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. 3-15351
For Review of Action Taken by Certain Self-Regulatory Organizations	

BRIEF OF THE NASDAQ STOCK MARKET LLC; NASDAQ OMX PHLX; AND EDGX EXCHANGE, INC. IN RESPONSE TO COMMISSION'S ORDER REGARDING PROCEDURES TO BE ADOPTED IN PROCEEDINGS

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The Nasdaq Stock Market LLC ("Nasdaq"), NASDAQ OMX PHLX LLC ("PHLX"), and EDGX Exchange, Inc. ("EDGX") (collectively, the "Exchanges") submit this brief in response to the Commission's July 3, 2013 Order Regarding Procedures To Be Adopted In Proceedings. That Order requested that the parties address a number of "preliminary matters" related to the Application of the Securities Industry and Financial Markets Association ("SIFMA") challenging certain immediately effective rule changes of the Exchanges as "denials of access" under Section 19(d) of the Exchange Act. Order at 3 (July 3, 2013). For the reasons set forth below, the Commission should dismiss the Application because the fees charged by an exchange for its proprietary market data products cannot constitute a "denial of access," and, even if they could, SIFMA has not demonstrated that it has been "aggrieved" by any such denial and its Application is untimely.

I. INTRODUCTION

As the Commission recognized in its Order, SIFMA's Application raises "novel procedural and substantive questions." Order at 3. In fact, SIFMA's attempt to use Section 19(d) of the Exchange Act to challenge the fees that the Exchanges charge for their proprietary market data products is entirely unprecedented. Under the Dodd-Frank amendments to Section 19(b) of the Exchange Act, Congress eliminated the requirement that the Commission approve each market data fee established by an exchange prior to its implementation, and authorized exchanges to designate such fee changes "immediately effective," subject only to the Commission's power to temporarily suspend a particular rule change. *NetCoalition v. SEC*, 715 F.3d 342, 344 (D.C. Cir. 2013) (citing 15 U.S.C. § 78s(b)). SIFMA had argued that it was entitled to judicial review of the Commission's non-suspension of immediately effective rule

changes establishing market data fees, but the D.C. Circuit held that Dodd-Frank's "overhaul of the Exchange Act . . . ousts [courts] of jurisdiction" to review such non-suspensions. *Id.*

SIFMA now seeks to evade Dodd-Frank and the D.C. Circuit's decision by renewing ***each and every*** rule challenge that it brought before the D.C. Circuit (24 in total), and by initiating nine additional rule challenges, under the guise of the Section 19(d) procedure for reviewing "denials of access." In direct conflict with Dodd-Frank's intent to streamline the regulatory process for exchanges' fee filings, SIFMA would have the Commission scrutinize in a Section 19(d) proceeding every fee with which SIFMA (or its members) happen to disagree.

That is not the law. Section 19(d) was enacted to permit the Commission to review "quasi-adjudicatory" actions by exchanges (*see, e.g.*, S. Rep. No. 94-75, 1975 WL 12347, at *26 (1975)), such as an exchange's decision to deny membership to an applicant or to impose a disciplinary sanction on a member, *see* 15 U.S.C. § 78s(d)(1). In such cases, any person "aggrieved" by the exchange's action may make a timely application requesting that the Commission review the exchange's "record" regarding its action against that particular applicant or member. *See* 15 U.S.C. § 78s(d)(2); 17 C.F.R. § 201.420(e). By contrast, when an exchange files a change in its market data fees, that fee change applies to an *entire class* of consumers, no person is denied access to the exchange or its facilities, and no record is created separate from what the exchange might submit to the Commission to support the rule change. Quite simply, Section 19(d) is not intended or suited for review of immediately effective fee filings.

For these reasons, counsel for SIFMA conceded before the D.C. Circuit that "it's pretty clear . . . that Congress would not have ever imagined that 19(d)" would be used as an avenue to review exchanges' fee filings. Tr. at 15-16, *NetCoalition v. SEC* (Nov. 13, 2012). That was

plainly correct. Congress made Section 19(d) available to review quasi-adjudicatory actions by exchanges, not to give the Commission ratemaking responsibilities regarding market data fees.

Moreover, even if a market data fee could theoretically constitute a "denial of access," SIFMA has failed to allege that such a denial has occurred or that either it or its members have been "aggrieved" by such a denial within the meaning of Section 19(d). SIFMA's Application does not allege that it or its members have been unable to purchase the challenged market data products at the prices offered. To the contrary, a majority of SIFMA's members currently subscribe to those products, as do many other market participants. In any event, even if SIFMA has established standing to pursue this Application, it would nevertheless be untimely because it purports to challenge rule changes that were filed between four months and nearly three years ago—well beyond the thirty-day deadline prescribed by Section 19(d). 15 U.S.C. § 78s(d)(2).

For each of these reasons, the Commission should dismiss SIFMA's Application at the outset. If the Application is nevertheless permitted to proceed, SIFMA would bear a heavy burden in attempting to prove that the challenged fees somehow amount to "denials of access." At minimum, SIFMA must demonstrate that an exchange's fee is prohibitively expensive for a significant segment of market data consumers, such that it actually prevents them from accessing a product that is essential to their ability to trade on the exchange. This standard follows from the language and structure of the Exchange Act as well as from the Commission's Section 19(d) decisions, and is necessary to ensure that Section 19(d) is not now routinely used to prosecute customers' disagreements with SRO prices, as SIFMA attempts in its challenge to the 33 different SRO fees at issue here and in the three related applications. SIFMA cannot possibly meet the statutory "denial of access" standard in connection with any of the products at issue.

II. PROCEDURAL AND FACTUAL BACKGROUND

Nasdaq, PHLX, and EDGX are self-regulatory organizations ("SROs") registered with the Commission as national securities exchanges. The Exchange Act requires SROs to file changes to their rules with the Commission. *See* 15 U.S.C. § 78s(b)(1). Under Dodd-Frank, rule changes "establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person" "shall take effect upon filing with the Commission if designated by the self-regulatory organization" as immediately effective. *Id.* § 78s(b)(3)(A).

If an SRO designates a rule change as immediately effective upon filing, "the Commission summarily may," in certain circumstances, "temporarily suspend the change," "[a]t any time within the 60-day period beginning on the date of filing of such a proposed rule change." *Id.* § 78s(b)(3)(C). If the Commission temporarily suspends a rule change in this manner, it must institute proceedings "to determine whether the proposed rule should be approved or disapproved." *Id.* The Commission actively exercises this suspension power. *See* 77 Fed. Reg. 56,247 (Sept. 12, 2012) (suspending SRO rule); 77 Fed. Reg. 26,595 (May 4, 2012) (same); 76 Fed. Reg. 58,065 (Sept. 19, 2011) (same); 76 Fed. Reg. 6,165 (Feb. 3, 2011) (same).

With respect to each of the rules that SIFMA challenges here, an exchange (or group of exchanges) filed with the Commission a rule change establishing fees for a market data product and designated the rule change immediately effective upon filing. The Commission thereafter published in the *Federal Register* a Notice soliciting comments on the rule change, and, in many cases, SIFMA filed comments objecting to the change. The Commission nevertheless did not suspend any of the rule changes within the 60-day window provided by Section 19(b)(3)(C).

In response, SIFMA filed a series of petitions for review in the D.C. Circuit challenging the Commission's non-suspension of the immediately effective rule changes. The court of

appeals dismissed the petitions for review, holding that it lacked jurisdiction to review the Commission's non-suspension of immediately effective rule filings. *NetCoalition*, 715 F.3d at 344. In so ruling, the D.C. Circuit stated that "[i]n light of *In re Bloomberg* [Exchange Act Rel. No. 49076, 2004 WL 67566 (Jan. 14, 2004)] and the Commission's brief in this court, we take the Commission at its word, to wit, 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." *Id.* at 353. Notwithstanding that dicta, the D.C. Circuit did not address, let alone decide, whether Congress intended to make the Section 19(d) procedure available to challenge an SRO's market data fees. In fact, the court expressly reserved judgment on the issue, stating that "*if* unreasonable fees constitute a denial of 'access to services' under section 19(d), we have authority to review such fees." *Id.* (emphasis added).

SIFMA filed the present Application on May 30, 2013, requesting, "pursuant to Sections 19(d) and 19(f) of the Securities Exchange Act of 1934," "an order setting aside certain rule changes . . . unilaterally issued by [Nasdaq and other exchanges] that limit the access of SIFMA's members and their customers to market data made available by the Exchanges."[1] SIFMA further requested that this Application be held in abeyance pending a decision in a concurrently filed application seeking review of a rule issued by NYSE Arca, Inc. *Id.* at 2.[2]

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[1] *See Application for an Order Setting Aside Rule Changes of Certain Self-Regulatory Organizations Limiting Access to Their Services* at 1, In re Application of SIFMA, Admin. Proc. File No. 3-15351 (May 30, 2013).

[2] *See Application for an Order Setting Aside Rule Change of NYSE Arca, Inc. Limiting Access to its Services*, In re Application of SIFMA, Admin. Proc. File No. 3-15350 (May 30, 2013). SIFMA subsequently filed two additional applications challenging rule changes of Nasdaq, NYSE, NYSE MKT, and NYSE Arca on June 17, 2013 and July 29, 2013.

On July 3, 2013, the Commission filed an order "request[ing] the views of the parties as to certain preliminary matters related to the proceeding." Order at 3. The questions posed by the Commission are addressed in turn below.

III. PRIMARY ISSUES BEFORE THE COMMISSION

The Commission asked the parties to identify "the primary issues the Commission will have to decide in considering the application." *Id.*[3] The primary—and threshold—issue confronting the Commission is whether immediately effective rule filings establishing fees for SRO products can even be challenged in a Section 19(d) proceeding. As set forth below, Section 19(d) cannot be used for this purpose, and SIFMA's Application should therefore be dismissed.

A. The Exchanges' Immediately Effective Fee Filings Cannot Constitute A Denial Of Access.

The text and purpose of Section 19(d), as well as the structure of the Exchange Act as a whole, establish that the fee an SRO sets for its proprietary market data products cannot constitute a "denial of access." Section 19(d) was enacted as part of the Securities Acts Amendments of 1975. *See* Pub. L. No. 94-29, § 16, 89 Stat. 97 (1975); *In re Application of Tower Trading, L.P.*, Exchange Act Rel. No. 47537, 2003 WL 1339179, at *3 (Mar. 19, 2003). It authorizes the Commission to review an action taken by an SRO that:

i. imposes any final disciplinary sanction on any member or person associated with a member;
ii. denies membership or participation to any applicant;
iii. prohibits or limits any person in respect to access to services offered by such organization or member thereof; or
iv. bars any person from becoming associated with a member.

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[3] The Commission also asked the parties to address "any other matters the parties believe would assist the Commission in determining the appropriate procedures for, and other issues related to, the proceeding." Order at 4. Given the overlap between these requests, they will be addressed together in this section.

In re Application of Allen Douglas Securities, Inc., Exchange Act Rel. No. 50513, 2004 WL 2297414, at *2 (Oct. 12, 2004); *see also* 15 U.S.C. § 78s(d). If an application under Section 19(d) challenges action that does not fall within one of these four enumerated categories, the Commission must dismiss the proceedings. *See In re Application of Larry A. Saylor*, Exchange Act Rel. No. 51949, 2005 WL 1560275, *2-3 (June 30, 2005).

The categories of SRO conduct listed in Section 19(d)—all of which involve conduct directed at a specific member or applicant—make clear that Section 19(d) was intended to govern "quasi-adjudicatory" proceedings by SROs. *See Tower Trading*, 2003 WL 1339179, at *3 ("Congress intended . . . Section 19(d), 'to encompass all final quasi-adjudicatory actions[.]'"). "[A]n adjudicatory determination [is] a particularized inquiry which will determine the legal rights and liabilities of a specific individual." *Gray Panthers v. Schweiker*, 652 F.2d 146, 155 n.18 (D.C. Cir. 1980); *see also Landsdowne On Potomac v. Openband At Landsdowne, LLC*, 713 F.3d 187, 201 (4th Cir. 2013) (An act is "adjudicatory" when it "resolve[s] disputes among specific individuals in specific cases," as opposed to "affect[ing] the rights of broad classes of unspecified individuals." (citation omitted)); *Abraham Lincoln Mem'l Hosp. v. Sebelius*, 698 F.3d 536, 559 (7th Cir. 2012) (same). Congress's intent to authorize review of quasi-adjudicatory proceedings under Section 19(d) is confirmed by the provision's legislative history. *See* S. Rep. No. 94-75, 1975 WL 12347, at *26 (1975) ("Section 19(d) would require the self-regulatory organizations to file with the appropriate regulatory agency . . . notice of all final quasi-adjudicatory actions."); *id.* (referring to a "limitation or prohibition of a person's access to requested services" as a "quasi-adjudicatory" proceeding); *id.* at *131 (same).

The Commission's past practice illustrates the types of "quasi-adjudicatory" actions the Commission reviews in Section 19(d) proceedings. For example, in *In re Application of*

Higgins, Exchange Act Rel. No. 24429, 1987 WL 757509 (May 6, 1987), two NYSE members requested permission to install telephones that would allow them direct access to their non-member customers from the NYSE trading floor. NYSE denied their request, and the members sought Commission review under Section 19(d). *Id.* at *1. After concluding that "the denial of Applicants' requests is a limitation of access to services," the Commission set aside NYSE's action and ordered it to permit installation of the requested telephone links. *Id.* at *14.

Similarly, in *In re Application of Tower Trading, L.P.*, Exchange Act Rel. No. 47537, 2003 WL 1339179 (Mar. 19, 2003), the Chicago Board Options Exchange ("CBOE") terminated a firm's appointment as a Designated Primary Market-Maker after concluding that the firm had failed to meet minimum performance standards. In an ensuing Section 19(d) proceeding, the Commission concluded that "CBOE's action amounted to a final, quasi-adjudicatory SRO action, and [the firm's] loss of its guaranteed participation fundamentally altered its access to services offered by CBOE." *Id.* at *5. Accordingly, the Commission held that jurisdiction existed under Section 19(d) and set aside CBOE's action. *Id.* at *5, *7.

The thirty-three SRO fee filings that SIFMA seeks to challenge here and in its three related applications are far different from the quasi-adjudicatory actions challenged in *Higgins* and *Tower Trading*. Unlike the SRO actions in those proceedings, which were targeted at *specific* members, the immediately effective fee filings at issue here are *generally applicable* SRO rules that apply across the board to all market data consumers. Those SRO rules bear no resemblance to the "final disciplinary sanctions," denials of "membership" and "association," and similar quasi-adjudicatory actions previously reviewed in Section 19(d) proceedings. *Allen Douglas Securities*, 2004 WL 2297414, at *2. Indeed, the Application does not name *a single person, member or entity* that has been denied access to the Exchanges' services, identify when

and how access was purportedly denied, or explain how an SRO fee could conceivably "prohibit[] or limit[] . . . access to services" to which numerous consumers willingly subscribe. For these and other reasons, the Application is improper and must be dismissed even supposing there were *some* instances where SRO fees could be reviewed under Section 19(d).

SIFMA's Application fails to identify a *single* instance in which the Commission has examined an allegedly unfair fee under Section 19(d). In its recent *NetCoalition* brief before the D.C. Circuit, the Commission cited only *In re Bloomberg*, Exchange Act Rel. No. 49076, 2004 WL 67566 (Jan. 14, 2004). But in that proceeding, Bloomberg did not challenge a fee, but rather a quasi-adjudicatory SRO action limiting its ability to display market data. *Id.* at *2. SIFMA's counsel acknowledged as much at argument, stating that "Bloomberg didn't involve fees," and admitting that "we don't have a decision from the Commission that says any kind of fees are subject to relief under 19(d)." Tr. at 15-16, *NetCoalition v. SEC* (Nov. 13, 2012).

The structure of the Exchange Act underscores that Section 19(d) proceedings cannot be used as SIFMA now suggests. The procedure governing "[p]roposed rule changes" is set forth in Section 19(b) of the Act, which explicitly applies to rule changes "establishing or changing a due, fee, or other charge." 15 U.S.C. § 78s(b)(3)(A); *see also id.* § 78s(c) (authorizing the Commission to "abrogate, add to, and delete from" SRO rules). Unlike Section 19(d), which subjects SRO action to review by the Commission "upon application by *any person* aggrieved thereby," *id.* § 78s(d)(2) (emphasis added), Section 19(b) permits only *the Commission* to institute proceedings to review an SRO's immediately effective fee filing, *id.* § 78s(b)(3)(C). If Congress had intended to give private parties the power to compel Commission review of every immediately effective SRO fee filing, it would have included that procedure in Section 19(b), the provision that expressly addresses proposed rule changes establishing or changing a fee, not

Section 19(d), which involves quasi-adjudicatory actions. SIFMA should not be permitted to use Section 19(d) as an end-run around the Exchange Act's carefully calibrated procedures.

Moreover, in contrast to Section 19(b), Sections 19(d)—and the related procedures set forth in Section 19(f)—are a remarkably poor fit for review of immediately effective SRO fee filings. First, Section 19(d) requires an SRO to "promptly file notice" with the Commission when it prohibits or limits access to a service. *Id.* § 78s(d)(1). Such a procedure makes sense in the context of a quasi-adjudicatory action that, for instance, terminates a firm's status as a market-maker, *see Tower Trading*, 2003 WL 1339179, but it makes no sense in the context of SRO fees because it would be impossible for an SRO to know, at the time it established a fee, whether some subset of consumers might claim that the fee is so high as to constitute a purported denial of access. Second, while Section 19(f) contemplates review based on "the record before the [SRO]," 15 U.S.C. § 78s(f); *see also* 17 C.F.R. § 201.420(e)—which an SRO generally produces when it undertakes quasi-adjudicatory action, *see, e.g.*, *Higgins*, 1987 WL 757509—SROs do not typically create a record in conjunction with establishing and changing a fee (except to the extent that an SRO elects to submit supporting documentation to the Commission).

Third, neither Section 19(d) nor Section 19(f) authorizes the Commission to set a specific fee for an SRO product. At most, the Commission can "grant [a] person access to services offered by the self-regulatory organization." 15 U.S.C. § 78s(f); *see, e.g.*, *Higgins*, 1987 WL 757509, at *14. The Commission cannot, however, establish the *terms* under which access must be provided, which means there is no mechanism under Section 19(d) or 19(f) for the Commission to alter allegedly unreasonable fees. Indeed, it would violate the Exchange Act's prohibition on prices that are "unfairly discriminatory" and not "fair and reasonable" for a

consumer to receive a special price merely because it disagreed with the price that its competitors willingly paid for a product. 15 U.S.C. §§ 78f(b)(5); 78k-1(c)(1)(D); 78s(b)(3)(C).

Finally, permitting consumers to challenge market data fees through Section 19(d) would undermine Congress's objective in the Dodd-Frank amendments to streamline the procedures governing the introduction of new market data products. Under the Exchange Act prior to 2010, it was sometimes difficult for SROs to bring new products to market quickly. In response to concerns about the Commission's pace in processing rule changes, and to promote regulatory "efficien[cy] and responsive[ness]," S. Rep. No. 111-176, 2010 WL 1796592, at *106 (2010), Congress amended the Exchange Act in 2010 by expanding the types of SRO rule changes that can take effect upon filing to include non-member fees. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 916, 124 Stat. 1376, 1833-36 (2010). This amendment reflects Congress's view that such fee filings are sufficiently non-controversial that they should take effect without prior notice and comment. *See* 15 U.S.C. § 78s(b)(3)(A).

Requiring the Commission to engage in extensive review of SRO fees in denial-of-access proceedings, and requiring exchanges to provide detailed justification for every pricing change, would generate the precise inefficiencies and burdens that Congress sought to eliminate in Dodd-Frank. Denial-of-access review of SRO fees would inevitably interfere with market-based competition and divert the Commission's finite resources from more pressing matters.

For all the reasons discussed above, an SRO's fees cannot constitute a denial of access under Section 19(d). SIFMA's Application challenging the Exchanges' market data fee filings under Section 19(d) should therefore be dismissed. *See Saylor*, 2005 WL 1560275, at *1.

B. SIFMA Is Not An "Aggrieved" Party Under Section 19(d).

Even if an SRO's filed fee could constitute a denial of access under Section 19(d), dismissal of SIFMA's Application would still be required because SIFMA is not "aggrieved" by

the fees at issue. 15 U.S.C. § 78s(d)(2); *see also* 17 C.F.R. § 201.430(b). SIFMA therefore lacks standing to challenge those fees in a Section 19(d) proceeding.

Section 19(d) provides for review of an alleged denial of access "upon application by any person aggrieved thereby." 15 U.S.C. § 78s(d)(2). The requirement of aggrievement distinguishes "a person with a direct stake in the outcome of a litigation from a person with a mere interest in the problem." *City of Orrville v. FERC*, 147 F.3d 979, 985 (D.C. Cir. 1998). Here, SIFMA has failed to demonstrate a direct stake in the enforceability of the Exchanges' rules. It has not alleged that the fees assessed by the Exchanges have prevented it from purchasing any of the products that are the subject of the Exchanges' filings. It is not even apparent whether SIFMA claims denial of access to itself, or to some (unidentified) members. If the latter, SIFMA is not a proper applicant because denial of access proceedings must be, and invariably are, brought by the party that is the object of challenged "quasi-adjudicatory" action. A denial-of-access proceeding is not a rule challenge, and SIFMA may not proceed as if it is. Indeed, SIFMA cannot satisfy an essential element of associational standing.[4]

SIFMA also has not alleged that it or its members have suffered any injury from their inability to purchase one of the products at issue, or that they lack reasonable market substitutes for the challenged product that could ameliorate any purported injury. To the contrary, most of

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[4] One requirement of associational standing is that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). SIFMA cannot meet this requirement because its members' claims necessitate "individualized proof" that they were actually denied access. *See id.* at 344; *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) ("The organization lacks standing to assert claims of injunctive relief on behalf of its members where 'the fact and extent' of the injury that gives rise to the claims for injunctive relief 'would require individualized proof.'" (citation omitted)).

SIFMA's members subscribe to a number of the products whose fees SIFMA now challenges, as do many other consumers.

Because SIFMA has not been "aggrieved" by the challenged fees, its Application must be dismissed. *See In re Application of Pecoraro*, Exchange Act Rel. No. 24980, 1987 WL 110280, at *1 n.1 (Oct. 2, 1987).

C. SIFMA's Application For Review Is Untimely.

Finally, SIFMA's Application also must be dismissed as untimely because it was filed well beyond the thirty-day period prescribed by the Exchange Act.

Under Section 19(d), a person allegedly aggrieved by a limitation or denial of access must file an application for Commission review "within thirty days after the date [that] notice was filed with [the Commission] and received by such aggrieved person." 15 U.S.C. § 78s(d)(2); *see also* 17 C.F.R. § 201.420(b) ("[t]he Commission will not extend this 30-day period, absent a showing of extraordinary circumstances"). Here, the Commission published "notice" of the challenged rule changes as early as September 17, 2010. *See* 75 Fed. Reg. 57,092 (Sept. 17, 2010).[5] Notice of the most recent rule change challenged by SIFMA in this Application was published on January 9, 2013. *See* 78 Fed. Reg. 1,910 (Jan. 9, 2013). There can be no doubt that SIFMA received notice of these rule changes; it filed petitions for review challenging each of them in the D.C. Circuit. *See, e.g.*, Petition for Review, No. 13-1079 (Mar. 25, 2013). Yet, SIFMA did not file its Application for Review pursuant to Section 19(d) until

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[5] As explained above, one indication that Section 19(d) is unsuited to review of generally applicable SRO fees is that there has not been SRO action toward a specific entity that would warrant "notice" to the Commission. If the Commission nevertheless concludes that immediately effective fee filings can be challenged under Section 19(d), "notice" should be held to occur at the time the Commission publishes notice in the *Federal Register* of the immediately effective fee.

May 30, 2013—more than thirty-two months after publication of the first rule change at issue, and more than four months after publication of the most recent one. Accordingly, SIFMA's filing falls well outside the thirty-day deadline prescribed by Section 19(d)(2) and 17 C.F.R. § 201.420.[6]

SIFMA has not presented any basis for concluding, nor could it, that the statutory deadline should be equitably tolled, or that "extraordinary circumstances" warrant an extension. SIFMA's failure to invoke the Section 19(d) procedure in a timely manner simply reflects the fact that, until recently, SIFMA—like everyone else—believed that Section 19(d) was unavailable to challenge SRO rule changes establishing market data fees.

IV. STANDARD OF REVIEW

The Commission also asked the parties to comment on "whether and to what extent the Commission's standard of review in this proceeding pursuant to Exchange Act Sections 19(d) and (f) differs from the standard of review applicable to the Commission's decision whether to suspend a rule under Exchange Act Section 19(b)(3)." Order at 3. Because SIFMA's Application is subject to dismissal for multiple reasons, the Commission need not consider the applicable standard of review. If the Commission nevertheless determines that SIFMA's Application can proceed, it should place both an initial burden of production—and the ultimate burden of proof—on SIFMA to demonstrate that the fees at issue here constitute a denial of access under the standard set forth in Section 19(f).

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[6] The rule changes at issue in SIFMA's third application for review were published in the *Federal Register* between April 2, 2013, *see* 78 Fed. Reg. 19,772 (Apr. 2, 2013), and April 10, 2013, *see* 78 Fed. Reg. 21,469 (Apr. 10, 2013), yet SIFMA did not file its application challenging those rules until June 17, 2013, more than two months later. Unlike the SRO rule changes at issue in SIFMA's first two applications, these rule changes were never challenged before the D.C. Circuit.

This allocation of the burden of production and burden of proof is mandated by both the structure of the Exchange Act and the policies underlying Dodd-Frank. Even if Congress did not intend the procedures governing proposed rule changes in Section 19(b) and the procedures authorizing amendment of SRO rules in Section 19(c) to be the *sole* means for review of SRO fees, the fact that Sections 19(b) and 19(c) *expressly* govern SRO rules—and that the other provisions in Section 19 are silent on the issue—makes clear that Congress intended at the very least that Sections 19(b) and 19(c) constitute the *principal* means for such review. An insufficiently rigorous burden on applicants seeking denial-of-access review of SRO fees would upend this statutory structure by facilitating the frequent, and unwarranted, invalidation of rule changes that the Commission left undisturbed under Sections 19(b) and 19(c). Moreover, by authorizing immediately effective filings for non-member fees, Congress sought in Dodd-Frank to ease the regulatory burdens and inefficiencies that had been hampering the introduction of new market data products. *See supra* pg. 11. This congressional objective would be severely compromised if exchanges were required to provide detailed justifications for every pricing change challenged in Section 19(d) proceedings. Accordingly, only when the applicant has made out a *prima facie* case that a challenged fee constitutes an improper denial of access should the SRO even be required to respond with its own justification for the fee. And at all times, even when a *prima facie* case is established, the ultimate burden of proof must remain with the applicant—the party seeking to establish that a denial of access has occurred.

In order to meet this initial burden of production—and ultimate burden of proof—an applicant challenging an immediately effective SRO fee filing as a denial of access must establish that there has been a "prohibition or limitation" on access to fundamentally important services of the SRO, and must meet one of the standards specified in Section 19(f). *See* 15

U.S.C. § 78s(f). Those standards require an applicant to prove that (1) the specific grounds on which the prohibition or limitation is based do not exist in fact, (2) the prohibition or limitation is not in accordance with the rules of the SRO, (3) the SRO rules are not consistent with the purposes of the Exchange Act, or (4) the prohibition or limitation imposes a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. *Id.*

SIFMA has failed in its Application to make out a *prima facie* showing of a denial of access under any of these standards. As an initial matter, SIFMA cannot demonstrate that any "prohibition or limitation" has been imposed. SIFMA merely alleges that the rules at issue "limit access to critical market data for anyone unwilling or unable to pay the onerous, supracompetitive fees." Application at 1. But SIFMA has not alleged that, as a result of those fees, it or its members have been unable to purchase any of the products that are the subject of the Exchanges' fee filings. To the contrary, many consumers regularly purchase the market data products at issue, and SIFMA's members are among them. Assuming that SRO fee filings can be challenged under Section 19(d), SIFMA must do more than allege that a fee is inconvenient or burdensome. It must allege—and ultimately prove—that the fee is "prohibit[ively]" expensive, 15 U.S.C. § 78s(d), such that it actually *prevents* a significant segment of the market from accessing a particular product. To conclude instead that a fee by its nature constitutes a "limitation" or "prohibition" that is statutorily equivalent to a "final disciplinary sanction," and therefore warrants 19(d) review, would distort the statutory language, transform the Section 19(d) procedure into the type of agency ratemaking that the Commission and other agencies have

sought to limit in recent decades, and completely displace the Section 19(b) procedures that Congress intended to be, at minimum, the primary means for reviewing SRO rule changes.[7]

In addition, "[i]n those cases in which [the Commission has] found a denial of access, an SRO had denied or limited the applicant's ability to utilize one of the *fundamentally* important services offered by the SRO," *In re Application of Sky Capital*, Exchange Act Rel. No. 34-55828, 2007 WL 1559228, at *4 (May 30, 2007) (emphasis added), such as trading floor operations, *see id.*, quotation collection and dissemination, *see Order Granting Application for a Conditional Exception by the NASD*, Exchange Act Rel. No. 34-44201, 2001 WL 396442, at *10 (Apr. 18, 2001), order routing and execution, *see id.*, trade reporting, *see id.*, or registration of market makers, *see In re Application of Morgan Stanley*, Exchange Act Rel. No. 34-39459, 1997 WL 802072, at *3 (Dec. 17, 1997). In those proceedings, "[t]he services at issue were not merely important to the applicant but were central to the function of the SRO." *Sky Capital*, 2007 WL 1559228, at *4. Here, SIFMA has failed even to allege that the challenged rule changes implicate a "fundamentally important service" that is central to the Exchanges' function.

Moreover, even if SIFMA could overcome these threshold obstacles, it still would be unable to make out a *prima facie* denial of access. As to the first Section 19(f) standard, there is no allegation that the "grounds" on which the fees were based somehow "do not exist." 15 U.S.C. § 78s(f). Nor could SIFMA hope to satisfy the second Section 19(f) standard, as there is no indication that any of the fees at issue violate "the rules of the SRO" that issued them. *Id.*

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[7] *See, e.g.*, Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change, at § VII.D.3 (SEC Sept. 14, 2001) ("[T]he 'public utility' cost-based ratemaking approach . . . is resource-intensive, involves arbitrary judgments on appropriate costs, and creates distortive economic incentives."); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) (upholding FERC's decision to "rely upon market-based prices in lieu of cost-of-service regulation").

Likewise, as the Exchanges have already demonstrated in their immediately-effective rule filings, *see, e.g.*, 76 Fed. Reg. 41,847-50 (July 15, 2011), SIFMA cannot show that the Exchanges' rules are inconsistent with the purposes of the Exchange Act, or that they impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In the 2010 *NetCoalition* decision, the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress had mandated a cost-based approach. *NetCoalition v. NYSE Arca, Inc.*, 615 F.3d 525, 534 (D.C. Cir. 2010). As the court emphasized, the Commission itself "intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost." *Id.* at 537. To meet its burden that the Exchanges' fee filings are inconsistent with the Exchange Act, SIFMA therefore must show that the Exchanges were not subject to competitive forces in setting the terms of their proposed fees. *Id.* at 532. In the absence of such showing, SIFMA must provide a "'substantial countervailing basis to find that the terms' violate the Exchange Act or SEC rules," *id.*—for example, that the Exchanges proposed the fee solely to exclude SIFMA from the market.

Finally, even if SIFMA is able to make out a *prima facie* denial of access, the Exchanges must be given some opportunity to defend their rule changes, including by raising affirmative defenses. In light of the Commission's commitment to a market-based approach to evaluating SRO fees, as upheld in *NetCoalition*, it should be a full defense that the product challenged in a denial of access proceeding is priced comparably to similar proprietary market data products.

In sum, under the Exchange Act and the Commission's Section 19(d) precedent, an applicant can only establish that an SRO's fee filing constitutes an impermissible "denial of access" if it can prove that (a) a significant segment of the market attempted to purchase the

product but was unable to do so because it was prohibitively expensive, (b) the product is critical to the ability to conduct business on the exchange, and (c) the exchange either was not subject to competitive forces in setting the relevant price, or there is a "substantial countervailing basis" for finding that the fee violates the Act. SIFMA cannot meet that burden here, and even if it could, the Exchanges must be given an opportunity to raise affirmative defenses.

V. CONSOLIDATION

The Commission also asked "whether the application for review should be consolidated with a similar and contemporaneous application for review filed by SIFMA, ['Proceeding 3-15350'], or whether this proceeding should be stayed pending the Commission's consideration of Proceeding 3-15350." Order at 3-4. The Exchanges do not object to consolidation of this Application for Review with the application in Proceeding 3-15350. Nor would they object to consolidation with the applications filed by SIFMA on June 17, 2013 and July 29, 2013.

As stated in their notices of appearance, the Exchanges also do not object to holding proceedings regarding the merits of the majority of these rule challenges in abeyance pending Proceeding 3-15350. The Exchanges respectfully request, however, that SIFMA's challenge to the rule change extending the pilot program for Nasdaq Last Sale, Release No. 34-64856, File No. SR-NASDAQ-2011-092, not be held in abeyance and be considered in conjunction with the NYSE Arca rule change at issue in Proceeding 3-15350. This will ensure that the Exchanges have a full and fair opportunity to represent their interests in any initial proceeding.

VI. FURTHER DEVELOPMENT OF THE RECORD

Finally, the Commission asked for the parties' view on "whether further development of the record would be helpful to the Commission's consideration of the application and whether it would be appropriate to assign an administrative law judge to conduct an evidentiary hearing for

the purpose of issuing an initial decision in this matter." Order at 4. As set forth above, the Exchanges believe that the Commission already has all the information it needs to dismiss SIFMA's Application as a matter of law. Accordingly, further development of the record and the assignment of an administrative law judge are unnecessary. Moreover, even if the Commission declines to dismiss the Application, it should restrict its review of the merits of SIFMA's request to the materials submitted by the Exchanges in conjunction with the immediately effective fee filings at issue, as well as materials submitted during the notice-and-comment period.[8] An evidentiary hearing would needlessly delay final resolution of SIFMA's challenge and further undermine Congress's goal of facilitating prompt review of SRO fee filings. To the extent that SIFMA is nevertheless permitted to build an evidentiary record, the Exchanges reserve the right to rigorously test such evidence and to submit evidence in response.

VII. CONCLUSION

The Commission should dismiss SIFMA's Application because SRO fees cannot constitute a denial of access, neither SIFMA nor its members are "aggrieved persons," and the Application is untimely. If the Commission determines that these immediately effective fee filings can be challenged under Section 19(d), it should require SIFMA to meet its substantial burden of production and ultimate burden of proof based on the existing factual record without permitting evidentiary proceedings.

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[8] *See Notice of Appearance of The Nasdaq Stock Market LLC*, In re Application of SIFMA, Admin. Proc. File No. 3-15351 (June 18, 2013) (listing the web address for each Nasdaq and PHLX rule change); *Notice of Appearance of EDGX Exchange, Inc.*, In re Application of SIFMA, Admin. Proc. File No. 3-15351 (June 18, 2013) (listing the web address for the EDGX rule change).

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