

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of:

The Application of SECURITIES INDUSTRY
AND FINANCIAL MARKETS ASSOCIATION

For Review of Action Taken by Certain Self-
Regulatory Organizations Listed in Exhibit A
Annexed Hereto.

Admin. Proc. File No. 315394

APPLICATION FOR AN ORDER SETTING ASIDE
RULE CHANGES OF CERTAIN SELF-REGULATORY
ORGANIZATIONS LIMITING ACCESS TO THEIR SERVICES

The Securities Industry Financial Markets Association (“SIFMA”) submits this application, pursuant to Sections 19(d) and 19(f) of the Securities Exchange Act of 1934 (the “Act”), for an order setting aside certain rule changes (the “Rule Changes”) unilaterally issued by the exchanges (the “Exchanges”) listed in Exhibit A attached hereto that limit the access of SIFMA’s members and their customers to market data made available by the Exchanges and are inconsistent with the Act.

1. SIFMA is a trade association that represents certain securities firms, banks, and asset managers. Market data is integral to the business of SIFMA’s members and their customers.

2. Beginning in August 2010, the Exchanges filed numerous Rule Changes that purported to allow the Exchanges to charge fees for the use of market-data products made available exclusively by each Exchange. The Rule Changes became effective upon filing with the SEC.

3. Despite SIFMA’s comment letters and petitions to suspend the Rule Changes, the SEC did not act within the 60-day period provided in the Act.

4. SIFMA thereafter petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the SEC’s failure to suspend the Rule Changes. Four petitions were submitted for decision (the “Argued Petitions”) and consideration of the remaining petitions was stayed pending such decision. On April 30, 2013, the Court dismissed the Argued Petitions for lack of jurisdiction while “tak[ing] 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, thereby opening the gate to our review” and reaffirming that *NetCoalition v. SEC*,

615 F.3d 525 (D.C. Cir 2010), “remains a controlling statement of law as to what sections 6 and 11A of the Exchange Act require of SRO fees.”

5. The SEC should set aside the Rule Changes because each constitutes a limitation on access to the Exchanges’ services for purposes of Section 19(d) and (f). This is so because they limit access to critical market data for anyone unwilling or unable to pay the onerous, supracompetitive fees the Exchanges are charging. Furthermore, the SEC should set aside the Rule Changes under Sections 19(d) and (f) because SIFMA’s members and their customers must pay fees that are not consistent with the Act. The Rule Changes are not “fair and reasonable” and they do not “provide for the equitable allocation of reasonable . . . fees . . . among . . . persons using [the Exchange’s] facilities.” Nor do the Rule Changes “promote just and equitable principles of trade,” or “protect investors and the public interest.” In sum, the Rule Changes are unenforceable under section 19(b)(3)(C).


6. Under the SEC’s “market-based” approach, market forces cannot provide a basis for finding that an exchange’s non-core data fees are “fair and reasonable” unless the exchange is subject to significant competitive forces in setting the fees. The Exchanges have offered no evidence of such competitive forces. The Exchanges also have provided no evidence of the cost of collecting and distributing the data at issue, despite the D.C. Circuit’s finding that such costs are undeniably relevant evidence, and an Exchange’s concession that its costs are “small, or even zero.”

7. SIFMA previously filed a challenge to the *Proposed Rule Change by NYSE Arca, Inc. Relating to Fees for NYSE Arca Depth-of-Book Data*, Admin. Proceeding File No. 3-15350 (the “NYSE Arca Petition”), and respectfully requests that this application be held in abeyance pending a decision on the NYSE Arca Petition.

Dated: July 29, 2013

Respectfully submitted,

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Rule of Practice 420(c) Statement: Service upon the applicant may be accomplished by serving their attorneys at the address listed above.

EXHIBIT A

Exchange	File Number	Release Number	Date Filed
NYSE MKT LLC	SR-NYSEMKT-2013-40	34-69553	5/10/2013
NYSE Arca, Inc.	SR-NYSEArca-2013-47	34-69554	5/10/2013