



March 31, 2023

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 U.S. Chamber of Commerce’s (“the Chamber”) Center for Capital Markets Competitiveness (“CCMC”) submits these comments in response to the four proposed rulemakings regarding equity market structure issued by the Securities and Exchange Commission (“SEC”) in December 2022 (“Proposed Regulations”). Although the Chamber does not object to pragmatic, cautious, and targeted efforts to enhance the structure of the U.S. equity markets – which by all accounts function extraordinarily well and are, as Chairman Gensler rightfully remarked, the “gold standard” for the world<sup>1</sup> — the Chamber is alarmed that the Proposed Regulations go far beyond what circumstances require. The Proposed Regulations do so in a manner that is needlessly radical and disruptive, and which fails to appreciate the potential for these new rules collectively to cause more harm than good.

We believe the SEC should focus on targeted reforms that reflect a broad consensus. For example, modernizing Rule 605 and a measured approach towards tick size reform could enhance market structure and gain the support of a wide spectrum of market participants. The SEC should proceed much more cautiously, deliberatively, and collaboratively, and with a firmer evidentiary footing, before proceeding with the more contentious aspects of the Proposed Regulations, including the qualified auctions mandate, drastic reductions in tick sizes and access fee caps and exchange rebates, and the unnecessary and overly prescriptive Regulation Best Execution. Relying on this approach will help to avoid unintended consequences and ensure that each such rule change furthers the SEC’s tripartite mission<sup>1</sup> of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

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<sup>1</sup> <https://www.sec.gov/news/speech/gensler-remarks-piper-sandler-global-exchange-conference-060822>

If adopted in their present form without further analysis and modification, the Proposed Regulations could disrupt trading within the U.S. equity markets, the deepest and most liquid in the world. U.S. equity markets have functioned incredibly well for decades and shown remarkable resiliency even through periods of economic and geopolitical turmoil. No individual or institution can conceivably foresee how the Proposed Regulations would work in practice or how specific provisions of these proposals would interact (or interfere) with one another, particularly in the absence of a phased approach where the impact of any individual change can be evaluated independently. The SEC's lackluster economic analyses included within the Proposed Regulations only adds to the difficulty commenters face when trying to formulate informed viewpoints on each of the proposals.

Over the last two decades, the Chamber has monitored and, when appropriate, provided our views to regulators and legislators on policy issues regarding equity market structure. These markets are critical for the capital formation on which our membership depends. A primary objective for the SEC with any market structure rulemaking initiative should be to make the equity markets more hospitable to smaller public companies – including emerging growth companies (EGCs) – and companies that trade with less liquidity than large capitalization companies. Yet nowhere throughout the Proposed Regulations is there any credible effort to address the longstanding issues facing smaller public companies or to improve liquidity for these stocks.

We believe that the evolution in market structure over the last twenty years has largely benefited investors, particularly retail investors. Trading costs for retail investors have never been lower, and the equity markets have become increasingly “democratized” as investors are able to manage their savings portfolios through new technologies and applications that have helped demystify the stock market for millions of households. Still, the Chamber is not reflexively opposed to Congress, the SEC, or self-regulatory organizations adopting new rules from time to time that are designed to enhance investor protections or promote competition and capital formation.

However, the approach pursued by the SEC with the Proposed Regulations is far from the informed and deliberative rulemaking process we have come to expect from the agency. The Chamber believes the SEC's process is fatally flawed and likely at odds with its obligations as prescribed by the Administrative Procedure Act (APA). The SEC has once again provided a limited amount of time for the submission of comments and has not announced any type of further public engagement. By contrast, when developing Reg. NMS in the early 2000s, the SEC held a number of public roundtables and solicited additional input from market participants to help craft an informed and better functioning rule.

The Chamber wishes to highlight just two examples of major deficiencies with the SEC's efforts. First, the Proposed Regulations frequently cite data collected from the consolidated audit trail (“CAT”) to justify certain provisions. However, due to its confidential and sensitive nature, the CAT data referenced in the proposals is not available to the public, so it is impossible for commenters to assess how the SEC relies on this data or to provide a unique

perspective on what the data actually indicates. Second, under the Disclosure of Order Execution Information proposal, the SEC proposes to update disclosure requirements under Rule 605 in order to “increase transparency of order execution quality” and “help promote competition.”<sup>2</sup> Yet, certain of the other Proposed Regulations rely on Rule 605 data.<sup>3</sup> If the SEC believes that Rule 605 should be amended to provide more accurate information, it would not be prudent to rely on existing Rule 605 data to support major rulemakings.

The SEC has also put forward a proposal to codify a best execution standard. The Chamber believes that the existing regulatory framework generally achieves the goal and that any gaps or deficiencies in the best execution framework would be best achieved through modification of the existing FINRA and MSRB requirements rather than proposed Regulation Best Execution (“Reg Best Ex”). The SEC has not considered the potential inconsistencies with having three standards; as such, the Chamber is concerned that the possibility of three overlapping best execution regimes as well as many of the proposed requirements set forth by the Commission in Reg Best Ex and the 300 pages of guidance detailed in the proposing release, will not result in a quantifiable benefit to investors.

The SEC has completed no analysis whatsoever regarding each individual proposal’s impact upon another, nor has it conducted any kind of study to assess the cumulative market and economic impact of the four Proposed Regulations. Also lacking is an analysis of how the Proposed Regulations would interact with other recent SEC rulemakings, including the proposed definition of an “exchange,”<sup>4</sup> proposed definition of a “dealer,”<sup>5</sup> and the recently-finalized shortening of the settlement cycle for securities transactions to T+1.<sup>6</sup> Commenters are left to ponder the possibility that the SEC could pick and choose certain provisions within each of the four proposals to implement, creating an infinite number of potential scenarios for what equity trading in the U.S. could look like once those rules are finalized. Given the arbitrary nature in which the Proposed Regulations were developed and released, it is entirely reasonable for market participants to expect that final rulemakings could look fundamentally different than the proposals. This piecemeal approach to financial regulation thwarts the core purposes of the notice requirements under the APA, which are designed to ensure that agency regulations are tested via exposure to diverse public comment, ensure fairness to affected parties, and give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.

Furthermore, a letter from the SEC Inspector General in October 2022 raises serious concerns about the capacity of the SEC to review, assess and analyze comments in light of the unprecedented volume of proposed rulemakings from the SEC since 2021.<sup>7</sup> Senior SEC officials

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<sup>2</sup> Disclosure of Order Execution Information proposal at 9

<sup>3</sup> For example, execution quality analysis contained in the Regulation Best Execution proposal uses data from Rule 605 reports; several tables in the Order Competition Rule proposal also use data collected from Rule 605 reports.

<sup>4</sup> Release No. 34-94062

<sup>5</sup> Release No. 34-94524

<sup>6</sup> Release No. 34-96930

<sup>7</sup> The Inspector General’s Statement on the SEC’s Management and Performance Challenges, October 22

reported a troubling increase in attrition and expressed concern that the SEC “may not have received as much feedback during the rulemaking process, either as a result of shortened timelines during the drafting process or because of shortened public comment periods.”<sup>8</sup> SEC staff also told the IG that the SEC’s haste increases the litigation risk associated with several rules. Notwithstanding these warnings from its own staff, the SEC staff marched ahead with the Proposed Rulemakings under the same flawed process that has defined its rulemaking efforts for the last two years.

These statements are particularly troubling when considering these four interlocking proposals, and it is unclear if the staff has the capacity to appropriately assess comments, make revisions, and identify issues that must be addressed. The IG report findings also call into question the ability of the SEC to implement rulemakings. In the case of the Proposed Regulations, the potential issues we have identified can harm the markets, while degrading investor protection, competition, and capital formation.

Given what is at stake for the millions of American investors that rely on efficient and competitive equity markets, the SEC must proceed in a more deliberative manner with respect to the Proposed Regulations. Certain incremental changes to equity market structure may indeed be warranted, but any changes must be based on sound evidence and be promulgated as part of a fully transparent and thorough rulemaking process.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Malinconico". The signature is written in a cursive, flowing style.

Kristen Malinconico  
Director  
Center for Capital Markets Competitiveness  
U.S. Chamber of Commerce

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<sup>8</sup> *Id.*