

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 84827 / December 14, 2018

In the Matter of the Applications of
SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION

and

BLOOMBERG L.P.

For Review of Actions Taken by
Various National Securities Exchanges and
National Market System Plans in Their Role as
Registered Securities Information Processors

ORDER

On November 21, 2018, New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC, and NYSE National, Inc. (collectively, “NYSE”) filed a motion to stay the effectiveness of our October 16, 2018 order that remanded certain matters to them (the “Remand Order”).¹ The Remand Order concerns certain challenges to exchange rule changes and National Market System (“NMS”) plan amendments brought by the Securities Industry and Financial Markets Association (“SIFMA”) and Bloomberg, L.P. (“Bloomberg”).

The Remand Order directs the exchanges and NMS plan participants that filed the challenged rule changes and plan amendments to consider the impact of an October 16, 2018 Commission decision on SIFMA’s and Bloomberg’s contentions that the challenged rule changes and NMS plan amendments should be set aside.² It also directs the exchanges and NMS

¹ *Sec. Indus. & Fin. Mkts. Ass’n*, Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018) (attaching list of remanded proceedings as Exhibit A). Several national securities exchanges and NMS plan participants have filed motions for reconsideration of the Remand Order, which are pending before the Commission.

² *See Sec. Indus. & Fin. Mkts. Ass’n*, Exchange Act Release No. 84432, 2018 WL 5023228 (Oct. 16, 2018) (“SIFMA Decision”). In that proceeding, the Commission set aside certain fees
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plan participants to “develop or identify” procedures to assess the challenged actions, provide notice to the Commission of those procedures within six months, and apply those procedures to the remanded challenges within one year.³ Before NYSE filed its stay motion, NYSE and other exchanges⁴ and NMS plan participants⁵ filed motions for reconsideration of the Remand Order.

NYSE’s stay motion, which several other exchanges and NMS plan participants have joined, seeks a stay of the Remand Order pending “judicial resolution of challenges to” that order.⁶ We decline to consider NYSE’s request for a stay of the Remand Order pending “judicial resolution of challenges to” that order because it is premature. NYSE’s motion for reconsideration of the Remand Order remains pending before the Commission, and an order granting the motions for reconsideration might obviate the need for judicial review.⁷

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imposed by two national securities exchanges, NYSE Arca, Inc., and Nasdaq Stock Market LLC, as improper limitations of access to exchange services.

³ Remand Order, 2018 WL 5023230, at *1-2 (citing, *inter alia*, 15 U.S.C. § 78f(b)(7); 17 C.F.R. § 242.608(a)(5); SIFMA Decision, 2018 WL 5023228, at *8 nn.68-69, *12 n.109).

⁴ In addition to NYSE, motions for reconsideration were filed by Nasdaq Stock Market LLC, Nasdaq PHLX LLC, Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq GCMX, LLC, and Nasdaq MRX, LLC (collectively, “Nasdaq”); Cboe Exchange, Inc., Cboe C2 Exchange, Inc., Cboe BZX Exchange, Inc., Cboe BYZ Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe EDGX Exchange, Inc. (collectively, “CBOE”); and Miami International Securities Exchange LLC and Miax Pearl LLC (collectively, “Miami International”).

⁵ Motions for reconsideration were filed by the Consolidated Tape Association, Nasdaq/Unlisted Trading Privileges Plan, and Options Price Reporting Authority, LLC.

⁶ On December 4, 2018, Nasdaq withdrew the motion for reconsideration it had filed with the Commission but did not withdraw its joinder of NYSE’s motion for a stay of the Remand Order. On December 10, 2018, Nasdaq, as administrator of the Nasdaq/Unlisted Trading Privileges Plan, withdrew the motion for reconsideration filed by the Nasdaq/Unlisted Trading Privileges Plan. The five other motions for reconsideration remain pending before the Commission.

⁷ *See, e.g., Texas v. United States*, 523 U.S. 296, 300 (1998) (“A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” (quotation and citation omitted)); *Sharemaster*, Exchange Act Release No. 70290, 2013 WL 4647204, at *4 (Aug. 29, 2013) (“Federal courts similarly decline to review hypothetical disputes because, as they have often explained, limited judicial resources should be used to resolve real controversies.” (citing *Florida State Conference of NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008); *Senty-Haugen v. Goodno*, 462 F.3d 876, 889 (8th Cir. 2006))), *petition granted on other grounds*, 847 F.3d 1059 (9th Cir. 2017); *James M. Schneider*, Exchange Act Release No. 69922, 2013 WL 3327751, at *6 & n.52 (July 2, 2013) (denying

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NYSE's stay motion also requests a stay pending our consideration of the motions for reconsideration. We deny that request. Commission Rule of Practice 401 authorizes a stay of a Commission order on a motion "by any person aggrieved thereby who would be entitled to review in a federal court of appeals."⁸ SIFMA and Bloomberg object to a stay on the basis that the Remand Order is not final, and thus is not appealable, because it neither marks the consummation of the agency's decisionmaking process nor determines the parties' rights and obligations with respect to the challenged rule changes and NMS plan amendments.⁹ We need not consider that argument now because NYSE's pending motion for reconsideration itself means the Remand Order is not final and appealable.¹⁰ Our resolution of NYSE's motion for reconsideration may not render the Remand Order final and appealable, but at the least NYSE cannot appeal the Remand Order now. As a result, Rule 401 does not authorize a stay.¹¹

Nonetheless, in light of the pending motions for reconsideration we toll the deadlines established by the Remand Order until the motions for reconsideration are resolved. Although motions for reconsideration have not been filed in every proceeding subject to the Remand Order, and two motions for reconsideration that were filed have been withdrawn, in order to treat all parties subject to the Remand Order equally we order the tolling of the deadlines in the Remand Order with respect to all proceedings remanded by the Remand Order. In so doing, we express no view regarding the merits of any arguments advanced by the parties concerning either the motion for a stay or the pending motions for reconsideration.

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motion premised on "hypothetical positions" respondent may take in future because respondent "posits an injury that may never materialize").

⁸ 17 C.F.R. § 201.401(c).

⁹ See *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) ("Agency actions are final if two independent conditions are met: (1) the action marks the consummation of the agency's decisionmaking process and is it not merely of a tentative or interlocutory nature; and (2) it is an action by which rights or obligations have been determined . . .").

¹⁰ *ZPR Inv. Mgmt., Inc.*, Investment Advisers Act Release No. 4286, 2015 WL 7769213, at *1 (Dec. 2, 2015) ("A pending request for reconsideration renders agency action nonfinal." (citing *United Transp. Union v. ICC*, 871 F.2d 1114, 1117 (D.C. Cir. 1989))).

¹¹ *Id.* ("Because the Commission's opinion is not final, 'no stay [is] required.'" (quoting *Castle Sec. Corp.*, Exchange Act Release No. 39999, 1998 WL 248379, at *4 (May 18, 1998))); see also *id.* at *1 n.4 (collecting additional authority).

Accordingly, IT IS ORDERED that NYSE's motion for a stay is denied and that the six-month and twelve-month periods provided in the Remand Order, which originally ran from October 16, 2018, shall toll pending resolution of the motions for reconsideration that are currently before the Commission with respect to the Remand Order.¹²

By the Commission.

Brent J. Fields
Secretary

¹² This order is issued in each of the cases identified in Exhibit A hereto.

Exhibit A

Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-15351 (May 31, 2013)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-15364 (June 25, 2013)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-15394 (July 29, 2013)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-15600 (Oct. 31, 2013)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-15773 (Mar. 5, 2014)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-15774 (Mar. 5, 2014)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16006 (Aug. 6, 2014)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16188 (Oct. 3, 2014)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16204 (Oct. 20, 2014)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16220 (Oct. 29, 2014)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16320 (Dec. 16, 2014)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16330 (Jan. 9, 2015)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16356 (Jan. 23, 2015)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16423 (Mar. 6, 2015)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16490 (Apr. 13, 2015)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16526 (May 7, 2015)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16574 (June 3, 2015)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16685 (July 10, 2015)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16724 (Aug. 5, 2015)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16793 (Sept. 3, 2015)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16834 (Sept. 28, 2015)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16918 (Oct. 23, 2015)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-16960 (Nov. 16, 2015)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17000 (Dec. 11, 2015)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17040 (Jan. 8, 2016)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17066 (Jan. 22, 2016)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17105 (Feb. 8, 2016)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17138 (Feb. 29, 2016)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17176 (Mar. 23, 2016)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17208 (Apr. 13, 2016)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17244 (May 9, 2016)

Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17331 (July 8, 2016)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17663 (Nov. 4, 2016)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17702 (Dec. 1, 2016)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17738 (Dec. 19, 2016)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17787 (Jan. 17, 2017)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17841 (Feb. 10, 2017)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-17877 (Mar. 13, 2017)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18002 (May 26, 2017)
Bloomberg, L.P., File No. 3-18010 (June 5, 2017)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18057 (June 30, 2017)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18094 (Aug. 1, 2017)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18144 (Aug. 29, 2017)
Bloomberg, L.P., File No. 3-18145 (Aug. 29, 2017)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18248 (Oct. 10, 2017)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18286 (Nov. 17, 2017)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18310 (Dec. 13, 2017)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18313 (Dec. 14, 2017)
Bloomberg, L.P., File No. 3-18315 (Dec. 14, 2017)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18345 (Jan. 19, 2018)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18362 (Feb. 6, 2018)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18365 (Feb. 9, 2018)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18383 (Feb. 28, 2018)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18441 (Apr. 19, 2018)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18525 (June 1, 2018)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18572 (July 5, 2018)
Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-18680 (Aug. 24, 2018)