

**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 IN OPPOSITION TO  
SIFMA'S MOTION TO CONSOLIDATE RELATED CHALLENGES INTO  
PROCEEDING BEFORE CHIEF ADMINISTRATIVE LAW JUDGE**

## I. INTRODUCTION

The Nasdaq Stock Market LLC (“Nasdaq”) respectfully opposes SIFMA’s request to consolidate six additional rule challenges with Administrative Proceeding File No. 3-15350, which is scheduled for a hearing before the Chief Administrative Law Judge (hereinafter “ALJ”) on February 2, 2015. SIFMA effectively seeks reconsideration of the Commission’s prior ruling setting two specific rule challenges for a hearing, and holding the remainder in abeyance, per *SIFMA’s own request*. The Commission instructed the Chief ALJ to proceed first with two specific rule challenges, in order to “provide an opportunity to address the common substantive legal issues that relate to all filings,” and “serve the interests of all parties and conserve resources.” *Order Establishing Procedures And Referring Applications For Review To Administrative Law Judge For Additional Proceedings* at 21-22 (May 16, 2014) (hereinafter “SEC Order”). To consolidate these challenges with six additional challenges would conflict with the Commission’s Order, impair Nasdaq’s ability to prepare for the upcoming hearing, and needlessly complicate these proceedings.

On May 30, 2013, SIFMA filed challenges to twenty-four rules filed by Nasdaq, NYSE Arca, Inc. (“NYSE Arca”), and other exchanges. SIFMA specifically requested that one challenge—involving the lawfulness of fees charged by NYSE Arca for its ArcaBook depth-of-book data product—move forward immediately, but requested that all of the remaining challenges be held in abeyance. While agreeing with Nasdaq that one of its rules should be included in the initial proceeding, the Commission otherwise granted SIFMA’s request, consolidating SIFMA’s challenge to a Nasdaq depth-of-book rule with the ArcaBook challenge in File No. 3-15350 and declaring that SIFMA’s challenges to the remaining rules would be held in abeyance pending resolution of this proceeding. For five months, as the parties and the Chief

ALJ have briefed and decided preliminary scheduling and jurisdictional issues, SIFMA has never suggested that it disagrees with the Commission's consolidation and abeyance ruling.

Now that the parties are actively preparing for the upcoming hearing—which is a mere three months away—SIFMA seeks to inject six additional rules into this proceeding in an apparent effort to prove that, when considered cumulatively, the fees violate the Exchange Act. This request is procedurally and substantively improper. The Chief ALJ lacks the authority to overturn the Commission's order directing that SIFMA's remaining rule challenges be held in abeyance pending the resolution of the two rule challenges at issue in this proceeding. Likewise, to the extent that SIFMA's motion asks the Commission to reconsider its longstanding approach to this proceeding, it should deny that request. Expanding this proceeding to encompass additional rule challenges would conflict with the Commission's ruling requiring that SIFMA demonstrate its standing to challenge *each* of the rules at issue because SIFMA has not submitted any evidence to the Chief ALJ supporting its standing with respect to those other rules. Finally, SIFMA's approach would introduce unnecessary complexity into a proceeding that both the Commission and the Chief ALJ have sought to keep streamlined and efficient. For each of these reasons, SIFMA's Motion To Consolidate should be denied.

## **II. BACKGROUND**

SIFMA submitted an application on May 30, 2013 seeking an order setting aside a rule change by NYSE Arca that authorizes fees for depth-of-book market data, Release No. 34-43291, File No. SR-NYSEArca-2010-97 (Nov. 9, 2010). That application was assigned Admin. Proc. File No. 3-15350. That same day, SIFMA submitted a separate application, assigned Admin. Proc. File No. 3-15351, seeking to set aside additional rule changes by multiple exchanges, including sixteen different rule changes regarding Nasdaq market data. One of those

rule changes is Nasdaq Stock Market Rule 7019, Release No. 34-62907, SR-NASDAQ-2010-110 (Sept. 14, 2010) (hereinafter “Nasdaq Rule 7019”), which amends the fees charged for certain Nasdaq depth-of-book data. The 3-15351 Proceeding also included four rule changes that amend additional fees charged for Nasdaq depth-of-book data.

On July 3, 2013, the Commission requested briefing by SIFMA and the exchanges on several matters, including whether it would be appropriate to consolidate the applications and/or to stay certain proceedings. *Order Regarding Procedures to be Adopted in Proceedings* (July 3, 2013). As SIFMA concedes in its Motion for Consolidation, at that time “SIFMA requested that all of the rule change challenges in the 3-15351 proceeding be held in abeyance pending a decision on the application in the 3-15350 proceeding.” Mot. 3. Indeed, SIFMA argued to the Commission that holding the 3-15351 Proceeding in abeyance would be “the most appropriate and efficient way to proceed with these parallel applications.” SIFMA Br. 7-8 (Aug. 30, 2013). According to SIFMA, abeyance was warranted because “the core legal issue presented by each of these rule changes is the same.” *Id.* at 8. SIFMA argued that “[b]y first considering the rule change at issue in Proceeding No. 15350, while holding SIFMA’s other application in abeyance, the Commission would be able to resolve this common legal question in a timely and cost-effective manner that would expedite the subsequent consideration of other rule changes.” *Id.* It concluded that “[t]his course would avoid burdening the parties and the Commission with the complication, expense, and administrative inconvenience of proceeding simultaneously on applications regarding multiple rule changes that raise the same fundamental issues.” *Id.*

In their response to the Commission’s July 3, 2013 request for briefing, Nasdaq and NASDAQ OMX PHLX (“PHLX”) stated that they did not object to “holding proceedings regarding the merits of the majority of these rule challenges in abeyance,” but requested that

“one of the [Nasdaq] rule challenges not be held in abeyance and be considered in conjunction with the NYSE Arca matter” in order to ensure that Nasdaq and PHLX had a “full and fair opportunity to represent their interests in future proceedings.” Notice of Appearance of The Nasdaq Stock Market LLC, *In re Application of Securities Industry and Financial Markets Association*, Admin. Proc. No. 3-15351 (June 18, 2013).

SIFMA objected to Nasdaq’s consolidation request, arguing that “this action would needlessly complicate and delay the Commission’s resolution of the common legal questions by putting multiple fees for multiple data products at issue simultaneously.” SIFMA Br. 10 (Aug. 30, 2013). SIFMA further requested that, if the Commission were to consider a Nasdaq rule change in the initial proceeding, it proceed only with Nasdaq Rule 7019. *Id.* SIFMA opposed any consolidation of additional rule challenges with the 3-15350 Proceeding in order to “limit the complication and delay that might be caused by factual variations, which may exist for other rule changes.” *Id.*

On May 16, 2014, the Commission issued an order that severed the challenge to Nasdaq Rule 7019 from the 3-15351 Proceeding and consolidated it with the 3-15350 Proceeding. *See* SEC Order at 21. The Commission also granted SIFMA’s request to withhold issuance of an order governing further proceedings in the remainder of the 3-15351 Proceeding until after the resolution of the consolidated 3-15350 Proceeding. *Id.* The Commission reasoned that this approach would “provide an opportunity to address the common substantive legal issues that relate to all filings,” and “serve the interests of all parties and conserve resources.” *Id.* at 21-22.

In the same order, the Commission ruled that SIFMA must “establish[] the requisite jurisdictional elements” showing that it has associational standing to proceed as a “person aggrieved” under Section 19(d)(2). *Id.* at 10-11. The Commission explained that “[f]or each

*challenged fee*, Section 19(d) . . . requires that an SRO have ‘prohibit[ed] or limit[ed]’ SIFMA members ‘in respect to access to services’ at issue.” *Id.* at 12 (emphasis added). To establish that its members are subject to an actual limitation of access, the Commission concluded that “SIFMA should present, at a minimum, member declarations, or other comparable evidence, establishing that particular SIFMA members purchase the depth-of-book products and explaining that those members are aggrieved because the level of the prices charged for those products is so high as to be outside a reasonable range of fees under the Exchange Act.” *Id.* at 14.

On October 20, 2014, after receiving briefing by the parties and declarations by SIFMA members, the Chief ALJ issued an order concluding that the Commission “has jurisdiction to determine the merits of the SIFMA applications *at issue*.” *Order On The Issues Of Jurisdiction And Scheduling* at 8 (Oct. 20, 2014) (emphasis added).<sup>1</sup> Consistent with the Commission’s May 16 Order, the Chief ALJ made no determination with respect to jurisdiction over *other* rule challenges.

### III. ARGUMENT

#### A. SIFMA’s Motion To Consolidate Improperly Seeks Reconsideration Of The Commission’s Abeyance Order.

The Chief ALJ was directed by the Commission to proceed first with two specific rule challenges in order to “provide an opportunity to address the common substantive legal issues that relate to all filings.” SEC Order at 21-22. The Commission provided these instructions at

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<sup>1</sup> For the reasons set out in Nasdaq’s brief of August 18, 2014, *see Brief of The Nasdaq Stock Market LLC In Response To SIFMA’s Opening Brief Regarding Satisfaction Of Jurisdictional Requirements* (Aug. 18, 2014), the Chief ALJ erred in concluding that SIFMA established the requirements of associational standing and that the Commission has jurisdiction to determine the merits of the SIFMA applications at issue. The Commission may address the jurisdictional issues raised by SIFMA’s bare-bones declarations *sua sponte* at this time, or Nasdaq will address them on appeal in due course.

SIFMA's specific request, and the Chief ALJ complied with them by addressing SIFMA's standing to challenge the two rule changes "at issue," but not SIFMA's standing with respect to any other rule challenges. *Order On The Issues Of Jurisdiction And Scheduling* at 2 (Oct. 20, 2014). SIFMA's belated effort to alter the long-standing procedural course of this proceeding—in contravention of its own previous position and the Commission's controlling May 16 Order—should be rejected.

SIFMA's Motion for Consolidation appears to be aimed at increasing the sheer amount of disputed fees at issue in this proceeding, because SIFMA cannot prevail on the merits with respect to the rule changes presently at issue. According to SIFMA, the current proceeding cannot move forward as currently structured because "the challenges before the Chief ALJ address only a small portion of the total fees charged for the depth-of-book data at issue." Mot. 2. But it was *SIFMA itself* that proposed holding the other rule challenges in abeyance pending the outcome of this proceeding. Nothing has changed since SIFMA made, and the Commission granted, that request. The four Nasdaq rule changes that SIFMA now seeks to consolidate with the 3-15350 Proceeding have always been part of the 3-15351 Proceeding, but not until now did SIFMA suggest that those additional challenges should proceed to an immediate hearing. To the contrary, SIFMA specifically requested that the Commission hold the 3-15351 Proceeding in abeyance to "limit the complication and delay that might be caused by factual variations, which may exist for other rule changes." SIFMA Br. 10 (Aug. 30, 2013).

SIFMA nevertheless argues that it now needs to include additional Nasdaq rule changes in this proceeding because it otherwise may be unable to show that its members were aggrieved by Nasdaq Rule 7019. SIFMA's request is puzzling, at best, given that SIFMA recently submitted sworn (but *pro forma*) declarations from its members asserting (in conclusory fashion)

that those members were aggrieved by Nasdaq Rule 7019. If SIFMA were now to contend that it can only show that its members are aggrieved by lumping in other Nasdaq fees, that position would raise serious questions about the accuracy of its members' form declarations. Perhaps this is not surprising, given that the rule change at issue did not increase the fees paid by any of the SIFMA members who submitted declarations; it instead simply left in place fees of no more than \$6,750 per year. But the remedy for SIFMA's inability to establish that its members were aggrieved by Nasdaq Rule 7019 should be dismissal of the petition, not the belated expansion of this proceeding to enable SIFMA to lump together multiple Nasdaq rule filings at once.

SIFMA also contends that challenges to additional NYSE Arca rules should be consolidated with the 3-15350 Proceeding because the "recent rule changes have increased or amended some of the fees before the Chief ALJ." Mot. 1. This is a complete reversal, however, of SIFMA's prior position. SIFMA previously argued that, because "the Exchanges continue to file new rule changes imposing fees for market data . . . it would not be practicable to address in a single consolidated proceeding every rule change that implicates the same legal issues as will be resolved in Proceeding No. 15350." SIFMA Br. 9 (Aug. 30, 2013). The Commission accepted SIFMA's position and ruled that it would withhold issuing an order governing further proceedings with respect to "additional applications SIFMA filed after the Proceedings." SEC Order at 21 n.118. The Commission's decision is correct and controlling.

**B. SIFMA Cannot Bypass The Jurisdictional Inquiry Mandated By The Commission.**

SIFMA's request should be denied for the additional reason that it improperly invites a determination regarding the merits of rule challenges before SIFMA has even demonstrated that it possesses standing to bring those challenges. As the Commission acknowledged, "the contours of [its] jurisdiction are not limitless" and "[it did] not mean to suggest that anyone may bring an application for review of SRO action." SEC Order at 11. A finding of jurisdiction prior



to proceeding to the merits in any of SIFMA's pending rule challenges is therefore necessary. Indeed, the Commission referred this matter to the Chief ALJ specifically to make "the determination of whether SIFMA has established the requisite jurisdictional elements with respect to certain fee challenges." *Id.* at 10.

Nothing in the Commission's May 16 Order or the Chief ALJ's Order on the Issues of Jurisdiction and Scheduling suggests that jurisdiction to challenge one rule change automatically confers jurisdiction to challenge all other rule changes. Indeed, as the Commission ruled, to pursue an application for review under Section 19(d)(2), an applicant must show it is a "person aggrieved" by the challenged action. SEC Order at 10; *see id.* at 12 (indicating that SIFMA must demonstrate the jurisdictional requirements "[f]or each challenged fee"). The Commission further ruled that SIFMA cannot establish that it has jurisdiction simply by *ipse dixit*; rather, it "must establish that its members are subject to an actual limitation of access" through presentation of, at a minimum, member declarations or other comparable evidence explaining that its members are aggrieved. *Id.* at 14. Here, there has been no evidentiary showing that any SIFMA member is aggrieved by any of the six additional rules that it seeks to challenge in this proceeding. SIFMA's consolidate-now-ask-questions-later approach would dispense with the critical jurisdictional inquiry mandated by the Commission with respect to *each* of the rule changes at issue and would mean that any organization with standing to challenge one SRO rule would automatically possess standing to challenge every other rule promulgated by that SRO. By requiring a particularized, rule-by-rule standing inquiry, the Commission has already concluded that this is not the law.

**C. Consolidation Would Unnecessarily Complicate This Proceeding.**

Finally, consolidation should be denied because adding six new rule challenges to this proceeding would inject unnecessary complexity into a proceeding that the Commission and the

Chief ALJ have consistently endeavored to simplify. *See* Mot. 2. The purported “inadequacies” that SIFMA now identifies in the proceeding reflect the streamlined, efficient approach originally proposed by SIFMA and endorsed and adopted by the Commission. SEC Order at 21-22.

As SIFMA previously explained, “[b]y first considering the rule change at issue in Proceeding No. 3-15350, while holding SIFMA’s other application in abeyance,” the Commission would be able to resolve the “core legal issue” common to each of the rule changes being challenged—*i.e.*, “what evidence is necessary to show that a fee is consistent with the requirements of the Exchange Act and applicable regulations, consistent with the decision in *NetCoalition I.*” SIFMA Br. 8 (Aug. 30, 2013). Proceeding with only a limited number of rule changes would allow this issue to be resolved in a timely and efficient manner, and expedite any subsequent consideration of other rule changes. *See id.*; SEC Order at 21-22.

Following this approach pays heed to the Chief ALJ’s caution that “[c]are and some degree of expedition is needed in this proceeding lest it resemble Dickens’s *Jarndyce v. Jarndyce*” or something even worse. *Order On The Issues Of Jurisdiction And Scheduling* at 11 (Oct. 20, 2014). As SIFMA itself argued, consolidation of the proceedings addressing these separate rule changes would be “unwieldy” and is “likely [to] increase both the cost and length of time required to resolve the fundamental legal issue before the Commission.” SIFMA Br. 8-9 (Aug. 30, 2013).

Moreover, although SIFMA claims that the additional six rule changes purportedly “all . . . raise common questions of law and fact regarding fees imposed for the same depth-of-book market data,” Mot. 2, SIFMA does not deny that adding six more rule challenges to this proceeding would inevitably generate additional factual questions regarding those distinct

market-data fees that are not “common” to the two rule challenges presently at issue. The Commission has already identified the two rule challenges that it deemed sufficiently related to warrant consolidation for an initial hearing to determine the legal standards under which future rule challenges will be decided. Expanding that hearing at this late date would add unnecessary complexity to the proceeding and needlessly strain the resources of the parties and the Chief ALJ.

#### IV. CONCLUSION

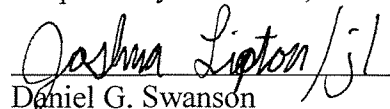
For the foregoing reasons, SIFMA’s Motion for Consolidation should be denied.

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 29, 2014, I caused a copy of the foregoing Brief of The Nasdaq Stock Market LLC In Opposition To SIFMA's Motion To Consolidate Related Challenges Into Proceeding Before Chief Administrative Law Judge to be served on the parties listed below via First Class Mail. Service was accomplished on SIFMA and the Exchanges via First Class Mail because of the large service list.

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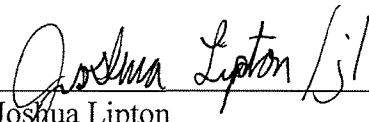
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