Nos. 10-1421, 10-1422, 11-1001 & 11-1065

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NETCOALITION; SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petitions for Review of Orders of the Securities and Exchange Commission

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FINAL BRIEF OF PETITIONERS NETCOALITION AND SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties. The parties to these consolidated cases are Petitioners NetCoalition and Securities Industry and Financial Markets Association ("SIFMA"); Respondent Securities and Exchange Commission ("SEC" or "Commission"); and Intervenors NYSE Arca, Inc., and The Nasdaq Stock Market, LLC and Nasdaq OMX PHLX LLC ("Intervenors" or "Exchanges").

Ruling under Review. Petitioners seek review of the Commission's refusal to suspend certain rule changes filed by the Exchanges imposing fees for market data. The four rule change filings, and their associated case numbers, are:

- *Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Market Data Feeds*, Release No. 34-62887, File No. SR-Phlx-2010-121, 75 Fed. Reg. 57092 (Sept. 17, 2010) (No. 10-1421);
- *Proposed Rule Change to Modify Rule 7019*, Release No. 34-62907, File No. SR-NASDAQ-2010-110, 75 Fed. Reg. 57314 (Sept. 20, 2010) (No. 10-1422);
- *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, 75 Fed. Reg. 70311 (Nov. 17, 2010) (No. 11-1001); and

- *Proposed Rule Change Relating to Fees for the PHOTO Historical Data Projects*, Release No. 34-63351, File No. SR-Phlx-2010-154, 75 Fed. Reg. 73140 (Nov. 29, 2010) (No. 11-1065).

As to each of these rule filings, the Commission refused to suspend their effectiveness within the 60-day period from the date of filing as provided for such action in Section 19(b)(3)(C) of the Exchange Act, 15 U.S.C. § 78s(b)(3)(C).

Related Cases. These consolidated cases arise out of the same dispute and involve substantially the same issues as *NetCoalition v. SEC*, Nos. 09-1042 & 09-1045, 615 F.3d 525 (D.C. Cir. 2010).

CORPORATE DISCLOSURE STATEMENT

NetCoalition is the public policy voice for some of the world's most innovative companies on the Internet. NetCoalition represents the interests of approximately 20 Internet companies or associations. Its members include Google, Bloomberg L.P., IAC/Interactive Corp, eBay, and Yahoo!. NetCoalition has no parent corporation, and no publicly held corporation has a 10% or greater ownership interest in NetCoalition.

SIFMA is a trade association that brings together the shared interests of more than 600 securities firms, banks, and asset managers. Formed as a result of the November 1, 2006 merger between the Securities Industry Association and The Bond Market Association, SIFMA's mission is to promote policies and practices to expand and perfect markets, foster the development of new products and services, and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington, DC, and London, and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. SIFMA has no parent corporation, and no publicly held corporation has a 10% or greater ownership interest in SIFMA.

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GLOSSARY

APA	Administrative Procedure Act
FCC	Federal Communications Commission
ICC	Interstate Commerce Commission
ISO	Intermarket Sweep Order
NBBO	National Best Bid and Offer
NYSE	New York Stock Exchange
SEC	Securities and Exchange Commission
SIFMA	Securities Industry and Financial Markets Association
SRO	Self-Regulatory Organization

JURISDICTIONAL STATEMENT

This Court has jurisdiction under Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78y(a), providing for direct review in this Court of final orders of the Commission. The SEC had jurisdiction under Section 19(b)(3)(C) of the Exchange Act, 15 U.S.C. § 78s(b)(3)(C). Petitioners timely petitioned for review on December 28, 2010 (Nos. 10-1421, 10-1422), January 3, 2010 (No. 11-1001), and March 7, 2010 (No. 11-1065).

QUESTIONS PRESENTED

In *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010), this Court held that the SEC had failed to support its theory that competition constrains the price of market-data fees charged by securities exchanges, so as to ensure that such fees are "fair and reasonable" under the Exchange Act. After the Court's decision in *NetCoalition*, the Exchanges filed a series of rule changes imposing new market-data fees based on substantially the same arguments and evidence as to supposed competition that this Court flatly rejected as inadequate in *NetCoalition*.

Citing the absence of cost data or any other basis to find that the fees are "fair and reasonable" as required by the Exchange Act, Petitioners asked the Commission to suspend the fees and initiate disapproval proceedings under Section 19(b)(3)(C) of the Exchange Act, which authorizes the Commission to suspend a rule change when "such action is necessary or appropriate in the public interest, for

the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act]." 15 U.S.C. § 78s(b)(3)(C). The Commission refused to do so within the 60-day statutory period to suspend.

The questions presented are:

1. Whether the Commission's refusal to suspend the rule changes is reviewable by this Court.

2. Whether the Commission's refusal to suspend the rule changes should be set aside as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law given the Commission's failure to consider cost data and the lack of evidence of competitive constraints under the teachings of *NetCoalition*.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in Appendix A.

STATEMENT OF FACTS

The background to this dispute is set forth in this Court's opinion in *NetCoalition*, 615 F.3d at 528–32. These consolidated cases, an outgrowth of *NetCoalition*, concern market-data fees charged by securities exchanges, which must be "fair and reasonable" and meet other requirements under the Securities Exchange Act of 1934.

1. Market data—information on quotations and trades in each of the thousands of securities traded daily in U.S. securities markets—is the oxygen of

the financial markets. Market data is "essential to investors and other market participants not physically present in a trading market, enabling them to make informed decisions when to buy and sell"; it "provides the basis for investment and portfolio decisions"; and it "creates confidence in the fairness and reliability of the markets." *Concept Release Concerning Self-Regulation*, Release No. 34-50700, 69 Fed. Reg. 71256, 71271 (Dec. 8, 2004). Wide distribution of market data is essential to achieving price transparency, "a cornerstone of the U.S. national market system." SEC, *Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change* § II (Sept. 14, 2001), http://www.sec.gov/divisions/marketreg/marketinfo/finalreport.htm.

Market data comes in a variety of forms. "Consolidated" data, referred to by the SEC as "core" data, is a stream of data consolidated from all the exchanges. It provides information on (1) the price and size of the last sale of a security and where it was traded; (2) the current highest bid and lowest offer for the security at each exchange, along with the number of shares available at those prices; and (3) the "national best bid and offer," or NBBO, which are the highest bid and lowest offer currently available in the country and the exchanges where those prices are available. *NetCoalition*, 615 F.3d at 529. All other market data is labeled by the SEC, although not by statute, as "non-core" data and is exclusive to a particular exchange. *Id*. at 529–30.

"Depth-of-book" data, the type of non-core data at issue in *NetCoalition* and in Nos. 10-1422 and 11-1001, refers to the number of shares of a security available to trade at any given price point and "consists of outstanding limit orders to buy stock at prices lower than, or to sell stock at prices higher than, the best prices on each exchange." *Id*. This data "allows a trader to gain background information about the 'liquidity' of a security on a particular exchange, *i.e*., the degree to which his total sale or purchase price will differ from what he would receive if the entire trade were made at the prevailing best prices." *Id.* at 530.

By providing a measure of the "depth" of a market for a security beyond the liquidity reflected in consolidated ("top of the book") data, depth-of-book data is essential for traders seeking to execute orders larger than the quoted size in the NBBO. *See* JA 467. Indeed, Intervenors themselves have touted the importance of their exclusive depth-of-book products both to professional and non-professional traders. *See id*. ("Now more than ever, in order to see and estimate true market liquidity, you need to look beyond just the top of book price."); JA 456 ("Now you can see what the Street sees . . . Can you really afford to trade with anything less than TotalView?").

Market data can also provide information about trading in options. Nasdaq PHLX Options Trade Outline ("PHOTO") market data, at issue in Nos. 10-1421 and 11-1065, "provides information about the activity of a particular option series

during a particular trading session" on that particular exchange. JA 42. Nasdaq promotes its exclusive options products as being "designed to promote full market transparency with minimal latencies."[1]

2. Exchanges have market power in setting their data fees because they enjoy a government-conferred regulatory monopoly over their market data. Exchanges are "exclusive processors"[2] that do not create market data; they simply aggregate data that broker-dealers are required by law to report to them for free, as part of the exchanges' self-regulatory, or quasi-governmental, role. *See* 17 C.F.R. §§ 242.601(b), 242.602(b). Congress recognized that exclusive processors would have a "contractual monopoly," and accordingly instructed the SEC to "assume a special oversight and regulatory role" and to regulate any exclusive processor as a "public utility." S. Rep. No. 94-75, at 9–11 (1975).

Under Section 11A of the Exchange Act, the SEC has a duty to ensure that exclusive processors of market data, like Intervenors, provide the data on terms that are "fair and reasonable" and "not unreasonably discriminatory." 15 U.S.C. § 78k-1(c)(1)(C), (D). Section 6(b) requires the SEC to ensure that an exchange's rules "provide for the equitable allocation of reasonable dues, fees, and other

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[1] *See* NASDAQ OMX Group, Inc., *PHLX Options Market, Data Products*, http://www.nasdaqtrader.com/Micro.aspx?id=phlxdp (last viewed Oct. 7, 2011).

[2] *See* 15 U.S.C. § 78c(a)(22)(B); *NetCoalition*, 615 F.3d at 531, 538.

charges among its members and issuers and other persons using its facilities." *Id.* § 78f(b)(4). Section 6(b) also requires the SEC to ensure that an exchange's rules are designed "to promote just and equitable principles of trade," "to protect investors and the public interest," and to prevent "unfair discrimination between customers, issuers, brokers, or dealers." *Id.* § 78f(b)(5).

Pursuant to these provisions, the SEC has promulgated regulations requiring exclusive processors that distribute market data to do so on terms that are "fair and reasonable" and "not unreasonably discriminatory." 17 C.F.R. § 242.603(a). The SEC further insisted in its 1999 Market Data Concept Release that market-data fees must be reasonably related to cost:

> [T]he fees charged by a monopolistic provider of a service (such as the exclusive processors of market information) *need to be tied to some type of cost-based standard* in order to preclude excessive profits if fees are too high or underfunding or subsidization if fees are too low. The Commission therefore believes that the total amount of market information revenues should remain *reasonably related to the cost* of market information.

Regulation of Market Information Fees and Revenues, Release No. 34-42208, 64 Fed. Reg. 70613, 70627 (Dec. 17, 1999) (emphases added).

This Court, too, has recognized the importance of assessing costs in determining the fairness and reasonableness of market-data fees. *See NetCoalition*, 615 F.3d at 537 ("the costs of collecting and distributing market data can indicate whether an exchange is taking 'excessive profits' or subsidizing its service with another source of revenue").

3. Before *NetCoalition*, the Exchanges provided depth-of-book data to investors at no cost, strongly suggesting that the marginal cost of producing it is *de minimis*—as one would suspect, given that the Exchanges receive the data for free from broker-dealers and can implement depth-of-book products using their existing infrastructure for collecting and disseminating consolidated data. In May 2006, however, NYSE Arca filed a proposed rule change with the Commission seeking to impose fees for its ArcaBook depth-of-book data product. *See id*. at 531.

In approving those fees,[3] the Commission invoked a new "market-based approach," which purported to assess whether proposed data fees complied with the Exchange Act by determining whether they were subject to "'significant competitive forces.'" *Id.* at 532. Petitioners sought review of the SEC's order, citing the lack of evidence for the "competitive constraint" theory and the Commission's failure to consider any cost data to test that theory. *Id.* at 533.

This Court held that the Commission's order "failed to disclose a reasonable basis for concluding that NYSE Arca [was] subject to significant competitive forces in pricing ArcaBook." *Id*. at 544 (citation omitted). In particular, this Court noted that the cost of producing market data is relevant to whether there is a

[3] *Order Setting Aside Action By Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data*, 73 Fed. Reg. 74770 (Dec. 9, 2008) ("Direct Order").

competitive market for the data because pricing that greatly exceeds costs "may be evidence of 'monopoly,' or 'market,' power." *Id*. at 537.

Because of the "seriousness of [the] order's deficiencies," the Court vacated the Commission's order and remanded "for further proceedings consistent with" its opinion. *Id.* at 544. NYSE Arca, supported by the Commission, sought panel rehearing, arguing that vacatur was unwarranted and that the exchange should be allowed on remand to continue charging the disallowed fees.[4] On October 25, 2010, this Court denied the petition for rehearing, and on November 9, 2010, the Court's mandate issued. The effect of the Court's vacatur was that the prior order approving the fees was "annulled, voided, rescinded, or deprived of force." *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 85 (D.D.C. 2007).

4. Undaunted by this Court's rulings, Intervenors proceeded to file a series of proposed fee rule changes, four of which are at issue here, each invoking the same purported economic justifications rejected in *NetCoalition*.[5] The rule change at issue in No. 11-1001 is essentially the *very same one* the Commission approved in the order vacated by this Court in *NetCoalition*, such that NYSE Arca continues

[4] *See* No. 09-1042, Dkt. #1266631 (Sept. 17, 2010); No. 09-1042, Dkt. #1271143 (Oct. 12, 2010).

[5] *See* JA 42–45, 97–100, 359–64, 545–48.

to assess the *very same fees* that *NetCoalition* held were not established as "fair and reasonable" as required by the Exchange Act. *See* JA 358.

The rule changes took effect upon filing pursuant to Section 19(b)(3)(A) of the Exchange Act, 15 U.S.C. § 78s(b)(3)(A), which had recently been amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), to make exchange fee filings immediately effective, subject to being suspended by the SEC if "such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act]." 15 U.S.C. § 78s(b)(3)(C).

Although the fee proposals are for different products, each is a market-data product made available exclusively by the particular exchange. No. 11-1001 is a petition for review of the Commission's refusal to suspend, within the 60-day period from the date of filing as provided in Section 19(b)(3)(C) of the Exchange Act, the *Proposed Rule Change by NYSE Arca, Inc. Relating to Fees for NYSE Arca Depth-of-Book Data* ("NYSE Arca Proposal"). The NYSE Arca Proposal allows NYSE Arca to charge fees for depth-of-book data. These fees are the same ones that were invalidated by this Court in *NetCoalition*. *See* JA 358 ("They are the same fees that NYSE Arca has charged since it received approval of those fees pursuant to the Direct Order").

No. 10-1421 is a petition for review of the Commission's refusal to suspend the *Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Market Data Feeds* ("PHLX Proposal"). The PHLX Proposal establishes fees for the PHOTO market-data product, which provides information about activity in a particular options series on the exchange during a trading session. JA 42.

No. 10-1422 is a petition for review of the Commission's refusal to suspend the *Proposed Rule Change by the NASDAQ Stock Market LLC to Modify Rule 7019* ("NASDAQ 7019 Proposal"). The NASDAQ 7019 Proposal modified distributor and direct access fees for depth-of-book data that NASDAQ makes available. JA 96.

Finally, No. 11-1065 is a petition for review of the Commission's refusal to suspend the *Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Fees for the PHOTO Historical Data Projects* ("PHLX Historical Proposal"). The PHLX Historical Proposal allows PHLX to charge fees for PHOTO historical options trading data. JA 544.

The text of the rule change filings and purported justifications offered by Intervenors are virtually identical for all four. Each filing makes the same assertion that the SEC and Intervenors made in *NetCoalition*, namely, that "competition for order flow" constrains the fees Intervenors can charge for their

exclusive market-data products.[6] *NetCoalition* rejected this assertion, noting "the lack of support in the record for the SEC's conclusion that order flow competition constrains market data prices." 615 F.3d at 541.

All four fee filings also rely on a "total platform" theory of competition that was urged, without success, in *NetCoalition*.[7] The *NetCoalition* Court rejected the "platform" theory as having been pressed by the SEC for the first time on appeal, *id*. at 542 n.16, and the SEC has not tried to support any of the fee filings under this theory. Nor have the Commission or Intervenors submitted any cost data to support the reasonableness of the fees.

5. Petitioners submitted written Comment Letters and Petitions for Disapproval requesting that the Commission suspend and institute proceedings to disapprove the proposed rule changes under Section 19(b)(3)(C) of the Exchange Act.[8] The Commission refused to do so, provided no explanation for its refusals, and contends that those decisions are immune from judicial review by virtue of the amendments to the Exchange Act in the Dodd-Frank Act.[9]

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[6] JA 44, 98–99, 360, 546–47.

[7] JA 44, 98–99, 363, 546–47.

[8] JA 48, 55, 368, 381–82, 550, 553.

[9] After Petitioners moved to consolidate the petitions, the SEC and Intervenors moved to dismiss, arguing that there was no reviewable order and that the Commission's refusal to suspend the rule changes was committed to agency discretion. By order dated June 3, 2011, the Court consolidated the cases and

Indeed, the Commission has asserted that, because of the change in the law, the *NetCoalition* case is "irrelevant" and "may well be moot." No. 10-1420, Dkt. #1300242 at 2, 3 (Mar. 28, 2011). This is tantamount to saying that Dodd-Frank gives the Commission unfettered authority, by doing and saying nothing, to allow any fee proposal to remain in effect without reference to the considerations expressed in *NetCoalition* or the requirements of the Exchange Act.

Curiously, however, even though Dodd-Frank took effect before this Court's decision in *NetCoalition*,[10] neither the Commission nor the Exchanges ever told this Court, while that case was *sub judice*, that they believed Dodd-Frank effectively mooted the *NetCoalition* proceedings. Nor did they ever suggest, in seeking panel rehearing to overturn the Court's vacatur, that the same proposed fees could simply be re-filed under Dodd-Frank, take effect and remain unsuspended with no possibility of judicial review, and thus continue to be charged to investors as if the *NetCoalition* decision did not exist.

Petitioners now seek review of the Commission's refusal to suspend the rule changes, which are inconsistent with the Exchange Act and this Court's decision in *NetCoalition*—a decision that, far from being "moot," is controlling here.

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referred the motions to dismiss to the merits panel, directing the parties to address the jurisdictional issues in their merits briefs.

[10] The Dodd-Frank Act took effect on July 21, 2010, prior to the Court's August 6, 2010 decision in *NetCoalition*.

SUMMARY OF ARGUMENT

1. Reviewability

The Commission's refusal to suspend the rule changes is reviewable by this Court. There is a strong presumption in favor of judicial review, and the Commission's refusal to suspend the rule changes, despite written requests by Petitioners to do so, is a "final order" reviewable under Section 25(a) of the Exchange Act, under this Court's expansive and practical definition of a final order and agency action. The Dodd-Frank amendments, on which the SEC and Intervenors rely to challenge the Court's jurisdiction, in fact support reviewability, and certainly nothing in that text supplies clear and convincing evidence that Congress intended to preclude review.

Because the Commission's refusal to suspend the fees has precisely the same impact on the rights of the parties as a formal denial of relief, judicial review is not precluded simply because the decision can be characterized as inaction rather than action. As is clear from this Court's recent decision in *Amador County v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011), "discrete" agency inaction such as the Commission's refusal to suspend an SRO rule change is reviewable. Any other conclusion would allow the Commission to escape review simply by choosing not to formalize or document its decision. That is not and cannot be the law.

Nor can review be denied on the ground that the suspension decision was committed to the Commission's discretion. Section 19(b)(3)(C) is best read to *require* the Commission to suspend an SRO rule change where, as here, the statutory criteria are met. But even if the Commission retains some discretion in the matter, there is still "law to apply" because Congress expressly set forth a standard to guide the Commission's decision, namely, whether suspension is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act. As in *Amador County*, the Commission's refusal to suspend the rule changes, contrary to the requirements of the statute, is subject to judicial review.

2. Merits

The Commission's refusal to suspend the rule changes is contrary to the requirements of the Exchange Act and the Administrative Procedure Act and should be vacated and set aside. The record is materially the same as was before the Court in *NetCoalition*, and Intervenors have provided no new or substantial evidence to justify their proposed market-data fees.

Despite the clear relevance of cost data as discussed in *NetCoalition*, Intervenors have again chosen not to supply, and the Commission has failed to request, any information concerning the cost of collecting and distributing their exclusive market data. Intervenors' arguments that providing cost data is too

burdensome or impractical were already rejected by the *NetCoalition* Court, as were the arguments that market-data fees are constrained by competition for order flow or the existence of economic substitutes.

Nothing has changed since *NetCoalition.* The Exchanges continue to charge supracompetitive prices for data products over which they enjoy a statutorily conferred monopoly, and they continue to try to justify those fees on the basis of the same speculative theories of competition, unsupported by any actual, real-world evidence of how traders respond to the monopoly prices. On the merits, the arguments remain the same as they were before the Court in *NetCoalition*.

In reality, both Intervenors and the Commission have staked their case on the claimed nonreviewability of the Commission's refusal to suspend the rule changes under the Dodd-Frank amendments, which they contend vitiate the *NetCoalition* decision. If, however, the Court rejects this attempted end run around its prior decision, and concludes that judicial review is appropriate, then its decision on the merits becomes an easy one: vacate the Commission's refusal to suspend the rule changes and remand for further proceedings, this time consistent with the ruling and mandate in *NetCoalition*.

STANDING

SIFMA and NetCoalition have associational standing to sue under Section 25(a) of the Exchange Act, 15 U.S.C. § 78y(a)(1). *See Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 486–87 (D.C. Cir. 2007).

First, SIFMA's and NetCoalition's members have standing to sue in their own right because they must pay Intervenors' supracompetitive and non-cost-based fees and are thus "aggrieved" under Section 25(a) and have suffered an injury-in-fact traceable to the SEC's action. *See Chamber of Commerce v. SEC*, 412 F.3d 133, 138 (D.C. Cir. 2005). A decision vacating the SEC's orders would redress that injury by eliminating Intervenors' authorization to charge the fees. *See Miss. Valley Gas Co. v. FERC*, 68 F.3d 503, 508 (D.C. Cir 1995).

Second, the suit is germane to SIFMA's purpose of promoting fair and orderly securities markets, and to NetCoalition's purpose of ensuring the integrity, usefulness, and continued expansion of the Internet, including the availability of market data at reasonable prices.

Third, participation of SIFMA's and NetCoalition's individual members is unnecessary; neither the questions presented nor the relief requested turns on considerations specific to SIFMA's or NetCoalition's individual members.

Fourth, SIFMA's and NetCoalition's members who buy Intervenors' market data are well within the zone of interests protected by the provisions of the

Exchange Act requiring the SEC to ensure that Intervenors' fees are fair and reasonable, equitable, and nondiscriminatory. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987).

STANDARD OF REVIEW

This Court reviews and will hold unlawful and set aside Commission action under the APA's "arbitrary and capricious" standard, *i.e.*, action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "unsupported by substantial evidence." 5 U.S.C. § 706(2). The Commission must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *NetCoalition*, 615 F.3d at 532–33 (internal quotation marks omitted); *see also Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (the SEC must "'determine as best it can the economic implications of the rule'").

ARGUMENT

I. THE COMMISSION'S REFUSAL TO SUSPEND THE EXCHANGES' FEE FILINGS IS SUBJECT TO JUDICIAL REVIEW.

A. The Commission's Refusal To Suspend An SRO Rule Change Is A Reviewable "Final Order" Under The Exchange Act.

Section 25(a)(1) of the Exchange Act provides that a "person aggrieved by a final order of the Commission" may obtain review of the order in this Court by filing a petition for review requesting that the order be modified or set aside in whole or in part. 15 U.S.C. § 78y(a)(1). The Commission's refusal to suspend the

rule changes, despite Petitioners' written requests that it do so, is a "final order" reviewable in this Court under Section 25(a)(1).

1. The Commission's refusal to suspend the rule changes is an "order." Because the Exchange Act does not define "order," this Court looks to the APA definition of that term. *See Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007). The APA defines "order" broadly as "the whole or a part of a final *disposition*, whether affirmative, *negative*, injunctive, or declaratory in form," of an agency in a matter other than rulemaking. 5 U.S.C. § 551(6) (emphases added); *see also Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 598 (D.C. Cir. 2007) ("As a general principle, 'the term "order" . . . should be read expansively.'"). The Commission's refusal to suspend the rule changes within the 60-day statutory period constitutes a final, negative disposition of Petitioners' petitions to suspend.

It does not matter that the Commission did not formally issue a piece of paper entitled "order" denying the petitions to suspend. As this Court has explained, "'when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief.'" *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987). That is the situation here. By allowing the 60-day window to suspend the fees to lapse without taking any formal action on the petitions to suspend, the Commission

achieved precisely the same result as if it had formally denied the petitions, and the impact on the parties' rights is the same—the fees remain in effect. "In such a situation, 'the court can undertake review as though the agency had denied the requested relief and can order an agency to either act or provide a reasoned explanation for its failure to act.'" *Id.*

Moreover, the Commission's refusal to suspend the rule changes was "[a]gency action made reviewable by statute" under the APA and thus "subject to judicial review." 5 U.S.C. § 704. Consistent with the broad definition of "order," the APA expressly defines "agency action" to include an agency's "failure to act." 5 U.S.C. § 551(13). And under the APA, agency inaction is reviewable as long as it is "'discrete.'" *Amador Cnty.*, 640 F.3d at 382 (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004)). In *Amador County*, this Court held that the Secretary of Interior's failure to disapprove a tribal-gaming compact was a "discrete agency inaction" reviewable by this Court. *Id.* Likewise here, the Commission's refusal to suspend the rule changes is a discrete agency inaction subject to judicial review. *Cf. Norton*, 542 U.S. at 64 (no reviewable action where plaintiffs sought to raise a "broad programmatic attack" on Department of Interior's failure to manage off-road vehicle use in wilderness areas).

2. The Commission's refusal to suspend the rule changes is also "final." This Court uses a two-part test to determine the finality of agency action: The

action (1) must "'mark the consummation of the agency's decisionmaking process,'" and (2) "'must be one by which rights or obligations have been determined or from which legal consequences will flow.'" *Domestic Sec., Inc. v. SEC*, 333 F.3d 239, 246 (D.C. Cir. 2003) (alteration omitted). Both elements are satisfied here.

First, when the Commission refused to suspend the fees within the 60-day statutory period, that marked the end of the decisionmaking process. This was "the last word" from the Commission as to whether it would suspend the fees and institute disapproval proceedings. *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1037–38 (D.C. Cir.) ("an agency's denial of a petition" is a final agency action subject to judicial review), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002). As far as the Commission is concerned, it has nothing left to do and its decision not to suspend is final.[11]

[11] The Commission has suggested that because it may "abrogate or amend" SRO rules in certain situations after the 60-day suspension period has expired under Section 19(c) of the Exchange Act, 15 U.S.C. § 78s(c), the Commission's refusal to suspend rule changes under Section 19(b)(3)(C) is non-final. If that were true, there would never be "final" action with respect to SRO rule changes because the Commission can *always* amend an SRO's rules. That argument is untenable. *See Fox*, 280 F.3d at 1038 (agency's desire to "continue considering" rules had no impact on finality). Indeed, under the Commission's theory, there would have been no final order in *NetCoalition* because the Commission could have amended NYSE Arca's rule after ordering its approval.

Second, "legal consequences" flow from the Commission's decision. Because of that decision, the Exchanges' unsupported fees remain in effect and Petitioners' members must pay them or forgo data that is extremely important to their trading decisions. *See Burlington N. R.R. v. Surface Transp. Bd.*, 75 F.3d 685, 690 (D.C. Cir. 1996) (a compulsory tariff filing "had immediate effects on legal rights relating directly to the parties' primary conduct"). As the Supreme Court has explained, "when Congress defined 'order' in terms of a 'final disposition,' it required that 'final disposition' to have some determinate consequences for the party to the [agency] proceeding." *ITT Corp. v. Local 134*, 419 U.S. 428, 443 (1975); *see also Indep. Broker-Dealers' Trade Ass'n v. SEC*, 442 F.2d 132, 140–41 (D.C. Cir. 1971). That is certainly true here.

3. Section 19(b)(3)(C) of the Exchange Act further supports the conclusion that the Commission's refusal to suspend an SRO rule change is a reviewable final order. That provision authorizes the SEC to temporarily suspend SRO rule changes and expressly provides that "Commission action pursuant to this subparagraph . . . shall not be reviewable under [Section 25] nor deemed to be 'final agency action' for purposes of [the APA]." 15 U.S.C. § 78s(b)(3)(C).

The "Commission action" made nonreviewable under Section 19(b)(3)(C) is the affirmative action to "temporarily suspend the change in the rules" of an SRO. The clear negative implication is that the Commission's disposition in *refusing* to

suspend an SRO rule change *is* reviewable under Section 25 and *is* final agency action under the APA. Had Congress intended to preclude review of the Commission's refusal to suspend an SRO rule change, it could and would have expressly done so. *See Kucana v. Holder*, 130 S. Ct. 827, 837 (2010) ("If Congress wanted the jurisdictional bar to encompass [agency decisions other than those specifically identified], Congress could easily have said so."); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1061–62 (D.C. Cir. 1995) (invoking the "familiar maxim of statutory construction: *expressio unius est exclusio alterius*").

In response, the Commission makes two points. *First*, it argues that because its refusal to suspend an SRO rule change "is not action, there was no need to say that it is unreviewable." No. 10-1420, Dkt. #1300242 at 5. *Second*, it argues that if a refusal to suspend "could somehow be deemed 'action,'" then it would be "as much 'action pursuant to this subparagraph' as is suspension," and thus equally nonreviewable under Section 19(b)(3)(C). *Id.* Neither point has merit.

As to the first point, the unstated premise of the Commission's argument is that agency inaction is presumptively nonreviewable unless Congress specifies to the contrary. That is wrong. As discussed above, agency inaction, like agency action, is presumptively reviewable where, as here, it is discrete. *See Norton*, 542 U.S. at 61–63; *Amador Cnty.*, 640 F.3d at 382; *Sierra Club*, 828 F.2d at 793 ("we also have jurisdiction to review agency inaction"). Thus, if Congress had intended

to preclude review of a refusal to suspend, it had every reason to make its intent clear. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) ("only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review").

As to the second point, the Commission's argument fails because the "Commission action" made nonreviewable under Section 19(b)(3)(C) is *only* the temporary suspension of a rule change, and *not* refusal to suspend a rule change. That is clear from the structure of the operative sentence: Using the same "Commission action" subject that governs the nonreviewability clause, the sentence begins, "Commission action pursuant to this paragraph shall not affect the validity or force of the rule change during the period it was in effect . . . ." 15 U.S.C. § 78s(b)(3)(C). "Commission action" in this clause obviously means suspension because when the Commission refuses to suspend a rule change, the rule's validity prior to suspension is not in question. There is no warrant for reading "Commission action" to mean one thing in the first clause of the sentence and another in the second.

Moreover, every other time the word "action" appears in Section 19(b)(3)(C) it refers to the Commission's action in suspending a rule change. The second sentence of Section 19(b)(3)(C) authorizes the Commission to "temporarily suspend" a rule change if "such action" appears necessary or appropriate. *Id*. And

the third sentence directs the Commission, if it takes "such action," to institute proceedings to determine whether the rule change should be approved or disapproved. *Id.* In both instances, "action" refers only to suspension and not to a refusal to suspend. The word "action" in the nonreviewability clause should be construed similarly under the "normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005).

Finally, Congress's decision to treat suspension and refusal to suspend differently makes sense in light of background principles of administrative law. Suspension is a temporary, interim measure that requires the Commission to institute further proceedings. Precluding judicial review is thus consistent with the familiar principle that agency action of a "merely tentative or interlocutory nature" is not reviewable. *Bennett v. Spear*, 520 U.S. 154, 178 (1997). But the opposite is true when the Commission refuses to suspend a rule change. As explained above, a refusal to suspend is a final disposition that triggers no further agency proceedings and has immediate effects on the parties' legal rights and obligations. In such circumstances, judicial review is ordinarily available. *See id.* Congress adhered to these principles when it precluded review of a suspension of an SRO rule change, but preserved review of a refusal to suspend.

4. Relying on *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007), and *AT&T Corp. v. FCC*, 369 F.3d 554 (D.C. Cir. 2004), the Commission contends that there is no reviewable agency action because the fees took immediate effect as the result of congressional action and not any action by the Commission. This argument is misplaced because Petitioners are not challenging the fact that the fees took immediate effect upon filing, but rather the Commission's subsequent refusal to suspend them. Although Congress made the decision that SRO rule changes should take immediate effect upon filing, it did not decide whether these or any other specific rule changes should be suspended pending disapproval proceedings. It charged the Commission with making that decision in accordance with the standards set forth in the statute. The Commission cannot escape responsibility for its decision by pointing the finger at Congress.

This case is thus unlike *AT&T* or *Sprint*. In *AT&T*, Congress had specified that absent an extension by the FCC, certain regulatory safeguards "'shall cease to apply.'" 369 F.3d at 556. Likewise, in *Sprint*, Congress had specified that absent a decision by the FCC, a petition to forbear from applying certain regulatory requirements "'shall be deemed granted.'" 508 F.3d at 1131. No comparable language appears in Section 19(b)(3)(C). Section 19(b)(3)(A) provides that a rule change "shall take effect upon filing," but the issue is not whether the Commission

erred in allowing the fees to take effect under Section 19(b)(3)(A), but whether the Commission erred in refusing to suspend the fees under Section 19(b)(3)(C).[12]

This case is instead like *Amador County*, where this Court held that the Secretary of Interior's failure to approve or disapprove a tribal-gaming compact was reviewable. *See* 640 F.3d at 380–83. The statute there provided that if the Secretary did not approve or disapprove a compact within 45 days, "'the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with'" the statute. *Id*. at 375. Concluding that the caveat language imposed an obligation on the Secretary to disapprove any compact that was inconsistent with the statute, the Court held that the Secretary's failure to disapprove a compact despite its inconsistency with the statute was a "discrete agency inaction" subject to judicial review. *Id*. at 381–82.

The same conclusion follows here. Section 19(b)(3)(C) provides that the Commission may suspend an SRO rule change if "such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in

[12] Moreover, in neither *AT&T* nor *Sprint* did the FCC deny a party's petition to act—in *AT&T*, no one had asked the FCC to extend the regulatory safeguards, 369 F.3d at 562; and in *Sprint*, the FCC "deadlocked with a 2-2 vote" and thus "did not deny" Verizon's petition, 508 F.3d at 1131–32. Here, by contrast, Petitioners filed written petitions asking the Commission to suspend the fees, and the Commission effectively denied those petitions by refusing to act on them within the 60-day statutory window. *See Sierra Club*, 828 F.2d at 793 (inaction may be functional equivalent of denial).

furtherance of the purposes of [the Exchange Act]." 15 U.S.C. § 78s(b)(3)(C). It further provides that an SRO rule change may be enforced only "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." *Id.*

As in *Amador County*, the caveat language in Section 19(b)(3)(C) is best interpreted to require suspension when a rule change conflicts with the purposes and requirements of the Exchange Act. At the very least, these standards constrain the SEC's discretion to refuse to suspend an SRO rule change and thereby limit the extent to which such a rule change may remain in effect by operation of law under Section 19(b)(3)(A). Either way, the Commission's refusal to suspend the fees is reviewable. *See* 640 F.3d at 382 (inaction reviewable because "Congress limited the extent to which a compact could be approved by operation of law").

5. Likewise without merit is the Commission's contention that the Court lacks jurisdiction because there is no administrative record or statement of the Commission's reasoning for the Court to review. As the Commission itself recognized when it certified the record to this Court, there *is* an administrative record consisting of the Exchanges' fee filings and Petitioners' petitions to suspend. *See* No. 10-1421, Dkt. #1316567 (July 5, 2011). Particularly against the backdrop of the administrative and judicial proceedings in *NetCoalition*, these materials provide a more than adequate basis for the Court to assess the

Commission's refusal to suspend the fees. In any event, "the lack of an adequate agency record to review does not eliminate a circuit court's jurisdiction." *Safe Extensions*, 509 F.3d at 599. Otherwise "agencies could escape judicial review by simply refusing to create a record to support their decisions." *Id*. at 600.

Nor does it matter that the Commission failed to give an explanation for its refusal to suspend the fees. "A 'fundamental' requirement of administrative law is that an agency 'set forth its reasons' for decision; an agency's failure to do so constitutes arbitrary and capricious agency action." *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001). This requirement is codified in Section 6(d) of the APA, 5 U.S.C. § 555(e), which mandates that whenever an agency denies "a written application, petition, or other request of an interested person made in connection with any agency proceeding," the agency must provide "a brief statement of the grounds for denial," unless the denial is "self-explanatory." *Id*. "The agency's statement must be one of 'reasoning'; it must not be just a 'conclusion'; it must 'articulate a satisfactory explanation' for its action." *Butte Cnty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010). Because the Commission was required to provide a statement of its reasons for refusing to suspend the fees, it should not be heard to invoke its own failure to comply with that requirement as a basis for denying judicial review.

In any event, as explained in *Amador County*, when the attack on the agency's decision is not that its reasoning is faulty, but that the decision is "'contrary to law'" because it conflicts with the organic statute, the Court "need[s] no agency reasoning." 640 F.3d at 382. That conclusion applies here as well: In light of the Exchange Act's requirements, and the absence of cost data or evidence of competitive constraints, the Commission was obligated to suspend the fees.

Finally, to the extent the Court concludes that the Commission's reasoning is necessary to permit meaningful judicial review, the Commission can "provide the court with any evidence it had before it when it made its decision." *Safe Extensions*, 509 F.3d at 604. At a minimum, the Court may remand to the Commission for further explanation. *See id*. at 599; *Tourus*, 259 F.3d at 737.[13]

[13] Nasdaq contends that No. 10-1422 is not properly before the Court because Petitioners did not file objections with the SEC to that rule change. That is wrong. In their October 8, 2010 Comment Letter and Petition for Disapproval, Petitioners urged the Commission "to suspend the effect of these *and other similar market data fee rule changes* proposed by self-regulatory organizations based on invalid grounds omitting cost data." JA 48 (emphasis added). Petitioners' December 8, 2010 Comment Letter and Petition for Disapproval specifically listed the rule change at issue in No. 10-1422 as one of the "similar market data fee rule changes" to which Petitioners objected. JA 367–68 & n.13. Because the justifications offered by Nasdaq in its rule filing in No. 10-1422 were virtually identical to those for the other rules, and because Petitioners requested disapproval of that rule for the same reasons, the Commission had ample opportunity to address Petitioners' objections to the rule change in No. 10-1422 before being challenged in this Court. *See Blount v. SEC*, 61 F.3d 938, 940 (D.C. Cir. 1995) (Section 25(c)(1)'s exhaustion requirement "is presumably aimed only at assuring that the Commission have had a chance to address claims before being challenged on them in court").

B. Judicial Review Is Not Barred Under The "Committed To Agency Discretion" Doctrine.

The Commission has also contended that judicial review is barred by APA § 701(a)(2), which provides that judicial review is not available if "agency action is committed to agency discretion by law." This argument too lacks merit.

1. For a decision to be committed to an agency's unreviewable discretion under APA § 701(a)(2), it must be shown that "the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Cody v. Cox*, 509 F.3d 606, 610 (D.C. Cir. 2007). "The exception for agency action 'committed to agency discretion by law' is a 'very narrow' one, reserved for 'those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Hi-Tech Furnace Sys., Inc. v. FCC*, 224 F.3d 781, 788 (D.C. Cir. 2000).

This is not such a case. The Exchange Act expressly specifies the criteria the Commission must consider in determining whether to suspend an SRO rule change—namely, whether "such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act]." 15 U.S.C. § 78s(b)(3)(C). In addition, the statute provides that an SRO rule change may be enforced only "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." *Id.*

These standards easily satisfy the "law to apply" test. *See Conn. Dep't of Children & Youth Servs. v. HHS*, 9 F.3d 981, 985 (D.C. Cir. 1993) (agency action reviewable because statute "explicitly se[t] forth the factors the Secretary must take into account"). This Court has "regularly found Congress has not committed decisions to agency discretion under far more permissive and indeterminate language." *Cody*, 509 F.3d at 610. The Court has found the requisite judicially manageable standard in language authorizing an agency to act "'in the interest of justice,'" *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1403 (D.C. Cir. 1995); as "'necessary for safety,'" *Safe Extensions*, 509 F.3d at 601; and as "'conditions of good administration warrant,'" *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 495 (D.C. Cir. 1988). *Cf. Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003) (action committed to agency discretion where statute authorized agency to act "'at any time for any reason the Administrator considers appropriate'").

2. Ignoring the express statutory standards governing suspension of an SRO rule change, the Commission contends that review is precluded because the statute provides that the Commission "may" suspend a rule change "if it appears to the Commission" that the statutory criteria for suspension are satisfied. This language does not grant the Commission unreviewable discretion or overcome the strong presumption in favor of judicial review.

Indeed, Section 19(b)(3)(C) is best interpreted to *require* the Commission to suspend an SRO rule change when the statutory criteria for suspension are satisfied. Congress often uses "may" to limit the circumstances in which an agency may act, without granting the agency discretion to refuse to act when the statutory criteria are met. The statute in *Amador County*, for example, provided that the Secretary of Interior "'may'" disapprove a compact under specified conditions. 640 F.3d at 380. Finding it "implausible" that Congress granted the Secretary discretion to refuse to disapprove an illegal compact, this Court held that the statute *required* the Secretary to disapprove a compact if it violated one of the statutory conditions. *Id*. at 381 ("disapproval is obligatory"). The same reasoning applies here: It is equally "implausible" that Congress granted the Commission discretion to refuse to suspend an SRO rule change when suspension "is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act]." 15 U.S.C. § 78s(b)(3)(C).

Even if the Commission retained some residuum of discretion to refuse to suspend an SRO rule change when the statutory criteria are met, that would not mean that Congress committed the decision to the Commission's unreviewable discretion. Countless statutes take the form "A may do X if Y." If this were enough to grant an agency unreviewable discretion, the category of action committed to agency discretion would hardly be narrow. For that reason, this

Court has explained that while the word "may" "suggests that Congress intends to confer some discretion on the agency," it "does not mean the matter is *committed* exclusively to agency discretion." *Dickson*, 68 F.3d at 1401. The Commission's contrary argument "confuses the narrow category of agency action wholly committed to agency discretion under APA § 701(a)(2) with the primary category of agency action that is subject to review for 'abuse of discretion' under APA § 706(2)(A)." *Hi-Tech*, 224 F.3d at 788.

Nor do the words "if it appears to the Commission" vest the Commission with unreviewable discretion. This Court has consistently found judicial review available under statutes with similar language authorizing the agency to act upon making a finding that requires the agency to exercise its judgment. *See, e.g.*, *Safe Extensions*, 509 F.3d at 601 (statute authorizing agency to prescribe standards it "'finds necessary for safety in air commerce'"); *Hi Tech*, 224 F.3d at 788 (statute authorizing agency to investigate "'in such manner and by such means as it shall deem proper'"); *Dickson*, 68 F.3d at 1402 (statute authorizing agency to waive a limitations period if it "'finds it to be in the interest of justice'"); *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1224 (D.C. Cir. 1993) (statute authorizing agency to adjust payments "'as the Secretary deems appropriate'"); *Conn. Dep't of Children & Youth Servs.*, 9 F.3d at 983, 985 (statute authorizing

agency to disburse funds to states that implement programs to the "'satisfaction of the Secretary'").

In short, "[t]he mere fact that a statute grants broad discretion to an agency does not render the agency's decision completely nonreviewable . . . unless the statutory scheme . . . provides absolutely no guidance as to how that discretion is to be exercised." *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985). That is not the case here. Because the statute "provides a perfectly workable standard to guide the court," the decision whether to suspend an SRO rule change is not committed to agency discretion by law. *Safe Extensions*, 590 F.3d at 601–02.

C. The Exchange Act Does Not Preclude Judicial Review Of The Commission's Refusal To Suspend An SRO Rule Change.

There is also no merit to the Commission's contention that APA § 701(a)(1), which prohibits judicial review where it is otherwise barred by statute, applies here. Whether a statute precludes judicial review "is a question of congressional intent." *Koretoff v. Vilsack*, 614 F.3d 532, 536 (D.C. Cir. 2010). Here, too, an intent to preclude review must be shown by clear and convincing evidence. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670–73 (1986). No such showing can be made here.

1. As discussed above, because Section 19(b)(3)(C) of the Exchange Act expressly precludes judicial review of a decision *to suspend* an SRO rule change but not a *refusal* to suspend, it is clear that Congress intended the latter decision to

be judicially reviewable. *See supra*, Part I.A. At a minimum, Congress's silence as to the reviewability of a refusal to suspend does not overcome the "strong presumption" of reviewability with "'clear and convincing evidence' of a contrary congressional intent." *Bowen*, 476 U.S. at 671–72. That should end any argument against reviewability based on APA § 701(a)(1).

2. For its contrary argument, the Commission invokes *Southern Railway v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979), which interpreted the Interstate Commerce Act to preclude judicial review of the ICC's decision not to investigate the lawfulness of a filed rate. *Seaboard* does not help the Commission because the factors that drove the Court's decision there are absent here.

First, unlike in *Seaboard*, where the "statute [was] silent on what factors should guide the Commission's decision," *id*. at 455, the statute here expressly specifies the factors the Commission must consider in determining whether to suspend an SRO rule change, *see supra*, Part I.B.

Second, the Court in *Seaboard* relied heavily on the fact that the statute there provided an alternative complaint mechanism whereby aggrieved parties could "require the Commission to investigate the lawfulness of any rate at any time," "secure judicial review of any decision not to do so," and recover damages

resulting from any overcharge. 442 U.S. at 454–55. The Exchange Act does not contain a comparable complaint mechanism.[14]

Third, the legislative history of the statute in *Seaboard* made clear that Congress intended to eliminate judicial review in light of past experience with its "disruptive consequences." *Id*. at 460; *see also Arrow Transp. Co. v. S. Ry.*, 372 U.S. 658, 663–64 (1963) (detailing history of courts enjoining newly filed rates). There is no similar history of judicial interference with SRO rule changes.[15]

3. Equally baseless is the argument that judicial review would unduly burden the Commission. Apart from the rule changes at issue here and in *NetCoalition*, Petitioners have found only two other instances in the past 20 years in which a party has sought judicial review of an SEC action with respect to an

[14] The Commission has pointed to Sections 19(c) and 19(d) of the Exchange Act, but neither provision is comparable to the complaint provision in *Seaboard*. Section 19(c), which authorizes the Commission to abrogate or amend SRO rules "as the Commission deems necessary or appropriate," 15 U.S.C. § 78s(c), does not provide a mechanism whereby parties may require the Commission to review an SRO rule. And the contours of the remedy provided by Section 19(d) are unclear. *See id*. § 78s(f) (authorizing the Commission to "grant . . . access to services").

[15] The Commission has suggested that Congress amended the Exchange Act in response to *NetCoalition*, but that supposition is unfounded, as the Dodd-Frank amendments became law on July 21, 2010—*before* the *NetCoalition* decision. There is no evidence that Congress had *NetCoalition* in mind when it enacted the SRO streamlining amendments in Dodd-Frank; the legislative history reflects that Congress was concerned with the *Commission's* delay in processing SRO rule changes, not with judicial review of the Commission's orders. *See* S. Rep. No. 111-176, at 106 (2010).

SRO rule change. *See Domestic Sec.*, 333 F.3d 239; *Timpinaro v. SEC*, 2 F.3d 453 (D.C. Cir. 1993). There is thus reason to "doubt the factual premise underlying this argument." *Safe Extensions*, 509 F.3d at 602.

But even if judicial review would increase the Commission's workload, that would not overcome the strong presumption that Congress intends judicial review of agency action. This Court has squarely rejected the "ludicrous proposition that courts may not review [agency action] because judicial review would create more work for the agency." *Id*. (noting that, in *Seaboard*, "the Supreme Court concluded that it could find no law to apply and only then said the disruptive consequences of allowing review confirmed this position"). "Like virtually every other agency, the [SEC] must defend its decisions in court." *Id*. On this point, too, this Court in *Amador County* has spoken: Where there is law to apply, as in that case and here, "Congress had no intention of trading compliance with [the statute's] requirements for efficiency in agency proceedings." 640 F.3d at 381.

D. Alternatively, The Court Should Construe The Petitions For Review As Petitions To Enforce The *NetCoalition* Mandate.

If the Court has any doubt as to its jurisdiction or the reviewability of the Commission's decision, it should construe the petitions for review as petitions for a writ of mandamus to enforce the Court's mandate in *NetCoalition*. *See Interstate Natural Gas Ass'n v. FERC*, 756 F.2d 166, 170 (D.C. Cir. 1985) (petition for

review may be treated as petition for mandamus and vice versa, and direct review and mandamus may be sought in the alternative).

1. This Court has "inherent power to construe the mandate of [its] earlier decision," and power under the All Writs Act to issue a writ of mandamus "to effectuate or prevent the frustration of orders previously issued." *PEPCO v. ICC*, 702 F.2d 1026, 1032 (D.C. Cir. 1983); *see also Office of Consumers' Counsel v. FERC*, 826 F.2d 1136, 1140 (D.C. Cir. 1987) (a "federal appellate court has the authority, through the process of mandamus, to correct any misconception of its mandate"). This is true regardless of whether the Commission issued a reviewable order. *See In re Core Commc'ns*, 531 F.3d 849, 855–56 (D.C. Cir. 2008) (issuing mandamus to enforce mandate despite lack of reviewable order); *Atl. City Elec. Co. v. FERC*, 329 F.3d 856, 858–59 (D.C. Cir. 2003) (same); *N. States Power Co. v. Dep't of Energy*, 128 F.3d 754, 758–59 (D.C. Cir. 1997) (same).

2. The Commission's refusal to suspend the rule changes flouts this Court's mandate in *NetCoalition*. The Court there held that the Commission lacked a sufficient basis to conclude that competition constrains market-data fees and can therefore be relied upon to ensure that they are "fair and reasonable" under the Exchange Act. 615 F.3d at 537–44. The Court accordingly vacated the Commission's order approving the fees and remanded to the Commission "for further proceedings consistent with this opinion." *Id*. at 544. NYSE Arca,

supported by the Commission, unsuccessfully petitioned for rehearing, asking for remand without vacatur so it could continue charging fees during the proceedings on remand. *See supra*, 8.

By refusing to suspend the rule changes, the Commission has achieved precisely the same result it sought to achieve, unsuccessfully, in *NetCoalition* and has bypassed the remand proceedings the Court ordered. Rather than attempting to cure the deficiencies this Court identified, the SEC has abdicated and allowed fees—including the very same fees at issue in *NetCoalition*—to remain in effect based upon substantially the same evidence and arguments as to supposed competition this Court rejected. If the Commission believes it has discovered new arguments or evidence that support its competition theory, it should explain its reasoning and present its evidence to the Court before allowing exchanges to impose new fees that have not been justified or found to be "fair and reasonable." Anything less is a transparent and unseemly end run around *NetCoalition*.

II. THE SEC'S REFUSAL TO SUSPEND THE RULE CHANGES WAS ARBITRARY AND CAPRICIOUS, CONTRARY TO LAW, AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

In light of the requirements of the Exchange Act and this Court's decision in *NetCoalition*, the Commission was obligated to suspend the rule changes, or at a minimum abused its discretion and acted arbitrarily and capriciously in refusing to do so. In the wake of this Court's decision holding that the Commission lacked a

sufficient basis to rely on supposed competition to ensure that market-data fees are "fair and reasonable" under the Exchange Act, suspension of Intervenors' unsubstantiated fees pending disapproval proceedings was manifestly "necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act]." 15 U.S.C. § 78s(b)(3)(C).

Indeed, the Commission itself has acknowledged that "it obviously would be inappropriate for [it] to rely on non-existent competitive forces as a basis for approving an exchange proposal." Direct Order, 73 Fed. Reg. at 74787. It is equally inappropriate to allow fee proposals to remain effective absent actual, rather than theoretical, evidence of competition. Yet in their rule filings, the Exchanges rely entirely on unsubstantiated and analytically flawed theory and speculation, already rejected in *NetCoalition*, to support their contention that significant competitive forces constrain the pricing of their market-data products.

The Exchanges did not support their rule changes with any evidence of the cost of collecting and distributing the market data. Instead, they continue to advance the conclusory argument that "order flow competition," and a related theory of "platform competition," justify the proposed fees, despite the fundamental errors in these theories and the lack of evidence to support them. Moreover, those theories essentially eliminate any oversight function by the Commission of any fee charged by any exchange. Because the alleged constraints

of order flow and platform competition will *always* exist, acceptance of Intervenors' argument means that *any* fee proposed by an exchange for the use of *any* of its facilities, whether market data or otherwise, will be deemed valid and not subject to challenge. The result would be a lack of any semblance of review by the Commission and an abdication of its supervisory role in assuring the fairness and reasonableness of an exchange's fees.

Finally, the rule changes cannot be sustained on the theory that adequate substitutes for Intervenors' market data constrain the fees they can charge for that data. Each exchange's exclusive market data is unique to that exchange. The same "substitutability" argument was rejected in *NetCoalition* and there is nothing new here to support it.

As in other recent cases decided by this Court, the Commission's refusal to suspend the rule changes reflects a failure to "adequately . . . assess the economic effects of a new rule"; to examine cost information as a critical part of that analysis; and to "respond to substantial problems raised by commenters." *Bus. Roundtable*, 647 F.3d at 1148–49; *see also id*. at 1155 (Commission relied on "*ipse dixit*, without any evidentiary support and unresponsive to the contrary claim" of objectors, and gave an "unutterably mindless reason" for applying new rule). Here, no less than in those cases, the Commission's action must be set aside.

A. The Rule Changes Are Not Supported By The Cost Data Called For By The *NetCoalition* Court.

As the Court in *NetCoalition* held, the costs incurred in collecting and distributing non-core market data are relevant in assessing the reasonableness of the fees an exchange charges for that data because "in a competitive market, the price of a product is supposed to approach its marginal cost, *i.e.*, the seller's cost of producing one additional unit." 615 F.3d at 537. As the Court stated:

> Supracompetitive pricing may be evidence of "monopoly," or "market," power. . . . Thus, the costs of collecting and distributing market data can indicate whether an exchange is taking "excessive profits" or subsidizing its service with another source of revenue . . . .

Id. Moreover, the need for cost data "appears to be elevated" because of the risk that Intervenors, as "exclusive" providers of their market data, can exercise market power. *Id*. at 538.

1. The Exchanges do not and cannot deny the relevance of cost data. Instead, they argue that costs can be ignored because "cost-based pricing" is "[i]mpractical." JA 363. The short answer is that "an agency may not shirk a statutory responsibility simply because it may be difficult." *NetCoalition*, 615 F.3d at 539; *see also NASD, Inc. v. SEC*, 801 F.2d 1415, 1420–21 (D.C. Cir. 1986) ("[t]hat it may be difficult to allocate costs does not provide an excuse for refusing to do so").

Beyond this, however, the Exchanges' argument attacks a straw man, as Petitioners have never argued that the Exchange Act requires strict, cost-of-service ratemaking. Thus, the "several documents attesting to the difficulty of cost-based pricing in this area" cited by NYSE Arca sweep wide of the mark. JA 363. Rather, Petitioners have consistently maintained that a proposed fee's relationship to cost is relevant in assessing whether competition significantly constrains market-data fees, particularly where, as here, the market is essentially a new one and the proponents of the fees have proffered no meaningful evidence of actual market behavior.

As noted in *NetCoalition*, the alleged difficulty of determining costs is also directly undercut by Intervenors' own statements. 615 F.3d at 538 (citing statements that "'NYSE Arca believes that the proposed market data fees would reflect an equitable allocation of its *overall costs* to users of its facilities'"; that, in setting fee levels, NYSE Arca considered "'the contribution that revenues accruing from Arca Book Fees would make toward meeting the *overall costs* of NYSE Arca's operations'"; and that "'market data revenues compare favorably to the markets' *cost of producing the data*'") (emphases added). The Commission virtually conceded the point during oral argument in *NetCoalition*:

> JUDGE EDWARDS: – obviously the folks who want to increase the fee have figured out something because they said we want to charge fees because our costs have gone up. So, they figured out something.

> MR. PENNINGTON: But they haven't done any kind of an allocation that would be a rate making –
>
> JUDGE EDWARDS: Well, then how do they know their costs went up?
>
> . . .
>
> JUDGE EDWARDS: No, but what I'm saying is they made the proposal on a significant, significantly because they said they were incurring increased costs, so obviously –
>
> MR. PENNINGTON: Yes.
>
> JUDGE EDWARDS: – someone figured it out in house, and I bet you they can figure it out in house.
>
> MR. PENNINGTON: Well, they can –
>
> JUDGE EDWARDS: I'd be stunned if they couldn't.
>
> MR. PENNINGTON: No, they can figure it out. I'm sure that whatever their increase[d] discrete cost is they know that.
>
> JUDGE EDWARDS: Right.

JA 440–41.

2. The obvious explanation for Intervenors' reluctance to provide cost data is that the marginal costs of collecting and disseminating non-core market data are insignificant and do not support the proposed fees. As Nasdaq recently conceded in another rule filing not at issue here, the marginal cost of providing market data to additional customers is "small, or even zero." *Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Link Market Data Fees and Transaction Execution Fees*, 76 Fed. Reg. 4970, 4973–74 (Jan. 27, 2011).

The Commission's refusal to suspend the rule changes, without considering costs, is no less arbitrary, capricious, and contrary to the Exchange Act here than the Commission's order was in *NetCoalition*. The Court should therefore vacate and set aside the rule changes and remand to the Commission for an assessment of Intervenors' costs of producing the market data at issue.

B. The Rule Changes Cannot Be Sustained Based On The Theory That Order Flow Constrains The Price Of Market Data.

Intervenors also cannot sustain their fees based on the argument, rejected in *NetCoalition*, that competition for order flow and trade execution provides an effective constraint on the fees an exchange can charge for its market-data products. *See* 615 F.3d at 541 (noting "the lack of support in the record" for this assertion). That reasoning remains flawed: The fact that an exchange competes for order flow does not, and cannot, demonstrate the separate proposition that market-data prices are constrained by competitive forces.

1. As the Court in *NetCoalition* held, the Commission failed to establish that "the connection works both ways." *Id*. at 539. The price of depth-of-book or other market data does not and could not affect marginal decisions to send orders to a particular exchange. Trading orders are placed on a transaction-specific, security-specific basis. As a result, the factors considered in placing trades on a particular exchange are transaction fees (including rebates), as well as other factors

potentially affecting trader choices at the point of trade, such as the exchange's execution speed, ease of access, and customer service. *See* JA 474–75, 490.

In contrast, market data is not paid for on a transactional basis, but instead is sold in monthly subscriptions, typically based on a fixed monthly fee per device or subscriber. *See* JA 475, 491. Data fees are thus a fixed or sunk cost that has already been incurred by traders prior to the point of trade. That cost does not vary based on the extent to which the data is used to place orders, or whether the trader examines the data for one security, all securities, or some number in between. An increase or decrease in the monthly subscription fee for data thus does not change a trader's marginal cost or incentive to buy or sell a particular security on a particular exchange. Market data is thus not a marginal cost of trading but a fixed cost—a necessary fixed input for the optimization of trading profits—for which a monopoly price can be charged.

2. The rule filings at issue provide no new or substantial evidence that competition for order flow acts as a meaningful competitive constraint on an exchange's market-data fees. Seeking to support the same fees that were rejected in *NetCoalition,* NYSE Arca contends that "more recent data" show that competition for order flow "has intensified," creating greater volatility in the shares of total trading volume on each of the various trading venues. JA 362. But

if that is true, it only underscores the need to buy market data, and pay the fixed monthly subscription fee, prior to the point of trade execution.

To have a reasonably comprehensive picture of liquidity in a given security, investors need market data from *all* exchanges with substantial trading in that security. *See* JA 494; *see also* JA 400 (NYSE Arca stating that "the displayed depth-of-book data of one trading center *does not provide a complete picture of the full market for the security*") (emphasis added). The more volatile and unpredictable the liquidity of each exchange, the greater the need to buy *all* major venues' data, in advance, to ensure a full picture of the liquidity available for a particular security across venues if and when it comes time to place an order for that security. And greater demand for an exchange's unique market data can only increase that exchange's ability to charge higher prices.

3. Intervenors also claim as new evidence a study cited by the SEC in a footnote in the Direct Order, but not specifically referred to by this Court in its decision. JA 362 (NYSE Arca filing citing Terrence Hendershott & Charles M. Jones, *Island Goes Dark: Transparency, Fragmentation, and Regulation*, 18 Rev. of Fin. Studies 743 (2005)); *see also* 76 Fed. Reg. at 4977 (Nasdaq filing citing "additional evidence" submitted by NYSE Arca). However, the Court rejected the conclusion Intervenors seek to derive from the Hendershott & Jones study, which was addressed to the single, anecdotal example of Island ECN, which lost 50% of

its market share nearly a decade ago when it stopped displaying its order book to the public. As the Court concluded, the Island ECN example merely shows that "depth-of-book market data is apparently important enough to at least some traders that it must be made available"; it "say[s] nothing about whether an exchange like NYSE Arca is constrained to price its depth-of-book data competitively." 615 F.3d at 541–42.[16]

For the same reason, the fact that a minority of professional traders may account for significant trading volume on the Exchanges, *see* JA 361, does not demonstrate that order flow competition constrains market-data prices. As the Island ECN example demonstrates, the *availability* of market data may be critical to a relatively small subset of professional investors—that is, an exchange cannot go completely "dark" with respect to market data without jeopardizing its order flow from high-volume traders. But that does not change the fact that exchanges with significant liquidity, such as NYSE Arca or Nasdaq,[17] can charge

[16] NYSE Arca also cited this purported "new evidence" in its petition for rehearing in *NetCoalition*, which this Court denied. *See* Int. Pet. Reh'g at 6–9, No. 09-1042, Dkt. #1266631 (Sept. 17, 2010). NYSE Arca also repeats the example of BATS, a competing exchange, having provided its depth-of-book data for free in order to gain order flow. *See* JA 362. The *NetCoalition* Court also rejected the argument that the BATS example supported the Exchanges' order flow competition theory. *See* 615 F.3d at 541.

[17] According to the Commission's own statistics in *NetCoalition*, Nasdaq reported 30.4% of the share volume in U.S.-listed equities during June 2008, the highest among all exchanges, and NYSE Arca reported 16.5%, the third highest. Direct

supracompetitive *prices* for their exclusive market data that traders need. And a professional trader needs access even to an exchange with a small overall market share but a dominant or substantial market share in particular securities. As the Commission itself has stated, "Few investors could afford to do without the best quotations and trades of such an SRO that is dominant in a significant number of stocks." *Regulation NMS*, 70 Fed. Reg. 37496, 37559 (June 29, 2005).

In sum, the record in this case, just as in *NetCoalition*, contains no substantial evidence that competition for order flow acts as a meaningful competitive constraint on an exchange's market-data fees. That flawed theory provides no support for the Commission's refusal to suspend the fees.

C. The "Joint Products" Theory Does Not Support The Contention That Intervenors' Market-Data Fees Are Constrained By Competition.

In an offshoot of their order flow argument, Intervenors claim that market data and trade executions are "joint products" with "joint costs" that are linked on a "platform basis" and that competition among different trading "platforms"

Order, 73 Fed. Reg. at 74783, tbl. 1. If considered together with affiliate NYSE, NYSE Arca enjoys even greater liquidity: approximately one-third of share volume in all U.S.-listed equities, and almost 45% of volume of NYSE-listed equities. *Id.* And those are just average figures—for individual securities, the share volume of the Exchanges can be much higher. However measured, there can be no question that Intervenors' share volume is substantial.

somehow constrains pricing for each exchange's unique market data.[18] Under this theory, an exchange could price its data fees higher and execution fees lower, or vice versa, but would allegedly be constrained by competitive forces from pricing those fees in the aggregate above the price of joint products on other exchanges or trading venues. *See*, *e.g.*, JA 43–44. Like the theory that order flow competition constrains market-data fees, the "platform competition" theory is fundamentally flawed and does not support the proposed fees.

1. *First*, the argument is inconsistent with the Exchange Act, which requires exclusive processors of market data to distribute the data they make available on "fair and reasonable terms." 15 U.S.C. § 78k-1(c)(1)(C). Intervenors essentially argue that they may set market-data prices that exceed competitive levels so long as they charge less for their other services—even though some buyers of market data, such as NetCoalition's members, are not even consumers of the Exchanges' order execution services. Allowing so-called "joint products" to immunize monopolistically priced data fees from review by wrapping them together with fees for other services would nullify the "fair and reasonable" requirement in the Exchange Act. As the *NetCoalition* Court held, in assessing the fairness and reasonableness of market-data fees, the pricing and accompanying costs of *market data itself* are what is relevant. *See* 615 F.3d at 537 ("Thus, the costs of collecting

[18] *See* JA 44, 98, 363, 546.

and distributing *market data* can indicate whether an exchange is taking 'excessive profits' or subsidizing its service with another source of revenue"); *id*. at 538 (noting "the risk that NYSE Arca could exercise market power appears to be elevated in the pricing of its *proprietary non-core data*") (emphases added).

2. *Second*, the "platform" theory is flawed as a matter of economics. Order execution services and market data are bought and sold separately, at different times in different proportions and by different consumers. Indeed, for firms that act as intermediaries between trading platforms and the public but do not trade themselves, such as Google and Yahoo!, the price of market data stands entirely on its own. *See* JA 490. When two products are bought and sold separately, the price of each is the result of the distinct competitive conditions confronting each product, and competition for one does not constrain the pricing of the other. *See* JA 495–96; *see also Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*, 694 F.2d 923, 929 (2d Cir. 1982) ("Competition between money market funds for shareholder business does not support an inference that competition must therefore also exist between adviser-managers for fund business. The former may be vigorous even though the latter is virtually non-existent. Each is governed by different forces.").

3. *Third*, Intervenors offer no evidence that market-data prices have been constrained by "platform competition." In fact the evidence is to the contrary: While arguing that market share for order flow is volatile and changes dramatically

due to "fierce competition," *see* JA 44, 362–63, the Exchanges identify no such volatility in the market for depth-of-book or other market data. If market data were bought and sold jointly with order execution services, one would expect to see switches in order flow accompanied by corresponding switches in depth-of-book data purchases. The lack of evidence that this happens demonstrates that these two products are not jointly bought and sold, undercutting the entire premise of the "platform competition" theory.

4. *Fourth*, as with its order flow competition theory, the "platform competition" theory wrongly assumes that traders can readily switch orders to another "platform" in response to a price increase in market data, and thereby lower their overall trading costs. But directing trade execution to a different platform does not save the trader the costs of purchasing market data from the first platform if he or she needs to obtain that platform's market data to optimize trading profits. And for those investors who purchase only market data from a platform and no other services, there is no aggregate cost of using an exchange, just the cost of the data they purchase. Their only choice is to pay the increased data prices imposed by the exchange or stop buying the data entirely.

In sum, Intervenors provide no actual evidence, let alone any substantial evidence, to support their "platform competition" hypothesis. The *NetCoalition* Court vacated the Commission's order in that case because there was no evidence

to support the Commission's theories as to pricing constraints. 615 F.3d at 542–44. The result here should be the same: vacatur of the Commission's refusal to suspend the rule changes, with the burden on the Commission, if it chooses, to try to support the proposed fees on remand with cost data and evidence of actual, as opposed to theoretical, competitive constraint.

D. The Rule Changes Cannot Be Sustained On The Theory That Substitutes Exist For The Exchanges' Market Data.

In *NetCoalition,* Intervenors and the Commission posited the existence of several so-called "substitutes" for depth-of-book data that allegedly constrain the Exchanges' exercise of market power: (1) core or consolidated data; (2) market data from other exchanges; (3) "pinging" orders; and (4) the threat of independent distribution of order data by securities firms and data vendors acting in concert. *See* 615 F.3d at 542. This Court rejected each of these arguments, holding that "the SEC had insufficient evidence before it to conclude that a trader interested in depth-of-book data would substitute any of the four alternatives (or simply do without) instead of paying a supracompetitive price." *Id.* at 544.

In the rule filings here, Intervenors have, by conspicuous omission, effectively abandoned core data, "pinging," and potential collaborative ventures as alternatives. And while they continue to suggest that market data from other

trading venues provides "pricing discipline" for their own data products,[19] they offer no new or substantial evidence to show that these alternatives meaningfully constrain their ability to charge monopoly prices for their exclusive market data.

1. As discussed by the *NetCoalition* Court, substitutability is evaluated using the SSNIP ("small but significant non-transitory increase in price") test, which asks whether a hypothetical monopolist could profitably impose a small but significant price increase, generally assumed to be 5%. *See* 615 F.3d at 542–43; FTC, *Horizontal Merger Guidelines* 8–13 (Aug. 19, 2010).

2. The only purportedly "new" evidence cited by the Exchanges is anecdotal and insubstantial. For example, according to NYSE Arca, for a one-month period in June 2010, "ten of the top 30 users" of "intermarket sweep orders" ("ISOs"), which are typically used by institutional rather than retail investors, did not subscribe to NYSE's ArcaBook depth-of-book product, supposedly evidencing that "[t]hey believe they have adequate sources of data to submit ISOs without purchasing ArcaBook data." JA 360.

This anecdotal evidence undermines the "substitutability" claim. The same evidence indicates that 20 firms, accounting for *93%* of all PNP ISOs (the primary type of ISO on NYSE Arca), and accounting for over half of NYSE Arca Tape A

[19] *See* JA 547 (citing "[t]he large number of SROs, TRFs, BDs and ATSs that currently produce proprietary data or are currently capable of producing it").

and Tape B trading volume, *do* purchase ArcaBook. *See* JA 361. The ten firms that do not subscribe accounted for only 7% of ISO orders and 1% of Tape A and Tape B trading volume. *See id.*[20] This evidence, thin as it is, confirms that most professional traders *do* regard NYSE Arca's depth-of-book data as essential.[21]

The rule filings do not supply the kind of empirical evidence the *NetCoalition* Court held is needed to support a substitutability argument, such as "the number of potential users of the data or how they might react to a change in price," or "whether the traders who want depth-of-book data would decline to purchase it if met with a supracompetitive price." 615 F.3d at 542–43. The Exchanges still have not proffered any actual "evidence of trader behavior" to support their untested substitutability theories. *Id.* at 543.

3. NYSE Arca also offers a "hypothetical" to demonstrate how alternatives to an exchange's market data supposedly constrain its fees, but it is just that—a

[20] According to NYSE Arca, the top 30 firms (including the 10 who did not purchase ArcaBook) comprise 56% of Tape A and B volume, and the 20 who did subscribe account for 54.72%, leaving the 10 non-subscribing firms to account for about 1% of Tape A and B volume. *See* JA 361 & n.26.

[21] NYSE Arca also contends that the fact that it lost subscribers when it began charging a fee for ArcaBook establishes that its current fees are at the competitive level because it cannot raise its prices any higher. *See* JA 361. But given high enough prices, every monopolist faces elastic demand for its products. *See* William M. Landes & Richard A Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 960–61, 978–79 (1981). Thus, the fact that NYSE Arca is allegedly constrained at its current price from increasing its fees says nothing about whether the current fees are set at the competitive level.

hypothetical—not actual evidence. JA 360–61. And it is divorced from economic reality. NYSE Arca's "hypothetical" assumes that were an exchange to increase the price of its data from $10 to $15, only 40% of its subscribers would cancel. *See id.* In a truly competitive market, a price increase of that magnitude—50%—should cause almost all users to switch. The test for whether there are substitutes for a product is whether users will switch when faced with a "small but significant non-transitory increase in price," generally assumed to be around 5%. *See NetCoalition*, 615 F.3d at 542; *Merger Guidelines*, *supra*, at 8–13. The hypothetical advanced by NYSE Arca is not substantial evidence.

Market data from other trading venues simply is not a substitute for the Exchanges' own exclusive data.[22] Each exchange's data is unique. Every vendor, Internet portal, or broker-dealer must obtain NYSE Arca's and Nasdaq's market

[22] As the United Kingdom Office of Fair Trading and the Competition Commission explained:

> An exchange is a monopolist of its proprietary market information. Of necessity the available market data sets will vary as between exchanges. As such, information from other exchanges is complementary and cannot substitute for exchange-specific information.

Anticipated Acquisition by Deutsche Borse AG of the London Stock Exchange, ¶ 93 (Mar. 29, 2005), *available at* http://www.oft.gov.uk/shared_oft/mergers_ea02/2005/deutsche.pdf.

data from those exchanges alone. Intervenors' continued assertion that market data from other trading venues is a substitute for their own data is without basis.

* * * *

Effective regulation by the SEC is essential to prevent exchanges from exploiting their monopoly over market data for unfair commercial gain. The SEC's refusal to suspend the Exchanges' fees is an abdication of its responsibility to ensure the fairness and reasonableness of those fees.

CONCLUSION

The Court should vacate the SEC's refusal to suspend the rule changes and remand for an assessment of the Exchanges' costs of providing their market data and, based on actual and substantial evidence, whether competition significantly constrains the pricing of such data.

Respectfully submitted,

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March 22, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 13,734 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface using the 2007 version of Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2012, I filed the foregoing Final Brief of Petitioners NetCoalition and Securities Industry & Financial Markets Association with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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STATUTORY ADDENDUM

5 U.S.C. § 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

15 U.S.C. § 78f(b). National securities exchanges

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(b) Determination by Commission requisite to registration of applicant as a national securities exchange

An exchange shall not be registered as a national securities exchange unless the Commission determines that--

(1) Such exchange is so organized and has the capacity to be able to carry out the purposes of this chapter and to comply, and (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2) of this title) to enforce compliance by its members and persons associated with its members, with the provisions of this chapter, the rules and regulations thereunder, and the rules of the exchange.

(2) Subject to the provisions of subsection (c) of this section, the rules of the exchange provide that any registered broker or dealer or natural person associated with a registered broker or dealer may become a member of such exchange and any person may become associated with a member thereof.

(3) The rules of the exchange assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer.

(4) The rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

(5) The rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this chapter matters not related to the

purposes of this chapter or the administration of the exchange.

(6) The rules of the exchange provide that (subject to any rule or order of the Commission pursuant to section 78q(d) or 78s(g)(2) of this title) its members and persons associated with its members shall be appropriately disciplined for violation of the provisions of this chapter, the rules or regulations thereunder, or the rules of the exchange, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

(7) The rules of the exchange are in accordance with the provisions of subsection (d) of this section, and in general, provide a fair procedure for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange or a member thereof.

(8) The rules of the exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.

(9)(A) The rules of the exchange prohibit the listing of any security issued in a limited partnership rollup transaction (as such term is defined in paragraphs (4) and (5) of section 78n(h) of this title), unless such transaction was conducted in accordance with procedures designed to protect the rights of limited partners, including--

(i) the right of dissenting limited partners to one of the following:

(I) an appraisal and compensation;

(II) retention of a security under substantially the same terms and conditions as the original issue;

(III) approval of the limited partnership rollup transaction by not less than 75 percent of the outstanding securities of each of the participating limited partnerships;

(IV) the use of a committee of limited partners that is independent, as determined in accordance with rules prescribed by the exchange, of the

general partner or sponsor, that has been approved by a majority of the outstanding units of each of the participating limited partnerships, and that has such authority as is necessary to protect the interest of limited partners, including the authority to hire independent advisors, to negotiate with the general partner or sponsor on behalf of the limited partners, and to make a recommendation to the limited partners with respect to the proposed transaction; or

(V) other comparable rights that are prescribed by rule by the exchange and that are designed to protect dissenting limited partners;

(ii) the right not to have their voting power unfairly reduced or abridged;

(iii) the right not to bear an unfair portion of the costs of a proposed limited partnership rollup transaction that is rejected; and

(iv) restrictions on the conversion of contingent interests or fees into non-contingent interests or fees and restrictions on the receipt of a non-contingent equity interest in exchange for fees for services which have not yet been provided.

(B) As used in this paragraph, the term "dissenting limited partner" means a person who, on the date on which soliciting material is mailed to investors, is a holder of a beneficial interest in a limited partnership that is the subject of a limited partnership rollup transaction, and who casts a vote against the transaction and complies with procedures established by the exchange, except that for purposes of an exchange or tender offer, such person shall file an objection in writing under the rules of the exchange during the period during which the offer is outstanding.

(10)(A) The rules of the exchange prohibit any member that is not the beneficial owner of a security registered under section 78*l* of this title from granting a proxy to vote the security in connection with a shareholder vote described in subparagraph (B), unless the beneficial owner of the security has instructed the member to vote the proxy in accordance with the voting instructions of the beneficial owner.

(B) A shareholder vote described in this subparagraph is a shareholder vote with respect to the election of a member of the board of directors of an issuer, executive compensation, or any other significant matter, as determined by the

Commission, by rule, and does not include a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80b-1 et seq.).

(C) Nothing in this paragraph shall be construed to prohibit a national securities exchange from prohibiting a member that is not the beneficial owner of a security registered under section 78*l* of this title from granting a proxy to vote the security in connection with a shareholder vote not described in subparagraph (A).

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15 U.S.C. § 78k-1. National market system for securities; securities information processors

(a) Congressional findings; facilitating establishment of national market system for securities; designation of qualified securities

(1) The Congress finds that--

(A) The securities markets are an important national asset which must be preserved and strengthened.

(B) New data processing and communications techniques create the opportunity for more efficient and effective market operations.

(C) It is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure--

(i) economically efficient execution of securities transactions;

(ii) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets;

(iii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities;

(iv) the practicability of brokers executing investors' orders in the best market; and

(v) an opportunity, consistent with the provisions of clauses (i) and (iv) of this subparagraph, for investors' orders to be executed without the participation of a dealer.

(D) The linking of all markets for qualified securities through communication and data processing facilities will foster efficiency, enhance competition, increase the information available to brokers, dealers, and investors, facilitate the offsetting of investors' orders, and contribute to best execution of such orders.

(2) The Commission is directed, therefore, having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, to use its authority under this chapter to facilitate the establishment of a

national market system for securities (which may include subsystems for particular types of securities with unique trading characteristics) in accordance with the findings and to carry out the objectives set forth in paragraph (1) of this subsection. The Commission, by rule, shall designate the securities or classes of securities qualified for trading in the national market system from among securities other than exempted securities. (Securities or classes of securities so designated hereinafter [FN1] in this section referred to as "qualified securities".)

(3) The Commission is authorized in furtherance of the directive in paragraph (2) of this subsection--

(A) to create one or more advisory committees pursuant to the Federal Advisory Committee Act (which shall be in addition to the National Market Advisory Board established pursuant to subsection (d) of this section) and to employ one or more outside experts;

(B) by rule or order, to authorize or require self-regulatory organizations to act jointly with respect to matters as to which they share authority under this chapter in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one or more facilities thereof; and

(C) to conduct studies and make recommendations to the Congress from time to time as to the possible need for modifications of the scheme of self-regulation provided for in this chapter so as to adapt it to a national market system.

(b) Securities information processors; registration; withdrawal of registration; access to services; censure; suspension or revocation of registration

(1) Except as otherwise provided in this section, it shall be unlawful for any securities information processor unless registered in accordance with this subsection, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a securities information processor. The Commission, by rule or order, upon its own motion or upon application, may conditionally or unconditionally exempt any securities information processor or class of securities information processors or security or class of securities from any provision of this section or the rules or regulations thereunder, if the Commission finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of this section, including the maintenance of fair and orderly markets in securities and the removal of impediments to and perfection of the mechanism of a national market system:

Provided, however, That a securities information processor not acting as the exclusive processor of any information with respect to quotations for or transactions in securities is exempt from the requirement to register in accordance with this subsection unless the Commission, by rule or order, finds that the registration of such securities information processor is necessary or appropriate in the public interest, for the protection of investors, or for the achievement of the purposes of this section.

(2) A securities information processor may be registered by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the address of its principal office, or offices, the names of the securities and markets for which it is then acting and for which it proposes to act as a securities information processor, and such other information and documents as the Commission, by rule, may prescribe with regard to performance capability, standards and procedures for the collection, processing, distribution, and publication of information with respect to quotations for and transactions in securities, personnel qualifications, financial condition, and such other matters as the Commission determines to be germane to the provisions of this chapter and the rules and regulations thereunder, or necessary or appropriate in furtherance of the purposes of this section.

(3) The Commission shall, upon the filing of an application for registration pursuant to paragraph (2) of this subsection, publish notice of the filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application. Within ninety days of the date of the publication of such notice (or within such longer period as to which the applicant consents) the Commission shall--

(A) by order grant such registration, or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred eighty days of the date of publication of notice of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for the conclusion of such proceedings for up to sixty days if it finds good cause for such extension and publishes its reasons for so finding or for such longer periods as to which the applicant consents.

The Commission shall grant the registration of a securities information processor if the Commission finds that such securities information processor is so organized, and has the capacity, to be able to assure the prompt, accurate, and reliable performance of its functions as a securities information processor, comply with the provisions of this chapter and the rules and regulations thereunder, carry out its functions in a manner consistent with the purposes of this section, and, insofar as it is acting as an exclusive processor, operate fairly and efficiently. The Commission shall deny the registration of a securities information processor if the Commission does not make any such finding.

(4) A registered securities information processor may, upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any registered securities information processor is no longer in existence or has ceased to do business in the capacity specified in its application for registration, the Commission, by order, shall cancel the registration.

(5)(A) If any registered securities information processor prohibits or limits any person in respect of access to services offered, directly or indirectly, by such securities information processor, the registered securities information processor shall promptly file notice thereof with the Commission. The notice shall be in such form and contain such information as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. Any prohibition or limitation on access to services with respect to which a registered securities information processor is required by this paragraph to file notice shall be subject to review by the Commission on its own motion, or upon application by any person aggrieved thereby filed within thirty days after such notice has been filed with the Commission and received by such aggrieved person, or within such longer period as the Commission may determine. Application to the Commission for review, or the institution of review by the Commission on its own motion, shall not operate as a stay of such prohibition or limitation, unless the Commission otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). The Commission shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

(B) In any proceeding to review the prohibition or limitation of any person in respect of access to services offered by a registered securities information

processor, if the Commission finds, after notice and opportunity for hearing, that such prohibition or limitation is consistent with the provisions of this chapter and the rules and regulations thereunder and that such person has not been discriminated against unfairly, the Commission, by order, shall dismiss the proceeding. If the Commission does not make any such finding or if it finds that such prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter, the Commission, by order, shall set aside the prohibition or limitation and require the registered securities information processor to permit such person access to services offered by the registered securities information processor.

(6) The Commission, by order, may censure or place limitations upon the activities, functions, or operations of any registered securities information processor or suspend for a period not exceeding twelve months or revoke the registration of any such processor, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest, necessary or appropriate for the protection of investors or to assure the prompt, accurate, or reliable performance of the functions of such securities information processor, and that such securities information processor has violated or is unable to comply with any provision of this chapter or the rules or regulations thereunder.

(c) Rules and regulations covering use of mails or other means or instrumentalities of interstate commerce; reports of purchase or sale of qualified securities; limiting registered securities transactions to national securities exchanges

(1) No self-regulatory organization, member thereof, securities information processor, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to collect, process, distribute, publish, or prepare for distribution or publication any information with respect to quotations for or transactions in any security other than an exempted security, to assist, participate in, or coordinate the distribution or publication of such information, or to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any such security in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter to--

(A) prevent the use, distribution, or publication of fraudulent, deceptive, or manipulative information with respect to quotations for and transactions in such

securities;

(B) assure the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information;

(C) assure that all securities information processors may, for purposes of distribution and publication, obtain on fair and reasonable terms such information with respect to quotations for and transactions in such securities as is collected, processed, or prepared for distribution or publication by any exclusive processor of such information acting in such capacity;

(D) assure that all exchange members, brokers, dealers, securities information processors, and, subject to such limitations as the Commission, by rule, may impose as necessary or appropriate for the protection of investors or maintenance of fair and orderly markets, all other persons may obtain on terms which are not unreasonably discriminatory such information with respect to quotations for and transactions in such securities as is published or distributed by any self-regulatory organization or securities information processor;

(E) assure that all exchange members, brokers, and dealers transmit and direct orders for the purchase or sale of qualified securities in a manner consistent with the establishment and operation of a national market system; and

(F) assure equal regulation of all markets for qualified securities and all exchange members, brokers, and dealers effecting transactions in such securities.

(2) The Commission, by rule, as it deems necessary or appropriate in the public interest or for the protection of investors, may require any person who has effected the purchase or sale of any qualified security by use of the mails or any means or instrumentality of interstate commerce to report such purchase or sale to a registered securities information processor, national securities exchange, or registered securities association and require such processor, exchange, or association to make appropriate distribution and publication of information with respect to such purchase or sale.

(3)(A) The Commission, by rule, is authorized to prohibit brokers and dealers from effecting transactions in securities registered pursuant to section 78*l*(b) of this title otherwise than on a national securities exchange, if the Commission finds, on the

record after notice and opportunity for hearing, that--

(i) as a result of transactions in such securities effected otherwise than on a national securities exchange the fairness or orderliness of the markets for such securities has been affected in a manner contrary to the public interest or the protection of investors;

(ii) no rule of any national securities exchange unreasonably impairs the ability of any dealer to solicit or effect transactions in such securities for his own account or unreasonably restricts competition among dealers in such securities or between dealers acting in the capacity of market makers who are specialists in such securities and such dealers who are not specialists in such securities, and

(iii) the maintenance or restoration of fair and orderly markets in such securities may not be assured through other lawful means under this chapter.

The Commission may conditionally or unconditionally exempt any security or transaction or any class of securities or transactions from any such prohibition if the Commission deems such exemption consistent with the public interest, the protection of investors, and the maintenance of fair and orderly markets.

(B) For the purposes of subparagraph (A) of this paragraph, the ability of a dealer to solicit or effect transactions in securities for his own account shall not be deemed to be unreasonably impaired by any rule of an exchange fairly and reasonably prescribing the sequence in which orders brought to the exchange must be executed or which has been adopted to effect compliance with a rule of the Commission promulgated under this chapter.

(4) The Commission is directed to review any and all rules of national securities exchanges which limit or condition the ability of members to effect transactions in securities otherwise than on such exchanges.

(5) No national securities exchange or registered securities association may limit or condition the participation of any member in any registered clearing agency.

(d) National Market Advisory Board

(1) Not later than one hundred eighty days after June 4, 1975, the Commission shall establish a National Market Advisory Board (hereinafter in this section referred to as the “Advisory Board”) to be composed of fifteen members, not all of

whom shall be from the same geographical area of the United States, appointed by the Commission for a term specified by the Commission of not less than two years or more than five years. The Advisory Board shall consist of persons associated with brokers and dealers (who shall be a majority) and persons not so associated who are representative of the public and, to the extent feasible, have knowledge of the securities markets of the United States.

(2) It shall be the responsibility of the Advisory Board to formulate and furnish to the Commission its views on significant regulatory proposals made by the Commission or any self-regulatory organization concerning the establishment, operation, and regulation of the markets for securities in the United States.

(3)(A) The Advisory Board shall study and make recommendations to the Commission as to the steps it finds appropriate to facilitate the establishment of a national market system. In so doing, the Advisory Board shall assume the responsibilities of any advisory committee appointed to advise the Commission with respect to the national market system which is in existence at the time of the establishment of the Advisory Board.

(B) The Advisory Board shall study the possible need for modifications of the scheme of self-regulation provided for in this chapter so as to adapt it to a national market system, including the need for the establishment of a new self-regulatory organization (hereinafter in this section referred to as a "National Market Regulatory Board" or "Regulatory Board") to administer the national market system. In the event the Advisory Board determines a National Market Regulatory Board should be established, it shall make recommendations as to:

(i) the point in time at which a Regulatory Board should be established;

(ii) the composition of a Regulatory Board;

(iii) the scope of the authority of a Regulatory Board;

(iv) the relationship of a Regulatory Board to the Commission and to existing self-regulatory organizations; and

(v) the manner in which a Regulatory Board should be funded.

The Advisory Board shall report to the Congress, on or before December 31, 1976, the results of such study and its recommendations, including such

recommendations for legislation as it deems appropriate.

(C) In carrying out its responsibilities under this paragraph, the Advisory Board shall consult with self-regulatory organizations, brokers, dealers, securities information processors, issuers, investors, representatives of Government agencies, and other persons interested or likely to participate in the establishment, operation, or regulation of the national market system.

(e) National markets system for security futures products

(1) Consultation and cooperation required

With respect to security futures products, the Commission and the Commodity Futures Trading Commission shall consult and cooperate so that, to the maximum extent practicable, their respective regulatory responsibilities may be fulfilled and the rules and regulations applicable to security futures products may foster a national market system for security futures products if the Commission and the Commodity Futures Trading Commission jointly determine that such a system would be consistent with the congressional findings in subsection (a)(1). In accordance with this objective, the Commission shall, at least 15 days prior to the issuance for public comment of any proposed rule or regulation under this section concerning security futures products, consult and request the views of the Commodity Futures Trading Commission.

(2) Application of rules by order of CFTC

No rule adopted pursuant to this section shall be applied to any person with respect to the trading of security futures products on an exchange that is registered under section 78f(g) of this title unless the Commodity Futures Trading Commission has issued an order directing that such rule is applicable to such persons.

15 U.S.C. § 78s. Registration, responsibilities, and oversight of self-regulatory organizations

(a) Registration procedures; notice of filing; other regulatory agencies

(1) The Commission shall, upon the filing of an application for registration as a national securities exchange, registered securities association, or registered clearing agency, pursuant to section 78f, 78*o*-3, or 78q-1 of this title, respectively, publish notice of such filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application. Within ninety days of the date of publication of such notice (or within such longer period as to which the applicant consents), the Commission shall--

(A) by order grant such registration, or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred eighty days of the date of a publication of notice of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if it finds that the requirements of this chapter and the rules and regulations thereunder with respect to the applicant are satisfied. The Commission shall deny such registration if it does not make such finding.

(2) With respect to an application for registration filed by a clearing agency for which the Commission is not the appropriate regulatory agency--

(A) The Commission shall not grant registration prior to the sixtieth day after the date of publication of notice of the filing of such application unless the appropriate regulatory agency for such clearing agency has notified the Commission of such appropriate regulatory agency's determination that such clearing agency is so organized and has the capacity to be able to safeguard securities and funds in its custody or control or for which it is responsible and that the rules of such clearing agency are designed to assure the safeguarding of

such securities and funds.

(B) The Commission shall institute proceedings in accordance with paragraph (1)(B) of this subsection to determine whether registration should be denied if the appropriate regulatory agency for such clearing agency notifies the Commission within sixty days of the date of publication of notice of the filing of such application of such appropriate regulatory agency's (i) determination that such clearing agency may not be so organized or have the capacity to be able to safeguard securities or funds in its custody or control or for which it is responsible or that the rules of such clearing agency may not be designed to assure the safeguarding of such securities and funds and (ii) reasons for such determination.

(C) The Commission shall deny registration if the appropriate regulatory agency for such clearing agency notifies the Commission prior to the conclusion of proceedings instituted in accordance with paragraph (1)(B) of this subsection of such appropriate regulatory agency's (i) determination that such clearing agency is not so organized or does not have the capacity to be able to safeguard securities or funds in its custody or control or for which it is responsible or that the rules of such clearing agency are not designed to assure the safeguarding of such securities or funds and (ii) reasons for such determination.

(3) A self-regulatory organization may, upon such terms and conditions as the Commission, by rule, deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any self-regulatory organization is no longer in existence or has ceased to do business in the capacity specified in its application for registration, the Commission, by order, shall cancel its registration. Upon the withdrawal of a national securities association from registration or the cancellation, suspension, or revocation of the registration of a national securities association, the registration of any association affiliated therewith shall automatically terminate.

(b) Proposed rule changes; notice; proceedings

(1) Each self-regulatory organization shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this subsection collectively referred to as a “proposed rule change”) accompanied by a concise general statement of the basis

and purpose of such proposed rule change. The Commission shall, as soon as practicable after the date of the filing of any proposed rule change, publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change. No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.

(2) Approval process

(A) Approval process established

(i) In general

Except as provided in clause (ii), not later than 45 days after the date of publication of a proposed rule change under paragraph (1), the Commission shall--

(I) by order, approve or disapprove the proposed rule change; or

(II) institute proceedings under subparagraph (B) to determine whether the proposed rule change should be disapproved.

(ii) Extension of time period

The Commission may extend the period established under clause (i) by not more than an additional 45 days, if--

(I) the Commission determines that a longer period is appropriate and publishes the reasons for such determination; or

(II) the self-regulatory organization that filed the proposed rule change consents to the longer period.

(B) Proceedings

(i) Notice and hearing

If the Commission does not approve or disapprove a proposed rule change

under subparagraph (A), the Commission shall provide to the self-regulatory organization that filed the proposed rule change--

(I) notice of the grounds for disapproval under consideration; and

(II) opportunity for hearing, to be concluded not later than 180 days after the date of publication of notice of the filing of the proposed rule change.

(ii) Order of approval or disapproval

(I) In general

Except as provided in subclause (II), not later than 180 days after the date of publication under paragraph (1), the Commission shall issue an order approving or disapproving the proposed rule change.

(II) Extension of time period

The Commission may extend the period for issuance under clause (I) by not more than 60 days, if--

(aa) the Commission determines that a longer period is appropriate and publishes the reasons for such determination; or

(bb) the self-regulatory organization that filed the proposed rule change consents to the longer period.

(C) Standards for approval and disapproval

(i) Approval

The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this chapter and the rules and regulations issued under this chapter that are applicable to such organization.

(ii) Disapproval

The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make a finding described in clause (i).

(iii) Time for approval

The Commission may not approve a proposed rule change earlier than 30 days after the date of publication under paragraph (1), unless the Commission finds good cause for so doing and publishes the reason for the finding.

(D) Result of failure to institute or conclude proceedings

A proposed rule change shall be deemed to have been approved by the Commission, if--

(i) the Commission does not approve or disapprove the proposed rule change or begin proceedings under subparagraph (B) within the period described in subparagraph (A); or

(ii) the Commission does not issue an order approving or disapproving the proposed rule change under subparagraph (B) within the period described in subparagraph (B)(ii).

(E) Publication date based on Federal Register publishing

For purposes of this paragraph, if, after filing a proposed rule change with the Commission pursuant to paragraph (1), a self-regulatory organization publishes a notice of the filing of such proposed rule change, together with the substantive terms of such proposed rule change, on a publicly accessible website, the Commission shall thereafter send the notice to the Federal Register for publication thereof under paragraph (1) within 15 days of the date on which such website publication is made. If the Commission fails to send the notice for publication thereof within such 15 day period, then the date of publication shall be deemed to be the date on which such website publication was made.

(F) Rulemaking

(i) In general

Not later than 180 days after July 21, 2010, after consultation with other regulatory agencies, the Commission shall promulgate rules setting forth the procedural requirements of the proceedings required under this paragraph.

(ii) Notice and comment not required

The rules promulgated by the Commission under clause (i) are not required to include republication of proposed rule changes or solicitation of public comment.

(3)(A) Notwithstanding the provisions of paragraph (2) of this subsection, a proposed rule change shall take effect upon filing with the Commission if designated by the self-regulatory organization as (i) constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization, (ii) establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, or (iii) concerned solely with the administration of the self-regulatory organization or other matters which the Commission, by rule, consistent with the public interest and the purposes of this subsection, may specify as without the provisions of such paragraph (2).

(B) Notwithstanding any other provision of this subsection, a proposed rule change may be put into effect summarily if it appears to the Commission that such action is necessary for the protection of investors, the maintenance of fair and orderly markets, or the safeguarding of securities or funds. Any proposed rule change so put into effect shall be filed promptly thereafter in accordance with the provisions of paragraph (1) of this subsection.

(C) Any proposed rule change of a self-regulatory organization which has taken effect pursuant to subparagraph (A) or (B) of this paragraph may be enforced by such organization to the extent it is not inconsistent with the provisions of this chapter, the rules and regulations thereunder, and applicable Federal and State law. At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1), the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) to determine whether the proposed rule should be approved or disapproved. Commission action pursuant to this subparagraph shall not affect the validity or force of the rule change during the period it was in effect and shall not be reviewable under section 78y of this title nor deemed to be "final agency

action" for purposes of section 704 of Title 5.

(4) With respect to a proposed rule change filed by a registered clearing agency for which the Commission is not the appropriate regulatory agency--

(A) The Commission shall not approve any such proposed rule change prior to the thirtieth day after the date of publication of notice of the filing whereof unless the appropriate regulatory agency for such clearing agency has notified the Commission of such appropriate regulatory agency's determination that the proposed rule change is consistent with the safeguarding of securities and funds in the custody or control of such clearing agency or for which it is responsible.

(B) The Commission shall institute proceedings in accordance with paragraph (2)(B) of this subsection to determine whether any such proposed rule change should be disapproved, if the appropriate regulatory agency for such clearing agency notifies the Commission within thirty days of the date of publication of notice of the filing of the proposed rule change of such appropriate regulatory agency's (i) determination that the proposed rule change may be inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination.

(C) The Commission shall disapprove any such proposed rule change if the appropriate regulatory agency for such clearing agency notifies the Commission prior to the conclusion of proceedings instituted in accordance with paragraph (2)(B) of this subsection of such appropriate regulatory agency's (i) determination that the proposed rule change is inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination.

(D)(i) The Commission shall order the temporary suspension of any change in the rules of a clearing agency made by a proposed rule change that has taken effect under paragraph (3), if the appropriate regulatory agency for the clearing agency notifies the Commission not later than 30 days after the date on which the proposed rule change was filed of--

(I) the determination by the appropriate regulatory agency that the rules of such clearing agency, as so changed, may be inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible; and

(II) the reasons for the determination described in subclause (I).

(ii) If the Commission takes action under clause (i), the Commission shall institute proceedings under paragraph (2)(B) to determine if the proposed rule change should be approved or disapproved.

(5) The Commission shall consult with and consider the views of the Secretary of the Treasury prior to approving a proposed rule filed by a registered securities association that primarily concerns conduct related to transactions in government securities, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor. If the Secretary of the Treasury comments in writing to the Commission on a proposed rule that has been published for comment, the Commission shall respond in writing to such written comment before approving the proposed rule. If the Secretary of the Treasury determines, and notifies the Commission, that such rule, if implemented, would, or as applied does (i) adversely affect the liquidity or efficiency of the market for government securities; or (ii) impose any burden on competition not necessary or appropriate in furtherance of the purposes of this section, the Commission shall, prior to adopting the proposed rule, find that such rule is necessary and appropriate in furtherance of the purposes of this section notwithstanding the Secretary's determination.

(6) In approving rules described in paragraph (5), the Commission shall consider the sufficiency and appropriateness of then existing laws and rules applicable to government securities brokers, government securities dealers, and persons associated with government securities brokers and government securities dealers.

(7) Security futures product rule changes

(A) Filing required

A self-regulatory organization that is an exchange registered with the Commission pursuant to section 78f(g) of this title or that is a national securities association registered pursuant to section 78o-3(k) of this title shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule change or any proposed change in, addition to, or deletion from the rules of such self- regulatory organization (hereinafter in this paragraph collectively referred to as a “proposed rule change”) that relates to higher margin levels, fraud or manipulation, recordkeeping, reporting, listing standards, or decimal pricing for security futures products, sales practices for

security futures products for persons who effect transactions in security futures products, or rules effectuating such self-regulatory organization's obligation to enforce the securities laws. Such proposed rule change shall be accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, upon the filing of any proposed rule change, promptly publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit data, views, and arguments concerning such proposed rule change.

(B) Filing with CFTC

A proposed rule change filed with the Commission pursuant to subparagraph (A) shall be filed concurrently with the Commodity Futures Trading Commission. Such proposed rule change may take effect upon filing of a written certification with the Commodity Futures Trading Commission under section 7a-2(c) of Title 7, upon a determination by the Commodity Futures Trading Commission that review of the proposed rule change is not necessary, or upon approval of the proposed rule change by the Commodity Futures Trading Commission.

(C) Abrogation of rule changes

Any proposed rule change of a self- regulatory organization that has taken effect pursuant to subparagraph (B) may be enforced by such self-regulatory organization to the extent such rule is not inconsistent with the provisions of this title, the rules and regulations thereunder, and applicable Federal law. At any time within 60 days of the date of the filing of a written certification with the Commodity Futures Trading Commission under section 7a-2(c) of Title 7, the date the Commodity Futures Trading Commission determines that review of such proposed rule change is not necessary, or the date the Commodity Futures Trading Commission approves such proposed rule change, the Commission, after consultation with the Commodity Futures Trading Commission, may summarily abrogate the proposed rule change and require that the proposed rule change be refiled in accordance with the provisions of paragraph (1), if it appears to the Commission that such proposed rule change unduly burdens competition or efficiency, conflicts with the securities laws, or is inconsistent with the public interest and the protection of investors. Commission action pursuant to the preceding sentence shall not affect the validity or force of the rule change during the period it was in effect and shall not be reviewable under

section 25 of this title nor deemed to be a final agency action for purposes of section 704 of Title 5.

(D) Review of resubmitted abrogated rules

(i) Proceedings

Within 35 days of the date of publication of notice of the filing of a proposed rule change that is abrogated in accordance with subparagraph (C) and refiled in accordance with paragraph (1), or within such longer period as the Commission may designate up to 90 days after such date if the Commission finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall--

(I) by order approve such proposed rule change; or

(II) after consultation with the Commodity Futures Trading Commission, institute proceedings to determine whether the proposed rule change should be disapproved. Proceedings under subclause (II) shall include notice of the grounds for disapproval under consideration and opportunity for hearing and be concluded within 180 days after the date of publication of notice of the filing of the proposed rule change. At the conclusion of such proceedings, the Commission, by order, shall approve or disapprove such proposed rule change. The Commission may extend the time for conclusion of such proceedings for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the self-regulatory organization consents.

(ii) Grounds for approval

The Commission shall approve a proposed rule change of a self-regulatory organization under this subparagraph if the Commission finds that such proposed rule change does not unduly burden competition or efficiency, does not conflict with the securities laws, and is not inconsistent with the public interest or the protection of investors. The Commission shall disapprove such a proposed rule change of a self-regulatory organization if it does not make such finding. The Commission shall not approve any proposed rule change prior to the 30th day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes

its reasons for so finding.

(8) Decimal pricing

Not later than 9 months after the date on which trading in any security futures product commences under this chapter, all self- regulatory organizations listing or trading security futures products shall file proposed rule changes necessary to implement decimal pricing of security futures products. The Commission may not require such rules to contain equal minimum increments in such decimal pricing.

(9) Consultation with CFTC

(A) Consultation required

The Commission shall consult with and consider the views of the Commodity Futures Trading Commission prior to approving or disapproving a proposed rule change filed by a national securities association registered pursuant to section 78o-3(a) of this title or a national securities exchange subject to the provisions of subsection (a) that primarily concerns conduct related to transactions in security futures products, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor.

(B) Responses to CFTC comments and findings

If the Commodity Futures Trading Commission comments in writing to the Commission on a proposed rule that has been published for comment, the Commission shall respond in writing to such written comment before approving or disapproving the proposed rule. If the Commodity Futures Trading Commission determines, and notifies the Commission, that such rule, if implemented or as applied, would--

(i) adversely affect the liquidity or efficiency of the market for security futures products; or

(ii) impose any burden on competition not necessary or appropriate in furtherance of the purposes of this section,

the Commission shall, prior to approving or disapproving the proposed rule,

find that such rule is necessary and appropriate in furtherance of the purposes of this section notwithstanding the Commodity Futures Trading Commission's determination.

(10) Rule of construction relating to filing date of proposed rule changes

(A) In general

For purposes of this subsection, the date of filing of a proposed rule change shall be deemed to be the date on which the Commission receives the proposed rule change.

(B) Exception

A proposed rule change has not been received by the Commission for purposes of subparagraph (A) if, not later than 7 business days after the date of receipt by the Commission, the Commission notifies the self-regulatory organization that such proposed rule change does not comply with the rules of the Commission relating to the required form of a proposed rule change, except that if the Commission determines that the proposed rule change is unusually lengthy and is complex or raises novel regulatory issues, the Commission shall inform the self-regulatory organization of such determination not later than 7 business days after the date of receipt by the Commission and, for the purposes of subparagraph (A), a proposed rule change has not been received by the Commission, if, not later than 21 days after the date of receipt by the Commission, the Commission notifies the self-regulatory organization that such proposed rule change does not comply with the rules of the Commission relating to the required form of a proposed rule change.

(c) Amendment by Commission of rules of self-regulatory organizations

The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as “amend”) the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this chapter and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this chapter, in the following manner:

(1) The Commission shall notify the self-regulatory organization and publish

notice of the proposed rulemaking in the Federal Register. The notice shall include the text of the proposed amendment to the rules of the self-regulatory organization and a statement of the Commission's reasons, including any pertinent facts, for commencing such proposed rulemaking.

(2) The Commission shall give interested persons an opportunity for the oral presentation of data, views, and arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation.

(3) A rule adopted pursuant to this subsection shall incorporate the text of the amendment to the rules of the self-regulatory organization and a statement of the Commission's basis for and purpose in so amending such rules. This statement shall include an identification of any facts on which the Commission considers its determination so to amend the rules of the self-regulatory agency to be based, including the reasons for the Commission's conclusions as to any of such facts which were disputed in the rulemaking.

(4)(A) Except as provided in paragraphs (1) through (3) of this subsection, rulemaking under this subsection shall be in accordance with the procedures specified in section 553 of Title 5 for rulemaking not on the record.

(B) Nothing in this subsection shall be construed to impair or limit the Commission's power to make, or to modify or alter the procedures the Commission may follow in making, rules and regulations pursuant to any other authority under this chapter.

(C) Any amendment to the rules of a self-regulatory organization made by the Commission pursuant to this subsection shall be considered for all purposes of this chapter to be part of the rules of such self-regulatory organization and shall not be considered to be a rule of the Commission.

(5) With respect to rules described in subsection (b)(5) of this section, the Commission shall consult with and consider the views of the Secretary of the Treasury before abrogating, adding to, and deleting from such rules, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor.

(d) Notice of disciplinary action taken by self-regulatory organization against a member or participant; review of action by appropriate regulatory agency; procedure

(1) If any self-regulatory organization imposes any final disciplinary sanction on any member thereof or participant therein, denies membership or participation to any applicant, or prohibits or limits any person in respect to access to services offered by such organization or member thereof or if any self-regulatory organization (other than a registered clearing agency) imposes any final disciplinary sanction on any person associated with a member or bars any person from becoming associated with a member, the self-regulatory organization shall promptly file notice thereof with the appropriate regulatory agency for the self-regulatory organization and (if other than the appropriate regulatory agency for the self-regulatory organization) the appropriate regulatory agency for such member, participant, applicant, or other person. The notice shall be in such form and contain such information as the appropriate regulatory agency for the self-regulatory organization, by rule, may prescribe as necessary or appropriate in furtherance of the purposes of this chapter.

(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. Application to such appropriate regulatory agency for review, or the institution of review by such appropriate regulatory agency on its own motion, shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). Each appropriate regulatory agency shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

(3) The provisions of this subsection shall apply to an exchange registered pursuant to section 78f(g) of this title or a National securities association registered pursuant to section 78o-3(k) of this title only to the extent that such exchange or association imposes any final disciplinary sanction for

> **(A)** a violation of the Federal securities laws or the rules and regulations thereunder; or

(B) a violation of a rule of such exchange or association, as to which a proposed change would be required to be filed under this section, except that, to the extent that the exchange or association rule violation relates to any account, agreement, contract, or transaction, this subsection shall apply only to the extent such violation involves a security futures product.

(e) Disposition of review; cancellation, reduction, or remission of sanction

(1) In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization on a member thereof or participant therein or a person associated with such a member, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction)--

(A) if the appropriate regulatory agency for such member, participant, or person associated with a member finds that such member, participant, or person associated with a member has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of such provisions of this chapter, the rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association, the rules of the Municipal Securities Rulemaking Board as have been specified in the determination of the self-regulatory organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this chapter, such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or

(B) if such appropriate regulatory agency does not make any such finding it shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.

(2) If the appropriate regulatory agency for a member, participant, or person associated with a member, having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this

chapter or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.

(f) Dismissal of review proceeding

In any proceeding to review the denial of membership or participation in a self-regulatory organization to any applicant, the barring of any person from becoming associated with a member of a self-regulatory organization, or the prohibition or limitation by a self-regulatory organization of any person with respect to access to services offered by the self-regulatory organization or any member thereof, if the appropriate regulatory agency for such applicant or person, after notice and opportunity for hearing (which 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) finds that the specific grounds on which such denial, bar, or prohibition or limitation is based exist in fact, that such denial, bar, or prohibition or 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 purposes of this chapter, such appropriate regulatory agency, by order, shall dismiss the proceeding. If such appropriate regulatory agency does not make any such finding or if it finds that such denial, bar, or prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter, such appropriate regulatory agency, by order, shall set aside the action of the self-regulatory organization and require it to admit such applicant to membership or participation, permit such person to become associated with a member, or grant such person access to services offered by the self-regulatory organization or member thereof.

(g) Compliance with rules and regulations

(1) Every self-regulatory organization shall comply with the provisions of this chapter, the rules and regulations thereunder, and its own rules, and (subject to the provisions of section 78q(d) of this title, paragraph (2) of this subsection, and the rules thereunder) absent reasonable justification or excuse enforce compliance--

(A) in the case of a national securities exchange, with such provisions by its members and persons associated with its members;

(B) in the case of a registered securities association, with such provisions and the provisions of the rules of the Municipal Securities Rulemaking Board by its

members and persons associated with its members; and

(C) in the case of a registered clearing agency, with its own rules by its participants.

(2) The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this chapter, may relieve any self-regulatory organization of any responsibility under this chapter to enforce compliance with any specified provision of this chapter or the rules or regulations thereunder by any member of such organization or person associated with such a member, or any class of such members or persons associated with a member.

(h) Suspension or revocation of self-regulatory organization's registration; censure; other sanctions

(1) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to suspend for a period not exceeding twelve months or revoke the registration of such self-regulatory organization, or to censure or impose limitations upon the activities, functions, and operations of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such self-regulatory organization has violated or is unable to comply with any provision of this chapter, the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance--

(A) in the case of a national securities exchange, with any such provision by a member thereof or a person associated with a member thereof;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by a member thereof or a person associated with a member thereof; or

(C) in the case of a registered clearing agency, with any provision of its own rules by a participant therein.

(2) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the

purposes of this chapter, to suspend for a period not exceeding twelve months or expel from such self-regulatory organization any member thereof or participant therein, if such member or participant is subject to an order of the Commission pursuant to section 78*o*(b)(4) of this title or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such member or participant has willfully violated or has effected any transaction for any other person who, such member or participant had reason to believe, was violating with respect to such transaction--

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933 [15 U.S.C.A. § 77a et seq.], the Investment Advisers Act of 1940 [15 U.S.C.A. § 80b-1 et seq.], the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.], this chapter, or the rules or regulations under any of such statutes;

(B) in the case of a registered securities association, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this chapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board; or

(C) in the case of a registered clearing agency, any provision of the rules of the clearing agency.

(3) The appropriate regulatory agency for a national securities exchange or registered securities association is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to suspend for a period not exceeding twelve months or to bar any person from being associated with a member of such national securities exchange or registered securities association, if such person is subject to an order of the Commission pursuant to section 78*o*(b)(6) of this title or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such person has willfully violated or has effected any transaction for any other person who, such person associated with a member had reason to believe, was violating with respect to such transaction--

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this chapter, or the rules or regulations under any of such statutes; or

(B) in the case of a registered securities association, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment

Company Act of 1940, this chapter, the rules or regulations under any of the statutes, or the rules of the Municipal Securities Rulemaking Board.

(4) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to remove from office or censure any person who is, or at the time of the alleged misconduct was, an officer or director of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such person has willfully violated any provision of this chapter, the rules or regulations thereunder, or the rules of such self-regulatory organization, willfully abused his authority, or without reasonable justification or excuse has failed to enforce compliance--

(A) in the case of a national securities exchange, with any such provision by any member or person associated with a member;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by any member or person associated with a member; or

(C) in the case of a registered clearing agency, with any provision of the rules of the clearing agency by any participant.

(i) Appointment of trustee

If a proceeding under subsection (h)(1) of this section results in the suspension or revocation of the registration of a clearing agency, the appropriate regulatory agency for such clearing agency may, upon notice to such clearing agency, apply to any court of competent jurisdiction specified in section 78u(d) or 78aa of this title for the appointment of a trustee. In the event of such an application, the court may, to the extent it deems necessary or appropriate, take exclusive jurisdiction of such clearing agency and the records and assets thereof, wherever located; and the court shall appoint the appropriate regulatory agency for such clearing agency or a person designated by such appropriate regulatory agency as trustee with power to take possession and continue to operate or terminate the operations of such clearing agency in an orderly manner for the protection of participants and investors, subject to such terms and conditions as the court may prescribe.

15 U.S.C. § 78y. Court review of orders and rules

(a) Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence

(1) A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated by the Commission for that purpose. Thereupon the Commission shall file in the court the record on which the order complained of is entered, as provided in section 2112 of Title 28 and the Federal Rules of Appellate Procedure.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.

(4) The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

(5) If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order.

(b) Commission rules; persons adversely affected; petition; record; affirmance, enforcement, or setting aside of rules; findings; transfer of proceedings

(1) A person adversely affected by a rule of the Commission promulgated pursuant to section 78f, 78i(h)(2), 78k, 78k-1, 78*o*(c)(5) or (6), 78*o*-3, 78q, 78q-1, or 78s of

this title may obtain review of this rule in the United States Court of Appeals for the circuit in which he resides or has his principal place of business or for the District of Columbia Circuit, by filing in such court, within sixty days after the promulgation of the rule, a written petition requesting that the rule be set aside.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated for that purpose. Thereupon, the Commission shall file in the court the rule under review and any documents referred to therein, the Commission's notice of proposed rulemaking and any documents referred to therein, all written submissions and the transcript of any oral presentations in the rulemaking, factual information not included in the foregoing that was considered by the Commission in the promulgation of the rule or proffered by the Commission as pertinent to the rule, the report of any advisory committee received or considered by the Commission in the rulemaking, and any other materials prescribed by the court.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the materials set forth in paragraph (2) of this subsection, to affirm and enforce or to set aside the rule.

(4) The findings of the Commission as to the facts identified by the Commission as the basis, in whole or in part, of the rule, if supported by substantial evidence, are conclusive. The court shall affirm and enforce the rule unless the Commission's action in promulgating the rule is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.

(5) If proceedings have been instituted under this subsection in two or more courts of appeals with respect to the same rule, the Commission shall file the materials set forth in paragraph (2) of this subsection in that court in which a proceeding was first instituted. The other courts shall thereupon transfer all such proceedings to the court in which the materials have been filed. For the convenience of the parties in the interest of justice that court may thereafter transfer all the proceedings to any other court of appeals.

(c) Objections not urged before Commission; stay of orders and rules; transfer of enforcement or review proceedings

(1) No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.

(2) The filing of a petition under this section does not operate as a stay of the Commission's order or rule. Until the court's jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires. After the filing of a petition under this section, the court, on whatever conditions may be required and to the extent necessary to prevent irreparable injury, may issue all necessary and appropriate process to stay the order or rule or to preserve status or rights pending its review; but (notwithstanding section 705 of Title 5) no such process may be issued by the court before the filing of the record or the materials set forth in subsection (b)(2) of this section unless: (A) the Commission has denied a stay or failed to grant requested relief, (B) a reasonable period has expired since the filing of an application for a stay without a decision by the Commission, or (C) there was reasonable ground for failure to apply to the Commission.

(3) When the same order or rule is the subject of one or more petitions for review filed under this section and an action for enforcement filed in a district court of the United States under section 78u(d) or (e) of this title, that court in which the petition or the action is first filed has jurisdiction with respect to the order or rule to the exclusion of any other court, and thereupon all such proceedings shall be transferred to that court; but, for the convenience of the parties in the interest of justice, that court may thereafter transfer all the proceedings to any other court of appeals or district court of the United States, whether or not a petition for review or an action for enforcement was originally filed in the transferee court. The scope of review by a district court under section 78u(d) or (e) of this title is in all cases the same as by a court of appeals under this section.

(d) Other appropriate regulatory agencies

(1) For purposes of the preceding subsections of this section, the term “Commission” includes the agencies enumerated in section 78c(a)(34) of this title insofar as such agencies are acting pursuant to this chapter and the Secretary of the Treasury insofar as he is acting pursuant to section 78*o*-5 of this title.

(2) For purposes of subsection (a)(4) of this section and section 706 of Title 5, an order of the Commission pursuant to section 78s(a) of this title denying registration to a clearing agency for which the Commission is not the appropriate regulatory

agency or pursuant to section 78s(b) of this title disapproving a proposed rule change by such a clearing agency shall be deemed to be an order of the appropriate regulatory agency for such clearing agency insofar as such order was entered by reason of a determination by such appropriate regulatory agency pursuant to section 78s(a)(2)(C) or 78s(b)(4)(C) of this title that such registration or proposed rule change would be inconsistent with the safeguarding of securities or funds.