To: Professor Howell E. Jackson
From: Christian Fernandez-Andes
Re: Depth-of-Book Data Litigation – *Nasdaq v. SEC*, No. 18-1292 (D.C. Cir.)
Date: March 22, 2020

FACTUAL BACKGROUND

"As registered national securities exchanges, Nasdaq and NYSE Arca are self-regulatory organizations ("SROs") subject to comprehensive . . . oversight and regulation [by the Securities and Exchange Commission]."[1] This extensive oversight includes the regulation of the sale and dissemination of market data by the exchanges to traders and brokers. There are two types of market data for the purposes of SEC regulations relevant to this action. "Core" market data consists of information "that must be disseminated [by exchanges] via an exclusive plan processor[, and includes] last-sale information of exchange-listed securities and the best bid and best offer of each exchange, from which the [National Best Bid and Offer ("NBBO")] is determined."[2] Non-core depth-of-book data, however, "includes buy orders at prices equal to or lower than the best available bid and sell orders at prices equal to or higher than the best available offer[,]"[3] thus encompassing "buying and selling interest not included in the NBBO."[4] This dispute is centered on the pricing of depth-of-book data by the Nasdaq Stock Market, LLC ("Nasdaq") and NYSE Arca, Inc. ("Arca").

"Anyone wanting to obtain depth-of-book data can do so at the prices filed with the [Securities and Exchange Commission by the exchanges]."[5] Previously, "data fees required approval from the Commission to become effective."[6] With the passage of Dodd-Frank, however, "Congress amended the Exchange Act to authorize exchanges to establish new fees through rule changes that become immediately effective upon filing."[7]

"In September 2010, Nasdaq filed an immediately effective rule change [with the SEC, as per Dodd-Frank's requirements,] involving three of its depth-of-book products: TotalView, OpenView, and Level 2."[8] Before the rule change, "Nasdaq's customers paid distributor and direct access fees for TotalView and OpenView, but they did not pay those fees for Level 2."[9] Thus, the "rule change harmonized [the] fees by leaving in place the preexisting TotalView and OpenView fees and extending the same fees to Level 2."[10] Likewise, "on November 9, 2010, Arca filed with the Commission the ArcaBook Filing at issue in this proceeding, establishing a fee of $750/month to access" Arca's depth-of-book data.[11] Additionally, "the ArcaBook Filing also imposed monthly fees per display device ($30/month for professional subscribers and $10/month for nonprofessional subscribers)."[12]

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[1] Consolidated Respondent's Final Brief of the Securities and Exchange Commission, at 5.
[2] Opening Brief for Petitioner NYSE Arca, Inc., at 5.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 6
[6] Opening Brief for Petitioner the Nasdaq Market, LLC, at 10.
[7] *Id.* at 11(emphasis added). *See also* 15 U.S.C. § 78s(b)(3)(A).
[8] Opening Brief for Petitioner the Nasdaq Market, LLC, at 12.
[9] *Id.* at 13.
[10] *Id.*
[11] Opening Brief for Petitioner NYSE Arca, Inc., at 10.
[12] *Id.*

Under Section 19(b) of the Securities Exchange Act of 1934 ("the Exchange Act")—as revised by Dodd-Frank—"[w]hen an exchange files an immediately effective fee change, the Commission has sixty days to temporarily suspend the rule and institute proceedings to determine whether it should be approved or disapproved."[13] The fee rule, however, may nonetheless be upended outside of the 60 day window via notice and comment rulemaking, under Section 19(c) of the Exchange Act.[14] This is acutely relevant in this instance, as "[t]he Commission did not suspend the [data fees at issue] within the sixty-day review period."[15] Furthermore, a past dispute involving these very same fee filings established that "Dodd-Frank . . . precludes judicial review of the Commission's nonsuspension of an exchange's immediately effective fee filing."[16]

Thus, with no avenue for challenging the depth-of-book data fees under Section 19(b) of the Exchange Act (outside of petitioning the SEC to initiate the notice and comment process and then seeking judicial review of any potential agency inaction), the Securities Industry and Financial Markets Association ("SIFMA")—a trade organization whose members include "some of the country's largest financial institutions"[17]—filed an application before the Commission under Section 19(d) of the Exchange Act, "alleging that its members have been unlawfully denied access [or more accurately, had their access limited in respect to] to [Nasdaq's and Arca's] services because the fees for . . . [their] depth-of-book data product[s] are unreasonably high."[18]

Section 19(d) of the Exchange Act stipulates that when an SRO "prohibits or limits any person in respect to access to services" that it offers, it must notify the Commission.[19] "[A]ny person aggrieved" by an SRO's alleged prohibition or limitation of access may petition the Commission for review.[20] If the SEC finds that the "specific grounds on which such . . . limitation is based exist in fact, that such . . . limitation is in accordance with the rules of the self-regulatory organization, and that such rules are, and were applied in a manner, consistent with" the Exchange Act, the Commission shall dismiss the application.[21] If, on the other hand, the Commission does *not* make the aforementioned findings, or if it determines that the "limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes" of the Exchange Act, the Commission "by order, shall set aside" the limitation.[22] Such an order is subject to appellate review.[23]

In this dispute, SIFMA alleges that Nasdaq's and Arca's depth-of-book data fees are improper by invoking past D.C. Circuit precedent from a related action. In that prior dispute, ("*Net Coalition I*")[24] the Commission—as well as the D.C. Circuit—adopted a "market based approach" when evaluating whether depth-of-book data fees were inconsistent with or contrary to the purposes of the Exchange Act (this dispute was litigated in the pre-Dodd-Frank regulatory scheme, so the Commission needed to approve market data fees before they went into effect).[25] "Under that

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[13] Opening Brief for Petitioner the Nasdaq Market, LLC, at 11.
[14] 15 U.S.C. § 78s(c).
[15] Opening Brief for Petitioner the Nasdaq Market, LLC, at 12.
[16] *Id.* at 11. *See also NetCoalition v. SEC* ("*NetCoalition II*"), 715 F.3d 342, 348–53 (D.C. Cir. 2013).
[17] Opening Brief for Petitioner the Nasdaq Market, LLC, at 1.
[18] *Id.* at 2 (internal quotation marks omitted).
[19] Section 19(d)(1), 15 U.S.C. § 78s(d)(1)
[20] Section 19(d)(2), 15 U.S.C. § 78s(d)(2).
[21] Section 19(f), 15 U.S.C. § 78s(f).
[22] *Id*.
[23] Section 25(a)(1), 15 U.S.C. § 78y(a)(1).
[24] *See NetCoalition v. SEC* ("*NetCoalition I*"), 615 F.3d 525, 532, 534 (D.C. Cir. 2010).
[25] Opening Brief for Petitioner the Nasdaq Market, LLC, at 9.

approach, market forces—not government price regulation—dictate an exchange's pricing decisions, *as long as those decisions were subject to significant competitive forces*."[26]

In this instance, "[t]he Commission referred [the application] to [an Administrative Law Judge ('ALJ')] for her to hold a hearing addressing whether the fees set in the ArcaBook Filing satisfied the standard set forth in Section 19(f)[.]"[27] "[T]he ALJ held a five-day hearing to expand the record[,]"[28] after which she "concluded that the . . . fees at issue satisfied" the Exchange Act's requirements, and therefore the application should be dismissed.[29] " SIFMA appealed the ALJ Decision to the Commission,"[30] and the Commission overruled the ALJ's decision "in its entirety."[31] Specifically, the Commission held that: (1) depth-of-book data fees are reviewable under Section 19(d), (2) the exchanges bear the burden of proving that depth of book data fees are fair and reasonable in a Section 19(d) proceeding, and (3) Arca and Nasdaq did not meet the aforementioned burden in this dispute.[32] Arca and Nasdaq sought an appeal of the Commission's decision, and now this case is before the D.C. Circuit.

ARGUMENTS

I. WHETHER SIFMA HAS STANDING

Arca argues that a "person aggrieved" under the Exchange Act is an entity affected by agency action and not a trade association such as SIFMA.[33] Arca adds that the SEC improperly adopted the Article III test for associational standing, when instead it should have focused on the statute's standing requirements, which do not "expand standing beyond the directly-affected entities to which the statute applies."[34] Arca goes on to contend that the Commission's view of standing "is inconsistent with the core requirement of representative litigation that the representative must be a member of the group it purports to represent and have suffered the same alleged injury."[35] Consequently, Arca implores the court that "[a]ssociational standing makes no sense in the context of a statute expressly designed to address individual injuries."[36] Nasdaq does not attempt to attack SIFMA's standing, however.

SIFMA begins its counterargument by noting that in "*NetCoalition I* . . . [the D.C. Circuit] interpreted identical language in Section 25(a) to permit SIFMA to sue on its members' behalf."[37] SIFMA then proceeds to argue that the Commission properly adopted the Article III test for standing from *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977), since Arca itself admitted before the Commission that if the statute allowed for associational standing, SIFMA would nonetheless have to satisfy *Hunt*.[38] SIFMA additionally argues that the

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[26] *Id.* at 1.
[27] Opening Brief for Petitioner NYSE Arca, Inc., at 12.
[28] *Id.*
[29] *Id.* at 20.
[30] *Id.*
[31] *Id.* at 22.
[32] SEC Decision, at 19–51.
[33] Opening Brief for Petitioner NYSE Arca, Inc., at 32.
[34] *Id.* at 33.
[35] *Id.* at 33–34. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011).
[36] *Id.* at 34.
[37] Initial Brief of Intervenor Securities Industry and Financial Markets Association, at 25.
[38] *Id.* at 26.

Commission's adopted standard for standing deserves *Chevron* deference.[39] The Commission makes similar arguments, focusing on how the D.C. Circuit construed the identical language in Section 25(a) to confer associational standing.[40]

II. WHETHER SECTION 19(D) OF THE EXCHANGE ACT APPLIES TO DEPTH-OF-BOOK DATA FEES

Nasdaq and Arca both contend that Section 19(d) of the Exchange Act "cannot be used to attack generally-applicable market data fees as [limitations] or denials-of-access."[41] Specifically, they argue that "Section 19(d) only permits review of action taken by an SRO that imposed a final disciplinary sanction, denied membership or participation to an applicant, prohibited or limited a person's access to services, or barred a person from becoming associated with a member[;]"[42] in their view, 19(d) only covers only what they refer to as "quasi-adjudicatory" actions—aimed at a *specific* person or entity—by the exchanges.[43]

Nasdaq first matter-of-factly reminds the court that Section 19(d) includes imposition of final disciplinary sanctions, denial of membership or participation to any application, or the barring of any person from becoming associated with a member[44] as *other* steps (in addition to denial or limitation of access) taken by SROs that may be subject to Commission review under Section 19(d).[45] These enumerated actions, Nasdaq contends, clarify that Congress was referring to quasi-adjudicatory actions when speaking of denials or limitations of access.[46] Nasdaq further supports this proposition by noting that "all four phrases in Section 19(d) appear under the heading notice of disciplinary action taken by [an] SRO."[47] Furthermore, Nasdaq argues that generally applicable market data fees cannot mean a denial or limitation of access as those words are commonly understood; charging for a service neither proscribes nor curtails a person's access to that service.[48] Lastly, both Petitioners note that SIFMA never provided even one example of a member that had its access to the exchanges' services limited or denied as a result of the fees.[49]

The Commission, on the other hand, contends that "[i]n common parlance, placing conditions—such as costs, fees, or prices—upon a person's access to something is said to limit that access."[50] Indeed, according to the Commission, "[c]harging fees 'curtail[s] or reduce[s] in quantity or extent' access to the fee-based services."[51] Likewise, SIFMA asserts that "[p]rovision of market data is a service offered by exchanges, and each challenged rule change limits access to

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[39] *Id.* at 25.
[40] Consolidated Respondent's Initial Brief of the Securities and Exchange Commission, at 30.
[41] Opening Brief for Petitioner NYSE Arca, Inc., at 24.
[42] *Id.*
[43] *Id.*
[44] U.S.C. § 78s(d).
[45] Opening Brief for Petitioner the Nasdaq Market, LLC, at 32.
[46] *Id. See also United States v. Williams*, 553 U.S. 285, 294 (2008) (statutory terms are "given more precise content by the neighboring words").
[47] *Id.*
[48] *Id.* at 33.
[49] *Id. See also* Opening Brief for Petitioner NYSE Arca, Inc., at 30.
[50] Consolidated Respondent's Initial Brief of the Securities and Exchange Commission, at 29. *See also Belitskus v. Pizzingrilli*, 343 F.3d 632, 642 (3d Cir. 2003) ("[M]andatory filing fees are widely used as a means of … limiting ballot access."); *Jelinek v. Astrue*, 662 F.3d 805, 814 (7th Cir. 2011) (discussing how the "cost" of medications "could have limited [the appellant's] access" to them).
[51] Consolidated Respondent's Initial Brief of the Securities and Exchange Commission, at 30 (quoting *Webster's New Collegiate Dictionary* 667 (1977)).

that service by conditioning access on payment of a fee."[52] Moreover, the Commission adds that "[t]he Exchanges mistakenly suggest that they do not 'limit' depth-of-book data access because they do not prohibit anyone willing to pay their fees from receiving such access or because the fees are not prohibitively high."[53] According to the Commission, however, "[t]hat interpretation is incorrect, as it treats 'limits' as coextensive with 'prohibits' and thereby renders 'limits' superfluous."[54] SIFMA adds to the textual argument by contending that the Commission deserves *Chevron* deference.[55] Nasdaq responds that "[w]hen it comes to statutes administered by several different agencies . . . courts do not defer to any one agency's particular interpretation."[56] Because other regulatory agencies administer Section 19(d) and 19(f) of the Exchange Act—according to Nasdaq, which claims that in some instances the FDIC, OCC, or Federal Reserve may administer the relevant portions of the statute—the Commission's interpretation is not afforded *Chevron* deference.[57]

Furthermore, Nasdaq contends that the structure of the Exchange Act supports its reading of the text. Specifically, the exchange argues that "[i]f Congress had intended to give private parties the right to compel Commission review of every immediately effective SRO fee filing, it would have included that procedure in Section 19(b)—the provision that expressly addresses immediately effective fee filings—but it elected not to do so."[58] Nasdaq further notes that the "omission reflects Congress's objective in Dodd-Frank to streamline the procedures governing the introduction of new market-data products."[59] Moreover, Nasdaq contends that because Section 19(d) requires SROs to (1) promptly file notice with the Commission when it prohibits or limits access of a member as well as (2) to notify the person of the specific grounds of the prohibition/limitation and provide an opportunity to be heard, it follows that 19(d) is referring to quasi-adjudicatory disciplinary-type actions (and therefore exclude generally applicable fees).[60] Nasdaq also asserts that the mention of a record as well as the remedy for successfully challenging an SRO action (setting aside the rule) further show that the 19(d) is inapplicable in this instance; there is no record created when a generally applicable fee is adopted, nor is setting aside a fee rule a proper remedy under SIFMA's definition of a prohibition or limitation of access.[61]

Conversely, the Commission argues that because Congress used more specific language when enumerating the other SRO actions subject to review, it must have intended a more broad reading of the term "limits."[62] Moreover, it backs up this assertion by arguing that the *noscitur a sociis* canon cannot override the plain meaning of the text.[63] The Commission also asserts that "Congress did not enact . . . the relevant provisions' headings . . . so they lack interpretive

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[52] Final Brief of Intervenor Securities Industry and Financial Markets Association, at 17 (internal quotation marks omitted).
[53] Consolidated Respondent's Initial Brief of the Securities and Exchange Commission, at 30.
[54] *Id.* at 30–31.
[55] Initial Brief of Intervenor Securities Industry and Financial Markets Association, at 16.
[56] *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*, 194 F.3d 72, 79 n.7 (D.C. Cir. 1999). *See* Reply Brief for the Petitioner the Nasdaq Market, LLC, at 4.
[57] *Id.*
[58] Opening Brief for Petitioner the Nasdaq Market, LLC, at 27.
[59] *Id.*
[60] *Id.* at 29.
[61] *Id.* at 30–31.
[62] Consolidated Respondent's Final Brief of the Securities and Exchange Commission, at 31.
[63] *Id.*

weight."[64] Additionally, the Commission explains that Sections 19(b) and 19(c) speak to *rulemaking*, while 19(d) deals more so with *enforcement* of those rules, which the SEC contends is the real issue at hand in this dispute.[65] Likewise, SIFMA opines that "immediate effectiveness does not eliminate enforcement-stage review."[66] SIFMA goes on to assert that "Section 19(b)(3)(C) expressly provides that an immediately effective rule 'may be enforced by an SRO to the extent it is not inconsistent with' applicable law."[67] SIFMA argues that "[t]his makes clear that SROs cannot enforce fee rules against their members if those rules are 'inconsistent' with the requirements of the Exchange Act."[68] Lastly, SIFMA notes that the text of the statute never mentions "quasi-adjudicatory" action or any sort of express language that would signal that the relevant portion of the statute only applies to such actions.[69]

Additionally, the Commission argues that the exchange's purposive argument—that Congress's intent to streamline regulatory procedures by passing Dodd-Frank militates against applying Section 19(d) to generally applicable fee rules—is incorrect as Congress's streamline intentions were limited to "procedures that would apply at the rule filing, not the enforcement stage."[70] SIFMA adds that Section 11A of the Exchange Act[71] reinforces this reading, as it is a textual analog to Section 19(d) (applicable instead to securities information processors) that allows for review of generally applicable fees.[72] SIFMA also argues that the presumption of reviewability of agency action dictates that 19(d) governs generally applicable market data fees; SIFMA contends that "if review were unavailable under Section 19(d), the Commission could insulate market-data fees from any judicial review simply through inaction, and aggrieved persons would have no remedy, even though the Exchange Act expressly regulates market data fees."[73]

III. WHETHER THE EXCHANGES BEAR THE BURDEN OF PROOF

Arca also argues that even if Section 19(d) could be used to challenge generally applicable market data fees, the burden of proof would be on SIFMA.[74] Arca claims that "[t]he language of Section 19(d) makes clear that a petitioner must establish a denial-of-access before the Section 19(f) process applies."[75] Nasdaq adds that "because the statute does not specify who bears the burden of proof, the default rule under the Administrative Procedure Act applies[,]"[76] and SIFMA therefore bears the burden as the proponent of the order setting aside the SRO action.[77] Additionally, Nasdaq and Arca contend that is the proper reading because Dodd-Frank's structure

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[64] *Id.* at 32. *See Revock v. Cowpet Bay W. Condominium Ass'n*, 853 F.3d 96, 105 n.11 (3d Cir. 2017) ("the authoritative text" of a statute is the enacted text, not a U.S. Code title that "has not been enacted into positive law").
[65] Consolidated Respondent's Final Brief of the Securities and Exchange Commission, at 33.
[66] Initial Brief of Intervenor Securities Industry and Financial Markets Association, at 18.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 21.
[70] Consolidated Respondent's Final Brief of the Securities and Exchange Commission, at 35.
[71] 15 U.S.C. § 78k-1.
[72] Initial Brief of Intervenor Securities Industry and Financial Markets Association, at 18–19.
[73] *Id.* at 20.
[74] *See also* Reply Brief for Petitioner NYSE Arca, Inc., at 15.
[75] *Id.*
[76] Reply Brief for the Petitioner the Nasdaq Market, LLC, at 17.
[77] *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005) ("Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.").

treats generally applicable fees as presumptively legitimate given their immediately effective nature.[78] Lastly, NYSE asserts that the Commission incorrectly relied on 17 CFR § 201.700(b), which only places the burden on SROs in *Section 19(b)* proceedings.[79]

SIFMA, on the other hand, argues that "[u]nder Section 19(f), the Commission can uphold a fee rule only if it affirmatively finds that, inter alia, the 'specific grounds' justifying the rule 'exist in fact' and the rule is 'consistent with the purposes' of the Exchange Act[,]" and that this language clearly implies that the exchanges must prove such a showing.[80] SIFMA claims that this interpretation also deserves *Chevron* deference.[81] The Commission takes a similar interpretation and argues that "the Exchange Act obligates the SRO to demonstrate that its proposed fee is consistent with the Exchange Act[.]"[82] The Commission adds that "[g]iven Congress's express limit to the SRO's enforcement authority, it follows that the burden remains on the SRO to establish the rule's consistency with the Exchange Act in enforcement proceedings."[83]

IV. WHETHER THE EXCHANGES SATISFIED THE REQUIREMENTS OF THE EXCHANGE ACT

The exchanges argue that even if the burden of proof rested on them, they made the proper showing for their fee rules to be upheld. As mentioned earlier, the threshold test for whether data fees are consistent with the Exchange Act—adopted in *Net Coalition I*—is whether the SROs were subject to competitive market forces when implementing a new fee rule.[84] Nasdaq first argues that alternative depth-of-book data products act as a competitive constraint on the exchanges.[85] Specifically, Nasdaq asserts that the vast majority of users do not require all depth-of-book data available, and since the majority of securities are not traded on any one particular exchange, most customers can substitute depth-of-book data products.[86] Indeed, only about a hundred or so firms purchase all the depth-of-book products; and these firms represent a small proportion of the depth-of-book data market as well as a large portion of the order flow market.[87] Additionally, Nasdaq presented evidence that it added and lost a significant amount of customers between 2008 and 2014 (ranging between 23% to 41% of total customers per year).[88]

Nasdaq also asserts that shifts, as well as threatened shifts, in order flow serve as a competitive constraint.[89] It is undisputed that the exchanges compete with each other for order flow, however, the exchanges assert that this competition spills over into the market for depth-of-book data.[90] This is so because order flow is the "life blood" of the exchanges, and Nasdaq

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[78] Opening Brief for Petitioner the Nasdaq Market, LLC, at 35–36.
[79] Opening Brief for Petitioner NYSE Arca, Inc., at 29.
[80] Initial Brief of Intervenor Securities Industry and Financial Markets Association, at 26–27.
[81] *Id.*
[82] Consolidated Respondent's Initial Brief of the Securities and Exchange Commission, at 26.
[83] *Id.* at 44.
[84] Opening Brief for Petitioner the Nasdaq Market, LLC, at 1.
[85] *Id.* at 40.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 41.
[89] *Id.* at 45.
[90] *Id.* at 45–46.

contends that trading firms and financial institutions use this reality to their advantage.[91] Arca goes a step further than Nasdaq, asserting that the market for depth-of-book data is competitive as a matter of law under the "platform" theory of competition.[92] Specifically, Arca claims that because the D.C. Circuit is bound by *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2285 (2018), the depth-of-book data fees must be examined on a platform-by-platform basis (with the data fees and order flow comprising both sides of the "platform"). When viewing the exchange's products/services in this light, Arca contends, they must he held to be competitive as a matter of law since competition for order flow is fierce and "competition that constrains pricing of one side of the platform also constrains pricing on the other side."[93] Additionally, Arca asserts that the Commission erred in disregarding two separate findings by the Department of Justice that the exchanges face competition in the market for depth-of-book data.[94] Lastly, Arca asserted that the Commission erred in not considering evidence presented by Arca that demonstrated the value that SIFMA members receive from depth-of-book data.[95] According to Arca, this disregard for the fact that SIFMA members often resell the exchanges' depth-of-book data for a profit, either directly or indirectly, amounted to arbitrary and capricious behavior by the SEC.[96]

SIFMA retorts by first asserting that under the Administrative Procedure Act's "arbitrary and capricious" standard of review, the court must defer to the Commission's economic analysis if it is reasonable.[97] SIFMA proceeds to argue that the exchanges failed to prove that customer switching was actually in *response* to price increases.[98] Additionally, according to SIFMA, many traders and firms need depth-of-book data from *all* the exchanges.[99] SIFMA also asks why prices have not converged among the various depth-of-book products if competition was truly fierce,[100] and notes that the DOJ findings were irrelevant as they were adjudicated and ultimately utilized in a different context anyhow.[101] Lastly, SIFMA contends that their members cannot sustainably divert orders from specific exchanges to exert pressure on them because of "best-execution price" regulatory obligations imposed on them (thereby invalidating the platform theory as applied to this case),[102] and even goes on to assert that competition for order flow would actually *increase* the price of depth-of-book data (though this argument seems like a stretch).[103]

Likewise, the SEC argues that the Exchanges did not prove that SIFMA members could actually reroute their order flow to exert pressure on the Exchanges to lower depth-of-book data,[104] as well as that the Exchanges failed to establish that the different depth-of-book products are actually capable of being substituted for one another.[105] The Commission also argues that the Exchanges failed to show that any customer switching among depth-of-book products was in

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[91] *Id.*
[92] Opening Brief for Petitioner NYSE Arca, Inc., at 35.
[93] *Id.* at 37.
[94] *Id.* at 42.
[95] *Id.* at 56.
[96] *Id.*
[97] Initial Brief of Intervenor Securities Industry and Financial Markets Association, at 29.
[98] *Id.* at 31–32.
[99] *Id.* at 40–41.
[100] *Id.* at 41.
[101] *Id.* at 41–42.
[102] *Id.* at 42
[103] *Id.* at 45–47.
[104] Consolidated Respondent's Initial Brief of the Securities and Exchange Commission, at 46.
[105] *Id.* at 52.

response to price increases of depth-of-book data,[106] and that the DOJ findings were irrelevant to this dispute given the dissimilar contexts and purposes.[107] Lastly, the Commission argues that it does not owe any special deference to the ALJ's findings,[108] and that whether SIFMA members profited from direct or indirect resale of depth-of-book data is irrelevant to the question at hand.[109]

Investor's Exchanges ("IEX"), as amicus curiae for SIFMA, adds that technical and regulatory changes have made fast and detailed information practically essential to brokers and traders, thus increasing the power that the exchanges have in the market.[110] IEX goes on to note that the fact that other Exchanges have raised the price of depth-of-book data—when at the same time other exchanges provide it for free—proves that the market for depth-of-book data is not constrained by either substitutes or the desire to attract and maintain order flow.[111] Lastly, IEX propounds a cost study that supposedly shows that the Exchanges sell their depth-of-book data for far more than the marginal cost of providing said product (which IEX claims is a sign of an anticompetitive market).[112] Likewise, Bloomberg LP and Wolverine Execution Services, as amici curiae, are in accord that depth-of-book data is all but essential for many firms in today's marketplace.[113] They add that the anticompetitive pricing of said data accordingly limits access to the U.S. capital markets,[114] and that the Exchanges' attempts to justify price increases based upon the "value" derived from their products lacks statutory basis and is an improper understanding of basic economics.[115]

V. ORAL ARGUMENT

On February 18, 2020, a panel comprised of Judge Sentelle, Judge Millett, and Judge Wilkins heard oral arguments. Almost immediately, Judge Millet asked Nasdaq's counsel if *NetCoalition II* solved the issue, since the *NetCoalition II* court mentioned a presumption of judicial review of data fees when arriving to their conclusion.[116] A brief discussion about whether such language was holding or dicta ensued, however, Nasdaq's counsel asserted that judicial review was nonetheless available under Nasdaq's reading of the text.[117] Specifically, he argued that data fees are subject to review via the Commission's opportunity to challenge them within 60 days as well as the opportunity for notice and comment rulemaking afterwards.[118] Upon being prompted by Judge Wilkins, Nasdaq's counsel noted that private parties can petition the SEC to

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[106] *Id.* at 57.
[107] *Id.* at 64.
[108] *Id.* at 65.
[109] *Id.* at 69.
[110] Initial Brief for Investor's Exchange as Amicus Curiae for Respondent the Securities and Exchange Commission, at 8–9.
[111] *Id.* at 13.
[112] *Id.* at 18–23.
[113] Brief for Amici Curiae Bloomberg L.P. and Wolverine Execution Services, LLC, at 6–9.
[114] *Id.* at 11.
[115] *Id.* at 20–21.
[116] Oral Argument.
[117] *Id.*
[118] *Id.*

commence notice and comment rulemaking, and that SEC inaction with respect to rulemaking was subject to judicial review (albeit under a highly deferential standard).[119]

Judge Millett then pressed Nasdaq's counsel as to whether Section 19(d) was really restricted to quasi-adjudicatory SRO decisions.[120] In particular, Judge Millet was interested in whether a clearly discriminatory and economically substantial fee rule could constitute a denial or limitation of access.[121] After much circular discussion, Nasdaq's counsel asserted that the line which Judge Millett was asking about did not need to be drawn today and that her question could be answered in a later dispute since SIFMA did not assert that the generally applicable data fees in this instance were discriminatory or high enough such that their members could not afford access.[122]

The discussion then shifted to who bore the burden of proof. Nasdaq took the position that in a normal (and proper) quasi-adjudicatory action's life cycle, SROs would have the burden of proof in the SRO proceeding, before the SEC, and on appeal; however, according to Nasdaq, since this was not a proper 19(d) action, it is the moving party—which is SIFMA in this case—that bears the burden as per Supreme Court precedent.[123] Judge Millett then proceeded to inquire about the "arbitrary and capricious" arguments, which Arca's counsel addressed. In particular, Judge Millett asked whether Nasdaq and Arca would need to prove that the 100 largest trading firms—which claim to require all depth-of-book data products to operate—could actual substitute the various products without hampering their business model, in order to win the substitutability argument.[124] Arca's counsel replied that they do not need to make such a showing to win the substitutability argument because those firms have made purposeful business model choices; they are not *required*, simply by participating in the industry, to purchase all depth-of-book products.[125] Judge Millett then asked what would happen if the exchanges win on one of the two "arbitrary and capricious" arguments (order flow competition and substitutability) and lost on the other; Arca's counsel replied that such an outcome was not logically possible, but would nonetheless lead to a favorable outcome to the Exchanges.[126]

The SEC's counsel then took the podium and began by noting how Congress had used similar language as Section 19(d) in a different portion of the Exchange Act and it was interpreted in the manner that the Commission was proposing.[127] The Court did not seem to take much interest in this argument, however. The Commission then proceeded to argue that in *National Association of Securities Dealers, Inc. v. S.E.C.*, 801 F.2d 1415 (D.C. Cir. 1986), the D.C. Circuit held that fees could be limitations of access.[128] The panel was quick to point out that in that case the fee was targeted at a specific individual and not a generally applicable fee, and therefore, the case cited did not stand for the proposition that all fees were limitations of access.[129] Additionally, the panel

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[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*

pointed out that in the cited case, the vendor targeted by the SRO's fee could not pay the sum, so their access to the SRO's services was quite literally limited as a result of the fee.[130]

Afterwards, a discussion ensued over whether there is any difference between the effectiveness and enforcement stages of an SRO's fee rule; a critical point that the SEC makes in its brief, as they assert that Section 19(d) speaks to enforcement-stage review.[131] Judge Millet strongly implied that she did not see a true distinction between when a fee becomes effective and when it is enforced.[132]

When SIFMA's counsel took the podium, the extent of the NASD case's holding was again discussed as well as the competition issue (the counter to the exchanges' "arbitrary and capricious" arguments).[133] SIFMA's arguments were no different than those in the briefs. The dialogue then shifted to what relief was proper should SIFMA win.[134] SIFMA asserted that setting the fee aside was the minimum, and upon being asked by the panel, argued that a refund or remittance of fees previously paid would also be proper since Section 19(f) speaks to remittance of a sanction.

VI. SUBSEQUENT REGULATORY ACTION

On February 14, 2020, the Commission—by a 5-0 vote—proposed new regulations on market data.[135] The proposed rule is intended to provide "changes to the way equity market data is collected and distributed to provide faster and more comprehensive information for investors who do not have access to expensive proprietary data streams."[136] Under the current system—as mentioned earlier in this memo—exchanges are required to provide bid and offer prices, as well as other core market data, exclusively to designated Securities Information Processors ("SIPs"), which consolidate the information and broadcast it to the public.[137] The new rule, however, will require exchanges to provide market data to "competing consolidators, and brokers or dealers that could consolidate the information for their own use, rather than getting it from one of the [previously designated SIPs]."[138] The "exclusive SIP model would give way to a 'competing consolidator' model where multiple firms could register with the Commission to consolidate and

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[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] Kadhim Shubber, *US market data shake-up aims to narrow high-frequency advantage*, FINANCIAL TIMES (Feb. 14, 2020), https://www.ft.com/content/3b0ff0ce-4f83-11ea-95a0-43d18ec715f5.
[136] *Id.*
[137] Paul Kiernan, *SEC Seeks to Improve Speed, Quality of Stock Data Available to Public*, THE WALL STREET JOURNAL (Feb. 14, 2020), https://www.wsj.com/articles/sec-seeks-to-improve-speed-quality-of-stock-data-available-to-public-11581726814?emailToken=c77898aec1a6aace8a732b37f2cb3911vNf121oDzgTpp3GThZf7imH3fkxHy6OnicwdDeTy1BfP3DKtTRHZ8eTOxu5Lc6yT69ws15vL+kex760OEc5D2cQ8Y848wc9X9ciNyAqLJ8e2bXqk21ipY84ovCU72XHUKGpXC2rY6aKAot2wsSQa4w%3D%3D&reflink=article_email_share.
[138] *Id.*

distribute core data."[139] SEC Commissioner Allison H. Lee lauded the rule, stating that it "seeks to reduce latency by requiring both core data and proprietary data to leave the starting gate at the same time and on the same track[.]"[140] Specifically, the regulation "would require core data and proprietary data sold by an exchange to be transmitted from that exchange using the same format, hardware, and method of transmission."[141] Additionally, "the proposed rule would add depth-of-book, odd-lot, and auction information to what would be defined as 'core data' required to be provided in" public feeds.[142] The rule is currently in the 60-day public comment period.

[139] SECURITIES AND EXCHANGE COMMISSION, COMMISSIONER ALLISON HERREN LEE'S STATEMENT ON PROPOSED RULE ON MARKET DATA INFRASTRUCTURE (Fed. 14, 2020), https://www.sec.gov/news/public-statement/statement-lee-infrastructure-2020-02-14.
[140] *Id.*
[141] SECURITIES AND EXCHANGE COMMISSION, *supra* note 119.
[142] *Id. See also* Kiernan, *supra* note 117.