

[Securities Regulation Daily Wrap Up, EXCHANGES AND MARKET REGULATION—D. C. Cir.: Cboe, Nasdaq challenge Reg NMS amendments, \(Nov. 1, 2024\)](#)

Securities Regulation Daily Wrap Up

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By [Anne Mathews, J.D.](#)

A Cboe spokesperson said the amendments fall short of the goals of enhancing the markets and protecting investors.

Cboe and Nasdaq are asking the D.C. Circuit to review the SEC's recent amendments to Regulation NMS. In September, the Commission unanimously [approved](#) rules that added a new tick size for the quoting of certain NMS stocks, reduced access fee caps, and increased transparency of exchange fees and rebates. Both petitioners had engaged with the SEC during the comment period, expressing particular concerns about changes to access fee caps ([Cboe Global Markets, Inc. v. SEC](#) (D.C. Cir. filed Oct. 30, 2024)).

Cboe statement. In a statement provided to Wolters Kluwer, a spokesperson of Cboe Global Markets said, "The U.S. equities market is the largest, most liquid, and most efficient in the world. Cboe is committed to advocating for targeted enhancements that advance the market and benefit all investors. However, we believe the SEC's recently adopted amendments to certain Reg NMS rules fall short of supporting these principles and will inhibit price discovery, leading us to file a petition for review with the DC Federal Court of Appeals."

Access fee caps. The amendments reduced the tick size from a whole penny to half a penny. When the rule was adopted, Chair Gary Gensler [said](#) that it was appropriate to lower the cap on access fees as well. Together, the reduced tick size and the reduced access fee cap (from \$0.003 to \$0.001) would lower costs for investors, Gensler stated.

However, Commissioner Mark Uyeda [said](#) that "it is difficult to determine *ex ante* whether traders will enjoy lower overall transactions costs in light of this change. Determining a specific cap for the access fee is not a simple proposition." And Commissioner Hester Peirce [asked](#) why the SEC wasn't following a phased approach that would implement access fee caps only after determining the effect of the market data infrastructure and tick size changes.

Nasdaq and Cboe comments. The petition filed with the D.C. Circuit, which Wolters Kluwer obtained from Cboe, does not elaborate on the exchanges' arguments for challenging the rule. However, both exchanges met with SEC staff on multiple occasions and filed multiple comment letters that offer insights into their objections.

Nasdaq had suggested a phased approach in a presentation to SEC staff, which it also submitted as a [comment](#). Its plan would have had a one-year phase with a fee cap of \$0.0015 before consideration of further reductions in two more phases. The presentation posited that "a drastic reduction in the access fee cap would have significant adverse effects on markets and investors; even if you doubt this view, the risks of being wrong are too great." Nasdaq warned that the proposal would widen spreads; degrade liquidity; and increase lit-dark imbalance, segmentation, and fragmentation.

In an April 2024 comment letter, Cboe [emphasized](#) that the SEC should not compress access fee caps, especially in a disproportionate manner. "We find that if the access fee cap is reduced to \$.001 [] from the current access fee cap of \$.003 [], liquidity providers will see a significant reduction in the rebates they receive. In turn, we expect bid-ask spreads will likely widen as acknowledged in the Proposal, making it more expensive for investors to enter and exit positions," Cboe wrote.

The petitioners are also likely to challenge the SEC's rulemaking authority over access fees. In its last [comment](#) on the proposal, Nasdaq expressed "significant concerns regarding the statutory authority of the Commission to engage in ratemaking." And Cboe argued, "It is not the role of government to set prices in competitive markets."

Attorneys: Paul E. Greenwalt III (Arentfox Schiff LLP) for Cboe Global Markets, Inc., Cboe BZX Exchange, Inc. and Cboe BYX Exchange, Inc. Vanessa Countryman for the SEC.

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

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