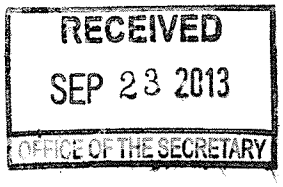
UNITED STATES OF AMERICA

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 BRIEF OF APPLICANT SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

I. INTRODUCTION

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 Brief of Applicant Securities Industry and Financial Markets Association ("SIFMA"). At the Commission's instruction, both the Exchanges and SIFMA submitted opening briefs on August 30, 2013 regarding the procedures to be adopted by the Commission in nearly three dozen challenges in which SIFMA contends that market-data fees adopted by the Exchanges constitute impermissible "denials of access."[1] The Exchanges urged the Commission to dismiss SIFMA's Application because, among other things, immediately effective fee filings cannot constitute a denial of access, neither SIFMA nor its members are "aggrieved" by the fees at issue, and SIFMA's Application is untimely. *See* Exchanges' Br. 6-14.

SIFMA's brief completely overlooks these threshold issues. Instead, SIFMA devotes its entire brief to proposing an untenable standard of review, and to opposing—without any legitimate justification—the Exchanges' request that *one* additional challenge (out of 33 total rule challenges initiated by SIFMA) be considered in conjunction with SIFMA's challenge to NYSE Arca's Arcabook product (No. 3-15350). Despite its failure to come to terms with the preliminary (and ultimately dispositive) issues, SIFMA's brief confirms that Section 19(d) was never intended as a vehicle for challenging immediately effective fee filings, particularly when, as here, there has been no identifiable denial of access to a specific, identified market participant. For example, SIFMA acknowledges that Section 19(d) requires an exchange to submit to the Commission the "record before the self-regulatory organization" ("SRO"). SIFMA Br. 10. While a record would ordinarily be developed by an SRO in the type of quasi-adjudicatory

[1] SIFMA filed an amended opening brief on September 3, 2013.

proceeding that the denial-of-access procedure was intended to encompass (such as proceedings to terminate membership), SIFMA effectively concedes that there is no "record" developed by the SRO when it sets market data fees. SIFMA instead argues that the "record" must consist of materials that the SRO "file[d] *with the Commission*" "in support of the [rule] change." *Id.* at 11 (emphasis added). SIFMA further proposes that the Commission engage in burdensome, cost-based review of each challenged fee filing, which would nullify the presumption embodied in Dodd-Frank and in the Commission's past pronouncements (such as Regulation NMS) that market-data fees should be immediately effective and ordinarily determined by market forces.

For the reasons set forth in the Exchanges' initial brief, which go wholly unrebutted by SIFMA, 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 show that the challenged fees somehow amount to "denials of access."

II. ARGUMENT

A. SIFMA Ignores A Number Of Threshold Questions.

SIFMA's opening brief fails to grapple with the primary issues before the Commission in this proceeding. Instead, SIFMA jumps directly to the question "whether the Exchanges' rule changes are 'fair and reasonable,'" and "otherwise comply with the Exchange Act and applicable regulations," which SIFMA suggests is the principal question at issue. SIFMA Br. 5. Before reaching that question, however, the Commission must consider a number of threshold matters.

First, SIFMA must establish that fees for SROs' proprietary market data products are even susceptible to challenge as "denials of access." Despite ample notice of this issue,[2] and its

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[2] *See, e.g.*, Order at 2 n.3 (July 3, 2013) ("In notices of appearance, [the Exchanges] appear to dispute the application of Exchange Act Sections 19(d) and 19(f), each stating that '[t]here
(Cont'd on next page)

previous admission 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* (D.C. Cir. Nov. 13, 2012), SIFMA completely ignores this question. As explained in the Exchanges' brief, the text and purpose of Section 19(d), as well as the structure of the Exchange Act as a whole, establish that SRO fee filings cannot be challenged under Section 19(d), which is limited to "quasi-adjudicatory" SRO proceedings. Exchanges' Br. 6-11. Simply put, the adoption of a generally applicable fee—which numerous consumers, including SIFMA's members, willingly pay—does not "prohibit[ ] or limit[ ] . . . access to services" within the meaning of Section 19(d). And a denial-of-access proceeding is especially inappropriate when no identifiable denial of access has occurred to a specific, identified market participant.

SIFMA's brief only underscores the extremely poor fit between Sections 19(d) and 19(f), on the one hand, and review of immediately effective SRO fee filings, on the other. Indeed, from the start, SIFMA's brief confirms that these proceedings are rule challenges masquerading as denial-of-access proceedings. The brief states that "[a]t issue in these applications" is not, as one would expect, an SRO denying the applicant access to its facilities, but instead "certain rule changes" adopted by the SROs. SIFMA Br. 1. It is the "terms of these rule changes" that SIFMA challenges, *id.*, not a denial of access itself. On SIFMA's theory, moreover, every new fee rule is at one and the same time a denial of access also, since "any party who does not pay these newly imposed fees . . . will be unable to access the market data." *Id.* It simply cannot be, however, that the very act of adopting a fee rule—which may be reviewed pursuant to Sections 19(b) and (c)—is simultaneously a denial of access that may be reviewed under Section 19(f).

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has been neither a request for, nor denial of, access within the meaning of [Section 19(d)(1)].'").

SIFMA's error is evident not only in its theory of what triggers a denial-of-access proceeding, but also in its proposal for how such proceedings be conducted. Section 19(f) provides that review may be based "solely" on "the record before the [SRO]," 15 U.S.C. § 78s(f), and SIFMA insists that the record for these proceedings "is clearly identifiable and should be considered closed," SIFMA Br. 10. The "record" referred to in Section 19(f) is the record that an SRO typically produces when undertaking a quasi-adjudicatory action regarding a specific individual, but generally does not produce in conjunction with establishing fees for its market data products. SIFMA is therefore compelled to contend that, in challenges to SRO fee filings pursuant to Section 19(d), "the 'record before the self-regulatory organization' consists of the materials submitted in support of the change pursuant to Section 19(b)(1), which requires the SRO *to file with the Commission* not only a copy of the rule change itself, but a statement of the 'basis and purpose' for the change." *Id.* at 11 (citing 15 U.S.C. § 78s(b)(1) (emphasis added)).

Material "file[d] with" the Commission is plainly not a record "before" an SRO, however; the plain language of Section 19 is therefore flatly inconsistent with the construction SIFMA places on it. SIFMA's interpretation also makes no sense: If the Commission has already received the entire "record" at the time the fee was filed, then it would have no reason to require an SRO whose fee has been challenged in a Section 19(d) proceeding to "certify and file with the Commission one copy of the record upon which the action complained of was taken." 17 C.F.R. 201.420(e). This record-certification requirement makes sense in the context of a quasi-adjudicatory determination that was conducted before the SRO and might later be reviewed by the Commission at the behest of the adverse party, but serves no purpose at all if the "record" merely "consists of the materials submitted in support of the [rule] change," which are already before the Commission. SIFMA Br. 11. SIFMA errs, moreover, not only in

characterizing "fil[ings] with the Commission" as the "record before the [SRO]," but also in insisting that the record here consists "solely" of the Commission's rulemaking file (*Id.* at 10), with no provision for an actual record before the SRO—for example, actual evidence that a specific party sought access to an SRO's facilities, was denied access through a specific action at a specific point in time, and as a consequence lacks access to fundamentally important services of the SRO. SIFMA is content with that outcome because in its haste to bring these 33 separate proceedings, it has created no such record "before the SRO."[3]

SIFMA's misplaced invocation of Section 19(f) is reflected, finally, in the relief it seeks, namely, that the Commission "set aside the fee[s]" in issue and "grant access" to the products in question. SIFMA Br. 6. But of course, the Commission has no power to do that—it cannot force SROs to grant access to data products for free. What SIFMA actually seeks is to use Section 19(f) to initiate countless ratemaking proceedings before the Commission. *Infra* pp. 6-9.

Ignoring this critical threshold question of whether there has been a reviewable denial of access, SIFMA relies solely on dicta from the D.C. Circuit suggesting that the court took "the Commission at its word . . . that it will make the section 19(d) process available to parties seeking review of unreasonable fees charged for market data." SIFMA Br. 4 (citing *NetCoalition v. SEC*, 715 F.3d 342, 353 (D.C. Cir. 2013)). But the D.C. Circuit's opinion cannot bear the weight that SIFMA places on it. In fact, the D.C. Circuit explicitly reserved judgment on the question whether denial-of-access proceedings can be used to challenge market-data fees,

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[3] In declaring that there has been a denial of access to "SIFMA members and their customers," SIFMA Br. 1, SIFMA implicitly confirms that it attempts to bring these proceedings in an exclusively representative capacity. Section 19(d) does not provide for proceeding in that manner, however. Exchanges' Br. 11-13.

stating that "*if* unreasonable fees constitute a denial of 'access to services' under section 19(d), we have authority to review such fees." 715 F.3d at 353 (emphasis added).

Moreover, even assuming that fees can be challenged under Section 19(d) in some circumstances, SIFMA must demonstrate (1) that it has been "aggrieved" by the fees at issue, Exchanges' Br. 11-13, (2) that it has satisfied the essential elements of associational standing, *id.* at 12 n.4, and (3) that its application is timely, *id.* at 13-14. Because SIFMA has not made any of those necessary showings here, its Application must be dismissed.

B. SIFMA's Proposed Standard Of Review Is Untenable.

In addition to ignoring several threshold questions, SIFMA's brief proposes an insupportable standard of review for denial-of-access proceedings involving allegedly unreasonable fees. According to SIFMA, the Commission must apply the standards set out in Section 19(f) of the Exchange Act without giving any consideration to the carefully calibrated regulatory structure of the Exchange Act or the objectives of the Dodd-Frank amendments. *See* SIFMA Br. 5-6. SIFMA's approach would place the Commission in the position of exercising ratemaking authority over SROs' market data fees—in direct contravention of the text, structure, and purpose of the Exchange Act, as well as the Commission's own precedent.

Congress enacted the Dodd-Frank amendments to the Exchange Act to streamline the process for SRO rule changes. *See* Exchanges' Br. 11. This congressional purpose would be dramatically undermined if Sections 19(d) and 19(f) were available to anyone who happened to disagree with an SRO's prices, even if they were not consumers of the SRO product about which they complain. SIFMA's proposed standard of review—which provides absolutely no deference to SROs' fee-setting procedures—would require the Commission to engage in extensive and protracted review of every SRO fee challenged as a denial of access, generating the exact burdens that Congress sought to eliminate in Dodd-Frank (if not even greater burdens). *See id.*

While SIFMA contends that "these rule changes likely could be addressed quickly and efficiently once the applicable legal standard is resolved," SIFMA Br. 9, it fails to explain how the Commission could address an endless stream of fact-intensive fee disputes without diverting its finite resources from more pressing matters.

Moreover, even assuming that Congress intended the Commission to review the reasonableness of SRO fees under Sections 19(d) and 19(f), the text and structure of the Exchange Act make clear that Sections 19(b) and 19(c) constitute—at minimum—the *primary* means for review of SRO rule changes. Unlike the remainder of Section 19, Sections 19(b) and 19(c) *expressly* govern SRO rules. Permitting consumers to use the denial-of-access procedure to secure the frequent nullification of rule changes that the Commission left undisturbed under Sections 19(b) and 19(c) would subvert this statutory structure. *See* Exchanges' Br. 15.

Finally, SIFMA's recommended standard disregards Commission precedent. The Commission has repeatedly affirmed that, to establish a denial of access, an applicant must show that the SRO "denied or limited the applicant's ability to utilize one of the *fundamentally important services* offered by the SRO." *See, e.g.*, *In re Application of Sky Capital*, Exchange Act Rel. No. 34-55828, 2007 WL 1559228, at *4 (May 30, 2007) (emphasis added) (citing cases). The services at issue thus cannot merely be important to the applicant; they must be "central to the function of the SRO." *Id.*; *see also* Exchanges' Br. 17. SIFMA's brief does not even mention this precedent and fails to allege that any of the challenged rule changes implicates a "fundamentally important service" that is central to the Exchanges' function.

For these reasons, if the Commission concludes that SIFMA's Application can proceed under Section 19(d), it should place both an initial burden of production—and the ultimate burden of proof—on SIFMA to demonstrate that the fees at issue constitute a denial of access.

The Exchanges should not be required to respond with their own justification for a fee until SIFMA makes a *prima facie* showing that (1) a significant segment of the market attempted to purchase the product but was unable to do so because it was prohibitively expensive; (2) the product is critical to the ability to conduct business on the exchange; and (3) 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. Exchanges' Br. 14-19.

Additionally, it should be a full defense in denial-of-access proceedings that the challenged product is priced comparably to similar data products. This defense follows inexorably from the Commission's market-based approach to evaluating SRO fees, which the D.C. Circuit upheld in the first *NetCoalition* case. *See NetCoalition v. SEC*, 615 F.3d 525, 537 (D.C. Cir. 2010) ("[T]he SEC 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." (citing 70 Fed. Reg. at 37,567)). While SIFMA suggests that *NetCoalition* might require evidence of the cost of producing the relevant data, *see* SIFMA Br. 2-3, 6-8, the *NetCoalition* court expressly rejected an argument that "Congress intended 'fair and reasonable' to be determined using a cost-based approach" and instead agreed with the Commission that "its market-based approach is fully consistent with the Exchange Act." 615 F.3d at 534. SIFMA's proposed standard of review, which contemplates the use of a cost-based approach, is therefore inconsistent with *NetCoalition* and with the Commission's past practice.

Furthermore, SIFMA's insistence on a cost-based approach belies its suggestion that future denial-of-access challenges to SRO fee filings "could be addressed quickly and efficiently once the applicable legal standard is resolved." SIFMA Br. 9. That would be the case if the Commission held, in accordance with the text of the Exchange Act and applicable regulations,

that immediately effective rule changes cannot be challenged as "denials of access," and might also be the case if applicants in such proceedings must meet the burden of production and burden of persuasion proposed by the Exchanges. But if SIFMA's proposed standard were adopted, each exchange's immediately effective fee filings would be subject to onerous cost-of-service ratemaking, placing unnecessary burdens on exchanges to justify their prices and on the Commission to review them. That is not what Congress intended in the Dodd-Frank amendments to the Exchange Act or what the D.C. Circuit ruled in *NetCoalition.*

C. SIFMA's Challenge To The Rule Change Extending Nasdaq Last Sale Should Not Be Held In Abeyance.

To ensure that they have a full opportunity to represent their interests, the Exchanges have requested that SIFMA's challenge to the rule change extending the pilot program for Nasdaq Last Sale, Release No. 34-64856, not be held in abeyance and be considered in conjunction with the NYSE Arca rule change at issue in Proceeding 3-15350. SIFMA objects to this request, arguing that the Exchanges can preserve their rights by seeking leave to participate in Proceeding 3-15350 pursuant to SEC Rule of Practice 210. SIFMA Br. 9-10. It is unclear, however, whether the Exchanges could actually intervene under Rule 210, which authorizes leave to participate in "any proceeding" *other than* "a proceeding to review a self-regulatory determination." 17 C.F.R. § 201.210(c). In any event, even assuming the Exchanges can participate in Proceeding 3-15350, such participation would not afford them a full opportunity to represent their interests. Nasdaq seeks the opportunity to defend its *own* market data product, and it should not be limited to defending the product of NYSE Arca, a vigorous competitor.

Moreover, SIFMA fails to explain how allowing *one* additional rule challenge—out of 33 total—to move forward would significantly complicate the proceedings. *See* SIFMA Br. 9-10. Indeed, SIFMA's insistence that all but one of its rule challenges be held in abeyance conflicts

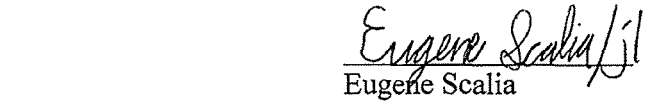
with its representations elsewhere that "the core legal issue presented by each of these rule changes is the same," *id.* at 8, and that "these rule changes likely could be addressed quickly and efficiently once the applicable legal standard is resolved in Proceeding No. 15350," *id.* at 9. If the challenge to the Nasdaq Last Sale extension can "be addressed quickly and efficiently" once the legal standard is settled, it is difficult to see how considering that challenge in conjunction with the challenge to the Arcabook fee would complicate and delay these proceedings.

Finally, SIFMA requests that, if the Commission does proceed with its challenge to one of the rule changes at issue in this Application, it should disregard the Exchanges' suggestion and instead select Release No. 34-62907 as the rule change not to be held in abeyance. *Id.* at 10. Here, again, SIFMA's explanation—that "factual variations" between the NYSE Arca product and Nasdaq Last Sale would lead to complication and delay, *id.*—is at odds with its claim that individual rule changes can be dealt with quickly and easily once the legal standard is resolved, *see id.* at 9. At minimum, the Commission should permit both the Nasdaq Last Sale extension and the rule change at issue in Release No. 34-62907 to proceed.

III. CONCLUSION

Because the Exchanges' immediately effective fee filings cannot constitute a denial of access, SIFMA is not an "aggrieved" party under Section 19(d), and SIFMA's Application for Review is untimely, the Application should be dismissed. If the Commission nevertheless concludes that these fee filings can be challenged pursuant to Section 19(d), it should require SIFMA to meet a heavy burden of production and ultimate burden of proof. Finally, in conjunction with the NYSE Arca rule change at issue in Proceeding 3-15350, the Commission should consider the challenge to the rule change extending the pilot program for Nasdaq Last Sale in order to ensure that the Exchanges have a full opportunity to represent their interests.

Respectfully submitted,



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