer. Finally, these policies and procedures would need to address how the wholesaler will assess order exposure opportunities for customer orders that may result in the most favorable price for those orders."). This is impractical for all orders and amounts to price setting.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

and/or other potential conflicts. This creates a two-tiered application of the rule based on the SEC's perception of which market participants are "good" vs. "bad" actors, rather than allowing market forces to drive competition.

In addition, the SEC contemplates that Proposed Reg Best Ex will "result in higher barriers to entry and potential exit of small broker-dealers," largely due to the high compliance costs of Rule 1101(b).[159] By contrast, the SEC believes that large, established broker-dealers will likely grow when smaller broker-dealers lose customers, either by absorbing customers or acquiring the broker-dealers that cannot afford to pay higher compliance costs or eliminate PFOF as a revenue source.[160] The SEC's express acknowledgement that its Proposal will have anticompetitive effects by causing market participants to leave the market is antithetical to its statutory mandate.

C. The Proposal Supplants Industry Expertise With Government Mandates That Are Overly Prescriptive And Uninformed With Respect To Non-Equity Products.

In addition to being bad policy that would result in worse—not "best"—execution for retail investors, the Proposal is inconsistent with the objective of best execution. Best execution traditionally has been a principles-based framework for good reason. It has allowed broker-dealers to use their expertise and judgment to assess the market and obtain best execution as products, markets, and technology evolve. Proposed Reg Best Ex would eliminate the flexibility that broker-dealers and their customers enjoy today, and install prescriptive requirements and a government-mandated checklist even where they are nonsensical, such as for digital asset securities. Such an approach is not only bad policy, but it could have harmful consequences for investors. Congress recognized long ago that government technocrats should not micromanage the markets and substitute their judgment for that of industry experts.[161]

1. Proposed Reg Best Execution Is Inconsistent With The Objective Of Best Execution Because It Would Substitute Government Checklists For The Discretion Of Industry Experts.

Although, as we described above, the SEC's proposed best execution standard is identical to FINRA's, and the categories of policies, procedures, and documentation required are approximately the same, Proposed Reg Best Ex differs from FINRA's existing best execution standard because it does not utilize a principles-based approach. Instead, it attempts to codify a one-size-fits-all "best ex checklist" that would substitute the judgment of government lawyers for industry experts. This "checklist" approach is

[159] *Id.* at 5523.

[160] *Id.* at 5539.

[161] *See supra* note 36 and accompanying text.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

unreasonably prescriptive and complex and does nothing to further best execution of customer orders. As Commissioner Peirce observed, in Proposed Reg Best Ex, the SEC is:

> [P]roposing to supplant brokers' judgment with our own step-by-step guide to achieving best execution. In the process, we are drawing sweeping conclusions about execution quality in equity markets, options markets, corporate bond markets, municipal markets, and crypto markets. Although I could have supported a principles-based Commission best execution rule proposal, I cannot support this proposal, which is unduly prescriptive and seems less concerned about whether customers actually get best execution than if brokers implement a checklist that the Commission itself is not confident will help brokers achieve even better—much less best—execution. … The proposed rule provides a handy checklist for SEC examiners and enforcement attorneys, but it does not foster brokers' exercise of judgment to achieve what is best for customers.[162]

As its complexity and length demonstrate, the Proposal attempts to address every nuance in the vastly complex financial markets, but no rule can do that. Rather, both market participants and regulators must be knowledgeable and nimble enough to assess the unique facts and circumstances presented by different markets as they evolve, and judge what is reasonable based on market expertise and technical knowledge. Excessive granularity in prescribing the specific steps a broker-dealer must take in order to comply with its best execution obligation effectively substitutes the judgment of the SEC Staff for the judgment of more knowledgeable industry professionals responsible for the broker-dealer's compliance with this highly technical rule.

As noted above, Proposed Rule 1101(a) would require broker-dealers to implement policies and procedures describing how they: (1) obtain and assess "reasonably accessible information" about the markets trading the relevant securities; (2) identify markets that may be reasonably likely to provide the most favorable prices for customer orders ("material potential liquidity sources"); and (3) incorporate material potential liquidity sources into its order handling practices, ensuring that the broker or dealer can efficiently access "each such" material potential liquidity source. Remarkably, broker-dealers already do all of this to satisfy their existing best execution obligations. Broker-dealers have developed extensive data networks and sophisticated analytical models to evaluate various markets, which are regularly assessed by the Firm and examined by FINRA. But under the new rule, will the documentation that broker-dealers create memorializing these processes be sufficient to meet the government's expectations? Will certain types of data be deemed by the government to be so important that failure to collect them or mention them in policies and procedures will violate the rule? Broker-dealers route to different market centers in a variety of ways, from applying for and becoming a member

[162] Comm'r Hester M. Peirce, SEC, *Is This the Best Execution We Can Get?* (Dec. 14, 2022), https://www.sec.gov/news/statement/peirce-best-execution-20221214.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

of an exchange to establishing contractual relationships and technical connections to other broker-dealers; but under the new rule, how many of those routes must a broker-dealer establish and document in order to meet the government's expectations?

While the Commission does not specify in the rule which data sources or material sources of liquidity a broker-dealer is required to consider, the Proposal makes it clear that the SEC intends to use Rule 1101 to enforce its own highly prescriptive and inflexible priorities on the industry and supplant the judgment of industry experts with the SEC's own judgment of the best market for a customer order. For example, when handling a retail order for a listed stock, the Proposing Release states that a broker-dealer utilizing the government "checklist" approach could prioritize midpoint pricing above all other factors that may be relevant:

> For a retail broker-dealer in NMS stocks, its policies and procedures for the best market determination could include assessments of any assurances from a wholesaler that certain orders routed by the retail broker-dealer to the wholesaler would be guaranteed midpoint executions by the wholesaler or otherwise exposed to opportunities for midpoint executions. If midpoint executions were not guaranteed by a wholesaler, a retail broker-dealer's policies and procedures could provide for assessments of whether customer orders would best be executed with midpoint liquidity that may be available on an exchange, ATS, or other market. Following an assessment of the opportunities for midpoint executions, a broker-dealer's policies and procedures could provide for an assessment of whether other price improvement opportunities might be available, such as from wholesalers, from resting liquidity between the best bid and offer on exchanges, through auctions, or otherwise.[163]

This government-mandated checklist approach would be inflexible and risks resulting in worse trade executions. For example, what if the checklist mandated that orders in NMS stocks were sent to an exchange providing midpoint liquidity (as the Proposing Release endorses), but the security was an illiquid security? What if the size of the order exceeded the size of the best bid or offer? In each of these cases, sending an order to an exchange that provides midpoint liquidity, as the checklist mandates, would be worse for the customer. But the static checklist wouldn't allow the broker-dealer to deviate from the

---

[163] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5460; *see also id.* at 5445 ("Retail broker-dealers often do not route customer orders to execute against midpoint liquidity that may be present on other markets prior to routing for execution by wholesalers. While a retail broker-dealer's decision to route orders to a wholesaler that provides price improvement may indeed be consistent with its duty of best execution in many cases, the Commission believes that customers would benefit from robust considerations by retail broker-dealers regarding, for example, the possibility of available liquidity priced at the midpoint of the NBBO at other markets.").

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

mandated list. What if exchange fees (which could be passed on to the customer[164]) exceeded any theoretical price improvement the customer could receive by routing to a venue with midpoint liquidity? What does it mean to have midpoint liquidity "available" when it is not displayed and can be programmed (for certain order types on certain market centers) to fade under certain conditions? Would a broker-dealer satisfy Proposed Reg Best Ex if it routed to a market maker, exchange, or ATS that sought to execute orders at midpoint, but only did so 90% of the time, 80% of the time, or 50% of the time, or less? All of the orders that are not filled at the midpoint must then be re-routed for execution at another exchange, market maker or ATS, or sent to an auction. In such cases the midpoint execution requirement of Proposed Reg Best Ex could result in retail investor orders being daisy chained to venues seeking midpoint execution, but experiencing slippage as they go unfilled. Again, the customer would be worse off because the static checklist would not allow the broker-dealer to use its discretion to adjust order handling to execute the customer's order in the best market, based on current market conditions.[165]

The inflexible "checklist" approach of the Proposal also fails to account for the fact that there may be different best execution approaches depending on the day, the time of week, or the current market conditions. A broker-dealer may seek best execution of orders differently at the open, during the continuous trading session, and at the close. It may seek best execution differently if there is an expected market-wide event that day, like an index rebalance or an options expiration date. Security-specific events like stock splits or offerings may impact best execution. Unexpected market-wide conditions like high volumes of activity and volatility may impact best execution. Does a broker-dealer need to have written policies and procedures documenting in detail how it will approach each of these situations? For both conflicted and non-conflicted transactions? And will it be held to those policies and procedures even when there are extenuating circumstances? It is impossible and impractical to create a "checklist" that envisions every possible scenario and, yet, that is precisely what the SEC appears to be forcing broker-dealers to do.

The risk that industry participants will not be able to keep track of or meet specific SEC staff priorities related to best execution is compounded by other elements of the rule. For example, Proposed Rule 1101(c) states that a broker-dealer would be obligated to

[164] We recognize these types of fees are not frequently passed onto customers in the current market structure, but the four Proposals create substantial uncertainty regarding whether and how current practices may change.

[165] Similar to the midpoint liquidity evaluation described above, the Proposing Release indicates that best execution policies and procedures should also include, inter alia: (i) the level of competition for individual orders within a given market, Reg Best Ex Proposing Release, 88 Fed. Reg. at 5456; and (ii) proprietary data feeds, quarterly Rule 606 order routing reports, and consolidated trade and quotation data, *id.* at 5457.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

"revise its best execution policies and procedures, including its order handling practices, accordingly" after it has conducted its comparative execution quality analysis.[166] But Proposed Rule 1101(c) does not state how frequently policies and procedures need to be updated. If a broker-dealer evaluates its execution quality on a monthly basis, does it need to update its policies and procedures on a monthly basis? What if the broker-dealer believes a monthly lapse by a market center is an anomalous, one-time issue, but the SEC disagrees and believes the broker-dealer should have updated its policies and procedures to avoid that market center until there was evidence the issue was resolved? The Proposal does not answer these important questions, which makes it even more difficult for market participants to fully understand its true costs. This is an unreasonable position to put broker-dealers in, and will subject them to inconsistent examination and enforcement efforts.

2. *Proposed Reg Best Ex Is Nonsensical For Crypto Assets.*

The prescriptive and onerous standards of Proposed Rule 1101 are particularly problematic when applied to digital assets, where the proposed rule's application makes no sense. First, it is unclear which crypto assets are "securities" and would be subject to the Proposal. There is little regulatory clarity regarding the treatment of digital assets as securities. Although Chair Gensler repeatedly has claimed that nearly every digital asset (with the potential exception of Bitcoin) is a security,[167] officials from other financial markets regulators, such as the Commodity Futures Trading Commission, and even former Commission officials, hold conflicting views.[168] Without a modern and workable framework to assess digital assets, market participants have been left to divine answers from enforcement actions, a single piece of limited SEC staff guidance, and arcane court

---

[166] *Id.* at 5472.

[167] *See, e.g.*, Chair Gary Gensler, SEC, Speech, Kennedy and Crypto (Sept. 8, 2022), https://www.sec.gov/news/speech/gensler-sec-speaks-090822 ("Without prejudging any one token, most crypto tokens are investment contracts under the Howey Test."); *SEC Chair Gary Gensler Discusses Potential Crypto Regulation And Stablecoins*, CNBC (June 27, 2022), https://www.cnbc.com/video/2022/06/27/sec-chair-gary-gensler-discusses-potential-crypto-regulation-and-stablecoins.html.

[168] *See, e.g.*, Press Release No. 8051-19, CFTC, In Case You Missed It: Chairman Tarbert Comments on Cryptocurrency Regulation at Yahoo! Finance All Markets Summit (Oct. 10, 2019), https://www.cftc.gov/PressRoom/PressReleases/8051-19 (expressing the view that Ether is a commodity, not a security); William Hinman, Director, Div. of Corp. Fin., SEC, Speech, Digital Asset Transactions: When Howey Met Gary (Plastic) (June 14, 2018), https://www.sec.gov/news/speech/speech-hinman-061418 ("based on my understanding of the present state of Ether, the Ethereum network and its decentralized structure, current offers and sales of Ether are not securities transactions").

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

opinions about investments in orange groves nearly a century ago.[169] Even in the Proposing Release, the SEC remains either unsure or intentionally vague as to whether the securities laws apply to many crypto assets, stating that "significant trading activity in crypto asset securities … *may* be occurring in non-compliance with the Federal securities laws."[170] Because crypto market participants are left without meaningful regulatory guidance to determine which digital assets are securities, they are left equally unsure as to which assets Proposed Reg Best Ex would apply.

The problems with applying Proposed Reg Best Ex to digital assets do not stop there. Aside from the definitional questions inherent in the Commission's approach to digital assets under Proposed Reg Best Ex, the Commission also has an information problem. Namely, "the Commission has limited information about the order handling and best execution practices of broker-dealers that engage in transactions for or with customers in crypto asset securities."[171] Yet, here, the Commission would seek to impose the same requirements on all financial products that it deems to be securities, notwithstanding any differences in the markets or order handling procedures for those assets. For example, there currently is no consolidated market data feed for crypto, and therefore there is no NBBO or similar metric to obtain a view of the entire market. To the extent certain digital assets are securities, the FINRA best execution standard is flexible enough to permit broker-dealers to meet that standard based on what information *is* reasonably available.[172] The SEC Proposal would not be. Moreover, there are other factors impacting order handling unrelated to price that could have outsized importance when compared to the traditional securities market. For example, certainty of execution and speed could be more important than price given the price volatility of many crypto assets. But the Proposal does not recognize these differences in how the crypto markets operate.

D. The SEC Has Failed To Conduct A Proper Economic Analysis.

The SEC states that Proposed Reg Best Ex is being proposed pursuant to Exchange Act Section 11A(a)(1)(C)(iv), which states, "It is in the public interest and appropriate for the protection of investors and the maintenance of the fair and orderly markets to assure … (iv) the practicability of brokers executing investors' orders in the best market."[173] As described above in Section I.C, Section 11A(a)(1)(C)(iv) is not a grant of rulemaking

---

[169] *See* Div. of Corp. Fin., *Framework for 'Investment Contract' Analysis of Digital Assets*, SEC, https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets (Mar. 8, 2023); *see also SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

[170] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5448.

[171] *Id.*

[172] Robinhood takes a number of steps to ensure our customers receive high quality trade executions with respect to digital assets.

[173] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5449.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

authority. In any event, the SEC has failed to conduct a serious economic analysis to prove that the Proposal will, in fact, have this desired effect and will not unduly burden market participants and investors. To this end, the SEC: (1) has not put forth any evidence supporting a claim that investors' orders will be better off with Proposed Reg Best Ex in place; (2) dramatically underestimates the costs of compliance with Proposed Reg Best Ex; and (3) neglects to consider the impact of the MDI Rules on the purported benefits and costs of Proposed Reg Best Ex, and does not consider the interaction of Proposed Reg Best Ex with the other, simultaneously issued rule proposals.

1. The SEC Fails To Quantify Any Legitimate Benefit Or Provide A Reasonable Basis For Believing There Will Be A Benefit To Investors If Proposed Reg Best Ex Is Adopted.

The SEC has not quantified any purported benefit to Proposed Reg Best Ex. Instead, it describes—qualitatively, speculatively, and conditionally—that Proposed Reg Best Ex:

- *could* promote investor protection by facilitating regulatory oversight and enforcement;[174]
- would improve retail investor order execution quality, *but only if* the proposal improves broker-dealers' order handling practices;[175] and
- *could* improve execution prices for retail investor orders *if* retail broker-dealers receive less PFOF and *if* that translates into an increase in price improvement.[176]

The SEC further acknowledges that any theoretical benefits "may be small."[177] In support of the above qualitative description of potential benefits, the SEC offers no quantitative data demonstrating that the changes contemplated by the Proposal—enhanced procedures and documentation—would actually help accomplish its purported goals.

The Commission claims that it cannot determine whether these hypothetical benefits will actually occur, much less the extent of any such benefit, because it "lacks detailed data on broker-dealers' current order handling practices and documentation practices that would allow it to predict the extent of changes as a result of this proposal."[178] Specifically, the SEC states it lacks (1) data regarding whether and to what extent broker-dealers

[174] *Id.* at 5523.

[175] *Id.*

[176] *Id.* at 5525.

[177] *Id.*

[178] *Id.* at 5523; *see also id.* at 5523 n.535 ("Commission lacks quantifiable data that summarizes how order handling data are currently documented ….").

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

already document order handling for non-NMS securities asset classes; (2) visibility into what information broker-dealers evaluate in making routing decisions; and (3) how specific customer and order characteristics affect order handling.[179] The SEC believes that at least some broker-dealers already document this information,[180] in which case there would be minimal, if any, benefits to implementing Proposed Reg Best Ex.

The SEC's admission that it has not conducted the required economic analysis to satisfy its basic rulemaking obligation renders the Proposal presumptively invalid as a statutory matter. Moreover, the SEC's claim that it cannot meet its basic rulemaking obligation because it "lacks the information necessary" is not credible. The Commission has the authority and ability to collect from SEC-registered broker-dealers the information it says it lacks—it simply hasn't made the effort to do so before rushing to propose this suite of rules. For example, FINRA examines all broker-dealers' compliance with best execution on a regular basis; the SEC could have asked FINRA to gather and share information regarding how broker-dealers document their best execution policies, procedures, and compliance. Additionally, the SEC has the ability itself to conduct targeted, thematic examinations apart from the regular periodic exams, and could have used such examinations to collect the relevant information. SEC Staff also could have solicited industry feedback through one of its advisory committees (e.g., Fixed Income Market Structure Advisory Committee) or through other mechanisms. There is no justification for rushing to release a proposal without attempting to collect the minimum amount of data that might support it. The SEC has also suggested that—even if it could obtain the requisite data—the diversity of broker-dealer practices would make this information difficult to review. Again, this is not a credible claim. The SEC does not know how difficult it is to review the data *until* it obtains the data. And "difficulty" should not be a reason for not fulfilling its basic rulemaking mandate.

In short, the SEC's lack of information and incomplete understanding about the practices it proposes to regulate does not excuse a deficient analysis—it obligates the Commission to take the time to gather information from broker-dealers regarding order handling practices and related documentation in connection with fulfilling their best execution obligations. Because—as the SEC believes—broker-dealers document this information with various degrees of detail, reviewing this information should allow the SEC to evaluate whether its theory of potential benefits makes sense. For example, it could evaluate: (1) whether broker-dealers with more detailed documentation regarding best execution are more likely to modify their order handling practices in accordance with their analyses; (2) whether broker-dealers with more rigorous processes around transactions for which they receive rebates or pay or receive PFOF result in better price improvement for customer orders; and (3) the extent to which enhanced documentation improves examination and

---

[179] *Id.* at 5523 n.535.

[180] *Id.* at 5534.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

enforcement efforts, as the SEC asserts.[181] The SEC's failure to gather the minimum required information for its economic analysis suggests that the Proposal is being rushed for purely political reasons, not valid policy reasons. We believe that if the SEC took the time to collect this information, it would learn about industry practices that challenge the purported bases for Proposed Reg Best Ex. For example, the SEC is concerned about "conflicted transactions" where PFOF is paid or received purportedly because it can be viewed as an inducement to select one venue over another. However, we understand that most retail broker-dealers that receive PFOF receive the same amount from all market makers to which they route, which means that PFOF is not influencing their routing decisions.

The scant data that the SEC does provide does not at all relate to whether Proposed Reg Best Ex will actually improve executions for retail investors. Rather, the SEC's economic analysis focuses on PFOF and internalization by wholesalers. In its discussion of the "baseline" state in its economic analysis, the SEC includes sixteen tables of data regarding NMS stocks and options trading and execution quality. Fourteen of those tables concern wholesaler activity, PFOF rates, and/or routing practices by broker-dealers that accept PFOF.[182] In other words, the SEC expends all of its energy in the economic analysis trying to prove that PFOF and internalization are "bad" (even though, as described above, the data actually shows that internalization provides better execution quality than on-exchange executions, even when PFOF is present).[183] Indeed, the SEC relied on essentially the same NMS stock-specific tables in its OCR Proposal, where the SEC used the data to argue that retail orders should be redirected from market makers to qualified auctions.[184]

For example, the SEC provides at Table 8 an analysis for a single month (March 2022) concluding that approximately 37% of shares of retail orders that month were internalized by wholesalers when there were orders at a better midpoint price displayed in the market.[185] But this statistic is meaningless in a vacuum. It does not tell us if there

---

[181] *Id.* at 5523 (referencing regulatory oversight and enforcement benefits); *id.* at 5525 ("the proposed documentation requirement would … facilitate enforcement and examination").

[182] Referring to Tables 1 through 8, 10, and 12-16. The remaining two are about which exchange groups own which options exchanges and how certain order execution occurs on options exchanges.

[183] *See supra* note 65.

[184] Tables 1 through 5 of Proposed Reg Best Ex are equivalent to tables 1 through 5 of the Proposed OCR. Proposed Reg Best Ex table 6 is equivalent to Proposed OCR table 7. Proposed Reg Best Ex table 7 is equivalent to Proposed OCR table 10. Proposed Reg Best Ex table 8 is equivalent to Proposed OCR table 20. Proposed Reg Best Ex table 15 is equivalent to Proposed OCR table 14. Proposed Reg Best Ex table 16 is equivalent to Proposed OCR table 15. Proposed Reg Best Ex tables 9-14 and 17-23 are not NMS stock-specific.

[185] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5502-03.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

was enough midpoint liquidity to be reasonably available, or if the midpoint liquidity was reasonably available with no additional cost to access that liquidity.[186] It also does not tell us whether the markets were volatile for the narrow sample size—if they were, the statistic is even less meaningful. In fact, the month sampled was one of the higher volatility months in 2022, which means any displayed midpoint liquidity could be fleeting and unattainable.[187] The SEC's analysis also ignores the impact that actual attempts to access the displayed midpoint liquidity might have on the market. As the SEC acknowledges, executing orders off-exchange results in less market impact than executing on-exchange. This increased market impact may have moved the midpoint in a direction unfavorable to customer orders, and it might have affected the quantity of shares subsequently pegged to the midpoint; the SEC's analysis fails to assess these considerations. The analysis also ignores whether or the extent to which the existing best execution rules might already address how these orders were executed. And, finally and most notably, the analysis fails to articulate how Proposed Reg Best Ex would actually result in better executions for customers for the sampled month or any month.

2. The SEC's Economic Analysis Significantly Underestimates The Costs Of Compliance With Proposed Reg Best Ex.

The SEC estimates the overall cost of compliance with Proposed Reg Best Ex will be $165.4 million for initial implementation, and $128.9 million annually thereafter.[188] While this is a very large number—and hard to justify given the fact that there are already best execution standards in place—it still materially underestimates the costs of compliance for the following reasons.

<u>First</u>, the SEC minimizes how difficult it is for retail broker-dealers to add a new routing destination to a broker-dealer's routing table (e.g., new market maker, exchange, ATS). The Proposal states that if a broker-dealer's regular review demonstrates execution quality issues, the broker-dealer should consider switching to alternate routing destinations. It estimates "switching" costs at $9,000 per "switch," based on how much the Commission thinks it costs to reprogram a smart order router ("SOR").[189] It estimates that each of the 225 broker-dealers that chooses not to "de-conflict" would make no

---

[186] *Id.* at 5503 n.430 ("does not account for any other differences in costs of executing the order at different venues, such as differences in PFOF or access fees and rebates").

[187] Katie Kolchin, *February Market Metrics and Trends, A Look at Monthly Volatility and Equity and Listed Options Volumes*, SIFMA Insights, Mar. 2023, https://www.sifma.org/resources/research/insights-market-metrics-and-trends/ (higher volatility in only 4 months).

[188] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5529.

[189] *Id.* at 5531 n.581.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

more than one switch per year, for a total estimated annual cost of no more than $2 million.[190] This is an underestimation for two primary reasons.

The SEC's estimate does not consider what a broker-dealer actually does when switching to a market center to which they are not currently connected. That is not a simple "reprogramming" of the SOR. This requires a commitment of all the fees and costs associated with establishing and maintaining a legal, contractual relationship with a market center, and building and testing a technological connection. This costs substantially more than $9,000. The SEC's analysis neglects to consider the cost of the extensive work—over several months—by engineers, programmers, compliance personnel, and attorneys to establish the pathway to trade on a new venue. Although the Proposing Release acknowledges that establishing a direct connection to an exchange is expensive, it states that routing to an executing broker instead of directly to the market center may be inconsistent with best execution obligations if it results in unnecessary transaction costs at the expense of the customer.[191] So broker-dealers will be faced with a choice between incurring the extensive costs of direct market connections, or subjecting themselves to regulatory risk if the SEC second-guesses their decision to use cost-saving intermediaries that offer market connections.

The SEC's estimate also does not realistically consider how many of these changes broker-dealers may be required to make. The allegation in the Proposal that broker-dealers will only need to make one "switch" per year lacks any basis in fact. Broker-dealers are required to conduct quarterly best execution analyses. There are at least dozens of venues where orders for each covered asset class could be executed, and "conflicted" broker-dealers will need to look at even venues that are not "material" sources. And, broker-dealers cannot simply rely on Rule 605 data to make decisions on where to route since how a market center performs can be highly specific to the type of order flow that is sent to it. That is, in many cases, broker-dealers will need to establish connections to market centers and actually route orders to them to evaluate whether they provide best execution for its customer orders. The SEC would also expect broker-dealers to continually search for midpoint liquidity. The likely result is penalizing broker-dealers who do not switch routing destinations often enough to capture this liquidity. The SEC must revise its analysis using reasonable, fact-based estimates of the costs and frequency of switches broker-dealers would be required to make in order to meet the SEC's expectations.

Many of these connection and/or switching costs may not even be revealed until years after the implementation of Proposed Reg Best Ex, as the SEC conducts examinations and

---

[190] *Id.* at 5531-32.

[191] *Id.* at 5458.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

investigations and issues guidance and/or brings cases that shed light on the agency's expectations regarding compliance.

Second, the Commission's cost analysis is insufficient because it does not adequately take into account the personnel who will be involved in the order handling discussions and decision-making required by Proposed Reg Best Ex. The Commission's estimation of costs focuses on legal and compliance personnel who will be involved. But it doesn't take into account *any* business personnel, other than an "operational specialist" whose time is worth $159/hour.[192] But evaluating whether orders received best execution, deciding what market centers to connect to, and negotiating and implementing those connections are topics that require significant business experience and expertise. Currently, best execution committees generally include relatively senior business personnel, including those that oversee customer order flow and those that oversee the technology needed for order routing, like algorithms and SORs. The SEC's cost estimates ignore the cost of such senior level involvement. Proposed Reg Best Ex also requires, in Rule 1102, an annual review of best execution practices that is presented to the Board of Directors of the broker-dealer. The SEC does not estimate the time needed to prepare for this presentation to the Board of Directors or the time and costs associated with Board of Director review.

Third, the SEC's analysis makes assumptions for which there is no reasonable basis. For example, the SEC assumes that over 2,000 broker-dealers will "de-conflict,"[193] resulting in lower compliance costs for those broker-dealers than for broker-dealers who need to comply with the heightened requirements of Rule 1101(b). But the SEC has identified no basis for this speculation.

Fourth, the cost analysis performed by the SEC also ignores taxpayer costs associated with the SEC conducting examinations and enforcement efforts related to compliance with Proposed Reg Best Ex, which could be substantial, and, as described above, would be duplicative of FINRA efforts, which are already paid for by member broker-dealers and their customers.

The fact that the Commission failed to incorporate the above costs into its compliance estimates is particularly egregious because it has acknowledged that Proposed Reg Best Ex's implementation and transaction costs "would ultimately be borne by customers."[194] The Commission must reassess the costs that Proposed Reg Best Ex would impose on the market to include those described above. It should then assess the extent to which those costs will be passed along to customers. And it then needs to compare the additional

---

[192] *Id.* at 5531 tbl.23.

[193] *See supra* note 146.

[194] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5529.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

costs to customers against the estimated benefits to customers (which the SEC also needs to quantify). Only then can the SEC present a reasonable economic analysis in support of this Proposal.

3. *The SEC Failed To Consider That Proposed Reg Best Ex Conflicts With The Other Proposed Rules Or That Other Pending Or Proposed Rules Obviate The Need For This Proposal.*

As we described above in Section I, the SEC has simultaneously issued four extensive market structure-related proposals, but has completely failed to consider the ways in which the rules will interact with each other and with already pending market structure initiatives like the MDI Rules.

First, the four market structure rule proposals conflict with each other in ways that the SEC does not contemplate or analyze in their proposing releases. In particular, Proposed Reg Best Ex and the Proposed OCR are fundamentally at odds with each other. Proposed Reg Best Ex addresses how broker-dealers handle retail investor orders when there are multiple options for execution such as routing to market makers, exchange limit order books, specialized exchange programs (e.g., retail liquidity programs), or ATSs. The Proposed OCR would eliminate all that choice for the majority of retail orders by mandating that qualifying orders in NMS stocks be sent to the newly proposed qualified auctions. Proposed Reg Best Ex does not contemplate how broker-dealers would seek best execution for orders sent to qualified auctions. Since a broker-dealer's discretion with respect to how to handle segmented orders would be heavily circumscribed by the OCR Rule, would those orders be exempt from Reg Best Ex or at least exempt from the definition of conflicted transactions? If not exempt, could a broker-dealer at least assume that all qualified auctions—which must be structured according to specific SEC guidelines regarding priority, allocation, pricing, and fees—are equally optimal destinations for segmented orders? Or will the broker-dealer need to evaluate which qualified auction is most likely to have the best prices and, if so, how should it conduct that evaluation? All of these questions will have an impact on compliance and cost of compliance, and none are taken into account in Proposed Reg Best Ex, including its economic analysis.

Some specific elements of Proposed Reg Best Ex, in particular, highlight the folly of ignoring how Proposed Reg Best Ex will be impacted by the other proposed rules. For example, the Proposal suggests that broker-dealers consider exchange retail liquidity programs as potential mechanisms for handling retail investor orders.[195] But exchange

---

[195] *Id.* at 5457 ("It could also include trading protocols and auction mechanisms operated by these entities, including those that may provide price improvement opportunities, such as exchange limit order books, retail liquidity programs, midpoint liquidity, and wholesaler price improvement guarantees."); *id.* at 5535 ("Under the proposal, broker-dealers would need to consider a wider range of trading venues and programs (such as retail liquidity programs) before routing customer orders.").

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

retail liquidity programs are not an option under the Proposed OCR.[196] It cannot be the case that the SEC thinks both that retail liquidity programs are legitimate avenues of price improvement for customer orders (Proposed Reg Best Ex) and that they are not meaningful enough to preserve (Proposed OCR). Similarly, Proposed Reg Best Ex explains that one of the reasons why Rule 1101(b) regarding conflicted transactions need only apply to retail orders and not institutional orders is that institutional customers have better access to information regarding the execution quality of their orders.[197] But Proposed Rule 605 would greatly increase the amount of information regarding execution quality for NMS stocks that is available to retail investors. The SEC does not mention this increased retail data access in Proposed Reg Best Ex and does not consider whether it would lessen the need for a heightened analysis for "conflicted transactions" for retail orders in the same way that it eliminates that need for institutional orders.

Second, while the SEC acknowledges that the MDI Rules will impact the economic analysis for Proposed Reg Best Ex,[198] it states that until the MDI Rules are implemented, the SEC cannot conduct a comprehensive quantitative analysis of the economic effects on NMS stocks of the MDI Rules.[199] However, the MDI Rules are expected to impact the NMS stock markets in ways that would materially affect the need for and compliance with Proposed Reg Best Ex. For example, including odd lot quotes in consolidated market data is expected to shift the competitive standing among different trading venues because, for example, different market centers might have the best odd lot and round lot quotes.[200] Similarly, including odd lots is expected to impact execution quality analyses by increasing the frequency with which marketable orders must "walk the book" to execute in full.[201] As another example, much of Proposed Reg Best Ex focuses on analyzing availability of midpoint liquidity for retail investor orders. However, the SEC expects that the implementation of the MDI Rules will impact midpoint liquidity by: shifting midpoints higher or lower due to odd-lot imbalances in certain stocks;[202] narrowing spreads;[203] and changing how exchange and ATS order types based on the NBBO perform and interact with other orders.[204] The Tick Size Proposal is also expected to impact midpoints and market participants' desire to trade at the midpoint. These potential impacts on

---

[196] OCR Proposing Release, 88 Fed. Reg. at 164.

[197] Reg Best Ex Proposing Release, 88 Fed. Reg. at 5525.

[198] *Id.* at 5491.

[199] *Id.* at 5523.

[200] *Id.* at 5491-92.

[201] *Id.* at 5491.

[202] *Id*.

[203] *Id.* at 5491-92.

[204] *Id.* at 5492.

DocuSign Envelope ID: 20EA38C6-DD2E-4CBC-9356-1565909977BE

Proposed Reg Best Ex are significant. If the SEC currently lacks the information it needs to ascertain how this costly new Proposal will interact with requirements it has already adopted or may adopt in advance of this rule, then it must wait until the MDI Rules are implemented and it has taken appropriate action with respect to tick sizes, and then reconsider its economic analysis before deciding whether or not an SEC best execution rule is necessary.

Third, the SEC has several pending or proposed rules that are designed to address the same issues as Proposed Reg Best Ex—whether retail orders are being exposed to sufficient venue and order-by-order competition, and whether they are obtaining optimal price improvement[205]—that are significantly less onerous on market participants than Proposed Reg Best Ex. As discussed in Section I, the SEC should implement the MDI Rules, amendments to Proposed Rule 605, and sensible tick size reform that would allow for half-cent pricing increments and analyze their impact on these goals. The SEC should withdraw Proposed Reg Best Ex until those changes are accomplished and it completes a new, proper economic analysis, which incorporates up-to-date information and data, to determine whether changes to the current best execution framework are actually required.

* * *

Robinhood appreciates the opportunity to comment on Proposed Reg Best Ex. Providing our customers with high quality trade executions is one of our most important roles. But Proposed Reg Best Ex will not further that goal. Proposed Reg Best Ex will create regulatory redundancy and inefficiencies. Its prescriptive approach to best execution would unnecessarily and unhelpfully curtail broker-dealers' ability to exercise their expert judgment in determining the best markets in which to execute customers' orders. Proposed Reg Best Ex lacks any reasonable economic analysis supporting the need for the rule and severely underestimates compliance and transaction costs associated with the Proposal. Accordingly, Proposed Reg Best Ex should be withdrawn. Instead, the MDI Rules, amendments to Rule 605 (or Rule 606), and our modified tick size recommendation should be implemented and allowed to take effect before any more drastic, onerous rules—namely, Proposed Reg Best Ex and the Proposed OCR—are reevaluated.

---

[205] *Id.* at 5524-25.

Please contact Robinhood's Deputy General Counsel, Lucas Moskowitz, at lucas.moskowitz@robinhood.com if you have any questions.

Sincerely,

DocuSigned by:
Steve Quirk
C15454D9007244A...

Steve Quirk
Chief Brokerage Officer
Robinhood Markets

Appendix A

Proposed Rule 1101	Existing FINRA Rule 5310
Information with respect to the best displayed prices	The character of the market for the security, including price
Opportunities for price improvement, including midpoint executions	Price improvement opportunities
Order exposure opportunities that may result in the most favorable price	Whether any material differences in execution quality exist among the markets trading; the quality of executions the member is obtaining via current order routing and execution arrangements relative to the quality of the executions that the member could obtain from competing markets
Attributes of customer orders / customer instructions	Terms and conditions of the order which result in the transaction, as communicated to the member and persons associated with the member; customer needs and expectations
Trading characteristics of the security	The character of the market for the security
Size of the order	Size and type of transaction
Likelihood of execution	Likelihood of execution of limit orders
Accessibility of the market	Accessibility of the quotation
Likelihood of obtaining better prices balanced against risk that delay could result in a worse price	Differences in price disimprovement
All efforts to enforce its best execution policies and procedures for conflicted transactions and the basis and information relied on for its determinations that such conflicted transactions would comply with the best execution standard	Transaction costs; the existence and internalization of payment for order flow arrangements