

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 the Participants in  
the NASDAQ/Unlisted Trading Privileges Plan, in  
the role of a registered Securities Information  
Processor.

Admin. Proc. File No. 3-18313

APPLICATION FOR AN ORDER SETTING ASIDE  
AMENDMENTS OF THE NASDAQ/UNLISTED TRADING PRIVILEGES PLAN  
LIMITING ACCESS TO ITS SERVICES

The Securities Industry Financial Markets Association (“SIFMA”) submits this application, pursuant to Section 11A 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) or Section 19 of the Act, for an order setting aside an amendment unilaterally issued by the Unlisted Trading Privileges Basis (“NASDAQ/UTP Plan” or “Plan”) in its role as a registered securities information processor (“SIP”). The amendment limits the access of SIFMA’s members and their customers to market data made available by the NASDAQ/UTP Plan 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, and members of SIFMA regularly access or seek to access the market data that registered SIPs like NASDAQ/UTP Plan make available.

2. The NASDAQ/UTP Plan has provided notice that it filed an amendment to its fee schedule, which purports to make derived data fee liable under the regular NASDAQ/UTP Plan fee schedule in its role as a registered SIP. *See* SEC Release No. 34-82072; File No. S7-24-89 (Nov. 14, 2017). The amendment became effective upon filing with the Commission, and the Commission has not yet suspended the amendments or instituted proceedings to disapprove them.

3. Section 11A of the Act provides aggrieved persons with the right to seek Commission review of SIP actions limiting access to its services. 15 U.S.C. § 78k-1(b)(5). If the Commission, upon notice and application by an aggrieved person or on its own motion, reviews the limitation of services and does not find that it is consistent with the provisions of the Act, or the rules and regulations thereunder, or finds that the limitation discriminates unfairly or imposes an inappropriate or unnecessary burden on competition, the Commission shall set aside the

limitation on services. *Id.* See also 17 C.F.R. § 242.608 (providing requirements for and review of amendments to national market system plans).

4. The Commission should review and set aside the amendment because it constitutes an improper limitation on access to the NASDAQ/UTP Plan's services under Section 11A(b) and (c). The amended fee schedule limits access to critical and exclusive market data for persons unwilling or unable to pay the NASDAQ/UTP Plan's fees. Furthermore, the Commission should set aside the amendment because SIFMA's members and their customers must pay fees that are not consistent with the Act. The amendment is not "fair and reasonable," 15 U.S.C. § 78k-1(c)(1)(C), does not "assure that all . . . persons may obtain [market data] on terms which are not unreasonably discriminatory," *id.* § 78k-1(c)(D), and does not "provide for the equitable allocation of reasonable . . . fees . . . among . . . persons using [the SIPs'] facilities," *id.* § 78f(b)(4). Nor does it "promote just and equitable principles of trade" or "protect investors and the public interest." *Id.* § 78f(b)(4). The amendment thus unfairly discriminates against BLP and its customers, and imposes a "burden on competition" that is not necessary or appropriate in furtherance of the purposes of the Act. *Id.* § 78f(b)(5)(B). Finally, the amendment does not comply with the substantive and procedural requirements for plan amendments contained in Commission Rule 608. 17 C.F.R. § 242.608. In sum, the amendment is unlawful and unenforceable under Section 11A(b)(5).

5. For the foregoing reasons, SIFMA respectfully requests that the Commission set aside the fee amendment.

Dated: December 13, 2017

Respectfully submitted,

SIDLEY AUSTIN LLP



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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.

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 13, 2017, I caused a copy of the foregoing Application for an Order Setting Aside Amendments of the NASDAQ/Unlisted Trading Privileges Plan in its role as a registered Securities Information Processors Limiting Access To Their Services to be served on the parties listed below by First Class Mail.

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Dated: December 13, 2017

  
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Benjamin Beaton