May 4, 2021

Via Electronic Mail

Hon. Gary Gensler, Chair
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Welcome and Suggested Regulatory Priorities

Dear Chair Gensler:

Welcome to the Securities and Exchange Commission. Healthy Markets Association is excited to work with you to continue improving the US capital markets, as well as the operations of your new agency.

The Healthy Markets Association is a not-for-profit member organization of public pension funds, investment advisers, broker-dealers, and market data firms focused on reducing conflicts of interest and improving the transparency, efficiency, and fairness of the capital markets.[1]

We write to urge you to continue the Commission's critical, bipartisan work towards modernizing oversight of the US capital markets. While US capital markets remain the world leader, recent market events and several longer term market trends have exposed significant cracks in the foundation of our markets that risk shaking the confidence of investors both in the markets and the regulators charged with policing them.

In the pages that follow, we offer suggestions on modernizing the regulatory structure for the US capital markets to better protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. We wish you a successful tenure and look forward to working with you, the Commission, and the agency staff on these important efforts in the months and years ahead.

[1] To learn more about Healthy Markets or our members, please see our website at http://healthymarkets.org/about.

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Directly Address Trading Conflicts of Interest and Trading Costs

Mitigate Order Routing Conflicts of Interest

The Commission should review order routing practices, with an eye towards promoting best execution. Some brokers's order routing practices appear inconsistent with their best execution obligations, and are harming their customers. Although specifics may differ between so-called "retail" and institutional investors,[2] the overarching concern is the same: investors' orders are often routed in ways that may be worse for investors, but better for their brokers. In most cases, retail and institutional investors are unaware of how their brokers' self-interested desire to avoid a fee, collect a payment, or hit a pricing tier at a venue, affects the prices they pay to buy and sell securities.[3]

Neither the Commission's 2018 adoption of enhanced order routing disclosures nor the now-defunct "Transaction Fee Pilot" have remedied the situation. And the circumstances surrounding the GameStop have once again placed conflicted order routing practices into the spotlight.[4]

While we previously supported the Transaction Fee Pilot[5] for much the same reason as dozens of pension funds and institutional investors[6] — that it would reduce brokers'

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[2] Healthy Markets generally objects to the characterization of "retail" investors as those who trade primarily through individual, often online brokers. As numerous studies have demonstrated, these individuals often have significantly greater wealth and financial resources than those who invest predominantly through institutional investment advisers. Thus, if the Commission is truly seeking to protect "mom and pop retail," it will ensure that its regulatory regime appropriately informs and empowers institutional advisers, like those who are members of Healthy Markets, who manage the bulk of savings and retirement assets.

[3] Often, the data that would be required to accurately measure the quality of the execution is simply unavailable to the investors. Further, even in the rare instances that reasonable information may be available, investors (particularly those trading through online, discount brokers) may be unable to bring the comprehensive financial and personnel resources to bear that would be necessary to make sense of it. Worse, even if those two conditions are met, there is often limited recourse for an investor.

[4] See, Letter from Tyler Gellasch, Healthy Markets Association, to Hon. Maxine Waters, et. al., Feb. 17, 2021, *available at* https://healthymarkets.org/wp-content/uploads/2021/02/Letter-to-HFSC-Hearing-2-17-21.pdf.

[5] Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, Sec. and Exch. Comm'n, May 24, 2018, *available at* https://healthymarkets.wpengine.com/wp-content/uploads/2018/06/05-24-18-HM-letter-Transaction-Fee-Pilot.pdf; Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, Sec. and Exch. Comm'n, July 6, 2018, *available at* https://healthymarkets.wpengine.com/wp-content/uploads/2018/07/07-06-18-HM-letter-Transaction-Fee-Pilot.pdf.

[6] *See, e.g.*, Letter from Kevin Duggan, Ontario Teachers' Pension Plan and Don Pontes, CalPERS, *et. al.*, to Brent J. Fields, Sec. and Exch. Comm'n, May 25, 2018, *available at* https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf; Letter from Joseph Brennan, Vanguard, to Brent J. Fields, Sec. and Exch. Comm'n, May 25, 2018, *available at*

conflicts of interest — we now believe the Commission should address the conflict of interests more directly and permanently. This may include prohibiting brokers acting as agents (for institutional or retail customers) from accepting order routing inducements.

At the same time, we urge the Commission and the Financial Industry Regulatory Authority ("FINRA") to step up efforts to enforce the requirements of the existing "best execution" obligation on brokers. In particular, while brokers are obligated to survey potential trading venues and sources of liquidity, there appears to be scant evidence that retail brokers are effectively considering exchanges, which may offer mid-point pricing that is often far better than prices provided through internalization measured off of the SIP NBBO.

We urge you to direct the Commission to breathe life into the duty of best execution, not just through new rules and guidance, but also through more robust enforcement of the existing framework with an eye towards investor protection and promotion of market integrity and quality.

Modernize and Correct Reporting for Execution Quality

The Commission's disclosure obligations under Regulation NMS are all outdated, and should be revised. In 2018, the Commission finalized a rule to improve order handling disclosures for some institutional orders,[7] which was designed to improve transparency for how orders are routed and executed. However, Rules 605 and 606 are still woefully out of date, and inadequate for most market participants. Worse, by failing to accurately incorporate essential information and relevant time horizons, these disclosures may affirmatively provide inaccurate and misleading information to market participants and regulators.

For example, many of the new order types and mid-point pricing schemes offered by the exchanges are excluded from the definition of "price improvement" for purposes of SEC Rule 605. Further, price improvement bears little relation to whether or not a customer actually received the best available price. Rule 605, which requires disclosure of statistics related to best execution, has not kept pace with the modern trading environment. Unfortunately, this allows firms to misleadingly claim "price improvement"

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https://www.sec.gov/comments/s7-05-18/s70518-3712174-162393.pdf; Letter from Heidi Hardin, MFS Inv. Mgmt, to Brent J. Fields, Sec. and Exch. Comm'n, May 25, 2021, *available at* https://www.sec.gov/comments/s7-05-18/s70518-3712713-162397.pdf; Letter from Brent Woods and Joseph Scafidi, Brandes Inv. Ptnrs, to Brent J. Fields, Sec. and Exch. Comm'n, April 10, 2018, *available at* https://www.sec.gov/comments/s7-05-18/s70518-3419059-162184.pdf; Letter from Brent Robertson and Robert Gouley, Ontario Municipal Employees Retirement System, to Brent J. Fields, Sec. and Exch. Comm'n, May 15, 2018, *available at* https://www.sec.gov/comments/s7-05-18/s70518-3647325-162406.pdf.

[7] Disclosure of Order Handling Information, SEC, 83 Fed. Reg. 58338, (Nov. 19, 2018), *available at* https://www.govinfo.gov/content/pkg/FR-2018-11-19/pdf/2018-24423.pdf.

(as defined in Rule 605) when they are, in fact, providing prices that are significantly inferior to those that may be available in the marketplace.

For example, one significant way in which these statistics are misleading is due to the unique treatment of so-called “odd-lot” orders, which are generally orders for less than 100 shares. Historically, “odd-lot’ orders and trades comprised a relatively small percentage of trades, and given their total share volumes, they were generally viewed as not material sources of liquidity nor necessarily essential for measuring market quality. As a result, “odd-lot” orders have traditionally not been included on the SEC-mandated industry “tapes,” also known as the Securities Information Processors (“SIPs”), nor are they considered “protected” quotes under Regulation NMS.[8]

Suppose a retail customer seeks to buy 25 shares of a stock through his online, retail brokerage account. Suppose further that 25 shares of that stock are available for sale on the New York Stock Exchange for $10 and 100 shares are available on several exchanges at a price of $10.01. The retail broker may sell the order to a market maker, who then may execute and give it to the customer at a price of $10.0098, claiming that the order received “price improvement” at a rate of 2 cents per 100 shares. However, the customer actually received price dis-improvement. The best available price would have been on the New York Stock Exchange for a whopping 98 cents per 100 shares cheaper.[9] Clearly, the customer didn’t get the best available price. The customer did not get best execution. This should give rise to regulatory scrutiny and action.

Alternatively, suppose the market maker did execute the order at the best available price of $10 (which is what we believe should be required by best execution). The broker could be able to claim (based on the current Rule 605 methodology) “price improvement” of a whopping $1.00 per 100 shares, even though the retail customer’s execution was not “improved” at all.

[8] Interestingly, while odd-lot trades have been reported in the SIPs for several years, odd-lot orders have not. See *Order Approving the Eighteenth Substantive Amendment to the Second Restatement of the CTA Plan*, SEC, Exch. Act Rel. No. 34-70794, Oct. 31, 2013, *available at* https://www.sec.gov/rules/sro/nms/2013/34-70794.pdf. Odd-lot orders are, however, included in the proprietary data feeds sold by exchanges because, not surprisingly, they are important sources of liquidity for investors of all sizes.

[9] *See also*, Robert P. Bartlett, III and Justin McCrary, *Modernizing Odd Lot Trading*, at 5, Feb. 16, 2021 (see authors for copy) (“As an illustration, consider a market maker that receives from a retail broker a marketable buy order for a single share when the price-protected NBBO stands at $1,000.00 x $1,000.10. At the time, an odd lot quote to sell 5 shares is also resting on Nasdaq at $1,000.07 and is visible to the market maker through its proprietary data subscriptions. Under Rule 611, the market maker may nevertheless fill the order at $1,000.09, as doing so does not trade-through the protected ask of $1,000.10. Indeed, by filling the order at $1,000.09, the market maker appears to provide $0.01 of price improvement to the marketable order. Yet the trader placing this hypothetical market order would no doubt question whether she received best execution: She would have received superior pricing had the market maker matched the best ask on Nasdaq. This simple example illustrates how even a trade that receives price improvement under Rule 605 may, in fact, receive price dis-improvement.”).

Given the material changes to the markets (including order and trade sizes, as well as time horizons in which trading decisions are made) since Rule 605 was adopted, we reiterate our calls to modernize and expand Rule 605.[10]

Similarly, Rule 606 still does not provide investors with sufficient details to determine whether their brokers are routing orders in ways that maximize the brokers' profits, or instead provide customers with the best prices. As we have previously explained, the 2018 revisions failed to provide the details necessary to provide investors with useful information.

Put simply, FINRA Rule 5310 and SEC Rules 605 and 606 should be updated and reconciled with one another.

Promote Fee Certainty for Order Routing

The Commission currently permits for-profit exchanges to change and assess their fees in ways that create significant risks to investors,[11] while also foreclosing the possibility of the Commission intervening to prevent the harm. We recognize that Congress has established some parameters for the process through which exchange fee filings may become effective, but that process does not need to deprive investors and the Commission of the ability to review and plan for exchange fee changes.

We recommend two simple reforms to better protect investors. First, exchanges are permitted to implement fee changes immediately upon filing with the Commission. This may include essentially overnight fee changes that do not permit all market participants with adequate opportunities to adjust and test their systems based on significant changes.[12] To address this concern, we urge the Commission to revise its process for notifications of trading fees and rebates so that fees may not be effective until 14 days prior notice has been provided by an exchange.[13]

Second, trading fees and rebates are currently assessed on a retrospective basis, by calendar month. This means that market participants generally do not know the fee charged or rebate provided from the exchange for any particular trade until the end of the calendar month. This creates significant challenges for brokers looking to make order routing decisions, but it also limits efforts to reduce brokers' conflicts of interest.

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[10] Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, Mar. 5, 2019, *available at* https://www.sec.gov/comments/4-729/4729-5020185-182987.pdf; *see also*, Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, Oct. 30, 2019, *available at* https://www.theice.com/publicdocs/Healthy_Markets_odd_lot_comment_letter_10.30.19.pdf.

[11] Letter from Jaffray Woodruff and Michael Ledwith, Quantitative Inv. Mgmt, to Brent J. Fields, Sec. and Exch. Comm'n, Dec. 21, 2018, *available at* https://www.sec.gov/comments/sr-cboeedga-2018-017/srcboeedga2018017-4827803-177046.pdf ("QIM Letter").

[12] See generally, QIM Letter.

[13] QIM Letter, at 2.

For example, a mutual fund may wish to pay "cost plus" commissions to its brokers, but the "cost" is not known for the broker until the end of the month. As a result, reconciling rebates and fees days or weeks after the trade would create significant administrative headaches for advisers whose funds may trade every day, including in assessing the costs or rebates to the correct investors and calculating the net asset values.

The Commission should instead require exchanges to apply fees on a prospective basis. If the brokers knew the costs of trading on a venue at the time of the trade, then those costs could be disclosed or passed through to the investor at the time of the trade execution. This could permit significantly greater transparency into trading costs and would likely reduce brokers' conflicts of interest.[14] At the same time, this could permit brokers to better assess and evaluate their own trading decisions and revenues.

Enhance Oversight of Fixed Income Trading Venues

Last year, the Commission proposed new rules for oversight of government securities ATSs and offered a Concept Release on the regulation of corporate and municipal debt ATSs.[15] As we stated in our recent comment to the Commission,[16] we urge the Commission to adopt reforms to fixed income trading venues without delay.

These reforms should build upon and expand the oversight that has already been provided to NMS Stock ATSs. Over the past several years, settlements with regulators have established that equities ATS operators engaged in or enabled:

- trading ahead of or against subscribers' orders;
- selectively sending indications of interest ("IOIs") to algorithmic trading firms, which allowed those firms to execute against subscribers in the pool, but also enabled those firms to trade away—and ahead—of the ATS's subscribers;
- sending subscribers' orders to other market centers without telling those subscribers;
- allowing the ATS operator's smart order router ("SOR") to use subscribers' order information when making unrelated order routing decisions;
- failing to police their pools as advertised, including by rating their own trading desk and high frequency trading firms as less predatory than the objective criteria would indicate;
- providing misleading information about the trading characteristics of the pool and its major participants;

[14] QIM Letter, at 2.
[15] *Regulation ATS for ATSs That Trade U.S. Government Securities, NMS Stock, and Other Securities; Regulation SCI for ATSs That Trade U.S. Treasury Securities and Agency Securities; and Electronic Corporate Bond and Municipal Securities Markets*, SEC, 85 Fed. Reg. 87106 (Dec. 31, 2020), *available at* https://www.govinfo.gov/content/pkg/FR-2020-12-31/pdf/2020-21781.pdf.
[16] Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, SEC, Mar. 22, 2021, *available at* https://www.sec.gov/comments/s7-12-20/s71220-8530174-230263.pdf ("Fixed Income ATS Letter").

- allowing employees or third-parties who have no role in ATS operations or oversight to have access to customers' confidential trading information;
- failing to construct the National Best Bid and Offer ("NBBO") as advertised;
- failing to monitor and restrict trading by subscribers in violation of the Market Access Rule; and
- violating the fair access requirements.[17]

As a result of these troubling findings, in 2015, the Commission proposed reforms to ATSs that trade NMS stocks (NMS Stock ATSs).[18] At the time, we urged the Commission to include ATSs beyond those that trade NMS stocks, such as fixed income securities.[19] Unfortunately, when the Commission finally adopted the reforms to NMS Stock ATSs in 2018, it rejected our suggestion.[20]

Nevertheless, many of the concerns equities investors and regulators had with NMS Stock ATSs also exist in fixed income trading venues. For example, to what extent do investors understand the rules of an electronic trading venue? How can those rules impact the stability and integrity of the prices? To what extent are customers treated the same? To what extent may the trading venue operator or affiliates use their customer information? To what extent (and under what conditions) may the trading venue operator share that information with other parties? To what extent may the trading venue operator or affiliates trade against customers in the trading venue? To what extent does a trading venue operator prevent (or enable) manipulative trading practices, such as spoofing? These questions exist for trading in fixed income trading venues as well as NMS Stock ATSs.

We thus urge the Commission to revise and adopt its proposed reforms to government ATSs, as well as adopt reforms to corporate and municipal debt trading venues. The Commission should be careful to apply these requirements to trading venues that perform similar functions, irrespective of their historical regulatory framework. And the Commission should focus on the risks of "pennying" and other abuses that may be enabled by "last look" features. Lastly, as outlined in our Fixed Income ATS Letter,[21] we further urge the application of the Commission's Reg SCI regime to those trading venues that may, in fact, pose significant risks to the trading of debt securities.

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[17] Letter from Tyler Gellasch, Healthy Markets Association, Brent J. Fields, SEC, Feb. 26, 2016, *available at* https://www.sec.gov/comments/s7-23-15/s72315-18.pdf ("Feb 2016 HMA ATS Letter")(citing to Healthy Markets Association, *The Dark Side of the Pools*, Sept. 15, 2015, *available at* https://healthymarkets.org).

[18] Regulation of NMS Stock Alternative Trading Systems, SEC, 80 Fed. Reg. 80998 (Dec. 28, 2015) ("NMS Stock ATS Proposal").

[19] Feb 2016 HMA ATS Letter.

[20] *Regulation of NMS Stock Alternative Trading Systems*, SEC, 83 Fed. Reg. 38768 (Aug. 7. 2018), *available at* https://www.govinfo.gov/content/pkg/FR-2018-08-07/pdf/2018-15896.pdf ("NMS Stock ATS Adopting Release").

[21] Fixed Income ATS Letter, at 9.

Establish Clear Best Execution Standards for Investment Advisers and Brokers

Investment advisers have a duty of best execution for when they are executing their clients' securities transactions.[22] Unlike broker-dealers, who are subject to FINRA's best execution rule[23] and guidance,[24] it is unclear how investment advisers should fulfill their best execution obligations. We reiterate our recommendation that the Commission complement improvements to best execution for brokers by adopting clear expectations for what process investment advisers should be expected to undertake to fulfill their best execution obligations.[25]

As the Commission's then-Office of Compliance, Inspections, and Examinations shared in its July 2018 Risk Alert, many investment advisers are not fulfilling their best execution obligations.[26] For example, the Commission staff found that many investment advisers were:

- not performing best execution reviews;
- not considering materially relevant factors during best execution reviews;
- not seeking comparisons from other broker-dealers;
- not fully disclosing best execution practices;
- not disclosing soft-dollar arrangements;
- not properly administering mixed use allocations; and
- not following best execution policies and procedures, or simply didn't have adequate ones.

Asset owners suffer when their investment advisers fail to meet their best execution obligations. However, because those obligations are not clearly established by the Commission or elsewhere, different advisers have clearly taken different views as to what may be required. We urge the Commission to establish a clear threshold set of best execution obligations for investment advisers. These obligations should include that the adviser:

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[22] See 1986 Release ("an adviser, as a fiduciary, owes its clients a duty of obtaining the best execution on securities transactions.").

[23] *Rule 5310: Best Execution and Interpositioning*, FINRA, *available at* https://www.finra.org/rules-guidance/rulebooks/finra-rules/5310.

[24] *Guidance on Best Execution Obligations in Equity, Options and Fixed Income Markets*, FINRA, Notice to Members 15-46, (Nov. 2015), *available at* https://www.finra.org/rules-guidance/notices/15-46.

[25] Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, Sec. and Exch. Comm'n, Aug. 7, 2018, *available at* https://www.sec.gov/comments/s7-09-18/s70918-4182239-172535.pdf.

[26] As discussed below, we note here that the proposed Commission interpretation and the Commission staff's recent "Risk Alert" could collectively offer significant new contours for those expectations. *Compliance Issues Related to Best Execution by Investment Advisers*, Sec. and Exch. Comm'n, July 11, 2018, *available at* https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20IA%20Best%20Execution.pdf (OCIE Risk Alert).

- has established and maintains a best execution committee that meets on at least a quarterly basis;
- measures and reviews (on a not less than quarterly basis) execution quality, based on a minimum list of "materially relevant factors";
- regularly evaluates broker performance and selection utilizing a minimum list of factors;
- makes active decisions regarding order routing and execution based upon its reviews;
- has appropriate policies and procedures, and practices related to the payment for research, including that it:
  - identifies and determines the value of research received and utilized;
  - establishes research payment mechanisms that can comply with its Section 28(e) obligations;
  - establishes research payment mechanisms that decouple the amount paid for research from trading volumes;
- periodically reviews (on a not less than annual basis) best execution policies, procedures, and practices, as well as disclosures related thereto; and
- the adviser fully discloses its best execution policies, procedures, and practices, including all relevant conflicts of interest, soft dollar arrangements, etc.

Collectively, these basic best execution expectations of investment advisers would reduce risks and costs for investors.

Enhance Fund Disclosures of Trading and Research Costs

In August 2020, the Commission proposed long-overdue reforms to funds' disclosures.[27] In November 2020, Healthy Markets Association joined the CFA Institute and the Council of Institutional Investors in urging the Commission to revise and adopt enhanced disclosures.[28] We urge you to revise the disclosure proposal to include information about best execution practices, trading costs, and research costs, and finalize it without delay.

For decades, asset owners have been in the dark about how their assets are being used, and even whether their assets are being used to subsidize other funds.[29] Over the past several years, regulators around the world have adopted new rules to require asset

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[27] *Tailored Shareholder Reports, Treatment of Annual Prospectus Updates for Existing Investors, and Improved Fee and Risk Disclosure for Mutual Funds and Exchange-Traded Funds; Fee Information in Investment Company Advertisements*, Sec. and Exch. Comm'n, 85 Fed. Reg. 70716 (Nov. 5, 2020), *available at* https://www.govinfo.gov/content/pkg/FR-2020-11-05/pdf/2020-17449.pdf.

[28] Letter from Tyler Gellasch, Healthy Markets Association, Jeff Mahoney, Council of Inst. Inv., and James Allen, CFA Institute, to Vanessa Countryman, Sec. and Exch. Comm'n, Nov. 6, 2020, *available at* https://www.sec.gov/comments/s7-09-20/s70920-7998614-225227.pdf.

[29] *See, e.g.*, Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, Sec. and Exch. Comm'n, Aug. 7, 2018, *available at* https://www.sec.gov/comments/s7-09-18/s70918-4182239-172535.pdf.

managers to disclose their best execution policies, as well as their funds' detailed costs—including transaction costs.

We urge the Commission to take the long-overdue step of modernizing fund prospectus disclosures to include:

- their best execution policies;
- detailed total trading costs;
- amounts paid for research from client assets (separate from trading costs); and
- whether the fund has policies and procedures designed to ensure that all commission dollars generated by the fund benefit the asset owners in the fund, including commissions used to pay for investment research.

Revise Oversight of Self-Regulatory Organizations

The Commission should reform the process through which rules of the exchanges are approved to better protect investors and fulfill expectations of the Exchange Act. The Commission is obligated to review filings of the self-regulatory organizations ("SROs," like the stock exchanges, FINRA and the Municipal Securities Rulemaking Board ("MSRB")) to determine that those filings are consistent with the Exchange Act,[30] including, *inter alia*, that the rules:

- provide for an equitable allocation of reasonable dues, fees, and other charges;[31]
- are "not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers";[32] and
- do "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act.[33]

The Commission's Rules of Practice clearly place the "burden to demonstrate that a proposed rule change is consistent with the [Exchange Act] and the rules and regulations issued thereunder" on the Exchange proposing a rule change.[34] In addition

> [t]he description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding, and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is

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[30] See *Susquehanna Int'l Grp., LLP v . SEC*, 866 F.3d 442 (D.C. Cir. 2017).
[31] 15 U.S.C. § 78f(b)(4).
[32] 15 U.S.C.§ 78f(b)(5).
[33] 15 U.S.C.§ 78f(b)(8).
[34] Rule 700(b)(3), Commission Rules of Practice, Sec. and Exch. Comm'n, 17 CFR 201.700(b)(3).

> consistent with the Act and the applicable rules and regulations.[35]

To assist exchanges, the Commission staff has offered extensive Staff Guidance on how they may "ensure that they have clearly described their proposed fees and addressed how they satisfy Exchange Act requirements that, among other things, fees be (i) reasonable, (ii) equitably allocated, (iii) not unfairly discriminatory, and (iv) not an undue burden on competition."[36]

The Commission has nevertheless permitted exchanges to offer extremely complex, custom-designed trading fee and rebate schedules that apply to individual firms. To the extent that different brokers and proprietary trading firms fall into different pricing tiers, it will directly impact the competitive balance between those firms.[37] As a result, pricing tiers not only impact the competition between venues for execution, but also the competition between brokers and other market participants.

Despite the Exchange Act's mandate that exchange fees be reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition, each firm is subject to whatever rate it can convince an exchange (presumably for business reasons) to grant. This is left to the whims of the exchange and the market participants.

Those without market power (e.g., smaller firms or those with less order volume) are likely to obtain the worst deals. A smaller firm's trading costs for any given trade on an exchange may be 30% or more of the costs of a larger competitor—for the exact same trade. Further, over time, as order flow has aggregated to the largest firms, this has increased their ability to negotiate even better rates, further expanding the gap between themselves and the smaller firms. These significant, structural disadvantages are one of the reasons small and medium-sized firms' numbers have been dwindling.

In 2018, the President and COO of Cboe told the Commission that the top 10 trading firms comprise more than half the volume on his firms' exchanges, and half of those

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[35] *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Amending the Fee Schedule Assessed on Members to Establish a Monthly Trading Rights Fee*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 86236, at 7, June 28, 2019, *available at* https://www.sec.gov/rules/sro/cboeedga/2019/34-86236.pdf.

[36] *Staff Guidance on SRO Rule Filings Relating to Fees*, Sec. and Exch. Comm'n, May 21, 2019, *available at* https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.

[37] Remarks of Joe Wald, Clearpool Group, before the SEC Roundtable on Market Access and Market Data, Oct. 25, 2018, Transcript at 198, *available at* https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102518-transcript.pdf. *Accord*, Remarks of Tyler Gellasch, Healthy Markets Association, before the SEC Roundtable and Market Access and Market Data, Oct. 26, 2018, Transcript at 280-281, *available at* https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102618-transcript.pdf.

large traders are net receiving payments at the end of the month.[38] This raises an important question, who is actually paying for the exchanges' operations (and the checks to the largest volume traders)?

In fact, several larger trading firms use their lower rates to attract greater order flow—consolidating their already unfair advantages. For example, below as Figure 1 is an excerpt from a pricing sheet from one large bank broker-dealer that is a few years old.

FIGURE 1: Broker A Exchange Pricing

	Tape A (NYSE)		Tape B (AMEX & Other)		Tape C (NASDAQ)	
	Taking	Providing	Taking	Providing	Taking	Providing
ARCA	0.00300	(0.00300)	0.00280	(0.00230)	0.00300	(0.00300)
BATS	0.00300	(0.00310)	0.00300	(0.00310)	0.00300	(0.00310)
NYSE	0.00250	(0.00180)	0.00250	(0.00180)	0.00250	(0.00180)
NASDAQ	0.00300	(0.00295)	0.00300	(0.00295)	0.00300	(0.00295)

The number and levels of these different pricing tiers is astronomical. As RBC Capital Markets explained to the Commission in 2018,

> In total, we found at least 3,762 separate pricing variables across the exchanges—that is, 3,762 factors that ultimately determine the fees charged and rebates offered by exchanges. These 3,762 variables strongly suggest that exchange prices are tailored and offered on a bespoke basis.[39]

Put simply, some of the largest volume traders are trading at dramatically reduced costs—or even for a profit—while smaller customers are paying significant sums for the exact same trade executions. This seems to be the opposite of an equitable allocation of reasonable fees, dues and charges. It further seems to be facially discriminatory.

Additionally, we have repeatedly raised concerns that some exchanges may be abusing the administrative processes to impose and collect fees on an "effective upon filing" basis, despite the Commission or staff having previously expressed concerns, suspending, or even disapproving the filing or a substantially similar filing.[40] We urge the

[38] Remarks of Chris Concannon, Cboe Global Markets, before the SEC Roundtable on Market Access and Market Data, Oct. 25, 2018, Transcript at 74-75, *available at* https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102518-transcript.pdf.
[39] Letter from Rich Steiner, RBC Capital Markets, to Brent J. Fields, Sec. and Exch. Comm'n, Oct. 16, 2018, *available at* https://www.sec.gov/comments/s7-05-18/s70518-4527261-176048.pdf.
[40] See, Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, Sec. and Exch. Comm'n, Mar. 19, 2019, *available at* https://www.sec.gov/comments/sr-box-2018-24/srbox201824-5151485-183409.pdf.

Commission to redefine the instructions on Form 19b-7 so that substantially similar filings may be considered amendments, and each is not a "new" filing.

Lastly, we note the Commission has repeatedly been challenged in court regarding its approval of rules changes by self-regulatory organizations.[41] To best establish that the Commission is fulfilling its obligation to review and determine that all self-regulatory organization rules are consistent with the Exchange Act, we urge you to direct the staff of the Division of Trading and Markets to review all self-regulatory organization filings, including those that are deemed effective upon filing, and make a written, affirmative determination that all such filings comply with the requirements of the appropriate filing form, the Exchange Act, and Commission rules.

Clarify Risks of Non-Securities-Related Activities of Broker-Dealer Affiliates

The Commission has adopted extensive rules and guidance regarding broker activities involving securities. However, many of those same brokers have affiliates that engage in those or remarkably similar activities with cryptocurrencies and other so-called "digital assets." Unfortunately, many investors are not aware of the additional risks or costs they may face with these non-securities-related activities (most often, trading and custody-related). For example, we understand that many cryptocurrency investors are not aware that their holdings may not be "guaranteed" or insured, such as by SIPC. Similarly, they may not be aware that traditional best execution rules do not necessarily apply to their "brokers" in such transactions.

We urge the Commission to review non-securities-related activities of broker-dealer affiliates and update rules and guidance so as to reduce investor confusion about the protections (or lack thereof) for different types of assets.

Promote Market Transparency and Integrity

Modernize Securities Holdings Reports

Adopted in 1975, and implemented in 1978, Section 13(f) requires investors to make disclosures if they hold more than $100 million in covered "equity" securities. The definition of what is an "equity" security is outdated, and does not include a number of financial instruments that it should, such as equity swaps or short positions. This allows some hedge funds to avoid reporting holdings, even if they have significant equity derivatives. At the same time, the reports are due 45 days after the end of the quarter.
In the summer of 2020, on a party-line basis, the Commission inexplicably proposed raising the threshold of equity securities for reporting from $100 million to $3.5 billion,

[41] See, e.g., *Susquehanna Int'l Grp., LLP v . SEC*, 866 F.3d 442 (D.C. Cir. 2017).

which would have significantly reduced the number of firms making reports.[42] Amidst "almost unanimous"[43] pushback, including from issuers, investors, Members of Congress, and Healthy Markets Association,[44] the ill-advised proposal was dropped.[45]

Enhancing disclosures could improve market efficiency and end some wild speculation (and misinformation) about short selling and short positions. Section 929X(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act modified Section 13(f) to direct the SEC to "prescribe rules providing for the public disclosure of the name of the issuer and the title, class, CUSIP number, aggregate amount of the number of short sales of each security, and any additional information determined by the Commission following the end of the reporting period."[46]

Regulators' and market participants' understanding of firms' holdings would be greatly aided by revisions to Section 13 filings to include all equity securities (including equity derivatives) and short positions. For example, if the equity derivatives traded by Archegos Capital Management were subject to detailed public disclosure requirements, it is possible that some banks' risk and compliance personnel would have identified the concentration of the positions, which could have mitigated at least those' banks' exposures to the fund. However, without such public disclosures, the banks were essentially dependent upon the completeness and accuracy of voluntary disclosures made to them pursuant to their own due diligence and credit risk management practices. Worse, had they looked to the Section 13 disclosures, they may have inaccurately believed that the other banks could be potential counterparties for transactions in those securities, even though the nature of those banks' positions meant that they would likely need to sell securities at the same time. Put another way, by failing to include all relevant equity positions and derivatives, the public disclosures could be materially misleading.

We are also puzzled that the Commission has decided to outsource its determination regarding equity securities that qualify for disclosure to a private third-party organization. We see no legitimate reason for this designation of governmental

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[42] *Reporting Threshold for Institutional Investment Managers*, Sec. and Exch. Comm'n, 85 Fed. Reg. 46016 (July 31, 2020), *available at* https://www.govinfo.gov/content/pkg/FR-2020-07-31/pdf/2020-15322.pdf.

[43] Ortenca Aliaj and Eric Platt, *SEC plan to cut fund disclosures faces almost unanimous opposition*, Financial Times, Oct. 20, 2020, *available at* https://www.ft.com/content/76be55f3-97ee-4f7b-bba1-b82cdd347d48.

[44] Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, Sec. and Exch. Comm'n, Aug. 28, 2020, *available at* https://www.sec.gov/comments/s7-08-20/s70820-7717968-222993.pdf.

[45] Benjamin Bain and Robert Schmidt, *Hedge Funds' Shot at Keeping Stock Investments Secret Fades*, Bloomberg, Oct. 27, 2020, *available at* https://www.bloomberg.com/news/articles/2020-10-27/hedge-funds-shot-at-stock-secrecy-fades-as-sec-shelves-revamp.

[46] 15 U.S.C. § 78m(f)(2) (2012).

authority, and we question whether it is consistent with the law. Instead, we recommend that the Commission directly maintain the list of covered financial instruments itself.

Lastly, we note that some have argued that the reporting delay could be shortened significantly[47] or the frequency of reporting increased. If the delay in the reporting period is shortened, we believe that the Commission should first ensure that it has a workable mechanism to allow larger institutional investors the opportunity to avoid premature disclosure of positions that are in flux. The current process is rarely used because of the current 45-day delay, but the process would need to be adequately staffed, if that period were materially shortened.

Accelerate Improvements to Consolidated Audit Trail

Following the Flash Crash of May 6, 2010, the Commission proposed a Consolidated Audit Trail ("CAT").[48] In December 2010, you testified as Chairman of the Commodity Futures Trading Commission alongside the then-Chair of the Securities and Exchange Commission on the stability and integrity of the capital markets.[49] During that hearing, the importance of the CAT was extremely clear.

Unfortunately, a useful CAT still does not exist.

The creation and implementation of the CAT has taken years longer than anticipated and the end product for when it will be "fully" operational is going to be significantly less useful for regulators or market participants than originally envisioned.[50] We urge you to direct the Division of Economic and Risk Analysis to use the current version of the CAT to analyze recent market events (e.g., GameStop, Archegos, etc.), and see what it can (and cannot) add to the Commission's and the public's understanding of those events. Lastly, we urge you to prioritize completing the implementation of the current version, and begin the already overdue process of upgrading this basic regulatory tool.

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[47] *See, e.g.*, Letter from Elizabeth King, NYSE Euronext, to Elizabeth Murphy, Sec. and Exch. Comm'n, Feb. 1, 2013, *available at* https://www.sec.gov/rules/petitions/2013/petn4-659.pdf.

[48] *Consolidated Audit Trail,* Sec. and Exch. Comm'n, 75 Fed. Reg. 32556 (June 8, 2010), *available at* https://www.sec.gov/rules/proposed/2010/34-62174fr.pdf.

[49] *Examining the Efficiency, Stability, and Integrity of the U.S. Capital Markets, Joint hearing of the US Senate Permanent Subcmte on Investigations and the Subcmte on Sec., Insurance, and Inv., Cmte on Banking, Housing, and Urban Affairs*, 111th Cong. (2010) *available at* https://www.hsgac.senate.gov/subcommittees/investigations/hearings/examining-the-efficiency-stability-and-integrity-of-the-us-capital-markets.

[50] *Hearing on Implementation and Cybersecurity Protocols on the Consolidated Audit Trail Before the House Fin. Serv. Cmte, Subcmte on Capital Markets, Sec. and Inv.*, 115th Cong. (2017), *available at* https://financialservices.house.gov/uploadedfiles/11.30.2017_tyler_gellasch_testimony.pdf (written testimony of Tyler Gellasch, Healthy Markets Association); *see also* Letter from Tyler Gellasch, Healthy Markets Association to Manisha Kimmel, Sec. and Exch. Comm'n, Feb. 14, 2019, *available at* https://healthymarkets.wpengine.com/wp-content/uploads/2019/03/CAT-Letter-2-14-19-2-1.pdf.

Enhance Oversight of Indexes Used for Investment Products

Millions of investors have placed trillions of dollars into investment products that are linked to benchmarks for interest rates, foreign exchange rates, equities prices, and countless other reference points. These benchmark-linked investment products range from mutual funds that track the S&P 500 index to complex, customized swaps used by the world's largest investors.

Following several scandals involving manipulation of key indexes in derivatives and securities markets, several foreign regulators have implemented significant oversight of benchmarks used for investment products. Regulators in the United States have largely not followed suit.

However, in 2019, then-SEC Commissioner Robert J. Jackson Jr. called on the Commission to consider oversight of these benchmarks.[51] We at Healthy Markets Association also released a report examining several examples of benchmark abuses, and offering suggestions for regulators.[52]

As you are acutely aware from your work at the Commodity Futures Trading Commission, benchmarks underpinning investment products may be (1) subject to conflicts of interest, (2) susceptible to manipulation, and (3) insufficiently transparent to ensure their accuracy or integrity. This may be of particular concern as the Commission wrestles with indexes that claim to be "sustainable," "ESG," or some other, similar designation.[53] Is a "green" index really climate friendly? Unfortunately, the existing United States regulatory framework is ill-equipped to address the risks and conflicts of interest posed by benchmark-linked investing.

Investors, and their returns, are increasingly dependent on the integrity and utility of their benchmarks, and while there has been significant progress on transition from LIBOR, countless other benchmarks are still rarely examined by US regulators. It is now time for investors and regulators to take a hard look at the governance, quality, methodology, and accountability of the benchmarks upon which so much of our economy now relies. This review can build on—and potentially seek to harmonize with—the existing EU Benchmark Regulation.

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[51] Hon. Robert J. Jackson, Jr. and Steven Davidoff Solomon, *What's Really in Your Index Fund?*, N.Y. Times, Feb. 18, 2019, *available at* https://www.sec.gov/news/speech/jackson-your-index-fund.

[52] *Benchmark-Linked Investments: Managing Risks and Conflicts of Interest*, Healthy Markets Association, Mar. 7, 2019, *available at* https://healthymarkets.wpengine.com/product/benchmark-linked-investments.

[53] Debbie Carlson, *Your ESG investment may be a 'light-touch' fund and not as green as you think*, MarketWatch, Dec. 29, 2020, *available at* https://www.marketwatch.com/story/your-esg-fund-may-not-be-as-green-as-you-think-11609203845.

Promote Availability of Essential Market Data

The provision of equity market data is woefully outdated, extraordinarily complex, and costly. In the equities markets, we have a two-tiered system that imposes significant costs on market participants, while also creating confusion and opportunities for abuses. We have petitioned the Commission to modernize the rules for the provision of market data[54] and objected to several market data filings by the NMS Plans and individual exchanges.[55] We have also offered extensive comments to the Commission in response to its Market Access and Market Data Roundtable[56] and its various proposed reforms.[57]

Over the past three years, the Commission has undertaken several steps to address the dramatic expansion of costs and complexity of equities market data. For example, three years ago, after receiving objections from Healthy Markets Association,[58] the Commission abrogated market date fee changes on the basis that the plans had not fulfilled their obligations under the Exchange Act and Commission Rules—for the first time in the more than four-decade history of the CTA/CQ and UTP Plans.[59]

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[54] Letter from Tyler Gellasch, Healthy Markets Association, to Hon. Jay Clayton, Sec. and Exch. Comm'n, Jan. 17, 2018, *available at* https://www.sec.gov/rules/petitions/2018/petn4-717.pdf.

[55] *See, e.g.*, Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, Sec. and Exch. Comm'n, Mar. 12, 2020, *available at* https://www.sec.gov/comments/sr-nysenat-2020-05/srnysenat202005-6944072-212127.pdf; Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, Sec. and Exch. Comm'n, Nov. 18, 2019, *available at* https://www.sec.gov/comments/sr-cboe-2019-082/srcboe2019082-6437608-198687.pdf.

[56] Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, Sec. and Exch. Comm'n, Oct. 23, 2018, *available at* https://www.sec.gov/comments/4-729/4729-4554022-176182.pdf (including copies of the initial plan documents, which were pulled from the Commission's hard copy archives).

[57] *See, e.g.*, Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, Sec. and Exch. Comm'n, Feb. 20, 2020, *available at* https://www.sec.gov/comments/4-757/4757-6847748-209720.pdf; Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, Sec. and Exch. Comm'n, Jan. 3, 2020, *available at* https://www.sec.gov/comments/s7-02-10/s70210-6610667-202889.pdf; Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, Sec. and Exch. Comm'n, Dec. 12, 2019, *available at* https://www.sec.gov/comments/s7-15-19/s71519-6540703-200569.pdf.

[58] Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, Sec. and Exch. Comm'n, Apr. 11, 2018, *available at* https://healthymarkets.wpengine.com/wp-content/uploads/2018/05/04-11-18-HM-letter-Market-Data-Reforms.pdf.

[59] *Order of Summary Abrogation of the Twenty-Third Charges Amendment to the Second Restatement of the CTA Plan and the Fourteenth Charges Amendment to the Restated CQ Plan*, Sec. and Exch. Comm'n, May 1, 2018, *available at* https://www.sec.gov/rules/sro/nms/2018/34-83148.pdf; and *Order of Summary Abrogation of the Forty-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*, Sec. and Exch. Comm'n, May 1, 2018, *available at* https://www.sec.gov/rules/sro/nms/2018/34-83149.pdf.

In September 2018, following Healthy Markets Association objections,[60] the Commission suspended and initiated proceedings to disapprove connectivity fee increases by three exchanges.[61]

In October 2018, the Commission remanded more than 400 market data filings and in May 2019, offered new guidance for how exchanges may improve their filings to better comply with the Exchange Act and Commission Rules.[62] Unfortunately, the Commission lost the remand in court,[63] and the guidance does not appear to have materially changed either the incoming filings or the Commission staff's review and approvals.

In May 2020, the Commission adopted an order directing the exchanges to revise the governance of the CTA/CQ and UTP Plans[64] and approved proposals by the CTA/CQ and UTP Plans to revise their confidentiality and conflicts of interest rules.[65] The timing and certainty of those reforms is also in doubt. Put simply, we do not believe that either of those well-intended reforms is going to resolve the immediate problems with equity market data for investors.

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[60] Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, Aug. 23, 2018, available at https://www.sec.gov/comments/sr-box-2018-24/srbox201824-4258035-173056.pdf (re BOX filing); Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, Sept. 4, 2018, available at https://www.sec.gov/comments/sr-miax-2018-19/srmiax201819-4300775-173209.pdf (re MIAX filing); and Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, Sept. 4, 2018, available at https://www.sec.gov/comments/sr-miax-2018-19/srmiax201819-4300775-173209.pdf (re MIAX PEARL filing).

[61] *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network*, Sec. and Exch. Comm'n, Rel. No. 34-84168, Sept. 17, 2018, *available at* https://www.sec.gov/rules/sro/box/2018/34-84168.pdf; *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule Regarding Connectivity Fees for Members and Non-Members*, Sec. and Exch. Comm'n, Rel. No. 34-84175, Sept. 17, 2018, *available at* https://www.sec.gov/rules/sro/miax/2018/34-84175.pdf; and *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule Regarding Connectivity Fees for Members and Non-Members*, Sec. and Exch. Comm'n, Rel. No. 34-84177, Sept. 17, 2018, *available at* https://www.sec.gov/rules/sro/pearl/2018/34-84177.pdf.

[62] *Staff Guidance on SRO Rule Filings Relating to Fees*, Sec. and Exch. Comm'n, May 21, 2019, *available at* https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.

[63] *NASDAQ Stock Mkt., LLC v. SEC*, 961 F.3d 421 (D.C. Cir. 2020).

[64] *Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88827, May 6, 2020, *available at* https://www.sec.gov/rules/sro/nms/2020/34-88827.pdf.

[65] *See, e.g., Order Approving the Thirtieth Substantive Amendment to the Second Restatement of the CTA Plan and Twenty-Second Substantive Amendment to the Restated CQ Plan, as Modified by the Commission, Concerning Conflicts of Interest*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88823, May 6, 2020, *available at* https://www.sec.gov/rules/sro/nms/2020/34-88823.pdf.

Lastly, in December 2020, the Commission adopted a rule to improve the content and latency of the SIPs, while also introducing competition to the provision of public market data (competing SIPs).[66] Unfortunately, despite a purported June 2021 implementation deadline, that rule is far from fully implemented. Further, we are deeply troubled by several likely unintended consequences of the rule, which we believe could create significant risks for investors.[67]

While the Commission sorts through the complex issues regarding the provision of market data, we urge you to simply split off what we believe is the most essential and easiest-to-implement reform: add essential, basic market data to the CTA/CQ and UTP Plans, including odd-lot orders, depth of book information, and auction information.[68]

At the Commission's Roundtable on Market Access and Market Data more than two years ago, it was widely accepted that this information was important for investors. As we have repeatedly informed the Commission, the exclusion of odd-lot orders in particular from the Plans has created significant opportunities for abuses.[69] Further, the Plans proposed adding odd-lot orders over a year ago, but these efforts have been stalled.

The Commission should take significant steps to improve the quantity, quality, and timeliness of essential market data, while also reducing the complexity, conflicts of interest, and costs with its provision. This will take time, but simply adding the data investors need should not wait any longer.

Promote Robust Public Markets

Ensure Integrity in Listing Process

Over the past year or so, the public equities markets have experienced unprecedented growth of Special Purpose Acquisition Companies (SPACs) as well as an increasing number of so-called "direct listings." The proliferation of these avenues into the public markets have created new opportunities for investors, but also present significant investor protection challenges.

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[66] *Market Data Infrastructure*, Sec. and Exch. Comm'n, 86 Fed. Reg. 18596 (Apr. 9, 2021), *available at* https://www.govinfo.gov/content/pkg/FR-2021-04-09/pdf/2020-28370.pdf (adopted Dec. 9, 2021).

[67] *See* Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, Sec. and Exch. Comm'n, May 26, 2020, *available at* https://www.sec.gov/comments/s7-03-20/s70320-7235195-217095.pdf; *see also*, Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, Sec. and Exch. Comm'n, July 27, 2020, *available at* https://www.sec.gov/comments/s7-03-20/s70320-7489141-221756.pdf.

[68] *See, e.g.*, Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, Mar. 5, 2019, *available at* https://www.sec.gov/comments/4-729/4729-5020185-182987.pdf.

[69] *Id.*; *Accord*, Letter from Tyler Gellasch, Healthy Markets Association, to CTA/CQ and UTP Plan Operating Committees, Oct. 30, 2019, *available at* https://www.theice.com/publicdocs/Healthy_Markets_odd_lot_comment_letter_10.30.19.pdf.

We strongly support the market for public securities. In general, when compared to private securities, public securities typically offer a number of significant advantages for investors, including:

- public securities typically are accompanied by more robust accounting and business disclosure practices;
- information about public companies, including third party research, is much more readily available and fairly distributed (as required by Commission rules, such as Regulation FD);
- public securities are far more easily and reliably valued;
- public securities markets generally offer a transparent and efficient method to liquidate holdings;
- liquidity risks and trading costs for public securities are often significantly lower than for similarly-situated private securities;
- public securities are much more easily benchmarked, such as against the S&P 500; and
- actual net performance tends to be at least as good, if not better, for institutional investors (and is markedly better for less sophisticated investors).

While we strongly support the expansion of the market for public securities, we urge the Commission to review the adequacy of investor protections in SPAC and direct listing processes, including potential greater disclosures regarding financial incentives for sponsors and other potential conflicts of interest in these transactions. Further, the Commission should explore the impact of unclear expectations regarding underwriter due diligence and potential impacts on liability for those involved in the transactions.

We welcome the Commission staff's recent warnings and clarifying statements regarding SPACs, including:

- the Office of Investor Education and Advocacy's March 10, 2021 Investor Alert about SPACs with celebrity involvement and endorsers;[70]
- the Divisions of Corporation Finance's Staff Statement on March 31, 2021 advising potential target companies of future limits on their activities and capital raising efforts if they go public via a merger with a SPAC;[71]

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[70] *Celebrity Involvement in SPACs, — Investor Alert*, Office of Investor Education and Advocacy, Sec. and Exch. Comm'n, Mar. 10, 2021, *available at* https://www.sec.gov/oiea/investor-alerts-and-bulletins/celebrity-involvement-spacs-investor-alert.

[71] *Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies*, Div. of Corp. Finance, Sec. and Exch. Comm'n, Mar. 31, 2021, *available at* https://www.sec.gov/news/public-statement/division-cf-spac-2021-03-31.

- Acting Chief Accountant Munter's March 31, 2021 statement advising potential target companies about considerations regarding governance and financial reporting;[72]
- the Division of Corporation Finance Director John Coates's April 8, 2021 statement about the continued applicability of securities laws (and any resulting liability) to information disclosed for SPAC transactions and raising questions about whether information provided in the de-SPAC, such as projections, should qualify for the safe harbor under Private Securities Litigation Reform Act;[73] and
- the Division of Corporation Finance Acting Director's and Acting Chief Accountant's April 12, 2021 statement on accounting for warrants.[74]

We also welcome reports that the Commission staff may be requesting information from broker-dealers about their risk management of SPAC activities.[75]

We understand that the rapid SPAC expansion of the past year may be rapidly cooling.[76] However, we note that hundreds of billions of dollars remain invested in SPACs that may continue to seek appropriate targets or reasonable terms for investors. Unfortunately, we are concerned that some SPAC Sponsors may be strongly incentivized to consummate merger transitions—even if on poor terms for investors—in order to receive the majority of their anticipated compensation. Given the heightened awareness of the risks and limits that a SPAC may impose on target companies, some target companies are likely to become more cautious, and therefore less willing to become a public company through a SPAC merger. Combined, these pressures may perversely lead to a risk of lower quality target company mergers and inflated valuations.

We urge the Commission to review past, but also future, merger transactions to ensure that investors are fully aware of the consequences and terms of these deals. Further, we urge the Commission to consider actions to make it easier for SPAC Sponsors to

[72] *Financial Reporting and Auditing Considerations of Companies Merging with SPACs*, Office of the Chief Accountant, Sec. and Exch. Comm'n, Mar. 31, 2021, *available at* https://www.sec.gov/news/public-statement/munter-spac-20200331.

[73] *SPACs, IPOs, and Liability Risk under the Securities Laws*, Div. of Corp. Fin., Sec. and Exch. Comm'n, Apr. 8, 2021, *available at* https://www.sec.gov/news/public-statement/spacs-ipos-liability-risk-under-securities-laws.

[74] *Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies ("SPACs")*, Div. of Corp. Finance, Sec. and Exch. Comm'n, Apr. 12, 2021, *available at* https://www.sec.gov/news/public-statement/accounting-reporting-warrants-issued-spacs.

[75] Jody Godoy and Chris Prentice, *U.S. regulator opens inquiry into Wall Street's blank check IPO frenzy -sources*, Reuters, Mar. 24, 2021, *available at* https://www.reuters.com/business/exclusive-us-regulator-opens-inquiry-into-wall-streets-blank-check-ipo-frenzy-2021-03-25/.

[76] David Michaels, Amrith Ramkumar, Alexander Osipovich, *SPAC Hot Streak Put on Ice by Regulatory Warnings*, Wall St. J., Apr. 16, 2021, *available at* https://www.wsj.com/articles/spac-hot-streak-put-on-ice-by-regulatory-warnings-11618565403.

effectively de-list and "give back" the funds of the SPAC offering to investors prior to the end of the investment period.

Similarly, we urder the Commission to review whether direct listings provide adequate investor protections. Because these offerings generally do not involve underwriting intermediaries who would otherwise perform important roles and responsibilities in traditional IPOs, investors who may acquire shares in the opening auctions face increased risks.[77]

Lastly, we are concerned that the Commission staff is inadequately scrutinizing initial offering documents, such as the S-1, for compliance with the federal securities laws. In particular, we note that the disclosures required by these documents are intended to provide investors with a full and fair understanding of the offering, including the company's management, financials, operations, and risks. Further, these documents are intended to provide basic accountability for executives and the company to shareholders and regulators. Recently, we have seen a number of companies go public with what appear to be inadequate or misleading disclosures. In other cases, the disclosures appear to hint at very significant risks, but they are not provided with sufficient specificity so as to assess their potential impacts on the company. We urge you to direct the staff to scrutinize these essential offering documents to ensure that they fulfill the purposes of the disclosure regime.

Address Areas of Potential Systemic Risk

Enhance Stability and Utility of Money Market Funds

We urge you to review the circumstances surrounding the outflows of money market funds in March 2020, and take actions to enhance funds' liquidity, and eliminate regulatorily-imposed limits that appeared to incentivize the rapid redemptions from prime money market funds.

In March 2020, the economy and financial markets froze, and much like in 2008, the federal government intervened. In the aftermath of that intervention, banking regulators have once again looked at money market funds as in need of reform. Earlier this year, the Commission released for public comment the President's Working Group on Financial Markets Report, *Overview of Recent Events and Potential Reform Options for Money Market Funds*.[78]

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[77] *See, e.g.*, Statement on Primary Direct Listings by Hon. Allison Herren Lee and Hon. Caroline Crenshaw, Sec. and Exch. Comm'n, Dec. 23, 2020, *available at* https://www.sec.gov/news/public-statement/lee-crenshaw-listings-2020-12-23 (raising issues regarding traceability of shares).

[78] *Request for Comment on Potential Money Market Fund Reform Measures in President's Working Group Report*, Sec. and Exch. Comm'n, Inv. Co. Act Rel. No. 34188, (Feb. 4, 2021), *available at* https://www.sec.gov/rules/other/2021/ic-34188.pdf ("2020 PWG Report Release").

Following the 2008 financial crisis, the Commission adopted extensive reforms to enhance the liquidity and stability of money market funds.[79] These 2010 Reforms required a fund to have at least (1) 10 percent of its assets in cash, treasuries, or securities that could turn into cash within one day, and (2) 30 percent in cash or securities that can turn into cash within one week.

The 2010 Reforms also imposed (1) limits on the overall maturities of a fund's portfolio, including that the maximum weighted average portfolio maturity was shortened from 90 to 60 days, and the weighted average life of the portfolio is limited to 120 days;[80] (2) requirements that funds hold sufficiently liquid securities to meet foreseeable redemptions;[81] (3) minimum credit quality standards, (4) stress testing requirements; and (5) monthly and other periodic disclosure requirements.[82]

The 2010 Reforms dramatically enhanced the stability and utility of money market funds. However, in 2014, the Commission adopted further reforms. The 2014 Reforms profoundly changed the money market fund industry. These reforms imposed fees (but permitted a stable share price) for any prime or tax-exempt fund whose shareholders are limited to natural persons, while imposing a floating share price and fees and gates for any prime or tax-exempt fund whose shareholders are not so limited.[83] It essentially left government funds alone. At the time, Democratic Commissioner Kara Stein objected to the 2014 Reforms, in part out of concerns that the gates would likely serve as a new threshold which might itself precipitate destabilizing runs in advance of the potential closing of the gates.[84] These reforms went into effect during 2016, and the impact was dramatic. That year, prime funds' assets fell from $1.27 trillion to $0.37 trillion, while government fund assets grew from $1.2 trillion to $2.2 trillion.[85]

In March 2020, the Board of Governors of the Federal Reserve System announced the creation of the Commercial Paper Funding Facility ("CPFF") and the Money Market

[79] *Money Market Fund Reform*, Sec. and Exch. Comm'n, 75 Fed. Reg. 10060, 10106 (Mar. 4, 2010), *available at* https://www.sec.gov/rules/final/2010/ic-29132fr.pdf ("2010 Reforms").
[80] 2010 Reforms, at 10070.
[81] 2010 Reforms.
[82] 2010 Reforms.
[83] At the time, SEC Chair Mary Jo White justified the distinction between "retail" and "institutional" money funds by explaining that "While the costs of a floating NAV can be justified against the demonstrable run risk in institutional prime funds, a different balance must be struck for retail and government funds." Statement of Hon. Mary Jo. White, SEC, July 23, 2014, *available at* https://www.sec.gov/news/public-statement/2014-07-23-open-meeting-statment-mjw.
[84] Statement of Hon. Kara M. Stein, July 23, 2014, *available at* https://www.sec.gov/news/public-statement/2014-07-23-open-meeting-statement-kms ("Ultimately, despite the rule's efforts to mitigate the risks posed by gates, I believe the incentives to avoid them will remain powerful. I fear these incentives may result in a greater chance of fire sales during times of stress, and a spread of the panic to other parts of our financial system, while also denying both investors and issuers access to capital.").
[85] Data excludes funds used as cash management tools for other mutual funds.

Mutual Fund Liquidity Facility ("MMLF"). These actions were ostensibly aimed to "assist money market funds in meeting demands for redemptions by households and other investors, enhancing overall market functioning and credit provision to the broader economy."[86]

Put simply, the Federal Reserve Bank of Boston promised to aid banks buying money market fund assets—even though money market funds were not dipping below the 30 percent weekly liquidity levels, much less the 10 percent daily thresholds.[87] Notably, for the entire period of the stress and up through February 2021, the median weekly liquid asset percentages have been well in excess of 30 percent. It is currently over 50 percent.

Some have asserted that money market funds need reform because prime money market fund outflows from March 2020 allegedly led to a freezing of the commercial paper market. That is just not true.

Prime money market funds contributed less than one-fifth of the outflows from the commercial paper market. What about the other four-fifths? Interestingly, as the PWG Report acknowledges, "at the end of February, prime [money market funds] offered to the public owned about 19 percent of outstanding [commercial paper]," which was over a $1.1 trillion market.[88] Yet, over the two weeks of March in question, these funds cut their holdings of commercial paper by just $35 billion (about 3 percent of the then-outstanding commercial paper market).[89]

Are we to believe that a 3 percent outflow from the market caused the entire financing system to freeze and necessitate government intervention? This assumption is made even more dubious by the fact that much, much greater outflows from prime money market funds had occurred in 2016 (roughly $900 billion), but with muted effects on the commercial paper markets.

Nevertheless, we agree that the rapid outflows from the prime money market funds could be concerning. In that regard, we note that the majority of these outflows came from institutional prime funds where gates could potentially come down, and that funds that approached the 30 percent weekly liquid asset threshold for the imposition of the gates seemed to be most impacted (as were those sponsored by globally systemically

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[86] *Id.*
[87] Once the facilities were created, money market funds advisers would be remiss to ignore them as potential avenues to quickly add liquidity to their holdings — even if not necessary. In this regard, these programs were similar to other federal programs designed to mitigate the economic shock from the onset of the pandemic.
[88] PWG Report, at 11, n.15.
[89] PWG Report, at 11.

significant banks).[90] It is very clear that, as Commissioner Stein feared, the linkage of the liquidity threshold to the imposition of a gate acted as a magnet for redemptions.

As a result, we believe that decoupling the liquidity percentages from the imposition of gates should be the Commission's top priority in modernizing money market fund rules. We further urge the Commission to consider revising its liquidity requirements. However, as we outlined in our recent letter to the Commission,[91] we strongly oppose efforts to simply kill money market funds by adding capital requirements or other unworkable, anti-investor restrictions.

Enhance Securities Lending Transparency and Resiliency

In 2013, the Financial Stability Board recommended that regulators obtain "a comprehensive and timely picture of how securities financing markets were evolving and the risks associated with patterns of behaviour in these markets."[92] Section 984(b) of the Dodd-Frank Act directed the Commission to "promulgate rules that are designed to increase the transparency of information available to brokers, dealers, and investors, with respect to the loan or borrowing of securities."[93]

Despite the systemic importance of securities lending markets, despite the Dodd-Frank Act directive to increase transparency in these markets, and despite periodic reminders of weaknesses in these markets, the Commission has not updated its rules.

Whether highlighted by the short selling associated with the GameStop dislocations, the securities repurchase agreements ("repo") that were central to the Financial Crisis,[94] or the "repo-to-maturity" trading that contributed to the collapse of MF Global,[95] the Commission has done essentially nothing to increase its own—or the market participants'—visibility into these opaque, arcane, and systemically important markets.

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[90] Viktoria Baklanova, Isaac Kuznits, and Trevor Tatum, *Prime MMFs at the Onset of the Pandemic: Asset Flows, Liquidity Buffers, and NAVs*, Sec. and Exch. Comm'n, at 1, Apr. 15, 2021, *available at* https://www.sec.gov/files/prime-mmfs-at-onset-of-pandemic.pdf.

[91] Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, Sec. and Exchange Comm'n, Apr. 19, 2021, *available at* https://healthymarkets.org/wp-content/uploads/2021/04/Money-Funds-PWG-Response-to-SEC-4-19-21.pdf.

[92] *Strengthening Oversight and Regulation of Shadow Banking*, Financial Stability Board, Aug. 29, 2013, *available at* https://www.fsb.org/wp-content/uploads/r_130829b.pdf.

[93] *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, Pub. L. 111–203 (2010), *available at* https://www.congress.gov/111/plaws/publ203/PLAW-111publ203.pdf.

[94] Frank Byrt, *The Repo Market and the Start of the Financial Crisis*, National Bureau of Economic Research, Dec. 2009, *available at* https://www.nber.org/digest/dec09/repo-market-and-start-financial-crisis ("The financial panic of 2007-8 stemmed from a run on the repurchase or "repo" market — the primary source of funds for the securitized banking system.").

[95] John Carney, *The Trade That Killed MF Global*, CNBC, Nov. 2, 2011, *available at* https://www.cnbc.com/id/45132384.

We urge you to enhance the Commission's and the public's visibility into securities finance markets (which are not within the scope of the Consolidated Audit Trail).[96]

Consider Shortening the Trade Settlement Cycle

The longer the period between the trade and settlement, the greater the risk that the settlement might not happen. In general, shortening the cycle is generally risk-reducing, which is why we were pleased when the Commission shortened the cycle from T+3 to T+2 just a few years ago.[97]

In 2015, the SEC's Investor Advisory Committee "strongly" recommended that the settlement cycle be shortened to T+1 for "U.S. equities and other US securities (corporate and municipal bonds, and UIT transactions) as soon as possible."[98]

If the US is to remain the leader of the global financial system, it should consider all steps to modernize its payments and settlement systems. However, we do not believe that "real time" processing is, at this time, feasible. Instead, we encourage the Commission to explore further shortening the settlement cycle, and note that DTCC has recently offered suggestions on why and how this should be done.[99]

Implement Security-Based Swaps Regulatory Regime

As you are no-doubt well aware, the Commission's Dodd-Frank Act-mandated security-based swaps rules are largely unimplemented. Some of the consequences of this failure have been highlighted by recent events involving Archegos Capital Management. The Commission, other regulators, and market participants would benefit from a far more robust regime for trading security-based derivatives, which should include efforts to not just have reporting, but also SEF-trading and centralized clearing.

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[96] We note that the Europeans have recently implemented a Securities Finance Transaction Regulation ("SFTR"). The compliance programs and vendor ecosystem developed in response to SFTR would drastically reduce the cost of an SEC securities finance transaction reporting regime, given that the vast majority of securities finance market participants operate internationally. See *SFTR Reporting*, ESMA, https://www.esma.europa.eu/policy-activities/post-trading/sftr-reporting.

[97] See, Press Release, *SEC Adopts T+2 Settlement Cycle for Securities Transactions*, SEC. Mar. 22, 2017, *available at* https://www.sec.gov/news/press-release/2017-68-0.

[98] *Shortening the Trade Settlement Cycle in U.S. Financial Markets, Recommendation of the Investor Advisory Committee*, SEC, Feb. 12, 2015, *available at* https://www.sec.gov/spotlight/investor-advisory-committee-2012/settlement-cycle-recommendation-final.pdf.

[99] *Why Shortening the Settlement Cycle Will Benefit the Industry & Investors*, DTCC, Feb. 4, 2021, *available at* https://www.dtcc.com/dtcc-connection/articles/2021/february/04/why-shortening-the-settlement-cycle-will-benefit-the-industry-and-investors.

Consider Enhancements to the Broker Capital Regime

The Commission's longstanding capital regime for broker-dealers should be reconsidered. Unlike capital rules imposed on banking entities by the banking regulators, capital rules for broker dealers are generally neither designed nor intended to prevent a firm's failure.[100] The Commission (and its staff) have generally taken the position that the agency should be agnostic as to whether a broker fails, provided that the customers' assets in the accounts may be eventually protected.

In this way, the provisions are intended to reduce the harm to investors if a broker were to fail, but not materially reduce the likelihood of such a failure. This approach—which has persisted despite the collapse of Lehman Brothers during the last financial crisis—inexplicably ignores potential massive secondary ramifications for investors.

As regulators and lawmakers painfully learned following the collapse of MF Global, protection of customers' assets is important, but so too is the timing of the availability to those assets. What if a retail broker dealer with millions of accounts invested in fractional shares of equities and diverse assets were to fail? What if the broker-dealer had an affiliate with significant crypto-currency holdings? We question whether the Securities Investor Protection Corporation (SIPC) and the Commission would be able to ensure that account-holders would have timely access to their assets, leading to a potential disaster for these investors. What would be the potential fallout for other firms in the marketplace if such a failure took place? Could it trigger other broker failures or market turmoil?

Similarly, we recently saw how several brokers were inadequately capitalized to support their customers' trading, leading to their customers being unable to execute desired trades. Robinhood customers, for example, were blocked from buying specific securities during a time of high volatility. The Commission's capital framework seems to ignore these direct, negative costs on investors. Worse, these instances have given rise to accusations that the financial markets are "rigged" or otherwise discriminatory in ways that undermine investor confidence and can deter future investment.[101]

We urge you to reconsider the existing broker capital framework to better protect investors from potential brokers' risks.

Conclusion

[100] We are not commenting on the capital requirements on broker-dealers that may be imposed on some entities pursuant to consolidated capital requirements imposed by the Board of Governors of the Federal Reserve System.

[101] Ben Gilbert and Allana Akhtar, *Robinhood users are revolting against the trading app after it stopped trades of GameStop*, Business Insider, Jan. 28, 2021, *available at* https://www.businessinsider.com/gamestop-stock-trading-robinhood-users-critics-revolt-2021-1.

We welcome you to the Commission and look forward to working with you on these very important issues for investors to continue making the US capital markets the strongest and most robust markets in the world.

Sincerely,

Tyler Gellasch
Executive Director

Cc: Hon. Allison Herren Lee, Commissioner
Hon. Hester Peirce, Commissioner
Hon. Elad Roisman, Commissioner
Hon. Caroline Crenshaw, Commissioner
Robert Cook, President and CEO, FINRA
Robert L.D. Colby, Chief Legal Officer, FINRA