

COPY

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 a Self-Regulatory  
Organization

Admin. Proc. File No. 3-18145

**MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO HOLD PROCEEDING IN ABEYANCE PENDING RESOLUTION OF  
*IN RE APPLICATION OF SIFMA (NO. 3-15350)***

The Nasdaq Stock Market LLC (“Nasdaq”) respectfully submits this memorandum in support of its motion for an order holding this proceeding in abeyance pending resolution of a similar proceeding initiated by the Securities Industry and Financial Markets Association (“SIFMA”), *In re Application of SIFMA*, Admin. Proc. File No. 3-15350, which is currently pending before the Commission on SIFMA’s petition for review of the Chief Administrative Law Judge’s initial decision. Holding this proceeding in abeyance is warranted because the issues raised in *In re Application of SIFMA* are substantially similar to the issues raised here.

This proceeding is one of more than 200 pending challenges under Sections 19(d) and 19(f) of the Securities Exchange Act to fees that Nasdaq and other self-regulatory organizations (“SROs”) charge for their proprietary data products. The first such proceeding was initiated by SIFMA on May 31, 2013, when it filed an application (No. 3-15350) challenging a rule change by NYSE Arca, Inc. regarding the fees for its ArcaBook depth-of-book product and a second application (No. 3-15351) challenging an additional 22 SRO rule changes setting market-data fees, including a Nasdaq rule change concerning its depth-of-book products. The Commission

thereafter severed SIFMA's challenge to the Nasdaq rule from the 21 other pending rule challenges in No. 3-15351, consolidated SIFMA's challenges to the two Nasdaq and NYSE rules under docket No. 3-15350, and referred the matter to the Chief Administrative Law Judge for a hearing regarding whether the market-data fees set by the two challenged rules are consistent with the Exchange Act. See Order Establishing Procedures and Referring Applications for Review to Administrative Law Judge for Additional Proceedings at 19-21 (May 16, 2014), *In re Application of SIFMA*, Admin. Proc. File No. 3-15350. The Commission further "determine[d] that it is appropriate to withhold issuance of an order governing further proceedings in the remainder of [No. 3-15351] until after the consolidated" proceeding in No. 3-15350 has been completed. *Id.* at 21. The Commission explained that moving forward "first with a limited group of rule challenges will provide an opportunity to address the common substantive legal issues that relate to all filings" and will thereby "serve the interests of all parties and conserve resources." *Id.* at 21-22.

After holding a five-day evidentiary hearing, the Chief Administrative Law Judge issued an initial decision on June 1, 2016, finding that the Nasdaq and NYSE Arca fees at issue in No. 3-15350 are consistent with the Exchange Act. SIFMA thereafter filed a petition for review of the initial decision, which the Commission granted on August 16, 2016. The matter has been fully briefed, and the parties are awaiting oral argument before the Commission.

In the meantime, SIFMA has filed dozens of other applications under Sections 19(d) and 19(f) challenging more than two hundred other SRO rules regarding fees for proprietary data products. In each of SIFMA's applications involving the rules of Nasdaq or Nasdaq-affiliated exchanges, SIFMA has requested that the Commission hold the proceeding in abeyance pending

the resolution of No. 3-15350, and Nasdaq (or its affiliated exchange) has acquiesced in that request. The Commission has not taken action in any of those other proceedings.

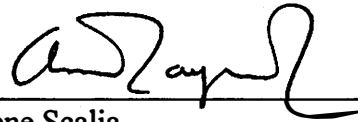
Like each of the pending SIFMA applications, the application filed by Bloomberg L.P. (“BLP”) raises a challenge under Sections 19(d) and 19(f) of the Exchange Act to a rule change by Nasdaq setting fees for a market-data product. The rule change at issue modifies certain fees for Nasdaq’s Short Interest Report product. See Release No. 34-81256, File No. SR-NASDAQ-2017-077 (Aug. 3, 2017). BLP argues that the Commission “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 that the rule change “limits access to critical market data for anyone unwilling or unable to pay” Nasdaq’s fees. Bloomberg L.P. Application for an Order Setting Aside Rule Change of a Certain Self-Regulatory Organization Limiting Access to Its Services ¶ 4 (filed Aug. 28, 2017).

SIFMA raised, and the Chief Administrative Law Judge rejected, similar arguments regarding the Nasdaq and NYSE Arca rule changes at issue in *In re Application of SIFMA*, No. 3-15350. Indeed, the Chief Administrative Law Judge found that the two rule changes challenged by SIFMA in that proceeding are consistent with the Exchange Act under the standard articulated by the D.C. Circuit in *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010), because the exchanges are “subject to significant competitive forces in setting fees” for market data, including “the availability of alternatives” to the exchanges’ products and the “need to attract order flow from market participants.” Initial Decision at 31, *In re Application of SIFMA*, Admin. Proc. File No. 3-15350. The Chief Administrative Judge’s conclusion that significant competitive forces constrain exchanges’ market-data pricing is directly relevant to whether the market-data fees challenged by BLP in this proceeding are consistent with the Exchange Act

under the *NetCoalition* standard. The Commission's resolution of *In re Application of SIFMA* will therefore substantially inform the parties' arguments and the Commission's reasoning regarding BLP's application.

Accordingly, as it has done with every other application filed after No. 3-15350, the Commission should hold this proceeding in abeyance pending the resolution of *In re Application of SIFMA*. Holding the proceeding in abeyance will conserve the resources of both the Commission and the parties by deferring further action in this matter until the relevant legal landscape has been settled.

Respectfully submitted,



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Dated: September 11, 2017

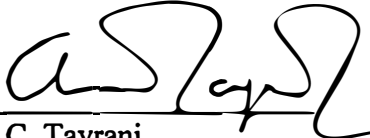
**CERTIFICATE OF SERVICE**

I hereby certify that on September 11, 2017, I caused a copy of the foregoing document to be served on the parties listed below via First Class Mail, except as otherwise provided.

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