WE THE INVESTORS

September 15, 2026

By Email Submission

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Office of the Corporate Secretary
FINRA
1700 K Street, NW
Washington, DC 20006

cc: Division of Trading and Markets, U.S. Securities and Exchange Commission; File No. S7-2026-20

Re: Regulatory Notice 26-15, FINRA Requests Comment on Modernizing FINRA's Best Execution Guidance

"Because payment for order flow creates fundamental conflicts of interest that cannot be cured by disclosure, the Commission should ban payment for order flow altogether." – Citadel, comment letter to the SEC (April 13, 2004)

Ms. Mitchell:

We The Investors ("WTI")[1] appreciates the opportunity to comment on FINRA's Regulatory Notice 26-15 (the "Notice"). This is the first comment letter WTI has filed with FINRA. We have filed many with the Securities and Exchange Commission (the "SEC" or "Commission"), and individual investors who support our work have filed thousands more,[2] but until now the retail investors we represent have had no occasion to write to the self-regulatory organization that is supposed to be protecting them. The Notice supplies the occasion. FINRA is asking, at the very moment the Commission proposes to rescind the only order-by-order price protection retail investors have, whether FINRA's best execution guidance should be "modernized." It should. But not in the direction the Notice points.

We The Investors is organized around five principles laid out in our Investors' Bill of Rights: Transparency; Simplicity and Fairness; Choice and Control; Best Execution; and Better Settlement

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[1] We The Investors is a grassroots advocacy campaign launched in March 2022, built by, and for, retail investors. Our mission is to advocate for retail investors and to empower them to represent themselves and understand market structure issues. We are supported by industry firms and over one hundred thousand retail investors. www.wetheinvestors.org.

[2] WTI-drafted letters were filed 1,703 times in the Commission's Regulation Best Execution and Regulation NMS files (S7-32-22 and S7-30-22, the same form letter indexed in both files), 2,654 times in the Order Competition Rule file (S7-31-22), 854 times in the minimum pricing increment file (S7-30-22, a separate letter), and, as of the date of this letter, 1,070 times in the Rule 611 rescission file (S7-2026-20, indexed as Letter Type B). See the Commission's comment file indices at https://www.sec.gov/comments/s7-31-22/s73122.htm, https://www.sec.gov/comments/s7-30-22/s73022.htm, https://www.sec.gov/comments/s7-32-22/s73222.htm and https://www.sec.gov/rules-regulations/public-comments/s7-2026-20. Our own letter on the Rule 611 rescission proposal is Letter from David Lauer, Co-Founder, We The Investors, to the SEC, File No. S7-2026-20 (July 21, 2026), https://www.sec.gov/comments/S7-2026-20/s7202620-970419-3008846.pdf (the "WTI Rule 611 Letter").

and Clearing.[3] Our Best Execution principle is simple: "Brokers must be held to a true best execution standard, not a 'good enough' standard. Order routing inducements are an intractable conflict-of-interest for brokers, and must be fully disclosed or eliminated." This letter is about the gap between that sentence and the standard FINRA has actually enforced.

Our position can be stated simply. For at least a decade FINRA has been unwilling or unable to enforce Rule 5310 against the conduct that matters most to retail investors: the routing of their orders to the wholesalers that pay their brokers the most, on terms that reduce the price improvement those orders would otherwise receive. FINRA has said, repeatedly and in writing, that this conduct is prohibited. FINRA has found, repeatedly and in writing, that firms engage in it. FINRA has never brought a case on it. The handful of cases FINRA has brought are process cases about the adequacy of a firm's paperwork, resolved two to nine years after the fact, for fines that would not cover a wholesaler's weekend, with no restitution to a single customer. And now, having produced that record, FINRA proposes to declare its approach "time-tested" and asks whether the one review standard that could actually be enforced, order-by-order review of internalized orders, should be relaxed.

Before the wholesalers and discount brokers raise this point, let us be clear. The lack of enforcement of Rule 5310 is not because they are providing best execution. It is because Rule 5310, as FINRA has chosen to administer it, is unenforceable against the conduct that matters. The rule states an outcome standard. FINRA enforces a paperwork standard. We explain the difference in Section V. We will below document clear, publicly known cases of Rule 5310 violations that were never the subject of enforcement actions. We will also show how FINRA stated each year that the patterns and practices in our markets were problematic, yet still did not act. We will also provide recommendations for what we would like to see in a modern best execution framework from FINRA.

Because the Commission has proposed to rely on FINRA's best execution regime as the sole protection for retail orders after Rule 611 is gone, we are filing this letter in the Commission's Rule 611 rescission docket as well, and we ask the Commission to make FINRA's demonstrated enforcement capacity a finding, not an assumption, in any final rule.

I. The Record: Ten Years, Ten Cases, Thirteen Million Dollars, Zero Restitution

FINRA Rule 5310 requires a member to "use reasonable diligence to ascertain the best market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions."[4] Rule 5310 has been substantively unchanged since 2012 and was last amended in May 2014. We reviewed every monthly "Disciplinary and Other FINRA Actions" report FINRA published from January 2016 through July 2026, 127 reports in all, together with FINRA's news releases, its own citations of its enforcement record, and BrokerCheck. Here is every action in that period in which FINRA charged a firm under Rule 5310 for the way it decided where to route customers' equity or options orders, which is the conduct that matters to the retail investors we represent.[5]

[3] The Investors' Bill of Rights is available at https://www.wetheinvestors.org/principles.

[4] FINRA Rule 5310(a)(1), https://www.finra.org/rules-guidance/rulebooks/finra-rules/5310.

[5] Matter numbers: E*TRADE 20130368815-01; Robinhood 2017056224001; TradeStation 2014041812501; Deutsche Bank 2014041813501; Barclays 2014041808601; Open to the Public Investing 2020065340901; Interactive Brokers 2014041809401; SpeedTrader (formerly Mint Global Markets) 2017056224501; Folio 2017056222301; tastytrade 2017056224801. "Investigation opened" is the year encoded in the matter number, except for tastytrade, where the firm's

Firm	Sanction	Restitution	Investigation opened, settled	What FINRA found
E*TRADE Securities	$900,000	None	2013 to June 2016 (about 3 years)	Review lacked accurate data; affiliate's routing changes accepted without analysis
Robinhood Financial	$1,250,000	None	2017 to Dec. 2019 (about 2 years)	All four venues paid for order flow; price improvement elsewhere not considered; "hundreds of thousands of orders each month" never reviewed
TradeStation Securities	$850,000	None	2014 to Mar. 2021 (about 7 years)	Routed to venues paying PFOF and highest rebates without execution quality analysis
Deutsche Bank Securities	$2,000,000	None	2014 to Mar. 2022 (about 8 years)	Own ATS first, despite 12 to 32 percent fill rates versus over 90 percent at exchanges
Barclays Capital	$2,000,000	None	2014 to Oct. 2022 (about 8.5 years)	Own ATS first, despite inferior fill rates in every quarter from 2015 through Q1 2019
Open to the Public Investing	$500,000	None	2020 to June 2023 (about 3 years)	Execution quality "reviews" consisted of reading the clearing firm's Rule 606 reports; no comparison to competing markets; PFOF not disclosed
Interactive Brokers	$3,500,000	None	2014 to Dec. 2023 (about 9 years)	IOI venues preferenced without evaluating price improvement; month-end rebate-tier routing unassessed
SpeedTrader (formerly Mint Global Markets)	No fine ("due to the firm's financial status")	None	2017 to Sept. 2024 (about 7 years)	Review was a manual check of ten random executions every two weeks; routed roughly 100 million shares a year to net-trading broker-dealers interposed between the firm and the best market
Folio Investments (Goldman Sachs Custody Solutions)	$1,300,000	None	2017 to Feb. 2026 (about 9 years)	Routed to two market centers that paid for order flow, then from 2022 to an affiliate; never compared to competing markets
tastytrade	$850,000	None	Nov. 2019 to July 2026 (6.7 years)	8.8 million orders routed exclusively to five market makers that paid for order flow; never compared to competing venues

BrokerCheck disclosure reports the matter as initiated Nov. 11, 2019. Sources: FINRA news release, June 2, 2016 (E*TRADE); FINRA news release, Dec. 19, 2019, and Disciplinary and Other FINRA Actions ("Monthly Report"), Feb. 2020 (Robinhood); Monthly Report, May 2021 (TradeStation); FINRA AWC No. 2014041813501 (Mar. 7, 2022) (Deutsche Bank); FINRA AWC No. 2014041808601 (Oct. 5, 2022) (Barclays); Monthly Report, Aug. 2023 (Open to the Public); Monthly Report, Feb. 2024 (Interactive Brokers); Monthly Report, Nov. 2024 (SpeedTrader); Monthly Report, Apr. 2026 (Folio); FINRA BrokerCheck report for tastytrade, Inc. (CRD 277027) (tastytrade). Monthly Reports are at https://www.finra.org/rules-guidance/oversight-enforcement/finra-disciplinary-actions/monthly-disciplinary-actions. We have excluded from the table Rule 5310 actions that did not concern the selection of routing venues for customer orders: the order-handling and pricing cases described in the text and note 15, and four market-maker actions concerning the handling of other broker-dealers' orders (Virtu Americas, $175,000 fine and $164,138 restitution, July 2020, a programming error affecting 13,136 extended-hours orders; G1 Execution Services, $575,000 fine and $816,619 restitution, June 2021, OTC order handling; StoneX Financial, $70,000 fine and $27,074 restitution, Aug. 2024, OTC order handling; Cantor Fitzgerald, $100,000 fine and $51,241 restitution, Aug. 2024, OTC order handling). Canaccord Genuity's March 2026 $20 million omnibus anti-money-laundering settlement lists Rule 5310 among some two dozen charged provisions without apportioning any part of the fine to it.

Firm	Sanction	Restitution	Investigation opened, settled	What FINRA found
Total: ten cases, ten years	**$13,150,000**	**$0**	**Median 7 years**	**Ten process cases. Zero quantified harm. Zero wholesaler respondents for retail routing. Zero cases on the terms of a PFOF arrangement.**

Not one case quantified customer harm. Not one case named a wholesaler as a respondent for its handling of retail order flow.[6] Not one case alleged that the terms of a payment for order flow arrangement reduced the price improvement customers received, which is the specific conduct FINRA reminded members was unlawful in Regulatory Notice 21-23. Every one of the ten is a "process" case: the firm's regular and rigorous review was not regular enough, or rigorous enough, or documented enough. The price the customer actually got is not the violation. The paperwork is.

Look at the matter numbers. Four of the ten cases carry 2014 matter numbers, meaning FINRA opened a best execution sweep in 2014 and closed its last case from that sweep in December 2023. Four carry 2017 matter numbers; that sweep, announced in FINRA's January 2018 priorities letter as an examination "that focuses on broker-dealers' best execution obligations when they receive order routing inducements, such as payment for order flow and maker-taker rebates, or when they internalize order flow,"[7] produced its first case in December 2019 and its last in July 2026. FINRA took eight and a half years to finish examining zero-commission brokers' payment for order flow arrangements, and the result was four settlements, three fines totaling $3.4 million, one firm too financially weak to fine, and no restitution. During those eight and a half years Robinhood alone collected, by its own public disclosures, several billion dollars in payment for order flow and related transaction revenue.[8]

The E*TRADE case deserves a word of its own, because of where it came from. It did not come from FINRA's surveillance. In late 2012, Ken Griffin, then an E*TRADE director, with Citadel among E*TRADE's largest shareholders, pressed the firm on whether customers whose orders were routed to E*TRADE's own market maker, G1 Execution Services, were receiving best execution. E*TRADE conducted an internal review, reported it to its regulators, and FINRA opened an examination of both firms' routing practices in July 2013.[9] The $900,000 settlement followed in June 2016, for

[6] Citadel Securities' July 2020 FINRA settlement ($700,000 plus restitution) was under Rules 5320 and 6460 (trading ahead and limit order display), not Rule 5310. The only Rule 5310 actions against retail wholesalers in the period are the two noted in note 5: Virtu Americas (July 2020; $175,000; a programming error that executed 13,136 extended-hours orders from two broker-dealer clients inside the NBBO but short of the midpoint) and G1 Execution Services (June 2021; $575,000; OTC securities, not NMS stocks). Neither concerned the handling of retail NMS order flow or the terms of a payment for order flow arrangement. We located no Rule 5310 action of any kind against Citadel Securities, Two Sigma Securities, Jane Street, Hudson River Trading or UBS Securities in the wholesaling context.

[7] FINRA, 2018 Annual Regulatory and Examination Priorities Letter (Jan. 2018), https://www.finra.org/sites/default/files/2018-regulatory-and-examination-priorities-letter.pdf. Robinhood's matter number is 2017056224001; Folio's is 2017056222301; tastytrade's is 2017056224801 (BrokerCheck shows the tastytrade matter initiated Nov. 11, 2019).

[8] Robinhood Markets, Inc., Form S-1 (July 1, 2021), https://www.sec.gov/Archives/edgar/data/1783879/000162828021013318/robinhoods-1.htm (transaction-based revenues, consisting of equity and options payment for order flow and cryptocurrency transaction rebates, of $170.8 million for 2019 and $720.1 million for 2020); Robinhood Securities, Rule 606 report for the first quarter of 2021 (approximately $331 million in payment for order flow and transaction rebates in a single quarter). Robinhood's transaction-based revenues from 2019 through 2025 exceed several billion dollars in its annual reports on Form 10-K.

[9] E*TRADE Financial Corp., Form 10-Q for the quarter ended June 30, 2013, Note 15, Regulatory Matters, https://www.sec.gov/Archives/edgar/data/1015780/000119312513321845/R23.htm ("During 2012, the Company completed a review of order handling practices and pricing for order flow between E*TRADE Securities LLC and G1

conduct between July 2011 and June 2012.[10] So the one affiliate-internalization case FINRA can claim in a decade arrived through the good offices of the largest wholesaler, who was upset that a conflicted routing arrangement disadvantaged them! Imagine that! Seven months later the Commission found that Citadel Securities itself had, from late 2007 through January 2010, run algorithms that executed millions of retail orders at prices it could see were not the best available.[11] FINRA, which regulated Citadel Securities throughout, brought nothing. In September 2017, Citadel Securities' Head of Execution Services took a seat on FINRA's Board of Governors.[12]

For scale: FINRA collected $89 million in fines in 2023, $59 million in 2024, and $75 million in 2025.[13] The entire ten-year total for order routing cases is about one seventh of what FINRA collected in fines in 2023 alone. Best execution has appeared among the top five fine categories in the annual Eversheds Sutherland survey of FINRA sanctions exactly once in the past five years: in 2022, in fifth place, on the strength of the two $2 million Deutsche Bank and Barclays settlements. It has not appeared since. In 2025, a year in which FINRA brought 431 disciplinary actions, the fewest in at least a decade, FINRA did not bring a single action citing Rule 5310.[14]

Over the same ten years FINRA also charged Rule 5310, or used its language, in a second category of cases: firms that failed to execute customers' market orders "fully and promptly," firms that failed to find the best price for a preferred security or a corporate or municipal bond, and market

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Execution Services, LLC. … On July 11, 2013, FINRA notified E*TRADE Securities LLC and G1 Execution Services, LLC that it is conducting an examination of both firms' routing practices."). Mr. Griffin's role is reported in Jenny Strasburg and Scott Patterson, "Citadel Questions E*Trade Order Routing," Wall Street Journal (Nov. 2012) ("Mr. Griffin's questions prompted E*Trade to conduct an internal review into its handling of orders from customers of its online brokerage, including how it uses its own market-making business to execute those trades"). Mr. Griffin joined E*TRADE's board in June 2009 under Citadel's 2007 investment agreement and declined to stand for re-election in 2013; E*TRADE Financial Corp., Form 8-K (Mar. 21, 2013). E*TRADE sold G1 Execution Services to an affiliate of Susquehanna International Group on February 10, 2014, and agreed to route 70 percent of its customer equity order flow to it for five years "subject to best execution standards." E*TRADE Financial Corp., Form 8-K (Feb. 11, 2014), https://www.sec.gov/Archives/edgar/data/1015780/000115752314000543/a50801535.htm.

[10] FINRA AWC No. 20130368815-01 (June 2, 2016); FINRA news release, June 2, 2016 ("E*Trade regularly accepted requests from G1X to change prioritization in E*Trade's order routing system"). The conduct period is as reported from the AWC; see also Section I, note 5.

[11] In the Matter of Citadel Securities LLC, Securities Act Release No. 10280 (Jan. 13, 2017), https://www.sec.gov/litigation/admin/2017/33-10280.pdf (relevant period "from late 2007 through January 2010"); SEC Press Release 2017-11, supra note 48.

[12] FINRA, Election Notice (July 21, 2017), https://www.finra.org/sites/default/files/notice_doc_file_ref/Election-Notice-072117.pdf (Joseph M. Mecane, Floor Member Representative Governor, appointed to a second term beginning at the 2017 annual meeting; "Joseph M. Mecane will be joining Citadel Securities in September as the Head of Execution Services"); Citadel Securities, leadership biography of Joseph Mecane, https://www.citadelsecurities.com/who-we-are/leadership/joseph-mecane/ (he "served on the FINRA Board of Governors"). Mr. Mecane was first appointed Floor Member Governor in December 2014 while at Barclays.

[13] Eversheds Sutherland, annual FINRA sanctions studies (2022 through 2026 editions), https://www.eversheds-sutherland.com/en/united-states/insights/2025-finra-sanctions-study, as reported in Financial Advisor (Mar. 18, 2026), WealthManagement.com (Mar. 17, 2026; Mar. 13, 2024) and InvestmentNews. Eversheds restates prior-year totals as late-reported actions are added; figures here are as reported in each year's study. The 2022 study's fifth-ranked category was "Best Execution (2 cases, $4.0 million)," reflecting Deutsche Bank Securities and Barclays Capital.

[14] We reviewed every FINRA monthly "Disciplinary and Other FINRA Actions" report covering calendar 2025 activity (the January 2025 through February 2026 reports) for any reference to Rule 5310, "best execution," "regular and rigorous" or "execution quality." There are none. Robinhood's $26 million March 2025 settlement (AWC, Mar. 7, 2025, https://www.finra.org/sites/default/files/2025-03/robinhood-AWC-030725.pdf) concerned anti-money-laundering, CAT reporting, influencer communications and disclosure of its order "collaring" practice, charged under FINRA Rules 2210, 2010, 3110 and 3310, NASD Rule 3010 and Exchange Act recordkeeping provisions, among others; it does not cite Rule 5310.

makers that mishandled other broker-dealers' OTC orders. We count roughly two dozen of those. The typical sanction was a fine between $12,500 and $125,000 and restitution measured in hundreds or low thousands of dollars; the largest, against Merrill Lynch for preferred-securities pricing in 2017, was $650,000 with $124,000 in restitution.[15] None of them concerned the decision to route retail orders to a venue that pays the broker. The words "regular and rigorous" and "execution quality" do not appear in a single FINRA monthly disciplinary report from 2016 through 2018. Those cases are the rest of FINRA's best execution docket, and they confirm the point: FINRA enforces Rule 5310 at the margins, against the stale bond price and the delayed market order, and not at the center, where the money is.

FINRA's own leadership has confirmed the thinness of this record. When FINRA's CEO testified before the House Financial Services Committee in May 2021, at the height of the GameStop episode, with payment for order flow the subject of national attention, the retail payment for order flow enforcement examples he offered Congress were TradeStation (March 2021) and Robinhood (December 2019), with E*TRADE (June 2016) added in a footnote.[16] Three cases in five years was the whole record FINRA could point to on the question Congress was asking.

The SEC's own Office of the Investor Advocate saw this coming. In its 2018 report to Congress, the Investor Advocate wrote that recent SEC and FINRA enforcement actions "tend to focus on black-and-white allegations such as misrepresentations, rather than more gray areas such as a broker's obligation to achieve the 'best execution' of customer orders. In our outreach to investors, we have heard particular concerns that troubling practices may proliferate if regulators do not bring cases that specifically address best execution."[17] That was eight years ago. The practices proliferated. The cases did not come.

II. What FINRA Knew, in FINRA's Own Words

It would be one thing if FINRA's enforcement priorities and findings reports reflected this idyllic environment of retail order routing. It does not.

[15] From the Monthly Reports, January 2016 through December 2024. Equity order-handling ("fully and promptly") cases charging or describing Rule 5310: D.A. Davidson (Jan. 2016, $22,500); Aegis Capital (Feb. 2016, $17,500; May 2017, $52,000; Nov. 2017, $27,500); Feltl & Company (Feb. 2016, $12,500); Morgan Stanley Smith Barney (Apr. 2016, $125,000); Financial West Investment Group (May 2016, $30,000); Merrill Lynch (Nov. 2016, $50,000, best execution reviews of the firm's own ATS used no independent data); Canaccord Genuity (Nov. 2016, $12,500); Finance 500 (Dec. 2016, $15,000); Barclays Capital (Dec. 2017, $40,000, twenty intermarket sweep orders executed inferior to displayed quotes, $850.47 customer harm); StockCross Financial Services (Nov. 2018, $35,000); Wallachbeth Capital (Oct. 2019, $60,000, Rule 611 case with Rule 5310 language); Merrill Lynch (May 2024, $825,000, failed to supervise whether retail equity orders were executed "fully and promptly" within its own systems). Preferred-securities and fixed-income pricing cases: Merrill Lynch (May 2016, $565,000 and $95,531 restitution; July 2017, $650,000 and $124,128 restitution); First Financial Equity (Jan. 2017, $35,000); Wells Fargo Clearing Services (June 2017, $20,000); UBS Financial Services (July 2017, $110,000); Morgan Stanley Smith Barney (Oct. 2017, $500,000 and $103,219 restitution); Selkirk Investments (May 2018, $30,500); Deutsche Bank Securities (Aug. 2018, $1.4 million, principally OATS and trade reporting, with a best execution supervisory finding for securities with limited quotations); Wintrust Investments (Jan. 2020, $35,000); Aegis Capital (Mar. 2021, $80,000 and $43,913 restitution); GlobaLink Securities (June 2024, $200,000 and $397,862 restitution). Restitution figures are as stated in the Monthly Reports.

[16] Statement of Robert W. Cook, President and CEO, FINRA, before the House Committee on Financial Services (May 6, 2021), https://www.finra.org/media-center/speeches-testimony/statement-financial-services-committee-us-house-representatives.

[17] SEC Office of the Investor Advocate, Report on Activities, Fiscal Year 2018, at 9, https://www.sec.gov/files/sec-investor-advocate-report-activities-2018.pdf.

FINRA's own examination reports have identified the same best execution deficiencies, in nearly identical language, in nine consecutive reports spanning 2017 to 2026. In December 2017, FINRA's first Report on Examination Findings stated that "some firms failed to implement and conduct an adequate regular and rigorous review," including "failing to compare the quality of the executions firms obtained via their order routing and execution arrangements … against the quality of the executions they could have obtained from competing markets," and "failing to consider certain factors set forth in FINRA Rule 5310 … such as speed of execution, price improvement and the likelihood of execution." FINRA concluded that "[a]s a result of such deficiencies, these firms failed to assure that order flow was directed to markets providing the most beneficial terms for their customers' orders."[18]

In December 2018, FINRA said the same thing.[19] In October 2019, FINRA added that "[s]ome firms did not adequately consider and address potential conflicts of interest relating to their routing of orders to affiliated alternative trading systems (ATSs) or market centers that provide payment for order flow or other routing inducements."[20] In 2021, 2022, 2023 and 2024, FINRA repeated all of it, now specifying "PFOF from wholesale market makers and exchange liquidity rebates."[21] In its 2025 and 2026 Annual Regulatory Oversight Reports, FINRA is still finding firms "[n]ot comparing the quality of the execution obtained via firms' existing order-routing and execution arrangements against the quality of execution they could have obtained from competing markets."[22]

Nine reports. Same findings. One case a year.

FINRA also told the industry, repeatedly, what it planned to do about it. In January 2018 FINRA announced that it was "expanding our equity best execution surveillance program to assess the degree to which firms provide price improvement when routing customer orders for execution or when executing internalized customer orders," and that "[o]nce the new surveillance pattern is in production, we will review systematically both the frequency of price improvement, as well as the relative amount of price improvement obtained or provided when compared to other routing or execution venues."[23] In January 2019 FINRA said it would "review firms' best execution decision-making where the firm routed all or substantially all customer orders to a small number of wholesale market makers from which they received payment for order flow," and would "review how firms quantify the benefits to customers from firms' receipt of order routing inducements."[24] In February 2020, FINRA sent zero-commission brokers a targeted examination letter demanding

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[18] FINRA, 2017 Report on FINRA Examination Findings (Dec. 2017), Best Execution, http://www.finra.org/sites/default/files/2017-Report-FINRA-Examination-Findings.pdf.

[19] FINRA, 2018 Report on FINRA Examination Findings (Dec. 7, 2018), https://www.finra.org/sites/default/files/2018_exam_findings.pdf.

[20] FINRA, 2019 Report on Examination Findings and Observations (Oct. 2019), https://www.finra.org/sites/default/files/2019-10/2019-exam-findings-and-observations.pdf.

[21] FINRA, Reports on FINRA's Examination and Risk Monitoring Program (2021, 2022, 2023) and Annual Regulatory Oversight Report (2024), Best Execution sections, https://www.finra.org/rules-guidance/guidance/reports/.

[22] FINRA, 2025 and 2026 Annual Regulatory Oversight Reports, Best Execution, https://www.finra.org/rules-guidance/guidance/reports/2026-finra-annual-regulatory-oversight-report/best-execution (the quoted finding continues, "including ATSs and additional sources of liquidity").

[23] FINRA, 2018 Annual Regulatory and Examination Priorities Letter, supra n.7.

[24] FINRA, 2019 Risk Monitoring and Examination Priorities Letter (Jan. 2019), at 4, https://www.finra.org/sites/default/files/2019_Risk_Monitoring_and_Examination_Priorities_Letter.pdf (the first quoted passage continues, "or an affiliated broker-dealer or an alternative trading system (ATS) in which the firm had a financial interest").

their payment for order flow contracts, the dollar amounts received, any "expected or guaranteed execution quality," and their best execution committee minutes.[25]

We would like to know what became of the price improvement surveillance pattern FINRA promised in January 2018. On the public record it has never produced a case. We would like to know what FINRA learned when it reviewed "how firms quantify the benefits to customers" of payment for order flow. On the public record, FINRA has never quantified anything: not a benefit, not a harm, not a dollar of restitution.

Then, in June 2021, FINRA issued Regulatory Notice 21-23, "FINRA Reminds Member Firms of Requirements Concerning Best Execution and Payment for Order Flow." The Notice concerned "longstanding … rules and guidance concerning best execution and payment for order flow." This was not a notice with new information; it was a notice that these issues should already have been well understood. The Notice stated that firms "may not negotiate the terms of order routing arrangements for those customer orders in a manner that reduces the price improvement opportunities that otherwise would be available to those customer orders absent payment for order flow."[26] It said "order-by-order review of execution quality is increasingly possible for a range of orders in equity securities and standardized options, and it is required for any orders that a member firm determines to execute internally." It said FINRA "may evaluate whether further changes to its best execution rule are necessary or appropriate." The footnotes to RN 21-23 cite the entirety of FINRA's relevant enforcement history: three cases (E*TRADE, Robinhood, TradeStation).

In plain language FINRA stated that firms cannot reduce price improvement to their customers in order to accept (or increase the amount of) payment for order flow. You may be shocked to learn that this is exactly what nearly every single firm that accepts payment for order flow does.

FINRA has never brought a case on the theory RN 21-23 announced. Not one. And the "further changes" FINRA has now gotten around to evaluating, five years later, are whether order-by-order review of internalized orders should "continue to be required" (Topic 3, Question 1), whether a "smarter order router" with "built-in best execution logic" should count as an order-by-order review (Topic 3, Question 3), and whether FINRA should create safe harbors for "executions pursuant to documented regular and rigorous methodologies" (Topic 1, Question 9). (We cite the Notice's questions by topic and number as they appear on FINRA's website; the PDF version letters the same questions.)

Finally, in February 2023, when the Commission proposed its own Regulation Best Execution, FINRA and the MSRB wrote to the Commission that FINRA has "long had a robust regulatory program" including "market surveillance, examinations, and, where appropriate, enforcement action," and flagged "the importance of providing regulatory clarity for broker-dealers if FINRA and MSRB rules would address the same conduct as an SEC rule."[27] The letter offered no statistics. It

[25] FINRA, Targeted Examination Letter, Zero Commissions (Feb. 2020), https://www.finra.org/rules-guidance/guidance/targeted-examination-letters/zero-commissions.

[26] FINRA Regulatory Notice 21-23 (June 23, 2021), at 2, 4-5, https://www.finra.org/rules-guidance/notices/21-23.

[27] Letter from FINRA and MSRB to the SEC re Regulation Best Execution (Feb. 7, 2023), https://www.finra.org/sites/default/files/2023-02/FINRA-MSRB-Joint-Comment-Letter-20230207-Regulation-Best-Execution.pdf.

could not have. Regulation Best Execution was withdrawn in June 2025.[28] FINRA's regulatory clarity was preserved. So was the record above.

The Notice before us contains no discussion of any of this. Not the nine years of identical exam findings, not the 2018 surveillance promise, not the 2020 sweep, not RN 21-23, not the enforcement record. It says the framework is "time-tested." We agree that it has been tested. It failed.

III. The Violations in Plain Sight

FINRA might respond that best execution violations are hard to prove. They are not hard to find. Here are several that have been sitting in the public record for years, in the words of the participants themselves.

A. Robinhood, as documented by the SEC

On December 17, 2020, the Commission entered an order against Robinhood Financial.[29] The findings, which Robinhood did not contest, read like a textbook case under RN 21-23, which FINRA would publish six months later:

> "[C]ertain of the principal trading firms told Robinhood that there was a trade-off between payment for order flow on the one hand and price improvement on the other: If Robinhood negotiated for higher payment for order flow revenue, according to the principal trading firms, there would be less money available for the principal trading firms to provide price improvement to Robinhood's customers." (¶ 21)
>
> "At least one principal trading firm communicated to Robinhood that large retail broker-dealers that receive payment for order flow typically receive four times as much price improvement for customers than they do payment for order flow for themselves—an 80/20 split of the value between price improvement and payment for order flow." (¶ 22)
>
> "Robinhood negotiated a payment for order flow rate that was substantially higher than the rate the principal trading firms paid to other retail broker-dealers—which resulted in approximately a 20/80 split of the value between price improvement and payment for order flow. Robinhood explicitly offered to accept less price improvement for its customers than what the principal trading firms were offering, in exchange for receiving a higher rate of payment for order flow for itself." (¶ 23)

When one wholesaler declined to pay Robinhood's rate in 2017, "Robinhood stopped routing customer orders to that principal trading firm" (¶ 27). Robinhood's own internal analysis in March 2019 concluded that "[n]o matter how we cut the data, our % orders receiving price improvement lags behind that of other retail brokerages by a wide margin" (¶ 39). The Commission quantified the harm: "approximately $34.1 million in price improvement" lost between October 2016 and June 2019, "even after netting the approximately $5 per-order commission costs" competitors charged at the time (¶ 42). The Commission imposed a $65 million penalty.

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[28] SEC, Withdrawal of Proposed Rules, Release No. 33-11377 (June 12, 2025), https://www.sec.gov/rules-regulations/2025/06/regulation-best-execution.

[29] In the Matter of Robinhood Financial, LLC, Securities Act Release No. 10906 (Dec. 17, 2020), https://www.sec.gov/litigation/admin/2020/33-10906.pdf.

FINRA examined the same firm over an overlapping period. FINRA's December 2019 settlement found that Robinhood did not adequately review its execution quality. It did not find that Robinhood traded its customers' price improvement for its own revenue, although that is exactly what happened. It quantified no harm. It ordered no restitution. It imposed a $1.25 million fine, roughly 3.7 percent of the customer harm the Commission would quantify a year later, and less than two percent of Robinhood's annual payment for order flow revenue at the time.[30] After the Commission's order came out, FINRA did nothing further. Six months later FINRA published RN 21-23 and described Robinhood's conduct as a violation. It has never charged anyone with it.

Note also what the Commission charged. The Robinhood order rests on Securities Act Section 17(a)(2) and (3), plus a recordkeeping charge: Robinhood misled customers about its payment for order flow and execution quality. That is a disclosure theory. The Commission did not, and under its own rules could not easily, charge the routing conduct itself, because "there is no Commission rule or standard addressing a broker-dealer's duty of best execution."[31] That duty lives in FINRA's rulebook. The only regulator with the rule did not use it. The regulator that used its rules did not have the right one.

B. Virtu's CEO explains the economics, then confirms the result

Nobody has described the mechanism more clearly than the chief executive of the wholesaler that operates it. Over a five-month span in 2020 and 2021, Virtu Financial's CEO, Doug Cifu, explained on an earnings call, on a podcast and on national television how retail order flow is valued, how that value is split, who decides the split, and what the result is for the customers of a broker that takes payment versus one that does not. Taken together, his statements are the RN 21-23 violation narrated by the counterparty.

Step one: wholesalers compete for brokers' orders on price improvement. On Virtu's third quarter 2020 earnings call, Mr. Cifu told analysts that "every counter party broker we deal with direct[s] order flow to us or to the competitors, the Citadels and Susquehannas of the world based on price improvement. That's the first and the most important thing." He described the game theory plainly: "the more price improvement i.e., the more we pay, put that in quotes, for the order improving off of the national best bid or best offer, the more order flow we're going to get."[32] On Bloomberg's Odd Lots podcast on March 29, 2021, asked how a broker decides its routing allocation, he said the broker's best execution committee makes the decision and that it is "100 percent always based off of how much are we willing to improve off of that NBBO."[33]

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[30] FINRA Letter of Acceptance, Waiver and Consent No. 2017056224001 (Dec. 19, 2019); FINRA news release, Dec. 19, 2019. Robinhood's Form S-1 (July 2021) reports transaction-based revenues (equity and options payment for order flow plus cryptocurrency transaction rebates) of $170.8 million for 2019; Bloomberg reported in October 2018 that Robinhood earned "more than 40 percent of its revenue earlier this year from selling its customers' orders to high-frequency trading firms." Foxman, Verhage and Woolley, "Robinhood Gets Almost Half Its Revenue in Controversial Bargain With High-Speed Traders," Bloomberg (Oct. 15, 2018).

[31] SEC, Regulation Best Execution, Proposed Rule, Release No. 34-96496 (Dec. 14, 2022), 88 Fed. Reg. 5440, 5442 (Jan. 27, 2023) ("While there is no Commission rule or standard addressing a broker-dealer's duty of best execution, the duty is addressed in FINRA and MSRB rules"), https://www.sec.gov/files/rules/proposed/2022/34-96496.pdf, at 11.

[32] Virtu Financial, Inc., Third Quarter 2020 Earnings Call (Nov. 6, 2020), remarks of Douglas A. Cifu in response to a question from Daniel Fannon of Jefferies, as transcribed by The Motley Fool, https://www.fool.com/earnings/call-transcripts/2020/11/06/virtu-financial-inc-virt-q3-2020-earnings-call-tra/. The bracketed alteration is ours; in the second passage we have omitted a stray "than" that appears in the transcript between "best offer" and "the more."

[33] Bloomberg, Odd Lots, "Virtu CEO Doug Cifu Explains Payment for Order Flow and the Future of HFT" (Mar. 29, 2021), https://www.bloomberg.com/news/articles/2021-03-29/virtu-ceo-doug-cifu-explains-payment-for-order-flow-and-the-

Step two: the value in a retail order can go to the customer as price improvement or to the broker as payment. In the same Odd Lots interview, Mr. Cifu described brokers recognizing that their customers' orders have economic value to market makers and telling the wholesalers, in his words, "we want you to pay profit share some of that bid offer back to us." He said most brokers return that value to their customers through price improvement, while some use it instead to subsidize zero commissions.

Step three: the broker, not the wholesaler, decides the split. On CNBC's Squawk Box on March 11, 2021, Mr. Cifu explained that Virtu tries to capture the bid-ask spread and shares some of that economics with the routing broker as a profit share, that the broker determines how much of it to retain and how much to pass to customers as price improvement, and that Virtu is "Switzerland" as to that allocation.[34] As CNBC's own account put it: "The market maker is profit sharing back to the retail broker."[35]

Step four: the result. Andrew Ross Sorkin then asked whether a retail investor at Fidelity, which does not accept payment for order flow, ultimately gets a better price than a Robinhood investor.

Let's also clarify something here – on CNBC's website, this interview is truncated and ends before Mr. Cifu admits to conduct tantamount to systemic violations of Rule 5310. That is unusual and not originally the case when the interview took place. CNBC, for some unknown reason, changed the interview clip at some point in the last couple of years. However, the original interview is available on Twitter (X.com), in which this systemic violation of Rule 5310 was expressed quite simply:

> **"Overall, through the course of a month, we will provide more price improvement for Fidelity than we do to Robinhood."**[36]

Fidelity accepts no payment for order flow on equity orders. Robinhood does. Their customers send the same kinds of orders in the same stocks to the same wholesaler. The customers did nothing differently; the brokers did. Mr. Cifu has described the pool of value, described the negotiation over how it is divided, identified who does the dividing, and confirmed the outcome: the customers of the broker that takes the payment get less. That is, in the words FINRA would publish three months later, a broker negotiating "the terms of order routing arrangements … in a manner that reduces the price improvement opportunities that otherwise would be available to those customer orders

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future-of-hft; the quotations are transcribed from the episode audio (at approximately 19:30 and 29:40 of the podcast download).

[34] Prepared Remarks of Tyler Gellasch, Executive Director, Healthy Markets Association, Before the Investor Advisory Committee of the Securities and Exchange Commission (June 10, 2021), at n.33 and accompanying text, https://healthymarkets.org/wp-content/uploads/2021/06/HMA-IAC-Meeting-Remarks-6-10-21-1.pdf ("He then acknowledged that brokers decide how much of that 'profit share' was kept by the brokers, versus how much would be shared with the brokers' customers in the form of price improvement. He claimed that his firm was 'Switzerland' and had no role in determining how much a broker would keep for itself versus how much it would give back to its customers."). We do not place quotation marks around sentences reconstructed from the interview; the characterization is Healthy Markets', and the clip is the primary source.

[35] @SquawkCNBC, Twitter (Mar. 11, 2021), https://twitter.com/SquawkCNBC/status/1369995291148050432 ("'We are sharing some of that profit back to the end user in the form of price improvement,' says @VirtuFinancial CEO @Dougielarge. 'The market maker is profit sharing back to the retail broker. The retail investor is ultimately benefitting.'").

[36] Ibid., at approximately 2:02 to 2:23. The answer is quoted in the same words in We The Investors' comment letter on File Nos. S7-32-22 and S7-30-22 (Mar. 15, 2023), https://www.sec.gov/comments/s7-30-22/s73022-typef.pdf, at n.5, and in part in the Healthy Markets remarks cited in note 34. If in the future CNBC removes this post, we have the original video and are happy to provide it upon request.

absent payment for order flow." FINRA has had five years to ask Mr. Cifu about it. We are not aware that it has.

Three months after the CNBC interview, in a written statement to the SEC's Investor Advisory Committee, Mr. Cifu told the Commission that retail brokers meet their best execution obligations "by routing to the venues or wholesalers that provide the best price and size executions, not the one that offers the highest payment for order flow."[37] That may be true as to which wholesaler gets the order. It says nothing about the rate the broker negotiated with all of them, which, by Mr. Cifu's own account, is what determines how much price improvement the customer gets. Robinhood's CEO made the same move before Congress, testifying that Robinhood had "negotiated the same rebate rate with each of the market-makers," which "eliminates any incentive for Robinhood to direct orders to any specific market maker."[38] A uniform rate removes the venue-selection conflict. It does nothing about the rate-level conflict, and the rate Robinhood negotiated with everyone was the one that bought its customers a 20/80 split of the value, against the 80/20 split that, a wholesaler told Robinhood, large retail brokers typically received (Robinhood order, ¶¶ 22-23).

C. The academic record: same wholesaler, same stock, same second, different price

Mr. Cifu's admission has been measured. In a study published in the Journal of Finance, Schwarz, Barber, Huang, Jorion and Odean placed roughly 85,000 simultaneous market orders across accounts at five retail brokers between December 2021 and June 2022.[39] The share of the quoted spread returned as price improvement ranged from 47 percent at TD Ameritrade to 27 percent at Robinhood and 19 percent at Interactive Brokers. The authors then matched TD Ameritrade and Robinhood trades executed at the identical wholesaler at the identical moment and found that "every single of the five venues provides better execution for TD Ameritrade," and that "almost the entirety of the observed execution difference is due to different treatments by market centers."

This means that either the wholesaler decides how much price improvement an order gets by looking at which broker sent it, or some brokers keep more of the price improvement for themselves. The order is the same. The customer is the same. The price is not.

The authors also noted why this is invisible in FINRA's and the Commission's existing disclosure regime: Rule 605 reports "do not report individual numbers for the different brokers from whom they receive order flow." A wholesaler can report excellent aggregate execution quality while systematically discriminating among brokers. The public data cannot show it. FINRA, which has the order-level data, has never charged misconduct here.[40]

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[37] Statement of Doug Cifu, Chief Executive Officer, Virtu Financial, SEC Investor Advisory Committee Meeting (June 10, 2021), filed as Exhibit 99.1 to Virtu Financial, Inc. Form 8-K (June 10, 2021), https://www.sec.gov/Archives/edgar/data/1592386/000110465921079146/tm2119142d1_ex99-1.htm ("And let's not forget that retail brokers have a legal obligation of best execution, which they meet by routing to the venues or wholesalers that provide the best price and size executions, not the one that offers the highest payment for order flow.").

[38] Testimony of Vladimir Tenev, CEO, Robinhood Markets, before the House Committee on Financial Services (Feb. 18, 2021), at 6, https://docs.house.gov/meetings/BA/BA00/20210218/111207/HHRG-117-BA00-Wstate-TenevV-20210218.pdf.

[39] Christopher Schwarz, Brad Barber, Xing Huang, Philippe Jorion and Terrance Odean, "The 'Actual Retail Price' of Equity Trades," 80 Journal of Finance 2507 (2025), doi 10.1111/jofi.13467; working paper (July 2023) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4189239. Quotations are from the working paper, at 31 and 37; the matched-venue comparison quoted is TD Ameritrade versus Robinhood.

[40] The authors note that disclosed payment for order flow rates alone do not explain the differences they observe, since Fidelity, which accepts none, also trailed TD Ameritrade. Their point, and ours, is that the broker's negotiated terms with

A separate randomized controlled trial found that "[b]rokers deriving comparatively more revenue from PFOF (e.g., Robinhood) provide negligible price improvement," while brokers deriving less "provide economically and statistically significant price improvement."[41] The Commission's own analysis in the Order Competition Rule proposal found that "brokers that receive PFOF receive inferior execution quality," a result "robust to the inclusion of controls for differences in the type of order flow coming from different broker-dealers."[42]

D. "Virtually, yes"

This is not new. On June 17, 2014, Senator Carl Levin put it to TD Ameritrade's Steven Quirk that "your subjective judgment as to which market provided best execution for tens of millions of customer orders virtually always led you to route orders to the markets that paid you the most." Mr. Quirk answered: "virtually, yes."[43] Senator Levin wrote to the SEC three weeks later that "for the time periods discussed at the hearing, TD Ameritrade virtually always routed customer orders to venues paying them the highest rebates."[44] The SEC's own staff memorandum to the Equity Market Structure Advisory Committee recorded that the TD Ameritrade executive "confirmed that the firm exclusively sent nonmarketable orders to the two venues paying the highest rebates" and estimated the firm "made $80 million in 2013 from maker-taker rebates."[45] FINRA's guidance, restated in November 2015, says that "a firm's routing decisions should not be unduly influenced by a particular venue's fee or rebate structure."[46] No FINRA action followed. Mr. Quirk is now Chief Brokerage Officer at Robinhood.

Once again it is worth pointing out that such guidance simply reiterates what a firm's existing obligation is – it does not impose a new obligation on any regulated firms. FINRA had the evidence and authority to charge firms with a violation at the time, but chose not to.

Private litigation has not filled the gap either. When TD Ameritrade customers sued over exactly this routing, the Eighth Circuit reversed class certification because "determining economic loss in this case entails individualized inquiry inconsistent with the predominance requirement of Rule

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the wholesaler, not anything about the customer's order, determine the price, and that no public disclosure reveals those terms or their effect.

[41] Bradford Lynch Levy, "Price Improvement and Payment for Order Flow: Evidence from a Randomized Controlled Trial" (June 27, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4189658.

[42] SEC, Order Competition Rule, Proposed Rule, Release No. 34-96495 (Dec. 14, 2022), 88 Fed. Reg. 128 (Jan. 3, 2023), Section VII (Tables 14 and 15), https://www.sec.gov/files/rules/proposed/2022/34-96495.pdf, at 239. The full sentence reads: "The results in Table 15 show that the Table 14 results indicating brokers that receive PFOF receive inferior execution quality are robust to the inclusion of controls for differences in the type of order flow coming from different broker-dealers."

[43] Conflicts of Interest, Investor Loss of Confidence, and High Speed Trading in U.S. Stock Markets, Hearing before the Permanent Subcommittee on Investigations, S. Hrg. 113-413 (June 17, 2014), https://www.govinfo.gov/content/pkg/CHRG-113shrg89752/pdf/CHRG-113shrg89752.pdf.

[44] Letter from Senator Carl Levin, Chairman, Permanent Subcommittee on Investigations, to SEC Chair Mary Jo White (July 9, 2014), https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/Ltr%20to%20SEC%20Chairman%20White%20re%20Equity%20Market%20Structure%20(July%209%202014).pdf.

[45] SEC Division of Trading and Markets, Memorandum to the Equity Market Structure Advisory Committee, Maker-Taker Fees on Equities Exchanges (Oct. 20, 2015), https://www.sec.gov/spotlight/emsac/memo-maker-taker-fees-on-equities-exchanges.pdf.

[46] FINRA Regulatory Notice 15-46 (Nov. 2015), at 6, https://www.finra.org/rules-guidance/notices/15-46 ("Firms should not allow access fees charged by particular venues to inappropriately affect their routing decisions, and, in general, a firm's routing decisions should not be unduly influenced by a particular venue's fee or rebate structure.").

23."[47] A retail investor cannot bring a best execution case alone; the harm per share is a fraction of a cent. A class cannot bring it either. That leaves FINRA. Which brings us back to Section I.

E. The dark pool cases

Between 2015 and 2018 the Commission, joined in several matters by the New York Attorney General, resolved a series of actions against dark pool operators, order routers and wholesalers: ITG (2015), UBS (2015), Barclays (2016), Credit Suisse (2016 and 2018), Deutsche Bank (2016), Citadel Securities (2017), Citigroup (2018) and Merrill Lynch (2018).[48] Most of these cases concerned the orders of institutional customers and other broker-dealers, and we cite them for that reason: they show what the Commission does when it finds order handling that harms customers, whoever the customers are. The conduct included ranking the firm's own dark pool first in a router that was supposed to rank venues by execution quality, leaking customer order information to favored high-frequency participants, and, in Merrill Lynch's case, disguising approximately 15.8 million executions at electronic liquidity providers as Merrill executions, including for customers who had instructed Merrill not to route there, with the stated internal "[g]oal … to increase the volume sent to these trading partners." Two of the cases were about retail orders specifically. The Commission found that Citadel Securities, the largest retail wholesaler, ran two algorithms on the retail marketable orders sent to it by other broker-dealers, one of which "immediately internalized an order at a price that was not the best price for the order that Citadel Securities observed," and

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[47] Ford v. TD Ameritrade Holding Corp., 995 F.3d 616 (8th Cir. 2021), https://law.justia.com/cases/federal/appellate-courts/ca8/18-3689/18-3689-2021-04-23.html. The Eighth Circuit reversed class certification a second time in Ford v. TD Ameritrade Holding Corp., No. 22-3232 (8th Cir. Sept. 3, 2024), https://ecf.ca8.uscourts.gov/opndir/24/09/223232P.pdf.

[48] SEC press releases and orders: ITG Inc. and AlterNet Securities, Rel. No. 33-9887 (Aug. 12, 2015) ($20.3 million; Securities Act 17(a)(2), (3); Reg ATS 301(b)(2), (10)); UBS Securities, Rel. No. 33-9697 (Jan. 15, 2015) ($14.4 million; 17(a)(2); Reg ATS; Reg NMS 612); Barclays Capital, Rel. No. 33-10010 (Jan. 31, 2016) ($35 million SEC, $35 million NYAG; 17(a)(2); Rule 15c3-5; Reg ATS); Credit Suisse Securities (USA), Rel. Nos. 33-10013 and 33-10014 (Jan. 31, 2016) ($54.3 million SEC, $30 million NYAG; 17(a)(2); Reg ATS; Reg NMS 602(b), 612); Credit Suisse Securities (USA), Retail Execution Services, SEC Press Release 2018-224 (Sept. 28, 2018) ($5 million SEC, $5 million NYAG; 17(a)(2)); Deutsche Bank Securities, SEC Press Release 2016-264 (Dec. 16, 2016) ($18.5 million SEC, $18.5 million NYAG; 17(a)(2); Reg ATS 301(b)(2)); Citadel Securities, Rel. No. 33-10280 (Jan. 13, 2017) ($22.6 million; 17(a)(2)); Citigroup Global Markets and Citi Order Routing and Execution, Rel. No. 33-10545 (Sept. 14, 2018) ($12.9 million; 17(a)(2); Exchange Act 5); Merrill Lynch, Pierce, Fenner & Smith, Rel. No. 33-10507 (June 19, 2018) ($42 million SEC; 17(a)(2), (3)) and NYAG settlement (Mar. 23, 2018) ($42 million; Martin Act). Whose orders: ITG (orders of sell-side subscribers to its POSIT dark pool); UBS (ATS subscribers, with sub-penny order types marketed to market makers and high-frequency firms); Barclays (LX subscribers, "institutional investors, broker-dealers, electronic liquidity providers"); Credit Suisse 2016 (Crossfinder subscribers and sell-side clients of its router); Deutsche Bank (institutional clients of its SuperX+ router); Citigroup (Citi Match was marketed "exclusively to institutional customers"); Merrill Lynch (institutional "direct strategy access" customers, "asset managers, mutual fund investment advisers, and public pension funds"). Citadel Securities (marketable orders "from retail investors" routed by retail broker-dealers) and Credit Suisse 2018 (Retail Execution Services desk) concerned retail orders. The Citadel Securities quotations, the "millions of orders placed by retail investors" language and the $22.6 million figure are from SEC Press Release 2017-11 (Jan. 13, 2017), https://www.sec.gov/news/pressrelease/2017-11.html; the "handle order flow on behalf of retail investors" and "retail customers did not receive any price improvement" language is from Press Release 2018-224 (Sept. 28, 2018), https://www.sec.gov/newsroom/press-releases/2018-224, describing Rel. No. 33-10565 (conduct from mid-2011 to March 2015); the "[g]oal is to increase the volume sent to these trading partners" language is from Rel. No. 33-10507 at ¶ 13. None of the SEC orders contains the words "best execution," "Rule 5310" or "Rule 2320" as a charged violation. FINRA's follow-on settlements: Deutsche Bank Securities, AWC No. 2014041813501 (Mar. 7, 2022) (conduct Jan. 2014 through May 2019; "DBSI was a broker-dealer for institutional customers"; marketable orders routed to SuperX before any exchange, the "SuperX ping"), https://www.finra.org/sites/default/files/2022-03/deutsche-bank-awc-030722.pdf; Barclays Capital, AWC No. 2014041808601 (Oct. 5, 2022) (conduct Jan. 2014 through Feb. 2019; institutional customers; all marketable orders routed to LX first), https://www.finra.org/sites/default/files/2022-10/Barclays-Capital-AWC-100522.pdf. The New York Attorney General filed its complaint against Barclays over LX on June 25, 2014.

the other of which "routed an order to the market that was not priced to obtain immediately the best price that Citadel Securities observed," affecting "millions of orders placed by retail investors." And it found that Credit Suisse's retail wholesaling desk executed orders from brokers "that handle order flow on behalf of retail investors" such that, for nearly four years, "retail customers did not receive any price improvement" on their non-reportable orders. Every one of these cases, institutional and retail alike, was charged by the Commission as a disclosure, market access, registration or Regulation ATS violation: Securities Act Section 17(a), Regulation ATS, Regulation NMS, Rule 15c3-5, and, for the Attorney General, the Martin Act. Not one was charged as a best execution violation. Citadel Securities paid $22.6 million for shortchanging retail orders and was never charged with failing to obtain the best price for them.

FINRA's contribution to this body of enforcement was two process cases, Deutsche Bank and Barclays, both concerning institutional customers' orders routed first to the firms' own dark pools, SuperX and LX. FINRA opened both matters in 2014, the year the Attorney General sued Barclays over LX. It settled them in March and October 2022, more than five years after the Commission and the Attorney General had settled with Deutsche Bank and nearly seven years after they had settled with Barclays, for $2 million each, alleging inadequate reviews, with no restitution. On the retail cases, Citadel Securities and Credit Suisse, FINRA brought nothing at all.

That is the pattern across a decade. Regulators charge disclosure. They do not charge the routing. The customer who received the inferior price is compensated in neither case.

IV. Payment for Order Flow Is an Intractable Conflict, and Disclosure Does Not Cure It

We want to address directly the premise underlying FINRA's approach to payment for order flow, because Topic 1, Question 6 asks whether FINRA should provide "standards for firms in providing price improvement to different customer orders" and address "decisions to route an order to another venue or internalize an order when paying for order flow." The premise is that a conflict of interest this direct can be managed through disclosure and periodic review. It cannot, and the firms that profit from it said so before they profited from it.

In April 2004, Citadel told the Commission: "Broker-dealers accepting payment for order flow have a strong incentive to route orders based on the amount of order flow payments, which benefit these broker-dealers, rather than on the basis of execution quality, which benefits their customers." It continued: "We do not believe that a broker-dealer that accepts payment for order flow and does not pass such payments on to its customers (either directly or through reduced execution fees or commissions) can consistently fulfill its best execution obligations." And it concluded: "Because payment for order flow creates fundamental conflicts of interest that cannot be cured by disclosure, the Commission should ban payment for order flow altogether."[49] Three months later, commenting on Regulation NMS, Ken Griffin wrote that "[i]nternalization is one of the greatest threats to price discovery in the financial markets," that broker-dealers "internalize the orders most advantageous to the broker-dealer (usually retail orders) and expose less advantageous orders to the market,"

[49] Letter from Adam C. Cooper, Senior Managing Director and General Counsel, Citadel Investment Group, L.L.C., to the SEC re Competitive Developments in the Options Markets, File No. S7-07-04 (Apr. 13, 2004), at 4, https://www.sec.gov/rules/concept/s70704/citadel04132004.pdf.

and that “[i]n the long run, unfettered internalization will result in substantially poor executions for all retail and institutional investors.”[50] Citadel was right.

The arguments for the practice are older than Citadel's objection to it, and they have not changed. In July 1989, the SEC convened a roundtable on payment for order flow, and the man who had built the modern version of the business explained it to Chairman Ruder. Brokers sent him orders, he said, "not only because they were receiving payment, but also because they get a totally automated execution." Retail flow was worth paying for because "that order flow is order flow which is valuable to me," unlike flow "from a competing specialist on an exchange or from a block firm." Asked whether he was simply quoting different prices to different customers, he agreed: "I am providing different quotes to different parties." As to best execution, "we are all satisfied that in fact this is the best execution. As to getting into a theoretical debate as to whether you can get in between the spread or not, I do not know." And the payments themselves were nothing to worry about, because they were "right out in the open," going "directly to the brokerage firm itself, not to an order clerk on a desk, not to a registered rep, not through dinners or anything else. It is very trackable, the NASD can audit that." He concluded: "I have a hard time understanding how anybody could find anything wrong with this style of payment for order flow."[51] Eleven years later he described the payment as "part of my trading profits in the form of a rebate,"[52] which is the "profit share" Mr. Cifu described in 2021. Thirteen years later he told the Commission that "everybody" had been saying "ban payment for order flow" for as long as he could remember and the Commission had shown "a great deal of restraint" in not listening.[53] The speaker was Bernie Madoff. Every defense of payment for order flow offered to FINRA and the Commission in 2026 was offered to the Commission in 1989, by him, in those words, including the assurance that the

[50] Letter from Kenneth Griffin, President and Chief Executive Officer, Citadel Investment Group, L.L.C., to the SEC re Regulation NMS, File No. S7-10-04 (July 9, 2004), at 6-7, https://www.sec.gov/rules/proposed/s71004/s71004-436.pdf.

[51] Securities and Exchange Commission, Roundtable on Commission Dollar and Payment for Order Flow Practices (July 24, 1989), transcript, remarks of Bernard L. Madoff, President, Bernard L. Madoff Investment Securities, at 107 ("a firm sent us order flow not only because they were receiving payment, but also because they get a totally automated execution"), https://www.sechistorical.org/collection/papers/1980/1989_0724_CommisionDollar_3of4.pdf; and at 114 ("we are all satisfied that in fact this is the best execution. As to getting into a theoretical debate as to whether you can get in between the spread or not, I do not know"), 133 ("I as a dealer have the right to decide that I will pay 20.01 ... to a Charles Schwab, because that order flow is order flow which is valuable to me. Order flow that may come from a competing specialist on an exchange or from a block firm may not be valuable to me. There is a major difference there." Chairman Ruder: "What you just say though, is that you are just providing different quotes?" Mr. Madoff: "I am providing different quotes to different parties.") and 146 ("For the first time, those hard dollars are right out in the open. They are very visible. We are certain that the money that the wholesaler is paying is going directly to the brokerage firm itself, not to an order clerk on a desk, not to a registered rep, not through dinners or anything else. It is very trackable, the NASD can audit that, and it seems to me that that is a major advantage.... I have a hard time understanding how anybody could find anything wrong with this style of payment for order flow."). The transcript is held in the SEC Historical Society's archive; page references are to the transcript's own pagination. The participants included Chairman David Ruder, Commissioner Joseph Grundfest and Richard Ketchum, then of the Commission's Division of Market Regulation and later CEO of FINRA.

[52] Alex Frew McMillan, "Q&A: Madoff talks trading," CNNfn (May 29, 2000), https://money.cnn.com/2000/05/29/investing/q_madoff/ (asked whether payment for order flow will ever disappear: "If I want to use Fidelity's salesmen and pay part of my trading profits in the form of a rebate, why shouldn't I be allowed to do it?"; and, on the practice generally, "Almost every firm in the country was receiving payment. And as long as the quality of execution is not altered because of payment for order flow, then that's fine.").

[53] Securities and Exchange Commission, Market Structure Hearing (Oct. 29, 2002), transcript, remarks of Bernard L. Madoff, https://www.sec.gov/spotlight/marketstructure/mkts102902-hrg.txt ("Fortunately, in my experience, they never have. And they have shown a great deal of restraint in not taking the advice of those people whose oxes have been gored in this competitive process. I remember everybody saying ban payment for order flow. They're still saying ban payment for order flow. We don't even pay for order flow any longer, although we're considering going back to paying for order flow."); participant list at https://www.sec.gov/news/extra/mktstr-invites.htm. Compare Odd Lots, supra (Mr. Cifu: "the SEC has looked at this five or six times").

regulator could audit it. The regulator never did. All they have offered up is limited and inadequate disclosure.

Consider what disclosure has actually accomplished. Rule 606 has required brokers to disclose their payment for order flow arrangements since 2001, with enhanced order-level disclosure since 2020. Robinhood's Rule 606 reports were public throughout the period the Commission found it was trading its customers' price improvement for its own revenue. Robinhood's customers could read that Robinhood received payment for order flow. They could not read that Robinhood had chosen a 20/80 split when, according to what a wholesaler told Robinhood itself, large retail brokers typically received 80/20 (Robinhood order, ¶ 22), because no disclosure rule requires that, and they could not compute what it cost them, because Rule 605 does not report execution quality by routing broker. The Commission charged Robinhood with a disclosure failure, and Robinhood now discloses more. Its customers still receive less price improvement than Fidelity's from the same wholesaler, according to that wholesaler's CEO, and nothing in the disclosure regime has changed that or ever could.

Disclosure fails here for a mechanical reason. The harm is a fraction of a cent per share, spread across millions of orders, measurable only against a counterfactual (what the order would have received elsewhere) that the customer has no data to construct. Disclosure works when the recipient can act on it. A retail investor who is told her broker is paid for her orders cannot determine what the payment cost her, cannot compare it to what another broker's arrangement would have cost her, and cannot bring a claim over it, as the Eighth Circuit has held. The only party in a position to act on the information is the regulator that holds the order-level data. That regulator is FINRA. See Section I.

Nor is "just and reasonable" price improvement a defense. Twenty years of wholesaler press releases have conditioned everyone to hear "97 percent of orders received price improvement" as proof of good execution. It proves only that the execution was inside the NBBO by at least one hundredth of a cent. The Commission's own analysis found that 18.64 percent of price-improved shares in wholesaler principal transactions received price improvement of less than a tenth of a cent, that 51 percent of the shares of individual investor marketable orders internalized by wholesalers were executed at prices less favorable than the NBBO midpoint, and that 75 percent of those shares "could have hypothetically executed at a better price against the non-displayed liquidity resting at the NBBO midpoint on exchanges and NMS Stock ATSs."[54]

Our own analysis of the consolidated tape for July and August 2026 makes the same point, matching the Commission's analysis closely. We took every off-exchange trade during regular hours that printed at a sub-penny price other than the midpoint, these are the trades wholesalers report as price-improved, and measured how far each was from the NBBO. The single most common answer, in every spread category from one cent to over a dollar, is one mil: one hundredth of a cent, the smallest increment at which an execution can be reported and still be called improved. In stocks quoted a penny wide, 47 percent of that volume received exactly one mil, and 64 percent received less than a tenth of a cent. In stocks quoted between ten and twenty-four cents wide, 21 percent received one mil. In stocks quoted more than a dollar wide, 18 percent did.[55] One mil of price

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[54] SEC, Order Competition Rule, Proposed Rule, Release No. 34-96495 (Dec. 14, 2022), 88 Fed. Reg. 128 (Jan. 3, 2023), at n.350 and Table 20 (51 percent and 75 percent figures), and at 88 Fed. Reg. 192 (18.64 percent figure; also at sec.gov PDF p. 113).

[55] We The Investors analysis of consolidated tape (SIP) trade and quote data, July 1 through August 31, 2026, regular trading hours. The sample is every trade reported off-exchange (through a FINRA trade reporting facility) at a price that is not a whole penny and is not the NBBO midpoint at the time of the trade. Midpoint executions are excluded so that the

improvement on a two-cent spread is not best execution. It is marketing. One mil on a dollar-wide spread is a receipt for a tenth of one percent of the spread. FINRA has the order-level data to run this table by broker and by wholesaler, which is the analysis Part 4 of Appendix A asks it to run. We ran it from the public tape.

Nor will competition among wholesalers discipline this on its own. Retail order flow is executed by a handful of firms. Using FINRA's own OTC Transparency data, we computed the concentration of non-ATS volume in NMS Tier 1 securities among the seven firms Hu and Murphy identify as retail wholesalers. In 2025, Citadel Securities alone handled 36 percent of that volume; Citadel Securities and Virtu together handled 61 percent. The Herfindahl-Hirschman Index was 2,438, well above the 1,800 level at which the Department of Justice and Federal Trade Commission's 2023 Merger Guidelines deem a market "highly concentrated," and it has risen further in 2026.[56] Those figures understate concentration in retail flow specifically, because the public FINRA data capture each firm's entire reported non-ATS volume rather than the retail-flagged orders Hu and Murphy analyzed with confidential Commission data; on that data they found an HHI averaging 2,605 from 2017 through May 2021 and reaching 2,900 in 2021. A market in which two firms execute three fifths of the flow, and set the "profit share" that brokers then divide, is not one in which a broker's quarterly committee can shop its customers' orders to a competitive field. It is one in which the terms are set by the buyer, and the buyer, as Mr. Cifu explained, is Switzerland.

The rest of the world has reached the conclusion Citadel reached in 2004. The UK regulator said in 2012 that payment for order flow "is unlikely to be compatible with our inducements rule and risks compromising compliance with best execution rules," and the Financial Conduct Authority has since stated flatly that it is "incompatible with our rules on conflicts of interest and inducements, and risks compromising firms' compliance with best execution," and that "the most straightforward method of complying … would be to prevent the conflict from arising in the first place."[57] The

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sample reflects wholesaler price improvement rather than midpoint crosses on ATSs. For each trade we measured the distance in mils (one mil is $0.0001, one hundredth of a cent) between the execution price and the NBBO side the trade improved, so that a buy executed at $20.0101 against a national best offer of $20.01 is one mil of improvement. Volume is then grouped by the NBBO spread at the time of the trade (one cent; two cents; three to four cents; five to nine cents; ten to twenty-four cents; twenty-five to forty-nine cents; fifty cents to one dollar; over one dollar). The denominator in each spread group is total off-exchange sub-penny, non-midpoint volume in that group. The full distribution for one through ten mils is available upon request. The tape does not identify the executing firm or the customer, so the analysis cannot distinguish wholesaler executions of retail orders from other off-exchange sub-penny prints; because Rule 612 of Regulation NMS prohibits sub-penny quotations and orders but permits sub-penny executions that result from price improvement, off-exchange sub-penny prints away from the midpoint are overwhelmingly wholesaler executions of marketable retail orders. Percentages are of share volume, not of orders. Data and code are available on request.

[56] We The Investors analysis of FINRA OTC Transparency Data (api.finra.org, weekly non-ATS firm summaries, NMS Tier 1), December 2021 through August 2026, restricted to the seven wholesalers identified in Hu and Murphy (2024) (Citadel Securities, Virtu Americas, G1 Execution Services/Susquehanna, Jane Street, Two Sigma Securities, UBS Securities, Wolverine Execution Services), with each firm's share computed against the combined seven-firm total, following Hu and Murphy's construction. Yearly HHI: 2022, 2,431; 2023, 2,342; 2024, 2,293; 2025, 2,438; 2026 through mid-August, 2,467. Edwin Hu and Dermot Murphy, "Competition for Retail Order Flow and Market Quality" (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4070056, report, using SEC retail-flagged data for January 2017 through May 2021, an internalizer HHI averaging 2,605 across the sample, with a low of 2,450 in 2018 and a high of 2,900 in 2021; the gap between the two series reflects the data, not the market. Hudson River Trading, which Hu and Murphy noted had "struggled to gain traction" as a retail internalizer, reached 8.5 percent of all NMS Tier 1 non-ATS volume in 2025; treating it as an eighth wholesaler lowers the 2025 HHI to 1,981. Data and methodology available on request. Concentration thresholds are from U.S. Department of Justice and Federal Trade Commission, Merger Guidelines (Dec. 18, 2023), § 2.1 (a market with HHI above 1,800 is highly concentrated), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf; the HRT-adjusted 2025 figure of 1,981 is also above that line.

[57] Financial Services Authority, Guidance on the practice of "Payment for Order Flow," FG12/13 (May 2012), https://www.fca.org.uk/publication/finalised-guidance/fg12-13.pdf (PFOF "is unlikely to be compatible with our

European Union banned payment for order flow under MiFIR Article 39a, and the last transitional exemption expired on June 30, 2026.[58] Singapore banned it effective April 2023 on the ground that it "is inconsistent with the CMS Broker's duty to provide Best Execution to customers."[59] Canada's market structure rules effectively prohibit it for Canadian-listed securities. Abroad, regulators removed the conflict. FINRA proposes to praise the framework that leaves it in place.

Nor can industry practice be the defense. The Third Circuit, sitting en banc in Newton v. Merrill Lynch, rejected the argument that a broker could escape liability for violating the duty of best execution "so long as she could identify a sufficient number of other broker-dealers engaged in the same wrongful conduct," holding that "[e]ven a universal industry practice may still be fraudulent."[60] There is no safety in the herd. That every retail broker accepting payment for order flow negotiates the same kind of arrangement Robinhood negotiated does not make the arrangement lawful. It makes the enforcement failure larger.

We note, finally, a comparison FINRA may find uncomfortable. FINRA Rule 3220 prohibits a member from giving anything of value above a set limit to an employee of another firm, because the rule "seeks to avoid improprieties, such as conflicts of interest, that may arise when a member or an associated person gives items of value to an employee of another person."[61] As part of FINRA Forward, FINRA raised that limit from $100 to $300, effective March 30, 2026, because the old limit had not kept up with inflation. FINRA has therefore modernized its rule against a $100 dinner influencing a broker's judgment. In the same rulebook, wholesalers may pay retail brokers hundreds of millions of dollars per quarter, and exchanges may pay brokers two to three billion dollars a year, to influence where customer orders go, and the rule governing that influence has produced ten process cases in ten years. FINRA knows a conflict of interest when the amount is $100. It cannot seem to find one when the amount is $100 million.

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inducements rule and risks compromising compliance with best execution rules"); FCA, Best execution and payment for order flow, TR14/13 (July 2014), https://www.fca.org.uk/publication/thematic-reviews/tr14-13.pdf; FCA, Payment for order flow (PFOF) multi-firm review (Apr. 2019), at 3-4, https://www.fca.org.uk/publication/multi-firm-reviews/payment-for-order-flow-pfof.pdf (source of both quotations in the text).

[58] Regulation (EU) 2024/791 of the European Parliament and of the Council of 28 February 2024, OJ L, 2024/791, 8.3.2024, inserting Article 39a into Regulation (EU) No 600/2014 (MiFIR); Member States in which payment for order flow existed before 28 March 2024 could exempt firms until 30 June 2026.

[59] Monetary Authority of Singapore, Guidelines to Notice SFA 04-N16 on Execution of Customers' Orders (revised Nov. 4, 2022, effective Apr. 1, 2023), https://www.mas.gov.sg/regulation/guidelines/guidelines-to-notice-sfa04-n16. Canada: Universal Market Integrity Rules 6.4 and 6.6 and Companion Policy 23-101CP; payment for order flow is not offered on Canadian marketplaces for Canadian-listed securities.

[60] Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266, 274 (3d Cir. 1998) (en banc) ("Under the district court's logic, a Section 10(b) defendant would be entitled to summary judgment even if it were her regular practice to knowingly violate the duty of best execution, so long as she could identify a sufficient number of other broker-dealers engaged in the same wrongful conduct to be able to argue in good faith that the underlying duty was 'ambiguous.' We cannot accept an analysis that would produce such a result. Even a universal industry practice may still be fraudulent.").

[61] FINRA Regulatory Notice 26-05 (Feb. 27, 2026), https://www.finra.org/rules-guidance/notices/26-05. Exchange rebate totals: the Commission's Transaction Fee Pilot proposal estimated rebates and related payments of "as much as $2.5 billion" annually (Release No. 34-82873 (Mar. 14, 2018), as summarized in SEC Investor Advisory Committee, Recommendation Regarding Exchange Rebate Tier Disclosure (Jan. 24, 2020), https://www.sec.gov/spotlight/investor-advisory-committee-2012/exchange-rebate-tier-disclosure.pdf); IEX estimated that "total rebate payouts by all exchanges last year topped $3.5 billion" for 2022, https://www.iex.io/article/why-exchange-rebate-tiers-are-anti-competitive.

V. Why the Rule Produces This Record, and What FINRA Should Do Instead

The record in Section I is not an accident of enforcement priorities. It is what Rule 5310, as FINRA has chosen to interpret and enforce it, produces. Understanding the mechanism matters, because the Notice's questions would make it worse.

Start with what the rule actually says. Rule 5310(a)(1) requires a member to buy or sell "so that the resultant price to the customer is as favorable as possible under prevailing market conditions." That is an outcome standard, and it is enforceable. FINRA holds the order-level data to test any firm's routing against it. Since June 2021 FINRA has also had, in RN 21-23, a published theory for the specific conduct that fails it. Nothing in the rule prevents FINRA from charging a broker whose routing arrangements demonstrably cost its customers price improvement. FINRA has simply never done so. What FINRA enforces instead is the Supplementary Material. .09 provides that a firm that does not review orders one by one may instead conduct a "regular and rigorous review" of execution quality, at least quarterly, on a "security-by-security, type-of-order basis." Payment for order flow appears in the rule text only as one of eight factors that review should "consider" (.09(b)(8)). The prohibition on negotiating routing terms that reduce price improvement lives entirely in guidance. FINRA has chosen to make the adequacy of the review, and never the price the customer received, the object of every case it brings. That choice has consequences. A firm that convenes a quarterly committee, produces minutes reflecting that it "considered" the eight factors, and then continues to route every order to the wholesalers that pay it, has on this record nothing to fear from FINRA. It has checked the boxes while failing to provide its customers best execution. This is what a "good enough" standard, rather than a "best" standard, looks like. The customer's price is never the violation. The committee's paperwork is. That is why every case in Section I is a process case, why none quantifies harm (the review, not the price, is what was deficient), and why none orders restitution (there is no measured loss to return).

FINRA knows this. A senior FINRA official has likened bringing a best execution enforcement action, absent a material misrepresentation by the broker, to "nailing jell-o to a wall."[62] We used the same phrase in our letter to the Commission on the Rule 611 rescission, and we should be clear about what we meant by it. We did not mean that best execution cannot be enforced. We meant that FINRA has never tried to nail it. A regulator that elects to enforce an outcome standard as a documentation standard will only ever be able to prove documentation failures, and after a decade of that it will find, as FINRA apparently has, that the thing it is trying to pin down has no shape. The jell-o is FINRA's own recipe. That is the sense in which Rule 5310 is unenforceable: not because the rule lacks a standard, but because FINRA has never held anyone to the one it has.

Topic 1, Question 9 asks whether FINRA should create safe harbors for "executions pursuant to documented regular and rigorous methodologies." A safe harbor for documentation would codify the loophole. Topic 3, Question 1 asks whether order-by-order review should "continue to be required for internalized order flow." Order-by-order review is the only standard under which the customer's actual price is the object of the review. Removing it would eliminate the last point at which the rule touches the outcome. Topic 3, Question 3 asks whether a "smarter order router"

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[62] The author of this letter was present when this was said at a meeting of asset managers. Better Markets attributes the same description to FINRA at the March 28, 2019 meeting of the Commission's Investor Advisory Committee, citing J.W. Verret, "Efforts to Sue the SEC Over Broker-Inducement Regulation Unlikely to Succeed," 17 Ohio St. Bus. L.J. 180, 196 (2023). Letter from Benjamin L. Schiffrin, Better Markets, to the SEC re File No. S7-2026-20 (Aug. 17, 2026), at n.12, https://www.sec.gov/comments/S7-2026-20/s7202620-1005119-3201347.pdf. WTI Rule 611 Letter, supra n.2, at 3.

with “built-in best execution logic” should constitute an order-by-order review. A router is the thing being reviewed. It cannot also be the review.

What FINRA should do is the opposite. We The Investors recommends:

1. **An order-by-order standard for all non-institutional orders,** replacing the aggregate regular-and-rigorous standard for retail flow. The review must consider all venues, including those with which the firm has no relationship or connection. It must be rigorously quantitative. De minimis price improvement is not sufficient justification for routing an individual order to a destination in which a conflict of interest exists, regardless of disclosure. Retail brokers should be judged strictly on the price received, order by order. Institutional orders, where implicit costs and information leakage legitimately dominate, may retain the flexibility of the current framework. Technology has made this practicable; RN 21-23 said so in 2021.

2. **An objective price improvement floor for conflicted retail executions.** Where a firm receives payment for order flow or internalizes, an execution should be presumed inconsistent with best execution unless it receives material price improvement: the midpoint or better where the spread is one tick, and at least a full tick where the spread is wider. This is the standard Canada has applied to dark executions since October 2012 (UMIR Rule 6.6) and the standard the Commission proposed for retail auctions in the Order Competition Rule.

3. **Execution quality reported by routing broker.** FINRA should require wholesalers to report execution quality statistics for each broker whose orders they execute, and require brokers to obtain and review them. Broker-level discrimination of the kind Schwarz et al. documented and Mr. Cifu described is invisible in aggregate Rule 605 data and will remain so until the data are disaggregated.

4. **Routing inputs, not just outputs.** A regular and rigorous review must document the routing parameters the firm used at each venue (immediate-or-cancel instructions, order size, sequencing, minimum quantity, reallocation behavior after fills), because fill rates and price improvement at a disfavored venue can be engineered by the firm doing the reviewing. A review that compares outcomes the firm itself manufactured is not a review. FINRA’s own economists have identified the harm from affiliate preferencing; FINRA’s examiners should be looking for how it is produced.[63]

5. **No reliance on the reviews of the firm that pays you.** Supplementary Material .09(c) permits a routing firm to rely on the regular and rigorous review of a receiving firm that handles the orders as agent for the customer. FINRA should state explicitly that no such reliance is acceptable, in any form, where the receiving firm pays the routing firm for the orders or executes them as principal. A broker cannot outsource its duty of loyalty to the counterparty on the other side of the conflict.

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[63] Amber Anand, Mehrdad Samadi, Jonathan Sokobin and Kumar Venkataraman, “Institutional Order Handling and Broker-Affiliated Trading Venues,” FINRA Office of the Chief Economist Working Paper (rev. Feb. 22, 2019), https://www.finra.org/sites/default/files/OCE_WP_jan2019.pdf, published at 34 Review of Financial Studies 3364 (2021) (“orders handled by brokers with high affiliated ATS routing are associated with lower fill rates. Trading costs based on the implementation shortfall approach are higher when clients select a broker with high affiliated ATS routing”; average fill rates of 16.9 percent for brokers in the highest tercile of affiliated-ATS routing versus 43.5 percent for the lowest tercile, working paper at 13).

6. **No blanket "not held" designations for retail orders.** The Notice reports that FINRA "has observed some firms including 'blanket' provisions in new account agreements" designating retail orders as not held, and firms that receive held retail orders and route them "as not held." FINRA has observed it. FINRA should state that it violates Rule 5310 and charge it.

7. **Examiner access to the routing audit trail.** Firms should maintain technology that permits examiners to review the order routing audit trail directly and periodically, not only on request. FINRA should publish, annually, the number of Rule 5310 examinations, referrals, and enforcement actions, and the restitution ordered.

8. **A standardized examination module.** FINRA has never published what a "regular and rigorous" review must contain, which is why every firm's review is different and every enforcement action is a bespoke argument about adequacy. Appendix A to this letter is a proposed examination module that asks the questions FINRA's own AWCs show it does not ask: whether the firm's router preferences venues that pay it; whether payment for order flow varies by order type or size; whether the firm changes routing tables after hitting an exchange pricing tier; whether directed orders are overridden; whether the firm has ever been asked by a counterparty to modify its routing in exchange for business; and, above all, whether the firm negotiated its payment for order flow rate knowing what it would cost its customers in price improvement, which is the question RN 21-23 poses and no AWC has ever asked. Part 4 of the module describes what FINRA should do with the answers. We offer it as a starting point.

9. **Bring a case on the RN 21-23 theory.** FINRA has the Robinhood order. It has the Cifu interview. It has nine years of its own exam findings. It has the order-level data no one else has. The theory has been on the books since June 2021. Use it.

10. **Benchmark every firm against its peers, and act on the outliers.** The questions in Appendix A produce numbers. FINRA should collect them, quarterly, in a standard format from every firm that routes non-institutional orders, and compute for each firm the same small set of metrics: price improvement as a share of the quoted spread on marketable orders; the share of executions at the midpoint or better; the share of price improvement below a tenth of a cent; payment for order flow per share and per order, by order type; the share of non-directed flow routed to venues that pay the firm; and fill rates and execution speed by venue. It should then do what Schwarz et al. did with 85,000 orders and no regulatory access: compare brokers at the same wholesaler, in the same stock, at the same moment, which FINRA can do on every order because the Consolidated Audit Trail identifies the routing broker. Firms in the bottom of the distribution on execution quality and the top on payment received should be examined that quarter; firms that stay there for two quarters should be referred to Enforcement. FINRA should publish the distributions annually. A facts-and-circumstances standard is hard to enforce against one firm in isolation. It is easy to enforce against a firm whose customers get 27 percent of the spread when its peers get 47 percent at the same wholesalers in the same stocks. Comparison is what gives the standard a shape. This is the surveillance pattern FINRA announced in January 2018. We are asking FINRA to build it, and to tell us whether it did.

11. **Take the conflicted firms out of the room.** A governor or advisory committee member whose firm receives payment for order flow, pays it, or internalizes retail orders should recuse from Board and committee deliberations on best execution rules, guidance and enforcement policy, and FINRA should publish each recusal. FINRA should also publish, for every industry governor and committee member, whether the member's firm receives or

pays payment for order flow. And no person should serve on the Board of Governors while employed by, or within two years of leaving, a member firm that has been the subject of a FINRA or Commission enforcement action within the preceding ten years. FINRA raised its gift limit to $300 because a dinner can influence judgment. It should apply the same insight to a seat at its own table.

12. **Make a named person accountable.** Every firm should designate one or more appropriately registered principals as individually accountable for oversight of best execution and customer order routing. Those principals should certify, at least annually and after any material routing change, that the firm has conducted the required execution quality review, considered reasonably available alternatives, evaluated material conflicts, and escalated identified deficiencies. Where a principal fails to perform those responsibilities reasonably, the firm should impose documented consequences proportionate to the failure: retraining, written discipline, enhanced supervision, removal of best execution supervisory responsibility, suspension or termination. And the firm should require Compliance and Legal to evaluate promptly whether the individual's conduct triggers any Form U4 or Form U5 disclosure obligation, including disclosures relating to regulatory investigations, internal reviews, or termination following allegations of violations of securities laws, regulations, rules or industry standards. Ten years of process cases have produced ten fines paid by firms and no consequence for any individual. A rule that no person is responsible for is a rule no one will enforce inside the firm either.

VI. If Rule 611 Is Rescinded, This Is All That Is Left

The Notice is issued "in light of the SEC's proposal to modify certain Regulation NMS requirements." That proposal would rescind Rule 611, the Order Protection Rule, adopted in 2005, which requires every trading center to maintain policies and procedures reasonably designed to prevent executing an order at a price inferior to a protected quotation displayed elsewhere. It is enforced mechanically, by the trading center's own systems, on every order, before execution, with an affirmative duty under Rule 611(a)(2) to regularly surveil the effectiveness of those procedures and promptly remedy deficiencies. It is the only rule in the national market system that guarantees a retail order the best displayed price. We set out our objections to the rescission in full in our July 21, 2026 letter to the Commission, and 1,070 individual investors have since filed their own (WTI Rule 611 Letter, supra n.2). We do not repeat those objections here. This section is about what FINRA's Notice does with the Commission's proposal.

The Commission's rationale for removing it is FINRA. The proposing release states that Rule 611 "is not needed as a backstop to best execution given today's highly automated, interconnected and competitive equity markets … and a broker's duty to provide best execution would apply regardless," and that "best execution obligations should continue to ensure brokers use reasonable diligence to secure the most favorable terms for customer orders."[64] FINRA's Notice accepts the handoff, observing that Rule 611 "'undergirds' a firm's best execution obligation and serves as a minimum requirement," and asking (Topic 1, Question 10) "[h]ow should FINRA approach oversight for compliance with best execution obligations in the absence of a trade-through rule?"

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[64] SEC, The Trade-Through Rule and Locked and Crossed Markets Provisions of Regulation NMS, Proposed Rule, Release No. 34-105655 (June 11, 2026), 91 Fed. Reg. 36,656, 36,664 (June 17, 2026), https://www.sec.gov/files/rules/proposed/2026/34-105655.pdf, at 28-30.

So the Commission proposes to remove the mechanical floor on the theory that FINRA's duty catches what falls through, and FINRA responds by declaring its framework "time-tested" and asking whether to relax order-by-order review. Each regulator is pointing at the other. Between them sits the record in Section I.

The two rules are not substitutes, and the Commission knew it when it adopted Rule 611. The 2005 adopting release explained that Rule 611 was needed because "many of the investors that ultimately received the inferior price in these trades may not be aware that their orders did not, in fact, obtain the best price."[65] Rule 611 was built so that investor protection would not depend on the investor noticing. Rule 5310 depends entirely on FINRA noticing, after the fact, on a quarterly aggregate basis, against a "reasonable diligence" standard. FINRA has been noticing the same deficiencies since 2017 and has brought one case a year.

The Commission's own data show what happens when protection is removed. When the round-lot definition changed on November 3, 2025 and certain 40-share quotes became protected overnight, the off-exchange trade-through rate for those quotes fell from 12.6 percent to 0.2 percent.[66] Run that in reverse across the whole market. The Commission's release concedes that after rescission "wholesalers may begin to trade through displayed round-lot quotes," that this would result "in worse prices for these orders," and that "[t]his would transfer value from the retail investors to the wholesalers, who would earn higher profits."[67] The only thing standing between retail investors and that transfer, by the Commission's own account, is FINRA Rule 5310 as FINRA enforces it.

Our answer to Topic 1, Question 10, then, is this. FINRA should tell the Commission, plainly, whether it is prepared to enforce best execution as the sole protection for every retail order in the United States, and if so, what it will do differently from the last ten years. If FINRA's answer is that its framework is "time-tested" and needs only updated guidance, the Commission should treat that answer as a reason not to rescind Rule 611.

VII. The Commission Should Review FINRA's Enforcement of Rule 5310

Section 19(g)(1) of the Exchange Act requires every self-regulatory organization to "comply with the provisions of this chapter, the rules and regulations thereunder, and its own rules, and … absent reasonable justification or excuse enforce compliance" with its rules by its members.[68] Section 19(h)(1) authorizes the Commission to censure, limit, suspend or revoke the registration of a self-regulatory organization that "without reasonable justification or excuse has failed to enforce compliance" with its own rules.

The Commission has used this authority. In 1996 it found that the NASD had known for years about the odd-eighth quoting convention among Nasdaq market makers and had done nothing, and it observed that the NASD's "dual role requires the NASD to subordinate its commercial interests … to

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[65] SEC, Regulation NMS, Final Rule, Release No. 34-51808 (June 9, 2005), 70 Fed. Reg. 37,496, 37,516 (June 29, 2005) ("Given the large number of trades that fail to obtain the best displayed prices … the Commission is concerned that many of the investors that ultimately received the inferior price in these trades may not be aware that their orders did not, in fact, obtain the best price. The Order Protection Rule will backstop a broker's duty of best execution on an order-by-order basis by prohibiting the practice of executing orders at inferior prices, absent an applicable exception.").

[66] Release No. 34-105655, supra n.61, at 196-202 and Table 9.

[67] Id. at 171.

[68] 15 U.S.C. § 78s(g)(1), (h)(1).

its public interest mandate."[69] In 1999 and again in 2005 it sanctioned the New York Stock Exchange for failing to police its floor brokers and specialists, in the latter case over more than $158 million in customer harm, with the Enforcement Director observing that "[w]hen SROs don't vigorously police and prosecute wrongdoing in their markets, investors suffer."[70] It has never applied Section 19(h) to FINRA.

We ask the Commission to review FINRA's enforcement of Rule 5310 against the standard of Section 19(g)(1), on the record set out in this letter, and to make its findings public before it adopts any rule that would make Rule 5310 the sole protection for retail order execution. Consider who FINRA answers to. FINRA's revenues in 2025 were about $1.96 billion, of which $991 million was regulatory fees paid by the firms it regulates, a figure that is net of $150 million FINRA's Board voted to rebate to those firms during the year.[71] The rebate alone is eleven times what FINRA collected in fines for retail order routing violations in the preceding decade. Ten of FINRA's twenty-two governors hold industry seats.[72] Since January 2026 one of them has been the Chief Legal, Compliance and Corporate Affairs Officer of Robinhood Markets, appointed ten months after Robinhood's $26 million FINRA settlement and five years after the Commission's $65 million order.[73] Beginning in September 2017 the Floor Member Governor's seat was held by the Head of Execution Services of Citadel Securities, the largest retail wholesaler, during the years FINRA was announcing its price improvement surveillance pattern and conducting its zero-commission sweep.[74] FINRA's Market Regulation Committee, which advises it on rules like this one, includes a broker that accepts payment for order flow.[75] We do not suggest that any of these people did anything improper. We suggest that a regulator funded by the industry, governed in part by the industry, and advised by the industry has not, on this record, enforced the one rule that constrains the industry's most lucrative retail practice, and that the Commission should ask whether those facts are related. FINRA's enforcement of this critical rule has produced ten process cases and no restitution in a decade, while FINRA's own examiners reported the violations every year. Whether

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[69] SEC, Report Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and the Nasdaq Market (Aug. 8, 1996), https://www.sec.gov/litigation/investreports/nd21a-report.

[70] SEC Press Release 99-72 (June 29, 1999); SEC Press Release 2005-53 and Release No. 34-51524 (Apr. 12, 2005), https://www.sec.gov/news/press/2005-53.htm.

[71] FINRA, 2025 Annual Financial Report, at 1, 11, 13 and 32, https://www.finra.org/sites/default/files/2026-07/2025-finra-annual-financial-report.pdf (Consolidated Statements of Operations: total operating revenues of $1,663.0 million; regulatory revenues of $990.9 million, "net of member firm rebates approved by the Board of $150.0 [million] in 2025 and $0 in 2024"; fines of $77.6 million; interest and dividend income of $83.0 million; net investment gains of $139.2 million; total approximately $1.96 billion). Fines are excluded from FINRA's operating budget (at 13). The ten-year total of fines in the ten routing cases in Section I is $13.15 million.

[72] FINRA By-Laws, Art. VII, Sec. 4(a), https://www.finra.org/rules-guidance/rulebooks/corporate-organization/composition-and-qualifications-board; FINRA, Board of Governors, https://www.finra.org/about/governance/finra-board-governors ("FINRA's Board comprises 22 industry and public members, with 10 seats designated for industry members, 11 seats designated for public members and one seat reserved for FINRA's Chief Executive Officer.").

[73] FINRA news release, "FINRA Announces Appointment of Four New Board Governors" (Jan. 6, 2026), https://www.finra.org/media-center/newsreleases/2026/finra-announces-appointment-four-new-board-governors ("Gallagher is Chief Legal, Compliance and Corporate Affairs Officer of Robinhood Markets."). Robinhood's FINRA settlement is dated March 7, 2025 (supra note 14); the Commission's order is dated December 17, 2020 (supra note 29).

[74] FINRA, Election Notice (July 21, 2017), supra note 12.

[75] FINRA, Advisory Committees, Market Regulation Committee, membership effective June 4, 2026, https://www.finra.org/about/governance/advisory-committees (listing, among others, Gary Goldsholle, Charles Schwab & Co., Inc.). Charles Schwab & Co. discloses receipt of payment for order flow in its Rule 606 reports.

that record reflects a "reasonable justification or excuse" is a question for the Commission. It should be asked before Rule 611 is gone, not after.

VIII. Listed Options

The Notice's eighth topic asks whether additional guidance is needed for listed options. It is, and the reason is that everything in this letter is worse in options. Payment for order flow in options is larger than in equities: the top five retail brokers disclosed $587 million in options payment for order flow against $436 million in equities in the first quarter of 2021 alone, and the Commission's Regulation Best Execution release found that roughly 70 percent of all retail payment for order flow comes from options.[76] The same dollar investment generates roughly ten times as much payment for order flow in options as in equities.[77] And there is no Rule 605 for options, so the aggregate execution quality data that at least exist for equities do not exist at all. FINRA's own 2024 Oversight Report asks firms how they "monitor options exchange order exposure requirements, auction mechanism usage and venue routing" and how they monitor those requirements "when routing orders to an affiliated entity or another broker-dealer that provides PFOF," which tells us FINRA knows where to look.[78] We have located no FINRA enforcement action on options best execution for retail flow. Each recommendation in Section V applies to options, and FINRA should say so explicitly.

IX. Conclusion

Notice 26-15 asks for comment on how to modernize FINRA's best execution guidance, but an examination of the record reveals that modernization would not cure the largest failing of existing standards: Enforcement. FINRA's guidance on payment for order flow and best execution has been clear since 2001, if not before, and explicit since 2021. Yet enforcement of those standards is sparse and inconsistent. FINRA's failure to enforce the existing best execution standard has led to the open proliferation of corrosive practices throughout markets. Enforcement is the foundation to FINRA's mission to protect investors and safeguard the integrity of markets, and yet an examination of the record reflects no such priority.

If, as FINRA acknowledged years ago, enforcing best execution is like "nailing jell-o to a wall", then FINRA should fix the problem, not ignore it, and we believe we have provided a roadmap to doing just that. The detailed recommendations we offer in Section V are, in most cases, things FINRA has acknowledged it could do. With this letter, we urge FINRA to adopt (1) order-by-order review for all non-institutional orders, replacing aggregate review for retail flow; (2) an objective price improvement floor for conflicted retail executions — midpoint or better at a one-tick spread, a full tick where wider; (3) execution quality reported by routing broker, not just in aggregate; (4) review

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[76] Rule 606 reports of TD Ameritrade, Robinhood, E*TRADE, Schwab and Webull for the first quarter of 2021, as compiled in Alexander Voigt, "Top 5 Brokers Raked In Over $1 Billion Payment For Order Flow During The First Quarter Of 2021," Benzinga (May 6, 2021), https://www.benzinga.com/fintech/21/05/20971201/top-5-brokers-raked-in-over-1-billion-payment-for-order-flow-during-the-first-quarter-of-2021; Regulation Best Execution, supra n.31, 88 Fed. Reg. at 5447 (first quarter 2022 payment for order flow of $796 million, of which $561 million, approximately 70 percent, in listed options).

[77] Ernst and Spatt, "Payment for Order Flow and Asset Choice" (2022), https://foster.uw.edu/wp-content/uploads/2022/07/4a-Ernst_Spatt-Payment-for-Order-Flow.pdf.

[78] FINRA, 2024 Annual Regulatory Oversight Report, Best Execution, "Related Considerations: Fixed Income and Options Trading," https://www.finra.org/rules-guidance/guidance/reports/2024-finra-annual-regulatory-oversight-report/best-execution. On the absence of Rule 605 disclosure for options, see also Regulatory Notice 26-15, Topic 8 ("Execution quality disclosures under Rule 605 of Regulation NMS apply only to covered orders in NMS stocks, not to listed options.").

of routing inputs, not only outputs, since a firm can manufacture the outcomes it reviews; (5) a bar on relying under .09(c) on the review of a firm that pays for the flow or executes it as principal; (6) a statement that blanket "not held" designations for retail orders violate Rule 5310; (7) periodic examiner access to the routing audit trail, plus annual publication of Rule 5310 examination and restitution figures; (8) a standardized examination module, offered as Appendix A; (9) an enforcement action on the RN 21-23 theory, unused since 2021; (10) quarterly peer benchmarking with referral of persistent outliers to Enforcement; (11) take the conflicted firms out of the room; and (12) make a named person accountable.

We welcome the opportunity to discuss these recommendations, and any of our findings, with FINRA staff or the Commission. We recognize that a letter from a retail investor organization telling FINRA its enforcement has failed is not the comment FINRA was hoping for, but it is the feedback the moment requires. The retail investors we represent and those beyond are everyday people - household investors - whose orders are being most impacted, and FINRA is the regulator with the rule, the data and the authority. This letter asks FINRA to use all three, to marshal these resources, in pursuit of its mission to protect investors. Thank you again for the opportunity to comment on this important matter.

Dave Lauer
Co-Founder, We The Investors
CTO, Urvin Finance

Appendix A. Proposed FINRA Best Execution Examination Module

Purpose and scope

This module is designed to determine (1) whether the firm has met its best execution obligations with respect to customer orders sent to an internal market making desk, an internalization system, a firm-operated ATS, another broker-dealer, an exchange or an ATS for execution; (2) whether the firm has adequate written supervisory procedures applicable to this area; and (3) whether the firm has demonstrated that it conducted the supervisory review set out in those procedures.

The module is specifically designed to test whether a firm that routes customer orders on a pre-determined, aggregate basis has established and followed procedures for a regular and rigorous, order-by-order review of the quality of the executions those orders receive. It is organized in four parts. Part 1 (Risk Scoping) establishes what the firm does with customer orders and where the conflicts lie. Part 2 (Compliance Assessment) tests whether the firm's regular and rigorous review is adequate to those facts. Part 3 (Controls Assessment) tests the firm's written supervisory procedures. Part 4 (Cross-Firm Quantitative Review) describes how FINRA should analyze the data the module produces across all firms. Background notes for examiners on latency and information leakage follow.

The module tests Rule 5310 as it exists today, including the aggregate regular and rigorous review that Supplementary Material .09 permits. Under Recommendation 1 of this letter, aggregate review would no longer satisfy the rule for non-institutional orders; if that recommendation is adopted, the Part 2 tests would apply to retail flow order by order, against the price each order received, and the Part 1 questions would remain as written. Nothing in the module should be read as accepting that a documented aggregate review is sufficient for retail orders routed under a conflict of interest. The module applies to listed options as well as equities; where a question refers to the NBBO, Rule 605 or an ATS, the examiner should apply the corresponding options concept (the NBBO across options exchanges, exchange auction and exposure requirements, and the absence of Rule 605 data for options).

Throughout, "PFOF" means payment for order flow in any form, including per-share or per-order payments, liquidity rebates, fee credits, free executions and reciprocal order flow arrangements. "R&R review" means the regular and rigorous review required by Supplementary Material .09 to Rule 5310.

Part 1. Risk Scoping

1.1 Order flow characteristics

Identify the volume and types of orders and customers sending orders to the firm, including whether the orders are directed or non-directed and whether any are generated by the firm itself. Obtain the following for the review period:

Firm order flow statistics	Total	Market	Limit	Mkt. limit	Cond.	Pegged	Other
Total orders received							
Directed							
Non-directed							
Retail and wealth management customer orders							

Firm order flow statistics	Total	Market	Limit	Mkt. limit	Cond.	Pegged	Other
Retail and wealth management, non-directed							
Retail and wealth management, directed							
Institutional customer orders							
Institutional, non-directed							
Institutional, directed							
Third-party broker-dealer customer orders							
Third-party broker-dealer orders received in a principal capacity, non-directed							
Third-party broker-dealer orders received in a principal capacity, directed							

1.2 Order routing disclosures

Determine whether the firm modified any of its order routing disclosures in any regulatory filing, customer notice or trading agreement within the past 24 months. What was changed, and why?

1.3 Order routing practices

Determine whether the firm routes customer orders on a pre-determined or automated basis according to any individual or combined characteristic of the order flow, including but not limited to:

- Customer type: retail broker; wealth management affiliate; retail customer; institutional customer (non-broker-dealer); client commission or commission sharing arrangement; fee-based or managed account; broker-dealer.
- Order time: pre-market session (before 9:30 a.m. ET); after-hours session (after 4:00 p.m. ET); the first five minutes of the regular session; the final five minutes before the close.
- Order size: fewer than 100 shares; more than 10,000 shares; notional value above a stated limit.
- Order type: market; limit; marketable limit (priced at or better than the NBBO on arrival); stop.
- Fee structure: commission rate; amount of PFOF.
- Security: market capitalization; historical average daily volume.
- Rule 606 status: whether the order is a “covered order” under SEC Rule 606.

Determine whether the firm designates any retail customer orders as “not held,” whether any such designation is made through a blanket provision in an account agreement or customer notice rather than order by order at the customer’s instruction, and whether the firm receives held orders from customers or correspondents and routes them onward as not held. Obtain the volume of retail orders so designated and the language of any such provision.

If the firm routes orders on a pre-determined or automated basis, identify and assess the firm’s routing practices, including why the firm determined it appropriate to route customer orders in that manner.

1.4 Routing venues

Identify every market to which the firm routes orders on a pre-determined or automated basis, and the firm's understanding of the qualitative and quantitative differences among those venues.

Venue profile	Venue A	Venue B	Venue C
Rule book published			
Form ATS published			
Subscriber manual published			
Venue discloses use of direct feeds for pricing pegged orders			
Venue discloses use of the SIP for some or all exchanges in pricing pegged orders			
Venue offers multiple connectivity methods with different latencies			
Venue offers proprietary market data feeds with different latencies			
Venue offers colocation			
Venue offers cross-connects to its matching engine			
Membership cost (annual)			
Connectivity cost (monthly)			
Market data fees (monthly)			
Venue publishes a lit quote			
Venue disseminates indications of interest			
Percentage of trades at the NBBO midpoint			
Published average trade size			
Published percentage of orders receiving price improvement			
Published average price improvement per share			
Price improvement as advertised by the venue			

1.5 Routing methodology

- Obtain the firm's routing parameters and routing tables.
- Obtain a diagram or flow chart of the order flow and routing process.
- Determine whether routing is based on general factors such as market class (OTC versus NMS), listing market, order size, order type or customer type.
- Determine whether the firm uses a smart order router ("SOR") (see 1.6).
- Determine the comparative results of the firm's routing, so as to understand differences in venue preference and any discrimination among venues or customer types, using the following:

Characteristics of the firm's venue routing	Venue A	Venue B
Volume of institutional customer orders routed, non-directed		
Volume of retail customer orders routed, non-directed		

Characteristics of the firm's venue routing	Venue A	Venue B
Percentage of total institutional customer orders routed, non-directed		
Percentage of total retail customer orders routed, non-directed		
Percentage of total institutional customer orders executed, non-directed		
Percentage of total retail customer orders executed, non-directed		
Percentage of institutional customer orders routed at a marketable price, non-directed		
Percentage of retail customer orders routed at a marketable price, non-directed		
Percentage of principal orders routed at a marketable price		
Total institutional customer shares sent, non-directed		
Total retail customer shares sent, non-directed		
Average daily volume, non-directed		
Number of block executions, non-directed		
Average order size, non-directed		
Average number of symbols sent daily, non-directed		
Average trade size, non-directed		
Percentage of non-directed orders that are not immediate-or-cancel		
Percentage of non-directed orders resting longer than 10 seconds		
Percentage of non-directed orders larger than 100 shares		
Percentage of the firm's non-directed trades at the midpoint on the venue		
Percentage of non-directed orders reloaded to the same venue within 5 seconds of a fill		
Ratio of reload order size to the size filled on the venue in the prior 5 seconds		
Average resting time of orders sent to the venue (total and by capacity)		
Percentage of non-directed orders in small-cap names (under $2 billion) sent to the venue		
Percentage of non-directed orders in mid-cap names ($2 billion to $10 billion) sent to the venue		
Percentage of non-directed orders in large-cap names (over $10 billion) sent to the venue		
Number of non-directed block orders sent to the venue		
Non-directed block orders as a percentage of total orders sent to the venue		
Non-directed shares priced to the far side as a percentage of total shares sent to the venue		
Non-directed shares priced to the midpoint as a percentage of total shares sent to the venue		

1.6 Smart order routers

- Determine which venues the firm's proprietary SOR uses for non-directed customer orders.
- Determine whether the firm uses any third-party broker's SOR, whether the firm knows which venues that SOR uses for the firm's non-directed customer orders, and whether the firm knows if the third party routes differently for its own broker-dealer customers.
- Determine whether the ability to capture rebates or lower access fees is a consideration where the order size is larger than the aggregate displayed size at the NBBO.

- Determine whether there are situations in which the order size exceeds the aggregate displayed size and the firm nonetheless ignores certain displayed venues.
- Determine whether the firm routes directed customer orders to its own ATS where the customer directed the order elsewhere.
- Determine the percentage of non-directed customer orders the firm routes to its own internalization engine or ATS before routing to any other venue, and the average order size and average fill size for those orders.
- If more than one market center is at the NBBO and the order size is less than the aggregate displayed size across protected markets, will the SOR route first to the market center that pays PFOF, or that pays the most PFOF?
- If more than one market center is at the NBBO and the order size is greater than the aggregate displayed size, will the SOR route first to venues that pay PFOF, or that pay the most PFOF? Will it ignore certain venues at the NBBO, for example for certain customers?
- If multiple markets are at the NBBO and the order size is less than the aggregate displayed size, will the firm route to a venue in which it has an ownership stake?
- Determine the percentage of non-directed institutional customer orders, and of non-directed broker-dealer orders, sent to venues in which the firm has an ownership stake.
- Determine the circumstances in which the routing logic is influenced by maker-taker fees, and whether, if more than one market center is at the NBBO, the SOR routes first to the market center that does not impose a removal fee, or that imposes the lowest fee.
- Determine whether fill rates are part of the routing logic and whether the firm's routing allocation is consistent with the fill rates it observes.
- Determine whether the SOR always checks an internal destination (such as an internal ATS) first, and whether affiliation is part of the routing logic, including whether the SOR always routes first to an affiliated broker-dealer, ATS, dark pool, or exchange specialist or market maker.
- Determine who has the ability to change routing parameters and routing destinations, who makes those decisions, and whether such decisions are approved as part of the R&R review.
- Determine whether the firm modifies its routing tables during the month after reaching a pricing tier threshold on a particular venue, and whether the firm instructs internal trading desks (for example, program trading) to increase their routing to certain venues so that the firm reaches pricing tiers.

1.7 Payment for order flow and order flow arrangements with other broker-dealers

Payment for order flow:

- Determine whether the firm has any explicit or implicit contractual arrangement to send order flow to any third-party firm, and whether it has any reciprocal order flow arrangement with any third-party firm.

- Determine whether the firm receives free executions or rebates from any third-party firm in exchange for maintaining another commercial relationship with that firm (for example, prime brokerage).
- Determine whether the firm has ever been asked by a third-party firm to modify its order routing in exchange for a new or continued commercial relationship with that firm.
- Does the firm route only to market centers that pay PFOF?
- Is PFOF paid per share or per order? Does it vary by order type, order size, or the market class of the security?
- Is there a minimum amount of order flow that must be routed to the other broker-dealer?
- If PFOF is shared with customers, obtain a detailed description of the practice. Does the firm pass the entire amount to customers, or only a portion? How is the transfer effected: do customers receive an offsetting credit against transaction costs, or reduced commissions?
- Does the firm receive any form of payment from another broker-dealer in addition to disclosed PFOF (for example, based on the number of orders or shares, or on order type)?
- Obtain all written agreements and disclosure documents.

Reciprocal order flow arrangements:

- Is there a minimum amount of order flow that must be routed to the other broker-dealer?
- Is the arrangement measured per share or per order? Does it depend on order type, order size, or the market class of the security?

Analyze and determine:

- All factors the firm uses to decide which broker-dealer receives customer orders.
- How PFOF or reciprocal order flow is considered in the firm's routing decisions for customer orders.
- The individuals responsible for approving routing decisions that are based in any way on PFOF or reciprocal order flow, and the individuals advised of those decisions.
- Whether the firm's PFOF-based routing decisions differ for orders routed on behalf of retail customers, institutional customers, the firm's principal activity, or the firm's proprietary activity.
- Whether the firm has denied customer requests to direct orders to particular venues, and whether it intends to connect to those venues.

Smart order routers and PFOF:

- Does the firm use an SOR to route customer orders to any broker-dealer that pays PFOF? How is PFOF considered in the SOR's routing decisions?
- If more than one market center is at the NBBO, will the SOR route first to the market center that pays PFOF, or that pays the most PFOF?

- How often does the firm change its SOR based in any way on PFOF, who approves those changes, and who is notified of them?

1.8 Routing to exchanges that pay rebates or charge fees

Determine whether the firm routes orders to any exchange that provides liquidity rebates or credits, or that charges maker-taker fees, and obtain:

- A description of all factors the firm uses to decide which exchange receives customer orders, including whether order type, size, security or customer type is a factor.
- How rebates, credits or maker-taker fees, and fill rates, are considered in the firm's routing decisions.
- The individuals responsible for approving routing decisions based in any way on rebates or fees, and the individuals advised of those decisions.
- Whether the firm routes a higher percentage of non-marketable orders to the exchanges that pay the highest rebate, and whether it avoids exchanges that charge a fee for posting non-marketable orders.
- Whether the firm allows any venue to uniquely identify orders as originating from a particular type of investor, and whether the firm receives compensation, or a higher rebate, for doing so.

Determine whether the firm's rebate- or fee-based routing decisions differ for retail customers, institutional customers, the firm's principal activity or its proprietary activity, or by order type (market, marketable limit, limit) or order size.

If the firm uses a SOR to route customer orders to any exchange that pays a rebate, determine how rebates, credits and maker-taker fees are considered in the SOR's routing logic; whether, if more than one market center is at the NBBO, the SOR routes first to the market center that does not impose a removal fee, or that imposes the lowest fee; how often the firm changes the SOR based on rebates or fees; who approves those changes; and who is notified.

Payment for order flow	**Total**	**Venue A**	**Venue B**
Percentage of non-directed retail and wealth management orders first routed to a third party or venue that will pay a rebate or PFOF			
Percentage of non-directed institutional customer orders first routed to a third party or venue that will pay a rebate or PFOF			
Percentage of non-directed broker-dealer orders first routed to a third party or venue that will pay a rebate or PFOF			
Percentage of non-directed retail and wealth management executions on which the firm receives a rebate or PFOF			
Percentage of non-directed institutional customer executions on which the firm receives a rebate or PFOF			
Percentage of non-directed broker-dealer executions on which the firm receives a rebate or PFOF			
Percentage of non-directed retail and wealth management executions on which the firm receives free execution			
Percentage of non-directed institutional customer executions on which the firm receives free execution			
Percentage of non-directed broker-dealer executions on which the firm receives free execution			

Payment for order flow	Total	Venue A	Venue B
Percentage of non-directed retail and wealth management orders sent to a venue in which the firm has an ownership stake			

1.9 Internalization and routing to affiliated market centers

Routing to an affiliated market center, or to a market center in which the firm has an ownership interest, is a form of internalization. Determine the extent to which internalization affects the firm's routing decisions and the potential for structural features of the affiliated venue to affect execution quality.

- Does the firm have an affiliated ATS, or is it the sponsoring broker-dealer for any ATS? Does it have an affiliated exchange specialist, market maker or floor broker? Does it have an ownership interest in any exchange?
- Is the firm's routing logic to send an order first to an internal ATS, an affiliated ATS, an ATS in which it has an interest, an affiliated specialist, market maker or floor broker, or an exchange in which it has an ownership interest?
- Determine whether the firm's retail and wealth management customer orders, and its institutional customer orders, are first routed to the firm's ATS or an affiliate.
- Determine the percentage of retail and wealth management customer orders, and of institutional customer orders, executed in the firm's ATS against the firm's proprietary or principal trading account.
- Determine whether the firm routes to its ATS while the ATS uses the SIP for some or all exchange pricing of pegged orders.
- Determine whether the firm operates in a data center that allows colocation with its ATS; whether it allows third-party brokers to cross-connect to the ATS; and whether it offers multiple connectivity options (FIX, binary) with different latency characteristics to third parties accessing the ATS.
- Determine whether any of the firm's proprietary trading groups has a cross-connect to the firm's ATS, uses a faster connectivity option to the ATS than any other participant, or uses direct exchange market data feeds while the ATS prices its pegged orders off the SIP.
- Determine whether the firm's ATS segments order flow. Describe each type of segmentation and why it exists.
- Determine whether the firm's ATS disseminates indications of interest to any third party, under what circumstances, and to whom.

1.10 Handling of directed customer orders

- Does the firm accept directed order routing instructions from customers? Does it follow them? If not, why not?
- Has the firm informed any customer that it does not support directed routing to particular venues, or to any venue that is not an exchange? Has it discouraged a customer from directing an order to a particular venue? Which venues, and why?

- Has the firm implemented any override of directed orders based on a risk threshold (for example, a maximum order quantity or notional limit lower than the maximum supported by the venue)?
- Has the firm informed any customer that it would waive its best execution obligations if the customer directed an order to a particular venue? List the venues, the customers and the reasons given.
- What criteria does the firm use to decide which venues to include in its routing table? Does the table differ by customer type or order type, and on what factors?

1.11 Information leakage

Determine whether the firm has assessed, and monitors for, each of the following in its order routing:

- Slow market arbitrage against the firm's orders, including where the firm routes pegged orders to venues that price off the SIP.
- Sequential routing of child orders and the information it reveals.
- Adverse selection at each venue.
- The firm's own connectivity choices (FIX versus binary protocols; 1, 10 or 40 Gb connections) and its use of direct feeds for pricing on its own ATS.
- Price dislocation on wholesaler executions (the NBBO at the time of routing compared with the average execution price on market and marketable limit orders).
- Routing to inverted venues for rebates, and routing of non-marketable orders to venues with high maker rebates.
- Preferencing of the firm's own ATS, wholesaler or internalization engine.
- Use of minimum quantity instructions.
- Execution speed on market orders, including monitoring for sub-second dislocations.
- Posting depth of book, which can leak information through direct depth-of-book feeds that display individual orders.

1.12 Payment for order flow negotiations and broker-specific execution quality

This section addresses the conduct described in Regulatory Notice 21-23: a firm may not negotiate the terms of its order routing arrangements in a manner that reduces the price improvement its customers' orders would otherwise receive.

- For each wholesaler or venue that pays the firm, obtain the history of the firm's PFOF rate, including every change and the date of each change, and identify who at the firm negotiated it.
- Determine whether the firm was told by any wholesaler, in any form, that the level of PFOF affected the level of price improvement available to its customers' orders, and obtain all such communications.

- Determine whether the firm asked any wholesaler what price improvement its orders would receive at a lower PFOF rate, or at no PFOF, and what the answer was. If the firm did not ask, determine why.
- Determine whether the firm ever declined a wholesaler's offer of greater price improvement in exchange for a lower rate, or stopped routing to a wholesaler that would not pay the firm's rate, and obtain the analysis, if any, that supported the decision.
- Determine whether the firm obtains execution quality statistics specific to its own order flow from each wholesaler, as distinct from the wholesaler's aggregate Rule 605 statistics, and whether the firm has asked each wholesaler whether it provides different price improvement to other brokers' orders and why.
- Determine whether the firm's own analysis has ever compared the price improvement its customers receive with the price improvement customers of other brokers receive at the same wholesalers, and what it showed.
- Determine whether the firm has compared, for its own orders, the price improvement received against the PFOF received, by order type and over time, and whether any increase in PFOF coincided with a decrease in price improvement.

Part 2. Compliance Assessment

2.1 The firm's regular and rigorous review

Once the examiner has obtained a detailed understanding of the firm's order routing practices, determine how the firm conducts its R&R review. Note that R&R review is not a substitute for order-by-order review.

Best execution committee:

- Review the minutes of committee meetings, the statistical reports, and all other information the committee used.
- Identify and explain every statistic, report or other item of information the committee regularly reviews.
- Explain how each member of the committee is made aware of changes to routing decisions, including changes made in light of exchange maker-taker fees and changes made in connection with PFOF arrangements, and who approves or is made aware of such changes.
- Area of concern: a committee member is from an affiliated entity to which the firm routes order flow.

If the firm does not have a committee, does it conduct specific reviews of customer order execution quality, and how?

2.2 Adequacy of the firm's procedures

Scope and breadth. The R&R review should cover the various order types and sizes the firm handles, and should include every venue to which the firm currently routes orders as well as venues to which it does not. Rule 5310 sets the minimum requirements of the review and requires that it be conducted at least quarterly.

1. If the firm does not conduct an order-by-order review, does it periodically conduct an R&R review of the quality of its customers' executions?

2. Is the review conducted at least quarterly?

3. Does the review adequately cover all types of orders routed away?

4. Obtain the firm's Rule 606 report and compare it with the R&R review. Do the two align? Is every venue in the Rule 606 report included in the R&R review?

5. Does the review include venues to which the firm does not currently route orders?

6. If the firm is an introducing broker that relies on the R&R reviews of its clearing or executing broker, does that broker pay the firm for its orders in any form, or execute them as principal? If so, the firm may not rely on that broker's reviews, and the examiner should assess the firm's own review. If not, do the clearing or executing broker's reviews meet the requirements of Rule 5310?

7. Have the firm's R&R reviews resulted in any change to its routing practices?

Internalized order flow. A firm is required to conduct a regular and rigorous assessment of its internalized order flow, and should ensure that customer orders executed internally received best execution. As part of this review the firm should compare the quality of its internalized executions with other market centers, in the same manner that it examines its routed order flow.

1. Does the firm's Rule 606 report include internalized order flow as a venue (whether by listing the firm as a routing venue or by a "principal" designation)?

2. If the firm internalizes order flow, do its R&R reviews compare the firm's internalized executions with other market centers?

3. Does it appear that internalized order flow was evaluated objectively, and in the same manner and to the same degree, as externally routed order flow?

4. If the firm routes to an affiliated entity, does it appear that affiliation, common ownership or other ownership interests have unduly influenced the firm's routing decisions?

Payment for order flow. A firm that receives PFOF must be particularly cognizant of the need to conduct an R&R review that takes into account all relevant factors, including material differences in price improvement opportunities, execution quality (including the likelihood of execution), and non-price factors including the costs of execution.

1. If the firm routes based on PFOF or rebates and fees, does its review address the adequacy of its disclosures on Rule 606 reports, confirmations and other documents, including disclosure of any sharing of PFOF, rebates or fees with customers?

2. Does the firm consider and review all relevant factors of execution quality, which may include PFOF, in its R&R review? A firm's failure to adequately review and consider all relevant factors may indicate that the receipt of PFOF or other compensation has unduly influenced its routing decisions.

Quantitative analysis. The R&R review should include a comparison of execution quality statistics. Rule 5310 specifies that these should include price improvement, price disimprovement, speed of execution, size of execution, fill rates, likelihood of execution for limit orders, and transaction costs.

1. Does the firm's review include, at a minimum, those statistics?
2. Are all venues reviewed consistently and against the same criteria?
3. Does any venue to which the firm does not route orders appear to offer more favorable execution quality?
4. Does a review of the execution quality statistics support the firm's routing decisions?
5. For orders routed to a venue that pays the firm, or internalized, what share of shares executed at the NBBO midpoint or better where the quoted spread was one tick, and what share received at least a full tick of price improvement where the spread was wider? What share received price improvement of less than $0.001 per share? Does the firm's review treat executions below those levels as consistent with best execution, and on what basis?

Part 3. Controls Assessment

Verify and assess whether the firm's written supervisory procedures meet the minimum requirements for this area:

1. Do the procedures identify the individual responsible for the R&R review, the frequency of the review, and the information the review must consider?
2. Do the procedures require documentation of the review, of any routing change made or declined as a result of it, and of the reasons?
3. Do the procedures address the conflicts identified in Part 1 (PFOF, rebates, affiliated venues, internalization) specifically, rather than by general reference to Rule 5310?
4. Do the procedures require that changes to routing parameters and destinations be approved through the R&R review process, and by whom?
5. Does the firm maintain an order routing audit trail (each customer order, the routing decision made for it, the parameters applied, every venue to which it or any part of it was sent, and the execution received) in a form that examiners can query directly, without a request to the firm? Do the procedures provide for periodic examiner access to it, and for how long is it retained?

Part 4. Cross-Firm Quantitative Review

The data called for in Parts 1 and 2 are to be collected from every firm routing non-institutional orders, quarterly, in the standard format of the tables above, and analyzed across firms rather than firm by firm.

4.1 Standard metrics. For each firm, and for each firm-wholesaler pair, compute for the quarter: (a) the effective-to-quoted spread ratio and price improvement as a share of the quoted spread, for market and marketable limit orders, by order size bucket; (b) the share of shares executed at the NBBO midpoint or better, and the share executed at the NBBO with no improvement; (c) the share of price-improved shares improved by less than $0.001; (d) PFOF received per hundred shares and per order, by order type (market, marketable limit, non-marketable limit) and, for options, per contract; (e) the share of non-directed retail orders routed first to a venue that pays the firm, and the share of retail limit orders routed to the venue paying the highest rebate; (f) fill rates and time to execution for non-marketable orders, by venue, against the venue-wide average; and (g) for firms that internalize, the same metrics for internalized orders against the metrics the firm's routed orders receive elsewhere.

4.2 Matched comparison. Using Consolidated Audit Trail data, compare marketable orders in the same security, at the same wholesaler, within the same second, across routing brokers, and report each broker's average price improvement relative to the others. A broker whose orders consistently receive less improvement than other brokers' orders at the same wholesaler has either negotiated a lower level of price improvement or is sending different orders; the firm should be asked which.

4.3 Outlier identification. Rank firms on each metric in 4.1 and 4.2. Flag any firm in the bottom quartile on price improvement or midpoint share, in the top quartile on payment received, or with a matched-comparison deficit at any wholesaler. Flag any firm whose metrics moved adversely by more than a stated threshold from the prior quarter, and any firm whose PFOF rate changed in the same quarter its price improvement fell.

4.4 Escalation. A flagged firm is examined under Parts 1 through 3 in the same quarter, with the firm asked to explain the deficit in writing. A firm flagged in two consecutive quarters on the same metric, or that cannot explain a matched-comparison deficit by reference to the characteristics of its orders, is referred to Enforcement for review under Rule 5310(a) and Regulatory Notice 21-23.

4.5 Publication. FINRA publishes annually the distribution of each metric across firms, the number of firms flagged, the number examined, the number referred, and the restitution ordered.

Background and examiner notes

Latency. Another factor that firms should consider in evaluating execution quality is latency. Although latency statistics are not among the required elements of Rule 605 reports, latency is an important factor in today's markets and can affect fill rates and speed of execution. Many market centers provide information about their technology and connectivity infrastructure, system and messaging capacity, server colocation and average latency. A firm should evaluate average latency when it routes to multiple ATSs, when it routes to a particular or preferred market center first (including an internal ATS) before making other routing decisions, or when it routes repeatedly to the same ATS, and should evaluate whether those practices result in latency that affects fill rates or the overall quality of executions.

Information leakage. A firm should also consider how information leakage can affect execution quality. It should assess whether its practice of routinely routing a customer order to multiple trading centers (internal or external), routing to a particular trading center (for example, an internal ATS) before making other routing decisions, or routing repeatedly to the same ATS, may result in information leakage, and what effect any leakage has on execution quality. A firm should weigh the risk of information leakage at a venue against the fill rates achieved there and assess whether the risk outweighs the potential for an execution. When routing to an internal ATS, a firm should analyze the ATS's procedures and safeguards for protecting order and trading information. When routing to an external ATS, a firm should ask the ATS to describe how it addresses potential information leakage.