

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 89504 / August 7, 2020

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 VACATING PRIOR ORDER AND REQUESTING ADDITIONAL BRIEFS

On October 16, 2018, we issued an opinion in *Securities Industry and Financial Markets Association* (the “SIFMA Decision”).¹ That proceeding involved a challenge under Section 19(d) of the Securities Exchange Act of 1934 to certain fees for market data imposed by two national securities exchanges, pursuant to generally applicable fee rules, as improper limitations or prohibitions of access to services offered by the exchanges. Our opinion held that the exchanges had failed to establish that the challenged fees were consistent with the purposes of the Exchange Act, and accordingly set them aside pursuant to Exchange Act Section 19(f). That decision was appealed to the Court of Appeals for the D.C. Circuit.

The same day that the SIFMA Decision issued, we also issued an order remanding to various exchanges and national market system (“NMS”) plans challenges to over 400 rule changes and plan amendments as improper limitations or prohibitions of access under Exchange Act Sections 11A and 19 that were asserted in 57 applications for review (the “Remand Order”).²

¹ *Sec. Indus. & Fin. Mkts. Ass’n*, Exchange Act Release No. 84432, 2018 WL 5023228 (Oct. 16, 2018).

² *Sec. Indus. & Fin. Mkts. Ass’n*, Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). *See* 15 U.S.C. §§ 78k-1, 78s; *see also* Rule 608(d) of Regulation NMS, 17 C.F.R. § 242.608(d) (asserted as an alternative basis of jurisdiction in some applications). A rule challenge to a Nasdaq fee rule from one application was severed from it and consolidated with the application for review that was addressed by the SIFMA Decision.

These applications were filed by either SIFMA or Bloomberg, L.P., and had remained pending while we considered the challenges addressed in the SIFMA Decision.

In the Remand Order, we explained that the purpose of our remand was to allow the exchanges and plan participants to “consider the impact of the SIFMA Decision, as well as SIFMA’s and Bloomberg’s contentions that the challenged rule changes [or plan amendments] should be set aside under Exchange Act Section 19 [or 11A].”³ We also instructed the exchanges and plan participants to “develop or identify fair procedures for assessing the challenged rule changes [or plan amendments] as potential denials or limitations of access to services,” and directed them to provide us notice of those procedures and to apply them to the challenges within specified timeframes.⁴ Various exchanges and plan participants moved for reconsideration of the Remand Order, which we denied.⁵ But we extended the deadlines in the Remand Order “so that they d[id] not begin to run until the resolution of the appeal of the SIFMA Decision in the D.C. Circuit and the issuance of the court’s mandate.”⁶ Both the Remand Order and the Order Denying Reconsideration were appealed to the D.C. Circuit.

On appeal of the SIFMA Decision, the D.C. Circuit held that Exchange Act “Section 19(d) is not available as a means to challenge the reasonableness of generally-applicable fee rules.”⁷ The court held that “for a fee rule to be challengeable under Section 19(d), it must, at a minimum, be targeted at specific individuals or entities.”⁸ Thus, the court held that “Section 19(d) is not an available means to challenge the fees at issue” in the SIFMA Decision.⁹ The court vacated the SIFMA Decision and remanded for further proceedings consistent with its opinion.¹⁰

That same day, the D.C. Circuit issued an order remanding the Remand Order to the Commission for reconsideration in light of *Nasdaq v. SEC*.¹¹ The court noted that the Remand Order required the exchanges and NMS plan participants to consider the challenges that the Commission had remanded in light of the SIFMA Decision. The court concluded that because the SIFMA Decision “has now been vacated, the basis for the [Remand Order] has

³ Remand Order, 2018 WL 5023230, at *1-2.

⁴ Remand Order, 2018 WL 5023230, at *1-2.

⁵ *Sec. Indus. & Fin. Mkts. Ass’n*, Exchange Act Release No. 85802, 2019 WL 2022819 (May 7, 2019) (the “Order Denying Reconsideration”).

⁶ Order Denying Reconsideration, 2019 WL 2022819, at *13.

⁷ *NASDAQ Stock Mkt., LLC v. SEC*, 961 F.3d 421, 424 (D.C. Cir. 2020) (“*Nasdaq v. SEC*”); *see also id.* at 430 (“[B]ased on the text and structure of the Exchange Act, we conclude that Section 19(d) is not available as a means to challenge generally-applicable fee rules.”).

⁸ *Nasdaq v. SEC*, 961 F.3d at 427-28.

⁹ *Nasdaq v. SEC*, 961 F.3d at 426 n.1.

¹⁰ *Nasdaq v. SEC*, 961 F.3d at 424, 431. The court’s mandate issued on August 6, 2020.

¹¹ *NASDAQ Stock Mkt., LLC v. SEC*, No 18-1324, --- Fed. App’x ----, 2020 WL 3406123 (D.C. Cir. June 5, 2020). The court’s mandate issued on August 6, 2020.

evaporated.”¹² Accordingly, we now vacate the Remand Order, as modified by the Order Denying Reconsideration, with the following exception. The Remand Order dismissed four challenges because they related to plan amendments that were withdrawn or effected changes that had been rescinded.¹³ In the Order Denying Reconsideration, we noted that the administrator of the plans at issue in those challenges did not challenge the dismissals.¹⁴ The D.C. Circuit also did not address them in its order, and while reconsidering the Remand Order we see no reason to vacate the uncontested dismissal of those four challenges now.

We order the parties to file briefs addressing whether the holding in *Nasdaq v. SEC* that Exchange Act Section 19(d) does not permit challenges to generally applicable fee rules requires us to dismiss the challenges we previously remanded.¹⁵ We note that, although the D.C. Circuit’s holding addresses only challenges brought under Exchange Act Section 19(d), we have previously recognized that Exchange Act Section 11A “uses essentially the same operative language regarding prohibitions and limitations of access as Sections 19(d) and (f).”¹⁶ We also note that the D.C. Circuit held “that for a fee rule to be challengeable under [Exchange Act] Section 19(d), it must, at a minimum, be targeted at specific individuals or entities.”¹⁷ We invite the parties to submit briefing stating whether the challenges asserted in the applications for review listed in Exhibit A should be dismissed, and specifically identifying any challenge that they contend should not be dismissed pursuant to the holding of *Nasdaq v. SEC*. Such contentions should be supported by legal argument and citation.

* * *

Accordingly, it is ORDERED that our order in *Securities Industry and Financial Markets Association and Bloomberg L.P.*, Exchange Act Release No. 84433 (Oct. 16, 2018), as subsequently modified, is vacated in its entirety, except to the extent that it dismisses Administrative Proceeding Numbers 3-17943, 3-17951, 3-18314, and 3-18316.

¹² *Id.* at *2; *see also id.* (“[T]he sole purpose of the challenged remand has disappeared.”).

¹³ *See* Remand Order, 2018 WL 5023230, at *2.

¹⁴ Order Denying Reconsideration, 2019 WL 2022819, at *3 n.22.

¹⁵ *See* Exhibit A (listing proceedings that are the subject of this order).

¹⁶ *See Sec. Indus. & Fin. Mkt. Ass’n*, Exchange Act Release No. 72182, 2014 WL 1998525, at *8 & n.75 (May 16, 2014); *see also Nasdaq v. SEC*, 2020 WL 3023116, at *5 (noting the two sections employ similar language).

¹⁷ *Nasdaq v. SEC*, 961 F.3d at 427-28.

It is further ORDERED that the parties may file simultaneous briefs addressing the issues outlined in this order, not to exceed 5,000 words, by September 8, 2020. The parties may file simultaneous response briefs, not to exceed 5,000 words, by October 8, 2020.¹⁸

By the Commission.

Vanessa A. Countryman
Secretary

¹⁸ The briefs shall conform to Rule of Practice 450(b)-(d), with respect to content and length limitations, 17 C.F.R. § 201.450(b)-(d), except the length limitations as modified in this order. Attention is also called to Rules of Practice 150-153, 17 C.F.R. §§ 201.150-153, and the Commission's March 18, 2020 order regarding the filing and service of papers in administrative proceedings. *Pending Administrative Proceedings*, Exchange Act Release No. 88415, 2020 WL 1322001 (Mar. 18, 2020), available at <https://www.sec.gov/litigation/opinions/2020/33-10767.pdf>.

Exhibit A

Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-15351 (May 31, 2013)¹
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)

¹ One of the rule changes challenged by this filing was set aside by the SIFMA Decision. This order applies only to the remaining challenges.

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)