August 8, 2019

ICI Joins in Fight Between the SEC and National Exchanges

by Lauren C. Jackson , Jeffrey T. Skinner

Last December, the SEC unanimously approved a two-year pilot program (the "Transaction Fee Pilot") intended to assess alternatives to the predominant pricing model used by national securities exchanges (the "Maker-Taker System").[i] Two months later, several national securities exchanges, including the NYSE and Nasdaq, petitioned the Court of Appeals for the D.C. Circuit to review the Transaction Fee Pilot.[ii] They argued in their petitions that the Transaction Fee Pilot is both incompatible with the SEC's statutory mandates as set forth in the Securities Exchange Act of 1934 and the requirements of the Administrative Procedures Act.[iii]

While the parties await a ruling from the D.C. Circuit, an array of market participants have voiced support for each side. Last week, ICI and CII filed an amicus curiae brief in support of the Transaction Fee Pilot. In that brief, ICI and CII argued that the SEC's approach was consistent with the law and a reasonable approach to resolving harms caused by the Maker-Taker System.[iv] According to the brief, those harms include: (i) creating conflicts of interest that can undermine the duty of best execution brokers owe their clients; (ii) increasing market complexity to the detriment of investors; and (iii) reducing price transparency, which undermines investor confidence in the markets.[v]

We do not know what weight the D.C. Circuit will give to briefs submitted by market participants or how it will eventually rule on the petition. However, we are certain, regardless of how the court rules, any changes to the predominant pricing model for transactions on national exchanges will send ripples across the markets. We encourage market participants to study the issue carefully and follow developments closely.

If you have questions about the Transaction Fee Pilot or securities regulation generally, please feel free to contact us.

By the ***Investment Management and Broker-Dealer Team at Kilpatrick Townsend & Stockton, LLP.***

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[i] SEC, *SEC Adopts Transaction Fee Pilot for NMS Stocks*, December 19, 2018, https://www.sec.gov/news/press-release/2018-298. The Maker-Taker System is a system of rebates and fees that national securities exchanges use to incentivize and discourage transactions that make or take liquidity. The Maker-Taker System came into prominence with the rise of computerized trading. After the so-called Flash Crash in 2010, market participants and regulators began to scrutinize alleged deficiencies in the market structure, including the Marker-Taker System. As an initial step, the SEC began soliciting public comments on market structure and the Maker-Taker System under the leadership of Chairman Mary Jo White in 2016.

[ii] New York Stock Exchange, LLC v SEC, No. 19-1054 (D.C. Cir. Feb. 25, 2019).

[iii] *Id.* at 2.

[iv] ICI, *ICI and CII File Amicus Brief Supporting the SEC's Transaction Fee Pilot for Listed Stocks*, August 1, 2019, https://www.ici.org/my_ici/memorandum/memo31880?WT.mc_id=daily190802.

[v] *Id.* Conspicuously absent from the list of harms is evidence that brokers are actually violating their duty of best execution. Also absent is any evidence that the Maker-Taker System produces less favorable transaction pricing than the system it replaced.