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.

File No. 3-15350

RESPONSE OF NYSE ARCA, INC. TO BRIEF OF APPLICANT SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN RESPONSE TO ORDER REGARDING PROCEDURES TO BE ADOPTED IN PROCEEDINGS

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NYSE Arca, Inc. ("NYSE Arca") respectfully submits this memorandum in response to the Brief of Applicant Securities Industry and Financial Markets Association in Response to the Order Regarding Procedures to be Adopted in Proceedings (the "SIFMA Brief") in the above-captioned application for review (the "Application") filed by the Securities Industry and Financial Markets Association ("SIFMA") with the Securities and Exchange Commission (the "Commission").

The SIFMA Brief largely fails to address the key questions raised by the Application and, in so doing, acknowledges that there has been no denial of access and that SIFMA is not a person aggrieved by any action by NYSE Arca.

I. SIFMA Attempts To Reargue *NetCoalition I* But Does Not Explain How It Has Been Denied Access or How It Is a Person Aggrieved

Because SIFMA does not purchase and has not sought to purchase any of the NYSE Arca's market data products approved by the rule filing covered by the Application, it is not surprising that the SIFMA Brief devotes exactly two (substantively identical) sentences to whether there has been a denial of access and who might be aggrieved by it had there been one, the *sine qua nons* for a denial of access petition.[1]

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[1] SIFMA Brief at 1 ("any party who does not pay these newly imposed fees—including SIFMA members and their customers—will be unable to access the market data made available by the Exchanges"); *see also id.* at 4 ("These applications request that the Commission set aside the rule changes *because they limit the access of SIFMA's members and their customers* to market data made available by the Exchanges … .") (emphasis added). Not only does this confirm that SIFMA does not use or seek to purchase the proprietary market data products at issue and thus cannot be "aggrieved" by rules setting prices for them, it makes SIFMA's standing even more tenuous because SIFMA is seeking to represent its members' customers, even further removed than SIFMA's members themselves. SIFMA makes no effort to explain how it could represent the interests of entities who deal at arm's length (and sometimes adversely) with SIFMA's members.

Instead, SIFMA tries to reargue *NetCoalition I* and recycle the arguments made in its prior request for the Commission to suspend pursuant to Section 19(b)(3)(C),[2] thus confirming that SIFMA has not pleaded, and cannot show, any denial of access or aggrieved person status as required by Section 19(d). SIFMA's brief confirms that SIFMA is trying to bring a Section 19(b)(3)(C) appeal under the guise of a Section 19(d) denial of access petition, but does not even attempt to fit within Section 19(d)'s distinct statutory framework (because it cannot do so). The Commission should not permit SIFMA to attempt to force the "round peg" of a Section 19(b)(3)(C) appeal into the "square hole" of a Section 19(d) denial of access proceeding.

As the SIFMA Brief makes clear, the situation is even worse with respect to standing: Even though certain SIFMA members purchase proprietary market data products from NYSE Arca, none of those members (or, even more distantly removed, their customers) has claimed to have been denied access to anything. SIFMA does not dispute that NYSE Arca has provided and been willing to provide access to all relevant market data products to anyone who wishes to purchase them in exchange for the fees NYSE Arca is permitted to charge for each

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[2] In recycling its Section 19(b)(3)(C) arguments, SIFMA mischaracterizes the ArcaBook rule filing. Although the fee schedule may be the same as the one the Commission previously approved, the rule filing is not "the same ... as the one[] the Commission approved in the order vacated in *NetCoalition I.*" SIFMA Brief at 2-3. SIFMA's contention ignores the sole holding in *NetCoalition I* — that the Commission "on th[at] record" did not support its conclusion or explain the basis for its approval. *NetCoalition v. S.E.C. (NetCoalition I)*, 615 F. 3d 525, 544 (D.C. Cir. 2010). Based upon that holding, the D.C. Circuit remanded so that the Commission could better explain the basis for its approval. The current ArcaBook rule filing is supported by a different and much larger record. It was on this record that the Commission determined not to suspend the current ArcaBook filing under Section 19(b)(3)(C) and implicitly determined that the filing was consistent with the Exchange Act. SIFMA also misstates the holding of *NetCoalition I* by suggesting that it requires a cost-based approach. To the contrary, the D.C. Circuit held that the Commission's prior interpretation that a market-based approach to evaluating whether non-core data fees are "fair and reasonable" is permissible. *NetCoalition I*, 615 F. 3d at 535; *see NetCoalition v. S.E.C. (NetCoalition II)*, 715 F.3d 342, 354 (D.C. Cir. 2013).

such product.[3] Thus, NYSE Arca has not denied access to anyone and SIFMA is not a person aggrieved by any denial of access. That alone requires dismissal of the application.

II. SIFMA Does Not Correctly State the Standard of Review

The critical fact for determining the correct standard of review for a rule such as the one SIFMA seeks to challenge is that the Commission has reviewed the rule pursuant to Section 19(b)(3)(C) and decided not to suspend it. Assuming, *arguendo*, that the mere existence of a market data fee rule in these circumstances can be deemed a denial of access and that SIFMA could be deemed aggrieved by such a rule even if it does not use such market data itself, the correct statement of the standard of review here requires applying Section 19(f) to a rule that took effect pursuant to Section 19(b)(3)(C). Section 19(b)(3)(C) is broader than Section 19(f): Section 19(b)(3)(C) allows the Commission to suspend a rule if doing so "is necessary or appropriate" for either the public interest or in furtherance of the Act, whereas Section 19(f) requires a petitioner to show that (a) the specific grounds on which the alleged denial is based do not exist in fact; (b) an SRO violated its own rules; (c) an SRO applied a rule in a manner inconsistent with the purposes of the Exchange Act; or (d) an SRO imposed an unnecessary or inappropriate burden on competition.[4] Thus, even if SIFMA could show a denial of access and that it was "aggrieved" by such denial, it would have to plead and prove that the rule filing at issue satisfied one or more of (a), (b), (c) or (d) given that the Commission had already decided not to suspend that rule.[5] For example, SIFMA would have to explain how the Commission

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3 NYSE Arca, Inc's Response to the Commission's Order Regarding Preliminary Matters (the "NYSE Brief") at 1-7.

4 NYSE Brief at 9.

5 Although Section 19(b)(3)(C) did not require the Commission to take specific steps in reviewing the rules SIFMA purports to challenge and did not require the Commission to explain its basis for not suspending any particular rule, by declining to suspend the rules, the Commission *did decide* not to suspend those rules.

could now find that a filing imposed an unnecessary or inappropriate burden on competition where the Commission did not believe it was necessary or appropriate to suspend that rule for the public interest or in furtherance of the Exchange Act.

Of course, determining that there were no denials of access and SIFMA is not an aggrieved person would negate any need to address how the standard of review should be applied when the Commission had an opportunity to but did not suspend a proprietary market data rule change.

III. SIFMA Bears the Burden of Showing That Any Action Resulting In a Purported Denial of Access Should Be Set Aside

SIFMA argues that the issue to be decided here is "whether, absent evidence regarding the cost of producing the market data, there is a sufficient basis for finding the fees to be fair and reasonable based on the alleged existence of competition." SIFMA Brief at 6. That puts the cart before the horse and assumes there has been a denial of access and that SIFMA was aggrieved by it, neither of which SIFMA has attempted to show. Both of those are predicates to addressing the merits of any application like this. SIFMA bears the burden of pleading and proving that it satisfies both, and both require evidence that would not be in the record regarding the rule filing at issue. And even if the Commission were to find that NYSE Arca denied access to SIFMA and thus that SIFMA was a person aggrieved, SIFMA would still need to show that the Commission should set aside the action because (1) the specific grounds on which such action was based do not exist in fact; (2) such action was not taken in accordance with the rules of the SRO as approved by the Commission (or subject to an exception to such approval); (3) such rules were not applied in a manner that is consistent with the purposes of the Act; or (4) the

rules impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[6]

Critically, the Commission has already found no basis to suspend the rules at issue under Section 19(b)(3)(C) despite SIFMA raising precisely the issues it now tries to recycle. That fact necessarily constrains the scope of review for denial of access. As shown in the NYSE Brief, SIFMA would have to show the existence of a flaw not covered by Section 19(b)(3)(C), because the necessary conclusion from the lack of suspension of the rules here is that there was no basis for the Commission to suspend under Section 19(b)(3)(C).[7] SIFMA bears the burden on each of these issues.

CONCLUSION

NYSE Arca respectfully submits that SIFMA has not adequately addressed the threshold issues that this Application presents, and thus the Application should be dismissed as a matter of law.

Dated: September 20, 2013

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6 15 U.S.C. § 78s(f); *see also Fog Cutter Capital Grp. Inc. v. S.E.C.*, 474 F.3d 822, 825 (D.C. Cir. 2007).

7 NYSE Brief at 8-9.