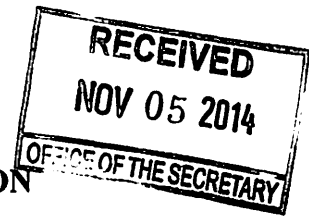


UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



In The Matter of the Application of:

SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION

for Review of Actions Taken by NYSE Arca, Inc..

Admin. Proc. File No. 3-16006

**REPLY BRIEF IN SUPPORT OF MOTION BY SECURITIES INDUSTRY
AND FINANCIAL MARKETS ASSOCIATION TO CONSOLIDATE
RELATED CHALLENGES INTO PROCEEDING BEFORE
CHIEF ADMINISTRATIVE LAW JUDGE**

In this motion, Applicant Securities Industry and Financial Markets Association (“SIFMA”) is requesting a narrow and targeted consolidation of several closely related challenges. The 3-15350 proceeding, pending before Chief Administrative Law Judge Brenda Murray (the “Chief ALJ”), challenges one rule change each by NYSE Arca, Inc. (“NYSE Arca”) and NASDAQ Stock Market LLC (“Nasdaq”) (collectively, the “Exchanges”), both of which authorize fees for depth-of-book market data products. Now that the Chief ALJ has ruled that SIFMA has standing to move forward in the 3-15350 proceeding, SIFMA is requesting that the proceeding be consolidated with challenges to a handful of additional rule changes that authorize fees for the *exact same* depth-of-book market data products. Some of the rule changes do no more than increase and restructure the *exact same fees* already before the Chief ALJ; the rest authorize additional fees that SIFMA’s members must pay to access, use, and/or distribute the depth-of-book market data products already before the Chief ALJ.

The Exchanges have no valid basis for opposing this request. Their primary argument is that consolidation is inappropriate because the Commission stayed the proceedings for some of these challenges at SIFMA’s request. NYSE Arca Opp. 7–8; Nasdaq Opp. 5–7. But, as explained in SIFMA’s motion and below, it is entirely appropriate for the Commission to revisit the issue now that circumstances have changed due to the Exchanges’ own actions. The Exchanges’ other argument—that consolidation would complicate the proceedings, NYSE Arca Opp. 9–13; Nasdaq Opp. 7–10—is pure smoke and mirrors; neither NYSE Arca nor Nasdaq identifies any factual or legal differences among the challenges that would complicate the proceedings.

It is clear that the Exchanges would prefer for the Chief ALJ to review only a small fraction of the total fees that they charge SIFMA’s members for depth-of-book data. They appear concerned that if the Chief ALJ has a more complete and up-to-date picture of what SIFMA’s

members must pay to access this data, the Exchanges' supracompetitive fees will be all the more difficult to justify as "fair and reasonable." 15 U.S.C. § 78k-1(c)(1)(C). But that is no reason to review these interrelated rule changes in piecemeal fashion. To the contrary, the need to ensure that the Chief ALJ has an up-to-date and accurate understanding of what the Exchanges charge for depth-of-book data is a compelling reason to order consolidation.

1. There is no merit to the Exchanges' suggestion that consolidation is inappropriate because SIFMA previously requested, and the Commission ordered, a more limited consolidation. NYSE Arca Opp. 7–8; Nasdaq Opp. 5–7. Nothing in the Commission's rules or the orders in these proceedings precludes the Commission from revisiting the question of consolidation as appropriate to address new factual developments. Rather, Rule of Practice 201(a) expressly authorizes the Commission to consolidate "any or all [of] the matters at issue" in proceedings "involving a common question of law or fact . . . as it deems appropriate to avoid unnecessary cost or delay." Thus, if consolidation initially is unnecessary but circumstances change such that it becomes "appropriate," the Commission has full authority to order it.

That is the case here. With respect to NYSE Arca, the two rule changes for which SIFMA has requested consolidation into the 3-15350 proceeding *had not even been filed* when SIFMA last briefed the question of consolidation in September 2013, and one of them was not even filed until *after* the Commission ruled on May 16, 2014. *See* Release No. 34-71483, File No. SR-NYSEArca-2014-12 (Feb. 5, 2014); Release No. 34-72560, File No. SR-NYSEArca-2014-72 (July 8, 2014) (collectively, "Recent NYSE Arca Rule Changes"). Moreover, all these rule changes did was increase and restructure fees authorized by the 2010 rule change that is already part of the 3-15350 proceeding. *See* SIFMA Consol. Mot. 5–6 (describing rule changes).

Consolidation thus has become appropriate to ensure that the Chief ALJ has before her the current versions of the fees at issue.¹

With respect to Nasdaq, consolidation has become appropriate to ensure that the Chief ALJ has a more complete picture of what SIFMA's members must pay Nasdaq for the depth-of-book data at issue in the 3-15350 proceeding. In a preview of what it will assert at the hearing, Nasdaq suggested to the Chief ALJ in an August filing that SIFMA's members are not injured by the challenged rule change pending before her because they are "charged no more than \$6,750 per month under the *fee provisions at issue*" in the 3-15350 proceeding. *Brief of the Nasdaq Stock Market LLC in Response to SIFMA's Opening Brief Regarding Satisfaction of Jurisdictional Requirements* 6, Admin. Proc. File No. 3-15350 (Aug. 18, 2014) (emphasis added). As SIFMA explained, this argument is misleading because it ignores that these fees are in addition to hundreds of thousands of dollars in other monthly fees. SIFMA Consol. Mot. 7, 8–9. Although the fees presently before the Chief ALJ are unreasonable both in isolation and in combination with other fees for the same data, Nasdaq's efforts to downplay the context in which its fees are charged make clear that it now is appropriate for the Chief ALJ to review a more complete set of fees charged for the same data product.

¹ NYSE Arca also suggests that consolidation is inappropriate because SIFMA requested, in its applications challenging the Recent NYSE Arca Rule Changes, that the proceedings be held in abeyance pending resolution of the 3-15350 proceeding. NYSE Arca Opp. 7–8. SIFMA requested that action because, under the Commission's Rules of Practice, the submission of an application under Section 19(d) of the Exchange Act triggers an automatic deadline for the Commission to issue a briefing schedule. *See* SEC Rule of Practice 450(a)(2). Holding these proceedings in abeyance thus was necessary to ensure that they did not proceed on a faster track than the 3-15350 proceeding, which was pending review on preliminary, threshold issues. Now that the Commission and the Chief ALJ have held that the 3-15350 proceeding may move forward, consolidation is appropriate to ensure that the merits review accounts for recent developments that affect how NYSE Arca currently enforces the fees at issue.

Moreover, with respect to both exchanges, SIFMA filed motions to consolidate as soon as it became clear that consolidating these proceedings would be the more efficient course. Just two weeks ago, the Chief ALJ still was considering arguments by the Exchanges that the 3-15350 proceeding should be dismissed on jurisdictional grounds. Until the Chief ALJ rejected these arguments and held that SIFMA has standing to move forward on the merits, moving for consolidation would not have advanced the goal of economy—if the ALJ had dismissed the proceeding on jurisdictional grounds, SIFMA’s consolidation motion would have become moot. Once the Chief ALJ ruled, SIFMA acted promptly and submitted its request two days later.

2. The Exchanges also are incorrect that consolidation would complicate the proceedings. NYSE Arca Opp. 9–13; Nasdaq Opp. 7–10. The challenges on which SIFMA seeks consolidation raise identical issues regarding the same depth-of-book market data products. To the extent that Exchanges attempt to identify sources of potential complexity, they significantly mischaracterize the effect that consolidation would have on the proceedings.

a. The Exchanges are wrong to suggest that consolidation would require extensive proceedings to determine SIFMA’s standing to challenge the six rule changes not currently part of the 3-15350 proceeding. *See* NYSE Arca Opp. 10–12; Nasdaq Opp. 7–8. The Commission already has held that an allegedly unreasonable fee for depth-of-book data “constitutes [a] reviewable limitatio[n] under Section 19(d),” and that SIFMA can represent its members’ interests because it “seeks to protect interests that are germane to its purpose” and its merits claims do not “requir[e] the participation of individual SIFMA members in the Proceedings.” Order Establishing Procedures and Referring Applications for Review to Administrative Law Judge for Additional Proceedings 12, 14, Rel. No. 34-72183, Admin. Proc. File Nos. 3-15350, 3-15351 (May 16, 2014) (“May 16 Order”). These holdings, which are based on the nature of

SIFMA's allegations and the type of data at issue, apply equally to *all* of SIFMA's challenges to the Exchanges' fees for depth-of-book data.²

The only standing issue left open by the Commission's May 16 Order is whether the fees subject SIFMA's members to "actual limitation[s] of access." *Id.* at 14. With respect to the fees authorized by the rule changes challenged in the 3-15350 proceedings, the Chief ALJ has held that SIFMA satisfied its burden on this point by submitting member declarations that (1) establish that SIFMA's members pay the challenged fees; and (2) explain that the members believe the prices are unreasonable under the Exchange Act for the reasons set forth in SIFMA's applications. Order on the Issues of Jurisdiction and Scheduling 9–10, Rel. No. 1921, Admin. Proc. File No. 3-15350 (Oct. 20, 2014). To the extent the other rule changes simply increase the amounts of the exact same fees, SIFMA already has established that its members are aggrieved by these fees, and its standing therefore already is established. To the extent the other rule changes involve additional fees, SIFMA can establish that its members are aggrieved by those rule changes by submitting member declarations that provide the same information about those fees as it did for the other fees. Because the Chief ALJ already has ruled on what information the declarations should contain to establish SIFMA's standing, there will be no need for further briefing on the applicable legal requirements. Jurisdiction can be established quickly and with minimal burden on the parties and the Chief ALJ.

b. The Exchanges also are incorrect that consolidation would complicate the proceedings on the merits. As neither exchange can dispute, each of the challenges proposed for consolidation into the 3-15350 proceeding involves the *exact same* depth-of-book market data products already

² Although the Commission noted that it was not addressing "whether jurisdiction exists over SIFMA's other fee rule challenges," it did so in the context of explaining that challenges that "[do] not involve depth-of-book data services" might raise different questions. May 16 Order 16 n.92. The challenges at issue here, of course, all involve only depth-of-book data.

before the Chief ALJ. Instead, the Exchanges' sole argument is that these challenges should not be consolidated because of variations in the fees they authorize. NYSE Arca Opp. 9–10; Nasdaq Opp. 8–10. That assertion is wrong.

With respect to NYSE Arca, *every single fee* modified by the Recent NYSE Arca Rule Changes was authorized initially by the 2010 rule change currently being reviewed by the Chief ALJ. *See* SIFMA Consol. Mot. 5–6 (describing rule changes). The only difference is that the Recent NYSE Arca Rule Changes modify the amounts charged pursuant to the fees authorized by the 2010 rule change. But because “the substantive question [before the Chief ALJ] concerns the *current* enforceability of the challenged fees,” May 16 Order 20 (emphasis added), the Chief ALJ already will need to take into account how those fees have been modified over time. Thus, rather than complicating these proceedings, consolidation instead will *simplify* them by clarifying the Chief ALJ’s authority to consider the fees in their current form.³

With respect to Nasdaq, the challenges proposed for consolidation into the 3-15350 proceeding involve additional fees for its depth-of-book data, but Nasdaq does not identify *any* factual variation between the fees already challenged in the 3-15350 proceeding and those proposed for consolidation that would complicate the proceedings. Nor could it. The written

³ NYSE Arca suggests that SIFMA conceded that the Recent NYSE Arca Rule Changes involve material factual differences because it previously argued that the Commission should seek to minimize “‘factual variations’” when determining which proceedings, if any, to consolidate. NYSE Arca Opp. 13 (quoting SIFMA Reply Br. Regarding Procedures 10, Admin. Proc. File No. 3-15350 (Sept. 20, 2013)). That suggestion is absurd. SIFMA was explaining why consolidation should be limited to rule changes involving depth-of-book data, and that the Commission should not consolidate (as Nasdaq had suggested) a rule change involving last sale data—which would have raised significant factual variations, as the Commission recognized. *See* May 16 Order 21 n.117 (noting that the fees for last sale data were “dissimilar”). In any event, SIFMA could not have been conceding anything about the facts raised by the Recent NYSE Arca Rule Changes because those rule changes had not even been filed yet.

justifications that Nasdaq submitted in support of these rule changes are substantively identical.⁴

If the rule changes raised distinct factual issues, or required different evidence or arguments to support them, then surely Nasdaq would have said so when explaining to the Commission why these rule changes were consistent with the Exchange Act.

Moreover, consolidation will not expand the scope of proceedings because the Chief ALJ will need to consider the total price that Nasdaq charges for depth-of-book data regardless of whether the component fees that go into that price are considered together or separately. Nasdaq must prove that its fees are “fair and reasonable,” 15 U.S.C. § 78k-1(c)(1)(C), and a fee may be more or less “fair and reasonable” depending on what other fees are charged for the same product. Thus, the totality of the fees that Nasdaq charges for depth-of-book data will be at issue in the 3-15350 proceeding regardless of whether other challenges are consolidated into the proceeding. Consolidation merely will help to ensure that the Chief ALJ has a more complete understanding of what Nasdaq requires purchases of depth-of-book data to pay, and will conserve resources by obviating the need for further proceedings in the future with respect to these interrelated rule changes.

⁴ Compare *Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Rule 7019*, Release No. 34-62907, File No. SR-NASDAQ-2010-110 (Sept. 14, 2010), with *Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify the Fees Applicable to Non-Display Usage of Certain NASDAQ Depth-of-Book Market Data*, Release No. 34-66724, File No. SR-NASDAQ-2012-044 (Apr. 3, 2012), and *Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Re-organize NASDAQ’s Rules Governing the Fees Applicable to NASDAQ’s Depth-of-Book Market Data*, Release No. 34-66740, File No. SR-NASDAQ-2012-042 (Apr. 5, 2012), and *Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify an Optional Depth Data Enterprise License Fee for Broker-Dealer Distribution of Depth-of-Book Data*, Release No. 34-67253, File No. SR-NASDAQ-2012-069 (June 25, 2012), and *Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify a Level 2 Subscriber Fee and Related Rule Clarifications*, Release No. 34-68493, File No. SR-NASDAQ-2012-133 (Dec. 20, 2012).

CONCLUSION

For the reasons stated above and in SIFMA's motion, the fee rule change challenges identified in Appendix A to SIFMA's motion should be consolidated into the 3-15350 proceeding that has been referred to the Chief ALJ.

Dated: November 4, 2014

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.

