

December 10, 2024

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1091

Re: Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, Final Rule (Release No. 34-101070; File No. S7-30-22)

Dear Ms. Countryman:

The Investment Company Institute¹ (ICI) respectfully submits this letter to the U.S. Securities and Exchange Commission (SEC) in support of the request for a stay included within the motion submitted by The Nasdaq Stock Market LLC and Cboe Global Markets, Inc. and their respective exchange groups (together, the “Exchanges”).² In the motion, the Exchanges request that the SEC stay the amendments to Rules 610 and 612 of Regulation NMS, which the SEC adopted on September 18, 2024.³

Without opining on the substance or merits of the litigation, and while ICI largely agrees with the underlying policy of the amendments as adopted and supports their ultimate implementation,⁴ ICI supports the Exchanges’ request for a stay of the non-severable Rules 610 and 612 due to the potential “sunk” costs asset managers will incur in complying with rules that may be

¹ The [Investment Company Institute](#) (ICI) is the leading association representing the asset management industry in service of individual investors. ICI’s members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage \$37.5 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 120 million investors. Members manage an additional \$9.6 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London.

² While the motion for stay was submitted directly to the SEC, the litigation was filed in the D.C. Circuit. *See* Cboe Global Markets, Inc., et al v. SEC, Case No. 24-1350 (D.C. Circuit).

³ Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, Exchange Act Release No. 101070, 89 Fed. Red. 81620 (Oct. 8, 2024) (Reg. NMS Amendments).

⁴ We note that the final rules as adopted reflected many of the recommendations in ICI’s comment letter. *See* Letter from Sarah A. Bessin, Deputy General Counsel, and Nhan Nguyen, Assistant General Counsel, ICI to Vanessa Countryman, Secretary, SEC, on *Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders* (Mar. 31, 2023), available at <https://www.sec.gov/comments/s7-30-22/s73022-20162791-332193.pdf>.

overturned.⁵ The Exchanges' challenge introduces uncertainty regarding whether the D.C. Circuit will vacate the rules and, if vacated, any costs incurred by market participants in complying with the rules cannot be recovered. In particular, to comply with the changes to the tick size and access fee reforms, market participants will be required to dedicate capital and resources to update various systems and processes to ensure that they can accurately and seamlessly process orders and quotes. While broker-dealers may incur more of the compliance costs, as outlined in SIFMA's letter supporting a stay, asset managers will also expend time and resources adjusting their trading and compliance systems to route orders in accordance with the adopted amendments as well as potentially paying for costs pushed down to them by market intermediaries.

This recommendation aligns with a letter that ICI sent to Chair Gensler on November 18, 2024, recommending that the SEC stay the effectiveness of a number of new requirements that have been the subject of legal challenge until the courts issue their decisions, in order to avoid uncertainty and needless expense.⁶ This is not a remote possibility, as several recently adopted SEC rules have been vacated as a result of lawsuits. Indeed, only three days after the ICI submitted its letter, a Federal District Court vacated a rule identified in that letter that created new requirements for certain liquidity providers to register as "dealers" or "government securities dealers."⁷ To prevent a similar outcome here, ICI supports the issuance of a stay.⁸

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⁵ In addition to the potential for significant compliance costs to be unrecoverable or "sunk," some ICI members have also raised the potential of a court decision that vacates one rule but not the other. In such a scenario, ICI has serious concerns about the operability and market impact of the remaining rule, if it is implemented in isolation. Regardless of statements made in the adopting release, *see* Reg. NMS Amendments at 81772, ICI does not believe Rules 610 and 612 to be severable.

⁶ Letter from Eric J. Pan, President and CEO, and Paul Cellupica, General Counsel, ICI to the Honorable Gary Gensler, Chair, SEC, *Recommendations Regarding the Commission's Rulemaking Affecting Registered Investment Companies, Investment Advisers, and Investors* (Nov. 18, 2024).

⁷ *See* National Association of Private Fund Managers v. SEC, No. 4:24-cv-00250 (N.D. Tex. Nov. 21, 2024); Crypto Freedom Alliance of Texas v. SEC, No. 4:24-cv-00361 (N.D. Tex. Nov. 21, 2024).

⁸ Further, ICI believes the SEC should toll the compliance date until litigation is resolved to provide market clarity as to compliance timelines.

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If you have any questions, please contact Paul G. Cellupica, General Counsel, at paul.cellupica@ici.org, and Kevin Ercoline, Assistant General Counsel, at kevin.ercoline@ici.org.

Regards,

/s/ Paul G. Cellupica
Paul G. Cellupica
General Counsel

/s/ Kevin Ercoline
Kevin Ercoline
Assistant General Counsel

cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Mark T. Uyeda, Commissioner
The Honorable Jaime Lizárraga, Commissioner
David H. Saltiel, Acting Director, Division of Trading and Markets