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[1]	File No. 3-15351

RESPONSE OF NEW YORK STOCK EXCHANGE LLC, NYSE ARCA, INC., AND NYSE MKT LLC TO THE COMMISSION'S ORDER REGARDING PRELIMINARY MATTERS

[1] The self-regulatory organizations ("SROs") whose rules purport to be challenged in this application include NASDAQ OMX PHLX, Inc., NASDAQ Stock Market LLC, NYSE Arca, Inc., BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Board Options Exchange, Inc., Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange LLC, NASDAQ OMX BX, Inc., National Stock Exchange, Inc., New York Stock Exchange LLC, and NYSE Amex, Inc. (now known as NYSE MKT LLC).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

OTHER SOURCES

New York Stock Exchange LLC, NYSE Arca, Inc., and NYSE MKT LLC (collectively, "the NYSE Entities") respectfully submit this memorandum in response to the Order Regarding Procedures to Be Adopted in Proceedings, dated July 8, 2013 issued by the U.S. Securities and Exchange Commission (the "Commission") in the above-captioned application for review (the "Application") filed by the Securities Industry and Financial Markets Association ("SIFMA"). The Application relates to rule filings pursuant to which the NYSE Entities charge fees for market data products offered by the NYSE Entities.

The NYSE Entities respectfully submit that the Application is fundamentally flawed and should be summarily dismissed because, *inter alia*, SIFMA has neither sought to purchase nor been denied access to any market data products offered by the NYSE Entities. This memorandum will address, in order, the issues on which the Commission requested comment.[2]

I. The Primary Issues The Commission Should Address in Considering the Application

The NYSE Entities respectfully submit that the Commission should address two preliminary inter-related issues when considering the Application: Whether there has been any denial of access as contemplated by Section 19(d) of the Securities Exchange Act of 1934 (the "Act") and, if so, whether SIFMA is a "person aggrieved" by any denial such that it could seek review under Section 19(d). For the reasons stated below, the NYSE Entities do not believe there has been any denial of access, and, even if the Commission were to assume there had been such a denial, SIFMA is not a "person aggrieved" by it and thus cannot seek review under Section 19(d).

---

2 On July 8, 2013, the Commission issued a nearly identical Order in File No. 3-15350. Because that Order relates to an application filed by SIFMA addressing nearly identical legal issues, the NYSE Entities are filing substantially similar briefs in each matter.

In the Application, SIFMA conclusorily alleges that the market data fees for the products at issue "constitute[] a limitation on access to the Exchanges' services for purposes of Section 19(d) and (f)" because "they limit access to critical market data for anyone unwilling or unable to pay the onerous, supracompetitive fees the Exchanges are charging."[3] That is not the standard for seeking review under Sections 19(d) or 19(f). "Anyone" cannot seek review under Section 19(d) and 19(f). The statute only permits persons who are actually aggrieved by an SRO action to seek review of that action.

Sections 19(d)(1) and (2), in pertinent part, provide that "[i]f any self-regulatory organization ... prohibits or limits any person in respect to access to services offered by such organization," that action shall be "subject to review by the [Commission] ... upon application by any person aggrieved thereby."[4] Rule 420(a) of the Commission's Rules of Practice, entitled "Application for review: when available," contains a similar limitation. Specifically, Rule 420(a) provides that:

> An application for review by the Commission may be filed by any person who is aggrieved by a self-regulatory organization determination, as to which a notice is required to be filed with the Commission pursuant to Section 19(d)(1) of the Exchange Act. Such determinations include any:
>
> ...
>
> (3) Prohibition or limitation in respect to access to services offered by that self-regulatory organization or member thereof.[5]

Because SIFMA has failed to demonstrate that it has been denied access and is a person aggrieved by such denial, it may not seek review of any of the rules at issue in the Application.

---

3 Application at 2 (emphasis added).

4 15 U.S.C. § 78s(d)(1) & (2).

5 17 C.F.R. § 201.420 (emphasis added).

a. SIFMA Has Neither Sought Nor Been Denied Access

SIFMA does not currently purchase, nor has it sought to purchase, any of the NYSE Entities' market data products approved by the rule filings covered by the Application. In this regard, SIFMA has neither sought "access to services offered by" the NYSE Entities nor been denied any such access.[6] Although certain SIFMA members do purchase market data products from the NYSE Entities, none of those members has claimed that it has been denied access. At all times, the NYSE Entities have provided and have been willing to provide access to the market data products to any party who wishes to purchase those market data products in exchange for the fees the NYSE Entities are permitted to charge pursuant to the rule filings applicable to such market data products. The only "action" taken with respect to the rule filings that are the subject of the Application here was to file them pursuant to Section 19(b) under the Act and then act in accordance with them as permitted by the Act.[7] Based upon these facts, there was no denial of access.

Another way of understanding why there has been no predicate denial of access here is to examine the notice requirements of the relevant statutes and Rules of Practice. Both make it a condition of seeking review under Section 19(d) that the SRO have filed a notice with the Commission describing the action taken by the SRO, and it is based on that notice that a denial of access proceeding may appropriately be brought. In context, the reason for this is clear: Denial of access petitions were intended to address things like denial of membership or associational rights for individuals, including in connection with SRO disciplinary proceedings.

---

6 15 U.S.C. § 78s(d)(1).

7 *Cf. In the Matter of the Application of Bloomberg L.P. for Review of Action taken by the New York Stock Exchange, Inc.*, Release No. 34-49076, January 14, 2004 (finding denial of access when the self-regulatory action in question was not taken pursuant to rules that had been filed pursuant to Section 19(b)).

But that is not the scenario presented here: The NYSE Entities established fees for new market data products that no market participant is required to purchase, secured approval to charge those fees as the Act requires, and have sold those products to whomever sought to purchase them on a fair and equal basis. No notice of a denial of access was filed, nor was one required to be filed, because there has been no occasion for the NYSE Entities to deny access with respect to the market data products at issue: The NYSE Entities have sold the products to anyone who sought to purchase them at the rates approved pursuant to the Act. Moreover, under Rule 420(a) no application for review may be filed unless the SRO was required to give notice of a denial of access, and because SIFMA has not sought or been denied access to the products at issue, the Application is not appropriate.

b. Even Assuming There Had Been A Denial Of Access, SIFMA Is Not A "Person Aggrieved" By Such Denial

Under Section 19(d), review must be sought by "a person aggrieved" by the self-regulatory action that denies access. As discussed above, the NYSE Entities have not taken any action to limit access to their market data products, nor has there been any denial of access. But assuming there had been any denial of access, SIFMA has no basis under Section 19(d) or Rule 420(a) to request Commission review of any of the rule filings that are the subject of the Application.

Because it has not purchased, and has not sought to purchase, any of the NYSE Entities' market data products that are the subject of the Application, SIFMA could not be "a person aggrieved" by any denial of access to those products. Simply put, SIFMA has not sought access to these products, has not been denied access to them, and therefore has no basis to seek review relating to them. In *In the Matter of the Application of Bloomberg L.P. for Review of Action taken by the New York Stock Exchange, Inc.*, Release No. 34-49076, January 14, 2004, the

most recent Commission review of a denial of access, Bloomberg had been party to a market data agreement with an SRO and the SRO took action to modify that agreement in a manner that the Commission determined required a rule filing pursuant to Section 19(b).[8] That was the basis for Bloomberg's denial of access proceeding. But SIFMA is in an entirely different position. Unlike Bloomberg, which had been party to a market data agreement with an SRO about which there had been action by the SRO, SIFMA does not allege that there was an existing relationship between any of the NYSE Entities and SIFMA relating to the market data products at issue, nor does SIFMA allege that it sought and was denied access to the market data products at issue.

SIFMA will presumably argue that it has associational standing to represent its members and should be permitted to bring the Application on that basis. But that will not help SIFMA here. As an initial matter, the Commission would need to decide whether Section 19(d) proceedings are amenable to representative litigation, and particularly representative litigation by a representative who has not been injured at all. In the context of class actions in an Article III court, it is well established that the class representative must actually be a member of the class it seeks to represent.[9] For example, in the context of a securities class action, the class representative must have purchased the stock at issue and suffered the same sort of injury claimed to have been suffered by other members of the proposed class. If the proposed class representative lacks standing, for example, the case is dismissed. As courts have explained, seeking to represent a proposed class some of whose members might have suffered injury does

---

8 *Id.*

9 *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 (1976); *see also McNair v. Synapse Grp. Inc.*, 672 F.3d 213, 224 (3d Cir. 2012).

not confer standing on the proposed class representative if he or she was not personally injured.[10] Section 19(d)'s limitation of the denial of access proceeding to persons aggrieved is similar to the Article III class representative standing requirement, and the result should be the same when the representative has not suffered any injury.

Assuming *arguendo* that the concept of associational standing could be applicable here, SIFMA would have to show that "(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."[11] When a party claims associational standing, "it is not enough to aver that unidentified members have been injured."[12] Instead, the association "must specifically 'identify members who have suffered the requisite harm.'"[13] Because SIFMA has failed to allege that it or any member organization purchased or sought to purchase, let alone has been denied or is unwilling to pay for, any of the NYSE market data products, it has failed to show that a member would have standing in its own right. Indeed, SIFMA has not fulfilled any of the requirements to assert associational standing: Doing so would also require an examination of how the Application might be germane to SIFMA's interests as SIFMA (something the Application does not address at all) and show that participation by individual members was not

---

10 *See E. Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403-04 (1977); *see also Maine State Ret. Sys. v. Countrywide Fin. Corp.*, 2011 WL 4389689, at *6 (C.D. Cal. May 5, 2011) ("lead plaintiffs must show that they personally have been injured, 'not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'") (quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1975)).

11 *Hunt v. Wash. State Apple. Adver. Comm'n*, 432 U.S. 333, 343 (1977).

12 *Chamber of Commerce of the United States v. E.P.A.*, 642 F.3d 192, 199-200 (D.C. Cir. 2011) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009)).

13 *Id.* (quoting *Summers*, 555 U.S. at 499).

necessary.[14] The latter will be particularly difficult for SIFMA to accomplish, because the fairness of any particular denial of access will need to be addressed with respect to the entity that was supposedly denied access, not an issue for which SIFMA can substitute itself.[15]

c. The Application Would Not Be Timely Even If There Had Been A Denial Of Access

Assuming *arguendo* there had been an actual denial of access and there was a party actually aggrieved by such denial bringing these proceedings, the proceedings would be untimely under Section 19(d). An aggrieved party may only seek review "upon application ... filed within thirty days after the date" the SRO files notice of its denial of access with the Commission.[16] If SIFMA claims that the rule filings at issue here, and the market data fees approved by them, constitute a denial of access under Section 19(d) simply because they exist and are in effect, then the notice given in connection with each rule filing constitutes the notice from which the time to file an application would run under Section 19(d)(2). The most recent rule filing by an NYSE Entity that is the subject of this Application was filed on July 3, 2012,

---

14 By way of example of how difficult this would be for SIFMA, the market data products at issue in the Application are intended for use by traders and other market participants — those who actually execute trades on markets operated by the NYSE Entities and other SROs. But SIFMA does not trade, which means that it would have an extremely difficult time explaining (a) why it might need whatever market data it might seek to buy and (b) why whatever the approved price for that data was unfair to SIFMA given SIFMA's "need" (i.e., none) for that product. The NYSE Entities respectfully submit that spending the Commission's and the markets' time fighting over such issues is a waste of regulatory resources that could much more beneficially be applied to other matters.

15 Relevant circumstances left out of the Application include who was supposedly denied access to which products, how such entities used or sought to use the products, how such entities bought or decided not to buy the products, and how the rule filings at issue affected such entities. In any event, SIFMA itself cannot make such an application and cannot show that it was denied access to any relevant market data product because it neither purchases nor has sought to purchase the products at issue in the NYSE filings it seeks to challenge.

16 15 U.S.C. § 78s(d)(1); Commission Rule of Practice 420, 17 C.F.R. § 201.420.

and notice was published in the Federal Register on July 19, 2012.[17] The oldest rule filing was filed in 2011.[18] Thus, this Application is time-barred and not timely because it was not filed within the 30 day time period set by Section 19.

II. Whether and to What Extent the Commission's Standard of Review in These Proceedings Pursuant to Sections 19(d) and (f) of the Act Differs from the Standard of Review Applicable to the Commission's Decision Whether to Suspend a Rule Under Section 19(b)(3) of the Act

When a self-regulatory organization denies access to its services and a proper party challenges that denial under Section 19(d), the Commission reviews the self-regulatory organization's actions under the standard set forth in Section 19(f). As noted *supra*, there has been no denial of access and SIFMA is not a proper party to challenge an alleged denial of access. Assuming, however, that the instant Application was proper, SIFMA would be required to demonstrate that the specific grounds on which the challenged action was based did not exist in fact and (1) such action was not taken in accordance with the rules of the self-regulatory organization as approved by the Commission (or subject to an exception to such approval); (2) such rules were not applied in a manner that is consistent with the purposes of the Act; or (3) the rules impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[19]

Pursuant to Section 19(b)(3), the Commission had an opportunity to suspend each of the NYSE Entities' rules and institute proceedings to determine whether the proposed rules should be approved or disapproved. When deciding whether to suspend a rule under Section

---

17 Rel. No. 34-67438; File No. SR-NYSEMKT-2012-19 (July 3, 2012), 77 Fed. Reg. 42535 (July 19, 2012).

18 Rel. No. 34-65669; File No. SR-NYSEArca-2011-78 (Oct. 26, 2011), 76 Fed. Reg. 69311 (Nov. 8, 2011).

19 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).

19(b)(3), the Commission must determine whether "it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance" of the Act.[20] That the Commission did not suspend any of the NYSE Entities' rule filings thus necessarily means that the Commission did not have a basis to do so under Section 19(b)(3).

This is critical to the way any legitimate denial of access proceeding relating to the rules challenged in the Application might proceed. In particular, review under Section 19(b)(3) appears broader than review under Section 19(f): Section 19(b)(3) allows the Commission to suspend and consider setting aside rules if doing so "is necessary or appropriate" for either the public interest or in furtherance of the Act, but review under Section 19(f) requires specific findings that the self-regulatory organization violated its own rules, applied a rule in a manner inconsistent with the purposes of the Act, or imposed an unnecessary or inappropriate burden on competition. The fact that the Commission found no basis to suspend the rules at issue under Section 19(b)(3) will thus constrain the scope of review for denial of access. In particular, an aggrieved person would have to show the existence of a flaw with respect to a rule filing that would not have required suspension under Section 19(b)(3), because the necessary conclusion from the lack of suspension of the rules here is that there were no bases for suspension under Section 19(b)(3). Accordingly, if there had been a denial of access and a proper party brought an application challenging that denial of access, the standard of review would be narrower than prescribed in Section 19(b)(3) and would exclude any bases for suspension under Section 19(b)(3).

---

20 15 U.S.C. § 78s(b)(3)(C).

III. Whether The Application Should Be Consolidated Or Whether Related Actions Should Be Stayed

The NYSE Entities do not take any particular view as to whether the Application should be consolidated with related applications or whether related applications should be stayed in favor of the first-filed application. The NYSE Entities do believe, however, that the Application should be handled in the most efficient manner possible, such that the parties can address in the first instance the common issues of law relating to all applications without having to address each specific rule filing and its record.[21] The NYSE Entities believe this is a reasonable approach, given that SIFMA's applications do not allege specific conduct of any particular self-regulatory organization with respect to its rule filings, but rather allege generically that all the challenged market data rule filings, by their very nature, are inappropriate and act to deny access. The NYSE Entities believe that the Commission can address (and should dispose of) this Application (and any similar applications) on this basis, and propose to address specific rule filings only after common issues of law no longer predominate and if a true denial of access proceeding is pursued by a truly aggrieved person.

IV. 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 These Matters

As explained above, SIFMA has not suffered a denial of access, and, therefore, there is no need to develop a factual record. Even if the Commission were to find that SIFMA

---

21 Following its filing of the applications docketed as File Numbers 3-15350 and 3-15351 which are specifically the subject of the Commission's Orders that requested this briefing and the briefing in File Number 3-15350, SIFMA filed two additional applications seeking review of nine more market data rule filings. (File Nos. 3-15364 & 3-15394). The NYSE Entities propose that whatever approach the Commission takes with respect to File Numbers 3-15350 and 3-15351 be applied consistently to File Numbers 3-15364, 3-15394, and any other applications relating to market data products that SIFMA subsequently may file.

had been denied access by the rules at issue, the factual record is well-defined by the rule filings and other material of which the Commission could take judicial notice. Accordingly, the appointment of an administrative law judge at this stage is unnecessary.

However, to the extent any proceedings take place regarding the merits particular rule filings, the NYSE Entities reserve the right to seek to expand the records to include information relating to the economic need expressed by whomever is challenging that particular rule (e.g., if a market participant claims to not be able to afford a certain product at a certain price, that participant should be required to demonstrate why the price set by the rule change is inappropriate based on its business need for the product), as well as to challenge whatever evidence and arguments might be made by whomever is challenging that rule. The NYSE Entities do not believe there is any present need for this sort of factual development, but reserve all rights with respect to any such proceedings.

[Remainder of page intentionally left blank]

CONCLUSION

The NYSE Entities believe that the Application presents threshold issues on which this Application and similar applications could and should be dismissed as a matter of law. The NYSE Entities would be happy to address additional questions regarding how to accomplish that goal in the most efficient way possible so as to avoid unnecessary expenditures of time and regulatory resources by the Commission, the Commission's staff, and the SROs.

Dated: September 3, 2013

MILBANK, TWEED, HADLEY & McCLOY LLP

By: Douglas W. Henkin

Douglas W. Henkin
Wayne M. Aaron
One Chase Manhattan Plaza
New York, NY 10005
(212) 530-5000

Attorneys for Attorneys for the New York Stock Exchange LLC, NYSE Arca, Inc., and NYSE MKT LLC (formerly known as NYSE Amex LLC and NYSE Amex, Inc.)