August 27, 2024

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

Re: Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, Release No 34-96494; File No. S7-30-22

Dear Ms. Countryman:

I appreciate the opportunity to comment in connection with SEC's proposed reforms to Regulation NMS and the volume pricing rule. I presently serve as an Associate Professor of Law with tenure at the George Mason University School of Law. I also recently served on the Investor Advisory Committee of the Securities and Exchange Commission and was the chairman of the Market Structure Subcommittee of that Advisory Committee. I am writing in my individual capacity, and my views are my own.

My views are however informed by my work as a professor of securities law. My views are also informed by my recent experience as Senior Counsel and Chief Economist to the House Committee on Financial Services, where I took academic leave from my teaching position to serve from May 2013 until April 2015 as an advisor to Chairman Hensarling on a variety of financial regulatory issues as senior counsel and chief economist to the Chairman.

I write to express my support for the proposed amendments to Reg NMS rules related to minimum pricing increments, access fees, and transparency of better-priced orders (the "Reg NMS" proposal or "Tick Size" proposal).

I write this third comment letter to the proposal to respond directly to a comment letter from Counsel for Nasdaq, and their haphazard effort to cite recent Supreme Court cases like *Loper Bright v Raimondo* and *West Virginia v. EPA* to threaten the viability of the SEC's NMS rule proposal and a brief 2-page comment letter that contains little analysis.

I. Loper Bright Overturns Chevron Deference. This Only Matters Where Legislation is Unclear. In Market Structure Regulation the Empowering Legislative Language is Clear And Chevron Doctrine Is Irrelevant.

Response to Nasdaq's Recent Letter

In a recent two-page comment letter, an Associate Counsel with Nasdaq asserts with limited analysis that the *Loper Bright* decision supports their critical position on the SEC's Regulation NMS reforms.[1]

Nasdaq asserts that:

"Recent Supreme Court decisions, including *Loper Bright Enterprises v. Raimondo* and *West Virginia v. EPA*, underline our concern that the Commission must adhere more closely to congressional intent in carrying out its statutory duties. This is a clear instance where the Commission's actions exceed its intended authority. If Congress had intended for the Commission to regulate exchanges like public utilities, it knows how to do so, as it has done in numerous other contexts, but it did not do so in this case."

This comment letter is submitted principally to show that the argument is flawed for two reasons. It represents a flawed reading of *Loper* (and *West Virginia*) case and it represents a flawed reading of the Exchange Act (including the 75 amendments to the Exchange Act).

To the contrary – a plethora of items in the 34 Act, the SEC's prior 50 years of regulation of the National Market System, and related constitutional precedent regarding the private non-delegation doctrine specific to self-regulatory organizations (SROs) – not only give the SEC sufficient delegation of authority to adopt the pending NMS proposal, they compel the SEC to exercise its authority that oversees a dynamically changing national market system. Congress expressly delegated to the Commission broad rulemaking authority to act in the public interest – not for a single party's private commercial interest.

I further note that in a comment letter of March 30, 2023, NASDAQ executive John Zecca proposed an access fee cap "that is $0.0015 for securities in the $0.005 tick size bucket while maintaining the same $0.0030 cap that exists today for securities in the $0.01 tick bucket." This more recent letter from the NASDAQ Associate Counsel and the first comment letter appears to be in conflict, and NASDAQ appears to suggest that changes in access fees NASDAQ prefers from a business perspective are allowed by Supreme Court doctrine, but that changes in access fees it happens to oppose are disallowed by Supreme Court doctrine.

I have yet to find that proposition of law in Supreme court precedent, but I will keep looking.

What does Loper Bright Actually Hold?

Loper Bright overrules *Chevron* deference, a prior doctrine that permitted agencies deference in interpreting their own statutes in the event of an ambiguity in the statute. That is irrelevant to the SEC's NMS rulemaking, because Chevron deference would never have been necessary to apply in the first place. The Court in *Loper* summarized the prerequisites to the Chevron test:

[1] See https://www.sec.gov/comments/s7-30-22/s73022-503776-1470023.pdf.

“After determining that a case satisfies the various preconditions, we have set for Chevron to apply, a reviewing court must first assess “whether Congress has directly spoken to the precise question at issue.” Id., at 842, 104 S.Ct. 2778. If congressional intent is “clear,” that is the end of the inquiry. Id. But if the court determines that “the statute is silent or ambiguous with respect to the specific issue” at hand, the court must, at Chevron’s second step, defer to the agency's interpretation if it “is based on a permissible construction of the statute.”

The facts in *Loper* involved a congressional delegation of authority to require paid compliance observers on fishing boats in the Pacific but did not mention paid compliance observers on fishing boats in the Atlantic. There were, further, provisions limiting the cost of Pacific observers, but no such limits on the cost of paid observers in the regulations adopted for Atlantic fishing vessels.

The Department of Commerce’s promulgation of fishing regulations to require paid observers on fishing boats in the Atlantic was challenged and overturned, and Chevron deference to the agency’s interpretation of its own statute was not applied. The doctrine of Chevron deference itself was overturned in that case.

The Court in *Loper* overturned Chevron, but nevertheless noted that courts would continue to consider the executive branch’s perspective, particularly if the implementing regulation was developed in the traditional manner. The *Loper* Court noted that:

“respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time….That is because “the longstanding ‘practice of the government’ ”—like any other interpretive aid—“can inform [a court's] determination of ‘what the law is.’ ”....The Court also gave “the most respectful consideration” to Executive Branch interpretations simply because “[t]he officers concerned [were] usually able men, and masters of the subject,” who were “[n]ot unfrequently ... the draftsmen of the laws they [were] afterwards called upon to interpret.””

The Court in *Loper* further found that there continue to be statutes which themselves delegate discretion to a regulator to “fill out a statutory scheme.” The Court elaborates that:

“In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes “expressly delegate[ ]” to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to “fill up the details” of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that “leaves agencies with flexibility,” such as “appropriate” or “reasonable.””

This description aptly describes Congress’s delegation of authority to the SEC to oversee the development of a national market system, which led to the implementation of Regulation NMS, including rules related to access fee caps for protected quotes. These rules have been in effect

for 19 years and are ripe for updating as the national market system has evolved. [2] In the adopting NMS release in 2005, the SEC explained that to protect limit orders, orders must be routed to those markets displaying the best-priced quotations. This purpose would be thwarted if market participants were allowed to charge exorbitant fees that distort quoted prices. Despite having the public investors' best interests to allow for the fairness of quotes in the national market system, Nasdaq now claims the SEC somehow does not have authority to update its own rules designed to protect the investing public. Nasdaq is mistaken.

The Exchange Act is replete with numerous sections whereby Congress **clearly granted the Commission broad authority to oversee the implementation, operation, and regulation of the national market system.** Congress also delineated goals for the Commission's pervasive regulatory authority to assure the availability of prompt and accurate trading information, to assure that the trading platforms are not controlled or dominated by particular market centers, to guarantee fair access to such systems by all brokers, dealers and investors, and to prevent any competitive restriction on their operation not justified by the purposes of the Exchange Act. To point out a few:

- **Section 11A: Oversight of National Market System**. The Commission was granted broad authority to establish the national market system to ensure fairness and usefulness of quotation information for the national market system. Congress directed the Commission to assure, among other things: (i) "economically efficient execution of securities transactions," (ii) "fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets," and (iii) "the practicality of brokers executing investors' orders in the best market." Congress further directed the Commission to assure the "fairness" and "usefulness" of protected quotes in the national market system and to assure that all exchanges display quotes in a manner consistent with the goals set out in the Exchange Act for the national market system.

- **Section 23(a)**. **Broad Rulemaking Authority.** The Commission was granted broad rulemaking authority to act in the public interest.

- **Section 6(b)(4), (5), (8). Oversight of Exchange's Fees.** The Commission must assure equitable allocation of reasonable fees, prevent unfair discrimination, and not allow SRO rules to impose a burden on competition not necessary or appropriate in furtherance of

[2] Further, *Loper Bright* does nothing to change agency deference for fact finding. the SEC will continue to enjoy deference as to determinations of fact with respect to factual findings regarding data about developments in markets that support its reforms to Regulation NMS. The Loper Court made clear that "although an agency's interpretation of a statute "cannot bind a court," it may be especially informative "to the extent it rests on factual premises within [the agency's] expertise." ….Such expertise has always been one of the factors which may give an Executive Branch interpretation particular "power to persuade, if lacking power to control.""

the Act. Congress expressly delegated oversight to the SEC over ensuring the reasonableness of SRO fees.

- **Section 19(c)**. The Commission may abrogate, add to, delete from, or amend, the rules of an SRO to ensure the fair administration of the SRO or to further the purposes of the Exchange Act. It is important to note that Section 19(c) that allows the Commission to amend SRO rules is at the heart of the constitutional private non-delegation doctrine, which requires that the SEC – and not any one SRO – shall have the final say over rules and full authority to implement its public policy goals as set by Congressional directives.[3]

- **Section 6(e)(2):** Directs that the Commission, by rule, may abrogate any exchange rule which imposes a schedule or fixes rates of commissions, allowances, discounts, or other fees, if the Commission determines that such schedule or fixed rates are no longer reasonable, in the public interest, or necessary to accomplish the purposes of this chapter. This language clearly empowers the SEC to find that access fees above a threshold are abrogated for no longer being reasonable or in the public interest as the SEC commenced in its NMS proposed rule.

West Virginia v. EPA is an Interesting Case. It Also Has Nothing To Do With This Rulemaking

The Court in *Loper Bright* described its prior opinion in *West Virginia v. EPA* as one example of an exception to Chevron deference in a list of exceptions that supported its decision in *Loper* to simply abandon Chevron deference altogether. The Court summarized the *West Virginia* decision as an exemption to Chevron for questions of economic or political significance on a national level. The *West Virginia* decision is irrelevant here for two reasons. First, the statutory language is clear, thus Chevron would not have been necessary, and the major questions doctrine would not have been needed as an exception to Chevron deference. Second, access fees and quote sizes are not a matter of national economic or political importance to the nation (however important they may be to NASDAQ's business model).

In conclusion, the two-page legal analysis provided in Nasdaq's most recent comment letter has been a fun diversion and a welcome launch point to describe how their subtly threatened litigation against the SEC's NMS proposal. It fails in a myriad of ways.

Much like the NYSE President's threat just before the 75 Act Amendments to sue the SEC over the SEC's reform of fixed commissions in 1975 (yes, it was about fees), this threat by NASDAQ rings hollow.

---

[3] *See* JW Verret Letter, December 21, 2023, discussing the private non-delegation doctrine and the well-settled U.S. Supreme Court precedent that outlines the constitutional underpinnings of the SEC/SRO framework, which mandates that the SEC is vested with the regulatory powers to implement its policy judgements to modify SRO rules. https://www.sec.gov/comments/s7-30-22/s73022-320579-833442.pdf

I encourage the SEC to adopt the access fee proposals and continue striving for market-driven solutions that benefit all market participants.

I thank you for considering this comment letter.

Sincerely,

J.W. Verret

Associate Professor, George Mason University Antonin Scalia Law School,
& former member of the SEC Investor Advisory Committee
& former Chairman of the SEC Investor Advisory Committee's Subcommittee on Market Structure