

1 LOHIER, *Circuit Judge, concurring*:

2 I agree with our resolution of the issues involved in this case and concur
3 fully in the majority opinion. I write separately to remind the reader that after
4 oral argument our panel requested and received a helpful amicus curiae brief
5 from the Securities and Exchange Commission (SEC) addressing the questions of
6 subject matter jurisdiction and immunity that the majority opinion so ably
7 resolves. To the litany of reasons in support of the result in this case, therefore, I
8 would add one more: deference to the SEC's reasonable and persuasive position
9 on the specific questions before us. In my view, that position is especially
10 persuasive because the SEC has significant, specialized expertise in exchange
11 matters and information relating to the defendant exchanges, delegates its
12 regulatory authority to the exchanges, retains extensive oversight over the
13 exchanges' exercise of that authority, and understands the boundaries of that
14 authority. Having independently arrived at the disposition (if not every
15 approach) urged by the SEC, the majority opinion understandably opted to say
16 nothing about deferring to the agency's position. But it would have been
17 perfectly appropriate to defer here, at least with respect to the narrow issues we
18 resolve, based on "the thoroughness evident in" the SEC's consideration of these

1 issues, “the validity of its reasoning,” and the “consistency” of its position “with
2 earlier and later pronouncements.” Skidmore v. Swift & Co., 323 U.S. 134, 140
3 (1944).