

# **Bond Case Briefs**

*Municipal Finance Law Since 1971*

---

## **SEC Proposes New Regulation Best Execution – Brokers Must Achieve “Most Favorable Price” for Customers; Heightened Obligations for Conflicted Retail Transactions**

**The proposal would codify for the first time the federal-level best execution standard for brokers and related obligations. New Regulation Best Execution would result in a pivot from what has been a principles-based approach to achieving and regulating best execution, to a prescriptive, rules-based regime that heavily emphasizes brokers’ policies and procedures. If adopted, the regulation will reshape the landscape for order routing, execution, and broker economics. Despite that, the Commission seems to rely on significant conjecture to support the proposal, often referring to “may,” “could,” and “might” when describing concerns with existing practices and potential ameliorative effects of the proposed requirements. This could prove pivotal to the outcome of inevitable judicial challenges after likely adoption in late 2023.**

On December 14, 2022, the SEC proposed [new Regulation Best Execution](#), encompassing new Exchange Act Rules 1100, 1101, and 1102. Regulation Best Execution would codify a federal best execution standard pursuant to which broker-dealers must achieve the “most favorable price” for customers. This means that broker-dealers would be required to use reasonable diligence to ascertain the best market for the 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. Regulation Best Execution would also require broker-dealers to establish related robust policies and procedures, particularly for firms engaging in “conflicted transactions” with or for retail customers, including principal trading, routing customer orders to affiliates, and receiving payment for order flow (PFOF).

The operative words in the proposed best execution standard are identical to those in FINRA Rule 5310. Nevertheless, and as the SEC acknowledges, key aspects depart from the current best execution regulatory regime and will require significant industry adjustments. Introducing brokers, brokers with PFOF arrangements, and executing brokers accustomed to internalizing retail order flow or executing retail trades for affiliates will feel particularly affected by this proposal.

Public comments are due by March 31, 2023.

### **Regulation Best Execution at a Glance**

Regulation Best Execution would apply to transactions in “securities” products (including equities, options, corporate and municipal bonds, government securities, and “crypto asset securities”) and would, among other things:

1. Codify a federal rules-based best execution standard for brokers, dealers, government securities brokers, government securities dealers, and municipal securities dealers (proposed Rule 1100 series) and establish exceptions similar to those available today.
2. Require broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to comply with the best execution standard (proposed Rule 1101) while

- providing a limited exemption for introducing brokers (proposed Rule 1101(d)).
3. Require enhanced policies and procedures for broker-dealers that engage in certain “conflicted transactions” for or with retail customers (proposed Rule 1101(b)).
  4. Require broker-dealers to review the execution quality of their customer transactions at least quarterly (proposed Rule 1101(c)).
  5. Require broker-dealers to review their best execution policies and procedures at least annually and present a report detailing the results of such review to their boards of directors or equivalent governing bodies (proposed Rule 1102).

The term “market” is interpreted broadly for purposes of existing requirements and would be broadly defined under Regulation Best Execution as well, including other broker-dealers, exchanges, alternative trading systems (ATSs), and other venues that become known. The scope may also include a variety of mechanisms operated by markets used by broker-dealers to transact for or with customers (including auction mechanics and other execution protocols).

[Continue reading.](#)

### **Goodwin Procter LLP**

By Nicholas J. Losurdo, Peter W. LaVigne, David G. Adams. Lauren A. Schwartz & Christopher Grobbel

MARCH 3, 2023