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Submitted electronically through: https://www.sec.gov/rules/submitcomments.htm

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

Re: File No. S7-29-22; Release No. 34-96493; Disclosure of Order Execution Information;

File No. S7-30-22; Release No. 34-96494; Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders; and

File No. S7-31-22; Release No. 34-96495; Order Competition Rule

Dear Ms. Countryman,

Fidelity Investments ("Fidelity")[1] appreciates the opportunity to provide comments to the Securities and Exchange Commission ("SEC" or "Commission") regarding multiple concurrently issued but independently proposed rule changes to the U.S. equity markets ("Proposal", "Proposals" or "Proposed Rule", "Proposed Rules").[2]

Fidelity and its affiliates are one of the world's leading providers of financial services, including investment management, retirement planning, portfolio guidance, brokerage, benefits

[1] Fidelity submits this letter on behalf of National Financial Services LLC ("NFS"), a Fidelity Investments company and SEC registered broker-dealer that provides trade execution, clearing and settlement services to its affiliated SEC registered introducing retail broker-dealer, Fidelity Brokerage Services LLC ("FBS") and to unaffiliated introducing broker-dealers (correspondents), custody clients, and direct institutional customers. Fidelity also submits this letter on behalf of Fidelity Management & Research Company LLC, the SEC registered investment adviser to the Fidelity family of mutual funds and Strategic Advisers LLC, a Fidelity Investments company and SEC registered investment adviser that provides discretionary investment management services for Fidelity's retail separately managed account and managed account products.

[2] Exchange Act Release No. 96493, 88 FR 3786 (Jan. 20, 2023) ("Order Execution Information"); Exchange Act Release No. 96494, 87 FR 80266 (Dec. 29, 2022) ("Minimum Pricing Increments, Access Fees and Transparency of Better Priced Orders"); Exchange Act Release No. 96495, 88 FR 128 (Jan. 3, 2023) ("Order Competition Rule"); Exchange Act Release No. 96496, 88 FR 5440 (Jan. 27, 2023) ("Regulation Best Execution"). Capitalized terms have the meaning ascribed to them in the Proposals. Because the Proposals cross-reference, and are inextricably connected to, each other, we provide our views in a single comprehensive comment letter submitted to the comment files of the SEC's Order Execution Information Proposal; Minimum Pricing Increments, Access Fees and Transparency of Better Priced Orders Proposal; and Order Competition Rule Proposal.

outsourcing and other financial products and services. We administer approximately $10 trillion in assets from more than 41 million individual investors, 23,000 employer client firms, and 3,700 clearing and custody client firms. With a diverse client base supported by numerous regulated entities, Fidelity offers the SEC a unique position from which to provide comments on the Proposals.[3]

I. Introduction

Fidelity believes that the U.S. equity markets are fundamentally strong and have shown tremendous resiliency in recent years despite numerous, unprecedented stresses including a global pandemic, geopolitical shocks, increased retail investor participation in the market, and national securities exchange outages. Technology and a competitive marketplace of multiple trading centers have helped the U.S. equity markets not simply maintain but strengthen their global competitive position with unmatched cost, liquidity, speed, and product innovation.

From an equity trading perspective, the interconnected national market system allows market participants to interact across sixteen national securities exchanges and more than forty private trading venues each day, in a relatively stable and competitive environment. Fidelity's retail customers, whether young investors saving for their first home, working families saving for their child's education, or individual investors preparing for their retirement, entrust their hard-earned assets to us and expect us to expertly navigate the equity markets on their behalf. We continuously seek to deliver on that expectation.

We do not take payment for order flow from wholesale market makers on equity trades. We return market maker economics on equity trades to our retail customers in the form of price improvement. In 2022 alone, we saved our retail customers over $1.3 billion in price improvement. While we chose not to deploy a payment for order flow business model in our own retail equity business, we accept it as a valid business model if the right disclosures are made to the customer to help inform their choice of which broker-dealer is best for them.

We support regulatory efforts that achieve better outcomes for retail investors and enable new ways for market participants to innovate and compete against each other. With respect to the Proposals, we are extremely supportive of the proposed Disclosure of Order Execution Information rule ("proposed amendments to Rule 605"). We believe the proposed amendments to Rule 605 will modernize the existing Rule 605 and provide retail investors greater transparency into execution quality among different brokers. More importantly, the proposed amendments to Rule 605 will set a standard baseline from which to assess execution quality metrics across the industry and to ensure that when future changes are made to the markets, the public is able to see, and track, the benefits of those changes.

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[3] Fidelity generally agrees with the views expressed by the Securities Industry and Financial Markets Association ("SIFMA"), SIFMA Asset Management Group ("SIFMA AMG"), Securities Traders Association ("STA") and Investment Company Institute ("ICI") in their comment letters. Fidelity submits this letter to supplement SIFMA, SIFMA AMG, STA and ICI views on specific issues.

At the same time, if adopted as proposed, we have less conviction that the Minimum Pricing Increments, Access Fees and Transparency of Better Priced Orders Proposal and the proposed Order Competition Rule would be beneficial to investors. Instead, we believe they present significant challenges and unintended consequences that have not been fully evaluated and that have a reasonable expectation of negatively impacting the current retail investor trading experience. For example:

- *Minimum Pricing Increments, Access Fees and Transparency of Better Priced Orders.* We do not see a clear retail investor benefit to the Commission's proposed smaller tick sizes. For marketable orders (which comprise most retail orders), we are not aware of data that supports the thesis that the tighter quoted spreads proposed will improve the effective spreads for retail investors who already benefit from significant price improvement versus the quote and thus achieve better prices and effective spreads for marketable orders. Looking at the SEC's own analysis and approach, the SEC data does not suggest that securities for which smaller tick increments are being proposed would clearly improve, nor does the data suggest they would necessarily be worse for retail investors, leading to little or no economic benefit for marketable retail orders by implementing the rule in its current form. Instead, we anticipate smaller ticks will lead to less liquidity per tick and increase quote fading risk, especially when this Proposal is combined with the proposed Order Competition Rule. For wider spread illiquid securities, if no intra tick exemption is available for retail orders, the effective spread could widen under the Proposal. Quoted spreads could also widen due to a decrease in access fees. All of these potential outcomes could harm retail investors.

  For retail investor non-marketable limit orders, Fidelity has significant concerns with smaller tick sizes and their impact on the execution quality for this segment of retail orders. Publicly available retail broker Rule 606 data indicates that non-marketable limit orders represent 10-20% of retail customer shares executed, and likely represent a much higher percentage of orders placed because many of these orders do not execute. We observe that retail investors typically place orders in penny increments – even when sub-penny increments are broadly available to them (*e.g.*, in sub-$1 securities). The proposed smaller tick sizes are likely to erode execution quality for retail investors due to increased prevalence of sophisticated traders "stepping ahead" of retail orders in smaller trading increments with minimal economic risk. In comparable conditions between retail orders in securities with a sub-penny tick versus a whole cent tick, the observed non-adjusted fill rate of non-marketable limit orders priced at the whole penny within 1% of arrival midpoint is lower in sub-penny tick securities, and thus it is likely that the fill rates of non-marketable limit orders for retail investors generally will be lower under the proposed sub-penny ticks, thereby increasing costs to retail investors. We also anticipate that changes to tick sizes will result in operational risk due to the complexity of the proposed changes and quarterly dynamic shifts in the marketplace.

- *The Order Competition Rule*. For the proposed Order Competition Rule, we see the potential for mixed or negative results. We have significant concerns that several scenarios may lead to a net detriment to retail investors, including increased quote fading

during Qualified Auctions. The prescriptive nature of the Proposal reduces the opportunity to differentiate and monetize the Qualified Auction model, which may disincentivize market participants from operating a Qualified Auction and/or lead to more opaque costs levied by Qualified Auction operators. Moreover, the proposed high barrier to run a Qualified Auction is anti-competitive. Realistically, only national securities exchanges and alternative trading systems ("ATS") with the highest market share are likely to meet the proposed requirements to operate a Qualified Auction, creating potential venue concentration which could lead to reduced market resiliency and higher prices -- an outcome that directly conflicts with the Commission's stated goals to decrease concentration in the marketplace. Instead, we would welcome a proposal that provides a smoother path for venues to operate a mechanism similar to the SEC's proposed Qualified Auction mechanism, which would allow innovation and competition to generate any potential benefits to investors, without the downside of the concerns we have in the irreversible and prescriptive Qualified Auction mechanism as proposed.

We also have significant concerns regarding increased technology and market data costs associated with both Proposals. At the industry and individual firm platform level, significant technology changes will need to be made to support the Proposals, which are not the only proposals on the SEC's rulemaking agenda to impact the equity markets.[4] Similarly, we anticipate market data costs will increase in several areas under the Proposals. Market data is a critical element of the equity markets, but the SEC has not yet required the self-regulatory organizations ("SROs") to re-submit a proposal setting fees for the data content underlying consolidated market data offerings pursuant to the Commission's Market Data Infrastructure Rules ("MDIR") nor acted on simple governance reforms to help curtail market data costs.[5] Instead, the SEC has proposed numerous rules that will further increase market data costs to the detriment of retail investors.

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[4] Despite its strength and stability, for many years, each SEC administration has focused efforts on equity market structure and has undertaken initiatives designed to strengthen it. While the present SEC administration is no exception, the breadth and depth of the current SEC administration's equity market structure agenda is notable, particularly during a time of tremendous market resiliency. In addition to the Proposals the current SEC administration has introduced sweeping changes including, but not limited to, the definition of "exchange" (See *Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange"; Regulation ATS for ATSs That Trade U.S. Government Securities, NMS Stocks, and Other Securities; Regulation SCI for ATSs That Trade U.S. Treasury Securities and Agency Securities* (SEC) 87 FR 15496 (Mar. 18, 2022)); the definition of "dealer" (*Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer* (SEC) 87 FR 23054 (Mar. 18, 2022)), and adopted amendments to shorten the standard securities settlement cycle (*Shortening the Securities Transaction Settlement Cycle* (SEC) Release Nos. 34-96930 (Mar. 15, 2023)).

[5] Securities and Exchange Commission *Market Data Infrastructure* 85 FR 16726 (Mar. 24, 2020); Fidelity comments available at: s70320-7235188-217092.pdf (sec.gov). Several exchanges filed petitions for review of the Market Data Infrastructure rule in the U.S. Court of Appeals for the District of Columbia Circuit, which were denied. *The Nasdaq Stock Market LLC, et al v. SEC*, No. 21-1100 (D.C. Cir. May 24, 2022). ("2022 D.C. Circuit MDIR decision"). Relatedly, the SEC issued a proposed Governance Order that directed the SROs to file a new single Consolidated Market Data NMS plan ("CT Plan") that would address certain governance changes. Several exchanges filed petitions for review of the CT Plan Order in the D.C. Circuit, which ruled in favor of the SEC in two of three disputed areas. *The Nasdaq Stock Market LLC, et al v. SEC*, No. 21-1167 (D.C. Cir. July 5, 2022). The SEC has yet to re-direct the SROs to file a new Plan.

Given recent exchange outages, we do not believe that the Commission has fully addressed the significant increase in financial risk to retail brokers under the Proposals, due to SEC-approved exchange error policies and limited liabilities that the exchanges currently enjoy as self-regulatory organizations. Today, if a national securities exchange has a technology error that impacts a retail customer order, due to exchange limitations on liability, the retail customer is unlikely to receive reimbursement from the exchange. Instead, broker-dealers typically voluntarily provide restitution to their customers to cover the exchange error. Under the proposed Order Competition Rule, more retail orders will occur on a national securities exchange, which raises the opportunity for more errors to occur on exchange. Neither retail customers nor broker-dealers should be financially responsible for exchange errors. Re-visiting exchange limitations on liability is a simple matter of fairness that the SEC should address.

We also do not believe that the SEC has fully contemplated systemic, market-wide risks associated with the concurrently proposed rules, how changes to one rule can impact another, and/or the full economic analysis of the concurrently issued proposals, notwithstanding the number of other rules that the SEC has recently proposed that will ultimately impact the equity market. Moreover, the SEC's multi-focused, rapid-fire rulemaking agenda increases the difficulty of addressing known rule deficiencies post-implementation given the interconnected nature of the Proposals and the market as a whole.

To this end, we strongly recommend that approval and implementation of the Proposals follow an incremental, phased approach, with periods of retrospective review to determine whether the intended outcomes were achieved. Specifically, we recommend the SEC launch their equity market structure reform agenda by first adopting proposed amendments to Rule 605, with certain modifications. For many years, the industry has urged the SEC to amend Rule 605 to provide more comprehensive standardized metrics upon which the markets, and market participants, can be evaluated. Implementation of proposed amendments to Rule 605 as an initial step would provide regulators, market participants, and the public a strong, data-driven benchmark against which to evaluate future reforms.

Fidelity does not support proposed changes to tick sizes that will unnecessarily add complexity and operational risk to markets with considerable uncertainty left as to whether retail and institutional investors would benefit from, or in fact be disadvantaged by, the changes. We support a more measured approach and suggest the SEC, after adopting proposed amendments to Rule 605, lower the minimum quoting increment for tick constrained national market system ("NMS") securities trading at or above $1/share to 50 mils. We believe this recommendation would improve venue competition and provide a path to improve the retail investor execution experience without potential "stepping ahead" concerns and lack of potential effective spread improvement. The SEC should measure the impact of this change, and, if necessary, based on data-driven metrics provided by Rule 605, pursue an opportunity to move to more narrow quoting increments in the future or return to a full penny tick if retail investors are harmed by the change. Any changes to access fees should be commensurate with tick size changes.

Finally, we support SEC rulemaking that allows diverse trading venues to compete on equal footing to attract retail order flow and provides greater opportunities for retail and

institutional investors to interact with each other in the marketplace. However, we cannot support the proposed Order Competition Rule in its current form. We are concerned with the prescriptive nature of the Proposal and believe that it does not clearly benefit retail investors and may disadvantage them. In place of the Proposal, we suggest the Commission consider allowing trading venues a more streamlined path to offering services similar to Qualified Auctions, without the prescriptive nature of the proposed structure. This rulemaking approach would allow market participants to use a trading structure because it delivers better outcomes, rather than locking the market into a trading structure whose benefits may not accrue as anticipated.

Executive Summary

- **Proposed Amendments to Rule 605**. Fidelity strongly supports SEC proposed amendments to Rule 605, with certain modifications. We recommend the SEC sequence their equity market structure reform agenda by adopting proposed amendments to Rule 605 first, to provide a strong benchmark against which to evaluate future reforms.

- **Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders**. As Proposed, Fidelity does not support changes to tick increments and access fees that will unnecessarily add complexity and operational risk to the markets, with uncertainty regarding whether retail and institutional investors will benefit from, or in fact be disadvantaged by, the proposed changes. Instead, we support SEC action to:

    - Lower the minimum quoting increment for tick constrained NMS securities trading at or above $1/share to 50 mils. The SEC should subsequently measure the impact of this change, and, if necessary, pursue an opportunity to move to more narrow quoting increments in the future based on data-driven metrics or return to a full penny tick if retail investors are harmed by the change; and

    - Make any potential access fee changes commensurate with tick size changes.

- **Order Competition**. Fidelity supports market driven innovation that can help drive better trading experiences and better execution prices for customers. However, the Proposal is highly prescriptive and while the SEC sets a case for improved outcomes, we see a far more nuanced potential for mixed or negative results. We do not support the Proposal as currently written.

    - We would support SEC rulemaking that provides a smoother path for venues to operate mechanisms similar to a Qualified Auction process. This course of action would allow innovation and competition to generate any potential upside benefits to investors, without the potential downside concerns we have with the current irreversible and prescriptive Proposal.

- **Market Data and Exchange Limitations on Liabilities**. Fidelity urges the Commission to advance critically needed equity market data reform and address exchange limitations on liability without further delay.

- **Rulemaking Process**. Fidelity expresses concern with the SEC's use of non-public consolidated audit trail ("CAT") data to justify its rulemakings because the public cannot analyze data it is not allowed to see.

Below, we provide further detail to our comments and questions on the Proposals and offer less disruptive alternatives for consideration that may result in better outcomes for investors.

II. Proposed Amendments to Rule 605

The Commission proposes to amend existing requirements under the Securities Exchange Act of 1934 ("Exchange Act") to update the disclosure required for order executions in NMS securities. First, the Commission proposes to expand the scope of reporting entities subject to Rule 605 reporting. The Commission also proposes to modify certain data elements in the rule. Finally, the Commission proposes to require all Rule 605 reporting entities to create a Summary Report available for retail investors, to enhance the accessibility of the required reports.

The Commission believes that modernized and enhanced execution quality reporting will help the public compare and evaluate execution quality among different market centers and broker-dealers, thereby increasing transparency of order execution quality and information available to investors and helping to promote competition.

We strongly support the SEC's proposed amendments to Rule 605. Fidelity has long championed broader execution quality transparency in the industry, particularly regarding standardized retail execution quality metrics, and we believe updates to Rule 605 are long overdue.[6] The Proposal will benefit investors and help drive better outcomes in several ways. It will help:

- Retail brokers and market makers better assess and identify market centers that they can access to seek liquidity on behalf of retail investors, thereby improving the ability to deliver better execution outcomes to investors;

- Provide the public, including industry professionals, media, academics, and end investors with execution quality performance data on which to compare outcomes for various brokers. We believe this outcome will encourage more performance competition among retail brokers to provide better prices, improving the overall quality of retail executions across the entire industry; and

- End investors to choose the best broker for them and their investment objectives inclusive of the execution quality differences among providers, leading to a more

[6] For example, see Fidelity comments to Securities Exchange Commission, proposed rule, *Disclosure of Order Handling Information*, 81 FR 49432 (Jul. 27, 2016) *available at*: https://www.sec.gov/comments/s7-14-16/s71416-26.pdf.

efficient allocation of capital to services and capabilities that will help investors in the long run.

In general, we support the Proposal because we believe that end investors will ultimately benefit through increased transparency that enables greater execution quality competition. Below we provide some additional considerations and changes designed to enhance the Proposal, as well as areas in which we have questions and would like further clarity.

Creation and Location of Rule 605 Reports

The SEC should explore using CAT data for Rule 605 reporting. Given the time and expense broker-dealers commit to reporting all equity and option trade data to the CAT, the SEC should explore the additional resource, cost, and standardization efficiencies to be obtained by using the CAT for Rule 605 reporting purposes. Use of CAT data for Rule 605 reporting would also facilitate future Rule 605 enhancements as changes would be made to a single, centralized database versus many different brokers and vendors having to interpret, build and generate new data for the reports.

We also recommend the SEC consider creating a central repository for industry-wide Rule 605 reports to be located on a single page on the SEC's website. The SEC has previously undertaken a similar cross-firm centralization function regarding the SEC's Form ATS-N. Centralizing Rule 605 data on a single website would facilitate accessibility and comparability of the metrics to the benefit of retail customers and market participants.

Retail Investor Summary Reports

The SEC proposes to require all market centers and broker-dealers who are subject to Rule 605 to produce summary execution quality statistics ("Summary Reports"), in addition to the more detailed reports required by Rule 605(a)(1). We agree that a Summary Report will help investors more effectively evaluate competing broker offerings. Fidelity has publicly supported this kind of reporting for many years and is the only retail broker to report this type of data continuously and voluntarily via the Financial Information Forum ("FIF").

While there are compliance and technology costs associated with enhanced Rule 605 reporting, we believe these costs are outweighed by significant benefits to retail investors. Among these benefits is greater competition among firms to provide customers with strong execution quality. For example, when, through FIF, three brokers first published their execution quality metrics in 2015, transparency brought marked improvement across all providers and across nearly every symbol and size bucket. This benefit was especially pronounced for categories that previously had no transparency (*e.g.,* odd lots).

Rule 605 Data Elements

Current Rule 605 reports group orders by order size and order type. The Proposal would modify the order size category to use the MDIR definition of round lot, and include odd-lots, fractional shares, and larger size orders in new Rule 605 reporting requirements. [7]

We support the SEC's proposal to accelerate the implementation of the revised SEC-approved round lot definition,[8] subject to our comments in the MDIR proposed rule. However, to allow for a seamless comparison across brokers, for both the Summary Report and detailed report, we believe a better alternative is to present order-size categories by notional dollar size in place of lot size. We observe that order notional sizes rather than lot sizes provide investors a clearer view of the execution experience associated with their order. We believe notional sizes are more easily compared over time as lot sizes change or stocks splits occur. We also believe that notional amounts are a more representative view of the cost to implement different types of trades and are more consistent with increased market use of fractional/notional trading.

If the Commission determines to move forward with the proposed Order Competition Rule in its current form, which we recommend it does not, the SEC should distinguish Rule 605 data by Segmented Order and non-Segmented Order flow and display this information separately in both the detailed Rule 605 reports and the proposed Summary Reports. While we believe that this information is most useful in the proposed Summary Reports, brokers may not be able to isolate this data separately in the Summary Reports unless it is already separately broken out in the full underlying Rule 605 data.

Expanding the Scope of Entities Required to Generate Rule 605 Reports

We agree that expanding Rule 605 reporting requirements to new entities will provide greater transparency into execution quality differences between and among those entities. These changes will increase the ability to measure retail order outcomes in a competitive environment.

We also observe that each firm's order flow is unique. The SEC should consider the balance of this additional transparency of order flow in the context of reporting fragmentation for trading venues that have built in segmentation (*i.e.*, ATS with multiple pools or an exchange that has a continuous order book and a retail price improvement book). Similarly, the SEC might consider the balance of this additional transparency in the context of retail brokers where experience may be materially different within a broker-dealer (*i.e.*, a retail broker chooses to offer retail customers different experiences within the same broker-dealer).

In the Proposal, the SEC notes that broker-dealers that execute fractional share transactions on behalf of their customers "may" be considered OTC market makers.[9] Under current Rule 605, OTC market makers are market centers that are required to publish Rule 605

[7] *Supra* note 5.

[8] The SEC also proposes to accelerate certain aspects of MDIR implementation in the concurrently issued Minimum Pricing Increments, Access Fees and Transparency of Better Priced Orders Proposal.

[9] Order Execution Information Proposal at 3798.

"venue" reports. The SEC should clarify whether a broker-dealer principally facilitating the trading of fractional share trades must publish a Rule 605 "venue" report as a market center, in addition to other, separate Rule 605 report(s) that it may be required to publish based on its activities. SEC commentary on Rule 605 "venue" reporting is particularly important given that the SEC has proposed, but not yet adopted, amendments to Rule 3b-16 of the Exchange Act which would significantly expand which trading venues fall under the SEC's definition of an "exchange".[10]

III. Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders

The SEC's proposed amendments to Rule 612 of Regulation NMS would establish a variable minimum pricing increment ("tick size") to apply to both the quoting and trading of NMS stocks, across all trading venues, with certain exceptions. Stocks would be evaluated by their primary listing exchange during the last month of a calendar quarter to determine the minimum pricing increment for the next calendar quarter. The existing quote/trade increments for stocks priced less than $1.00 per share would not change (remain at $0.0001), but new sub-penny minimum pricing increments (of $0.001, $0.002, and $0.005) would be established for quotations, orders, indications of interest, and trades in NMS stocks priced equal to or greater than $1.00 per share.

In proposing the amendments, the SEC seeks to improve trading in certain "tick-constrained" stocks by allowing competitive market forces to establish prices in sub-penny increments and to enable buyers to obtain lower prices from willing sellers, and sellers to obtain higher prices from willing buyers. The SEC also seeks to accelerate the MDIR provisions concerning transparency of better priced orders available in the market to provide investors with this information in a timelier manner than previously anticipated.

We support the SEC's proposed changes to minimum pricing increments, access fees, and transparency of better priced orders where we believe changes may improve outcomes for investors broadly and enable more competition. We are also receptive to certain aspects of the Proposal designed to help lower quoted spreads and enable more competition across trading venues. However, we have many open questions and have identified several unknown outcomes that prevent us from providing our full support to the Proposal.

Proposed Changes to Tick Size May Not Improve Effective Spreads for Tick-Constraint Names and May Widen Effective Spreads in Illiquid Securities to the Detriment of Investors

We recognize that certain securities are tick-constrained[11] and may benefit from a reduced trading increment that may subsequently lead to improved price discovery, lower quoted

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[10] *Supra* note 8.

spreads, and reduced transaction fees for institutional investors. However, it is not clear that retail investors will receive better effective spreads through the proposed reduced trading increments. In fact, using the SEC's own data, for tick constrained names, we observe that when the quoted spread is < 1.1cents, wholesaler effective spread of 2.74 bps results in a realized spread adjusted for payment for order flow of -0.15 bps.[12] A negative realized spread (based on the SEC's approach) suggests that the execution quality provided to a retail investor is already very good and may not improve if tick size is reduced for these tick constrained names.

Similarly, based on SEC data, an S&P 500 stock in the <$30 price group which includes many tick constrained securities (as tick constraint is more likely to happen in liquid low price securities) has a wholesaler effective spread of 1.18 bps and wholesaler realized spread adjusted for payment for order flow that is negative (-0.14 bps), implying even with a narrowing quoted spread, these securities and segment of order flow are already priced at or better than their "fair value".[13] It would appear that any current economic surplus, based on the SEC's methodology (which we acknowledge can be subject to debate), may be present in securities with quoted spread in 3-5 cents where the wholesaler realized spread is 0.5 bps, and in securities with quoted spread in 5+ cents where the wholesaler realized spread is 1.22 bps, after adjusting for payment for order flow.[14] This outcome appears particularly true for low liquidity non-S&P 500 securities, where the realized spread is greater than 10 bps across all price categories.[15] These wider spread securities are unlikely to receive smaller tick increments in the Proposal. With no intra tick exemption for retail, it is plausible that effective spreads for these wider spread securities may actually increase under the Proposal. Quoted spread could also widen due to a decrease in access fees.

Changes to Tick Size Increments Will Increase "Stepping Ahead" Opportunities to the Detriment of Investors

From an institutional investor standpoint, we do not yet know how the proposed changes to tick size will impact liquidity and trading costs at the parent-level block order. We have concerns around the negligible cost that it would take for a market participant to "step ahead" in the most granular tick increment buckets (10 mil/$0.001, 20 mil/$0.002).[16] For these reasons,

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[11] In terms of defining tick constrained, we believe that the SEC should consider the time weighted average quoted spread in addition to certain liquidity metric(s) at the National Best Bid and Offer ("NBBO") (relative to average trade size and turnover).

[12] *See* Order Competition Rule Proposal, Table 8 at 194.

[13] *Id*. Table 9 at 195.

[14] *Id*. Table 8 at 194.

[15] *Id.* Table 9 at 195.

[16] This concern is also acknowledged by the Commission in the Minimum Pricing Increments, Access Fees and Transparency of Better Priced Orders Proposal at 80316, "…a smaller tick fragments liquidity in the order book into more price levels, which can increase complexity and the incidence of pennying – which could harm liquidity."

we support an incremental, data-driven approach to narrowing ticks beyond 50 mils/$0.005 for tick-constrained securities.

Similarly, from a retail broker standpoint, we are concerned that the SEC-proposed tick increments are too granular and instead of intended benefits accruing to retail investors, the SEC may increase opportunities for sophisticated market participants to take advantage of retail investors for a minimal economic risk.

Retail investors typically place limit orders in penny increments and find it intuitive to do so. Our observation of retail limit orders in securities priced under $1, where the quoting increments are $0.0001, is that retail investors, even when having more ticks as an option and seeing more ticks in the market data, trend towards placing whole penny limit orders.

Further, we observe statistically significant differences in non-adjusted fill rates for limit orders entered at the full penny (priced within 1% of arrival midpoint) when a sub-penny tick is allowed (stocks under $1) versus stocks under similar conditions where the sub-penny tick is not allowed. Customers have inferior fill rates when sub-penny quoting is allowed, because they are generally placing limit orders in penny increments while other market participants are stepping ahead in more granular increments. If the Proposal is adopted in its current form, retail order execution quality and confidence in market fairness may be eroded due to sophisticated market participants gaining execution priority by placing a slightly more aggressively priced order (stepping ahead) than retail investor orders, with minimal economic risk, which we expect will reduce the fill rate of limit orders and ultimately increase the costs to end retail investors. Based on data available to us, this outcome seems to be a more likely scenario than limit orders for retail investors having the same or better execution quality.

We see a similar trend across median daily volume or volatility groups. Our data suggests that stepping ahead using sub-penny pricing affects at-cent orders significantly, even though they are favored by retail investors. If tick size is reduced for tick constrained names, it is likely that we will see continual use of whole-cent limit order from retail investors, and the execution quality of these orders will decline. This is also why we do not support allowing market centers to accept and rank orders on prices smaller than the quoted increment, with the exception of trades with a retail order. Allowing the ranking of sub-quote increments, even if hidden from display, would likely encourage the same stepping ahead concerns we have of reducing the tick sizes overall.

We are therefore concerned that adoption of lower tick sizes may benefit more sophisticated market participants at the expense of retail investors, particularly if marketable retail orders are also not price improved. Specifically, sophisticated investors may see their orders filled faster at the expense of higher total costs to individual retail investors. We believe this is the wrong outcome. Alternatively, a more measured approach to changes in tick size will allow the marketplace to analyze the positive or negative impact of tick size changes to investors and can help ensure the benefits of the changes accrue to retail investors as intended.

Proposed Tick Size Changes Will Increase Operational Risk

We also believe that the proposed increased complexity and dynamic shifts of tick size, at quarter end, with short transition times, will raise operational risk in the market and at individual firms. Quarterly changes to tick sizes appear sufficiently dynamic but it is not clear why the SEC has chosen to base tick size on just one month of activity. We would want to balance switching between tick sizes with adjusting to a tick size that will likely be more "permanent". We are concerned that frequent changes to tick size may further complicate and create operational risk in areas like corporate actions.[17] Frequent changes to tick sizes will also require considerable investor education and reduce perceived accessibility of the market to new investors.

The SEC Should Not Harmonize Trade and Quote Increments

From a retail broker standpoint, we oppose harmonizing minimum trade and quote increments because we believe it will reduce opportunities for meaningful price improvement inside the NBBO, particularly in wider-spread tick buckets ($0.01 and $0.005).[18] Under the Proposal, securities would be designated a minimum trade increment based on an average quoted spread, however there could be variation in that security's spread during the day. The challenge is that while the market structure would be designed to allow a security to have 4-8 trading increments inside the quote, that level of trading might not always happen, effectively limiting opportunities for price improvement. For example, consider a scenario where a security is in the 1-cent tick group and on average trades with a 5-cent quoted spread which provides considerable opportunity for price improvement in penny-increments. However, during some periods of the trading day, the quote narrows to 2-cents. During those periods, there is no opportunity for price improvement on the trade other than at midpoint, which does not provide sufficient opportunity for a retail order to benefit from what could be better pricing inside the penny increment.[19]

An Alternative Approach to Tick Size Changes

Fidelity does not support proposed changes to tick sizes that will unnecessarily add complexity and operational risk to our markets with considerable uncertainty as to whether retail and institutional investors will benefit from, or in fact be disadvantaged by, the changes. We

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[17] For example, a hypothetical security trades around $3 and is placed in the 10-mil quoting/trading bucket. The issuer institutes a 20-for-1 reverse split and the new stock price is $60. The trading dynamics of a $60 security typically look very different from those of a $3 security. If the Proposal is adopted in its current form, the marketplace needs clarity on whether the reverse-split stock will trade with the same 10 mil increment (which is probably too granular for something at that price point) or be re-bucketed to different tick size increment. This situation further complicates the existing risk surrounding corporate actions as brokers will need to consume and adjust post-corporate action tick sizes the morning of the events. In addition, today tick sizes are all determined by price point (<$1 vs. >$1), eliminating this confusion. If the Proposal is adopted in its current form, each corporate action event will require brokers to determine the appropriate new increment for the stock(s) impacted.

[18] Harmonization of quoting and trading increments would be less impactful for us as an institutional investor, as many of our executions are near/mid/far.

[19] The Commission appears to have addressed this point in the proposed Order Competition Rule by allowing Qualified Auctions to have a 10-mil trading increment for Segmented Orders. However, this proposed trading increment for Segmented Orders does not address or allow for open competition generally.

support a more measured approach and suggest the SEC, after adopting proposed amendments to Rule 605, lower the minimum quoting increment for tick constrained NMS securities trading at or above $1/share to 50 mils. We believe this recommendation will improve venue competition and provide a path to improve the retail investor execution experience without the potential "stepping ahead" concerns and lack of potential effective spread improvement we have outlined above versus the Proposal.

The SEC should consider an implementation plan for tick size changes that measures the impact of these changes, based on the metrics that the SEC's proposed amendments to Rule 605 seek to provide, and should pursue a data-driven analysis evidencing that a need to progress to more narrow ticks is warranted. This approach will allow the SEC to learn what is working and what is not, while holding the Commission and market participants accountable as to whether further reforms are needed.

Access Fees

Rule 610(c) under the Exchange Act currently imposes an access fee cap of $0.0030 per share for quotation of $1.00 or more per share and 0.3% of the quotation price if the price of the protected quote or other quote is less than $1.00 per share. The SEC established current access fee caps for NMS stocks in 2005 in consideration of then-current market practices.

The SEC's proposed amendments to Rule 610 would reduce the current access fee cap for quotation in NMS stocks priced at $1.00 or more per share to $0.005/share for stocks with a tick size of $0.001, and $0.001 per share for stock with tick size of greater than $0.001. For quotations in NMS stocks priced less than $1.00, the access fee cap would be 0.05 percent of the quotation price. We understand that the SEC's proposed changes to access fees are designed, among other items, to update the cap to reflect current market practices, accommodate the reduction in the minimum pricing increments, and preserve the ability of the agency business models to charge fees for access.

We believe the current access fee cap helps improve liquidity and provide narrower quotes than otherwise would be available in the marketplace. We agree that access fees could be reduced in certain segments, either because current caps distort trading dynamics or because access fees and tick sizes are linked, and a reduction in tick sizes should be commensurate with a reduction in access fees.

We are concerned that more granular tick sizes may decrease liquidity provision incentives in less liquid securities and the related impact to maintaining a tight NBBO. Lower access fees will reduce rebates, and some securities may require rebates larger than 10 mils to incentivize tight quotes. Thus, an access fee reduction, all else being equal, is likely to widen quotes, which may create unintended consequences for market competition. Lower access fees may also create less price differentiation across exchanges. We also see unknown implications from creating locked/crossed markets with the proposed changes to tick-sizes and access fees which should be examined further.

For these reasons, we support an access fee change only when it is commensurate with a change to tick sizes. For example, if the minimum quoting increment for tick constrained NMS securities trading at or above $1/share is lowered to 50 mils (from current 1 cent), the access fee should be halved, or reduced from the current fee of 30mil under 1 cent, to 15 mil under a 50-mil tick.

Rebate and Fee Transparency

The SEC proposes amendments that would also broadly prohibit an exchange from imposing or providing any fee, rebate or other remuneration for the execution of an order in an NMS stock unless such fee, rebate, or other remuneration can be determined at the time of execution. The SEC further proposes that any exchange that imposes a fee or provides a rebate that is based on a certain volume threshold or establishes tier requirements or tiered rates based on minimum volume thresholds would be required to set such volume thresholds or tiers using volume achieved during a stated period prior to the assessment of the fee or rebate. If adopted as proposed, these amendments would enable market participants to determine what fee or rebate level would be applicable to any submitted order at the time of execution.

We support prohibiting exchanges from imposing fees or providing rebates for the execution of any order unless the fee or rebate can be determined at the time of execution. Predeterminable fees, rebates, or other renumeration for the execution of an order at time of trade is a positive outcome for the industry and investors and will reduce market complexity and increase transparency.[20]

We also observe that certain fee and rebate tiers are based on monthly volume thresholds that are so high that they appear to be offered on a bespoke basis to a small number of firms. For this reason, we suggest the SEC require exchanges to disclose how many firms meet each pricing tier, as well as how many firms are eligible for a tier when filing a request to introduce new fees or change their fee schedule. We believe that this level of transparency is necessary for regulators and the marketplace to evaluate pricing dynamics among firms. [21]

Round Lot and Odd Lot Changes

In the SEC's Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders Proposal, the SEC proposes to accelerate the implementation of the round lot and

[20] However, we are unclear if forward looking pricing tiers achieved by end-of-month trading volumes inadvertently locks brokers into an exchange on an on-going basis which can reduce competition and may create distortions in market share and/or broker incentives. The SEC should consider this potential market action in any final rule.

[21] See generally, *Staff Guidance on SRO Rule Filings Relating to Fees* (SEC) May 21, 2019 noting that in fee filings, SROs should include…"whether the relevant product or service, including the corresponding proposed fee or fee change, is targeted at – or expected to be limited in its applicability to – a specific segment(s) of market participants (and if so, the related details)… and…"the projected number of purchasers (including members, as well as non-members) of any new or modified product or service and the expected number of purchasers likely to be subject to a new fee or pricing tier, including members and non-members."

odd-lot information definitions adopted by the SEC in 2020 under the MDIR.[22] These proposed round lot and odd lot changes are in addition to the SEC's proposed changes concerning round lot and odd-lot information under concurrently proposed SEC amendments to Rule 605.

The SEC's stated intent with proposed changes to round lots and odd-lots in the Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders Proposal is to decouple round lot and odd lot changes from other parts of the MDIR that may proceed at a slower pace (*i.e.*, development of Competing Consolidators). The SEC also proposes to amend the odd-lot information definition adopted under the MDIR to require the identification of the best odd-lot order.

Fidelity supports the accelerated implementation of a revised definition of round lot for certain higher priced securities with 1) regulatory and industry-wide education to investors on the changes and 2) a sufficient implementation time to address a variety of broker-dealers' Regulation NMS obligations[23] and to develop systems to monitor the applicable round lot for stocks each month. We also support adding better-priced odd lots to the SIP when this information provides actionable information to the marketplace, such as helping broker-dealers meet their best execution obligations. However, we believe the transparency of odd lot orders may be "gameable" and the Commission should balance the advantages and disadvantages of odd-lot transparency in any final rulemaking.[24]

Technology Changes and Market Data Costs Should be Further Addressed

We anticipate firms will need to make significant technology changes if the Proposal is adopted in its current form. These technology changes span areas such as front-end systems changes for order display and response purposes, and revisions to ATS matching engines and order tickets. Changes to tick size will also lead to a significant increase in end-to-end market data message traffic from the SIPs all the way through to front end systems, with implications for infrastructure capacity and resiliency.[25]

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[22] *Supra* note 5.

[23] For example, among other rules, under Rule 603(c) (the "Vendor Display Rule"), a broker, or dealer would be required to make systems changes to provide a consolidated display reflecting smaller-sized orders in higher-priced stocks.

[24] For example, a protected NBBO is 10.10 x 10.108, with a 10-mil tick size and 100 share round lot. By placing a limit order to buy 1 share at 10.101, a market participant could effectively get queue priority for a single share priced 10 mils better than the quote and hold the whole market to that quote. This would a) change all the execution quality benchmarks that brokers are held to, for a single share with nominal price improvement; b) create customer confusion about protected size (a protected NBBO versus an unprotected NBBO); and c) potentially enable market participants to game the execution quality statistics they provide by placing 1-share orders into the marketplace.

[25] *See More Ticks, More Messages*, Phil Mackintosh, October 27, 2022, available at https://www.nasdaq.com/articles/more-ticks-more-messages.

We also anticipate that the Proposal will increase equity market data costs in two respects.

First, we anticipate certain increased market data costs generally under the Proposal. For example, retail brokers will need to: 1) consume and store an increased amount of market data to comply with new variable tick size, round lot and odd-lot requirements; 2) make required updates to existing systems to consume increased market data; and 3) absorb additional costs due to the likelihood that the SIP will cause third-party data vendors to require additional capacity (hardware) to support higher message rates. The number of required changes to front-end quote and trade displays and streaming rates will vary depending on the number of new data fields firms are ultimately required to present to investors and the increase in message rates that will impact streaming displays. While the proposed rule contains many variables, we conservatively estimate the cost of these changes to be an approximate 10% increase over our current infrastructure costs that support the delivery and/or storage of market data.

Second, and more importantly, the Proposal would add new data fields to SIP data without disclosing how much the SROs will ultimately charge retail investors and broker-dealers for this data. For example, the SEC would require that certain data, such as "best odd-lot order to buy and best odd-lot order to sell", be included in SIP data so that this data is broadly accessible to broker-dealers and investors. The issue with this model is that SIP data is not free. SIP data pricing is set by the SROs who, under the current exclusive SIP model, have a vested interest to maintain high SIP data costs and to increase these costs, particularly each time the SEC adds new data elements to the SIP.[26]

Today, SIP data costs are charged to retail customers on a per investor basis (based on whether they are acting in a non-professional or professional capacity) and to broker-dealers (via a myriad of additional fees (*e.g.*, display fees, non-display fees, access fees etc.) for use of this exact same data). This complex and often opaque pricing model is completely inconsistent with cost to the SROs to produce SIP data (which does not scale on a per investor basis) and is highly biased towards the retail investor picking up the tab for data that should be freely available in the marketplace. To address this disparity, the SEC must advance approved, but still outstanding, market data infrastructure and governance changes without further delay.

The SEC Must Advance Needed Market Data Reforms

We continue to be highly concerned with the disproportionate growth in market data costs, lack of competition around core market data, and SEC inattention to this important marketplace issue. Millions of retail investors rely on SIP market data to evaluate and execute their trading decisions. Rising market data costs negatively impact competition in the broker-dealer market, making it more difficult for new entrants and levying an additional tax on already tight broker-dealer operating margins.

[26] By way of example, under MDIR, the SEC determined to add certain information, such as depth of book data, to the SIP. Fidelity estimates that the 2022 CBOE, Nasdaq, NYSE proposed fee amendment for this change would have more than doubled Fidelity's depth of book costs over its current depth of book spend.

In 2022, the SEC appropriately rejected a proposed amendment to the Nasdaq/UTP Plan, put forth by the CBOE, NYSE and Nasdaq, that would have priced core market data at such expensive levels other plan participants refused to approve or execute the amendment.[27] As a result of the SEC' rejection, the SROs need to develop and file a new proposed fee amendment to establish a price for core market data, which further delays the implementation of the MDIR, as the fee amendment is an initial action step, from which further MDIR reforms cascade.

It remains unclear as to when and how the SEC's approved, but outstanding, market data reforms will be implemented. To this end, we urge the SEC to:

- Order the SROs to jointly submit a new CT Plan, containing provisions of the plan the D.C. Circuit upheld, including the new voting method and to clarify majority vote of SROs is needed (not 2/3 votes). This action seeks to address the disproportionate power certain legacy exchanges have over the current data plans;

- Transfer authority for setting market data fees to the new CT Plan. Due to the revised voting method, the new governance structure will provide a better platform to set reasonable fees and otherwise support the MDIR's intended goals; and

- Order the existing consolidated equity market data plans adopt the same method for allocating votes that is required under the new CT Plan. When the MDIR was adopted, there was little reason to change the governance of the existing SIPs since they were expected to soon be retired. Because their retirement has been delayed to an uncertain date, the SEC has every reason to require the existing SIPs to adopt the same voting changes that were previously upheld by in the 2022 D.C. Circuit decision.

With market data providing such a critical component to the national market system, we are not clear why the SEC has not found a place for it on their broad rulemaking agenda. We urge the SEC to complete these reforms without further delay.

IV. <u>Proposed Order Competition Rule</u>

The Commission proposes to amend Regulation NMS to add a new rule designed to promote competition, protect the interests of individual investors, and further the objectives of a national market system. The proposed rule would generally prohibit a Restricted Competition Trading Center from internally executing certain retail orders ("Segmented Orders") at a specific price unless those orders are first exposed to competition at that price in a Qualified Auction operated by an Open Competition Trading Center. The SEC's Proposal is designed to benefit

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[27] Joint Industry Plan; Order Disapproving the Fifty-Second Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (Sept. 21., 2022) available at: https://www.sec.gov/rules/sro/nms/2022/34-95849.pdf. The other SROs that are participants in the Nasdaq/UTP Plan and that did not approve or execute the amendment were Financial Industry Regulatory Authority, Inc.; Investors Exchange LLC; Long-Term Stock Exchange, Inc.; MEMX LLC; MIAX PEARL, LLC; and Nasdaq BX, Inc.

retail investors by promoting competition and transparency to enhance the opportunity for their orders to receive more favorable prices than they receive in the current market structure. The Proposal is further designed to benefit institutional investors by providing opportunities to trade directly with retail investor orders that are mostly inaccessible to institutional investors in the current market structure.

We support market-driven innovation that can help drive better trading experiences and better execution prices for customers. We believe that while competition exists for retail order flow in the marketplace today[28] there could always be more.

We understand the SEC's rationale for the Proposal, given market makers' broad interactions with retail investor orders. As an institutional investor, we have limited opportunities to interact with retail order flow through a variety of market-driven solutions. We support finding ways for institutional investors to have better access to retail flow in a way that is beneficial to both constituents, and if a Qualified Auction might improve prices for retail in the process, it could drive better outcomes for end investors.

Under the current market structure, retail brokers, or their executing/clearing broker-dealer, subject to FINRA best execution obligations, typically route retail customer marketable orders to wholesale market makers. Wholesalers compete with each other, and other market participants, for retail order flow and fill these marketable orders, often internally, at prices typically better than the NBBO, providing retail customers immediate executions as well as price and size improvement. If the order cannot be filled by the wholesaler, either in whole or part, the wholesaler will pay the costs of executing retail orders on national securities exchanges and ATSs. If retail customer orders do not receive pricing commensurate with expectations during periods of market volatility, technology issues or venue outages, wholesalers or the retail broker will typically make the retail customer whole as a customer service. This same process generally does not occur when trades are executed on exchange, due to exchange limitations on liability.

In the current market structure, retail investors have a consistent trading experience, with execution prices at or better than the NBBO. An unintended consequence of the proposed Order Competition Rule is that retail investors may pay more in implicit transaction costs and lose much of the benefits they realize in the current model.

While we understand why the SEC has designed the proposed Order Competition Rule, we do not support the Proposal as currently written. Our concerns with the Proposal are presented from the standpoint of a broker-dealer and institutional investor, and span technology and market data, SRO reform, and general marketplace concerns. We identify these concerns below and suggest alternatives that we believe would be less disruptive while still addressing the SEC's goals to provide more competition for retail order flow and greater opportunity for institutional investors to interact with retail order flow.

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[28] For example, we have seen new wholesalers organically enter the market and both exchanges and ATS continue to innovate with new offerings seeking to address this segment of the market (*i.e.,* retail liquidity programs, on demand auctions, etc.)

Retail Broker Execution Concerns – Quote Fading and Lack of Guaranteed Fills

The proposed Qualified Auction model would generally prohibit a broker-dealer from internally executing a Segmented Order (a retail order) at a specific price unless the Segmented Order is first exposed to competition at that price in a Qualified Auction. If the Segmented Order does not receive an execution in the Qualified Auction, the broker could either internally execute the order at the specific price or route the order back out to the market, subject to the broker's best execution obligations.

As proposed, it is unclear that the Qualified Auction model will, in aggregate, result in a better experience or better execution prices for retail investors. We believe the Proposal presents a likely negative impact to the current retail experience, due to the high potential for quotes to fade during the Qualified Auction process and lack of a guaranteed fill at or inside NBBO for Segmented Orders. The market will likely view any Segmented Order that did not receive an execution in a Qualified Auction ("order remainders") as less attractive, resulting in the need to seek additional liquidity sources for order remainders, with potentially less attractive lot size and price slippage, or the difference between the expected price and the price at which the order executes.

For example, we anticipate that tightening spreads (from the SEC's concurrently proposed changes to tick sizes) would mean less liquidity at the NBBO. While today most retail orders might be filled at the NBBO or better (largely due to wholesalers that are willing to size enhance due to the value of a broker's order flow and the avoidance of exchange fees), under the Proposal a higher percentage of those orders would outsize the NBBO and be required to be routed away or executed at multiple price levels on an order book. This course of action will increase take fees for retail brokers and/or the market maker who is trading the order, which will in turn increase the overall cost to the end retail investor.

Further, today, if a wholesaler has an oversized order, it may route part of the order and fill the balance principally or fill it in its entirety at the NBBO price. Either way, the wholesaler is legally prohibited from front-running that order.

Under the proposed Order Competition Rule, the oversized order will be displayed to the entire marketplace on the SIP, though the Auction Message, and while some oversized orders may be filled in their entirety, there is a strong likelihood that many Qualified Auction participants would either fade their quotes or front-run the order and pull their quotes prior to the order being filled. We believe this outcome will lead to inferior prices for retail customers. It is not clear if this activity will be *de minimis* and the overall performance across all orders will be better, or if the Commission is equipped to surveil this activity for front running. This potential outcome highlights another reason why we believe the Commission should start their reform agenda with adopting proposed amendments to Rule 605 as we believe that it is critically important to have the right benchmark in place to understand whether other changes to equity market structure result in better outcomes for customers.

Retail Broker Concerns – Prescriptive Trading Mandates Conflict with Broker Dealer Obligations

We observe that the Proposal is extremely prescriptive, which we acknowledge to some extent is necessary to address the potential gaming or business models that might arise that would invalidate the goal of the Proposal. However, if passed in its current form, we believe the SEC's proposed Order Competition Rule will conflict with the SEC's proposed Regulation Best Execution. The SEC's proposed Order Competition Rule will require brokers to route retail orders to Qualified Auctions, when brokers could instead route retail orders to a wholesaler for a better price and customer experience. In the Proposals, the SEC is simultaneously requiring brokers to send retail investor orders to a venue where they may receive a worse price, and then forcing them to bear the costs of erroneous trades by not addressing SROs' limitations in liability. This is a lose-lose scenario for retail investors in a package of rules intended to improve investor outcomes.

The proposed regulatory requirement for brokers to establish a limit price for purposes of sending a Segmented Order to a Qualified Auction brings new risk to brokers which should be mitigated and/or addressed by the Commission. Retail investor orders are largely "Held" orders, which means that the broker does not have price or time discretion over the order. To allow the order to be eligible to participate in the Qualified Auction, the Proposal would require brokers to place a limit price on the Segmented Order. In most cases, by placing a limit price on the Segmented Order, the broker would be required to change the terms of the customer's "Held" order to comply with the SEC's mandate. These conflicting requirements and expectations should be addressed in any final rulemaking.

Retail Broker - Questions on Definition of Segmented Order

We also have many open questions concerning the definition of a Segmented Order. First, the SEC has created yet another definition to capture a subset of traders generally known as "retail investors." For example, FINRA typically defines a "retail customer" as someone who is not an "Institutional Customer" as that term is defined under FINRA rule 4512(c)[29] and exchanges have their own definition of "retail customer" for purposes of their Retail Liquidity Programs.[30] For purposes of defining what constitutes a retail customer trade, the SEC should

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[29] FINRA Rule 4512(c) defines the term "institutional account" as the account of: (1) a bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million.

[30] For example, under the NYSE's Retail Liquidity Program, a "Retail Order" is an agency order or a riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization, 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. Cboe EDGX has a separate definition of retail for the purposes of accessing their

consider an existing definition of a retail customer to provide market participants greater clarity for compliance with the rules.

Second, we anticipate that the SEC's proposed definition of Segmented Order may not function as intended, as investors may look to use multiple brokerage firms to stay below the trading threshold, thereby changing the outcome of the SEC's analysis. For example, if retail investors believe they could receive better execution quality by falling under the Segmented Order definition, they could simply change their trading habits to retain multiple brokers, fragment their trading across platforms, and avoid tripping the Segmented Order threshold. This type of behavior is directly observed in the options market, where the definition of a Professional Customer relies on each broker calculating a certain order behavior threshold. For this reason, if the Proposal moves forward, we suggest the SEC consider identification of a Segmented Order on a market-wide basis via the CAT, rather than relying on individual brokers to flag activity on only their individual platforms.

Third, the SEC has not addressed how an investment adviser's trading for its managed accounts and separately managed accounts offerings should be classified under the proposed definition of a Segmented Order. In a typical managed account or separately managed account relationship, an investment adviser has discretionary trading authority and manages an account held in the name of a retail client. An investment adviser often aggregates orders for its client accounts, typically through block trades in a master account held in the name of the investment adviser at a brokerage firm, and the trades are then allocated to the individual client accounts according to the purchase and/or sale orders placed for each client account involved in the transaction. We recommend that the SEC not classify orders of managed accounts and separately managed accounts as Segmented Orders for purposes of the proposed Order Competition Rule. This approach would provide registered investment advisers the flexibility to choose the best routing outcome for their order flow, consistent with their best execution obligations.

Institutional Investor Concerns

Institutional investors serve an important role in the U.S. equity markets. They manage a growing pool of assets for a wide range of investors, including young investors saving for their first home, working parents saving for their child's education, and individual investors saving for their retirement. Working on behalf of their clients, institutional investors help provide necessary capital and liquidity to the equity markets. The SEC asserts the Proposal will provide institutional investors greater opportunity to interact with retail order flow; however, we believe the ultimate outcome may be different.

Notably, with order-by-order competition, an order will be broadcast across the entire market. We are concerned that Qualified Auction participants will fade their quotes or cancel their bid/offer and front-run auction trading prior to the segmented order being filled on the Qualified Auction. As a potential auction participant, we would be competing against this

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"retail priority" program. Different exchange definitions of "Retail Order" shows the scope of similarly intended rules that brokers need to keep track of, and a new definition of "Retail Order" in the proposal, if adopted, would add a new layer of complexity.

behavior. Auctions may also preference institutions that have strong technology and a short trading horizon/strategy as the signal-to-noise ratio improves and could lead to greater information leakage risks on larger blocks. We question how many traditional institutional investors – including mutual funds, pension funds, and other institutions who invest on behalf of millions of Americans will be able to participate in Qualified Auctions. We are left wondering whether the SEC has designed a process that creates an uneven playing field among market participants, to the detriment of retirees and pensioners.

Technology Concerns

The Proposal is technologically complex and introduces a tremendous amount of uncertainty to the marketplace without a strong demonstration that it will lead to better outcomes. For example, from a technology standpoint the Proposal will require re-routing existing systems, new costs, new FIX messages, and new steps in the trade flow process. Introducing brokers have "know your customer" responsibilities and would need to determine how best to adjust account opening systems to capture information on whether a customer order was a Segmented Order, or not. Originating Broker requirements to identify Segmented Orders will require systems changes to clearing firms as well, as clearing firms would be required to identify Segmented Orders and make changes to systems to track monthly account-level trading volumes.

The Proposal will also contribute significantly increased levels of market data message traffic, which can place stress on market infrastructure and stability. We question whether the Commission has appropriately addressed increased levels of message traffic associated with the Proposals and worked to ensure that the technology infrastructure of our markets remains strong and resilient.

Market Data Concerns

In connection with the proposal to require retail orders to be routed to a Qualified Auction for execution, the SEC proposes to include Auction Messages and certain other information (such as quotation and transaction information specified in the proposed definition of open competition trading center) in SIP data. Market participants would need to consume this data to comply with their obligations under the Proposal. We anticipate that the proposed Order Competition Rule will increase equity market data costs in two respects.

First, increased message rates from the SIP will likely cause our market data services groups to require additional capacity to support higher rates of consuming and storing information as well as absorb additional costs due to the likelihood that the SIP will cause third-party data vendors to require additional capacity (hardware) to support higher message rates. As a result of the Proposal, we anticipate an approximate 10% increase in capacity associated market data storage and capacity costs. This estimate does not include costs associated with maintaining numerous CAT records nor do they include costs associated with human resources, across several departments and firms, to implement these changes.

Second, and more importantly, the Proposal would add new data fields to SIP data without disclosing how much the SROs will ultimately charge for this data. The existing model for dissemination of equity market data though the exclusive SIPs provides for pricing of SIP data to be set by the SROs, who have a vested interest to maintain high SIP data costs and to increase these costs, particularly each time the SEC adds new data elements to the SIP. To correct this imbalance, we urge the SEC to take actions we have recommended earlier in this letter to address outstanding market data infrastructure and governance changes.

SRO Reform/ Exchange Limitations on Liability Concerns

Since the SEC issued the Proposals, the NYSE experienced a major systems issue during its opening auction on January 24, 2023. The issue resulted in millions of dollars in losses for investors, and the cause of the event remains under review. Retail investor losses were particularly heavy, due to the time of the issue (opening auction) and retail use of order types that execute at a specific market price or benchmark to the opening auction price.

Unfortunately, only about 60% of retail investors claiming compensation were reimbursed from the NYSE for their losses, based on exchange limitations on liability and exchange-specific criteria for valid reimbursement requests.[31] Instead, retail brokers and wholesale market makers, who had no connection to the NYSE systems issue, voluntarily stepped in to make their customers whole. Given the SEC's proposed Qualified Auction model, and existing exchange limitations on liability, we are concerned that the SEC intends to shift liability for exchange failures from exchanges to retail customers and their brokers.

When a broker-dealer has a systems issue that impacts its customers, the broker typically price corrects for that error to ensure that customers are "made whole." In a competitive marketplace, brokers who do not provide such accommodations soon find their customers trading elsewhere and/or suing their broker in arbitration.

What brokers lack, that exchanges have been granted, are government-approved limitations on liability. Exchanges unilaterally impose limitations on liability that have no relation to the financial losses sustained because of exchange activity. Most exchanges limit liability to an aggregate of $500,000 a month. Broker-dealers are powerless to negotiate the limitations on liability demanded by exchanges because these limitations are established by the exchanges themselves, in the exchanges' rule books, which are subsequently approved by the SEC.

This special, one-sided arrangement, which to our knowledge is not present in any other regulated American industry, confers on the exchanges an unfair and inappropriate competitive advantage over their competitors and eliminates an important form of market-based discipline, creating a moral hazard. The numbers are not small: for the January 24 event, due in large part

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[31] *NYSE Plans to Pay in Full 60% of Claims Submitted After Glitch*, Bloomberg, February 7, 2023 available at: https://www.bloomberg.com/news/articles/2023-02-06/nyse-plans-to-pay-in-full-60-of-claims-submitted-after-glitch

to the time of day in which it occurred, market-wide impact to broker-dealers were tens or hundreds of millions of dollars, many multiples of the exchange's liability limit.

Qualified Auctions are an untested, technologically complex concept, and we anticipate that thousands of auctions will simultaneously run each minute of the trading day. With larger volumes of auctions, the likelihood of any one auction failing increases, and given exchange limitations on liability, retail investors shouldn't expect compensation for errors. Moreover, the SEC should not perpetuate a structure where brokers are asked continuously to absorb the costs for issues caused by the exchanges.

If the SEC is determined to proceed with the concept of Qualified Auctions, the SEC should first address the concept of exchanges' rule-based limitations on liability. Prohibiting exchanges from creating rule-based limitations on liability would impose market discipline on exchanges to maintain financial resources to absorb the consequences of any failure without disadvantaging retail investors and relying on market participants with no relation to the issue, to cover exchange losses. This goes to the core of the SEC's mission to protect investors and maintain fair, orderly and efficient markets without government-granted competitive advantages for select market participants.

General Marketplace Concerns

The Proposal's concurrent changes to the equity markets are likely to create disorder given the complexities in implementing intertwined changes. The order-by-order nature of Qualified Auctions will allow market participants to be more selective about the stocks they want to trade. Institutions may not interact with all orders in all Qualified Auctions, causing certain stocks to trade more poorly in auctions than in the current model.

Under proposed Rule 615, only Open Competition Trading Centers may operate a Qualified Auction. A threshold requirement for NMS Stock ATS to operate as an Open Competition Trading Center is that during at least four of the preceding six calendar months, the Open Competition Trading Center had an average daily share volume of 1.0 percent or more of the aggregate average daily share volume for NMS stocks as reported by an effective transaction reporting plan. We are concerned that this requirement is a high barrier and may stifle innovation and competition among potential operators. That is, under the Proposal, only the largest exchanges and ATS will be able to operate as an Open Competition Trading Center and offer Qualified Auctions, providing an advantage to incumbents who have limitations on liability and that have experienced major systems outages. This preference conflicts with the SEC's attempt to promote competition, and more fundamentally with its "fairness" mission. We recommend lowering the requirement to allow any fair and open access venue to operate a Qualified Auction, and only if a venue trips the current 1% fair access threshold, would the venue be required to be Reg SCI compliant.

In keeping with the SEC's focus on fair, orderly, and efficient markets, the SEC should not mandate prescriptive trading mechanics, matching logic, or price setting that interfere with market forces in ways that could ultimately harm competitive forces, execution quality and

outcomes for investors. We are concerned with SEC determinations regarding the Qualified Auction venues to which a broker-dealer must connect. The market has a robust history of identifying what venues provide the best outcomes for trading, with volumes following those competitive forces. If the venue is large and delivers a poor execution quality, existing broker-dealer best execution obligations and proposed amendments to Rule 605 would naturally limit the volume in that venue. Alternatively, if the venue were small, but provided superior execution quality, it could stand alone as a small venue, and more people would naturally connect to it.

Under the Proposal, a Qualified Auction operator would not be able to charge a fee for the submission or execution of a Segmented Order, the submission of an auction response, or submission of an auction response that was not executed. Fees for the execution of an auction response would be capped and any rebate for the submission or execution of a segmented order or for the submission or execution of an auction response would also be capped.

Along with capping the fees that Qualified Auction operators (likely national securities exchanges) could charge brokers for submitting Segmented Orders to a Qualified Auction, we suggest the Commission consider capping other fees that exchanges charge for trading in benchmark-setting auctions such as the primary market opening and closing auctions. Given the recent outage on the NYSE, and how the market is bound to the opening auction price, this course of action provides way to help bring costs down in an environment where listing exchanges have a monopoly on pricing. We also urge the SEC to consider other fees, outside of transaction fees, that retail brokers will incur in Qualified Auctions. For example, we do not believe that Qualified Auction operators should be allowed to charge for connectivity associated with accessing a Qualified Auction. While national securities exchanges currently charge connectivity fees, wholesale market makers do not.

Proposed Alternative Approaches

Given that we are not certain whether some of the theoretical trading benefits of the proposed Order Competition rule would outweigh some equally likely theoretical trading erosion for retail investors, we are not able to support the Proposal in its current form.

We suggest the Commission consider alternative pathways to allow different trading venues to compete for retail order flow and for institutional investors to interact with retail order flow. For example, the Commission might consider rules that would allow both exchanges and ATS to accept, rank, and execute at a sub-penny price when the contra party is a *bona fide* retail order. Alternatively, the Commission might consider rules allowing exchanges and ATS to trade and segment pools/limit order books to *bona fide* retail orders either by retail MPID or other pre-arranged anonymous identifier. Providing these explicit exemptions for orders trading against retail flow may address the SEC's concerns over the current market structure. At worst, more infrastructure and data will be available to understand if further action could produce better outcomes for investors.

V. <u>**Rulemaking Process Concerns**</u>

We are concerned that the Commission has chosen to support its own economic analysis in the Proposals by using CAT data that is only available to SEC, FINRA and the national securities exchanges. The SEC's use of non-public data to justify proposed rulemaking sets a dangerous precedent because the public cannot analyze data it is not allowed to see. For these reasons, we support SIFMA's Freedom of Information Act request to the SEC concerning information on which the Commission predicated its economic analysis for the Proposals. [32]

VI. An Alternative Path Forward

We commend the Commission's efforts to improve our markets, which are strong and the envy of the world. We have noted several items the SEC should adopt, as well as recommended changes to help ensure the best outcomes for investors and our markets.

Chair Gensler has stated that in proposing the reforms, that he seeks to: 1) improve the quality of the NBBO by placing more trades on exchange; 2) level the playing field between exchanges and market makers and reduce concentration of retail orders executed by wholesale market makers; 3) improve access to retail orders by institutional investors and increase competition; and 4) increase transparency of execution quality and potential conflicts.[33] We suggest a measured approach to address these goals.

As stated earlier, we recommend the SEC start their equity market structure reforms with an accurate set of market quality metrics, upon which the impact of other proposed reforms can be evaluated. Given that the SEC has acknowledged in its Proposal that the current Rule 605 is outdated and needs to be updated, it is logical that current Rule 605 metrics do not provide an adequate base upon which to evaluate market quality. Accurately quantifying the impact of the Transparency of Better Priced Orders Proposal or proposed Order Competition Rule can only take place if the analysis cascades from accurate metrics produced from amendments to Rule 605.

First, we suggest that the SEC adopt proposed amendments to Rule 605, with certain modifications, and, after allowing time for those reforms to integrate in the marketplace, undertake a retrospective review to determine the extent to which Rule 605 amendments have addressed the SEC's concerns. For example, starting with Rule 605 amendments can improve the quality of the NBBO and increase the transparency of execution quality and potential conflicts.

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[32] Letter from Ellen Greene, Managing Director, SIFMA to Vanessa Countryman, Secretary, Securities and Exchange Commission (Feb. 8, 2023) concerning File No. S7-32-22, File No. S7-31-22; File No. S7-30-22; and File No. S7-29-22, including Letter from Ellen Greene, Managing Director, SIFMA to FOIA Officer, Freedom of Information Act Office, Securities and Exchange Commission (Feb. 8, 2023) concerning *Information Regarding the Data Relied upon by the Commission in Proposing Certain Commission Rulemaking Related to Market Structure* available at: s73122-20156863-325026.pdf (sec.gov).

[33] *See* Gary Gensler, "Market Structure and the Retail Investor: Remarks Before the Piper Sandler Global Exchange Conference" (June 8, 2022), *available at* https://www.sec.gov/news/speech/gensler-remarks-piper-sandler-global-exchange-conference-060822.

Second, if needed, the SEC might lower the minimum quoting increment for tick constrained NMS securities trading at or above $1/share to 50 mils. The SEC should measure the impact of this change, and, if necessary, pursue an opportunity to move to more narrow quoting increments in the future based on data-driven metrics. The SEC should make any potential access fee changes commensurate with tick size changes.

Third, we suggest the Commission consider alternative paths to the proposed Order Competition Rule that provide trading venues a more streamlined path to offering services similar to the proposed Qualified Auction construct, without the prescriptive nature of the proposed structure. This rulemaking approach would allow market participants to use a trading structure because it delivers better outcomes, rather than irreversibly locking the market into a trading structure whose benefits may not accrue as anticipated.

For example, we suggest the Commission consider rules that would allow any venue to accept, rank and execute in sub-penny increments when, and only when, the counterparty is a *bona fide* retail order and/or the ability for exchanges and ATS to trade and segment pools/limit order books to *bona fide* retail orders either by retail MPID or other pre-arranged anonymous identifier. Allowing any venue to accept and rank in sub-penny increments when not involving a retail order would raise our concerns around stepping ahead of limit orders and that impact on retail execution quality. Providing these explicit exemptions for orders trading against retail flow may address SEC concerns with competition for retail order flow and the ability for institutional investors to interact with retail order flow, without overly prescriptive and complex market structure. At worst, more infrastructure and data will be available to understand if further action could produce better outcomes for investors.

Fidelity customers enjoy best-in-class price improvement and execution services with the current equity market structure, and it is imperative for us to maintain this standard.

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Fidelity would be pleased to provide further information, participate in any direct outreach efforts the Commission undertakes, or respond to questions the Commission may have about our comments.

Sincerely,

Derrick Chan

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

Haoxiang Zhu, Director, Division of Trading and Markets
Kelly Riley, Division of Trading and Markets
David Shulman, Division of Trading and Markets