May 24, 2018

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Transaction Fee Pilot for NMS Stocks (Release No. 34-82873; File No. S7-05-18)

Dear Mr. Fields:

Better Markets[1] appreciates the opportunity to comment on the above-captioned proposal ("Pilot" or "Proposal") released for comment by the Securities and Exchange Commission ("SEC" or "Commission"). We congratulate and commend the Commission, the Division of Trading and Markets, and the Commission staff for a long-considered, thoughtful, and balanced Proposal. With a few enhancements, we strongly support the Proposal and encourage the Commission to approve it promptly and commence the Pilot before the year's end. As important, we look forward to the Commission's quick and thorough analysis of the results of the Pilot and its commitment to act promptly and boldly upon its findings. Investors and our markets have already waited too long for such basic, essential reforms.

Fundamental solutions to market structure problems, particularly those that aim to upend market incumbents' business models and deeply rooted conflicts of interests, will not be proposed or supported by those who benefit from the system. A statutorily created, independent regulator – such as the SEC – with a mandate to protect investors, instill and maintain fair and orderly markets, and promote capital formation is the *only* entity that can and must solve these problems. Payments by the exchanges that incentivize and induce routing decisions by broker-dealers at the expense of best execution and market quality is one of those most entrenched and insidious market practices today, and it requires forceful and independent intervention by the SEC. We applaud the SEC for recognizing its indispensable role in addressing this issue. The Pilot will help the Commission to fulfill this role in the most informed, authoritative, and expeditious manner.

1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

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This is a pro-investor, pro-market quality initiative, and it deserves to be approved and implemented without delay. Our comments will focus on aspects of the Proposal that must be maintained in the final design of the Pilot, as well as a few enhancements that will help the Commission more effectively achieve the policy goals underlying the Pilot.

SUMMARY

The Pilot should be approved as proposed as quickly as possible. While there is at least one groundbreaking study that has demonstrated what appears to be a legalized kickback system between large exchanges and large retail-oriented broker-dealers at the expense of retail investors and market quality,[2] the Commission still lacks[3] sufficient data[4] to outlaw rebates and other related practices (such as front-running and information leakage) that harm investors. This Pilot, as proposed, should fill this data and knowledge gap. For the Pilot to produce the necessary, conclusive, representative data, it must retain the following elements:

- It must include a "no-rebate" bucket. There simply is no substitute for this element of the Pilot. The Proposal itself shows that all of the exchanges that engage in the practice of legal kickbacks have also done so even when the access fee is very low. In other words, the exchanges have a history of subsidizing rebates,[5] and so a very low access fee cap (for example, as was proposed by the Equity Market Structure Advisory Committee (EMSAC)) is not an effective way to simulate a "no-rebate" environment.

- It must include all National Market System ("NMS") stocks above $2 per share without regard to the stock's capitalization levels. The Pilot aims to produce invaluable data that promises to arm the Commission with next-generation reform ideas and settle some academic debates regarding market liquidity. Leaving out small or mid-cap issuers will handicap this effort and hamper future reforms, especially those related to liquidity issues.

- It must require the production of the data exactly as outlined in the Proposal. All of the data-fields are thoughtfully proposed, and the cost of producing them is minimal and certainly acceptable given the enormity of the benefits.

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2 *See* Robert H. Battalio *et al.*, *Can Brokers Have It All? On the Relation Between Make-Take Fees and Limit Order Execution Quality*, 71 J. OF FIN., 2193 (2016), *available at* http://onlinelibrary.wiley.com/doi/10.1111/jofi.12422/full.

3 *See* Transaction Fee Pilot for National Market System Stocks 83 Fed. Reg. 13008, 13044-50 (Mar. 26, 2018) (discussing the limitations of current studies and data) ("Release").

4 The ten retail brokers analyzed in the Battalio study "make up approximately 2.1% of the broker-dealers with exchange memberships, and less than 0.3% of broker-dealers overall. Although these are well-known retail brokers, due to the lack of representativeness of the sample (e.g., the majority of the broker-dealers represented in the Battalio study are online broker-dealers), these broker-dealers may be more (or less) likely than the average broker-dealer to route customer orders in ways that benefit themselves at the expense of their customers. The findings in the Battalio study, therefore, may not be representative of a broader sample of broker-dealers." Release at 13045.

5 *See* Release at 13049. Seven exchanges have some categories of rebates that exceed the maximum access fees charged by these exchanges, meaning they are willing and able to subsidize their rebates through presumably other non-access fee revenue. Therefore, a low-cap access fee alone is not enough to dry up the source of rebates: the actual rebate itself must be banned.

- It cannot permit issuers to exempt themselves out of the Pilot. Today, no issuer has any say over exchanges' decisions to set access fee or rebate levels on its stock, or over exchanges' decisions to sell special access and premium exchange data to certain market participants. In this regard, the Pilot should not be structured any differently.

In addition, the Commission should take two other steps, without complicating the implementation any further, to ensure that the Pilot maximizes its utility and goes into effect as soon as possible.

- The Commission must have stringent requirements for market-makers who want to continue enjoying Linked Pricing privileges in the "no-rebate" bucket. If any market-maker in fact does qualify for this extraordinary exemption, the SEC must review their trading activity every quarter to ensure they are meeting all of their obligations as market-makers, and promptly disqualify those who do not fully satisfy all of their obligations.

- The Commission should develop in-take systems and encourage Alternative Trading Systems (ATSs) to submit applicable datasets as required of the exchanges. The Commission need not attempt to essentially impose an access fee pilot regime over ATSs (one that, at least formally, does not exist now), but neither should the Commission deprive itself of the data that ATSs can produce and submit.

- The Commission should promptly move to finalize the Pilot without waiting for actions on any of its other market structure initiatives, such as its Regulation NMS Stock or any potential guidance or rulemaking on "best execution." This Pilot will assist the Commission in pursuing those other efforts if and when they are undertaken, aid in their design, and confirm their importance. Accordingly, the Pilot deserves its own separate and fast track.

COMMENTS

Brief Description of the Proposal

The Commission is proposing to conduct a pilot program by lowering access fee caps in some instances and by prohibiting rebates or other economic inducements offered by the exchanges in others. The goal is to "produce data on the effects of equity exchange transaction fees and rebates, and possible effects of changes in those fees and rebates, on order routing behavior, execution quality, and market quality."[6] The Pilot would apply to all registered equities exchanges (including, inverted "taker-maker" exchanges) but will not apply to ATSs. It will run for a maximum of two years, with an automatic sunset at the end of year 1, unless the Commission publishes a notice extending the Pilot for another year.[7] The Pilot will also have a six-months pre- and post-pilot period, during which the exchanges are required to gather and report the same data as they would during the Pilot. This pre-Pilot data will establish a baseline against which to compare the Pilot results, and the post-Pilot data will show how broker-dealers and exchanges are readjusting their behavior, fees, and order execution outcomes.

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6 Release at 13011.

7 For a summary chart of the Pilot, *see* Release at 13015.

The Pilot will divide all NMS stocks above $2 per share into four groups ("buckets"): three tests buckets and one control bucket. Each of the test buckets will contain 1,000 NMS stocks that have been "selected through stratified sampling by market capitalization, share price and liquidity."[8] After 1,000 NMS stocks are placed in each of the three test buckets, the remaining unassigned NMS stocks will be placed in the control bucket.

The first two buckets would have lower access fee caps than are currently set and they would permit rebates, while the third bucket would have the same access fee cap as is currently set but, crucially, would allow no rebates. The control bucket will test for the status quo. The exchanges will be required to gather and report various data related to access fees and rebates, broker-dealers' order routing decisions, and other metrics regarding order execution and market qualities.

<u>The Conflicts of Interests Between Broker-Dealers Seeking Rebates and Their Obligations to Achieve Best Execution for Investors</u>

In the past few years, many in academia, in industry, on committees that advise regulators, and in Congress have identified and sounded the alarm about rebates and other economic inducements that affect order routing decisions of broker-dealers. Specifically, they have highlighted how those decisions degrade best execution, contribute to the "darkening" of the markets, and increase market fragmentation and complexity.[9] The preeminent concern related to rebates has "centered on the potential for conflicts of interest between broker-dealers and their customers that may distort best execution practices."[10]

Today, broker-dealers knowingly route investors' orders to exchanges that offer the highest rebates, in the process causing traffic jams (which reduces the probability of execution) or queues at these popular venues. Those backups are serious enough to have a meaningful impact on the prices of the stock at which the investors' orders are executed. So, even if at the time of routing, the exchanges are quoting the most favorable prices for a particular stock, thus creating sufficient grounds for a broker-dealer to claim she is in the best execution zone,[11] the wait times due to the queues cause orders to either not execute or take longer to execute, resulting in a less favorable price. The potential conflicts of interest are "more likely when broker-dealers retain the rebates, because such broker-dealers have greater incentive to maximize those rebates potentially at the

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8 *See* Release at 13019. "Stratified sampling refers to selecting stocks for each Test Group and the Control Group according to predefined criteria. As proposed, the predefined criteria would result in each Test Group and the Control Group containing a group of stocks that, as a group, reflect a similar distribution of market capitalization, share price, and liquidity. For example, when stratifying stocks on the basis of liquidity, each Test Group and the Control Group would have a similar distribution of high, moderate, and low liquidity securities." *See* Release at 13019 n.116.

9 For references, *see* Release at 13010-11 nn.22 & 23, 13041 n.235.

10 Release at 13041.

11 "Many investors do not access markets directly; instead, they rely on a broker to route their orders to one of many exchanges. Because they pay a commission, investors may believe that their broker will represent their best interests. However, most exchanges incentivize brokers to route orders for private gain, by using fee structures such as rebates for brokers who trade at their exchange." *See* David Cimon, *Broker Routing Decisions in Limit Order Markets* 2 (Bank of Canada, Working Paper, 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_ id=2789804.

expense of customer execution quality."[12] In the end, the broker-dealer benefits by collecting the rebate, while the investor is left with stocks that were executed at less-than favorable prices.[13]

The No-rebates Bucket Is Essential for the Pilot to Produce the Necessary Data to Inform the Commission of its Policy Choices

The Proposal includes a "no-rebate" bucket that would prohibit the exchanges from offering any kind of rebates or discounts to broker-dealers that trade in the NMS stocks included in this bucket. We support this, and we believe the Commission must ensure that exchanges do not creatively circumvent this blanket prohibition by offering other discounts to member broker-dealers. The Commission correctly argues that, if a critical goal of the Pilot is to study conflicts of interests between exchanges and broker-dealers as "presented by the payment of transaction-based rebates, [then]… the proposed Pilot would be substantially more informative with a no-rebate bucket than a pilot without one, because the no-rebate bucket would allow the proposed Pilot to gather data to test the effects of an outright prohibition on transaction-based rebates."[14] We further agree that, "if rebates create a conflict of interest for broker-dealers when they decide where to route an order," and if this order routing decision subsequently impacts execution quality or market quality, then then there is no substitute to a "no-rebate" bucket and "only a complete prohibition on rebates will allow the Commission to study directly these conflicts and their effects by observing what would happen in the absence of rebates."[15]

Equally importantly, the Proposal shows that all of the exchanges that offer these distortive rebates do so even in excess of the access fee they charge. For example, the NYSE has a rebate plan that pays 50% more than it can theoretically charge as an access fee ($0.0045 rebates vs. $0.0030 access fee).[16] This means that simply lowering the access fee cap, which in theory is supposed to serve as the source of the rebates, will not stop the exchange from offering rebates, as the exchanges currently are able to subsidize their rebates using other revenue sources (such as data or connection fees). Only a blanket prohibition on the actual rebates (and similar discounts) will achieve SEC's intended policy goal of isolating the effect of rebates and economic inducements on order routing decisions, execution quality, and market quality.

Finally, by including a "no-rebate" bucket, the Commission can better examine whether it needs to adjust the maximum level of the access fee that exchanges can impose on broker-dealers. Rebates not only distort order routing decisions of broker-dealers but also appear to prop up an artificially high level of access fee. The "no-bucket" test would help the Commission and interested researchers finally observe the true, free-market-based level of the "access fee" as exchanges will compete to set a lower access fee that is unburdened with the need to offset the rebates that the same exchanges offer to attract orders. The Proposal itself discusses that the "no-rebate" is intended "to test, within the current regulatory structure, natural equilibrium pricing for

12 Release at 13041 n.239.

13 *See id.* at 13041 n.241 (discussing the Battalio study having "found that a sample of retail broker-dealers appear to route orders to venues that offer large rebates, thereby maximizing order flow payments. However, as noted in the Battalio study, routing orders to venues with large rebates did not result in superior execution quality for non-marketable limit orders.").

14 Release at 13022.

15 *Id.*

16 *See* Release at 13049 tbl.2.

transaction fees in an environment where all rebates are prohibited and exchanges do not need to charge offsetting transaction fees on the contra-side to subsidize those rebates."[17] Gaining meaningful understanding of this market-based level of access fee can further help the Commission as it seeks to respond to some calls from the broker-dealer community to lower its current maximum level of $0.0030.[18]

<u>The Pilot Must Include All NMS Stocks Above $2 Per Share Without Regard to its Capitalization</u>

The Pilot proposes to include all NMS equity stocks and Exchange Traded Products ("ETPs") above $2 per share (and drop them from the Pilot if they fall below $1 per share) without regard to the stock's capitalization levels.[19] This is a sensible approach and should not be changed in the final design of the Pilot. Having a $2 per share minimum threshold would cover the vast majority of publicly traded equities, thus helping the Pilot to produce incontestably high-quality and representative data.[20] Additionally, it is important for the Pilot to produce a maximally broad and representative dataset that would help the Commission and other researchers better study rebates "across the full spectrum of NMS stocks, including both large market capitalization companies with potentially substantial liquidity and trading activity as well as mid- and small-capitalization companies with potentially less trading activity."[21]

A dataset that includes NMS stocks with no restrictions on capitalization levels would also help settle academic debates on the relative impact of rebates on liquid vs. less-liquid stocks and other supposedly beneficial aspects of rebates.[22] Some have argued that rebates may be beneficial to attract liquidity in the small- and mid-cap stocks. With such stocks included in the pilot, the SEC and other researchers will be able to answer that question more definitively, and if need be, help the SEC tailor its regulation in this area to account for any significant differential impact on stocks with different capitalizations. Others "have argued that the beneficial aspects of rebates, including their potential to contribute to narrowing quoted spreads, may outweigh their potential for these distortions in mid- and small-capitalization securities, which can face persistent challenges in attracting liquidity."[23] According to this view, "transaction rebates may facilitate the provision of beneficial liquidity for mid- and small-capitalization securities, and may outweigh any negative distortive impact on broker-dealer incentives, market complexity, or price transparency."[24] What better way to study these purported benefits than to include all NMS stocks with no regard to their capitalization levels in the Pilot? We support the Commission's approach and urge that it be maintained in the final design of the Pilot.

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17 Release at 13023.

18 *See* Release at 13024 (describing how the "no-rebate" bucket is "is designed to gather data on the impact of creating an environment where fee levels are not potentially distorted by rebates and rebates do not influence routing.")

19 *See* Release at 13017.

20 *See* Release at 13017 n.102 ("Based on data computed from Center for Research on Securities Prices (CRSP), during the last five years (2012–2016), 94.4% of publicly traded common stocks and ETPs had a share price above $2. Of those stocks, only 4.3% dropped below $1 at any point in that period.").

21 *See* Release at 13018.

22 *See* Release at 13018 n.106 (discussing academic and industry perspectives that highly liquid stocks, in particular, do not need rebates, and any offered to transact in those is particularly distortive of execution quality and market quality.).

23 Release at 13018.

24 Release at 13018-9.

The Data Fields and Formats Are User-Friendly and Critical for Use by the SEC and Outside Researchers

In the final design of the Pilot, the Commission must maintain the data fields and reporting formats, including making them machine accessible, as is proposed. All of the data-fields are thoughtfully designed, and their format is user-friendly and modern. The cost of producing the data and adhering to the formatting requirements would be minimal and certainly acceptable given the enormity of the benefits. Of particular importance is the data related to transaction fees and order routing: Without these two sets of standardized data, the Commission and outside researchers will remain in the dark about the extent and harmful impact of economic inducements on order routing, best execution, and market quality. The public posting of standardized data on transaction fees and rebates would "facilitate analysis of the Pilot data, including the effect that transaction-based fees and rebates have on order routing behavior, execution quality, and market quality."[25] The order routing data would "contain information about the exchanges to which broker-dealers route orders, which will permit a closer examination of how broker-dealers may change their order routing behavior in response to changes in fees and rebates at each exchange."[26]

However, we believe the Commission should either cull the data from the exchanges' websites, as required of the exchanges to post, and host it on the SEC's own dedicated and permanent website or require the exchanges to report the same dataset to the SEC as they are required to publish on their own website. Having a central location that houses the entire data set would further facilitate research, and would allow the SEC to offer analytical tools that would aid in extracting the greatest possible benefit from the data.

Issuers Should Not be Permitted to Opt-Out of the Pilot

The Commission should flatly reject any calls to permit issuers to opt-out of the Pilot. Issuers currently have no say over exchanges' policies that have distorted the markets and permitted these conflicts of interest to arise in the first place. Furthermore, exchanges that modify their access fees dozens of times a year do not survey issuers or permit them to opt-out of these fee changes or creation of order types. Finally, there simply is no evidence that the Pilot will cause any imminent danger to any issuer's stock price or liquidity. The Pilot's goal, as repeatedly stressed throughout the Proposal and argued here, is to study the impact of certain practices followed by broker-dealers and exchanges. If issuers are permitted to opt-out, this will damage the integrity of the dataset and introduce weaknesses and doubts in the eventual conclusions, causing more regulatory blindness and paralysis.

The SEC's Market-Maker's Exemption for Linked Pricing Must Be Stringent and Compliance Must Be Periodically Monitored

The Proposal would permit exchanges to offer certain newly registered market-makers to continue enjoying Linked Pricing incentives in a "no-rebate" environment. The Commission contemplates permitting exchanges "to adopt new rules that would provide non-rebate Linked

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25 Release at 13029.
26 Release at 13032.

Pricing to its registered market-makers during the Pilot."[27] These new rules would be required, for example, to set a "minimum quote size combined with a requirement to be at the national best bid and offer for a designated percentage of the day," and only when the market-maker meets these obligations, would the exchange be permitted to offer them a non-rebate "fee discount to remove liquidity."[28]

While this arrangement seems to complicate the Pilot, we can nonetheless see the benefits of incentivizing true market-makers to remain in the exchange and engage in bona fide market-making activities. But, we believe the Commission must exercise vigilance and require the exchanges to provide a list of these market-makers registered under the new rules and certify to the Commission on a quarterly basis that indeed these market-makers are meeting their obligations. The final version of the Pilot should provide sufficient authority to the Commission to discontinue this exemption if the Commission's staff finds either that the exchanges did not establish sufficiently stringent requirements for market-makers or that market-makers failed to satisfactorily meet these new requirements.

The SEC Should Encourage ATSs to Submit the Same Data Required of the Exchanges Without Imposing an Access Fee Regime

While, in the name of practicality, relative simplicity, and efficiency, it is understandable why the Commission proposes to exclude ATSs from the Pilot, the Commission should nonetheless develop in-take systems and encourage ATSs to submit the applicable dataset, similar to the one required of the exchanges. The Commission need not attempt to essentially impose an access fee regime on ATSs (one that, at least formally, does not exist now), but neither should the Commission deprive itself of the data that ATSs can produce and submit. Compared to exchanges, information regarding transaction fee arrangements and order routing as it relates to ATSs is even more scarce. As such, production and reporting of this information could be enormously useful for the Commission, academics, and the Financial Industry Regulatory Authority (FINRA).

While it is encouraging to read in the Proposal that the Commission believes it has the means to obtain sufficient information to study how the "exogenous shocks to transaction-based fees on exchanges" would "have an effect on order routing decisions, including whether broker-dealers [would] alter their routing of order to ATSs during the proposed Pilot,"[29] it is nonetheless concerning that the Commission does not seem to have current, comprehensive, and reliable information on the transaction fee arrangements the ATSs employ. We believe the Commission must remedy this shortcoming and regulatory blindsight promptly.

The Pilot Should Not Wait for the Completion of the SEC's Various Other Market Structure Improvements

The Commission should not wait for the completion of its proposals on "Regulation NMS Stock ATS" or the "Disclosure of Order Handling Information" before commencing the Pilot, nor

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27 Release at 13024.
28 Release at 13024 n.140.
29 Release at 13070.

should it wait for the implementation of the Consolidated Audit Trail or some future guidance on best execution before it commences with the Pilot.

We understand and appreciate the importance of the Commission's other efforts related to market structure, and we have separately commented on most of them. The Commission must indeed finalize its Regulation ATS proposal[30] to modernize and harmonize the regulation of trading venues that transact over 13% of today's equities volume.[31] The Commission must also require the permanent disclosure of much more structured and detailed information on order handling for the benefit of both retail and institutional investors.[32] And finally, as we have argued before, the Commission must, once and for all, have the tools and data it needs to effectively oversee the capital markets and effectively discover and punish those who manipulate the markets.[33] The CAT will be essential in that effort, and the Commission has to enforce its own rules to hold SROs accountable for non-compliance.[34]

All those efforts are important to protect investors, promote fair and orderly markets, and facilitate capital formation. But the SEC does not need to sacrifice the Pilot to advance these other initiatives. Quite the opposite, we believe the Pilot will help the Commission finalize and implement them. With this in mind, we urge the Commission to place the Pilot on a separate and fast track.[35]

CONCLUSION

We urge the Commission to promptly finalize and approve this Pilot. Millions of investors are harmed by current market practices that rely heavily on access fees and rebates. While the harm to an individual investor may be small, taken collectively, these practices represent an enormous tax on investors as a class. Worse, investors receive no benefit in return. Far from it: They bear this tax *and* receive less than "best execution" of their trades. The Commission is on the right track toward solving this problem by proposing this Pilot, and it should approve and start it without delay.

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30 *See* Better Markets, Comment Letter on Regulation of NMS Stock ATS (Feb. 26, 2016), *available at* https://bettermarkets.com/sites/default/files/SEC%20-%20CL%20-%20Regulation%20of%20NMS%20Stock%20ATS%20-%202-26-2016.pdf.

31 *See* Release at 13048.

32 *See* Better Markets, Comment Letter on NMS Plan Governing the Consolidated Audit Trail (July 18, 2016), *available at* https://bettermarkets.com/sites/default/files/CL%20-%20SEC%20-%20Consolidated%20Audit%20Trial%207-18-2016.pdf.

33 *See* Better Markets, Comment Letter on Disclosure of Order Handling Information (Sept. 2016), *available at* https://bettermarkets.com/sites/default/files/SEC%20-%20CL%20-%20Disclosure%20of%20Order%20Handling%20-%209-26-16_0.pdf.

34 *See* Lev Bagramian, *Flash Crash Anniversary: A Reminder of Why We Need CAT and Why the SEC Should Flex Its Muscle to End Industry*, Better Markets (May 4, 2018), https://bettermarkets.com/spotlight-series-investors-and-markets/flash-crash-anniversary-reminder-why-we-need-cat-and-why-sec.

35 While the Pilot seems to be appropriately designed to accommodate any overlap with the Tick Size Pilot (currently underway), we believe the Commission should consider waiting for the Tick Size Pilot's completion, should that be expected within two months of the final approval of the Transaction Fee Pilot, before it commences with the Transaction Fee Pilot.

Sincerely,

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