October 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. 5440 (Jan. 27, 2023); Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders (File No. S7-30-22, RIN 3235-AN23), 87 Fed. Reg. 80266 (Dec. 29, 2022); Disclosure of Order Execution Information (File No. S7-29-22, RIN 3235-AN22), 88 Fed. Reg. 3786 (Jan. 20, 2023); Order Competition Rule (File No. S7-31-22, RIN 3235-AM57), 88 Fed. Reg. 128 (Jan. 3, 2023).

Dear Ms. Countryman:

Better Markets[1] appreciates the opportunity to comment on the above-captioned Proposed Rules[2] that are intended to improve the fairness and transparency of our securities markets and ensure that retail investors are not unfairly exploited as their securities trades are executed. The Proposed Rules, once adopted, will strengthen the obligation of brokers to get the best available prices for their clients; reduce the minimum trading increments or "tick sizes" to improve buy and sell prices and reduce the access fees that increase the costs of trading; increase transparency by expanding the reporting requirements that shed light on the quality of trade executions that brokers have achieved for their clients; and ensure that most retail orders are sent through auctions where they will be exposed to open and competitive bidding. Better Markets submits this supplemental comment letter to respond to some of the arguments that have been raised in opposition to these proposals and reiterate its strong support for the Proposed Rules.

Regulation Best Execution

The SEC must adopt Regulation Best Execution so that its rules require broker-dealers to exercise reasonable diligence to obtain the most favorable prices for their customers under prevailing market conditions. The industry opposes Regulation Best Execution on the ground that

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 88 Fed. Reg. 5,400 (Jan. 27, 2023); 87 Fed. Reg. 80,266 (Dec. 29, 2022); 88 Fed. Reg. 3786 (Jan. 20, 2023); 88 Fed. Reg. 128 (Jan. 3, 2023).

a FINRA rule already incorporates a duty of best execution.[3] The existence of a FINRA rule provides no basis for the Commission to withdraw or dilute the proposed Regulation Best Execution.[4]

- Regulation Best Execution would provide the Commission with the full arsenal of enforcement tools at its disposal to ensure that broker-dealers are providing best execution to their customers and following their own policies and procedures for doing so. Currently, the Commission must either rely on FINRA to enforce a duty of best execution—something FINRA seldom does—or invoke the general anti-fraud provisions of the securities law. That is grossly insufficient to protect investors or ensure that they actually get best execution.[5]

- 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 broad group of broker-dealers will not only punish lawbreakers but also be a deterrent to bad behavior and benefit investors.

- The Commission should also ensure that its Regulation Best Execution is stronger than the very low FINRA standard reflected in its rule. That rule merely requires broker-dealers to conduct either an order-by-order review of execution quality ***or*** a "regular and rigorous review of the quality of the executions of its customers' orders" that needs to be performed only quarterly.[6] As a result, the duty of best execution under FINRA's rule 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. That is also grossly insufficient.

    - An effective Regulation Best Execution rule that actually results in investors obtaining best execution should require that broker-dealers document on an order-by-order basis the data that they considered as they handled and executed customers' orders and purportedly applied the duty of best execution—after all, that is the data they collect and use for their own economic purposes, including executing the orders, managing their book, and creating and modifying their algorithms. A duty of best execution that applies to broker-dealers at all times

[3] *See, e.g.*, SIFMA, Comment Letter re: Regulation Best Execution (Mar. 31, 2023), https://www.sec.gov/comments/s7-32-22/s73222-20163541-333880.pdf, at 4.

[4] *See generally* Better Markets, Comment Letter re: Regulation Best Execution (Mar. 31, 2023), https://bettermarkets.org/wp-content/uploads/2023/03/Better_Markets_Comment_Letter_SEC_Regulation_Best_Execution.pdf.

[5] *See, e.g., Robinhood Financial, LLC*, Exchange Act Release No. 90694, 2020 WL 7482170, at *2 (Dec. 17, 2020) (finding that Robinhood lost its customers $34.1 million in price improvement and violated its duty of best execution by failing to conduct adequate regular and rigorous reviews of the execution quality it was providing on customer orders despite knowing that its high payment for order flow rates from principal trading firms could result in inferior prices for its customers).

[6] FINRA Rule 5310.09(a).

whenever they handle customer orders and that requires that they document their compliance on an order-by-order basis would be a materially better rule that would counteract the current practice of brokers simply routing retail orders to wholesalers in return for payment for order flow without a basis for believing that those routing decisions will actually yield the most favorable prices and which they then claim periodically in the aggregate meet the very low FINRA standard.

  - A periodic assessment in the aggregate is never going to accurately capture or reflect whether investors received best execution. That's why those very brokers would never run their business based on such incomplete and deficient quarterly aggregates of information. Only real time order-by-order data that brokers themselves use and consider when handling and executing customers' orders should be used to determine if brokers satisfy the duty of best execution.

  - Finally, the best execution duty has to apply to broker-dealers at all times whenever they handle customer orders regardless of their ability to act in multiple capacities.

- While we believe the proposed rule is clear, the Commission should clarify that the duty of best execution applies in full to the execution of orders from institutional clients, considering some concerns raised about ambiguity. If a broker is providing brokerage services to any investor, institutional or otherwise, then they should always be subject to the duty of best execution. To the extent any exception is necessary with respect to institutional clients, it should be limited to Request-For-Quote platforms where the broker is unambiguously not acting in its capacity as the institutional customer's agent.

- Finally, the Commission should clarify and specify the scope of a broker's duty to seek prices available in other trading venues, which must be robust, and it should require that the broker's policies and procedures incorporate those obligations.

<u>Minimum Pricing Increments and Access Fees</u>

The Commission's proposal to lower the minimum pricing increments, or "tick sizes," at which a stock's price can be quoted would benefit investors. Investors are constrained by the current minimum tick size limitation for most stocks of $0.01. Lowering the minimum tick size would allow investors to determine the prices at which they would bid or offer without being unreasonably impeded by a fixed minimum tick size that is too large and that prevents stocks from reaching a natural price that would be within a penny spread.

The proposal to lower *access fees* would ensure that the fees charged to access a protected quotation do not distort the true price that is available to investors. A reduction in the minimum tick size without reducing access fees could permit fees to become a higher percentage of the minimum pricing increment, which would almost certainly undermine price transparency.

The industry opposes the proposed reduction in minimum tick sizes by arguing that minimum tick sizes that are too small will lead to an increase in routing complexity and transaction costs, as excessive fragmentation can reduce overall quote depth and result in less resilient liquidity in times of stress.[7] The industry opposes the proposed reduction in access fees by arguing that in some cases the lower fees will represent a greater percentage of the minimum tick size than is currently the case.[8] But a few changes to the proposed rules would overcome these objections.[9]

- Tick sizes should be lowered, but the minimum tick size should be $0.005. Lowering the minimum tick size to $0.001, as proposed, raises the risk that at each price point there will be less liquidity and less stability in the quotes, which undermines the objective of increasing participation on the lit exchanges. The complexity of the proposal's four-tier system for minimum tick sizes also favors high-frequency traders who have a long history of leveraging complexity to their advantage and to the detriment of ordinary investors.

- Access fees should be lowered, but the Commission should adopt a uniform access fee cap for all stocks, rather than the current proposal to distinguish stocks with a $0.001 tick size and subject them to a smaller fee cap of $0.0005. The Commission rejected this alternative because a uniform $0.001 access fee cap would necessitate modifying the proposed four-tier system for minimum tick sizes as the access fee cap should not be greater than one-half of the tick size and the proposed four-tier system for minimum tick sizes has the smallest increment as $0.001. But, as noted, the Commission should just dispense with the $0.001 tick size and have the minimum tick size be $0.005, which with an access fee cap of $0.001 would be lower as a percentage of the minimum tick size than it is currently.[10]

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7 *See, e.g.*, Citadel Secs., Comment Letter re: Minimum Pricing Increments (Mar. 31, 2023), https://www.sec.gov/comments/s7-30-22/s73022-20164212-334052.pdf, at 5-6.

8 *See, e.g.*, Robinhood, Comment Letter re: Access Fees (Mar. 31, 2023), https://www.sec.gov/comments/s7- 30-22/s73022-20162926-332838.pdf, at 56.

9 *See generally* Better Markets, Comment Letter re: Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders (Mar. 31, 2023), https://bettermarkets.org/wp-content/uploads/2023/04/Better_Markets_Comment_Letter_Regulation_NMS.pdf.

10 *See generally* IEX, Comment Letter re: Minimum Pricing Increments (Oct. 13, 2023), https://www.sec.gov/comments/s7-30-22/s73022-273139-659002.pdf, at 4 ("IEX and many other commenters have urged the SEC to limit the tick size reduction to one-half cent. There is a general consensus in favor of taking that step."); IEX, Comment Letter re: Access Fees (Oct. 19, 2023), https://www.sec.gov/comments/s7-30-22/s73022-276579-672162.pdf, at 1 ("IEX and numerous other commenters . . support a reduction in the access fee cap. The general consensus of these commenters supports a reduction to $0.001 ('10 mils') per share for all stocks priced at or more than $1.00 per share.").

Disclosure of Order Execution Information

The proposed amendments to Rule 605 of Regulation NMS would increase transparency by ensuring that additional information is disclosed on a monthly basis about how investor orders are executed in the markets, thus increasing the ability of investors and other market participants to compare and evaluate execution quality. The industry's main response to this proposal is that the Commission should adopt the amendments to Rule 605 before proceeding with any of the other market structure proposals.[11] But there is no meritorious reason for the Commission to do so.[12]

- The SEC does not need more information about execution quality to know that its proposals will benefit investors, especially with respect to Regulation Best Execution and Minimum Pricing Increments and Access Fees. The argument that the Commission should first get more information is a delaying tactic designed to forestall meaningful reforms that are already clearly necessary and appropriate.[13]

Order Competition Rule

The Order Competition Rule would largely eliminate the harmful effects of payment for order flow by requiring that retail orders be routed first to open auctions. The industry opposes the Order Competition Rule by arguing that it will actually eliminate competition by requiring that nearly all retail marketable orders be sent to an auction mechanism that in practice only exchanges will be able to offer.[14] But the rule would force retail brokers to provide their customers with more competitive routing and execution via auctions because other traders would interact with retail orders before they are executed internally by wholesalers.[15]

- The rule would reduce or remove the market power, size, and dominance that conflict-ridden wholesalers currently exert by requiring the routing of a large percentage of retail order flow to auctions where they would be subject to true order-by-order competition.

- The Commission should enhance the proposal by eliminating from the proposed rule the provision that would allow wholesalers to execute at the midpoint of the NBBO and thereby prevent retail orders from going through the competitive auction process.

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11 *See, e.g.*, SIFMA, supra note 3, at 22-23.

12 *See generally* Better Markets, Comment Letter re: Disclosure of Order Execution Information (Mar. 31, 2023), https://bettermarkets.org/wp-content/uploads/2023/04/Better_Markets_Comment_Letter_Disclosure_of_Order_Execution_Information.pdf.

13 IEX, supra note 10, at 1 (Oct. 13, 2023) (explaining that changes to Rule 605 "should not be viewed as a precondition to the Commission's consideration and adoption of" its other market structure proposals).

14 *See, e.g.*, Citadel Secs., Comment Letter re: Order Competition Rule (Mar. 31, 2023), https://www.sec.gov/comments/s7-31-22/s73122-20164211-334052.pdf, at 1-2, 21.

15 *See generally* Better Markets, Comment Letter re: Order Competition Rule (Mar. 31, 2023), https://bettermarkets.org/wp-content/uploads/2023/03/Better_Markets_Comment_Letter_SEC_Order_Competition_Rule.pdf.

- If the Commission decides not to adopt the Order Competition Rule, then it is especially important for the Commission to adopt the strongest possible version of Regulation Best Execution that requires brokers to exercise reasonable diligence to obtain the most favorable prices for their customers under prevailing market conditions on an order-by-order basis and that incorporates the modifications outlined above. Indeed, if a materially improved Regulation Best Execution is adopted, implemented, and enforced, the need for an order competition rule may materially decrease.

Conclusion

We hope these comments are helpful as the Commission finalizes the Proposed Rules.

Sincerely,

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