Securities Regulation Daily Wrap Up, EXCHANGES AND MARKET REGULATION—D.C. Cir.: Amicus brief backs SEC's Reg NMS tick size, access fee amendments, (Mar. 27, 2025)

Securities Regulation Daily Wrap Up

Click to open document in a browser

By Anne Mathews, J.D.

Amici said the rule's challengers put "the access-fee cart before the tick-size horse."

Several interest groups representing institutional investors have filed an amicus brief in support of the SEC's Regulation NMS amendments. The SEC stayed the amendments late last year to avoid market disruption while a challenge by Nasdaq and Cboe proceeded in the D.C. Circuit. The amicus brief filed in that case argues that investors wanted the amendments, that the SEC's choice of tick size and access fee rates were appropriate, and that the Commission acted within its statutory authority (Brief of Healthy Markets Ass'n, et al. as Amici Curiae Supporting Respondent, *Cboe Global Markets, Inc. v. SEC*, No. 24-1350 (D.C.Cir. Mar. 25, 2025)).

Amici are Healthy Markets Association (HMA), Council of Institutional Investors (CII), and American Securities Association (ASA). HMA represents pension systems including CalPERS, while ASA represents the interests of regional financial services firms. The three groups submitted multiple comment letters supporting the proposed amendments.

Investor support. The brief argues that investors had "clamored for the Regulation NMS amendments for years." Amici summarized the arguments they made in their comment letters.

HMA had criticized exchanges' discriminatory pricing tiers for access fees and rebates and urged the SEC to adopt a 10 mils fee cap regardless of the quotation and trading increments selected. The group also supported narrowing quotation increments for most NMS stocks and standardizing trading increments across venues.

CII's comment letter supported the access fee caps, noting that the vast majority of access fees collected are paid out to liquidity providers in the form of rebates, resulting in conflicts of interest that harm institutional investors.

Finally, ASA's comment letter recommended a half-cent tick size for the most liquid stocks—any lower would directly benefit high-frequency trading, the group argued—and an access fee cap of 10 mils for all NMS securities.

SEC's authority. The groups countered petitioners' argument that the SEC needs to make decisions on a case-by-case basis for each exchange. The petitioners do not challenge the Commission's authority to adopt the order-protection rule, and in amici's view, access fee caps are necessary to implement that rule.

"If the Commission adopted the order-protection rule without adopting a reasonable fee cap, venues with protected quotations would escalate their fees, effectively capturing government-sanctioned economic rents from market participants," the brief argues. The amendments are tailored to this risk by applying the fee caps only to trading against protected quotations. Similarly, the tick-size amendment requires an accompanying adjustment to access fee caps.

The SEC is statutorily authorized to ensure the fairness and usefulness of quotation information, but it can't do that without placing some limit on the variance between the true price and the displayed price, amici submit.

The numbers are good. The brief states that the SEC arrived at the half-penny tick and 10 mils figures based on robust data and significant investor comments. The numbers were then subjected to extensive empirical analysis. The Commission reasoned that the 10 mils cap would lower costs to investors, align access fees

© 2025 CCH Incorporated and its affiliates and licensors. All rights reserved.

with the reduction in other transaction costs, foster competition, and align on-exchange pricing with that of off-exchange venues.

Procedural argument. Finally, amici states that the petitioners conceded during the rulemaking that the SEC had statutory authority to modify access fees. Notably, Nasdaq asked the SEC to reduce access fees from 30 mils to 15 mils. In doing so, they invited one of the "errors" they have now changed course to complain about by asserting the SEC lacks authority over access fees. The court should extend the invited-error doctrine to the administrative context and shut down the challenge to the SEC's authority over access fees, the brief concludes.

The case is No. 24-1350.

Attorneys: Paul Greenwalt, III (Arentfox Schiff LLP) for Cboe Global Markets, Inc., Cboe BZX Exchange, Inc., Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc. and Cboe EDGX Exchange, Inc. Dominick V. Freda for the SEC.

Companies: Cboe Global Markets, Inc.; Cboe BZX Exchange, Inc.; Cboe BYX Exchange, Inc.; Cboe EDGA Exchange, Inc.; Cboe EDGX Exchange, Inc.

LitigationEnforcement: ExchangesMarketRegulation FedTracker Securities FinancialIntermediaries DistrictofColumbiaNews

© 2025 CCH Incorporated and its affiliates and licensors. All rights reserved.