

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 NASDAQ Stock
Market LLC.

Admin. Proc. File No. 3-15774

**APPLICATION FOR AN ORDER SETTING ASIDE RULE CHANGE OF
NASDAQ STOCK MARKET LLC LIMITING ACCESS TO ITS 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 the *Proposed Rule Change with Respect to NASDAQ Last Sale*, Release No. 34-71351; File No. SR-NASDAQ-2014-006 (the “Rule Change”). The Rule Change limits the access of SIFMA’s members and their customers to market data made available by NASDAQ Stock Market LLC (the “Exchange”) and is 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. On January 17, 2014, the Exchange provided notice that it filed the Rule Change, which purports to allow the Exchange to charge fees on a permanent basis for the use the NASDAQ Last Sale Market Data Products made available exclusively by the Exchange.

3. Although SIFMA has filed a petition to suspend the Rule Change and to institute proceedings to disapprove it under Section 19(b)(2)(B), the SEC has not acted to suspend the Rule Change or to institute proceedings to disapprove it.

4. SIFMA has previously petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the SEC’s failure to suspend similar 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 Change because it constitutes a limitation on access to the Exchange’s services for purposes of Section 19(d) and (f). This is so because it limits access to critical market data for anyone unwilling or unable to pay the onerous, supracompetitive fees the Exchange is charging. Furthermore, the SEC should set aside the Rule Change 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 Change is not “fair and reasonable” and it does not “provide for the equitable allocation of reasonable . . . fees . . . among . . . persons using [the Exchange’s] facilities.” Nor does the Rule Change “promote just and equitable principles of trade,” or “protect investors and the public interest.” In sum, the Rule Change is 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 Exchange has offered no evidence of such competitive forces. The Exchange also has 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 the Exchange’s concession in a separate rule filing that the marginal cost of providing market data to additional customers is “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 “First NYSE Arca Petition”), and respectfully requests that this application be held in abeyance pending a decision on the First NYSE Arca Petition.

Dated: March 4, 2014

Respectfully submitted,

SIDLEY AUSTIN LLP



Carter G. Phillips
Dennis C. Hensley
Kevin J. Campion
Eric D. McArthur
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for SIFMA

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