

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 85802 / May 7, 2019

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 DENYING RECONSIDERATION

Various national securities exchanges and National Market System (“NMS”) plan participants (collectively, “Movants”) request that the Commission reconsider an October 16, 2018 order. That order remanded to those exchanges and plan participants challenges filed by the Securities Industry and Financial Markets Association (“SIFMA”) and Bloomberg L.P. (collectively, “Applicants”) to exchange rule changes and NMS plan amendments (“Remand Order”).¹ For the reasons explained below, their motions are denied, but the deadlines for complying with the directives in the Remand Order are extended.

¹ *Sec. Indus. & Fin. Mkts. Ass’n*, Exchange Act Release No. 88433, 2018 WL 5023230 (Oct. 16, 2018). Five pending motions were filed by the following groups or entities: (1) New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC, and NYSE National, Inc. (collectively, “NYSE”); (2) Cboe Exchange, Inc., Cboe C2 Exchange, Inc., Cboe BZX Exchange, Inc., Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe EDGX Exchange, Inc.; (3) Miami International Securities Exchange LLC and MIAX Pearl LLC; (4) The Consolidated Tape Association, through New York Stock Exchange LLC, acting in its capacity as Network Administrator of the Consolidated Tape Association and Consolidated Quotation Plan; and (5) the Options Price Reporting Authority, LLC. The Nasdaq Stock Market

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I. Background

A. Applicants filed 61 applications for review of exchange rule changes and NMS plan amendments that remained pending while a related case was adjudicated.

Between May 2013 and August 2018, Applicants filed 61 applications for review challenging certain rule changes and plan amendments. The applications alleged that these rule changes and plan amendments imposed excessive fees for various market data products offered by the exchanges and NMS plans and accordingly were improper limitations or prohibitions of access to services that they offered under Sections 11A and 19 of the Securities Exchange Act of 1934 (“Exchange Act”).² These challenges remained pending consistent with various requests by the parties while we considered challenges to market data product fees in a related lawsuit, which resulted in an opinion issued on October 16, 2018, where we vacated certain fees (“SIFMA Decision”).³

The SIFMA Decision’s origins lie in *NetCoalition v. SEC*.⁴ There, the D.C. Circuit vacated our approval of a fee rule filed by NYSE Arca, Inc., holding that we had articulated an acceptable basis for assessing the fairness and reasonableness of the fees but that the record was insufficient to support our conclusions.⁵ The D.C. Circuit remanded for further proceedings.

Subsequently, NYSE Arca filed with the Commission in 2010 a new rule that imposed the same fees vacated in *NetCoalition I* but that designated the filing as effective immediately pursuant to a change in the law made by the Dodd-Frank Act.⁶ The Commission did not suspend

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LLC, Nasdaq PHLX LLC, Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq GEMX, LLC, and Nasdaq MRX, LLC also filed a motion for reconsideration and withdrew it before filing a petition for review of the Remand Order in the D.C. Circuit. The Nasdaq Stock Market LLC, acting as administrator of the Nasdaq/Unlisted Trading Privileges Plan, also filed and withdrew a motion for reconsideration before filing a petition for review of the Remand Order in the D.C. Circuit.

² See 15 U.S.C. §§ 78k-1, 78s.

³ *Sec. Indus. & Fin. Mkts. Ass’n*, Exchange Act Release No. 88432, 2018 WL 5023228 (Oct. 16, 2018); see also *id.* at *8 n.59 (discussing our earlier decision to “withhold issuance of an order governing further proceedings” in other rule challenges “until after the resolution” of the challenge resulting in the SIFMA Decision) (citation omitted).

⁴ 615 F.3d 525 (D.C. Cir. 2010) (“*NetCoalition I*”).

⁵ *NetCoalition I*, 615 F.3d at 534-35, 539-44.

⁶ *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, Pub. L. No. 111–203, 124 Stat. 1376 (July 21, 2010); see also Exchange Act Section 19(b)(3)(A), 15 U.S.C. § 78s(b)(3)(A) (permitting self-regulatory organizations (“SROs”) to designate as immediately effective rule changes “establishing or changing a due, fee, or other charge imposed by the [SRO] on any person, whether or not the person is a member of the [SRO]”).

that filing as Dodd-Frank permitted. Subsequently, NetCoalition and SIFMA petitioned the D.C. Circuit for review. The court held that it lacked jurisdiction to consider challenges to the Commission’s non-suspension of the fees under Exchange Act Section 19(b).⁷ But the court, in so holding, “[took] the Commission at its word” that the Commission would “make the [Exchange Act] section 19(d) process available to parties” seeking to challenge fees as improper limitations or prohibitions of access to exchange services, and recognized that this Commission process would “open[] the gate to [judicial] review.”⁸

Following *NetCoalition II*, SIFMA filed a challenge with the Commission to NYSE Arca’s 2010 fee rule under Exchange Act Section 19(d). We issued a procedural order that explained that we “have jurisdiction generally to consider fee rule challenges” under Exchange Act Sections 19(d) and (f) and determined that those provisions can be applied to claims that market data fees are improper limitations of access (“2014 Procedural Order”).⁹ Nonetheless, we found the record insufficient to determine whether the Commission had jurisdiction over the challenges at issue.¹⁰ The 2014 Procedural Order consolidated SIFMA’s challenge to NYSE Arca’s 2010 fee rule with another challenge to a fee rule filed by The Nasdaq Stock Market LLC (“Nasdaq”), assigned the consolidated action to an administrative law judge (“ALJ”), and directed the ALJ to receive additional evidence necessary to apply the general principles of jurisdiction discussed in the 2014 Procedural Order.¹¹ The 2014 Procedural Order also directed the ALJ to hold a hearing on the merits and prepare an initial decision.¹²

In response to a request from SIFMA to which no exchange objected, the 2014 Procedural Order stated that the Commission would withhold issuance of an order governing further proceedings in similar challenges to other exchange rules and NMS plan amendments until after the resolution of the consolidated proceeding (“Lead Case”).¹³ The parties to subsequent challenges—both Applicants and Movants—consistently either requested proceedings be held in abeyance, or acquiesced to opposing parties’ requests, on the basis that, because the Lead Case raised similar issues, its resolution would likely be relevant to the other cases.¹⁴ These remaining challenges are the subject of the Remand Order.

⁷ *NetCoalition v. SEC*, 715 F.3d 342 (D.C. Cir. 2013) (“*NetCoalition I*”).

⁸ *NetCoalition II*, 715 F.3d at 353.

⁹ *Sec. Indus. & Fin. Mkts. Ass’n*, Exchange Act Release No. 72182, 2014 WL 1998525, at *6, *9-11 (May 16, 2014).

¹⁰ *Id.*

¹¹ *Id.* at *11-12.

¹² *Id.*; see also SIFMA Decision, 2018 WL 5023228, at *8 and nn.66-69 (explaining the assignment was a permitted, but not required, procedure).

¹³ 2014 Procedural Order, 2014 WL 1998525, at *13.

¹⁴ See, e.g., *Sec. Indus. & Fin. Mkts. Ass’n*, Admin. Proc. No. 3-17841 (Feb. 10, 2017), at 3 (abeyance request by SIFMA in exchange rule challenge); *Sec. Indus. & Fin. Mkts. Ass’n*, Admin. Proc. No. 3-17841 (Feb. 21, 2017), at 2 (New York Stock Exchange LLC stating it does
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B. While the Lead Case was pending, we stayed the effectiveness of NMS plan amendments in another challenge in response to a motion by one of the Applicants.

In one challenge involving NMS plan amendments, Bloomberg filed a motion for a preliminary stay of the effectiveness of the amendments, which we granted (“Bloomberg Stay Order”).¹⁵ The Bloomberg Stay Order discussed the standards for assessing challenges to limitations of access under Exchange Act Section 11A.¹⁶ After we stayed the challenged amendments, the amendments were rescinded, and we dismissed that challenge.¹⁷

C. After we issued a decision in the Lead Case, we remanded approximately 60 pending applications for review.

Ultimately, the assignment of the Lead Case to the ALJ allowed a record to be developed so that we could resolve the questions of jurisdiction, standing, and the merits.¹⁸ The SIFMA Decision found, based on facts adduced at the hearing, that we had jurisdiction to consider the challenges at issue under Exchange Act Section 19(d), that the fees could be considered as limitations of access, and that SIFMA had standing to bring them.¹⁹ The decision also outlined the framework established by Exchange Act Section 19(f) that would apply to SIFMA’s challenges as informed by *NetCoalition I*.²⁰ We ultimately held that NYSE Arca and Nasdaq had failed to meet their burden of establishing that the challenged fee changes were consistent with the purposes of the Exchange Act, and accordingly set certain fee changes aside.

Because the pending applications for review raised similar issues to the Lead Case, we considered the SIFMA Decision relevant to those other applications. And the analysis in both

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not object to request); *Sec. Indus. & Fin. Mkts. Ass’n*, Admin. Proc. No. 3-18313 (Dec. 28, 2017), at 1 (abeyance request by Nasdaq in NMS plan proceeding on grounds that “the issues raised in this proceeding are similar” to those in Lead Case and so its disposition “is likely to inform the parties’ arguments and the Commission’s decision in this matter”); *id.* at 3 (noting Nasdaq “has acquiesced” in each of SIFMA’s abeyance requests previously); *Sec. Indus. & Fin. Mkts. Ass’n*, Admin. Proc. No. 3-18313 (Jan. 9, 2018), at 3 (SIFMA stating it does not oppose).

¹⁵ *Bloomberg L.P.*, Exchange Act Release No. 83755, 2018 WL 3640780 (July 31, 2018).

¹⁶ *See id.* at *7-9.

¹⁷ *See* Remand Order, 2018 WL 5023230, at *2.

¹⁸ *Cf. Calvin David Fox*, Exchange Act Release No. 48731, 2003 WL 22467374, at *3 (Oct. 21, 2003) (“The Commission cannot properly complete its review function in this matter until the NYSE has provided the Commission with clarification and further explanation of the basis of its finding[.]”); *Jonathan Feins*, Exchange Act Release No. 37091, 1996 WL 169441, at *2 (Apr. 10, 1996) (“[I]t is important that a[n SRO] clearly explain the bases for its conclusions. If it fails to do so, we cannot discharge properly our review function.”).

¹⁹ *See* SIFMA Decision, 2018 WL 5023228, at *11.

²⁰ *See id.* at *11-13.

the 2014 Procedural Order and the Bloomberg Stay Order was not available when these other challenges were first filed.²¹ Therefore, we deemed remand to be the appropriate next step to provide the exchanges and NMS plan participants the opportunity to consider the impact of the SIFMA Decision and these orders on the cases subject to the Remand Order.²²

The Remand Order also reminded the exchanges and plans of their obligations under the Exchange Act with respect to potential limitations of access to services.²³ We referenced the exchanges’ “legal obligation to provide notice and an opportunity to be heard to those involved, to develop a record, and to ‘explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.’”²⁴ We then directed the exchanges to “develop or identify fair procedures for assessing the challenged rule changes as potential denials or limitations of access to services, as required by Exchange Act Section 6(b)(7).”²⁵ We similarly directed the plans to “develop or identify specific procedures and standards for assessing the challenged plan amendments as potential denials or limitations of access . . . as required under Rule 608(a)(5) of Regulation NMS.”²⁶ We instructed each exchange and plan to “provide written notice to the Commission of the procedures that it has developed or identified that comply with [the Exchange Act and the rules and regulations thereunder] and that are tailored to the challenges brought” by SIFMA and Bloomberg within six months of the date of the Remand Order, and to “complete the process of applying the procedures to the challenged rule changes [and plan amendments] within one year.”²⁷

The Remand Order noted that “further appeal to the Commission from the exchanges’ actions may be taken as appropriate.”²⁸ Our order “express[ed] no view regarding the merits of

²¹ See 2014 Procedural Order, 2014 WL 1998525, at *7 (adopting three-part test for associational standing); *id.* at *8 (explaining that “not every fee charged by an SRO will constitute a reviewable limitation of access,” and identifying “at least three important considerations [that] restrict what fees might constitute reviewable limitations under Section 19(d)”); Bloomberg Stay Order, 2018 WL 3640780, at *7-9.

²² We also dismissed four of the challenges because they related to plan amendments that were either withdrawn or whose changes were rescinded. See Remand Order, 2018 WL 5023230, at *3-4. The Consolidated Tape Association (“CTA”), who administers the plans at issue in those challenges, moved for reconsideration of the Remand Order with respect to several applications for review and included the file numbers for those challenges in the caption of its motion. CTA makes no mention of the dismissals in its brief, and it is unclear how CTA could establish that it has standing as an aggrieved party to contest the dismissal of lawsuits against it. We therefore construe the brief as not contesting those dismissals.

²³ *Id.* at *1-2.

²⁴ *Id.* at *1 (quoting SIFMA Decision, 2018 WL 5023228, at *8).

²⁵ *Id.*

²⁶ *Id.* at *2.

²⁷ *Id.*

²⁸ *Id.*

the parties' challenges to the rule changes" and plan amendments. The order "[d]id not set aside the challenged rule changes" and plan amendments pending the remand.²⁹

NYSE and Nasdaq appealed the SIFMA Decision to the D.C. Circuit and moved for reconsideration of the Remand Order. Several other exchanges and plan participants also filed motions for reconsideration. Subsequently, Nasdaq withdrew its motion for reconsideration of the Remand Order and filed an appeal of that order in the D.C. Circuit. NYSE also sought a stay of the Remand Order pending judicial review, which several other exchanges and plan participants joined. We issued an order finding that motion to be "premature" because we had yet to rule on the pending reconsideration motions.³⁰ Nonetheless, we "toll[ed] the deadlines established by the Remand Order until the motions for reconsideration [were] resolved."³¹

II. Analysis

A. Reconsideration is not available for the Remand Order because it is not a final order.

"Reconsideration is an extraordinary remedy" that is "granted only in exceptional cases."³² Here, reconsideration is not appropriate because our Rules of Practice authorize motions for reconsideration of only final orders.³³ The Remand Order is not a final order.

The Supreme Court has stated that a final order is one that "marks the consummation of the agency's decisionmaking process," and one "by which rights or obligations have been determined or from which legal consequences will flow."³⁴ An order that remands for further proceedings is not final under this test because, as the D.C. Circuit has held, it contemplates a continuation, not the consummation, of an agency's decisionmaking process:

²⁹ *Id.* at *1-2.

³⁰ *Sec. Indus. & Fin. Mkts. Ass'n*, Exchange Act Release No. 84827, 2018 WL 6589870, at *1 (Dec. 14, 2018).

³¹ *Id.* at *2.

³² *Eric J. Brown*, Exchange Act Release No. 66752, 2012 WL 1143573, at *1 (Apr. 5, 2012) (internal citations omitted).

³³ *See* Commission Rule of Practice 470, 17 C.F.R. § 201.470(a) ("A party or any person aggrieved by a determination in a proceeding may file a motion for reconsideration of a *final order* issued by the Commission.") (emphasis added); *see also* MODEL ADJUDICATION RULE 450(A) (ADMIN. CONFERENCE OF THE U.S. 2018) ("Any party may file a motion for reconsideration of a final order issued by [the Agency].") (brackets in original). Although we have exercised discretion to entertain motions for reconsideration of non-final orders in the past, Rule 470 does not compel us to do so. *See, e.g., May Capital Grp.*, Exchange Act Release No. 54711, 2006 WL 3199183 (Nov. 6, 2006) (denying motion to reconsider remand order).

³⁴ *See Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotation marks and citations omitted).

The courts of appeals that have considered the question . . . have uniformly held that, as a general rule, a remand order is ‘interlocutory’ rather than ‘final’ In so holding, the courts have generally pointed out that a party claiming to be aggrieved by final agency action can appeal, if still aggrieved, at the conclusion of the administrative proceedings on remand.³⁵

The Remand Order is not the consummation of Commission decisionmaking regarding any of the challenged rules and amendments. The Remand Order makes no determinations regarding rights or obligations of the parties in these specific challenges. Rather, it references the legal principles in other Commission cases that may be relevant to the exchanges and plan participants in evaluating these matters once a fulsome record has been developed and the contested issues have been refined through application of the legal principles to that record.³⁶ That process may result in further Commission review and a final Commission decision that may be appealed to a court of appeals. The Remand Order thus is a continuation of the decisionmaking process. To interrupt that process now, when the parties may find on remand that they can resolve some issues without further review, undermines the efficient administration of these cases.

Courts have identified “a small category of decisions that, although they do not end the litigation, must nonetheless be considered ‘final’” under the “collateral order” exception.³⁷ The Supreme Court has repeatedly emphasized the “modest scope” of the exception and the necessity of keeping the category “narrow and selective in its membership.”³⁸ Such orders must (a) “conclusively determine the disputed question”; (b) “resolve an important issue completely

³⁵ *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 329-30 (D.C. Cir. 1989) (collecting cases) (internal citations omitted); *see also Al-Saffy v. Vilsack*, 827 F.3d 85, 93 (D.C. Cir. 2016) (finding that EEOC ALJ’s remand of a complaint to the Department of Agriculture for further action “was not and could not become final agency action”); *Viglietta v. Metro. Life Ins. Co.*, 454 F.3d 378, 378-79 (2d Cir. 2006) (per curiam) (holding remand of ERISA claim to claims administrator was not a final judgment, in part, because “no legal question has been decided by the district court”); *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 289 (5th Cir. 1999) (holding “[a]gency orders which remand to an [ALJ] for further proceedings are not final orders”); *Carolina Power & Light Co. v. U.S. Dep’t of Labor*, 43 F.3d 912, 914-15 (4th Cir. 1995) (holding Secretary of Labor’s remand of matter to ALJ not a final order and in fact “does the exact opposite” of ending the litigation); *In re Riggsby*, 745 F.2d 1153, 1156 (7th Cir. 1984) (“[I]t is well established that an order by a district court remanding an administrative appeal for further proceedings before the agency is not a final order.”).

³⁶ *See* Remand Order, 2018 WL 5023230, at *1.

³⁷ *See Swint v. Chambers Cty. Comm’n*, 514 U.S. 35, 42 (1995).

³⁸ *See Will v. Hallock*, 546 U.S. 345, 350 (2006); *see also Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 864, 868 (1992) (“[W]e have also repeatedly stressed that the ‘narrow’ exception should stay that way and . . . have accordingly described the conditions for collateral order appeal as stringent.” (citations omitted)).

separate from the merits of the action”; and (c) “be effectively unreviewable on appeal from a final judgment.”³⁹

The Remand Order satisfies none of these criteria. It does not conclusively determine any of the disputed issues in the remanded cases, including jurisdiction, standing, or whether the challenged exchange rules or plan amendments constitute impermissible limitations of access. Rather, it directs the exchanges and plan participants to make such determinations once a record is fully developed. Nor have Movants identified any issues separate from the merits that the Remand Order resolves. Finally, rather than prevent later review by the Commission or the courts, the Remand Order provides parties the opportunity to develop the record and arguments to facilitate any such eventual review, and Movants cite no authority for the proposition that the Commission is somehow estopped from providing them an opportunity to further support their legal position.⁴⁰ Reconsideration is not appropriate here.⁴¹

B. Movants misconstrue the Remand Order.

Movants make several arguments objecting to specific aspects of the Remand Order. We address those arguments in order to be responsive to Movants’ concerns. As explained below, Movants misconstrue both the law and the Remand Order.

1. Notice and process

Movants allege that they were given inadequate process because they were not provided notice that the Commission was considering a remand and not provided an opportunity to brief or otherwise present argument. However, remand is appropriate when intervening events,

³⁹ *Occidental*, 873 F.2d at 329 (quoting *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987)). For example, the D.C. Circuit has held that an agency’s remand order was reviewable because it included a denial of qualified immunity that the court held satisfied the separable, conclusive, and unreviewable prongs of the test. *See Meredith v. Fed. Mine Safety & Health Review Comm’n*, 177 F.3d 1042, 1048-52 (D.C. Cir. 1999). *But see Sierra Club v. U.S. Dep’t of Agriculture*, 716 F.3d 653, 657-58 (D.C. Cir. 2013) (finding that district court’s remand to executive department so it could complete an environmental impact statement did not fall into the collateral order exception despite arguments to the contrary).

⁴⁰ *See supra* note 18 (citing cases where Commission remanded cases to SROs to remedy incomplete record and enable Commission to conduct statutorily mandated review); *see also Eagle Supply Grp.*, Exchange Act Release No. 39800, 1998 WL 133847, at *4 (Mar. 25, 1998) (remanding under Exchange Act Section 19(f) so that SRO could “provide a sufficient basis for its decision to enable us to make the requisite determination”); *cf. Aluminum Co. v. United States*, 790 F.2d 938, 941 (D.C. Cir. 1986) (“It is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding.”).

⁴¹ *Cf.* Rule of Practice 103(a), 17 C.F.R. § 201.103(a) (“The Rules of Practice shall be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding.”).

including issuance of new precedent, have an impact on the underlying action.⁴² Here, the SIFMA Decision, the 2014 Procedural Order, and the Bloomberg Stay Order were issued while the challenges subject to the Remand Order were pending. These new Commission precedents provide the factual and legal framework that the exchanges and plan participants will need to address in justifying rule changes and plan amendments challenged as improper limitations of access.

Movants argue that we established a binding process in our 2014 Procedural Order that requires us to refer all challenges to an ALJ for development of a record rather than remand them to Movants. But Movants point to nothing in the 2014 Procedural Order that supports this argument. On the contrary, as the Commission noted in the SIFMA Decision:

The adoption of this procedure in the instant matter should not be viewed as altering the way we review actions taken by SROs. We continue to expect SROs to develop the record in proceedings consistent with the procedural fairness requirements of the Exchange Act applicable to prohibitions or limitations of access to exchange services, and to explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.⁴³

Movants also object that we have never required them to follow the procedures identified in the Remand Order before and suggest that by doing so we are improperly imposing new legal obligations. But it is the Exchange Act that imposes the procedural requirements for assessing challenges based on a limitation of access, and our longstanding practice in cases reviewing such challenges has been to encourage the development of the record by an SRO to facilitate our review as the Exchange Act requires.⁴⁴ The Remand Order is consistent with that practice.

⁴² See, e.g., *Saad v. SEC*, 873 F.3d 297, 304 (D.C. Cir. 2017) (remanding to Commission “to address, in the first instance, the relevance—if any—of” recent Supreme Court decision); *Chatam v. SEC*, 604 F.2d 1368, 1369 (D.C. Cir. 1978) (noting D.C. Circuit’s previous remand of proceedings to Commission “for further consideration in light of” intervening D.C. Circuit case); *Larry C. Grossman*, Exchange Act Release No. 81517, 2017 WL 3836591, at *1 (Aug. 31, 2017) (noting case was remanded from Eleventh Circuit so that Commission could “reconsider its order . . . in light of” intervening Supreme Court decision); *Warren E. Turk*, Exchange Act Release No. 55942, 2007 WL 1800481, at *5 (June 22, 2007) (remanding to NYSE to provide respondent “an opportunity to develop a full evidentiary record” in light of new Commission decisions).

⁴³ SIFMA Decision, 2018 WL 5023228, at *8.

⁴⁴ See Remand Order, 2018 WL 5023230, at *1 n.3 (citing *Atlantis Internet Grp.*, Exchange Act Release No. 75168, 2015 WL 3643461 (June 12, 2015); *Int’l Power Grp. (“IPWG”)*, Exchange Act Release No. 66611, 2012 WL 892229, at *6-7 (Mar. 15, 2012)); see also *Stephen R. Flaks*, Exchange Act Release No. 13638, 1977 WL 475206, at *3 n.8 (June 28, 1977) (noting that while Exchange Act Section 19(f) “contains no express grant of a power to remand,” the Commission has the power to remand in a Section 19(f) case where the record shows that the proceedings before the self-regulatory body were inadequate because “[w]e do not believe that Congress intended to leave the victim of such a flaw without a remedy” or “to require us to

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2. Remand procedure

Movants contend that the challenged rule changes and plan amendments cannot constitute reviewable prohibitions or limitations of access under Exchange Act Sections 19(d), (f), and 11A(b)(5), or that the Commission must determine that the challenged rule changes and plan amendments constitute reviewable prohibitions or limitations of access before any remand. We have long recognized that certain types of exchange rules and plan provisions, including those involving market data fees, can constitute prohibitions or limitations of access reviewable under Exchange Act Section 11A.⁴⁵ And we found the specific fees at issue in the SIFMA Decision to be limitations of access.⁴⁶ The existence of jurisdiction with respect to the remanded challenges turns on the application of the law to the evidence; our 2014 Procedural Order set out a framework for that application.⁴⁷ The development of a record in these cases will aid our resolution of the jurisdictional issue in the event of a subsequent appeal to the Commission following the remand.⁴⁸ Movants will be able to appeal any adverse ruling on this issue to the courts in any appeal from a final Commission order.

Movants also argue that they have no way to know in advance of filing their rule changes and plan amendments who might consider those filings to constitute limitations of access. As a result, they contend, they would not be aware of the need to respond to any challenges to the rule changes and plan amendments before filing them. But the Remand Order requires Movants to

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reverse the self-regulatory body's action *in toto* whenever any error was made, without regard to the impact of such outright reversal on the public interest, on the protection of investors, and on the self-regulatory bodies' autonomy and functioning"); *ABN AMRO Clearing Chicago, LLC*, Exchange Act Release No. 83849, 2018 WL 3869452, at *9 (Aug. 15, 2018) (finding remand to registered securities exchange "appropriate in instances, as here, when the incorrect standard of review has been applied below"); *Christopher J. Peterson*, Exchange Act Release No. 29688, 1991 WL 292138, at *4 (Sept. 13, 1991) (finding remand to registered securities exchange appropriate to give the exchange "the opportunity to apply [its own rules] in accordance with the view expressed" in the opinion, including potentially a further hearing).

⁴⁵ See 2014 Procedural Order, 2014 WL 1998525, at *8 & n.74 (citing, *inter alia*, *Cincinnati Stock Exch.*, Exchange Act Release No. 43316, 2000 WL 1363274, at *3 (Sept. 21, 2000) (finding CTA Plan fees on market data display devices to be limitation of access); *Institutional Networks Corp.*, Exchange Act Release No. 20874, 1984 WL 472209, at *6 (Apr. 17, 1984) (finding NASD fees charged for quotation information to be limitation of access), *aff'd sub nom. NASD v. SEC*, 801 F.2d 1415, 1419 (D.C. Cir. 1986); *Bunker Ramo Corp.*, Exchange Act Release No. 15372, 1978 WL 171128, at *2 (Nov. 29, 1978) (finding OPRA access fees for last sale transaction reports to be limitation of access).

⁴⁶ SIFMA Decision, 2018 WL 5023228, at *11.

⁴⁷ See *supra* note 21 and accompanying text.

⁴⁸ The same is true of Movants' arguments regarding SIFMA's standing, which we also addressed in our 2014 Procedural Order. See 2014 WL 1998525, at *6-9.

take action only with respect to Applicants' challenges to the rule changes and plan amendments that they have already brought as prohibitions or limitations of access; the Remand Order does not require Movants to provide notice and an opportunity to be heard to others.

Some Movants argue that our remand constitutes an improper delegation to Movants of our own statutory responsibilities under Exchange Act Sections 19(f) and 11A. This argument misconstrues the Remand Order. The Commission must make certain findings under Exchange Act Section 19(f) to sustain the challenged action.⁴⁹ Further statutory and regulatory obligations require certain exchange and NMS plan procedures to provide the Commission an adequate record with which to perform its mandate under Sections 11A and 19(f).⁵⁰ The Remand Order reminds Movants of their obligations to comply with these requirements on remand, not to make the Commission's ultimate determinations under the Exchange Act. Proceedings before Movants do not replace our review, but are a necessary predicate to that review.⁵¹

3. Directions on remand

Movants argue that the Remand Order constitutes improper Commission rulemaking because it effectively amends the exchanges' rules and the NMS plans without adhering to the statutory and regulatory requirements governing Commission rulemakings. Movants also contend that the Remand Order requires them to conduct their own rulemaking, which they assert the Commission cannot do, or that our instructions on remand otherwise exceed our statutory authority. We disagree with both arguments.

The Remand Order does not amend Movants' rules or require them to conduct a rulemaking. Rather, the Remand Order requires only that Movants identify or develop fair procedures for assessing Applicants' challenges to the particular rule changes and plan amendments in these specific remanded proceedings as potential denials or limitations of access. The Remand Order does this so the proceedings on remand comport with notions of fair process.

⁴⁹ See SIFMA Decision, 2018 WL 5023228, at *11-12 & n.102; Remand Order, 2018 WL 5023230, at *1 & nn.3-4; see also Bloomberg Stay Order, 2018 WL 3640780, at *7-8 (outlining review requirements for NMS plan amendments).

⁵⁰ See SIFMA Decision, 2018 WL 5023228, at *8 nn.68-69, *12 & n.109; Remand Order, 2018 WL 5023230, at *1 (citing 15 U.S.C. § 78f(b)(7); 17 C.F.R. § 242.608(a)(5)); cf. *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 621 (2d Cir. 2004) (requiring that SRO consider dispute before Commission review because doing so "promotes the development of a record in a forum particularly suited to create it, upon which the Commission and, subsequently, the courts can more effectively conduct their review" and "provides SROs with the opportunity to correct their own errors prior to review by the Commission").

⁵¹ Some Movants also suggest that we lack authority to order a remand under Exchange Section 19, but since 1977 we have frequently availed ourselves of the option to remand actions to exchanges where, as here, the record is insufficient for us to discharge our review function. See *Flaks*, 1977 WL 475206, at *3 n.8; see also *supra* notes 18, 40 (citing other cases where Commission remanded to SROs under Exchange Act Section 19(f)).

Movants already may have such procedures, and may simply need to elucidate how their existing procedures can apply to the challenges at issue. For example:

- Exchange Act Section 6(b)(7) states that “[a]n exchange shall not be registered [with the Commission] as a national securities exchange unless . . . [t]he rules of the exchange . . . provide a fair procedure for . . . the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange or a member thereof.”⁵²
- Exchange Act Section 15(A)(b)(8) states that “an association of brokers and dealers [such as FINRA] shall not be registered [with the Commission] as a national securities association unless . . . the rules of the association . . . provide a fair procedure for . . . the prohibition or limitation by the association of any person with respect to access to services offered by the association or a member thereof.”⁵³
- Rule 608(a)(5) of Regulation NMS states that every NMS plan must have “specific procedures and standards governing the granting or denial of access.”⁵⁴

But if Movants do not have such procedures, the Remand Order does not require Movants to engage in a rulemaking to establish procedures for all future challenges. The Remand Order only requires Movants to assess Applicants’ particular challenges using procedures that accord with the fairness requirements of the Exchange Act and Regulation NMS.⁵⁵

We note that in doing so the Remand Order is entirely consistent with our past precedent. In *IPWG*, we remanded an applicant’s claim that a clearing agency improperly limited its access to the agency’s services after finding that the “lack of a record below ma[d]e it impossible for the Commission to assess the merits” of the appeal and that we could not conclude that the agency had provided the applicant “with the procedural safeguards required by” the Exchange Act.⁵⁶ We remanded to the agency “for development of the record . . . pursuant to procedures that accord with the fairness requirements of . . . the Exchange Act.”⁵⁷ We also urged, but did not

⁵² 15 U.S.C. § 78f(b)(7).

⁵³ 15 U.S.C. § 78o-3(b)(8).

⁵⁴ 17 C.F.R. § 242.608(a)(5).

⁵⁵ *See, e.g.*, Exchange Act Section 6(d)(2), 15 U.S.C. § 78f(d)(2) (providing that “the exchange shall notify such person of, and give him an opportunity to be heard upon, the specific grounds for the . . . prohibition or limitation under consideration and keep a record” and that “a determination by the exchange to . . . prohibit or limit a person with respect to access to services offered by the exchange . . . shall be supported by a statement setting forth the specific grounds on which the . . . prohibition or limitation is based”).

⁵⁶ 2012 WL 892229, at *7-8.

⁵⁷ *Id.* at *8.

direct, the agency to “adopt procedures that accord with the fairness requirements of [the Exchange Act], which may be applied uniformly in any future such issuer cases.”⁵⁸

The need for the clearing agency to develop a record using procedures that accorded with the fairness requirements of the Exchange Act did not necessitate a rulemaking because all that was at issue was the Commission’s review under Section 19(f) of the applicant’s particular challenge. Indeed, we held in a subsequent case that although the agency had not yet “adopt[ed] procedures” to “be applied uniformly in future cases” the agency had provided the applicant the requisite notice and opportunity to be heard “on the record before us.”⁵⁹ As in *IPWG*, the Remand Order requires only that Movants identify or develop procedures for assessing Applicants’ particular challenges to the specific rule filings and plan amendments at issue here.

Some Movants argue that they cannot be required to comply with the Remand Order and request that we adjudicate the challenges based on the existing record. We disagree and decline to adjudicate these challenges at this point. Of course, Movants may file notice with us in response to the Remand Order that they believe the procedures that they applied and the record that they developed when the rules and amendments were originally filed with the Commission are statutorily sufficient. On that basis, they could choose to determine that all of the challenged rules and amendments are consistent with the Exchange Act. At that point, Applicants, or any aggrieved party, could appeal such determinations. We would, in reviewing such actions, consider our recent orders, the SIFMA Decision, and *NetCoalition I & II*. Movants may also withdraw any of the challenged rules or amendments at any time and re-file them at a later date.

C. A stay of the Remand Order is not appropriate.

On November 21, 2018, NYSE moved to stay the Remand Order pending judicial review. On December 14, 2018, we issued an order in which we deemed that motion “premature” because we had yet to rule on the pending reconsideration motions.⁶⁰ Because we have denied those motions, we now address NYSE’s motion for a stay pending appeal and deny that motion.

Commission Rule of Practice 401, pursuant to which NYSE seeks a stay, “permits stay motions only by persons aggrieved by a Commission order ‘who would be entitled to review in a federal court of appeals.’”⁶¹ The Exchange Act provides that only a “person aggrieved by a *final order* of the Commission entered pursuant to [the Exchange Act] may obtain review of the order” in a court of appeals.⁶² As discussed above, the Remand Order is not a final order.

⁵⁸ *Id.*

⁵⁹ *Atlantis Internet Grp.*, 2015 WL 3643461, at *6 & n.21 (reiterating that the agency should, but not directing that it must, adopt procedures to be applied uniformly in future cases).

⁶⁰ *Sec. Indus. & Fin. Mkts. Ass’n*, 2018 WL 6589870, at *1.

⁶¹ *Francis V. Lorenzo*, Exchange Act Release No. 82755, 2018 WL 994316, at *1 (Feb. 21, 2018) (quoting 17 C.F.R. § 201.401(c)).

⁶² *See* Exchange Act Section 25(a), 15 U.S.C. § 78y(a) (emphasis added).

Accordingly, NYSE is not entitled to review of the Remand Order in a court of appeals.⁶³ Therefore, Rule 401 does not apply.⁶⁴

Even if Rule 401 permitted NYSE to seek a stay, NYSE failed to show it is entitled to one. A stay pending appeal is an “extraordinary remedy.”⁶⁵ The moving party has the burden of showing that a stay is warranted.⁶⁶ Traditionally, when it evaluates stay motions, the Commission considers whether: (i) there is a strong likelihood that the moving party will eventually succeed on the merits of the appeal; (ii) the moving party will suffer irreparable harm without a stay; (iii) another party will suffer substantial harm as a result of a stay; and (iv) a stay is likely to serve the public interest.⁶⁷ The first two factors are the most critical, but a stay decision rests on the balancing of all four factors.⁶⁸ We find that NYSE has not established that a stay is warranted.

1. Likelihood of success on the merits

NYSE argues that it is likely to succeed on the merits for several reasons. First, NYSE argues that the Remand Order violates the Exchange Act because it contemplates review of challenged market data fees as prohibitions or limitations of access to exchange services under Exchange Act Section 19(d). But in *NetCoalition II*, the D.C. Circuit took us “at [our] word” that we would “make the section 19(d) process available to parties seeking review of unreasonable fees charged for market data.”⁶⁹ And we recently held that certain challenged

⁶³ See *supra* discussion in Section II.A.

⁶⁴ See *Lorenzo*, 2018 WL 994316, at *1 (finding Rule 401 to be inapplicable “because the Commission has not yet entered a final order, reviewable by an appellate court”); *Michael S. Steinberg*, Advisers Act Release No. 4008, 2015 WL 331125, at *1-2 (Jan. 27, 2015) (holding that Rule 401 did not apply to Commission’s briefing order because it was not a Commission order to which respondent was entitled to appellate review).

⁶⁵ Bloomberg Stay Order, 2018 WL 3640780, at *7 (quoting *Nken v. Holder*, 556 U.S. 418, 432-34 (2009)).

⁶⁶ *Bruce Zipper*, Exchange Act Release No. 82158, 2017 WL 5712555, at *3 (Nov. 27, 2017).

⁶⁷ *Id.*

⁶⁸ Bloomberg Stay Order, 2018 WL 3640780, at *7; see also *id.* (“The appropriateness of a stay turns on a weighing of the strengths of these four factors; not all four factors must favor a stay for a stay to be granted.”). NYSE cites case law holding that a litigant can compensate for a lesser showing on one element by making an unusually strong showing on another factor. *Cf. Scottsdale Capital Advisors Corp.*, Exchange Act Release No. 83783, 2018 WL 3738189, at *4 (Aug. 6, 2018) (granting stay of SRO action where movant “raised serious legal questions on the merits and has shown that the balance of the hardships tips decidedly in favor of a stay”). But NYSE does not identify any particular element of the test on which it asserts it has made a sufficient showing to compensate for a diminished showing on any other element.

⁶⁹ *NetCoalition II*, 715 F.3d at 353.

market data fees “[we]re limitations of access to exchange services” within the scope of Section 19(d), and we set them aside in the SIFMA Decision.⁷⁰ This is consistent with our longstanding precedent that has “treated certain fees charged by registered securities information processors as reviewable prohibitions or limitations on access” to services.⁷¹ Indeed, the D.C. Circuit has held that we “quite properly concluded” a challenged fee “constituted an improper prohibition or limitation of access to services,” and sustained our order setting that fee aside.⁷²

NYSE nonetheless argues that market data fees cannot be reviewed under Section 19(d) because that statutory provision applies only to actions that are “self-evidently *disciplinary* or quasi-adjudicatory”—actions “directed at individual members to address misbehavior” (emphasis in brief). But “[w]e have never found that Section 19(d) is limited to quasi-adjudicatory actions.”⁷³ “The phrase ‘quasi-adjudicatory action’ appears nowhere in the text of Section 19, or, indeed, anywhere else in the Exchange Act.”⁷⁴ Although Section 19(d) provides for review of an SRO’s “final disciplinary sanction,” it separately provides for review of SRO action that “prohibits or limits any person in respect to access to services.”⁷⁵ Congress provided different statutory standards for our review of these two distinct categories of SRO actions.⁷⁶ A prohibition or limitation of access need not constitute disciplinary action to be reviewable.

⁷⁰ 2018 WL 5023228, at *11.

⁷¹ 2014 Procedural Order, 2014 WL 1998525, at *8 nn.74 & 75; *see also* Order Accepting Jurisdiction, Establishing Procedures, and Ordering Briefs, *Cincinnati Stock Exch.*, 2000 WL 1363274, at *3 (finding that “charging fees to [CSE] specialists is a limitation on access to the CTA’s services”); *Institutional Networks*, 1984 WL 472209, at *6 (finding that “fees for access to NASDAQ services are a limitation on access within the terms of the statute”); *Bunker Ramo*, 1978 WL 171128, at *2 (finding “that the imposition of an access fee can be a limitation upon access to a service offered by an exclusive processor,” but determining that “imposition of some form of an access fee” was permissible).

⁷² *NASD v. SEC*, 801 F.2d 1415, 1419 (D.C. Cir. 1986).

⁷³ 2014 Procedural Order, 2014 WL 1998525, at *11; *see also id.* (“[T]o the extent that we previously have cited the legislative history [regarding quasi-adjudicatory actions] to construe the scope of Section 19(d), we have relied on that history to construe the statute expansively, not to limit its reach.”); *Tower Trading*, Exchange Act Release No. 47537, 2003 WL 1339179, at *3 (Mar. 19, 2003) (“Congress intended . . . Section 19(d), ‘to encompass *all* final quasi-adjudicatory actions[.]’” (internal citation omitted and emphasis added)).

⁷⁴ 2014 Procedural Order, 2014 WL 1998525, at *11.

⁷⁵ 15 U.S.C. § 78s(d).

⁷⁶ *See* Exchange Act Section 19(e), 15 U.S.C. § 78s(e) (standard applicable to disciplinary sanctions); Exchange Act Section 19(f), 15 U.S.C. § 78s(f) (standard applicable to prohibitions or limitations of access); *cf. Keith Sequeira*, Exchange Act Release No. 81786, 2017 WL 4335070, at *3-4 (Sept. 29, 2017) (recognizing difference between bar imposed as a disciplinary sanction reviewable under Section 19(e) and non-disciplinary bar reviewable under 19(f)).

NYSE also asserts that it was improper for us to remand SIFMA’s and Bloomberg’s fee challenges to it because we did not first conclude that the challenged fees constituted “denial[s] of access” to exchange services. In our 2014 Procedural Order, we found that the record did not contain sufficient evidence for us to resolve the issues of jurisdiction and standing with respect to the fees addressed in the SIFMA Decision, and we assigned that case to an ALJ for development of a record and a determination of jurisdiction.⁷⁷ Similarly, remand of the pending challenges will allow NYSE to develop a record on jurisdiction and other issues and to explain its conclusions based on that record in a written decision that will allow us to perform our review. This process is consistent with the Exchange Act, which authorizes us to review SRO action based on “the record before the self-regulatory organization.”⁷⁸ We find it appropriate to allow for the development of jurisdictional facts before making a determination of jurisdiction.⁷⁹

Second, NYSE argues that the Remand Order violates the Exchange Act because it reassigns the Commission’s statutory task of assessing the consistency of the challenged fees with the Exchange Act to the exchanges. But the Remand Order directs the exchanges to comply with their own statutory obligations. Exchange Act Section 6(b)(7) provides that the rules of an exchange generally must “provide a fair procedure for . . . the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange.”⁸⁰ Among other things, “the exchange shall notify such person of, and give him an opportunity to be heard upon, the specific grounds for the . . . prohibition or limitation under consideration and keep a record.”⁸¹ And “[a] determination by the exchange to . . . prohibit or limit a person with respect to access to services offered by the exchange . . . shall be supported by a statement setting forth the specific grounds on which the . . . prohibition or limitation is based.”⁸² These statutory procedures do not replace a proceeding before the Commission for review of exchange action;

⁷⁷ See 2014 Procedural Order, 2014 WL 1998525, at *12 (explaining that “[r]eferral will give the law judge the opportunity to receive and address additional evidence bearing on the existence of jurisdiction” and to make “a determination of jurisdiction”).

⁷⁸ See Exchange Act Section 19(f), 15 U.S.C. § 78s(f).

⁷⁹ See *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 216 F.3d 291, 295 (2d Cir. 2000) (“Because, on the current record, we cannot determine that [jurisdictional] requirements were satisfied, we remand to the district court for further proceedings on the jurisdictional issue.”); *United States ex rel. Miss. Road Supply Co. v. H.R. Morgan, Inc.*, 528 F.2d 986, 987 (5th Cir. 1976) (per curiam) (“[I]t is vital to a proper determination of the jurisdictional issue for the record to be properly developed and a decision made by the district court”); see also *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1118 (9th Cir. 2004) (remanding for development of facts on compliance with jurisdictional amount-in-controversy requirement).

⁸⁰ 15 U.S.C. § 78f(b)(7).

⁸¹ Exchange Act Section 6(d)(2), 15 U.S.C. § 78f(d)(2).

⁸² *Id.*

instead, they enable it.⁸³ Nothing in the Remand Order disclaims our intention to perform that ultimate review following the exchanges' development of the record.

NYSE argues that various statutory and regulatory provisions conflict with the Remand Order. None does. Exchange Act Section 19(d) makes SRO action prohibiting or limiting access to services reviewable by the Commission.⁸⁴ Nothing in the Remand Order eliminates that review. And like the Remand Order, Exchange Act Section 19(f) specifically contemplates the development of a record before the exchanges to facilitate the Commission's review.⁸⁵ Exchange Act Section 19(b)(4)(B) is inapposite because it applies not to exchanges like NYSE but to "proposed rule change[s] filed by a registered clearing agency for which the Commission is not the appropriate regulatory agency."⁸⁶ Rule of Practice 700 is also inapposite. The Commission adopted this rule "to formalize the process it will use when conducting proceedings to determine whether an SRO's proposed rule change should be disapproved under Section 19(b)(2) of the Exchange Act."⁸⁷ Rule 700 applies when the Commission institutes proceedings under Section 19(b) "to determine whether a self-regulatory organization's proposed rule change should be disapproved."⁸⁸ It does not apply where, as here, a private party initiates a proceeding under Section 19(d) by filing an application for review of exchange action.⁸⁹

⁸³ SIFMA Decision, 2018 WL 5023228, at *8 (stating SROs should "develop the record in proceedings consistent with the procedural fairness requirements of the Exchange Act applicable to prohibitions or limitations of access to exchange services" and "explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review").

⁸⁴ 15 U.S.C. § 78s(d).

⁸⁵ See 15 U.S.C. § 78s(f) (providing that, in a proceeding considering a challenge to a prohibition or limitation of access, a "hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to dismiss the proceeding or set aside the action of the self-regulatory organization").

⁸⁶ 15 U.S.C. § 78s(b)(4)(B).

⁸⁷ *Rules of Practice*, Exchange Act Release No. 63723 (Jan. 14, 2011), 76 Fed. Reg. 4066, 4066 (Jan. 24, 2011).

⁸⁸ 17 C.F.R. § 201.700(b)(1); see also Exchange Act Section 19(b)(2)(A)(II), 15 U.S.C. § 78s(b)(2)(A)(II) (reflecting Commission authority to "institute proceedings . . . to determine whether the proposed rule change should be disapproved"); Exchange Act Section 19(b)(3)(C), 15 U.S.C. § 78s(b)(3)(C) (Commission may suspend immediately effective rule filing and institute rule disapproval proceedings within 60 days of filing of rule); Exchange Act Section 19(b)(2)(B), 15 U.S.C. § 78s(b)(2)(B) (providing procedures for rule disapproval proceedings).

⁸⁹ See 15 U.S.C. § 78s(d) (authorizing an aggrieved person to file an application for review of an SRO decision that "prohibits or limits any person in respect to access to services offered by such organization or member thereof"); Rule of Practice 420(a)(iii), 17 C.F.R. § 201.420(a)(iii) (authorizing filing of application for review by a person aggrieved by an SRO's "prohibition or limitation in respect to access to services offered by that self-regulatory organization or a member thereof"); Rule of Practice 101(a)(9)(iii), 17 C.F.R. § 201.101(a)(9)(iii) (defining term

(continued . . .)

NYSE also argues that “remand to the exchanges” is “contemplated nowhere in the Exchange Act” and asserts that the Remand Order is thus an “outright violation of a clear statutory provision.” Because NYSE fails to identify the “clear statutory provision” that is central to its argument, it has not shown that it is likely to succeed on the merits. In any case, we have long construed Section 19(f) to permit remand.⁹⁰ Remand provides the parties with an opportunity to develop the record consistent with the procedural fairness requirements of the Exchange Act,⁹¹ offers the exchanges a chance to explain their determinations,⁹² and allows them to respond in the first instance to the SIFMA Decision.⁹³ Remand promotes fairness, affords the exchanges and plans an opportunity to respond to the Applicants’ arguments in the first instance,⁹⁴ and facilitates our review of SIFMA’s and Bloomberg’s challenges.⁹⁵

Third, NYSE argues that there is “no basis” to review its fees because the Commission did not suspend the challenged fees within 60 days after they were filed with the Commission

(. . . *continued*)

“proceeding” to include “any agency process initiated . . . [b]y the filing, pursuant to Rule 420, of an application for review of a self-regulatory organization determination”).

⁹⁰ *Flaks*, 1977 WL 475206, at *3 n. 8; *see also, e.g., Monroe Parker Sec., Inc.*, Exchange Act Release No. 39057, 1997 WL 564167, at *4 (Sept. 11, 1997) (remanding denial of access claim under Exchange Act Section 19(f)).

⁹¹ *Cf. IPWG*, 2012 WL 892229, at *8 (remanding “for development of the record . . . and for further consideration, pursuant to procedures that accord with the fairness requirements of [applicable provision] of the Exchange Act”).

⁹² *Cf. Atlantis Internet Grp.*, 2015 WL 3643461, at *8 (remanding for SRO “to provide a statement setting forth the specific grounds on which the [challenged actions] are based”); *see also Richard T. Sullivan*, Exchange Act Release No. 40671, 1998 WL 786943, at *6 (Nov. 12, 1998) (“It is important that a self-regulatory organization clearly explain the basis for its conclusions. If it fails to do so, an applicant is impaired in his or her ability to urge a contrary position to us, and we cannot discharge our review function. It therefore appears appropriate to remand this case to the NASD for a statement of the basis for its determination, how it resolved the competing assertions of the parties and the basis for that resolution.”).

⁹³ *See, e.g., Morton Kantrowitz*, Exchange Act Release No. 51238, 2005 WL 424921, at *4 (Feb. 22, 2005) (remanding for consideration of Commission precedent issued after SRO decision on appeal); *Peterson*, 1991 WL 292138, at *4 (remanding to exchange “to give it the opportunity to apply” rule as interpreted for the first time by the Commission); *cf. Saad*, 873 F.3d 297, 304 (remanding for the Commission to address in the first instance the applicability of Supreme Court decision issued after Commission decision on review).

⁹⁴ *See supra* notes 80-82 and accompanying text; *cf. MFS Sec. Corp. v. SEC*, 380 F.3d at 621 (holding that the administrative exhaustion requirement “provides SROs with the opportunity to correct their own errors prior to review by the Commission”).

⁹⁵ *Eagle Supply Grp.*, 1998 WL 133847, at *4 (remanding under Exchange Act Section 19(f) so that NASD could “provide a sufficient basis for its decision to enable us to make the requisite determination”).

and institute rule disapproval proceedings under Exchange Act Section 19(b).⁹⁶ According to NYSE, to ensure the ongoing effectiveness of its fees the Exchange Act “requires only” that it make immediately effective rule filings with the Commission “accompanied by a concise general statement of the[ir] basis and purpose,”⁹⁷ unless the Commission suspends those fees within 60 days of filing. NYSE contends that the Remand Order improperly “demands” that NYSE do more “to justify the ongoing effectiveness” of immediately effective fee filings.

But the ultimate “question here is not whether the challenged rule changes should have become effective.”⁹⁸ “Rather, it is whether those rules are enforceable.”⁹⁹ As the D.C. Circuit recognized in *NetCoalition II*, Exchange Act Section 19(b)(3)(C) provides that “[a]ny proposed rule change of a self-regulatory organization which has taken effect [upon filing] may be enforced by such organization to the extent it is *not inconsistent* with the provisions of [the Exchange Act], the rules and regulations thereunder, and applicable Federal and State law.”¹⁰⁰ This language, the court found, means that “SROs cannot enforce fee rules against their members if those rules are ‘inconsistent’ with the requirements of the Exchange Act, including sections 6 and 11A.”¹⁰¹ Thus, when presented with an appropriate application to set aside an immediately effective fee rule that we did not suspend, “Section 19(f) still requires us to determine (in the first instance) if a ‘prohibition or limitation is in accordance with the rules of the [SRO],’ and whether such rules are ‘consistent with the purposes of’ the Exchange Act and thus enforceable.”¹⁰²

Fourth, NYSE argues that the Commission “needed to use notice-and-comment rulemaking to change existing Commission regulations” before issuing the Remand Order. NYSE does not identify any existing Commission regulation that the Remand Order modifies, however, and there is none. The Remand Order is not a rulemaking but rather an order issued in specific adjudicatory proceedings.¹⁰³ It does not impose new obligations but rather directs the exchanges to follow existing law.¹⁰⁴

⁹⁶ See *supra* note 88.

⁹⁷ Exchange Act Section 19(b)(1), 15 U.S.C. § 78s(b)(1) (cited by NYSE).

⁹⁸ 2014 Procedural Order, 2014 WL 1998525, at *10.

⁹⁹ *Id.*

¹⁰⁰ *NetCoalition II*, 715 F.3d at 352 (citing 15 U.S.C. § 78s(b)(3)(C) (emphasis added)).

¹⁰¹ *Id.*

¹⁰² 2014 Procedural Order, 2014 WL 1998525, at *10 (quoting Exchange Act Section 19(f)); see also *id.* at *9-11 (explaining that Sections 19(d) and (f) can be applied to the applications for review of market data fees as improper prohibitions or limitations of access to exchange services).

¹⁰³ Remand Order, 2018 WL 5023230, at *3 (remanding to exchanges only those challenges made in specified proceedings); see also *supra* note 52 and accompanying text.

¹⁰⁴ See *supra* notes 80-82 and accompanying text.

Fifth, NYSE argues that “the Commission not only denied [NYSE] due process, it denied [NYSE] any process in these fee-filing challenges before demanding that [it] expend time, effort, and resources complying with an unlawful Order.” NYSE’s argument rests in substantial part on its claim that the Remand Order is “unlawful.” This contention is not likely to succeed because there is nothing unlawful about the Remand Order for the reasons explained above.

In any case, the Remand Order did not deny NYSE due process. “[T]he nature of adjudication is that similarly situated non-parties may be affected by the policy or precedent applied, or even merely announced in dicta, to those before the tribunal.”¹⁰⁵ The Remand Order requires the exchanges and plans to consider the impact of the SIFMA Decision, the 2014 Procedural Order, and the Bloomberg Stay Order on the pending applications for review. In so doing, it directs the exchanges to develop or identify the statutorily required “fair procedures” and apply them to SIFMA and Bloomberg.¹⁰⁶ And it provides the exchanges with an additional opportunity to be heard through the preparation of a written decision before the Commission conducts any hearings on SIFMA’s and Bloomberg’s applications under Section 19(f).¹⁰⁷ Indeed, the Commission cannot set aside any of the challenged fees without the additional opportunity for another appeal following the completion of procedures before the exchanges.¹⁰⁸ NYSE has not established that it was denied due process.

2. Irreparable injury

NYSE also fails to show that it will suffer irreparable injury if the Remand Order is not stayed pending appeal. To establish irreparable harm, NYSE must show an injury that is “both certain and great” and “actual and not theoretical.”¹⁰⁹ A stay “will not be granted [based on] something merely feared as liable to occur at some indefinite time,”¹¹⁰ and a “movant must show that the alleged harm will directly result from the action which the movant seeks to [stay].”¹¹¹

NYSE does not cite this standard in its briefs or otherwise establish that it has satisfied it. Instead, NYSE argues that it has shown “procedural and financial injury” that is irreparable. NYSE asserts that its “senior officials . . . will need to determine” how to comply with the

¹⁰⁵ See *Goodman v. FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999) (citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969)).

¹⁰⁶ See Remand Order, 2018 WL 5023230, at *1 (“Upon remand, the exchanges shall develop or identify fair procedures for assessing the challenged rule changes as potential denials or limitations of access to services, as required under Exchange Act Section 6(b)(7).”).

¹⁰⁷ See *id.*; see also Exchange Act Section 19(f), 15 U.S.C. § 78s(f) (detailing minimum hearing procedures required before final adjudication of challenge to prohibition or limitation of access to services).

¹⁰⁸ See Exchange Act Section 19(f), 15 U.S.C. § 78s(f).

¹⁰⁹ *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

¹¹⁰ *Id.* (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931)).

¹¹¹ *Id.*

Remand Order and that compliance will require “diverting existing employees from their current jobs and/or hiring additional employees.” But “the Supreme Court long has recognized the ‘expense and disruption of defending . . . [a] protracted adjudicatory proceeding[]’ does not constitute irreparable harm.”¹¹² Indeed, courts have held that it is “clear” that “litigation expense and attendant inconvenience do not constitute irreparable injury sufficient to justify judicial intervention into pending agency proceedings.”¹¹³ Similarly, “injury resulting from attempted compliance with government regulation ordinarily is not irreparable harm.”¹¹⁴ NYSE does not cite any cases to the contrary. Nor does it, for example, demonstrate that a stay is needed to prevent “the imminent destruction of a business.”¹¹⁵ NYSE’s cost of compliance with the Remand Order is not an irreparable injury. This factor does not favor a stay.¹¹⁶

* * *

¹¹² *John Thomas Capital Mgmt. Grp.*, Exchange Act Release No. 74345, 2015 WL 728006, at *4 (Feb. 20, 2015) (quoting *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980)); *see also Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974) (“Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.”).

¹¹³ *Rosenthal & Co. v. CFTC*, 614 F.2d 1121, 1127-1128 (7th Cir. 1980).

¹¹⁴ *Sharemaster*, Exchange Act Release No. 80705, 2017 WL 2117529, at *2 (May 16, 2017) (quoting *Am. Hosp. Ass’n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980)).

¹¹⁵ *Zipper*, 2017 WL 5712555, at *4.

¹¹⁶ We also note that we do not anticipate compliance with the Remand Order to require individual proceedings for every challenged rule change. Some of the challenged rule changes appear to have been withdrawn before they went into effect, and so may require no procedures at all. *See, e.g., Notice of Filing of Proposed Rule Change Establishing Fees Relating to End Users and Amending the Definition of “Affiliate,” as well as Amending the Exchange’s Price List to Reflect the Changes*, Exchange Act Release No. 77642 (Apr. 18, 2016), 81 Fed. Reg. 23,786 (Apr. 22, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-04-22/pdf/2016-09323.pdf>; *Notice of Withdrawal of a Proposed Change, as Modified by Amendment Nos. 1 and 2, Establishing Fees Relating to End Users and Amending the Definition of “Affiliate,” as well as Amending the NYSE Price List to Reflect the Changes*, Exchange Act Release No. 78953 (Sept. 27, 2016), 81 Fed. Reg. 68,083 (Oct. 3, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-10-03/pdf/2016-23754.pdf>. Some of the rule changes are challenged at multiple points during their development, and so might be considered as a set. *See, e.g.,* SR-NYSE-45 (subject to five different challenges as part of Admin. Proc. File Nos. 3-17663, 3-17738, 3-17787). Some of the rule changes involve the same or similar changes, and so also might be considered together. *See, e.g.,* SR-NASDAQ-2011-092; SR-NASDAQ-2011-132; SR-NASDAQ-2012-078; SR-NASDAQ-2012-145; SR-NASDAQ-2013-053; SR-NASDAQ-2013-126 (six challenged rule changes that are all extensions of fee pilots for NASDAQ Last Sale market data products). Movants are in the best position to determine how to comply with the Remand Order in ways that are least burdensome from their perspective.

We need go no further in our analysis of whether a stay is appropriate. Under the four-factor test for determining whether a stay is appropriate discussed above, if with respect to the first two factors the movant can show neither a likelihood of success on the merits nor irreparable harm absent a stay, the “inquiry into the balance of harms [and the public interest] is unnecessary, and the stay should be denied without further analysis.”¹¹⁷ Accordingly, we deny NYSE’s request for a stay of the Remand Order pending judicial review.

Nonetheless, we recognize that after we issued the Remand Order NYSE and Nasdaq filed petitions for review of the SIFMA Decision in the D.C. Circuit. In the Remand Order, we instructed each exchange and plan to consider the impact of the SIFMA Decision on the remaining challenges brought by SIFMA and Bloomberg; develop or identify procedures for assessing the challenges as potential limitations of access to services; and “provide written notice to the Commission of the procedures that it has developed or identified that comply with [the Exchange Act and the rules and regulations thereunder] and that are tailored to the challenges brought” within six months of the date of the Remand Order, and “complete the process of applying the procedures to the challenged rule changes [and plan amendments] within one year.”¹¹⁸ We now toll those deadlines so that they do 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.

III. Conclusion

We issued an order on December 14, 2018 tolling the six-month and twelve-month periods provided in the Remand Order until resolution of the motions for reconsideration.¹¹⁹ Those deadlines will now run from the resolution of the appeal of the SIFMA Decision in the D.C. Circuit and the issuance of the court’s mandate. In all other ways, the motions for reconsideration of the Remand Order and a stay pending judicial review are DENIED.¹²⁰

By the Commission.

Vanessa A. Countryman
Acting Secretary

¹¹⁷ *In re Revel AC, Inc.*, 802 F.3d 558, 571 (3d Cir. 2015) (alterations in original). Although we need not consider the last two factors of the four-factor test, we believe that consideration of whether a stay will harm any other party or the public interest militates against a stay here.

¹¹⁸ Remand Order, 2018 WL 5023230, at *2.

¹¹⁹ 2018 WL 6589870.

¹²⁰ This order is issued in each of the cases identified in Exhibit A hereto, as well as the four cases that the Remand Order dismissed: *Sec. Indus. & Fin. Mkts. Ass’n*, File No. 3-17943 (Apr. 25, 2017); *Bloomberg, L.P.*, File No. 3-17951 (Apr. 27, 2017); *Sec. Indus. & Fin. Mkts. Ass’n*, File No. 3-18314 (Dec. 14, 2017); *Bloomberg, L.P.*, File No. 3-18316 (Dec. 14, 2017).

Exhibit A

Sec. Indus. & Fin. Mkts. Ass'n, File No. 3-15351 (May 31, 2013)¹²¹
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)

¹²¹ 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)