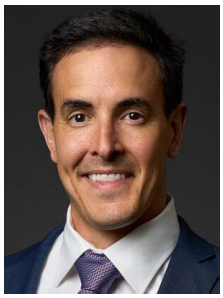
DC Circ. Decision Reaffirms SEC Authority Post-Loper Bright

By **Charles Sommers, Daniel Feith and Thomas Archer** (December 5, 2025)



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On Oct. 14, the U.S. Court of Appeals for the District of Columbia Circuit denied a petition for review seeking to invalidate the U.S. Securities and Exchange Commission's 2024 amendments to Rules 610 and 612 of Regulation NMS. These amendments lowered the maximum fee that national securities exchanges may charge for executing against a quotation, and reduced the minimum trading increment, or tick size, for most exchange-listed securities.

In Cboe Global Markets Inc. v. SEC, the court upheld the SEC's authority under the Securities Exchange Act to impose a uniform, industrywide fee cap, and rejected arguments that the rule was arbitrary or capricious or exceeded the SEC's statutory authority.[1] Following the decision, the SEC extended the compliance timelines for implementation of the rule amendments.[2]

This article outlines the background and substance of the tick size and fee cap amendments to Regulation NMS, the D.C. Circuit's reasoning in upholding the SEC's authority, and the broader implications of the decision for market participants and future rulemaking.

In short, the court's decision reinforces the D.C. Circuit's deference to SEC expertise in market structure regulation even after the U.S. Supreme Court's 2024 decision in Loper Bright Enterprises v. Raimondo, but the ultimate implementation of at least the access fee cap remains uncertain given the current SEC's interest in other changes to Regulation NMS — and in particular the elimination of the order protection rule.

Background on the Adopted Rules and the Exchanges' Challenge

The SEC adopted Regulation NMS in 2005 to modernize the structure of the U.S. equity markets. Among other things, Regulation NMS introduced (1) Rule 611, also known as the order protection rule; (2) Rule 612, which standardized the trading increment, or tick size, in which a stock can be quoted on exchanges; and (3) Rule 610, which caps the allowable fees exchanges may charge for accessing protected quotes.

These provisions sought to promote efficient execution, competition among trading venues and price transparency. The 2005 iteration of Rules 610 and 612, respectively, capped access fees at 30 mils — $0.003 per share — for stocks priced at or above $1 and established a minimum tick size of one cent.

In September 2024, the SEC adopted amendments narrowing the minimum tick size for most exchange-listed securities from $0.01 to $0.005 and reducing the access fee cap from 30 mils to 10 mils per share for securities priced at or above $1. The SEC concluded that smaller ticks would promote tighter spreads and greater price competition, while lower fee caps would improve transparency and mitigate potential distortions in quoted prices that

would arise if access fees are too large in relation to the tick size for a stock.

A coalition of national securities exchanges petitioned the D.C. Circuit for review of the adopted rules, arguing that the SEC exceeded its statutory authority and acted arbitrarily and capriciously.

The coalition contended that fee regulation falls outside the scope of Section 11A of the Exchange Act, which it argued only permits the SEC to regulate the dissemination of market information, not to impose a uniform, industrywide fee cap, and that any regulation of fees must proceed on an exchange-by-exchange basis under Section 19 of the Exchange Act. The exchanges also claimed that the SEC's decision lacked sufficient empirical support and failed to justify lowering the cap to 10 mils.

The Court's Findings

The D.C. Circuit rejected both lines of argument from the exchanges. The court held that Sections 11A and 23 confer "'broad, discretionary' authority" for the SEC to adopt rules promoting the fairness and efficiency of the national market system.

A uniform-access fee cap, the court explained, directly supports these statutory goals by aligning displayed prices with true transaction costs and preventing exchanges from charging excessive fees where order-routing obligations leave market participants with no practical alternative. Capping access fees, the court noted, was a "'necessary' and 'appropriate'" means of ensuring the fairness and usefulness of quotation information, as required by statute.[3]

The D.C. Circuit also rejected the exchanges' argument that the SEC could only regulate fees on an exchange-by-exchange basis under Section 19. The court observed that Section 19(c)'s savings clause states that "[n]othing in this subsection shall be construed to impair or limit the Commission's power to make … rules and regulations pursuant to any other authority under this chapter."

According to the court, this explicitly preserved the commission's broader authority, including the power to "make such rules and regulations as may be necessary or appropriate to implement" the Exchange Act.[4] Requiring the SEC to proceed venue by venue, the court explained, would frustrate Congress' design by compelling the agency "continually to relitigate issues that may be established fairly and efficiently in a single rulemaking." The court noted that the exchanges' theory would also mean the SEC had to proceed in this fashion with respect to any new proposed policy that conflicted with an exchange's rules, not just access fees.

The court also found the rulemaking neither arbitrary nor capricious, underscoring that federal agencies retain latitude to make technical and economic judgments when grounded in reasoned analysis and broad grants of statutory authority, despite the elimination of Chevron deference in Loper Bright. Per the court, the SEC had reasonably analyzed market data, considered competing economic theories and explained its choice of a 10-mil cap as a balance between reducing distortions and preserving exchange revenue.

In doing so, the SEC made permissible predictive judgments about market behavior that warranted deference to its technical expertise. The court described the SEC's evaluation of fee and rebate effects as a "natural course of rational agency decision-making," supported by economic modeling and empirical data gathered since the 2019 fee cap pilot program was vacated.

Additionally, the court, citing the D.C. Circuit's 2023 decision in Xcel Energy Services Inc. v. Federal Energy Regulatory Commission, emphasized that "'it is perfectly legitimate for the Commission to base its findings on basic economic theory,' including by relying on 'generic factual predictions, as long as the agency explains and applies the relevant economic principles in a reasonable manner.'"[5]

The court thus upheld the SEC's determination that a 10-mil cap appropriately balanced competing considerations: mitigating pricing distortions, preserving exchange revenues and maintaining consistency with rates charged by alternative trading systems. The court found "no basis to second-guess the Commission's choice."

Implications for Market Participants

Market Structure Implications

The ruling allows the SEC's changes to proceed, reducing the minimum tick size for roughly 70% of listed securities from $0.01 to $0.005 and the cap for access fees from $0.03 to $0.01 per 100 shares. If these amendments are implemented, exchanges, broker-dealers and other trading platforms will need to assess the effects on order-routing strategies, transaction-cost modeling and liquidity incentives.

Implementation Remains Uncertain

Although the court's decision upholds the SEC's authority, it remains unclear whether the SEC will ultimately implement these amendments as adopted or delay their implementation to reconsider the original rulemaking in a subsequent proposal.

The SEC appears poised to revisit, and potentially eliminate, Rule 611 — the order protection rule — as indicated by Chairman Paul Atkins' prior dissent from the Regulation NMS adopting release and the SEC's Sept. 18 roundtable discussion on rescinding the rule itself.[6] Because the order protection rule requires routing to an exchange's protected quotations in certain circumstances, the access fee cap was originally designed to prevent an exchange from charging excessive fees — e.g., $10 — for accessing a protected quotation.

If the order protection rule is rescinded, the rationale for maintaining capped access fees would likely disappear.

Judicial Affirmation of Broad SEC Authority

Departing from its prior decision striking down the access fee cap pilot program, the D.C. Circuit confirmed that Section 11A of the Exchange Act grants the SEC wide discretion to regulate the structure of the national market system, including through industrywide fee caps and tick-size requirements.

The court viewed the rule as a reasonable exercise of the SEC's mandate to ensure fair and efficient markets and price transparency.

Deference to Agency Expertise After Loper Bright

Despite the Supreme Court's elimination of Chevron deference in Loper Bright last year, the court emphasized that agencies retain latitude to make predictive policy judgments and

line-drawing decisions when grounded in broad statutory authority, technical expertise and reasoned explanation.[7]

While the D.C. Circuit no longer defers to the SEC's interpretation of the Exchange Act itself, the court upheld the SEC's delegated authority under the Exchange Act to facilitate the establishment of a national market system.

More generally, the opinion suggests that while courts will no longer defer to the SEC's interpretation of ambiguous statutes, they will continue to defer to a federal agency's expert, data-driven judgments in technical areas.

Forum Shopping

The ruling also highlights an emerging judicial divide in administrative review of SEC rules.

While the D.C. Circuit upheld the SEC's Regulation NMS amendments because they were grounded in detailed economic reasoning, the U.S. Court of Appeals for the Fifth Circuit has shown greater skepticism.

For example, in Alliance for Fair Board Recruitment v. SEC,[8] the Fifth Circuit in December 2024 struck down the Nasdaq board diversity rule. The U.S. District Court for the Northern District of Texas in November 2024 similarly struck down the SEC's rule that expanded the scope of who is considered a dealer under the Exchange Act,[9] while the Fifth Circuit in June 2024 vacated the SEC's rule governing advisers to private funds, both in cases styled as National Association of Private Fund Managers v. SEC.[10]

Given these apparent differences in approach, parties wishing to challenge SEC rulemakings should be mindful of venue.

Conclusion

The D.C. Circuit's decision reaffirms the SEC's broad discretion to shape market structure under the Exchange Act, even after Loper Bright. The opinion draws a line between statutory interpretation and predictive policy judgments, which remain within the agency's domain.

More broadly, the ruling underscores that while Loper Bright has narrowed the boundaries of agency authority, it has not eliminated judicial respect for agency expertise in complex, data-intensive areas.

As the SEC advances Atkins' regulatory agenda — particularly anticipated revisions to the order protection rule — it remains unclear whether an access fee cap, which was at the heart of the exchanges' challenge to the amended rules, will survive in any form.

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[1] Cboe Global Markets Inc. v. SEC, case number 24-1350, in the U.S. Court of Appeals for the D.C. Circuit.

[2] The Chairman's statement can be found at https://www.sec.gov/newsroom/speeches-statements/atkins-101525-statement-regarding-minimum-pricing-increments-access-fee-caps.

[3] 15 U.S.C. § 78k–1(c)(1)(B).

[4] 15 U.S.C. § 78w(a)(1).

[5] 41 F.4th 548, 560–61 (D.C. Cir. 2022).

[6] See SEC, Roundtable on Trade-Through Prohibitions, https://www.sec.gov/newsroom/meetings-events/roundtable-trade-through-prohibitions.

[7] For a discussion of the Loper Bright decision, please see our Sidley Update. https://www.sidley.com/en/insights/newsupdates/2024/06/us-supreme-court-overrules-chevron-reshaping-the-future-of-regulatory-litigation.

[8] 125 F.4th 159 (5th Cir. 2024).

[9] No. 4:24-cv-00250-O (N.D. Tex. Nov. 21, 2024).

[10] No. 23-60471 (5th Cir. June 5, 2024).