

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

In The Matter of:

The Application of SECURITIES INDUSTRY  
AND FINANCIAL MARKETS ASSOCIATION

For Review of Action Taken by NYSE Arca, Inc.

Admin. Proc. File No. 3-15360

**APPLICATION FOR AN ORDER SETTING ASIDE RULE CHANGE  
OF NYSE ARCA, INC. LIMITING ACCESS TO ITS SERVICES**

The Securities Industry Financial Markets Association (“SIFMA”) submits this application, pursuant to Sections 19(d) and 19(f) of the Securities Exchange Act of 1934 (the “Act”), for an order setting aside the *Proposed Rule Change by NYSE Arca, Inc. Relating to Fees for NYSE Arca Depth-of-Book Data*, Release No. 34-63291, File No. SR-NYSEArca-2010-97 (the “Rule Change”). The Rule Change limits the access of SIFMA’s members and their customers to market data made available by NYSE Arca, Inc. (the “Exchange”) and is inconsistent with the Act.

1. SIFMA is a trade association that represents certain securities firms, banks, and asset managers. Market data is integral to the business of SIFMA’s members and their customers.

2. On November 1, 2010, the Exchange filed the Rule Change, which purports to allow the Exchange to charge fees for the use of Arcabook, a depth-of-book data feed provided exclusively by the Exchange. The Rule Change became effective upon filing with the SEC.

3. Despite SIFMA’s comment letter and petition to suspend the Rule Change and institute proceedings to disapprove it under Section 19(b)(2)(B), the SEC did not act within the 60-day period provided in Section 19 of the Act.

4. SIFMA then petitioned for review in the Court of Appeals for the District of Columbia Circuit. On April 30, 2013, the Court dismissed the petition for lack of jurisdiction while “tak[ing] the Commission at its word . . . 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 our review” and reaffirming that *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir 2010), “remains a controlling statement of law as to what sections 6 and 11A of the Exchange Act require of SRO fees.”

5. The SEC should set aside the Rule Change because it constitutes a limitation on access to the Exchange's services for purposes of Section 19(d) and (f) by limiting access to critical market data for anyone unwilling or unable to pay the onerous, supracompetitive fees the Exchange is charging. Furthermore, the SEC should set aside the Rule Change under Sections 19(d) and (f) because SIFMA's members and their customers must pay fees that are not consistent with the Act. The Rule Change is not "fair and reasonable" and does not "provide for the equitable allocation of reasonable . . . fees . . . among . . . persons using [the Exchange's] facilities." Nor does the Rule Change "promote just and equitable principles of trade," or "protect investors and the public interest." In sum, the Rule Change is unenforceable under section 19(b)(3)(C) of the Act.

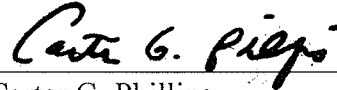
6. Under the SEC's "market-based" approach, market forces cannot provide a basis for finding that an exchange's non-core data fees are "fair and reasonable" unless the exchange is subject to significant competitive forces in setting the fees. The Exchange has offered no evidence of such competitive forces. The Exchange also has provided no evidence of the cost of collecting and distributing the data at issue, despite the D.C. Circuit's finding that such costs are undeniably relevant to whether the Exchange is charging supracompetitive fees. There is, therefore, no basis for finding that the Rule Change complies with the Act's "fair and reasonable," or other, requirements.

7. Finally, the Rule Change is essentially the very same one the Commission approved in the order vacated by the D.C. Circuit in *NetCoalition*, such that the Exchange continues to assess the very same fees that the D.C. Circuit in *NetCoalition* held were not established as "fair and reasonable" as required by the Exchange Act.

Dated: May 30, 2013

Respectfully submitted,

SIDLEY AUSTIN LLP



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**Rule of Practice 420(c) Statement:** Service upon the applicant may be accomplished by serving their attorneys at the address listed above.