

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 1921 /October 20, 2014

ADMINISTRATIVE PROCEEDING
FILE NO. 3-15350

In the Matter of the Application of

SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION

For Review of Actions Taken by
Self-Regulatory Organizations

ORDER ON THE ISSUES
OF JURISDICTION AND
SCHEDULING

On May 16, 2014, the Securities and Exchange Commission (Commission) issued an Order Establishing Procedures and Referring Applications for Review to Administrative Law Judge for Additional Proceedings. *Sec. Indus. & Fin. Mkts. Ass'n (Commission Order II)*, Exchange Act Release No. 72182, 2014 SEC LEXIS 1686. The twenty-two page Order covers several challenges filed pursuant to Section 19(d) of the Securities Exchange Act of 1934 (Exchange Act) to rule changes by self-regulatory organizations. The proceeding was assigned to me.

This proceeding involves a series of challenges made by the Securities Industry and Financial Markets Association (SIFMA), an association representing financial institutions and securities firms, against rule changes made by two self-regulatory organizations (SRO), NYSE Arca, Inc. (NYSE), and NASDAQ Stock Market LLC (NASDAQ). The rule changes concern fees charged for access to “non-core” data offered by the SROs, namely “depth-of-book” data.¹ Prior to a rule change by some SROs in 2006, financial institutions obtained the depth-of-book data at no charge. The issues underlying this proceeding have already been the subject of several Commission orders and two D.C. Circuit Court of Appeals decisions. *See* Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data (*Commission Order I*), 73 Fed. Reg. 74770 (Dec. 9, 2008); *Commission Order II*;

¹ “Non-core” data differs from “core” data, which includes information such as the best prices offered and bid for each security. *Commission Order II*, 2014 SEC LEXIS 1686, at *4. SROs are required to make “core” data available, but are not required to make “non-core” data available. *Id.* Depth-of-book data “consists of outstanding limit orders to buy stocks at prices lower than, or to sell stocks at prices higher than, the best prices” on a respective exchange. *NetCoalition I*, 615 F.3d at 529-30 (internal footnote omitted).

NetCoalition v. SEC (NetCoalition I), 615 F.3d 525 (D.C. Cir. 2010); *NetCoalition v. SEC (NetCoalition II)*, 715 F.3d 342 (D.C. Cir. 2013).

In *Commission Order II*, the Commission instructed that I first make a “determination of jurisdiction” before holding a hearing on the merits. 2014 SEC LEXIS 1686, at *52. The Commission determined that SIFMA may pursue an application for review under Exchange Act Section 19(d)(2) if, among other requirements, it “established the requisite jurisdictional elements” showing that it had associational standing to proceed in this matter as a “person aggrieved” under Section 19(d)(2) by SRO action identified in Section 19(d)(1). *Id.* at *25-26. The Commission laid out several tests to determine whether SIFMA has associational jurisdiction, which are discussed at length below. *Id.* at *26-42.

I conducted a telephonic prehearing conference on June 23, 2014, and I established a briefing schedule on the jurisdictional question. *SIFMA*, Admin. Proc. Rulings Release No. 1564, 2014 SEC LEXIS 2299 (June 27, 2014).

Issue

The immediate issue is whether SIFMA has standing as a “person aggrieved” under Exchange Act Section 19(d)(2) to challenge rule changes filed with the Commission by NYSE and NASDAQ. The rule changes at issue allow the SROs to charge for “non-core” depth-of-book data. *Commission Order II*, 2014 SEC LEXIS 1686, at *3-6, *15-22.

Pending before me presently are briefs on the jurisdictional question whether SIFMA has associational standing to challenge the rule changes as a “person aggrieved” under Section 19(d)(2), and a request filed on September 8, 2014, by NYSE, for oral argument in support of the briefing on the jurisdictional question.

Summary of Arguments and Procedural Background

SIFMA’s Brief

SIFMA’s brief, filed July 29, 2014, has nine exhibits consisting of declarations from SIFMA members Bank of America; Bloomberg L.P.; Citigroup Global Markets Inc.; Credit Suisse Securities (USA) LLC; Goldman, Sachs & Co.; JP Morgan Chase & Co.; Liquidnet, Inc.; Charles Schwab & Co., Inc.; and Wells Fargo & Company (collectively, SIFMA Declarations and SIFMA Declarants).

SIFMA represents that in May 2006, NYSE proposed a rule change which would allow it to charge a fee for access to its depth-of-book data, which it previously had made available at no cost. SIFMA Brief at 2. Under the existing law at the time, the rule change could not take effect unless the Commission gave its approval after finding that the rule was consistent with the Exchange Act. *Id.* The Commission approved the proposed rule, however, the D.C. Circuit vacated the Commission order, finding that the Commission did not adequately explain the basis of its approval and that its economic justification for approving the rule was not supported by substantial evidence. *See NetCoalition I*, 615 F.3d at 528, 537-44.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), effective in July 2010, allowed exchanges to implement new rules that were immediately effective upon filing with the Commission, subject to the Commission's authority to temporarily suspend those rules within sixty days of filing. SIFMA Brief at 3-4; *see* Pub. L. 111-203, Title IX, §§ 4, 916(c), 124 Stat. 1376, 1835 (July 21, 2010) (codified at 12 U.S.C. § 5301, note on effective and applicability provisions; 15 U.S.C. § 78s(b)(3)(A), (C)). According to SIFMA, NYSE and NASDAQ took advantage of this new regime by filing two proposed new rules regarding depth-of-book fees that, in the case of the proposed NYSE rule, was essentially identical to the rule vacated in *NetCoalition I*, and in the case of both rules, invoked the same economic justifications rejected by *NetCoalition I*. SIFMA Brief at 3-4. The Commission declined to suspend either rule. *Id.* at 4.

SIFMA and another party petitioned the D.C. Circuit to review the Commission's refusal to suspend NYSE's and NASDAQ's proposed new rules. The court held that Dodd-Frank precluded judicial review of a rule change at the filing stage, but stated "we take 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." *NetCoalition II*, 715 F.3d at 353. Following the D.C. Circuit's decision, SIFMA filed a series of applications requesting that the Commission set aside these rule changes, some of which were eventually consolidated into this proceeding. SIFMA Brief at 5; *Commission Order II*, 2014 SEC LEXIS 1686, at *1, *50.

On the issue of jurisdiction, SIFMA argues that it plainly has associational standing to challenge the rule changes. SIFMA Brief at 7. According to SIFMA, the Commission established a three factor test to determine whether SIFMA has associational standing as a "person aggrieved" under Section 19(d)(2), and has already held that SIFMA satisfied two of the three factors, namely that (1) the interests it seeks to protect are germane to the organization's purpose and (2) neither the claim asserted nor the relief requested requires participation of individual members. *Id.* at 7-8.

With respect to the remaining factor, that "its members would otherwise have standing to sue in their own right," SIFMA argues that the Commission only requires SIFMA to show that "it represents identified members who are themselves persons aggrieved within the meaning of Section 19(d)(2)." *Id.* at 8 (internal quotation marks omitted). To make that showing, SIFMA must satisfy three conditions, namely that SIFMA (1) is asserting "a basis that, if established, would lead the Commission to conclude that the fee violates Exchange Action Section 19(f)"; (2) "the limitation must pertain to the applicant's ability to utilize one of the fundamentally important services offered by the SRO"; and (3) "SIFMA must establish that its members are subject to an actual limitation of access." *Id.* at 8-9 (internal quotation marks omitted). SIFMA contends that the Commission has already held that SIFMA has satisfied conditions (1) and (2), leaving only the third condition to be decided. *Id.*

According to SIFMA, the Commission has explained that SIFMA could establish the third condition by submitting "member declarations . . . 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.” *Id.* at 9 (internal quotation marks and alteration omitted). SIFMA contends that it has done just that by submitting the SIFMA Declarations, establishing that SIFMA members purchase the depth-of-book products and are aggrieved because each SIFMA Declarant has no way to access, use, and distribute the SROs’ depth-of-market data products other than to pay fees it believes are not fair and reasonable. *Id.* at 9-10. With the SIFMA Declarations, SIFMA argues that it has satisfied “the only jurisdictional condition” left open, and that it has established that it has associational standing to proceed as a “person aggrieved” under Section 19(d)(2). *Id.* at 10.

NYSE Brief in Opposition to SIFMA

NYSE’s Brief in Opposition (NYSE Opposition), filed on August 19, 2014, has as Exhibit 1, a transcript of the February 16, 2010, oral argument in *NetCoalition I* and the Declaration of Colin Clark, a senior vice president of NYSE Group, the parent company of NYSE (Clark Declaration). NYSE contends that SIFMA has not shown its members are “persons aggrieved” under Section 19(d)(2), and that therefore SIFMA does not have associational standing and its applications should be dismissed. NYSE Opposition at 20.

According to NYSE, its depth-of-book data, known as ArcaBook, is a proprietary depth-of-book product that provides lists of all “the bids and offers placed on the NYSE Arca exchange, including those outside the prevailing market price, on a real-time data feed.” *Id.* at 2. NYSE recites much of the background described by SIFMA, but disagrees with some of SIFMA’s factual assertions. NYSE asserts that the D.C. Circuit’s decision in *NetCoalition I* did not require the Commission to assess the proposed fees using a cost-based approach. *Id.* at 3-4. It notes that Dodd-Frank allows rules setting market data fees to take effect upon filing with the Commission, with the Commission having authority to suspend a rule “if it appears to the Commission that such action is necessary or appropriate to the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act.]” *Id.* at 4 (citing 15 U.S.C. § 78s(b)(3)(A), (C)) (alteration in original).

NYSE also claims that SIFMA is wrong that the 2010 NYSE rule change authorized essentially the same fees as those that had been vacated in *NetCoalition I*. *Id.* at 4. NYSE contends that the 2010 NYSE rule change is based on a new and different record that directly responds to the issues raised in *NetCoalition I*. *Id.* at 5.

NYSE argues that SIFMA has not satisfied what the Commission described as three important considerations whether the fees might constitute reviewable limitations under Section 19(d). *Id.* at 6-7. NYSE claims SIFMA was required, but failed, to provide evidence that its members are aggrieved, because the SIFMA Declarations do not *explain* why the ArcaBook fees are unreasonably high and how that confers “aggrieved person” status. *Id.* at 9-10. NYSE argues that the SIFMA Declarants should “have provided [me] with an explanation of why and how ‘the level of prices charged’ for ArcaBook results in that specific declarant being aggrieved.” *Id.* at 10. Instead, NYSE contends that the SIFMA Declarations do nothing more than assert each SIFMA Declarant is aggrieved “simply because it has to pay *something* for ArcaBook.” *Id.* According to NYSE, the SIFMA Declarations are therefore in direct conflict

with *NetCoalition I* and *Commission Order II*, both of which made clear that the mere existence of a fee is not itself a limitation on access. *Id.* at 11. Moreover, the SIFMA Declarations merely allege that the fees are unreasonable, but do not *show* that to be the case, which NYSE argues the Commission required. *Id.* at 12. NYSE also claims that the SIFMA Declarations contain nothing more than recitations that the prices are unfair, and such a recitation, made by SIFMA General Counsel Ira Hammerman (Hammerman Declaration), was already rejected by the Commission earlier in this proceeding. *Id.* at 8. Therefore, NYSE concludes that no SIFMA Declarant provided any evidence or made any specific assertions that it was aggrieved. *Id.* at 10-13.

NYSE also asserts that statements made by the SIFMA Declarants that they paid monthly fees to receive the depth-of-book data does not “establish” that each SIFMA member purchased the depth-of-book data at issue and that the SIFMA Declarants needed to provide more information about how it used the data to demonstrate that they were aggrieved. *Id.* at 13-18. NYSE contends such information is needed because it is “key to understanding whether any particular declarant might be aggrieved at all.” *Id.* at 15. For example, in June 2014, Bloomberg paid \$9,510 relating to ArcaBook data. *Id.* at 19; Clark Declaration at 2. Some \$4,000 of that amount was likely for profit-making activities and “Bloomberg re-vended ArcaBook data to 4,586 of Bloomberg’s customers through their Bloomberg terminals,” and received \$4,586 in direct customer billings. NYSE Opposition at 19. Overall and taking into account other alleged fees, NYSE estimates that in June 2014, Bloomberg earned at least \$1,086 more from sending ArcaBook data to its customers than it paid to access and redistribute ArcaBook data. *Id.*

NASDAQ Brief in Opposition to SIFMA

NASDAQ’s Brief in Opposition (NASDAQ Opposition), filed on August 19, 2014, has as Exhibit A, the Declaration of Jeannie Merritt, a vice president of NASDAQ OMX (Merritt Declaration). NASDAQ insists SIFMA needed to show that its members, due to the rule changes, were subject to “an actual limitation of access.” NASDAQ Opposition at 2 (internal quotation marks omitted). NASDAQ contends that the SIFMA Declarations fail to make this showing, merely containing assertions that the fees are too high, but not containing any of the required facts that establish the rule changes at issue actually limit any SIFMA member’s access to “NYSE Arca’s or Nasdaq’s data products” or that the prices charged as “unreasonably high.” *Id.* at 3-5. Instead, NASDAQ claims that SIFMA Declarations are “form declarations . . . without any accompanying substantiation or explanation of any kind.” *Id.* at 5. As a result, SIFMA “failed to ensure that its members were actually ‘aggrieved’ by the Nasdaq rule change at issue.” *Id.*

Furthermore, NASDAQ asserts that none of SIFMA’s nine declarants “paid higher fees as a result of the Nasdaq Rule Change – the fees that they paid to access Nasdaq’s depth-of-book data were either the same or lower following the Rule change.” *Id.*; Merritt Declaration ¶¶ 9-11. NASDAQ asserts that the SIFMA Declarants are among the largest and most profitable institutions in the industry and have posted near-record profits, and that each SIFMA Declarant was charged no more than \$6,750 per month under the fee provisions at issue, which did not increase as a result of the rule changes. NASDAQ Opposition at 6.

NASDAQ believes that, at a minimum, SIFMA needed to show that members who resold the data at issue have been limited in their ability to sell data and unable to pass on any purported cost increase to customers, and that members who used the data internally had to show that the rule change limited their use of the data. *Id.* NASDAQ, like NYSE, believes that SIFMA's quarrel is not with unreasonable fees, but with any fees whatsoever. *Id.* at 7. In NASDAQ's view, SIFMA has not shown that its members are subject to an actual limitation of access, so its applications should be dismissed for lack of jurisdiction. *Id.* at 7-8.

NASDAQ concedes that the Commission has found that SIFMA met two elements of the associational standing test, and that the remaining jurisdictional inquiry before me is whether SIFMA's members would otherwise have standing to sue in their own right. *Id.* at 8. However, NASDAQ now asserts that the SIFMA Declarations are so perfunctory and subjective, which the Commission "could not have anticipated," that SIFMA has failed to meet the element that "neither the claim asserted nor the relief requested requires the participation of individual members"; as a result, SIFMA's individual members are now required to participate in the proceeding. *Id.* at 10-11. NASDAQ also claims that SIFMA has not shown that its members suffered an injury-in-fact caused by the rule change and "must produce actual evidence, not mere allegations, of facts that support its standing." *Id.* at 9-10 (internal quotation marks omitted).

SIFMA's Reply Brief

In its Reply Brief, SIFMA argues that NYSE's and NASDAQ's positions in opposition are attempts to insulate their fees from Commission review. Reply Brief at 3. SIFMA maintains that NYSE and NASDAQ have conflated the issues of jurisdiction and the merits, and that it is not required to show that the fees at issue are unreasonable just to establish standing. *Id.* at 6.

SIFMA argues that the Commission has found that SIFMA has satisfied two of the three elements for associational standing and the third element referred to me was whether SIFMA "represents identified members who are themselves persons aggrieved." *Id.* at 3-4. SIFMA reiterates that as to that third element, the only question remaining is whether it represents members who "are subject to an actual limitation of access." *Id.* at 4. It quotes the Commission to support its position that it can show its members are subject to an actual limitation of access by producing member declarations to such effect. *Id.* SIFMA contends that it need only show at this stage that its members pay the challenged fees and explain that they are aggrieved because the fees are unreasonable under the Exchange Act. *Id.* SIFMA argues that the SIFMA Declarations established both these points because each declaration alleged both that the SIFMA member has paid the challenged fees and will continue to do so and that the SIFMA member believes that the prices are unreasonable under the Exchange Act for reasons explained in SIFMA's applications. *Id.* at 4-5. SIFMA therefore believes that it has made the requisite showing for jurisdiction. *Id.* at 5.

SIFMA takes issue with NASDAQ's contention that it is required to demonstrate at this stage of the proceeding that the prices charged for these products are unreasonable, arguing that that is the ultimate merits question to be determined. *Id.* at 6. SIFMA quotes the Commission as stating that Exchange Section 19(f) places the burden on the exchanges to establish, among other things, that a challenged rule is consistent with the purposes of the Exchange Act. *Id.* SIFMA

claims that as a matter of fundamental principle, standing is a “threshold inquiry that in no way depends on the merits of a case.” *Id.* (internal quotation marks omitted). SIFMA argues that “the most that can be required of SIFMA at this stage are sufficient *allegations* of unreasonable pricing, not *proof* of it.” *Id.* at 8.

SIFMA discounts three arguments raised by NYSE and NASDAQ. First, while NYSE and NASDAQ argue that SIFMA must provide evidence that the fees are unreasonable, SIFMA argues that the Commission only required SIFMA to *explain*, not *prove*, that its members are aggrieved because the fees are unreasonable. *Id.* at 9-11. Second, SIFMA contends that there is no basis for NYSE’s and NASDAQ’s purported concerns that the Commission will be inundated with baseless, unsubstantiated challenges to data fees as a result of this challenge, because other elements of the Commission’s standing test will weed out frivolous claims. *Id.* at 11-12. Third, SIFMA argues that NYSE’s contention that the Commission required proof establishing jurisdiction because it rejected the Hammerman Declaration has no merit, because the SIFMA Declarations eliminated each of the Commission’s objections against the previous declaration. *Id.* at 12-13.

SIFMA argues that it is beyond dispute that its members suffer a pecuniary loss by having to pay fees for the market data at issue. *Id.* at 14. It contends that the D.C. Circuit has twice held “that SIFMA members are injured by the challenged fees and that SIFMA is a person ‘aggrieved’ under the Act’s judicial review provision and has associational standing to sue on its members’ behalf.” *Id.* (citing *NetCoalition I*, 615 F.3d at 532-33; *NetCoalition II*, 715 F.3d at 347-48). As a result, SIFMA argues that NYSE and NASDAQ’s arguments that SIFMA should present additional evidence of injury are foreclosed by this authority. *Id.*

SIFMA argues that NYSE and NASDAQ’s arguments fail even absent this authority because: (1) an inquiry on standing is unrelated to the profitability of the person making the challenge; (2) it is settled that SIFMA’s claim does not require the participation of individual SIFMA members; (3) the pecuniary loss has to be identifiable, but it does not have to be substantial; (4) the SIFMA Declarations establish that SIFMA members pay monthly access and device fees for ArcaBook data; (5) SIFMA members pay NYSE Arca access and redistribution fees to provide ArcaBook data to their clients; and (6) the SIFMA Declarations contain sworn statements that SIFMA members pay the challenged NASDAQ fees. *Id.* at 14-18. Finally, SIFMA complains that its members pay NASDAQ fees, which “like the ones they replaced – are supracompetitive, insufficiently justified, and unenforceable under the Act.” *Id.* at 19.

Rulings

The findings and conclusions in this Order are based on the record. The parties’ filings and all documents and exhibits of record have been fully reviewed and carefully considered. All arguments and conclusions that are inconsistent with this Order have been considered and rejected.

I DENY NYSE’s request for oral argument because I disagree that SIFMA’s Reply Brief raises new substantive arguments that the opposing parties should be allowed to address.

I find that the Commission has jurisdiction to determine the merits of the SIFMA applications at issue. Section 19 of the Exchange Act, “Registration, Responsibilities, and Oversight of Self-Regulatory Organizations,” provides:

(d)(1) If any self-regulatory organization . . . prohibits or limits any person in respect to access to services offered by such organization . . . , the self-regulatory organization shall promptly file notice thereof with the appropriate regulatory agency

(d)(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine.

15 U.S.C. § 78s(d).

The Commission has decided that it has jurisdiction generally to consider challenges to SRO rules under Section 19(d), and that a three-part test is appropriate for assessing whether an association has standing to bring suit in place of individual members as a “person aggrieved” under Section 19(d)(2):

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.

Commission Order II, 2014 SEC LEXIS 1686, at *28-29 (internal quotation marks and colon omitted). The Commission has determined further that SIFMA has passed parts (b) and (c) of the three-part test for standing to file an application challenging a rule change by an SRO:

There is no question that . . . SIFMA seeks to protect interests that are germane to its purpose. 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.

Id. at *30 (internal footnote omitted).

The only part of the three-part test left to resolve is whether SIFMA members have standing to sue in their own right as a “person aggrieved.” To make this determination, the

Commission has set out three important considerations for what could constitute a reviewable limitation on access under Section 19(d):

First, SIFMA still must establish that its members are subject to an actual limitation of access. . . .

Second, . . . [SIFMA] must assert a basis that, if established, would lead the Commission to conclude that the fee violates Exchange Act Section 19(f). . . .

Third, . . . [the SRO must have] denied or limited the applicant's ability to use one of the fundamentally important services offered by the SRO

Id. at *35-36, *40 (internal quotation marks omitted). The Commission has found that SIFMA at this stage has satisfied parts two and three, holding that "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)," and that "ArcaBook and NASDAQ's depth-of-book products are also sufficiently important to meet the [fundamentally important] standard." *Id.* at *39-40.

Thus, the only issue to be resolved is whether SIFMA has established that its members are subject to an actual limitation of access, which the Commission told SIFMA it could do by presenting:

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.²

Id. at *35-36.

The question here is not whether SIFMA showed that the rules at issue have imposed unreasonably high fees, but whether it should have an opportunity to do so. The SIFMA Declarations establish that since September 2010, some SIFMA members have paid monthly fees in order to continue accessing, using, and distributing depth-of-book data, and these members explain that they are aggrieved because, as set forth in SIFMA's applications, the level of the prices charged is so high as to be outside a reasonable range of fees under the Exchange Act. Thus, SIFMA has provided a reasonable and persuasive response to what the Commission required it to show to establish associational standing in order to challenge the rules on behalf of its members.

² Alternatively, the Commission held that SIFMA could present member declarations showing they were unable to purchase depth-of-book products due to alleged supracompetitive pricing in violation of the Exchange Act. *Commission Order II*, 2014 SEC LEXIS 1686, at *36 n.76.

NYSE's and NASDAQ's arguments in opposition improperly conflate issues of jurisdiction with merits. For example, they demand that SIFMA show how much individual SIFMA members pay for depth-of-book data, how much they charge their customers for that data, how each SIFMA member uses that data, and whether those prices have increased with the onset of the new fees. *See* NYSE Opposition at 14-19; NASDAQ Opposition at 5-6. These issues may indeed have relevance in the ultimate disposition of this matter, but they clearly pertain to the merits, not jurisdiction. The same critique applies to NYSE's and NASDAQ's contentions that SIFMA must present evidence establishing that the fees are "unreasonable." *See* NYSE Opposition at 10-12; NASDAQ Opposition at 4-5. Establishing the reasonableness or unreasonableness of the fees is a merits issue and has no bearing on whether SIFMA has standing to pursue this case or whether the Commission has jurisdiction to hear it.

Also without merit are NYSE's and NASDAQ's arguments that the substance of the SIFMA Declarations were already rejected when the Commission rejected the Hammerman Declaration. The Commission, in rejecting the Hammerman Declaration, held that "standing alone [the Hammerman Declaration] is insufficient," but in that same paragraph described the type of declarations that *would* be sufficient, describing in effect, the SIFMA Declarations. *Commission Order II*, 2014 SEC LEXIS 1686, at *35-36. In conclusion, the Commission, in remanding this case to me, laid out a very specific set of factors for determining jurisdiction. I find that SIFMA has met these factors.

Scheduling Order

The Commission directed me to hold a hearing following a ruling on jurisdiction that will address "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 [*Commission Order I*], the D.C. Circuit's decision in *NetCoalition I*, and appropriate briefing from the parties" *Commission Order II*, 2014 SEC LEXIS 1686, at *52 (internal footnotes omitted). To accomplish this directive, I ORDER the following:

- December 22, 2014: NYSE and NASDAQ shall provide SIFMA with a list of their witnesses, copies of exhibits, and any written expert testimony;
- January 12, 2015: SIFMA shall provide NYSE and NASDAQ with a list of its witnesses, copies of exhibits, and any written expert testimony;
- January 19, 2015: Prehearing briefs shall be filed; and
- February 2, 2015: Hearing shall begin at 9:30 a.m. at the Securities and Exchange Commission, Hearing Room 2, 100 F Street, N.E., Washington, D.C. 20549.

NYSE and NASDAQ are limited to six witnesses total and SIFMA is limited to four witnesses. Expert witness reports and prehearing briefs shall be no longer than 30 pages with

two attachments. Care and some degree of expedition is needed in this proceeding lest it resemble Dickens's *Jarndyce v. Jarndyce*, or worse yet, from the Commission's perspective, *Checkosky v. SEC*, 139 F.3d 221 (D.C. Cir. 1998).

Brenda P. Murray
Chief Administrative Law Judge