

MEMO# 32536

June 17, 2020

DC Circuit Court of Appeals Invalidates SEC's Transaction Fee Pilot Program

[32536]

June 17, 2020 TO: ICI Members

Equity Markets Advisory Committee SUBJECTS: Litigation & Enforcement

Trading and Markets RE: DC Circuit Court of Appeals Invalidates SEC's Transaction Fee Pilot Program

On June 16, the U.S. Court of Appeals for the D.C. Circuit issued an opinion invalidating the SEC's Transaction Fee Pilot Program.[\[1\]](#) In December 2018, the SEC adopted Rule 610T, which established the pilot to assess how national securities exchanges' pricing of transactions—"the maker-taker" model—affects equity market quality and investor outcomes.[\[2\]](#) In February 2019, three stock exchange groups petitioned the D.C. Circuit to vacate the pilot; the court heard oral arguments on the case last October. ICI and the Council of Institutional Investors filed an amicus curiae ("friend of the court") brief with the court in support of the pilot.[\[3\]](#)

Unfortunately, the court determined that the SEC "significantly" exceeded its authority under the Exchange Act in adopting the pilot. Specifically, the court found that the SEC adopted the pilot without determining that it was "necessary or appropriate" to promote the purposes of the Exchange Act, i.e., to protect investors or maintain fair and orderly markets. The court noted that the SEC could not reasonably assess the pilot's market impact, including its effects on liquidity and competition. Instead of identifying a definite problem caused by the maker-taker model, the SEC intended to use the pilot to "shock the market" and obtain data to discern whether other regulatory action would be necessary. Therefore, the court characterized the pilot as a costly and "aimless, 'one-off' regulation" that is not authorized under the Exchange Act.[\[4\]](#)

Concurring Opinion

The concurring opinion characterized the pilot as less flawed but ultimately supported its invalidation. The opinion acknowledged growing concerns behind the maker-taker model and noted that the pilot reflected "years of informal and formal public discussion."[\[5\]](#) Further, the opinion stated that the SEC has the statutory authority to address the maker-taker model. However, the opinion emphasized that the SEC failed to adopt a position on the model and describe how the pilot's results would inform future regulation. In taking a position, the SEC did not necessarily need to "pick a side"—instead, it could have stated that it "suspected problems" with the model or that uncertainty about the model harms the

markets. Therefore, should the SEC seek to continue the pilot, it would need to assert that it has sufficient reason to suspect that such problems exist.

Nhan Nguyen
Counsel, Securities Regulation

[Attachment](#)

endnotes

[1] New York Stock Exchange LLC, et al. v. Securities and Exchange Commission, No. 19-1042 (D.C. Cir. June 16, 2020). A copy of the opinion is attached to this memo.

[2] We previously provided a summary of pilot as adopted. See ICI Memorandum No. 31547 (Jan. 4, 2019), *available at* https://www.ici.org/my_ici/memorandum/memo31547. ICI submitted two letters in support of the SEC's proposal to conduct a transaction fee pilot program. See Letter from Susan Olson, General Counsel, ICI, to Brent J. Fields, Secretary, SEC (Oct. 1, 2018), *available at* <https://www.ici.org/pdf/31417a.pdf>; Letter from Susan Olson, General Counsel, ICI to Brent J. Fields, Secretary, SEC (May 23, 2018), *available at* <https://www.ici.org/pdf/31218a.pdf>.

[3] See ICI Memorandum No. 31880 (Aug. 1, 2019), *available at* https://www.ici.org/my_ici/memorandum/memo31880.

[4] Given the court's finding that the SEC authority exceeded its authority to adopt the pilot program, it concluded that the SEC was not entitled to "Chevron deference", *i.e.*, the administrative law principle where a federal court defers to an agency's interpretation of an ambiguous or unclear statute. However, the court declined to further rule on whether the SEC's adopting the pilot was based on reasoned decision making, *i.e.*, whether it was "arbitrary and capricious".

[5] The concurring opinion notes, for example, the SEC's Equity Market Structure Advisory Committee's work and recommendations in 2015-16.

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