

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

In The Matter of the Petition of

CITADEL SECURITIES LLC, RONIN
CAPITAL, LLC, SUSQUEHANNA
INVESTMENT GROUP, and
SUSQUEHANNA SECURITIES

Admin. Proc. File No. 3-17189

**RESPONSE BRIEF OF CHICAGO BOARD OF OPTIONS EXCHANGE,
INCORPORATED, INTERNATIONAL SECURITIES EXCHANGE, LLC, NYSE ARCA,
INC., AND NYSE MKT LLC PURSUANT TO THE COMMISSION'S APRIL 1, 2016
ORDER**

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INTRODUCTION

Just as the Exchanges predicted, Petitioners have argued that the Commission lacks jurisdiction to review Petitioners' allegations that the Exchanges violated their PFOF rules.¹ *Compare* Exch. Br. at 5 (“Although the Petition fails to cite any jurisdictional basis, that omission is likely because Petitioners have never wanted the Commission to be involved in addressing the issues they raise.”) *with* Pet. Br. at 2 (asking the Commission to deny Petitioners’ “request for administrative relief as quickly as possible so that they may timely pursue the judicial relief to which they would then be entitled”). Because the Exchanges demonstrated in their opening brief why the Commission has jurisdiction here pursuant to the clear terms of Section 19 of the Exchange Act and Rule of Practice 101, Petitioners’ arguments against Commission jurisdiction are easily disposed of. Indeed, the Commission’s April 18, 2016 *amicus curiae* filing in *Scottsdale Capital Advisors Corp. v. Financial Industry Regulatory Authority, Inc.*, Case No. 16-cv-860-DKC (D. Md.) (Exhibit A hereto) supports the conclusion that the Commission has jurisdiction.

ARGUMENT

As an initial matter, the Commission recently recognized that the Exchange Act’s grant of exclusive jurisdiction to the Commission to consider questions about the “interpretation of the federal securities laws and [SRO rules]” makes sense because those “issues fall within the Commission’s expertise and ... would therefore benefit from channeling through the administrative process.” *See* Exhibit A at 18; *see also* Exch. Br. at 3-4 (noting that Section 19(h)

¹ Capitalized terms not defined herein have the meanings set forth in the Brief of Chicago Board Options Exchange, Incorporated, International Securities Exchange, LLC, NYSE Arca, Inc., and NYSE MKT LLC pursuant to the Commission’s April 1, 2016 Order (“Exch. Br.”). References to the Market Makers’ Initial Brief Regarding Jurisdiction, dated April 15, 2016, shall be in the form “Pet. Br. at xx.”

of the Exchange Act gives the Commission jurisdiction to ensure that SROs comply with their rules and that the Act was amended to vest more control in the Commission over SROs). That statement reflects and respects Congress's express grant of jurisdiction to the Commission in Section 19 to oversee SROs' compliance with their own rules.

Although Congress defined the Commission's jurisdiction through Section 19 of the Exchange Act, Petitioners ignore both that statutory text and judicial decisions construing it. With regard to judicial decisions, Petitioners' claim that "no court has held that the Commission has jurisdiction over this matter" (Pet. Br. at 1) is false. Both the Seventh Circuit and the district court held that the Commission has jurisdiction to consider Petitioners' claims that the Exchanges violated their rules. *See Citadel Secs., LLC v. Chicago Bd. Options Exch., Inc.*, 808 F.3d 694, 699 (7th Cir. 2015) ("the plain language of the Exchange Act calls for SEC review of [Petitioners'] allegations of improper PFOF fees"); *Citadel Sec., LLC v. Chicago Bd. Options Exch., Inc.*, Case No. 1:13-cv-05833, at 4-5 (N.D. Ill Aug. 8, 2014) (ECF No. 32) ("The SEC is authorized to ensure that SROs properly enforce their own rules.").

Petitioners also do not dispute that Section 19 requires the Commission to ensure that SROs follow their rules and instead argue that, because the Commission cannot "award" Petitioners "damages," the Commission lacks jurisdiction. *See* Pet. Br. at 9-10. But that confuses express statutory jurisdiction to decide whether an exchange has violated its rules with what the Commission might do if it were to decide that an exchange had violated its rules.² Petitioners also ignore the fact that both *Citadel* courts expressly rejected Petitioners' remedy argument, recognizing that the availability of particular remedies has nothing to do with whether the Commission has jurisdiction *vel non*, the question the Commission asked the parties to

² Of course, the Commission need never consider the issue of an appropriate remedy if, as it should, it grants the Exchanges' planned motion to dismiss the Petition.

address.³ See *Citadel*, 808 F.3d at 699; *Citadel*, Case No. 1:13-cv-05833, at 4-5. And as the D.C. Circuit has explained, the absence of a particular “damages remedy” in connection with the Commission’s power to review whether SROs have violated their own rules reflects the fact that Congress chose not to provide a particular remedy in that context, not that the system Congress created is inadequate to address Petitioners’ claims. See *In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 114 (D.C. Cir. 2008) (by adopting a process which does not provide for damage remedies for aggrieved persons, “Congress has displaced claims for relief based on state common law”). This also disposes of Petitioners’ argument that the remedies available to the Commission were it to find that an exchange had violated its own rules are not an adequate administrative remedy (Pet. Br. at 12): As *Series 7* explained, they are the only remedies Congress deemed necessary in this context.⁴ Finally, *Barbara v. NYSE*, 99 F.3d 49 (2d Cir. 1996), does not help Petitioners. The Commission has made clear that for subject matters that fall within the four corners of the exclusive review process created by the Exchange Act, there is no role of any kind for district courts. See Ex. A at 11-12. Because the Second Circuit’s discussion of exhaustion in *Barbara* is inconsistent with the Commission’s structural view of the

³ A similar flaw underpins Petitioners’ assertion that the Rules of Practice do not give the Commission “authority to adjudicate a private dispute for damages against an Exchange” (Pet. Br. at 1) — courts (including in this case) have held that a dispute regarding whether an SRO has violated its own rules is *not* cognizable as a “private dispute for damages against an Exchange.” That is because “the plain language of the Exchange Act calls for SEC review” of Petitioners’ allegations that the Exchanges violated their rules. *Citadel*, 808 F.3d at 699. Petitioners would have the Commission hold that the Seventh Circuit and district court compelled Petitioners to undertake an exercise in futility by requiring that they present their claims to an agency that lacks jurisdiction to consider them.

⁴ Petitioners’ assertion that they would have “less right to protect their interests than would a party, for example, who is responding to a disciplinary proceeding” (Pet. Br. at 12) is a red herring. Congress determined that assertions that SROs violated their own rules should be addressed exclusively by the Commission and, as in *Series 7*, if Petitioners dislike that result then their dispute is with Congress. Moreover, as a practical matter, the Petition provides Petitioners’ views to the Commission and there is no indication that the Commission will not consider those views when determining whether the Exchanges violated their rules.

Exchange Act and the holding in *Series 7, Barbara* is irrelevant.

Petitioners also suggest that the Seventh Circuit did not find that any specific remedy existed before the Commission. *See* Pet. Br. at 4-6. But the Seventh Circuit did not have to find that any specific remedy might be available to conclude that, pursuant to the plain language of Section 19, the Commission has jurisdiction to determine whether an SRO has violated its own rules.

Petitioners ignore Section 19(h) and Rule 101(a)(9)(i) altogether and instead argue that the Rules of Practice define the Commission's jurisdiction, *see* Pet. Br. at 8-9, but that is backwards. The Rules of Practice do not define the limits of the Commission's jurisdiction, they provide the structure within which specific proceedings are addressed by the Commission. Indeed, it would be inconsistent with the Exchange Act for the Rules of Practice to be written or interpreted to decline jurisdiction Congress vested in the Commission through the Exchange Act. Put differently, just as federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them," *Colorado Water Cons. Dist. v. U.S.*, 424 U.S. 800, 813 (1976), the Commission should not fail to exercise the jurisdiction Congress granted through the Exchange Act.

Petitioners themselves cite authority for the proposition that an agency cannot expand its jurisdiction through rules of practice, *see* Pet. Br. at 8-9, but that is a non-issue where, as here, the statute itself creates jurisdiction and the rule (Rule 101(a)(9)(i)) fits within that statutory grant. Because Petitioners' proposed interpretation of Rule 101(a)(9)(i) ignores the actual language of the rule and conflicts with the jurisdictional grant contained in Section 19(h) of the Exchange Act, that proposed interpretation cannot be correct.

Petitioners' focus on Rule of Practice 420 (Pet. Br. at 6-8) also is misplaced, because the

Exchanges need not contend that this proceeding falls within that rule. Petitioners essentially argue that the scope of Rule 101 is coextensive with the scope of Rule 420, but that argument cannot withstand a review of the text of the two rules. Rule 420 is intended to address reviews by the Commission of certain specific SRO actions, such as disciplinary actions and membership determinations, and to that end refers specifically to Exchange Section 19(d), but not to Section 19(h).⁵ Not surprisingly, it is thus found in the “Appeal to the Commission and Commission Review” section of the Rules of Practice. In contrast, Rule 101 (found in the “General Rules” section of the Rules of Practice) speaks to “any” proceeding undertaken by the Commission, including (but not limited to) Rule 420 proceedings.

Finally, Petitioners’ arguments that the conduct at issue is not “regulatory” (Pet. Br. at 10-12) relate solely to whether SROs are immune from certain civil claims if such claims are pursued in court. Because the Exchanges are not asserting SRO immunity in this proceeding before the Commission, Point III of Petitioners’ Brief is irrelevant and should be ignored in its entirety. *See Citadel*, 808 F.3d at 700 (“Section 78(h)(1) states that the SEC’s jurisdiction covers claims against an SRO for violating ‘its own rules’; the regulatory or private nature of the action does not determine the SEC’s jurisdictional reach.”).

CONCLUSION

For all the foregoing reasons and those set forth in the Exchanges’ Brief, the Exchanges respectfully submit that the Commission should enter an order, under Section 19 of the Exchange Act and Rule 101(a)(9)(i), confirming that it has jurisdiction here and commencing a proceeding

⁵ This also disposes of Petitioners’ arguments that the Commission cannot have jurisdiction because the Exchanges did not provide any adjudicative process in connection with Petitioners’ demands that the Exchanges make them whole for the misconduct of other market participants (Pet. Br. at 3-4). That argument relates only to issues reviewable under Section 19(d), whereas the source of the Commission’s jurisdiction here is Section 19(h).

to address the Petition, set a schedule for the Exchanges to move to dismiss the Petition, and otherwise stay all proceedings related to the Petition until after the Commission has decided the motion to dismiss.⁶

Dated: April 22, 2016

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⁶ It has been suggested that the Commission engage in some form of summary adjudication, which the Exchanges do not agree is appropriate. For example, Petitioners seem to suggest that the Petition simply be granted without further ado (Pet. Br. at 2). That suggestion ignores the fact that the primary issue raised by the Petition is whether the Exchanges complied with their PFOF rules, and the natural first step in issuing a reasoned decision regarding that issue is to examine Petitioners' allegations and compare them to the Exchanges' rules, in the same way a court determines whether a complaint states a claim upon which relief could be granted. The Exchanges believe that the result of that evaluation will be the conclusion that, even accepting Petitioners' factual allegations as true, the Exchanges did not violate their PFOF rules, which will require dismissal of the Petition.

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, I caused a copy of the foregoing Reply Brief of Chicago Board of Options Exchange, Incorporated, International Securities Exchange, LLC, NYSE Arca, Inc. and NYSE MKT LLC Pursuant to the Commission's April 1, 2016 Order to be served on the parties listed below via the methods set forth for each recipient.

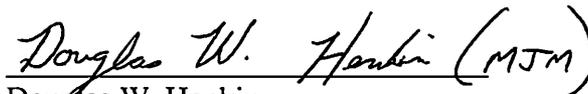
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