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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 Certain Self-Regulatory Organizations

Admin. Proc. File No. 3-15350

The Honorable Brenda P. Murray
Chief Administrative Law Judge

BRIEF OF THE NASDAQ STOCK MARKET LLC IN RESPONSE TO SIFMA'S OPENING BRIEF REGARDING SATISFACTION OF JURISDICTIONAL REQUIREMENTS

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August 18, 2014

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INTRODUCTION

The Nasdaq Stock Market LLC ("Nasdaq") respectfully submits that the nine *pro forma* declarations provided by the Securities Industry and Financial Markets Association ("SIFMA"), which state only that the members paid the fees in question and subjectively believe in the legal conclusion that the fees violate the Securities Exchange Act of 1934, do not constitute evidence satisfying SIFMA's burden to "establish that its members are subject to an actual limitation of access." Order Establishing Procedures and Referring Applications for Review to Administrative Law Judge for Additional Proceedings, Exchange Act Release No. 34-72182, Admin. Proc. File Nos. 3-15350 & 3-15351 (May 16, 2014) ("Order") at 14. Nor has SIFMA submitted any evidence specific to the fees in question, contrary to the Commission's requirement that SIFMA establish "[f]or each challenged fee" that a self-regulatory organization ("SRO") has "'prohibit[ed] or limit[ed]' SIFMA members 'in respect to access to services' at issue." *Id.* at 12 (citation omitted). Accordingly, SIFMA has failed to submit evidence establishing that its members are aggrieved by an actual limitation of access, that its members have suffered an injury-in-fact caused by the challenged rule changes, or that this case can proceed without the participation of SIFMA's members. In the absence of adequate declarations, those jurisdictional shortcomings can be remedied at this stage only by SIFMA making its members available for depositions and other discovery, or by forgoing associational standing altogether through an action initiated in the name of SIFMA's individual members, who would then be required to establish standing in their own right. On the current record, however, SIFMA lacks associational standing to pursue this action under Section 19(d) of the Exchange Act and its application should be dismissed for lack of jurisdiction.

I. SIFMA Must Establish That The Rule Changes Actually Limit Members' Access To SRO Services.

In the initial stage of this proceeding, SIFMA must establish that it has standing to challenge two rule changes (out of the thirty-seven rule changes SIFMA has challenged in total) on behalf of its members. As the Commission explained in its Order governing this proceeding, "whether SIFMA is a person aggrieved" and therefore has standing to challenge the rule changes "turns on whether it represents identified members who are themselves persons aggrieved within the meaning of Section 19(d)(2)." Order at 12. To make this showing, SIFMA must establish "[f]or each challenged fee" that "an SRO ha[s] 'prohibit[ed] or limit[ed]' SIFMA members 'in respect to access to services' at issue." *Id.* (citation omitted).

While SIFMA need not "establish a complete prohibition of access," the Commission emphasized that "an applicant must still be subject to an SRO action that actually *limits* its access to SRO services." *Id.* at 13 (emphasis in original). Furthermore, while "certain fees" may constitute reviewable prohibitions or limitations on access, "not every fee charged by an SRO will constitute a reviewable limitation on access." *Id.* at 13-14.[1]

Accordingly, the Commission concluded that "SIFMA . . . must establish that its members are subject to an actual limitation of access." *Id.* at 14. In addition, the Commission held that a declaration from SIFMA's general counsel "that identifies certain SIFMA members who purchase ArcaBook" was "insufficient . . . to conclude that there has been a limitation of access." *Id.* Instead, the Commission explained, "SIFMA should present, at a minimum, member declarations, or other comparable evidence, establishing that particular SIFMA

[1] Nasdaq believes that the appropriate standard is even higher than described in the Commission's Order, and that SRO fee rules may not properly be challenged under Section 19(d). Nasdaq recognizes that this Tribunal is bound by the determinations in the Order, however, and therefore reserves those issues for any appeal.

members purchase the depth-of-book products and explaining that those members are aggrieved because the level of prices charged for those products is so high as to be outside a reasonable range of fees under the Exchange Act." *Id.*

Finally, the Commission directed this Tribunal to "receive and address additional evidence bearing on the existence of jurisdiction," and to make a determination as to the existence of jurisdiction before holding a hearing on whether the challenged rules should be vacated under Section 19(f). *Id.* at 20.

II. SIFMA'S *Pro Forma* Declarations Fail To Establish That The Rule Changes In Question Actually Limit Members' Access To The Services.

In response to the Commission's Order, SIFMA submitted nine virtually identical declarations that contain no facts establishing that the rule changes at issue here actually limited any SIFMA member's access to NYSE Arca's or Nasdaq's data products. Instead, the declarations merely assert – with a robotic repetition – that (1) the member pays a fee for the products at issue, *see* Brief of Applicant Securities Industry and Financial Markets Association Regarding Satisfaction of Jurisdictional Requirements (July 29, 2014) ("SIFMA Br.") Exs. 1-9 at ¶¶ 5-8, and (2) the member "believes that the level of the prices charged for the depth-of-book data products at issue is so high as to be outside a reasonable range of fees under the Securities Exchange Act of 1934," *id.* Exs. 1-5, 7-9 at ¶ 9; *see also id.* Ex. 6 at ¶ 8.

First, the paragraphs stating that the members pay the fees at issue are plainly insufficient to establish SIFMA's standing. As the Commission explained, "not every fee charged by an SRO will constitute a reviewable limitation on access." Order at 13-14. Equally insufficient are the paragraphs stating that the products are only available to the members if they pay the fees (¶ 7), or that the members expend money paying the fees that they would not have to pay in the absence of the fees (¶ 8) – those are simply alternative ways of stating that the members paid fees

for the products in question. Indeed, as SIFMA acknowledges in its brief, all parties before the Commission agreed that SIFMA members "pay the challenged fees in order to access the relevant market data products." SIFMA Br. at 6. Nonetheless, the Commission referred the matter to this Tribunal for a determination as to jurisdiction, demonstrating that the purchase of the products alone is insufficient to satisfy the jurisdictional prerequisites. Likewise, the Commission held that the declaration from SIFMA's general counsel identifying "certain SIFMA members who purchase ArcaBook" is "insufficient for [it] to conclude that there has been a limitation of access." Order at 14.

Second, the paragraph in each declaration stating that the member "believes" that the fees at issue are "so high as to be outside a reasonable range of fees under the Securities Exchange Act of 1934" merely states a subjective belief in a legal conclusion – it is not evidence at all. *See, e.g.*, *NetCoalition v. SEC*, 615 F.3d 525, 541 (D.C. Cir. 2010) (reasoning that "self-serving views" provide "little support" for a proposed conclusion and rejecting a statement deemed to be "a conclusion, not evidence"). As the Commission explained in the Order, "an applicant cannot object to an SRO fee simply because it believes that it is too high." Order at 14. And yet SIFMA has submitted nothing more in support of its standing than what the Commission has already held is insufficient.

Furthermore, SIFMA has submitted no evidence that *explains* why the fees at issue here are so high as to be outside a reasonable range of fees, which clearly fails the test set forth by the Commission. *Id.* at 14 (requiring SIFMA to submit declarations "explaining that those members are aggrieved because the level of prices charged for those products is so high as to be outside a reasonable range of fees"). Likewise, SIFMA's generic declarations – which contain no evidence at all specific to the fees in question – fail to satisfy the requirement that it present

evidence "[f]or each challenged fee" (*id.* at 12), as opposed to a generic complaint that any fee is too high. *See id.* at 13-14 ("not every fee charged by an SRO will constitute a reviewable limitation on access"). In short, the Commission did not require a thorough initial inquiry into jurisdiction so that SIFMA could simply offer form declarations stating, without any accompanying substantiation or explanation of any kind, that its members hold a "belief" that the Commission already knew they held. The jurisdictional inquiry envisioned by the Commission – and by this Tribunal, which provided over two months for jurisdictional briefing and set a thirty-five page limit for each brief – is not merely a matter of "checking the box."

Instead of submitting factual material demonstrating – on a non-conclusory basis – that the prices charged for the particular products at issue are unreasonably high, as required by the Commission, SIFMA would prefer to reflexively challenge *every* fee-related SRO rule change. But in its apparent haste to challenge every SRO fee filing, without regard to whether there may be an actual limitation of access, SIFMA failed to ensure that its members were actually "aggrieved" by the Nasdaq rule change at issue here ("the Nasdaq Rule Change"). *See* Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Rule 7019, Exchange Act Release No. 34-62907, File No. SR-NASDAQ-2010-110 (Sept. 14, 2010). In fact, as demonstrated in the attached declaration, *none* of the nine SIFMA members submitting declarations here actually 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. *See* Declaration in Support of Brief of Nasdaq Stock Market Regarding Proposed Rule Change To Modify Rule 7019 ("Declaration") at ¶¶ 9-11 (Ex. A).

Furthermore, the Declaration undermines any notion that the Nasdaq fees (independent of any change in the level of fees) are so high as to limit access to any Nasdaq product. To the

contrary, the financial institutions that submitted declarations as part of the SIFMA submission – which are among the largest and most profitable institutions in an industry posting near-record profits, *see, e.g.*, Robin Sidel & Saabira Chaudhuri, *U.S. Bank Profits Near Record Levels*, Wall St. J., Aug. 11, 2014, *available at* http://online.wsj.com/articles/u-s-banking-industry-profits-racing-to-near-record-levels-1407773976 – were each charged no more than $6,750 per month under the fee provisions at issue here, *see* Declaration at ¶ 10. Plainly, SIFMA must come forward with more than the declarations it has submitted to establish that fees of this level – *which did not increase at all as a result of the Rule Change* – constitute an "actual limitation of access" to its members. *See* Order at 14.

At minimum, for example, to establish standing the SIFMA members that resell the market data at issue here to their own customers must present evidence demonstrating that they have been limited in their ability to sell this data, such as by losing customers or profits due to the rule changes, and that they have not passed on any purportedly increased costs to customers. And the SIFMA members who use the data internally must present evidence demonstrating that they were limited in their ability to use this data as they otherwise would because of the rule changes. Without such a showing, it is impossible to ascertain whether SIFMA's members are themselves "aggrieved" by the fee filings.

SIFMA has presented no such evidence, and instead seeks to use the vehicle of associational standing to avoid making *any* showing that any member has actually been aggrieved. This is precisely the result that the Commission held to be unacceptable, it is why the Commission rejected the superficial declaration from SIFMA's general counsel, and it is why the Commission ordered that SIFMA come forward with evidence explaining the injuries purportedly suffered by its members. Given SIFMA's failure to present such evidence – via

more informative declarations or otherwise – this proceeding should not be permitted to go forward at all, and certainly not without the SIFMA members participating directly as parties without reliance on associational standing, or making their employees available for depositions and allowing other forms of discovery so that Nasdaq and this Tribunal may properly understand the members' asserted injury.

The reality, however, is that no SIFMA member has been limited or excluded in its access to any Nasdaq data product. SIFMA's indiscriminate challenge to the Nasdaq Rule Change – and to the other thirty-five fee filings not at issue in this proceeding – demonstrates that its quarrel is not with *unreasonable* fees, but with *any fees whatsoever* charged for SRO market data products. Under SIFMA's theory, which makes an asserted "belief" enough to trigger protracted adversarial proceedings, the Office of Administrative Law Judges can expect to be inundated with baseless, unsubstantiated challenges to data fees. Indeed, thirty-five such challenges are currently waiting in the wings, having been stayed pending the outcome of these current proceedings. Additional challenges would inevitably follow whenever any SRO sets or changes a price – even when the price is only a few thousand dollars and the rule change does not actually increase any member's price. SIFMA's approach flies in the face of the Commission's instruction that "not every fee challenged by an SRO will constitute a reviewable limitation on access," and demonstrates the necessity of requiring factual content, as opposed to subjective belief, explaining why SIFMA "members are aggrieved because the level of prices charged for those products is so high as to be outside a reasonable range of fees under the Exchange Act." *Id.* at 13-14.

Because SIFMA has failed to demonstrate that "its members are subject to an actual limitation of access," it has not established that it possesses associational standing to represent

members who are "aggrieved" under Section 19(d) of the Exchange Act. Its applications should therefore be dismissed for lack of jurisdiction.

III. SIFMA Also Lacks Associational Standing Because Its Members Have Not Suffered An Injury-In-Fact Caused By The Rule Changes And Would Be Required To Participate In This Proceeding.

In addition to failing to establish that its members were "aggrieved," as defined by the Commission's Order, SIFMA failed to demonstrate it meets two other requirements of associational standing: that its members have suffered an injury-in-fact caused by the rule changes at issue and that this proceeding does not require the participation of SIFMA's members.

In order to determine whether SIFMA possesses associational standing, the Commission concluded that "the following three-part test . . . 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.'" Order at 11 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Concluding that the second and third elements of this test were met, the Commission referred to this Tribunal the question whether SIFMA had met the first element: whether "its members would otherwise have standing to sue in their own right." *Id.* at 11, 20. As discussed above, the conclusory declarations of SIFMA's members fall far short of establishing that they have been "aggrieved" under Section 19(d) by an actual limitation of their access to the particular depth-of-book products at issue. In addition, those declarations fail to establish that SIFMA's members have suffered an injury-in-fact sufficient to enable them to bring suit in their own right. SIFMA's perfunctory approach to

standing – which the Commission could not have anticipated – also eliminates its ability to meet the third element of associational standing because, by relying exclusively on its members' subjective beliefs, SIFMA has necessitated the participation of those members in this proceeding.

A. SIFMA's Members Have Not Suffered An Injury-In-Fact Caused By The Challenged Fees.

Given the Commission's decision to use the associational standing test employed by the federal courts, this proceeding should also look to the federal courts' standing jurisprudence to evaluate SIFMA's associational standing. Indeed, SIFMA took that very approach in its brief before the Commission, where it relied on Article III case law in an effort to establish its standing. *See* Reply Brief of Applicant Securities Industry and Financial Markets Association Regarding Procedures To Be Adopted in Proceedings (Sept. 23, 2013) at 4-5 (citing *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005)).

Under Article III, SIFMA must prove three elements in order to demonstrate its members' standing: "(1) injury-in-fact, (2) causation, and (3) redressability." *Rainbow/PUSH Coal. v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003). SIFMA's brief does not satisfy this test.

In particular, SIFMA has failed to demonstrate that its members have suffered an injury-in-fact caused by the Rule Change. In order for standing to exist, "[t]he injury must be both 'concrete and particularized' and 'actual or imminent.'" *Id.* (citation omitted). The burden on SIFMA to demonstrate an injury is "'the same as that of a plaintiff moving for summary judgment in the district court'"; it must "produce actual evidence, not mere allegations, of facts that support its standing." *Id.* (citing *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002)); *see also id.* at 544 (rejecting "broad and conclusory assertions" as insufficient to establish injury); *id.* at 545 (noting that "bare allegations, unsupported by any evidence, obviously cannot establish" injury) (citing *Sierra Club*, 292 F.3d at 899); *id.* (holding that submitting "nothing

more than identical declarations" from its members asserting that they would be seriously aggrieved is insufficient to establish injury because plaintiff cannot "'rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts' in support of its claim of injury") (quoting *Sierra Club*, 292 F.3d at 899) (alteration in original).

SIFMA's conclusory member declarations fail to meet this burden because they contain "mere allegations" and provide no "actual evidence" of injury on the part of SIFMA's members. As explained above, the declarations merely assert – without any supporting factual content – that SIFMA members purchase the products and that they believe the level of prices charged for those products is unreasonably high. Such "identical declarations" setting out "bare allegations, unsupported by any evidence, obviously cannot establish" the injury-in-fact required to demonstrate standing. *Id.* at 545 (citing *Sierra Club*, 292 F.3d at 899). And here, "actual evidence" of injury is particularly important because, as discussed above, the Nasdaq Rule Change did not actually result in higher fees for any of the SIFMA members that submitted declarations. *See* Declaration at ¶¶ 9-11. Accordingly, SIFMA lacks associational standing because it has failed to satisfy this essential element of its standing.

B. By Relying Exclusively On Its Members' Subjective Beliefs To Establish Jurisdiction, SIFMA Has Necessitated The Participation Of Those Members In The Proceeding.

In addition to failing to establish an injury-in-fact caused by the challenged rule changes, SIFMA has eliminated its ability to meet the third element of the test for associational standing by relying exclusively on its members' subjective beliefs to demonstrate jurisdiction. The third element of the associational standing test mandates that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Order at 11 (citing *Hunt*, 432 U.S. at 343). The Commission concluded that this prong was satisfied, determining that "SIFMA's arguments do not turn on the identity of the particular member paying the depth-

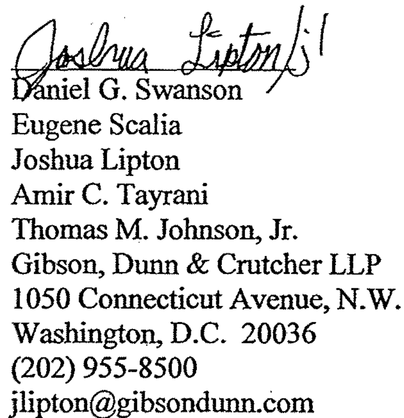
of-book fees." *Id.* at 12. The Commission could not have anticipated, however, that SIFMA's only evidence in support of its members' standing to sue in their own right would be their own subjective beliefs. By relying solely on those subjective beliefs to demonstrate jurisdiction, instead of providing factual content, SIFMA necessarily injects into this proceeding the question of what its members believe and why – which is an inquiry that requires the participation of individual members. SIFMA has submitted no evidence indicating that the members themselves are similarly situated, or that the analysis relating to these two different products is identical. For example, if one of the SIFMA members resells the market data products to its customers for a profit, it would be necessary for that customer to explain why it believes the fees it pays are unreasonably high when it charges an even higher price to its customers for the very same data. On the other hand, if another SIFMA member derives value from the data products it purchases in other ways, the analysis of why that member believes the fee is unreasonably high is likely to be different. Given these differences, there is likely wide variance in the subjective beliefs of individual members as to why the fees are supposedly unreasonably high. Because SIFMA has relied solely on these members' subjective beliefs in support of its standing arguments, SIFMA's approach necessarily requires those members' participation in this proceeding, which defeats the third element of the associational standing test.

CONCLUSION

SIFMA's conclusory brief and declarations fail to establish that its members are "person[s] aggrieved" by an actual limitation under Section 19(d) of the Exchange Act and the Commission's Order. Moreover, SIFMA provided no evidence that any member suffered an injury-in-fact caused by the rule changes at issue, and its reliance on the subjective beliefs of its members to establish standing requires their participation in this proceeding. Accordingly,

SIFMA has failed to establish that it possesses associational standing, and its applications should be dismissed for lack of jurisdiction.

Respectfully submitted,



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Dated: August 18, 2014

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	Admin. Proc. File No. 3-15350
For Review of Action Taken by Certain Self-Regulatory Organizations	The Honorable Brenda P. Murray Chief Administrative Law Judge

DECLARATION IN SUPPORT OF BRIEF OF NASDAQ STOCK MARKET REGARDING PROPOSED RULE CHANGE TO MODIFY RULE 7019

I, Jeannie Merritt, on behalf of and in my capacity as a Vice President of NASDAQ OMX, do declare as follows:

1. I am a Vice President at NASDAQ OMX. I make this declaration, on behalf of and in my capacity as a Vice President of NASDAQ OMX, based upon my best knowledge and belief.

2. NASDAQ OMX is a financial services corporation that owns The Nasdaq Stock Market LLC ("Nasdaq"), which is a self-regulatory organization registered with the Securities and Exchange Commission (the "Commission") as a national securities exchange. The Securities Exchange Act of 1934 requires self-regulatory organizations to file changes to their rules with the Commission.

3. On September 7, 2010, Nasdaq filed with the Commission a proposed rule change to modify Nasdaq Rule 7019 (the "Rule Change"), which governs market data distribution fees. The Rule Change was aimed at harmonizing the distributor and direct access fees for depth products by including Level 2, also known as NQDS, under the current TotalView fee for NASDAQ-listed securities. The Rule Change did not affect user fees, but rather was aimed solely at the harmonization of distributor and direct access fees.

4. For example, prior to the Rule Change, distributors receiving the data feed containing the NASDAQ Level 2 entitlement and OpenView entitlement paid distributor fees for non-NASDAQ listed securities (under the OpenView entitlement) but did not pay distributor fees for NASDAQ-listed securities. By contrast, distributors receiving the NASDAQ-listed data through NASDAQ TotalView did pay a fee. Through the Rule Change, Nasdaq harmonized the fees across these products.

5. Similarly, prior to the Rule Change, customers who only accessed the Level 2 information through the Level 2 entitlement directly from Nasdaq were not charged a direct access fee, whereas customers who accessed TotalView and OpenView were charged a direct

access fee. The Rule Change harmonized these fees by applying a direct access fee to customers subscribing only to the Level 2 entitlement. Customers, however, would only be charged one direct access fee for NASDAQ-listed securities and one direct access fee for non-NASDAQ listed securities, paralleling the existing TotalView and OpenView direct access entitlements.

6. The Rule Change thus allowed Nasdaq to harmonize its distributor and direct access fees and ensure consistency across depth products.

7. I am aware that the Securities Industry and Financial Markets Association ("SIFMA") made a submission in this proceeding that attached declarations from the following nine 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 and Company.

8. The Nasdaq Finance Department generated a list of the distributor and direct access fees by utilizing the names of the nine SIFMA members as a basis for the list. Then I identified the following billing components for inclusion in the list of fees:

Billing Component Name	Billing Component Numbers
Non NASDAQ-listed Depth Direct Access	900561
Non NASDAQ-listed Depth External Distributor	900560
Non NASDAQ-listed Depth Internal Distributor	900559
NASDAQ-listed Depth Direct Access	900551
NASDAQ-listed Depth External Distributor	900035
NASDAQ-Listed Depth Internal Distributor	900550

To the best of my ability, I reviewed the list provided by the Nasdaq Finance Department, and I culled the distributor and direct access fees from the list, and created a new list showing such fees paid by each of these SIFMA members before and after the Rule Change went into effect. Specifically, I have totaled the monthly fees paid by each of these SIFMA members in June 2010 (before the Rule Change went into effect) and in June 2011 (after the Rule Change went into effect).

9. To the best of my knowledge, the list shows that the monthly distributor and direct access fees paid by each of these nine SIFMA members in June 2011 (after the Rule Change went into effect) were the same as or lower than the distributor and direct access fees paid by each particular member in June 2010 (before the Rule Change went into effect).

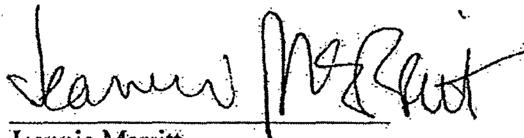
10. In no case were the monthly distributor and direct access fees in excess of $6,750 per month for any of these SIFMA members unless a particular firm had multiple accounts or held multiple agreements with Nasdaq. And, for any of these SIFMA members, in no case did the monthly distributor and direct access fees increase from June 2010 to June 2011.

11. Specifically, the monthly distributor and direct access fees shown in the Nasdaq billing system and as provided by the Nasdaq Finance Department paid in June 2010 and June 2011 by each SIFMA member who submitted a declaration were as follows:

12. These fees did not increase for these customers because all nine of the SIFMA members submitting declarations were already subscribing to TotalView and OpenView products before implementation of the Rule Change. Accordingly, when Nasdaq harmonized the fees via the Rule Change at the level of the fees for the TotalView and OpenView products, the fees for these nine SIFMA members did not change.

I declare under penalty of perjury, on behalf of NASDAQ OMX, that the foregoing is, to the best of my knowledge, true and correct.

Executed on August 18, 2014



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Vice President
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