

March 31, 2023

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

Re: File No. S7-32-22; Release No. 34-96496; Regulation Best Execution  
File No. S7-30-22; Release No. 34-96494; Regulation NMS: Minimum Pricing  
Increments, Access Fees, and Transparency of Better Priced Orders  
File No. S7-31-22; Release No. 34-96495; Order Competition Rule

Dear Ms. Countryman:

Goldman Sachs & Co. LLC (“**Goldman**”) appreciates the opportunity to provide the Securities and Exchange Commission (the “**SEC**” or the “**Commission**”) with comments<sup>1</sup> on proposed Regulation Best Execution (the “**Best Execution Proposal**”) and on certain aspects<sup>2</sup> of the Minimum Pricing Increments (Tick Sizes), Access Fees, and Transparency of Better Priced Orders (the “**Tick Size Proposal**”), and the Order Competition Rule (the “**Order Competition Proposal**”) proposals (together the “**Trading Proposals**”).<sup>3</sup>

We share the Commission’s belief that the liquidity, efficiency, and overall performance of the U.S. securities markets is of central importance to investors and the U.S. and global economies. While we appreciate the Commission’s important role in periodically re-evaluating market structure, any significant changes to the way our markets operate must be carefully evaluated to identify and understand the full range of potential outcomes.

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<sup>1</sup> Our comments are made on behalf of Goldman Sachs & Co. LLC. as well as Folio Investments, Inc., an affiliated U.S. broker-dealer, which serves as an introducing broker and provides custody, clearing, and related services.

<sup>2</sup> We are not providing comments on the proposed amendments to Rule 605 (See Exchange Act Release No. 96493 (Dec. 14, 2022) 88 FR 3786 (Jan. 20, 2023)). We have consistently supported enhanced disclosure to aid customers and market participants in the evaluation of execution quality and, while we generally support the proposed amendments, we concur with many of the suggested modifications that we expect to be set forth in industry association comment letters.

<sup>3</sup> Exchange Act Release No. 96496 (Dec. 14, 2022), 88 FR 5440 (Jan. 27, 2023) (proposing a best execution regulatory framework) (“**Best Execution Proposal**”); Exchange Act Release No. 96495 (Dec. 14, 2022), 88 FR 128 (Jan. 3, 2023) (proposing NMS Rule 615) (“**Order Competition Rule**” or “**Order Competition Proposal**”); Exchange Act Release No. 96494 (Dec. 14, 2022), 87 FR 80266 (Dec. 29, 2022) (proposing to amend Regulation NMS Rule 612 and NMS Rule 610) (“**Tick Size Proposal**”).

Therefore, while we agree with the Commission that a broker-dealer's duty to provide best execution to its customers is foundational to the functioning of our equity markets, we do not believe the Commission's Best Execution Proposal furthers this objective and therefore we cannot support it. We believe it will have the unintended consequence of reducing execution quality, particularly for institutional investors, by limiting the ability for broker-dealers to exercise their judgment and market expertise. These concerns are amplified by the fact there has not been a clear identification of shortcomings in the existing Financial Industry Regulatory Authority ("FINRA") and Municipal Securities Rulemaking Board ("MSRB") best execution framework.

In addition, the Commission did not undertake an analysis of the collective impact of the Trading Proposals, nor did it give the public sufficient opportunity to do so. The U.S. securities markets are widely regarded as the most resilient, liquid, and efficient in the world, but they are also quite complex. The Commission is proposing a series of significant and interrelated proposals that need to be carefully examined, especially in light of current economic and market conditions.

In particular, greater consideration should be given to the cumulative effect of the Trading Proposals with regard to operational risk and market resilience. As we discuss more fully below, the combined effect of the Trading Proposals is likely to be substantially higher volumes of mandated and complex order routing and messaging traffic. This has the potential to increase operational risk, concentrated in one or a few market venues, and consequently, the likelihood and potential impact of market disruption.

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### **Executive Summary**

- ***Adding Another Best Execution Standard Is Unnecessary and May Diminish Execution Quality***

The existing FINRA and MSRB best execution framework has served investors and our marketplace well. These standards provide clear guidelines for execution quality factors to be considered while maintaining flexibility for broker-dealers to exercise their judgment and expertise in meeting their duty of best execution.

In contrast, the Commission's Best Execution Proposal takes a more prescriptive approach to the required policies and procedures and places predominant emphasis on one execution quality factor, the prevailing market price. This will have an unintended negative impact on execution quality for larger customer orders, especially institutional orders. Rather than propose a broad new set of requirements, we recommend that the Commission first engage with FINRA and the MSRB, identify specific aspects of their existing best execution rules and guidance that need to be improved, and then consider appropriate enhancements.

In the alternative, if the Best Execution Proposal is ultimately adopted, the Commission should expressly exempt institutional customer accounts as defined under the FINRA and MSRB rules. Additionally, the Commission should modify the definition of an introducing broker, which is too narrow and saddles a subset of introducing broker-dealers with heightened best execution

responsibilities for which they have neither the necessary tools (e.g., market access and market data), nor the analytical expertise, to satisfy.

- ***The Cumulative Effect of the Trading Proposals on Market Resilience Must Be Adequately Considered***

The operational efficiency and resilience of our capital markets is critical to their growth and to investor confidence. While the Commission Staff have presented a stand-alone economic analysis for each of the individual Trading Proposals, they have not presented an analysis of their collective impact. When considered together, the Trading Proposals will result in a confluence of complex order routing dynamics and changes to market pricing that have the potential to create additional stress points in the market. We urge the Commission to carefully consider potential increases in operational risk and decreases in market resilience.

- ***The Definition of “Segmented Order” Should Be Aligned with Existing FINRA Rules***

The Order Competition Proposal introduces a new order type: segmented orders. We are concerned that the account classification within the definition of “segmented order,” and the related exception, will introduce complexity and cause confusion and uncertainty for investors. We urge the Commission to align the account classification and the large order criteria in the Order Competition Proposal with existing FINRA rules.

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**I. Adding Another Best Execution Standard Is Unnecessary and May Diminish Execution Quality**

**A. The Proposal Reduces an Essential Component of Best Execution: Broker-Dealer Judgment and Expertise**

A broker-dealer’s duty of best execution in handling customer orders is of fundamental importance. FINRA (previously the National Association of Securities Dealers, “NASD”) and the MSRB each have long-standing best execution rules and well-developed guidance on these rules. Indeed, since FINRA’s publication of Notice to Members 01-22 in 2001, its seminal best execution guidance, it has issued numerous additional notices providing further guidance on its rule (FINRA Rule 5310 and predecessor NASD Rule 2320). Such notices explain the execution quality factors to be considered as well as the scope and nature of the required execution quality reviews.<sup>4</sup>

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<sup>4</sup> FINRA Regulatory Notice, FINRA Reminds Member Firms of Obligation to Execute Marketable Customer Orders Fully and Promptly, Notice 22-04 (Jan. 21, 2022); FINRA Regulatory Notice, FINRA Reminds Member Firms of Requirements Concerning Best Execution and Payment for Order Flow, Notice 21-23 (Jun. 23, 2021); FINRA Regulatory Notice, FINRA Reminds Member Firms of Their Obligations Regarding Customer Order Handling, Margin Requirements and Effective Liquidity Management Practices During Extreme Market Conditions, Notice 21-12 (Mar. 18, 2021); FINRA FAQ, Best Execution and Order Handling, Section 4 (Jul. 14, 2015); NASD Notice, NASD Regulation Reiterates Member Firm Best Execution Obligations And Provides Guidance To Members Concerning Compliance, Notice 01-22 (Mar. 14, 2001).



The existing FINRA and MSRB<sup>5</sup>) best execution framework has served investors and the U.S. marketplace well for decades. In large part, the framework has been successful because it provides clear guidelines without being overly prescriptive. Like the Best Execution Proposal, the existing FINRA and MSRB framework requires broker-dealers to establish, maintain, and enforce policies and procedures reasonably designed to ensure compliance with their duty of best execution. Importantly, the FINRA and MSRB framework preserves broker-dealers' ability to exercise judgment and use their market expertise in evaluating the mosaic of factors that inform decisions to fulfill the varied trading objectives and strategies of diverse customers in a constantly changing market.

In contrast, the Best Execution Proposal imposes a rigid set of policies and procedures that require broker-dealers to follow predetermined decisions memorialized in their written procedures.<sup>5</sup> The Best Execution Proposal diminishes the unique value that broker-dealers provide to their customers and jeopardizes their ability to fulfill their duty of best execution.

#### **B. To Deliver Execution Quality Broker-Dealers May Need to Diverge From Prescriptive Procedures**

The Best Execution Proposal mandates a "one-size-fits-all" set of policies and procedures and requires an unprecedented level of granularity and preset decision-making. The proposed procedures effectively require a broker-dealer to "map out" precisely how each order it receives will be handled and/or routed over its order life, leaving reduced opportunity for the broker-dealer's informed exercise of judgment and discretion. While the fact that broker-dealers must follow their own policies and procedures is not a new requirement, the Best Execution Proposal creates a conundrum for broker-dealers in that adhering to the required preset policies and procedures may not achieve best execution for their clients, while deviating from them is a violation.<sup>6</sup>

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<sup>5</sup> Best Execution Proposal at 5449. For example, in accordance with Rule 1101(a) of proposed Reg Best Ex, the required policies and procedures must detail (1) how the broker-dealer will obtain and assess information regarding the markets trading the relevant securities, including information regarding price, volume, and execution quality; (2) how the broker-dealer will identify markets that may be reasonably likely to provide the most favorable prices ("material potential liquidity sources"); and (3) how the broker-dealer will incorporate material potential liquidity sources into its order handling practices and ensure it can efficiently access such sources. A broker-dealer would also be required to have policies and procedures detailing how it will determine the best market and make routing or execution decisions for customer orders by (i) assessing information on the best displayed prices, opportunities for price improvement, including midpoint executions, and other order exposure opportunities that may result in the most favorable price; (ii) assessing the attributes of customer orders, the trading characteristics of the security, the likelihood of execution, and any customer instructions in selecting the market most likely to provide the most favorable price, and (iii) in determining the number and sequencing of markets to be assessed, reasonably balancing the likelihood of obtaining better prices with the risk that delay could result in worse prices.

<sup>6</sup> Best Execution Proposal at 5442.

For example, a broker-dealer must have policies and procedures detailing how it will determine “the number and sequencing of markets to be assessed.”<sup>7</sup> Requiring such preset decision-making may limit one of the most essential tools used in achieving best execution: the smart order router, designed to be nimble and responsive to changes in a dynamic market through varied configurations affecting market selection and sequencing. For example, an institutional client, may, based on their urgency and current market conditions, decide to access more or fewer markets for a given strategy or at specific points in the strategy’s life, and the smart order router would be adjusted by the broker to accommodate those changed trading objectives. Such decisions are often supported by statistical evidence and customized to the particular institutional client.

### **C. The Proposal Prioritizes Prevailing Price Over Other Considerations**

In the Best Execution Proposal, the Commission has also taken a retail-focused position that stresses price relative to the prevailing National Best Bid and Offer (“NBBO”) as the most important best execution consideration. However, institutional customers’ trading objectives reflect a more complex relationship to NBBO. Institutional customers must consider the cumulative effect of orders routed to the market, the direct market impact of such orders, and the potential for information leakage. These considerations factor into an institutional customer’s decision to transact in block-size or over a time horizon (e.g., over the course of the trading day) via algorithm.<sup>8</sup> Institutions are typically focused on “parent order performance” (i.e., the execution quality they receive on their full order) which reflects the aggregate execution quality received across all individual executions (i.e., “child orders”). Thus, unlike the performance of a typical retail order, institutional order performance is not focused on single, small-sized execution but, instead, is typically evaluated relative to certain key benchmarks such as order arrival price, the volume weighted average price (“VWAP”), or the security’s closing price.

The handling of block-sized orders also illustrates the unique best execution considerations for institutional clients and non-institutional clients who trade in large size. While the execution price of a block trade may be inferior to the NBBO, pricing for a block trade is based on numerous factors. These can include the impact that a large block can have on market price, the certainty of execution, and the ability to shift risk to an intermediary that is skilled in managing and unwinding it. Institutional and non-institutional clients who trade in large size rely on the knowledge and expertise of broker-dealers to help determine optimal liquidity solutions, often in challenging market conditions.

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For all the above reasons, we do not support the Best Execution Proposal and do not believe it should be adopted. However, we would support efforts to identify aspects of the existing best

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<sup>7</sup> For example, a broker-dealer must have policies and procedures detailing how it will determine “the number and sequencing of markets to be assessed, reasonably balancing the likelihood of obtaining better prices with the risk that delay could result in worse prices.” Best Execution Proposal at 5449-50. In light of the sheer number of permutations of orders, markets, and market conditions, satisfying this requirement may be an impossibility.

<sup>8</sup> See Bershova, Nataliya and Rakhlin, Dmitry, *The Non-Linear Market Impact of Large Trades: Evidence from Buy-Side Order Flow* (Jul. 2013).

execution framework of FINRA and the MSRB that should be enhanced, and a tailored approach to addressing them. We believe that these regulators, with their decades of experience in developing best execution regulation and guidance and examining broker-dealers' compliance with such duties, will be able to provide valuable insight on this fundamental protection in the U.S. capital markets.

## **II. If Adopted, the Best Execution Proposal Should Be Modified With Respect to Institutional Clients and the Introducing Broker Definition**

### **A. Institutional Accounts Should Be Expressly Exempted**

As previously discussed, institutional customers' trading objectives, and the orders they place to achieve those objectives, are very different from those of individual retail customers. Institutional customers' orders are typically large and complex and frequently out-size available liquidity at the NBBO, often by many multiples. Institutions select and evaluate their broker-dealers based upon their comparative skill in handling and executing these large and complex orders.

There appears to be agreement regarding (1) the very different execution objectives and related execution quality measurements for retail orders, which are customarily smaller in size, versus institutional orders; and (2) the ability of institutional customers to monitor the quality of executions they receive. Indeed, the Commission itself has recognized this in the Best Execution Proposal.<sup>9</sup> The Commission has also recognized that its core concerns regarding the handling of retail customer orders, such as those related to payment for order flow and conflicts of interest, do not squarely apply to the handling of institutional customer orders.<sup>10</sup>

We believe that the Best Execution Proposal will have a disproportionate negative impact on the execution quality of institutional customers' orders.<sup>11</sup> Furthermore, as we have emphasized, the FINRA and MSRB framework has well-served institutional customers, who also have developed the extensive tools and expertise to evaluate execution quality. Therefore, if the Best

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<sup>9</sup> As the Commission stated, "[i]nstitutional customer orders handled on a not held basis may sometimes be executed based on customer-specified standards that may prioritize outcomes other than execution prices." Best Execution Proposal at 5519.

<sup>10</sup> As the Commission also explains:

The Commission understands that institutional customers often utilize multiple broker-dealers in the handling of their orders, which lowers the costs of switching brokers if they exhibit poor execution quality. Furthermore, in general, the Commission believes that there is less conflict in institutional customer order handling because institutional customers have better access (compared to retail customers) to data, which they utilize to monitor and analyze the execution quality that various broker-dealers offer. The Commission believes that (compared to retail brokers) institutional monitoring and lower switching costs encourage broker-dealers to provide increased execution quality in order to compete to attract institutional orders.

Best Execution Proposal at 5525.

<sup>11</sup> As noted, the Best Execution Proposal presents similar concerns with respect to non-institutional customers who trade in large size.



Execution Proposal is ultimately adopted, we encourage the Commission to expressly exempt institutional customer accounts, as defined under the FINRA and MSRB rules, from its scope and allow best execution for such accounts to continue to be governed under the FINRA and MSRB framework.

### **B. Introducing Broker Definition Should Be Modified**

We believe the Best Execution Proposal's definition of introducing broker, as set forth in proposed Rule 1101(d), is too narrowly scoped. Introducing broker-dealers rely on their executing broker-dealers for routing, execution, and market venue access decisions. Using the data provided by their executing broker-dealers, they then make their own independent determinations about execution quality.

As proposed, to qualify for the exemption that would allow them to continue the current standard for evaluating best execution, a broker-dealer must satisfy the three conditions of the new definition. In our view, the conditions disqualify a subset of broker-dealers without a corresponding policy reason or benefit to investors. Most notably, we disagree with proposed Rule 1101(d)(2), which limits a broker-dealer to the use of only an unaffiliated executing broker. While we acknowledge that conflicts of interest can exist between affiliated broker-dealers, we believe that such conflicts have been, and can continue to be, effectively managed, including through disclosure. We urge the Commission to eliminate the condition to the extent that it disqualifies an introducing broker from selecting an affiliated executing broker.<sup>12</sup>

### **III. The Cumulative Effect of the Trading Proposals on Market Resilience Must Be Adequately Considered**

We also encourage the Commission to give much more consideration to the impact that simultaneous implementation of the Trading Proposals could have on market stability, resiliency, and efficiency. The overlay of the Trading Proposals as contemplated by the Commission will add significant complexity to the ecosystem, which we believe will be potentially detrimental to investors across the market.

As an initial matter, the goal of finding the best available price for marketable retail orders will increase opportunity cost and operational risk for institutional customers and their broker-dealers. To illustrate this point, assume a retail order fails to execute at the midpoint and the broker-dealer handling the order commences a qualified auction to execute it as required under the Order Competition Proposal. Algorithmic strategies across the marketplace would likely be programmed to respond to the auction, including "child orders" from institutional clients who would need to include the qualified auction as a "material potential liquidity source" consistent with their obligations under the Best Execution Proposal. In terms of messages, the one retail order would trigger responses with very little benefit for the responders. Outcomes would be (1) increased opportunity cost for unfilled orders as prices continue to change in a dynamic market;

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<sup>12</sup> With respect to the other conditions under proposed Rule 1101(d), we concur with the comments that we expect to be set forth in the Securities Industry and Financial Markets Association ("SIFMA") comment letter.

(2) a greater risk of information leakage during the qualified auction, which in accordance with the Order Competition Proposal, lasts 100-300 milliseconds; and (3) increased operational risk resulting from the routing of orders in response to auction messages.

The simultaneous implementation of the Trading Proposals will increase message traffic and may challenge the stability of infrastructures managing this increase and market participants navigating the consumption of this data. With the introduction of minimum pricing increments under the Tick Size Proposal, market participants will be compelled to move their pricing in sub-pennies to stay within bid-ask spreads. Sub-penny quoting will significantly increase the volume of orders. The broadcast of qualified auctions will similarly increase message traffic.

Additionally, as we have noted in prior public comments, sub-penny quoting decreases the incentives for displayed liquidity by lowering the economic cost for stepping ahead of displayed orders.<sup>13</sup> Simultaneous changes in tick size and access fees may further alter the stability of the NBBO in unpredictable ways. For example, spreads may narrow with smaller tick sizes but available liquidity may decrease, as it will now be spread among more price points. Market participants may then need to execute at multiple price levels in order to access liquidity, increasing price volatility, particularly in times of stress. In other cases, spreads may widen with reduced access fees and restructured rebates, which may also increase volatility.

Finally, the confluence of complex order-routing dynamics, changes to the NBBO, and increased message traffic will create additional stress points in the market. When these dynamics are concentrated in a single or a few select market venues, as the case will be with qualified auction venues where market participants will be compelled to comply with the tenets of the Order Competition Rule and the Best Execution Proposal, there is an even greater risk of market disruption resulting from increased operational stresses. These dynamics will likely be even more pronounced during times of market volatility when the certainty of outcomes is highly valued by all market participants and any extra load on execution systems is undesirable.

Given the potential of the Trading Proposals to increase stress and message traffic for market participants and infrastructure, it may be instructive to consider safeguards the Commission undertook in adopting Regulation NMS in 2006. In particular, the Commission implemented operational solutions to ensure that market efficiencies were not sacrificed for the benefit of mandated price protection under the new Order Protection Rule, Rule 611.<sup>14</sup>

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<sup>13</sup> Letter to Elizabeth M. Murphy, Secretary, Securities Exchange Commission from Greg Tuser and Matthew Lavicka, Goldman Sachs (Jun. 25, 2010) (comment letter discussing Release No. 34-61358, File No. S7-02-10, Concept Release on Equity Market Structure; Release No. 34-62115; File No. 4-602, Market Structure Roundtable.).

<sup>14</sup> As the Commission highlighted in reference to their process, which included re-proposal of Reg. NMS:

Even prior to formulating proposals, our review included multiple public hearings and roundtables, an advisory committee, three concept releases, the issuance of temporary exemptions intended in part to generate useful data on policy alternatives, and a constant dialogue with industry participants and investors. This process continued after the proposals were published for public comment. We held a public hearing on the proposals in April 2004 that included more than thirty



In contrast to the limited analysis provided on the interrelated impacts of the Trading Proposals, the Commission provided fulsome analysis of specified exceptions needed in the Reg NMS proposal to facilitate market participants' compliance with its new Order Protection Rule. While technology has developed significantly since Reg. NMS was adopted, there are still practical limits to the ability of order and execution systems to transmit and process messages. In Reg. NMS, among other things, the Commission explicitly addressed concepts such as the ability to declare self-help (and bypass markets experiencing downtime delays or flickering quotes), use of intermarket sweep orders (to allow market participants to simultaneously access multiple venues and prices), and other order routing protocols and exceptions needed to communicate across the broad spectrum of the equity markets without interfering with market efficiencies or creating latencies.<sup>15</sup> While similar marketplace issues are implicated by the Trading Proposals, they have not been recognized or addressed.

As undertaken in the Reg. NMS Order Protection Rule process, we urge the Commission to more closely evaluate the impact of simultaneous implementation of the Trading Proposals before any decision to adopt them and, together with the industry, develop solutions to address the market stresses posed by the Trading Proposals. We reiterate our long-held position that the operational efficiency and resiliency of our capital markets is critical to their growth and to investor confidence.

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panelists representing investors, individual markets, and market participants from a variety of different sectors of the securities industry. . . We then carefully considered the more than 700 comments letters submitted by the public, which encompassed a wide range of views. In addition, the Commission staff prepared several studies of relevant trading data to help evaluate and respond to the views of commenters. Consequently, rather than immediately adopting rules, the Commission re-proposed Regulation NMS in its entirety in December 2004 to afford the public an additional opportunity to review and comment on the details of the rules and on the staff studies. The Commission then received, and carefully considered, more than 1500 additional comments on the re-proposal.

*See* Exchange Act Release No. 51808 (Jun. 9, 2005) 70 FR 37496, 37947-48 (Jun. 29, 2005) ("Regulation NMS Adopting Release"). Here also follows a portion of such regulatory history: Concept Release, Regulation of Market Information Fees and Revenues, Release No. 42208 (Dec. 9, 1999), 64 FR 70613 (Dec. 17, 1999); Concept Release, Request for Comment on the Effects of Decimal Trading in Subpennies, Exchange Act Release No. 44568 (Jul. 17, 2001), 66 FR 38390 (Jul. 24, 2001); Concept Release Concerning Self-Regulation, Exchange Act Release No. 50700 (Nov. 18, 2004), 69 FR 71256 (Dec. 8, 2004) ("SRO Structure Release"); SRO Transparency Release, Exchange Act Release No. 50699 (Nov. 18, 2004), 69 FR 71126 (Dec. 8, 2004); Original Proposal, Regulation NMS, Exchange Act Release No. 49325 (Feb. 26, 2004), 69 FR 11126 (Mar. 9, 2004); Extension of Comment Period, Regulation NMS, Exchange Act Release No. 49749 (May 20, 2004), 69 FR 30142 (May 26, 2004); Re-proposal, Regulation NMS, Exchange Act Release No. 50870 (Dec. 16, 2004), 69 FR 77424 (Dec. 27, 2004).

<sup>15</sup> *See* Regulation NMS Adopting Release; Regulation NMS Extension of Compliance Dates, Exchange Act Release No. 53829 (May 18, 2006), 71 FR 30038 (May 24, 2006); Order Exempting Certain Print Protection Transactions from Rule 611 of Regulation NMS, Exchange Act Release No. 55884 (Jun. 8, 2007), 72 FR 32926 (Jun. 14, 2007).

#### **IV. The Definition of “Segmented Order” under the Order Competition Proposal Should Be Aligned with Existing FINRA Rules**

Setting aside the important question of whether the Order Competition Proposal is likely to improve execution quality for retail orders, we believe the Order Competition Proposal’s criteria for defining relevant customer account classifications within the definition of “segmented order” introduces unnecessary complexity. In our view, the definition should be harmonized with existing FINRA definitions and standards. “Segmented order” is defined as “an account of a natural person, or an account held in legal form on behalf of a natural person or group of related family members.”<sup>16</sup> The definition would include non-institutional, high net worth accounts that are currently governed by FINRA and SEC Regulation Best Interest standards. This new definition will require broker-dealers to overlay procedures for yet another account classification, which in addition to being cumbersome and susceptible to errors, will undoubtedly cause confusion and uncertainty for the impacted customers. Rather than creating an overlapping account classification, we recommend that the Commission refer to existing account classification standards, starting with FINRA Rule 4512(c), a well-established and understood standard that sets the threshold for distinguishing between institutional and non-institutional accounts.<sup>17</sup>

Within its definition, “Segmented order” also includes accounts “with an average daily number of trades executed in Regulation NMS stocks of less than 40 in each of the preceding six calendar months.”<sup>18</sup> This added requirement to identify a “segmented order” by continuously performing a calculation of each relevant account’s average daily number of trades, over a rolling six-month window (and which may need to encompass the independent trading activities of various family members) creates risk of error for broker-dealers and uncertainty for customers, whose order-handling could change depending upon the volume of their activity.<sup>19</sup>

Finally, the Order Competition Proposal provides certain exceptions from its requirements, including an exception for segmented orders that have a notional value of at least \$200,000 (calculated at the midpoint of the NBBO upon receipt of the order). As with the elements of the “segmented order” definition, we believe this exception should be harmonized with existing FINRA criteria for large orders. FINRA Rule 5320 is well-established as the criteria used to

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<sup>16</sup> Order Competition Proposal at 243.

<sup>17</sup> FINRA Rule 4512(c) provides:

For purposes of this Rule, the term “institutional accounts” shall mean the account of:

- 1) a bank, savings and loan association, insurance company or registered investment company;
- 2) an investment adviser registered with the SEC under Section 203 of the Investment Adviser Act or with a state securities commission (or any agency or office performing like functions); or
- 3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least \$50 million

<sup>18</sup> Order Competition Proposal at 243.

<sup>19</sup> In addition, the Order Competition Proposal does not address how the rules apply to a customer who splits orders between multiple broker-dealers or multiple family members, i.e., whether they should be aggregated. Similarly, there is no explanation on how large orders with multiple executions should be treated. The Order Competition Proposal also does not address how orders from foreign dealers or banks should be treated.

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determine when the size of a customer's order reflects the requisite level of sophistication to provide trading consent.<sup>20</sup> We think this test is a better measure of a customer's marketplace sophistication.

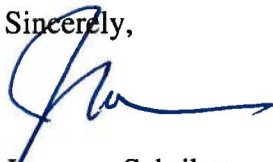
For all the aforementioned reasons, we suggest that the Commission modify the definition of "segmented order" and the related exception to align with the relevant FINRA standards.

## V. Conclusion

We urge the Commission to (1) provide additional opportunities for the public and industry participants to actively engage with the Commission Staff on each of the Trading Proposals through public hearings, roundtables, advisory committees and/or concept releases; and (2) exercise due caution as implementation timelines and compliance dates are set for each or any of the Trading Proposals.

Goldman Sachs appreciates the opportunity to comment on these very important Trading Proposals. We would be pleased to discuss any of the comments or suggestions in this letter with the Commission Staff in more detail. Please feel free to contact the undersigned with any questions.

Sincerely,



Jameson Schriber  
Managing Director  
Goldman Sachs & Co. LLC

cc: Gary Gensler, Chairman  
Hester M. Peirce, Commissioner  
Caroline. A. Crenshaw, Commissioner  
Mark T. Uyeda, Commissioner  
Jaime. Lizarraga, Commissioner

Haixiang Zhu, Director  
Division of Trading and Markets

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<sup>20</sup> FINRA Rule 5320, Prohibition Against Trading Ahead of Customer Orders, is applicable to orders of 10,000 shares or more unless such orders are less than \$100,000 in value.