

ORAL ARGUMENT NOT YET SCHEDULED

No. 24-1350

**United States Court of Appeals
for the District of Columbia Circuit**

CBOE GLOBAL MARKETS, INC., CBOE BZX EXCHANGE, INC., CBOE BYX
EXCHANGE, INC., CBOE EDGA EXCHANGE, INC., CBOE EDGX EXCHANGE,
INC., NASDAQ, INC., THE NASDAQ STOCK MARKET LLC, NASDAQ BX,
INC., AND NASDAQ PHLX LLC,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for Review of a Rule
of the United States Securities and Exchange Commission

**BRIEF OF *AMICUS CURIAE* SECURITIES INDUSTRY AND
FINANCIAL MARKETS ASSOCIATION (SIFMA)
IN SUPPORT OF PETITIONERS**

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**CERTIFICATE AS TO PARTIES, RULINGS
AND RELATED CASES**

Pursuant to Rule 28(a)(1) of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, the undersigned counsel for *Amicus Curiae* the Securities Industry and Financial Markets Association (SIFMA) certifies the following:

(A) Parties and Amici.

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Opening Brief for Petitioners.

(B) Ruling Under Review.

Petitioners seek review of the Commission's final rule entitled Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, Release No. 34-101070, 89 Fed. Reg. 81,620 (Oct. 8, 2024).

(C) Related Cases. SIFMA is not aware of any related cases.

/s/ Daniel J. Feith
Daniel J. Feith

January 17, 2025

**DISCLOSURE STATEMENT PURSUANT
TO CIRCUIT RULE 26.1**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rules 26.1 and 29(b) of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, undersigned counsel certifies:

Amicus curiae SIFMA states that it is a non-profit, tax-exempt corporation. It has no parent corporation, and no publicly held corporation has a 10% or greater ownership in SIFMA.

/s/ Daniel J. Feith
Daniel J. Feith

January 17, 2025

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GLOSSARY

NMS	National Market System
Reg NMS Amendments	Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, Release No. 34-101070, 89 Fed. Reg. 81,620 (Oct. 8, 2024)
SEC	United States Securities and Exchange Commission
SIFMA	Securities Industry and Financial Markets Association

INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association (SIFMA)¹ is the leading trade association for broker-dealers, investment banks, and asset managers operating in the United States and global capital markets. On behalf of industry members and their one million employees, SIFMA advocates on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. SIFMA regularly files amicus briefs in cases arising under federal securities laws.

As broker-dealers and similar financial institutions, SIFMA members are responsible for effecting nearly all trading in National Market System (NMS) stocks in the United States on behalf of investors. SIFMA therefore has a strong interest in ensuring that the regulatory structure of equity

¹ No party's counsel authored this brief in whole or part; no party nor party's counsel contributed money intended to fund preparing or submitting it; and no person—other than *amicus*, its members, or its counsel—contributed money intended to fund preparing or submitting it. All parties consent to SIFMA's participation as *amicus*. See Notice of Intent to File as *Amicus Curiae* and Consent Motion for Extension of Time to File *Amicus Curiae* Brief, Dkt. 2089424 (Dec. 13, 2024).

markets serves the interests of investors and that regulations affecting SIFMA's members are sound, fair, and administrable. The amendments to Regulation NMS at issue in this litigation implement significant changes to equity markets. If Petitioners prevail in their challenge to those amendments, SIFMA believes it is essential that the Court also vacate the amendments reducing tick sizes under Rule 612. As explained herein, leaving reduced tick sizes in place while vacating the reduced access fee cap will create or exacerbate distortions in the National Market System that will harm both SIFMA's members and investors broadly.

STATUTES AND REGULATIONS

Except for 17 C.F.R. § 242.611, the Order Protection Rule, all applicable statutes and regulations are contained in the Brief for Petitioners.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1975, Congress directed the Securities and Exchange Commission (SEC or Commission) to establish a National Market System linking the Nation's securities exchanges. This reform aimed to protect investors and enhance price transparency and market efficiency by enabling investors to trade securities in the "best market," 15 U.S.C. § 78k-1(a)(1)(C)(iv)—*i.e.*, at the best available bids and offers across any securities exchange. There are

currently 16 securities exchanges trading NMS stocks, and those stocks trade across all those exchanges, as well as off-exchange.

This case involves amendments by the SEC to two important aspects of the National Market System: the maximum access fees exchanges can charge to execute trades (the “access fee cap”), and the size of the increments (“tick sizes”) in which bids and offers may be quoted. *See* Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, 89 Fed. Reg. 81,620 (Oct. 8, 2024) (“Reg NMS Amendments”). In the Reg NMS Amendments, the SEC reduced the access fee cap from \$0.0030 (“30 mils”) per share to \$0.0010 (“10 mils”) per share, and reduced the minimum tick sizes for NMS stocks accounting for nearly 75 percent of all shares traded from \$0.01 (one penny) to \$0.005 (a half-penny). *Id.* at 81,622. The remaining NMS stocks would remain subject to the current one-penny pricing increment. *Id.*

Petitioners, a group of securities exchanges, primarily challenge the access fee cap amendments. SIFMA submits this brief to explain the important, albeit subtle, linkages between access fees and tick sizes, which underscore why, if the Court vacates the access fee amendments, it should vacate the tick size amendments as well.

As discussed below, maintaining a proper proportional relationship between access fees and tick sizes is critical to ensuring price transparency and efficient capital allocation, and ultimately to fulfilling the objectives of the National Market System. If access fees grow too large as a percentage of tick sizes—as would happen if the Court vacated the access fee cap amendments and thereby restored the prior cap of \$0.0030 per share while leaving in place the amendments reducing tick sizes for most stocks to \$0.005—it will harm the National Market System in two respects. First, it will undermine price transparency and best execution by creating circumstances where the best displayed price on an exchange is not actually the best price once access fees are taken into account. And second, it will distort trading by exacerbating incentives for market participants to trade stocks with a smaller tick size over otherwise identical stocks with a larger tick size.

In the Reg NMS Amendments, the Commission appropriately treated the amendments to access fees and tick sizes as a package deal, recognizing the relationship between them and agreeing with commenters that access fees should not be greater than half of minimum tick sizes. That is the very situation vacatur of the access fee amendments but not the tick size

amendments would bring about. Therefore, if the Court agrees that the access fee cap amendments are invalid, it would be unsound as a matter of equity market structure, incorrect as a matter of law, and contrary to the Commission's own reasoning to sever the tick size amendments and let them stand.

ARGUMENT

I. Vacating the Reduced Access Fee Cap While Maintaining Reduced Tick Sizes Would Undermine Key Objectives of the National Market System.

Congress directed the Commission to establish a National Market System in order to promote “fair and orderly markets,” the “availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities,” and “the practicability of brokers executing investors’ orders in the best market.” 15 U.S.C. § 78k-1(a)(1)(C)(iii), (iv). As the Commission has explained, “[t]he national market system is premised on promoting fair competition among markets, while at the same time assuring that all of these markets are linked together, through facilities and rules, in a unified system that promotes interaction among the orders of buyers and sellers in a particular NMS stock.” 89 Fed. Reg. at 81,621. Safeguarding these interests requires sound regulation of equity market structure.

Regulation of access fees and tick sizes is an important element of equity market structure. Access fee regulations promote price transparency and discovery by limiting the disparity in the level of access fees among different exchanges, because the wider that disparity, “the less useful and accurate are the prices of quotations displayed for NMS stocks.” Regulation NMS, 70 Fed. Reg. 37,496, 37,544 (June 29, 2005). Tick size regulations likewise promote price discovery by ensuring that the best displayed offer to buy (“bid”) or sell (“offer”) a stock—which under the Commission’s Order Protection Rule are the prices at which market participants generally must execute trades, *see* 17 C.F.R. § 242.611²—reflect meaningful price improvement, rather than just an attempt to jump the line and claim priority. *See* 70 Fed. Reg. at 37,596. And regulation of both access fees and tick sizes promotes efficiency and capital formation by allowing NMS stocks to compete on a more level playing field across exchanges and by encouraging

² The Order Protection Rule generally provides that a market participant cannot sell a security at a price that is lower than the best displayed bid, and they cannot buy a security at a price greater than the best displayed offer, unless an exception applies. 17 C.F.R. § 242.611. Where a sale occurs at a price lower than the best bid (e.g., a sale occurs at \$9.99 when a bid was displayed on an exchange at \$10.00) or a purchase occurs at a price higher than the best offer (e.g., a purchase occurs at \$12.00 when there was an offer at \$11.99), it is known as a “trade through”—i.e., the transaction occurred at a price that “traded through” the better priced quotation that was available.

use of types of market orders that provide liquidity. *See id.* at 37,595–96; *see also id.* at 37,499 (“[C]ompetition among multiple markets trading the same stocks can detract from the most vigorous competition among orders in an individual stock, thereby impeding efficient price discovery for orders of all sizes.”).

Access fees and tick sizes are important not just on their own, however, but also in relation to one another. As the Commission itself has recognized, “tick size and access fees are relational in so far as the access fee cannot be more than half of the minimum pricing increment.” 89 Fed. Reg. at 81,653. To understand why, it is helpful to consider the “unintended market distortions” that would result if access fees make up an outsized percentage of tick sizes. Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, 87 Fed. Reg. 80,266, 80,290 (Dec. 29, 2022). These distortions would affect trading both among exchanges with different access fee pricing models and among stocks with different tick sizes, and would impede price transparency, decrease market efficiency, and ultimately undermine the objectives of the National Market System.

A. Severing Access Fees from Tick Sizes Will Distort Trading Among Exchanges with Different Pricing Models.

Access fees that are outsized in relation to tick sizes risk distorting trading and undermining price transparency across exchanges that use different access fee pricing models.

Exchanges employ three basic pricing models: maker-taker, taker-maker, and traditional. Most exchanges today use a maker-taker model, whereby they provide rebates for market participants who “make” liquidity by posting bids or offers, and charge access fees to market participants who “take” that liquidity by executing trades against those posted quotations. For example, prior to the Reg NMS Amendments, a typical maker-taker exchange might charge liquidity takers an access fee of \$0.003 per share, provide liquidity makers a rebate of \$0.002 per share, and pocket the difference of \$0.001. *See* 89 Fed. Reg. at 81,660. A taker-maker model has an inverse structure, charging access fees to post liquidity and providing rebates to take it. And a traditional model involves charging a flat fee for all trades effected on the platform, making no distinction between participants who make liquidity and those who take it. As noted *supra* at 6 & n.2, however, regardless of an individual exchange’s pricing model, all trading in NMS

securities is subject to the Order Protection Rule, which prohibits market participants from trading such stocks at a price worse than the best displayed quotation across any exchange.

Now consider what can happen when a given stock is traded across exchanges with different pricing models under an access fee cap of \$0.003 per share and a minimum tick size of \$0.005—*i.e.*, the situation that would exist if the Court vacates the reduced access fees without also vacating the reduced tick sizes. Assume that the national best bid and national best offer for a stock trading in a half-penny increment is \$10.01 x \$10.02. In those circumstances, a maker-taker exchange might display a 100-share bid price of \$10.01 for the stock (the national best bid), while an inverted exchange might display a 100-share bid price of \$10.005 (which would be one trading increment below the national best bid). In this scenario, the SEC's Order Protection Rule requires a seller to trade at a price no worse than the best displayed bid price of \$10.01. The seller thus must trade against the bid on the maker-taker exchange (or elsewhere in the market at a price equal to or greater than \$10.01) rather than the inverted exchange's lower displayed bid of \$10.005.

The problem is that, when considering fees and rebates, the net price of the lower bid could actually be greater than that of the higher bid. This can occur when, as sometimes happens, an inverted exchange offers a rebate greater than 20 mils. *See* 89 Fed. Reg. at 81,694 tbl. 4 (identifying at least two exchanges offering such rebates). For example, if the inverted exchange offers a 30-mil rebate, a seller who executed against the bid of \$10.005 on that exchange would sell his 100 shares for \$1000.50, *plus* a rebate of \$0.30, for a final price of \$1000.80. But on the maker-taker exchange, where the Order Protection Rule requires the seller to trade, the seller receives \$1001 *minus* access (or “take”) fees of \$0.30 (assuming the exchange charges the maximum access fee, as most do, *see* 89 Fed. Reg. at 81,694 tbl. 4), for a final price of just \$1000.70—despite the nominally higher \$10.01 bid.

EXAMPLE A: 30 MIL ACCESS FEE CAP / 30 MIL REBATE / HALF-PENNY TICK SIZE		
	Taker-Maker Exchange	Maker-Taker Exchange
Posted Bid	\$10.005	\$10.01
Sales Price for 100 Shares	\$1000.50	\$1001
Transaction Fees/(Rebates)	(\$0.30)	\$0.30
Final Price Net of Fees/Rebates	\$1000.80	\$1000.70

Thus, although the transaction on the maker-taker exchange occurs at a superior posted price, it is economically *inferior* to the transaction on the inverted exchange.

The problem here is not simply that outsized transaction fees can prevent investors from making trades with the best *net* prices, making posted quotations misleading about which transaction is actually superior. The problem is that this distortion can affirmatively mislead market participants about the *direction* prices are moving. Using the example above, suppose the \$10.005 bid on the inverted exchange is posted first and executed against. Immediately after that execution, another market participant posts the \$10.01 bid on the maker-taker exchange and receives an execution. This would suggest that the price of the stock is rising from \$10.005 to \$10.01 when, in fact, the net price has fallen. Only sophisticated market participants who can account for the various fees and rebates embedded in displayed quotations across different exchanges with different pricing models will be able to understand that despite appearing to rise, the price for this stock has actually fallen. *See generally* 89 Fed. Reg. at 81,733 (acknowledging these problems).

The danger of price distortion exists even where exchanges offer lower rebates, allowing them to capture more of the transaction fees. Imagine, for example, an inverted exchange offers a 20-mil rebate and that, as in the above example, there is a 100-share bid price on that exchange of \$10.005, while a maker-taker exchange displays a 100-share bid price of \$10.01. Again, under the Order Protection Rule, the seller must trade against the latter bid (or elsewhere in the market at a price equal to or greater than that bid), as \$10.01 is the best displayed price. When fees and rebates are accounted for, however, the quotations on the two exchanges are actually identical. On both exchanges, the seller will receive a final price of \$1000.70 for his 100 shares: \$1001 *minus* access fees of \$0.30 on the maker-taker exchange, and \$1000.50 *plus* rebates of \$0.20 on the inverted exchange.

EXAMPLE B: 30 MIL ACCESS FEE CAP / 20 MIL REBATE / HALF-PENNY TICK SIZE		
	Taker-Maker Exchange	Maker-Taker Exchange
Posted Bid	\$10.005	\$10.01
Sales Price for 100 Shares	\$1000.50	\$1001
Transaction Fees/(Rebates)	(\$0.20)	\$0.30
Final Price Net of Fees/Rebates	\$1000.70	\$1000.70

This creates similar problems to those discussed above: When transactions at different posted prices are economically equivalent, the information reflected in different quotations has less value, especially for unsophisticated investors. This example also illustrates how access fees that are disproportionate to tick sizes can allow traders to “queue jump” and claim priority for their quote without actually improving the net stock price. In this example, if there is a \$10.005 bid on an inverted exchange, a competing trader could obtain priority for his order under the Order Protection Rule by posting a bid of \$10.01 on a maker-taker exchange. However, as explained above, the economics of these orders are the same. Queue jumping of this sort distorts the signal conveyed by different quotes and in fact is one of the concerns the SEC has previously expressed about allowing sub-penny tick sizes. *See* 70 Fed. Reg. at 37,596 (“[T]he Commission is concerned that sub-penny quoting may be used by market participants as more as a means of stepping ahead of competing limit orders for an economically insignificant amount than of promoting genuine price competition.”).

To be sure, the potential for access fees to undermine price transparency and discovery exists even when those fees are proportionate to tick sizes, as access fees function as additional sub-penny increment

increases applied to each transaction. *Cf.* 89 Fed. Reg. at 81,652 (“[O]ne of the purposes of the access fee cap was, and remains, to help to ensure that transaction fees do not unduly distort the price of protected quotations.”). But the relationship between access fees and tick sizes determines the *degree* of distortion. For instance, if the stock in Example A above were quoted only in one-penny increments, then access fees of \$0.003 would not cause superior *quoted* prices not to yield the superior *net* prices. The net prices would certainly be closer than the quoted prices, but a higher quoted price would still yield a higher net price:

EXAMPLE C: 30 MIL ACCESS FEE CAP / 20 MIL REBATE / ONE-PENNY TICK SIZE		
	Taker-Maker Exchange	Maker-Taker Exchange
Posted Bid	\$10.00	\$10.01
Sales Price for 100 Shares	\$1000	\$1001
Transaction Fees/(Rebates)	(\$0.30)	\$0.30
Final Price Net of Fees/Rebates	\$1000.30	\$1000.70

In other words, a transaction occurring at \$10.01 remains superior to a transaction occurring at \$10.00 (by a total of \$0.40), notwithstanding the different exchange fee models, and a transaction occurring at \$10.00 followed

by a transaction occurring at \$10.01 would actually reflect a rising price for the security. Thus, as the SEC has observed, an “access fee cap that is less than half of the tick size ... maintain[s] coherence between net and quoted prices.” 89 Fed. Reg. at 81,733.

B. Severing Access Fees from Tick Sizes Will Distort Trading Among Stocks with Different Tick Sizes.

Access fees that are disproportionate to tick sizes can also exacerbate distortions among stocks with different tick sizes.

As noted above, the Commission’s amendments permitting half-penny tick sizes would apply only to some NMS stocks³; others remain subject to a \$0.01 tick size. 89 Fed. Reg. at 81,691. Now imagine two stocks—Stock A and Stock B—that have identical national best bid prices of \$100 per share but different tick sizes: Stock A has a tick size of \$0.01, and Stock B has a tick size of \$0.005. Assume further the market has an access fee cap of \$0.003

³ The amendments correlate a stock’s tick size to its “Time-Weighted Average Quoted Spread” over an evaluation period—essentially, the average difference between the best bid and best offer for the stock over a fixed evaluation period. Under the amendments, only stocks with a time-weighted average quoted spread under 1.5 pennies during the most recent evaluation period can be quoted in half-penny tick sizes. Stocks with a spread greater than 1.5 pennies during the evaluation period remain subject to a \$0.01 tick size. *See* 89 Fed. Reg. at 81,691.

and that the stocks trade on a maker-taker exchange offering a \$0.002 rebate to liquidity providers.

In this scenario, if a market participant wants to provide a new best bid for Stock A, it will have to improve the current quotation to \$100.01. If it quotes 100 shares, its pre-rebate costs over the current best bid will increase by \$1 (*i.e.*, 100 shares x \$0.01 increase over the best bid). When and if that quote is executed against, the market participant will receive a \$0.002 per share “maker” rebate, totaling \$0.20. So, this market participant has effectively improved the market by \$1 (*i.e.*, the price at which a seller could immediately sell its shares) while incurring a net cost over the prevailing bid of \$0.80.

But what if that market participant provides a new best bid quotation for Stock B instead? Then, it needs to improve the quotation only by a half-penny to \$100.005. Quoting 100 shares would require the market participant to increase its pre-rebate costs by \$0.50. If this quote gets executed against, the market participant receives the same \$0.002 per share rebate (\$0.20 per 100 shares) as with Stock A, but when the trade is complete, it has improved the market by only \$0.50 (100 shares times the permitted tick size of a half penny) and has incurred a net cost of just \$0.30—less than half of the net

costs from trading Stock A. All else equal, of course this hypothetical trader will prefer Stock B over Stock A—it earns the same amount but risks far less—even though trading Stock A better improves the market.

This disparity will drive market participants—and in particular liquidity providers such as market makers that provide the vast majority of quotations for securities especially in thinly-traded stocks—toward stocks trading in half-penny increments over otherwise comparable stocks trading in full-penny increments. This will undermine price discovery, efficiency, and competition by incentivizing trading based not on views of the value of the stock but on differences in tick sizes. To be sure, this structural bias exists even under the rules as adopted; however, preserving existing access fees while keeping reduced tick sizes will significantly amplify this distortive effect.

II. The Tick Size Amendments Are Not Severable from the Access Fee Amendments.

The foregoing examples illustrate why, as a practical matter, the Court should vacate the tick size amendments if it vacates the access fee amendments. It is equally clear, as a legal matter, that the two sets of amendments are inseverable. Therefore, if the reduced access fee caps are vacated, the reduced tick sizes must be as well.

The Commission's own words confirm this. As the Commission explained in adopting the final NMS amendments, "tick size and access fees are relational in so far the access fee cannot be more than half of the minimum pricing increment." 89 Fed. Reg. at 81,653. That is the very situation restoring the access fee cap to \$0.003 while leaving \$0.005 tick sizes in place would bring about. In that situation, access fees would represent 60 percent of the tick size. That is the opposite of what the Commission intended. To permit severance in this situation would be the paradigmatic arbitrary and capricious action because it would lack a "rational connection between the facts found and the choice made." *Finnbin, LLC v. Consumer Prod. Safety Comm'n*, 45 F.4th 127, 135 (D.C. Cir. 2022) (cleaned up).

This Court considers two factors when assessing the severability of agency rulemakings. First, it asks whether there is "substantial doubt" that "the agency would have adopted the same disposition regarding the unchallenged portion [of the rule] if the challenged portion were subtracted." *Nasdaq Stock Mkt. LLC v. SEC*, 38 F.4th 1126, 1144 (D.C. Cir. 2022) (citation omitted). Second, the Court considers "whether the remaining parts of the agency action can function sensibly without the stricken provision." *Id.* (cleaned up). If the Court harbors doubts at either step, severing the

challenged from the unchallenged is “not an option,” and the Court should set aside the agency rule in full. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000).

Here, both indicators of agency intent and practical considerations preclude severing the access fee cap and tick size amendments. As to agency intent, as noted above, the Commission has recognized access fees must not “represent an outsized portion of the displayed quotations.” 87 Fed. Reg. at 80,290.

Indeed, the Commission relied upon the relationship between access fees and tick sizes to justify reducing the access fee cap in light of the planned tick size reduction. In the final NMS amendments, the Commission stated that “since an access fee that is too high when compared to the tick size can create pricing distortions, the access fee caps need to be adjusted in conjunction with the reduction in tick size to prevent such distortions.” 89 Fed. Reg. at 81,624. The contrapositive is equally true. If the access fee caps are restored to their prior, higher levels, preventing distortions requires adjusting up tick sizes as well.

It is equally clear from the examples discussed in Part I *supra* that the tick size amendments cannot “function sensibly” if the access fee

amendments are vacated. *Nasdaq*, 38 F.4th at 1144. The Commission implemented the two sets of amendments together to try to “promote price discovery and price competition” so that pricing would be better aligned “with the principles of supply and demand.” 87 Fed. Reg. at 80,279. Causing access fees to be disproportionate to tick sizes will undermine these goal by obscuring price transparency and distorting trading incentives and competition in contravention of market principles. *See MD/DC/DE Broads. Ass’n v. FCC*, 253 F.3d 732, 736 (D.C. Cir. 2001) (vacating a rule in its entirety because without the invalid provisions, the rule failed to achieve its stated purposes).

The fact that the Commission included a severability clause in the Reg NMS amendments does not alter the analysis. *See* 89 Fed. Reg. at 81,772 (“The Commission considers the provisions of the final amendments to be severable to the fullest extent permitted by law.”). Courts need not abide by severability clauses in agency rules. *See Nasdaq*, 38 F.4th at 1145 (declining to enforce severability clause in SEC rule); *MD/DC/DE Broads.*, 253 F.3d at 734 (declining to defer to severability clause in FCC rule because the remaining portions of the rule would not have sensibly served the goals for which the rule was designed); *see also Cmty. for Creative Non-Violence v.*

Turner, 893 F.2d 1387, 1394 (D.C. Cir. 1990) (stating that the “determination of severability will rarely turn on the presence or absence of [a severability clause]” (cleaned up)). The Commission here acknowledged as much. *See* 89 Fed. Reg. at 81,772 (recognizing that “[i]f parts of a regulation are invalid and other parts are not, courts set aside only the invalid parts unless the remaining ones cannot operate by themselves or unless the agency manifests an intent for the entire package to rise or fall together” (cleaned up)). Thus, in the face of the Commission’s clear intent and the practical realities of the relationship between access fees and tick sizes, the severability clause is irrelevant.

CONCLUSION

For the foregoing reasons, if the Court vacates the access fee cap amendments, it should hold that the tick sizes amendments are inseverable and vacate them as well.

January 17, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure 32(g) and District of Columbia Circuit Rule 32(g), I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure Rule 29(a)(5) and District of Columbia Rule 29(a)(5) because it totals 4,367 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and District of Columbia Circuit Rule 32(f).

/s/ Daniel J. Feith

Daniel J. Feith

January 17, 2025

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2025, I caused the foregoing brief to be served on all registered counsel through the Court's CM/ECF system.

/s/ Daniel J. Feith
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ADDENDUM

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17 C.F.R. § 242.611

ORDER PROTECTION RULE

(a) ***Reasonable policies and procedures.***

- (1) A trading center shall establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs on that trading center of protected quotations in NMS stocks that do not fall within an exception set forth in paragraph (b) of this section and, if relying on such an exception, that are reasonably designed to assure compliance with the terms of the exception.
- (2) A trading center shall regularly surveil to ascertain the effectiveness of the policies and procedures required by paragraph (a)(1) of this section and shall take prompt action to remedy deficiencies in such policies and procedures.

(b) ***Exceptions.***

- (1) The transaction that constituted the trade-through was effected when the trading center displaying the protected quotation that was traded through was experiencing a failure, material delay, or malfunction of its systems or equipment.
- (2) The transaction that constituted the trade-through was not a “regular way” contract.
- (3) The transaction that constituted the trade-through was a single-priced opening, reopening, or closing transaction by the trading center.
- (4) The transaction that constituted the trade-through was executed at a time when a protected bid was priced higher than a protected offer in the NMS stock.
- (5) The transaction that constituted the trade-through was the execution of an order identified as an intermarket sweep order.

- (6) The transaction that constituted the trade-through was effected by a trading center that simultaneously routed an intermarket sweep order to execute against the full displayed size of any protected quotation in the NMS stock that was traded through.
 - (7) The transaction that constituted the trade-through was the execution of an order at a price that was not based, directly or indirectly, on the quoted price of the NMS stock at the time of execution and for which the material terms were not reasonably determinable at the time the commitment to execute the order was made.
 - (8) The trading center displaying the protected quotation that was traded through had displayed, within one second prior to execution of the transaction that constituted the trade-through, a best bid or best offer, as applicable, for the NMS stock with a price that was equal or inferior to the price of the trade-through transaction.
 - (9) The transaction that constituted the trade-through was the execution by a trading center of an order for which, at the time of receipt of the order, the trading center had guaranteed an execution at no worse than a specified price (a “stopped order”), where:
 - (i) The stopped order was for the account of a customer;
 - (ii) The customer agreed to the specified price on an order-by-order basis; and
 - (iii) The price of the trade-through transaction was, for a stopped buy order, lower than the national best bid in the NMS stock at the time of execution or, for a stopped sell order, higher than the national best offer in the NMS stock at the time of execution.
- (c) ***Intermarket sweep orders.*** The trading center, broker, or dealer responsible for the routing of an intermarket sweep order shall take reasonable steps to establish that such order meets the requirements set forth in § 242.600(b)(47).

- (d) ***Exemptions.*** The Commission, by order, may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any person, security, transaction, quotation, or order, or any class or classes of persons, securities, quotations, or orders, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.