



February 7, 2024

Ms. Vanessa Countryman,  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549

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

The Equity Markets Association (“EMA”)<sup>1</sup> writes to comment briefly in response to a letter (“the Letter”) submitted to the Securities and Exchange Commission (the “SEC” or the “Commission”) that contains a number of inaccuracies, misstatements of law and economic theory, and untruths about how EMA-member exchanges operate and compete. The Letter, submitted by J.W. Verret of the George Mason University Antonin Scalia Law School,<sup>2</sup> is not a rigorous, serious academic, legal, or economic analysis of the volume-based tiered pricing and minimum pricing proposals (“the Proposals”) and the Commission should not rely upon it to aid in its analysis. The Letter warrants a response to ensure that its misstatements and misrepresentations do not distort the rulemaking records. In response to the lengthy Letter, EMA would note the following:

1. The Letter inaccurately applies legally significant terms like “market power” and “oligopoly” to EMA members without conducting any analysis whatsoever to support

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<sup>1</sup> 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.

<sup>2</sup> See Ltr. From J.W. Verret to V. Countryman, dated Jan. 12, 2024, available at <https://www.sec.gov/comments/s7-30-22/s73022-401140-914622.pdf> (the “Letter”).

doing so. In fact, no exchange or “family” of exchanges wholly represents more than 20% of market volume among exchanges – levels which are a far cry from the 85% market share of Bell Telephone Company, to which the author inaptly analogizes, and which is widely understood to be insufficient to constitute market power.

2. The Letter ignores the reality that almost half of all equity volumes are executed by non-exchange market centers. Relatedly, the Letter ignores the fact that since the Commission adopted Regulation National Market System (NMS), the number and types of market centers trading equities securities has ballooned to 16 exchanges, as well as scores of alternative trading systems (“ATSEs”), central risk books, single dealer platforms, and wholesalers – including four new exchanges that have been established over the past few years alone.<sup>3</sup> Again, these facts belie the notion that somehow, the large exchange groups are exercising oligopolistic power to exclude competition.
3. The Letter also contends without basis that exchange pricing harms investors by limiting competition for innovative services and by raising their costs. The reality is that investors, and in particular retail investors, experience tighter spreads, higher and faster fill rates, and pay lower costs to trade than ever before. Moreover, as noted above, investors have never had more choices than they do now for trading venues or better technology to support their orders and trading strategies. This reality further punctuates how misguided the Letter is as it relates to the Bell Telephone Company analogy.
4. The Letter improperly alleges repeatedly that access fees are excessive, both in an absolute sense and relative to ATSEs but it provides no basis for such conclusions other than by making bald assumptions about exchanges’ costs. The Letter also fails to recognize that net transaction fees are far lower on exchanges than they are on ATSEs.
5. The Letter asserts inaccurately that exchanges have extracted \$30 billion in excess rents from “above market access fees and distortionary impacts from rebate tiers” over the course of 15 years. The inaccurate assertion, evidences no appreciation for how exchanges actually operate. The aforementioned \$30 billion example fails to account for the impact of rebates in tightening spreads, increasing depth of book, and in lowering costs for investors. In addition, the Letter also seems to have overlooked the crucial importance and reliance of the entire marketplace on the displayed quotes provided by exchanges.
6. The Letter improperly assumes that because equity volumes are concentrated among a handful of large wholesale market makers then those same wholesale market makers are among the highest volume exchange participants and recipients of exchange rebates. Yet the Letter neither explains how exchanges’ volume-based pricing causes such concentration, nor that banning volume-based pricing would result in concentration

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<sup>3</sup> It is also worth noting that all four of the Cboe “family” of equity exchanges came into existence after the implementation of Regulation NMS.

reduction. It also ignores many smaller brokers' ability to obtain the best exchange pricing tiers by accessing trading venues through larger brokers.

7. The Letter derides volume-based pricing for being a form of “price discrimination,” which it then asserts is harmful because federal antitrust statutes like the Robinson-Patman Act already regulate price discrimination in certain contexts. However, such statutes are inapt here. The Securities and Exchange Act of 1934 (“the Exchange Act”) does not prohibit exchanges from varying the fees they charge their customers; instead, it prohibits price differentiation only to the extent that doing so is “unfair.” And meanwhile, the Letter does not explain how volume-based pricing is unfair or that the Exchange Act’s power to suspend individual fee filings also includes the power to promulgate rules which categorically ban pricing models.
8. The Letter misstates the role of the SEC as being a competition authority on par with the Department of Justice (“DoJ”) and the Federal Trade Commission. It is our position that the SEC’s role is decidedly more limited in this respect. The Exchange Act directs the SEC to facilitate competition, but it also prohibits the SEC from promulgating rules that would burden competition (including competition among exchanges and non-exchanges). The Exchange Act also provides for exchange fees to become immediately effective upon filing without requiring affirmative SEC findings that the fees are, among other things, not unduly burdensome to competition. Although the Letter cites a 2020 Memorandum of Understanding between the SEC and the DoJ to suggest that the SEC has become a full-fledged competition regulator,<sup>4</sup> the Letter fails to mention that the DoJ’s Antitrust Division publicly rebuked the SEC for not adequately considering the collective competitive impacts of its 2022 equity market structure proposals.<sup>5</sup>

For these and other reasons, EMA recommends that the Commission consider the facts rather than the Letter’s unsupported misstatements of fact and law for purposes of these two rulemakings. Thank you for the consideration on EMA’s views.

Respectfully,



Kevin R. Edgar  
Partner

Baker & Hostetler LLP on behalf of the Equity Markets Association

<sup>4</sup> See <https://www.sec.gov/files/atr-sec-mou-06-22-2020.pdf>.

<sup>5</sup> See Comment Letter of DOJ, Antitrust Division, dated April 11, 2023, available at <https://www.sec.gov/comments/s7-29-22/s72922-20164065-334011.pdf>.

Cc: The Honorable Gary Gensler, Chairman  
The Honorable Caroline A. Crenshaw, Commissioner  
The Honorable Hester M. Peirce, Commissioner  
The Honorable Jaime Lizárraga, Commissioner  
The Honorable Mark T. Uyeda, Commissioner  
Haoxiang Zhu, Director, Division of Trading and Markets