



December 23, 2016

Via Electronic Mail (rule-comments@sec.gov)

Mr. Brent J. Fields, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Re: File No. 265-29, Comments Regarding an Access Fee Pilot Program

Dear Mr. Fields:

The Healthy Markets Association appreciates the opportunity to offer comments to the Securities and Exchange Commission and its Equity Market Structure Advisory Committee regarding an access fee pilot program. We believe that an access fee pilot program could provide investors with incredibly valuable information, and we urge the Commission to propose a rulemaking to implement one without delay.

### **About Healthy Markets**

The Healthy Markets Association is an investor-focused not-for-profit coalition working to educate market participants and promote data-driven reforms to market structure challenges. Our members, who range from a few billion to hundreds of billions of dollars in assets under management, have come together behind one basic principle: Informed investors and policymakers are essential for healthy capital markets.<sup>1</sup>

### **Background**

We begin our remarks by recognizing, as it seems nearly every major market participant has, that the dominant pricing structure for trading--the so-called "maker-taker" system--is both effective at attracting order flow and deeply flawed.

With the adoption of Rule 610 under Regulation NMS,<sup>2</sup> access fees were limited to not more than 30 cents per 100 shares. As the Commission staff has noted, "[t]he Rule 610 cap on fees indirectly limits the size of the rebates that an exchange can offer because exchanges typically use fees collected on one side of the transaction to fund the rebates they pay on the other side."<sup>3</sup> In recent years, while the number of trading venues has proliferated, the dominance of the maker-taker pricing model has persisted. While numerous execution venues have experimented over the years

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<sup>1</sup> To learn more about Healthy Markets, or our Buyside and Working Group Members, please see our website at <http://www.healthymarkets.org>.

<sup>2</sup> Regulation NMS, 70 Fed. Reg. 37496 (Jun. 29, 2005), available at <https://www.sec.gov/rules/final/34-51808.pdf>.

<sup>3</sup> SEC Staff Memorandum to the Equity Market Structure Advisory Committee, at 3, Oct. 15, 2015, available at <https://www.sec.gov/spotlight/emsac/memo-maker-taker-fees-on-equities-exchanges.pdf>

with other pricing structures to attract order flow, those efforts have met extremely limited success<sup>4</sup>.

Unfortunately, the maker-taker pricing model creates a fundamental conflict of interest for brokers looking to route their customers' orders. At its worst, a broker is incentivized to route an order to the venue that pays it the most (or costs the least), instead of the venue that has the highest likelihood of execution fostering best execution for its customers.<sup>5</sup>

Investors, brokers, and even executives of leading market venues,<sup>6</sup> have suggested that a ban could reduce conflicts of interest and complexity. Perhaps in recognition that a ban might be too draconian of a step for the Commission to take directly, many experts and policymakers<sup>7</sup> have urged the Commission to adopt a pilot program to study the effects to aid in the discovery of optimal price points and to reduce the obvious conflicts of interest.<sup>8</sup>

After significant study, on July 8, 2016, the EMSAC recommended that the SEC "propose a pilot program to adjust the access fee cap under rule 610."<sup>9</sup> The key substantive parameters of the EMSAC Recommendation were for the Commission to conduct a study of a randomly selected stocks and ETFs with over \$3 billion in market capitalization for a period of two years. The securities would be broken into four buckets:

1. Control bucket;
2. \$.0020 per share access fee cap;
3. \$.0010 per share access fee cap; and
4. \$.0002 per share access fee cap.

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<sup>4</sup> See SEC Staff Memorandum to the Equity Market Structure Advisory Committee, Oct. 15, 2015, available at <https://www.sec.gov/spotlight/emsac/memo-maker-taker-fees-on-equities-exchanges.pdf>

<sup>5</sup> In 2014, the U.S. Senate Permanent Subcommittee on Investigations held a groundbreaking hearing highlighting these exact concerns. *Conflicts of Interest, Investor Loss of Confidence, and High Speed Trading in U.S. Stock Markets*, Hearing before the Permanent Subcommittee on Investigations, Committee on Homeland Security and Government Affairs, June 17, 2014, video available at <http://www.hsgac.senate.gov/subcommittees/investigations/hearings/conflicts-of-interest-investor-loss-of-confidence-and-high-speed-trading-in-us-stock-markets>. Similarly, for an overview of many institutional investors' concerns with the maker-taker pricing model, we urge you to review an October 17, 2015 presentation to the EMSAC made by Capital Group's Matt Lyons. Matt Lyons, *EMSAC - Presentation on Maker Taker Pricing*, Oct. 17, 2015, available at <https://www.sec.gov/spotlight/capital-group-presentation-matt-lyons-emsac.pdf>.

<sup>6</sup> See, e.g., Matthew Leising and Sam Mamudi, *Sprecher of ICE Says Banning Maker-Taker Would Simplify Trading*, Feb. 12, 2014 (quoting Jeffrey Sprecher, CEO of Intercontinental Exchange Group Inc.), available at <https://www.bloomberg.com/news/articles/2014-02-12/sprecher-of-ice-says-banning-maker-taker-would-simplify-trading>.

<sup>7</sup> See, e.g., H.R. 1216, the Maker-Taker Conflict of Interest Reform Act of 2015, 114th Cong. 2015. See also Letter from Charles Schumer, U.S. Senator, to Hon. Mary Schapiro, Chair of SEC, May 10, 2012 ("These models create a conflict of interest, as brokers may be incentivized to execute trades on a particular venue even if that venue is not offering the best price.").

<sup>8</sup> While the maker-taker pricing model dominates in the U.S., order routing incentives vary significantly around the world. The Board of the International Organization of Securities Commissions (IOSCO), *Report on Order Routing Incentives*, CR07/2016, Dec. 2016, available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD551.pdf>.

<sup>9</sup> EMSAC, *Recommendation for an Access Fee Pilot*, July 8, 2016, available at <https://www.sec.gov/spotlight/emsac/recommendation-access-fee-pilot.pdf> (hereinafter, "EMSAC Recommendation").

We applaud many aspects of the EMSAC Recommendations, but note that it did not include inverted pricing venues or Alternative Trading Systems (ATs).<sup>10</sup> The recommendation also did not include a “trade at” provision.<sup>11</sup>

Below, we wish to offer three key comments that are not addressed by that recommendation:

1. The Commission should directly propose the pilot program, and not use the NMS Plan process;
2. The proposal should be as simple as possible, but also include all relevant exchanges and ATs; and
3. The Commission should provide Canadian regulators with the opportunity to coordinate a similar effort.

### **The Commission Should Propose a Pilot Program Itself**

The implementation of a pilot program to study access fees and related conflicts of interest is too complex and important of a task to be outsourced to the Self-Regulatory Organizations (SROs) through the NMS Plan process.

We understand why the Commission may be tempted to direct the SROs to develop a pilot program. By asking the SROs to do it, the Commission would be relieved of the burdens of identifying and addressing all of the details. It could also exploit the significant differences between the administrative procedures related to a rule proposal versus a Commission order, including the necessity of comprehensive cost-benefit analysis. And it may relieve the Commission of some litigation risks. This approach would likely make the NMS Plan route “quicker to the starting line” than a direct rule proposal.

Unfortunately, while a NMS Plan order may be released by the Commission more quickly, the rest of the process would likely take significantly longer.

If the Commission were to direct the SROs to create an Access Fee Pilot program, the Commission would be directing one set of for-profit market participants to develop a study that directly impacts their own bottom lines.<sup>12</sup> Recent experience with the NMS Plan process, including for the development of the Consolidated Audit Trail (CAT) and the Tick Size Pilot,

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<sup>10</sup> In its recommendation, the EMSAC specifically noted that this formulation was consistent with the current application of Rule 610. EMSAC Recommendation at 2.

<sup>11</sup> Exchange operators, worried that an access fee pilot may negatively impact their market share, have argued vociferously for a “trade at” component that may mitigate potential migration of order flow away from their venues. When the EMSAC Recommendation was being considered, the NYSE leadership called the pilot program “ill conceived.” Andrew Ackerman, NYSE Official Criticizes Trading Fee Plan, Wall St. Journal, Apr. 26, 2016, (quoting Tom Farley, President of the New York Stock Exchange), available at <http://www.wsj.com/articles/nyse-official-criticizes-trading-fee-plan-1461707792>.

<sup>12</sup> We agree with the growing chorus of market participants and experts that argue that NMS Plan governance deserves significant reforms, including through the direct inclusion of other market participants. That said, we also question whether the NMS Plan process is, in its entirety, outdated. Since it was first adopted, the SROs have both proliferated in number and become for-profit entities. Conceptually, we are concerned any time the regulatory apparatus is outsourced to market participants who may have their financial interests conflict with their regulatory ones. Simply broadening participation to include more for-profit market participants (such as broker-dealers and investment advisers) may reduce concerns with the balance of the NMS Plans, but may also lead to regulatory stagnation and even more conflicts of interest. We are not convinced that all of these conflicts of interest would completely offset each other.



suggests that such a process would result in unnecessary complexity and result in significant delays. We urge the Commission to not repeat its mistake with the CAT and the Tick Size Pilot, and instead assume its rightful position as the primary securities markets regulator. The Commission should propose the pilot directly.

### **The Proposal Should Be Simple, But Also Should Include All Relevant Exchanges and ATSS**

The concern of market participants and others is that brokers may be incentivized to route orders to the benefit of their own bottom lines, as opposed to what may be in their customers' best interests. Those incentives are not just about access fees.

Nevertheless, as currently formulated by several groups (including the EMSAC), the pilot program would establish different experimental buckets based on various access fee caps. This framework, by operating within the parameters of Rule 610, would not easily apply to inverted exchanges or ATSS. We believe this is a flawed approach that lends itself to more complexity and continues an unknown number of unintended consequences. If regulators agree with market participants that financial incentives beyond just access fees influence brokers to route orders based on factors other than execution quality, then they should design a pilot to measure those impacts.

At the same time, while, in the abstract, we might want to study a myriad of potential concerns with the existing market structure, we also must balance those desires with the need to make the study implementable and effective.

Many brokers, and certainly brokers with smart order routers, make order routing decisions based on clear and consistent algorithmic patterns. Predicted overall costs to the brokers for trading at each potential venue often play a significant role in that logic. Access fees are significant components to that, as are rebates and exchanges' tiered pricing regimes. A pilot program of maximum utility would address all of these incentives and cost factors. Similarly, while investors and other market participants might be interested in learning the effects of a "trade at" requirement, and we agree it would be worthwhile to study, such a component to this pilot may dramatically increase the study's complexity and decrease the utility of the study's findings. At the same time, if a "trade at" component is not included in a study, efforts must be taken to ensure that order routing activity does not entirely migrate away from the covered venues, which is why it would be critical to include all relevant exchanges and ATSS in the pilot program.

If the Commission elects to stay within the framework of simply an access fee pilot, without addressing other direct financial incentives that influence order routing decisions, then we agree that the EMSAC's Recommendations seem reasonable. While not ideal, this approach would likely provide significant value to investors.

### **The Commission Should Provide Canadian Regulators with the Opportunity to Coordinate**

To date, Canadian interests in studying order routing incentives have been similar to those in the U.S. Given the tight relationship between our markets, however, Canadian regulators have been reluctant to conduct a study on their own. Where possible, we encourage the Commission to reach out to their Canadian counterparts to give them the opportunity to coordinate with a Commission proposal. While efforts to coordinate across the border should not be used to justify



any delay by the Commission, the inclusion of Canadian markets may greatly aid investors who trade securities in both markets.

**Conclusion**

Amidst growing concerns with brokers' conflicts of interest, market participants, experts, and policymakers have been clamoring for the Commission to adopt a study to address order routing incentives for years. The Commission is now finally poised to study a key component of those incentives--access fees. This is an incredibly valuable effort for investors, and we applaud you for your work.

We urge the Commission to propose a pilot program to study the impact of order routing incentives without delay.

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Gellasch", written in a cursive style.

Tyler Gellasch  
Executive Director

Cc: Hon. Mary Jo White, Chair  
Hon. Michael S. Piwowar, Commissioner  
Hon. Kara M. Stein, Commissioner  
Stephen Luparello, Director of the Division of Trading and Markets