

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 72182 / May 16, 2014

Admin. Proc. File Nos. 3-15350, 3-15351

In the Matter of the Application of

SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION

For Review of Actions Taken by
Self-Regulatory Organizations

**ORDER ESTABLISHING PROCEDURES AND REFERRING APPLICATIONS FOR
REVIEW TO ADMINISTRATIVE LAW JUDGE FOR ADDITIONAL PROCEEDINGS**

I.

The Securities Industry and Financial Markets Association ("SIFMA"), an industry trade group, has filed several applications for review challenging, pursuant to Section 19(d) of the Securities Exchange Act of 1934,¹ certain self-regulatory organization ("SRO") rule changes affecting fees that a number of SROs charge for non-core market data. On July 3, 2013, we directed the parties to provide briefing on preliminary procedural issues relating to the applications for review filed in Administrative Proceedings 3-15350 (the "'50 Proceeding") and 3-15351 (the "'51 Proceeding") (collectively, the "Proceedings").² Among other things, the SROs argued that the fees at issue do not constitute "denials of access" and, therefore, cannot be challenged under Exchange Act Section 19(d). Having now considered the parties' briefs in response to our prior order, we refer the '50 Proceeding, which we consolidate with one rule challenge from the '51 Proceeding, to an administrative law judge for further proceedings consistent with this order.

¹ 15 U.S.C. § 78s(d). Exchange Act Section 19(d) requires the Commission, upon timely "application by any person aggrieved," to review, among other things, action by an SRO that "prohibits or limits" "access to services offered by" the SRO to any person. The relevant standard of review is specified in Section 19(f). 15 U.S.C. § 78s(f).

² SIFMA later filed additional applications related to other fees, which remain pending.

II.

BACKGROUND

Because an understanding of prior proceedings before the Commission and the United States Court of Appeals for the District of Columbia Circuit, along with changes in applicable law, is important to our consideration of the initial issues and to provide context for further development of the record, we set out in detail below the relevant history of prior challenges to SRO fee rules by SIFMA and NetCoalition³ and the background of the Proceedings.

A. NYSE Arca filed a proposed rule change establishing fees for its ArcaBook "depth-of-book" market data service.

On May 23, 2006, NYSE Arca, Inc. ("NYSE Arca") filed a proposed rule (the "2006 ArcaBook Fee Rule") with the Commission pursuant to which NYSE Arca would begin to charge fees for access to ArcaBook, a proprietary "depth-of-book" data product previously provided to customers free of charge.⁴ ArcaBook contains "a compilation of all limit orders resident in the NYSE Arca limit order book, available on a real-time basis."⁵

The Commission requires SROs to provide certain "core data" to central data processors for consolidation and distribution pursuant to joint industry plans.⁶ For each NMS security, this core data includes: "(1) [a] national best bid and offer ('NBBO') with prices, sizes, and market center identifications; (2) the best bids and offers from each SRO that include prices, sizes, and market center identifications; and (3) last sale reports from each SRO."⁷ In contrast, "[a]n exchange's depth-of-book order data includes displayed trading interest at prices *inferior* to the best-priced quotations that exchanges are required to provide for distribution in the core data

³ NetCoalition is an advocacy group that represents "leading global Internet and technology companies." <http://netcoalition.com> (last visited April 8, 2014). It was reported in October 2012 that NetCoalition was winding down operations following the launch of the Internet Association. <http://thehill.com/blogs/hillicon-valley/technology/263793-netcoalition-winds-down-operations> (last visited April 8, 2014).

⁴ Form 19b-4, SR-NYSEArca-2006-21, filed May 23, 2006, *available at* http://www.nyse.com/nysenotices/nysearca/rule-filings/pdf?file_no=SR-NYSEArca-2006-21&seqnum=1 (last visited April 8, 2014).

⁵ Notice of Filing of Proposed Rule Change Relating to Approval of Market Data Fees for NYSE Arca Data, Securities Exchange Act Release No. 53592, File No. SR-NYSEArca-2006-21 (June 6, 2006), 71 Fed. Reg. 33,496, 33,497 (June 9, 2006).

⁶ *See* Rule 603(b) of Regulation NMS, 17 C.F.R. § 242.603(b).

⁷ Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data, Exchange Act Release No. 59039, File No. SR-NYSEArca-2006-21 (Dec. 2, 2008), 73 Fed. Reg. 74,770, 74,780 (Dec. 9, 2008) ("2008 ArcaBook Approval Order").

feeds."⁸ SROs are not required to make "non-core data," like depth-of-book data, available to central data processors for consolidation.⁹ Nor are broker-dealers required to purchase depth-of-book or other non-core data to satisfy their duty of best execution.¹⁰

Under then applicable law, the Commission was required to determine whether the proposed ArcaBook fee rule was consistent with the Exchange Act before it could go into effect.¹¹ Although the procedural framework has changed (as discussed below), the relevant substantive requirements of the Exchange Act as to market data fees (for both core and non-core data)¹² remain the same today as in 2006. Among other things, Exchange Act Section 6 requires that an exchange's rules provide for the "equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities,"¹³ not "permit unfair discrimination between customers, issuers, brokers, or dealers,"¹⁴ and "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Exchange Act.¹⁵ And, when as here, an SRO distributes information with respect to quotations or transactions on an exclusive basis on its own behalf, it acts as an "exclusive processor"¹⁶ and must distribute data on "fair and reasonable" and "not unreasonably discriminatory" terms.¹⁷

⁸ *Id.* (emphasis in original); see also *NetCoalition v. SEC*, 615 F.3d 525, 529–30 (D.C. Cir. 2010) ("*NetCoalition I*").

⁹ 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,779 ("[I]ndividual exchanges and other market participants distribute non-core data voluntarily.").

¹⁰ *Id.* ("[T]he Commission does not believe that broker-dealers are required to purchase depth-of-book order data, including the NYSE Arca data, to meet their duty of best execution.").

¹¹ *NetCoalition I*, 615 F.3d at 528 ("As an SRO, an exchange must also file any proposed rule change (including a fee change) with the SEC for approval. . . . The SEC notices a rule change proposal for public comment and either approves it if it is consistent with the requirements of the Exchange Act or disapproves it.").

¹² 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,779 ("The standards in section 6 of the Exchange Act and Rule 603 of Regulation NMS do not differentiate between types of data and therefore apply to exchange proposals to distribute both core data and non-core data.").

¹³ Exchange Act Section 6(b)(4), 15 U.S.C. § 78f(b)(4).

¹⁴ Exchange Act Section 6(b)(5), 15 U.S.C. § 78f(b)(5).

¹⁵ Exchange Act Section 6(b)(8), 15 U.S.C. § 78f(b)(8).

¹⁶ Exchange Act Section 3(a)(22)(B), 15 U.S.C. § 78c(a)(22)(B).

¹⁷ Exchange Act Section 11A(c)(1)(C)–(D), 15 U.S.C. § 78k–1(c)(1)(C)–(D); see also Rule 603(a) of Regulation NMS, 17 C.F.R. § 242.603(a) (same).

B. The 2006 ArcaBook Fee Rule was approved.

On December 2, 2008, we approved the 2006 ArcaBook Fee Rule,¹⁸ applying a market-based approach, which focuses on "whether the exchange was subject to significant competitive forces in setting the terms of its proposal for non-core data, including the level of any fees."¹⁹ We found that (1) "NYSE Arca's compelling need to attract order flow from market participants"; and (2) "the availability to market participants of alternatives to purchasing the ArcaBook data" constituted such competitive forces.²⁰ Based on this determination and the absence of a "substantial countervailing basis" to find that the 2006 ArcaBook Fee Rule otherwise failed to comply with the Exchange Act or the rules thereunder, we approved the rule change.²¹ On January 30, 2009, NetCoalition and SIFMA each petitioned for review of the 2008 ArcaBook Approval Order,²² asserting that our market-based approach was inconsistent with the Exchange Act and that our decision was not supported by the record.

C. The D.C. Circuit vacated the 2008 ArcaBook Approval Order.

Although the D.C. Circuit vacated the 2008 ArcaBook Approval Order, it held that our market-based approach to evaluating fees charged for non-core data was permissible, upholding it "against the petitioners' cost-based challenges."²³ The court recognized that we had approved the 2006 ArcaBook Fee Rule "based on [our] determination that consideration of costs was unnecessary because of an alternative indicator of competitiveness," *i.e.*, the "two broad types of significant competitive forces" discussed above to which we concluded NYSE Arca was subject.²⁴ For the reasons explained below, however, the court found that our determination

¹⁸ We reviewed the 2006 ArcaBook Fee Rule following the Division of Market Regulation's approval of it on delegated authority. Order Approving Proposed Rule Change Relating to NYSE Arca Data, Exchange Act Release No. 54597, File No. SR-NYSEArca-2006-21 (Oct. 12, 2006), 71 Fed. Reg. 62,029 (Oct. 20, 2006). When NetCoalition sought review of the order on delegated authority, NYSE Arca argued in a letter that we lacked the authority to review the decision because NetCoalition purportedly was neither "a party to an action made pursuant to delegated authority" nor "a person aggrieved by such action" as required by our Rule of Practice 430(b)(1). 17 C.F.R. § 201.430(b)(1). In accepting the appeal, we necessarily rejected NYSE Arca's jurisdictional argument. *See* Order Granting Petition for Review and Scheduling Filing of Statements (Corrected), *NetCoalition*, Exchange Act Release No. 55011 (Dec. 27, 2006).

¹⁹ 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,781.

²⁰ *Id.* at 74,782.

²¹ *Id.* at 74,794.

²² Petitions for Review, Nos. 09-1042 & 09-1045 (D.C. Cir. filed Jan. 30, 2009).

²³ *NetCoalition I*, 615 F.3d at 535, 537 (concluding that the Commission's construction of the Exchange Act was permissible and did not "arbitrarily depart from prior practice").

²⁴ *Id.* at 539.

failed to meet the reasoned decision-making standard mandated by the Administrative Procedure Act ("APA").²⁵

First, the D.C. Circuit found an inconsistency between what it characterized as the Commission's "repeated statements throughout the Order and in its briefs that depth-of-book data is simply not very important to most traders, even professionals,"²⁶ and our conclusion that market data was important enough to market participants to drive order flow to trading venues.²⁷ "More problematic," however, was what the D.C. Circuit found to be a "lack of support in the record for [our] conclusion that order flow competition constrains market data prices."²⁸ The court did not dispute that the availability of market data could drive order flow, but found that the record did not support the conclusion that it "*necessarily*" did so.²⁹

Second, the D.C. Circuit found that the record contained insufficient evidence to conclude that a trader interested in depth-of-book data would substitute any of the alternatives we identified in the 2008 ArcaBook Approval Order or forgo it, "instead of paying a supracompetitive price."³⁰ The D.C. Circuit found that "the inquiry into whether a market for a product is competitive" focuses on the elasticity of demand for the product, not merely the number of consumers who purchase it.³¹ But "without additional evidence of trader behavior,"

²⁵ *Id.* at 539, 544. Before explaining the particular reasons for which it vacated the 2008 ArcaBook Approval Order, the D.C. Circuit observed that "cost analysis is [not] irrelevant." *Id.* at 537. Because "in a competitive market, the price of a product is supposed to approach its marginal cost," the D.C. Circuit found that "the costs of collecting and distributing market data can indicate whether an exchange is taking 'excessive profits' or subsidizing its service with another source of revenue." *Id.* The D.C. Circuit observed that "[s]upracompetitive pricing may be evidence of 'monopoly,' or 'market,' power." *Id.* It further observed that the "risk that NYSE Arca could exercise market power appears to be elevated in the pricing of its proprietary non-core data," because "[t]here is no dispute that NYSE Arca is the 'exclusive' provider of this data." *Id.* at 538. And although NYSE Arca asserted that the ArcaBook fees "would reflect an equitable allocation of its overall costs," the record contained no evidence of the costs associated with ArcaBook. *Id.*

²⁶ *Id.* at 540.

²⁷ In a footnote, the D.C. Circuit hypothesized that this "apparent contradiction" could be resolved if "evidence of the traders using NYSE Arca's depth-of-book data" and "the percentage of total trading volume those traders may generate" showed that a small but influential group of professional traders were interested in ArcaBook data. *Id.* at 541 n.14.

²⁸ *Id.* at 541. The court specifically rejected as insufficient a variety of supporting evidence cited in the 2008 ArcaBook Approval Order.

²⁹ *Id.* at 540–41 (emphasis in original).

³⁰ *Id.* at 544.

³¹ *Id.* at 542. The court observed that because market power has been defined as "the ability to raise price profitably by restricting output," "the fact that there are few buyers does not by itself

(continued...)

the court found that we had not adequately supported our determination that alternatives constrain NYSE Arca's depth-of-book fees.³² The record did not "reveal the number of potential users of the data or how they might react to a change in price," or "how many traders accessed NYSE Arca's depth-of-book data during the period it was offered without charge," which would show "how many traders might be interested in paying for ArcaBook."³³ On the record before it, the D.C. Circuit also specified reasons the alternatives to depth-of-book data we identified might not serve as effective substitutes for ArcaBook data.³⁴

D. Congress passed the Dodd-Frank Act providing for, among other things, the immediate effectiveness of SRO rule filings affecting fees.

On July 21, 2010, the Dodd-Frank Act was signed into law.³⁵ Pursuant to the Act, SRO rule changes "establishing or changing a due, fee, or other charge imposed by the [SRO] on any person" now take effect upon filing with the Commission.³⁶ We may temporarily suspend such a rule change any time in the sixty-day period commencing on the date the rule was filed with us if it appears that a suspension "is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of" the Exchange Act.³⁷ If we temporarily suspend an immediately effective rule filing, we must institute proceedings to determine whether the rule should be approved or disapproved.³⁸ In such a proceeding, approval of an SRO rule change is required if the rule is "consistent with the requirements of" the Exchange Act and the associated rules and regulations applicable to the SRO.³⁹ Otherwise, we must disapprove the rule.⁴⁰

(...continued)

demonstrate a lack of market power." *Id.* at 543. "Stated differently," evidence that few people purchase depth-of-book data "tells us little about whether the data is 'critically important' to those traders who do" purchase it. *Id.*

³² *Id.*

³³ *Id.* at 542, 43.

³⁴ *Id.* at 543–44.

³⁵ *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, Pub. L. 111–203, 124 Stat. 1376 (July 21, 2010).

³⁶ Exchange Act Section 19(b)(3)(A)(ii), 15 U.S.C. § 78s(b)(3)(A)(ii). Before Dodd-Frank, fees assessed on SRO members (but not those on non-members) took effect immediately.

³⁷ Exchange Act Section 19(b)(3)(C), 15 U.S.C. § 78s(b)(3)(C).

³⁸ *Id.* (referencing rule approval procedures of Exchange Act Section 19(b)(2)(B), 15 U.S.C. § 78s(b)(2)(B)).

³⁹ Exchange Act Section 19(b)(2)(C)(i), 15 U.S.C. § 78s(b)(2)(C)(i).

⁴⁰ Exchange Act Section 19(b)(2)(C)(ii), 15 U.S.C. § 78s(b)(2)(C)(ii).

E. NYSE Arca filed an immediately effective rule change maintaining the fees approved in the 2008 ArcaBook Approval Order.

On November 1, 2010, NYSE Arca filed with the Commission a Form 19b-4 giving notice of an immediately effective rule change enabling NYSE Arca to continue to assess the same market data fees for ArcaBook it had charged since the 2008 ArcaBook Approval Order (the "2010 ArcaBook Fee Rule").⁴¹ On November 9, 2010, the D.C. Circuit's decision vacating the 2008 ArcaBook Approval Order became effective,⁴² and we issued a release providing notice of the 2010 ArcaBook Fee Rule and soliciting comments on it.⁴³

NYSE Arca asserted that "in conjunction with fees for other services," the ArcaBook data fees "provide for an equitable allocation of NYSE Arca's overall costs among users of its services," and that they are "fair and reasonable because they compare favorably to fees that other markets charge for similar products" and because "competition provides an effective constraint on the market data fees that [NYSE Arca] has the ability and incentive to charge."⁴⁴

On December 8, 2010, NetCoalition and SIFMA submitted a Comment Letter and Petition for Disapproval to the Commission, asserting that NYSE Arca had re-proposed the same fees that the D.C. Circuit had vacated. Among other things, NetCoalition and SIFMA asserted that NYSE Arca (1) had raised the same arguments previously rejected by the D.C. Circuit; (2) did not follow the D.C. Circuit's "teaching" that costs should be considered in assessing the reasonableness of fees; and (3) did not supply any new or substantial evidence to support the conclusion that the ArcaBook fees were "fair and reasonable" and otherwise compliant with the Exchange Act.⁴⁵

⁴¹ Form 19b-4, File No. SR-NYSEArca-2010-97, at 6, *available at* http://www.nyse.com/nysenotices/nysearca/rule-filings/pdf?file_no=SR-NYSEArca-2010-97&seqnum=1 (Nov. 1, 2010) (last visited April 8, 2014) ("2010 ArcaBook Fee Filing").

⁴² On October 25, 2010, the D.C. Circuit denied NYSE Arca's motion for panel rehearing, and on November 9, 2010, the court issued its mandate.

⁴³ Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. Relating to Fees for NYSE Arca Depth-of-Book Data, Exchange Act Release No. 63291 (Nov. 9, 2010), 75 Fed. Reg. 70,311 (Nov. 17, 2010).

⁴⁴ 2010 ArcaBook Fee Filing, at 8.

⁴⁵ Letter from Ira D. Hammerman and Markham Erickson to Florence E. Harmon, Deputy Secretary, U.S. Securities and Exchange Commission, at 2 (Dec. 8, 2010), *available at* <http://www.sec.gov/comments/sr-nysearca-2010-97/nysearca201097-1.pdf> (last visited April 8, 2014).

F. The D.C. Circuit held that it lacks statutory jurisdiction to consider challenges to the non-suspension of immediately effective rule filings.

On December 10, 2010, following the expiration of the sixty-day period during which the 2010 ArcaBook Fee Rule could have been temporarily suspended, NetCoalition and SIFMA together petitioned the D.C. Circuit to review the non-suspension of the fee filing.⁴⁶

The D.C. Circuit held that it did not have statutory jurisdiction to consider challenges to the non-suspension of immediately effective rule filings.⁴⁷ The court found dispositive that Exchange Act Section 19(b)(3)(C), which governs the suspension of immediately effective SRO rule filings, provides that "action pursuant to this subparagraph . . . shall not be reviewable under [Exchange Act Section 25(a)] nor deemed to be 'final agency action' for purposes of" the APA.⁴⁸ Because the D.C. Circuit concluded that "Commission action" under that clause included both suspension and non-suspension of immediately effective rule filings,⁴⁹ it determined that it lacked jurisdiction to consider the petitions.

Although the court found that the relevant statutory text was clear, it explained that its decision also was "bolstered by the availability of judicial review down the road."⁵⁰ The D.C. Circuit observed that Section 19(b)(3)(C) provides that "[a]ny proposed rule change of a self-regulatory organization which has taken effect [upon filing] may be *enforced* by such organization to the extent it is *not inconsistent* with the provisions of [the Exchange Act], the rules and regulations thereunder, and applicable Federal and State law."⁵¹ This language, the court found, means that "SROs cannot enforce fee rules against their members if those rules are 'inconsistent' with the requirements of the Exchange Act, including sections 6 and 11A," and thus "also suggests that judicial review, if available, is to occur at the enforcement stage."⁵²

The court concluded that "if unreasonable fees constitute a denial of 'access to services' under section 19(d)," it had "authority to review such fees."⁵³ Although the D.C. Circuit did not

⁴⁶ Petition for Review, *NetCoalition v. SEC*, 10-1421, Doc. #1285264 (D.C. Cir. filed Dec. 28, 2010). The court consolidated that proceeding with other SRO fee rule challenges brought by the petitioners. Order, *NetCoalition v. SEC*, 10-1421, Doc. #1311399 (D.C. Cir. June 3, 2011) (consolidating Nos. 10-1421, 10-1422, 11-1001, and 11-1065). A number of similar cases were held in abeyance pending resolution of the consolidated appeal.

⁴⁷ *NetCoalition v. SEC*, 715 F.3d 342, 353 (D.C. Cir. 2013) ("*NetCoalition II*").

⁴⁸ *Id.* at 348–49 (citing 15 U.S.C. § 78s(b)(3)(C)); *id.* at 351.

⁴⁹ *Id.* at 351.

⁵⁰ *Id.* at 352.

⁵¹ *Id.* (citing 15 U.S.C. § 78s(b)(3)(C) (emphasis added)).

⁵² *Id.*

⁵³ *Id.* at 353.

address whether a fee could constitute a denial of access reviewable under Section 19(d), it stated that it took "the Commission at its word, to wit, that it will make the section 19(d) process available to parties seeking review of unreasonable fees charged for market data, thereby opening the gate to [appellate court] review."⁵⁴

The D.C. Circuit also held that its decision vacating the 2006 ArcaBook Fee Rule (*NetCoalition I*) "remains a controlling statement of the law as to what sections 6 and 11A of the Exchange Act require of SRO fees."⁵⁵ The court summarized its holding as follows: "[T]here must be evidence that competition will in fact constrain pricing for market data before the Commission approves a fee charged for market data premised on a competitive pricing model."⁵⁶

G. SIFMA filed applications for review under Exchange Act Section 19(d) of immediately effective rule changes governing market data fees.

On May 31, 2013, SIFMA filed an application challenging the 2010 ArcaBook Fee Rule (the "'50 Application"),⁵⁷ asserting, among other things, that the 2010 ArcaBook Fee Rule (1) constituted a limitation on access reviewable under Exchange Act Sections 19(d) and (f); and (2) was unenforceable under Exchange Act Section 19(b)(3)(C) because it (a) was not "fair and reasonable," (b) did not "provide for the equitable allocation of reasonable . . . fees . . . among . . . persons using [NYSE Arca's] facilities," and (c) failed to "promote just and equitable principles of trade" and "protect investors and the public interest." In particular, SIFMA asserted that NYSE Arca had offered no evidence that it was subject to significant competitive forces in setting the challenged fees and provided no evidence of the cost of collecting and distributing the data at issue. SIFMA also asserted that the 2010 ArcaBook Fee Rule was "essentially the very same one" that the D.C. Circuit had rejected in *NetCoalition I*.

The same day, SIFMA filed an additional application (the "'51 Application," and collectively with the '50 Application, the "Applications") challenging an additional twenty-two post-Dodd-Frank fee rules from a number of SROs, including a fee rule for NASDAQ's depth-of-book data products,⁵⁸ as well as one other fee rule from the participants in the Nasdaq/UTP Plan.⁵⁹ SIFMA characterized the fees it challenged as "onerous" and "supracompetitive" and

⁵⁴ *Id.* The court was referring to statements in the Commission's brief that a party aggrieved by a fee can challenge it before the Commission under Section 19(d) and thereby ultimately obtain court review of any resulting "final order" of the Commission.

⁵⁵ *Id.* at 354.

⁵⁶ *Id.*

⁵⁷ Application for An Order Setting Aside Rule Change of NYSE Arca, Inc. Limiting Access to Its Services, Admin. Proc. File No. 3-15350.

⁵⁸ *Nasdaq Stock Market LLC*, Exchange Act Release No. 62907, File No. NASDAQ-2010-110 (Sept. 14, 2010).

⁵⁹ Application for An Order Setting Aside Rule Changes of Certain Self-Regulatory Organizations Limiting Access to Their Services, Admin. Proc. File No. 3-15351.

asserted that they were unenforceable and inconsistent with the Exchange Act for essentially the same reasons it asserted in the '50 Application. SIFMA asked that the '51 Proceeding "be held in abeyance" pending a decision in the '50 Proceeding.

III.

Having considered the parties' responses to the initial briefing orders, we find as follows:

A. **We may review SRO fee rules under Exchange Act Section 19(d) so long as the relevant statutory requirements are satisfied.**

The SROs contend that we should dismiss the Proceedings for the following reasons: (1) we lack jurisdiction because SIFMA is not a "person aggrieved" under Exchange Act Section 19(d)(2) and there has been no "denial of access" under Section 19(d)(1); (2) the review SIFMA seeks is inconsistent with the statutory scheme for review of SRO actions; and (3) the Applications are untimely because they were filed more than thirty days after we published notice of the rule filings. As discussed below, we hold that we have jurisdiction generally to consider fee rule challenges under Exchange Act Section 19(d) but refer to a law judge the determination of whether SIFMA has established the requisite jurisdictional elements with respect to certain fee challenges.

1. **Exchange Act Section 19(d) permits associational standing.**

As explained below, we determine that Exchange Act Section 19(d) permits associational standing in challenges to SRO fee rules. To pursue an application for review under Exchange Act Section 19(d)(2), among other things, an applicant must be a "person aggrieved" by SRO action identified in Section 19(d)(1).⁶⁰ NYSE argues that SIFMA is not a person aggrieved because it brings its applications in a solely representative capacity, and neither purchases, nor desires to purchase, the market data services for which SROs charge allegedly excessive fees. We reject NYSE's reading of Section 19(d). There is no statutory requirement that a person aggrieved must itself be subject to a prohibition or limitation of access to SRO services. We find that neither the Exchange Act, nor any of our case law, prohibits associational standing under Section 19(d).⁶¹

Analogous precedent supports recognizing associational standing under Section 19(d)(2) in appropriate circumstances. The Commission, in connection with the 2008 ArcaBook Fee Approval Order, and the D.C. Circuit, in *NetCoalition I*, treated NetCoalition and SIFMA (both representative parties) as "person[s] aggrieved" for purposes of their challenges to the 2006

⁶⁰ 15 U.S.C. § 78s(d)(1), (2).

⁶¹ *Cf. Int'l Power Group, Ltd.*, Exchange Act Release No. 66611, 2012 WL 892229, at *8 & n.12 (Mar. 15, 2012) (finding that issuer was a person aggrieved for purposes of its challenge to clearing agency's suspension of clearing and settlement services with respect to issuer's securities "even [though] those services [wer]e not provided directly to the issuer").

ArcaBook Fee Rule.⁶² And in the context of Article III standing to proceed in federal court,⁶³ the D.C. Circuit held in *NetCoalition II* that its "constitutional jurisdiction [wa]s not in doubt" because "[o]n behalf of their members," SIFMA and NetCoalition "assert[ed] a financial injury allegedly caused by the SEC's inaction which could be remediated if the SEC were to suspend the fee rules."⁶⁴

Nonetheless, the contours of our jurisdiction are not limitless, and we do not mean to suggest that anyone may bring an application for review of SRO action that prohibits or limits any other person's access to SRO services.⁶⁵ We find that the following three-part test for associational standing employed by the federal courts is an appropriate standard by which to determine whether SIFMA is a person aggrieved under Section 19(d)(2): "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."⁶⁶

⁶² Order Granting Petition for Review and Scheduling Filing of Statements (Corrected), *NetCoalition*, Exchange Act Release No. 55011 (Dec. 27, 2006) (implicitly rejecting NYSE Arca argument that NetCoalition was not a "person aggrieved" entitled to challenge delegated authority approval order under Rule of Practice 430); *NetCoalition I*, 615 F.3d at 532 (finding that, in challenge by NetCoalition and SIFMA to Commission approval of 2006 ArcaBook Fee Rule, the court's "jurisdiction ar[ose] under 15 U.S.C. § 78y(a)(1) ('A *person aggrieved* by a final order of the Commission . . . may obtain review of the order in the United States Court of Appeals . . . for the District of Columbia Circuit . . .')") (emphasis added; ellipses in original)).

⁶³ Although this consideration is not directly applicable to us, we find it instructive. See *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 74 (D.C. Cir. 1999) ("Agencies, of course, are not constrained by Article III of the Constitution; nor are they governed by judicially-created standing doctrines restricting access to the federal courts."), cited in *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 27 (D.C. Cir. 2002).

⁶⁴ *NetCoalition II*, 715 F.3d at 437–48 (citing, among other authority, *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (setting out requirements of associational standing)); see also *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 486–87 (D.C. Cir. 2007) (finding representative party had standing to challenge Commission rule).

⁶⁵ Cf. *Fund Democracy*, 278 F.3d at 25 (finding that alleged representative organization lacked associational standing where it could not identify any actual members injured by challenged action); *Am. Legal Found. v. FCC*, 808 F.2d 84, 90 (D.C. Cir. 1987) (rejecting claim of associational standing where self-professed "media watchdog," among other things, "serve[d] no discrete, stable group of persons with a definable set of common interests").

⁶⁶ *Hunt*, 432 U.S. at 343, cited in *WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 (D.C. Cir. 2013).

There is no question that, by challenging fees that its members pay as excessive under the Exchange Act, SIFMA seeks to protect interests that are germane to its purpose.⁶⁷ In addition, neither SIFMA's claim that the fees at issue are inconsistent with the Exchange Act, nor its request that we set those fees aside requires the participation of individual SIFMA members in the Proceedings.⁶⁸ SIFMA's arguments do not turn on the identity of the particular member paying the depth-of-book fees; rather, they address the fees with respect to the standards set forth in the Exchange Act and rules thereunder, and SIFMA requests that we set aside those fees for all persons. And to the extent that evidence regarding individual members is necessary to consideration of the first element of associational standing analysis, that evidence bears on standing issues, not the merits of SIFMA's claim itself.

Accordingly, whether SIFMA is a person aggrieved turns on whether it represents identified members who are themselves persons aggrieved within the meaning of Section 19(d)(2).⁶⁹ For each challenged fee, Section 19(d) thus requires that an SRO have "prohibit[ed] or limit[ed]" SIFMA members "in respect to access to services" at issue.⁷⁰ Focusing on the word "prohibit" and opinions in which we have used the term "denial of access," NASDAQ contends that "SIFMA must demonstrate that an exchange's fee is *prohibitively expensive* for a significant segment of market data consumers," such that, among other things, the fee "actually *prevents* them from accessing" the services at issue.⁷¹ Taking this argument one step further, NYSE Arca argues that there has been no denial of access because it provides ArcaBook to anyone willing to pay the challenged fee for it. In contrast, SIFMA argues that Section 19(d) requires only a showing that a challenged SRO action "limits any person in respect to access to services offered by" the SRO.

⁶⁷ Cf. *City of Olmsted Falls v. FAA*, 292 F.3d 261, 268 (D.C. Cir. 2002) (finding lack of associational standing where, among other things, City sought to advance interests of its residents that were not germane to its purpose).

⁶⁸ Cf. *Telecomm. Research & Action Ctr. v. Allnet Commc'n Servs., Inc.*, 806 F.2d 1093, 1095 (D.C. Cir. 1986) (denying associational standing because plaintiff organization's claims for money damages were of a kind that would ordinarily require individual participation); *O'Hair v. White*, 675 F.2d 680, 692 (5th Cir. 1982) (finding lack of associational standing where "both the claims asserted and relief sought required [member's] individual participation" and challenged conduct "affected [member] alone and d[id] not have any legal or practical significance for the rest of [association's] membership").

⁶⁹ Cf. *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) ("When a petitioner claims associational standing, it is not enough to aver that unidentified members have been injured. Rather, the petitioner must specifically identify members who have suffered the requisite harm." (internal quotation marks omitted)).

⁷⁰ 15 U.S.C. § 78s(d)(1), (2) (requiring the Commission to review a properly challenged SRO action that "prohibits or limits any person in respect to access to services offered by such" SRO).

⁷¹ NASDAQ '51 Proceeding Br. at 3 (emphasis added).

The language of the Exchange Act and our precedent show that SIFMA is correct that there is no need to establish a complete prohibition of access.⁷² Yet, an applicant must still be subject to an SRO action that actually *limits* its access to SRO services. For example, in *Bloomberg, L.P.*, we concluded that NYSE's "imposition and enforcement of" certain restrictions relating to the dissemination of depth-of-book data "effected a denial of access to Bloomberg" of services because NYSE "would not provide Bloomberg access to [that] data unless it disseminated and continue[d] to disseminate" it in accordance with the restrictions.⁷³

Invoking *Bloomberg*, SIFMA asserts that because its members cannot obtain depth-of-book data services without paying the fees it challenges, it is subject to a limitation on access to depth-of-book data. We previously have treated certain fees charged by registered securities information processors as reviewable prohibitions or limitations on access under Exchange Act Section 11A,⁷⁴ which uses essentially the same operative language regarding prohibitions and limitations of access as Sections 19(d) and (f).⁷⁵ But not every fee charged by an SRO will

⁷² See Exchange Act Section 19(d)(1), 15 U.S.C. § 78s(d)(1) (referencing SRO action that "prohibits *or* limits" access) (emphasis added); *Interactive Brokers LLC*, Exchange Act Release No. 39765, 53 SEC 466, 1998 WL 117627, at *3 n.8 (Mar. 17, 1998) (reviewing challenged SRO action under Section 19(f) where, although the Commission "acknowledge[d] that [applicant] ha[d] not been denied access entirely," its "access undeniably ha[d] been limited"); see also *Matthew Brian Proman*, Exchange Act Release No. 57740, 2008 WL 1902072, at *2 (Apr. 30, 2008) ("A denial of access involves a *denial or limitation* of the applicant's ability to utilize one of the fundamentally important services offered by the SRO." (emphasis added and internal quotation omitted)).

⁷³ Exchange Act Release No. 49076, 57 SEC 265, 2004 WL 67566, at *2 (Jan. 14, 2004).

⁷⁴ See Order Accepting Jurisdiction, Establishing Procedures, and Ordering Briefs, *Cincinnati Stock Exch.*, Exchange Act Release No. 43316, 54 SEC 857, 2000 WL 1363274, at *3 (Sept. 21, 2000) (finding that "charging fees to [CSE] specialists is a limitation on access to the CTA's services"); *Institutional Networks Corp.*, Exchange Act Release No. 20874, 1984 WL 472209, at *6 (Apr. 17, 1984) (finding that "fees for access to NASDAQ services are a limitation on access within the terms of the statute"), *aff'd sub nom.*, *NASD v. SEC*, 801 F.2d 1415, 1419 (D.C. Cir. 1986) (holding that "the Commission quite properly concluded in its April order that NASD's proposal constituted an improper prohibition or limitation of access to services"); *Bunker Ramo Corp.*, Exchange Act Release No. 15372, 1978 WL 171128, at *2 (Nov. 29, 1978) (finding "that the imposition of an access fee can be a limitation upon access to a service offered by an exclusive processor," but determining that, under the circumstances, "imposition of some form of an access fee" was permissible).

⁷⁵ Compare Exchange Act Section 11A(c)(5)(A) (requiring notice "[i]f any registered securities information processor prohibits or limits any person in respect of access to services offered" and authorizing review, on timely application "by any person aggrieved" of such action) with Sections 19(d)(1), (2) (requiring notice "[i]f any self-regulatory organization . . . prohibits or limits any person in respect to access to services offered" and authorizing review, on timely application "by any person aggrieved" of such action).

constitute a reviewable limitation on access. Rather, at least three important considerations restrict what fees might constitute reviewable limitations under Section 19(d).

First, SIFMA still must establish that its members are subject to an actual limitation of access. Although SIFMA's general counsel submitted a declaration that identifies certain SIFMA members who purchase ArcaBook, standing alone this is insufficient for us to conclude that there has been a limitation of access. And SIFMA provides no such information with respect to the depth-of-book product at issue in the '51 Proceeding. SIFMA should present, at a minimum, member declarations, or other comparable evidence, establishing that particular SIFMA members purchase the depth-of-book products and explaining that those members are aggrieved because the level of the prices charged for those products is so high as to be outside a reasonable range of fees under the Exchange Act.⁷⁶ We find that a law judge should receive this evidence in the first instance.

Second, an applicant cannot object to an SRO fee simply because it believes that it is too high. Rather, an applicant must assert a basis that, if established, would lead the Commission to conclude that the fee violates Exchange Act Section 19(f).⁷⁷ This is evident from the text of Section 19(f), which sets out the exclusive bases to set aside a limitation of access to services following an application under Section 19(d),⁷⁸ and our Rules of Practice, which mandate that an application for review "identify the determination complained of and set forth in summary form a brief statement of the alleged errors in the determination and supporting reasons therefor."⁷⁹ For example, in *Bloomberg*, the applicant asserted (and the Commission ultimately found) that NYSE's enforcement of the restrictions at issue was not in accordance with NYSE's rules because they were not filed with the Commission as proposed exchange rules or approved by the Commission.⁸⁰

⁷⁶ Alternatively, SIFMA could present declarations from its members showing that they were unable to purchase depth-of-book products due to alleged supracompetitive pricing violating the Exchange Act. *Cf. Chamber of Commerce v. SEC*, 412 F.3d 133, 138 (D.C. Cir. 2005) (holding that petitioner suffered injury-in-fact because it could not purchase mutual funds that did not comply with challenged regulations).

⁷⁷ We note that SIFMA previously submitted extensive comments regarding the rule proposal in the '50 Proceeding explaining in detail its basis for challenging the ArcaBook fees as contrary to the Exchange Act. *See supra* note 45 and accompanying text.

⁷⁸ 15 U.S.C. § 78s (providing that if the Commission "does not make" any of the findings required by the section with respect to a challenged SRO prohibition or limitation of access to services or "finds that such [challenged] prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes" of the Exchange Act, it "shall set aside the [SRO] action").

⁷⁹ Rule of Practice 420(c), 17 C.F.R. § 201.420(c).

⁸⁰ 2004 WL 67566, at *3, *5.

Although we do not address the merits of SIFMA's legal or factual assertions, SIFMA plainly has alleged a basis in its Applications to conclude that the depth-of-book fees it challenges are contrary to the Exchange Act.⁸¹ SIFMA contends that those fees are "onerous" and "supracompetitive" and that the rules implementing the charges violate the Exchange Act because they are not "fair and reasonable,"⁸² and do not "provide for the equitable allocation of reasonable" fees among the persons using the SROs' facilities,⁸³ "promote just and equitable principles of trade,"⁸⁴ or "protect investors and the public interest."⁸⁵ Specifically, SIFMA relies in part on the D.C. Circuit's holdings in *NetCoalition I* and *II*⁸⁶ and contends, among other things, that the SROs have failed to provide sufficient evidence that they were subject to significant competitive forces in setting the fees as required by the Commission's market-based approach to the evaluation of fees for non-core market data.⁸⁷ Thus, SIFMA has appropriately articulated in its Applications a basis for concluding, if established by the evidence, that the depth-of-book fees should be set aside under Section 19(f).⁸⁸

Third, as we explained in *Morgan Stanley & Co.*, "[i]n those cases in which we have found a denial of access, an SRO had denied or limited the applicant's ability to utilize one of the fundamentally important services offered by the SRO," which "were not merely important to the applicant but were central to the function of the SRO."⁸⁹ NASDAQ argues that SIFMA has failed to plead compliance with the *Morgan Stanley* requirement in its Applications. We have

⁸¹ See *supra* notes 57 and 59 and accompanying text.

⁸² 15 U.S.C. § 78k-1(c)(1)(C)-(D); see also 17 C.F.R. § 242.603(a).

⁸³ Exchange Act Section 6(b)(4), 15 U.S.C. § 78f(b)(4).

⁸⁴ Exchange Act Section 6(b)(5), 15 U.S.C. § 78f(b)(5).

⁸⁵ *Id.*

⁸⁶ See *supra* text accompanying notes 55 and 56.

⁸⁷ 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,781 (explaining that the "market-based approach" requires consideration, among other things, of "whether the exchange was subject to significant competitive forces in setting the terms of its proposal for non-core data, including the level of any fees").

⁸⁸ We do not mean to suggest that, in requiring an applicant to articulate, as a preliminary matter, its theory of why a rule is invalid, the burden of proof has shifted to the applicant. See *supra* text accompanying note 77. Exchange Act Section 19(f) places the burden on an SRO to establish, among other things, that its challenged rule is "consistent with the purposes of" the Exchange Act. 15 U.S.C. § 78s(f). That burden remains with the SRO once a determination has been made that review is appropriate under Section 19(d).

⁸⁹ Exchange Act Release No. 39459, 53 SEC 379, 1997 WL 802072, at *3 (Dec. 17, 1997), cited in *Sky Capital LLC*, Exchange Act Release No. 55828, 2007 WL 1559228, at *4 (May 30, 2007).

not hesitated to dismiss applications for review that have failed to meet this standard.⁹⁰ But we need not look to the evidence submitted by SIFMA to determine its consistency with our governing standard because our precedent resolves this issue. In *Bloomberg*, we found the NYSE depth-of-book data services at issue to be within the scope of Section 19(d).⁹¹ Based on *Bloomberg*, we believe that ArcaBook and NASDAQ's depth-of-book products are also sufficiently important to meet the *Morgan Stanley* standard.⁹²

2. Sections 19(d) and (f) can be applied to the Applications.

We reject the SROs' generalized assertions that the Exchange Act Section 19 statutory scheme does not permit review of the Applications under Sections 19(d) and (f). NASDAQ argues that the Dodd-Frank amendments to Section 19 bar the Commission from considering Section 19(d) challenges to immediately effective rule changes because Congress intended the Section 19(b) rule suspension and consideration process to be the exclusive avenue of review for such rules. In the SROs' view, Congress expressly would have provided for our jurisdiction under Section 19(d) if it had intended Section 19(f) review of SRO fee rules to be available after Dodd-Frank.

We reach the opposite conclusion; *i.e.*, we find it compelling that nothing in the Dodd-Frank Act removed jurisdiction under Section 19(d) for challenges to fee rules at the enforcement stage.⁹³ Congress provided that rule changes involving fees charged to non-

⁹⁰ See, e.g., *Proman*, 2008 WL 1902072, at *2 (finding that relevant standard was not satisfied when Proman failed to identify any services "'central to the function of the SRO,' such as access to an exchange trading floor or registration as a market maker" to which he had been denied access); *Sky Capital*, 2007 WL 1559228, at *4 (finding that *Morgan Stanley* test was not met when applicant failed to show that NASD "Office of the Ombudsman provide[d] a 'fundamentally important service' that [wa]s central to the function of NASD"); *Morgan Stanley*, 1997 WL 802072, at *3 (finding that application for review did not allege a denial of access where applicant merely sought "relief from the automatic operation of [an SRO] prohibition, which its employee's actions triggered").

⁹¹ We separately have noted the increased value of depth-of-book order data to market participants following the "initiation of decimal trading in 2001." 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,780.

⁹² If the '50 Proceeding and portion of the '51 Proceeding that we consider herein did not involve depth-of-book data services, SIFMA would have needed to submit at least a member declaration or comparable evidence sufficient to meet the controlling standard. We do not address at this time, nor do we refer to a law judge to consider, whether jurisdiction exists over SIFMA's other fee rule challenges.

⁹³ Cf. *NetCoalition II*, 715 F.3d at 348 ("Although the Congress is authorized to preclude judicial review of agency action, . . . we assume that the Congress has not done so absent clear and convincing evidence of a contrary legislative intent." (internal citation and quotation omitted)).

members would become immediately effective on filing and further mandated a sixty-day period in which such filings could be suspended and rule consideration proceedings initiated under Section 19(b).⁹⁴ But the question here is not whether the challenged rule changes should have become effective. Rather, it is whether those rules are enforceable. Nothing in the relevant Dodd-Frank amendments removes our authority under Section 19(f) to find an SRO rule unenforceable because it is inconsistent with the Exchange Act.⁹⁵ As the D.C. Circuit recognized, even following Dodd-Frank, an immediately effective rule filing "may be enforced" by an SRO only "to the extent it is not inconsistent with" the Exchange Act and other applicable law.⁹⁶ But when we do not suspend an immediately effective SRO rule in the statutory sixty-day period, we have not made a decision to approve the rule or find it enforceable.⁹⁷ Indeed, because we have not initiated the statutory process to determine if the rule should be approved or disapproved, a proceeding under Section 19(d) is not the second proceeding to determine the enforceability of the rule, it is the first.⁹⁸ On a sufficient application, Section 19(f) still requires us to determine (in the first instance) if a "prohibition or limitation is in accordance with the rules of the [SRO]," and whether such rules are "consistent with the purposes of" the Exchange Act and thus enforceable.⁹⁹

⁹⁴ Exchange Act Section 19(b)(3)(A), 15 U.S.C. § 78s(b)(3)(A). Congress also made other changes to the rule approval procedures that were expected to "encourage the SEC to employ a more transparent and rapid process for consideration of rule changes." S. Rep. No. 111-176, at 106 (2010), *available at* <http://www.gpo.gov/fdsys/pkg/CRPT-111srpt176/pdf/CRPT-111srpt176.pdf> (last visited April 8, 2014). These changes do not directly affect the rules challenged here because the Commission never suspended them and initiated approval proceedings.

⁹⁵ *Cf. id.* (explaining that "[n]othing in" the relevant Dodd-Frank amendments to Exchange Act Section 19 "diminishes the SEC's authority," among other things, to "disapprove a rule that is not consistent with the Exchange Act").

⁹⁶ Exchange Act Section 19(b)(3)(C), 15 U.S.C. § 78s(b)(3)(C), *cited in NetCoalition II*, 715 F.3d at 352.

⁹⁷ Exchange Act Section 19(b)(3)(C) provides that we "summarily *may* temporarily suspend" an immediately effective rule change within sixty days of its filing; it does not compel such an action under any circumstances. 15 U.S.C. § 78s(b)(3)(C) (emphasis added). If we suspend a rule change, that suspension initiates a formal process to determine whether the rule should be approved or disapproved. And if we do not suspend a rule change, we need not explain why.

⁹⁸ *Cf. Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting) ("Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner.").

⁹⁹ Exchange Act Section 19(f), 15 U.S.C. § 78s(f). Congress also left in place our ability to modify SRO rules through notice and comment rulemaking under Exchange Act Section 19(c).

We also reject NASDAQ's argument that review is not appropriate because the Section 19(d) and (f) statutory scheme is ill-suited to address immediately effective rule filings. NASDAQ asserts that when an SRO sets a fee it will not know if the parties paying the fee will view it as excessive. For this reason, NASDAQ asserts, the SRO will be unable to determine whether it needs to provide notice to the Commission pursuant to Exchange Act Section 19(d)(1) that the fee constitutes a prohibition or limitation on access to services. But such uncertainty and potential failure to file do not determine whether an application under Section 19(d) is valid, since we have held that "the failure of an SRO to file the required notice does not prevent Commission review."¹⁰⁰ Moreover, parties and the Commission receive notice of the content and basis of immediately effective fee rules when they are filed with the Commission pursuant to Section 19(b).

NASDAQ also argues that there is no "record before the [SROs]" that can be reviewed under Section 19(f). But this argument essentially ignores that, for each challenged fee, the SROs prepared and submitted to the Commission Form 19b-4 filings providing the basis for the fee. These filings, and the subsequent responses to them, effectively provide a record as contemplated by Section 19(f). Moreover, under the plain language of Section 19(f) and our rules, we have the discretion to expand the record beyond that before the SRO (as we discuss further below).¹⁰¹

In addition, NASDAQ's assertion that there is "no mechanism under Section 19(d) or 19(f) for the Commission to alter allegedly unreasonable fees" is inapposite. SIFMA has asked us to vacate the challenged rules as improper limitations on access to services, not to set new fees for those services.¹⁰²

Finally, we reject NASDAQ's assertion that the legislative history of the 1975 amendments to the Exchange Act establishes that Section 19(d)(2) is limited to "quasi-adjudicatory" SRO actions and that review is inappropriate here because there is no such predicate action. The phrase "quasi-adjudicatory action" appears nowhere in the text of Section 19, or, indeed, anywhere else in the Exchange Act. We have never found that Section 19(d) is limited to quasi-adjudicatory actions and decline to do so now. And to the extent that we

¹⁰⁰ *MFS Sec. Corp.*, Exchange Act Release No. 47626, 56 SEC 380, 2003 WL 1751581, at *6 n.13 (Apr. 3, 2003) (citing *William J. Higgins*, Exchange Act Release No. 24429, 48 SEC 713, 1987 WL 757509, at *5 n.29 (May 6, 1987)), *aff'd*, 380 F.3d 611 (2d Cir. 2004).

¹⁰¹ 15 U.S.C. § 78s(f) (providing that a hearing "*may* consist solely of consideration of the record before the [SRO] and opportunity for the presentation of supporting reasons" for dismissal or action by the parties (emphasis added)); Rule of Practice 452, 17 C.F.R. § 201.452 ("Upon its own motion . . . , the Commission may allow the submission of additional evidence.").

¹⁰² Exchange Act Section 19(f), 15 U.S.C. § 78s(f) (requiring Commission on sufficient showing to "set aside the [challenged SRO] action" and to "require [SRO] to . . . grant . . . access to services" at issue).

previously have cited the legislative history NASDAQ identifies to construe the scope of Section 19(d), we have relied on that history to construe the statute expansively, not to limit its reach.¹⁰³

3. The Proceedings will not be dismissed as untimely.

We also decline the SROs' invitation to dismiss the Proceedings as untimely. Given that SIFMA filed the Applications within 30 days of the decision in *NetCoalition II*, we find there are "extraordinary circumstances" sufficient to extend the application filing deadline under Rule 420(b) of our Rules of Practice.¹⁰⁴

B. The '50 Proceeding is referred to an administrative law judge.

Given the factors discussed above, we find it appropriate to refer the '50 Proceeding (consolidated with a portion of the '51 Proceeding as discussed below) to an administrative law judge for additional record development and proceedings consistent with this order. On our own motion, we may "refer [a] proceeding to a hearing officer for the taking of additional evidence."¹⁰⁵ Our Rules of Practice also provide us the flexibility to "direct, in a particular proceeding, that an alternative procedure shall apply or that compliance with an otherwise applicable rule is unnecessary," based on our determination that "to do so would serve the interests of justice and not result in prejudice to the parties to the proceeding."¹⁰⁶ In similar contexts, we have referred matters to an administrative law judge for development of the record and preparation of an initial decision.¹⁰⁷

¹⁰³ *Tower Trading*, Exchange Act Release No. 47537, 56 SEC 270, 2003 WL 1339179, at *3 (Mar. 19, 2003) ("Congress intended . . . Section 19(d), 'to encompass *all* final quasi-adjudicatory actions[.]'" (internal citation omitted and emphasis added)).

¹⁰⁴ 17 C.F.R. § 201.420(b); *see also MFS Sec.*, 2003 WL 1751581, at *3 & n.17 (accepting an untimely application for review where the "Court of Appeals . . . asked for the Commission's views as to whether" an SRO's actions comported with relevant law and the application "present[ed] novel facts and legal issues").

¹⁰⁵ Rule of Practice 452, 17 C.F.R. § 201.452. As noted above, we have statutory authority to consider an expanded record under Exchange Act Section 19(f). *See supra* note 101 and accompanying text.

¹⁰⁶ Rule of Practice 100(c), 17 C.F.R. § 201.100(c).

¹⁰⁷ Order Accepting Jurisdiction and Establishing Procedures, *Nasdaq Stock Mkt., LLC*, Exchange Act Release No. 55909, 2007 WL 1725775, at *1 (June 14, 2007) (designating an administrative law judge to preside over Nasdaq's claim that "fee [wa]s excessive and constitute[d] a denial of access"); Order Remanding Case to Administrative Law Judge for Issuance of Initial Decision Pursuant to Rule of Practice 360, *Nasdaq Stock Mkt., LLC*, Exchange Act Release No. 57741, 2008 WL 1902073, at *2 (Apr. 30, 2008) (ordering preparation of initial decision); *Cincinnati Stock Exch.*, 2000 WL 1363274, at *3, *4 (determining "that the record requires development in certain areas" and "to appoint an administrative law judge to preside

(continued...)

A number of factors support our decision to refer the consolidated '50 Proceeding to a law judge. Referral will give the law judge the opportunity to receive and address additional evidence bearing on the existence of jurisdiction and the substantive issues raised by the consolidated '50 Proceeding. Following a determination of jurisdiction, we direct the law judge to hold a hearing addressing whether the challenged rules should be vacated under the statutory standard set forth in Exchange Act Section 19(f) – as informed by the two-part test set out in our 2008 ArcaBook Approval Order,¹⁰⁸ the D.C. Circuit's decision in *NetCoalition I*,¹⁰⁹ and appropriate briefing from the parties – and after such a hearing to issue an initial decision in this matter.¹¹⁰

We believe it prudent for the law judge to consider a fully developed record given the focus of the D.C. Circuit on the state of the record in *NetCoalition I*.¹¹¹ We perceive no harm to the parties from allowing an expansion of the record. Had we suspended the challenged fee rules for further review under Section 19(b), our rules would have dictated that "all interested persons . . . be given an opportunity to submit written data, views, and arguments" concerning the fee proposal.¹¹² And an SRO effectively can supplement the record unilaterally by resubmitting an existing rule filing with additional supporting materials, subject to potential rule suspension for behavior inconsistent with the Exchange Act.¹¹³ Finally, because the substantive question concerns the current enforceability of the challenged fees, it is appropriate to consider relevant evidence not available at the time of the initial rule filings.

The administrative law judge shall have all the powers of a Hearing Officer under Rule of Practice 111, including the authority to regulate the scope, schedule, and course of the

(...continued)

over this proceeding" in proceeding challenging fees as impermissible prohibition or limitation of access).

¹⁰⁸ 73 Fed. Reg. at 74,781.

¹⁰⁹ *See supra* Section II.C.

¹¹⁰ We also invite any interested persons to address any of these issues through amicus briefing in a manner established by the law judge. To the extent that Rule of Practice 201 would appear to prohibit such participation, we waive such restrictions under Rule of Practice 100(c).

¹¹¹ We recognize that if the law judge were to find jurisdiction lacking under the principles identified in this order, then it would be unnecessary to prepare an initial decision.

¹¹² Rule of Practice 700(c)(1), 17 C.F.R. § 201.700(c)(1); *see also id.* § 201.700(d)(3) (providing that the record would include, among other things, "all written materials received from any interested parties on the proposed rule change, including the [SRO]").

¹¹³ Exchange Act Section 19(b)(3)(C) (providing that the Commission may suspend immediately effective rule filings within sixty days of filing if it appears "such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of" the Exchange Act).

proceeding, as well as the conduct of the parties and their counsel.¹¹⁴ The law judge, in the exercise of his or her discretion, may determine which of our Rules of Practice it is appropriate to apply to this proceeding, including whether and in what form to receive particular additional evidence or documents, and whether and what kind of additional proceedings may be appropriate.

C. The challenge to fees for NASDAQ's depth-of-book data products will be severed from the '51 Proceeding and consolidated with the '50 Proceeding.

We also determine to sever the challenge to the fees for NASDAQ's depth-of-book data products from the '51 Proceeding,¹¹⁵ and to consolidate it with the '50 Proceeding. Under our Rules of Practice, we may sever proceedings and order "proceedings involving a common question of law or fact" consolidated for hearing.¹¹⁶ These challenges share common legal and factual issues because they concern fees for similar depth-of-book services offered by competing exchanges. In contrast, we determine that it is not appropriate to consolidate for hearing at this time SIFMA's challenge to the pilot program for the Nasdaq Last Sale data product.¹¹⁷

D. Issuance of an order governing further proceedings in the '51 Proceeding will be withheld pending resolution of the '50 Proceeding.

We also determine that it is appropriate to withhold issuance of an order governing further proceedings in the remainder of the '51 Proceeding until after the resolution of the consolidated '50 Proceeding.¹¹⁸ SIFMA requests that we do this and no SRO objects.¹¹⁹ We find that there is good cause for our determination for the following reasons. Proceeding first with a limited group of rule challenges will provide an opportunity to address the common substantive legal issues that relate to all filings for the first time following *NetCoalition I*.¹²⁰ This will serve

¹¹⁴ 17 C.F.R. § 201.111.

¹¹⁵ *See supra* note 58.

¹¹⁶ Rule of Practice 201(a), (b), 17 C.F.R. § 201.201(a), (b).

¹¹⁷ Exchange Act Release No. 64856, File No. SR-NASDAQ-2011-092 (July 12, 2011). Based on our preliminary review, it appears this pilot program is dissimilar to the NYSE ArcaBook service in a number of material ways and, although NASDAQ requested that we proceed with the last sale challenge, NASDAQ has offered no basis to prefer it to the depth-of-book challenge.

¹¹⁸ We will also do so with respect to the additional applications SIFMA filed after the Proceedings. *See supra* note 2.

¹¹⁹ Although SIFMA requested that we hold the '51 Proceeding "in abeyance," unlike the D.C. Circuit, we have no such specific procedure under our Rules of Practice.

¹²⁰ *Cf. Order, David L. Arnold*, Exchange Act Release No. 37880, 1996 WL 647802, at *9 (Oct. 28, 1996) (postponing scheduled hearing as to one respondent in light of expected Supreme Court decision and noting that "extensive resources may be saved" thereby); *Basardh v. Gates*,

the interests of all parties and conserve resources, by focusing the issues in a single proceeding to those limited to depth-of-book products.¹²¹ Nor is there any prejudice to the parties.¹²² SIFMA – the party that challenges the fees on behalf of members who pay them – requests that we first proceed with the '50 Proceeding. We will allow all parties to assert their views in the '50 Proceeding, while reserving the ultimate resolution of the remaining rule challenges in the '51 Proceeding. And consolidating the challenge to NASDAQ depth-of-book data fees with the '50 Proceeding provides NASDAQ with the additional opportunity to directly participate in the resolution of the relevant issues.

IV.

Accordingly, IT IS ORDERED that the challenge to Nasdaq Stock Market LLC, Exchange Act Release No. 62907, File No. NASDAQ–2010–110 (Sept. 14, 2010) of the Securities Industry and Financial Markets Association in Administrative Proceeding File No. 3-15351 be, and hereby is, severed from that proceeding and consolidated with Administrative Proceeding File No. 3-15350; and it is further

ORDERED that Chief Administrative Law Judge Brenda P. Murray shall designate an administrative law judge to preside over the consolidated Administrative Proceeding File No. 3-15350 in accordance with this order.

By the Commission.

Lynn M. Powalski
Deputy Secretary

(...continued)

545 F.3d 1068, 1069 (D.C. Cir. 2008) (stating the court "often" has held petitions in abeyance when "other pending proceedings . . . may affect the outcome of the case"). Indeed, the D.C. Circuit previously held in abeyance several petitions for review pending the result in *NetCoalition II*.

¹²¹ See Rule of Practice 103(a), 17 C.F.R. § 201.103(a) (requiring that Rules "be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding").

¹²² See *supra* note 106 and accompanying text.