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	File No. 3-17943

NEW YORK STOCK EXCHANGE LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE APPLICATION OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION FOR REVIEW OF ACTION TAKEN BY CERTAIN SELF-REGULATORY ORGANIZATIONS

New York Stock Exchange LLC ("NYSE"), in its capacity as administrator of the Consolidated Tape Association ("CTA") Plan and the Consolidated Quotation ("CQ") Plan (collectively, the "Plans"), respectfully submits this memorandum of law in support of its motion to dismiss the application seeking review of action taken by certain self-regulatory organizations (the "Application"), dated April 24, 2017, filed by the Securities Industry and Financial Markets Association ("SIFMA").

NYSE respectfully submits that the Application should be dismissed for two reasons. *First*, the Application is moot. Three days after SIFMA filed the Application, the Chairman of the Plans filed a letter with the Commission announcing, on behalf of the Plans' participants (the "Participants"),[1] that the amendments to the Plans had been withdrawn, thereby

[1] The Participants are: BATS Exchange, Inc., BATS-Y Exchange, Inc., Chicago Board Options Exchange, Inc., Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc. International Securities Exchange LLC, Investors' Exchange LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLZ, Inc., Nasdaq Stock Market LLC, National Stock Exchange, NYSE, NYSE MKT LLC, and NYSE Arca, Inc.

rendering the Application moot because there is nothing to set aside. *Second*, the Application is untimely because SIFMA did not submit the Application within the 30-day period prescribed by Rule 420(b) of the Commission's Rules of Practice.

BACKGROUND

The relevant facts are straightforward. On March 2, 2017, the Participants filed with the Commission an immediately-effective proposal to amend the Second Restatement of the CTA Plan and the Restated CQ Plan (the "Amendments"). On March 23, 2017, the CTA filed a notice of determination with the Commission concerning the Amendments (the "Notice of Determination").[2] On April 24, 2017, 32 days after the Notice of Determination was filed, SIFMA submitted the Application seeking to set aside the Amendments.[3] Just three days later, Emily Kasparov, Chairman of the Plans, filed a letter with the Commission stating that the Participants had withdrawn the Amendments.[4]

ARGUMENT

A. THE APPLICATION IS MOOT

The withdrawal of the Amendments renders the Application moot. The Commission has long recognized that "[t]he test for mootness is whether the relief sought would, if granted, make a difference to the legal interest of the parties."[5] Although the Commission has recognized that it, like other administrative agencies, has substantial discretion in determining "whether the resolution of an issue is precluded by mootness," the Commission has "declined to

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2 *See* Release No. 34-80300; File No. SR-CTA/CQ-2017-02.

3 *See* Exhibit A, attached hereto.

4 *See* https://www.sec.gov/comments/sr-ctacq-2017-02/ctacq201702-1726123-150695.pdf.

5 *Matter of the Applications of Marshall Financial, Inc.*, Securities Exchange Act Rel. No. 50343 (Sept. 10, 2004) (quoting *Coalition for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 458 (6th Cir. 2004)).

consider an [application] where even a favorable decision by Commission would entitle the applicant to no relief."[6]

In *Matter of the Applications of Marshall Financial, Inc.*, the Commission dismissed Marshall Financial, Inc.'s ("Marshall") application on mootness grounds.[7] There, in an underlying proceeding, a hearing officer for the NASD determined that Marshall should be suspended until it produced evidence that it had paid various fees related to certain arbitrations in accordance with NASD rules; the suspension order, however, never took effect because Marshall had paid the fees before the order was served on it.[8] Consequently, the Commission held Marshall's application challenging the determination of the NASD officer was moot because there was no sanction that the Commission could "set aside" pursuant to Exchange Act Section 19(e).[9]

Dismissing SIFMA's Application as moot is consistent with *Marshall Financial.* The relief sought by SIFMA in the Application is for the Commission to "set aside" the Amendments on the grounds that "they limit access to critical market data for anyone unwilling or unable to pay the onerous, supra-competitive fees the [self-regulatory organizations] are charging."[10] But because there are no longer any Amendments for the Commission to "set aside," the Application is moot under the *Marshall Financial* test and must be dismissed.

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6 *Id.* (internal quotation marks and ellipses omitted).

7 *See* Securities Exchange Act Rel. No. 50343 (Sept. 10, 2004).

8 *See id.*

9 *See id.*

10 *See* Exhibit A ¶ 4.

B. THE APPLICATION IS UNTIMELY

Dismissal of the Application is also warranted because SIFMA did not timely file the Application in accordance with the Commission's Rules of Practice. Rule 420(b) provides that "an applicant must file an application for review with the Commission within 30 days after the notice of determination is filed with the Commission and received by the aggrieved person applying for review" and states that "[t]he Commission will not extend this 30-day period, absent a showing of extraordinary circumstances." Here, the CTA filed the Notice of Determination with the Commission on March 23, 2017 concerning the immediately-effective amendments to the Plans. SIFMA filed the Application on April 24, 2017, 32 days after the Notice of Determination was filed. The Application is, therefore, untimely under Rule 420(b). Moreover, SIFMA has not attempted to make any showing that extraordinary circumstances exist warranting an extension of the 30-day period set by the Rules of Practice.[11] Thus, SIFMA's failure to file the Application timely requires dismissal by the Commission.[12]

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11 *See* Rule 420(b); *MFS Sec. Corp.*, Exchange Act Rel. No. 47626, 56 SEC 380, 2003 WL 175181, at *3.

12 Should the Commission not wish to dismiss the Application on mootness or timeliness grounds, NYSE does not object to SIFMA's request that the application for review "be held in abeyance" pending a decision in File No. 3-15350 (as consolidated) by the Commission. NYSE, however, reserves all other objections to the Application, including, but not limited to, the objections that the Amendments to the Plans at issue do not relate to a purported denial or limitation of access to market data and that in any event SIFMA is not a party aggrieved by the Amendments to the Plans at issue.

CONCLUSION

For all the foregoing reasons, NYSE respectfully requests that Application should be dismissed.

Dated: May 8, 2017
New York, New York

Respectfully submitted,

BAKER BOTTS L.L.P.

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EXHIBIT A

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. _____

APPLICATION FOR AN ORDER SETTING ASIDE AMENDMENTS 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"), or alternatively, to the extent those provisions are determined to be inapplicable, pursuant to Commission Rule 608(d), for an order setting aside certain amendments unilaterally issued by the self-regulatory organizations ("SROs") listed in Exhibit A attached hereto. The amendments limit the access of SIFMA's members and their customers to market data made available by the SROs 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, and members of SIFMA regularly access or seek to access the market data that the SROs make available.

2. The SROs have provided notice that they filed the amendments, which purport to allow them to charge new and amended fees for market data and related services made available exclusively by the SROs. The amendments became effective upon filing with the SEC, and the SEC has not suspended the amendments or instituted proceedings to disapprove them.

3. SIFMA has submitted other applications pursuant to Sections 19(d) and 19(f) challenging earlier rule changes by the SROs that adopted or amended fees for various market data products. In an order dated May 16, 2014, the SEC held that (1) it has jurisdiction to review such applications by persons aggrieved by an SRO's rule change imposing fees for market data, and (2) such fees will be held unenforceable to the extent they are inconsistent with the Act, including the Act's requirement that the data for which those fees are imposed be made available on "fair and reasonable" terms. Order Establishing Procedures 10–19, Rel. No. 34-72182, Admin. Proc. File Nos. 3-15350 & 3-15351 (May 16, 2014). In addition, the SEC referred to the Chief Administrative Law Judge ("Chief ALJ") SIFMA's challenges to two of the rule changes

and stayed proceedings on the other challenges. *Id.* at 19–22.

4. The SEC should set aside the amendments because they constitute limitations on access to the SROs' 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, supra-competitive fees the SROs are charging. Furthermore, the SEC should set aside the amendments because SIFMA's members and their customers must pay fees that are not consistent with the Act. The amendments are not "fair and reasonable," 15 U.S.C. § 78k-1(c)(1)(C), and they do not "provide for the equitable allocation of reasonable . . . fees . . . among . . . persons using [the SROs'] facilities," *id.* § 78f(b)(4). Nor do they "promote just and equitable principles of trade" or "protect investors and the public interest," *id.* § 78f(b)(4). In sum, the amendments are unenforceable under Section 19(b)(3)(C).

5. SIFMA respectfully requests that this application be held in abeyance pending a decision in the proceeding before the Chief ALJ, as has been done with other challenges.

Dated: April 24, 2017

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 of Notice
Consolidated Tape Association Plan Participants	SR-CTA/CQ-2017-02	34-80300	March 23, 2017

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. _____

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2017, I caused a copy of the foregoing Application For An Order Setting Aside Amendments Of Certain Self-Regulatory Organizations Limiting Access To Their Services to be served on the parties listed below by First Class Mail.

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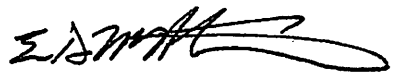
Dated: April 24, 2017



Eric D. McArthur

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	File No. 3-17943

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2017, I caused a copy of the foregoing Memorandum of Law in support of NYSE's Motion to Dismiss to be served on the parties listed below.

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