

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1324

September Term, 2019

FILED ON: JUNE 5, 2020

THE NASDAQ STOCK MARKET, LLC, ET AL.,
PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION,
RESPONDENT

BOX EXCHANGE LLC, ET AL.,
INTERVENORS

Consolidated with 18-1327, 19-1112, 19-1113, 19-1128, 19-1129

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

Before: MILLETT and WILKINS, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

These petitions for review were considered on the record from the Securities and Exchange Commission, as well as on the briefs and oral arguments of the parties. We have accorded the issues full consideration and determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petitions for review be granted and that the Commission's October 16, 2018 Remand Order be remanded to the Commission for reconsideration in light of our disposition in No. 18-1292. The motions to dismiss the petitions for lack of jurisdiction are denied.

We have jurisdiction under the collateral order doctrine to review the Commission's order. *See Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 330–332 (D.C. Cir. 1989); *see generally Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022, 1024 (D.C. Cir. 1976) (*per curiam*) (holding that the collateral-order doctrine applies to the Hobbs Act, 28 U.S.C. § 2342, which contains language nearly identical to the Securities and Exchange Act, 15 U.S.C. § 78y(a)(1)).

First, the Remand Order conclusively (i) commands the Petitioners to develop rules and procedures for adjudicating challenges to changes in generally applicable fees, and (ii) orders immediate and expeditious adjudication of scores of fee disputes. Specifically, the Commission's order imposes on Petitioners the immediate obligations both to develop procedures for resolving and then to use those procedures to adjudicate 61 applications for review challenging more than 400 rule changes and plan amendments. In doing so, the Commission has compelled Petitioners to employ a legal framework and process for those adjudications that Petitioners argue the Commission cannot lawfully impose. See *Securities Indus. & Fin. Mkts. Ass'n*, Exchange Act Release No. 84433, at 1–3 (Oct. 16, 2018), 2018 WL 5023230 (“Remand Order”). The order further requires that all of those actions be completed within one year. *Id.* at 2–3. The Commission has not left that directive open to further consideration.

Second, the authority of the Commission to impose that ponderous burden and adjudicatory obligation on Petitioners is an “important question” that is “separate from the merits” of any particular fee change. *Oglala Sioux Tribe v. United States Nuclear Regulatory Comm'n*, 896 F.3d 520, 528 (D.C. Cir. 2018) (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009)).

Third, the Remand Order is effectively unreviewable on appeal. As the Commission acknowledged at oral argument, Petitioners are self-regulatory organizations that are not permitted to appeal their own decisions on this remand. See 15 U.S.C. § 78s(d)(2) (providing for review of a self-regulatory organization's decision “on [the Commission's] own motion, or upon application by any person aggrieved thereby”); *id.* § 78k-1(b)(5)(A) (same for the framework that the Remand Order applies to plan amendments); see also *Occidental Petroleum*, 873 F.2d at 330–332 (When the party challenging the order cannot appeal “after the proceedings on remand, then the order is by definition effectively unreviewable on appeal from a final judgment.”) (internal quotation marks omitted). Even on the off chance that the Commission might ultimately review the merits of those decisions on its own motion or at another party's request, Petitioners would have already borne the entire burden of developing procedures and conducting hundreds of proceedings. At that point, any available redress would be too little and too late. The damage would be done before the Remand Order's legality could be reviewed. So it is now or never for judicial review.

What is worse, the sole purpose of the challenged remand has disappeared. The Remand Order tasks Petitioners with considering the applications for review in light of the merits order. Remand Order at 2 (remanding “so that [Petitioners] can consider the impact of the” merits order). Because the merits order has now been vacated, the basis for the Commission's remand has evaporated. Presumably that is why the Commission conceded at oral argument that a remand to the agency would be appropriate if we vacated its merits order in No. 18-1292—as we do today. We agree with the Commission, and remand for it to reconsider the Remand Order in light of our decision in No. 18-1292.

For those reasons, we grant the petitions for review.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk