

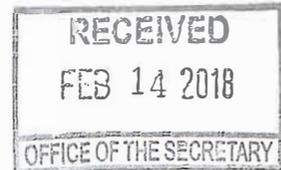
UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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. 3-18365



MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO HOLD PROCEEDING IN ABEYANCE PENDING RESOLUTION OF
IN RE APPLICATION OF SIFMA (NO. 3-15350)

On February 8, 2018, the Securities Industry and Financial Markets Association (“SIFMA”) filed an Application for Review of Action Taken by the Participants in the NASDAQ/Unlisted Trading Privileges Plan, in the Role of a Registered Securities Information Processor. The Nasdaq Stock Market LLC (“Nasdaq”), in its capacity as administrator of the Nasdaq Unlisted Trading Privileges Plan (“Nasdaq/UTP Plan”), respectfully submits this memorandum in support of its motion for an order holding this proceeding in abeyance pending resolution of a similar proceeding initiated by SIFMA, *In re Application of SIFMA*, Admin. Proc. File No. 3-15350. That proceeding is currently pending before the Commission on SIFMA’s petition for review. Holding this proceeding in abeyance is warranted because the issues raised in *In re Application of SIFMA* are similar to the issues raised here.

This proceeding is one of more than 200 pending challenges to fees that Nasdaq, other self-regulatory organizations (“SROs”), and registered securities information processors (“SIPs”) charge for market data. The first such proceeding was initiated by SIFMA on May 31, 2013, when it filed an application (No. 3-15350) challenging a rule change by NYSE Arca, Inc.

regarding the fees for its ArcaBook depth-of-book product and a second application (No. 3-15351) challenging an additional 22 SRO rule changes setting market-data fees, including a Nasdaq rule change concerning its depth-of-book products. The Commission thereafter severed SIFMA's challenge to the Nasdaq rule from the 21 other pending rule challenges in No. 3-15351, consolidated SIFMA's challenges to the two Nasdaq and NYSE rules under docket No. 3-15350, and referred the matter to the Chief Administrative Law Judge for a hearing regarding whether the market-data fees set by the two challenged rules are consistent with the Exchange Act. *See Order Establishing Procedures and Referring Applications for Review to Administrative Law Judge for Additional Proceedings at 19-21 (May 16, 2014), In re Application of SIFMA*, Admin. Proc. File No. 3-15350. The Commission further "determine[d] that it is appropriate to withhold issuance of an order governing further proceedings in the remainder of [No. 3-15351] until after the consolidated" proceeding in No. 3-15350 has been completed. *Id.* at 21. The Commission explained that moving forward "first with a limited group of rule challenges will provide an opportunity to address the common substantive legal issues that relate to all filings" and will thereby "serve the interests of all parties and conserve resources." *Id.* at 21-22.

After holding a five-day evidentiary hearing, the Chief Administrative Law Judge issued an initial decision on June 1, 2016, finding that the Nasdaq and NYSE Arca fees at issue in No. 3-15350 are consistent with the Exchange Act. SIFMA thereafter filed a petition for review of the initial decision, which the Commission granted on August 16, 2016. After the matter was fully briefed, the Commission issued an order remanding to the ALJs all matters pending before the Commission in which an ALJ had issued an initial decision, including SIFMA's challenge to the depth-of-book data fees charged by Nasdaq and NYSE Arca. *See Order, In re Pending Administrative Proceedings*, Securities Act Release No. 10,440, at 1 (Nov. 30, 2017). On

December 21, 2017, the Chief Administrative Law Judge issued an order ratifying her prior rulings in the proceeding. On January 31, 2018, SIFMA filed a “protective” petition for review of the Chief ALJ’s ratification order.

In the meantime, SIFMA has filed dozens of other applications challenging more than two hundred other SRO and SIP rules regarding fees for market data. In each of SIFMA’s applications involving the rules of Nasdaq-affiliated exchanges, SIFMA has requested that the Commission hold the proceeding in abeyance pending the resolution of No. 3-15350, and Nasdaq has acquiesced in that request. The Commission has not taken action in any of those other proceedings.

This application raises a challenge under Section 11A and Section 19 of the Exchange Act to an amendment to the Nasdaq/UTP Plan adopting a “Multiple Instance, Single User” (“MISU”) program that would allow firms to provide a net reporting option for professional subscriber fees that includes both internal devices for which the subscriber firm controls access to market data, as well as external devices for which another vendor controls access to market data. The Nasdaq/UTP Plan expects that the MISU program will result in a decrease in the number of devices being reported because, unlike the MISU program, the current net reporting option program allows net reporting of internal devices only. To ensure that this new program is revenue neutral, the Nasdaq/UTP Plan proposed an increase in the professional subscriber device fee from \$22 to \$24, regardless of whether or not a professional subscriber opts for the MISU program. This amendment would also harmonize the fees under the Nasdaq/UTP Plan with the fees under the CTA and CQ Plans, thereby reducing the administrative burden on subscriber firms.

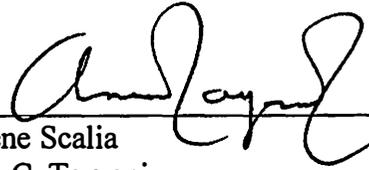
SIFMA argues that the Commission “should review and set aside the amendment because it constitutes an improper limitation on access to the NASDAQ/UTP Plan’s services under Section 11A(b) and (c),” and that the amendment “limits access to critical and exclusive market data for persons unwilling or unable to pay the NASDAQ/UTP Plan’s fees.” Securities Industry and Financial Markets Association Application for an Order Setting Aside Amendment of the Nasdaq/Unlisted Trading Privileges Plan Limiting Access to Its Services ¶ 4 (filed Feb. 8, 2018).

SIFMA raised, and the Chief Administrative Law Judge rejected, similar arguments regarding the Nasdaq and NYSE Arca rule changes at issue in *In re Application of SIFMA*, No. 3-15350. The Chief Administrative Law Judge found that the two rule changes challenged by SIFMA in that proceeding are consistent with the Exchange Act under the standard articulated by the D.C. Circuit in *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010), because the exchanges are “subject to significant competitive forces in setting fees” for market data, including “the availability of alternatives” to the exchanges’ products and the “need to attract order flow from market participants.” Initial Decision at 31, *In re Application of SIFMA*, Admin. Proc. File No. 3-15350. The Chief Administrative Law Judge’s conclusions are relevant to whether the fees challenged by SIFMA in this proceeding are consistent with the Exchange Act. The Commission’s resolution of *In re Application of SIFMA* will therefore inform the parties’ arguments and the Commission’s reasoning regarding SIFMA’s application.

Accordingly, as it has done with every other application filed after No. 3-15350, the Commission should hold this proceeding in abeyance pending the resolution of *In re Application of SIFMA*. Holding the proceeding in abeyance will conserve the resources of both the Commission and the parties by deferring further action in this matter until the relevant legal landscape has been settled.

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Respectfully submitted,



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Dated: February 14, 2018

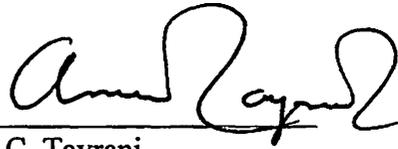
CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2018, I caused a copy of the foregoing document to be served on the parties listed below via First Class Mail, except as otherwise provided.

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