

MEMO# 31880

August 1, 2019

ICI and CII File Amicus Brief Supporting the SEC's Transaction Fee Pilot for Listed Stocks

[31880]

August 1, 2019 TO: ICI Members

Equity Markets Advisory Committee SUBJECTS: Litigation & Enforcement

Trading and Markets RE: ICI and CII File Amicus Brief Supporting the SEC's Transaction Fee Pilot for Listed Stocks

The Investment Company Institute (ICI) and Council of Institutional Investors (CII) recently filed the attached *amicus curiae* (“friend of the court”) brief in *New York Stock Exchange LLC, et al. v. Securities and Exchange Commission*. The case concerns a pilot program that the SEC adopted in late 2018 to assess how the manner in which national securities exchanges price transactions affects equity market quality and investor outcomes.[\[1\]](#) Earlier this year, three groups of stock exchanges petitioned the DC Circuit Court of Appeals to vacate the pilot.

ICI’s and CII’s amicus brief supports the SEC’s adoption of the pilot. This memorandum summarizes ICI’s and CII’s brief as well as the briefs of the petitioning exchanges and the SEC.

Exchange Brief

The exchanges petitioning the court to vacate the pilot program include the New York Stock Exchange, the Nasdaq Stock Market, CBOE BZX Exchange, and their affiliated equity exchanges. The exchanges argue that the pilot should be vacated because it is a dangerous experiment that is incompatible with the SEC’s statutory mandate and the requirements of reasoned agency decision-making. They make four arguments to support their claim:

- The SEC exceeded its rulemaking authority by adopting a pilot program without determining that it would advance the objectives of the Securities Exchange Act of 1934 (“Exchange Act”);
- The SEC failed to consider adequately the effects of the pilot program on efficiency, competition, and capital formation;
- The pilot program is arbitrary and capricious because it treats issuers in a disparate manner and because the pilot does not apply to the transaction pricing models of off-exchange trading venues; and

- The SEC failed to consider adequately alternatives to the pilot.

SEC Brief

The SEC's brief responds to each of the arguments made by the petitioning exchanges and argues that the court should allow the pilot to proceed. The SEC's arguments are:

- The SEC properly exercised its rulemaking authority under the Exchange Act when it adopted the pilot program and made all statutorily required findings;
- The SEC reasonably considered the economic consequences of the pilot;
- The pilot program reasonably provides for differential treatment of issuers and trading venues; and
- The SEC adequately considered alternatives to the pilot.

ICI and CII Brief

ICI and CII filed an amicus brief in support of the SEC, urging the court to deny the petition for review. The brief explains that ICI and CII have a strong interest in ensuring that equity markets serve the interests of investors. ICI and CII members experience firsthand the harms from the transaction pricing schemes that exchanges currently employ, and the transaction fee pilot represents a sound approach for determining whether permanent changes to transaction fee rules would improve equity market quality. The brief also argues:

- The SEC reasonably concluded that exchange transaction pricing structures present problems worthy of study. The predominant pricing model, known as maker-taker pricing: (1) creates conflicts of interest that can undermine the duty of best execution that brokers owe investors; (2) increases market complexity to the detriment of investors; and (3) reduces price transparency; and

The SEC reasonably explained why the alternatives the petitioning exchanges proposed were insufficient to achieve the purpose of the pilot program. The brief explains how the SEC reasonably addressed each of the alternatives raised by the petitioner exchanges.

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[Attachment](#)

endnotes

[1] See [ICI Memorandum No. 31547](#) (January 4, 2019) for a summary of the pilot program, which the Commission adopted in December 2018.

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