



asset management group

March 31, 2023

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

Re: **File No. S7-32-22; Release No. 34-96496; Regulation Best Execution, File No. S7-31-22; Release No. 34-96495; Order Competition Rule, File No. S7-30-22; Release No. 34-96494; Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, and File No. S7-29-22; Release No. 34-96493; Disclosure of Order Execution Information (the “Proposals”).**¹

Dear Ms. Countryman:

The Asset Management Group of the Securities Industry and Financial Markets Association (“**SIFMA AMG**”)² appreciates the opportunity to provide comments to the Securities and Exchange Commission (the “**Commission**”) on the four above-referenced Proposals.

We support the Commission’s mission to protect investors; to maintain fair, orderly, and efficient markets; and to facilitate capital formation. Our members share this same mission, both in their fiduciary role, and in attracting and retaining the business of their tens of millions of retail investors – both individually and as fund investors. We strive to treat investors fairly and give them the best chance for investment success. To that end, we value transparent markets, with efficient price discovery, and overall stability and resilience. Given our shared mission with the Commission, coupled with our front-line experience and insight into both specific markets and overall operational functionality, we offer our thoughtful insights to help the Commission deliver needed reforms in an efficient, cost-effective manner, while avoiding unintended adverse consequences.

In general, SIFMA AMG supports the Commission’s efforts to improve our markets through greater disclosure, increased transparency, and greater competition. However, our members have serious concerns about the breadth and depth of the proposed changes. To that end, we request that the Commission share its supporting data to help us to identify the specific market dislocations to be addressed by the Proposals. Again, in our view, reform proposals must carefully target clearly identified issues and must be

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

narrowly tailored to achieve the intended benefit with reasonably appropriate costs all the while avoiding collateral adverse consequences.

In reviewing the overall package of proposed changes, while perhaps individually manageable, we are concerned that in aggregate, and also coupled with the multiple significant reforms proposed across the Commission's regulated markets and entities, these Proposals, without careful refinement and an orderly, sequential roll-out, may introduce stresses, the negative consequences of which could dwarf any intended benefit. The many changes will be both operationally complex and costly to implement, and it is unclear how these four proposals will interact with each other, let alone with the dozens of other proposals the Commission has promulgated during the past 18 months. Other regulatory initiatives, including T+1 accelerated settlement and USD LIBOR Transition, are currently taxing the industry's legal and operational resources. Given the unexamined interaction, we harbor grave concerns of the negative consequences that could result from such a revolutionary transformation of our strong and resilient markets. While our members are committed to work to achieve the Commission's goals, we will struggle to do everything everywhere all at once.

Overview

We urge caution in moving forward with these Proposals notwithstanding the aspirational market enhancements which undoubtedly are the genesis of the Commission's intentions. In our view, there is a natural starting point for the path forward and this begins with the Commission's Order Execution Information proposal (the "**Rule 605 Proposal**") to enhance disclosure of order execution information by updating Rule 605. Once an amended Rule 605 is implemented, the Commission will have better access to the data it needs to fully assess market quality and to consider whether additional rulemaking is needed and how any such rulemaking should be designed.

With respect to the proposed Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders (the "**Tick Size Proposal**"), SIFMA AMG generally supports consideration of changes to minimum pricing increments ("**tick sizes**"), access fees, as well as certain enhancements to order transparency. However, we urge the Commission to first engage with market participants to assess which stocks are tick-constrained and what the appropriate tick sizes and access fee caps should be to promote the best market structure. We are concerned that harmonizing trading increments with quoting increments under the Tick Size Proposal would harm retail investors. Public roundtable discussions - with industry and Commission staff participation - will provide the Commission with much needed perspectives to better ensure optimal outcomes.

While SIFMA AMG supports market structure changes to improve executions and experiences for retail investors, SIFMA AMG cannot endorse the proposed Order Competition Rule ("**OCR**") because, among other concerns, it fails to address significant operational questions (such as how the qualified auctions would operate in conjunction with the Order Protection Rule)³ and because any perceived benefit appears more speculative than concrete as to whether it would achieve its goals of improving executions for retail investors or enhancing competition. Rather, our members sincerely fear the OCR is likely to have the opposite effect by harming retail investor executions, such as by facilitating frontrunning of segmented orders, and by limiting competition in mandating the venue and manner of execution of segmented orders.

³ 17 CFR 242.611.

As for the proposed Regulation Best Execution (“**Reg Best Ex**”), while SIFMA AMG strongly supports robust best execution standards, we believe that the existing regulatory framework achieves such a purpose. We are concerned with the possibility of three overlapping best execution regimes,⁴ as well as with many of the proposed requirements set forth by the Commission in Reg Best Ex and the guidance detailed in the proposing release, such as the Commission’s expectations to assess non-material sources of liquidity for conflicted transactions. We fear these requirements would raise significant costs without any clear, quantifiable benefit to customers.

Executive Summary

A. Consider the Proposals as an Integrated Package.

As the Proposals represent an overall policy initiative for market enhancement, the impact of each on the other must be considered based on data obtained from the implementation of each sequentially to consider their individual, and collective, costs, benefits, and effects.

B. Provide Data Supporting the Proposals.

Data clarifying and clearly defining the specific need for such expansive and expensive changes is critical to allow for an assessment as to whether and how each Proposal addresses demonstrated market dislocations individually and collectively.

C. First Implement the Rule 605 Proposal to Gather Data To Inform An Assessment of the Merit of and Needed Changes to the other Proposals.

The Rule 605 Proposal will result in further transparency into execution quality and thereby provide data critical to assess the merit of, and any needed changes to, the other Proposals.

D. Tailor Tick Sizes Based on Market Input.

Revisiting the “one-size fits all” tick size and a reduction of the outdated access fee cap of 30 mils is advisable but should be informed by market input to set appropriate levels and avoid unintended consequences.

E. Abandon the Order Competition Rule As it Will Damage Competition.

In mandating where certain orders must trade, we sincerely fear the OCR Proposal will harm competition and make markets less efficient.

⁴ Although FINRA and the MSRB have indicated they intend to harmonize their rules with any Commission best execution rules, it remains unclear how harmonization could be achieved, including how the rules could be consistently enforced with both FINRA and the Commission conducting examinations and enforcement of the rules.

F. Reassess the Need for Reg Best Ex as it is Redundant to Existing Regimes and Fails to Address Differences in Non-equity Securities.

While our members endorse efforts to increase market efficiency, promote competition, reduce costs, and mitigate conflicts of interest, the Commission needs to demonstrate how the regimes operated by FINRA and MSRB are flawed and how the new Proposal will appropriately address the needs of non-equity markets.

Discussion

I. Consider the Proposals as an Integrated Package.

As noted above, our members believe that the Proposals should not be examined in isolation given the obvious impact each will have on the other. While proposed simultaneously, what is truly needed is an explanation of how the Commission sees them interacting and, potentially, how they might be rolled out either at once or sequentially.

In carefully reading through the Proposals, our members have found it hard to find reference to if, and how, the Commission considered their interaction in terms of the effect each might have on the other, the benefit of each of them with respect to the other, the risk that there could be adverse effects of their interaction, or the costs of deploying them simultaneously or sequentially within an already constrained industry capacity. While it is certainly unclear, our members believe it is more likely the Commission intends implementation simultaneously given the common release dates and comment periods.

With the possible exception of the Rule 605 Proposal, each Proposal individually represents a substantial and fundamental change to U.S. equity market structure. Consequently, the cumulative effects of multiple, major changes to the market structure necessarily compound, making the need for careful analysis of their intersections indispensable. Commissioner Uyeda's comments resonate with our members:

“[T]he Commission proposed—side-by-side—four complex rules with interrelated effects—and did not even attempt to consider the combined impact of those proposals. Far from being an incremental process, where the Commission and other interested persons could learn from experience before proceeding with reforms, the Commission has launched a shock-and-awe approach with the hope that everything falls into place and – more importantly – improves on the status quo. Whether that will occur is an open question.”⁵

Without some analysis and discussion by the Commission of the interrelationship between and among the Proposals, it is unclear how market participants can be expected to form clear opinions on each Proposal. The purported costs, benefits, and effects of any one Proposal are certain to change depending on whether one or more of the other Proposals are adopted.

Given the risk of unexamined negative consequences to our robust equity markets, SIFMA AMG's members urge the Commission to take a step back, to make sure the effect of one Proposal on the other is analyzed, and to present to the commenting public its informed view as to how such interaction is beneficial and the associated costs are reasonable.

⁵ <https://www.sec.gov/news/statement/uyeda-best-execution-20221214>.

II. Provide Data Supporting the Proposals.

While reference is made to the genesis of each Proposal, absent providing the non-public CAT data and related information (including pertaining to the Commission's methodology), SIFMA AMG members, as well as the rest of the commenting public, are handicapped in assessing the merit of the problem to be addressed, the tailoring of the Proposals to address the specific problem, and the justification for the inevitable costs associated with the Commission's proposed fix.

To that end, SIFMA AMG's members support SIFMA's letter dated February 8, 2023 requesting the Commission's data supporting the Proposals so that the public can provide meaningful comment.⁶ We likewise support SIFMA's Freedom of Information Act ("FOIA") request pertaining to this data (appended to SIFMA's data request letter) and acknowledge that courts have noted that "it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. . . . An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."⁷

SIFMA AMG urges the Commission to provide such data in accordance with SIFMA's FOIA request to help facilitate the public's review of the Proposals, and does not believe the present comment period can be at all effective absent the ability to review the data, assess the merit of any perceived problem, consider the efficacy of the proposed changes, and the appropriateness of the related costs – in each case based on the collective interaction of the Commission's Proposals.

Our concern in this area is not merely procedural. Our members note that particularly in each of the Reg Best Ex, OCR, and Tick Size Proposals, the Commission has omitted to identify quantifiable benefits that could result and to weigh the estimated costs against such benefit. We are also seriously concerned that the costs and burdens are significantly underestimated as to the implementation of the Proposals, either individually or collectively.

III. Rule 605 Proposal.

A. Overview of Proposal.

As Rule 605 has not been substantively updated since its adoption, and markets have changed dramatically, SIFMA AMG supports the much needed updates the Commission has proposed and believes that data to be gathered and organized thereunder can better inform the merit of and approach to the other Proposals under consideration. SIFMA AMG strongly believes any proposed reforms to Rule 605 should be adopted and operated for a meaningful period of time (*i.e.*, at least one year) so that adequate data is available for a meaningful analysis to be made to assess the merit for any additional changes to the current market structure.

⁶ <https://www.sec.gov/comments/s7-31-22/s73122-20156863-325026.pdf>

⁷ *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982); *see also, Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1133 (D.C. Cir. 1995).

B. First Implement The Rule 605 Proposal to Gather Data To Inform An Assessment of the Merit of and Needed Changes to the other Proposals.

SIFMA AMG applauds the Commission for proposing much-needed changes to enhance and modernize the data included in Rule 605 reports and to make such data more useful for market participants. In particular, SIFMA AMG generally supports the Commission's proposed inclusion of the size improvement metric and odd-lot data, and the creation of separate order categories for immediate-or-cancel orders, non-marketable limit orders, and stop orders.

One point to highlight is that based on our experience, broker-dealers sometimes serve as an introducing broker and do not make routing decisions. Customer orders are sent by the introducing broker to a clearing broker that makes the routing decisions. In such a case, the introducing broker may not be in the best position to generate the Rule 605 reports.

SIFMA AMG believes that the enhancements to Rule 605 data would not only improve order execution information available for market participants to make trading and order routing decisions but would provide a better ability for the Commission and the public to measure the need for additional rulemaking, as well as the actual effects of any subsequently adopted rules.

As a result, and as noted previously, SIFMA AMG strongly believes the Commission should adopt amendments to Rule 605 *before* considering any of the other Proposals.

IV. Tailor Tick Sizes Based on Market Input.

A. Overview of Proposal.

SIFMA AMG commends the Commission's interest in seeking to improve trading for stocks that are, in fact, tick-constrained and generally supports the Commission revisiting the "one-size fits all" tick size and a reduction of the outdated access fee cap of 30 mils. However, SIFMA AMG believes that more careful consideration, analysis, and industry input should be gathered to inform the appropriate tick sizes.

In our view, as modifying the tick size for NMS stocks has significant implications for the trading of such securities, it is critical that each of these are carefully considered and addressed to mitigate any potentially adverse or unintended consequences of the Tick Size Proposal. SIFMA AMG is eager to engage with the Commission to constructively consider these issues with an aim toward creating a better and more efficient market structure.

SIFMA AMG recommends that the Commission take a step back and consider the following issues before proceeding toward reforms in this area:

- the \$0.001 and \$0.002 tick sizes are too granular and that the overall tick size and access fee structure is overly complex, and while we support lowering access fee caps, the appropriate caps should be tied to the ultimate determination of what the most appropriate tick sizes should be, for which quantitative analysis is needed,

- while the Commission is motivated to improve trading for tick constrained stocks and to level the playing field among different trading centers, there must be comprehensive quantitative analysis as to appropriate tick sizes, and
- harmonizing trading increments with the proposed quoting increments would harm investors by denying price improvement to investors and retail investors in particular.

B The Proposed Tick Size is Overly Granular and Industry Input is Needed.

SIFMA AMG appreciates the Commission’s efforts to improve these aspects of market structure, but encourages the Commission to proceed with caution. SIFMA AMG strongly believes more careful consideration and analysis is necessary to ensure that any adopted tick size levels and access fee caps promote the best national market system possible, and strongly recommends the Commission lead a public roundtable to gather insights from market participants.

Among SIFMA AMG’s concerns is that the proposed complex and variable approach would lead to investor confusion and likely investment friction as tick sizes would adjust quarterly, while round lots would change monthly, and tick sizes would be based on average quoted spread, while round lots are based on a stock’s price. Implementing such an approach, particularly in concert with the other proposed changes involving the OCR, Reg Best Ex, and Rule 605 Proposals, will serve to increase operational risk and cause investor confusion given the attendant sudden changes in the price of a security likely to be caused thereby.

The proposed \$0.001 and \$0.002 tick sizes are too granular of a pricing increment and would make the costs of queue jumping (or “pennying”) negligible, reintroducing concerns for which Rule 612 was initially adopted. In other words, allowing quotations in this granular of an increment would make the cost of stepping ahead of another order too inexpensive and will deter market participants from providing liquidity due to the risk that their liquidity provision will be abused as a price discovery mechanism and then stepped ahead of for an economically insignificant amount.⁸

We expect the Commission will receive comments espousing alternative approaches to apply filters for the determination of the level of tick constraints and the applicable tick sizes that could address the issue. Note that we see the filter approach and tick size calibration to be highly interrelated with a looser filter likely to align with a larger tick size and a tighter filter allowing smaller tick sizes. Similarly, perhaps higher-priced shares should qualify for a tick size wider than \$0.01. It is important to note that absent an appropriate calibration as to the granularity of the tick-sizes, the volume of messaging exchanged between investors could be unduly increased, leading to unwarranted costs.

Our members found it telling that the Commission acknowledges such dynamic changes could disproportionately harm less sophisticated investors that may be slower to respond to changes in quotations.⁹ Accordingly, while SIFMA AMG recognizes the potential benefits of introducing more

⁸ The Commission appropriately acknowledges this risk: “a smaller tick fragments liquidity in the order book into more price levels, which can increase complexity and the incidence of pennyng —which could harm liquidity.” Tick Size Proposal at 80316.

⁹ Tick Size Proposal at 80317 (“The risk of being pennied could discourage liquidity provision, particularly by market participants that are slower to respond to changes in market conditions, and could increase trading costs for these investors.”).

granular tick sizes to tick-constrained securities, we recommend that the Commission gather industry input in identifying the optimal approach for the benefit of all investors.

C. A Comprehensive Quantitative Analysis is Needed to set Appropriate Tick Sizes and Access Caps.

SIFMA AMG believes that a more robust analysis is necessary to evaluate the most appropriate tick sizes for purposes of achieving the best balance between available liquidity at the inside quotation versus narrower spreads. Appropriately balancing these competing considerations would help ensure that the Commission achieves the best national market system possible through modification of tick sizes.

We agree with the Commission's conclusion that reducing tick sizes for tick-constrained stocks may improve market quality for such stocks. However, the \$0.005, \$0.002, and \$0.001 tick size proposals do not appear to spring from an analysis by the Commission as to whether such sizes would be the optimal tick-sizes for the stocks to which they would apply. We are not convinced by the references to the Tick Size Pilot – which may have suggested general improvements to market quality – as justification for the specific \$0.005, \$0.002, and \$0.001 proposed tick-sizes.

Rather than advance these specific tick-size proposals based on general anecdotal evidence, SIFMA AMG members pledge to work with the Commission to identify optimal tick-sizes for applicable stocks. We recommend the Commission hold public roundtables to evaluate the various proposals to define tick-constrained stocks received through this comment process and to assess the impact an adjustment to applicable tick-sizes will have.

Our members have similar thoughts on the proposed access fee cap levels with respect to creating the best possible national market system. While it is correct to note that tick sizes and access fees are linked with each other, the proposed two distinct access fee caps (rather than four to correspond to the four proposed tick sizes) appear to be based more on preserving the status quo for certain market participants rather than assessing the optimal cap approach based on market input. We expect both tick sizes and access fees should be set at tiered levels based on objective criteria that the Commission should set after study of input to be received from market participants.

SIFMA AMG believes that the Commission should consider and propose, with appropriate analysis, what it believes to be the most appropriate access fee caps to promote the best national market system. To the extent that such analysis yields access fee caps that preserve exchanges' current net capture rates, such outcome should only be an ancillary consequence of the Commission's policy determination rooted in furthering the purposes of the Exchange Act.

D. Harmonizing Trading Increments with the Proposed Quoting Increments would Harm Investors.

Under the Tick Size Proposal, the Commission would harmonize quoting and trading increments (*i.e.*, restrict executions from occurring at pricing increments other than the proposed quoting increments). SIFMA AMG believes that the proposed harmonization of quoting and trading increments: (1) would harm investors by denying them potential price improvement and (2) fails to account for differences in the roles and functions of different market participants.

E. Acceleration of Round Lot / Odd Lot Order Data and Market Data Infrastructure Rules.

SIFMA AMG supports acceleration of the changes adopted as part of the MDI rules to modify round lots based on the price of a security as well as the inclusion of odd-lot order data as part of consolidated market data. However, we are concerned that the Commission has not taken sufficient steps to ensure the timely implementation of the full set of MDI rules and transition from an exclusive SIP model to a competing consolidator model. For this reason, SIFMA AMG urges the Commission to ensure that the SROs develop an appropriate NMS plan for consolidated market data and fee structure so that market participants can benefit from the full implementation of the MDI rules.

V. Abandon the Order Competition Rule As it Will Damage Competition.

A. Overview of Proposal.

While SIFMA AMG appreciates the Commission's goal of improving executions for retail investors, it is not clear that the Proposal would accomplish this aim and may, in fact, cause greater harm to retail investors.

A summary of the key issues, explained in greater detail below, are as follows:

- the Proposal is inconsistent with the Exchange Act and would harm competition among trading centers and make markets less efficient by mandating where certain orders must trade and market makers will be disincentivized from quoting as aggressively on exchange, leading to wider bid-ask spreads / less quoted depth,
- the auction mandate's stated purpose - to allow institutional investors to interact with retail investors – will not be achieved as few, if any, buy-side firms will be able to participate in the auctions (which would occur on an ad hoc basis across different venues with <300 millisecond response times), and
- the Commission's economic analysis for the OCR appears theoretical and in conflict with our members' perceptions of both the limited benefits and likely negative consequences.

SIFMA AMG believes that there are considerably less disruptive approaches to accomplish the Commission's goals of improving executions for retail customers, such as by making exchanges' retail liquidity providers ("RLPs") more competitive (*e.g.*, by allowing retail quotations on the consolidated market data feed or allowing retail accounts managed by asset managers to trade therein) that the Commission has not considered.

B. The Order Competition Rule Is Inconsistent with the Exchange Act and Would Harm Competition among Trading Centers.

SIFMA AMG is deeply concerned that the OCR would dictate the specific manner in which particular types of orders (*i.e.*, segmented orders) would have to execute. Until the OCR, the national market structure has been designed to facilitate but not direct innovations in market structure. Market centers have been allowed to innovate and compete with each other without the Commission mandating where or how an equities transaction must execute, such as an auction. The OCR would require that

segmented orders *must* seek an execution through a qualified auction on an exchange¹⁰ unless they are executed at particular price points (*i.e.*, at the midpoint or better).¹¹

SIFMA AMG does not believe that a regulatory intervention to mandate the manner of executing orders on behalf of natural persons through qualified auctions is either necessary or in the public interest for the protection of investors, and believes it would harm competition among trading centers. Accordingly, our members strongly believe that the OCR is inconsistent with the Exchange Act and would, contrary to the Commission's intended goals, actually serve to harm competition.

Our members believe that the Commission's evaluation of competitive dynamics for the execution of retail/segmented orders is based on a faulty premise – namely that there is not competition for retail orders today because the vast majority are routed to a small number of wholesalers. In our members' experience, wholesalers compete vigorously with each other and with exchanges' RLPs in order to provide the best execution quality for these orders. While in theory, auctions could encourage competition, not only do our members experience competition through a variety of trading routes, we have serious concerns that by effectively foreclosing alternative, existing, and vibrant trading centers, competition will be eroded along with liquidity.

The determination of which trading center to route an order for execution, including an available auction, is determined today by competitive forces. Prescribing an auction as the sole means of execution for these orders can only serve to reduce competition, contrary to the Commission's Exchange Act mandate to promote efficiency and encourage competition.

One of the core purposes and mandates of the national market system is to assure "fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets."¹² We firmly believe the OCR would hinder fair competition and innovation among trading centers through mandating that all segmented orders, unless executed at the midpoint or better, be routed to qualified auctions operated by exchanges.

Without an ability to view any supportive data relied on by the Commission in crafting this proposal, it is not apparent to our members that there is even a problem requiring a solution. This Proposal appears more likely generated by the perception that there is a problem, and then the crafting of a theoretical fix to address the theoretical problem. To be clear, our members do not experience a lack of competition in these markets and actually believe the proposed fix could make trading conditions far worse. The prescriptiveness of the proposed auction mandate is inappropriate as market forces should be relied on to establish the best venues for garnering liquidity and depth – and thereby trade flows – rather than mandating an approach without a demonstration of robust trading liquidity and depth in the auction markets.

¹⁰ As explained below, for all practical purposes, qualified auctions would have to be operated by an exchange notwithstanding that an NMS Stock ATS could in theory operate a qualified auction.

¹¹ That certain ATSs could operate qualified auctions under the OCR does not cure the limitation on where a segmented order may be executed, because, as a practical matter, few (if any) ATSs will be able to meet the 1% volume threshold required to operate an auction.

¹² 15 U.S.C 78k-1(a)(1)(C)(ii).

C. Auctions Are Not Easily Accessible to Retail Investors and Fund Managers.

Our members understand that as envisioned, the SEC-mandated exchange-operated auctions would occur spontaneously across many different venues and require nearly instantaneous action to bid. Auctions would occur on an ad hoc basis across different venues with less than a 300 millisecond response time.

Our members are gravely concerned that trading through such a system would simply be impossible for the vast majority of buy-side market participants, given that qualified auctions will have a duration of only 100 – 300 milliseconds, operate in increments of \$0.001, and likely involve millions of auctions in thousands of symbols across multiple exchanges. To begin with, system access would need to be established across every auction venue by every market participant. Trading would have to be fully automated to identify when and where the auction would be held and to enter bids. Mandated auctions are likely to raise additional issues, including: (1) increased messaging volume (creating further stress on systems and requiring further operational builds), (2) the risk of informational leakage that could harm buy-side investors who participate in these auctions, and (3) the relatively small “upside” to engaging in the auctions because the order sizes – on average – would be small. Such practical hurdles would effectively close whole markets to the buy-side.

We are concerned that the Commission’s intended goal – to increase interaction between institutional and retail flow – would be seriously eroded because of the auctions’ inaccessibility for buy-side participants. If all retail order flow is redirected to auctions and away from exchanges’ RLP programs, and buy-side participants cannot efficiently access to the auctions, the opportunity for institutional and retail flow to interact will actually be damaged given these strategic, technological and regulatory constraints.

We note the Commission’s observation that today, wholesalers route approximately 20% of total share volume to external venues for execution. Institutional investors have the opportunity to interact with those retail orders on exchanges and ATSS, including through ATS midpoint and exchange RLPs (through broker-dealer’s eligible to participate in RLPs). The Proposal appears to be premised on the expectation that institutional investors that might today place midpoint liquidity on ATSS would instead submit those as qualified auction responses (or to exchange order books). As noted above, that seems unlikely, with the result being that there could be fewer retail/segmented orders routed to ATSS, resulting in fewer opportunities for institutional investors to interact with retail order flow.

D. The Economic Analysis is Largely Theoretical and at Odds with our Members’ Perceptions.

SIFMA AMG has serious concerns with the Commission’s economic analysis for the OCR. As a threshold matter, the economic analysis does not account for the associated costs, benefits and effects related to the operational issues identified above. While the Commission estimates that the forgone price improvement for segmented orders under the current market structure results in a \$1.5 billion “competitive shortfall.”¹³ SIFMA AMG finds this estimate to be wholly unreliable given the significant uncertainties of how investor behavior will change in response to the OCR.

¹³ Proposal at 130 (“Based on an analysis of trading data from the wholesalers and national securities exchanges in the first quarter of 2022, the competitive shortfall is estimated to be approximately 1.08 basis points per dollar traded by wholesalers or 1.08 cents for every \$100 traded, with an estimated total annual competitive shortfall of \$1.5 billion.”).

In addition, the Commission's own statements in the Proposal provide little confidence that the OCR would have the effect of providing investors with the remedy for the perceived competitive shortfall. To the contrary, our members firmly believe it will result in higher costs for investors through commissions and increased trading costs, even if investors are able to trade and liquidity providers participate.

Most problematic are the Commissions' own statements in the Proposal:

- “The Commission acknowledges 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.”¹⁴
- “It 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.”¹⁵
- “The Commission acknowledges considerable uncertainty in the costs that would arise from Proposed Rule 615, due to whether the current market practice of routing through wholesalers would persist.”¹⁶
- “There may also be an increase in trading costs for retail broker customers that carry greater adverse selection risks and individual investors whose orders would not meet the definition of a segmented order because they averaged 40 or more daily trades in NMS stocks over the six preceding calendar months.”¹⁷
- “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.”¹⁸
- “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.”¹⁹

The OCR and the \$1.5 billion competitive shortfall is consequently premised on the many “uncertain” outcomes that market participants will continue to act as they do today. In other words, the for the

¹⁴ OCR at 208.

¹⁵ OCR at 208.

¹⁶ OCR at 179.

¹⁷ OCR at 179.

¹⁸ OCR at 179.

¹⁹ OCR at 178.

competitive shortfall to be actualized into ~\$1.5 billion, all market participants would need to continue to act exactly as they do today—in particular that wholesalers will continue to be willing to provide price improvement at current levels and that liquidity from other market participants (that are fast enough to participate in 300 millisecond auctions) will provide additional price improvement (net of exchange transaction, connectivity and market data fees) to segmented orders.

SIFMA AMG believes that these assumptions that market participants will largely act the same is untenable, particularly when the OCR is combined with the numerous other changes to the market structure set forth in the Proposals. The competitive shortfall is more likely to be price improvement received “instead of” rather than “in addition to” the price improvement they receive today.

VI. Reassess the Need for Reg Best Ex as it is Redundant to Existing Regimes and Fails to Address Differences in Non-Equity Securities.

A. Overview of Proposal.

SIFMA AMG strongly endorses the importance of a robust best execution process for broker-dealers’ handling of customer orders in order to provide customers with the best terms reasonably available. SIFMA AMG also broadly supports the principles relied on by the Commission in Reg Best Ex—increasing market efficiency, promoting competition, reducing costs, mitigating potential conflicts of interest, and recognizing the differences among types of market participants. These principles that we both share have also long been recognized by FINRA and the MSRB and exist today in these SROs’ best execution rules, which have continued to function very well for investors.

Notwithstanding our shared view of the foundational principles underlying an effective best execution regime, SIFMA AMG believes Reg Best Ex is deeply flawed and cannot support its adoption as:

- Reg Best Ex fails to identify a market failure supporting the need for a Commission-level best execution rule as the Commission has not claimed that the current FINRA and MSRB rules fail to provide customers with best execution, and SIFMA AMG believes the rules work very well and continue to adapt as markets evolve,
- Reg Best Ex fails to adequately address differences in the manner in which non-equity securities trade, leading to confusing applications when attempting to fit the various types of securities within the Rule and detailed guidance outlined in the Reg Best Ex proposing release, and
- SIFMA AMG continues to believe that best execution is achieved through the current SRO framework and any identifiable deficiencies within that framework would be best improved by changes to the existing framework and enhancing/facilitating competition, such as through enhanced Rule 605 disclosures.

To the extent the Commission wishes to further examine the current best execution regime, SIFMA AMG supports broader industry and regulatory discussions and collaboration. However, as discussed in greater detail below, SIFMA AMG cannot support the adoption of proposed Reg Best Ex, which we believe is unworkable, unnecessary, and duplicative.

B. The Commission Has Failed to Identify a Market Failure or Demonstrate Meaningful Benefits of Reg Best Ex.

Our members are concerned that notwithstanding the Commission's proposal of a completely new best-execution regime, nowhere in the proposing release does the Commission claim that customers are not receiving best execution for their orders under the existing regime.

To the extent the Commission is able to identify any specific deficiencies in the enforcement of these best execution rules, SIFMA AMG believes that the appropriate mechanism to remedy such concerns would be for the Commission to employ its oversight authority to work with FINRA and the MSRB to amend the current rules or provide additional guidance related to the current rules.²⁰ Adding a new regulation to an already effective regime potentially puts customers' current execution quality at risk and subjects market participants to unnecessary costs, without any guarantee of improving the status quo.

Moreover, as the Commission has brought its own enforcement actions for violations of the best execution standard that involve fraud, it does not clearly state that its current enforcement ability, as well as FINRA's and the MSRB's existing regulatory authority, is insufficient to address potential violations of best execution. The Commission has not made any claim that FINRA, which has the authority to issue cease and desist orders and disgorgement for violations of FINRA and MSRB rules,²¹ has failed to enforce best execution requirements. Nor has the Commission specified why, in addition to its current ability to enforce FINRA and MSRB rules and directly enforce best execution cases involved fraud, cease and desist and disgorgement authority are needed to enforce best execution.

In other words, SIFMA AMG believes that the Commission should identify a best execution violation that it could not have brought under its existing authority. Courts have similarly made clear, such as in the case of the Commission's Transaction Fee Pilot, that regulation is generally only appropriate to address identified problems:

"Normally, unless an agency's authorizing statute says otherwise, an agency regulation must be designed to address identified problems. *See Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (holding that "[a] rule is legislative if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy"). **Rules are not adopted in search of regulatory problems to solve; they are adopted to correct problems with existing regulatory requirements that an agency has delegated authority to address.**"²²

Moreover, we are not aware that customers are failing to receive best execution under existing FINRA and MSRB best execution requirements. Given that each is an SRO over which the Commission has oversight authority and that the Commission has not alleged that the SRO rules are failing to provide best execution for customers, there appears to be no failure that justifies the imposition of a redundant, costly regulatory regime.

²⁰ SIFMA AMG notes that this is an approach that has routinely been employed with successful outcomes. See, e.g., TRACE; shortened trace periods.

²¹ See FINRA Rule 9800 Series.

²² *New York Stock Exchange et al v. SEC*, No. 19-1042 (D.C. Cir. 2020) (emphasis added).

Reg Best Ex fails to identify a single quantitative benefit that would result from Reg Best Ex's adoption and merely alludes to speculative, potential benefits to "investor protection" that may arise through potential changes to order routing.²³ Without any quantifiable benefits, the only thing for which the Commission and the public can be certain of is that Reg Best Ex will impose considerable costs (even under the Commission's grossly understated estimates), which costs may ultimately be borne by customers.²⁴

If the Commission has concerns about best execution in today's market environment, it should conduct a detailed study, request information from market participants about current practices, or issue a concept release to identify and problems and explore workable solutions with public input. The Commission should be aware of the problem it is attempting to solve before imposing a costly new set of rules on market participants without any clear benefits.

C. Reg Best Ex Lacks Significant Clarity and Creates Ambiguous Obligations

While Reg Best Ex's rule text sets forth a relatively concise set of requirements that in some ways appear to allow for broker-dealers to make facts and circumstances based determinations to achieve best execution as they do today, the Reg Best Ex proposing release contains very detailed guidance on the expectations of the Commission as to the specific ways in which broker-dealers would be expected to comply with the Reg Best Ex.

At a minimum, these diverging explanations create ambiguity and confusion, making it difficult for market participants to discern the appropriate standard and to provide meaningful comment on Reg Best Ex. In the worst, but perhaps most likely, case, the "guidance" in the proposing release will become the standard to which all market participants are held. This guidance itself is presented without clear, definitive standards, which makes it further likely that enforcement of the rule would lead to additional undefined "requirements" that broker-dealers will not be able to anticipate.

Ultimately, the Reg Best Ex rule text prescribes one set of purported requirements, while the Commission's discussion of Reg Best Ex in the proposing release communicates an entirely different set of requirements.²⁵

²³ See e.g., Reg Best Ex at 5524 ("The Commission preliminarily believes that the proposal would enhance investor protection and improve retail customer order execution quality to the extent that the proposal improves broker-dealers' order handling practices."). If retail order execution quality could be enhanced through Reg Best Ex, there should be some means by which the Commission could quantify such benefit, which the Commission has not done.

²⁴ See Reg Best Ex at 5545-47. The Commission estimates across all firms that would be subject to Reg Best Ex initial hourly burdens of 312,031 hours and costs of \$46.25 million and ongoing hourly burdens and costs of 391,577 hours and \$11.32 million per year. These estimates massively understate the actual costs for a variety of reasons including, for example, that there are not effective ways to identify the counterfactual scenarios of executions a firm could have received had the firm routed to another executing broker-dealer.

²⁵ As an example of the Commission turning a general policy and procedure requirement into a specific requirement, see pg. 83: "*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*

D. Reg Best Ex Does Not Adequately Consider Differences in the Markets for Other Securities

Reg Best Ex is broad in scope and would apply to transactions in all securities, but does not contain sufficient clarity as to how broker-dealers could comply with the proposed requirements with respect to many types of securities.

While the proposed requirements are least unclear with respect to the equity markets, strongly suggesting that Reg Best Ex was designed primarily with equity markets in mind, attempting to apply Reg Best Ex to other asset classes raises significant questions given significant differences in the market structure for those securities. For example, the data and information necessary to perform the best execution analyses to the level of detail prescribed by the guidance in the Reg Best Ex proposing release do not exist for many different types of securities.

This puts broker-dealers in an impossible position of being required to perform an analysis for which they do not have the necessary inputs. This problem is further compounded by Reg Best Ex's conflicted transactions requirements, which would require broker-dealers to seek out information beyond what is reasonably available and, in many markets, may not exist.

SIFMA AMG members note that fixed income markets trade very differently than equities, and although the Commission attempts to shoehorn the fixed income market structure into its guidance, there remain many aspects of Reg Best Ex that are difficult to square with the fixed income markets, such as the higher volume of principal and riskless principal transactions.

Even where the Commission has offered specific guidance related to fixed income securities, the Commission does so only with respect to government securities, municipal securities, and corporate bonds. This leaves out entire sectors of the fixed income markets, such as for mortgage-backed securities, credit default swaps, and collateralized loan obligations—the markets for which are themselves very different from the more liquid markets for government securities, municipal securities, and corporate bonds—yet all of these fixed income securities would be subject to the same rules and guidance provided by the Commission.

As another example, restricted securities would also be subject to Reg Best Ex, yet these are highly illiquid and there often are no venues offering pricing information and trading opportunities.²⁶ It is entirely unclear, for instance, how a broker-dealer selling a restricted security as principal or riskless principal could even determine a broader range of markets for such security as a conflicted transaction. At the same time, crypto asset securities have a substantial amount of liquidity, although much of it is available in international markets (many of which may be in unregulated jurisdictions) or through autonomous mechanism, such as automated market makers. Reading the rule and relevant guidance, it would appear that

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." These are very specific for "could" statements and change the entire impact of Reg Best Ex.

²⁶ 17 CFR 230.144(a)(3) (defining restricted securities).

the Commission would expect a firm to access international markets to the extent they are material sources of liquidity that may have the best price for a crypto asset security.

The key point is that the Commission claims it is proposing a principles-based standard to accommodate varying facts and circumstances while at the same time providing prescriptive guidance of its expectations—which, based on our experience is unequivocally the standard to which firms will be held—and yet this guidance is incomplete, having failed to address key differences among different types of securities. This is decidedly not the recipe for good policy.

E. Alternatively, and Notwithstanding Our Objections, Reg Best Ex Could Be Improved.

While we recommend the Commission abandon Reg Best Ex, in the event the Commission moves forward, we have three suggestions to minimize the downside risk.

It is our strong recommendation that the Commission should hew most closely to the existing FINRA best-ex guidance to avoid confusion, conflicts, and excessive implementation costs. The FINRA approach works quite well, and we would go so far as to say that if the Commission finds a deficiency with the FINRA regime, rather than part ways, the Commission should work to bring FINRA into alignment with its improved approach.

The second relates to the proposed exemption for trades involving institutional investors. While we understand such an exemption when the institutional investor solicits multiple bids, to the extent it only interacts with a single dealer, best execution protections should apply. When receiving multiple bids, the investor can make an informed judgment as to the appropriateness of the bids, whereas when receiving only one quote, the investor is constrained in performing such an analysis and would benefit from the protection.

Finally, as to the definition of “retail investor”, we are concerned the definition could be deemed to include retail investors when an investment advisor is trading on their behalf. Our concern would be that normally an advisor executes a bunched trade on behalf of multiple clients, including both funds and individual retail investors. However, in the event there is a different treatment for retail investors – whether or not investing through an investment advisor - the advisor could prefer to separate the trades into different bunches to avoid overall retail treatment. Such a bifurcated approach could potentially damage pricing and increase costs. For this reason, we recommend that the definition of “retail investor” exclude such investors when executing through an investment advisor.

As noted at the outset of these comments, on behalf of its members’ retail clients, SIFMA AMG shares the Commission’s mission to protect investors; to maintain fair, orderly, and efficient markets; and to facilitate capital formation. As fiduciaries, and also as our members work to attract and retain the business of their tens of millions of retail investors, we aim to take a stand for all investors, to treat them fairly, and to give them the best chance for investment success. It is our shared mission with the Commission, coupled with our front-line experience and insight into both specific markets and overall operational functionality, that compels us to provide thoughtful insights to help the Commission deliver needed reforms in an efficient, cost-effective manner, while avoiding unintended adverse consequences.

In that spirit, our members have serious concerns about the breadth and depth of the proposed changes. In our view, reform proposals must carefully target clearly identified issues and must be narrowly tailored to achieve the intended benefit with reasonably appropriate costs all the while avoiding collateral adverse consequences.

We are concerned that in aggregate, and coupled with the multiple significant reforms proposed across the SEC's regulated markets and entities, these Proposals, without careful refinement and an orderly, sequential roll-out, may introduce stresses, the negative consequences of which could dwarf any intended benefit. Given the unexamined interaction, we harbor grave concerns of the negative consequences that could result from such a revolutionary transformation of our strong and resilient markets.

On behalf of SIFMA AMG, we appreciate the opportunity to respond to the Proposals and your consideration of our comments and recommendations. If you have any questions or require additional information, please do not hesitate to contact us by calling William Thum at (202) 962-7381.

Sincerely,



William C. Thum
Managing Director and Assistant General Counsel, SIFMA AMG

cc: Honorable Gary Gensler, Chair, U.S. Securities and Exchange Commission
Honorable Caroline A. Crenshaw, Commissioner, U.S. Securities and Exchange Commission
Honorable Jaime Lizárraga, Commissioner, U.S. Securities and Exchange Commission
Honorable Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission
Honorable Mark T. Uyeda, Commissioner, U.S. Securities and Exchange Commission