January 5, 2024

By Electronic Submission

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

Re: **File No. S7-18-23; Volume-Based Exchange Transaction Pricing for NMS Stocks**

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association ("SIFMA")[1] respectfully submits this letter to the U.S. Securities and Exchange Commission ("Commission" or "SEC") to comment on the above-referenced proposal to prohibit national securities exchanges from offering volume-based transaction pricing in connection with the execution of agency and riskless principal orders (collectively, "agency-related orders") in NMS stocks (the "Proposal").[2] As a threshold matter, SIFMA believes that it is not possible to provide meaningful comment on the Proposal without understanding how the Commission views the Proposal intersecting with the Commission's other pending proposals related to equity market structure.[3]

SIFMA appreciates the Commission's interests in promoting free and fair competition among market participants. However, SIFMA disagrees with the Commission's assertion that broker-dealers currently compete on an unlevel playing field.[4] To the contrary, in the current market structure environment, all broker-dealers have an equal opportunity to obtain the lowest exchange fees and highest exchange rebates available for their customers through volume-based transaction pricing and all exchanges have the ability to offer such pricing to incentivize the routing of order flow to their venues. The Proposal, on the other hand, appears designed to tip an already-level playing field in favor

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[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly one million employees, we advocate for legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] Securities Exchange Act Release No. 98766 (Oct. 18, 2023), 88 FR 76282 (Nov. 6, 2023).

[3] *See* Letter from Ellen Greene, Managing Director, SIFMA, to Vanessa Countryman, Secretary, Commission, dated Mar. 31, 2023, at 12-21, https://www.sec.gov/comments/s7-32-22/s73222-20163541-333880.pdf ("SIFMA EMS Proposals Comment Letter") (commenting on the Commission's December 2023 equity market structure proposals and raising similar concerns with respect to the intersections between such proposals).

[4] *See e.g.*, Gary Gensler, Chair, SEC, *Statement on Exchanges' Volume-Based Rebates and Fees* (Oct. 18, 2023) https://www.sec.gov/news/statement/gensler-volume-based-rebates-and-fees-101823 ("Currently, the playing field upon which broker-dealers compete is unlevel."); Jamie Lizárraga, Commissioner, SEC, *Fairer and More Competitive Public Markets* (Oct. 18, 2023), https://www.sec.gov/news/statement/lizarraga-statement-volume-based-rebates-and-fees-101823 (noting that the Proposal would, among other things, "level[] the playing field").

of lower-volume broker-dealers and exchanges, an action which is not within the Commission's statutory mandate. And the Commission's proposed mechanism for this change—a government-mandated prohibition on volume-based transaction pricing for agency-related orders—is an extreme measure that will interfere with the interplay of market forces that would otherwise determine exchange transaction fees and rebates.[5] SIFMA believes that the Commission should avoid interfering in well-functioning markets, absent extraordinary circumstances.

SIFMA also continues to believe the Commission should take a cautious approach to reform that is narrowly tailored to an identified market failure. Here, the Commission has failed to identify a particular market harm or harm to investors caused by volume-based transaction pricing. Instead, the Commission has premised the Proposal on (1) remediating a potential conflict of interest in routing orders—without explaining why existing rules such as FINRA's best execution rule or the SEC's Regulation Best Interest do not already address such concerns, and (2) theoretical enhancements to competition that do not survive scrutiny.[6]

SIFMA believes that the Proposal is unlikely to achieve its intended goals and would, in fact, (**i**) negatively impact market efficiency and competition both among exchanges and among broker-dealers; (**ii**) raise costs for smaller/medium-sized broker-dealers and investors; and (**iii**) reduce exchange liquidity by disincentivizing the routing of orders to exchanges. The Commission's own economic analysis indicates that the Proposal could reduce market efficiency, harm lower-volume exchange members and result in wider spreads to the detriment of all market participants.[7]

For these reasons and because SIFMA believes that the Proposal would negatively impact the current equity market structure, SIFMA cannot support the Proposal. Notwithstanding these concerns, SIFMA would not be opposed to the Commission requiring that exchanges periodically disclose to the Commission certain information if they offer volume-based transaction pricing for any NMS stocks, for both principal and agency-related orders.

Executive Summary

SIFMA's comments regarding the Proposal can be summarized as follows:

(i) ***It Is Not Possible to Provide Meaningful Comment on the Proposal Given the Commission's Numerous Outstanding Equity Market Structure Proposals*** – As discussed in Part I, the Commission has not provided analysis or substantive discussion of how the Proposal is intended

[5] SIFMA agrees with Commissioner Peirce's statement that "[w]e need more evidence before taking the extreme step of imposing an outright ban on a particular approach to pricing. An unsubstantiated fear that there could be problems does not justify adding an onerous and potentially ineffective rule to an already over-prescriptive equity market-structure ruleset." Hester M. Peirce, Commissioner, SEC, *Fears for Tiers: Statement on Proposed Volume-Based Exchange Transaction Pricing for NMS Stocks* (Oct. 18, 2023), https://www.sec.gov/news/statement/statement-peirce-proposed-volume-based-exchange-transaction-pricing-nms-10-18-2023.

[6] SIFMA agrees with Commissioner Uyeda's statement that "the Commission would have been better off making a serious attempt to study and identify the root causes of how pricing and trading volume on exchanges has led to current conditions." Mark T. Uyeda, Commissioner, SEC, *Statement on Volume-Based Exchange Transaction Pricing for NMS Stocks* (Oct. 18, 2023), https://www.sec.gov/news/statement/uyeda-statement-volume-based-rebates-and-fees-101823.

[7] *See infra* Part III.c of this Letter.

to operate in light of the Commission's numerous recent proposals related to equity market structure. The Commission should not consider prohibiting volume-based transaction pricing for agency-related orders before the Commission: (i) determines whether to finalize any EMS Proposals, (ii) examines the effects of any finalized adopted EMS Proposals, and (iii) re-opens the comment period for the Proposal under the modified equity market structure.

(ii) ***The Commission Overestimates the Incentives of Volume-Based Transaction Pricing on Order Routing Determinations*** – As discussed in Part II, SIFMA is concerned about the lack of substantive analysis on the influence of volume-based transaction pricing on order routing determinations when weighed against significantly more important factors in order routing. The Commission also does not explain why existing regulatory requirements such as FINRA's best execution rule or Regulation Best Interest do not address the apparent conflict of interest raised by volume-based transaction pricing. The Commission should not prohibit volume-based transaction pricing for agency-related orders without such an analysis and explanation.

(iii) ***The Proposal Would Negatively Impact Competition and Efficiency*** – As discussed in Part III, SIFMA believes that the Proposal would harm competition—both among exchanges and broker-dealers—by artificially limiting the fees an exchange could charge for transactions. Volume-based discounts are common across every industry and are an important tool used by exchanges to attract more order flow and therefore promote competition. Volume-based transaction pricing also provides a means by which medium and smaller broker-dealers can receive discounted fees.

(iv) ***The Proposal Would Discourage Routing to Exchanges and Raise Costs for Investors*** – As discussed in Part IV, SIFMA believes that prohibiting volume-based discounts would reduce incentives to submit liquidity to exchanges and would incentivize routing more orders to off-exchange trading centers. Moreover, the direct effect of the Proposal, as stated by the Commission, would be to raise costs for the many investors (including other broker-dealers) that route through broker-dealers qualifying for the lowest exchange transaction fee tiers.

(v) ***The Proposal Raises a Number of Operational Concerns If Adopted as Proposed*** – As discussed in Part V, SIFMA believes that the Proposal does not account for certain operational concerns including: (a) the need for an exception for affiliated funds of a broker-dealer; (b) situations where a resting principal order is used to fill a subsequently received agency order as riskless principal; (c) incompatibilities with the proposed "riskless principal" definition with the existing "riskless principal" definition under FINRA/exchange rules; and (d) the need for separate, detailed consideration of any of the proposed alternatives (through a separate proposal) prior to any potential adoption of such alternatives.

(vi) ***The Proposal Should Not Extend to Options Markets*** – As discussed in Part VI, the Proposal should not extend to options markets, which are substantially different from equities markets in many ways. The Proposal could not simply be extended to options markets without addressing these differences and without a separate cost/benefit analysis.

(vii) ***Enhanced Disclosure Should Be a Necessary First Step Prior to Any Prohibition of Volume-Based Transaction Pricing*** – As discussed in Part VII, SIFMA does not oppose Alternative 3 in the Proposal, which would require exchanges to periodically disclose certain information if they offer volume-based transaction pricing for any NMS stocks, for both principal and agency-related orders.

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I. It Is Not Possible to Provide Meaningful Comment on the Proposal Given the Commission's Numerous Outstanding Equity Market Structure Proposals

The Commission has not provided analysis or substantive discussion of how the Proposal is intended to operate in light of the Commission's numerous recent proposals related to equity market structure, including (i) Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders ("Tick Size Proposal"),[8] (ii) Order Competition Rule ("OCR"),[9] and (iii) Regulation Best Execution ("Reg Best Ex") (collectively the "EMS Proposals").[10] Consequently, SIFMA believes that it is not possible to provide meaningful comment on the Proposal without understanding how the Commission views the Proposal interacting with the EMS Proposals. We also do not know what unintended consequences may result from any EMS Proposals that the Commission determines to advance, and the adoption of one or more of the EMS Proposals would each result in a different equity market structure from the current environment. As a result, the Commission should not consider prohibiting volume-based transaction pricing for agency-related orders before the Commission: (i) determines whether to finalize any EMS Proposals, and (ii) examines the effects of any finalized adopted EMS Proposals. Also, because U.S. equity market structure will have changed substantially with the adoption of just one of the EMS Proposals, the Commission should re-open the comment period for the Proposal post-adoption of any EMS Proposal(s) to solicit views on the Proposal in a new environment.[11]

SIFMA has set forth below some of the potential intersections between the Proposal and the EMS Proposals for which analysis and discussion by the Commission is necessary to elicit meaningful and informed public comment. Our broader concern, however, is that it is an inappropriate delegation of responsibility for the Commission to place the entire burden on market participants to consider how a new proposed rulemaking (*i.e.*, the Proposal) will interact with multiple in-flight Commission proposals. This disconnected sequencing burdens commenters that may wish to consider whether the Proposal might inform or alter their views on the EMS Proposals, which are now well past the March 31, 2023 public comment deadlines and likely well-into the Commission's final rulemaking process.

A. <u>Intersections with the Tick Size Proposal</u>

First, the Tick Size Proposal would require all exchange fees and rebates to be determinable at the time of execution, but this Proposal would eliminate volume-based fee discounts for agency and riskless principal executions.[12] It is unclear if the Commission is still contemplating the proposed requirement under the Tick Size Proposal that all fees, including any volume-based discounts, be determinable at the time of execution, or if the Commission might now abandon this aspect of the Tick Size Proposal. Commenters are likely to have had different comments on this aspect of the Tick Size

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[8] Exchange Act Release No. 96494, 87 FR 80266 (Dec. 29, 2022).

[9] Exchange Act Release No. 96495, 88 FR 128 (Jan. 3, 2023).

[10] Exchange Act Release No. 96496, 88 FR 5440 (Jan. 27, 2023). The Commission also proposed amendments to Rule 605 execution quality reports as part of the EMS Proposals. Exchange Act Release No. 96493, 88 FR 3786 (Jan. 20, 2023).

[11] *See also infra* Part VII of this Letter.

[12] Tick Size Proposal, *supra* n.8, at 80292.

Proposal had they been aware that the Commission intended to prohibit volume-based discounts for agency-related executions.

Second, the Commission's economic analysis in the Proposal is premised on the existing market structure in which fees and rebates are capped by access fees of $0.003. However, the Tick Size Proposal, if adopted, would lower access fees for most securities to $0.001, which would in turn result in lower exchange transaction fees and any attendant volume-based transaction pricing.[13] Consequently, the stated cost and benefit estimates have no reliable meaning if access fees will change with the Commission's adoption of the Tick Size Proposal.[14] The Commission has failed to appropriately calibrate the purported benefits and costs of the Proposal to the pending market structure under the Tick Size Proposal. As a result, there is no way to determine whether the estimated costs or burdens are accurate, or will remain accurate in a world with an adopted Tick Size Proposal.

Third, under the Proposal, a "riskless principal" execution is defined to not require that the two legs of the trade be at the "same price" in order to prevent circumventing the prohibition by improving a customer order by "an economically insignificant amount."[15] It is unclear what an "economically insignificant amount" means if the Tick Size Proposal is adopted and tick sizes and trading increments are harmonized.[16]

B. Intersections with the Order Competition Rule Proposal

In the OCR, the Commission proposed to prohibit volume-based transaction fees for qualified auctions, but *explicitly* stated that transaction-based fee schedules would continue to be permitted on exchange limit order books.[17] Here again, commenters would likely have had different views had they known that the Commission intended to prohibit volume-based discounts for agency-related orders.

For example, the Proposal appears designed to disincentivize institutional investors' interaction with retail orders (referred to as "segmented orders" under the OCR proposal)—one of the key impetuses for the OCR.[18] Under the proposed OCR, orders resting on a continuous order book of the open competition trading center operating a qualified auction at the conclusion of an auction period

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[13] *Id.* at 80290.

[14] *See e.g.*, Proposal at 76317-18 (estimating a combined overall increase of $26,382,403 in net transaction fee revenue across 11 venues assuming that both volume and average net captures remain the same as those of January 2023). It is unclear what this figure would be where access fees are capped at $0.001 for most NMS stocks.

[15] *Id.* at 76292.

[16] For example, if a firm receives a customer order in a $0.001 trading-increment stock and lifts a quotation from an exchange and then provides a full increment of price improvement to the customer order (*i.e.*, price improvement of $0.001), it is unclear if this would be considered price improvement by an "economically insignificant amount" and therefore a prohibited riskless principal execution under the Proposal.

[17] OCR proposal, *supra* n.9, at 224 ("Furthermore, volume-based rebate and fees, which are utilized by many exchanges in their transaction based fee schedules, would not be permitted within qualified auctions (**but would remain permitted on exchange [limit order books]**).") (emphasis added).

[18] *Id.* at 148 ("[Q]ualified auctions would give the trading interest of other investors, particularly institutional investors, an opportunity to interact directly (without the participation of a dealer) with, and thus execute against, the marketable orders of individual investors.").

would have priority over auction responses at a less favorable price for the segmented order.[19] Additionally, displayed orders resting on a continuous order book of an open competition trading center operating a qualified auction would have priority over auction responses at the same price.[20]

An institutional investor that seeks to interact with segmented orders might choose to do so through posting orders to an exchange's limit order book. Doing so would have at least two advantages over submitting a response to a qualified auction by allowing the institutional investor to: (i) obtain or share in any available volume-based transaction pricing and (ii) avoid the substantial investment in infrastructure and market data necessary to participate in a qualified auction lasting only 100 to 300 milliseconds. If the Proposal is adopted, the first of these advantages will be eliminated. Again, this alters the balance of costs and benefits of the OCR and could change the views that commenters on the OCR have already expressed.

C. Intersections with the Reg Best Ex Proposal

The Commission expresses concern in the Proposal for the possibility that volume-based transaction pricing contributes to a conflict of interest between broker-dealers and their customers. Specifically, the Commission states that:

> "The application of volume-based pricing to non-principal order flow **adds to the conflict of interest between a broker and its customer as broker-dealers may be incentivized to execute customer orders in a manner that would not be consistent with the broker-dealer's duty of best execution** (to execute customer trades at the most favorable terms reasonably available under the circumstances)."[21]

This concern was not raised in connection with the Commission's Reg Best Ex proposal.[22] Now, it appears that the Commission believes that volume-based transaction pricing presents a conflict of interest of such magnitude that it should be prohibited for agency-related orders. If volume-based transaction pricing really presents such a large conflict of interest, it should have been substantively discussed in the Reg Best Ex proposal. It is also unclear why the Commission did not consider, as a less invasive and costly reasonable alternative, addressing the Commission's concern(s) regarding volume-based transaction pricing under the Reg Best Ex framework.

This contradiction creates significant confusion regarding volume-based transaction pricing considerations as part of a broker-dealer's best execution analysis. There may, in fact, be circumstances where the duty of best execution would compel a broker-dealer to route based on a

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[19] *See* OCR proposed Rule 615(c)(5)(v).

[20] *Id.*

[21] Proposal at 76299 (emphasis added).

[22] The only reference to volume-based transaction pricing in the Reg Best Ex proposal appears in an explanatory footnote in the Commission's economic analysis. Reg Best Ex proposal, *supra* n.10, at 5463. The Commission also solicited comment on whether the Commission should "specify transaction fees in the rule text as considerations for determining the best market" and asking commenters to "explain how fees may be relevant to the best execution standard and a broker-dealer's best market determination." *Id.* at 5463 (Q.54). This question in proposed Reg Best Ex (and the absence of any citations in the Proposal to commenters' input on this question) suggests that the Commission remains uncertain of the role that volume-based transaction pricing plays in best execution analyses.

volume-based transaction pricing.[23] Yet, the Proposal suggests that such routing may currently be inconsistent with a broker-dealer's duty of best of execution because it presents a potential conflict of interest. In either case, significantly greater clarity is necessary from the Commission on the intersection between the Proposal and proposed Reg Best Ex (as well as the other EMS Proposals, as described above).

II. The Commission Overestimates the Incentives of Volume-Based Transaction Pricing on Order Routing Determinations

The SEC's unsupported conclusion that volume-based transaction pricing incentivizes broker-dealers to route against their customer's best interest ignores existing regulatory obligations and significantly more important factors in order routing. A broker-dealer's consideration of volume-based discounts in their routing decisions generally arises only after a firm considers a host of other factors, including its best execution responsibilities (as well as Regulation Best Interest), which market is displaying the NBBO, the depth of liquidity at various market centers, compliance with the Order Protection Rule (for marketable orders), and the exchange rebate model (*e.g.*, maker-taker) relative to the nature of the order (*e.g.*, marketable or nonmarketable).[24]

In other words, consideration of volume-based discounts on order routing decisions are likely a significantly lower priority for broker-dealers than the Proposal suggests. For example, where two exchanges for a given security may both have the same rebate model, an equal amount of liquidity, display the same prices, and are equally accessible, volume-based discounts may then influence broker order routing decisions as a tie-breaker. However, this is precisely the space in which exchanges compete and should compete to attract additional order flow to their venues, including with volume-based transaction pricing.

There is very little, if any, Commission discussion of the magnitude of volume-based discounts on order routing decisions relative to the much more important determinants noted above. Nor does the Commission explain why FINRA's existing best execution rule and Regulation Best Interest obligations are insufficient to address the potential conflict of interest raised by volume-based transaction pricing. Notwithstanding the Commission's lack of discussion or analysis of these points in the Proposal, the Commission proposes the extraordinary measure of a complete prohibition on volume-based transaction pricing for agency-related orders. It is inappropriate for the Commission to take the far-reaching step of intervening in exchange transaction pricing without, at a minimum, a fulsome analysis of the magnitude of the alleged conflict of interest and explanation of why existing rules or less interventionist measures are inadequate to address such conflicts.

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[23] For example, if a broker-dealer has achieved a volume-tier on Exchange A but not Exchange B and both Exchanges at the time of an order route are otherwise equal (*e.g.*, same price, liquidity, accessibility *etc.*), it would appear to promote best execution to route to Exchange A to reduce transaction costs (particularly where the customer receives pass-through fees).

[24] Some clients of a broker-dealer, such as those trading via direct market access may also choose to direct their order flow to a particular venue, but in such case, there is no conflict of interest between the client directing the order and the routing broker-dealer. Such clients would be denied transaction based pricing currently available to them through directed orders under a pass-through fee arrangement.

III. The Proposal Would Negatively Impact Competition and Efficiency

SIFMA believes that the Proposal would harm competition—both among exchanges and broker-dealers—by artificially limiting the fees an exchange could charge for transactions. Volume-based discounts are common across every industry and are an important tool used by exchanges to attract more order flow and therefore promote competition. Volume-based transaction pricing also provides a means by which medium and smaller broker-dealers can receive discounted fees.

a. The Proposal Would Negatively Impact Competition Among Exchanges

As a threshold matter, the Commission's role should not be to structurally tip the markets in favor of lower-volume exchanges as the Proposal purports to do—particularly not at the expense of customers that could bear the burden of higher fees assessed on their orders as a result of the elimination of volume-based discounts for agency-related orders.[25] This is not within, and is rather contrary to, the Commission's statutory mandate.[26] SIFMA believes that it is inappropriate for the Commission to favor certain exchanges over others, such as those that have chosen not to offer volume-based transaction pricing.

The Proposal Would Remove a Critical Tool Allowing Smaller Exchanges to Compete with Larger Exchanges and Could Advantage Larger Exchanges That Cross-Subsidize Transaction Fees

Volume-based discounts provide one of the only means by which smaller exchanges can gain market share from, and thereby compete with, larger exchanges. Without volume-based discounts, larger exchanges are likely to increase their competitive advantage over smaller exchanges. New entrants to the exchange business often attract liquidity by offering lower fees to market participants that route higher volumes to their exchanges. If the Proposal is adopted, smaller exchanges would not be able to use this incentive mechanism for a substantial amount of order flow and will find it more difficult to encourage participants to try their venues over existing, proven exchanges.

Moreover, NYSE and Nasdaq, as the primary exchanges with a listing business, have diversified sources of revenue, such as listing fees, that smaller exchanges do not. A diversified business model would very likely allow NYSE and Nasdaq more flexibility to compete with smaller exchanges in a world without volume-based discounts for agency-related orders. Smaller exchanges without such ancillary revenue streams could not follow suit (or at least could not do so for very long).

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[25] *See e.g.,* Proposal at 76303-04 ("Newer or smaller exchanges may find it difficult to attract order-flow away from the larger legacy exchanges given that a sizable portion of order flow is provided by the high-volume exchange members which qualify for the top tiers and similar terms would have to be offered to those members to pull them away.").

[26] Section 11A of the Exchange Act provides that the public interest, protection of investors and maintenance of orderly markets is served by assuring "fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets." 15 U.S.C. 78k-1(a)(1)(C). Because all exchanges have the ability to offer volume-based transaction pricing and all broker-dealers have an equal opportunity to obtain more favorable transaction pricing as a result, there is already fair competition among exchange markets and broker-dealers with respect to transaction fees.

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As a result, without smaller exchanges having the ability to attract additional agency-related order flow through volume-based discounts, larger exchanges may be able to increase their market share..

The Commission acknowledged the possibility of larger exchanges subsidizing their transaction fee revenue in the context of the proposed ban on transaction-based pricing for qualified auctions under the OCR. Specifically, the Commission stated that rebates offered by exchanges in qualified auctions would be capped at 5 mils to "limit cross-subsidization of qualified auctions by the largest open competition trading centers in ways that would not be available to smaller competitors, **because larger competitors may have more or larger alternative revenue sources**."[27] The Commission appears not to have considered that these same "alternative revenue sources" could similarly be used by larger exchanges to subsidize transaction revenue if the Proposal is adopted.

There Are Significant Flaws in the Commission's Economic Analysis Regarding Inter-Exchange Competition

SIFMA believes there are significant flaws in the Commission's economic analysis regarding exchange competition for at least three reasons. First, as noted immediately above, the Commission did not consider or analyze the ability of larger exchanges to offset their transaction fee revenue through other means relative to smaller exchanges inability to do so. To the extent larger exchanges do cross-subsidize their transaction fee revenue through other sources of revenue, such exchanges are likely to increase their market share relative to smaller exchanges.

Second, the Commission's economic analysis assumes without sufficient evidence that there is a correlation between the number of fee tiers offered by an exchange and an exchange's market share, as set forth in the Table 5 of the Proposal.[28] However, Table 5 shows only each exchange's market share and number of fee tiers at a single point in time (*i.e.*, averages during January 2023) rather than across a period of time.[29] This analysis fails to acknowledge that the exchanges with the highest number of fee tiers have lost market share over time.[30] At a minimum, the Commission needs to analyze changes in exchange market share over time relative to the number of fee tiers to establish such a correlation.

Third, the Commission has not presented evidence indicating that smaller exchanges cannot effectively compete and gain market share in today's market structure, nor has the Commission analyzed whether volume-based discounts may have helped smaller exchanges to gain market share. For example, MEMX LLC ("MEMX") founded just four years ago has acquired a market share across all NMS stocks of ~3%.[31] The Commission approved MIAX Pearl LLC ("PEARL") for equities

[27] OCR Proposal, *supra* n.9, at 160 (emphasis added).

[28] Proposal at 76307-08.

[29] *Id.*

[30] For example, NYSE—the exchange with the most fee tiers of 93 according to Table 5 of the Proposal—had an overall market share of ~12-13% from 2018-2020, which has been reduced to ~9-10% from 2020 to present. Cboe Exchange, Inc., Market Share Charts, NYSE/Floor, https://www.cboe.com/us/equities/market_statistics/venue/nysefloor/all_market/.

[31] Cboe Exchange, Inc., Market Share Charts, Members Exchange, https://www.cboe.com/us/equities/market_statistics/venue/membersexchange/.

trading in August 2020, and PEARL today holds a market share across all NMS stocks of ~2%.[32] The Cboe Global Markets ("Cboe") equities exchanges[33] began as alternative trading systems ("ATSs") in the mid-2000s and today account for a market share across all NMS stock of ~14% compared to ~16% for the Nasdaq exchanges and ~20% for the NYSE exchanges.[34]

One reason why such exchanges (without significant listing businesses) may have been able to gain market share over time is because of—rather than in spite of—volume-based incentives. Such an analysis by the Commission is of critical importance to inform whether or not volume-based transaction pricing helps or harms competition among exchanges. To the extent the Commission's analysis were to find that volume-based transaction pricing allows smaller exchanges to *gain* market share, the proposed prohibition would appear to *negatively* impact competition among exchanges.

b. The Proposal Would Negatively Impact Competition Among Broker-Dealers

The Commission contends that the Proposal would help small and medium-sized broker-dealers better compete for customer order flow and reduce their transaction fees.[35] By eliminating volume-based pricing for agency and riskless-principal orders, the Commission reasons that smaller broker-dealers will be able to attract more customer order flow.

At the same time, the Commission acknowledges that many smaller broker-dealers may choose to route orders through larger broker-dealers to: (i) leverage sophisticated smart order routers ("SORs") of the larger broker-dealer, (ii) avoid exchange membership fees, (iii) leverage faster connectivity infrastructure of the larger broker-dealer, and (iv) benefit from the larger broker-dealer's lower exchange fees and higher exchange rebates based on volume.[36]

However, the Commission fails to explain why it believes that eliminating volume-based pricing for agency-related orders will cause small/medium-sized broker-dealers to invest in creating/operating their own SORs, establish low-latency connectivity and pay for additional exchange memberships (particularly when they already receive the same lower fees and higher rebates based on volume that larger broker-dealers receive via pass-through arrangements with such larger broker-dealers). This is a *critical* gap in Commission's reasoning as these investments would be necessary to support the customer business that the Commission believes could migrate to such broker-dealers if the Proposal is adopted.

In reality, the elimination of volume-based pricing for agency-related orders will disadvantage small/medium-sized broker-dealers rather than empower them. This is because small/medium-sized broker-dealers will continue to use the services of larger broker-dealers on these three dimensions (SOR, membership fees, and connectivity) but will now have higher trading costs relative to today

[32] Cboe Exchange, Inc., Market Share Charts, MIAX Pearl Exchange, https://www.cboe.com/us/equities/market_statistics/venue/miaxpearl/.

[33] Cboe BZX Exchange, Inc., Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe EDGX Exchange, Inc..

[34] Cboe Exchange, Inc., U.S. Equities Market Volume Summary, https://www.cboe.com/us/equities/market_share/.

[35] Proposal at 76285-86.

[36] *Id.* at 76314-15.

because they will no longer receive lower fees and higher rebates available through pass-through transaction-based pricing. Customers will also continue to leverage the services of larger broker-dealers for the same reasons and will likewise face higher trading costs.[37] SIFMA cannot support the Proposal given the uncertain benefits to competition among broker-dealers coupled with the certainty of increased trading costs for small/medium-sized broker-dealers.

c. The Commission's Own Economic Analysis Suggests That the Proposal Could Negatively Impact Market Efficiency

The Commission's own economic analysis suggests that the Proposal could lead to wider spreads on exchanges arising from, among other things, greater market segmentation between principal orders routed to certain exchanges and agency/riskless principal orders routed to other exchanges. Specifically, the Commission states that "such segmentation could negatively impact overall transaction costs by resulting in wider spreads being quoted on exchange."[38] Agency traders, knowing that their orders would be more likely to be routed to certain agency exchanges over others where they are more readily identified as an agency order, "could elect to provide liquidity at a wider spread as a means of compensation for the increased risk of being adversely selected by a principal trader."[39] The Commission also estimates that wider spreads would occur on exchanges that attract more principal order flow: "[t]he relative scarcity of agency order flow on exchanges that become dominated by principal trading following the implementation of the proposed rules could also result in wider spreads on those exchanges."[40]

The Commission's analysis describes other negative impacts on market efficiency as well and potential harm to lower-volume broker-dealers that could arise from the Proposal. For example, the Commission states that "additional order flow [from volume-based transaction pricing] may ultimately be beneficial to lower-volume broker-dealers" in the current market structure.[41] According to the Commission, "[w]hen volume-based discounts induce additional order flow from high-volume broker-dealers to convene on a dominant exchange, more liquidity reduces the cost of searching for the best execution and benefits the lower-volume broker-dealers."[42] If true, these statements appear to be contrary to the Commission's suggestion that the Proposal would benefit lower-volume broker-dealers because such broker-dealers currently benefit from volume-based transaction pricing.

SIFMA is highly concerned that the Commission believes that the Proposal is likely to negatively impact market efficiency, could harm lower-volume exchange members, and result in wider spreads to the detriment of all market participants.[43] Given these anticipated impacts of the Proposal if

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[37] *See also infra* Part IV of this letter (discussing increased costs to investors).

[38] Proposal at 76325.

[39] *Id.*

[40] *Id.*

[41] Proposal at 76326.

[42] *Id.*

[43] *See also* Proposal at 76321 ("Applying the insights from the price discrimination literature to the exchange setting suggests that the proposed ban on volume-based pricing ***may decrease both overall order flow across exchanges and***

adopted, SIFMA urges the Commission not to adopt the Proposal and actualize these negative consequences on market efficiency.

IV. The Proposal Would Discourage Routing to Exchanges and Could Raise Costs for Investors

SIFMA believes that prohibiting volume-based discounts would reduce incentives to display liquidity on exchanges and would incentivize routing more orders to off-exchange trading centers. SIFMA generally agrees with the Commission's observation that "[l]acking the ability to offer volume discounts on agency-related order flow may make exchanges less competitive."[44]

By dampening incentives to route agency-related orders to exchanges, the Proposal would reduce liquidity available on exchanges, including displayed liquidity.[45] If this reduction in on-exchange liquidity occurs, the Commission's economic analysis indicates that this may "result in wider (NBBO) spreads thereby harming execution quality in the market as a whole."[46] SIFMA is deeply concerned about such a potential outcome arising from the Proposal which could harm all market participants.

Moreover, the direct effect of the Proposal, as stated by the Commission, would be to raise costs for the many investors (including other broker-dealers) that route through broker-dealers qualifying for the lowest exchange transaction fee tiers.[47] The Commission offers no quantitative estimates of what these increased costs to investors would be. And the only apparent benefit such investors (and smaller broker-dealers) receive to off-set these unquantified costs is the uncertain possibility that the Proposal will "increase the variety of broker-dealers available" or result in some lower-volume broker-dealers "specializ[ing] in niche areas or . . . provide personal attention to investors."[48] As explained above, SIFMA does not believe that lower-volume broker-dealers are likely

overall efficiency, defined in terms of profit summed across broker-dealers and the exchanges.") (emphasis added), *and* 76319 ("The Commission also believes that the proposed banning of volume discounts, when considered in isolation, ***may have the effect of reducing efficiency*** if high-volume exchange members reduce the amount of order flow which they execute on the exchanges, something which could ***harm investor welfare***.") (emphasis added).

[44] Proposal at 76320. SIFMA does not believe that the Commission should, as a result of reduced incentive to route agency-related orders to exchanges, expand the Proposal to apply to off-exchange trading centers such as ATSs. *See id.* at 76291 (Q.5). Many ATSs do not charge separate fees for access to their ATS, but rather a broker-dealer operator provides access to its ATS as part of a bundle of services provided to a client pursuant to a commission rate for such services. The Proposal is therefore largely incompatible with ATS pricing structures.

[45] *See* Proposal at 76321 ("Tiered pricing can heighten the incentive to add liquidity to exchanges, enhancing not only total order flow and profit summed across the exchanges but also total broker-dealers' welfare.").

[46] *Id.*

[47] Proposal at 76319 ("Investors and other market participants that send exchange orders through large exchange members, which currently likely benefit from the volume-based transaction tiers of their sponsors, ***may experience costs in the form of higher fees*** from their executing broker-dealers under the proposed rule.") (emphasis added).

[48] *Id.* at 76317. The Commission also suggests that execution quality could be improved to the extent that broker-dealers "focus on execution quality for their customers in making routing decisions without the influence of volume-based exchange transaction pricing . . ." *Id.* The Commission does not provide any evidence that investors currently receive poor execution quality, nor (as previously noted) does it explain why existing rules, such as the duty of best

to invest in the necessary exchange memberships, routing technology, and connectivity/market data infrastructure to support investors currently using larger broker-dealers because of the elimination volume-based trading for agency-related orders. Consequently, if the Commission adopts the Proposal, most investors that currently benefit from transaction-based pricing will continue to use the same broker-dealers they currently do, except with higher trading costs.

When weighing the anticipated effects of the Proposal of reduced exchange liquidity and higher investor execution costs against the illusory benefits of increased competition, SIFMA believes that the Proposal may cause more harm than good.

V. Operational Concerns Regarding the Proposal

SIFMA believes that the Proposal does not account for certain operational concerns, some of which are described below. Notwithstanding SIFMA's belief that the Commission should not proceed with the Proposal, SIFMA believes that these operational issues would need to be resolved as part of any adoption of the Proposal.

A. An Exception Is Needed under the Proposal for Affiliated Funds of a Broker-Dealer

Some firms are organized to have one or more trading funds and an affiliated broker-dealer whose primary function is to route orders for those funds. Most or all of such organizations' order flow is routed to exchanges as agency orders, which would be ineligible for volume-based transaction pricing under the Proposal.

Given the affiliation of the broker-dealer and its funds for such organizations, the order flow of the fund(s) is effectively proprietary flow of the broker-dealer and should be treated as such. The same group under common control is carrying out the trading activity, and it is only because of the organizational structure of such firms that their orders are represented as agent.[49] Accordingly, SIFMA believes that an exception is necessary under the Proposal to allow for orders of an affiliated fund of a broker-dealer under common control to be treated as proprietary orders of the broker-dealer for purposes of volume-based transaction pricing.

Without doing so, the Proposal may result in a significant negative impact on exchange liquidity. Facing higher transaction fees and lower transaction rebates on exchanges, such firms will have substantially less incentive to route to exchanges and may seek more executions on off-exchange venues. The only other alternative for such firms would be to reorganize themselves—at massive costs unaccounted for in the Commission's economic analysis—to isolate their trading in a proprietary-trading broker-dealer.[50]

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execution (which requires a review of execution quality), are insufficient to ensure that broker-dealers provide high-quality executions to investors.

[49] In other words, such an organization could have organized itself as a proprietary trading broker-dealer rather than having a broker-dealer servicing separate affiliated funds.

[50] At a minimum, the Proposal appears designed to structurally favor firms organized as proprietary trading broker-dealers over those organized as funds with an affiliated broker-dealer.

B. It Is Unclear How Firms Will Be Able to Comply with the Proposed Anti-evasion Rules for Certain Riskless Principal Executions

The Proposal does not address the fact that broker-dealers cannot always know when an execution of a proprietary order may be used to fill a subsequently received customer order. Under the Proposal, the Commission contemplates that exchanges will require broker-dealers to mark their orders to distinguish proprietary orders from agency-related orders or that exchanges will require the use of different ports for principal vs. agency-related orders.[51] These mechanisms are predicated on broker-dealers knowing at the time of order submission whether the order will execute as principal, riskless-principal or agency. This may not always be possible. For example, where a broker-dealer has a resting principal order on an exchange, it may subsequently receive executions against that order that it may determine to use to fill a subsequently received customer order (*e.g.*, a not-held order).

In such instances, it would be unfair to consider the firm to have violated an exchange's anti-evasion rules or order marking requirements adopted pursuant to the Proposal when the firm believed in good faith at the time of order entry that the order would not be used to fill a customer order in a riskless principal capacity. Other regulatory obligations may compel a firm to fill the customer order as riskless principal and could therefore conflict with exchange anti-evasion rules adopted pursuant to the Proposal. Accordingly, clearer guidance on the proposed anti-evasion rules adopted by exchanges should be provided and there should be allowances for situations where an execution on an order originally designated as principal may subsequently be used in a riskless principal capacity to fill a customer order.

C. The Proposed "Riskless Principal" Definition Is Incompatible with Existing Regulatory Requirements

SIFMA is concerned that there are inconsistencies between the proposed definition of "riskless principal" under proposed Rule 6b-1(a) and existing definitions used by self-regulatory organizations ("SROs"). This discrepancy creates uncertainty and operational challenges for broker-dealers.

Specifically, the Commission's proposed definition removes the requirement for riskless principal trades to occur at the same price, a provision present in existing rules such as FINRA Rule 5320.03. This FINRA rule mandates specific timing and pricing parameters for riskless principal trades, including order receipt preceding principal trading, offsetting allocation within 60 seconds, and execution at the same price (excluding any markup/markdown or fees). Additionally, transaction reporting of riskless principal trades is contingent upon both legs being executed at the same price.[52] The Commission FAQs to Rule 611 under the Exchange Act[53] further tie the riskless principal executions to these SRO rules, stating that riskless principal trades must comply with the relevant SRO trade reporting rules.[54]

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[51] Proposal at 76292.

[52] FINRA Rule 6622(d)(3)(B).

[53] 17 CFR 242.611.

[54] Division of Trading and Markets, Commission, *Responses to Frequently Asked Questions Concerning Rule 611 and Rule 610 of Regulation NMS*, Question 3.04, https://www.sec.gov/divisions/marketreg/nmsfaq610-11.htm.

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Adopting the proposed definition for Rule 6b-1(a) would create a separate definition for riskless principal depending on the purpose (allocating a trade to a client and transaction reporting versus exchange fees). This divergence could cause a trade to be considered riskless principal for exchange fees but not for transaction reporting, causing uncertainty about recordkeeping for such orders. Broker-dealers would also need to comply with these varied riskless principal definitions across different regulations, increasing compliance costs and complexity.

SIFMA urges the SEC to consider the potential negative consequences of these discrepancies and seek alignment between the proposed definition and existing SRO rules. This would enhance clarity, minimize operational burdens for broker-dealers, and ensure consistent application of the riskless principal definition across the market.

D. The Commission's Range of Possible Alternatives Need Separate, Detailed Consideration before Any Potential Adoption

In the Proposal, the Commission solicits comment a range of different alternatives including: (i) prohibiting volume-based transaction pricing for proprietary orders in addition to agency-related orders (Q.11);[55] (ii) prohibiting fee tiering for all orders with an exception for market makers (Q.12);[56] (iii) allowing volume-based transaction pricing but requiring volume tiers to be based on total aggregate volume submitted to the exchange with tiered pricing applied to all members uniformly (Q.13); (iv) allowing volume-based transaction pricing for proprietary orders but prohibiting an exchange from basing tiers on total consolidated volume and instead limit fee tiering to volume that occurs solely on the exchange (Q.14); (v) allowing volume-based transaction pricing for proprietary orders but prohibit exchanges from basing tiers in an auction, trading session, or special program or order types on volume done outside that auction/trading session, or program/order type (Q.15);[57] (vi) extending the proposed prohibition on volume-based transaction pricing to agency-related orders in options markets (Q.16); and (vii) prohibiting tiering for which fewer than 50% of an exchange's members could have met the criteria during the prior month or prohibit tiers for which only one, two, three, or four members can qualify (Q.18).

These potential alternatives present important differences and would give rise to different costs, benefits and economic analyses. The proposing release fails to provide any discussion of costs and benefits for some of the alternatives, and where it is provided, the analysis is incomplete and insufficient for public comment. SIFMA cautions against adoption of any of these potential alternatives without separate, detailed consideration of the costs and benefits of such alternatives, including (where possible) quantitative estimates of the economic impact that also consider the intersection with the Commission's EMS Proposals, and an opportunity for public comment. Without doing so, SIFMA is concerned that market participants will not have been provided with sufficient information to provide meaningful comment on the proposed changes to volume-based transaction pricing, consistent with the Administrative Procedures Act.

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[55] *See also* Proposal at 76329.

[56] *See also id.* at 76331.

[57] *See also id.* at 76334.

SIFMA strongly opposes any adoption of a full ban on volume-based transaction pricing for proprietary orders as well as agency-related orders, as suggested in Alternative 1.[58] As the Commission notes, principal trading does not involve any potential conflict of interest in making a routing decision for a customer.[59] SIFMA believes that exchanges, at a minimum, should be permitted to offer volume-based transaction pricing for principal orders as means to attract additional liquidity to their venues and such incentives are pro-competitive as they can drive transaction costs down for broker-dealers.

VI. The Proposal Should Not Extend to Options Markets

Because SIFMA believes that the Proposal should not be adopted with respect to equities, SIFMA similarly believes that it should not extend to options trading either. Customer orders in options markets often receive the highest rebates, which are passed on to customers by many broker-dealers.[60] To the extent that these rebates are tied to volume-based discounts, extending the Proposal to options markets could cause direct harm to retail customers who may no longer receive pass-through rebates.

Additionally, the listed options market is fundamentally different from the Reg NMS securities market. There are roughly 11,000 NMS stocks. In contrast, there are at least 1.4 million active strikes in listed options. Each underlying security, options class and strike price has its own unique liquidity profile. The result is that liquidity across the U.S. listed options market in all but a few liquid underlying securities is fragmented and episodic.

Discouraging options exchanges from offering volume-based incentives without a clear reason or mandate for disrupting the current model may further reduce liquidity in what is already an episodic and fragmented market. The elimination of volume-based transaction pricing, especially for those who contribute to the depth of market at scale, will act to disincentivize those participants from taking incremental risk (*i.e.*, being on the NBBO). Therefore, SIFMA would expect NBBOs to widen, leading to a worse experience for all orders, including customers. Widening of spreads also has knock-on effects above and beyond execution quality.[61]

Moreover, the execution of orders in options markets is markedly different than for equities with many transactions, particularly for complex orders, occurring through auction mechanisms whereby a broker-dealer pairs with a customer order as principal and seeks potential price

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[58] *Id.* at 76329.

[59] *Id.* ("[S]uch [principal] order flow does not have the potential for a conflict of interest between members and customers with respect to routing.").

[60] *See e.g.*, Cboe BZX Options Fee Schedule (effective Nov. 15, 2023), Customer Penny Add Volume Tiers, https://www.cboe.com/us/options/membership/fee_schedule/bzx/ (providing the higher rebates to members adding customer orders in higher volumes).

[61] Consistent with SIFMA comments on the impact on competition among broker-dealers for equities, there is no reason to believe that small or medium sized broker-dealers would make the necessary investments in routing infrastructure and exchange connectivity to options exchanges to improve competition among broker-dealers in options markets. Options markets are considerably more complex than equities and therefore more costly to operate in, which makes it even less likely that the purported benefits to broker-dealer competition would be realized if the Commission extends the Proposal to options markets.

improvement opportunities for such order on an exchange. Such executions are effectively riskless principal, but also agency insofar as other market participants may execute against a portion of the order through an exchange auction mechanism. The Proposal cannot, therefore, simply be extended to options markets without addressing these critical differences.[62]

At most, and notwithstanding SIFMA's strong objections to the Proposal applying to equities, SIFMA believes that the Proposal should apply to equities first before any contemplated extension to options markets. A separate and independent economic analysis of the impact of such a prohibition on options markets with an opportunity for public notice and comment would also be necessary prior to any extension of the Proposal to options markets.

VII. Enhanced Disclosure Should Be a Necessary First Step Prior to Any Prohibition of Volume-Based Transaction Pricing

Given the Commission's concerns related to volume-based transaction pricing articulated in the Proposal, SIFMA would support the Commission gathering further information from exchanges related to volume-based transaction pricing. To that end, SIFMA does not oppose Alternative 3 in the Proposal, which would require exchanges to periodically disclose certain information to the Commission if they offer volume-based transaction pricing for any NMS stocks, for both principal and agency-related orders.[63] Such information could be used to inform whether the effects of volume-based transaction pricing are of such significance that a subsequently proposed limitation would be appropriate.

If the Commission determines to proceed with the current Proposal, SIFMA urges the Commission to only consider doing so after any implementation of the EMS Proposals, in particular after market participants and the Commission have had a chance to evaluate our equity market structure with the benefit of amended Rule 605 reports. At such time, the Commission should re-open the comment period on the Proposal to allow market participants the opportunity to re-evaluate the Proposal under a changed equity market structure.

* * *

SIFMA greatly appreciates the Commission's consideration of these comments and would be pleased to discuss them in greater detail. If you have any questions or need any additional information, please contact the undersigned at (212) 313-1287, Joe Corcoran at (202) 962-7383, or our counsel, Charlie Sommers of Sidley Austin LLP at (202) 736-8125.

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[62] For example, the Commission's definition of riskless principal under the Proposal would not work in the context of options exchange auctions as a broker-dealer bringing a paired order to an options exchange auction would not for example, in the case of a customer order to buy, be purchasing the option from another person to offset a contemporaneous sale to such customer. Options markets also have a significantly more complex regime to identify the originator of an order with at least 10 different capacities (or origin codes) as compared to agency, riskless principal, and principal orders in equities markets. These different origin codes would need to be considered in any extension of the Proposal to options markets.

[63] Proposal at 76333.

Respectfully Submitted,

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