HEALTHY MARKETS
TRANSPARENCY & TRUST

December 20, 2018

Via Electronic Mail (rule-comments@sec.gov)

Mr. Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Release No. 34-83454; File No. SR-NYSE-2018-28

Dear Mr. Fields:

The Healthy Markets Association[1] appreciates the opportunity to comment on the above-referenced 19(b)(1) filing,[2] which seeks to make permanent the Retail Liquidity Program ("RLP") Pilot. The RLP Pilot, which was originally approved more than a half-dozen years ago,[3] creates a tiered and segmented market structure that adds unnecessary complexity and reduces the ability for investor orders to naturally interact. Our concerns regarding its structure and how it operates have already been well articulated by others, and so we will not repeat them here.

Despite our reservations about the RLP Pilot, it nevertheless offers the Commission a unique opportunity to explore brokers' fulfillment of their best execution obligations. This letter seeks to comment on the best execution implications of the pilot.

Under the RLP Pilot, covered market participants have the opportunity to receive potential price improvement to trades occurring at prices equal to or greater than $1.00

[1] The Healthy Markets Association is an investor-focused not-for-profit coalition working to educate market participants and promote data-driven reforms to market structure challenges. Our members, who range from a few billion to hundreds of billions of dollars in assets under management, have come together behind one basic principle: Informed investors and policymakers are essential for healthy capital markets. To learn more about Healthy Markets, please see our website at http://www.healthymarkets.org.
[2] *New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Make Permanent the Retail Liquidity Program Pilot, Rule 107C*, SEC, Rel. No. 34-83454, Jun. 15, 2018, *available at* https://www.sec.gov/rules/sro/nyse/2018/34-83454.pdf ("NYSE Permanent Filing").
[3] *Order Granting Approval to Proposed Rule Changes, as Modified by Amendments Nos. 1 and 2, Adopting NYSE Rule 107C to Establish a Retail Liquidity Program for NYSE-Listed Securities on a Pilot Basis Until 12 Months From Implementation Date, and Adopting NYSE Amex Rule 107C to Establish a Retail Liquidity Program for NYSE Amex Equities Traded Securities on a Pilot Basis Until 12 Months From Implementation Date, and Granting Exemptions Pursuant to Rule 612(c) of Regulation NMS*, SEC, Rel. No. 34-67347, July 3, 2012, *available at* https://www.sec.gov/rules/sro/nyse/2012/34-67347.pdf ("Original Pilot Approval").

per share by at least $0.001 per share.[4] At the time it was proposed, the Commission received over thirty comment letters, several of which were in support of the program.[5] Some commenters raised concerns on the impact of the Sub-Penny Rule, whether the proposals impede fair access, and whether the proposals implicate rules and standards relating to best execution and order protection.[6] Several commenters appreciated that this was a significant issue, which deserved careful Commission consideration.[7] We agree that those issues are valid areas for concern, and that the Commission should carefully scrutinize the program and the policies implicated by it.

When approving the pilot, the Commission stated that it did

> not believe that the Program will create any best execution challenges that are not already present in today's markets. A broker's best execution obligations are determined by a number of facts and circumstances, including (1) the character of the market for the security (e.g., price, volatility, relative liquidity, and pressure on available communications); (2) the size and type of transaction; (3) the number of markets checked; (4) accessibility of the quotation; and (5) the terms and conditions of the order which result in the transaction.[8]

While we agree that the pilot didn't create any particularly novel challenges, it further exacerbated some pre-existing market structure problems, including increased tiering and segmentation, as well as complexity.

Despite our other reservations with the RLP Pilot, in the six years since it was first implemented, the pilot seems to have offered significant price improvement

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[4] For more information about the RLP program see the NYSE Retail Liquidity Program "Fact Sheet", NYSE, *available at* https://www.nyse.com/publicdocs/nyse/markets/liquidity-programs/RLP_Fact_Sheet.pdf.

[5] A current director of Healthy Markets commented on the proposal stating that the proposals are "quite appealing" to the interests of "fair and transparent markets that benefit retail investors." See letter from Christopher Nagy, TD Ameritrade, to Elizabeth Murphy, SEC, Nov. 20, 2011, *available at* https://www.sec.gov/comments/sr-nyse-2011-55/nyse201155-22.pdf.

[6] *Notice of Filing of Rule Change Proposing a One-Year Pilot Program Adding New Rule 107C to Establish a Retail Liquidity Program to Attract Additional Retail Order Flow to the Exchange for NYSE-listed Securities*, SEC, Rel. No. *34-65672*, *available at* https://www.sec.gov/comments/sr-nyse-2011-55/nyse201155.shtml.

[7] *See, e.g.*, Letter from Jim Toes, Securities Traders Ass'n, to Elizabeth Murphy, SEC, Apr. 26, 2012, *available at* https://www.sec.gov/comments/sr-nyse-2011-55/nyse201155-40.pdf.

[8] Original Pilot Approval, at 27, n.75.

opportunities.[9] By NYSE's analysis, between August 1, 2012 and January 2, 2018, orders totaling in excess of 6.8 billion shares were executed through the program, providing improvements of $12.3 million dollars.[10] This appears to be greater than the average price improvement provided through other common execution avenues. The fill rates have also been, at times, significant.[11]

Interestingly, it appears that the program has not generated significant activity.[12] When the Commission approved the program it noted

> most marketable retail order flow is executed in the OTC markets, pursuant to bilateral agreements, without ever reaching a public exchange. The Commission recently noted that "a very large percentage of marketable (immediately executable) order flow of individual investors" is executed, or "internalized," by broker-dealers in the OTC markets. A recent review of the order flow of eight retail brokers revealed that nearly 100% of their customer market orders were routed to OTC market makers. The same review found that such routing is often done pursuant to arrangements under which retail brokers route their order flow to certain OTC market makers in exchange for payment for such order flow. To the extent that the Program may provide price improvement to retail orders that equals what would be provided under such OTC internalization arrangements, the Program could benefit retail investors.[13]

FINRA has stated that a broker "must compare the quality of the executions it is obtaining via current order routing and execution arrangements (including the internalization of order flow) to the quality of the executions that it could obtain from

[9] For example, NYSE publishes daily statistics related to improvements given on a daily basis available for public review. A recent sampling found that, on a single day over 8 million shares across 1,495 symbols received minimum price improvements of $0.0011. See NYSE Liquidity Statistics, NYSE, *available at* https://www.nyse.com/markets/liquidity-programs#nyse-nyse-mkt-rlp.
[10] NYSE Permanent Filing, at 17.
[11] Id., at 17 (noting that the fill rate in May 2018 exceeded 25%). That said, we recognize that accessing a venue with a fill rate of even 25% is different than accessing a wholesale market maker who will generally fill the order on a proprietary basis.
[12] Id., at 23 ("Although the Program provides the opportunity to achieve significant price improvement, the Program has not generated significant activity.").
[13] Original Pilot Approval, at 24.

competing markets."[14] Over the past few years, FINRA has examined several brokers' order routing practices,[15] and made a number of disturbing findings regarding brokers' best execution practices. For example, FINRA recently found that some firms did not compare the quality of the execution obtained against the quality of execution they could have obtained from competing markets.[16]

One of the competing markets should likely have been the RLP Pilot. Yet, the RLP Pilot received very little volume. Why? We would be curious to see whether, and to what extent, brokers evaluated the venue. Had they done so, we would expect them to have concluded that they should attempt routing more orders to the program. Had the data suggested the venue's executions were inferior, then they could have always changed their behavior. But we see little evidence of any of that having happened.

This program appears to offer a somewhat unique opportunity for the Commission and FINRA to test brokers' compliance with their best execution obligations, and particularly their obligation to assess other execution venues. We encourage you to use it. Thank you for your consideration.

Sincerely,

Tyler Gellasch
Executive Director

Cc: Heidi Pilpel, Senior Special Counsel, SEC

[14] *Guidance on Best Execution Obligations in Equity, Options and Fixed Income Markets*, FINRA, Notice to Members 15-46, Nov. 2015, at 5, *available at* http://www.finra.org/industry/notices/15-46, ("A firm that limits its review of execution quality only to those markets to which it currently routes customer order flow without considering competing markets would not satisfy the duty of best execution.").
[15] *See, e.g.*, *Targeted Examination Letter on Order Routing and Execution Quality of Customer Orders*, FINRA, July 2014, *available at* http://www.finra.org/industry/targeted-examination-letter-order-routing-and-execution-quality-customer-orders; *see also*, *Targeted Examination Letter on Order Routing Conflicts*, FINRA, Nov. 2017, *available at* http://www.finra.org/industry/order-routing-conflicts.
[16] 2018 Report on FINRA Examination Findings, FINRA, Dec. 2018, *available at* https://www.finra.org/sites/default/files/2018_exam_findings.pdf.