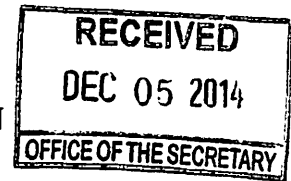


UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



In The Matter of the Application of:

SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION

for Review of Actions Taken by
Self-Regulatory Organizations

Admin. Proc. File No. 3-15350

The Honorable Brenda P. Murray,
Chief Administrative Law Judge

**REQUEST FOR ISSUANCE OF SUBPOENAS PURSUANT TO
RULE 232 OF THE COMMISSION'S RULES OF PRACTICE**

Pursuant to Rule 232 of the Securities and Exchange Commission's ("SEC" or "Commission") Rules of Practice, the Securities Industry and Financial Markets Association ("SIFMA") respectfully requests that the Honorable Brenda Murray, Chief Administrative Law Judge (the "Chief ALJ"), or her designee, issue the enclosed subpoenas duces tecum (collectively, the "Subpoenas" and attached hereto as Exhibit A and Exhibit B) directed to the Nasdaq Stock Market LLC ("Nasdaq") and NYSE Arca, Inc. ("NYSE Arca") (collectively, the "Exchanges"). *See* Rule 232(a) (permitting a party, in connection with any hearing ordered by the Commission, to "request the issuance of subpoenas . . . requiring the production of documentary or other tangible evidence returnable at any designated time or place").

The requested Subpoenas make targeted requests of information necessary to evaluate and respond to arguments the Exchanges already have made, and to evaluate other factors, such as the cost of producing and distributing the data at issue, which the D.C. Circuit has held is relevant to whether the Exchanges' fees are constrained by competitive forces. As explained below, these requests are narrowly tailored to seek information directly relevant to the issues the

Commission referred for a hearing, are necessary to develop the record regarding the challenged fee rules, and are reasonable in scope. As such, they easily meet the Commission's criteria for issuance under Rule 232. Issuance of the requested Subpoenas, therefore, is appropriate.

FACTUAL BACKGROUND

SIFMA's Challenges to the Exchanges' Rule Changes. This proceeding involves a series of applications filed by SIFMA requesting that the Commission set aside certain rule changes adopted by Nasdaq and NYSE Arca that impose fees for access to depth-of-book market data products. SIFMA's applications challenge the rule changes on the grounds that they limit access of SIFMA's members and their customers to the Exchanges' depth-of-book data and violate Sections 19(d) and 19(f) of the Securities Exchange Act of 1934 (the "Act") (codified at 15 U.S.C. § 78s(d) and (f)). In particular, SIFMA contends that the fees imposed by the rule changes are not "fair and reasonable," Section 11A(c)(1)(C)-(D) (15 U.S.C. § 78k-1(c)(1)(C)-(D)), and do not "provide for the equitable allocation of reasonable . . . fees . . . among . . . persons using [the Exchanges'] facilities," "promote just and equitable principles of trade," or "protect investors and the public interest," Section 6(b)(4)-(5) (15 U.S.C. § 78f(b)(4)-(5)).

Order Establishing Procedures and Referring Applications for Review. On July 3, 2013, the Commission requested briefing by SIFMA and the Exchanges on certain preliminary matters, including the primary issues to be decided in considering SIFMA's applications, and the extent to which further record development would be appropriate.¹ On May 16, 2014, the Commission referred this proceeding to the Chief ALJ for further proceedings consistent with the order. Order Establishing Procedures and Referring Applications for Review, Admin. Proc. File Nos. 3-15350 & 3-15351 (May 16, 2014) ("May 16 Order"), 19-22. Specifically, the

¹ See Order Regarding Procedures to be Adopted in Proceedings, Admin. Proc. File Nos. 3-15350 & 3-15351 (July 3, 2013).

Commission summarized the arguments made in SIFMA's applications and concluded that "SIFMA has appropriately articulated in its Applications a basis for concluding, if established by the evidence, that the depth-of-book fees should be set aside under Section 19(f)." *Id.* at 15.

Noting that the Act and the Commission's rules give the Commission "the discretion to expand the record beyond that before the SRO," *id.* at 18, the Commission directed the administrative law judge to "receive and address additional evidence bearing on the . . . substantive issues raised by" SIFMA's applications and "to hold a hearing addressing whether the challenged rules should be vacated under the statutory standard set forth in Exchange Act Section 19(f)—as informed by the two-part test set out in our 2008 ArcaBook Approval Order, the D.C. Circuit's decision in [*NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010) ("*NetCoalition I*")], and appropriate briefing from the parties—and after such a hearing to issue an initial decision in this matter," *id.* at 20. In *NetCoalition I*, the D.C. Circuit made clear that, when evaluating whether the Exchanges' fees are constrained by competition, the cost of collecting and distributing the market data is relevant. *See, e.g., NetCoalition I*, 615 F.3d at 537 ("[T]he 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").

Hearing. On October 20, 2014, the Chief ALJ issued an order finding that SIFMA had associational standing to proceed with this challenge and scheduled a hearing on the merits. Order On The Issues Of Jurisdiction And Scheduling, Admin. Proc. File No. 3-15350 (Oct. 20, 2014). The hearing is scheduled to commence in approximately 135 days, on April 20, 2015. Order on Joint Motion to Extend Hearing and Prehearing Schedules, Admin. Proc. File No. 3-15350 (Nov. 21, 2014).

The Requested Subpoenas. In connection with this hearing, SIFMA respectfully requests the issuance of the attached Subpoenas directed to Nasdaq (Ex. A) and to NYSE Arca (Ex. B). These Subpoenas are the only discovery that SIFMA anticipates seeking in this matter. As explained in more detail below, the Subpoenas generally seek information related to the fees the Exchanges charge for their depth-of-book data products, the costs incurred by the Exchanges to provide these products, and the Exchanges' reasons for setting fees at particular levels. The Subpoenas seek information that is exclusively within the Exchanges' control or that SIFMA cannot reasonably obtain from an alternative source. Without access to this information, SIFMA's ability to test any fee justifications put forward by the Exchanges at the hearing would be prejudiced.

ARGUMENT

The SEC Rules create a strong presumption in favor of discovery, including the issuance of subpoenas for relevant information. Pursuant to SEC Rule of Practice 232, "[i]n connection with any hearing ordered by the Commission, a party may request the issuance of . . . subpoenas requiring the production of documentary or other tangible evidence . . ." Rule 232(a). The requested subpoena must be issued, unless it is "unreasonable, oppressive, excessive in scope or unduly burdensome." Rule 232(b). Under such circumstances, the person requested to issue such a subpoena "may, in his or her discretion, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show the general relevance and reasonable scope of the . . . evidence sought." *Id.* As explained below, the evidence sought by the Subpoenas plainly is "general[ly] relevan[t]" to this proceeding, and the Subpoenas are reasonable in scope. Accordingly, SIFMA respectfully requests that the Subpoenas be issued.

I. The Subpoenas Seek Evidence “Generally Relevant” to This Proceeding.

First, the Subpoenas should be issued by the Commission because they seek evidence generally relevant to “the substantive issues raised by” SIFMA’s applications—that is, whether “the challenged rules should be vacated under the statutory standard set forth in Exchange Act Section 19(f)—as informed by the two-part test set out in [the Commission’s] 2008 ArcaBook Approval Order, the D.C. Circuit’s decision in *NetCoalition I*, and appropriate briefing from the parties” May 16 Order, at 20.

A. Rule 232 Subpoenas Are Issued When There Is “Any Possibility” That The Information Sought May Be Relevant.

In SEC proceedings, the concept of “relevance,” as a general matter, is “*much broader* than that concept under the Federal Rules of Evidence.” *In the Matter of City of Anaheim*, 71 S.E.C. 191 & nn. 5-7 (1999) (emphasis added). In particular, “[administrative] law judges should be inclusive in making evidentiary determinations,” and should follow an approach of, “If in doubt, let it in.” *Id. Accord In the Matter of Alessandrini & Co.*, 45 S.E.C. 399, 408 (1973); *In the Matter of Charles P. Lawrence*, 43 S.E.C. 607, 612-613 (1967) (“[A]ll evidence which can conceivably throw any light upon the controversy should normally be admitted.”).

Although the relevancy standard under the SEC Rules already is broad, “the standard of relevance is *even broader* when it comes to document subpoenas.” *In the Matter of Putnam Inv. Mgmt., LLC (“Putnam II”)*, Admin. Proc. Rel. No. 614, Admin. Proc., File No. 3-11317 (April 7, 2004) (emphasis added) (denying SEC motions to quash subpoena). A request for discovery is relevant ““if there is *any possibility* that the information sought may be relevant to the subject matter of the action.”” *In the Matter of Monetta Fin. Servs.*, Admin. File. No. 3-9546, 1998 WL 211406, at *4 (Apr. 21, 2004) (quoting 9 C. Wright & A. Miller, *Fed. Practice & Proc.* § 2008 (2d ed. 1994)) (emphasis added).

B. The Subpoenas Seek Information Relevant To This Proceeding.

The documents SIFMA seeks here are directly relevant to the issues referred to the Chief ALJ for a hearing.²

First, the Subpoenas seek documents concerning the costs incurred by the Exchanges to provide their proprietary depth-of-book data, including marginal cost. In *NetCoalition I*, the D.C. Circuit recognized the critical importance of assessing costs in determining whether the Exchanges' fees are constrained by competitive forces. 615 F.3d at 537 ("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"). In particular, the Court observed that the Exchanges' cost of producing market data is relevant 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." *Id.* In 2013, the D.C. Circuit reaffirmed that *NetCoalition I* "remains a controlling statement of the law as to what sections 6 and 11A of the Exchange Act require of SRO fees." *NetCoalition v. SEC*, 715 F.3d 342, 354 (D.C. Cir. 2013) ("*NetCoalition II*"). The documents SIFMA seeks, which pertain to whether the prices the Exchanges set for market data exceed the marginal cost of providing that data, are therefore directly relevant to determining whether fees are enforceable under the Exchange Act.

These documents are relevant regardless of whether the Exchanges affirmatively attempt to justify the market data fees by reference to marginal cost. To show that their fees are constrained by significant competitive forces, the Exchanges would need either (1) to present evidence that the price of the depth-of-book data approaches its marginal cost, or (2) to explain

² The information requested in the Subpoenas may be relevant to this proceeding for reasons in addition to those set forth here.

how their fees are competitively constrained *despite* prices that exceed marginal cost. Under either scenario, the information SIFMA seeks in the Subpoenas is relevant. It would provide SIFMA with evidence to test the Exchanges' explanations, and it would allow the ALJ to assess the competitiveness of the depth-of-book data market with a more complete record on the costs incurred to provide data in that market.

Second, cost data is relevant to evaluating the Exchanges' argument that they may disregard cost because it is impossible to differentiate the cost of providing their market data from the cost of operating their trade execution platforms. *See* Release No. 34-63291; File No. SR-NYSEArca-2010-97 (Nov. 9, 2010) (stating "that the economics literature confirms that there is no way to allocate common costs between joint products that would shed any light on competitive or efficient pricing"); Release No. 34-62907; File No. SR-NASDAQ-2010-110 (Sept. 14, 2010) ("Analyzing the cost of market data distribution in isolation from the cost of all of the inputs supporting the creation of market data will inevitably underestimate the cost of the data."). As the D.C. Circuit noted in *NetCoalition I*, however, there are reasons to believe that the Exchanges already do allocate these costs. *See* 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 documents that SIFMA seeks through the Subpoenas would assist in resolving this question.

Finally, the information SIFMA seeks through the Subpoenas is relevant to testing other arguments that the Exchanges made in their rule filings and may continue to assert in this

proceeding. To take another example, the Exchanges argue that competition for order flow constrains the price of market data fees because “if a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected broker-dealers will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data.” Release No. 34-62907; File No. SR-NASDAQ-2010-110 (Sept. 14, 2010). The proposed Subpoenas request documents directly relevant to evaluating the Exchanges’ argument that the level of depth-of-book data fees significantly affects order flow. Among other things, the Subpoenas request documents concerning the Exchanges’ order flow market share as it changed over time. This information is relevant to assessing the accuracy of the Exchanges arguments, and consequently, whether the Exchanges can satisfy their burden to show that the market data fees are fair and reasonable.

II. SIFMA’s Document Requests Are Narrow In Scope, And Producing Documents In Response Would Not Impose An Unreasonable, Oppressive, or Undue Burden On The Exchanges.

Producing the information SIFMA seeks would not impose any unreasonable burdens on the Exchanges. Any purported challenges to production that the Exchanges may assert cannot outweigh the relevance and materiality of the requested documents.

As an initial matter, the Commission has repeatedly held that an information request is not unreasonably or unduly burdensome if it is relevant. Indeed, the Commission has established that “it certainly is not unreasonable, oppressive, excessive in scope, or unduly burdensome for Commission officials to [produce information] in a Commission proceeding when a respondent makes a reasonable showing that the information they possess could possibly assist in its defense.” *Raymond James Fin. Servs., Inc.*, S.E.C. Rel. No. 619, Admin. Proc. No. 3-11229, 2005 WL 975346, at *1 (Feb. 10, 2005). *See also In the Matter of Mitchell M. Maynard*, S.E.C. Rel. No. 643, Admin. Proc. No. 3-13008, 2008 WL 2566726, at *2 (Jun. 27, 2008) (holding that

a subpoena is “unreasonable, excessive in scope, and unduly burdensome because it concerns matters that are not relevant to the issues in this administrative proceeding”). SIFMA’s demonstration above that its document requests are relevant to the subject matter of this proceeding also establishes that they are not unreasonably or unduly burdensome. *Supra* Part I.B.

Moreover, SIFMA has also taken appropriate steps to limit the scope of its requests. *First*, SIFMA’s requests target arguments that the Exchanges made in their rule filings, and the Exchanges cannot now assert that it would be unduly burdensome for them to provide relevant documents concerning those arguments. *Second*, many of SIFMA’s requests pertain to evidence that the Exchanges have already cited in their rule filings. For example, in a 2010 filing, NYSE Arca included various charts and graphs reflecting market data subscriptions, trade volume, and order flow market share. See Release No. 34-63291; File No. SR-NYSEArca-2010-97, Ex. B (Nov. 9, 2010). Some of SIFMA’s requests merely ask for more complete or updated figures on the data contained in these charts or other data the Exchanges relied upon. Such requests do not create undue burden.


CONCLUSION

Based on the foregoing, SIFMA respectfully requests the issuance of the enclosed subpoenas duces tecum directed to the Nasdaq Stock Market LLC and NYSE Arca, Inc.

Dated: December 4, 2014

Respectfully submitted,

SIDLEY AUSTIN LLP



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San Francisco, CA 94104
(415) 772-7402

Counsel for SIFMA

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of the Application of:

SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION

for Review of Actions Taken by
Self-Regulatory Organizations

Admin. Proc. File No. 3-15350

The Honorable Brenda P. Murray,
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2014, I caused a copy of the foregoing Request For Issuance Of Subpoenas Pursuant To Rule 232 Of The Commission's Rules Of Practice by SIFMA to be served on the parties listed below via First Class Mail. Service was accomplished on the Exchanges via First Class Mail because of the large service list:

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
(via hand delivery)

Douglas W. Henkin
Wayne M. Aaron
Milbank, Tweed, Hadley & McCloy LLP
One Chase Manhattan Plaza
New York, New York 10005

Daniel G. Swanson
Eugene Scalia
Joshua Lipton
Amir C. Tayrani
Thomas M. Johnson, Jr.
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dated: December 4, 2014

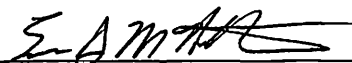

Eric D. McArthur

EXHIBIT A

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of the Application of:

SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION

for Review of Actions Taken by
Self-Regulatory Organizations

Admin. Proc. File No. 3-15350

The Honorable Brenda P. Murray,
Chief Administrative Law Judge

SUBPOENA DUCES TECUM

TO: Custodian of Records
NASDAQ Stock Market LLC
One Liberty Plaza
165 Broadway
New York, New York 10006

YOU MUST PRODUCE everything specified in the Attachment to this Subpoena to:

SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

by the date of _____.

Dated: December ____, 2014.

By:

Honorable Brenda P. Murray
Chief Administrative Law Judge

**ATTACHMENT TO SUBPOENA
TO NASDAQ STOCK MARKET LLC**

DEFINITIONS AND INSTRUCTIONS

1. The term “document” is used in the broadest sense, and includes without limitation the following items, whether printed, recorded, microfilmed, or reproduced by any process, or written or produced by hand, and whether or not claimed to be privileged, confidential, personal, or preliminary: letters, memoranda, reports, agreements, communications, correspondence, summaries of records or personal conversations, diaries, forecasts, statistical statements, graphs, charts, plans, drawings, minutes or records of meetings or conferences, lists of persons attending meetings or conferences, reports of or summaries of interviews, opinions of counsel, circulars, drafts of any documents, books, instruments, appraisals, applications, accounts, tapes and all other material of any tangible medium of expression, computer diskettes, and all other magnetic or electronic media.

2. The term “communication” means all inquiries, discussion, conversations, negotiations, agreements, understandings, meetings, telephone conversations, letters, notes, telegrams, correspondence, memoranda, e-mail, facsimile transmissions, or other form of verbal, written, mechanical, or electronic intercourse.

3. The term “Request” means the request for production of documents in Your possession, custody, or control.

4. The terms “You” and “Your” shall refer to NASDAQ Stock Market LLC, its subsidiaries and affiliates, and all officers, directors, employees, agents, representatives, and all other persons acting in concert with it, on its behalf, or under its control, whether directly or indirectly.

5. The term “concerning” means referring to, relating to, describing, evidencing, or constituting.

6. The term “depth-of-book data” means data showing bids to buy at prices below, and offers to sell at prices above, the National Best Bid and Offer.

7. The term “person” means any natural person or any legal entity, including, without limitation, a proprietorship, partnership, trust, firm, corporation, association, government agency or entity, or other organization, or association.

8. The term “subscriber” means any person who pays any fees to You for the ability to access, view, distribute, use, or display depth-of-book data.

9. The term “trade execution” means the completion of a buy or sell order for a security listed on Your exchange.

10. The term “order flow” means the volume of purchases, sales, swaps and trades in securities executed on an exchange.

11. The singular includes the plural and vice versa; the words “and” and “or” shall be both conjunctive and disjunctive; the word “all” means “any and all”; the word “any” means “any and all”; the word “including” means “including without limitation.”

12. Each Request contained herein calls for the production of all Documents in Your possession, custody, or control.

13. Documents shall be produced as they are kept in the usual course of business or shall be organized and labeled to correspond to the paragraphs of the Request to which they are responsive.

14. Unless otherwise provided, these Requests seek documents from August 1, 2006 to the present.

15. Unless otherwise specifically stated, You shall produce Documents authored, compiled, considered, created, drafted, edited, generated, possessed, prepared, read, received, recorded, referred to, reviewed, sent to or by, transmitted to or by, utilized, or written from August 1, 2006 to the present.

16. In the event that any document called for by these Requests is to be withheld on the basis of a claim of privilege, identify the document as follows: author, addressee, indicated or blind copies, date, subject matter, number of pages, attachments or appendices, all persons to whom distributed, shown, or explained, present custodian, the nature of the privilege asserted, and the complete factual basis for its assertion. Produce a log containing the above descriptions contemporaneously with the documents responsive to the subpoena.

17. If a portion of an otherwise responsive document contains information subject to a claim of privilege, only those portions of the document subject to the claim of privilege shall be deleted or redacted from the document and the rest of the document shall be produced. If any portions of any otherwise responsive documents are deleted or redacted, those portions are to be included on the log of privileged documents and identified as required by instruction 15.

18. Documents are to be produced in full and complete form, including all drafts and all copies of documents that bear any notes, marks, or notations not existing in the original or other copies.

DOCUMENT REQUESTS

1. Documents sufficient to identify the total number of subscribers to each and all of Your depth-of-book data products or fees and any changes in the number of subscribers on a monthly basis from August 1, 2006 to the present.

2. All Documents sufficient to identify the aggregate fees paid by subscribers for each and all of Your depth-of-book data products on a monthly basis from August 1, 2006 to the present.

3. All Documents sufficient to identify Your market share of order flow and any changes in Your market share throughout the period from August 1, 2006 to the present, including without limitation, all Documents sufficient to prepare charts and graphs for Nasdaq equivalent to those contained at JA213-217 of the Joint Appendix to *NetCoalition v. SEC (NetCoalition II)*, No. 10-1421, (D.C. Cir. Mar. 7, 2012).

4. All Documents concerning the setting of prices or fees for Your depth-of-book data products, including without limitation, Documents concerning: Your reasons for setting prices at a particular level; the extent to which those prices enable You to recover the costs of providing Your depth-of-book data products; and/or the relationship between Your depth-of-book data prices and Your order flow, including without limitation, any documents regarding the effects of price changes on Your market share of order flow.

5. All marketing, promotion, and advertising materials You have used to promote Your depth-of-book data products from August 1, 2006 to the present, including without limitation any offers of free trial periods or other promotions for a limited time period.

6. All Documents concerning the costs, including the marginal costs, of providing depth-of-book data to subscribers, including without limitation, the costs: to collect, aggregate, process, store, distribute, and display depth-of-book data; and/or to obtain and retain market data subscribers, including, without limitation, advertising, promotion, customer service, and subscriber account management costs.

7. All Documents concerning the profitability of Your depth-of-book data products, including without limitation: all Documents regarding the way and/or reason You allocate, assign, or apportion revenue, costs, profits, and margins to Your depth-of-book data business; the percentage of Your total exchange revenues derived from Your depth-of-book data fees; and/or any accounting Documents sufficient to identify any cost centers or profit centers attributed to or assigned to Your depth-of-book data products.

8. All Documents concerning the extent to which the fees You charge for use of Your trade execution platform enable You to recover the costs of building, maintaining, hosting, and/or operating the platform.

9. All Documents concerning Your identification of competitive or substitute products for Your depth-of-book data products and Your pricing strategy for competing against those competitive or substitute products, including without limitation, any analysis, study, examination, and/or assessment that You performed concerning the competitiveness of the depth-of-book data market and/or competitive or substitute products for Your depth-of-book data products.

10. All Documents you intend to use or refer to during the hearing before the Chief Administrative Law Judge in Admin. Proc. File No. 3-15350.

EXHIBIT B

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of the Application of:

**SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION**

for Review of Actions Taken by
Self-Regulatory Organizations

Admin. Proc. File No. 3-15350

The Honorable Brenda P. Murray,
Chief Administrative Law Judge

SUBPOENA DUCES TECUM

TO: Custodian of Records
NYSE Arca, Inc.
11 Wall Street
New York, New York 10005

YOU MUST PRODUCE everything specified in the Attachment to this Subpoena to:

SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

by the date of _____.

Dated: December __, 2014.

By:

Honorable Brenda P. Murray
Chief Administrative Law Judge

**ATTACHMENT TO SUBPOENA
TO NYSE ARCA, INC.**

DEFINITIONS AND INSTRUCTIONS

1. The term “document” is used in the broadest sense, and includes without limitation the following items, whether printed, recorded, microfilmed, or reproduced by any process, or written or produced by hand, and whether or not claimed to be privileged, confidential, personal, or preliminary: letters, memoranda, reports, agreements, communications, correspondence, summaries of records or personal conversations, diaries, forecasts, statistical statements, graphs, charts, plans, drawings, minutes or records of meetings or conferences, lists of persons attending meetings or conferences, reports of or summaries of interviews, opinions of counsel, circulars, drafts of any documents, books, instruments, appraisals, applications, accounts, tapes and all other material of any tangible medium of expression, computer diskettes, and all other magnetic or electronic media.

2. The term “communication” means all inquiries, discussion, conversations, negotiations, agreements, understandings, meetings, telephone conversations, letters, notes, telegrams, correspondence, memoranda, e-mail, facsimile transmissions, or other form of verbal, written, mechanical, or electronic intercourse.

3. The term “Request” means the request for production of documents in Your possession, custody, or control.

4. The terms “You” and “Your” shall refer to NYSE Arca, Inc., its subsidiaries and affiliates, and all officers, directors, employees, agents, representatives, and all other persons acting in concert with it, on its behalf, or under its control, whether directly or indirectly.

5. The term “concerning” means referring to, relating to, describing, evidencing, or constituting.

6. The term “depth-of-book data” means data showing bids to buy at prices below, and offers to sell at prices above, the National Best Bid and Offer.

7. The term “person” means any natural person or any legal entity, including, without limitation, a proprietorship, partnership, trust, firm, corporation, association, government agency or entity, or other organization, or association.

8. The term “subscriber” means any person who pays any fees to You for the ability to access, view, distribute, use, or display depth-of-book data.

9. The term “trade execution” means the completion of a buy or sell order for a security listed on Your exchange.

10. The term “order flow” means the volume of purchases, sales, swaps and trades in securities executed on an exchange.

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12. Each Request contained herein calls for the production of all Documents in Your possession, custody, or control.

13. Documents shall be produced as they are kept in the usual course of business or shall be organized and labeled to correspond to the paragraphs of the Request to which they are responsive.

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recorded, referred to, reviewed, sent to or by, transmitted to or by, utilized, or written from August 1, 2006 to the present.

16. In the event that any document called for by these Requests is to be withheld on the basis of a claim of privilege, identify the document as follows: author, addressee, indicated or blind copies, date, subject matter, number of pages, attachments or appendices, all persons to whom distributed, shown, or explained, present custodian, the nature of the privilege asserted, and the complete factual basis for its assertion. Produce a log containing the above descriptions contemporaneously with the documents responsive to the subpoena.

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18. Documents are to be produced in full and complete form, including all drafts and all copies of documents that bear any notes, marks, or notations not existing in the original or other copies.

DOCUMENT REQUESTS

1. Documents sufficient to identify the total number of subscribers to each and all of Your depth-of-book data products or fees and any changes in the number of subscribers on a monthly basis from August 1, 2006 to the present.

2. All Documents sufficient to identify the aggregate fees paid by subscribers for each and all of Your depth-of-book data products on a monthly basis from August 1, 2006 to the present.

3. All Documents sufficient to identify Your market share of order flow and any changes in Your market share throughout the period from August 1, 2006 to the present, including without limitation, all Documents sufficient to provide an update of the charts and graphs contained at JA213-217 of the Joint Appendix to *NetCoalition v. SEC (NetCoalition II)*, No. 10-1421, (D.C. Cir. Mar. 7, 2012).

4. All Documents concerning the setting of prices or fees for Your depth-of-book data products, including without limitation, Documents concerning: Your reasons for setting prices at a particular level; the extent to which those prices enable You to recover the costs of providing Your depth-of-book data products; and/or the relationship between Your depth-of-book data prices and Your order flow, including without limitation, any documents regarding the effects of price changes on Your market share of order flow.

5. All marketing, promotion, and advertising materials You have used to promote Your depth-of-book data products from August 1, 2006 to the present, including without limitation any offers of free trial periods or other promotions for a limited time period.

6. All Documents concerning the costs, including the marginal costs, of providing depth-of-book data to subscribers, including without limitation, the costs: to collect, aggregate, process, store, distribute, and display depth-of-book data; and/or to obtain and retain market data subscribers, including, without limitation, advertising, promotion, customer service, and subscriber account management costs.

7. All Documents concerning the profitability of Your depth-of-book data products, including without limitation: all Documents regarding the way and/or reason You allocate, assign, or apportion revenue, costs, profits, and margins to Your depth-of-book data business; the percentage of Your total exchange revenues derived from Your depth-of-book data fees; and/or

any accounting Documents sufficient to identify any cost centers or profit centers attributed to or assigned to Your depth-of-book data products.

8. All Documents concerning the extent to which the fees You charge for use of Your trade execution platform enable You to recover the costs of building, maintaining, hosting, and/or operating the platform.

9. All Documents concerning Your identification of competitive or substitute products for Your depth-of-book data products and Your pricing strategy for competing against those competitive or substitute products, including without limitation, any analysis, study, examination, and/or assessment that You performed concerning the competitiveness of the depth-of-book data market and/or competitive or substitute products for Your depth-of-book data products.

10. All Documents you intend to use or refer to during the hearing before the Chief Administrative Law Judge in Admin. Proc. File No. 3-15350.