

April 13, 2023

Ms. Vanessa Countryman (via electronic submission)
Secretary, Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: File Nos. S7-29-22; S7-30-22; S7-31-22; and S7-32-22

Ladies & Gentlemen:

I appreciate the opportunity to provide my views to the Securities and Exchange Commission (the "Commission") in response to Exchange Act Releases Nos. 96493, 96494, 96495 and 96496 (the "Proposing Releases"),¹ in which the Commission solicits comments regarding four proposals that would fundamentally alter: (i) how national market system stocks ("NMS stocks") are quoted and traded, and related economics; (ii) the mechanics of retail-investor order execution; (iii) the scope of information that reporting entities must provide about the orders that they execute; and (iv) the depth and breadth of a broker-dealer's best execution obligations. As someone who has served as a CEO of both a Commission-registered stock exchange and an alternative trading system ("ATS"),² and been intimately involved in various market structure debates over the last 20 years,³ I feel I have a unique ability and responsibility to contribute to the discussion.⁴

¹ Exchange Act Release No. 96493, File No. S7-29-22, Disclosure of Order Execution Information, December 14, 2022, 88 FR 3786 (January 20, 2023) ("Order Execution Information Release"). Exchange Act Release No. 96494, File No. S7-30-22, Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, December 14, 2022, 87 FR 80266 (December 29, 2022) ("Pricing Controls Release"). Exchange Act Release No. 96495, File No. S7-31-22, Order Competition Rule, December 14, 2022, 88 FR 128 (January 3, 2023) ("Order Competition Rule Release"). Exchange Act Release No. 96496, File No. S7-32-22, Regulation Best Execution, December 14, 2022, 88 FR 5440 (January 27, 2023) ("Regulation Best Execution Release").

² I served as CEO of Direct Edge from 2007 through 2014, when it transitioned from a broker-dealer ATS operator to the operator of two SEC registered stock exchanges. I've also served in senior management positions at BATS Global Markets, NASDAQ and Brut, LLC. See O'Brien, William, LinkedIn Profile, retrieved April 13, 2023, available at <https://www.linkedin.com/in/william-o-brien-76a42a13/>.

³ See, e.g., Letter from William O'Brien, COO, Brut, LLC, to Jonathan G. Katz, Secretary, Commission, dated October 24, 2003, available at <https://www.sec.gov/rules/sro/nasd2003128/wobrien10242003.htm> (regarding Exchange Act Release No. 48501).

⁴ I will limit my comments to the substance of each proposal, notwithstanding there are serious concerns whether the Commission has satisfied its obligations under the Administrative Procedure Act (5 U.S.C. §§ 551-559) in promulgating them. See, e.g., Letter from Ellen Greene, Managing Director, Equity and Options Market Structure, Securities Industry and Financial Markets Association ("SIFMA"), to Vanessa Countryman, Secretary, Commission, February 8, 2023, available at

The regulations outlined in the Proposing Releases will likely impose significant disruption, costs and unintended consequences on securities markets, with no certainty of producing materially better long-term outcomes for investors. In particular, mandates to alter minimum price variations and access fees continues a tradition of regulatory interference that has created more problems than it has solved. Proposed Rule 615 attempts to resurrect a ghost of market structure past, making “flash orders” mandatory for certain retail order flow. Proposed changes to Rule 605 data submissions ignore the existential problem with Rule 605 and are unlikely to be of benefit to retail investors. The incremental benefits of Proposed Regulation Best Execution are unclear, though the related release highlights a lack of best-execution infrastructure with respect to fixed-income securities that the Commission should work to address.

The United States stock market is the most well-capitalized, liquid, efficient and fair securities marketplace on the planet. There is no shortage of investors seeking to invest here, traders seeking to trade here, and companies seeking to list their securities here.⁵ There is always room for a healthy discussion about how to improve it further. But the Commission should also resist the temptation to interfere with market mechanisms that are working well, especially without certainty of purpose and sufficient confidence that the outcome will be materially better. With these proposals, the Commission appears to be attempting to further its Congressional mandate under the Securities Act Amendments of 1975⁶ “for investors’ orders to be executed without the participation of a dealer.”⁷ In fulfilling that mandate, however, Congress directed the Commission that any such efforts must first ensure “economically efficient execution of securities transactions,” “fair competition... between exchange markets and markets other than exchange markets,” and “the practicability of brokers executing investors’ orders in the best market.”⁸ Both individually and on a collective basis, the Proposing Releases appear unlikely to further these required objectives.

The Commission should consider more limited changes, gather more data, redirect its efforts and seek broader industry consensus before imposing such a sweeping overhaul of our nation’s markets.

<https://www.sec.gov/comments/s7-31-22/s73122-20156863-325026.pdf> (regarding the Proposing Releases).

⁵ In recent days it has been reported that two large foreign issuers are abandoning their listings in the United Kingdom to list in the United States, a vote of confidence in our market quality. See BBC News, “Building giant set to switch share listing to US,” March 2, 2023, *available at* <https://www.msn.com/en-us/money/personalfinance/building-giant-set-to-switch-share-listing-to-us/ar-AA187K4j>

⁶ 15 U.S.C. §78k-1, *available at* <https://www.govtrack.us/congress/bills/94/s249>.

⁷ *Id.*

⁸ *Id.*

Specific Comments

The following are specific thoughts and comments on each of the Proposing Releases individually.

Pricing Controls Release

The subjects of sub-penny quoting and trading increments, and the fees market centers charge for execution services, has been one of controversy and consternation in the market structure community since the transition to decimals in 2001.⁹ The Commission issued a Concept Release in 2001 seeking industry comment on the potential of sub-penny pricing,¹⁰ and related issues were exhaustively discussed as part of the consideration and adoption of Regulation NMS in 2005.¹¹ As part of that dialogue, I urged the Commission to refrain from interfering in price increments:

“Commission involvement in the allowable minimum increment would most likely thwart the capability of market competition to keep this aspect of market structure in check as the appropriateness of sub-pennies ebbs and flows with changing market conditions.”¹²

At that time, the Commission determined there were “substantial drawbacks to sub-penny quoting,” and that “on balance, the costs of sub-penny quoting are not justified by the benefits.”¹³

In the Pricing Controls Release, the Commission has come to the completely opposite conclusion – that sub-penny quoting would not only be a net benefit, but that the optimal approach is a new sub-penny regime that has subsets of Reg NMS stocks trading at different sub-penny increments on an ever-changing basis.

⁹ See, e.g., Testimony of Laura S. Unger, Acting Chair, Commission, Concerning The Effects of Decimalization on Securities Markets, before the Senate Subcommittee on Securities and Investment Committee on Banking, Housing, and Urban Affairs, United States Senate (May 24, 2001), available at <https://www.sec.gov/news/testimony/052401tslu.htm>.

¹⁰ Exchange Act Release No. 44568 (July 18, 2001), 68 FR 38390 (July 24, 2001) (“Sub-Penny Concept Release”). At that time, “the majority of comments opposed sub-penny pricing.” Reg NMS Adopting Release, *infra* n. 11, at 70 FR 37551.

¹¹ See, e.g., Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹² See Letter from William O’Brien, COO, Brut, LLC, to Jonathan G. Katz, Secretary, Commission, dated July 29, 2004, available at <https://www.sec.gov/rules/proposed/s71004/brut072904.pdf> (regarding Exchange Act Release Nos. 49325 and 49749).

¹³ Reg NMS Adopting Release, *supra* n.11, at 70 FR 37553.

The Commission's two primary justifications for these changes do not support the complicated arrangement that is proposed. The first is that some stocks are "tick constrained," meaning they would have sub-penny quoted spreads if they were allowed.¹⁴ This appears to be true, but does not in itself warrant what the Commission seeks to impose. It is also worth noting that the effect on the efficacy and usage of retail limit orders is not discussed at all in the Commission's proposal. There appears to be no data discussing to what extent retail investors will actually enter limit orders in anything other than penny increments. Professional traders may easily be able to step ahead of such orders, reducing retail limit-order fill rates. Given the Commission adopted the current rule to "limit the ability of a market participant to gain execution priority over competing limit orders by stepping ahead by an economically insignificant amount,"¹⁵ this should at a minimum be studied before introducing sub-penny increments by Commission fiat.

The second is that the current framework, "results in greater opportunities to trade OTC in sub-penny increments mak[ing] it more difficult for exchanges and ATSS to compete with OTC market makers for retail order flow. The Commission believes that the contrast between on and off-exchange sub-penny trading and the competitive responses by market participants results in market complexity and inefficiencies."¹⁶ This argument is more suspect - exchanges have long offered several mechanisms that include sub-penny incentives for retail market order submission, namely maker-taker price structures and Retail Liquidity Programs like that of the New York Stock Exchange.¹⁷ There is no evidence to suggest the competitive balance between exchanges, ATSS and wholesalers would change by imposing four new quoting tiers.

Moreover, the Commission should embrace, not eschew, market forces. When driven by market participants, complexity is the result of innovation and competition, and should be encouraged. When driven by regulators, complexity quickly becomes obsolete, unable to adapt to unintended consequences and changing market dynamics, and thus should be minimized. This is the lesson to be learned by the last twenty years of Commission involvement in the minimum pricing increment and access fees.

¹⁴ Many market participants have provided evidence to this effect. See, e.g., MEMX Tick Constrained Securities (August 2021), available at <https://memx.com/wp-content/uploads/MEMX-Market-Structure-Report-Tick-Constrained-Securities.pdf>.

¹⁵ Reg NMS Adopting Release, *supra n. 11*, at 70 FR 37551.

¹⁶ Pricing Controls, *supra n. 1*, at 87 FR 80274.

¹⁷ See, e.g., NYSE Rule 107C.

I would suggest a simpler approach that:

1. Allows all market participants to quote and trade at the increments they choose, subject to a *de minimis* increment (perhaps \$.0001);
2. Modify Rule 610¹⁸ to cap exchange and ATS access fees at half of the relevant trading venue's chosen minimum quoting increment, so as to avoid creating incentives for unnatural quoting; and
3. Keep the "trade through" requirements of Rule 610 pegged to the penny, allowing market participants to ignore sub-penny quotes if they felt it was consistent with their duty of best execution and/or business model.¹⁹

This would get the Commission largely out of the increment and rate-fixing business, letting market forces determine who succeeds in attracting retail order flow.

Order Competition Rule Release

The Order Competition Rule Release resuscitates an "order exposure" concept that goes back forty years. Ever since the Commission allowed off-exchange trading of NYSE-listed securities in 1979,²⁰ exchanges have wanted this order flow back. As part of these efforts, in 1982 the NYSE offered a proposal that "would have applied only to over-the-counter market makers and would have required the exposure of customer orders and market maker principal interest in these orders to other markets prior to execution."²¹ The Commission subsequently²¹ proposed Rule 11A-1, which would have required brokers to "stop" customer orders at the NBBO prior to internalizing them, and expose them to the market for at least 30 seconds at a minimum increment (then $\frac{1}{8}$) better than the intended execution price.²² It seems almost silly to talk about exposing orders for 30 seconds in fractions, but the motivations and issues raised are eerily similar to the Order Competition Rule.

¹⁸ 17 C.F.R. 242.610.

¹⁹ All subject to common-sense exceptions such as reference-price trades like VWAP and other long-standing exceptions.

²⁰ SEC Rule 19c-3 effectively repealed NYSE Rule 390, which prohibited off-exchange trading by exchange-member firms.

²¹ FINRA (then known as the NASD) Notice to Members 83-7 (February 3, 1983), *available at* <https://www.finra.org/rules-guidance/notices/83-7> ("FINRA NTM 83-7").

²² See generally *Id.*

The Commission never adopted proposed Rule 11A-1,²³ for a variety of very good reasons. I can't outline them any better than the FINRA Board of Governors did when commenting on the proposal in 1983:

“The Board believes that adoption of the proposed rule would be a classic example of over-regulation.....

The costs of this burdensome regulation far outweigh any speculative benefits that may result. The complexity of the exposure requirement and the steps involved in complying with the rule would render the efficient execution of retail principal transactions extremely difficult, if not virtually impossible.....

The proposed rule will result in imposing an insurmountable burden on competition in off-board transactions and would constitute a de facto repeal of Rule 19c-3 [the rule that allowed off-exchange trading].....

The Board notes that the proposed rule would substantially reduce the efficiency of industry built systems which automatically process customer orders.... The proposed rule would impair the progress made in developing facilities to efficiently automate the execution of small orders, which facilities are even more crucial today in light of the recent increase in volume in all markets.....”²⁴

In explaining its decision not to move forward, the Commission stated that “absent evidence of need..... there is insufficient justification for imposing the costs associated with the rule.”²⁵

Proposed Rule 615 is a modernized version of Rule 11A-1, driven by the same concerns, that “data analysis suggests that opening up individual investor orders to order-by-order competition would lead to significantly better prices for those investors.”²⁶ and that retail investors can have the best of all worlds, “receiv[ing] the benefits of segmentation.... but without the negative effects of those orders being isolated from order-by-order competition.”²⁷

²³ See SEC Annual Report, 1983, at 22, available at <https://www.sec.gov/files/1983.pdf> (“1983 SEC Report”).

²⁴ FINRA NTM 83-7, *supra n. 21*.

²⁵ 1983 SEC Report, *supra n. 23*, at 22.

²⁶ Order Competition Rule Release, *supra n. 1*, at 88 FR 130.

²⁷ *Id.*

There are myriad ways to outline objections to this proposal, just as FINRA did with its prehistoric predecessor, but I will focus on two. The first is that the whole concept of order-by-order competition versus competition for order flow generally is mis-characterized, if not misunderstood, in the proposed rationale for this rule. The competition for retail order flow between and among exchanges and wholesalers has been and continues to be extremely competitive. Despite the current concentration in two wholesaling firms (Virtu and Citadel), there are a host of other firms actively competing for this business. Virtu did not even exist fifteen years ago, showing the ability of new entrants to compete successfully in this business. If anything, concentration among retail brokerage firms may be driving an increased concentration in the wholesaler market, as combining firms look to create economies of scale and increase customer value by consolidating their vendors.

Moreover, basic economics dictate that such order-by-order competition would impose new costs that would ultimately be borne by retail investors. In addition to the increased infrastructure costs, time delay and missed opportunity costs associated with routing orders to qualified auctions, as opposed to instantaneous NBBO (or better) execution by wholesalers, the effect would simply sub-segment an already segmented order flow pool. For every order that is picked off and executed in a qualified auction, others will be returned to wholesalers for execution. It is highly likely the per-share price improvement of these left-over orders will go down, or even disappear altogether, as a result.

I would also note the similarities between Proposed Rule 615 and another program I am very familiar with - Direct Edge's Enhanced Liquidity Provider ("ELP") Program - which was generally characterized as "flash orders".²⁸ In 2006 Direct Edge created an order-exposure mechanism that customers could choose to use voluntarily on an order-by-order basis. Before a marketable order was routed to another exchange for execution, other Direct Edge subscribers wishing to participate in the program received notification of the order, through a distinct data feed, and a short (100 milliseconds generally) time to respond with interest to execute the order.

²⁸ See generally Reuters, "Direct Edge in crosshairs of 'flash' order debate" (July 27, 2009), available at <https://www.reuters.com/article/us-exchanges-flashes-analysis-idUSTRE56Q4B320090727>.

The proposed qualified auctions under the Proposed Rule 615 look a lot like flash orders, with two differences that make Qualified Auctions much less constructive. First, participation in qualified auctions is mandatory. Unlike Direct Edge's ELP program, where brokers submitting routable orders could choose to participate in the program on an order-by-order basis, under Rule 615 all non-exempted segmented orders received by wholesalers must be submitted to qualified auctions. Neither retail brokers nor wholesalers are allowed to fulfill their duty of best execution towards their retail customers and these orders in deciding whether or not to use a qualified auction - the Commission has usurped that duty from them.

The second difference is that in qualified auctions, segmented orders would be exposed to the entire market. In Direct Edge's ELP program all subscribers could receive such "flashes" (and any broker-dealer could be a subscriber) but they were on a data feed that was distinct from Direct Edge's depth-of-book feed, requiring a modest investment of time and energy to incorporate into a subscriber's trading infrastructure. Under the Order Competition Rule as proposed requires "wide dissemination of qualified auction messages in consolidated market data" with the goal of "ensur[ing] the broadest possible participation of market participants in qualified auctions."²⁹ Thus every market participant, whether they desire to participate in qualified auctions or not, or even a member of the open competition trading center running the qualified auction, will know of the order being flashed. That is a highly suboptimal approach to order exposure, where the risks of information leakage and market impact should be carefully balanced against the goals of price and size improvement.³⁰ As long as financial markets have existed, participants will take advantage of information regarding orders they have no desire to trade with, if given the chance.

I have always believed that order-exposure mechanisms which are narrowly tailored to reduce market impact and optimize the chance of price and size improvement can be beneficial to those that choose to use them. But the Proposed Rule 615 is the exact opposite. It contains the most negative aspects of order exposure without any of the protective guardrails. The notion that

²⁹ Order Competition Rule Release, *supra* n.1, at 88 FR 157.

³⁰ While the market impact of a single segmented order may be small, recent events have underscored the impact of such orders in the aggregate. See generally Aramonte, S and F Avalos (2021): "[The rising influence of retail investors](#)", *BIS Quarterly Review*, March (noting that "sudden bursts of [retail] trading activity can push prices far away from fundamental values."). Available at https://www.bis.org/publ/qtrpdf/r_qt2103v.htm.

dissemination of such flashes in consolidated data promotes fairness does not acknowledge how such an approach would harm market quality, because market participants would now have disincentives to aggressively quote and display liquidity. They could just sit back and decide which auction orders to trade against on a case-by-case basis. This was part of the rationale behind the Commission's proposal to ban flash orders back in 2009:

“Specifically, flash orders have the potential to discourage the public display of trading interest and harm quote competition among markets.... The unfairness results because those getting that advanced look do not have to publicly display a quote for everyone else to see, yet are able to rely on the information provided by the publicly displayed quotes to facilitate their transactions. As a result, flash orders have the potential to significantly undermine the incentives to display limit orders and to quote competitively.”³¹

Simply put, the Order Competition Rule is an unnecessary and likely harmful imposition on market structure, in furtherance of an agenda that goes back to the 1970's. It was misguided then, and is misguided now. This proposal should not be implemented in anything resembling its current form.

Order Execution Information Release

The Order Execution Information Release proposed amendments to the scope, depth and breadth of Rule 605, its first meaningful update since its adoption over twenty years ago.³² At first glance the proposals seem, at best, to be a long-overdue modernization of this rule. At worst, they seem harmless. Market participants have many substantive issues, both in their own businesses and with proposed regulatory changes. Why raise meaningful objections to reporting requirements? Rule 605 data has its uses - for academics, for market structure specialists within brokerage firms, and certainly for regulatory examiners and enforcement personnel. What's the harm in updating the specifications and requiring more market participants to provide data? Perhaps there isn't any.

³¹ Speech of Mary L. Schapiro, Chairman, Commission, Statement Before the SEC Open Meeting – Flash Orders (September 17, 2009) *available at* <https://www.sec.gov/news/speech/2009/spch091709mls-flash.htm>.

³² Exchange Act Release No. 43590 (November 17, 2000), 65 FR 75414 (December 1, 2000) (“Rule 605 Adopting Release”).

But the Order Execution Information Release ignores the elephant in the room - that Rule 605 is not a meaningful factor in how retail investors decide which brokers to use and how to place and route orders. And given that was a primary the reason why Rule 605 was adopted, that is a problem:

“Currently, given the lack of comparable public information on execution quality, retail investors may conclude that the most rational strategy is simply to opt for a broker-dealer that offers the lowest commission and a fast execution. As a result, there may be limited opportunities for market participants to compete on their ability to obtain the best prices for these investor orders. By increasing the visibility of order execution and routing practices, the rules adopted today are intended to empower market forces with the means to achieve a more competitive and efficient national market system for public investors.”³³

Almost twenty-three years later, does anyone believe Rule 605 has achieved this objective? Are retail investors actually using Rule 605 information to make decisions about where they invest or how they trade?³⁴

The meteoric rise of Robinhood illustrates that, in a world where it is easier than ever to access and analyze public information, Rule 605 is largely irrelevant to retail-investor decision making. The story of Robinhood is well known - this start-up accumulated millions of users in a very short period of time.³⁵ What propelled this growth has been often debated but is primarily attributed to their early embrace of zero-dollar commissions, an easy user interface integrated with new asset classes like crypto-currencies, and savvy usage of social media, customer marketing strategies and an upbeat approach to market participation.³⁶ Whether you like how Robinhood handles customers orders or

³³ *Id.*, at 65 FR 75415.

³⁴ An argument can be made that institutional investors aren't really using Rule 605 data either, but I will limit my comments to retail investors.

³⁵ See *generally* U.S. News & World Report, “How Robinhood Changed an Industry” (September 17, 2019) *available at* <https://money.usnews.com/investing/investing-101/articles/how-robinhood-changed-an-industry>.

³⁶ See *generally* G. Vasiliadis, “How Robinhood Got Nearly 1 Million Users Before the Company Even Existed” (November 23, 2017) *available at* <https://medium.com/inside-viral-loops/how-robinhood-got-nearly-1-million-users-before-the-company-even-existed-dfb1a57231f8>. It certainly looks like retail investors still, as the Commission put it, “conclude that

not, I hope that all can agree that Rule 605 reports played no role in their efforts to acquire new customers. Even for investors that chose not to use Robinhood's services, or Robinhood customers that stopped doing business with the firm over execution-quality concerns, there is scant evidence that Rule 605 data played any factor. These trends are not unique to Robinhood - other new entrants like Public, Webull and others have followed similar trajectories.

Rule 605 simply is not providing a material benefit to the next generation of investors that are entering the market. This cohort is one of many contradictions – some are very new to investing but using complex and high-risk trading strategies.³⁷ They are skeptical of mainstream news sources but quick to take advice from influencers on TikTok and other social media platforms.³⁸ A minority think market structure is inherently rigged against them and that certain participants are the enemy (Citadel, hedge funds, “the shorts”) but they can't wait for their next day of trading.³⁹ The form, substance and distribution methods of Rule 605 simply do not speak to these investors, or meet them where they are.

Even firms that attempt more methodical and data-driven approaches to product differentiation don't really find Rule 605 data useful in doing so. While large retail brokers do cite Rule 605 reports at times and make them available to customers as required by law, they are not a key differentiators in their efforts to stand out among competitors. Third-party analysis, such as StockBrokers.com review of online brokers, doesn't appear to use Rule 605 data at all.⁴⁰ In the Order Execution Information Release, the Commission itself acknowledges that “Rule 605 Reports are not readily usable by market participants,”⁴¹ which by inference means they are not being used.

the most rational strategy is simply to opt for a broker-dealer that offers the lowest commission and a fast execution.” See n. 32 *supra* and accompanying text.

³⁷ See Deloitte, “The rise of newly empowered retail investors: How they're changing customer expectations and investing dynamics” (2021) *available at* <https://www2.deloitte.com/us/en/pages/financial-services/articles/the-future-of-retail-brokerage.html>.

³⁸ See *Id.*

³⁹ See, e.g., Reddit, “What is Citadel and where do I go to get away from them?” (2021) *available at* https://www.reddit.com/r/RobinHood/comments/l80dza/what_is_citadel_and_where_do_i_go_to_get_away/; USA Today, “'Looking down their nose at you': GameStop frenzy showed a fresh contempt for hedge funds. Why do Americans hate them?” (February 11, 2021) *available at* <https://www.usatoday.com/story/money/markets/2021/02/11/hedge-funds-gamestop-what-are-hedge-fund-s-best-hedge-funds/4371758001/>

⁴⁰ See StockBrokers.com, “How We Test” *available at* <https://www.stockbrokers.com/how-we-test>.

⁴¹ Order Execution Information Release, *supra* n.1, at 88 FR 3822.

Without such usage and benefit, Rule 605's whole reason for being is called into question. The statutory basis for Rule 605 is under Section 11A of the Exchange Act, and in particular the desire to promote fair competition among markets.⁴² If it is not fulfilling that objective, the basis for why the Rule 605 continues to exist is subject to question. And in the Order Execution Information Release, the Commission doubles down - using the word "competition" 135 times, and continuing to stress the fostering of competition as the rationale for the rule.⁴³

I have participated in market structure debates and regulation long enough to know that regulations like Rule 605 are far more likely to expand, rather than disappear. What I suggest is that any effort to modernize Rule 605 should focus first and foremost on making it of some utility to the investors it was adopted and intended to serve.

Regulation Best Execution Release

Proposed Regulation Best Execution would layer numerous additional procedural and record-keeping obligations on top of an already-robust set of best execution regulations, such as FINRA Rule 5310. Numerous commenters have questioned the need for and incremental benefit of the proposal.⁴⁴ I would like to focus my comments on the application of Proposed Regulation Best Execution to fixed-income securities, and how such efforts appear premature given the lack of pricing information necessary to comprehensively satisfy the new rules' requirements. Before significantly broadening out best-execution duties, the Commission should consider doing more to improve the quality of bond-market data, as it began doing for stocks over fifty years ago.⁴⁵

Throughout the Regulation Best Execution Release, the Commission states the current market data in fixed-income securities is of insufficient quality. Noting that "market participants do not have the same level of price transparency in these markets as they do in the NMS stock market,"⁴⁶ the Commission correctly notes that this "makes

⁴² See generally n.6 *supra* and accompanying text.

⁴³ See, e.g., Order Execution Information Release, *supra* n.1, at 88 FR 3787 (noting that "providing increased visibility into the execution quality of larger broker-dealers would similarly encourage competition among market participants.").

⁴⁴ See, e.g., Letter from Ellen Greene, Managing Director, Equity and Options Market Structure, SIFMA, to Vanessa Countryman, Secretary, Commission, March 31, 2023, at 4, available at <https://www.sec.gov/comments/s7-32-22/s73222-20163541-333880.pdf> (regarding the Proposing Releases).

⁴⁵ For disclosure purposes, I am an investor in BondCliQ, a company which has products designed to optimize credit market data for all market participants. For more see <https://www.bondcliq.com/>.

⁴⁶ Regulation Best Execution Release, *supra* n.1, at 88 FR 5445.

it more difficult for customers to evaluate their transactions.”⁴⁷ This has real-world, quantifiable consequences, as the Commission highlights there are “significant differences in the variability of execution prices among interdealer trades compared to the variability of execution prices among customer trades in the same bonds on the same trading day.”⁴⁸ Bond pricing information is nowhere near as robust or widely available as it needs to be.

The conclusion the Commission draws from this misses the mark. In stating that current market data differences “highlights the importance of robust best execution considerations by broker-dealers in these markets,”⁴⁹ the Commission ignores that poor market data in these securities makes fulfilling the duty of best execution incredibly difficult. Proposed Regulation Best Execution would make it even worse, by creating specific data-dependent requirements where such data does not really exist. What are the “best available prices” for corporate bonds - available market-wide or to the particular broker-dealer?⁵⁰ For example, how could a broker-dealer’s procedures discuss opportunities for midpoint executions in corporate bonds when you can’t even credibly determine what is the market-wide national best bid and best offer in a bond at any given moment?⁵¹

The Commission should thus re-focus its efforts, taking steps to further strengthen the quality and availability of fixed-income market data before imposing new best-execution obligations with respect to these securities. There are a variety of ways to explore doing this, from improving the quality of TRACE data, encouraging or requiring fixed-income dealers to provide quotation data to third-party aggregators, to authorizing data sources to serve as reference prices for cross-trades and other transactions. In taking such efforts, the Commission would adhere to same principles it outlined over fifty years ago when beginning to create a national market system for stocks, that “an essential step toward formation of a central market is to make information on prices, volume and quotes for all securities in all markets available to all investors so that buyers and sellers of securities can make informed investment decisions and not pay more the lowest price at which someone is willing to sell nor sell for less the highest price a buyer is prepared to offer.”⁵²

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Proposed Rule 1101(a)(2) (regarding a broker-dealer’s “best market determination” requirement.)

⁵¹ *Id.*

⁵² SEC Policy Statement on the Future Structure of Securities Markets (February 2, 1972), at 9, *available at* https://books.google.com/books?id=FkwI6_c_nUkC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

Conclusion

The Commission should be commended for the considerable time and effort that went into drafting the Proposing Releases. It is never easy to propose market-structure reform, and regardless of the outcome my hope is that the conversation that has been started will be constructive. What results from this process should be significantly different from what the Commission has proposed, building upon an already-strong foundation and jump-starting the next fifty years of the evolution of the National Market System.

I am happy to answer any questions regarding my comments and to participate in further discussions regarding the Proposing Releases in any way the Commission would find useful.

Sincerely,

/s/ William O'Brien

William O'Brien
Former CEO
Direct Edge