

May 11, 2026

Hon. Paul Atkins, Chairman  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: File No. S7-2026-10 and File No. 4-862

Dear Chairman Atkins,

The Healthy Markets Association<sup>1</sup> appreciates the opportunity to object to:

1. MEMX's request for "temporary exemptive relief" from the planned implementation of changes to Rule 610(c);<sup>2</sup> and
2. Nasdaq's request to "immediately delay the implementation of the changes to Rules 610(c) and 612."<sup>3</sup>

The requests should be denied, and the unanimously adopted changes to Rule 610(c) and Rule 612 should be implemented without further delay.

## MEMX's Exemption Request and Nasdaq's Exemption Request

MEMX has asked the Commission to:

1. "delay implementation of Rule 610(c), as amended, for: (a) protected quotations and other best bids and best offers priced \$1.00 or more in those NMS stocks that would continue to be subject to a \$0.01 minimum pricing increment pursuant to Rule 612(b)(2)(i), and (b) protected quotations and other best bids and best offers in NMS stocks that are priced below \$1.00 per share;" and, separately,

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<sup>1</sup> The Healthy Markets Association is a non-profit member organization focused on improving the transparency, efficiency, competitiveness, and fairness of the capital markets. Our members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms. Our members collectively have over a trillion dollars of investments in stocks, bonds, US treasury securities, private equity funds, and other "traditional" assets. Some of our members have exposure to digital assets, as well as investments in digital asset market participants, such as crypto exchanges. We work with chief investment officers, portfolio managers, trading desk heads, operations teams, risk managers, data analysts, compliance officers, and other professional investment team staffers engaged in the investment process. Our expertise and focus is on market plumbing.

<sup>2</sup> *Notice of an Application of MEMX LLC for Temporary Exemptive Relief From Compliance with Certain Provisions of Rule 610(c) of Regulation NMS, as Amended, Pursuant to Section 36(a)(1) of the Securities Exchange Act of 1934 and Rule 610(f) of Regulation NMS, and Request for Comment*, SEC, Exch. Act. Rel. No. 34-105058, Mar. 20, 2026, available at <https://www.sec.gov/files/rules/exorders/2026/34-105058.pdf> ("MEMX Exemption Request").

<sup>3</sup> Letter from John Zecca, Nasdaq, to Vanessa Countryman, SEC, Apr. 17, 2026, available at <https://www.sec.gov/comments/s7-2026-10/s7202610-755827-2324494.pdf> ("Nasdaq Exemption Request").

2. “allow exchanges to charge an access fee of up to \$0.0015 by modifying the \$0.0010 amended access fee cap for those NMS stocks that would be subject to the new \$0.005 minimum pricing increment pursuant to Rule 612(b)(2)(ii).”<sup>4</sup>

In making the request, MEMX has claimed that these delays would “give the Commission time to consider and discuss with market participants whether and how access fees should be regulated in light of possible changes to Rule 611”<sup>5</sup> and “ensure that the industry does not have to implement new regulations that the Commission may later eliminate or modify.”<sup>6</sup>

In a cursory, three-page comment to the MEMX Exemption Request, Nasdaq articulated its own, distinct, and much broader exemption request (“Nasdaq Exemption Request”). The Nasdaq Exemption Request goes much further, and urges the Commission to “immediately delay, in its entirety, the implementation of the amendments to Rules 610(c) and 612 that the Commission adopted in September 2024.”<sup>7</sup> Specifically, Nasdaq has asked for the changes to both transaction fee caps and tick sizes to be further delayed until after the implementation of the not-yet-proposed changes to the Order Protection Rule. In other words, Nasdaq is asking the Commission to essentially ignore its unanimously adopted changes that were preceded by over a decade of study and a year of litigation.

In seeking the relief, Nasdaq has claimed that allowing the rules to be implemented in November 2026 “risks creating regulatory whiplash and waste at a time when the industry is focused on preparing to expand trading hours to 23/5—which is a major market development in its own right.”<sup>8</sup>

## Standards For The Commission

The Commission’s exercise of its exemptive powers, like other agency actions, must comply with the basic demands of the Administrative Procedure Act. The Court of Appeals for the District of Columbia Circuit has ruled that it must:

hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary” or “capricious. To satisfy that standard, an agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. The agency’s explanation must be clear enough that the agency’s “path may reasonably be discerned. And the

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<sup>4</sup> MEMX Exemption Request, at 4-5.

<sup>5</sup> MEMX Exemption Request, at 3.

<sup>6</sup> MEMX Exemption Request, at 3-4.

<sup>7</sup> Nasdaq Exemption Request, at 2.

<sup>8</sup> Nasdaq Exemption Request, at 3.



agency may not “entirely fail[] to consider an important aspect of the problem.”<sup>9</sup>

Applying that standard, the Court has recently vacated a Commission Exemptive Order.<sup>10</sup> That case is illustrative here.

In 2020, after extensive negotiations with MGEX Futures Exchange, the Commission issued an Exemptive Order intended to excuse the exchange from compliance with securities rules.<sup>11</sup> The MGEX Exemptive Order explained that the agency’s objective was to put MGEX’s financial products (aka, SPIKES futures) on the same regulatory footing as an existing set of products (aka, VIX futures).

The Court found that while the MGEX Exemptive Order had identified a clear objective (i.e., to promote competition with another financial product), it had fatally failed to explain why its exemption from securities rules was necessary to achieve that objective. The Court noted that the Commission had thoughtfully articulated good reasons for its security futures rules when it adopted them, and that the Commission had not adequately explained why those reasons should be overruled. The Commission’s exercise of its exemptive powers under Section 36 are thus conditioned upon the agency first articulating the contours of why the exemption is necessary, in light of the broader rule.

In the context of the MEMX Exemption Request, the Nasdaq Exemption Request, or any other suggestions to revisit the Commission’s unanimously adopted revisions to tick sizes and transaction fees, the Commission must gather the relevant facts, analyze them, and provide a rational connection between its action and its objective. The Commission found that narrowing the ticks was a reasonable decision that would reduce costs, and the Court agreed. The Commission found that reducing transaction fee caps was a reasonable decision, and the Court agreed.

Reversing one or both of those decisions would require significant new data and analysis about each specific issue.

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<sup>9</sup> *Cboe Futures Exchange, LLC, v. SEC*, 77 F.4th 971 (D.C. Cir. 2023), available at <https://law.justia.com/cases/federal/appellate-courts/cadc/21-1038/21-1038-2023-07-28.html> (internal quotations and citation omitted) (“MGEX Order Decision”).

<sup>10</sup> MGEX Order Decision.

<sup>11</sup> *Order Granting Conditional Exemptive Relief, Pursuant to Section 36 of the Securities Exchange Act of 1934 (“Exchange Act”) with Respect to Futures Contracts on the SPIKESTM Index*, SEC, Exch. Act Rel. No. 90510, Nov. 24, 2020, available at <https://www.sec.gov/files/rules/exorders/2020/34-90510.pdf> (“MGEX Exemptive Order”).



# The Commission Has Spent Over a Decade Considering Changes to Tick Sizes and Transaction Fee Caps

Well over a decade ago, Congress and regulators began deep investigations and consideration of the concerns with transaction fees, rebates, and other aspects of Regulation NMS.<sup>12</sup>

In 2016, the Commission's Equity Market Structure Advisory Committee recommended that the Commission adopt an access fee cap pilot program.<sup>13</sup>

In 2019, the Commission adopted the Transaction Fee Pilot,<sup>14</sup> precisely to address the concerns with the high fee caps and rebate payment practices. That Rule was challenged by the leading exchange families in the DC Circuit Court of Appeals, and vacated – essentially returning the default state of play as it had been for 15 years.<sup>15</sup>

The Commission tried again in 2022, when it proposed revisions to tick sizes and transaction fee caps.<sup>16</sup> The Commission received extensive comments (including from HMA), and was supported by hundreds of investors with trillions of dollars in assets under management. Many of them expressly noted the desire to reduce transaction fees so as to reduce distortive impacts on order routing behavior.

In light of comments received, the Commission staff undertook significant new economic analyses and materially revised the proposal along the lines outlined by some commenters. In September, 2024, the Commission unanimously adopted revisions to both tick sizes and transaction fees.<sup>17</sup> Each sitting Commission delivered detailed remarks in support of the final rule.<sup>18</sup>

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<sup>12</sup> See, e.g., *Computerized Trading: What Should the Rules of the Road Be?*, Hearing before the U.S. Senate Banking Committee's Subcommittee on Securities, Insurance, and Investments, (112 Cong. 2012), available at <https://www.govinfo.gov/content/pkg/CHRG-112shrg80168/html/CHRG-112shrg80168.htm>.

<sup>13</sup> Recommendation for an Access Fee Pilot, Equity Market Structure Advisory Committee, SEC, July 8, 2016, available at <https://www.sec.gov/spotlight/emsac/recommendation-access-fee-pilot.pdf>.

<sup>14</sup> *Transaction Fee Pilot for NMS Stocks*, SEC, 84 Fed. Reg. 5202 (Feb. 20, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-02-20/pdf/2018-27982.pdf>.

<sup>15</sup> *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 546 (D.C. Cir. 2020).

<sup>16</sup> *Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders*, SEC, 87 Fed. Reg. 80266 (Dec. 29, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-12-29/pdf/2022-27616.pdf>.

<sup>17</sup> *Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders*, SEC, 89 Fed. Reg. 81620 (Oct. 8, 2024), available at <https://www.govinfo.gov/content/pkg/FR-2024-10-08/pdf/2024-21867.pdf>.

<sup>18</sup> See, Remarks of Hon. Gary Gensler, Sept. 18, 2024, available at <https://www.sec.gov/newsroom/speeches-statements/gensler-statement-regulation-nms-091824>; Remarks of Hon. Hester Peirce, Sept. 18, 2024, available at <https://www.sec.gov/newsroom/speeches-statements/peirce-statement-regulation-nms-091824>; Remarks of Hon. Caroline Crenshaw, Sept. 18, 2024, available at <https://www.sec.gov/newsroom/speeches-statements/crenshaw-statement-regulation-nms-091824>;



The Commission's changes to Rule 610(c) and Rule 612 were quickly challenged in the Court of Appeals for the District of Columbia Circuit by, amongst others, Nasdaq.

HMA and others filed extensive amicus briefs in the case, supporting the Commission's decision to adopt the changes. After a thorough airing of all of the relevant policy and procedural issues, the Court denied the petition in October 2025, essentially leaving the Commission's revisions intact, and ready to implement.<sup>19</sup> Given the uncertainty of the litigation, and the desire to ensure a smooth transition, the Commission voluntarily delayed the implementation of the tick size and transaction fee changes until November 2026.

Nasdaq seems to simply want to relitigate the issues with a new Commission; but without any new facts or analysis.

MEMX appears to be more measured, but its request is also directly contrary to the Commission's past analysis, as recognized by the Court. In fact, the Court expressly addressed the Commission's analysis of a potential 15 mil fee cap:

petitioners insist that the SEC did not meaningfully explore alternative fee arrangements— specifically, a multi-tiered fee model that would apply a 15-mil cap to half-penny-tick stocks priced at or above \$1. But the Commission considered that very proposal (and others), raising concerns that a higher fee would increase transaction costs and worsen price transparency. We have no reason to second-guess that exercise of judgment.<sup>20</sup>

MEMX appears to be essentially suggesting that the Commission ignore that analysis (which had been accepted by the Court), and make the opposite determination. Oddly, neither MEMX nor any other commenters to date appear to have offered any new facts, much less reasonable analysis, that would support such a flip-flop by the Commission.

We appreciate the Commission's consideration of changes to Rule 611. In fact, we at HMA have urged reforms to Rule 611 as a participant in both of the agency's 2025 roundtable discussions on the topic.<sup>21</sup> In fact, HMA first advocated for modifying Rule 611 in 2015.<sup>22</sup>

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Remarks of Hon. Mark Uyeda, Sept. 18, 2024, *available at* <https://www.sec.gov/newsroom/speeches-statements/uyeda-statement-regulation-nms-091824>; and Remarks of Hon. Jaime Lizarraga, Sept. 18, 2024, *available at* <https://www.sec.gov/newsroom/speeches-statements/lizarraga-statement-regulation-nms-091824>.

<sup>19</sup> *Cboe Global Markets, Inc. v. SEC*, No. 24-1350 (D.C. Cir. 2025), *available at* <https://law.justia.com/cases/federal/appellate-courts/cadc/24-1350/24-1350-2025-10-14.html>.

<sup>20</sup> *Cboe Global Markets, Inc. v. SEC*, at 26.

<sup>21</sup> Letter from Chris Nagy, HMA, to Hon. Paul Atkins, SEC, September 16, 2025, *available at* <https://www.sec.gov/comments/4-862/4862-658187-1965294.pdf>; see also Letter from Chris Nagy, HMA, to Hon. Paul Atkins, SEC, Dec. 12, 2025, *available at* <https://healthymarkets.org/wp-content/uploads/2025/12/611-Roundtable-12-15-25.pdf>.

<sup>22</sup> Statement of Dave Lauer, HMA, Before the Equity Market Structure Advisory Committee, SEC, May 13, 2015, *available at* <https://www.sec.gov/comments/265-29/26529-15.pdf> ("2015 Statement to EMSAC").



However, that does not mean that potential changes to Rule 611 should indefinitely forestall already adopted changes to other key elements of Regulation NMS. We don't see the changes to the Market Data Infrastructure Rule or Rule 605 or other rules as suddenly warranting an indefinite "pause" on all things. The reality is that the revisions to Rule 601(c) and 612 are long overdue capital market systems upgrades. Their implementation does not negate or unduly complicate future, potential upgrades. Unquestionably, future rules changes can and must reflect these changes being made, but that's essentially what some market participants are seeking to avoid. They don't want the upgrades.

To be clear, the Commission's analysis of the final rules made it clear how investors would be better protected, and the markets more fair, orderly, and efficient, by the implementation of the tick size and transaction fee cap reductions. They were supposed to be implemented by now, and investors continue to lose every day that they are not.

Meanwhile, however, MEMX and Nasdaq are essentially seeking indefinite delays. Regardless of how any delay is entitled, it would likely be quite lengthy, if not permanent. The delays are ostensibly being sought to await the implementation of rules changes that are not yet proposed.

Those rules changes (most notably, to Rule 611) would need to be proposed and published in the Federal Register.

Commenters would need the opportunity to consider them and offer relevant facts and analysis.

The Commission and its staff would need the time to consider the comments and engage in thoughtful analysis.

The Commission and its staff would need the time to revise and consider a final rule and any potentially related guidance or FAQs.

And then the rules would likely need to withstand a likely legal challenge. It is customary for the Commission to stay the implementation of its rules, while they are being challenged – as happened to the implementation of the Rule 610(c) and 612 changes at issue now.

And then the Commission would have to give time for market participants to build and implement the changes to Rule 611.

Even assuming the most optimistic timelines, the implementation of Rule 611 changes would likely not occur for at least another three years. During that time, we could well assume the Commission would be unlikely to suddenly allow for the implementation of tick size or transaction fee reforms. And so, despite being unanimously approved, the changes to tick sizes and transaction fees would not be implemented for over four years.



That delay, in and of itself, is contrary to the Commission's mission, its own determinations and findings in adopting the reforms, and the agency's obligations under the law.

## The Exemption Requests Are Not the Same

While the record suggests that the Commission could not reasonably grant any of the referenced Exemption Requests, we note that the impacts and analyses of the different requests are very different. For example, the Commission's own analysis in finalizing the changes to tick sizes made it clear that narrowing the current, artificially-wide penny spreads would better protect investors and promote market efficiency. As such, we do not believe that the Commission could reasonably choose to ignore those savings without significant new data and analysis.

We believe that the analysis regarding transaction fee caps, however, is somewhat different. The Commission chose to lower the caps significantly, and it supported that decision with robust analysis. MEMX is not seeking to ignore that decision, but rather make a less dramatic change. In this case, the benefits to investors and other market participants arising from lower fee caps would still exist, but likely in a more muted nature than it would were the rule fully implemented. It could be theoretically possible for the Commission to gather sufficient facts and engage in sufficient analysis to conclude that it would impose a less dramatic fee cap reduction, so as to alleviate some concerns now being raised. It hasn't happened yet, but we could understand it. The Nasdaq Exemption Request, by contrast, would require the Commission to wholesale disregard its entire analysis on the application of the transaction fee caps, and ignore the harms the Commission has already identified.

## Conclusion

The Commission unanimously adopted changes to tick sizes and transaction fees, finding that the reforms would protect investors, and make the markets more fair, orderly, and efficient. In doing so, the Commission agreed with several market participants, and explicitly rejected arguments from some others, including several exchanges.

The Commission then provided market participants with more than ample time to implement the adopted rule changes. Even further, because the rule changes were challenged in court and the Administration changed, the Commission repeatedly extended the compliance deadlines.

Now, however, after having lost their substantive arguments before the Commission; and after having lost their substantive and procedural arguments before the Court of



Appeals for the District of Columbia Circuit, some market participants are making “Hail Mary” attempts to duck the rules.

The Exemption Requests, if granted, would stop the implementation of unanimously adopted rules changes for several more years, if not forever.

Unfortunately for the Exemption Requests’ supporters, the Commission’s own analysis on the importance of its revisions to tick sizes and transaction fee caps shows that further delays in implementation have very concrete harms. The Commission cannot reasonably ignore its own extensive deliberations, analysis, and conclusions simply because some market participants don’t want to comply with a rule change.<sup>23</sup>

The Commission should stick to its own administrative record, and reject these attempts to abandon its hard-fought progress. If you have any questions, please contact me at [ty@healthymarkets.org](mailto:ty@healthymarkets.org). Thank you for your consideration.

Respectfully submitted,

Tyler Gellasch  
President and CEO

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<sup>23</sup> See, *Choe Futures Exchange, LLC, v. SEC*, 77 F.4th 971 (D.C. Cir. 2023), available at <https://law.justia.com/cases/federal/appellate-courts/cadc/21-1038/21-1038-2023-07-28.html> (setting aside the MGEX Exemption Order).