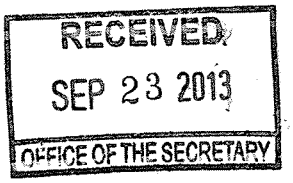
UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



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. 3-15350

REPLY BRIEF OF APPLICANT SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION REGARDING PROCEDURES TO BE ADOPTED IN PROCEEDINGS

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In its initial brief, Applicant Securities Industry and Financial Markets Association ("SIFMA") explained that the applications in Admin. Proc. File Nos. 3-15350 and 3-15351 can be resolved through straightforward proceedings to determine whether the fees imposed by the rule changes challenged in these actions limit access to the services of various exchanges in a manner inconsistent with the Securities Exchange Act of 1934 (the "Act") and applicable regulations. Although the exchanges that submitted briefs (collectively, the "Exchanges")[1] generally agree with SIFMA on the procedures to be followed, they contend that the Commission should (1) impose threshold barriers to review that have no basis in—and in fact conflict with—the Act, and (2) apply a standard of review created out of whole cloth. These contentions are meritless.

I. There Is No Threshold Barrier To Deciding Whether The Fee Rule Changes Comply With The Act And Applicable Regulations.

As SIFMA explained, the rule changes at issue in these proceedings are subject to challenge under § 19(d) of the Act because they limit access to market data by requiring payment of unreasonable fees as a precondition to access, and §§ 19(d) and (f) require the Commission to set aside those limitations unless it finds that the fees are consistent with all applicable statutory and regulatory requirements, including the requirement that they be "fair and reasonable." SIFMA Br. 5-7; *see* 15 U.S.C. §§ 78k-1(c)(1)(C), 78s(d), (f). The Exchanges attempt to insulate themselves from this review by arguing that (1) their fee rule changes are unreviewable under § 19(d) because they are not "denials of access"; (2) SIFMA lacks standing to challenge the fee rule changes because it is not a "person aggrieved" by these actions; and (3) SIFMA's applications are untimely. NYSE Br. 1-8; Nasdaq Br. 6-14. These arguments are inconsistent with the Act and would require the Commission to contravene commitments it made to the D.C. Circuit.

[1] New York Stock Exchange LLC, NYSE Arca, Inc., and NYSE MKT LLC (collectively, "NYSE") submitted a brief in Nos. 3-15350 and 3-15351 ("NYSE Br."). The Nasdaq Stock Market LLC, NASDAQ OMX PHLX LLC, and EDGX Exchange, Inc. (collectively, "Nasdaq") submitted a brief in No. 3-15351 ("Nasdaq Br.").

A. The Fee Rule Changes Limit Access To Services.

The fee rule changes are squarely within the scope of actions subject to challenge under § 19(d). By its terms, § 19(d) applies to "[a]ny action" by a self-regulatory organization ("SRO") that "prohibits or limits ... access to services offered by" the SRO. 15 U.S.C. § 78s(d)(1), (2). Each of the challenged rule changes fits unambiguously within this definition because it is (1) an "action" by an SRO that (2) "limits ... access" to market data "offered by" the SRO by allowing only those who have paid the requisite, unjustified fees to access the data.

In arguing that the fee rule changes are not subject to challenge under § 19(d), the Exchanges ignore the statute's unambiguous language. Without citing any authority, NYSE contends that it does not limit access to its market data products because it allows access by "any party who wishes to purchase those market data products in exchange for the fees" at issue in these proceedings. NYSE Br. 3. But it is well-established that an SRO that imposes unjustified limitations as a condition to access "limits" access within the meaning of § 19(d), regardless of whether persons choose to comply with the limits rather than forgo access. *See In re Bloomberg*, Exchange Act Rel. No. 34-49076, 2004 WL 67566, at *2 (Jan. 14, 2004) (exchange's refusal to provide access to data unless recipient agreed to limitations on use "effected a denial of access to ... services" once the exchange actually imposed the limitations). Thus, even if the language were ambiguous, the Commission already has construed it to encompass precisely this kind of claim, foreclosing the Exchanges' argument. Here, both NYSE and Nasdaq concede that they have collected the challenged fees from SIFMA's members as a condition of access. NYSE Br. 3; Nasdaq Br. 3. By conditioning access on the payment of a monopolistic fee, and by collecting that fee, the Exchanges have "effected a denial of access." *Bloomberg*, 2004 WL 67566, at *2.[2]

[2] NYSE attempts to distinguish *Bloomberg* because the action challenged there violated the exchange's own rules. NYSE Br. 3 n.6. But an exchange's action may be set aside if, *inter alia*, it

Nasdaq argues more broadly that a fee rule change can never be challenged under § 19(d) because that section is reserved for challenges to "quasi-adjudicatory" actions in which an SRO has made an individualized determination. Nasdaq Br. 7-10. Thus, in Nasdaq's view, the procedures set forth in §§ 19(b) and (c) provide the *sole* mechanisms by which an immediately effective fee rule change may be reviewed, and a party aggrieved by the fee rule change has no administrative or judicial mechanism by which to challenge it. *See id.* at 9-10.[3]

The Commission, of course, already rejected this position when it explicitly represented to the D.C. Circuit that § 19(d) "provides a means by which it may be determined whether a fee that becomes effective upon filing is consistent with applicable law." Final Brief of Respondent Securities and Exchange Commission at 45, *NetCoalition II* ("SEC Br."). *See also id.* at 46 ("Judicial review of a Commission order in a denial of service proceeding permits a court to consider directly whether a fee is consistent with the Act."). Nasdaq identifies no reasoned basis for the Commission to change its position. To the contrary, Nasdaq's position that the Commission cannot directly review an exchange's imposition and enforcement of a fee rule is flatly inconsistent with § 19(b)(3)(C), which provides that such a rule change "may be enforced" only "to the extent it is not inconsistent with" the Act. 15 U.S.C. § 78s(b)(3)(C). In enacting this provision, Congress necessarily intended the Commission to review fee rule changes directly at the enforcement stage; otherwise, there would be no mechanism to review SRO actions for compliance.

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violates its own rules *or* is inconsistent with the Act. *See* 15 U.S.C. § 78s(f); *see also* SIFMA Br. 5-6. Where, as here, an immediately effective rule change imposes unreasonable fees pursuant to an immediately effective rule change, its action is inconsistent with the Act, 15 U.S.C. § 78k-1(c)(1)(C), and the rule purporting to allow the fees is unenforceable, *id.* § 78s(b)(3)(C) (fee rule enforceable only if "not inconsistent" with Act).

[3] Section 19(b) authorizes the Commission to temporarily suspend and review an immediately effective rule change, but the Commission's decision not to do so has been held not subject to judicial review. *NetCoalition v. SEC* (*NetCoalition II*), 715 F.3d 342, 353 (D.C. Cir. 2013). Section 19(c) authorizes the Commission to alter SRO rules "as [it] deems necessary," but provides no mechanism for a person aggrieved by the rule to initiate proceedings or seek review.

Nasdaq's remaining contentions are meritless. First, its argument that § 19(d) cannot be used to review an immediately effective rule change because the provision requires the SRO to notify the Commission when it limits access and to produce a record, Nasdaq Br. 10, is completely unfounded, given that an SRO proposing an immediately effective rule change must notify the Commission and produce a supporting record. *See* 15 U.S.C. § 78s(b)(1); 17 C.F.R. §§ 240.19b-4(b)(1), 249.819. Second, its suggestion that the Commission lacks authority to rewrite a fee rule or to allow discriminatory access, Nasdaq Br. 10-11, is a red herring because the Commission is being asked to set aside the fee rule changes altogether, not to rewrite them. Finally, its concern that § 19(d) review would undermine Congress's supposed intent to "streamline the procedures governing the introduction of new market data products," *id.* at 11, is purely imaginary: Because fee rule changes take effect immediately and remain effective throughout the pendency of § 19(d) review, there is no risk that such proceedings would affect the speed with which new products—or new fees—might be brought to market. Review under § 19(d) merely ensures that the statute's intent to protect consumers from fee-gouging is fulfilled.

B. SIFMA Is a "Person Aggrieved" By The Challenged Access Limits.

SIFMA plainly has standing to initiate these proceedings. To bring an application under § 19(d), an applicant need only be a "person aggrieved" by the challenged action. 15 U.S.C. § 78s(d)(2). As the Exchanges concede, many of SIFMA's members have been forced to pay the challenged fees in order to access market data products. *See* NYSE Br. 3; Nasdaq Br. 3; *see also* Declaration of Ira Hammerman ("Hammerman Decl.") ¶¶ 4-6 (Ex. A) (identifying individual members who paid fees challenged in Proceeding No. 3-15350).[4] These members have suffered

[4] SIFMA will provide information regarding which of its members pay the fees at issue in Proceeding No. 3-15351, as necessary, at such time as the Commission decides to move forward with that proceeding. *See* Hammerman Decl ¶ 7.

injuries-in-fact traceable to the Exchanges' actions and are therefore "aggrieved." *Chamber of Commerce v. SEC*, 412 F.3d 133, 138 (D.C. Cir. 2005). SIFMA has associational standing to initiate these proceedings on its members' behalf because (1) it has identifiable members with standing to proceed in their own right; (2) the proceeding is germane to SIFMA's purpose of promoting fair and orderly securities markets, *see* Hammerman Decl. ¶¶ 2-3; (3) participation by SIFMA's individual members is unnecessary because the validity of the fee rule changes does not turn on member-specific considerations; and (4) SIFMA's members who purchase the data products or would like to do so are within the zone of interests protected by the Act's requirement that the fees be, *inter alia*, fair and reasonable. *See Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 486-87 (D.C. Cir. 2007).

On this basis, the D.C. Circuit has already held that SIFMA is a "person aggrieved" by a fee rule change. In *NetCoalition v. SEC* (*NetCoalition I*), 615 F.3d 525 (D.C. Cir. 2010), SIFMA petitioned for review of the Commission's approval of a rule change essentially identical to the one at issue in Proceeding No. 3-15350. The D.C. Circuit held that SIFMA had standing because it was a "person aggrieved" within the meaning of the Act's judicial review provision. *Id.* at 532 (applying 15 U.S.C. § 78y(a)); *see* Brief of Petitioners at 18-20, *NetCoalition I* (explaining that SIFMA was "aggrieved" because its members' access was contingent on paying challenged fee). Because § 78s(d) uses the same "person aggrieved" standard, the D.C. Circuit's holding applies equally here. *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) ("'identical words used in different parts of the same act are intended to have the same meaning'").

The Exchanges make no attempt to distinguish *NetCoalition I*. Instead, they argue that SIFMA's members cannot be "aggrieved" unless they were unable to purchase the data products, NYSE Br. 6; were subject to adjudication, Nasdaq Br. 12; or lacked "reasonable market substi-

tutes" for the challenged product, *id.* But none of these supposed (and arbitrary) conditions is a requirement for finding a person to be "aggrieved." *NetCoalition I*, 615 F.3d at 532.

The Exchanges' arguments that SIFMA lacks associational standing are equally baseless. NYSE's unsupported assertion that the phrase "person aggrieved" should be interpreted to exclude associations, NYSE Br. 6-7, ignores the many cases in which associations have brought suit as persons "aggrieved" under § 78y(a). *See, e.g.*, *Fin. Planning Ass'n*, 482 F.3d at 486-87; *NetCoalition I*, 615 F.3d at 532. And the Exchanges' suggestions that these proceedings turn on member-specific considerations, NYSE Br. 6-7; Nasdaq Br. 12 n.4, are simply incorrect. Charging monopolistic fees for market data aggrieves all prospective purchasers, who must either pay an unlawful fee or forgo a desired product. *See Chamber of Commerce*, 412 F.3d at 138. The legality of the fees does not turn on any individual member's circumstances.

C. The Applications Are Timely.

The Exchanges' characterization of SIFMA's applications as untimely, NYSE Br. 7-8; Nasdaq Br. 13-14, is incorrect. Although an application generally must be brought within 30 days of notice to the Commission, 15 U.S.C. § 78s(d)(2), this requirement is far from absolute. An application may be brought "within such longer period as [the Commission] may determine," *id.*, and, as Nasdaq acknowledges (at 13-14), a longer period may be provided through equitable tolling or as otherwise warranted by "extraordinary circumstances." SEC Rule of Practice 420(b); *Young v. United States*, 535 U.S. 43, 49 (2002) ("limitations periods are customarily subject to equitable tolling unless tolling would be inconsistent with the text of the relevant statute" (internal citations and quotation marks omitted)). The Exchanges offer no argument as to why SIFMA's applications fall outside these exceptions. In fact, the applications fit well within them.

First, tolling is appropriate for the period during which the Commission's decision whether to temporarily suspend the rule change was still pending. Because the Commission has

60 days in which to suspend an immediately effective rule change and initiate review proceedings, 15 U.S.C. § 78s(b)(3)(C), requiring persons aggrieved by such rule changes to file §19(d) applications within 30 days would force such persons to initiate potentially duplicative proceedings at a time when the Commission is still considering whether to take other action to protect their rights. Equitable tolling is wholly appropriate under such circumstances. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553-54 (1974) (tolling appropriate to avoid the "needless duplication of motions" and to preserve "the efficiency and economy of litigation"); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1990) (characterizing such tolling as equitable). Here, suspension proceedings remained open through the pendency of SIFMA's appeals from the Commission's decisions not to suspend. *See NetCoalition II*, 715 F.3d 342. The order in those appeals issued on April 30, 2013, and SIFMA timely initiated these proceedings 30 days later.

Second, regardless of whether suspension proceedings toll the 30-day period as a general matter, tolling is appropriate under the circumstances of these proceedings. Equitable tolling is appropriate "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period." *Irwin*, 498 U.S. at 96. Here, SIFMA diligently pursued its rights by timely filing comments and petitioning the Commission for disapproval,[5] petitioning for review in the D.C. Circuit, and filing these applications upon conclusion of the appeal. In light of the fact that the statute had only just been amended to allow SROs to issue immediately effective fee rule changes, Pub. L. No. 111-203, 124 Stat. 1376 (2010), there was understandably considerable uncertainty regarding the proper mechanism for persons aggrieved by the changes to mount a challenge. Given this uncertainty, it would be inequitable to hold that SIFMA's dili-

[5] *See, e.g.*, SIFMA & NetCoalition, Comment Letter and Petition for Disapproval, File No. SR-NYSEArca-2010-97 (Dec. 8, 2010), *available at* http://www.sec.gov/comments/sr-nysearca-2010-97/nysearca201097-1.pdf (challenging rule change in 3-15351 within 30 days of the date (November 9, 2010) on which NYSE Arca, Inc. provided notice to the Commission).

gent and timely pursuit of administrative and judicial remedies under § 19(b), rather than immediately and precipitously commencing a proceeding under § 19(d), forecloses SIFMA from obtaining meaningful review of the challenged actions. *Cf. Irwin*, 498 U.S. at 96 & n.3 (equitable tolling applies when claimant timely seeks relief in wrong forum). This is particularly so because the Commission succeeded in obtaining dismissal of SIFMA's § 19(b) challenge in part by arguing that § 19(d) provides an effective path to review "[i]n this case." SEC Br. 45. *See NetCoalition II*, 715 F.3d at 347.

II. The Exchanges Bear The Burden Of Proving That Their Fee Rule Changes Are Consistent With The Act And Applicable Regulations.

As SIFMA explained, § 19(f) requires that the Commission "shall set aside" a challenged fee rule change *unless* it finds that, *inter alia*, the fee is consistent with the Act and applicable regulations. *See* SIFMA Br. 5-7; SEC Br. 45 (§ 19(f) "directs the Commission to require the SRO to grant access to the services unless it finds" the § 19(f) standard satisfied). An SRO therefore must affirmatively prove that its action satisfies the applicable statutory and regulatory requirements; if it fails to do so, the Commission "shall set aside" the action. 15 U.S.C. § 78s(f). Ignoring this language, the Exchanges argue that *SIFMA* bears the burden of proving that the fee rule changes *do not* satisfy the § 19(f) standard. NYSE Br. 8; Nasdaq Br. 14-19. This position has no basis in the text of the Act, and the Exchanges do not purport to identify any.

Instead, Nasdaq argues (at 15) that the Commission should construct an elaborate burden-shifting scheme to vindicate Congress's supposed "purpose" of facilitating "the introduction of new market data products," which—in Nasdaq's view—would be undermined if § 19(d) remained a viable means for an aggrieved person to challenge fee rule changes. As an initial matter, a supposed legislative purpose provides no basis for the Commission to ignore the unambiguous allocation of burdens in § 19(f). *See Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211-12

(1998) (legislative purpose "irrelevant" to "unambiguous statutory text"). In any event, Nasdaq is incorrect that § 19(d) review would burden the introduction of new products or otherwise interfere with § 19(b). Unlike § 19(b), which requires the Commission to decide whether to suspend a rule change pending further review, § 19(d) provides an enforcement-stage remedy for aggrieved persons that does not hamper the ability of an SRO to enforce its rule—or to collect fees—during the pendency of the proceeding. *See supra* p.4.

There is likewise no basis in the statute for the Commission to impose the other requirements that Nasdaq insists SIFMA must satisfy, such as demonstrating that (1) the fee is so "'prohibit[ively] expensive'" that it "actually *prevents* a significant segment of the market from accessing [the] product," and (2) "the product is critical to the ability to conduct business on the exchange." Nasdaq Br. 16, 19 (first alteration in original). Nasdaq cites no authority for the former, ignoring that § 19(d) applies to both prohibitions *and* limitations. With respect to the latter, Nasdaq relies exclusively on several cases in which the Commission has held that an SRO's denial of access to certain grievance procedures or extraordinary remedies were unreviewable under § 19(d) because they did not involve "'fundamentally important service[s].'"[6] But the rules at issue here affect the provision of market data, a service that is fundamental to the national market system. *See NetCoalition I*, 615 F.3d at 528-29. And, in any event, the Commission never suggested to the D.C. Circuit that there is any obstacle to § 19(d) review in this case.[7]

Finally, there is no merit to NYSE's contention (at 8-9) that the Commission's review

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[6] Nasdaq Br. 17; *see In re Application of Sky Capital*, Exchange Act Rel. No. 34-55828, 2007 WL 1559228, at *3-4 (May 30, 2007) (access to SRO Ombudsman not a protected "service"); *In re Application of Morgan Stanley*, Exchange Act Rel. No. 34-39459, 1997 WL 802072, at *3 (Dec. 17, 1997) (same for denial of requested exemption from disciplinary rule).

[7] Nasdaq also addresses (at 18) what it believes to be the appropriate standard for assessing the consistency of a fee with the Exchange Act. That question, of course, will be one of the primary issues on the merits. *See* SIFMA Br. 5-7.

under § 19(d) is somehow limited by its earlier decision not to suspend the rule change under § 19(b)(3)(C). The Commission never set forth its reasons for non-suspension and has taken the position that its suspension authority is permissive, such that it need not suspend a rule change even if the change is inconsistent with the Act. SEC Br. 35-41. Under these circumstances, a given non-suspension decision provides no basis for concluding that the Commission made a determination that would be "law of the case" for purposes of § 19(d).

III. Proceeding No. 3-15351 Should Be Held In Abeyance.

None of the Exchanges disagrees with SIFMA that most of the rule challenges in Proceeding No. 3-15351 should be held in abeyance pending resolution of Proceeding No. 3-15350. NYSE Br. 10, Nasdaq Br. 19. Nasdaq, however, asks (at 19) that the challenge to the rule change extending the pilot program for Nasdaq Last Sale, Rel. No. 34-64856, File No. SR-NASDAQ-2011-092, be allowed to proceed. As SIFMA explained (at 9-10), proceeding in this manner would be inefficient and unnecessary to protect Nasdaq's rights. To the extent the Commission decides to move forward with a challenge in Proceeding No. 3-15351, SIFMA requests that it do so with the challenge to Nasdaq Stock Market LLC Release No. 34-62907, File No. NASDAQ-2010-110, which—unlike the rule change identified by Nasdaq—involves fees for a depth-of-book data product, and thus would reduce the complexity inherent in handling factual variations.

IV. Further Record Development Is Unnecessary.

SIFMA agrees with the Exchanges that there is no need to develop the evidentiary record, and that the record consists of the materials already submitted pursuant to § 19(b)(1). SIFMA Br. 10-12; NYSE Br. 10-11; Nasdaq Br. 19-20.

CONCLUSION

For the foregoing reasons, SIFMA respectfully requests that the preliminary matters on which the Commission requested briefing be resolved in the manner set forth above.

Dated: September 20, 2013

Respectfully submitted,

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Exhibit A

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. 3-15350

DECLARATION OF IRA HAMMERMAN IN SUPPORT OF THE APPLICATIONS OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION FOR ORDERS SETTING ASIDE RULE CHANGES OF CERTAIN SELF-REGULATORY ORGANIZATIONS

I, Ira Hammerman, do declare as follows:

1. I am the Senior Managing Director and General Counsel for the Securities Industry and Financial Markets Association ("SIFMA"). I make this declaration upon my own personal knowledge.

2. SIFMA is an industry association that brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry.

3. SIFMA has nearly 100 standing committees and four professional Societies. In addition, task forces and subcommittees meet and evolve to address specific topical needs as they arise. Through these functions, thousands of industry participants gather to share their views and ensure their collective voice is heard by governing entities throughout the world.

4. On May 30, 2013, SIFMA filed applications for orders setting aside the rule changes of certain self-regulatory organizations that purport to impose fees for market data products. The Securities and Exchange Commission has assigned these applications administrative file numbers 3-15350 and 3-15351.

5. The rule change at issue in the 3-15350 proceeding is 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 ("NYSE Arca Rule Change"). This rule change imposes fees for access to depth-of-book data made available by the exchange.

6. In order to obtain access to depth-of-book data made available by NYSE Arca, members of SIFMA have paid fees imposed by the NYSE Arca Rule Change. The members who

have paid these fees include the following: Charles Schwab & Co.; Citigroup Global Markets Inc.; Credit Suisse; and Goldman Sachs.

7. The 3-15351 proceeding involves other fee rule changes by various exchanges or groups of exchanges. SIFMA has requested that the 3-15351 proceeding be held in abeyance pending the resolution of the 3-15350 proceeding involving the NYSE Arca Rule Change. SIFMA will provide information regarding which of its members pay the fees at issue in the 3-15351 proceeding, as necessary, at such time as the Commission decides to move forward with that proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 9/19/13

Ira Hammerman