

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 2323/February 18, 2015

ADMINISTRATIVE PROCEEDING

File No. 3-15350

In the Matter of the Application of

SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION

For Review of Actions Taken by
Self-Regulatory Organizations

ORDER ON PROTECTIVE ORDER

On May 16, 2014, the Securities and Exchange Commission (Commission) issued an Order Establishing Procedures and Referring Applications for Review to Administrative Law Judge for Additional Proceedings. *Sec. Indus. & Fin. Mkts. Ass'n*, Securities Exchange Act of 1934 Release No. 72182, 2014 SEC LEXIS 1686. The hearing is scheduled to begin on April 20, 2015.

On February 3, 2015, NASDAQ Stock Market LLC (NASDAQ) and NYSE Arca, Inc. (NYSE Arca) (collectively, the Exchanges), filed a motion requesting the entry of a protective order. On February 9, 2015, the Securities Industry and Financial Markets Association (SIFMA) filed an opposition to the Exchanges' proposed protective order. On February 11, 2015, the Exchanges filed their reply brief.

All parties agree that the entry of a protective order is necessary in this proceeding, but they disagree on the scope. The Exchanges argue that many of the SIFMA members are its competitors and seek a protective order that would permit disclosure of "highly confidential" information to only this Court, outside counsel, experts, the Commission, and the authors of the documents. SIFMA argues the Exchanges' highly confidential documents need to be disclosed to its members because SIFMA's expertise regarding depth-of-book products resides with those members. SIFMA instead proposes a revised protective order that would permit disclosure of the Exchanges' highly confidential documents to SIFMA's members who are members of its Market Data Subcommittee, but only in their capacity as members of that Subcommittee.

Ruling

SIFMA does not effectively contest the allegation that many of its members compete with the Exchanges in the provision of certain financial information. Accordingly, the Exchanges' desire to prevent disclosure of sensitive material to its competitors is wholly reasonable. SIFMA has not offered a convincing justification why its members require access to the Exchanges' highly confidential information, and its proposed protective order is inadequately enforceable because it seeks to bind the conduct of SIFMA members, which SIFMA in the recent past has disclaimed the ability to control. Furthermore, if SIFMA believes that the Exchanges are improperly designating its documents, the Exchanges' proposed protective order contains a mechanism for resolving those issues. The Exchanges' proposed protective order is GRANTED.

Brenda P. Murray
Chief Administrative Law Judge

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The Honorable Brenda P. Murray,
Chief Administrative Law Judge

[PROPOSED] PROTECTIVE ORDER

In connection with the above-captioned proceedings, the Securities Industry and Financial Markets Association (“SIFMA”), the Nasdaq Stock Market LLC (“Nasdaq”), and NYSE Arca, Inc. (“NYSE Arca”) (together, the “Parties”) anticipate submitting confidential and highly confidential business documents and offering testimony regarding confidential, competitively sensitive topics, including pricing. This proceeding involves competitors, customers, and suppliers; accordingly, the disclosure of confidential information to one another or to the public in connection with this proceeding could harm the business of a producing party. Thus, in order to protect competition, and to preserve the confidentiality of competitively sensitive business information, the Parties have agreed to the following protections from disclosure for certain information (as described below).

IT IS HEREBY STIPULATED AND ORDERED AS FOLLOWS:

A. DEFINITIONS

1. As used in this Order:

a. “Confidential Information” means any trade secret or confidential

commercial or financial information, as such terms are used in Exemption 4 of the Freedom of

Information Act, 5 U.S.C. § 522(b)(4), SEC Rule of Practice 322, 17 CFR § 201.322, or Fed. R. Civ. P. 26(c)(1)(G), or any document or other material containing such information that has not been made public by the person claiming confidentiality. Any materials that are now in the public record are not Confidential Information.

b. “Highly Confidential Information” means information that: (i) meets the above definition of Confidential Information; (ii) constitutes highly sensitive business information, such as, but not limited to, contracting and negotiation strategies, pricing information, competitive analyses, and corporate goals or strategies; and (iii) is sufficiently sensitive that its disclosure to a competitor, customer, vendor, or supplier would materially affect or threaten injury to the business of the person or entity producing it. By way of example, Highly Confidential Information may include strategic planning information, customer lists, proprietary technology and systems, internal accounting data, and pricing information.

c. The “Parties” include the Securities Industry and Financial Markets Association (“SIFMA”), the Nasdaq Stock Market LLC (“Nasdaq”), and NYSE Arca, Inc. (“NYSE Arca”).

d. The “Exchanges” are Nasdaq and NYSE Arca.

e. “Protected Information” means information that is designated either as Confidential Information or Highly Confidential Information under the terms of this Order.

f. “Protected Person” means any person (including a Party or a non-Party) that has provided any materials in connection with this proceeding that it has designated as Protected Information.

g. The “Tribunal” means the Chief Administrative Law Judge of the Securities Exchange Commission.

h. “Disclosed” means shown, divulged, revealed, produced, described, transmitted, or otherwise communicated, in whole or in part.

i. “This action” means the above-captioned proceedings, as well as any further proceedings in connection with this matter, whether in front of this Tribunal, the Securities Exchange Commission, a federal court of appeals, or any other tribunal or authority.

j. “Document” means documents or electronically stored information as defined in Fed. R. Civ. P. 34(a).

B. DESIGNATION OF CONFIDENTIAL OR HIGHLY CONFIDENTIAL INFORMATION

2. Any Protected Person may designate as Confidential Information or Highly Confidential Information any documents or transcripts of testimony that it provides to any Party or the Tribunal in this action, to the extent such information constitutes Confidential Information or Highly Confidential Information as defined in Paragraphs 1(a) or 1(b) of this Order, as the case may be. In addition, a Protected Person may designate as Confidential Information or Highly Confidential Information any documents or transcripts of testimony produced or provided during this action by another person that the Protected Person believes in good faith contain its Confidential Information or Highly Confidential Information; such designation shall be made within 30 days of the date the Protected Person learns that the production or testimony contains its Confidential Information or Highly Confidential Information. Such designation constitutes a representation to the Tribunal that such Protected Person believes, in good faith, that the information so designated constitutes Confidential Information or Highly Confidential Information.

3. In the event that one or more of the Parties uses the confidential documents subject to the Protective Order as an exhibit during a witness’s testimony at the hearing, that

portion of the witness's testimony shall be subject to this Protective Order and the hearing room shall be cleared of everyone except the Parties, their counsel, and any others who the Tribunal allows to be present after hearing argument regarding who may be present during the relevant testimony. The Tribunal shall order that the confidential documents, if admitted into evidence, and the transcript, which covers testimony on the confidential documents, be placed under seal pursuant to the Commission's Rules of Practice. *See* 17 C.F.R. § 102.322(d). The party who produced the witness shall be responsible for designating the confidential portions of the transcript (with reference to the page(s) and line(s)) within ten days of receiving them.

4. Any production of documents or testimony not designated as Confidential Information or Highly Confidential Information will not be deemed a waiver of any future claim of confidentiality concerning such information if it is later designated Confidential Information or Highly Confidential Information. However, any such subsequent designation will not retroactively prohibit the disclosure of any information for which disclosure was permitted by this Order when made.

5. A Protected Person that designates a document as Confidential Information or Highly Confidential Information must stamp or label each confidential page of each document with the designation "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," as the case may be. If the entire document is not Confidential Information or Highly Confidential Information, the Protected Person shall stamp or label only those pages that contain such information. Where a production of data that constitutes Confidential Information or Highly Confidential Information is produced in electronic format on a disk or other medium that contains exclusively Confidential Information or Highly Confidential Information, the appropriate designation may be placed on the disk (or other medium). If a pleading or expert witness report contains Confidential

Information or Highly Confidential Information, then the Party submitting such pleading or expert witness report shall promptly serve and file a version of that pleading or expert witness report with the Confidential Information or Highly Confidential Information redacted, which version shall not be subject to the restrictions in this Protective Order.

6. Where electronic files and documents are produced in native electronic format, such electronic files and documents shall be designated for protection under this Protective Order by appending to the file names or designators information indicating whether the file contains Confidential Information or Highly Confidential Information, or shall use any other reasonable method for appropriately designating such information produced in electronic format, including by making such designations in reasonably accessible metadata associated with the files. When electronic files are printed for use in a proceeding before a court or other tribunal, the Party printing the electronic files or documents shall affix a legend to the printed document corresponding to the applicable confidentiality designation and including the production number and designation associated with the native file.

7. Any party that objects to the designation as Protected Information of any documents or transcripts may notify the designating person in writing, copying all Parties. The designating person shall then have 7 days from receipt of the notification to file a motion seeking an order upholding the confidentiality designation. The burden of proving that the designation is proper shall be upon the person seeking to uphold the designation. If a motion is filed, the Parties shall continue to treat the designated Protected Information at issue as Confidential Information or Highly Confidential Information, as the case may be, until the Tribunal rules on the motion. If the designating person does not seek an order within 7 days of receiving notice, or

if the Tribunal determines the designation of Protected Information to have been inappropriate, the challenged designation shall be rescinded.

8. In the event of a disclosure of any Confidential Information or Highly Confidential Information to any person or persons not authorized to receive such disclosure under this Protective Order, the Party responsible for having made such disclosure, and each Party with knowledge thereof, shall promptly notify the Protected Person whose material has been disclosed and provide to such Protected Person all known relevant information concerning the nature and circumstances of the disclosure. The disclosing Party shall also promptly take all reasonable measures to retrieve the improperly disclosed material and to ensure that no further or greater unauthorized disclosure and/or use thereof is made. Unauthorized or inadvertent disclosure shall not change the confidential status of any disclosed material or waive the right to maintain the disclosed material as containing Confidential or Highly Confidential Information.

C. SCOPE OF DISCLOSURE OF PROTECTED INFORMATION

9. Except as otherwise agreed or ordered, information designated as Confidential Information shall not be disclosed to any person other than the persons set forth below, and may be used by or disclosed to the persons set forth below only in this action:

- (a) The Tribunal and all persons employed by the SEC or similarly assisting the Tribunal in this action, including law clerks, court reporters, and stenographic or clerical personnel;
- (b) Outside counsel of record for the Parties in this action and their partners, employees, and/or agents assisting such counsel in connection with this action;
- (c) In-house counsel for each Party;

(d) Testifying or consulting experts retained by a Party to assist outside counsel in connection with this action, including employees of the firm with which the expert or consultant is associated to the extent necessary to assist the expert's work in this action, provided that such experts and staff are not employed by, or involved in competitive decisionmaking for, any Party or associational member of a Party (for the avoidance of doubt, no SIFMA member (or any employee of any SIFMA member) shall be considered to be a testifying or consulting expert for purposes of this provision);

(e) The SEC, including (but not limited to) the Office of the Secretary and the Office of Administrative Law Judges;

(f) Authors, addressees, and recipients of particular information designated as Confidential Information or Highly Confidential Information solely to the extent that they have previously had lawful access to the particular information disclosed or to be disclosed;

(g) Any fact witness designated (before after the entry of this Protective Order) in writing by any Party to testify at the hearing in this action. For the avoidance of doubt, if a Party shows Confidential Information to an individual designated in writing as a potential fact witness in this matter and that individual does not actually testify, that Party shall not be deemed in breach of this Protective Order.

10. Except as authorized by this Order, documents, transcripts of testimony, or other materials designated as Highly Confidential Information pursuant to this Order shall not be disclosed to any person other than the persons set forth in Paragraphs 9(a)-(b) and (d)-(f), and may be used by a receiving person only in this action.

(a) **Written Acknowledgement.** Prior to disclosing any document designated as Confidential or Highly Confidential to any person listed above in ¶ 9(c)-(d) or (g),

counsel for the Party or Parties desiring such disclosure shall obtain from such person a written acknowledgment in the form of Exhibit A to this Protective Order stating that such person has read this Protective Order and agrees to be bound by its terms. Counsel for the party making the disclosure must retain the original of such executed acknowledgment for a period of at least one year following the final resolution of this action.

(b) Parties' counsel shall take reasonable and appropriate measures to prevent unauthorized disclosure of documents (including copies of documents or any work product or other material reflecting the contents of Confidential or Highly Confidential material) designated as Confidential or Highly Confidential.

11. **Filing Under Seal of Documents Designated Confidential or Highly Confidential.**

(a) Information designated Confidential or Highly Confidential that is included in or appended to any brief, memorandum, pleading, expert report, or other submission shall be filed under seal with the Secretary's Office. Before information designated Confidential or Highly Confidential is filed with the Secretary's Office, it shall be placed in a sealed envelope marked "CONFIDENTIAL – DOCUMENTS SUBJECT TO PROTECTIVE ORDER – FILE UNDER SEAL," displaying on the front of the envelope the case name, file number, a designation of what the document is, the name of the Party on whose behalf it is submitted, and the name of the attorney who has filed the document.

(b) To the extent that a Party quotes from any information designated as Confidential or Highly Confidential in a brief, memorandum, pleading, expert report, or other submission, then such portion of the brief, memorandum, pleading, expert report, or other submission shall be filed under seal. In such circumstances, counsel shall prepare two versions of the brief, memorandum, pleading or other submission, *i.e.*, a public version and a confidential

version. The public version shall redact the sealed portions of the brief, memorandum, pleading, expert report, or other submission. The confidential version shall be a full and complete version of the brief, memorandum, pleading, expert report, or submission and shall be filed with the Secretary's Office under seal as above and should be submitted via email to the Tribunal and outside counsel of the other Parties.

12. **Exceptions to Limitations on Disclosures.** Notwithstanding any other provisions of this Order, nothing in this Order limits a person's use or disclosure of its own information designated as Protected Information.

13. **Use of Confidential or Highly Confidential Documents or Information at Hearing.** Any documents designated as Confidential or Highly Confidential may be offered in evidence or offered as exhibits at hearing in these proceedings. Such materials will not be placed onto the public record without the prior written authorization of the Protected Person.

14. **Obligations upon Conclusion of Litigation.**

(a) **Order Remains in Effect.** Unless otherwise agreed or ordered, this Protective Order shall remain in force after dismissal or entry of final judgment not subject to further appeal, including any appeal or other review in federal court.

(b) **Return of Confidential Materials.** Within sixty days after dismissal or entry of final judgment not subject to further appeal, including any appeal or other review in federal court, all confidential materials, including copies of such documents, shall be destroyed or returned to the respective Parties.

(c) **Work Product.** Notwithstanding the above requirement to return or destroy confidential materials, outside counsel for a Party may retain attorney work product, including an index which refers or relates to documents designated as Confidential or as Highly

Confidential, so long as that work product does not duplicate verbatim substantial portions of the text or images of such documents. This portion of the work product containing information designated as Confidential or Highly Confidential shall continue to be Confidential or Highly Confidential under this Protective Order and shall be treated in accordance with the terms of this Protective Order.

(d) **Return of Documents Filed under Seal.** After dismissal or entry of final judgment not subject to further appeal, including any appeal or other review in federal court, the Tribunal may elect to return to the Parties or, after notice, destroy documents filed or offered under seal at the hearing or otherwise restricted by the Tribunal as to disclosure.

15. **Non-Waiver.** Entry of this Protective Order is without waiver of and does not prejudice any future request by either Party for the production of documents or information, including by the SEC.

16. **Order Subject to Modification.** This Protective Order shall be subject to modification by the Tribunal on her own motion.

17. **Persons Bound.** This Protective Order shall take effect when entered and shall be binding upon the Parties, Parties' counsel, and persons made subject to this Protective Order by its terms.

So Ordered.

Dated:

BRENDA P. MURRAY
Chief Administrative Law Judge

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NOTICE AND ACKNOWLEDGEMENT OF PROTECTIVE ORDER

I, _____, hereby certify that I have read and agree to
abide by the terms of the Protective Order entered in the above-captioned proceedings.

Dated: _____