

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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In The Matter of:

The Application of SECURITIES INDUSTRY
AND FINANCIAL MARKETS ASSOCIATION

For Review of Action Taken by NYSE National,
Inc.

Admin. Proc. File No. 3-19735

**APPLICATION FOR AN ORDER SETTING ASIDE RULE CHANGE OF
NYSE NATIONAL, INC. 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 to Establish Fees for the NYSE National Integrated Feed*, Release No. 34-88211, File No. SR-NYSENAT-2020-05 (the “Rule Change”). The Rule Change limits the access of SIFMA’s members and their customers to market data made available by NYSE National, Inc. (the “Exchange”) and is inconsistent with the Act.

1. SIFMA is a trade association that represents securities firms, banks, and asset managers. Market data is integral to the business of SIFMA members and their customers, and they regularly access or seek to access the market data the Exchange makes available.

2. The Exchange has provided notice that it filed the Rule Change, which establishes new fees for market data products and related services made available exclusively by the Exchange. The Rule Change purports to become effective upon filing, and the Commission has not yet suspended the Rule Change or instituted proceedings to disapprove it.

3. SIFMA has submitted other applications pursuant to Sections 19(d) and 19(f) challenging earlier rule changes by other exchanges that adopted or amended fees for various market-data products. In an order dated May 16, 2014, the Commission held that (1) it has jurisdiction to review such applications by persons aggrieved by an exchange’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. *See In re SIFMA*, Release No. 72812 (May 16, 2014). And the Commission subsequently set aside two such rule changes on the ground that the exchanges had failed to prove that their fees were constrained by competition. *See In re SIFMA*, Release No. 84432 (Oct. 16, 2018).

4. For the same reason, the Commission should set aside the Rule Change here because it constitutes a limitation on access to the Exchange's services for purposes of Section 19(d) and (f). This is so because the proposed fees limit access to critical market data for anyone unwilling or unable to pay the onerous, supra-competitive fees the Exchange is charging. Furthermore, the Commission should set aside the Rule Change under Sections 19(d) and (f) because it forces SIFMA's members and their customers to pay fees that are not consistent with the Act. The Rule Change is not "fair and reasonable," 15 U.S.C. § 78k-1(c)(1)(C), and it does not "provide for the equitable allocation of reasonable . . . fees . . . among . . . persons using [the Exchange's] facilities," *id.* § 78f(b)(4). Nor does the Rule Change "promote just and equitable principles of trade" or "protect investors and the public interest," *id.* § 78f(b)(4). In sum, the Rule Change is unenforceable under Section 19(b)(3)(C).

5. Under the Commission'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 not shown that its fees are subject to significant competitive forces. And the Exchange 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. *See NetCoalition v. SEC*, 615 F.3d 525, 537–38 (D.C. Cir. 2010).

6. For these reasons, SIFMA respectfully requests that the Commission set aside the Rule Change. SIFMA further requests that this application be held in abeyance pending the D.C. Circuit's decisions in *Nasdaq Stock Market LLC v. SEC*, No. 18-1292, and consolidated cases.

Dated: March 11, 2020

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.

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2020, I caused a copy of the foregoing Application For An Order Setting Aside Rule Change of NYSE National, Inc. Limiting Access To Its Services to be served on the parties listed below by First Class Mail.

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