ICAN
If ICAN, You Can

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

Re: Equity Market Structure Proposals (File Numbers S7-29-22, S7-30-22, S7-31-22, and S7-32-22)

March 31, 2023

Dear Ms. Countryman:

Investor Choice Advocates Network ("ICAN") is pleased to submit this response to the Securities and Exchange Commission ("Commission" or "SEC") on its recent equity market structure proposals (the "Proposals").[1] ICAN recommends withdrawing the Proposals.

<u>The Proposals Fail to Adequately Consider Harm to Investors</u>

In a recent interview, SEC Chair Gary Gensler said of debate among investment firms, brokerages, exchanges, and other market participants about the Proposals, "Weigh in, give us your best advice. But our client is different, our client is the American public. And Congress has laid out in very specific ways that we have to focus on competition and we have to focus on efficiency to help investors and help issuers."[2] The Chair's comments suggest that the Commission welcomes, in particular, input relating to the Proposals' impact on retail investors. ICAN collected a number of views on that topic, including commissioning a survey of retail investors, and interviewing retail traders, and policy and finance experts. This comment letter should be read in connection with ICAN's video collection of some of those interviews.[3]

The message from all of these sources is clear: the Commission's analysis is inadequate, and the Proposals – either by design or as a result of a failure to sufficiently analyze the Proposals' adverse impact on the choices currently enjoyed by retail traders – will harm the very investors the Proposals purport to want to protect.

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[1] Exchange Act Release No. 96496, 88 FR 5440 (Jan. 27, 2023) ("Regulation Best Execution"); Exchange Act Release No. 96495, 88 FR 128 (Jan. 3, 2023) ("Order Competition Rule"); Exchange Act Release No. 96494, 87 FR 80266 (Dec. 29, 2022) ("Minimum Pricing Increments"); Exchange Act Release No. 96493, 88 FR 3786 (Jan. 20, 2023) ("Order Execution Information").
[2] Lydia Beyoud and Katherine Doherty, SEC Chief is Open to Trading-Revamp Tweaks Amid Criticism, Bloomberg (March 2, 2023).
[3] https://www.youtube.com/watch?v=j0nCS7mCFK4&t=1s

The Proposals' Analysis Is Woefully Inadequate For Investors To Evaluate Adverse Impacts

The Proposals themselves create serious concerns about the possible negative impacts they could have on retail investors. As an initial matter, and as observed by other commenters, "the Commission has provided almost no analysis as to how the Proposals relate to, or would operate with, each other and the anticipated cumulative effects if more than one Proposal is adopted."[4] For this reason alone, the Commission should withdraw the Proposals until further analysis of the *cumulative impacts* is available.

But even if the Commission had adequately explained the cumulative effect of adopting all of the Proposals, which it has not, the analysis regarding each individual proposal is wholly insufficient for investors to evaluate their impact. For example, in the section of the proposed Order Competition Rule addressing economic effects, the proposal relies on unpublished working papers[5] and academic work that is decades old.[6] As a result, the SEC is unable to reach any firm conclusions about the economic impacts the rule would have, acknowledging "considerable uncertainty in the costs and benefits of this rule because the Commission cannot predict how different market participants would adjust their practices in response to this rule."[7] Similarly, the SEC states, "[i]t is unknown whether the current industry practice of routing nearly all retail order flow to wholesalers would persist were the Commission to adopt this rule, because wholesalers might charge for this service and retail brokers might find it more profitable to develop their own routing services."[8] If the Commission cannot describe the probable impacts of its own Proposals, the Commission should not expect investors to endorse the Proposals.

One adverse impact the Commission's analysis fails to discuss sufficiently is to the substantial benefits and many choices currently enjoyed by investors that the Proposals appear designed to eliminate. As another commenter observed:

> The private markets have been improving the equity trading system and lowering costs for retail investors for many years. They would likely continue to do so absent government interference. History shows that, if the current regulatory structure remained in place, private parties would

[4] SIFMA Comment Letter (February 8, 2023), https://www.sec.gov/comments/s7-31-22/s73122-20156863-325026.pdf.

[5] See, e.g., p. 187, n. 366, citing results in Thomas Ernst & Chester Spatt, Payment for Order Flow and Asset Choice (last revised Mar. 13, 2022) (unpublished manuscript), available at https://ssrn.com/abstract=4056512 (retrieved from SSRN Elsevier database); See p. 208, n. 417, citing Robert H. Battalio, Brian C. Hatch & Mehmet Saglam, The Cost of Exposing Large Institutional Orders to Electronic Liquidity Providers (last revised Nov. 7, 2022) (unpublished manuscript), available at https://ssrn.com/abstract=3281324 (retrieved from Elsevier database).

[6] See, e.g., p. 207, n.414 citing Lawrence R. Glosten & Paul R. Milgrom, Bid, Ask, and Transaction Prices in a Specialist Market With Heterogeneously Informed Traders, 14 J. Fin. Econ. 71 (1985); p. 189, n.370, citing Maureen O'Hara & Mao Ye, Is Market Fragmentation Harming Market Quality?, 100 J. Fin. 459 (2011); p. 215, n.433 citing Roger Huang & Hans Stoll, Dealer versus auction markets: A paired comparison of execution costs on NASDAQ and the NYSE, 41 J. Fin. Econ. 313 (1996) and Hank Bessembinder & Herbert Kaufman, A cross-exchange comparison of execution costs and information flow for NYSE-listed stocks, 46 J. Fin. Econ. 293 (1997).

[7] Proposed Rule 615, p. 253.

[8] *Id*. at 254.

> pursue ways to attract new retail customers with even lower transaction costs and eat further into the competitive shortfall discussed in the SEC Proposal.[9]

Because the Proposals fail sufficiently to analyze possible adverse impacts on the choices currently available to investors, the Commission should withdraw the Proposals.

The Proposals Ignore Investor Preferences

To assess the views of actual investors concerning the impact of the Proposals, in early February 2023, ICAN commissioned an informal survey of retail traders regarding the Regulation Best Execution proposal.

Of the 163 responding investors, fewer than 5% thought the proposal would positively impact their investments, while 33% thought the proposal would negatively impact their investments because of additional costs and complexities, and nearly 60% of responding retail investors said, "It should be up to me, rather than the SEC, to decide whether to prioritize price and speed over all other factors when executing a trade."

Because Regulation Best Execution imposes additional regulatory burdens on brokers executing a "conflicted transaction," which includes any transaction for which a broker receives payment for order flow, the proposal creates a regulatory incentive to avoid payment for order flow rather than simply requiring disclosure of the receipt of payment for order flow. The overwhelming majority of the retail traders responding to the survey properly understood that Regulation Best Execution, while proposed by the Commission in the name of investor protection, may result in greater costs and reduced choices for investors.

In a recent speech, SEC Chair Gensler said, "For the last 90 years, our capital markets have relied on a basic bargain. Investors get to decide which risks to take, as long as companies provide full, fair, and truthful disclosures. Congress tasked the SEC with overseeing this bargain. We do so through a disclosure-based regime, not a merit-based one."[10] The survey results above suggest that the Proposals would break this bargain and put the Commission's apparent distaste for fully-disclosed, commission-free trading resulting from payment for order flow above investors' ability to decide which risks to take.

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[9] Andrew N. Vollmer, Mercatus Center at George Mason University, Comment Letter, "Adopting the Proposed Order Competition Rule Would Degrade Equity Markets For Retail Traders" (February 27, 2023), https://www.sec.gov/comments/s7-31-22/s73122-20158161-326279.pdf.

[10] Gensler, Gary, Chair, U.S. Securities and Exchange Commission, *Testimony Before the United States Senate Committee on Banking, Housing, and Urban Affairs* (September 15, 2022).

March 31, 2023

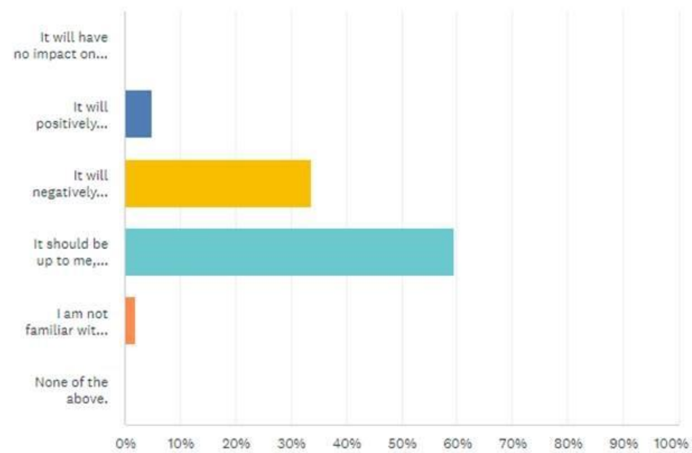
Investor Choice Advocates Network (https://www.icanlaw.org/) Survey

QUESTION SUMMARIES DATA TRENDS INDIVIDUAL RESPONSES

Q1

How do you feel the SEC's proposed best execution rule impacts your investments? (Please read information on the rule above)

Answered: 163 Skipped: 0



ANSWER CHOICES	RESPONSES	
It will have no impact on my investments.	0.00%	0
It will positively impact my investments by ensuring that my broker is getting me the best price for my trades.	4.91%	8
It will negatively impact my investments because it adds unnecessary complexity and costs to my trades.	33.74%	55
It should be up to me, rather than the SEC, to decide whether to prioritize price and speed over all other factors when executing a trade.	59.51%	97
I am not familiar with the SEC's proposed best execution rule.	1.84%	3
None of the above.	0.00%	0
TOTAL		163

The investors survey results confirm views obtained by ICAN in a series of interviews (here). For example, Bloomberg Columnist Nir Kaissar was "struck by the compliance obligation [the Proposals] are putting on financial firms that are using payment for order flow," but payment for order flow "has truly democratized the market – anyone can now participate. If you make payment for order flow so onerous, which [the Proposal] seemingly does, you make it so onerous that brokers do not want to engage in payment for order flow any longer. Then I think the real danger here is that retail investors will no longer have access – you'll go back to days when you needed to have a certain amount of money to transact, and as a practical matter that kept out a huge amount of investors." Mr. Kaissar's concerns are echoed by retail trader Nick Brunner, who told ICAN that he opposes the Proposals in part because "payment for order for me personally has allowed access to the market. Without that I don't think I would be profitable as a trader. . . . Really what's happening is by restricting it you kind of make it so only the big players are allowed to play in the market." Similarly, retail trader and finance and litigation analyst Dr. J. B. Heaton was troubled by the insufficient analysis of the Proposals' impact: "there's just no way to know what the effect of this rule is going to be, and the proposed rule acknowledges that and in my mind that doesn't meet the statutory requirement." Dr. Heaton says, "this seems to be a solution in search of a problem . . . not only might retail traders get hurt rather than helped by this, we may end up with something we really don't want, which is effectively a non-exchange market maker that ends up becoming a de facto super exchange."

Conclusion

In light of the foregoing concerns, ICAN requests that the Commission withdraw the Proposals.

Sincerely,

Nicolas Morgan
Founder and President
ICAN