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 Actions Taken by Self-Regulatory Organizations	Admin. Proc. File No. 3-15350 The Honorable Brenda Murray, Chief Administrative Law Judge

RENEWED MOTION FOR ORAL ARGUMENT OF THE NASDAQ STOCK MARKET LLC AND NYSE ARCA, INC.

The Nasdaq Stock Market LLC and NYSE Arca, Inc. ("the Exchanges") respectfully renew their Motion for Oral Argument, which was filed on November 8, 2016, and which remains pending before the Commission. The Exchanges renew their request in light of last week's article in *The Wall Street Journal* reporting that the Commission is "poised to weigh in with" a decision in this matter and "plans to announce its decision in October, according to two people familiar with the matter." Dave Michaels & Alexander Osipovich, *Brokers Score Wins On Cost of Data Feed*, Wall Street J., Sept. 28, 2018, at B1, B10. It would be inconsistent with the Commission's Rules of Practice to issue a ruling in this matter without granting the Exchanges' motion for oral argument.

Rule 451 of the Commission's Rules of Practice provides that the Commission "shall" grant motions for oral argument "with respect to whether to affirm all or part of an initial decision by a hearing officer ... unless exceptional circumstances make oral argument impractical or inadvisable." 17 C.F.R. § 201.451(a). In accordance with that Rule, the Commission consistently grants motions for oral argument where it is reviewing a decision rendered by an administrative law judge. *See, e.g.*, In the Matter of James E. Cohen, No. 3-15974 (June 20,

2018); In the Matter of Paul Edward "Ed" Lloyd, No. 3-16182 (June 30, 2017); In the Matter of Harding Advisory LLC and Wing F. Chau, No. 3-15574 (May 26, 2016); In the Matter of J.S. Oliver Capital Mgmt., L.P., No. 3-15446 (Jan. 27, 2016); In the Matter of Edgar R. Page and PageOne Fin. Inc., No. 3-16037 (Feb. 5, 2016).

There are no exceptional circumstances that would justify denying the Exchanges' request for oral argument. Indeed, there are compelling considerations weighing in favor of oral argument in this proceeding, including the fact that there have been recent public discussions of market-data issues that may warrant a response during oral argument. Oral argument is also warranted to address relevant legal developments since the close of briefing in this case, including the Supreme Court's recent decision in *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2285 (2018), which confirmed that "courts should 'combin[e]' different products or services into 'a single market' when 'that combination reflects commercial realities'" and provides further support for the Exchanges' joint-platform arguments and Chief ALJ Murray's Initial Decision.

The Securities Industry and Financial Markets Association ("SIFMA") itself has joined in the Exchanges' request for oral argument on multiple occasions. *See* Joint Submission by Securities Industry and Financial Markets Association, NYSE Arca, Inc., and The Nasdaq Stock Market LLC Regarding "Supplemental Briefing Order" (Mar. 8, 2018); Securities Industry and Financial Markets Association's Submission in Response to Commission Briefing Order (Aug. 3, 2018). There is no reasonable basis for the Commission to deny the parties' joint request for oral argument in this proceeding of far-reaching significance.

The Wall Street Journal article also highlights a second potential area of concerns with the Commission's procedures. The article states that "[i]ndustry executives credit ... a new

director of trading and markets, Brett Redfearn, for the stepped-up scrutiny of exchanges' fees." Michaels & Osipovich, *supra*, at B10. The article goes on to note that "Mr. Redfearn corresponded with Sifma in its legal challenge to the NYSE and Nasdaq fee increases, according to court records." *Id.* That was an understatement. The privilege log filed by SIFMA in this proceeding demonstrates that, before joining the Division of Trading and Markets, Mr. Redfearn, in his capacity as a SIFMA member representative, was deeply involved in formulating SIFMA's legal strategy in this proceeding: His name is listed 16 times in the privilege log, including 10 times in entries for communications with SIFMA's counsel containing "discussion of litigation strategy." *See* https://www.sec.gov/litigation/ apdocuments/3-15350-event-90.pdf. Mr. Redfearn's substantial personal participation in this proceeding on behalf of SIFMA mandates his recusal from any involvement in the Commission's consideration of this matter. *See Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (recusal is required where "a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it") (internal quotation marks omitted). The Commission's decision in this matter should confirm that Mr. Redfearn was recused from this proceeding.

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2018, I caused a copy of the foregoing document to be served on the parties listed below via First Class Mail, except as otherwise provided.

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Dated: October 3, 2018