



February 8, 2023

## **FREEDOM OF INFORMATION ACT REQUEST**

### **By Website Submission**

FOIA Officer  
Freedom of Information Act Office  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549

**Re: Information Regarding the Data Relied upon by the Commission in Proposing  
Certain Commission Rulemaking Related to Market Structure**

Dear Sir or Madam:

### **I. INTRODUCTION**

This is a request under the Freedom of Information Act (“FOIA”).<sup>1</sup> As described in greater detail below, the Securities Industry and Financial Markets Association (“SIFMA”) requests that the U.S. Securities and Exchange Commission (“Commission”) provide SIFMA with certain data relied upon by and referenced in the Commission’s four recent proposed rulemakings related to market structure (the “Proposals”) under the Securities Exchange Act of 1934 (“Exchange Act”).<sup>2</sup> There are two types of data requests, as described in Section III below. The first data request is for certain subsets of Consolidated Audit Trail (“CAT”) data, which data is not publicly available, referenced in the Proposals.<sup>3</sup> The second data request is for the Commission to identify publicly available data referenced in the Proposals where it is not clear the precise source of such publicly available data.

Importantly, SIFMA is not requesting that the CAT data be provided in a manner that would include any personally identifiable information or individual firm’s trading data. Rather, as detailed further below, SIFMA requests that only the subsets of the CAT data used in connection with each table or figure in the Commission’s economic analyses of each Proposal be provided in a manner that would provide SIFMA or other members of the public with the ability to critically analyze and/or replicate the data analyses of the Commission without revealing the underlying firms or persons attributable to such data.

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<sup>1</sup> 5 U.S.C. 552 *et. seq.*

<sup>2</sup> See *infra* notes 4 – 7 and accompanying text.

<sup>3</sup> For clarity, the subsets of CAT data referred to herein relate to the record of the end execution that was used to produce the relevant figures in the Commission’s economic analyses; and not additional underlying records.

SIFMA believes that the use of non-public CAT data is highly problematic in connection with proposed rulemakings because the public cannot meaningfully comment on the Commission's analyses and conclusions. Nevertheless, providing the unattributable CAT data used for each table or figure as described herein could help facilitate the public's review and validation of the Commission's economic analyses without disclosing any information that should remain confidential. SIFMA encourages the Commission to make the data requested herein publicly available on a voluntary basis to facilitate even broader public review of the relevant data.

## **II. BACKGROUND**

On December 14, 2022, the Commission proposed four rules related to market structure: (i) Regulation Best Execution;<sup>4</sup> (ii) Order Competition Rule;<sup>5</sup> (iii) Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders;<sup>6</sup> and (iv) Disclosure of Order Execution Information.<sup>7</sup> In connection with each of the Proposals, the Commission makes reference to certain data relied upon by the Commission in formulating the Proposals. This data includes non-public CAT data. This data also includes certain publicly available data for which greater clarity is needed as to the source of such public data.<sup>8</sup>

## **III. TERMS OF THE REQUESTS**

### **A. General Instructions**

With respect to each individual "Request" noted below, SIFMA requests that the data be provided in an electronic and machine-readable format. The data should be readily accessible to the Commission staff given that it was used within the last year to formulate the Proposals.

For the CAT data described below in subsection B, SIFMA requests that the Commission provide anonymized subsets of the CAT data used in connection with each table or figure using CAT data in each of the Proposals. SIFMA appreciates the sensitive nature of some of the components of CAT data and is not requesting any CAT data that could be attributable to a particular market participant. However, as detailed further below in subsection B, SIFMA believes that the raw order-level data (*e.g.*, anonymized orders, prices, quantities of each order *etc.* used in connection with each table or figure) can be made publicly available without risk of revealing sensitive financial or commercial information. The primary goal and guiding principle of making such information public is to facilitate public review of the Commission's analyses, assumptions, and conclusions, while minimizing privacy concerns.

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<sup>4</sup> Exchange Act Release No. [96496](#), 88 FR 5440 (Jan. 27, 2023) (Regulation Best Execution).

<sup>5</sup> Exchange Act Release No. [96495](#), 88 FR 128 (Jan. 3, 2023) (Order Competition Rule).

<sup>6</sup> Exchange Act Release No. [96494](#), 87 FR 80266 (Dec. 29, 2022) (Minimum Pricing Increments).

<sup>7</sup> Exchange Act Release No. [96493](#), 88 FR 3786 (Jan. 20, 2023) (Order Execution Information).

<sup>8</sup> 17 CFR 242.605.

For the publicly available data described below in subsection C, SIFMA requests that the names of the particular firms be provided to allow for replication of the data analyses conducted by the Commission in the Proposals. In other words, the relevant data is already public, but it is not sufficiently clear from the Proposals which sources of public data were used by the Commission. The sources of these data come from publicly available reports by broker-dealers pursuant to Rule 605 and Rule 606 of Regulation NMS.<sup>9</sup> For these, SIFMA requests that the Commission simply provide a list of the names of the broker-dealers from whom the publicly available data was drawn.

With respect to both the CAT data and publicly available data, the precise methodology or formula used in connection with the Commission's use of such data is not always clear in each Proposal as well as the queries or extraction criteria from the data sources. Accordingly, SIFMA also requests that the Commission make public for each of the tables and uses of the CAT data and publicly available data (specified below in subsections B and C) the following:

- (1) *Methodology/Formula* – The Commission's methodology or formula relating to the use of such data in a manner that would facilitate replication of the Commission's analyses;
- (2) *Queries* – The queries, metrics, and/or extraction criteria from the data sources used by the Commission; and
- (3) *Rationale* – The rationale behind the Commission's use of such methodology/formula and the queries/extraction criteria.

SIFMA requests that this information be provided in a Word or PDF document that notes the relevant table or data reference (as specified below in subsections B and C) in each Proposal followed by the methodology, query, and rationale details. This information is necessary to effectively evaluate the Commission's analyses in the Proposals.<sup>10</sup>

## **B. CAT Data Referenced in the Proposals**

Rule 613 of Regulation NMS under the Exchange Act<sup>11</sup> requires the establishment of a National Market System Plan (the "CAT NMS Plan") to provide for an accurate, time-sequenced

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<sup>9</sup> 17 CFR 242.605 and 17 CFR 242.606.

<sup>10</sup> SIFMA notes that these requests are not dissimilar to what the Commission staff requires of self-regulatory organizations ("SROs") with respect to the submission of proposed fee filings pursuant to Section 19(b) of the Exchange Act, which require, among other things, that a SRO describe "its methodology for determining the baseline costs and revenues for the product or service, as well as its methodology for estimating the expected costs and revenues for the product or service." See Commission, *Staff Guidance on SRO Rule Filings Relating to Fees* (May 21, 2019), [https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees#\\_ftnref3](https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees#_ftnref3). SIFMA believes that the Commission should hold itself to at least this same standard as Commission staff apply to regulated entities, particularly given the significance of the Proposals. Unlike a SRO fee proposal where a broker-dealer could cease being a member of that SRO if they disfavored a particular proposal, the Proposals (if adopted) would apply to all broker-dealers without exception, thus making it even more important that the methodology, formula, queries, and rationale related to the relevant data are clearly understood.

<sup>11</sup> 17 CFR 242.613.

record of orders beginning with the receipt or origination of an order by a member of a national securities exchange or national securities association, and document the life of the order through the process of routing, modification, cancellation, and execution (in whole or in part) of the order.<sup>12</sup> Each of the Proposals relies on CAT data for certain analyses supporting the Proposals.

SIFMA requests that the Commission provide the subsets of CAT data in connection with each table or figure cited by the Commission in the Proposals to facilitate meaningful review and validation of the Commission's analyses. Specifically, SIFMA requests that the Commission provide for each table or figure a lists of the orders, prices, share quantities, and other relevant information as may relate to a particular table or figure (*i.e.*, at the same level of granularity as used by the Commission)—all without any attribution of such information to any particular broker-dealer, market participant, or trading venue.<sup>13</sup> SIFMA also requests that the capacity of each order (*i.e.*, whether it was executed as agent or principal) also be withheld from the CAT data. Additionally, SIFMA requests that the Commission provide the precise methodologies, formulas, queries and rationale used in connection with each table or figure in order to facilitate replication of the Commission's analyses.

For example, in the Regulation Best Execution Proposal, the Commission analyzes execution quality statistics between exchanges and certain wholesale market makers based on Rule 605 reports<sup>14</sup> in Table 5 and then supplements this analysis with CAT data in Table 6.<sup>15</sup> SIFMA requests that the Commission provide a list of all of the orders, order sizes, and other relevant information from the CAT data used in Table 7 at the same level of granularity as used by the Commission and without providing any information regarding the specific broker-dealers, market participants, or specific trading venues to which such orders are attributed. This would help facilitate SIFMA and the public's validation of the Commission's methodology and analysis

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<sup>12</sup> See Limited Liability Company Agreement of Consolidated Audit Trail, LLC (July 24, 2020), <https://catnmsplan.com/sites/default/files/2020-07/LLC-Agreement-of-Consolidated-Audit-Trail-LLC-as-of-7.24.20.pdf>. See also Exchange Act Release No. 89397, 85 FR 45941 (July 30, 2020) (Commission order approving an amendment to the CAT NMS Plan).

<sup>13</sup> SIFMA notes that the Proposal contain certain references to the use of CAT data in places in the Proposals other than in connection with a particular table or figure. See *e.g.*, Exchange Act Release No. 96495, 88 FR 128, at note 287 and accompanying text (Jan. 3, 2023). While SIFMA believes that it is critical to understand the Commission's use of CAT data in each instance where it was used, SIFMA is focusing its request on the CAT data used in the tables and figures of the Proposals. SIFMA believes that making public the CAT data in the tables and figures (in the manner described herein) is the most immediately important to facilitate understanding of the Proposals. However, it may be necessary to request additional CAT data referenced in the Proposals. If SIFMA determines that such additional CAT data is necessary, it shall do so pursuant to an additional FOIA request.

<sup>14</sup> See *infra* n.20 and accompanying text describing Rule 605 reports.

<sup>15</sup> Exchange Act Release No. 96496, 88 FR 5440, 5498 - 5501 (Jan. 27, 2023) ("To supplement the analyses using Rule 605 data [in Table 5] and test for the robustness of the results that it generated, CAT data was analyzed [in Table 6] to look at the execution quality of marketable orders of individual investors in NMS Common Stocks and ETFs that were less than \$200,000 in value and that executed and were handled by wholesalers during Q1 2022 ('CAT retail analysis').").

without the risk of reverse engineering of trading strategies or otherwise revealing sensitive financial information.<sup>16</sup>

Similarly, Tables 6 and 7 of the Order Competition Rule Proposal also draws comparisons between data taken from Rule 605 reports and compares Rule 605 data in Table 6 to more granular CAT data in Table 7.<sup>17</sup> The raw CAT data used in Table 7 (*e.g.*, the orders, order sizes, order type, principal/agency execution, and price improvement statistics) can be made publicly available without any attribution of such orders to particular market participants and would facilitate similar review of the Commission’s methodology and analysis.<sup>18</sup>

As an additional example, Table 4 of the Order Execution Information Proposal uses CAT data to analyze “stop orders” during March 2022.<sup>19</sup> SIFMA requests that the Commission provide the raw order data, at the same level of granularity as used by the Commission, to produce this Table 4. As with the other examples noted above, this CAT data can be made public without any attribution to the particular market participants or broker-dealers from whom such order originated.

Set forth below is a list for each Proposal of the relevant tables and/or figures that reference the use of CAT by the Commission. SIFMA requests that all of the CAT data used in connection with these tables/figures, as well as the precise formulas or methodologies, be made publicly available pursuant to this FOIA request letter in an anonymized manner, as explained above.

- Regulation Best Execution – The following tables/figures within the Proposal use CAT data: (i) Table 3 and 4, which refer to certain “estimates from CAT data,” (ii) Table 6, (iii) Table 7, (iv) Table 8, (v) Table 15, and (vi) Table 16.

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<sup>16</sup> For example, it is unclear from the Commission’s analysis in creating Table 6 whether the Commission first evaluated whether the Rule 605 data in Table 5 could be replicated using CAT data before proceeding with its analysis and conclusion in Table 6. Providing the CAT data pursuant to this FOIA request would facilitate the public’s review as to whether the Commission conducted this critical procedural step (and if conducted, whether the Commission did so accurately) in the data analysis.

<sup>17</sup> Exchange Act Release No. [96495](#), 88 FR 128, 190-194 (Jan. 3, 2023).

<sup>18</sup> See *supra* n. 16 (describing some of the ways in which the CAT data could be used validate the Commission’s findings presented in its tables). Additionally, a number of the Commission’s conclusions drawn from its use of CAT data present averages that may not be statistically significant. See *e.g.*, Exchange Act Release No. [96495](#), 88 FR 128, n.6 (Jan. 3, 2023) (noting that Table 7 finds, on average, that marketable orders routed to wholesalers have adverse selection costs that are 71% lower than the adverse selection costs of orders routed to national securities exchanges). The Commission has not made clear whether these averages are statistically significant or whether there may be variations (*e.g.*, for particular stocks) that make the reported averages statistically insignificant. Making public the requested CAT data pursuant to this request letter would help facilitate review of the Commission’s methodologies and conclusions in this regard.

<sup>19</sup> Exchange Act Release No. [96493](#), 88 FR 3786, 3845 (Jan. 20, 2023).

- Order Competition Rule – The following tables/figures within the Proposal use CAT data: (i) Table 3, (ii) Table 7, (iii) Table 8, (iv) Table 14, (v) Table 15, (vi) Table 18, (vii) Table 19, (viii) Table 20, (ix) Table 22, and (x) Table 23.
- Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders – The following tables/figures within the Proposal use CAT data: none.
- Disclosure of Order Execution Information – The following tables/figures within the Proposal use CAT data: (i) Table 3, (ii) Table 4, (iii) Table 5, and (iv) Figure 14.

### **C. Publicly Available Data (Rule 605 and Rule 606 Data)**

Pursuant to Rule 605 of Regulation NMS, certain broker-dealers are required to make publicly available information related to their order executions.<sup>20</sup> Similarly, pursuant to Rule 606, certain broker-dealers are required to provide disclosures on a quarterly basis regarding order routing.<sup>21</sup> In the Proposals, the Commission uses Rule 605 and Rule 606 reports for certain of its analyses, but it is unclear which firms' reports were used. This limits the ability of the public to understand and evaluate the Commission's analyses.

Accordingly, SIFMA requests that the names of the broker-dealers to whom the Rule 605 and Rule 606 reports relate be made publicly available pursuant to this request. These can be provided in list form corresponding to the reference to such data in each Proposal (*e.g.*, Table 2 of Regulation Best Execution used the following broker-dealers' Rule 606 reports: . . .). Additionally, SIFMA requests that the Commission provide the precise methodologies and formulas used in connection with any calculations using these data in order to facilitate replication of the Commission's analyses. Set forth below is a list of where relevant references to these data are mentioned in each Proposal for which SIFMA requests disclosure.

- Regulation Best Execution
  - *Rule 605 Reports*: (i) Table 5 and footnotes 412 - 413.
  - *Rule 606 Reports*: (i) Table 2; (ii) Table 3 (Panels A and B); (iii) Table 4; (iv) footnote 439; (v) Table 12 and footnote 460; (vi) Table 13; (vii) discussion on page 5508 of the Federal Register publication;<sup>22</sup> (viii) Table 14; (ix) Table 15; and (x) Table 16.
- Order Competition Rule

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<sup>20</sup> 17 CFR 242.605.

<sup>21</sup> 17 CFR 242.606.

<sup>22</sup> Exchange Act Release No. [96496](#), 88 FR 5440, 5508 (Jan. 27, 2023) ("From the Rule 606 reports of 15 major retail brokers for listed options, we can infer that as of Q4 of 2020, 11 of them had PFOF arrangements with wholesalers, one firm routed the orders directly to the exchanges, one firm routed the orders to its parent firm, and the remaining two firms routed the orders to wholesalers but did not have PFOF arrangements. According to the Rule 606 reports, wholesalers paid \$560 million in PFOF to the 11 retail brokers for nondirected orders in listed options in Q1 2022.").



- *Rule 605 Reports*: (i) Table 1; (ii) Table 5; (iii) Table 6; (iv) Table 16; (v) Table 18; and (vi) Table 19.
- *Rule 606 Reports*: (i) Table 2; (ii) Table 3; (iii) Table 4; (iv) Table 7; (v) Table 14; (vi) Table 15; (vii) Table 16; and (viii) Table 17.
- Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders
  - *Rule 605 Reports*: none.
  - *Rule 606 Reports*: (i) footnote 467 and accompanying text.
- Disclosure of Order Execution Information
  - *Rule 605 Reports*: none.
  - *Rule 606 Reports*: (i) footnote 614 and accompanying text.

#### IV. LEGAL BASIS FOR THE REQUEST

SIFMA respectfully requests the above-described information pursuant to 5 U.S.C. Section 552(a), which generally requires, among other things, that a federal agency must make its records available to any person pursuant to the statute unless an exception or exclusion applies. A federal agency is generally required to determine whether to comply within 20 business days of receipt of such a request.

SIFMA does not believe that an exemption or exclusion for withholding the data applies. With respect to the publicly available data, SIFMA is requesting only that the Commission identify the sources of such public data in order to allow for meaningful analysis of such data. In the case of CAT data, SIFMA is only requesting CAT data that does not contain personally identifiable information or information that could attribute a particular order or execution to a particular market participant. Because the requested CAT data and the underlying orders and execution could not be attributed to a particular market participant, the CAT data would not reveal trade secrets or privileged or confidential commercial or financial information subject to an exemption from public disclosure under FOIA.<sup>23</sup> SIFMA does not believe that any CAT data released pursuant to this request could be used to reverse engineer any market participants' trading strategies or other confidential commercial or financial information.

Additionally, SIFMA believes that neither the CAT data nor the publicly available data requested herein would be exempt from disclosure as information contained in or related to examination, operating, or condition reports about financial institutions that the Commission regulates or supervises.<sup>24</sup> In the case of CAT data, such data are not examination, operating, or condition reports about financial institutions. Rather, the CAT data represents anonymized order and execution information of all market participants. Although the SEC may use certain CAT data pertaining to an individual firm in carrying out its examination and supervisory functions

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<sup>23</sup> 5 U.S.C. 552(b)(4).

<sup>24</sup> 5 U.S.C. 552(b)(8).

over broker-dealers, such data cannot be said to have been distilled into any report, consideration, or conclusion relating to the examination, operation, or condition of any particular broker-dealer.<sup>25</sup> Moreover, SIFMA requests that the CAT be provided in a manner that it could not be attributable to any market participant. As a result, no particular broker-dealer would be identifiable in the requested CAT data.

With respect to the information requested regarding Rule 605 and Rule 606 reports, SIFMA believes that because these reports are already publicly available, there is no basis to claim that these are exempt as information contained in or related to examination, operating, or condition reports about financial institutions that the Commission regulates or supervises. While the Commission may use these reports to carry out its examinations of broker-dealers, the primary purpose of such reports is to inform the public of where a broker-dealer routes orders or the executions provided by a particular trading center.

Finally—and most importantly—these data are essential to enable meaningful comment on the Proposals, and it has been well established by courts that a federal agency, such as the Commission, has an obligation to make data relied upon in connection with a proposed rulemaking publicly available. *See, e.g., Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1133 (D.C. Cir. 1995); *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) (“[T]he Administrative Procedure Act requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule.”); *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982) (“In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. . . . An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.”), *cert. denied*, 459 U.S. 835 (1982); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977) (proposed rule must provide sufficient information to permit informed “adversarial critique”), *cert. denied*, 434 U.S. 829 (1977); *Kern County Farm Bureau v. Allen*, 450 F.3d 1072 (9th Cir. 2006) (“Integral to an agency's notice requirement is its duty to ‘identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules.’” (citing *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991))). It is simply not possible for the public to substantively evaluate the purported costs, benefits, effects, and economic baseline on which the Proposals are based if the Commission uses “secret data” that is unavailable to the public.

## V. FEES

Generally, the Commission charges certain fees in fulfilling FOIA requests, as set forth on the Commission’s schedule of fees.<sup>26</sup> A waiver or reduction of fees may be appropriate if the disclosure of the requested records is in the public interest because (1) it is likely to contribute

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<sup>25</sup> For example, the requested CAT data is unlike a Commission exam report of a particular broker-dealer that may contain findings or considerations of the Commission related to the examined broker-dealer.

<sup>26</sup> 17 CFR 200.80(e). *See also* Schedule of Fees for Records Services, Commission, *available at* <https://www.sec.gov/foia/feesche.htm>.



significantly to public understanding of the operations or activities of the government and (2) the disclosure is not primarily in the commercial interest of the requester.<sup>27</sup> SIFMA asks that any fees be waived regarding this request because SIFMA believes the request is consistent with these considerations.<sup>28</sup>

For example, the subject of the requested records concerns the data used to support proposed rules of the Commission that, if adopted, would directly impact SIFMA members and all market participants. Disclosure of the requested records is likely to significantly contribute to the public's understanding of the Proposals because it will be used to help understand and analyze the Commission's rationale behind the Proposals as well as the purported benefits, costs, and effects the Proposals will have on market participants. Moreover, as the discussion in Part IV above makes clear, courts have long recognized there to be a compelling public interest and requirement under the Administrative Procedure Act<sup>29</sup> that a federal agency, such as the Commission, identify and make available technical studies and data used in reaching the decisions to propose particular rules.<sup>30</sup>

However, to the extent it is determined that any fees should be paid, SIFMA agrees to pay the applicable fees up to a total amount of \$1,000. If the Commission believes the fees for this request will exceed this amount, SIFMA request that you please contact SIFMA at the telephone number or e-mail address provided below to discuss the costs.<sup>31</sup>

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Please do not hesitate to contact SIFMA at (212) 313-1287 or at [egreene@sifma.org](mailto:egreene@sifma.org) should you have any questions about this request. Thank you.

Sincerely,



Ellen Greene  
Managing Director, Equity and Options Market Structure  
SIFMA

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<sup>27</sup> 17 CFR 200.80(e)(1), (2).

<sup>28</sup> 17 CFR 200.80(e)(4).

<sup>29</sup> 5 U.S.C. 553(b)-(c).

<sup>30</sup> *Connecticut Light & Power Co.*, 673 F.2d at 530-31.

<sup>31</sup> 17 CFR 200.80(e)(3).