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March 31, 2023

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1091

Re: *Regulation Best Execution; File No. S7-32-22*
Order Competition Rule; File No. S7-31-22

Dear Ms. Countryman:

The Investment Company Institute¹ is writing to provide comments on the proposals for Regulation Best Execution² and the Order Competition Rule³ issued by the Securities and Exchange Commission (the “Commission” or SEC). Proposed Regulation Best Execution would establish a new Commission-level standard regarding a broker-dealer’s duty of best execution with new compliance and recordkeeping obligations as well as additional obligations with respect to “conflicted transactions” for or with retail customers. The Commission’s proposed Order Competition Rule would add a new rule, proposed Rule 615, to Regulation NMS that would prohibit “restricted competition trading centers,” such as wholesalers, from internally executing segmented orders for NMS securities until after a broker-dealer exposes the order to competition in an auction, unless an exception applies.

ICI members, which include US-registered investment companies (“registered funds”), such as mutual funds, ETFs, and money market funds in addition to other investment companies

¹ The [Investment Company Institute](http://www.ici.org) (ICI) is the leading association representing regulated investment funds. ICI’s mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in Europe, Asia and other jurisdictions. Its members manage total assets of \$29.7 trillion in the United States, serving more than 100 million investors, and an additional \$8.1 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through [ICI Global](http://www.ici.org).

² *Regulation Best Execution*, Securities Exchange Act Release No. 96496, 88 Fed. Reg. 5440 (Jan. 27, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-01-27/pdf/2022-27644.pdf>.

³ *Order Competition Rule*, Securities Exchange Act Release No. 96495, 88 Fed. Reg. 128 (Jan. 3, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-01-03/pdf/2022-27617.pdf>.

regulated under the Investment Company Act of 1940, as amended (“1940 Act”), as well as non-US regulated funds⁴ (together with registered funds, “regulated funds” or “funds”), along with their advisers, seek to ensure that broker-dealers are providing best execution with respect to their clients’ orders and support efforts to enhance execution quality and market integrity. We believe that FINRA and MSRB’s best execution rules, and related notices and guidance, combined with the SEC’s enforcement efforts, have proved effective in protecting investors. However, if the SEC were to move forward with adopting its own best execution standard, ICI has concerns with how certain terms in proposed Regulation Best Execution, as well as in the Order Competition Rule, are defined and the potential negative impact on members’ order handling and resulting execution quality for advisory clients.

Additionally, ICI is concerned about the potential lack of coordination by the SEC with FINRA, MSRB, and the exchanges (SROs) with regard to establishing a consistent best execution standard as well as any SRO rulemakings needed to implement such finalized best execution standard. Further, with regard solely to the proposed Order Competition Rule, while ICI supports greater opportunities for institutional investors to execute against retail order flow, we question certain of the underlying assumptions of that proposal and whether the auctions, as proposed, will operate as intended and increase interaction of institutional and retail order flow. Finally, we have an overarching concern about the lack of implementation sequencing of not only the Regulation Best Execution and Order Competition Rule proposals but, more broadly, the lack of sequencing of all four of the market structure proposals the SEC recently issued (collectively, the “Market Structure Proposals”),⁵ as each proposal has significant implications individually and for one another as well as significant interplay with other recently adopted and proposed SEC rules.

To address these concerns, we make the following recommendations:

- First, in Section I, if the SEC moves forward with adopting Regulation Best Execution and the Order Competition Rule, we recommend that the SEC revise its proposed definitions of “transaction for or with a retail customer” and “segmented order” in the respective proposals to reflect existing FINRA and exchange definitions of “retail order.” These existing definitions recognize that an order should be treated as a “retail order” based on *who is submitting the order* rather than who the ultimate account holder is. Registered investment advisers often submit orders on behalf of discretionary advisory accounts, which may include accounts for natural persons or institutions (*e.g.*,

⁴ “Non-US regulated funds” refer to funds that are organized or formed outside the United States and are substantively regulated to make them eligible for sale to retail investors, such as funds domiciled in the European Union and qualified under the UCITS Directive (EU Directive 2009/65/EC, as amended), Canadian investment funds subject to National Instrument 81-102, and investment funds subject to the Hong Kong Code on Unit Trusts and Mutual Funds.

⁵ The other two market structure proposals the Commission recently issued are: *Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders*, Securities Exchange Act Release No. 96494, 87 Fed. Reg. 80266 (Dec. 29, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-12-29/pdf/2022-27616.pdf> (“Regulation NMS Amendments”); *Disclosure of Order Execution Information*, Securities Exchange Act Release No. 96493, 88 Fed. Reg. 3786 (Jan. 20, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-01-20/pdf/2022-27614.pdf>.

endowments or foundations), to broker-dealers on an aggregated or “bunched” basis to obtain better average price execution for investors. If orders from some discretionary advisory accounts are considered “transactions for or with a retail customer” or “segmented orders,” advisers may no longer be able to aggregate all discretionary advisory account orders together as some orders will likely be subject to separate order handling procedures and compliance requirements due to the “conflicted transaction” provisions of Regulation Best Execution and the auction routing provisions of the Order Competition Rule. We urge the Commission to adopt our recommended changes to its proposed definitions to permit continuation of well-accepted order aggregation practices, which benefit investors.

- Second, in Section II, if the SEC decides to adopt its own best execution standard, we recommend that the SEC adopt a best execution standard that is consistent with SRO standards and coordinate closely with the SROs regarding implementation. ICI specifically recommends that the SEC should: 1) incorporate into its best execution standard the factors included in FINRA’s best execution standard, and 2) coordinate with the SROs to adopt a trade modifier indicating whether an order is a “retail” order. ICI is concerned that, as drafted, the SEC’s proposed best execution standard may result in an inappropriately singular focus on price when considering best execution without adequately weighing other factors critical for large, institutional orders. Further, without a trade modifier, ICI is concerned about the inefficient order handling practices that our members likely would experience due to non-originating brokers being unable to determine whether our members’ orders are institutional orders or retail orders subject to the “conflicted transaction” provisions of Regulation Best Execution.
- Third, as discussed in Section III, with regard to the proposed Order Competition Rule, while ICI and its members appreciate increased opportunities for institutional investors to interact with retail order flow, we question some of the key assumptions underlying the auction mechanism in the proposal and, as a result, whether the auctions would operate as proposed or be effective. We recommend that the SEC re-evaluate its assumptions and take a simpler approach.
- Fourth, as discussed in Section IV, we recommend that the SEC perform an economic analysis that acknowledges the critical interplay among the Market Structure Proposals. Further, we recommend that the SEC propose a multi-year, phased implementation schedule that acknowledges the interconnected compliance implementation efforts that will be required for all the Market Structure Proposals as well as other proposed and final market structure rulemakings the SEC has recently issued. Regarding the Market Structure Proposals specifically, it is important that the proposals be implemented, if adopted, in a sequenced manner. For example, it is unknown how reduced tick sizes and the auctions will affect liquidity and order flow. If all four Market Structure Proposals have similar compliance dates, it will be impossible for our members to assess whether they are receiving best execution from brokers for client orders, as it will be premature to determine the impact on best execution until all the Market Structure Proposals are fully implemented.

I. Orders From Discretionary Advisory Accounts Should Not Constitute “Transactions for or With a Retail Customer” or “Segmented Orders”

If the SEC moves forward with the proposals, ICI is concerned that the proposed definition of “transaction for or with a retail customer” under Regulation Best Execution and the proposed definition of “segmented order” under the Order Competition Rule are overly broad and may inappropriately subject orders from certain discretionary advisory accounts to the “conflicted transaction”⁶ provisions of proposed Regulation Best Execution and the auction routing requirements of the proposed Order Competition Rule. In this section, we analyze how the proposed definitions of “transaction for or with a retail customer” under Regulation Best Execution and “segmented order” under the Order Competition Rule would impact order aggregation and handling practices by advisers and potentially result in worse average executed prices for their clients. Next, we offer recommended language for these definitions, drawing from existing FINRA and exchange rules as well as Regulation Best Interest,⁷ that would prevent orders from discretionary advisory accounts from being subject to the “conflicted transaction” provisions of proposed Regulation Best Execution and the auction routing requirements of the proposed Order Competition Rule, thus allowing advisers to maintain current order aggregation practices that generally result in better average executed prices for their discretionary advisory clients.

a. Current Investment Adviser Order Aggregation and Handling Practices and the Negative Implications for Discretionary Advisory Clients if Their Accounts are Treated as “Accounts of Natural Persons”

Under proposed Regulation Best Execution, if the broker-dealer handling the order is engaging in a “conflicted transaction” for or with a retail customer, that customer order is subject to a heightened due diligence and compliance requirement.⁸ The broker-dealer would need to obtain and assess information beyond that otherwise required, evaluate additional markets beyond those otherwise required, and document how it complied with the best execution standard, including documenting prices at reviewed markets at the time the order was handled or executed.⁹ A “transaction for or with a retail customer” would be defined as “any transaction for or with *the*

⁶ The SEC proposes to define a “conflicted transaction” as any “transaction for or with a retail customer” where a broker-dealer: (i) executes an order as principal, including riskless principal; (ii) routes an order to, or receives an order from, an affiliate for execution; or (iii) provides or receives “payment for order flow.” Proposed Rule 1101(b), *Regulation Best Execution*, 88 Fed. Reg. at 5555. The SEC considers “payment for order flow,” consistent with Rule 10b-10(d)(8), to include wholesalers paying for order flow as well as exchange rebates. *Regulation Best Execution*, 88 Fed. Reg. at 5464 n.183.

⁷ *Regulation Best Interest: The Broker-Dealer Standard of Conduct*, Securities Exchange Act Release No. 86031, 84 Fed. Reg. 33318 (July 12, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12164.pdf> (“Regulation Best Interest”).

⁸ Proposed Rule 1101(b), *Regulation Best Execution*, 88 Fed. Reg. at 5555-56.

⁹ *Id.* See also *id.* at 5468 (“The Commission preliminarily believes that, in connection with documenting its compliance with the proposed best execution standard and its best execution determinations for conflicted transactions, the broker-dealer could document the prices received from those markets that it checked pursuant to its policies and procedures.”).

account of a natural person or held in legal form on behalf of a natural person or group of related family members. [emphasis added.]”¹⁰

Similarly, under the proposed Order Competition Rule, “segmented orders” would be required to be handled differently than non-segmented orders.¹¹ A segmented order would be defined as “an order for an NMS stock that is *for an account* (i) *Of a natural person* or an account held in legal form on behalf of a natural person or group of related family members; and (ii) In which the average daily number of trades executed in NMS stocks was less than forty in each of the six preceding months. [emphasis added.]”¹² Unless an exception applies,¹³ segmented orders would be required to be routed to specific venues for execution—either a “qualified auction,”¹⁴ an “open competition trading center,”¹⁵ or an exchange. The SEC suggests that the proposed best

¹⁰ Proposed Rule 1101(b)(4)(i), *Regulation Best Execution*, 88 Fed. Reg. at 5556.

¹¹ Proposed Rule 615 would only apply the auction routing measures to “segmented orders,” thus resulting in different order handling between segmented and non-segmented orders. Proposed Rule 615(a), *Order Competition Rule*, 88 Fed. Reg. at 244.

¹² Proposed Rule 600(b)(91), *Order Competition Rule*, 88 Fed. Reg. at 243-44.

¹³ One such exception is if the segmented order has a market value of at least \$200,000 calculated with reference to the midpoint of the national best bid and national best offer when the order is received. Proposed Rule 615(b)(2), *Order Competition Rule*, 88 Fed. Reg. at 244. If the adviser were trading for itself or other legal entities, such as funds, orders for or on behalf of such accounts would not constitute “segmented orders” as an adviser or other legal entity is not a natural person. When an adviser is trading on behalf of discretionary advisory accounts of natural persons, however, the allocated trade amount of an aggregated order to each underlying discretionary advisory account may be under \$200,000 and each underlying discretionary advisory account may be making less than forty trades a day. Even though an aggregated order on behalf of multiple discretionary advisory accounts is likely to have a market value of at least \$200,000 and the adviser is likely making more than forty trades a day, if the definition of “segmented order” applies to the underlying discretionary advisory accounts of investment advisers, many orders currently viewed in the market and traded by brokers as “institutional” would likely be subject to the proposed auction routing requirements. Not only would this be detrimental to current adviser order aggregation and handling practices, as discussed further in this letter, but it would also remove from the proposed auctions contra-side liquidity for segmented orders to execute against, which is necessary for the auctions to operate as proposed.

¹⁴ The SEC proposes to define a “qualified auction” as an auction operated by an “open competition trading center” pursuant to proposed Rule 615(c). Proposed Rule 600(b)(81), *Order Competition Rule*, 88 Fed. Reg. at 243.

¹⁵ The SEC proposes to define “open competition trading center” as one of two entities. First, a national securities exchange that: (i) operates an SRO trading facility that is an automated trading center and displays automated quotations that are disseminated in consolidated market data; (ii) provides transaction reports disseminated in consolidated market data identifying the national securities exchange as the venue of execution; (iii) has an average daily share volume of 1% or more of the aggregate average daily share volume for all NMS stocks as reported by an effective transaction reporting plan during at least four of the preceding six calendar months; and (iv) has internal rules governing a “qualified auction” including compliance with proposed Rule 615(c). Second, a NMS Stock ATS that: (i) displays quotations through an SRO display-only facility (currently, the only such facility is FINRA’s ADF); (ii) operates as an automated trading center and displays automated quotations that are disseminated in consolidated market data; (iii) provides transaction reports identifying the NMS Stock ATS as the venue of execution that are disseminated in consolidated market data; (iv) allows any registered broker-dealer to become a subscriber, subject to narrow exceptions; (v) provides equal access among all subscribers to all services that are related to the “qualified auction” and to any continuous order book; (vi) has an average daily share volume of 1% or more of the aggregate average daily share volume for NMS stocks as reported by an effective transaction reporting plan during at least four of the preceding six calendar months; and (vii) operates pursuant to an effective Form ATS-N and, with regard to any “qualified auction,” the Form ATS-N sets forth the operations of its “qualified auction”

execution standard would likely require routing to an auction if such auctions function as the SEC anticipates.¹⁶

Investment advisers are subject to a fiduciary duty that requires the adviser to not subordinate its clients' interests to its own.¹⁷ Working large orders over time generally results in a weighted execution price average that is more advantageous than individual orders executed immediately.¹⁸ For that reason, in order to share the adviser's economies of scale, prevent performance dispersion, and provide a better average execution price to discretionary accounts trading in the same security, investment advisers often aggregate orders from individual discretionary advisory accounts together when executing trades.¹⁹ Many of those advisory accounts, such as separately managed accounts, are owned by or on behalf of natural persons or institutions, such as endowments and foundations. Our members have informed us that currently, separately managed account trading practices do not generally draw distinctions (other than as required by applicable ERISA provisions) between accounts of natural persons and accounts of

and compliance with the requirements of proposed Rule 615(c), as well as the requirements above. Proposed Rule 600(b)(64), *Order Competition Rule*, 88 Fed. Reg. at 243.

¹⁶ See *Regulation Best Execution*, 88 Fed. Reg. at 5459 (“As another example, auctions may offer an opportunity to expose marketable customer orders to prices that are more favorable than prices that would be achieved by crossing the spread. Accordingly, . . . a broker-dealer’s policies and procedures would be required to address how it will assess order exposure opportunities that may result in the most favorable price.”).

¹⁷ See *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Investment Advisers Act Release No. 5248, 84 Fed. Reg. 33669, 33670 n.16 (July 12, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12208.pdf> (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own”) (citations and quotations omitted).

¹⁸ See Steven W. Stone and Michele Hawkins, *Trading Conflicts of Interest 17* (2008), available at <https://www.morganlewis.com/~media/files/publication/presentation/speech/currentbestexecution2.ashx> (discussing the negative effects of an adviser being forced to disaggregate trades). First, accounts trading first may receive a better price than accounts trading later as the first trades may create a market impact and “push” prices, particularly in thinly traded securities. Second, the early trades may result in “signaling” or “tipping” brokers that larger volume may be forthcoming with brokers adjusting their bids and offers to the detriment of advisers’ clients. Third, similarly managed accounts will likely experience performance dispersion as a result of paying different execution prices for the same securities. See also *SMC Capital, Inc.*, SEC No Action Letter (pub. avail. Sept. 5, 1995), available at <https://www.sec.gov/divisions/investment/noaction/smccapital090595.htm> (“[L]arger orders for the purchase or sale of securities generally may be executed at lower commission costs on a per-share and per-dollar basis than smaller orders. [The investment adviser] believes it is obligated to seek the best possible execution of all trades for all its clients . . . by engaging in the aggregation of orders.”). Further, the incoming letter for the SMC Capital No Action Letter provided the example that “where an adviser wishes to acquire the same securities for two accounts that cannot be aggregated because one is owned by affiliates, how is the adviser to determine which account’s orders get filled first? One possibility is that the order of fill be randomized; another is that the right to go first rotates in a fixed order. In either case, the result would be that the accounts would be deprived of the economies of scale that aggregation allows, and one or more accounts could be inadvertently ‘front runned.’ [sic]” See also generally Phil Mackintosh, *Who Counts as a Retail Investor*, NASDAQ (Dec. 17 2020), available at <https://www.nasdaq.com/articles/who-counts-as-a-retail-investor-2020-12-17> (“What an institutional investor needs from their broker is very different from what retail investors need. Larger institutional orders are orders typically ‘worked’ during the day using sophisticated algorithms to minimize the impact.”).

¹⁹ *Supra* note 18. Further, some asset managers also aggregate orders from individual discretionary advisory accounts with registered fund orders to seek even greater economies of scale for their clients.

institutions. Further, our members have explained to us that these accounts may be established at the broker in the individual's name or the adviser's name, with the adviser having discretionary trading authority in either case.

Given the proposed term "account of a natural person," ICI is concerned that existing adviser order aggregation and handling practices would be disrupted, with detrimental results to investors, if discretionary advisory accounts owned by individual investors were treated as the "accounts of natural persons" and their orders were treated as "transactions for or with a retail customer" or "segmented orders."²⁰ If advisers were required to separate discretionary advisory account order flow into "institutional" and "retail," doing so could result in investment advisers no longer being able to aggregate these orders together to achieve lower average executed prices, prevent performance dispersion, or pass on economies of scale. Changing current aggregation practices would likely result in worse average priced executions for advisory clients.²¹

b. Recommendation Regarding Definition of an "Account of a Natural Person"

In the proposing release for Regulation Best Execution, the SEC stated that:

²⁰ Not only would treating orders from discretionary advisory accounts owned by individual investors as "retail" order flow disrupt current adviser order aggregation and handling practices, with detrimental results, it would also be inapposite to how brokers currently view and handle such orders. Even though an aggregated order may constitute an aggregate of orders from advisory accounts of natural persons, the order is generally handled by a broker as a large, institutional order. See Phil Mackintosh, *Routing 201: Some of the Choices an Algo Makes in the Life of an Order*, NASDAQ (Nov. 14, 2019), available at <https://www.nasdaq.com/articles/routing-201%3A-some-of-the-choices-an-algo-makes-in-the-life-of-an-order-2019-11-14> ("Almost all large orders are 'worked.' An investor trying to buy 100,000 shares would have outsized market impact if they displayed the entire order to other traders."). When the adviser sends the aggregated order to the broker for execution, the broker interfaces with the adviser and may not have transparency at the outset into the individual accounts that underlie the order. See, e.g., *Consolidated Audit Trail*, Securities Exchange Act Release No. 67457, 77 Fed. Reg. 45721, 45770 (Aug. 1, 2012), available at <https://www.govinfo.gov/content/pkg/FR-2012-08-01/pdf/2012-17918.pdf> ("The Commission believes it is appropriate that there be an extended timeframe for reporting this data because this information (e.g., allocation to subaccounts) might not be available until later in the order handling and execution process[.]"). For some members, it is not until after execution of the order that trades are allocated to the underlying accounts and names of the account holders are disclosed to the custodian broker. While there is some FINRA guidance addressing who should be viewed as the account holder, such guidance relates to account recordkeeping and not order handling. See NASD Regulatory and Compliance Alert (June 1998) ("When an [Registered Investment Adviser (RIA)] opens an account with a broker/dealer for a pool of client monies, the RIA is the customer However, if the RIA opens an account in the name of an individual client, this creates a customer account [for the individual]."). As discussed in Section I.b, FINRA and exchange rules related to order handling exclude orders from discretionary advisory accounts from the definition of "retail orders." Thus, excluding discretionary advisory accounts owned by individual investors and their orders from the definitions of "transactions for or with a retail customer" and "segmented orders" would not only result in better average priced executions for these advisory clients, but would also be consistent with current market practice and be supported by existing regulatory definitions of "retail orders."

²¹ Additionally, having to treat individual discretionary advisory accounts as "accounts of natural persons" may affect the ability of investment advisers to access liquidity for their clients. The "conflicted transaction" provisions of Regulation Best Execution likely will impact routing determinations by brokers as to where to send orders. Such provisions may impact decisions to post orders on exchanges offering rebates, route to certain ATSS, or route to internalizing brokers. When seeking to move large volume, our members are concerned about accessing liquidity without moving the market due to information leakage. Any impact on the ability of our members to access liquidity when working large orders, particularly in less liquid securities, would be detrimental to overall execution quality.

. . . several national securities exchanges operate programs for trading “retail” orders that are limited to accounts of natural persons or certain accounts on behalf of natural persons. The proposed definition of retail customer is also consistent with FINRA’s rule for certain trade reporting. Proposing a definition of retail customer that is similar to existing Commission and SRO rules would facilitate compliance with proposed Rule 1101(b) and help mitigate the costs of compliance because broker-dealers would already be familiar with identifying orders for the accounts of natural persons, or for related accounts, in these other contexts.²²

The SEC made a similar statement regarding the definition of “segmented order” in the Order Competition Rule proposal.²³ While we agree with the apparent intent of these statements, the SEC’s proposed definitions of “transactions for or with a retail customer” and “segmented orders” do not, in fact, precisely reflect existing exchange and FINRA rules for trading “retail” orders. We therefore recommend that the SEC revise these definitions to more closely reflect existing exchange and FINRA rules for trading “retail” orders, consistent with the SEC’s stated intent.

FINRA Rule 7620A.01, which both proposals cite, states that “Retail Order” means:

. . . an order that originates from a natural person, **provided that, prior to submission, no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology.** An order from a “natural person” can include orders on behalf of accounts that are held in a corporate legal form, such as an Individual Retirement Account, Corporation, or a Limited Liability Corporation that has been established for the benefit of an individual or group of related family members, **provided that the order is submitted by an individual.** [emphasis added.]²⁴

Both proposals also cite IEX Rule 11.190(b)(15) and Nasdaq Stock Market Rulebook, Equity 7, Section 118(a) to support the proposed definitions, but fail to mention that both the IEX and Nasdaq rules include substantially similar language as emphasized above in the FINRA rule.²⁵

²² *Regulation Best Execution*, 88 Fed. Reg. at 5465.

²³ *See Order Competition Rule*, 88 Fed. Reg. at 149 (“Patterning the definition of segmented order on existing SRO rules is designed to leverage market knowledge and to facilitate compliance with Proposed Rule 615. This would help reduce the costs of compliance because broker-dealers would already be familiar with identifying orders as for the accounts of natural persons, or for related accounts, in these other contexts.”).

²⁴ FINRA Rule 7620A.01.

²⁵ *See* IEX Rule 11.190(b)(15) (“A Retail order must reflect trading interest of a natural person **with no change made to the terms of the underlying order of the natural person with respect to price** (except in the case of a market order that is changed to a marketable limit order) **or side of market and that does not originate from a trading algorithm or any other computerized methodology** (a ‘retail customer’). An order from a retail customer can include orders submitted on behalf of accounts that are held in a corporate legal form - such as an Individual Retirement Account, Corporation, or a Limited Liability Company - that have been established for the benefit of an

These rules focus on *who is submitting the order* as opposed to who the ultimate account holder is. By not including the above emphasized language in the proposed definitions of “transaction for or with a retail customer” and “segmented order,” the proposed definitions do not maintain the current focus on *who is submitting the order*.

If the SEC proceeds with adopting the proposals, revising the proposed definitions of “transaction for or with a retail customer” and “segmented order” to reflect existing FINRA and exchange definitions of “retail order” would allow the continuation of existing advisory order aggregation and handling practices, in which the orders of discretionary advisory accounts are aggregated together for better average executed prices to the benefit of investors. We therefore recommend that the SEC revise the definition of “transaction for or with a retail customer” under Regulation Best Execution to be [suggested revisions in **bold**]:

. . . any transaction for or with **an order originating from** the account of a natural person or held in legal form on behalf of a natural person or group of related family members **if, prior to submission of such order, no change is made to the terms of the order with respect to price or side of market, the order does not originate from a trading algorithm or any other computerized methodology, and the order was submitted by an individual.**

Similarly, the proposed definition of “segmented order” under the Order Competition Rule should be amended to be [suggested revisions in **bold**]:

. . . an order for an NMS stock that is for an account (i) Of a natural person or an account held in legal form on behalf of a natural person or group of related family members **if, prior to submission of such order, no change is made to the terms of the order with respect to price or side of market, the order does not originate from a trading algorithm or any other computerized methodology, and the order was submitted by an individual;** and (ii) In which the average daily number of trades executed in NMS stocks was less than forty in each of the six preceding months.

In adopting Regulation Best Interest, the SEC applied similar considerations in addressing the issue of whether “a natural person” includes discretionary advisory accounts. The SEC determined it was appropriate to exclude from the protections of Regulation Best Interest

individual or group of related family members, **provided that the order is submitted by an individual.**” (emphasis added)); Nasdaq Stock Market Rulebook, Equity 7, Section 118(a) (“A ‘Designated Retail Order’ is an agency or riskless principal order . . . that originates from a natural person and is submitted to Nasdaq by a member that designates it pursuant to this section, **provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology.** An order from a ‘natural person’ can include orders on behalf of accounts that are held in a corporate legal form - such as an Individual Retirement Account, Corporation, or a Limited Liability Company - that has been established for the benefit of an individual or group of related family members, **provided that the order is submitted by an individual . . .**” (emphasis added)).

accounts already owed a fiduciary duty by a financial professional.²⁶ In response to comments received, the SEC revised the final definition of “retail customer” to be:

. . . a natural person, **or the legal representative of such natural person**, who: (i) Receives a recommendation of any securities transaction or investment strategy involving securities from a broker, dealer, or a natural person who is an associated person of a broker or dealer; and (ii) Uses the recommendation primarily for personal, family, or household purposes. [emphasis added.]²⁷

The SEC clarified in the Regulation Best Interest adopting release that “legal representatives” mean non-professional legal representatives of a natural person and was intended to exclude professional fiduciaries. As the SEC stated:

[W]e are providing the protections . . . to non-professional persons who are acting on behalf of natural persons but who are not regulated financial services industry professionals retained by natural persons to exercise independent professional judgment. . . . Our definition is intended to capture natural persons and their legal representatives who rely directly on the broker-dealer for the recommendation. Accordingly, such non-professional legal representatives would not include regulated financial industry professionals. We believe this responds to commenters who stated that it should not be necessary to provide the protections of Regulation Best Interest to regulated professionals.²⁸

Similar to the SEC’s policy considerations in Regulation Best Interest, discretionary advisory accounts do not need the enhanced safeguards for “conflicted transactions” under proposed Regulation Best Execution or auction routing under the proposed Order Competition Rule that were designed for individual investors.²⁹ Having advisory accounts subject to the enhanced due

²⁶ See *Regulation Best Interest*, 84 Fed. Reg. at 33342 (“[W]e are modifying the definition to focus on natural persons and their legal representatives, and are clarifying that we interpret ‘legal representatives’ to mean non-professional legal representatives of a natural person We believe this change and clarification provides more certainty that institutions and certain professional fiduciaries are not covered for purposes of Regulation Best Interest.”).

²⁷ Rule 151-1(b)(1).

²⁸ *Regulation Best Interest*, 84 Fed. Reg. at 33343. While the SEC considered Regulation Best Interest when drafting the definitions of “transaction for or with a retail customer” and “segmented order,” the SEC indicated that it did not incorporate all of the Regulation Best Interest “retail customer” definition because that definition is limited to scenarios where a person receives and uses a recommendation. See *Regulation Best Execution*, 88 Fed. Reg. at 5465 n.186; *Order Competition Rule*, 88 Fed. Reg. at 149 n.187. We agree that it would not make sense to adopt the privity clauses in Regulation Best Interest for the definitions of “transaction for or with a retail customer” and “segmented order.”

²⁹ See *Regulation Best Execution*, 88 Fed. Reg. at 5465 (“The Commission also preliminarily believes that retail customers generally would benefit more than non-retail customers from the more robust conflicted transactions requirements because retail customers are likely to have fewer resources for evaluating the best execution practices of their broker-dealers than non-retail customers. For example, institutional customers likely have additional knowledge, experience, and analytical resources as compared to retail customers and, thus, are more readily able to evaluate the impact of their broker-dealers’ conflicted transactions.”); *Order Competition Rule*, 88 Fed. Reg. at 149

diligence measures for “conflicted transactions” and the competitive auction function would, as previously explained, result in worse average executed prices for those advisory accounts as advisers would no longer be able to aggregate orders and utilize economies of scale. For that reason, if the SEC proceeds with adopting the proposals, we recommend that the SEC act consistently with its stated intent in the proposals and model the proposed definitions of “transaction for or with a retail customer” under Regulation Best Execution and “segmented order” under the Order Competition Rule after the existing exchange and FINRA definitions of “retail order.”³⁰

II. Any Adopted SEC Best Execution Standard Should Be Consistent with SRO Standards and the SEC Should Coordinate Closely with the SROs Regarding Implementation

a. Any SEC Best Execution Standard Should Incorporate the Factors in FINRA’s Best Execution Standard to Reduce Uncertainty Regarding the Relevance of Considerations in Addition to Price

The SEC proposes to define its best execution standard as requiring a broker-dealer 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.”³¹ If the SEC moves forward with adopting its own best execution standard, ICI is concerned that, in the absence of further clarification, this proposed standard may result in an inappropriately singular focus on price when considering best execution without providing broker-dealers the flexibility to adequately weigh other factors critical to large, institutional orders. This result would be in conflict with the SEC’s recent statement that, in directing brokerage, a discretionary investment adviser should consider “the full range and quality of a broker’s services . . . including, among other things, the value of research provided as well as execution capability, commission rate, financial responsibility, and responsiveness to the adviser. . . . [T]he determinative factor is not the lowest possible commission cost, but whether the transaction represents the best qualitative execution.”³²

To address this concern, if the SEC adopts a final best execution standard, we recommend that the SEC incorporate into the text of its standard the text of FINRA’s best execution standard, including the specific factors relevant to a best execution determination. FINRA’s best execution standard requires a broker-dealer to use:

n.187 (“Proposed Rule 615 . . . is designed to promote competition for individual investor orders.”). Aggregated orders from discretionary advisory accounts submitted to a broker by an adviser benefit from the institutional resources noted by the SEC in proposed Regulation Best Execution and are not routed or handled as “individual orders,” which are the intended beneficiaries of the proposed Order Competition Rule.

³⁰ Further, the SEC should define “transaction for or with an institutional customer” under proposed Regulation Best Execution as “any transaction that is not for or with a retail customer.”

³¹ Proposed Rule 1100, *Regulation Best Execution*, 88 Fed. Reg. at 5555.

³² *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, 84 Fed. Reg. at 33675 (citations and quotations omitted).

. . . 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. Among the factors that will be considered in determining whether a member has used “reasonable diligence” are:

- (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.³³

While the SEC acknowledges that for large orders, a broker may need to emphasize potential information leakage and the associated price impact when handling and executing the order, the SEC makes these statements in the context of providing guidance regarding the drafting of compliance policies and procedures to make a “best market” determination rather than in the context of the best execution standard itself.³⁴ We agree with the SEC that considerations such as the size of an order, and the associated sensitivity to information leakage and price impact, are relevant in making best execution decisions when handling large orders. For funds and their advisers, avoiding information leakage and price impact is a critical concern, as such factors negatively impact the overall execution quality of a large order. To ensure that these important considerations are part of any final SEC best execution standard, we urge the SEC to explicitly incorporate these factors into the text of the standard, as FINRA’s standard currently does. Without this certainty, institutional investors, such as funds and advisers, could lose the flexibility necessary for their orders to obtain best execution.

Further, if the SEC does adopt its own best execution standard, explicitly incorporating the text of FINRA’s best execution standard would clarify the role that customer instructions play in determining the “reasonable diligence” performed by a broker-dealer in providing best execution. While the SEC acknowledges that broker-dealers should take into account customer instructions,³⁵ ICI is concerned that, without explicit reference to customer instructions in the text of the best execution standard, our members’ instructions to their brokers may not be adequately weighed as part of a best execution determination. For example, many asset managers utilize randomized routing instructions when executing equity orders to eliminate information leakage and prevent other traders from determining routing and execution patterns. As previously discussed, limiting information leakage and price impact are vitally important to the overall execution quality of our members’ orders. Explicitly incorporating the FINRA factors into the text of the SEC best execution standard would acknowledge the importance of customer instructions as part of a broker’s due diligence.

³³ FINRA Rule 5310(a)(1).

³⁴ *Regulation Best Execution*, 88 Fed. Reg. at 5462.

³⁵ *Regulation Best Execution*, 88 Fed. Reg. at 5462-63.

b. The SEC and the SROs Should Coordinate Adoption of a Modifier to Identify “Retail” Orders if the SEC Adopts Regulation Best Execution

While our recommendation made in Section I addresses the issue of whether orders from an account are appropriately considered “retail” or “institutional” at the outset, an issue remains regarding the ability of the non-originating broker-dealer routing, handling, or executing against orders to know whether such orders are “retail” or “institutional.” For that reason, if the SEC proceeds with adopting Regulation Best Execution, a trade modifier or similar designator is needed to let routing and executing brokers beyond the originating broker know if they are handling a retail or institutional order. Further, because trade modifiers generally are adopted pursuant to SRO rulemakings,³⁶ it is critical that the SEC provide adequate time for the SROs to revise their rulebooks and adopt necessary amendments prior to any final compliance date for Regulation Best Execution.

We understand that, as an operational matter, once an order is routed past the originating broker, no other party would definitively know if the order was retail or institutional. For example, if the asset manager uses an algorithm to work a large order over time, while the originating broker handling the order may know that the order is an institutional order, if the large order is broken up into smaller, child orders and executed across various venues, including affiliated ATs, internalizing brokers, or posted on an exchange, no entity interacting with the order would know whether the order was retail or institutional. ICI is concerned that this could lead to routing and executing brokers, out of an abundance of caution, treating all orders, including institutional orders submitted by investment advisers, as retail orders for purposes of proposed Regulation Best Execution and subjecting such orders to the “conflicted transaction” provisions of the proposal. Such a result would negatively impact execution quality for our members and the investors they represent.³⁷

The proposed Order Competition Rule addresses the issue of identifying “retail” orders by requiring originating brokers to “establish, maintain, and enforce written policies and procedures reasonably designed to identify the orders of customers as segmented orders [and thus retail orders]” and “identify[] such order[s] as a segmented order to the routing destination.”³⁸ If the SEC moves forward with adopting proposed Regulation Best Execution, we recommend that the SEC add a similar requirement to Regulation Best Execution so that broker-dealers will know if

³⁶ See, e.g., *Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Rule 7.31*, Securities Exchange Act Release No. 96701, 88 Fed. Reg. 4252 (Jan. 24, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-01-24/pdf/2023-01277.pdf> (SRO rule filing amending the Immediate-or-Cancel trade modifier designated on Mid-Point Liquidity Orders); *Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 7.31(i)(2)*, Securities Exchange Act Release No. 96714, 88 Fed. Reg. 4874 (Jan. 25, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-01-25/pdf/2023-01412.pdf> (SRO rule filing amending the Self Trade Prevention modifier that can be designated on orders).

³⁷ See *supra* note 21 (explaining the potential decrease in accessed liquidity sources by brokers and the associated negative impact on execution quality if aggregated orders submitted by investment advisers on behalf of discretionary advisory accounts were subject to the “conflicted transaction” provisions of Regulation Best Execution).

³⁸ Proposed Rule 615(e)(1) & (2), *Order Competition Rule*, 88 Fed. Reg. at 245.

they are handling a “retail” or “institutional” order once the order is routed beyond the originating broker, with the “retail” orders being the orders potentially subject to the heightened “conflicted transaction” requirements. We believe the SEC could achieve this by either 1) if the Order Competition Rule is adopted, limiting “conflicted transactions” to segmented orders (and adopting the “segmented order” definition with ICI’s suggested revisions discussed in Section I above); or 2) otherwise requiring a “retail” trade modifier such as that found in certain exchange regulations.³⁹

c. Coordinating with the SROs Will Result in Decreased Costs and Reduced Market Uncertainty to the Benefit of All Investors

While we specifically recommend that the SEC incorporate the factors from FINRA’s best execution standard and include a “retail” trade modifier if the SEC moves forward with Regulation Best Execution, we more broadly recommend public and transparent coordination by the SEC and the SROs with respect to any adoption and implementation of Regulation Best Execution. The SEC estimates that proposed Regulation Best Execution would cost the broker-dealer community approximately \$300 million to comply for the first year and \$150 million each year thereafter.⁴⁰ Based on discussions with our members and other market participants, we believe this is likely a significant underestimate. Nonetheless, if the SEC adopts Regulation Best Execution, there are measures the SEC could take that would potentially minimize costs or at the very least reduce uncertainty and allow market participants to more accurately project compliance costs. Because costs will likely be passed onto asset managers, and ultimately investors, in the form of increased commissions,⁴¹ we feel it is important to emphasize measures that may reduce costs and market uncertainties.

First, in addition to incorporating the text of FINRA’s best execution standard, the SEC should coordinate closely with FINRA and MSRB to ensure the adoption and implementation of a consistent best execution standard by all three regulators. Having three different regulatory regimes defining a best execution standard will inherently be more costly, whereas consistency among regulators would facilitate compliance, improve market efficiency, and avoid unnecessary costs. Second, the SEC should coordinate with the exchanges, as well as FINRA and MSRB, to

³⁹ See, e.g., IEX Rule 11.190(b)(15) (requiring that a “retail order” be designated with a “retail order” modifier); Nasdaq Stock Market Rulebook, Equity 7, Section 118(a) (requiring “designated retail orders” to be designated as such). We asked members if limiting “conflicted transactions” to orders entered as “held” or “market” would be sufficient, as “not held” was the signifier the SEC settled upon for determining Rule 606 reporting in connection with institutional orders. See *Disclosure of Order Handling Information*, Securities Exchange Act Release No. 84528, 83 Fed. Reg. 58338, 58342 (Nov. 19, 2018), available at <https://www.govinfo.gov/content/pkg/FR-2018-11-19/pdf/2018-24423.pdf> (“Commenters who supported an order type-based approach suggested that the not held order type classification would be an effective proxy for identifying orders typical of institutional investors.”). Our members informed us that they utilize both “held” and “market” orders and therefore neither of those trade modifiers would be sufficient to distinguish all retail orders from institutional order flow.

⁴⁰ See *Regulation Best Execution*, 88 Fed. Reg. at 5482 (“The Commission estimates aggregate compliance costs of \$165.4 million in one-time costs and \$128.9 million in annual costs on broker-dealers as they update, or establish, their policies and procedures for the handling, execution, and review of customer orders.”).

⁴¹ For funds, brokerage commissions are generally capitalized. Thus, increased commissions will result in adverse impacts to performance as securities will cost more to buy and will be sold for less.

ensure any necessary SRO rulemakings are finalized prior to the compliance date of any final Regulation Best Execution. If Regulation Best Execution were to have a compliance date prior to the SROs adopting any necessary implementing rules, significant uncertainty would result. It would be very difficult, if not impossible, for market participants to determine how to comply with their best execution obligations if all the relevant pieces were not yet finalized. This would result in increased allocated resources and costs as market participants would be uncertain how to follow required legal obligations when the necessary implementing SRO rules had not yet been enacted.

III. The SEC Should Re-Evaluate Its Assumptions Regarding Auctions

While ICI generally supports the SEC's intent in the Order Competition Rule to make retail order flow more available to institutional investors, we have serious concerns about the operational aspects of the proposed auctions, which are very prescriptive, and we question certain of the SEC's underlying assumptions. A key underlying premise of the auctions' operability is that institutional investors, primarily asset managers, will step in to execute against retail order flow.⁴² Based on discussions with our members, while some members may step in for certain executions, there are a variety of reasons institutional investors may choose not to participate in an auction. For example, based on third-party analysis and feedback from our members, we understand that retail investors, in many cases, trade different names than institutions.⁴³ Further, members, particularly managers of index funds, have informed us that they generally execute at the close of the trading day, whereas retail orders typically execute at the open. As a result, it is not clear that the proposed auctions would result in significant interaction between retail and institutional orders.

Additionally, apart from the likelihood that auctions may not provide the retail and institutional crossing opportunities that the SEC assumes, there are other reasons asset managers may not fill the role in the proposed auctions that the SEC anticipates. To the extent that asset managers had order flow they wanted to direct to the auctions, the prescriptive nature and associated required disclosure of the auctions is likely to prevent many asset managers from utilizing the auctions at all. Auctions would likely result in information leakage for asset managers as the resulting displayed and disseminated executions could identify the asset manager to other market participants. As previously mentioned, preventing information leakage and price impact are critical aspects of execution quality for our members. The proposed operational processes of auctions will likely lead many asset managers to avoid auctions when seeking to execute large orders.

⁴² See, e.g., *Order Competition Rule*, 88 Fed. Reg. at 131 ("Proposed Rule 615 is designed to maintain the price improvement benefits of the segmentation of individual investor orders and to enhance those benefits through the introduction of order-by-order competition with a wide range of market participants, including institutional investors, through an auction mechanism that is fast, low-cost, transparent, and fair.").

⁴³ Bloomberg, U.S. Institutional Equity Trading Study (Feb. 2021) ("Retail investors tend to trade different names than institutions[.]"). Bloomberg further noted in its study that only 30% of the buy-side traders interviewed stated that increased retail order flow from 2020 impacted their trading.

ICI supports efforts to increase institutional access to retail order flow. We are concerned, however, about the overall impact that prescriptive auctions would have on order execution quality and market structure generally. If the unsupported assumptions that the SEC relies on turn out to be wrong, ICI is concerned that the execution quality retail investors would receive, including in shares of ETFs and listed closed-end funds offered by ICI members, would suffer. Further, as proposed, auctions would result in a significant increase in messaging traffic, which, in tandem with the proposed tick size reform in the Regulation NMS Amendments proposal, would cause significant strain on current messaging infrastructure. As there has been no testing to ensure the current messaging infrastructure can withstand this increase, ICI is concerned that it may result in increased latency and delay issues. Therefore, instead of moving forward with the proposed Order Competition Rule, we encourage the Commission to re-evaluate its assumptions and consider a simpler approach to facilitate the ability of institutional order flow to interact with retail orders.

IV. The SEC Should Perform an Economic Analysis that Acknowledges the Critical Interplay Among the Market Structure Proposals and Implement Any Finalized Market Structure Proposals in a Phased and Sequenced Manner

Notwithstanding our comments on the Market Structure Proposals, we note that none of the four Market Structure Proposals acknowledges the cumulative costs and burdens, including the regulatory complexity and the implications for market structure, that will result if all the Market Structure Proposals are adopted. The SEC itself acknowledges that the Market Structure Proposals will impact one another, with some of the proposals asking questions about the implications of the other proposals.⁴⁴ Before adopting any of the Market Structure Proposals, we urge the SEC to conduct an economic analysis that acknowledges the critical interplay among these proposals and, if adopted, the far-reaching implications they will have for existing market structure, market participants, and investors. Further, as it did prior to the adoption of Regulation NMS in 2005,⁴⁵ the SEC should hold public hearings with the industry to address and better understand existing standards and practices and the interrelated impact that these proposals would have.⁴⁶ After these public hearings, perhaps simpler and more tailored approaches can be implemented to address any potential issues the hearings reveal.

Additionally, we urge the Commission to propose for notice and comment a holistic, staged multi-year implementation schedule with respect to all four Market Structure Proposals, as well

⁴⁴ See, e.g., *Order Competition Rule*, 88 Fed. Reg. at 178 n.343 (“The Commission is also separately proposing a new rule addressing the best execution obligations of broker-dealers. . . . The Commission encourages commenters to review that proposal to determine whether it might affect their comments on this proposal.”). These requests for comment regarding how the Market Structure Proposals affect one another appear to contradict statements made by Director Zhu that the Market Structure Proposals “stand on their own.” See Commission Open Meeting Webcast Archive, 2022.12.14 Open Meeting Part 01 at 1:08:25 – 1:09:00, available at <https://www.youtube.com/watch?v=s9gdfxCoIq4>.

⁴⁵ *Regulation NMS*, Securities Exchange Act Release No. 51808, 70 Fed. Reg. 37495 (June 29, 2005), available at <https://www.govinfo.gov/content/pkg/FR-2005-06-29/pdf/05-11802.pdf>.

⁴⁶ See, e.g., *Proposed Regulation NMS: Hearing Before the Securities and Exchange Commission* (April 21, 2004), available at <https://www.sec.gov/spotlight/regnms/nmstrans042104.txt>.

as other recently adopted market structure reforms, taking into account the combined implementation efforts that will be required across all of these rulemakings, how the rulemakings interrelate, and the related impacts and burdens on funds, advisers, and other market participants. The already adopted market structure amendments, such as the Commission's recent rule shortening the securities settlement cycle (T+1),⁴⁷ will require significant resources to implement, comply with, and test. ICI is concerned that if those compliance and implementation periods overlap with those of the Market Structure Proposals, there may not be sufficient resources to develop and enhance the required policies, procedures, and systems as well as implement and test such policies, procedures, and systems in a timely manner. This would increase the risk to market integrity and potentially cause active harm to industry participants and, ultimately, investors.

Regarding implementation of any finalized and adopted Market Structure Proposals, ICI believes that Disclosure of Order Execution Information should be implemented first and Regulation Best Execution should be implemented last. Because the execution quality metrics obtained from an updated Rule 605 would likely inform how some aspects of the other Market Structure Proposals are implemented, Disclosure of Order Execution Information should be implemented first. Further, because any final rules on Disclosure of Order Execution Information, Regulation NMS Amendments, and the Order Competition Rule would impact best execution determinations,⁴⁸ it is important that Regulation Best Execution be implemented last so that the effect of the other Market Structure Proposals can be reflected in the required best execution policies and procedures. It would be very difficult for broker-dealers to draft best execution policies and procedures, and for our members to assess whether their clients are receiving best execution, before broker-dealers have had sufficient time to assess the effect the other Market Structure Proposals may have on best execution determinations. This is of particular concern as it is

⁴⁷ See, e.g., *Shortening the Securities Transaction Settlement Cycle*, Securities Exchange Act Release No. 96930, 88 Fed. Reg. 13872 (March 6, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-03-06/pdf/2023-03566.pdf>. We have emphasized that transitioning to a shorter settlement cycle will be a “complex, labor-intensive, and intricate undertaking that will require significant communication and coordination between all industry participants, including funds and fund advisers, broker-dealers, custodians, infrastructure providers, service providers, and others.” Letter from Susan Olson, General Counsel, and Joanne Kane, Chief Industry Operations Officer, ICI to Vanessa A. Countryman, Secretary, SEC on *Shortening the Securities Transaction Settlement Cycle* at 2 (April 11, 2022). We also highlight that even as the Commission has introduced these Market Structure Proposals, it has yet to implement other outstanding market structure reforms related to NMS data, including its 2020 NMS data governance order and the final MDI rule. *Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data*, Securities Exchange Act Release No. 88827, 85 Fed. Reg. 28702 (May 13, 2020), available at <https://www.govinfo.gov/content/pkg/FR-2020-05-13/pdf/2020-10041.pdf>; *Market Data Infrastructure*, Securities Exchange Act Release No. 90610, 86 Fed. Reg. 18596 (April 9, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-04-09/pdf/2020-28370.pdf>.

⁴⁸ See *Regulation Best Execution*, 88 Fed. Reg. at 5456 n.136 (noting that best execution assessments will require a broker-dealer to assess auction mechanisms if handling a customer order subject to the proposed requirements in the Order Competition Rule); *id.* at 5457 (“In addition, a broker-dealer generally should consider whether consolidated trade information, exchange proprietary data feeds, odd lot market data, and execution quality and order routing information contained in reports made pursuant to Rules 605 and 606 of Regulation NMS are readily accessible and needed in order for the broker-dealer to identify material potential liquidity sources for its customers’ orders.”).

unclear which of the four Market Structure Proposals is likely to be implemented first due to the lack of proposed compliance dates in the Market Structure Proposals.⁴⁹

Conclusion

We hope that our comments are helpful to the Commission and staff as they further refine their approach to a broker-dealer's best execution obligations and to order competition. If you have any questions or require further information regarding our comments, please do not hesitate to contact either Sarah Bessin at sarah.bessin@ici.org or Kevin Ercoline at kevin.ercoline@ici.org.

Sincerely,

/s/ Sarah A. Bessin

Sarah A. Bessin
Deputy General Counsel

/s/ Kevin Ercoline

Kevin Ercoline
Assistant General Counsel

cc: The Honorable Gary Gensler
The Honorable Hester M. Peirce
The Honorable Caroline A. Crenshaw
The Honorable Mark T. Uyeda
The Honorable Jaime Lizárraga

Dr. Haoxiang Zhu, Director
Michael A. Macchiaroli, Associate Director
Thomas K. McGowan, Associate Director
Randall W. Roy, Deputy Associate Director
Raymond Lombardo, Assistant Director
Division of Trading and Markets

William A. Birdthistle, Director
Sarah G. ten Siethoff, Deputy Director
Division of Investment Management,
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⁴⁹ None of the proposals for Regulation Best Execution, the Order Competition Rule, or Disclosure of Order Execution Information includes proposed compliance dates. The proposal for the Regulation NMS Amendments includes compliance dates for certain provisions of the proposed rule, such as the inclusion of additional round lots and odd lot information into NMS core data, but no compliance date for other provisions of the rule, including additional tick sizes, or an overall compliance date.