

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 84433 / October 16, 2018

In the Matter of the Applications of  
SECURITIES INDUSTRY AND FINANCIAL  
MARKETS ASSOCIATION

and

BLOOMBERG L.P.

For Review of Actions Taken by  
Various National Securities Exchanges and  
National Market System Plans in Their Role as  
Registered Securities Information Processors

ORDER

On October 16, 2018, the Commission issued its decision in *Securities Industry and Financial Markets Association* (the “SIFMA Decision”).<sup>1</sup> In that proceeding, the Securities Industry and Financial Markets Association (“SIFMA”) challenged under Section 19 of the Securities Exchange Act of 1934 (the “Exchange Act”) certain fees imposed by two national securities exchanges, NYSE Arca, Inc. and Nasdaq Stock Market LLC, as improper limitations or prohibitions of access to services offered by the exchanges. Our decision held that the exchanges failed to meet their burden of establishing that the challenged fees were consistent with the purposes of the Exchange Act, and accordingly set them aside.

While SIFMA’s challenge to those fees was before us, SIFMA and Bloomberg L.P. filed an additional 61 applications for review that challenged over 400 rule changes filed by national securities exchanges and plan amendments filed by National Market System (“NMS”) plan participants as improper limitations or prohibitions of access under Exchange Act Sections 11A and 19.<sup>2</sup> These applications for review remained pending while we considered the SIFMA challenges that resulted in the SIFMA Decision.

<sup>1</sup> Exchange Act Release No. 84432 (October 16, 2018), *available at* <https://www.sec.gov/litigation/opinions/2018/34-84432.pdf>

<sup>2</sup> See 15 U.S.C. §§ 78k-1, 78s. A rule challenge from one of those applications was considered as part of the SIFMA Decision. See Exhibit A.

## **Remand of Challenges to Exchanges' Rule Changes**

We now deem it appropriate to remand to the respective exchanges the challenges to the rule changes that are the subject of the other applications for review that have been filed. We express no view regarding the merits of the parties' challenges to the rule changes. We also note that this order does not set aside the challenged rule changes.

We remand these challenges to the respective exchanges so that they can consider the impact of the SIFMA Decision, as well as SIFMA's and Bloomberg's contentions that the challenged rule changes should be set aside under Exchange Act Section 19. Upon remand, the exchanges shall develop or identify fair procedures for assessing the challenged rule changes as potential denials or limitations of access to services, as required under Exchange Act Section 6(b)(7).<sup>3</sup> We direct the exchanges to footnotes 68-69 and 109 of the SIFMA Decision and accompanying text, which reference the exchanges' legal obligation to provide notice and an opportunity to be heard to those involved, to develop a record, and to "explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review."<sup>4</sup>

Each exchange shall provide written notice to the Commission of the procedures that it has developed or identified that comply with Exchange Act Section 6(b)(7) and that are tailored to the challenges brought by SIFMA and Bloomberg. Each such notice shall be provided to the Commission within six months of the date of this order. The exchanges shall complete the process of applying the procedures to the challenged rule changes within one year from the date of this order, and further appeal to the Commission from the exchanges' actions may be taken as appropriate.

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<sup>3</sup> See 15 U.S.C. § 78f(b)(7) (providing that the rules of an exchange generally must "provide a fair procedure for . . . the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange"); see also Exchange Act Section 6(d)(2), 15 U.S.C. § 78f(d)(2) (requiring that "[i]n any proceeding by a national securities exchange to determine whether a person shall be . . . prohibited or limited with respect to access to services offered by the exchange . . . , the exchange shall notify such person of, and give him an opportunity to be heard upon, the specific grounds for . . . prohibition or limitation under consideration and keep a record"); *Int'l Power Grp., Ltd. ("IPWG")*, Exchange Act Release No. 66611, 2012 WL 892229, at \*8 (Mar. 15, 2012) (remanding "for development of the record . . . and for further consideration, pursuant to procedures that accord with the fairness requirements of [applicable provision] of the Exchange Act," and stating that clearing agency "should adopt procedures that accord with th[os]e fairness requirements"); *Atlantis Internet Grp. Corp.*, Exchange Act Release No. 75168, 2015 WL 3643461, at \*6 n.21 (June 12, 2015) ("[W]e reiterate our statement in *IPWG* that 'we believe that [the clearing agency] should adopt procedures that accord with the fairness requirements of [the Exchange Act], which may be applied uniformly in any future such issuer cases.'" (quoting *IPWG*, 2012 WL 892229, at \*8)).

<sup>4</sup> See SIFMA Decision at 14; see also, e.g., *Calvin David Fox*, Exchange Act Release No. 48731, 2003 WL 22467374, at \*3 (Oct. 31, 2003) (stating that the "Commission cannot properly complete its review function in this matter until the NYSE has provided the Commission with clarification and further explanation of the basis of its finding" subject to review).

### **Remand of Challenges to NMS Plan Amendments**

With respect to the challenges to NMS plan amendments (except as noted below), we remand those challenges to the plan participants so that they too can consider the impact of the SIFMA Decision on them, as well as SIFMA's and Bloomberg's contentions that the challenged plan amendments should be set aside under Exchange Act Sections 11A or 19. The participants may also consider the relevance of our stay order in *Bloomberg L.P.*<sup>5</sup> In particular, the plan participants shall develop or identify specific procedures and standards for assessing the challenged plan amendments as potential denials or limitations of access, as well as the method by which any disputes will be resolved, as required under Rule 608(a)(5) of Regulation NMS.<sup>6</sup> This order expresses no view regarding the merits of the parties' challenges to the plan amendments. Nor does it set the challenged plan amendments aside.

Each NMS plan, through its representatives, shall provide written notice to the Commission of the procedures and standards that they have developed or identified that comply with Regulation NMS and related rules and that are tailored to the challenges brought by SIFMA and Bloomberg. Each such notice shall be provided to the Commission within six months of the date of this order. The plan participants shall complete the process of applying the procedures to the challenged plan amendments within one year from the date of this order, and further appeal to the Commission from the plan participants' actions may be taken as appropriate.

Two challenges involve the same NMS plan amendments.<sup>7</sup> In these cases, the plans' administrator filed motions arguing that the challenges should be dismissed because the amendments were later withdrawn. Bloomberg and SIFMA did not oppose dismissal on that basis. We therefore find it appropriate to grant the motions and dismiss those proceedings.

Lastly, in two other proceedings Bloomberg and SIFMA challenged additional identical NMS plan amendments,<sup>8</sup> and the Commission stayed those amendments in response to Bloomberg's request for a stay.<sup>9</sup> The plans' administrator then filed with the Commission new amendments to "rescind the changes made . . . pursuant to" the challenged plan amendments and asserted that as a result the "stay order issued by the Commission . . . [is] now moot."<sup>10</sup> In a joint

<sup>5</sup> *Bloomberg L.P.*, Exchange Act Release No. 83755, 2018 WL 3640780 (July 31, 2018).

<sup>6</sup> See 17 C.F.R. § 242.608(a)(5) (providing that NMS plans "shall include . . . [t]he terms and conditions under which brokers, dealers, and/or self-regulatory organizations will be granted or denied access (including specific procedures and standards governing the granting or denial of access) . . . [and] [t]he method by which disputes arising in connection with the operation of the plan will be resolved").

<sup>7</sup> Admin. Proc. Nos. 3-17943 and 3-17951.

<sup>8</sup> Admin. Proc. Nos. 3-18314 and 3-18316.

<sup>9</sup> See *Bloomberg*, 2018 WL 3640780, at \*1.

<sup>10</sup> *Notice of Filing and Immediate Effectiveness of the Twenty-Fourth Charges Amendment to the Second Restatement of the CTA Plan and the Fifteenth Charges Amendment to the Restated CQ Plan*, Exchange Act Release No. 84194 (Sept. 18, 2018), 83 Fed. Reg. 48,356,

(continued . . .)

submission, Bloomberg and SIFMA stated that in light of the new amendments and communications between parties' counsel regarding those amendments, "Bloomberg and SIFMA agree with [the plans' administrator] that no further proceedings are necessary in this matter."<sup>11</sup> We construe Bloomberg and SIFMA's submission as a motion to withdraw their applications and dismiss proceedings. Given that the new amendments rescind the amendments that were the basis of their challenges, it is appropriate to grant their request and dismiss those proceedings as well.

\* \* \*

Accordingly, it is ORDERED that the challenges to rules and plan amendments made in the proceedings listed in Exhibit A are remanded to the respective exchanges and NMS plan participants for proceedings consistent with this order. It is further ORDERED that Administrative Proceeding Numbers 3-17943, 3-17951, 3-18314, and 3-18316 are dismissed.

By the Commission.

Brent J. Fields  
Secretary

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(continued . . .)

48,356 (Sept. 24, 2018), available at <https://www.gpo.gov/fdsys/pkg/FR-2018-09-24/pdf/2018-20661.pdf>.

<sup>11</sup> *Joint Submission of Bloomberg and SIFMA*, Admin. Proc. File Nos. 3-18314; 3-18316 (Aug. 31, 2018) at 1, available at <https://www.sec.gov/litigation/apdocuments/3-18314-event-9.pdf>.

## Exhibit A

Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-15351 (May 31, 2013)<sup>1</sup>  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-15364 (June 25, 2013)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-15394 (July 29, 2013)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-15600 (Oct. 31, 2013)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-15773 (Mar. 5, 2014)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-15774 (Mar. 5, 2014)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16006 (Aug. 6, 2014)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16188 (Oct. 3, 2014)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16204 (Oct. 20, 2014)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16220 (Oct. 29, 2014)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16320 (Dec. 16, 2014)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16330 (Jan. 9, 2015)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16356 (Jan. 23, 2015)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16423 (Mar. 6, 2015)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16490 (Apr. 13, 2015)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16526 (May 7, 2015)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16574 (June 3, 2015)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16685 (July 10, 2015)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16724 (Aug. 5, 2015)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16793 (Sept. 3, 2015)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16834 (Sept. 28, 2015)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16918 (Oct. 23, 2015)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16960 (Nov. 16, 2015)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17000 (Dec. 11, 2015)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17040 (Jan. 8, 2016)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17066 (Jan. 22, 2016)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17105 (Feb. 8, 2016)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17138 (Feb. 29, 2016)

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<sup>1</sup> One of the rule changes challenged by this filing was set aside by the SIFMA Decision. This order applies only to the remaining challenges.

Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17176 (Mar. 23, 2016)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17208 (Apr. 13, 2016)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17244 (May 9, 2016)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17331 (July 8, 2016)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17663 (Nov. 4, 2016)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17702 (Dec. 1, 2016)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17738 (Dec. 19, 2016)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17787 (Jan. 17, 2017)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17841 (Feb. 10, 2017)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17877 (Mar. 13, 2017)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18002 (May 26, 2017)  
Bloomberg, L.P., File No. 3-18010 (June 5, 2017)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18057 (June 30, 2017)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18094 (Aug. 1, 2017)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18144 (Aug. 29, 2017)  
Bloomberg, L.P., File No. 3-18145 (Aug. 29, 2017)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18248 (Oct. 10, 2017)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18286 (Nov. 17, 2017)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18310 (Dec. 13, 2017)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18313 (Dec. 14, 2017)  
Bloomberg, L.P., File No. 3-18315 (Dec. 14, 2017)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18345 (Jan. 19, 2018)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18362 (Feb. 6, 2018)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18365 (Feb. 9, 2018)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18383 (Feb. 28, 2018)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18441 (Apr. 19, 2018)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18525 (June 1, 2018)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18572 (July 5, 2018)  
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18680 (Aug. 24, 2018)