

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of:

The Application of SECURITIES INDUSTRY
AND FINANCIAL MARKETS ASSOCIATION

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



The Securities Industry Financial Markets Association (“SIFMA”) submits this application, pursuant to Sections 19(d) and 19(f) of the Securities Exchange Act of 1934 (the “Act”), for an order setting aside certain rule changes (the “Rule Changes”) unilaterally issued by the exchanges (the “Exchanges”) listed in Exhibit A attached hereto that limit the access of SIFMA’s members and their customers to market data made available by the Exchanges and are inconsistent with the Act.

1. SIFMA is a trade association that represents certain securities firms, banks, and asset managers. Market data is integral to the business of SIFMA’s members and their customers.

2. Beginning in August 2010, the Exchanges filed numerous Rule Changes that purported to allow the Exchanges to charge fees for the use of market-data products made available exclusively by each Exchange. The Rule Changes became effective upon filing with the SEC.

3. Despite SIFMA’s comment letters and petitions to suspend or abrogate the Rule Changes, the SEC did not act within the 60-day period provided in the Act.

4. SIFMA thereafter petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the SEC’s failure to suspend or abrogate the Rule Changes. Four petitions were submitted for decision (the “Argued Petitions”) and consideration of the remaining petitions was stayed pending such decision. On April 30, 2013, the Court dismissed the Argued Petitions for lack of jurisdiction while “tak[ing] the Commission at its word . . . that it will make the section 19(d) process available to parties seeking review of unreasonable fees charged for market data, thereby opening the gate to our review” and reaffirming that

NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir 2010), “remains a controlling statement of law as to what sections 6 and 11A of the Exchange Act require of SRO fees.”

5. The SEC should set aside the Rule Changes because each constitutes a limitation on access to the Exchanges’ services for purposes of Section 19(d) and (f). This is so because they limit access to critical market data for anyone unwilling or unable to pay the onerous, supracompetitive fees the Exchanges are charging. Furthermore, the SEC should set aside the Rule Changes under Sections 19(d) and (f) because SIFMA’s members and their customers must pay fees that are not consistent with the Act. The Rule Changes are not “fair and reasonable” and they do not “provide for the equitable allocation of reasonable . . . fees . . . among . . . persons using [the Exchange’s] facilities.” Nor do the Rule Changes “promote just and equitable principles of trade,” or “protect investors and the public interest.” In sum, the Rule Changes are unenforceable under section 19(b)(3)(C).

6. Under the SEC’s “market-based” approach, market forces cannot provide a basis for finding that an exchange’s non-core data fees are “fair and reasonable” unless the exchange is subject to significant competitive forces in setting the fees. The Exchanges have offered no evidence of such competitive forces. The Exchanges also have provided no evidence of the cost of collecting and distributing the data at issue, despite the D.C. Circuit’s finding that such costs are undeniably relevant evidence, and an Exchange’s concession that its costs are “small, or even zero.”

7. SIFMA is concurrently filing a challenge to the *Proposed Rule Change by NYSE Arca, Inc. Relating to Fees for NYSE Arca Depth-of-Book Data*, Release No. 34-63291, File No. SR-NYSEArca-2010-97 (the “NYSE Arca Petition”) and respectfully requests that this application be held in abeyance pending a decision on the NYSE Arca Petition.

Dated: May 30, 2013

Respectfully submitted,

SIDLEY AUSTIN LLP



Carter G. Phillips
Dennis C. Hensley
Kevin J. Campion
Eric D. McArthur
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for SIFMA

9530008

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

EXHIBIT A

Exchange	File Number	Release Number	Date Filed
NASDAQ OMX PHLX, Inc.	PHLX-2010-121	34-62887	8/31/2010
NASDAQ Stock Market LLC	NASDAQ-2010-110	34-62907	9/7/2010
NASDAQ OMX PHLX, Inc.	PHLX-2010-154	34-63351	11/8/2010
NASDAQ Stock Market LLC	NASDAQ-2011-092	34-64856	6/30/2011
NASDAQ Stock Market LLC	NASDAQ-2011-091	34-64944	7/25/2011
NASDAQ Stock Market LLC	NASDAQ-2011-132	34-65488	9/27/2011
NASDAQ Stock Market LLC	NASDAQ-2011-139	34-65525	9/29/2011
NASDAQ Stock Market LLC	NASDAQ-2011-129	34-65527	9/30/2011
NASDAQ Stock Market LLC	NASDAQ-2011-130	34-65526	9/30/2011
NYSE Arca, Inc.	NYSEArca-2011-78	34-65669	10/26/2011
BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, Nasdaq Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE Amex, Inc., and NYSE Arca, Inc.	S7-24-89	34-65866	11/11/2011
NASDAQ Stock Market LLC	NASDAQ-2011-153	34-65836	11/16/2011
NYSE Arca, Inc.	NYSEArca-2011-96	34-66128	12/28/2011
NASDAQ Stock Market LLC	NASDAQ-2012-005	34-66165	1/5/2012

Exchange	File Number	Release Number	Date Filed
NASDAQ Stock Market LLC	NASDAQ-2012-044	34-66724	3/26/2012
NASDAQ Stock Market LLC	NASDAQ-2012-042	34-66740	3/28/2012
NASDAQ Stock Market LLC	NASDAQ-2012-069	34-67253	6/12/2012
NASDAQ Stock Market LLC	NASDAQ-2012-078	34-67376	6/27/2012
NYSE MKT LLC	NYSEMKT-2012-19	34-67438	7/3/2012
NASDAQ OMX PHLX, Inc.	PHLX-2012-93	34-67466	7/6/2012
EDGX Exchange, Inc.	EDGX-2012-37	34-67766	8/21/2012
NASDAQ Stock Market LLC	NASDAQ-2012-133	34-68493	12/18/2012
NASDAQ Stock Market LLC	NASDAQ-2012-145	34-68568	12/20/2012

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2013, 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 via First Class Mail. Service was accomplished on the Exchanges via First Class Mail because of the large service list.

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
(via hand delivery)

Jeffrey Rosentrock
General Counsel
Direct Edge
545 Washington Boulevard
6th Floor
Jersey City, NJ 07310

Janet L. McGinness
Corporate Secretary
New York Stock Exchange LLC
NYSE Arca, Inc.
NYSE Amex, Inc.
11 Wall Street
New York, New York 10005

Richard S. Rudolph
Associate General Counsel
NASDAQ OMX PHLX
1900 Market Street
Philadelphia, PA 19103

Edward S. Knight
Executive Vice President and General
Counsel
NASDAQ Stock Market LLC
One Liberty Plaza
165 Broadway
New York, New York 10006

Joanne Moffic-Silver
General Counsel
Chicago Board Options Exchange, Inc.
400 South LaSalle Street
Chicago, IL 60605

Michael J. Simon
General Counsel
International Securities Exchange, LLC
60 Broad Street
New York, New York 10004

Eric Swanson
General Counsel and Secretary
BATS Exchange, Inc.
BATS Y Exchange, Inc.
8050 Marshall Drive
Lenexa, KS 66241

David Whitcomb
General Counsel
Chicago Stock Exchange, Inc.
440 South LaSalle Street
Chicago, IL 60605

Marcia E. Asquith
Corporate Secretary
Financial Industry Regulatory Authority, Inc.
1735 K Street
Washington, DC 20006

Joan C. Conley
Corporate Secretary
NASDAQ OMX BX, Inc.
100 Franklin Street #600
Boston, MA 02110

Philip M. Pinc
Vice President, Counsel and Secretary
National Stock Exchange, Inc.
440 South LaSalle Street, Suite 2600
Chicago, IL 60605

Dated: May 30, 2013



Eric D. McArthur