Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

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

Dear Ms. Countryman:

The American Securities Association (ASA) is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The ASA's mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. The ASA has a geographically diverse membership of almost one hundred members that spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest regions of the United States.

We welcome this opportunity to provide our perspective on the four proposed rulemakings regarding market structure issued by the Securities and Exchange Commission (SEC) in December 2022 (Proposed Rules).

The ASA previously submitted a letter requesting that the SEC extend the March 31, 2023 deadline for comment submissions in order to ensure that market participants had sufficient time to fully assess the impact that the Proposed Rules will have on competition, capital formation, and trading costs for retail and institutional investors.[1]

The ASA is an active participant in the policy conversation related to equity market structure and has provided observations and recommendations on the topic to the SEC and Congress for years. The ASA has long been concerned about the decline in public companies over the last two decades, and we believe improving the market structure and trading environment for small public companies and emerging growth companies (EGCs) will incentivize more businesses to enter the public markets.

[1] https://www.americansecurities.org/post/asa-calls-on-sec-to-delay-comment-timeline-for-market-structure-proposals

I. Background

Congress laid out five constructs for the SEC to create a national market system in equities: fair market competition, efficient order execution, transparency of price quotations, the best execution of customer orders, and opportunities for investors' orders to interact directly, without the participation of a dealer.[2] The SEC was guided by these features when it adopted Regulation NMS in 2005 (Reg NMS).

Today's equity market structure is a function of regulation, technology, and competition. The SEC rules created a zero-sum game which allowed market participants to compete to obtain the best technology, which has allowed first movers to extract profits before everyone else caught up. This resulted in a hyper competitive market where everyone whose business model depended on it uses similar technology, and until now, the rules haven't changed. As a result, both costs and margins have come down significantly and the market has reached a point of maximum efficiency, which has greatly benefited retail investors.

While many facets of today's market structure serve retail investors well, several distortions exist that must be considered prior to implementing any sweeping reforms. These distortions include:

- Different 'tiers' of market structure exist across the equity market;
- The current one-size-fits-all regulation of equity trading harms small issuers and has contributed to a decrease in initial public offerings (IPOs);
- The overreliance on time and price exacerbates price moves in all securities; and
- Existing law allows for monopoly pricing power by for-profit entities whose interests are not aligned with those of everyday investors.

A primary objective of the SEC's efforts with the Proposed Rules – or any rulemaking for that matter – should be to promote competition within the markets that will further lower costs and increase efficiencies for investors.

In our view, the Proposed Rules suffer from two fundamental flaws: (1) the SEC has not properly assessed the full scope of how the rules would work in concert with one another if they were adopted; and (2) they would not promote competition in the equity markets. The ASA believes that a more incremental approach towards market structure reform that promotes competition and tailors certain rules to increase liquidity for smaller public companies and EGCs would be more appropriate. There are certain reform ideas within the Proposed Rules the ASA supports, provided the SEC take a more deliberate approach instead of imposing them on the market all at once.

[2] 15 U.S.C. sec. 78k-1(a)(1)(C).

II. Concerns Regarding Rulemaking Process and Scope of Proposed Rules

The ASA has registered our concerns regarding the SEC's current rulemaking agenda on several occasions over the last two years. Since Spring of 2021, the SEC has proposed roughly 50 new rulemakings and provided limited time for affected parties to comment on proposals, sometimes providing only 30 days for the public to provide comments.

The Proposed Rules were approved during an open meeting of the SEC on December 14, 2022 and represent the most consequential effort by the SEC to remake equity market structure in recent history. The SEC's comment period does not properly account for the time and resources necessary for the public to fully comprehend and respond to each proposal and contemplate what the new market structure might look like if all four proposals are adopted collectively.

Commenters must also consider the possibility that the SEC will arbitrarily pick and choose certain aspects of each proposal to implement. This creates an unlimited set of possible scenarios for what the environment for equity trading will look like once some or all of the Proposed Rules are finalized. Yet none of the individual proposals consider how the Proposed Rules could interact with one another or what the cumulative cost or impact of the Proposed Rules would be on the market.

Rather than marching down its current path, the SEC should prioritize targeted reforms that would gain the support of a wide spectrum of market participants, and, more importantly, would help inform the SEC as to whether further changes to equity market structure are necessary and in the best interest of investors.

A discussion of these targeted reforms follows:

III. Disclosure of Order Execution Information

The SEC is proposing to amend Reg NMS Rule 605 to expand the number of entities that would be required to disclose certain information related to execution quality. Under the proposed rule, broker-dealers that introduce or carry 100,000 or more customer service accounts, single dealer platforms, and entities that would be subject to the auction requirements of the order competition proposal would be required to provide a monthly Rule 605 report. The ASA is generally supportive of the Rule 605 proposal and agrees that the SEC should update both the content of these disclosures as well as entities required to provide them.

Additionally, the ASA believes that the SEC should update the 605 disclosures for payment for order flow (PFOF) in a common-sense plain language manner that should appear as follows:

"XYZ broker received payment from the sale of its customers' securities orders. The total amount of this payment was $____. XYZ sold its customer orders to the following firms __, ___, ___, and ___. XYZ received the following payments from each firm ____, ___, ___, ___, and ___." (the amount of payments from each firm that paid the broker for customer orders can also be set forth in a simple table format)

IV. Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders

A. Tick Size. Current market structure has a one-size-fits-all approach that applies a minimum tick size of one-cent for all stocks trading at or above $1.00/share.

For many stocks that are "tick constrained," this one-cent increment is much larger than what the market on its own would dictate. The one-cent increment for quoting can make it difficult for liquidity providers to fill orders and often results in higher trading costs. Accordingly, the ASA supports a reduction in the tick size to one-half cent for stocks that are currently tick constrained.

The ASA is also very supportive of widening the tick size for stocks that are not tick constrained and have sporadic liquidity such as those of many small, mid-cap, and EGC issuers. We suggest the SEC allow these companies to work with the exchanges where they are listed to implement a tick size that is appropriately tailored to their market characteristics, such as liquidity, research coverage, market cap, etc. (i.e. an intelligent tick size). That said, we strongly oppose the application of a one-half cent tick size to any stock outside of the most liquid (narrower spread) stocks—regardless of how the Commission chooses to define that universe.

We oppose reducing the tick size below one-half cent for even the most liquid stocks. A tick size of one-tenth of a cent for the most liquid stocks would directly benefit high frequency trading activity and the exchanges who profit from it. Importantly, it will also put every other market participant at a disadvantage when they attempt to access exchange liquidity or post displayed limit orders, the exact opposite of what the Commission is trying to achieve. The result will be lower aggregate liquidity, the needless creation of more messaging traffic, and a government sponsored increase of exchange market data revenues.

We are also highly concerned about the ability of investors to react to rapidly changing prices at multiple price levels on multiple exchanges in a one-tenth of a cent world. The Commission notes that "a smaller tick size may increase the cost of executing large orders by fragmenting liquidity across multiple price levels and increasing the complexity of locating shares for the orders."[3] We agree, and the level of technology required to post and seek liquidity in this

[3] Proposing Release, at 80304.

environment will be extremely costly and it is not currently an in-house function of many firms' trading businesses.

We believe that reducing the tick size to one-half cent for stocks with narrower spreads will address the current market need. We suggest the Commission refrain from considering any further changes to tick sizes until it can evaluate the result of that change and determine if any further action is justified with hard data.

B. Access Fees. We support the SEC changing the exchange access fee structure. The mandatory access fee of 30 mils in Reg NMS has distorted pricing and increased overall transaction costs.[4] This has occurred because for-profit exchanges use their market power to extract monopoly rents through the mispricing of market participant's access to displayed liquidity.[5]

Not surprisingly, we strongly support reducing access fees to 10 mils for all NMS securities because it will reduce the overall cost of exchange trading. We are not alone in supporting a substantial reduction in access fees.[6] This should (1) lead to an increase in investor interaction with displayed quotes, (2) provide an economic reason for all participants to submit displayed quotes to an exchange, and (3) end the corrosive and discriminatory nature of the current exchange fee and rebate system (more on this below).

We believe the Commission should eliminate the tiered fee and rebate pricing models used by certain exchanges. However, in the event the exchanges are allowed to retain these pricing structures, we believe full detailed disclosure of how they work in practice is necessary.

It should concern the SEC that rebate benefits are so heavily concentrated among certain market participants. The current tiered rebate pricing scheme imposes a burden on market competition that impacts every other exchange member that cannot trade the volume needed to obtain the highest rebate tiers. Eliminating this discriminatory practice would force exchanges to come up with an alternative pricing method that fairly allocates exchange fees among *all of its members*, as is required by law.[7]

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[4] Letter from Paul M. Russo, Managing Director, Goldman Sachs & Co., to Brent F. Fields, Secretary, SEC, dated May 24, 2018.
[5] The maximum access fee is used by regulated for-profit exchanges to subsidize maximum rebate payments, and this subsidy creates conflicts of interest in order routing that does not lead to better execution quality for investors.
[6] Letter from Stacy Cunningham, President, NYSE, to Brent J. Fields, Secretary, SEC, dated October 2, 2018, avail. at https://www.sec.gov/comments/s7-05-18/s70518-4470779-175854.pdf. See Letter from John Ramsay, Chief Market Policy Officer, IEX to Brent J. Fields, Secretary, SEC, dated June 27, 2018, avail. at https://www.sec.gov/comments/s7-05-18/s70518-3968434-167099.pdf. RBC Capital Markets, "Complexity of Exchange Pricing and Corresponding Challenges to Transparency and Routing" (October 2018), avail. at https://www.sec.gov/comments/s7-05-18/s70518-4527261-176048.pdf. Larry Harris, ''Maker-Taker Pricing Effects on Market Quotations,'' at 24 (Nov. 14, 2013), avail. at https://www.lexissecuritiesmosaic.com/gateway/sec/speech/hujibusiness_Maker-taker.pdf. Letter from Paul M. Russo, Managing Director, Goldman Sachs & Co., to Brent F. Fields, Secretary, SEC, dated May 24, 2018, at note 5 and accompanying text. Among others.
[7] 15 U.S.C. sec. 78f (b)(4); 15 U.S.C. sec. 78f (b)(8)

The SEC is also proposing to prohibit an exchange from setting fees or rebates in a way such that the fee or rebate for a trade cannot be determined at the time the trade is executed. We support this effort. If the rebate paid by an exchange for each trade is known *at the time of* the trade, then market participants will have a better understanding of the fees, rebate schedules, and impact of tiered pricing on their execution costs.

Finally, the ASA supports the inclusion of a best odd-lot bid/offer in the consolidated tape, but we caution the SEC from requiring broker-dealers to use this metric as a benchmark against execution quality.

V. Retail Auctions

ASA does not believe that auction mechanism will work as intended and we fear it may harm the ability of certain firms to compete by negatively impairing their use of third-party execution service providers who guarantee and provide certainty of order execution. To be clear, this dynamic exists outside of and is not related to any PFOF arrangement one broker-dealer may have with another.

Not every firm has a sophisticated trading operation to match the speed necessary to compete on every order in today's market. So, the need to outsource certain execution functions to other firms who specialize in this is extremely important to these firms' customers and their business models. Any interference with a firm's choice to outsource such services to third parties will severely impair their ability to compete in today's market. The auction process introduced in the Order Competition proposal unfairly discriminates against every business model that outsources execution services to others to compete, and therefore, we oppose it.

In the proposing release, the SEC acknowledges that wholesalers currently provide price improvement for retail orders but speculates that an order-by-order auction would lead to greater price improvement for retail investors. Such assertions are empirically unfounded and not supported by any evidence within the Proposed Rules.

From a retail trading perspective, while this construct is intended to improve prices for retail investors, the tradeoff is certainty of execution (spread is the price investors pay for certainty). If successful, the tick size and round lot reforms will narrow spreads, hence our view that the proposals in aggregate seem to be "solving" the same problem twice.

Any implementation of the auction concept would only serve to transfer order execution away from wholesalers directly toward the exchange promoting this idea. This begs the question: how will further enabling the market power of a monopoly increase competition within the overall architecture of today's equity market structure?

Further, as previously noted, if the SEC were to prioritize modernizing the disclosure of order execution information, it could assess the effect of these updated requirements on price improvement and determine whether additional steps are necessary without micromanaging the way the market functions.

Finally, the Commission could encourage competition for retail orders by giving market centers and market participants more flexibility to compete to offer retail investors price improvement, without mandating auctions or any other forced execution mechanism.

VI. Best Execution Proposal

The SEC has proposed Regulation Best Execution (Proposed Reg Best Ex), a federal best execution framework to consist of three components (1) Rule 1100, which sets forth "the best execution standard"; (2) Rule 1101, which requires policies and procedures; and (3) Rule 1102, which requires an annual report.

Proposed Reg Best Ex is unique among the four SEC proposals in that it would apply to all securities transactions (e.g., equities, fixed income, private securities, digital assets), while the other three proposals apply only to national market system (NMS) for equities.

First, the Proposed Reg Best Ex establishes requirements that go beyond the existing best execution regulatory regime established by the current rules of the Financial Industry Regulatory Authority (FINRA) and the Municipal Securities Rulemaking Board (MSRB). Yet, the SEC has not established a legal rationale for why or even which FINRA and MSRB rules are failing markets or investors to justify a federal requirement.

FINRA Rule 5310 contains a vast body of interpretive guidance that has evolved alongside market changes while MSRB Rule G-18 serves transactions in municipal securities and was modeled on FINRA Rule 5310.

These rules should remain the standards for best execution in our industry. Proposed Reg Best Ex will create complications in areas that are not currently linked up with established today's best execution rules, subjecting broker-dealers to substantial regulatory uncertainty among and between the various rules.

Second, the SEC's Proposed Reg Best Ex is overly burdensome. It imposes detailed policies and procedures requirements, ultimately amounting to a checklist by which to automate a process that requires independent thought and consideration. The proposal also calls into question broker-dealers' judgment about where and how to execute customers' orders by forcing an entirely new regulatory model on top of established protections for which the SEC has not identified any failure. Ultimately, this proposal would also stifle brokers' ability to decide what exactly is best execution for their customers and encourage thoughtless bureaucratic complacency.

Third, Proposed Reg Best Ex approaches retail customer protection with an overly broad brush. Retail broker-dealers will be faced with an intensified standard for conflicted transactions. As such, firms might be forced to rethink their business models – a consideration that currently maximizes efficiency and returns – to adopt an outcome that would have the opposite effect. Prescriptive requirements can ultimately cost the customer more out of pocket, and we caution the SEC from pushing firms into untenable situations when current best execution requirements are working well for markets and customers.

At the very least, it's unclear whether a retail broker-dealer can comply with the SEC's proposal while also balancing conflicts and trying to achieve the best price for its customer.

Fourth, Proposed Reg Best Ex should not apply to institutional customers who arguably do not want the protection of a best-execution rule. Institutional investors arrive at a decision to enter into a trade for various reasons and the bottom line is not always price. In fact, the exact same security can be valued at different prices by separate institutions who might wish to own the security for entirely different objectives.

It is common practice for an institutional customer to initiate outreach for a bid on a security to several broker-dealers who separately engage in outreach to its own customers to gauge interest and pricing and quantity. If price and quantity can be agreed upon, then the parties will transact, but if there is no agreement, then there will be no deal. Thus, it is short-sighted for the SEC to imply that a broker-dealer should make the price of a security paramount to other competing interests, especially for institutional customers.

Proposed Rule 1101 requirements to establish and maintain written policies and procedures go beyond current SRO rules. In crafting such a prescriptive proposal, the Commission broadly undermines the decision-making capacity of individual broker-dealer employees and effectively subjects an experienced professional to having to be micromanaged by an unnecessarily complicated rule.

In conclusion, the ASA opposes Proposed Reg Best Ex because it is overly broad in scope, does not contemplate the interaction of existing best execution rules, ignores the unintended consequences, and has not identified any regulatory failure or concern with the rules that work well in practice today.

VII. <u>Conclusion</u>

We applaud the SEC for proposing important steps to change the current market structure and we are supportive of certain reforms. We look forward to working with you and the staff on how to move the ideas that can garner consensus forward.

Sincerely,

Christopher A. Iacovella

Christopher A. Iacovella
President & Chief Executive Officer
American Securities Association