

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 73922 / December 23, 2014

Admin. Proc. File No. 3-15350, 3-15351, 3-15773, 3-16006

In the Matter of the Applications of  
  
SECURITIES INDUSTRY AND FINANCIAL  
MARKETS ASSOCIATION  
  
For Review of Actions Taken by  
Self-Regulatory Organizations

**ORDER DENYING CONSOLIDATION MOTIONS**

The Securities Industry and Financial Markets Association ("SIFMA"), an industry trade group, requests that the Commission consolidate six challenges to self-regulatory organization ("SRO") rule changes affecting fees that NYSE Arca, Inc. ("NYSE Arca") and Nasdaq Stock Market LLC ("NASDAQ") charge for depth-of-book market data with two related rule challenges pending before the Commission's Chief Administrative Law Judge ("CALJ").<sup>1</sup> NYSE Arca and NASDAQ oppose consolidation. For the reasons explained below, consolidation is denied because, at this time, it would not promote efficiency as contemplated by the relevant Commission rule.

**I. Background**

On May 16, 2014, the Commission consolidated and referred two challenges to SRO depth-of-book fee rule filings to the CALJ for fact-finding, a determination of jurisdiction, and

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<sup>1</sup> SIFMA brought the six rule challenges it seeks to consolidate in three separate proceedings (Administrative Proceedings File Numbers 3-15351, 3-15773, and 3-16006), and the Commission previously consolidated the two challenges pending before the CALJ into one proceeding (Administrative Proceeding File Number 3-15350).

preparation of an initial decision.<sup>2</sup> The lead challenge (Administrative Proceeding File Number 3-15350) concerned fees that NYSE Arca charged for its ArcaBook depth-of-book product,<sup>3</sup> which had been the subject of a prior proceeding before the Commission and two decisions of the United States Court of Appeals for the District of Columbia Circuit.<sup>4</sup> The second challenge concerned an amendment to a fee rule applicable to NASDAQ depth-of-book data products.<sup>5</sup> The NASDAQ rule was but one of twenty-three SRO rules that SIFMA challenged in Administrative Proceeding File Number 3-15351, which also included several additional rule filings addressing other NASDAQ depth-of-book fees. These depth-of-book fee challenges were the first that the Commission would address following the D.C. Circuit's *NetCoalition* decisions

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<sup>2</sup> Order Establishing Procedures and Referring Applications for Review to Administrative Law Judge for Additional Proceedings, *Sec. Indus. & Fin. Mkt. Ass'n*, Exchange Act Release No. 72182, 2014 WL 1998525, at \*13 (May 16, 2014).

<sup>3</sup> Application for An Order Setting Aside Rule Change of NYSE Arca, Inc. Limiting Access to Its Services, Admin. Proc. File No. 3-15350 (filed May 31, 2013), *challenging rule given effect by Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. Relating to Fees for NYSE Arca Depth-of-Book Data*, NYSEArca-2010-97, Exchange Act Release No. 63291 (Nov. 9, 2010), 75 Fed. Reg. 70311 (Nov. 17, 2010).

<sup>4</sup> Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data, NYSEArca-2006-21, Exchange Act Release No. 59039 (Dec. 2, 2008), 73 Fed. Reg. 74,770, 74,780 (Dec. 9, 2008) *vacated by NetCoalition v. SEC*, 615 F.3d 525, 529-30 (D.C. Cir. 2010); *NetCoalition v. SEC*, 715 F.3d 342, 353 (D.C. Cir. 2013) (holding that, following enactment of Dodd-Frank Act, the court lacked jurisdiction to consider appeal from Commission's determination not to stay immediately effective NYSE Arca fee rule filing re-imposing ArcaBook fees after prior *NetCoalition* decision but recognizing potential availability of alternative avenue of review through the Commission's adjudication process).

<sup>5</sup> Application for an Order Setting Aside Rule Changes of Certain Self-Regulatory Organizations Limiting Access to Their Services, Admin. Proc. File No. 3-15351 (filed May 31, 2013), *challenging, among other rules, rule given effect by Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Rule 7019*, NASDAQ-2010-110, Exchange Act Release No. 62907 (Sept. 14, 2010), 75 Fed. Reg. 57314 (Sept. 20, 2010).

and the Dodd-Frank amendments to the SRO rule approval provisions of Section 19 of the Securities Exchange Act of 1934.<sup>6</sup>

In consolidating SIFMA's challenge to a single NASDAQ rule filing with SIFMA's lead challenge to the ArcaBook fee rule, the Commission struck a balance between the parties' positions on consolidation. SIFMA had argued that there was no need for consolidation and thus its ArcaBook challenge should proceed alone with SIFMA's remaining challenges held in abeyance. In contrast, NASDAQ had argued for the consolidation of a rule challenge relating to its last-sale product.<sup>7</sup> To provide NASDAQ an opportunity to participate as a party in the determination of the relevant common issues, the Commission determined to consolidate one of SIFMA's challenges to NASDAQ's fee rule filings. But because NASDAQ's preferred challenge related to a different type of data product (last-sale data) than ArcaBook, the Commission instead consolidated one of SIFMA's challenges to a NASDAQ depth-of-book fee rule.<sup>8</sup>

On October 20, 2014, following briefing and SIFMA's submission of several member affidavits, the CALJ issued an order finding that jurisdiction existed over the two rule challenges before her. In the same order, the CALJ established deadlines for the exchange of witness lists,

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<sup>6</sup> See generally *Sec. Indus. & Fin. Mkt. Ass'n*, 2014 WL 1998525, at \*1-6 (discussing history of *NetCoalition* litigation and Dodd-Frank amendments to Exchange Act Section 19).

<sup>7</sup> *Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Extend Fee Pilot Program for NASDAQ Last Sale*, NASDAQ-2010-092, Exchange Act Release No. 64856 (July 12, 2011), 76 Fed. Reg. 41845 (July 15, 2011). SIFMA challenged this rule change in the 3-15351 proceeding.

<sup>8</sup> That challenge – also contained in 3-15351 – addressed NASDAQ's *Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Rule 7019*, NASDAQ-2010-110, Exchange Act Release No. 62907 (Sept. 14, 2010), 75 Fed. Reg. 57314 (Sept. 20, 2010).

exhibits, and expert testimony, and the filing of pre-hearing briefs, and set an initial hearing date.<sup>9</sup>

Soon thereafter, on October 24, 2014, SIFMA moved to consolidate six additional challenges with the two challenges pending before the CALJ. Two of the six additional challenges concerned revised ArcaBook fees that NYSE Arca made effective after SIFMA filed the challenges pending before the CALJ.<sup>10</sup> The remaining four challenges addressed rule changes relating to fees for the three depth-of-book products NASDAQ offers (Tier 2, OpenView, and TotalView).<sup>11</sup> SIFMA had included these four challenges in its 3-15351 application, which it filed over sixteen months before its consolidation motions. SIFMA

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<sup>9</sup> Order on the Issues of Jurisdiction and Scheduling, *Sec. Indus. & Fin. Mkt. Ass'n*, Admin. Proc. Rulings Release No. 1921 (Oct. 20, 2014), available at <http://www.sec.gov/alj/aljorders/2014/ap-1921.pdf>.

<sup>10</sup> Application for An Order Setting Aside Rule Change of NYSE Arca, Inc. Limiting Access to Its Services, Admin. Proc. File No. 3-15773 (filed Mar. 5, 2014), *challenging rule given effect by Proposed Rule Change Amending the Fees for NYSE ArcaBook*, NYSEArca-2014-12, Exchange Act Release No. 71483 (Feb. 5, 2014), 79 Fed. Reg. 8217 (Feb. 11, 2014); Application for An Order Setting Aside Rule Change of NYSE Arca, Inc. Limiting Access to Its Services, Admin. Proc. File No. 3-16006 (filed Aug. 6, 2014), *challenging rule given effect by Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the Fees for NYSE ArcaBook*, NYSEArca-2014-72, Exchange Act Release No. 72560 (July 8, 2014), 79 Fed. Reg. 40801 (July 14, 2014).

<sup>11</sup> *Proposed Rule Change To Modify the Fees Applicable to Non-Display Usage of Certain NASDAQ Depth-of-Book Market Data*, NASDAQ-2012-044, Exchange Act Release No. 66724 (Apr. 3, 2012), 77 Fed. Reg. 21125 (Apr. 9, 2012); *Proposed Rule Change to Re-organize NASDAQ's Rules Governing the Fees Applicable to NASDAQ's Depth-of-Book Market Data*, NASDAQ-2012-042, Exchange Act Release No. 66740 (Apr. 5, 2012), 77 Fed. Reg. 21609 (Apr. 10, 2012); *Proposed Rule Change To Modify an Optional Depth Data Enterprise License Fee for Broker-Dealer Distribution of Depth-of-Book Data*, NASDAQ-2012-069, Exchange Act Release No. 67253 (June 25, 2012), 77 Fed. Reg. 38871 (June 29, 2012); *Proposed Rule Change To Modify an Optional Depth Data Enterprise License Fee for Broker-Dealer Distribution of Depth-of-Book Data*, NASDAQ-2012-069, Exchange Act Release No. 67253 (June 25, 2012), 77 Fed. Reg. 38871 (June 29, 2012).

previously had requested that each of the six challenges that it later sought to consolidate be held in abeyance pending a decision on the 3-15350 rule challenge pending before the CALJ.

On November 21, 2014, the CALJ granted the parties' Joint Motion to Extend Hearing and Prehearing Schedules.<sup>12</sup> In their motion, the parties asserted that the deadlines set in the initial scheduling order "d[id] not allow [them] sufficient time to complete the submissions discussed therein, including expert reports, and prepare for the hearing." In granting an extension to address this issue, the CALJ ordered that there would be "no further adjournments or postponements," and that, as the parties had represented in their motion, the extension would "not be used to 'expand the proceedings.'" The extension order set new deadlines for relevant litigation events ranging from January 20, 2015 (for the SROs' initial pre-hearing filings) to April 20, 2015 (for the hearing).

## II. Legal Analysis

### A. Standard for consolidation under Rule of Practice 201(a)

Under Rule 201(a) of the Commission's Rules of Practice, "proceedings involving a common question of law or fact may be consolidated for hearing of any or all the matters at issue in such proceedings."<sup>13</sup> The rule further provides that the Commission "may make such orders concerning the conduct of such proceedings as it deems appropriate to avoid unnecessary cost or delay."<sup>14</sup>

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<sup>12</sup> *Sec. Indus. & Fin. Mkts. Ass'n*, Admin. Proc. Rulings Release No. 2024 (Nov. 21, 2014), available at <http://www.sec.gov/alj/aljorders/2014/ap-2042.pdf>.

<sup>13</sup> 17 C.F.R. § 201.201(a).

<sup>14</sup> *Id.*

**B. The Commission's May 2014 consolidation order struck a balance between narrowing the issues and allowing additional SRO participation.**

The Commission's May 2014 consolidation order narrowed the issues by allowing a lead case to go forward before a law judge (the initial ArcaBook fee rule challenge) while also allowing participation by NASDAQ through consideration of one of SIFMA's challenges to NASDAQ depth-of-book fee rules. As the Commission then explained, "[p]roceeding first with a limited group of rule challenges will provide an opportunity to address the common substantive legal issues that relate to all filings for the first time following *NetCoalition I*."<sup>15</sup>

Although the Commission recognized that this limited consolidation would "serve the interests of all parties and conserve resources, by focusing the issues in a single proceeding to those limited to depth-of-book products," it did not consolidate all the pending applications involving depth-of-book data products.<sup>16</sup> Instead, the Commission recognized that other applications had been filed challenging other rule filings and explained that the Commission would withhold issuance of briefing orders in those cases.<sup>17</sup> Those applications included five of the six rule challenges that SIFMA now requests be consolidated, as well as a number of other challenges to rule filings for other types of data products.

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<sup>15</sup> *Sec. Indus. & Fin. Mkt. Ass'n*, 2014 WL 1998525, at \*13.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at \*13 & n.118 (determining "to withhold issuance of an order governing further proceedings" in the portions of the 3-15351 proceeding that were not consolidated with the ArcaBook challenge and "with respect to the additional applications SIFMA filed" after it initiated that proceeding). Although the Commission did not (and logically could not) specifically reference the applications that SIFMA filed after the May 16, 2014 order, it plainly ordered that the only SRO fee rule challenges that SIFMA had brought that would proceed were the two challenges consolidated before the CALJ. *Id.* at \*13 (reflecting decision to proceed "first with a limited group of rule challenges" to promote efficiency). Therefore, the Commission has not issued scheduling orders in SIFMA's later filed challenges.

**C. Consolidation at this stage of the proceedings would not promote efficiency or avoid unnecessary cost or delay.**

At this stage of the proceedings, consolidation would not promote efficiency or avoid unnecessary cost or delay. Consolidation is likely to complicate unduly the proceedings pending before the CALJ by introducing new issues at this late stage in the proceedings. The law judge has issued a revised scheduling order under which the SROs' initial submissions, including expert reports, are due on January 20, 2015. The parties previously represented in their joint motion for extension of time that the issues raised by the rule challenges already pending before the CALJ were "complex and w[ould] require considerable time and effort to brief and to make ready for presentation at the hearing." Given this existing complexity, we see no need to further complicate the case by now adding six additional rule challenges to the mix.

Moreover, further consolidation likely would delay the resolution of the challenges currently before the CALJ. The CALJ would need to make an initial determination of jurisdiction with respect to each of any additional consolidated rule challenges (potentially based on supplemental record evidence), and, if she found jurisdiction, would need to prepare a comprehensive initial decision addressing additional legal and factual issues relevant to each such challenge. Because consolidating more rule challenges in the current limited proceeding would expand the scope of the proceeding before the CALJ, it likely would unnecessarily delay the resolution of that proceeding and, by extension, the large number of additional challenges in which the Commission has not issued scheduling orders that share common issues with the lead challenges.

**D. SIFMA's contrary arguments do not require consolidation.**

SIFMA's contrary arguments do not require that its motions for consolidation be granted. First, SIFMA argues that consolidation is appropriate because all of its depth-of-book fee rule challenges raise common issues. But the existence of common issues of law or fact does not compel consolidation; it only makes consolidation permissible.<sup>18</sup> The Commission previously determined that only a subset of SIFMA's rule challenges would go forward before the CALJ, even though it acknowledged the existence of "common substantive legal issues that relate to all filings."<sup>19</sup> Nonetheless, those applications that the Commission determined would not proceed until resolution of the case before the CALJ benefit from the prior adjudication of shared issues. This is equally true, if not more so, with respect to challenges involving depth-of-book fees, because they likely share more common issues with the challenges pending before the CALJ than other challenges do. Accordingly, consolidating the additional depth-of-book challenges is not necessary to advance the goals identified in the Commission's May 2014 order.

Second, SIFMA argues that the CALJ needs to be able to consider the six additional rule challenges to issue an opinion on the challenges pending before her. Specifically, SIFMA asserts that consolidation of the additional ArcaBook challenges is appropriate because "the Chief ALJ does not have before her all of the rule changes that affect how [ArcaBook] fees currently are enforced." Similarly, SIFMA asserts that the NASDAQ fee rule challenge before the CALJ addresses "only a small portion of the total fees charged for the depth-of-book data at issue" and that consolidation would allow for consideration of the additional fee elements.

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<sup>18</sup> Rule of Practice 201(a), 17 C.F.R. § 201.201(a) (providing that "proceedings involving a common question of law or fact *may* be consolidated for hearing of any or all the matters at issue in such proceedings" (emphasis added)).

<sup>19</sup> *Sec. Indus. & Fin. Mkt. Ass'n*, 2014 WL 1998525, at \*13.

Contrary to SIFMA's argument, the additional depth-of-book fee challenges need not be consolidated simply because they may be relevant to the CALJ's consideration of the pending fee applications. The CALJ is not prohibited from considering the current ArcaBook fees or additional NASDAQ depth-of-book charges implicated by the rule challenges that are the subject of SIFMA's consolidation motions.<sup>20</sup> In fact, SIFMA asserts that these challenges will be part of the scheduled hearing regardless of whether they are consolidated. Thus, it is not necessary to consolidate these applications based on their relevance.

### **III. Conclusion**

Accordingly, IT IS ORDERED that the motions for consolidation of the Securities Industry and Financial Markets Association with respect to certain rule challenges in Proceedings 3-15350, 3-15351, 3-15773, and 3-16006 be, and hereby are, denied.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Brent J. Fields  
Secretary

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<sup>20</sup> See *Sec. Indus. & Fin. Mkt. Ass'n*, 2014 WL 1998525, at \*12 (characterizing it as "prudent for the law judge to consider a fully developed record," finding "no harm to the parties from allowing an expansion of the record," and finding it "appropriate to consider relevant evidence not available at the time of the initial rule filings"); see also Rule of Practice 323, 17 C.F.R. § 201.323 (authorizing the Commission or hearing officer to take official notice of, among other things, "any material fact that might be judicially noticed by a district court of the United States" and "any matter in the public official records of the Commission"); *Roussin v. AARP, Inc.*, 664 F. Supp. 2d 412, 415, 416 (S.D.N.Y. 2009) (stating that "court may take judicial notice of filings with government agencies that are a matter of public record" and taking notice of New York state insurance rate filings), *aff'd* 379 F. App'x 30 (2d Cir. 2010) (summary order).