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RE: University of Pittsburgh Securities Arbitration Clinic's Response
to Regulatory Notice 26-15, Best Execution: FINRA Requests Comment on
Modernizing FINRA's Best Execution Guidance

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Dear Ms. Mitchell:

The University of Pittsburgh School of Law's Securities Arbitration Clinic (the "Clinic") appreciates the opportunity to comment on *Regulatory Notice 26-15*.¹ The Clinic represents small retail investors in FINRA's Dispute Resolution Services forum without charge. Our client population consists almost entirely of two groups: elderly investors of limited financial means, many of whom depend on the assets at issue for their remaining income, and young, inexperienced investors who opened their first brokerage account on a mobile application within the last several years. As a generality, neither group reads Rule 605 reports, maintains execution quality dashboards, negotiates connectivity with venues, or selects among order types. They open an application, enter a ticker, and trust that the firm on the other side of the screen owes them something. Rule 5310 is the principal source of that obligation.

FINRA is correct that a member's best execution obligations apply to all transactions with customers "regardless of the time when an order is received or a transaction is executed."² But the market conditions in extended and overnight sessions differ from regular-hours conditions by an order of magnitude rather than by degree; the volatility controls and reference prices that operate during regular hours are largely absent; and the investors most likely to be trading at 3:00 a.m. are the least equipped to price those differences. Guidance that restates the general standard without specifying what it requires in those conditions will not change firm behavior, and it will not help a retail customer. The Clinic therefore urges FINRA to issue extended-hours guidance that is concrete about what reasonable diligence demands when the book is thin, the reference price is unreliable, and no one at the firm is awake.

¹ FINRA, *Regulatory Notice 26-15, Best Execution: FINRA Requests Comment on Modernizing FINRA's Best Execution Guidance* (July 24, 2026) [hereinafter *Notice 26-15*].

² *Id.* at 13.

I. EXTENDED TRADING HOURS

A. Extended and Overnight Sessions Are Materially Worse Execution Environments Than Regular Trading Hours.

FINRA's model risk disclosure under Rule 2265 already advises customers of six risks in extended hours trading: lower liquidity, higher volatility, changing prices, unlinked markets, an exaggerated effect from news announcements, and wider spreads.³ The evidence developed since that model was adopted demonstrates that the six risks are borne overwhelmingly by retail investors and are aggravated by the absence of the volatility protections that investors take for granted during the trading day.

1. Liquidity, Spreads, and Volatility are Greater During Extended Trading Hours.

In May 2026, IOSCO published a global report of extended trading hours in equity markets, drawing on survey responses from regulators and trading venues across twenty-one jurisdictions.⁴ The study found that “[a]cross markets, trading activity outside regular trading hours is generally characterized by lower liquidity and wider bid-ask spreads, with execution conditions differing from those observed during the regular trading hours sessions.”⁵ Further, the study found that while retail investors are the primary driver for demand to extend trading hours, institutional demand

³ FINRA Rule 2265(a); *see also* FINRA, *Regulatory Notice 14-54*, at 1 (Dec. 2014) (enumerating the six risks that a member's extended hours risk disclosure statement must, at a minimum, address).

⁴ Int'l Org. of Sec. Comm'ns, *Extended Trading Hours*, OR/06/26 (May 2026), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD820.pdf> [hereinafter *IOSCO Report*]. The report is based on questionnaires distributed to regulators and trading venues across twenty-one jurisdictions, supplemented by roundtable discussions with venues, clearing agencies, market participants, self-regulatory organizations, and academics. *Id.* at 8–9, 40–41.

⁵ *Id.* at 5, 20–21.

remained limited “chiefly due to concerns around execution quality, liquidity concentration and operational costs.”⁶

The IOSCO study also found that the risks associated with trading outside regular trading hours are not marginal. One United States trading venue reported to IOSCO that, in the third quarter of 2025, consolidated post-close spreads were nineteen times wider and pre-open spreads thirty-three times wider than during regular trading hours.⁷ BlackRock, examining its most actively traded iShares ETFs, found that quoted bid-ask spreads in overnight trading hours were on average nearly ten times wider as compared to regular trading hours.⁸ A Brazilian venue reported a volatility differential of 45.8% between regular and non-regular hours from March to October of 2025.⁹ Several venues attributed these differences to the smaller number of market makers willing to supply liquidity outside the regular session.¹⁰

Academic material reaches similar conclusions to the IOSCO Report. For example, a comprehensive study of after-hours trading concluded that “nocturnal” trading in United States-listed equities—defined as trading between 8:00 p.m. and 4:00 a.m.—was virtually nonexistent as recently as late 2022, grew rapidly through 2023 and 2024, is predominantly retail-driven, concentrates in a relatively small subset of securities, and occurs on a single dominant platform where liquidity is supplied by only two market makers.¹¹ The study found that “[c]ompared to regular trading

⁶ *Id.* at 38.

⁷ *Id.* at 20.

⁸ BlackRock Invs., LLC, *Market Spotlight: 24 Hour Trading — Implications for Markets and Investors* (2025), <https://www.blackrock.com/corporate/literature/whitepaper/blackrock-market-spotlight-24-hour-trading.pdf>; see also *IOSCO Report*, *supra* note 4, at 21 (summarizing the same finding).

⁹ *IOSCO Report*, *supra* note 4, at 20.

¹⁰ *Id.* (reporting that several venues attributed differences in volatility and spreads to the smaller number of market makers providing liquidity outside regular hours).

¹¹ Gregory W. Eaton, Andriy Shkillo & Ingrid M. Werner, *Nocturnal Trading* 1–2 (Fisher Coll. of Bus. Working Paper No. 2025-007, Dec. 19, 2025), <https://ssrn.com/abstract=5181159>.

hours, nocturnal spreads are roughly twice as wide.”¹² And critically, they find that average net profitability for overnight traders is close to zero unless positions are held over longer horizons.¹³

The Clinic acknowledges, in fairness, that the same study finds quoted and effective trading costs on the dominant overnight venue to be relatively low, and we do not dispute that finding.¹⁴ But low spreads on the one venue to which a member happens to route are not the same thing as best execution. Rule 5310.09(b) requires a member to compare the execution quality it obtains against what is available from competing markets, and in a session dominated by a single platform with two liquidity providers, that comparison is either impossible or trivial.¹⁵ And a session in which the average participant earns approximately nothing in expectation, while absorbing three to four times the price impact and bearing concentration risk on a single venue, is a session that transfers the timing risk of overnight news from professionals to amateurs.

2. The Volatility Controls and Reference Prices of Regular Hours Do Not Operate During Extended Hours.

The primary issue with extending trading hours is that the mechanisms which are designed to prevent a retail investor’s orders from being filled at an absurd price simply do not exist outside the regular session. For example, the Limit Up-Limit Down Plan applies only during regular trading hours, from 9:30 a.m. to 4:00 p.m. Eastern Time.¹⁶ Market-wide circuit breakers likewise do not operate outside regular

¹² *Id.* at 3.

¹³ *Id.* at 1.

¹⁴ *Id.*

¹⁵ FINRA Rule 5310.09(b).

¹⁶ FINRA, *Guardrails for Market Volatility* (Nov. 26, 2024), <https://www.finra.org/investors/insights/guardrails-market-volatility> (“The LULD Plan applies during regular trading hours from 9:30 a.m. to 4:00 p.m.”); *see also* *Limit Up-Limit Down Plan*, <https://www.luldplan.com/> (last visited September 10, 2026).

trading hours.¹⁷ And, as FINRA itself identifies in the *Notice*, the Securities Information Processors do not currently operate during the overnight hours, which means there is no NBBO at all against which a fill can be measured.¹⁸

Although trading venues have implemented mechanisms to mitigate the risks associated with trading during extended hours—such as disabling market, pegged, and stop orders; anchoring matching to the prior regular-session closing price; and imposing venue-specific overnight price bands—these substitutes are not uniform across venues, are not calibrated under an NMS plan, are not subject to the transparency that attends the LULD Plan, and are not mentioned anywhere in Rule 2265’s six enumerated risks.¹⁹ FINRA’s own *2026 Annual Regulatory Oversight Report* identifies venue-specific overnight price bands as a feature that firms’ supervisory systems must be designed to account for, including by reviewing scenarios that appear to reflect trades outside the bands or trades that appear designed to set the bands in a potentially manipulative manner.²⁰

Each of the execution quality considerations in Supplementary Material .09(b) of Rule 5310 presupposes a comparison against something.²¹ But during extended trading hours and especially overnight, the comparators are missing, unreliable, or venue specific. Guidance that tells members to consider those factors, without telling them what to use as a benchmark when the NBBO does not exist and one venue holds

¹⁷ *IOSCO Report*, *supra* note 4, at 23 (noting that U.S. limit up-limit down and market-wide circuit breakers do not operate outside of regular trading hours).

¹⁸ *Notice 26-15*, at 7 (observing that firms participate in equity markets “in the overnight hours for NMS stocks when the SIPs are not currently operating” and asking how firms benchmark execution quality absent an NBBO).

¹⁹ See *IOSCO Report*, *supra* note 4, at 22–23 (describing venue-level restrictions on market, pegged, and stop orders and the absence of auctions during extended sessions); FINRA Rule 2265; *Guardrails for Market Volatility*, *supra* note 16.

²⁰ *Extended Hours Trading*, FINRA: 2026 Annual Regulatory Oversight Report (2026), <https://www.finra.org/rules-guidance/guidance/reports/2026-finra-annual-regulatory-oversight-report/extended-hours-trading> [hereinafter *2026 Oversight Report*].

²¹ FINRA Rule 5310.09(b); *Notice 26-15*, at 4, 10–11.

nearly all the volume, does not give members an administrable standard and does not give customers a reviewable one.

3. Operational Fragility and Thin Supervision Plague Extended Hours.

On August 5, 2024, after a disappointing U.S. jobs report and during the unwinding of the yen-based carry trade, the dominant overnight alternative trading experienced capacity failures, cancelled the trades executed in the early morning hours, and halted trading; it reopened only partially on August 12 and resumed without restriction the week of August 19th.²² Customers of at least one major retail broker were unable to place trades at all.²³

IOSCO's survey documents why this fragility is structural rather than incidental. Eleven trading venues reported significant difficulty securing and retaining qualified staff willing to work irregular hours; extended sessions strain surveillance because additional alerts require additional resources, a burden that falls hardest on smaller firms; prolonged periods of low liquidity may create opportunities for manipulative strategies; and respondents identified heightened cybersecurity risk during off-hours activity.²⁴ IOSCO also noted that the compressed post-trade windows inherent in extended hours reduce the capacity for timely intervention when something goes wrong.²⁵

²² Eaton, Shkilko & Werner, *supra* note 10 (documenting the halt, the partial reopening on August 12, the unrestricted resumption the week of August 19, and the Korea Financial Investment Association's prohibition on routing to the venue); Suzanne McGee, *US Overnight Trading Platform Blue Ocean Completes Fix for Capacity Issues*, Reuters (Aug. 19, 2024) (reporting that the venue's systems could not accommodate the surge in activity and that customers of at least one retail broker were unable to place trades).

²³ See McGee, *supra* note 22.

²⁴ *IOSCO Report*, *supra* note 4, at 28–30.

²⁵ *Id.* at 29.

FINRA's own examination program further confirms the structural risks. The *2026 Annual Regulatory Oversight Report* lists among its findings that firms failed to maintain reasonably designed supervisory systems and controls, including with respect to identifying and reporting potentially manipulative activity conducted in after-hours trading, and failed to report required Trade Reporting Facility and Consolidated Audit Trail information arising from extended hours activity.²⁶ The same report identifies as an *effective practice* the evaluation of operational readiness and customer support needs during overnight hours, together with backup trading arrangements and communications to customers about potential service interruptions.²⁷

B. Rule 2265 Disclosure Should Not Operate as a Substitute for Substantive Best Execution Guidance.

FINRA has already articulated the governing principle in the analogous context of extreme market conditions. In extreme market conditions, meaningful disclosures may inform customers' expectations, but they do not excuse order handling procedures that are unfair or otherwise inconsistent with a member's best execution obligations.²⁸ The Clinic urges FINRA to restate that principle expressly in any extended-hours guidance. Rule 2265 disclosure functions in practice as a defense rather than as information. It appears in an account agreement executed at onboarding, is acknowledged with a checkbox, and is usually only produced years later in arbitration as proof that the customer assumed the risk.

²⁶ *2026 Oversight Report*, *supra* note 16 (listing, among findings, inadequate supervision "with respect to the identification and reporting of potentially manipulative activity conducted in after-hours trading" and failures to report required Trade Reporting Facility and Consolidated Audit Trail information arising from extended hours activity).

²⁷ *Id.*

²⁸ *Notice 26-15*, at 8 & n.28; see FINRA, *Regulatory Notice 21-12* (Mar. 18, 2021).

The content of that disclosure has not kept pace with the market it describes. Rule 2265's six risks were adopted in 2009 and have not been substantively revised.²⁹ They say nothing about the inapplicability of LULD price bands or market-wide circuit breakers; nothing about the absence of an NBBO overnight; nothing about venue-specific price bands or order-type restrictions; nothing about the possibility that an executed trade will be cancelled following a venue systems failure; and nothing about whether anyone at the member firm will answer the phone.

Supplementary Material .06—which addresses orders in securities with limited quotations or pricing information—is the closest existing analogue and should be used as an example for explicit guidance pertaining to extended-hours trading.³⁰ Guidance should state that where a security lacks reliable contemporaneous cross-market pricing, a member's reasonable diligence ordinarily includes (i) requiring or strongly defaulting to limit orders; (ii) applying and disclosing maximum price-deviation controls at the firm level, independent of whatever the venue provides; (iii) documenting the reference price used and the basis for treating it as reliable; and (iv) using the prior regular-session close and the next regular-session opening print as ex post reasonableness checks within the member's regular and rigorous review.

C. Extended Hours and the Clinic's Elderly Clients.

The Clinic's older clients are not the retail investors whose demand is said to be driving the extension of trading hours. They are, however, the investors who will be

²⁹ FINRA Rule 2265 was adopted in 2009, and its model disclosure has not been substantively revised since. *See* Exchange Act Release No. 34-59987 (May 27, 2009) (SR-FINRA-2009-021); FINRA, *Regulatory Notice 14-54* (Dec. 2014).

³⁰ FINRA Rule 5310.06; *see Notice 26-15*, at 13 (asking whether additional guidance would help firms apply Supplementary Material .06 to extended hours trading).

holding the resulting positions, and they present two characteristics that FINRA's guidance should address directly.

1. The Time of Day, Fatigue, and "Customer Needs and Expectations" All Affect the Clinic's Elderly Clients.

Rule 5310 applies to a customer's order regardless of the hour in which it arrives, and Supplementary Material .09(b)(7) directs members to consider "customer needs and expectations."³¹ But beyond that, FINRA's guidance does not state how members should interpret retail customer's expectations when such a customer's order is placed during pre- or post-regular hours.

The problem is that a member filling such an order has an incentive to fill the order in their own favor. For example, assume a customer places an order at 1:00 a.m. The member is incentivized to treat the timestamp on the order as if the customer evaluated and elected to trade despite the presence of overnight conditions, and therefore as a reason the ordinary expectation of prompt execution at the best available price should not apply. The timing of customers' orders could become a fool-proof defense for member firms: if the customer is assumed to have analyzed the risks and expects her order to be filled as promptly as possible—regardless of when the order was placed—then the member firm cannot be faulted for giving the customer what she asked for by trading when she did.

But the stakes these assumptions take on are set by the non-regular sessions themselves. The United States pre-market session opens at 4:00 a.m. Eastern Time, the post-market session runs to 8:00 p.m., and alternative trading systems operate from 8:00 p.m. to 4:00 a.m.³² The pre-open window is precisely where one United

³¹ FINRA Rule 5310, 5310.09(b)(7); see *Notice 26-15*, at 10–11.

³² *IOSCO Report*, *supra* note 4, at 14.

States venue measured spreads thirty-three times wider than during regular hours.³³ So an investor who is awake before dawn and checking an account balance is exposed to the thinnest and most expensive book of the entire twenty-four-hour cycle.

Furthermore, retail customers and members decide fundamentally different questions. In the Clinic's experience, a retail customer entering an order expresses a view on which, and how much, of a security to buy or sell. Generally, they are not considering which venue, session, and how their order may be affected by the conditions of the venue and session at all. Even fewer know that these tradeoffs even exist. But all these considerations are determined by a member. So, to read a retail customer's 4:00 a.m. order as an expression of preference about all these factors attributes to the customer vast amounts of decisions they did not know they made. Consequently, FINRA should explicitly state that held retail order carries the same expectation outside regular hours that it carries during normal hours.

A member could satisfy this equal-treatment standard by simply routing overnight orders through the same smart order router it uses during the day and documenting that it did so; further steps are needed. Using an identical process for entirely different sessions which have fundamentally different risk assessments will produce materially worse outcomes. We believe that FINRA should explicitly state that the diligence a member owes to orders outside regular hours is greater than, rather than the same as, orders during regular hours because most retail customers expect an identical experience when placing such trades, which the non-regular sessions simply cannot provide. That is not to say that member firms should refuse overnight orders or override customer's instructions outside of normal hours. What the Clinic is

³³ *Id.* at 20.

arguing is that those members who do engage in non-regular hour trading should clearly bear the diligence burden for those sessions.

2. Elderly Investors are Targeted by Fraudsters and are Disproportionately Affected by the Absence of a Human Being on Duty.

The scale of fraud directed at older investors is now extraordinary. In 2025, victims aged sixty and older filed 201,266 complaints with the FBI's Internet Crime Complaint Center and reported \$7.748 billion in losses—a fifty-nine percent increase from 2024—with an average reported loss of approximately \$38,500 and more than 12,400 victims each losing over \$100,000.³⁴ Investment fraud was the largest loss category for that cohort by a wide margin, at \$3.519 billion.³⁵

Overnight sessions widen this exposure in a specific and correctable way. Our senior clients typically discover a problem and attempt to rectify it by calling a human being. FINRA's own Securities Helpline for Seniors operates from 9:00 a.m. to 5:00 p.m. Eastern Time, Monday through Friday.³⁶ Member firms' supervisory and compliance staffing is, according to venues surveyed by IOSCO, thinnest during precisely the hours when overnight trading occurs.³⁷ FINRA Rule 2165's temporary hold authority and Rule 4512's trusted contact requirement are both human processes which depend on someone noticing something and picking up the phone.³⁸ A cascade of overnight

³⁴ Fed. Bureau of Investigation, Internet Crime Complaint Ctr., *2025 Internet Crime Report* 6, 44 (2026), https://www.ic3.gov/AnnualReport/Reports/2025_IC3Report.pdf.

³⁵ *Id.* at 46.

³⁶ FINRA, *Securities Helpline for Seniors*, <https://www.finra.org/investors/need-help/helpline-seniors>.

³⁷ *IOSCO Report*, *supra* note 4, at 28–29, 32 (reporting that eleven trading venues identified significant challenges securing and retaining qualified staff for irregular hours, and that surveillance during extended sessions requires additional resources to address additional alerts).

³⁸ FINRA Rule 2165 (Financial Exploitation of Specified Adults); FINRA Rule 4512(a)(1)(F) (trusted contact person).

liquidations in an eighty-two-year-old's account is the signature of an account takeover or a relationship-based investment scheme. During the day, a supervisor may see it. At 2:00 a.m., in most firms, no one is looking.

The Clinic accordingly supports the flexibility FINRA contemplates at Section D(7)(d) of the *Notice*, which asks whether best execution guidance should accommodate a firm's decision to hold an order that would otherwise be executed immediately in order to combat fraud such as account takeovers.³⁹ We submit that the case for such flexibility is strongest, and should be stated most clearly, for the extended and overnight sessions. A member should not face a best execution objection for pausing a 3:00 a.m. liquidation in a specified adult's account long enough to reach a trusted contact.

D. Extended Hours and How They Could Affect the Clinic's Young, Inexperienced Investor Clients.

1. The Behavioral Profile of Investors Under Thirty-Five is Higher-Risk than Other Investors.

Investors under thirty-five are far more likely to engage in higher-risk behavior than older investors. For example, forty-three percent of investors under thirty-five trade options, compared to only ten percent of investors fifty-five and older. Twenty-two percent of young investors' purchase on margin, compared with just four percent for those above fifty-five.⁴⁰ Twenty-nine percent report buying meme stocks or other viral

³⁹ *Notice 26-15*, at 15 (asking whether FINRA should provide flexibility or specific guidance regarding best execution obligations where firms hold orders that would otherwise be executed immediately in order to combat fraud, such as account takeovers).

⁴⁰ Press Release, FINRA, *New FINRA Foundation Research Examines Shifting Investor Behaviors, Preferences and Attitudes* (Dec. 4, 2025), <https://www.finra.org/media-center/newsreleases/2025/new-finra-foundation-research-examines-shifting-investor-behaviors>. The investor survey component drew on 2,861 respondents holding investments outside retirement accounts.

investments.⁴¹ Sixty-one percent rely on social media for investing information and proceed to act on recommendations from those social media influencers.⁴² And although their stated tolerance for large risks has fallen, sixty-two percent still believe that taking big risks is necessary to reach their financial goals.⁴³

2. Round-the-Clock Availability Feeds into the Dangers of Gambling-Adjacent Trading Behaviors Found in Young Investors.

Gambling is now a mainstream activity among young Americans, and disproportionately so as compared with other categories of investors. Pew Research Center's July-to-August 2025 survey of 9,916 adults found that twenty-two percent of United States adults had bet money on sports in the prior year, rising to thirty-one percent of adults under thirty and thirty-six percent of men under thirty.⁴⁴ The Siena Research Institute reported in April 2026 that twenty-seven percent of Americans, and fifty-two percent of men aged eighteen to forty-nine, hold an active account with an online sportsbook.⁴⁵

The relationship between gambling and securities trading is well established in the finance literature.⁴⁶ Investors who prefer speculative, lottery-like stocks share the socioeconomic and demographic profile of gamblers,⁴⁷ reviews have mapped the

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Pew Rsch. Ctr., *Americans Increasingly See Legal Sports Betting as a Bad Thing for Society and Sports* (Oct. 2, 2025), <https://www.pewresearch.org/short-reads/2025/10/02/americans-increasingly-see-legal-sports-betting-as-a-bad-thing-for-society-and-sports/> (survey of 9,916 U.S. adults conducted July 8 to August 3, 2025).

⁴⁵ Siena Rsch. Inst., *More Than a Quarter of Americans, 27%, Have an Active Online Sports Betting Account; A Third Have Opened an Account At Least Once* (Apr. 13, 2026), <https://sri.siena.edu/2026/04/13/more-than-a-quarter-of-americans-27-have-an-active-online-sports-betting-account-a-third-have-opened-an-account-at-least-once/>.

⁴⁶ See, e.g., Alok Kumar, *Who Gambles in the Stock Market?*, 64 J. FIN. 1889 (2009) (finding that individual investors generally prefer stocks with gambling-adjacent features).

⁴⁷ *Id.*

conceptual and empirical overlap between gambling, investing, and speculation,⁴⁸ and survey work of individual retail investors find measurable rates of compulsive gambling in the financial markets.⁴⁹

These behaviors result in documented financial consequences. For example, the legalization of online sports betting produced sharp increases in betting that did not displace other gambling or consumption.⁵⁰ Instead, legalization significantly reduced household savings as negative-expected-value bets crowded out positive-expected-value investments—including net deposits to brokerage accounts.⁵¹ Those effects concentrated among financially constrained households, whose credit card balances rose, available credit fell, and overdraft frequency increased.⁵² Many of the Clinic’s younger client population fits this description.

The feature that has most distinguished a sportsbook application from a brokerage application, for a twenty-four-year-old holding a phone at midnight, is availability. The sportsbook is always open and the market is not. Extended and overnight equity sessions erase that distinction. The demand for erasing that distinction is not coming from the people who would bear the professional consequences of a bad fill. IOSCO found that demand for further extension of trading hours is primarily retail-driven while institutional interest remains limited.⁵³ And issuers and institutional investors generally do not favor extended hours because of liquidity and volatility concerns.⁵⁴

⁴⁸ See Jennifer N. Arthur, Robert J. Williams & Paul H. Delfabbro, *The Conceptual and Empirical Relationship Between Gambling, Investing, and Speculation*, 5 J. BEHAV. ADDICTIONS 580 (2016).

⁴⁹ Ruben Cox, Atipol Kamolsareeratana & Roy Kouwenberg, *Compulsive Gambling in the Financial Markets: Evidence from Two Investor Surveys*, 111 J. BANKING & FIN. 105709 (2020).

⁵⁰ Scott R. Baker, Justin Balthrop, Mark J. Johnson, Jason Kotter & Kevin Pisciotto, *Gambling Away Stability: Sports Betting’s Impact on Vulnerable Households*, 183 J. FIN. ECON. (2026).

⁵¹ *Id.*

⁵² *Id.*

⁵³ IOSCO Report, *supra* note 4, at 5.

⁵⁴ IOSCO Report, *supra* note 4, at 16.

A product feature demanded by retail investors and declined by professionals, delivered into a session with spreads an order of magnitude wider, no LULD bands, no circuit breakers, and no NBBO, warrants more regulatory attention than a six-item disclosure form. That the overnight session exhibits large positive order imbalances consistent with herding is exactly what one would predict if the flow is driven by attention and social signal rather than analysis.⁵⁵

3. More Convenience for Retail Investors is Not Enough to Justify the Risks.

The case for extended hours is convenience. With convenience comes greater retail investor participation. Robinhood, which launched overnight trading in 2023, reported that on its busiest days as much as twenty-five percent of total daily trading volume came from outside traditional market hours.⁵⁶ But convenience is a benefit only if it produces better outcomes, and the best available evidence is that trading outside traditional hours does not. In fact, average net profitability for overnight traders is close to zero absent longer holding periods.⁵⁷ Zero expected return, purchased with three to four times the price impact and none of the regular session's guardrails, is real risk that manifests in dire consequences for the Clinic's clients.

4. Blanket "Not Held" Designations Compound the Problem.

Although Section D(7) of the *Notice* addresses held and not held orders separately, the Clinic notes one interaction that FINRA should resolve. FINRA has expressed concern about the broad categorization of small retail customer orders as not held

⁵⁵ Eaton, Shkilko & Werner, *supra* note 10 (reporting large order imbalances for the overnight period (0.17), consistent with herding behavior).

⁵⁶ Robinhood Mkts., Inc., *Robinhood 24 Hour Market Reaches \$10B+ in Total Volume Traded Overnight* (Mar. 6, 2024), <https://robinhood.com/us/en/newsroom/robinhood-24-hour-market-reaches-10b-in-total-volume-traded-overnight/>.

⁵⁷ Eaton, Shkilko & Werner, *supra* note 10.

when the customer expects immediate and full execution at the best available price, and about blanket provisions in new account agreements designating all or a subset of a customer's orders as not held.⁵⁸ That concern is at its most acute in extended hours. An order entered at 2:00 a.m. by a retail customer, designated not held by a blanket account-agreement provision, and “worked” by a firm with no personnel on duty, produces the worst of every world. In that situation, the customer expects prompt execution, the firm claims time and price discretion, and no one is actually exercising the discretion the designation presupposes. FINRA should state that a blanket not held designation is not a reasonable basis for relieving a member of its ordinary time-of-execution responsibilities for small retail orders, and that this is particularly so in sessions in which the member maintains no trading desk.

E. The Access Argument has Its Limits.

The strongest argument for extended trading hours is access. A worker on a night shift cannot participate in the regular session because she is at work. Extending the trading day gives her the same access to the market that a nine-to-five investor already enjoys. Properly analyzed, this argument supports adopting session-specific guidance rather than counting against such adoption.

1. The Access Deficit Is Real, but Narrower Than It Appears.

According to federal data, eighty-four percent of wage and salary workers worked a regular daytime schedule, sixteen percent usually worked a non-daytime schedule, including six percent on evening shifts and four percent on night shifts.⁵⁹

⁵⁸ Notice 26-15, at 14 (“FINRA is concerned regarding the broad categorization of small, retail customer orders as not held when the customer expects these orders to be immediately and fully executed at the best price available in the marketplace.”).

⁵⁹ Press Release, U.S. Bureau of Lab. Stat., Job Flexibilities and Work Schedules—2017-2018 Data from the American Time Use Survey (Sept. 24, 2019), <https://www.bls.gov/news.release/flex2.nr0.htm> [hereinafter *BLS*]

Additionally, part-time workers were twice as likely as full-time workers to work a non-daytime schedule, and the highest incidences were in leisure and hospitality, transportation and utilities, and wholesale and retail trade.⁶⁰ It is worth noting that for most workers it is not a choice. Thirty-nine percent of those on non-daytime schedules cited the nature of the job, against nineteen percent citing personal preference, and twelve percent worked those hours to accommodate school or a second job.⁶¹ These are not investors who selected an unusual schedule to trade at unusual hours.

But the access deficit is not as wide or as impactful as the data suggests. The real deficit stems from nontraditional workers' ability to *react* to information, not their *access* to the market. For example, a night-shift worker can decide, on her own analysis, to buy or sell an order into the next regular session, including a limit-on-open or market-on-open order that participates in the opening auction—one of the deepest liquidity events of the trading day. Nothing about her schedule prevents that, and Rule 5310 already obliges her member to handle that order with reasonable diligence when the session opens. For the ordinary case of a retail investor building or unwinding a position, the schedule is not a barrier at all.

But what she cannot do is react. If an issuer releases earnings at 4:15 p.m. and she works from 11:00 p.m. to 7:00 a.m., she is asleep through the entire regular session that follows. Her only waking window in which to respond to that information is the post-market, overnight, or pre-market session. That is a genuine informational

Work Schedules Release]. Data were collected from wage and salary workers, excluding the self-employed, and apply to a person's sole or main job.

⁶⁰ *Id.*

⁶¹ *Id.*

asymmetry. But this asymmetry is considerably narrower than the general proposition that longer hours help working people.

2. The Access Offered Is Access to a Materially Worse Market.

The problem with this asymmetry is clear. Two retail investors receive the same 4:15 p.m. earnings release. The day-shift investor reacts by trading into the 9:30 a.m. opening auction, with all the protections typically available. The night-shift investor reacts by trading into a book supported by two market makers, with none of those protections operating.⁶² One United States venue measured its pre-open spreads at thirty-three times regular-hours levels.⁶³

The consequence in this scenario is that the quality of a customer's execution is determined by her employment schedule rather than by her information, her analysis, or the terms of her order. FINRA's best execution jurisprudence contains no principle under which a customer characteristic wholly unrelated to the order justifies materially inferior handling. If anything, the access asymmetry issue identifies a class of investors who are structurally unable to reach the session in which execution is best, and that identification is a reason for FINRA to specify what members owe them.

3. Implications for Future FINRA Guidance.

The access asymmetry issue leads to three concrete recommendations:

First, requiring a member that markets extended-hours or overnight access to retail customers to make available, and to disclose at the point of order entry, order types that rest until the next regular session, including limit-on-open and market-on-open

⁶² See *supra* Part I.A.2.

⁶³ *IOSCO Report*, *supra* note 4, at 20.

orders. A customer whose only reason for being awake at 3:00 a.m. is her work schedule should be given a genuine choice between a volatile and illiquid market now and a predictable, liquid market in six hours. At present, the overnight session is presented as the accommodation while the alternative is not presented at all.

Second, access asymmetry cuts decisively against reading a 3:00 a.m. order as evidence of the customer's "needs and expectations" under Supplementary Material .09(b)(7).⁶⁴ What that customer needed was access to the market. While her member could have met that need with a resting order into the opening auction, routing her instead into the session with the widest spreads and no reference price did not serve the need she had. Rather, it selected the venue least favorable to her.

Third, implement and adopt session-specific regular and rigorous review. If members are to justify extended hours on access grounds, the execution quality delivered in those sessions should be measured separately and disclosed, so that the size of the access discount is a known quantity rather than an assumption.

As of the date of this letter, the Commission's comment file for its September 17, 2026 roundtable on preparations for twenty-four-hour trading contains only a handful of submissions, none of which addresses the asymmetrical overnight access for shift workers or for other retail investors whose schedules constrain their participation.⁶⁵ One retail commenter did volunteer, unprompted and while otherwise supporting expanded hours, a concern that round-the-clock trading would prove addictive for

⁶⁴ FINRA Rule 5310.09(b)(7).

⁶⁵ *Comments on Roundtable on Preparations for 24-Hour Trading*, File No. 4-913, <https://www.sec.gov/rules-regulations/public-comments/4-913> (last visited Sept. 14, 2026).

some participants.⁶⁶ The access argument deserves a consideration, and the answer bears directly on the guidance FINRA is now formulating.

F. Conclusions and Recommendations.

FINRA's instinct that Rule 5310's principles-based framework is durable is correct. Principles do not stop applying at 4:00 p.m. But a principle applied to conditions it was not written for, without interpretive content specific to those conditions, will be litigated after the fact rather than followed in advance.. The extended and overnight sessions are the part of the trading day where retail investors receive the least protection and the least supervision, and where FINRA's own investor education materials already caution investors to know the risks.⁶⁷ We urge FINRA to give members, and the investors they serve, guidance concrete enough to be followed and specific enough to be reviewed.

II. HELD AND NOT-HELD ORDERS: PRESERVING CUSTOMER EXPECTATIONS AND EXECUTION PROTECTIONS.

A. Background of the Issue.

A held order generally requires a broker-dealer to attempt to execute the customer's order immediately.⁶⁸ In contrast, a not held order gives the broker dealer discretion over the time and price of execution.⁶⁹ SEC staff guidance explains that the

⁶⁶ Anonymous Comment Letter, File No. 4-913 (July 24, 2026), <https://www.sec.gov/comments/4-913/4913-973339-3026007.html> (stating that "some people will be very addicted to [overnight trading]").

⁶⁷ FINRA, *Investor Insights: Extended-Hours Trading: Know the Risks* (July 31, 2024), <https://www.finra.org/investors/insights/extended-hours-trading>.

⁶⁸ See U.S. Sec. & Exch. Comm'n, *Responses to Frequently Asked Questions Concerning Rule 606 of Regulation NMS* (Aug. 16, 2019), <https://www.sec.gov/rules-regulations/staff-guidance/trading-markets-frequently-asked-questions/faq-rule-606-regulation>.

⁶⁹ *Id.*

classification follows the customer's reasonable expectations.⁷⁰ When a customer expects an immediate attempt at execution, the order should be categorized as held. When the customer expects the broker dealer to exercise time and price discretion, it should be categorized as not held.

Not-held orders allow customers to delegate execution decisions to a broker when immediate execution may not produce the best overall result. The flexibility is particularly useful for large orders, where executing the entire order at once may affect the market price or make it difficult to obtain the desired quantity at favorable prices. Rather than seeking immediate execution, a broker can divide a large order into smaller transactions to obtain more favorable execution. The SEC has recognized that institutional investors commonly use not held orders for this purpose, relying on broker-dealers' execution discretion to manage the market impact associated with large orders.⁷¹ Whereas held orders typically better suit retail investors who seek immediate executions and rely less on broker discretion.⁷² SEC staff guidance accordingly emphasizes the customer's reasonable expectations when determining whether an order should be categorized as held or not held.⁷³

SEC staff guidance describes this distinction with examples. Where a customer submits an order for 15 shares and reasonably expects the broker-dealer to attempt immediate execution, staff states the order should be categorized as held.⁷⁴ Where a customer submits an order for 150,000 shares and reasonably expects the broker-

⁷⁰ *Id.*

⁷¹ *Disclosure of Order Execution Information*, Exchange Act Release No. 99,679, at 367 (Mar. 6, 2024), <https://www.sec.gov/rules-regulations/2025/09/disclosure-order-execution-information>.

⁷² *Disclosure of Order Handling Information*, 83 Fed. Reg. 58338, 58343 (Nov. 19, 2018), <https://www.federalregister.gov/d/2018-24423>.

⁷³ See U.S. Sec. & Exch. Comm'n, *supra* note 68.

⁷⁴ *Id.*

dealer to exercise discretion regarding when to execute it, staff states that the order should be categorized as not held.⁷⁵

B. Why the Distinction is Different for Small Investors.

1. The Firm has Greater Control Over When the Customer's Order is Executed.

When an order is treated as not held, the customer loses control over the timing of execution and permits the broker-dealer to determine when to execute the order. Although the broker-dealer remains subject to its best execution obligations, the customer no longer has the same expectation of an immediate attempt at execution. This distinction can be significant in a volatile market, where the price available when the customer submits an order may differ from the price available when the broker ultimately executes it.

2. Classification can Affect Whether Execution Quality is Captured in Rule 605 Data.

Proper classification of retail orders also contributes to execution quality reporting under SEC Rule 605. Rule 605 requires standardized reporting of measures such as execution speed, effective spreads, and price improvement.⁷⁶ This information allows investors to compare the execution quality provided by different broker-dealers, promoting competition among the firms.⁷⁷

⁷⁵ *Id.*

⁷⁶ *Disclosure of Order Execution Information*, Exchange Act Release No. 99,679, at 23–24, 208–209 (Mar. 6, 2024), <https://www.sec.gov/rules-regulations/2025/09/disclosure-order-execution-information>.

⁷⁷ *Id.* at 23.

Accurate representation of retail orders in this data is therefore important. Institutional parent orders handled on a not held basis generally fall outside Rule 605 reporting, while retail orders for which customers reasonably expect immediate execution may qualify as covered held orders.⁷⁸ Proper classification helps ensure that ordinary retail executions are represented in the data used to evaluate how quickly and at what prices firms execute customer orders. Accordingly, broad classification of ordinary retail orders as not held could make those statistics less representative of the execution quality retail customers receive.

C. Blanket Not-Held Provisions in Retail Account Agreements are Problematic.

1. Blanket Provisions May Not Reflect Customer's Actual Expectations.

SEC guidance indicates that held/not held classification should reflect the customer's reasonable expectations regarding execution.⁷⁹ An order should generally be categorized as held when the customer reasonably expects an immediate attempt at execution and as not held when the customer expects the broker-dealer to exercise time or price discretion.⁸⁰

FINRA has observed that some firms use provisions in new account agreements or other customer documents providing that all, or certain categories of, customer orders will be treated as not held.⁸¹ This is concerning because a retail customer may agree

⁷⁸ *Id.* at 50, 367.

⁷⁹ See U.S. Sec. & Exch. Comm'n, *supra* note 68.

⁸⁰ *Id.*

⁸¹ Fin. Indus. Regul. Auth., Regulatory Notice 26-15, *FINRA Requests Comment on Modernizing FINRA's Best Execution Guidance* (July 24, 2026), <https://www.finra.org/rules-guidance/notices/26-15>.

to this provision without fully understanding the discretion associated with not held orders. Agreement to a blanket sometimes boilerplate provision does not necessarily establish that the customer reasonably expects the broker dealer to exercise time and price discretion with their orders. If a customer submits an order with the reasonable expectation of prompt execution, that expectation should control. Additionally, classifying a small retail investor's order as not held may allow the order to avoid Rule 605 reporting, thereby skewing the execution quality data that retail investors rely on to compare broker-dealers.

2. Recommendation for Guidance on Blanket Not-Held Provisions.

FINRA should clarify that a blanket not held provision, standing alone, is insufficient to classify all or broad categories of retail orders as not held. If firms are permitted to rely on such provisions, customers should receive clear disclosure explaining the time and price discretion being granted. Most importantly, the classification of a particular order should remain consistent with the customer's instructions and reasonable execution expectations. Where a retail customer reasonably expects immediate execution, a boilerplate contractual provision should not take precedence over that expectation.

D. The Guidance is Unclear Regarding Converting/Routing Held Orders as Not Held.

1. Held Orders are Recharacterized During Routing.

Question 7(b) addresses the practice of a firm receiving an order from a retail customer as a held order but subsequently routing that order to another firm for handling and execution as not held.⁸² In essence, the customer gives Broker A a held

⁸² U.S. Sec. & Exch. Comm'n, *supra* note 1.

order – meaning the customer expects prompt execution. Broker A then sends the order to Broker B but tells Broker B that it can handle the order as “not held,” giving Broker B discretion over the timing and price of the execution.⁸³

The relevant question then becomes whether and to what extent a firm’s recharacterization of an order during the routing process should alter the best execution obligations applicable to that order, particularly when the customer originally submitted the order without granting such discretion. This practice also raises questions regarding which firm bears responsibility for ensuring best execution when the routing firm and executing firm are handling the same order under different classifications.⁸⁴

2. The Impact on Retail Investors is Real.

Retail investors may be particularly harmed when a held order is routed to another firm and subsequently handled as not held. When a retail customer places a held order, the customer generally and reasonably expects prompt execution and has not authorized the exercise of time and price discretion.⁸⁵ Permitting a firm to unilaterally change that characterization during the routing process risks undermining the customer’s instructions and reasonable expectations, while also exposing the customer to execution delays and potentially less favorable execution prices.

Additionally, this practice arguably heightens the asymmetry between firms and retail investors. This asymmetry is particularly significant for elderly and less

⁸³ *Id.*

⁸⁴ See FINRA, *Customer Order Handling: Best Execution and Order Routing Disclosures*, in 2026 FINRA Annual Regulatory Oversight Report (2026), <https://www.finra.org/rules-guidance/guidance/reports/2026-finra-annual-regulatory-oversight-report/best-execution>.

⁸⁵ U.S. Sec. & Exch. Comm’n, *supra* note 1.

sophisticated investors, who may be unfamiliar with the distinction between held and not held orders and may reasonably assume that their original instructions will govern throughout the execution process. While the broker understands the implications between “held” and “not held,” many retail investors almost certainly do not. Allowing technical language in an account agreement or an internal routing decision to substitute for actual customer understanding inherently places the consequences of that asymmetry on the investor.

The change in characterization may also reduce the practical value of regulatory protections associated with the customer’s original order instructions, particularly where the customer is unaware that the order will be handled differently after routing. Without clear disclosure, retail investors may not understand that a firm’s routing practices can result in their held orders being handled with greater time and price discretion than they initially authorized or expected.⁸⁶ This lack of transparency risks leaving retail customers unable to meaningfully evaluate the execution of their orders or understand the risks associated with the manner in which those orders are handled.⁸⁷

3. The Clinic’s Recommendation.

The Clinic recommends that a retail customer’s original designation of an order as held generally remains controlling throughout the routing and execution process. Through its representation of retail investors, including elderly and less sophisticated investors, the Clinic recognizes that many customers may not understand the

⁸⁶ See Press Release, U.S. Sec. & Exch. Comm’n, *SEC Adopts Rules That Increase Information Brokers Must Provide to Investors on Order Handling* (Nov. 2, 2018), <https://www.sec.gov/newsroom/press-releases/2018-253>.

⁸⁷ *Id.*

technical distinction between held and not held orders or the additional discretion afforded to a broker when an order is treated as not held. Accordingly, a firm should not be able to alter the best execution obligations associated with a held order merely by routing that order to another firm for handling as not held.

Where a change in treatment is necessary, the Clinic recommends that firms be required to provide clear and understandable disclosure regarding the change and, where feasible, obtain the customer's informed consent before granting additional time or price discretion. Any exception should be narrowly construed and supported by a legitimate, customer-centered justification demonstrating that the change is consistent with the customer's objectives and interests.

In addition, consistent with FINRA's existing guidance that a firm cannot transfer its duty of best execution to another person, the routing firm should retain responsibility for evaluating the execution quality ultimately received by the customer, notwithstanding its decision to route the order to another firm for handling and execution.⁸⁸ This protection would help ensure that internal routing practices do not override retail customers' instructions or diminish the protections they reasonably expect when placing held orders.

More specifically, the Clinic suggests that FINRA could therefore require firms to consider the following factors before changing the categorization of an order:

- Did the customer authorize discretion?
- Is there a demonstrable customer benefit from the change?
- Is the change necessary to accomplish the customer's objective?

⁸⁸ See FINRA, *Regulatory Notice 21-12: FINRA Reminds Member Firms of Their Obligations Regarding Customer Order Handling, Margin Requirements and Effective Liquidity Management Practices During Extreme Market Conditions*, at 3 (Mar. 18, 2021), <https://www.finra.org/rules-guidance/notices/21-12>.

- Could the change materially delay execution?
- Does the change expose the customer to additional market risk?
- Does the routing firm have a financial incentive to send the order to the particular executing firm?
- Would a reasonable retail investor have understood that their “held” order might subsequently be handled as not held?

III. THE NBBO SHOULD REMAIN AN IMPORTANT BENCHMARK.

If the SEC rescinds Rule 611, FINRA should continue to recognize the national best bid and offer as a presumptive benchmark for evaluating executions of ordinary retail orders. Retail customers generally expect marketable orders to be executed promptly at the best reasonably available displayed price. This expectation is especially important for older and less sophisticated investors, who may reasonably assume that their broker’s automated systems protect them from avoidable inferior-price executions.

A. FINRA Should Permit Firms to Execute Away from the Best Displayed Price.

FINRA should permit firms to execute away from the best displayed price when legitimate execution-quality considerations support that decision. For example, available size, likelihood and speed of execution, quotation reliability, and the net cost actually borne by the customer. However, when a retail order is executed at a price inferior to the contemporaneous NBBO, the firm’s systems should automatically identify the execution for review and preserve the information necessary to explain the routing decision. That record should include the applicable NBBO, displayed size, execution price and time, order characteristics, execution venue, material fees or

rebates, and the reason the selected execution was consistent with the customer's interests.

B. FINRA Should Clarify Which Data, Policies, and Procedures are Required to Oversee Compliance.

Flagged records should principally support firm supervision and FINRA oversight rather than place the burden on customers to analyze complex routing information. Older and inexperienced investors may never request or understand detailed execution data, and disclosure alone cannot substitute for fair order-handling procedures. Compliance departments within firms should include in their periodic reviews of inferior-price retail executions, examine patterns by venue and order type, and retain supporting records for regulatory examination. Firms are already encouraged to conduct, and in many cases already do, quarterly compliance audits. Customers should receive a concise explanation upon request, but their protection should not depend upon their ability to independently detect execution problems.

This approach would preserve flexibility under Rule 5310's reasonable-diligence standard while creating accountability where Rule 611 previously supplied an automatic pricing floor. It would not prohibit executions away from the NBBO, it would require firms to demonstrate that such executions resulted from customer-focused judgment rather than routing payments, internalization incentives, access costs, or institutional convenience.

The Clinic appreciates the opportunity to comment on this important issue and welcomes further dialogue on protecting vulnerable investors as the trading day expands.



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