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Congress of the United States
House of Representatives
Washington, DC 20515–2502

November 28, 2022

The Honorable Gary Gensler
Chair
Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Dear Chair Gensler:

I write to express my concerns about potential rule proposals related to the U.S. equity market structure that I understand the Commission will consider in the coming months. Your June 8, 2022 remarks entitled, "Market Structure and the Retail Investor," described six areas of anticipated reforms, including improving order-by-order competition by requiring retail investors' stock trades to be executed in auctions, implementing an SEC best execution rule, and addressing alleged conflicts of interest regarding payment for order flow, exchange rebates, and related access fees.[1] Since those remarks, the discussions I have had with market participants, regulated entities, and main street investors, lead me to believe these proposals are not based upon a clearly identified problem, will not achieve their purported objectives, and instead will harm millions of Americans who, for the first time in their lives, are investing in the stock market to build a more secure financial future for themselves and their families.

Stated simply, the SEC has yet to produce empirical evidence demonstrating that there is a problem with the current quality of U.S. equity markets for retail investors that would justify increased government intervention. Furthermore, the SEC has not demonstrated there is a problem severe enough to justify an onslaught of highly prescriptive, complex and untested "solutions," such as forcing retail orders to be executed in intraday auctions.

The concept of intraday auctions for retail stock trades appears to have been hastily developed over the last year without any basis in decades of market structure debate among market participants, Congress, and the SEC.[2]

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1 "Market Structure and the Retail Investor:" Remarks Before the Piper Sandler Global Exchange Conference: https://www.sec.gov/news/speech/gensler-remarks-piper-sandler-global-exchange-conference-060822. In your remarks, you outlined the following areas of anticipated reforms: 1) harmonizing the tick size regime across different market centers; 2) accelerating the implementation of new round lots and accelerating the enhanced transparency for quotation information with the remaining odd lots from the Market Data Infrastructure Rule, along with potentially creating a odd-lot best bid and offer; 3) requiring all Rule 605 reporters to provide summary statistics of execution quality; 4) implementing an SEC best execution rule; 5) enhancing order-by-order competition through auctions; and 6) mitigating conflicts with respect to payment for order flow and exchange rebates.

2 Unlike Regulation NMS and other prior SEC market structure reforms, the idea for intraday retail auctions has been subject to little, if any, real public debate or review by the Commission over decades of market structure discussions and rulemaking efforts. For example, auctions do not appear to have ever been suggested by or to the SEC's Equity Market Structure Advisory Committee, which was established in 2015, and held meetings through April 2017.

This suggested reform generally lacks economic justification when order competition exists in today's equities markets and investors already receive low-cost, high quality trade executions. It is untested, overly complex and likely to cause poor outcomes for a substantial number of issuers and investors compared to the current market structure. Other concepts like an SEC best execution rule are likely to be duplicative and unnecessary.[3]

The reality is our equity markets remain the deepest, most liquid in the world, and provide retail investors with historically high access to low-cost investment opportunities.[4] You claim that your agenda will make markets more fair for retail investors, but I believe that your rush to regulate and fundamentally alter the way our equity markets function through multiple expansive, burdensome reforms will do the opposite.

Equity markets reforms should be data-driven, deliberate, and without political influence. They should be inclusive of industry and investor feedback and ensure that the benefits outweigh the costs for our capital markets, our economy, and tens of millions of retail investors.

I am also troubled by the number and scope of interrelated and, in some cases, overlapping proposals you have directed SEC staff to develop. In particular, I question the SEC's ability to conduct an adequate and methodological economic analysis of your sizeable and complex rulemaking package. Any one of the six areas of potential changes alone could significantly impact market function, market quality and costs for retail investors. The problem is only compounded when the full set of anticipated proposals are considered together, which they must be in any serious economic analysis.

With actions on each of the six components, the number of variables will only multiply, and it is unlikely that the Commission will be able to reasonably predict and evaluate the consequences that so many complicated and interconnected rule proposals will have on market quality and the costs to retail investors. The result will be a flawed and incomplete economic analysis and, in turn, a new set of government rules will fail to meet the basic standards of the Administrative Procedure Act and may significantly disrupt market liquidity and harm millions of retail investors.

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3 As you know, pursuant to SEC authorization under Section 19 of the Securities Exchange Act of 1934, FINRA has enforced a best execution rule (Rule 5310) for decades. *See* https://www.govinfo.gov/content/pkg/FR-2011-12-09/pdf/2011-31606.pdf. There has been no evidence presented to date that FINRA's best execution rule is outdated or otherwise incapable of ensuring that retail broker-dealers achieve best execution for their customers' stock trades. Indeed, FINRA's best execution rule has been enforced by both FINRA *and* the SEC for decades.

4 *See* "The 'Actual Retail Price' of Equity Trades," Sept. 2022, by Christopher Schwarz, Brad M. Barber, Xing Huang, Philippe Jorion, and Terrance Odean available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4189239; "Commission Savings and Execution Quality for Retail Trades" (Dec. 2, 2021), by S.P. Kothari, S.P., Travis L. Johnson, and Eric C. So available at: https://ssrn.com/abstract=3976300; "The Impact of Zero Commissions on Retail Trading and Execution," by Shane Swanson available at: https://www.greenwich.com/equities/impact-zero-commissions-retail-trading-and-execution; "Payment for order flow provides a better cost of execution, says former SEC Chair Jay Clayton" (CNBC) available at: https://www.cnbc.com/video/2022/08/03/payment-for-order-flow-provides-a-better-cost-of-execution-says-former-sec-chair-jay-clayton.html. Although the Commission has discussed some of these suggested reforms in the context of the Gamestop events of early 2021, the market structure concerns that contributed to that event relate primarily to the outdated T+2 settlement cycle, as well as short-term, pandemic-driven trading activities among some retail investors, not competition among trading centers or payment for order flow. *See* "Republicans Correct the Record Regarding the Meme Stock Event of January 2021" available at: https://republicans-financialservices.house.gov/news/documentsingle.aspx?DocumentID=408380. Moreover, rushing to implement fundamental changes to our equity market structure based on a very brief, unprecedented period of market volatility and trading activity would be inappropriate and inconsistent with the Commission's historic rulemaking practices.

Given these very serious investor protection concerns, I would request that you respond to the following questions no later than December 13th, 2022:

1. Over the last several years, millions of new retail investors have begun participating in our equities markets, and many of these investors are younger and more diverse than ever. Will your suggested market structure proposals raise costs, including potential brokerage fees, for many of these retail investors?

2. I am concerned that intraday auctions may harm liquidity for many small and mid-cap issuers – and retail investors in these issuers – to the extent that liquidity providers in auctions are no longer willing to take the other side of these trades or less willing to provide a price that meets or beats the National Best Bid and Offer. Is it the SEC's belief that an auction system will result in reduced liquidity for less actively traded stocks and lead to higher costs for many retail investors? If not, why?

3. To date, how many SEC employees have been involved with developing the market structure proposals you described in your June 8, 2022, remarks?

4. A recent report from the SEC's Acting Inspector General states that the SEC has had "difficulties hiring individuals with rulemaking experience," has resorted to "relying on detailees, in some cases with little or no experience in rulemaking," and has "borrowed staff from other organizational areas to assist with rulemaking activities."[5] Of the employees listed in response to question #3, how many 1) do not work in either TM or the Division of Economic and Risk Analysis; or 2) have little or no experience on matters related to equity market structure; or 3) are detailees?

Sincerely,

Ann Wagner

Ann Wagner
Member of Congress

5 https://www.sec.gov/files/inspector-generals-statement-sec-mgmt-and-perf-challenges-october-2022.pdf.