



May 21, 2018

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Petition for Rulemaking Concerning Market Data Fees (File No. 4-716)

Dear Mr. Fields:

SIFMA appreciates the opportunity to comment on the Petition for Rulemaking Concerning Market Data Fees (the “Petition”) submitted by a cross-section of market participants.¹ SIFMA wishes to respond to the comment letter submitted by The Nasdaq Stock Market LLC (“Nasdaq”) opposing Commission consideration of the Petition.²

The Petition proposes a number of steps that the Commission could take to promote transparency and improve governance of the National Market System, including requiring revenue and expense disclosure, repealing immediate effectiveness for SIP fee filings, amending NMS voting rules, and improving exchanges’ economic analysis. Petition 7–9. Rather than addressing these proposals, Nasdaq’s letter focuses overwhelmingly (at 2–3, 5–8) on an administrative law judge’s Initial Decision about competition among depth-of-book data services. *In re SIFMA*, File No. 3-15350. SIFMA, of course, strongly disagrees that competition constrains market-data prices, for the reasons set forth in SIFMA’s briefs and currently under *de novo* review by the Commission. Regardless, Nasdaq’s letter repeatedly contends that the Initial Decision, which addresses only depth-of-book data, has definitively resolved the questions raised in the Petition, which largely focus on top-of-book data. *E.g.*, Letter at 4–5 (“the petition would require the Commission to ... disregar[d] the record and findings in the SIFMA denial-of-access proceeding”); *id.* at 3, 4, 6, 8.

But Nasdaq’s attempt to tie the Commission’s hands misunderstands the posture of the Petition and the *SIFMA* Initial Decision. The Petition invites the Commission to consider

¹ See Petition for Rulemaking Concerning Market Data Fees (Dec. 6, 2017), *available at* <https://www.sec.gov/rules/petitions/2017/petn4-716.pdf>.

² See Letter from Joan C. Conley, Senior Vice President & Corporate Secretary, Nasdaq, to Brent J. Fields, Secretary, Commission, dated February 26, 2018, *available at* <https://www.sec.gov/comments/4-716/4716-3160363-161950.pdf>.

structural and procedural reforms to the National Market System that the Commission has not yet spoken to. Those reforms are independent of the specific question, addressed in the Initial Decision, whether depth-of-book prices are constrained by competition. And the Initial Decision’s answer to that question is not final. “The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record.” SEC Rules of Practice 411. Accordingly, the Commission has granted review of that Initial Decision to consider SIFMA’s objections to it. *See* Release No. 78595 (Aug. 16, 2016). Insofar as Nasdaq’s letter merely rehashes arguments already addressed by the parties’ submissions, SIFMA respectfully refers the Commission to its opening and reply briefs in that pending proceeding.

The Petition’s call for greater transparency regarding costs and revenues, moreover, is not at odds with the Initial Decision in any event. *Contra* Nasdaq Letter 4–6. Nasdaq’s letter seeks to avoid the disclosure of cost data because the “Chief ALJ explained that ‘[c]ost and profit margin data are not required.’” Letter at 4 (citing Op. 33 [sic]). It asserts that the Petition and SIFMA’s litigation “see[k] the imposition of a cost-based ratemaking approach,” *id.*, when in fact both urge only disclosure and review—the Commission’s core concerns. *Id.* Such “disclosures of cost and revenue data proposed in the petition,” Nasdaq contends, “would represent a dramatic departure” that the “Commission and Courts” have “condemned.” *Id.* Neither the Commission nor the Courts, however, has “condemned” any potential efforts by the Commission to increase transparency surrounding the exchanges’ fee increases. The Initial Decision, in fact, quoted the D.C. Circuit’s decision in *NetCoalition I* expressly acknowledging that “cost analysis” is “not ... irrelevant.” Op. 4 n.7 (quoting 615 F.3d 525, 537 (D.C. Cir. 2010)). The Chief ALJ and D.C. Circuit, therefore, both recognized that “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.*

Similarly, Nasdaq argues that transparency and governance reforms are “unnecessary because competitive forces substantially constrain exchanges’ ability to raise market-data prices to unlawful levels.” Letter at 6. Nasdaq proceeds to discuss, at great length, the evidence Nasdaq believes shows that competition constrains market-data pricing. SIFMA’s briefs appealing the Initial Decision explain why Nasdaq’s position is incorrect: even after the D.C. Circuit vacated the Commission’s decision for lack of evidence of competition in *NetCoalition I*, the exchanges’ evidence and testimony here showed they wield significant pricing power because most customers do not treat market-data products as substitutes, Br. 5–21, Reply 2–13, and cannot constrain prices through their order-routing decisions, Br. 21–32, Reply 13–20. SIFMA will not repeat those arguments in connection with this Petition.³ Suffice it to say, because there is no evidence of

³ That SIFMA has “challenged more than 200 market-data fee filings” since 2013, Letter at 3, only proves that market participants are powerless to prevent the exchanges from filing more than 200 new or expanded fees since 2013. Unconstrained by market competition, the exchanges change their pricing practically every month. The customers who pay must resort to regulatory rather than competitive responses to those fees, as the D.C. Circuit ruled was appropriate in *NetCoalition II*, 715 F.3d 342, 353 (D.C. Cir. 2013) (“[W]e take the Commission at its word ... that it will make the section 19(d) process available to parties seeking review of unreasonable fees charged for market data.”).

competitive constraints, Nasdaq’s position fails under the Commission’s and the D.C. Circuit’s prior rulings.⁴

It is worth noting, however, that Nasdaq’s arguments make a fundamental error by conflating core and non-core data.⁵ The Initial Decision addressed only non-core “depth-of-book” data sold by individual exchanges, not the consolidated core “top-of-book” data sold jointly by the exchanges and discussed extensively in this Petition. In the *SIFMA* proceeding, the exchanges did not even contend, and the ALJ never considered, that “competitive forces substantially constrain exchanges’ ability to raise market-data prices” for core data. *Contra* Letter at 6. As a result, Nasdaq’s letter blurs the Commission’s longstanding cost-based approach to the pricing of consolidated top-of-book data,⁶ on the one hand, and the Initial Decision’s very different approach to depth-of-book fees.⁷

Accordingly, the Initial Decision’s discussion of cost and competition does not answer the fundamental questions raised in this Petition. The Initial Decision says nothing about the “complete lack of transparency concerning the allocation of hundreds of millions of dollars collected by exchanges for the dissemination of data through SIPs.” Petition at 4. It does not address the lack of meaningful governance over the National Market System Plans, specifically the “exchanges[’] complete control over setting SIPs’ fees with no input from other market participants.” *Id.* Nor does it confront the exchanges’ ability to “implement new fees or increase existing fees for market data feeds with minimal review” through “immediately effective” fee filings. Petition at 5–7. Tellingly, Nasdaq’s letter includes only 4 citations to the Petition, compared to more than 15 citations to the Initial Decision.

⁴ Nasdaq’s attempt to link the Treasury Report on Capital Markets to specific evidence before the Commission, Letter at 8 n.3, only reinforces SIFMA’s position. Notwithstanding the years-old material cited by Nasdaq, *id.*, only months ago the U.S. Treasury Department concluded that “the market for proprietary data feeds is not fully competitive.” A Financial System That Creates Economic Opportunities, at 64 (Oct. 2017), available at <https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf>.

⁵ “Core data” refers to “top-of-book” market data that is consolidated and sold exclusively by the Securities Information Processor to establish the national best bid and offer, while “non-core data” generally refers to exchange-specific “depth-of-book” (or “proprietary”) market data showing orders on an exchange that are not at the top of the exchange’s order book.

⁶ The Commission has explicitly recognized that because the “mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees,” ArcaBook Order, 73 Fed. Reg. 74770, 74779 (Dec. 9, 2008); accord Regulation NMS, 70 Fed. Reg. 37496, 37504 (June 29, 2005) (fees charged for core data “need to be tied to some type of cost-based standard . . .”); Release No. 42208, 64 FR 70613, 70627 (Dec. 17, 1999); *NetCoalition I*, 615 F.3d at 529 n.2.

⁷ To be sure, SIFMA vigorously disagrees with the Initial Decision’s conclusion that competitive forces constrain depth-of-book pricing. Top-of-book pricing under § 11A of the Exchange Act, however, is not even before the Commission in the *In re SIFMA* proceeding under § 19(d).

Accordingly, SIFMA respectfully submits that the arguments and evidence included in the parties' briefs sufficiently address the questions pending before the Commission in *In re SIFMA*. But neither those submissions nor the Initial Decision purport to resolve the questions of transparency, governance, and structural reform raised in this Petition, which the Commission now has the opportunity to address.

If you have any questions or would like to discuss this matter further, please do not hesitate to contact us.

Respectfully submitted,

Melissa MacGregor
Managing Director and Associate General Counsel

CC: Brett Redfearn, Director, Division of Trading & Markets