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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of:

The Application of BLOOMBERG L.P.

For Review of Action Taken by Certain Self-Regulatory Organizations

File No. 3-17951

NEW YORK STOCK EXCHANGE LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE APPLICATION OF BLOOMBERG L.P. FOR REVIEW OF ACTION TAKEN BY CERTAIN SELF-REGULATORY ORGANIZATIONS

New York Stock Exchange LLC ("NYSE"), in its capacity as administrator of the Consolidated Tape Association ("CTA") Plan and the Consolidated Quotation ("CQ") Plan (collectively, the "Plans"), respectfully submits this memorandum of law in support of its motion to dismiss the application seeking review of action taken by certain self-regulatory organizations (the "Application"), dated April 26, 2017, filed by Bloomberg L.P. ("BLP").

NYSE respectfully submits that the Application should be dismissed for two reasons. *First*, the Application is moot. One days after BLP filed the Application, the Chairman of the Plans filed a letter with the Commission announcing, on behalf of the Plans' participants (the "Participants"),[1] that the amendments to the Plans had been withdrawn, thereby rendering the Application moot because there is nothing to set aside. *Second*, the Application is untimely

[1] The Participants are: BATS Exchange, Inc., BATS-Y Exchange, Inc., Chicago Board Options Exchange, Inc., Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc. International Securities Exchange LLC, Investors' Exchange LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLZ, Inc., Nasdaq Stock Market LLC, National Stock Exchange, NYSE, NYSE MKT LLC, and NYSE Arca, Inc.

because BLP did not submit the Application within the 30-day period prescribed by Rule 420(b) of the Commission's Rules of Practice.

BACKGROUND

The relevant facts are straightforward. On March 2, 2017, the Participants filed with the Commission an immediately-effective proposal to amend the Second Restatement of the CTA Plan and the Restated CQ Plan (the "Amendments"). On March 23, 2017, the CTA filed a notice of determination with the Commission concerning the Amendments (the "Notice of Determination").[2] On April 26, 2017, 34 days after the Notice of Determination was filed, BLP submitted the Application seeking to set aside the Amendments.[3] Just one day later, Emily Kasparov, Chairman of the Plans, filed a letter with the Commission stating that the Participants had withdrawn the Amendments.[4]

ARGUMENT

A. THE APPLICATION IS MOOT

The withdrawal of the Amendments renders the Application moot. The Commission has long recognized that "[t]he test for mootness is whether the relief sought would, if granted, make a difference to the legal interest of the parties."[5] Although the Commission has recognized that it, like other administrative agencies, has substantial discretion in determining "whether the resolution of an issue is precluded by mootness," the Commission has "declined to

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2 *See* Release No. 34-80300; File No. SR-CTA/CQ-2017-02.

3 *See* Exhibit A, attached hereto.

4 *See* https://www.sec.gov/comments/sr-ctacq-2017-02/ctacq201702-1726123-150695.pdf.

5 *Matter of the Applications of Marshall Financial, Inc.*, Securities Exchange Act Rel. No. 50343 (Sept. 10, 2004) (quoting *Coalition for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 458 (6th Cir. 2004)).

consider an [application] where even a favorable decision by Commission would entitle the applicant to no relief."[6]

In *Matter of the Applications of Marshall Financial, Inc.*, the Commission dismissed Marshall Financial, Inc.'s ("Marshall") application on mootness grounds.[7] There, in an underlying proceeding, a hearing officer for the NASD determined that Marshall should be suspended until it produced evidence that it had paid various fees related to certain arbitrations in accordance with NASD rules; the suspension order, however, never took effect because Marshall had paid the fees before the order was served on it.[8] Consequently, the Commission held Marshall's application challenging the determination of the NASD officer was moot because there was no sanction that the Commission could "set aside" pursuant to Exchange Act Section 19(e).[9]

Dismissing BLP's Application as moot is consistent with *Marshall Financial.* The relief sought by BLP in the Application is for the Commission to "set aside" the Amendments on the grounds that they "limit[] access to critical market data for anyone unwilling or unable to pay the onerous, supra-competitive fees the [self-regulatory organizations] are charging."[10] But because there are no longer any Amendments for the Commission to "set aside," the Application is moot under the *Marshall Financial* test and must be dismissed.

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6 *Id.* (internal quotation marks and ellipses omitted).

7 *See* Securities Exchange Act Rel. No. 50343 (Sept. 10, 2004).

8 *See id.*

9 *See id.*

10 *See* Exhibit A ¶ 4.

B. THE APPLICATION IS UNTIMELY

Dismissal of the Application is also warranted because BLP did not timely file the Application in accordance with the Commission's Rules of Practice. Rule 420(b) provides that "an applicant must file an application for review with the Commission within 30 days after the notice of determination is filed with the Commission and received by the aggrieved person applying for review" and states that "[t]he Commission will not extend this 30-day period, absent a showing of extraordinary circumstances." Here, the CTA filed the Notice of Determination with the Commission on March 23, 2017 concerning the immediately-effective amendments to the Plans.[11] BLP filed the Application on April 26, 2017, 34 days after the Notice of Determination was filed. The Application is, therefore, untimely under Rule 420(b). Moreover, BLP has not attempted to make any showing that extraordinary circumstances exist warranting an extension of the 30-day period set by the Rules of Practice.[12] Thus, BLP's failure to file the Application timely requires dismissal by the Commission.[13]

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[11] In its Application, BLP states that the date of notice was March 27, 2017. *See* Exhibit A at page 4. BLP asserts that the date of notice should be measured from the date on which BLP received a letter from NYSE noting that BLP's "Server Application Program Interface product would be considered a Non-Display Use and subject data recipients to the applicable Access Fees." *See id.* at page 4 n. 1. But BLP ignores the fact that the Notice of Determination was filed with the Commission on March 23, 2017 and offers no explanation why this is not the applicable date of notice triggering the 30-day period under Rule 420(b).

[12] *See* Rule 420(b); *MFS Sec. Corp.*, Exchange Act Rel. No. 47626, 56 SEC 380, 2003 WL 175181, at *3.

[13] NYSE reserves all other objections to the Application, including but not limited to objections that the Amendments to the Plans at issue do not relate to a purported denial or limitation of access to market data and that BLP lacks standing to assert denial of access claims on behalf of its customers.

CONCLUSION

For all the foregoing reasons, NYSE respectfully requests that Application should be dismissed.

Dated: May 8, 2017
New York, New York

Respectfully submitted,

BAKER BOTTS L.L.P.

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EXHIBIT A

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of: The Application of BLOOMBERG L.P. For Review of Action Taken by Certain Self-Regulatory Organizations Listed in Exhibit A Annexed Hereto.	)	Admin. Proc. File. No. ________

APPLICATION FOR AN ORDER SETTING ASIDE RULE CHANGES OF CERTAIN SELF-REGULATORY-ORGANIZATIONS LIMITING ACCESS TO THEIR SERVICES

SEC
Mail Processing
Section
APR 26 2017
Washington DC
410

Bloomberg L.P. ("BLP") submits this application pursuant to Sections 19(d) and 19(f) of the Securities Exchange Act of 1934 (the "Act"), or alternatively, to the extent Section 19(d) is determined to be inapplicable, pursuant to Commission Rule 608(d), for an order setting aside certain rule changes (the "Rule Change") issued jointly by the self-regulatory organization participants (the "SROs") of the Consolidated Tape Association and Consolidated Quotation System Plans and as interpreted by the administrator of the Plans listed in Exhibit A attached hereto. The Rule Change limits the access of BLP and its customers to market data made available by the SROs and is inconsistent with the Act.

1. BLP is a global business and financial information and news leader, which provides real time market data, analytics, and news to more than 325,000 subscribers globally. Market data is important to the business of BLP and its customers. BLP and its customers regularly seek access to the market data that the SROs make available.

2. The SROs have provided notice that they filed the Rule Change, which purports to allow them to charge new and amended fees for market data products and related services made available exclusively by the SROs. The Rule Change became effective upon filing with the SEC, and the SEC has not suspended the Rule Change or instituted proceedings to disapprove it.

3. In an order dated May 16, 2014, the SEC held that (1) it has jurisdiction to review applications by persons aggrieved by an SRO'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. Order Establishing Procedures 10-19, Rel. No. 34-72182, Admin. Proc. File Nos. 3-15350 & 3-15351 (May 16, 2014).

4. The SEC should set aside the Rule Change because it constitutes a limitation on access to

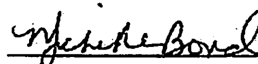
the SRO's services for purposes of Sections 19(d) and 19(f) and Commission Rule 608(d). This is so because it limits access to critical market data for anyone unwilling or unable to pay the onerous, supra-competitive fees the SROs are charging. Furthermore, the SEC should set aside the Rule Change under Sections 19(d) and (f) and Commission Rule 608(d) because BLP and its customers must pay fees that are not consistent with the Act or the rules hereunder. The Rule Change is not "fair and reasonable," 15 U.S.C. § 78k-1(c)(1)(C), does not "provide for the equitable allocation of reasonable...fees...among... persons using the [SROs'] facilities," *id.* § 78f(b)(4), and "permit[s] unfair discrimination" *id.* § 78f(b)(5). Nor does the Rule Change "promote just and equitable principles of trade" or "protect investors and the public interest," *id.* § 78f(b)(4). These fees run counter to the *NetCoalition* decision. "[B]ecause of the mandatory nature of this regime, *core data fees* should bear some relationship to cost." See *NetCoalition v. SEC*, 615 F.3d 525, Note 2 (D.C. Cir. 2010) (emphasis added). In sum, the Rule Change is unenforceable under either Section 19(b)(3)(C) or Commission Rule 608(b)(3).

5. For the foregoing reasons, BLP respectfully requests that the SEC set aside this Rule Change.

Dated: April 26, 2017

Respectfully submitted,

Bloomberg L.P.



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Rule of Practice 420(c) Statement: Service upon the applicant may be accomplished by serving its attorneys at the address listed above.

EXHIBIT A

Exchange	File Number	Release Number	Date of Notice
Consolidated Tape Association Plan Participants	SR-CTA/CQ-2017-02	34-80300	March 27, 2017[1]

[1] On March 27, 2017, the New York Stock Exchange, as administrator of the CTA Plan and on behalf of the CTA, provided Bloomberg with a letter informing Bloomberg that its Server Application Program Interface product would be considered a Non-Display Use and subject data recipients to the applicable Access Fees.

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In the Matter of:	)	
The Application of BLOOMBERG L.P.	)	
	)	Admin. Proc. Fil. No. __________
For Review of Action Taken by Certain Self-Regulatory Organizations Listed in Exhibit A Annexed Hereto	)	

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2017, I caused a copy of the foregoing Application For An Order Setting Aside Rule Changes Of Certain Self-Regulatory Organizations Limiting Access To Their Services to be served on the parties listed below by First Class Mail.

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Dated: April 26, 2017

Michelle Bond

UNITED STATES OF AMERICA
Before the
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In the Matter of: The Application of BLOOMBERG L.P. For Review of Action Taken by Certain Self-Regulatory Organizations	File No. 3-17951

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2017, I caused a copy of the foregoing Memorandum of Law in support of NYSE's Motion to Dismiss to be served on the parties listed below.

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