Equity Markets Association

January 16, 2024

Via Electronic Submission

Ms. Vanessa Countryman, Secretary
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. S7-18-23; Release No. 34- 98766; Volume-Based Exchange Transaction Pricing for NMS Stocks

Dear Ms. Countryman:

The Equity Markets Association ("EMA") welcomes the opportunity to provide comments on the U.S. Securities and Exchange Commission's ("SEC" or "Commission") Volume-Based Exchange Transaction Pricing for NMS stocks (the "Proposal").[1] The EMA was established in 2015 with the intent to provide federal policymakers, regulators, and investors with in-depth analysis on important issues that impact the U.S. equity markets. Its members, Intercontinental Exchange, Inc. (the parent company of NYSE Group), Nasdaq, and Cboe Global Markets remain committed to this mission, and believe that a fair and transparent marketplace incentivizes strong capital formation and ensures a robust secondary market for trading securities. The EMA's members are unified in their concerns about the Proposal.

If adopted, this Proposal would prohibit national securities exchanges from offering volume-based transaction pricing in connection with the execution of agency or riskless principal orders in NMS stocks. The Proposal would also require equity exchanges that have volume-based transaction pricing for member proprietary volume to disclose to the SEC each month the number of firms that qualify for each volume-based transaction pricing tier, which would be made public via the SEC's EDGAR system.

[1] "Volume-Based Exchange Transaction Pricing for NMS Stocks," 88 FR 76282 (November 6, 2023).

Banning volume-based pricing for agency and riskless principal orders would harm the U.S. equity markets by undermining incentives that promote important liquidity, widening spreads and increasing costs for investors, and reducing overall market quality at a time when the markets are strong.

To justify its Proposal, the Commission relied extensively – if not almost exclusively – upon input from just two sources: the Investors Exchange ("IEX") and the Healthy Markets Association ("HMA"). Both IEX and HMA adorn their opposition to volume-based pricing with altruistic overtones, but in doing so, they disguise the extent to which IEX would stand to benefit from a ban of this pricing model, which IEX chooses to eschew. Indeed, even as IEX claims that its opposition to volume-based pricing is rooted in investor interests, banning volume-based pricing would just so happen to help IEX to improve its competitive position vis-à-vis other exchanges. Meanwhile, HMA is a trade association which represents IEX, as well as buy-side firms. Besides being self-interested, the views of IEX and HMA lack rigorous evidentiary support and they do not reflect the mainstream positions of equity market participants. Notably, in an attempt to justify their views, IEX and HMA rehash years old evidence that was previously presented to the SEC in support of the Transaction Fee Pilot – the same evidence that the SEC concluded was not sufficient to determine that rebates are harmful. There is nothing to support that IEX and HMA's self-serving and unpersuasive justifications are any more persuasive now. Thus, it is alarming that the SEC chose to rely upon these rehashed perspectives in drafting its Proposal.

Although the SEC seemingly relied upon extensive input from IEX and HMA, it failed to do the same with respect to the EMA's members, which collectively represent the majority of trading on the U.S. equity market. The Commission did not solicit relevant data from EMA's members or significantly engage with them on this important topic prior to the Proposal's release, despite numerous opportunities and prior interactions in which to do so. The EMA's members' stated views on this topic (which were prompted when notice of the Proposal surfaced in the Commission's Regulatory Flexibility agenda) are also largely omitted from the Proposal's cited sources.

The EMA would have expected the SEC to have engaged in more balanced outreach prior to acting. If not for the sake of fairness, then at the very least this engagement would be to ensure that the Proposal would not have unforeseen consequences for the sound and efficient operation of the markets or the welfare of investors. The EMA's members play an important role in the markets, the prosperous evolution of which further reinforces the importance of these members' inputs. Therefore, the SEC should regard us as partners to aid the Commission in the rulemaking process and in fulfilling its mandate.

The SEC should prioritize targeted, consensus-driven improvements in order to allow industry actors to continue their work supporting strong markets for investors within a sound regulatory framework. However, the extent of industry collaboration present in this Proposal is largely summarized by its reliance on the uncontested bias of a single market participant and an associated industry group. There is a considerable amount of data and resources from the EMA's members on the Proposal's topic that would add invaluable context to the discussion but are bewilderingly omitted. Respectfully, this failure negates any validity toward the perceived merits of the Proposal, and the Commission should not move forward with its adoption.

The EMA's expertise on issues pertaining to the U.S. equity markets is an invaluable resource that would enhance the Commission's initiatives and provide immense insight and benefit through a collaborative rulemaking process. Equity market structure reform raises highly complex regulatory issues. The EMA's members support consensus-driven, incremental, and thoughtful improvements to the well-functioning equity market infrastructure and are uniquely positioned to identify the potential impacts that this type of proposed rulemaking may have.

We encourage the SEC not to move forward with the Proposal and instead focus on collaborative rulemakings that further the Commission's mission to protect investors, facilitate capital formation, and foster fair, orderly, and efficient markets. Thank you for the consideration of EMA's views.

Respectfully,

Kevin R. Edgar
Partner
Baker & Hostetler LLP on behalf of The Equity Markets Association