

May 7, 2024



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

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

Dear Ms. Countryman:

On behalf of Nasdaq, Inc. (“Nasdaq”), I write to submit a supplemental comment on the above-referenced equity market structure reform proposal that the Securities and Exchange Commission (the “SEC” or the “Commission”) published on December 14, 2022.¹ Specifically, I submit this Letter to respond to the latest comment letter filed by the Investors Exchange LLC (“IEX”) on April 19, 2024 (the “Letter”).

In the Letter,² IEX proposes that “a single fee cap is...more efficient.” IEX further states that a cap “of 10 mils is best” as it “aligns with pricing by ATs” and it “appropriately limits the distortive effects of high access fees on the fairness and reliability of displayed quotes.”

Importantly, IEX references research of mine to support its views, despite the fact that my research has consistently disagreed with its premise. Unfortunately, it is not the first time that IEX has used fuzzy math to make misleading claims about market economics.³ Thus, I feel compelled to correct the record to defend my credibility as an economist and economic researcher.

First, IEX employs bad math in the Letter when it argues that “different access fee caps based on tick size ... would allow exchanges to impose a ‘penalty fee’ for participants looking to access quotes in stocks that are less actively traded.”⁴ It is a fact that investors measure costs in percent, not cents. It is also mathematically true that a one-cent tick, or a 30 mil access fee, represents a far higher cost (in percent) for a \$2 stock than a \$200 stock. Data also proves that

¹ See Securities Exchange Act Release No. 34-96494 (December 14, 2022), 87 FR 80266 (December 29, 2022) (the “NMS Proposal”)

² See Letter at 5.

³ See Phil Mackintosh, “Three Charts Dispel the ‘Price Improvement Myth,’” dated Nov. 2, 2018, at <https://www.nasdaq.com/articles/three-charts-dispel-the-price-improvement-myth-2018-11-02>; Phil Mackintosh, “What’s Fair? It Depends on Your Point of View,” October 3, 2019, at <https://www.nasdaq.com/articles/whats-fair-it-depends-on-your-point-of-view-2019-10-03>; Phil Mackintosh, “Is Free Fair To All?,” dated January 29, 2019, at <https://www.nasdaq.com/articles/is-free-fair-to-all-2019-01-29>.

⁴ See Letter at 2.

actively-traded,⁵ \$2 stocks are far more likely to be tick-constrained. That is why we joined a consortium of market participants to propose an intelligent tick regime where the tick is a more consistent economic "cost" to investors. It's also why the SEC's own current tick size proposal attempts to reduce tick sizes for what they consider tick-constrained stocks.⁶ For the same economic reason, some commenters⁷ even proposed the SEC consider wider ticks for less active and higher priced stocks.

The truth is that a flat access fee cap would in fact *maintain* the unequal and distortive effects of ticks on displayed quotes.

Secondly, IEX suggests shamelessly that I've agreed with its position that ATS fees are generally 10 mils in a 2020 article on market data.⁸ The quote that IEX uses to support this, however, plainly undercuts IEX's assertion, as it expressly qualifies my estimate of 10 mil as a "guesstimate", made in "the absence of better data."⁹ In short, we have no idea either what the "typical" ATS charge is or whether 10 mils is even average. Something made even clearer in another study I published and which IEX declined to cite.¹⁰

Ironically, IEX then defends the fact that Form ATS-N data shows that ATS fees are in fact highly variable. They do this by arguing that some ATSEs provide services which are not comparable to the services that exchanges provide to their customers. That includes segmentation of order flow, that is illustrative of the fact that ATSEs enjoy advantages that would persist, and likely increase, with a lower cap on access fees.

Finally, the notion that IEX now seeks to present itself as a champion of market simplicity and efficiency is rich. Not only given that IEX owes its existence as an exchange to the complexity it added to the market when it introduced its speed bump, or for the routing uncertainty it introduced when it argued for and received approval for protection of its fading D-Limit quotes. But also because IEX has consistently modified its own trading and port fees, including just recently when it raised its maker rebates to one level for some stocks and another level for others.

This all serves to highlight the folly of IEX's position that a 10 mil fee cap would render exchanges more competitive with ATSEs than they are now. That's because, even if the

⁵ See <https://www.pm-research.com/content/ijinvest/early/2023/11/10/joi20231290>.

⁶ Although we do not support all aspects of the SEC's tick size proposal, we do agree with the SEC that a one-size-fits-all tick regime is not appropriate for the markets.

⁷ See Letter from BlackRock to V. Countryman, dated March 31, 2023, at <https://www.sec.gov/comments/s7-32-22/s73222-20163995-333998.pdf>; Letter from Pragma to V, Countryman, dated March 23, 2023, at <https://www.sec.gov/comments/s7-30-22/s73022-20160511-329131.pdf>.

⁸ See Letter at 6.

⁹ *Id.*, n.20.

¹⁰ See Phil Mackintosh, "Leveling a Slice of the Playing Field," at <https://www.nasdaq.com/articles/leveling-a-slice-of-the-playing-field> (stating that despite the fact that little is known about how pricing to different customers really works for dark pools, a survey of Form ATS-Ns provides some transparency, which suggests that "ATS fee schedules have a lot of variation").

Commission were to equalize access fees across exchanges and ATSEs, the competitive playing field would continue to favor ATSEs and (no surprise) exchanges with fading quotes.¹¹

I appreciate the Commission's consideration of my comment.

Sincerely,



Phil Mackintosh

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

¹¹ See Phil Mackintosh, "IEX is All-In on Data Revenues, Quote Fade and (Virtual) Rebates, dated April 1, 2021, at <https://www.nasdaq.com/articles/iex-is-all-in-on-data-revenues-quote-fade-and-virtual-rebates-2021-04-01>.