

## **The existing system of rebate tiers fails the smell test. As the SEC examines competitive inequities in the stock market, here's an explainer on how exchanges' rebate tiers are used to stack the deck for a small number of firms.**

In recent months, there has been a vigorous debate about market competition, as it impacts the handling of retail orders. Another aspect of competition, involving exchange market makers, has received much less attention. Yet, there is glaring evidence that the business of making markets has grown increasingly more concentrated and less competitive over time. There is also clear evidence that the exchange fee structure helps to keep it that way. As the SEC considers areas needing reform, this is one that cries out for it.

### **Seeking Liquidity from a Shrinking Pool**

It is well understood that the number of firms that compete to make markets and provide liquidity on exchanges has long been trending downward. It is also well known that the fixed costs of making markets have steadily increased. These include rising costs of exchange market data and technology and the costs of managing risks from quoting simultaneously on a multitude of trading venues, among others.<sup>1</sup>

What is not well appreciated is the way that exchange pricing tiers keep the playing field tilted in favor of a small number of firms by heavily subsidizing their costs, but not those of most trading firms.

### **The Role of Rebate Tiers**

The large "maker-taker" exchanges use rebates partly to compensate liquidity providers for the high costs of making markets, and they fund the rebates from access fees that are pegged by regulation at a limit of \$0.003 (30 mills) per share. Exchanges argue that rebates are needed to attract market makers. Others, IEX Exchange included, believe that rebates help to foster the complex system that drives up costs that rebates are used to reduce, in a self-reinforcing cycle. For present purposes, though, the issue is not whether rebates are needed but how their method of allocation affects competition.

While the large exchanges generally fix access fees at the maximum rate, rebates are highly tiered, such that the maximum rebate rate per share typically exceeds the maximum access fee. The top rebate rate is substantially (up to two times or more) higher than the base rate. Tiers are generally set based on total consolidated volume (TCV), a measure of each firm's volume on the exchange, compared to total market-wide volume by all participants, on or off-exchange.

For example, 1.4% of TCV, the top adding rebate tier for Nasdaq as of February of this year, equals about 3 billion shares, a level that topped the volume conducted on most individual exchanges and all but one alternative trading system (out of 32) that month.<sup>2</sup>

Based on IEX's analysis, meeting the top rebate tiers across all exchanges would require a firm to trade solely based on liquidity providing orders, more than 9% of all exchange volume.<sup>3</sup>

And because they are based on a percentage of total market volume, the best rates will always be highly restrictive, regardless of changes in market conditions.

Clearly, these are not simply volume discounts of the type common in many businesses. We are not aware of another example in which a provider of essential services – in this case, access to an exchange—grants highly favorable pricing to select customers that can meet a threshold of business measured in relation to all market-wide volume in that business sector. And, of course, a stock exchange is not just any other business, but one that is held to strict obligations to deal fairly with all its members and to act in ways that serve public investors.

Further, the same exchanges offer specialized "bespoke" volume tiers with formulas that are so specific, they can appear to be specifically designed to benefit one or a few firms,<sup>4</sup>

and it is widely assumed that some are. The exchanges do not admit that these highly tailored pricing paths are individually negotiated, but there are no clear regulatory standards around how tiers are set, and no transparency around how many firms qualify, or could conceivably qualify, for a particular tier.

## The Impact on Competition

Considering that total rebate payouts by all exchanges last year topped \$3.5 billion, the payout to individual firms can dramatically impact their costs and profits. Extrapolating from the top rebate rates and minimum share volumes, our analysis concludes the potential benefits to individual firms could easily amount to hundreds of millions of dollars annually. One exchange executive, at a public forum in 2018, revealed that 5 of the market's top 10 trading firms received a check from the exchange at the end of each month, representing a net payout after accounting for all exchange charges and rebates, including fixed costs of market data, technology, and infrastructure.<sup>5</sup>

But that is only true for the select few that receive the lion's share of the benefits. Payouts to most trading firms will do much less to compensate for their fixed costs, which do not scale in proportion to their trading volume. The upshot is that the use of TCV and tailored-tier rates seems to have the effect, if not the purpose, of allowing the highest-volume firms that already have a competitive edge to keep it. Therein lies the problem.

If the system were just about incentivizing liquidity providers, you might assume exchanges would spread rebate benefits more evenly, giving a bigger incentive for more firms to compete. The problem is that an individual exchange that did so might encourage some firms to increase their participation over time, but only at the cost of driving away orders from the firms that matter most now. That is what makes it a structural impediment to competition, one that requires intervention.

The firms that are short-changed by the system – competing market makers, would-be competitors, and those that would simply benefit from more competition – understand this impediment. The American Securities Association (ASA), which represents some of them, made the point clearly in a recent letter:

We agree.

## What Standards Apply and What is the Solution?

There are various laws that target anticompetitive practices in general. Using the lexicon of those laws, the rebate tier system might be called a "restraint of trade." In non-legal terms, you might just say it smells bad.

Still, market participants need not look to the antitrust laws for relief or just suffer to hold their noses. The Securities Exchange Act of 1934 (Exchange Act) includes a set of relevant core principles that govern exchange practices. For one, exchanges may not allow "unfair discrimination" among their members. They also may not "impose any burden on competition not necessary or appropriate" to meet the purposes of the Exchange Act. And they must provide for an "equitable allocation of reasonable dues, fees, and other charges."

Exchanges must file their fee and rebate schedules with the SEC. Although fee filings do not need pre-approval to take effect, the Commission can suspend them if it decides they don't meet these standards or that the exchange has not clearly shown why they meet the standards. And the fact that fees of a certain type have been previously allowed does not shield the exchanges from greater scrutiny going forward, as the agency has shown in its review of market data fees in recent years.

The justifications offered in rebate and tier filings have tended to be thin. They include statements that exchanges use fees and rebates to compete with each other for order flow but do not address at all the disparate impact on members and their ability to compete. The exchanges maintain they don't unfairly discriminate because the benefits apply equally to all firms that meet the required conditions. Yes, and the Met Gala is open to anyone who can pay \$50,000 for a plate, or whose name is Kardashian. It seems hard to credit that "equitable allocation" means much of anything, if it means exchanges can adopt fee structures with no regard for the relative impact on their members' business. And it is hard to understand how the restraint on competition is "necessary or appropriate" to advance any goal of the Exchange Act.

There are various actions the Commission could take to make exchange pricing fairer and promote competition. For one, it could adopt a rule that prohibits the use of pricing methods that by their nature are anti-competitive, including tiers based on TCV or that are individually negotiated. If any exchange wants to argue that it must use those methods to attract sufficient liquidity, we would be interested to hear that argument.

The Commission could also require exchanges in their filings, based on full disclosure, to affirmatively demonstrate why any specific pricing tiers are fair and non-discriminatory and don't hurt competition. Disclosure could include the number of firms

that presently qualify or could potentially qualify under changed criteria, based on trading data available to the exchange. If a tier is only available to a few firms, the exchange should be required to clearly show why it does not burden competition, or else why the burden is necessary to achieve some other purpose.<sup>7</sup>

## Conclusion

The fact that exchanges compete vigorously with each other should not obscure the point that their pricing practices can unfairly discriminate and hinder competition among their members. The Exchange Act is meant to prevent them from doing so. On its face, the existing system of rebate tiers fails the smell test. As the Commission examines competitive inequities in the equities markets, this is an area it should not overlook.

1. See IEX, “The Rising Tick of Broker Costs and the Shrinking Pool of Competitors” (June 8, 2021), avail. at <https://www.iex.io/article/the-rising-tide-of-broker-costs-and-the-shrinking-pool-of-competitors>.
2. Based on NYSE TAQ Data and FINRA ATS Data
3. Letter from John Ramsay, Chief Market Policy Officer, IEX, to Vanessa Countryman, Secretary, SEC, dated March 20, 2023, at 23-25 avail. at <https://www.sec.gov/comments/s7-30-22/s73022-20160364-328968.pdf>
4. See RBC Capital Markets, “Complexity of Exchange Pricing and Corresponding Challenges to Transparency and Routing” (October 2018), at 3, avail. at <https://www.sec.gov/comments/s7-05-18/s70518-4527261-176048.pdf>
5. Statement of Chris Concannon, President and COO of Cboe Global Markets, Transcript of SEC Roundtable on Market Data Products, Market Access Services, and Their Associated Fees (October 25, 2018), at 74-75, avail. at <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102518-transcript.pdf>
6. Letter from Christopher A. Iacovella, President & CEO, American Securities Association, to Vanessa Countryman, Secretary, SEC, dated March 31, 2023, at 5, avail. at <https://www.sec.gov/comments/s7-32-22/s73222-20163332-333215.pdf>
7. We note that the Commission has very recently suspended tier filings by two affiliated exchanges and is seeking further information to determine whether they have been adequately justified, which we view as a positive sign of increased focus on these issues. See Securities Exchange Act Release No. 97406, 88 FR 28641 (May 4, 2023); Securities Exchange Act Release No. 97437, 88 FR 30181 (May 10, 2023).