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Emily Manzer

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THE D.C. CIRCUIT HAS STRUCK AGAIN: JUDICIAL DEFERENCE & THE SEC'S EXPERIMENTAL RULE MAKING AUTHORITY

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INTRODUCTION

Stocks, securities, equities, IPOs, dividends, margins, day-trading, market caps, shorting, covering, bull-market, bear-market, makers, takers, volatility, liquidity, and capitalization. All of these buzz terms are associated with the securities market. The average person is likely unfamiliar with the securities market and may think of it as an abstract innovation. This unfamiliarity is understandable, considering the market's complexity. Not everyone has the time to take a deep dive into the intricacies of the securities market. Even a shallow plunge to acquire a broad, surface-level understanding of the market proves time-consuming. It can be difficult to understand the market, because definitions or explanations use unfamiliar terms and other unknown references, requiring further investigation. This cycle of research can seem endless. An unfamiliar consumer likely only knows that market stability is good, and any conduct that led to the 2008 Recession is bad, and at the most basic level, consumers know they want a functioning economy so they can keep their jobs and homes.

Congress chose to protect the public from its unfamiliarity with the securities market by empowering the Securities and Exchange Commission ("SEC") to make rules and regulations as necessary or appropriate "to facilitate the establishment of a national market system."[1] Nevertheless, even a highly specialized agency like the SEC does not have all the answers to market complexities.

1. 15 U.S.C. § 78k-1(a)(2) (2019).

The SEC has the authority to implement experimental rules when faced with a complex issue and "under conditions of extreme uncertainty."[2] However, the SEC does not hold the unbridled authority to adopt any rule they see fit. Instead, it is limited to its congressionally delegated statutory authority, the Administrative Procedure Act ("APA").[3] The APA provides a set of procedures for all federal agencies (like the SEC) to follow when formulating and implementing rules to ensure agencies stay within the bounds of their authority.[4] The APA requires a court to invalidate an agency promulgated rule that is "arbitrary" or "capricious,"[5] requiring the agency to engage in reasoned decision-making.[6] The APA also requires courts to invalidate agency action if it is "in excess of statutory . . . authority."[7] A court will evaluate this authority by applying the Chevron Doctrine,[8] discussed in substantial detail below.

When developing rules, the SEC's statutory authority requires it to "consider, in addition to the protection of the investors, whether the action will promote efficiency, competition, and capital formation."[9] If the SEC did not consider these factors when implementing a rule, a court could invalidate the rule for failing to engage in reasoned

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2. Zachary J. Gubler, *Experimental Rules*, 55 B.C. L. REV. 129, 136 (2014). The term "experimental rules" refers to rules that "terminate automatically and are designed for the express purpose of generating data during [a] [short-term] period that can then be used to determine the optimal policy strategy for the long run." *Id.* at 129. The Securities Act of 1933 expressly allows the SEC to adopt "such rules and regulations as may be necessary to carry out the provisions of [the Act]." 15 U.S.C. § 77s(a) (2019).

3. Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2019) (controlling registration of securities with the SEC and national markets); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78qq (2019) (controlling trading of securities).

4. 5 U.S.C. § 706 (2019).

5. *Id.* § 706(2)(a).

6. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983); *see also* DENNIS KELLEHER ET AL., SETTING THE RECORD STRAIGHT ON COST-BENEFIT ANALYSIS AND FINANCIAL REFORM AT THE SEC 3, 58 n.124 (Better Mrkts., Inc. 2012).

7. 5 U.S.C. § 706(2)(c) (2019).

8. Daniel T. Shedd & Todd Garvey, Cong. Research Serv., R43203, Chevron Deference: Court Treatment of Agency Interpretations of Ambiguous Statutes 6 (2013).

9. 15 U.S.C. § 78c(f) (2019).

decision-making under the "arbitrary and capricious" review standard. However, the D.C. Circuit[10] has inflated this review standard by requiring the SEC to "attempt, if not complete, an accurate cost-benefit determination."[11] Using this heightened level of review, the D.C. Circuit has invalidated rule after rule implemented by the SEC, essentially undermining the SEC's rulemaking authority.[12] The courts' unpredictable application of the Chevron Doctrine[13] and the "arbitrary and capricious" review hurdles are particularly problematic for agencies like the SEC which have a strong interest in adopting experimental rules.[14]

A critical example of the SEC's legal challenges in adopting experimental rules is the agency's attempt to adopt rules regarding maker-taker transaction fees. Maker-taker fees are transactional fees that securities exchanges impose on traders. Exchanges charge customers fees when they buy securities from the market. Stock exchanges keep part of this fee for themselves but provide the rest as rebates to broker-dealers selling stock. In *N.Y. Stock Exch. LLC v. SEC*, the SEC defended experimental Rule 610T, which was adopted to study the market effects of maker-taker fees.[15] Rule 610T placed stocks into

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10. The D.C. Circuit plays a significant role in administrative law, having "concurrent or exclusive jurisdiction in many cases involving review of federal-agency actions." As much as "one third of D.C. Circuit appeals are from agency decisions." David M. Cooper, *The Role of the D.C. Circuit in Administrative Law*, A.B.A. (Mar. 14, 2018), https://www.americanbar.org/groups/litigation/-committees/appellate-practice/articles/2013/winter2013-0313-role-dc-circuit-administrative-law/; *see also* John G. Roberts Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 387–89 (2006).

11. James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811, 1813 (2012); *see* Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG. 289, 295 (2013); *see also* Michael E. Murphy, *The SEC and the District of Columbia Circuit: The Emergency of a Distinct Standard of Judicial Review*, 7 VA. L. & BUS. REV. 125, 163–64 (2012); KELLEHER ET AL., *supra* note 6, at 28.

12. Cox & Baucom, *supra* note 11.

13. VALERIE C. BRANNON & JARED P. COLE, CONG. RESEARCH SERV., R44954, CHEVRON DEFERENCE: A PRIMER 18 (2017).

14. Gubler, *supra* note 2, at 129, 154; *see also* Yoon-Ho Alex Lee, *An Options Approach to Agency Rulemaking*, 65 ADMIN. L. REV. 881, 887 (2013).

15. N.Y. Stock Exch. LLC v. SEC, 962 F.3d 541 (D.C. Cir. 2020).

two groups.[16] The first group was subject to a $0.001 fee cap,[17] while the second group was prohibited from imposing maker-taker fees altogether when trading stocks.[18]

The SEC provided largely adequate reasons for studying maker-taker fees' market effects, including . . . .[19] Scholars, stakeholders, and other market participants have conflicting ideas about whether maker-taker fees harm the market.[20] However, the SEC lacked sufficient data to take a conclusory position on whether the effects were problematic.[21] Perhaps, this was a strategic move by the SEC to evade the court's rejection of the rule as arbitrary and capricious. Whatever the reason, the D.C. Circuit found the SEC lacked statutory authority under the Chevron Doctrine to issue such a rule because it could not conclusively say that maker-taker fees negatively affected the market.[22]

The D.C. Circuit's holding puts the SEC in an undesirable position. The SEC has substantial evidence suggesting issues surrounding maker-taker fees, and it has the statutory authority to protect investors

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16. Commodity and Securities Exchanges, 17 C.F.R. § 242.610T (2021).

17. *Id.* § 242.610T(a)(1).

18. *Id.* § 242.610T(a)(2).

19. *See* Transaction Fee Pilot for NMS Stock, 84 Fed. Reg. 5202, at 5204–05, 5214 (Feb. 20, 2019) (codified as 17 C.F.R. § 242.610T).

20. *See N.Y. Stock Exch. LLC*, 962 F.3d at 545; Robert Battalio et al., *Can Brokers Have it All? On the Relation Between Make-Take Fees and Limit Order Execution Quality* 35 (Oct. 20, 2015) (unpublished manuscript); Memorandum from the SEC Mkt. Structure Advisory Comm. on Maker-Taker Fees on Equities Exchs. to the SEC Div. of Trading & Mkts. 16–29 (Oct. 20, 2015), https://www.sec.gov/-spotlight/emsac/memo-maker-taker-fees-on-equities-exchanges.pdf [hereinafter SEC Memorandum]; Stanislav Dolgopolov, *The Maker-Taker Pricing Model and Its Impact on the Securities Market Structure: A Can of Worms for Securities Fraud?*, 8 VA. L. & BUS. REV. 231, 270 (2014); Robert Battalio et al., *Make-Take Fees Versus Order Flow Inducements: Evidence from the NASDAQ OMX PHLX Exchange* 24–25 (unpublished manuscript) [hereinafter Battalio et al., *Order Flow Inducements*]; Ilan Guedj & Zhong Zhang, *Maker-Taker Fees In A Fragmented Equity Market,* LAW360 2–3 (Feb. 14, 2019, 2:44 PM), https://www.bateswhite.com/media/publication/-169_Guedj_and_Zhang_Maker-Taker_Fees.pdf; Paul G. Mahoney, *Equity Market Structure Regulation: Time to Start Over*, 10 MICH. BUS. & ENTREPRENEURIAL L. REV. 1, 22 (2020); Isao Yagi et al., *Analysis of the impact of maker-taker fees on the stock market using agent-based simulation*, ARXIV 4–6 (Oct. 18, 2020), https://arxiv.org/pdf/2010.08992.pdf.

21. *N.Y. Stock Exch. LLC*, 962 F.3d at 567.

22. *Id.* at 555.

and market stability. However, the SEC is unable to implement a rule that will produce data to address these issues. As caselaw stands now, if the SEC had taken the position that a market problem existed, the court would have invalidated the rule for failing to adequately conduct a cost-benefit analysis.[23] When tasked with regulating a complex and potentially elusive industry, how is the SEC supposed to carry out its congressionally assigned duties when the court closes the door at every turn?

This Comment argues that the D.C. Circuit misapplied the Chevron Doctrine, finding that the SEC exceeded its statutory authority in adopting Rule 610T, subjecting the agency to yet another judicially inflated standard. Instead of using the traditional tools of statutory construction to determine whether the SEC was authorized to implement Rule 610T, as required by the Chevron Doctrine, the D.C. Circuit analogized to ill-fitting caselaw. Other than an explicit congressional delegation to study the effects of maker-taker fees on the market, the SEC is left with few options to address the troublesome fee structure. The SEC may overcome this obstacle by framing the rule as to update existing regulation, taking an outcome-oriented options approach, and engaging in sharpened advocacy.

Part I of this Comment discusses governing laws such as the APA, the Chevron Doctrine, and the Securities and Exchange Act. Part II presents the relevant facts and the holding of *N.Y. Stock Exch. LLC*, including the fee structure, current maker-taker fee regulation, and existing data. Part III addresses the court's flawed reasoning in *N.Y. Stock Exch. LLC*. Finally, Part IV presents possible solutions for avoiding invalidation by the D.C. Circuit of future experimental rules adopted by the SEC.

23. See discussion infra Part I Section A.2.

I. BACKGROUND AND DISCUSSION OF RELEVANT LAW

A. The Administrative Procedure Act

The Administrative Procedure Act provides that a court shall invalidate an agency action if it is arbitrary, capricious, or in excess of the agency's statutory jurisdiction.[24] In reviewing agency action, the court must consider the whole record or the parts of the record cited by the parties.[25] Courts must review an agency's analysis supporting a rule under a "[h]ighly deferential" standard and "presume[] the validity of the agency's action."[26] There is a significant amount of case law interpreting the APA's review standard.

1. The D.C. Circuit's Bloated Arbitrary and Capricious Standard of Review

The arbitrary and capricious standard requires agencies to engage in reasoned decision-making that involves both procedural and substantive features.[27] The procedural feature requires "an agency [to] demonstrate that it followed a specified procedure, including that 'it has responded to significant points made during the public comment period, examined all relevant factors, and considered significant alternatives to the course of action ultimately chosen.'"[28] The substantive feature requires an agency have a "satisfactory" explanation for its actions that does not "run counter to the evidence before the agency," and "that demonstrates a rational connection between the facts found and the choice made."[29] To substantiate its decisions, agencies must "tak[e] into account all available data, basing all conclusions and predictions on sufficient evidence and demonstrating that their conclusions are reasonable in light of this data."[30]

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24. The APA provides other review standards in addition to the two mentioned, however this Comment only discusses the most relevant review standards. 5 U.S.C. § 706(2) (2019).

25. *Id.*

26. AT&T Corp. v. FCC, 220 F.3d 607, 616 (D.C. Cir. 2000).

27. *Id.*

28. Gubler, *supra* note 2, at 143–44.

29. *Id.* at 144.

30. *Id.*

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The D.C. Circuit developed the overblown standard, requiring agencies to conduct an in-depth and accurate cost-benefit analysis, through a lineage of caselaw beginning in 1993 with *Timpinaro v. SEC*[31] and cumulating in 2010 with *Am. Equity Inv. Life Ins. Co. v. SEC*.[32] Many scholars criticize the D.C. Circuit for inflating the arbitrary and capricious standard, but some experts argue the SEC put itself in this situation when, in 1970, it began offering cost-benefit analysis sections in its proposed regulation releases, not required by statutes and executive orders.[33] Generally, these sections "only repeated policy arguments made elsewhere in the release, and supplied no additional information or analysis."[34] The analysis "did not quantify expected benefits, and its quantified costs were typically limited to a subset of the direct compliance burden, estimated for an entirely different purpose: a mandate under the Paperwork Reduction Act."[35] In 1996, an amendment to the SEC's statute required the agency to "consider the impact of its rules on 'efficiency, competition, and capital formation.'"[36] The D.C. Circuit began rejecting rule after rule for two reasons. First, the SEC failed to accurately assess "efficacy, impact, and capital formation" against the benefit of the rule, or second, the court did not agree with how the SEC interpreted the above assessment.[37]

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31. Kraus & Raso, *supra* note 11, at 290 n.1.

32. *Id.*; *see* Cox & Baucom, *supra* note 11, at 1814; *see also* Cooper, *supra* note 10.

33. In 1981, Executive Order 12,886 required certain agencies to submit a cost-benefit analysis, though the SEC qualified for an exemption. This analysis is not subject to judicial review. *See* Kraus & Raso, *supra* note 11, at 296.

34. Kraus & Raso, *supra* note 11, at 297.

35. *Id.*

36. *Id.* at 298. Scholars struggle to understand why Congress added this language since the SEC was already required to consider the impact of its rules on efficiency, competition, and capital formation. Congress originally wrote the SEC's review statute with the word "determination," but changed it to "consider" in the final draft. *See* Cox & Baucom, *supra* note 11, at 1821.

37. *See, e.g.*, Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005); Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010); Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

2. The Chevron Doctrine: Interpreting Agencies' Statutory Authority

The Chevron Doctrine is a test that determines whether an agency acted within its authority when implementing specific APA required regulations. Step one asks whether Congress has, implicitly or explicitly, delegated the agency statutory authority to enact the rule.[38] In doing so, courts should use the "traditional tools of statutory interpretation."[39] If the statutory language is ambiguous or silent, step two asks whether the agency's construction of its statutory authority is permissive.[40]

Courts sometimes conflate the arbitrary and capricious standard with the Chevron Doctrine's second step.[41] While "*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administered[,] '[e]ven under this deferential standard agencies must operate within the bounds of reasonable interpretation.'"[42] In *N.Y. Stock Exch. LLC*, the court examined whether the SEC implemented Rule 610T within the SEC's statutory authority.

B. SEC's Statutory Rulemaking Authority

Congress grants the SEC statutory authority to make rules and regulations "necessary or appropriate for the protection of investors or maintenance of fair and orderly markets."[43] For that reason, the SEC implemented Rule 610T by relying on the "necessary and appropriate" language. In developing rules, the SEC must also consider "whether the action will promote efficiency, competition, and capital formation."[44] In particular, Congress requires the SEC to have "due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets."[45] Thus, to avoid courts

38. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

39. *Id.* at 843 n.9.

40. *Id.* at 843.

41. *See* N.Y. Stock Exch. LLC v. SEC, 962 F.3d 541, 557 (D.C. Cir. 2020).

42. Michigan v. EPA, 576 U.S. 743, 751 (2015) (quoting Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 332 (2014)).

43. 15 U.S.C. § 78k-1(c)(1)(D) (2019).

44. 15 U.S.C. § 78c(f) (2019).

45. 15 U.S.C. § 78k-1(a)(2) (2019).

invalidating agency regulations, agencies must abide by the APA and adopt rules within the agencies' statutory authority.

II. FACTS & HOLDING

A. Explanation of Maker-Taker Fees

An exchange is a market where traders[46] can buy and sell commodities, derivatives, and other financial instruments in a regulated space. There are many different exchanges, some only deal in stocks while others offer futures or options.[47] This Comment mainly references stock and the New York Stock Exchange (NYSE), but it also applies to any exchange employing the maker-taker fee structure. Exchanges are like swap meets where people buy products from many different vendors. There are various swap meets, and similarly, many different exchanges.[48] However, stock exchanges do not sell stocks; they are venues for others to buy and sell stocks. Exchanges collect fees from traders like how swap meets collect fees from patrons to enter the venues and vendors who rent space in the venues. Not only do these fees fund the exchanges' operational costs, but they are also a way exchanges manipulate trading behavior.

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46. A trader is a person who buys and sells financial instruments such as stocks, bonds, and commodities. Traders are professional investors seeking to make a profit from favorable changes in the market. A dealer is a person who buys and sells securities from their own account. Dealers seek to profit from a markup on the securities sold from their inventory to customers. Whereas a broker acts as an agent who executes orders on behalf of their clients. Traders and dealers are clients to brokers who make trades on their behalf. The distinctions between the three terms can become blurry because sometimes one person acts as both a broker and a dealer, known as a broker-dealer. Broker-dealers can even execute trades of their own, essentially wearing all three hats. *See* Adam Hayes, *Dealer*, INVESTOPEDIA, https://www.investopedia.com/terms/d/dealer.asp (last updated June 9, 2021).

47. *See* Will Kenton, *Exchange*, INVESTOPEDIA, https://www.investopedia.-com/terms/e/exchange.asp (last updated July 31, 2020).

48. Different exchanges deal in different types of securities. Some exchanges only provide a venue for trading stocks, while others only trade futures. Even when two exchanges both provide a venue for trading stocks, they have different requirements for what type of stock can be traded within its exchange. Sometimes a company's stock meets the different requirements of both exchanges, and the company can choose to list their stock on both exchanges.

While various exchanges operate differently, on the NYSE, when a trader is looking to buy or sell certain stocks, they place an "order." This trader is a "taker" because they are taking liquidity[49] from the market. Then, a "maker" is the trader that fulfills that order.[50] Exchanges encourage makers to fill orders quickly, which ensures market liquidity. Most exchanges impose a fee on takers to promote liquidity, which flows from the taker to the maker as a rebate. Lastly, the exchange keeps a fraction of the taker's fee as a transaction cost. This fee structure is known as the maker-taker fee model.[51]

Broker-dealers consider many factors when selecting an exchange for their client's orders, such as quotations,[52] transaction fees, and routing incentives.[53] Thus, fee structures can have overwhelming "effects on the [National Market System], influencing market efficiency, competition between and among market participants and trading venues, broker-dealers' ability to obtain the best execution for their clients, and the opportunities for [the best] execution of investors' orders."[54]

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49. "Liquidity refers to the efficiency or ear with which an asset or security can be converted into ready cash without affecting its market price." *See* Adam Hayes, *Liquidity*, INVESTOPEDIA, https://www.investopedia.com/terms/l/liquidity.asp (last updated Mar. 25, 2021).

50. *See* Andrew Bloomenthal, *What Maker-Taker Fees Mean for You,* INVESTOPEDIA, https://www.investopedia.com/articles/active-trading/042414/-what-makertaker-fees-mean-you.asp (last updated June 22, 2020).

51. Traditionally, exchanges employed the payment for order flow fee structures to promote liquidity instead of using the maker-taker model. *See* Battalio et al., *Order Flow Inducements*, *supra* note 20, at 2. "Payment for order flow is a method of transferring some of the trading profits from market making to the brokers that route customer orders to specialists for execution. Internalization allows a firm to capture trading profits from trading against the firm's own customers' orders." Payment for order flow poses its own conflict of interest issues as well. U.S. SEC. & EXCH. COMM'N, SPECIAL STUDY: PAYMENT FOR ORDER FLOW AND INTERNALIZATION IN THE OPTIONS MARKETS (2000), https://www.sec.gov/news/studies/ordpay.htm.

52. Quotations are the most recent sale price of a stock. The Investopedia Team, *Quotation*, INVESTOPEDIA, https://www.investopedia.com/terms/q/quotation.asp (last updated Mar. 8, 2021).

53. Transaction Fee Pilot for NMS Stock, *supra* note 19, at 5246.

54. Brief for Respondent at 6, N.Y. Stock Exch. LLC v. SEC, 962 F.3d 541 (D.C. Cir. 2020) (No. 19-1046).

B. Regulation National Market System—Access to Quotations Rule 610(c)

In 2005, the SEC implemented Rule 610(c), which was the first regulation to limit exchanges from charging transaction fees over an amount on specific quotations.[55] The SEC set this limit to $0.003 per share when traders execute an order against a protected quotation, $1.00 quotations, or greater than $1 quotations.[56] Additionally, "[i]f the price of a protected quotation or other quotation is less than $1.00, the fee or fees cannot exceed or accumulate to more than 0.3% of the quotation price per share."[57] A protected quotation immediately and automatically executes, is in consolidated market data feeds, and is the best bid or best offer of national securities exchanges[58] or associations.[59] For example, even if NYSE's best bid price for HP stock is $15.58 per share, it is not better than Nasdaq's best bid price of $15.55 per share. As a result, it is not a protected quotation. Since the HP stock is more than $1.00 per share, it is still subject to a $0.003 per share transaction cap. The SEC asserted the fee cap would "harmoniz[e] quotation practices and preclud[e] the distortive effects of exorbitant fees."[60] The fee cap has remained unchanged since 2005, despite inflation and exchanges' reduced transaction costs.

C. Debate Surrounding Maker-Taker Fees and Rule 610(c)

Discussions about maker-taker fees, in the past decade, have focused on market effects and whether they are necessary to ensure market liquidity.[61] Technological advances have decreased trading costs for exchanges, making many question whether the current fee cap

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55. 17 C.F.R. § 242.610(c) (2021).

56. *Id.* § 242.610(c)(1).

57. *Id.* § 242.610(c)(2).

58. Currently, thirteen exchanges trade NMS stock. *See* Guedj & Zhang, *supra* note 20, at 1.

59. *See* 17 C.F.R. § 242.611(a)(1) (2021).

60. Regulation NMS, 70 Fed. Reg. 37,496, at 37, 545 (June 29, 2005) (codified as 17 C.F.R. §§ 242.600–242.612).

61. *See* Gary Stone, *The Maker-Taker Model and Access Fees: It's Time for the SEC to Correct the Prisoner's Dilemma*, BLOOMBERG PROF. SERVS. (Jan. 24, 2014), https://www.bloomberg.com/professional/blog/maker-taker-access-fees/.

is too high.[62] The maker-taker fee structure could also encourage trading centers to artificially inflate transaction fees to subsidize transaction rebates.[63] Rebates may sway broker-dealers to send their clients' orders to an exchange offering the higher maker fee rebate rather than an exchange with the best execution price for the client.[64] Excessive rebates embolden broker-dealers to formulate new order types "designed to enhance high-speed traders' ability to control the amount of their transaction fees and to obtain priority in exchanges' order books so that their trades execute first."[65] Public prices of stock do not include maker-taker fees, creating price transparency issues.[66]

Additionally, some claim that the maker-taker model creates market fragmentation.[67] Because exchanges can only implement one transaction fee model, organizations operate multiple exchanges to profit from different categories of investors who are attracted to a particular fee structure.[68] Rather than trade on maker-taker exchanges, investors may prefer to use taker-maker exchanges or non-exchange venues.[69]

Finally, the maker-taker fee structure causes inequity and excessive intermediation.[70] Giant firms with the most advanced technology can exploit this fee structure by setting their algorithms to avoid taker fees

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62. Transaction Fee Pilot for NMS Stock, *supra* note 19, at 5239 n.463.

63. *See id.* at 5204.

64. *Id.*

65. Brief for Investment Co. Inst. & Council of Institutional Inv. as Amici Curiae Supporting Respondent at 16, N.Y. Stock Exch. LLC v. SEC, 962 F.3d 541 (D.C. Cir. 2020) (No. 19-1053); *see also* Guedj & Zhang, *supra* note 20, at 3.

66. For instance, "consider a market with a maker rebate of $0.002 and a taker fee of $0.003 per share. If a market maker was a maker on both the bid and offer, a displayed quote (which generally may not be priced in subpenny increments) 107 of $10 by $10 would actually be interest to buy at $9.998 and sell at $10.002. While the displayed price of $10 by $10 would lock the market, the market maker's net cost would reflect a spread of $0.004 per share." SEC Memorandum, *supra* note 20, at 25–26.

67. *Id.* at 22 n.95; *see* Guedj & Zhang, *supra* note 20, at 3.

68. *See* Guedj & Zhang, *supra* note 20, at 3.

69. Transaction Fee Pilot for NMS Stock, *supra* note 19, at 5204. Exchanges that employ the taker-maker model charge the party filling the order to pay the transaction cost and then pass on part of the fee collected to the purchaser in the form of a rebate.

70. *N.Y. Stock Exch. LLC*, 962 F.3d at 566 (Pillard, C., concurring).

and instead collect the highest maker fee.[71] The ability to manipulate the system encourages these firms to transact as much as possible, sometimes "at the expense of long-term investors."[72]

D. Transaction Fee Pilot for NMS Stocks Rule 610T and Its Purpose

In December of 2018, the SEC adopted Rule 610T, the rule at issue in *N.Y. Stock Exch. LLC* Rule 610T intended to:

> [A]ssign 1,460 randomly selected [NMS] stocks to one of two "Test Groups." Half of those stocks will be subject to a $0.0010 cap on the transaction fees that national securities exchanges can charge for executing trades . . . Stocks assigned to the other Test Group will be subject to a prohibition on exchanges' payment of rebates to broker-dealers who send orders to the exchange for execution. All other publicly traded stocks will be assigned to a "Control Group" and will not be subject to either of these restrictions.[73]

The purpose of Rule 610T was to determine the appropriateness of Rule 610(c)'s maker-taker cap or whether it allowed fees to be artificially high to subside rebates.[74] Scholars, the SEC, and stakeholders alike share concerns regarding maker-taker fees' effects on the market.[75] Among these concerns are conflicts of interest, market complexity, market fragmentation, reduced transparency, benefits accessible only to high-volume dealers, and excessive intermediation.[76]

E. Inadequate Maker-Taker Fee Data

The SEC reviewed all available data on maker-taker fees but found all fell short of what it needed to take a conclusive stance on the fee structure's market effect. Assessing maker-taker fees' effects requires reliable empirical data, not merely theoretical conjecture.[77]

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71. Transaction Fee Pilot for NMS Stock, *supra* note 19, at 5205.
72. *Id.* at 5306 n.24.
73. *N.Y. Stock Exch. LLC*, 962 F.3d at 568 (Pillard, C., concurring).
74. Brief for Respondent, *supra* note 54, at 8.
75. *See generally* sources cited *supra* note 20.
76. *N.Y. Stock Exch. LLC*, 962 F.3d at 565–66 (Pillard, C., concurring).
77. Brief for Respondent, *supra* note 54, at 10.

A 2013 study of broker-dealers' order routing data, referred to as the "Battalio Study," described how the authors believed maker-taker fees might have distortive effects on the market.[78] Specifically, the study found "broker-dealers appear to trade execution quality of customer orders, as measured by the likelihood of and time to execution (not price), for the rebates obtained by providing liquidity to maker-taker venues."[79] In doing so, broker-dealers aim to capture higher rebates for the broker-dealer at the client's expense.[80] The SEC could not rely on the data generated by the study because it only used "order level data from a single broker-dealer."[81] An analysis based on such a small sample size does not provide results representing a generalized broker-dealer behavior.[82]

Moreover, in 2015 Nasdaq experimented by "lower[ing] access fees and rebates for a sample of 14 [sic] stocks over a period of four months."[83] During the four months, Nasdaq "lost market share in the stocks with lower fees and rebates" as it "appeared to migrate to other make-take venues with higher fees and rebates."[84] The experiment further revealed a slower response to present the National Best Bid Offer,[85] suggesting that lowering rebates reduced liquidity. Additionally, the experiment showed "mixed evidence that prices quoted on Nasdaq become less efficient during" the four months.[86] The SEC argued that using a sample size of only fourteen stocks was not representative of the market.[87] Notably, the experiment only affected one exchange venue of thirteen.

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78. *Id.*
79. Transaction Fee Pilot for NMS Stock, *supra* note 19, at 5248.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 5249.
84. *Id.*
85. Transaction Fee Pilot for NMS Stock, *supra* note 19, at 5249.
86. *Id.*
87. *Id.* at 5250.

III. ANALYSIS

A. Court's Holding

In applying only the Chevron Doctrine's first step, the D.C. Circuit held the SEC lacked authority to issue an experimental rule without identifying a market problem and a hypothetical solution. The majority found the statute authorizing the SEC to implement regulations deemed "necessary and appropriate" to regulate the national securities market failed to provide the SEC with authority to issue experimental rules "to gather data . . . to determine . . . whether regulatory action was necessary."[88] The Court did not reach a position as to whether "the SEC failed to determine the Rule's effects on efficiency, competition, and capital formation" or whether the SEC "failed to consider an alternative."[89]

B. Majority's Reasoning

Applying the first step of *Chevron*,[90] the D.C. Circuit found that Congress, neither explicitly nor implicitly, delegated the SEC statutory authority to enact Rule 610T without identifying a market problem and a hypothetical solution.[91] The court stated, "the regulatory requirements of the Pilot Program were adopted to collect data, not to maintain 'fair and orderly markets,' as specified in its authorizing statute."[92] The majority claimed the SEC had never "adopted a one-off regulation such as Rule 610T without congressional authority."[93] The majority seemingly focused on the fact that Rule 610T was not a "trial run of a new regulation" and that in passing it, the SEC did not have an "agenda."[94] Additionally, the court was unimpressed that the SEC abstained from taking a position about whether there was a market problem, and with the SEC's contention that it could "not reasonably

88. *Id.* at 554.
89. *Id.*
90. *See* discussion *supra* Part I Section A.2.
91. *N.Y. Stock Exch. LLC*, 962 F.3d at 556.
92. *Id.* at 555.
93. *Id.*
94. *Id.* at 551.

assess the effect of the new Rule."[95] The court continues to find that "the Commission has no delegated authority to adopt a 'one-off' regulation like Rule 610T that imposes significant, costly, and disparate regulatory requirements merely to secure information that may or may not indicate to the SEC whether there is a problem worthy of regulation."[96]

Relying on *Michigan v. EPA*, the court rejected the SEC's contention that the Exchange Act's language authorizing the SEC "to make such rules and regulations as may be necessary or appropriate to implement the provisions of the Act" authorized Rule 610T.[97] The majority claims *Michigan v. EPA* stresses that agencies cannot solely rely on a "necessary or appropriate" provision for authority to implement "regulations as it sees fit with respect to all matters covered by the agency's authorizing statute."[98] The majority found the SEC's reliance on *Morning v. Family Publishing Service* unfounded because *Michigan v. EPA* post-dates it.[99] Therefore, the court reasoned, *Michigan v. EPA*'s rejection of authority based solely on "necessary and appropriate" language replaces *Mourning's* "reasonable relation" approach.[100] Additionally, even if *Mourning* did apply, its application is warranted only in step two of *Chevron*.[101] The court further distinguished the SEC's other principal case, *United Telegraph Workers*, because in that case Congress had "directed the FCC 'to inform itself of technical advancements and improvements.'"[102] Finally, the court noted, "unless an agency's authorizing regulation says otherwise, an agency regulation must be designed to address identified problems."[103]

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95. *Id.* at 555.
96. *Id.*
97. *N.Y. Stock Exch. LLC*, 962 F.3d at 547.
98. *Id.* at 554.
99. *Id.* at 556.
100. *Id.*
101. *Id.*
102. *Id.*
103. *N.Y. Stock Exch. LLC*, 962 F.3d at 556 (citing Mendoza v. Perez, 754 F.3d 1002, 1021).

C. Concurrence's Reasoning

Writing for the concurrence, Judge Pillard agreed that if the SEC wanted to adopt an experimental rule, it needed to address an identified regulatory problem to exercise its statutory authority.[104] However, Judge Pillard believed the SEC was closer to staying within the bounds of its statutory authority than the majority suggested. She wrote, "[t]he Commission [SEC] certainly has statutory authority to promulgate temporary rules designed to better inform its governance of fair and orderly markets."[105] The SEC must break down the necessity for any proposed rule to determine whether it is "necessary and appropriate."[106]

The concurrence outlined the research leading up to the Pilot Program and further worked through six different problems with the current fee structures noted in the SEC's brief.[107] The concurrence cited the SEC's reasoning for why other studies were inaccurate.[108] Judge Pillard wondered why the SEC was so cautious in its approach in light of the administrative record.[109]

Judge Pillard concluded, "[i]t may appear formalistic to fault the SEC for saying that a fee structure 'may' be distorting the market. But without a statement of the agency's position and plan, we cannot distinguish a valid, nonarbitrary effort."[110] Judge Pillard suggests the SEC should have taken the position that maker-taker fees' uncertain effects on markets, investors, and capital formation causes significant harm requiring redress.[111] While applauding the SEC for having an "open mind," Judge Pillard wrote, "developing a testable hypothesis does not equate to prejudgment."[112]

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104. *Id.* at 560 (Pillard, J., concurring).
105. *Id.*
106. *Id.* at 561.
107. *Id.* at 565.
108. *Id.* at 566.
109. *N.Y. Stock Exch. LLC*, 962 F.3d at 560 (Pillard, J., concurring).
110. *Id.* at 567.
111. *Id.* at 568.
112. Id.

D. Flaws in the D.C. Circuit Court's Analysis

1. Interpreted Michigan v. EPA's Holding Too Broadly

In *Michigan v. EPA*, the Supreme Court interpreted Congress's intent in authorizing the EPA to regulate power plants if the regulation is "appropriate and necessary after considering the results of [a] study."[113] The majority's interpretation is misleading and overbroad. The EPA argued they did not have to consider costs when implementing a regulation because the statute did not explicitly mention costs but only required the regulation to be necessary and appropriate.[114] Using traditional forms of statutory interpretation, the Supreme Court disagreed, finding "necessary and appropriate" statutes require agencies to consider a broad array of factors, including costs.[115] Specifically, the Court held:

> The Agency must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary. We need not and do not hold that the law unambiguously required the Agency, when making this preliminary estimate, to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value. It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for costs.[116]

Because the Court used traditional tools of statutory construction in applying "necessary and appropriate," *Michigan v. EPA* is only controlling on issues surrounding that specific statute. There, the Court looked to legislative history to determine the meaning of "necessary and appropriate." Congress's intent in requiring agencies to adopt "necessary and appropriate" rules is different in some statutes than in others.

Even if Congress's intent in including the "necessary and appropriate" language in the EPA statute was the same as its intent in the SEC's authorizing statute, the Court's narrow holding does nothing

113. Michigan v. EPA, 576 U.S. 743, 748 (2015).
114. Id. at 756.
115. Id. at 749.
116. Id. at 759.

for the analysis in *N.Y. Stock. Exch. LLC*. While the SEC relied on the "necessary and appropriate" language in its authoritative statute, it did not argue that the statute did not require them to consider costs when implementing Rule 610T.[117] On the contrary, the SEC did, in fact, consider costs in implementing Rule 610T, though it conceded some unknown costs.[118]

2. Failed to Conduct Statutory Interpretation

Unlike the Court in *Michigan v. EPA*, the majority in *N.Y. Stock Exch. LLC* did not use traditional statutory construction methods when reviewing an agency's statutory authority. Traditional statutory interpretation is a tool available per *Chevron*.[119] With little explanation, the Court concluded that collecting data was not "necessary and appropriate" to maintain "fair and orderly markets."[120]

The purpose of statutory construction is to determine the legislature's intent when enacting a specific statute. Traditional tools of statutory construction include "examination of the text of the statute, dictionary definitions, canons of construction, statutory structure, legislative purpose, and legislative history."[121] In *N.Y. Stock Exch. LLC*, however, the court did not use these methods or attempt to determine Congress's intent in employing the "necessary and appropriate" language. Instead, the court made that determination itself, stripping Congress of its ability to set policies and the SEC of its authority to implement Congress's objectives through regulation.

3. Administrative Record

Putting aside *Michigan v. EPA*, there was plenty in the administrative record showing enough issues surrounding the maker-taker fee structure to warrant a rule to conduct further investigation.[122]

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117. See generally N.Y. Stock Exch. LLC, 962 F.3d 541.

118. Id. at 551.

119. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

120. N.Y. Stock Exch. LLC, 962 F.3d at 559.

121. Ronald M. Levin, A Blackletter Statement of Federal Administrative Law, 54 ADMIN. L. REV. 1, 44 (2002).

122. *See* discussion *supra* Part II Section E.

In the final rule adaptation and its briefs, the SEC explained the available maker-taker fee studies.[123] Some of these studies revealed that maker-taker fees created conflicts of interest, market fragmentation, and issues with price transparency and market efficiency.[124] Other studies showed that a reduction in maker-taker fees reduced market liquidity.[125] The SEC clarified that these studies were inadequate, specifically noting that they were not representative of all broker-dealer behavior or the securities market as a whole.[126] In reviewing these studies, it also appears clear that not all groups conducting the studies were independent and unbiased. Nasdaq's conclusion that maker-taker fees posed no problems to the securities market was unsurprising, considering a reduction in the maker-taker cap meant a reduction in its revenue.

Determining whether maker-taker fees create issues such as conflicts of interest, market fragmentation, price transparency, and market efficiency, is essential to the SEC carrying out its congressionally delegated duty to protect investors and maintain fair and orderly markets. Thus, given the vast amount of information in the administrative record, it was unreasonable for the D.C. Circuit to set aside the issues surrounding maker-taker fees.

4. Requiring Regulation Addresses an Identified Problem

Finally, the D.C. Circuit's requirement that regulations must address identified problems is unfounded. In stating this proposition, the court cites *Mendoza v. Perez*. There, the court was determining whether a rule was interpretative or legislative.[127] Legislative rules are subject to APA requirements and review standards, whereas interpretive rules are not.[128] The *Mendoza* court said, "[a] rule is legislative if it . . . adopts a new position inconsistent with existing

123. Brief for Respondent, *supra* note 54, at 10–11; *see also* Transaction Fee Pilot for NMS Stock, *supra* note 19, at 5247–51.

124. Transaction Fee Pilot for NMS Stock, *supra* note 19, at 5247–51.

125. *Id.* at 5249.

126. *Id.* at 5251.

127. Mendoza v. Perez, 754 F.3d 1002, 1021 (D.C. Cir. 2014).

128. *Id.*

regulations, or otherwise effects a substantive change in existing law or policy."[129]

In *Mendoza,* the court was trying to determine if an experimental rule was legislative or interpretative. This is not at issue in *N.Y. Stock Exch. LLC,* where the SEC did take a new position inconsistent with existing regulation, thus making it a legislative rule subject to the APA. However, the D.C. Circuit further argues that "[r]ules are not adopted in search of regulatory problems to solve; they are adopted to correct problems with existing regulatory requirements that an agency has delegated authority to address."[130] This argument is unsubstantiated.

Rather, it is clear that the SEC's position was that it lacked confidence in the existing fee cap. Taking issue with an existing regulation is unquestionably an action that takes an inconsistent position with existing regulation. Rule 610T attempts to temporarily adjust the exiting fee cap, which affects "a substantive change in existing law or policy."

IV. ENSURING AGENCIES AUTHORITY TO ADOPT EXPERIMENTAL RULES THAT ARE CRITICAL TO SUCCESSFUL REGULATION

A. Benefits of Experimental Rules

Throughout the last decade, scholars have advocated for a move toward more experimentally-based policy-making because of the array of benefits it provides.[131] Experimental rules are the definition of reasoned decision-making as "data generated at an earlier stage can be

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129. *Id.* (citing Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 237 (D.C. Cir. 1992)).

130. *Id.*

131. *See, e.g.*, Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247 (2007) (discussing how temporary legislation can be utilized as a means of regulatory experimentation); Michael Abramowicz et al., *Randomizing Law*, 159 U. PA. L. REV. 929 (2011); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011); Zachary J. Gubler, *Making Experimental Rules Work*, 67 ADMIN. L. REV. 551 (2015) [hereinafter Gubler, *Making Experimental Rules Work*]; Gubler, *supra* note 2; Lee, *supra* note 14. *See generally* Michael Greenstone, *Toward a Culture of Persistent Regulatory Experimentation and Evaluation*, *in* NEW PERSPECTIVES ON REGULATION 111 (David Moss & John Cisternino eds., 2009).

used to inform decisions made at later stages in the process."[132] Experimental rules provide little room for distorted perceptions of probabilities because "staged decision procedures may allow short-term biases to diminish."[133] On its face, the arbitrary and capricious review standard seems to support the knowledge experimentation generates[134] rather than precluding the process of experimentation itself. Experimental rules are a preferred way of adopting more efficient regulations.[135]

Many scholars have suggested that the SEC is the agency that may benefit the most from experimental rules.[136] The SEC regulates a national market that does not vary from state to state.[137] Additionally, it faces extreme uncertainty that would benefit from empirical data.[138] Thus, by allowing experimental rules determined by the SEC to be effective or necessary, policy-making across the board can become more streamlined and efficient.

B. Solutions

In *N.Y. Stock Exch. LLC,* the SEC most likely purposely avoided taking a conclusory stance on maker-takers fees' effect on the market. It was worried the court would have found the rule arbitrary and capricious considering the conflicting data in the record. Instead, the court found the SEC acted outside of its jurisdiction in doing so because they could not conclusively identify a market issue. How, then, can the SEC address the controversy surrounding maker-taker fees?

Some scholars argue that the court should relax the heightened arbitrary and capricious standard when reviewing experimental rules,[139] allowing the SEC to take a position on market problems despite having conflicting evidence in the record. Other than an amendment to the APA instructing the court to show more deference to agency decision-

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132. Gubler, *supra* note 2, at 130.

133. Gersen, *supra* note 131, at 266.

134. Gubler, *supra* note 2, at 144.

135. *See* Gubler, *Making Experimental Rules Work*, *supra* note 131, at 558.

136. *See, e.g.*, Gubler, *supra* note 2, at 131; Abramowicz et al*., supra* note 131, at 987; Sabel & Simon, *supra* note 131, at 56.

137. Abramowicz et al., *supra* note 131, at 987.

138. *Id.* at 988.

139. Gubler, *supra* note 2, at 133.

making when implementing an experimental rule, the D.C. Circuit relaxing its own inflated review standard is unlikely.

Other scholars have argued that the SEC should focus on moving rules past cost-benefit analysis of the heightened review standard with an outcome-oriented options approach.[140] An outcome-oriented approach focuses on the rule's outcome, providing the option to change the rule if it does not produce a likely outcome.[141] Therefore, a court cannot fault an agency for acting arbitrarily and capriciously.[142] The rule would essentially say that if the regulation produces outcome "A," then the regulation stays the same, but if the regulation produces outcome "B," the agency will modify the regulation. This approach addresses the concurrence's concern by offering a regulatory scheme and hypothesis.

Experimental rules might fare better with sharpened advocacy. Though the SEC's refusal to take a position on the effect of maker-taker fees on the market seemed to be a strategic approach, it nevertheless failed to achieve the desired outcome. Scholars have warned agencies of solely relying on avoiding conclusions.[143] Agencies should propose rules "as a lawyer, not as an econometrician or empiricist."[144] Agencies need to unmistakably state the rule's objective, how the rule accomplishes that objective, "the relative strengths and weaknesses of other approaches considered or suggested by the comments, what the possible impact on each of the Review Standard's factors might be, and what variables (and unknowable a *priori*) are unknown in making those estimates."[145]

When implementing a rule in an already regulated area, agencies should frame the rule's purpose as updating or testing an existing outdated regulation. In *N.Y. Stock Exch. LLC*, the SEC should have outlined the purpose of Rule 610T as updating existing fee cap limits. The SEC's failure to adequality frame the rule's purpose led the majority to adopt NYSE's more appealing argument about their

140. Lee, *supra* note 14, at 887.
141. *Id.* at 881.
142. *Id.* at 897–99.
143. Cox & Baucom, *supra* note 11, at 1840.
144. *Id.*
145. *Id.* at 1841.

proposed purpose of Rule 610T.[146] Adding fuel to the fire, at one point, the SEC described the purpose of the rule as inducing "an exogenous shock" to the market.[147] Shocking the market did not sit well with the majority, as it referenced it in almost every page of the opinion.[148]

Sharpened advocacy, coupled with an options approach, and greater judicial deference to agency rulemaking authority, could be the amalgam that enables the SEC to implement necessary experimental rules in the future.

CONCLUSION

Considering Congress members have already expressed concern about maker-taker fees,[149] even applauding the SEC's pilot program,[150] there is hope Congress may direct the SEC to engage in such a maker-taker fee study. Congressional action may address the SEC's current issue with maker-taker fees, but what about next time? Indeed, the SEC will face another market dilemma with conflicting theoretical opinions and little empirical data. It will find itself in the same boat with serious regulatory questions, little data to take a position, and no authority to act. Should it be subject to such a rigorous standard of review that may not be required for permanent rulemaking? Perhaps, instead, the court should show the SEC the deference it deserves.

This Comment does not advocate for carte blanche agency authority. Our jurisprudence recognizes "that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to

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146. N.Y. Stock Exch. LLC v. SEC, 962 F.3d 541, 563 (D.C. Cir. 2020) (Pillard, J., concurring) (suggesting that the majority relied too heavily on the NYSE's brief).

147. Brief for Respondent, *supra* note 54, at 13.

148. *See generally N.Y. Stock Exch. LLC*, 962 F.3d 541.

149. *See* Maker-Taker Conflict of Interest Reform Act of 2015, H.R. 1216, 114th Cong. (1st Sess. 2015).

150. Letter from Mark R. Warner, U.S. Sen., to Hon. Jay Clayton, SEC Chairman (July 14, 2017) (on file with the United States Senate); Press Release, Sen. Mark R. Warner, Warner Applauds Proposed SEC Pilot Program Restricting 'Maker-Taker' Pricing Model (Mar. 14, 2018), https://www.warner.senate.gov/public/index.-cfm/2018/3/warner-applauds-proposed-sec-pilot-program-restricting-maker-taker-pricing-model.

delegate power under broad general directives."[151] Congress sets wide-ranging policy goals and intelligible principles.[152] Administrative agencies with relative experience and expertise carry out these goals by implementing regulations.[153] As experts, agencies are in the best position to know about the problems in the industry it regulates, not the court. "In a contemporary legal and political climate that is defined by a rising skepticism of government and more particularly of regulation," it is absurd to think that the court should allow the SEC to implement rules at its whim.[154] However, the SEC spent almost ten years looking at maker-taker fees and could not conclude its effect on the market without conducting Rule 610T.[155] How can the court fault the SEC for being so thoughtful?

At the end of the day, the American people are most interested in a stable, accessible, and accurately priced securities market. This is precisely why Congress delegated the authority to the SEC to regulate the national securities market. In direct contradiction of this overwhelming policy interest, the D.C. Circuit stripped the SEC of its ability to do so in *N.Y. Stock Exch. LLC*. However, it should be enough that the SEC spent over a decade looking into the issue, presented the data they found, and explained why the data was inadequate to take a position, though still suggestive enough to create a temporary rule allowing them to study the effects further.

Emily Manzer[*]

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151. Mistretta v. United States, 488 U.S. 361, 372 (1989) (citing Opp Cotton Mills, Inc. v. Adm'r of the Wage & Hour Div. of the Dept. of Labor, 312 U.S. 126, 145 (1941)).

152. *Opp Cotton Mills, Inc.*, 312 U.S. at 145.

153. James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363, 364 (1976).

154. Cox & Baucom, *supra* note 11, at 1835.

155. N.Y. Stock Exch. LLC v. SEC, 962 F.3d 541, 562 (D.C. Cir. 2020) (Pillard, J., concurring).

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