March 31, 2023

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

Re: Regulation Best Execution (File No. S7-32-22, RIN 3235-AN24); 88 Fed. Reg. 5,440 (Jan. 27, 2023)

Dear Ms. Countryman:

Better Markets[1] appreciates the opportunity to comment on the above-captioned Proposed Rule ("Proposal" or "Release") issued by the Securities and Exchange Commission ("SEC" or "Commission") on December 14, 2022.[2]

The Proposal, if adopted, would establish a best execution standard for registered brokers, dealers, government securities brokers and dealers, and municipal securities dealers ("broker-dealers"). Specifically, proposed Regulation Best Execution would require broker-dealers to "use reasonable diligence to ascertain the best market for the security, and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions (for purposes of Regulation Best Execution, 'most favorable price')."[3]

To flesh out this duty, broker-dealers would be required to establish, maintain, and enforce written policies and procedures to comply with the best execution standard, including heightened policies and procedures for conflicted transactions. Conflicted transactions would include transactions as principal, with affiliates, or involving payment for order flow ("PFOF"). Broker-dealers would be required to review their execution quality on a quarterly basis and compare that execution quality with what it could have obtained in other markets. They would also be required to review their policies and procedures annually and prepare a report on that review. Finally,

[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

[2] Regulation Best Execution, 88 Fed. Reg. 5,440 (Jan. 27, 2023).

[3] Release at 5,555.

1825 K Street, NW, Suite 1080, Washington, DC 20006 | TELEPHONE (1) 202.618-6464 | FAX (1) 202.618.6465 | WEBSITE bettermarkets.com

broker-dealers would be required to maintain and preserve records made in compliance with the best execution standard.

## BACKGROUND

The simple fact is that in today's securities markets, many investors—especially retail investors—are not getting the best available prices for their orders to buy and sell stock. This state of affairs has arisen from a number of inter-related factors.

- First, while there is a FINRA [and MSRB] rule requiring broker-dealers to use "reasonable diligence" to seek out and obtain the best execution price for client orders, the rule is weak on its face, difficult to enforce, and provides broker-dealers too much discretion to determine what their own duty of best execution is.

- Second, our securities markets have become enormously fragmented and largely opaque, including 24 exchanges, dozens of ATSs, and a cadre of wholesalers or internalizers—market participants that for their own benefit, attract and execute a huge percentage of retail order volume. As a result, finding the best prices poses challenges.

- Third, as a result of this fragmentation and opacity, the chosen benchmark for determining the "best" execution price, known as the NBBO, is a distorted and incomplete metric, one that typically is ***not*** the best price at which orders can be executed.

- Fourth, huge conflicts of interest are in play when it comes to order execution, and that profit motive induces some market participants to route orders for execution in ways that do not yield best execution for clients. Specifically, sophisticated market participants such as the wholesalers can game the system through the process of PFOF—paying brokers for retail order flow, executing those orders internally at prices that reflect apparent price improvement over the NBBO benchmark, and then, in turn, engaging in offsetting trades at better prices for their own gain.

The Proposal seeks to address the first problem, the weaknesses in the rules governing the duty of best execution. However, evaluating the Proposal requires an understanding of the foregoing factors and the challenges they pose as the SEC seeks to improve the quality of trade executions that retail investors receive.

### 1. The duty of best execution is currently set forth in a weak FINRA rule.

The duty of best execution predates modern securities laws and has its roots in common law principles of agency and fiduciary obligations, including obligations of "undivided loyalty and

reasonable care that an agent owes to his principal."[4] Explicit in the duty of best execution owed by a principal to an agent is the "understanding that the client is engaging in the trade and retaining the services of the broker as his agent solely for the purpose of maximizing his own economic benefit, and that the broker receives her compensation because she assists the client in reaching that goal."[5] While this duty grew out of common law principles of agency, in today's capital markets, this duty applies to broker-dealers via SRO rules and through the antifraud provisions of the federal securities laws.[6]

The duty of best execution for broker-dealers is primarily governed by SRO rules at the Financial Industry Regulatory Authority ("FINRA"). Specifically, Rule 5310 states that in any transaction with a customer or customer of another broker-dealer, a broker-dealer "shall use ***reasonable diligence to ascertain the best market*** for the subject security and buy or sell in such market so that the resultant price to the customer is ***as favorable as possible under prevailing market conditions***."[7] This multifaceted standard includes a list of factors to determine when a broker-dealer has used "reasonable diligence" in executing a customer's trade, including:

a) the character of the market for the security (e.g., price, volatility, relative liquidity, and pressure on available communications);
b) the size and type of transaction;
c) the number of markets checked;
d) accessibility of the quotation; and
e) the terms and conditions of the order which result in the transaction, as communicated to the member and persons associated with the member.[8]

This list of factors demonstrates the many considerations that can go into an analysis of the duty of best execution. Additionally, depending on the size of the trade, the type of trade, and the type of investor seeking to execute the trade, some of these factors may be more important to the broker-dealer's best execution duty than others. For example, the most important factors to a retail investor purchasing a few shares of a popular exchange-traded fund will be markedly different than the most important factors to a large institutional investor seeking to purchase a large block of shares of an individual stock. While price may be most important to the retail investor, the institutional investor may have additional considerations such as filling the order in certain blocks. This provides broker-dealers with a lot of leeway and latitude to determine what their own duty of best execution is and is not. With that leeway and latitude comes the enticing opportunity for broker-dealers to take advantage of investors.

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4 *Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266, 270 (3d Cir. 1998); *See also* SEC, Report of Special Study of Securities Markets, H.R. Doc. No. 95, 88th Cong. 1st Sess. Pt. II 623, https://www.sechistorical.org/collection/papers/1960/1963_SSMkt_Chapter_07_2.pdf ("A broker-dealer acting as an agent for a customer in the execution of a transaction assumes the obligations of a fiduciary…a corollary of the fiduciary's duty of loyalty to his principal is his duty to obtain or dispose of property for his principal at the best price discoverable in the exercise of reasonable diligence").

5 *Newton*, F.3d at 273.

6 Regulation NMS, Exchange Act Release No. 51,808, 70 Fed. Reg. 37,496, 37,538 (June 9, 2005).

7 FINRA Rule 5310(a)(1) (emphasis added).

8 FINRA Rule 5310(a)(1)(A-E).

FINRA's best execution regulatory framework, coupled with existing caselaw, presents the duty of best execution as "a corollary of the fiduciary's duty of loyalty,"[9] to protect investors by limiting broker-dealer discretion to route customer orders in a way that maximizes profit at the expense of the customer. Thus, at least in theory, the duty of best execution essentially requires that broker-dealers route customer orders in a manner that will result in the best execution reasonably available under prevailing market conditions. Yet the supplementary materials accompanying FINRA's Rule 5310 reveal how weak the standard actually is, essentially requiring only periodic reviews of execution quality. Those materials require broker-dealers to conduct either an order-by-order review of execution quality ***or*** "regular and rigorous reviews of the quality of the executions of its customers' orders." Those periodic reviews need only be quarterly.[10] Because of these provisions, the duty of best execution has been reduced to a general requirement—applicable to all of a broker-dealer's customer orders in the aggregate—to periodically assess which order routing practices offer the most favorable terms of execution under the circumstances. It serves as a weak deterrent against order routing and execution practices that harm investors.

**2. Enforcement of the best execution standard has been notoriously weak.**

The multi-factor tests in FINRA Rule 5310 to determine execution quality, coupled with misleading execution quality data (discussed in more detail below), makes the duty of best execution exceedingly difficult to monitor, much less enforce. In the most egregious cases, the SEC has stepped in, but because it has no best execution rule in its own arsenal, it generally relies on the anti-fraud provisions in the securities laws.

This approach to enforcement of the best execution requirement—and the impact of the intense conflicts of interest between brokers and their clients arising from PFOF—is illustrated starkly by a December 2020 SEC enforcement action against Robinhood. According to the SEC, Robinhood—among other things—misled its customers about its receipt of PFOF.[11] While some disclosures such as trade confirmations and customer agreements mentioned that Robinhood "may" receive PFOF, its more readily accessible (and likely more widely read) FAQs about its revenue sources omitted any mention of PFOF, even though PFOF was (and still is) Robinhood's

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[9] SEC, Report of Special Study of Securities Markets, H.R. Doc. No. 95, 88th Cong. 1st Sess. Pt. II 623, https://www.sechistorical.org/collection/papers/1960/1963_SSMkt_Chapter_07_2.pdf.

[10] FINRA Rule 5310.09(a).

[11] *See* Robinhood Fin., LLC, Securities Act Release No. 10906, Exchange Act Release No. 90694 (Dec. 17, 2020). Robinhood neither admitted nor denied the allegations; Author Hannah Levintova observed that "[t]he same year that Robinhood launched, financial journalist Michael Lewis published Flash Boys—an exposé of high frequency trading firms that shed light on how [PFOF] deals were negotiated by Wall Street," the "conflicts of interest," and "how trading firms' order flow profits [come] at the expense of everyday investors." Hannah Levintova, Robinhood Promises Free Trades. Did Alex Kearns Pay with His Life?, MOTHER JONES (Apr. 29, 2021), https://www.motherjones.com/ politics/2021/04/robinhood-gamestop-free-trades-alex-kearns/. After noting that the book "touched off a firestorm on Wall Street and in Washington," she detailed how Robinhood then concealed its receipt of PFOF from the public and customers. *Id.*

largest source of revenue. Concealing its receipt of PFOF was an intentional decision by Robinhood "because it believed that [PFOF] might be viewed as controversial by customers."[12]

Additionally, Robinhood misled its customers about execution quality while knowingly giving its customers inferior execution. Consider the following from the SEC enforcement order:

> In or around May 2016, Robinhood began negotiations with a number of principal trading firms about potentially routing Robinhood customer orders to those entities. In the course of those negotiations, certain of the principal trading firms told Robinhood that there was a trade-off between payment for order flow on the one hand and price improvement on the other: If Robinhood negotiated for higher payment for order flow revenue, according to the principal trading firms, there would be less money available for the principal trading firms to provide price improvement to Robinhood's customers… Robinhood explicitly offered to accept less price improvement for its customers than what the principal trading firms were offering, in exchange for receiving a higher rate of payment for order flow for itself.[13]

The SEC ultimately found that Robinhood lost its customers approximately $34.1 million in price improvement even after considering potential savings from "commission-free trading."[14] The SEC's action resulted in a settlement under which Robinhood agreed to pay a $65 million civil penalty and to retain an independent consultant to review its policies and procedures relating to PFOF, its communications with its customers, and its execution of customer orders, and to ensure Robinhood followed those policies and procedures in the future.[15] For its part, FINRA alleged that Robinhood violated Rule 5310, although the allegations as well as the relief were tepid, resulting in a censure, a $1.25 million fine, and the retention of an independent consultant to evaluate the firm's policies for compliance with Rule 5310. This rare instance of enforcement involving the duty of best execution epitomizes the failure of FINRA rule 5310 to serve as an

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[12] Robinhood Fin., LLC, Securities Act Release No. 10906, Exchange Act Release No. 90694, at 2 (Dec. 17, 2020) (The use of "controversial" here is a flag that one of the biggest benefits of settling with prosecutors and regulators like the SEC is that the settling party gets to negotiate not just the penalty and the violations, but also the very language of the documents announcing the settlement. Of all the things customers might think about Robinhood truthfully disclosing that it gets most of its revenue from HFT firms buying their orders, "controversial" would seem pretty low on the list. One can presume that Robinhood correctly believed that its customers would see this conflicted financial arrangement as a red warning flag, which is why they presumably chose to conceal it).

[13] Robinhood Fin., LLC, Securities Act Release No. 10906, Exchange Act Release No. 90694, at 6 (Dec. 17, 2020).

[14] Robinhood Fin., LLC, Securities Act Release No. 10906, Exchange Act Release No. 90694, at 10 (Dec. 17, 2020) (A very recent study by the Dutch Authority for the Financial Markets comes to the same conclusion, finding that customer orders routed to venues that paid for those orders received price improvement, at most, eight percent of the time); Philip Stafford, Retail Investors Lose Out When Brokers Sell Their Orders, Dutch Regulator Warns, FIN. TIMES (Feb. 9, 2022), https://www.ft.com/content/4d5866b6-b723-416e-92b2-940d28d303a6.

[15] Robinhood Fin., LLC, Securities Act Release No. 10906, Exchange Act Release No. 90694, at 11-15 (Dec. 17, 2020).

effective deterrent against violations of a broker's basic obligation to seek out and obtain the best price for client orders.

### 3. **Decades of market fragmentation have introduced unnecessary complexity that sophisticated market participants have used to maximize their own profits.**

The market structure of the U.S. capital markets has evolved significantly since the foundational securities laws passed in the 1930s and 1940s. Today, the Commission is charged with overseeing 24 national securities exchanges, 99 alternative trading systems, 7 national clearing agencies, 5 SROs, and thousands of advisers, broker-dealers, and funds.[16] Decades of exemptions from those foundational securities laws, carved out by Congress and the Commission, have needlessly fragmented and complicated our capital markets into the system we have today. What does it say about the current state of our equity markets where 90 percent of retail orders[17] are routed to a select number of dark, off-exchange wholesalers and away from lit-exchanges where price discovery is available and transparent for all to see?

Market structure has been intentionally complexified and overengineered by the financial industry and U.S. regulators—sometimes inadvertently but often deliberately—to the advantage of a very small number of Wall Street firms, which seek to extract profits from investors by "getting between the wall and the wallpaper."[18] The consequence, and too often the goal, of this created complexity has been the transformation of our financial markets from a wealth creation system for the many into a wealth extraction system for the few. This market fragmentation, has created opportunities for predatory market participants, including brokers, high-frequency trading firms, and others, to take advantage of retail traders, through PFOF arrangements, maker-taker fee structures at exchanges, and other arrangements, all of which create conflicts of interest between brokers and their clients, lead to inferior execution, and, relatedly, enable certain privileged market participants to take advantage of retail investors.

Illiquid, inefficient, unfair, disorderly, or unstable markets undermine the public confidence necessary to attract and maintain investor participation, thereby limiting the value of information derived from secondary trading, distorting capital allocation and costs across the U.S. economy, and ultimately, constraining the capital formation critical to job creation and U.S. economic growth.

### 4. **Faulty price improvement metrics have enabled broker-dealers to evade the duty of best execution.**

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[16] *Fiscal Year 2023 Budget Request for the Federal Trade Commission and the Securities and Exchange Commission Before the Subcomm. on Fin. Servs. and Gen. Gov't*, 117th Cong. (2022) (statement of Gary Gensler, Chair, SEC).

[17] Release at 5,444.

[18] *See* Thomas Jaffe, *Getting between the wall and the wallpaper,* FORBES (Oct. 20, 1997), https://www.forbes.com/forbes/1997/1020/6009066a.html#7d354a61363d.

Despite the existence of FINRA Rule 5310, which governs a broker-dealer's duty of best execution, retail broker-dealers that accept PFOF and wholesalers claim they offer their customers "price improvement" on the trades they execute. However, price improvement, by definition, must be defined relative to a benchmark—that is, the price must be improved relative to some other price. To put it simply, in the equities markets, price improvement is measured against a flawed benchmark—the so-called "national best bid or offer," or the "NBBO."

Despite its name, the NBBO frequently does not represent the "best" bid or offer available on the public U.S. stock exchanges. The NBBO is disseminated through a public data feed that consolidates executable orders across the U.S. stock exchanges. However, these exchanges facilitate only about 53 percent of the trading volume across the markets, which means that the trading interest leading to transactions in 47 percent of the market is excluded from the NBBO.[19] For the remaining trading that does occur on-exchange, an estimated 20 percent is executed against hidden orders, which are also excluded from the NBBO.[20] And trading interest in the form of "odd-lot" orders (i.e., in general, orders for less than 100 shares) is excluded from the NBBO as well, despite being regularly displayed at better prices than the NBBO in certain categories of securities. The Commission stated it best when it said, "[w]hen evaluating price improvement, it is important to note that the NBBO displayed across exchanges does not include many of the best prices available on exchanges, such as odd lots and non-displayed orders."[21]

The Proposal provides contemporaneous evidence that wholesalers only give marginal price improvement to NMS stock orders. In analyzing CAT data, the Proposal found:

> on average, 51% of the shares internalized by wholesalers are executed at prices less favorable than the NBBO midpoint. Out of these individual investors shares that were executed at prices less favorable than the midpoint, on average, 75% of these shares could have hypothetically executed at a better price against the non-displayed liquidity resting at the NBBO midpoint on exchanges and NMS Stock ATSs.[22]

The Proposal concludes that despite wholesalers technically complying with its duty of best execution using NBBO as its benchmark, "customers would benefit from robust consideration by retail broker-dealers regarding, for example, the possibility of available liquidity priced at the

[19] *See* CBOE, U.S. Equities Market Volume Summary (accessed March 15, 2021), https://www.cboe.com/us/equities/market_statistics/.

[20] SEC, Select Metrics: U.S. Exchanges Hidden Rate (%), Market Structure, Data Visualizations (last accessed March 13, 2021), https://www.sec.gov/marketstructure/datavis/ma_exchange_hiddenrate.html#.YFAJBy1h2-w (The hidden volume rate, as we mentioned above, generally ranges from ten to thirty percent, depending on the exchange and measurement period).

[21] SEC STAFF REPORT ON EQUITY AND OPTIONS MARKETS STRUCTURE CONDITIONS IN EARLY 2021 12 n.39 (2021).

[22] Release at 5,502.

midpoint of the NBBO at other markets."[23] This is a tacit admission by the Commission that the NBBO midpoint is a flawed metric.

As long as, and up until, the NBBO (as currently constructed) is the benchmark for measuring a broker-dealer's duty of best execution to its customers, broker-dealers will be able to leverage PFOF to prey on retail order flow and retail investors. Only the truly egregious examples of a broker-dealer ripping off their own customers—as we witnessed in the December 2020 Robinhood enforcement action—will be punished if the NBBO is used as the benchmark for best execution in its current state. [24]

### 5. Payment for Order Flow ("PFOF") creates especially intense conflicts of interest.

In the 1980s, market-maker Bernie Madoff, who would later become infamous for operating the largest Ponzi scheme in history and stealing billions from his investors, recognized that he could make a profit if he could convince broker-dealers to route their trades, i.e. their order flow, to his firm for execution.[25] He also realized he could only make this profit if the orders he received were largely uninformed about the direction of the market. Thus, he began paying brokers a penny per share to send him their order flow, which was enticing to brokers who were having to pay the NYSE three cents per share to execute orders on exchange.[26] The concept of retail PFOF was born. This practice was of course lucrative for brokers, and also for the high-frequency trading ("HFT") firms, or wholesalers, that purchase this order flow and make money by collecting the spread between what they are willing to buy or sell a stock for (the bid or offer), and what they are willing to sell or buy the stock for (the offer or bid).

While PFOF has been around since the 1980s, the practice became much more prevalent over the past few years with PFOF revenue exploding. For instance, PFOF revenue received by four major brokerages from wholesalers in 2020 was $2.5 billion compared to PFOF revenue for from these same firms in 2019, which was only $895 million.[27] That is a 280% increase in PFOF revenue in just one year. That trend continued into 2021 with PFOF revenue for the 12 largest U.S. brokerages topping out at $3.8 billion, including nearly $1 billion in PFOF revenue for Robinhood alone.[28] With wholesalers willing to spend inordinate sums to broker-dealers for retail order flow

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[23] Release at 5,445.

[24] The SEC's Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders rule proposal to include odd-lot data into its core market data, along with other changes, should help to increase price transparency.

[25] Shawn Tully, *No such thing as a free trade: How Robinhood and others really profit from 'PFOF' – and why it harms the markets*, FORTUNE (March 1, 2021), https://fortune.com/2021/03/01/robinhood-trading-app-free-trades-pfof-stock-market/.

[26] Robert H. Battalio & Tim Loughran, *Does Payment for Order Flow to Your Broker Help or Hurt You*, 80 J. BUS. ETHICS 37, 38-29 (2007).

[27] Gary Shorter, Cong. Rsch. Serv., IF11800, Broker-Dealers and Payment for Order Flow 1 (2021) (The four brokerages include TD Ameritrade, Robinhood, E*Trade, and Charles Schwab).

[28] Wayne Duggan, *Could the SEC End Payment For Order Flow*, FORBES (Aug. 22, 2022), https://www.forbes.com/advisor/investing/payment-for-order-flow/ (In 2021, Robinhood received $974 million in PFOF revenue, nearly half of all their revenue brought in that year).

in today's markets, broker-dealers face powerful conflicts of interest as they choose between accepting PFOF and faithfully exercising their duty of best execution.

## OVERVIEW OF THE PROPOSAL

The Commission proposes to establish its own best execution standard for brokers, dealers, government securities brokers and dealers, and municipal securities dealers. The Proposal would require the exercise of ***reasonable diligence*** to obtain the most favorable prices under prevailing market conditions. Its principal regulatory mechanism is the requirement that broker-dealers establish, maintain, and enforce written ***policies and procedures*** reasonably designed to comply with that best execution standard. The Proposal is broadly applicable to orders for all types of securities, including equities, fixed income, private securities, and digital assets.

**Proposed Rule 1100**

Broker-dealers shall use reasonable diligence to ascertain the best market for the security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions (for purposes of Regulation Best Execution, "most favorable price").

- Exemption: Regulation Best Execution does not apply to a broker dealer when:
  (i) another broker-dealer is executing a customer order against the broker-dealer's quotation;
  (ii) an institutional customer, exercising independent judgement, executes its order against the broker-dealer's quotation; or
  (iii) the broker-dealer receives an unsolicited instruction from a customer to route the customer's order to a particular market for execution.

**Proposed Rule 1101**

Broker-dealers shall establish, maintain, and enforce written policies and procedures with respect to promoting the best execution of customer orders.

*Proposed Rule 1101(a)(1)*—Policies and procedures shall address how the broker or dealer will comply with best execution standard by:

(i) obtaining and assessing reasonably accessible information concerning the markets trading the relevant securities;
(ii) identifying material potential liquidity sources; and
(iii) incorporating material potential liquidity sources into its order handling practices.

*Proposed Rule 1101(a)(2)*—Policies and procedures shall address how the broker-dealer will determine the best market for customer orders that it receives by:

(i) assessing reasonably accessible and timely information for best displayed prices and opportunities for price improvement that may result in most favorable price;

(ii) assessing the attributes of the customer orders and trading characteristics; and
(iii) reasonably balancing the likelihood of obtaining better prices with the risk that delay could result in a worse price.

*Proposed Rule 1101(b)*—Any order that a broker-dealer executes as principal, including riskless principal; routes to, or receives an order form an affiliate; or provides or receives payment for order flow ("conflicted transactions") shall include additional information in its policies and procedures, including:

(i) how a broker-dealer will obtain and access information about price, volume, and execution quality, in identifying a broader range of markets beyond those identified as material potential liquidity sources;
(ii) how the broker-dealer evaluates a broader range of markets, beyond material potential liquidity sources, that might provide the most favorable price for customer orders; and
(iii) documenting its compliance with best execution standard for conflicted transactions and any arrangement concerning payment for order flow, including parties to the arrangement, all qualitative and quantitative terms, and date and terms of changes to the arrangement.

*Proposed Rule 1101(c)*—Broker-dealers shall review the execution quality of their transactions on a quarterly basis and compare with the execution quality that could have been obtained from other markets and revise its best execution policies and procedures accordingly.

*Proposed Rule 1101(d)*—Introducing brokers are exempt from 1101(a), (b), and (c) if they establish, maintain, and enforce written policies and procedures to review the execution quality of such executing broker and compare it with what it might have obtained from other executing brokers. Introducing brokers do not carry customer accounts or hold customer funds or securities; their executing broker is unaffiliated with the introducing broker; and they do not accept payment for order flow.

**Proposed Rule 1102**
Broker-dealers shall review and assess the design and overall effectiveness of their best execution policies and procedures on an annual basis. Each broker-dealer shall prepare a written report and present it to the Board of Directors.

**Books and Records Requirement**
Broker-dealers shall maintain and preserve required records and other documents.

**COMMENTS**

The Proposal represents an important step forward in the effort to ensure that retail investors obtain something closer to the best available prices for their securities trades. Having a

Commission rule in place—not only an SRO rule—will by itself confer a number of important advantages, enabling the Commission to use the rule in its examination efforts and enforcement actions. In addition, the Proposal is stronger in substance than the FINRA rule, which promises to further enhance trade execution practices for the benefit of retail investors.

However, we also raise a number of concerns related to the Proposal. It is not sufficient by itself to address the problems surrounding retail order execution and it therefore cannot be viewed in isolation. It is part of a set of market structure rule proposals that will require greater retail order competition, reduced tick sizes, and enhanced disclosure about execution quality.[29] It is important that all of these reforms take effect to maximize the improvements to retail order routing and execution practices that the Commission is appropriately seeking to achieve. Moreover, the Commission should consider additional reforms, including banning the incentives—notably PFOF—that are largely responsible for the conflicts of interest that degrade order routing and execution practices to the detriment of retail investors. Finally, we urge the SEC to clarify the application of the Proposal in some important respects, specifically with respect to institutional traders and access to market data.

## I. It is necessary and appropriate for the SEC to establish its own Regulation Best Execution to enhance its examination and enforcement power with respect to violations of the best execution requirement.

In many ways, the SEC's proposed Regulation Best Execution mirrors FINRA Rule 5310 governing a broker-dealer's duty of best execution. For example, proposed Rule 1100 states that a broker-dealer shall:

> use ***reasonable diligence to ascertain the best market for the security***, and buy or sell in such market so that the ***resultant price to the customer is as favorable as possible under prevailing market conditions*** (for purposes of Regulation Best Execution, "most favorable price").[30]

This language in the Proposal is similar to FINRA's existing Rule 5310 on a broker-dealer's duty of best execution, which states that a broker-dealer must:

> use ***reasonable diligence to ascertain the best market for the subject security*** and buy or sell in such market so that the ***resultant price to the customer is as favorable as possible under prevailing market conditions***.[31]

[29] *See* Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, 87 Fed. Reg. 80,266 (Dec. 14, 2022); *see also* Disclosure of Order Execution Information, 88 Fed. Reg. 3,786 (Dec. 14, 2022); *see also* Order Competition Rule, 88 Fed. Reg. 128 (Dec. 14, 2022).

[30] Release at 5,555 (emphasis added).

[31] FINRA Rule 5310 (emphasis added).

Despite the substantive similarities between the core duty set forth in the Commission's proposed Regulation Best Execution and the core duty set forth in FINRA's Rule 5310 governing best execution, the Proposal will confer several important advantages over the status quo. Simply by virtue of enshrining the duty of best execution in its arsenal of securities regulations, the Commission will have more examination and enforcement tools at its disposal to enforce the duty of best execution instead of having to rely on the anti-fraud provisions in securities laws or on the ability or willingness of FINRA to take action.

While the Commission has generally broad authority to bring injunctive actions under Section 21(d)(1) of the Securities Exchange Act for violations of federal securities laws and regulations, its authority is limited in certain circumstances regarding enforcement of SRO rules, such as FINRA Rule 5310. Section 21(f) of the Securities Exchange Act specifically states that the Commission cannot bring an injunctive action for violation of an SRO rule unless the SRO is "unable or unwilling" to take the appropriate action or such action is "necessary or appropriate in the public interest or for the protection of investors."[32] Additionally, as noted in the Proposal, the Commission also has limited authority to obtain civil penalties for violations of SRO rules or obtain relief in administrative and cease-and-desist proceedings for violations of SRO rules.[33]

The Proposal reinforces the point by highlighting the limitations on the Commission in enforcing violations of SRO rules, such as FINRA Rule 5310. Instead of relying on the anti-fraud provisions of the securities laws or waiting for the SRO to take action, if this Proposal were adopted the Commission would have the full collection of enforcement tools to ensure broker-dealers are providing best execution to their customers and following their own policies and procedures for doing so. The ability of the Commission to bring injunctive actions for violations of a broker-dealer's duty of best execution, issue cease-and-desist orders, and sanction a broader group of broker-dealers will also serve as a deterrent against bad behavior and be a net benefit to investors.

The Commission's Proposal would also facilitate Commission enforcement by transforming the existing duty of best execution from a principles-based duty enforced through anti-fraud laws to a more prescriptive duty that requires brokers to establish, maintain, and enforce written policies and procedures reasonably designed to comply with the best execution standard. These clear-cut obligations are more readily enforced and are more likely to induce compliance.

Finally, with its own rule, the Commission has the opportunity to apply the duty of best execution more broadly and fairly across all broker-dealers, including those that are currently exempt from FINRA Rule 5310 or are not registered with FINRA at all.[34] Ultimately, the Commission will better be able to protect investors and the integrity of the public markets if it adopts its own Regulation Best Execution.

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32 Securities Exchange Act Section 21(f).

33 Release at 5,485.

34 Commission registered broker-dealers are not required to register with FINRA under Section 15(b)(8) of the Securities Exchange Act if they effect transactions in securities solely on an exchange. Additionally, the Proposal makes clear that Regulation Best Execution should apply to those entities performing broker-dealer functions for crypto securities regardless of whether they are registered with FINRA or the Commission.

## II. The Proposal offers several substantive advantages over FINRA rule 5310.

### A. The Proposal would strengthen the obligation of brokers to pursue best execution in general and specifically with respect to conflicted transactions.

The Proposal includes prescriptive provisions governing the steps that a broker must take in connection with the duty of best execution. For example, the policies and procedures required under the Proposal must address ***how*** the broker will comply with the best execution standard by obtaining necessary information, identifying suitable markets, and incorporating potential liquidity sources into its order handling practices. The policies and procedures must also address ***how*** the broker will determine the best market by accessing timely information, assessing the attributes of customer orders, and determining the numbering and sequencing of markets to be assessed. These stand in contrast to the rudimentary list of factors that must be ***considered*** under FINRA rule 5310 when assessing "reasonable diligence" or that brokers must consider in their regular reviews of execution quality.

The additional requirements for broker-dealers' conflicted transactions in the Proposal are a step in the right direction and above and beyond the requirements in FINRA Rule 5310. These additional requirements are justified because of the powerful incentives created by conflicts of interest in order routing and execution, such as routing to an affiliate or to a broker-dealer offering PFOF in exchange for order flow. While the Proposal should go further, as discussed below in Section III, requiring additional policies, procedures, and documentation of such transactions should mitigate the economic incentives faced by broker-dealers when operating in conflicted transactions and complying with the duty of best execution. Specifically, Proposed Rule 1101(b) would require broker-dealers in conflicted transactions to include in its policies and procedures (1) information related to price, volume, and execution quality when identifying a broader range of markets beyond material potential liquidity sources; (2) how the broker-dealer evaluates those broader range of markets that may provide more favorable prices; and (3) documenting any arrangements concerning payment for order flow and the terms of that agreement. This additional information should help equip the Commission to ensure that broker-dealers engaging in conflicted transactions are complying with Regulation Best Execution.

### B. The Proposal would strengthen the requirements applicable to introducing brokers to address market structure issues.

The Proposal would narrow what is known as the introducing broker exemption relative to FINRA Rule 5310. Typically, an introducing broker relies on another broker-dealer, or clearing broker, to execute customer trades. Because the introducing brokers do not execute the trade, FINRA has allowed these firms to rely on the clearing broker's review of its execution quality for purposes of the duty of best execution so long as the clearing broker discloses "the statistical results and rationale" of its review to the introducing broker and the introducing broker reviews these results and rationale.[35] This exemption has enabled broker-dealers that rely on other broker-dealers to execute their customers' trades to comply with a substandard duty of best execution. The

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[35] FINRA Rule 5310.09(c).

Commission's Proposal would narrow this exemption so that far fewer broker-dealers could take advantage of it, which would benefit investors.

Like FINRA's introducing broker exemption, the Commission's proposed rule includes an exemption from maintaining policies and procedures for certain introducing brokers. However, this exemption would not be as widely available to introducing brokers as the exemption found in the FINRA rule and even when broker-dealers do qualify for the exemption, they would have more concrete and specific requirements. The Commission's Proposal would narrow the definition of "introducing broker" by defining it as a broker-dealer that: (1) does not carry customer accounts or hold customer funds or securities; (2) has an arrangement with an unaffiliated broker-dealer to execute the introducing broker's customer orders; and (3) has not accepted PFOF, rebates, or other benefit in return for routing the orders to the clearing broker.[36] There are no such provisos in the definition of an introducing broker in FINRA Rule 5310. Narrowing the definition of an introducing broker for purposes of complying with the duty of best execution as the Proposal seeks to do more appropriately accounts for the duties of a broker-deal in today's markets. It also recognizes that certain conflicted relationships that exist between introducing brokers and clearing brokers, including affiliated entities and PFOF, can affect the duty of best execution.

The introducing broker exemption in the Proposal not only narrows the definition of who is an introducing broker but also includes more concrete and specific actions required by the introducing broker in analyzing the execution quality of its clearing broker. Instead of the more general requirement that an introducing broker review the results and rationale of the executions by the clearing broker, the introducing broker would need to establish policies and procedures to compare the execution quality of the clearing broker with the execution quality it may have obtained from other broker-dealers.[37] This more concrete and specific requirement for introducing brokers would require introducing brokers to survey the market for the best execution quality, which in turn, should lead to customers of introducing brokers getting better execution on their trades.

## III. **Heightened policies and procedures for conflicts of interest are appropriate, but PFOF is fundamentally inconsistent with principles of Best Execution and the Commission should ban the practice.**

The Proposal's heightened policies and procedures for conflicted transactions are an improvement from existing SRO rules regarding the duty of best execution, but they do not solve for the problem that PFOF is fundamentally inconsistent with the principles of best execution. FINRA's best execution requirements have not kept pace with order routing technology or practices and have been too malleable to mitigate the conflicts of interest presented by PFOF arrangements. PFOF presents material conflicts of interest that the best execution rule established by FINRA—as currently drafted, interpreted, and enforced—does almost nothing to mitigate.

The Proposal's heightened requirements for broker-dealers engaging in conflicted transactions, such as ones with the exchange of PFOF, may help root out the most egregious

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[36] Release at 5,475.
[37] *See* Release at 5,484.

instances of broker-dealers acting against the best interests of their customers in executing their trades. However, the fundamental inconsistency between a broker-dealer's duty of best execution and accepting PFOF will likely not be solved through disclosure and heightened policies and procedures alone. It is well documented that broker-dealers that accept PFOF do so to the detriment of their customers in the form of worse execution quality. In fact, the economic analysis section in the Proposal makes a compelling case for banning PFOF altogether and walks the reader up to that line only to stop short. We believe the Commission should cross that line and ban PFOF. At a minimum, in the absence of an outright ban on PFOF, the Commission should add to the heightened disclosures and other measures described in the Proposal and more clearly require an order-by-order documentation of best execution compliance with respect to all conflicted transactions.

### A. PFOF represents an exceptionally powerful, damaging, and well-recognized conflict of interest.

PFOF creates a distinct conflict of interest between (1) a broker-dealer's duty of best execution and (2) a broker-dealer's economic incentive to maximize its own profits for shareholders and owners through revenue streams such as PFOF. This conflict of interest, in practice, has been found to affect broker-dealer order-routing decisions and harm customers. One need only look at the 2020 SEC enforcement action against Robinhood, which found that company executives internally reviewed the firm's order routing practices, determined that limiting order routing to wholesalers offering PFOF was harming its customers, and yet, continued to preferentially route orders to those wholesalers offering them PFOF.[38]

The SEC and its professional staff have long recognized the inherent conflicts of interest associated with PFOF. In a Memorandum to the SEC's Equity Market Structure Advisory Committee, the SEC's Division of Trading and Markets bluntly expressed the SEC's view, in part, as follows:

> The Commission has stated that the existence of payment for order flow raises the potential for conflicts of interest for broker-dealers handling orders.[39]

The Division also emphasized that the "economic incentives" associated with PFOF "create potential conflicts of interest with a broker's duty of best execution and may cause observers to

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[38] *See* Robinhood Fin., LLC, Securities Act Release No. 10906, Exchange Act Release No. 90694 (Dec. 17, 2020) (finding that "Robinhood had conducted a[n] . . . extensive internal analysis that found Robinhood's execution quality and price improvement metrics were substantially worse than other retail broker-dealers' in many respects, and [that] senior Robinhood personnel were aware of this analysis" and further finding that Robinhood executives knew that "the percentage of orders that received price improvement and the amount of price improvement, measured on a per order, per share, and per dollar traded basis" were "substantially worse than other broker-dealers").

[39] *See* Memorandum to the Equity Market Structure Advisory Committee from the SEC Division of Trading and Markets, Certain Issues Affecting Customers in the Current Equity Market Structure (Jan. 26, 2016), at 7-10, available at https://www.sec.gov/spotlight/equity-market-structure/issues-affecting-customers-emsac-012616.pdf.

question the rigor with which a broker seeks to obtain the best execution for its customer orders."[40] The Division went even further, however, in suggesting the following:

> [I]n the absence of payment for order flow, market makers could have incentives to quote more competitively, in which case customers could receive even better prices for their orders.[41]

Furthermore, after studying the issue for years, the SEC's Division of Trading and Markets expressly stated the following:

> One option to address concerns with [PFOF] would be to prohibit this practice on the grounds that it presents a conflict of interest too significant to be adequately addressed by disclosure and best-execution obligations.[42]

Nevertheless, the SEC has not since that time changed its longstanding policy views that (1) disclosure alone can adequately address the clear conflicts of interest presented by PFOF; and (2) "a broker-dealer does not necessarily violate its best-execution obligation merely because it receives payment for order."[43]

In fact, the SEC and Better Markets are not alone in warning about these inherent conflicts of interest and the utility of PFOF in our markets. Consider the following excerpt from Citadel Investment Group, L.L.C., one of the largest payers of PFOF in today's markets, when they submitted this comment letter to the SEC arguing for a ban on PFOF in the options markets back in 2004:

> Citadel Group urges the Commission to ban payment for order flow. This practice distorts order routing decisions, is anti-competitive, and creates an obvious and substantial conflict of interest between broker-dealers and their customers. Broker-dealers accepting payment for order flow have a strong incentive to route orders based on the amount of order flow payments, which benefit these broker-dealers, rather than on the basis of execution quality, which benefits their customers. Furthermore, the parties making such payments (either voluntarily or through an exchange-mandated program) are forced to find other ways to recoup the amounts of such payments, whether through wider spreads or a reduction in other benefits that otherwise could, and should, be provided to customers.
>
> Payment for order flow is a practice that on its face is at odds with a broker-dealer's obligations to its customers. A broker-dealer has a fiduciary obligation to obtain the best execution reasonably available for its customers' orders under prevailing market conditions. We do not believe that a broker-dealer that accepts payment for

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[40] *Id.* at 6.
[41] *Id.*
[42] *Id.* at 10.
[43] *Id.* at 7.

> order flow and does not pass such payments on to its customers (either directly or through reduced execution fees or commissions) can consistently fulfill its best execution obligations.
>
> In practice, the conflict of interest caused by payment for order flow may lead broker-dealers to execute customer options orders at a "defensible" price, rather than aggressively pursuing the best possible price and seeking price improvement opportunities. Gradually, this results in the erosion of market efficiency and wider bid/ask spreads. Even in cases where execution price may not be affected, public customers whose order flow is being sold to the highest bidder, may be left with the perception that they could have gotten better execution in the absence of these payments.
>
> Because payment for order flow creates fundamental conflicts of interest that cannot be cured by disclosure, the Commission should ban payment for order flow altogether.[44]

Additionally, the Proposal's own economic analysis proves time and again that PFOF is not consistent with a broker-dealer's duty of best execution. For example, in its analysis of NMS securities transactions involving PFOF, the Proposal's economic analysis found "[r]egression results in Table 16 support the conclusion that wholesalers provide worse execution quality to brokers that receive more PFOF…all else equal, for the orders wholesalers internalize, execution quality declines as the amount of PFOF paid to the retail broker increases…and receive less price improvement."[45] Similarly, the analysis goes on to find that "wholesalers earn higher realized spreads on orders for which they pay more PFOF."[46]

### B. The Commission should ban PFOF.

The evidence is simply too overwhelming for the SEC to ignore taking further action than simply requiring more disclosures and more detailed policies and procedures for conflicted transactions, including those that involve PFOF. The record on PFOF's economic effects on customer order execution quality is long and well-established. It certainly justifies the banning of PFOF and the Commission should do just that.

The arguments against banning PFOF are unpersuasive. The Proposal suggests that banning PFOF might result in increased commissions for retail investors. But the evidence suggests that on balance, investors would be better off financially in a world where they pay commissions but get better execution prices that would result from a ban on PFOF. The Commission's findings in the Robinhood enforcement action reflect the point, stating "[i]n reality, however, 'commission free' trading at Robinhood came with a catch: Robinhood's customers

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44 Citadel Investment Group, L.L.C., Comment Letter on Concept Release to Competitive Developments in the Options Market (Apr. 13, 2004), https://www.sec.gov/rules/concept/s70704/citadel04132004.pdf.

45 Release at 5,511.

46 Release at 5,511.

received inferior execution prices compared to what they would have received from Robinhood's competitors. For larger value orders, this price difference at Robinhood exceeded the commission its competitors would have charged."[47] In addition, investors would have the benefit of heightened transparency: If they are going to pay a price for the execution of their orders either through commissions or inflated execution prices associated with PFOF, they are entitled to an honest description of the nature of those costs. Banning PFOF, with the possible restoration of commissions, would offer that advantage—in addition to saving them money in many cases.

### C. Absent a ban on PFOF, the Commission should strengthen the Proposal by requiring an order-by-order documentation of compliance with the best execution requirement for all conflicted transactions.

If the Commission declines to ban PFOF, then it should move beyond disclosure and heightened policies and procedures to requiring broker-dealers engaging in conflicted transactions to document on an order-by-order basis the data that it considered as it handled retail customers' orders.

The Proposal acknowledges that the Commission considered requiring order-by-order documentation for conflicted or all transactions.[48] The Proposal cites two benefits of this approach: (1) improve the quality of the broker-dealer's review of its execution quality and (2) improve regulator's oversight over broker-dealer efforts to provide best execution to its customers.[49] The Proposal goes on to state that the order-by-order analysis for conflicted transactions would "offer greater benefits" because brokers engaging in such transactions "have greater incentives to route orders in a manner that might not result in best execution for customers."[50]

It is clear from the Proposal that the Commission believed the costs to broker-dealers of requiring order-by-order analysis would be too high.[51] However, in reaching this conclusion, the Commission glosses over the reality that many large broker-dealers that engage in conflicted transactions, especially those that engage in PFOF, "already maintain this type of documentation for both internal review and operational purposes."[52] If the largest broker-dealers, who are the most likely to engage in conflicted transactions, are already engaging in order-by-order execution quality analysis as the Proposal states, then it should follow that the costs of requiring the duty of best execution on an order-by-order basis for these companies should be minimal. If a broker-dealer deems it worthwhile to maintain order-by-order execution quality data for its own economic purposes than it should be held to that same standard for purposes of enforcing the duty of best execution. Broker-dealers that are not already engaging in this order-by-order analysis have two

47 Robinhood Fin., LLC, Securities Act Release No. 10906, Exchange Act Release No. 90694, at 2 (Dec. 17, 2020).
48 *See* Release at 5,539-5,540.
49 Release at 5,539.
50 Release at 5,539.
51 *See* Release at 5,539.
52 Release at 5,539.

options: adopt the practice or forego PFOF and other conflicted transaction at whatever volume they deem to be too costly under an order-by-order documentation requirement.

## IV. The Proposal would benefit from further clarification on several key distinctions.

As discussed above, the effectiveness of the Proposal will rely heavily on the Commission's ability to conduct examinations and enforce compliance with Regulation Best Execution. Yet the broad and multifaceted requirements in the Proposal pose challenges as the Commission oversees compliance with Regulation Best Execution, especially due to the fact that industry will be armed with teams of lawyers and execution quality experts to refute any claim that the company did not offer best execution to its customers. Where possible, the Commission should be explicit with the requirements of this Proposal. The Proposal could be strengthened with further clarification on several key distinctions, including (1) application of the institutional customer exemption and (2) the responsibilities of broker-dealers to obtain and assess information beyond those identified as material potential liquidity sources.

### A. The exemption for institutional customers should be clarified.

The proposed Rule 1100 provides several exemptions from the best execution standard for broker-dealers. One of these exemptions applies when "an institutional customer, exercising independent judgement, executes its order against the broker-dealer's quotation."[53] This exemption, if adopted, would be a new exemption to the existing duty of best execution. For example, FINRA does not include such an exemption. Because this would be a new exemption, coupled with the fact that the duty of best execution derives from common law of agency, which the Proposal itself cites as a corollary of the fiduciary duty, the Commission should proceed with caution. The distinction the Commission attempts to make in the Proposal between a broker-dealer acting as the buyer or seller of securities (who would be exempt) from a broker-dealer accepting and handling order flow could cause confusion in the marketplace about when the duty of best execution actually applies for institutional customers.

In a footnote in the Proposal, the Commission briefly explains when the duty of best execution and the proposed Regulation Best Execution would apply to institutional customers. The Proposal states that when a broker-dealer is acting "solely as a buyer or seller of securities in transactions directly with an institutional customer" then the exemption would apply.[54] The Proposal then highlights the use of Request-for-Quote ("RFQ") platforms in the fixed income industry as an example of when this exemption would apply. This example, coupled with the qualifying language "exercising independent judgement, executes its order against the broker-dealer's quotation," raises more questions than it answers about when the duty of best execution applies to institutional customers. If the exception is meant to apply exclusively to RFQ platforms, where the broker-dealer is not acting in its capacity as the institutional customer's agent, then the Commission should clarify that fact. However, if the Commission intended this exception to apply to any and all situations where a broker-dealer is acting as an agent of an institutional customer as

[53] Release at 5,452.
[54] Release at 5,452 n.114.

principal in executing an order then the exception should be abandoned as it would conflict with the common law agency obligation of duty of care as well as the objectives underlying the Proposal.[55]

### B. The scope of the duty to obtain market data should also be clarified.

As mentioned above, the structure of the U.S. capital markets is extremely fragmented, with dozens of national securities exchanges and ATSs. While market data is consolidated on lit exchanges and broadly available, we know this is only a small portion of the overall volume of trading within the capital markets and only a small percentage of retail equity trading. At its core, the duty of best execution requires broker-dealers to use reasonable diligence to obtain the best execution for its customers under prevailing market conditions. In order to obtain the best execution, it is necessary to understand, in real-time, the pricing and volumes available on the many different lit and dark exchanges.

Several provisions of the Proposal specifically require broker-dealers to compare the execution quality of customers' orders with what might have been obtained from other markets. However, with so much of the trading activity being conducted on dark exchanges and not included on widely available data feeds from lit exchanges, it is unclear how a broker-dealer is supposed to gather the information necessary to carry out this duty faithfully. Similarly, the Proposal requires broker-dealers in conflicted transactions to include in their policies and procedures information about how it obtains and assesses information about price, volume, and execution quality in markets beyond those identified as material potential liquidity sources, However, the Proposal provides no affirmative duties on a broker-dealer in a conflicted transaction to actually go out and obtain this additional information. Again, it is not clear how a broker-dealer should compare its execution quality versus other material potential liquidity sources if it does not have access to those data feeds in real time. These information gaps that exist in our fragmented markets, between the availability of real time quotes on lit exchanges versus the more difficult access to real time quotes on dark exchanges, suggests the duties under the Proposal may be incomplete at best.

The Proposal is clear that market data in the public quotation system must be considered by broker-dealers to comply with their duty of best execution.[56] What is less clear is the duty of broker-dealers to obtain access to additional market data to compare execution quality from ATSs, wholesalers, and others. ***Do*** they have to pay to obtain otherwise dark market data from ATS or wholesalers? These vague conditions and requirements will only serve as ammunition for broker-dealers trying to squeeze as much profit out of their customers' trades as possible. For example, if I am a broker-dealer that accepts PFOF and routes my customers order flow to one or two wholesalers, is my only responsibility to compare that execution quality of those wholesalers versus the lit exchange? Additionally, how should an introducing broker compare the execution quality of its executing broker to the pricing and execution quality of markets it doesn't have access to that information in real-time? Is the only requirement to compare the execution quality to consolidated lit exchange market data feeds? How would these vague requirements hold up to

55 *See* Release at 5,482 n.255.
56 Release at 5,443.

potential defenses broker-dealers could claim in enforcement actions? At an absolute minimum, the Commission should clarify that a broker-dealer's policies and procedures must include a requirement to assess all available market data feeds, including proprietary data feeds it has access to, in its best execution analysis.[57]

To provide clearer regulatory guidance to market participants, and to ensure that the Commission can adequately enforce the final rule, the Commission should clarify the precise scope of a broker's duty to obtain information regarding execution opportunities across markets that are so fragmented and opaque.[58]

## CONCLUSION

We hope these comments are helpful as the Commission finalizes the Proposal.

Sincerely,

Stephen W. Hall
Legal Director and Securities Specialist

Scott Farnin
Legal Counsel

Better Markets, Inc.
1825 K Street, NW
Suite 1080

57 This is consistent with existing FINRA guidance. *See* FINRA, *Guidance on Best Execution Obligations in Equity, Options and Fixed Income Markets,* Reg. Notice 15-46, Nov. 20, 2015.

58 With respect to the Commission's approach to economic analysis, Better Markets has long taken the view that the Commission is not obligated to conduct cost-benefit analysis, that its duty is only to "consider" the impact of its proposals on efficiency, competition, and capital formation (the ECCF factors), and that it retains considerable discretion and leeway in doing so. These principles are set forth in a number of our reports, *e.g.* Stephen Hall, The Ongoing Use and Abuse of Cost-Benefit Analysis in Financial Regulation, Better Markets (Mar. 23, 2023) and we have offered them in our comment letters, including the one submitted today on the order competition proposal that accompanies the Proposal on best execution. Better Markets Comment Letter, Order Competition Rule, 88 Fed. Reg. 128 (Dec. 14, 2022). That comment letter also expresses our view that the Commission must be wary of industry opposition to all of the pending market structure reforms and must discount their exaggerated predictions of harm on the markets or investors that are forthcoming with respect to the proposals. We incorporate by reference herein both the report and the comment letter cited above, and we contend that with respect to the instant Proposal on best execution, the Commission has more than met its duty to evaluate the three "ECCF" factors.

Washington, DC 20006
(202) 618-6464

shall@bettermarkets.org
sfarnin@bettermarkets.org

http://www.bettermarkets.org