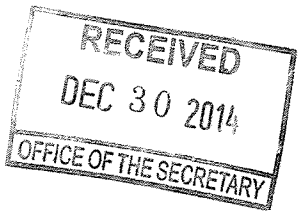
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



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

NYSE ARCA, INC.'S OPPOSITION TO THE AMENDED REQUEST FOR ISSUANCE OF SUBPOENAS PURSUANT TO RULE 232 OF THE COMMISSION'S RULES OF PRACTICE FILED BY THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

NYSE Arca, Inc. ("NYSE Arca") respectfully submits this opposition to the Amended Request for Issuance of Subpoenas Pursuant to Rule 232 of the Commission's Rules of Practice (the "Amended Request") filed by the Securities Industry and Financial Markets Association ("SIFMA") on December 19, 2014. Although SIFMA claims to have amended four of its subpoena requests, even the amended subpoena requests are oppressive and unduly burdensome and should be denied or quashed.[1]

[1] *See* SEC Rule 232(b); *see generally Order on Subpoenas*, Admin. Proc. File No. 3-14848 (Aug. 20, 2012) (Murray, Chief ALJ) (denying motion for issuance of a subpoena as "unreasonable, excessive in scope, and unduly burdensome at this late date," because *inter alia* the subpoena would "require a party to undertake data collection just as it is preparing to submit a prehearing brief . . . and is preparing its case in chief"); *Order on Application to Quash*, Admin. Proc. File No. 3-14697 (Apr. 27, 2012) (Murray, Chief ALJ) (subpoena requests were unreasonable and unduly burdensome where gathering the requested information would take weeks or months due to, in part, the passage of four years and the changes in personnel and computer systems).

BACKGROUND AND PROCEDURAL HISTORY

It is important to put this proceeding into context. Although SIFMA asserts (without explanation) that the pricing for ArcaBook is too high, what this dispute has really been about since its inception is that SIFMA and its members want to force exchanges to give away proprietary market data for free. The Commission need only recall the argument by SIFMA's counsel in *NetCoalition v. Securities and Exchange Commission*, 615 F.3d 525 (D.C. Cir. 2010) ("*NetCoalition I*") to see this:

> MR. PHILLIPS: ... Now, these are for profit enterprises, so those interactions have changed to some extent, but we're still basically their customers, and if we really want that information, if there's a significant call for it my guess is they will realize that it's in their best interests not necessarily in a profit loss basis, but just simply in the best interests of protecting their customer base to go forward and provide the information for free.[2]

That is, SIFMA's goal is *free* proprietary market data, not *cheaper* proprietary market data; that is likely why SIFMA and its members have been so vague in their allegations. It is thus not surprising that SIFMA's pursuit of cost and profitability data is misguided and inconsistent with governing law: It is part of a process designed to force exchanges to give away proprietary market data, which they are not required to do.[3] And it was

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2 *NetCoalition v. Securities and Exchange Commission*, Nos. 09-1042 et al., Transcript of Oral Argument at 20:17-25 (Feb. 16, 2010) (attached hereto as Exhibit A); *see also id.* at 19:21-20:4 (in response to a question about how time-consuming ratemaking proceedings would be, SIFMA's counsel stated his hope that exchanges would simply give in and distribute the data for free).

3 *See generally NetCoalition I*, 615 F.3d at 537 (market forces should play a role in determining what non-core data should be made available and at what price); *U.S. v. Deutsche Borse AG and NYSE Euronext*, No. 11-cv-2280 (D.C. Dist.), Complaint dated Dec. 22, 2011 ¶ 21 ("Each exchange (or other trading platform) owns non-core data and can distribute it voluntarily for a profit in competition with data from other exchanges.")

designed to make this proceeding longer and more complicated to accomplish that goal, just as SIFMA's counsel conceded before the DC Circuit nearly five years ago.

There is another reason SIFMA and its members' submissions have been so vague and have conspicuously failed to assert that anyone cannot afford to pay the prices for ArcaBook data: Some of SIFMA's members — declarant Bloomberg being an example — re-sell proprietary market data to their customers and charge a markup to do so.[4] Unlike the exchanges, those SIFMA members' re-sale prices are not regulated, and one of the primary goals of these proceedings is to enable them to increase their own margins at the exchanges' expense. Moreover, some of SIFMA's members operate alternative trading platforms (such as ATSs and dark pools) that compete with exchanges such as NYSE Arca, and some competing venues use the exchanges' proprietary market data to operate those competing platforms.[5] That is a key point: *Some of SIFMA's members use the exchanges' own market data to compete with the exchanges to attract order flow.*

SIFMA's arguments in favor of the cost and profitability discovery it seeks — which it claims it has "narrowed" to costs "borne by [NYSE Arca] exclusively in collecting and distributing" ArcaBook data[6] — ignore what NYSE Arca's filings

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(Attached hereto as Exhibit B); *see also U.S. v. Deutsche Borse AG and NYSE Euronext*, No. 11-cv-2280 (D.C. Dist.), Competitive Impact Statement dated Dec. 22, 2011 at 6 (same) (Attached hereto as Exhibit C).

4 *See, e.g.,* http://www.bloomberg.com/enterprise/data/real-time-data/ (describing Bloomberg's real-time market data offerings) (last visited December 28, 2014).

5 *See, e.g.,* http://www.iextrading.com/about/ ("IEX consumes direct market data feeds of all 11 of the registered stock exchanges* and LavaFlow ECN.") (last visited December 28, 2014).

6 Amended Request at 4 (italics in original).

actually say, what the DC Circuit held and said in *NetCoalition I*, and how much the record has changed since *NetCoalition I* was decided. *First*, NYSE Arca has consistently stated that the costs of producing market data cannot be separated from the costs of operating the market itself. Indeed, the language that SIFMA mis-cites to support its amended requests is drawn from a recent explanation by NYSE Arca of why market data and trade executions are a joint platform whose costs cannot be separated. What NYSE Arca actually said in the filing SIFMA cites is that

> [t]he costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence.[7]

Indeed, NYSE Arca went on to say — on the very same page — that

> [a]nalyzing the cost of market data product production and distribution in isolation from the cost of all of the inputs supporting the creation of market data products will inevitably underestimate the cost of the data and data products,[8]

the opposite of what SIFMA asks the Commission to conclude from SIFMA's misquotation from that filing.

Second, the DC Circuit did not hold that the Commission must consider cost information. The DC Circuit upheld the Commission's competition-based approach to evaluating proprietary market data fees, noting that Congress knew how to tie a fee's

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7 Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Amending the Fees for NYSE ArcaBook, File No. SR-NYSEArca-2014-12, 79 Fed. Reg. 8217, 8220 (Feb. 11, 2014) (underlined portions omitted by SIFMA).

8 *Id.*

reasonableness to its underlying cost and did not do so for proprietary market data fees.[9] And it agreed that the Commission was not required to consider costs in evaluating proprietary market data fees, noting only that costs "can" indicate whether there is a competitive market at work.[10]

Third, there has been a significant change in the record regarding the existence of competition in the proprietary market data space since *NetCoalition I*. The DC Circuit held that the Commission's competition-based approach to reviewing proprietary market data fee filings was appropriate, but held that there was not sufficient evidence of the existence of competitive constraints to support the Commission's approval of the original ArcaBook fee filing.[11] But there is now *direct* evidence of competitive constraints on proprietary market data pricing: For example, in connection with the proposed merger of NYSE Euronext and Deutsche Borse AG in 2011, the Department of Justice — the primary antitrust regulator — concluded that there is competition for the sale of proprietary market data. Referring to Direct Edge, the DOJ stated that "NYSE and Direct Edge compete head-to-head ... in the provision of real-time proprietary equity data products."[12] ArcaBook is, of course, a real-time proprietary

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9 *See NetCoalition I*, 615 F.3d at 534-35 & n.11.

10 *See id.* at 536-37.

11 *See id.* at 537-44.

12 *U.S. v. Deutsche Borse AG and NYSE Euronext*, No. 11-cv-2280 (D.C. Dist.), Complaint dated Dec. 22, 2011 ¶ 24 (Exhibit B); *see also U.S. v. Deutsche Borse AG and NYSE Euronext*, No. 11-cv-2280 (D.C. Dist.), Competitive Impact Statement dated Dec. 22, 2011 at 6 (specifically discussing depth-of-book data as part of the competitively-constrained market) (Exhibit C). Critically, the DOJ felt the need to act to preserve the level of competition it found existed in the market for proprietary market data.

equity data product, and the DOJ has concluded that there are meaningful competitive constraints on NYSE in that market.

The evidence NYSE Arca will submit in support of its affirmative case will address the questions posed by the Commission in the ArcaBook Direct Order and by the DC Circuit in *NetCoalition I*, and NYSE Arca intends to supplement the record for the competition-related questions the DC Circuit noted and provide additional support for market data and trade executions being joint products.[13] That record will be provided to SIFMA before SIFMA is required to put in its case[14] and will make it unnecessary to consider cost data at all and thus unnecessary to engage in the fishing expedition SIFMA seeks. As the Chief ALJ noted before SIFMA purported to amend its subpoena requests, NYSE Arca is permitted to define the scope of the evidence it intends to use to prove its affirmative defense:

> But Mr. Warden, what you're forgetting is they've got the burden of proof. They have to prove the things are reasonable. You've got -- you know you -- you're not in the catbird seat, but they've got the burden of proof. They've got to come in with evidence and you're going to see what they come in with. I mean, we've got a schedule and they have to give you the exhibits and they have to give

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13 Indeed, the DOJ believes that market data and trade executions are "closely linked." *See U.S. v. Deutsche Borse AG and NYSE Euronext*, No. 11-cv-2280 (D.C. Dist.), Complaint dated Dec. 22, 2011 ¶ 36 ("competition in real-time proprietary equity data is largely limited to registered securities exchanges, and is closely linked to and derived from an exchange's presence in trading and market data collection") (Exhibit B).

14 *See, e.g.*, Transcript of December 18, 2014 Administrative Proceeding Pre-Hearing Conference ("Tr.") at 26:21-22 (CHIEF ALJ MURRAY: "They've got to come in with evidence and you're going to see what they come in with.").

> you the list of witnesses, which I've limited -- number. So I just don't go along with what you say.[15]

As the Chief ALJ noted, NYSE Arca has no obligation to turn over other evidence — whether it might support, detract from, or otherwise be relevant to the ArcaBook fees at issue — so long as NYSE Arca does not rely on that evidence in defense of those fees.[16] And the Chief ALJ stated clearly and unequivocally that NYSE Arca has the right to define the scope of evidence on which it will rely in showing that the ArcaBook fees meet the relevant standard:

> And if they decide that what he's described as the route that they're going to take to show that these costs ... or changes in the charges are reasonable, that's their -- that's their choice. If I decide that they've left a very strong element out of their proof, you know, that's something else to be considered. If you make the position that they should have produced costs and they failed to do so, and that's a major deficiency, and I buy it, well, then that's fine. But I can't tell them how to present their case, and I'm not going to do that. That's their choice. So if they're not going to cover costs, fine, they're not going to cover costs.[17]

Consistent with the Chief ALJ's statements at the December 18 prehearing conference, SIFMA's amended requests should be denied and/or quashed because granting them would preclude NYSE Arca from deciding "how to present [its] case" and from exercising its option "not ... to cover costs."

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15 *See* Tr. at 26:17-27:1.

16 *See* Tr. at 41:25-42:11 (CHIEF ALJ MURRAY: "[Y]ou say pick and choose; of course they're going to pick and choose. That's their job. ... They're going to make the best case they can for their client, and you're going to make the ... best case for your client. ... there's no impetus on them to give you any kind of Brady material or Jencks material. So you know, you got a hard row to hoe, but that's it. That's the name of the game.").

17 *See* Tr. at 47:9-23.

This is the lens through which SIFMA's amended subpoena requests must be viewed. When so viewed, NYSE Arca respectfully submits they should be quashed and/or denied.

SIFMA'S AMENDED REQUESTS SHOULD BE QUASHED AND/OR DENIED

When considered in the context set forth above and the context of the individual amended requests, SIFMA's amended subpoena requests should be quashed an/or denied in their entirety.

Amended Request Nos. 4 and 9 Should Be Quashed and/or Denied

Amended Request Nos. 4 and 9 seek documents relating to why NYSE Arca set the fees for ArcaBook as it did and what products it viewed as potential competitive or substitute products for ArcaBook. But NYSE Arca explained in the ArcaBook fee filing itself why it set the fees for ArcaBook as it did and what products it viewed as potential competitive or substitute products for ArcaBook.[18] To the extent that NYSE Arca's fact or expert witnesses intend to rely on other information relating to the subjects of Amended Request Nos. 4 and 9, that information will be produced with NYSE Arca's submissions on January 20, 2015 insofar as that is required by the Chief ALJ's prior orders and the agreements reached at the December 18 prehearing conference. As noted above, there is no basis for discovery relating to matters NYSE Arca does not intend to rely on in its affirmative case, and in light of NYSE Arca's confirmation that it will produce information not set forth in the ArcaBook Filing that it intends to rely on, Amended Request Nos. 4 and 9 should be quashed and/or denied.

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[18] *See* Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. Relating to Fees for NYSE Arca Depth-of-Book Data, File No. SR-NYSEArca-2010-97 (the "ArcaBook Filing") at 4-9 & 12-15 (Nov. 9, 2010).

Amended Request Nos. 6 and 7 Should Be Denied

Amended Request Nos. 6 and 7 seek "cost" and "profitability" data relating to ArcaBook. NYSE Arca objects to these requests for two related reasons.

As an initial matter, SIFMA has expressly stated that it does not seek to compel NYSE Arca to create documents to respond to document requests.[19] But NYSE Arca does not track "costs" relating to ArcaBook as requested in Amended Request No. 6 or the "profitability" of ArcaBook as requested in Amended Request No. 7,[20] and NYSE Arca would have to create documents even to know how to think about responding to them, let alone to respond to them. It is far too late in this proceeding to demand that NYSE Arca create documents to satisfy SIFMA's curiosity.

In any event, as demonstrated above, SIFMA's quest for cost and profitability data relating to ArcaBook is misconceived, because the DC Circuit did not mandate consideration of such data by the Commission and NYSE Arca intends to present evidence of competitive constraints that will confirm that it is unnecessary to consider the data SIFMA seeks (even if it existed for ArcaBook). Because SIFMA's justifications for seeking this data are wrong and there is no need to consider it here, Amended Request Nos. 6 and 7 should be quashed and/or denied.

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19 *See* Tr. at 42:15-16 ("MR. WARDEN: ... no creation of documents.").

20 Amended Request No. 7 also seeks "revenue" information relating to ArcaBook. To that extent it is duplicative of Request No. 2, which has already been addressed by the Chief ALJ, and Amended Request No. 7 should be denied for that reason as well.

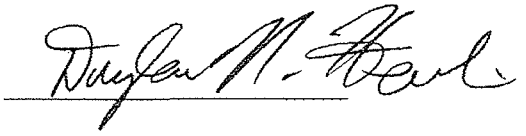
CONCLUSION

For all of the foregoing reasons and those stated on the record during the December 18, 2014 prehearing conference, SIFMA's amended subpoena requests should be quashed and/or denied in their entirety.

Dated: December 29, 2014
New York, New York

Respectfully submitted,

BAKER BOTTS L.L.P.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2014, I caused a copy of the foregoing NYSE Arca, Inc.'s Opposition to the Amended Request For Issuance of Subpoenas Pursuant to Rule 232 of the Commission's Rules of Practice Filed By The Securities Industry And Financial Markets Association to be served on the parties listed below via First Class Mail. Service was accomplished on SIFMA and Nasdaq via First Class Mail.

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Exhibit A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NETCOALITION,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Nos. 09-1042 et al.

Tuesday, February 16, 2010
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES KAREN LeCRAFT HENDERSON AND MERRICK B. GARLAND AND SENIOR CIRCUIT JUDGE HARRY T. EDWARDS

APPEARANCES:

ON BEHALF OF THE PETITIONERS:

CARTER G. PHILLIPS, ESQUIRE

ON BEHALF OF THE RESPONDENT:

MARK PENNINGTON, ESQUIRE

ON BEHALF OF THE INTERVENOR:

DOUGLAS W. HENKIN, ESQUIRE

C O N T E N T S

P R O C E E D I N G S

THE CLERK: Case number 09-1042. et al., NetCoalition, Petitioner v. Securities and Exchange Commission. Mr. Phillips for the Petitioners; Mr. Pennington for the Respondent; and Mr. Henkin for the Intervenor.

JUDGE HENDERSON: Mr. Phillips, good morning. I think --

ORAL ARGUMENT OF CARTER G. PHILLIPS. ESQ.

ON BEHALF OF THE PETITIONERS

MR. PHILLIPS: Good morning, Your Honors. May it please the Court, my name is Carter Phillips, and I'd like to reserve three minutes for rebuttal, please.

JUDGE HENDERSON: All right.

MR. PHILLIPS: I'd like to start, I think, where we have common ground among the parties. First of all, it is accepted by all sides that the New York Stock Exchange Arca is an exclusive processor of information, and therefore subject to regulation by the Securities Exchange Act under Section 3A; and second, that the depth of book data fees that are at the issue in this are in fact reviewable under a fair and reasonable standard, so that there is some form of rate making that has to be applied. All of the parties agree to that extent.

The point at which we come to disagreement, obviously, is the extent to which a fair and reasonable

assessment can be made without any regard to costs whatsoever, particularly in a market that is a brand new market, where we've never had any efforts to sell this particular type of data before, and we're trying to evaluate whether or not the fees are fair and reasonable.

And it seems to me that the sort of fundamental question you would ask yourself in that situation is if you had a reasonable allocation of the fees and you said, you know, that this basically represents a 10 percent profit and 90 percent of the costs then you would say okay, that's a pretty reasonable way to proceed. But if you on the other hand thought that this was 10 percent of the cost and 90 percent of the profit then the only conclusion you would draw from that is obviously that this is a not fair and reasonable fee under those circumstances, or at least you would have to take a harder look at the basis on which those fees are being determined.

And that's particularly true, it seems to me, in this case where New York Stock Exchange Arca specifically said in its application that part of the reason why we're asking to put in fees, because we didn't charge anything for this historically, the reason we're doing this is because of increased costs that we've incurred. Now, that seems under those circumstances perfectly sensible in the absence of a completely deregulated environment to say fine, if there are

additional costs that justify these particular data being charged then put forward those costs, let us see what they look like, and then we can make an assessment of whether or not it's a fair and reasonable evaluation.

It seems to me that is the fairest and most reasonable understanding of what a rate making rule requires. Just and fair and reasonable rates typically start with the notion of cost, as courts established that on a number of occasions. Historically that's what Congress would have understood in 1975 when it imposed this kind of a requirement. We're talking about exclusive processors.

The legislative history is quite clear that they should be treated like any other kind of regulated industry where it's, you know, you have essential information that's not accessible by any other source, and under those circumstances the right solution is to regulate it. It may turn out in time after you've regulated for awhile that you can comfortably conclude that there's a place to deregulate, and you've certainly seen that in the electric and natural gas oil pipeline situations where because there were clear substitutes available that ultimately the agencies that regulated those particular activities could conclude that they could rely on the market.

But here we don't have any direct market substitutes for this exclusive data that NYSE Arca has put forward in the

circumstances of this case. And in the absence of something that we can turn to that says yes, we are confident that these prices will be constrained then it seems to me a complete at least abuse of discretion, if not contrary to the statute itself for the SEC not to insist on having some cost information made available to it so that it can evaluate that, and then be in a position to make a judgment, at least in the first instance that these are just and reasonable rates.

JUDGE EDWARDS: Mr. Phillips, part of what --

JUDGE HENDERSON: Is that the same case --

JUDGE EDWARDS: I'm sorry.

JUDGE HENDERSON: Is that the same case with NASDAQ's total view that the SEC approve that in 2002?

MR. PHILLIPS: Those are the, yes, the same basic problem is embedded in that.

JUDGE HENDERSON: So, I thought you began by saying this is a brand new field. Am I incorrect that back in 2002 SEC, the SEC approved exactly this type of market based approach with respect to the NASDAQ depth --

MR. PHILLIPS: Depth of book.

JUDGE HENDERSON: -- of non-core date?

MR. PHILLIPS: Right. In 2002 the portion of the SEC acting on delegated authority --

JUDGE HENDERSON: Right.

MR. PHILLIPS: -- approved this, and it wasn't

subsequently reviewed under those circumstances, so it was allowed to go into effect. If the Court were to conclude in this case that some form of cost analysis is appropriate for any kind of rate setting for fees for depth of book it would be available to the parties to go back and ask the SEC to take another look at it, and frankly, it would be in the authority of the SEC to take another look at it, and candidly I assume that they would.

I mean, it's interesting that the rationale that was put forward by NYSE Arca in this case in the first instance was, you know, our fees are reasonable because they're less than the fees that were charged by other monopolists under these circumstances. Now, the Commission didn't embrace that particular perspective, and I think that makes a lot of sense. But, you know, the reality is, is that we're talking about three major players in this field who have significant ability to influence or control the costs that they're going to impose on users of this information, and the Commission's answer is ultimately to say well, I just don't know how much everybody needs this information.

Well, that's all well and good, but we know that at least 19,000 subscribers are out there, and significantly want the information. I can represent quite confidently because of my clients that there are lots more who would do so if the prices were more reasonable than they are today. And if you

look back and you think about sort of the regulatory history, I mean, my guess is that whenever the railroad started up there were probably not 19,000 people using the railroads, there were probably just a few hundred, and everybody else used wagons to get things across, and over time it became more and more popular.

So, it is in the nature of this kind of undertaking when you start a new market, and you create a new opportunity people have to learn about it, they have to develop the expertise in order to be able to use this particular tool as they go forward in their investment decision making.

And so, you know, to sit here and say well, we'll just leave it in the hands of the market rather than take some evaluation of the actual costs it seems to me to simply sort of cast all of those people aside and to constrain a market that would otherwise be in a position hopefully to develop in a proper way so that you can make an assessment down the road whether or not --

JUDGE EDWARDS: Let me see if I understand some of this. Part of what I think the Agency says is if this price is too large or too high they'll go to one of the other processes for the same, similar data.

MR. PHILLIPS: Right. But while they will say -- I mean, they don't actually say that --

JUDGE EDWARDS: Right.

MR. PHILLIPS: -- because you can't do that, because their data is their data. I mean, the New York Stock Exchange knows what's on their market, and NYSE Arca knows what's on its. They don't, you know, buying one isn't a substitute for the other, so they just say it has some sort of generic ability to constrain, so you can at least get some --

JUDGE EDWARDS: All right. So, you're --

MR. PHILLIPS: -- information.

JUDGE EDWARDS: -- rejecting that suggestion that you can move from process A to process B --

MR. PHILLIPS: Right. Clearly, that's not --

JUDGE EDWARDS: -- because they're not offering the same thing.

MR. PHILLIPS: Right. It's not the same data, it's fundamentally different data.

JUDGE EDWARDS: And then I think you're also saying to the, I want to make sure I understand this, to the extent that they are offering some things that are similar, they all have rocket power, for want of a better term, the price is set too high then there are groups of people who will be excluded from using all three, they just can't.

MR. PHILLIPS: Right. Absolutely. And some of them can't even use one, much less all three. But the reality is, you know, if you want to be in a position to make use of this tool you really do need from all three, and so therefore you

really are at the mercy of whatever race they said. And the notion that the three of them now are basically in this situation where they're pegging against each other and saying well, as long as my rates are slightly less than the next rates it will just continue to escalate up and the rates will continue on, particularly given the ruling now from the Commission that's under review in this specific case, in contrast to the ruling that came out in the previous decision by the Division. Because now they have said we have concluded that because there is competition for orders all of the exchanges are subject to some kind of a constraint on the costs they're going to be able to impose, and therefore presumptively whatever number they come up with is basically a number they get to make the call on, and then we'll see whether or not there are any supervening considerations that would justify a different undertaking in this context.

But the Court, I mean, the Commission, you know, doesn't come to a, you know, to the, you know, leaves that issue, you know, basically now to the market.

JUDGE EDWARDS: Well, your order flow argument you're saying I think the Commission will hear from them, they're relying very heavily on that, and you're saying that doesn't really constrain the fee setting at all.

MR. PHILLIPS: No, because the decision as to where you're going to place an order is securities and transaction

specific. If I want to buy Goggle, I want to buy Google. You know, somebody, you know, I'm a broker/dealer, my customer says I want to buy Google, so what am I going to do? I'm going to go look and see where I can execute the best opportunity for Google.

The question of whether or not I'm going to get depth of book data for a particular exchange is something I will have made months ago because I have to subscribe on a monthly basis. And so, I have to have that information available to me. Will I use --

JUDGE GARLAND: Okay, isn't their argument that if you want to buy Google and you want the best deal, and you think depth of book is required that you'll go to the exchange that offers depth of book, and you'll ignore NYSE because they're not making their exchange attractive? That's their argument, right?

MR. PHILLIPS: I guess that, I mean, I don't know that they make that precisely that way, because the problem is, is that that doesn't make any sense because without -- if you go to the place that gives you the depth of book it may be the smallest exchange, and its depth of book could be 10 shares. They may not have any more than 10 shares available. Whereas, for Google, which I think is a NASDAQ, on the NASDAQ, let's assume that for purposes of argument, you know, that's where all the liquidity is, and if you really want to buy

thousands of shares of it, the only place you can find that out is by going to the NASDAQ --

JUDGE GARLAND: So, their --

MR. PHILLIPS: -- depth of book.

JUDGE GARLAND: Assuming I'm understanding their argument, their argument that this is an element by which exchanges differentiate themselves and make themselves more attractive doesn't really work, that is that depth of book is not the relevant factor with respect to where you're going to trade?

MR. PHILLIPS: Right. I think at the margins it can be a relevant factor for the unusually small exchanges and operations. But once you get to a certain level of strength, and the NYSE Arca, NASDAQ, New York Stock Exchange clearly are in that category where nobody can make, or you don't have the option of saying I'm not going to trade on those exchanges, that's just not something any realistic person can do. And so, you're going to have to buy the depth of book, and since it is an exclusive processor for each one of them, and since just a reasonable rate, or fair and reasonable rate making is the statutory requirement then it seems to me it's incumbent on the Commission to say look, we'll look at the cost data, we'll make an assessment, and then we'll decide whether or not these are fair and reasonable rates. We're not going to simply leave it --

JUDGE GARLAND: Well, can I ask you on --

MR. PHILLIPS: -- unregulated.

JUDGE GARLAND: -- on that point, are you withdrawing, or am I misconstruing your argument from numeral one, as compared to your argument in roman numeral three? That is --

MR. PHILLIPS: Yes.

JUDGE GARLAND: You're nodding to suggest at least you understand what I'm asking which is --

MR. PHILLIPS: Right.

JUDGE GARLAND: -- the way you're putting the argument now is that yes, perhaps competition could be a way of guaranteeing just and reasonable rates, there isn't enough evidence here that there is competition, therefore arbitrary and capricious, that's roman number three.

MR. PHILLIPS: Right.

JUDGE GARLAND: Roman numeral one, at least as I read it was --

MR. PHILLIPS: Is a statutory interpretation argument.

JUDGE GARLAND: -- statutory has to be, can't be dependent on competition.

MR. PHILLIPS: Right. What the Court said in Goldstein v. SEC is pretty much the way I come out in this particular case, because in that case the Court said even if

the Act doesn't foreclose the Commission's interpretation, the interpretation, you know, is outside the bounds of reasonableness, and so it doesn't matter whether you sort of look at it as the statute --

JUDGE GARLAND: Well, it --

MR. PHILLIPS: -- you're looking at --

JUDGE GARLAND: Of course it does matter, but it matters in a sense if we held the way --

MR. PHILLIPS: But it matters for the long haul, it doesn't matter --

JUDGE GARLAND: Yes.

MR. PHILLIPS: -- for the specifics of this case. Right.

JUDGE GARLAND: Which unfortunately matters to us because we're writing an opinion.

MR. PHILLIPS: Well, it would matter to me, too, and my client --

JUDGE GARLAND: Yes.

MR. PHILLIPS: -- in the long run. So --

JUDGE GARLAND: But --

JUDGE EDWARDS: What Goldstein was saying no matter how you look at it, it fails, which is also to say fails under Chevron I/II. I mean, I remember it quite well.

MR. PHILLIPS: Right.

JUDGE EDWARDS: What Judge Garland is asking you,

are you pretty much moving away from the Chevron I/II argument, and resting primarily on arbitrary and capricious and lack of --

MR. PHILLIPS: Yes. I'm not abandoning the Chevron I argument, it just seems to me for purposes of what Judge Edwards you asked about earlier, how do you write this opinion? If it were me I would write this opinion to say we don't need to decide whether or not the statute precludes that, that's an argument for another day, but we do need to decide that cost is a fundamental element of any kind of fair and reasonable rate making, that's statutorily mandated. And until we are fully convinced, and the Commission can make a showing based on a mature market that cost isn't a consideration, or it doesn't need to be a consideration, the statute demonstrably pushes us in favor of regulation.

JUDGE GARLAND: All right. But that's still a different question. So, under what I regard as roman numeral one, cost is relevant because in regulated industries we look at costs and we give some return above cost, that's how it's done. If I look at your roman numeral three argument, the argument is cost is relevant because super competitive profits indicate lack of competition. Those are two very different ways to --

MR. PHILLIPS: Well, I agree with that.

JUDGE GARLAND: -- look at cost.

MR. PHILLIPS: I agree with that, Judge Garland. And, you know, my basic, you know, my first argument is still I think that Congress intended that there would be in fact cost regulation. But I recognize that even in other situations where fair and reasonable rate making is part of the practice, at some point it is possible that the Commission might be in a position where it could deviate from a pure cost based analysis to something else, because there's a lot of precedent that suggest that. I don't think that's the way this statute was teed up, but if the Court were not prepared to accept my statutory argument then at a minimum it has to recognize that the statute provides more than indifference as to whether or not there ought to be a regulatory scheme in place that protects consumers and ensures that the rates are fair and reasonable under those circumstances.

JUDGE GARLAND: Can I ask you one more question? As I understand it depth of book information, the SEC has not required it to be published, is that right?

MR. PHILLIPS: That is correct.

JUDGE GARLAND: So, if you were to win, and they were to decide okay, we're just not going to produce this stuff, could they do that?

MR. PHILLIPS: Yes, they could do that. Obviously, we would have to go back to the Commission and make a pitch that we think that's a terrible mistake, and that the

Commission --

JUDGE GARLAND: So, what if they were --

MR. PHILLIPS: -- ought to add it --

JUDGE GARLAND: Right.

MR. PHILLIPS: -- to the depth of, ought to add it to the consolidated data.

JUDGE GARLAND: But at least they could do it during the period of the rate making, or whatever it is we are going to call this proceeding. So, you could -- and given our experience with rate making in other cases this could be multiple years before you come out with a rate that you regard as having been, and forget about whether you regard it, but the Agency regards it as --

MR. PHILLIPS: Right.

JUDGE GARLAND: -- being just and reasonable, other than purely competitive, is that right? I mean, we could be three or four years from now before any depth of book data is published.

MR. PHILLIPS: Yes. Although I don't know that that's necessarily the assumption I would make. Because again, remember, when they filed the application, NYSE Arca specifically said that we were doing this to recover specific costs that we have in mind. I don't know why it would be particularly different if they had that information back when they filed the application why they couldn't simply release

those data now --

JUDGE GARLAND: Well, you would undoubtedly disagree with the data, I mean, your argument is about marginal cost.

MR. PHILLIPS: Right.

JUDGE GARLAND: And say almost all economists agree that in the real world it's very difficult to evaluate what marginal cost is, right?

MR. PHILLIPS: Well, I think it's harder, actually, to allocate fixed costs to --

JUDGE GARLAND: Okay.

MR. PHILLIPS: -- rather than it is to --

JUDGE GARLAND: Well, we'll add that to it.

MR. PHILLIPS: -- determine marginal costs. But --

JUDGE GARLAND: But that doesn't suggest that the rate making proceeding is going to be very easy, or quick. I mean, they may have a view about what their costs are, you are very unlikely to agree with it. So, there --

MR. PHILLIPS: Right.

JUDGE GARLAND: -- has to be a proceeding, right?

MR. PHILLIPS: Right. But I don't know that that necessarily requires that it be a three to four year proceeding, because --

JUDGE GARLAND: What's the typical --

MR. PHILLIPS: -- we're not asking for pure rate, you know, a pure regulated rate making process to be

undertaken. Our basic position here is that you cannot make a determination of whether something is fair and reasonable without at least some assessment of what the thing costs to begin with. And, you know, it --

JUDGE GARLAND: I guess what I'm trying to get at is --

MR. PHILLIPS: You know, I realize that once you open the box --

JUDGE GARLAND: Yes.

MR. PHILLIPS: -- you've got the pandora problem.

JUDGE GARLAND: Exactly.

MR. PHILLIPS: I understand that.

JUDGE GARLAND: And what I'm asking about is, you know, we want data to be out there.

MR. PHILLIPS: Yes.

JUDGE GARLAND: We want -- and there's going to be all different kinds of data over the next few years that may be good to be out there, might not. And if in each situation there has to be the kind of proceeding that you're talking about aren't we slowing down the release of the data?

MR. PHILLIPS: Well, I think the alternative way to think about it is that it very well may be that the Exchanges would recognize that their costs for this are virtually non-existent, and that they will then adopt the view that previously existed, which was to offer those data for free in

order to better serve transparency and protect the consumers' interests. I think that's just as legitimate and likely outcome of this as the alternative, which was that we're going to have to slog through all the rate making.

JUDGE GARLAND: So, you think that the Exchanges have this sort of elimuncinary (phonetic sp.), or whatever the pronunciation of the word is, attitude about things that they're going to release it for free just because they like transparency? That's not the approach you're taking in your brief in terms --

MR. PHILLIPS: No, no.

JUDGE GARLAND: -- of their motives.

MR. PHILLIPS: No. To be sure. I understand that. But I think what they'll recognize is this goes back to the same point the Commission made about the relationship between the people who use the exchanges, and the exchanges themselves, there's obviously an interaction there. Now, these are for profit enterprises, so those interactions have changed to some extent, but we're still basically their customers, and if we really want that information, if there's a significant call for it my guess is they will realize that it's in their best interests not necessarily in a profit loss basis, but just simply in the best interests of protecting their customer base to go forward and provide the information for free.

JUDGE GARLAND: Okay. One more question, this is a fact question I'm not sure I understand. With respect to the core data --

MR. PHILLIPS: Yes.

JUDGE GARLAND: -- the brief suggested that the fees for that are negotiated, not determined on the basis of costs.

MR. PHILLIPS: So far they have been, yes.

JUDGE GARLAND: And is that because the Agency's been unable to figure out what the cost is, or --

MR. PHILLIPS: No, that's because the Agency I think has placed a fair amount of pressure on the parties to come to some kind of an agreement as to the cost, and they've done that so far successfully. But obviously if at some point the negotiations were to break, or those understandings were to break down then I think the Commission would have to undertake a pure cost based analysis in the same way it does with the tape, you know, with the consolidated tape where the exchangers provide the information, and they get it back they have to pay the fees for that. I mean, the fair and reasonable approach in that situation according to the exchanges absolutely requires an analysis of the costs in order to come up with something that's fair and reasonable. All we're asking is whatever's good for the exchanges when they have to pay a fee ought to be good for their customers when we have to pay a fee.

JUDGE GARLAND: Are there proceedings to determine that? And how --

MR. PHILLIPS: Yes, there are proceedings.

JUDGE GARLAND: -- long do they take?

MR. PHILLIPS: The Commission's order asking for an analysis of 10 or 12 questions was a year or so ago, as I recall.

JUDGE GARLAND: Thanks.

MR. PHILLIPS: Thank you, Your Honor.

JUDGE HENDERSON: All right. Thank you. Mr. Pennington.

ORAL ARGUMENT OF MARK PENNINGTON, ESQ.

ON BEHALF OF THE RESPONDENT

MR. PENNINGTON: Good morning. Mark Pennington for the Securities and Exchange Commission. It was thrilling to hear the words elimuncinary and the securities market in the same sentence.

In 1972 when the Commission first recognized that market data technology had reached the point where it would make sense to tie all the markets together and to create a national market system it recognized at that time that there was always going to be this tension between unification and diversity, and their downsides of monopolization and fragmentation. And as it's gone through the last 30 or 40 years of implementing the national market system that's the

issue that comes up constantly, and it comes up here. You have market data that is useful to investors, you could require it all to be disclosed; you could leave the exchanges, the markets to just decide what to disclose; or you can come up with some balance. And the Commission has come up with the concept of core data, which is basically "last transactions," requires that to be distributed, and then leaves the non-core data, including depth of book data, like we have here, up to the individual markets, or up to the individual markets to decide whether they want to distribute it or not, and whether they want to charge for it or not.

And it's subject to the Commission's oversight, it has to be among other things the fees have to be fair and reasonable. And the Commission has not deregulated the area, it has set up a two step test that starts by asking is there a competitive market, are there competitive pressures on the exchanges that will keep them from overcharging, from charging monopolistic fees for this data. And if so, and if there's no countervailing arguments then we rely on the market.

Let me talk for a just a minute about the statutory issue, which would be roman numeral one I think in both briefs. The language of the statute is, is it requires the fees to be fair and reasonable; and it doesn't say there has to be a cost based analysis; and the statute in fact, Section 6(E)(1)(b) of the Exchange Act which was added in 1975 at the

same time expressly does say consider costs when you're deciding whether to allow the exchanges to set commissions, so Congress had that in mind, sometimes cost based rate making is essential, sometimes it's not. And this Court has held in a number of cases, particularly in the natural gas and electricity area that when there's a competitive market the regulator can rely upon market based prices in lieu of cost of service regulations to assure a just and reasonable rate of return. So, we think the statute permits us to do this, and we think -- so I'd like to turn then to the second issue, which is sort of the APA issues.

And I'd like to point out first of all that the Commission, there are no sort of administrative law issues in terms of the Commission here noticed this matter three times, first, when it was submitted; second, when it decided to take the matter from delegated authority; and then third, took the extremely unusual, perhaps unique or nearly unique step of putting out its proposed order and says this is what we're thinking about adopting, give us any further thoughts if you have, and each time obtained additional information. So, the Commission has really looked hard at this. What's more, it's been looking at this very issue, how much to charge for market data, really since the National Market System Act was passed in 1975. So, we come to it with a lot of experience, and a lot of hard thought.

And the Petitioners say well, what you're really required to do either as an absolute matter of statutory interpretation, or at least until you get some more experience with this type of data is first of all, just figure out the costs, after all, what could be more reasonable than that, than you have a yardstick you can measure it against, you can hold it against --

JUDGE GARLAND: Can you focus on the roman numeral three --

MR. PENNINGTON: Yes.

JUDGE GARLAND: -- argument, which has basically been retreated to? So, that is why costs don't have to be evaluated for purposes --

MR. PENNINGTON: Right.

JUDGE GARLAND: -- of determining whether there really is competition here, and not whether --

MR. PENNINGTON: Right.

JUDGE GARLAND: -- costs have to be evaluated for purposes of setting up regulatory rate.

MR. PENNINGTON: Well, I think the first, the threshold problem with the Petitioner position is their assumption is it would be easy to figure costs, just figure that out. But what the Commission has found is that it's virtually impossible to figure costs, you may be able to figure out depending on how the market is set up the sort of

you think of as a market as generating market data, and then the market decides to start selling its data, so they say well, we'll come up with some kind of a connector to connect our market to the world. You might be able, depending on how that's done, to figure out that sort of direct cost. But that's not how rate making is done. If you're going to figure out costs you have to allocate a reasonable amount of other relevant costs of operating the market, which generates the data to the market data. And that was what the Commission talked about in the 1999 release, it said we haven't ever done this, the parties have always agreed on the prices, would it be helpful if we came up with a, if we laid out some standards for figuring out costs? And the industry said no, it's a meaningless exercise. And the Commission pointed --

JUDGE GARLAND: Well, what is to prevent under that theory cross subsidization?

MR. PENNINGTON: Well, the theory is, or the belief is if there's a competitive market that acts as a check on the price, that's --

JUDGE GARLAND: But the competitive market is not for depth of book data, it's overall -- your argument about it is it's one exchange against another.

MR. PENNINGTON: Well, our argument is, though, that they won't -- our argument is that the order flow, and the depth of book are, as one of the commentators said, two sides

of the same coin, that the exchanges use -- you can't really even separate them out. The markets operate and they generate this data which has value. But if you don't distribute the data you don't get the order flow, and consequently you don't have a business, which is -- and that's by far their largest profits come from the order flow, from the order flow itself.

JUDGE GARLAND: Right. But your own, you know, part of your argument for why you should let this go is it's not that important, not that many people want depth of book data, only five percent of the NASDAQ customers buy it.

MR. PENNINGTON: Right.

JUDGE GARLAND: What else did you -- a similar line said 99 percent of the shares traded at the NBBO --

MR. PENNINGTON: Right.

JUDGE GARLAND: -- that suggests that depth of book is, to coin a phrase, the tail wagging the dog here. It's not --

MR. PENNINGTON: Well --

JUDGE GARLAND: -- very important for order flow.

MR. PENNINGTON: Well, if it's -- well, but if it's not very important, or if it's not very important, I mean, if it's not important for, if it's not important to investors then you can't exercise monopoly pricing over it. The point would be --

JUDGE GARLAND: Well, you can for the investors who

it's important to you can. I mean, just because things are unimportant doesn't mean that you can't get a monopoly price for it.

MR. PENNINGTON: Right. And if to the extent that it is important there's a competitive market among the markets the sort of combined product of order flow and depth of book data, which are inter-related, to the extent that it's not important there's no ability to exercise --

JUDGE GARLAND: No, but --

MR. PENNINGTON: -- monopoly power.

JUDGE GARLAND: -- I guess it depends on --

JUDGE EDWARDS: That just isn't, it isn't following.

JUDGE GARLAND: I guess it depends on how many people it's important to. If it's only --

JUDGE EDWARDS: Right.

JUDGE GARLAND: -- important to a small number of people then it may not matter for order flow, but you still may be able to make a profit off of those people.

JUDGE EDWARDS: Right.

MR. PENNINGTON: Well, let's look at what the evidence ahead -- first of all, let's look at what the evidence was that the Commission relied on, because I don't know that it got into quantifying that amount, but that -- what you have to bear on the other hand is that the cost is not going to be a perfect substitution, it's not going to be a

solution to the problem. In other words, you say perhaps there are some people out there who can't get this data that would like it, so why don't we just figure out the cost? But we don't think we can meaningfully come up with the cost. So, you're going to distort the market by coming up with what looks like a cost number, but it's artificial. I mean, you're in an area where you don't know, you can't tell exactly what you're going to do to the market. But the Commission had a substantial basis for believing that the competition for order flow, and given how many people are going to want it, is going to be a useful check on the price.

JUDGE GARLAND: Where's the evidence --

JUDGE EDWARDS: Where's the evidence of that?

JUDGE GARLAND: -- on how many --

MR. PENNINGTON: All right.

JUDGE GARLAND: -- people are going to want it?

MR. PENNINGTON: Well, the evidence we have is that not very many people buy it.

JUDGE GARLAND: Well, there you go. That hurts, doesn't help.

MR. PENNINGTON: No. The evidence that the competition for order flow will be a sufficient check on the price for the data.

JUDGE EDWARDS: Why?

MR. PENNINGTON: This is the record evidence that

the Commission relies on, which is testimony, or the -- starting with back in 2001 they had the special advisory committee, and they brought up themselves that the motivation to enhance shareholder value by the profits, the concern was that the exchanges are now for profit, so they're going to start charging a lot for this data, because they're not just selling it to their members. The motivation to enhance shareholder value by increasing market data fees will be checked by the need to make data available to generate order flow and attract listings.

JUDGE GARLAND: Well, that's just a conclusive, but what's the evidence of that, other than this advisory committee statement what's --

MR. PENNINGTON: Well --

JUDGE GARLAND: -- the evidence?

JUDGE EDWARDS: It's a self-serving statement, too, isn't it?

MR. PENNINGTON: I mean, Your Honor, this brings us back to --

JUDGE EDWARDS: You wouldn't have expected them to say otherwise.

MR. PENNINGTON: Well, no, this was an advisory committee that was put together across the range, and there was a division within the committee, but it wasn't just the markets, maybe it was just the markets who thought it would be

adequate, but everybody here has an interest. The Commission has --

JUDGE EDWARDS: I mean, the reason we're asking this is that when we read the briefs on work flow I'm not getting the argument. I mean, one point of the argument makes sense, when you flip it it doesn't. I just don't see the connection, so that's why I think Judge Garland asked you where's the evidence, what are you pointing to? And now you're saying well, an advisory committee speculated.

MR. PENNINGTON: No, it was the judgment of people who were experts in the industry that this -- I mean, there are no numbers, so it's a judgment about how much --

JUDGE EDWARDS: Right.

MR. PENNINGTON: -- influence does it have. Second, when NYSE Arca, again, this is certainly self-interested, but when they filed, or in connection with their application they said this is a factor we've considered when we decided what price to set. And other --

JUDGE GARLAND: Well, I mean, that really, with respect, that's not worth anything, that's the other side saying, you know, leave us alone from regulation because don't worry, we're competitive. I mean, I'm not saying they're, that doesn't mean they're right or wrong, but it's not evidence. I mean, your opponent cites a lot of quotations from the exchanges saying how, you know, how important the

depth of book data is going to be, and all that stuff, and you blow that off as not important because that's just marketing information. So, I mean, to what extent are we going to take views of the exchanges on this?

MR. PENNINGTON: Well, they have a reasoned position, and the Commission was persuaded by it, and then in response to the final notice there was an economic study submitted that came to the same conclusion that this would be an effective competitive market, to the extent that it matters, the price will be checked. I mean, we don't have numbers, but the alternative solution, we don't have cost numbers either. As I say there's going to be --

JUDGE EDWARDS: Was there any determination made in this study as to the number of folks who might want it, who would be foreclosed?

MR. PENNINGTON: No.

JUDGE EDWARDS: And that --

MR. PENNINGTON: And the market price will foreclose some people. Everybody, if you charge something you're going to foreclose somebody. The evidence is you're not foreclosing a lot of people because not a lot of people want to stay there, and if they want to get it somewhere else there are available substitutes for it. So, our judgment is it's not essential data, and we are satisfied based on the evidence that was available to us that there was competition for order

flow will be sufficient to check the possibility of monopoly pricing.

JUDGE GARLAND: What was your answer to their -- they cite, let's see, on page 46 of their brief, the NYSE Arca's marketing document saying now more than ever in order to see and estimate true market liquidity you need to look beyond just the top of book price. I mean --

MR. PENNINGTON: Well, the evidence is if you look, the --

JUDGE GARLAND: So, then it is necessary, it is --

MR. PENNINGTON: No.

JUDGE GARLAND: -- now essential.

MR. PENNINGTON: No, I mean, if you look at NASDAQ which offers this, and this is the company that has five percent of the people buy the security that was giving the stuff away. I'm sorry, ISE was giving the data away and got 15 percent. I mean, it's a relevant factor, some people use it, mostly professionals who are in the business, this is not something that's, it's essential to ordinary investors, or most ordinary investors. There may be somebody somewhere who would like to get this who can't afford the fee and won't have it available. But the alternative is to either say you can't charge for it, in which case you run the risk that it's not going to be distributed, or you're distorting the market by using a cost based mechanism that is not going to come up with

a number that you can say well, that's useful. I mean, even if we come up with the cost, I guess, you still have this question of you can't quantify it exactly, the Agency has to make a judgment based on what's the record before it, and what's its experience with this type of data.

JUDGE EDWARDS: See, it really sounds like your argument, you're going back and forth, and I'm not sure, it sounds like your argument it's essential, it's not essential, and we can't figure it out anyway, so let them do what they want to do. That's what I keep hearing. It's not essential, it's like who cares, and we can't figure it out.

MR. PENNINGTON: Well, I think --

JUDGE EDWARDS: Now, obviously --

MR. PENNINGTON: -- I think that's right --

JUDGE EDWARDS: -- obviously the folks who want to increase the fee have figured out something because they said we want to charge fees because our costs have gone up. So, they figured out something.

MR. PENNINGTON: But they haven't done any kind of an allocation that would be a rate making --

JUDGE EDWARDS: Well, then how do they know their costs went up?

MR. PENNINGTON: I -- they --

JUDGE EDWARDS: You should have accepted, you shouldn't have accepted --

MR. PENNINGTON: We didn't base it --

JUDGE EDWARDS: -- their proposal.

MR. PENNINGTON: We didn't base it on their cost representations, we based it on the judgment that we would let the cost be set by a competitive market.

JUDGE EDWARDS: No, but what I'm saying is they made the proposal on a significant, significantly because they said they were incurring increased costs, so obviously --

MR. PENNINGTON: Yes.

JUDGE EDWARDS: -- someone figured it out in house, and I bet you they can figure it out in house.

MR. PENNINGTON: Well, they can --

JUDGE EDWARDS: I'd be stunned if they couldn't.

MR. PENNINGTON: No, they can figure it out. I'm sure that whatever their increase discrete cost is they know that.

JUDGE EDWARDS: Right.

MR. PENNINGTON: But the Commission has said since 1999 that the harder problem, the impossible problem so far is to allocate the common costs, the cost of operating the market, some part of that would have to be paid for. So, the Commission --

JUDGE GARLAND: Can you tell me where is that, I was just looking for that. Is that in the final order?

MR. PENNINGTON: Which?

JUDGE GARLAND: The SEC's conclusion that it would be impossible, or very difficult to figure out costs?

MR. PENNINGTON: Yes, it's --

JUDGE GARLAND: Can you just help me with that? I'm not saying -- I'm sure it is in here, I'm just trying to focus on that now that you're emphasizing it. It starts at J.A. 688 of the order.

MR. PENNINGTON: Well, I've --

JUDGE GARLAND: Maybe I'll give the Intervenor a chance --

MR. PENNINGTON: There's a quotation from the special study, and it's where the Commission, it talked about the -- there's a discussion in the opinion, I can't lay my finger on it, but --

JUDGE GARLAND: Okay.

MR. PENNINGTON: -- it is in there about how in 1999 we proposed it, nobody had a solution, the industry was against it, the advisory committee was against it, it's not, has not -- there's nobody has come up with a practical way to do it. So, if you have to make a choice between letting some theoretical people be deprived of data that's professional data, and it's not essential data, alternatively to undertake this cost allocation process that nobody knows how to do our choice is that we believe it's a competitive market, and we believe there are available alternatives, and that all in all

the best result here is to allow competition to solve the problem.

JUDGE GARLAND: Okay. After you sit down if you could just take a quick look and -- or maybe the next speaker will know where to point us to. Thank you.

JUDGE HENDERSON: All right. Mr. Henkin.

ORAL ARGUMENT OF DOUGLAS W. HENKIN, ESQ.

ON BEHALF OF THE INTERVENOR

MR. HENKIN: Good morning, may it please the Court, Douglas Henkin representing the Intervenors. I wanted to jump to Judge Garland, your question. I believe the place that you were looking for, although it was just based on a quick look, starts on page 61 of the order. But to jump into some of the --

JUDGE GARLAND: Thank you.

MR. HENKIN: -- issues that were being addressed, under anti-trust law, and this is something that has not yet been really dealt with by any of the speakers, one of the important options that has to be considered in assessing competition is market participants' abilities to just say no to a product. And that's really where the action has been on this, Judge Garland, I agree with your point about the tail wagging the dog, because this is, depth of book fees are a very, very, very small aspect of the market, they're not the core fees, they don't represent core data. The SEC explained

back in Reg. NMS in 2005 that it was going to allow proprietary data to be sold by the exchanges under exactly the rule and the regime that it set forth here.

So, just saying no is an option, and when you look at the evidence that exists in the record that goes to in the ISE case that when it was free, when ISE was giving the data away only 15 percent of the professional, of the participants took the data, NASDAQ only five percent buy the data. When Island went dark, and the Petitioners say when it went dark completely, that's actually not true, it was a more controlled experiment than that, when Island stopped displaying market data for three ETF funds their market share for order flow with respect to those three funds declined by 50 percent. And the SEC also looked at --

JUDGE GARLAND: So, how do those two things fit together?

JUDGE EDWARDS: Right.

JUDGE GARLAND: That there's only a few people want it, but when you go dark all together you increase by 50 percent.

MR. HENKIN: Decrease.

JUDGE HENDERSON: Decrease.

JUDGE EDWARDS: Decrease.

JUDGE GARLAND: I mean decrease by 50. Yes, you decrease by 50 percent. How do those two fit together? If

only a few people want it why does going dark lead to a decrease of 50 percent?

MR. HENKIN: Well, with respect to Island, I can't speak to precisely why, the point is that it demonstrates the connection between order flow and market data.

JUDGE GARLAND: The Island one does, but --

MR. HENKIN: Correct.

JUDGE GARLAND: -- how does that make up, how does that -- what do I do with the five percent figure? That seems like it's not particularly relevant to order flow, otherwise more people would buy it.

MR. HENKIN: It is, because it's indicative that the SEC was correct about the importance of depth of book data, and more importantly, who it's important to. It's important to people who are trading very large market sizes. This is not about the retail investors, you need to look at the actual market here, and all of the evidence is, including one piece that I'm going to get to in a moment, all of the evidence confirms that the SEC's views of the way this part of the market works were right.

JUDGE GARLAND: Okay. So, just so -- this is actually is an explanation --

MR. HENKIN: Uh-huh.

JUDGE GARLAND: -- and that explanation is that for the big investors it matters, and where they go matters, that

is it matters to which exchange they would go to. So, let me ask two questions about that.

JUDGE EDWARDS: Do you agree with that?

JUDGE GARLAND: Is that what you're saying?

MR. HENKIN: It depends by the word matters. When you say it matters for in terms of competition for order flow, yes.

JUDGE GARLAND: Yes, that's what I mean.

MR. HENKIN: Whether the depth of book data is actually important for their trading decisions I'm not sure I would agree with, at least --

JUDGE GARLAND: Well, then why --

MR. HENKIN: -- on a universal basis.

JUDGE GARLAND: -- is order flow affected by that if --

JUDGE EDWARDS: Right.

JUDGE GARLAND: -- it doesn't affect?

MR. HENKIN: Well, order flow is affected by it because when a, depending upon what data, what market data a participant gets that will determine or help determine where it sends its orders. And if the quality of the data that it's not getting, if the quality of the data that it gets from one market center is better than the quality of the data that it gets from another center, all else being equal, that will tend to nudge the orders to the market center where the better data

is coming from. So --

JUDGE GARLAND: So --

MR. HENKIN: -- they're competing in that sense.

JUDGE GARLAND: All right. So, you're saying that depth of book is important in the sense that it nudges you, could nudge you from one exchange to another?

MR. HENKIN: My only question is with the word important. It is something that is competitively of value. The data itself isn't important. Where I'm struggling is whether it's important for the trade execution decisions because the Petitioners' argument focused on evaluating their best execution obligations, and what the SEC concluded is that it's --

JUDGE GARLAND: Well, then leave --

MR. HENKIN: Yes.

JUDGE GARLAND: I understand. Leave that part aside. But for purposes of evaluating why else are you going to be pushed from one exchange to another based on whether it has depth of book if not because it's important to your trading decisions?

MR. HENKIN: Well, it could be because it's important to where you steer the business, that is --

JUDGE GARLAND: Yes.

MR. HENKIN: -- one possibility. And then all of the other aspects that go into markets, or participants

deciding where to route their orders. And the SEC went through a long list, and actually NYSE's submission in the record went through a long list of how market participants direct their data, first they try -- their orders, first they try to internalize it, then they try to send it to non-exchange markets like ECNs and alternative trading systems. Only after they've gone through all of those do they then try to send it to exchanges. That's the way the analysis goes when they're trying to determine where to send the orders. And in there, within there the availability of market data and the quality of that market data can be a factor, and that's why the competitive position that the --

JUDGE GARLAND: All right. So, this raises two questions in my mind. The first question is it sounds like you're saying that with respect to retail there isn't really any, there is no competitive effect here.

MR. HENKIN: There is no competitive effect for retail investors because they very, very rarely, and the record clearly shows this, have any need for depth of book data. On an access basis, though, the proposal doesn't treat them differently if they feel that it's necessary for them.

JUDGE GARLAND: I thought the fee is different, isn't it?

MR. HENKIN: The fee is different for professional versus non-professional, but it's --

JUDGE GARLAND: Right.

MR. HENKIN: -- available to both if they want it.

JUDGE GARLAND: Right. But the fee for non-professional you're saying there's no competitive pressure on it.

MR. HENKIN: Well, there is competitive pressure because if nobody buys it then the exchanges won't sell it.

JUDGE GARLAND: That's different. In other words, the order flow pressure doesn't exist.

MR. HENKIN: It is less in the individual investor prospective, but that is primarily. And the record also shows why this is true. The individual investors generally don't determine where their orders go, their broker/dealers usually determine where brokers go.

And so, if you look for example in the record one of the things that the SEC relied on was the Schwab data, and we also mentioned this in the Intervenor's brief. The Schwab data that showed that I think it was 94 percent of orders were directed by Schwab not to an exchange at all, and that therefore there was no effect on, that depth of book data could have asserted on those orders. So, it really is a broker/dealer issue, not a retail investor issue.

JUDGE GARLAND: Mr. Phillip's other argument was, that this raised in my mind is some things like his example, at least hypothetical example was Google was traded with

enough liquidity only in one exchange, so that there really, this could not be, the order flow couldn't be a competitive factor with respect to that, is that right or wrong?

MR. HENKIN: With respect to that we just disagree, and we think the record disproves it. There has been declining market share, and basically the theory goes, the theory that the Petitioners are relying on is this notion that listed markets have a monopoly, and listing markets have a monopoly in trades of the shares that are listed in the first instance on those markets. The SEC looked at that, and looked at it exhaustively in terms of statistics and concluded that in fact those market shares had been declining, and that no market, no listing market has a majority, or a monopoly share of trading in its listed shares.

And in fact, from NYSE's perspective that share had dropped from about just under 80 percent to around 30 percent in just a few years. And you contrast that with something like the BATTS (phonetic sp.) exchange, which is also discussed in the record, which went from zero to just under 10 percent in about three years in part by offering some of its market data for free.

So, there is an extraordinary amount of fluidity in the order flow as between exchanges, and the main reason for this is that the SEC has as part of shepherding the national market system allowed for unlisted trading privileges, and

that's one of the things that has caused all the fluidity between the markets in terms of where the order flow goes versus where a security might be listed in the first instance. We just think that the Petitioners have got the data wrong in that regard, and the record clearly reflects that the SEC was right. Thank you.

JUDGE HENDERSON: All right. Does Mr. Phillips have any time left?

THE CLERK: Mr. Phillips does not have any time left.

JUDGE HENDERSON: You have --

MR. PENNINGTON: Do you want the pages now?

JUDGE HENDERSON: You have the answer to the question? All right. Why don't you go ahead and tell Judge Garland that.

MR. PENNINGTON: In the opinion on page number 74 around notes 254, and page number 100, note 313.

JUDGE GARLAND: Yes, I got the 100. Thank you.

JUDGE HENDERSON: All right. Mr. Phillips, why don't you take a couple of minutes.

ORAL ARGUMENT OF CARTER G. PHILLIPS, ESQ.

ON BEHALF OF THE PETITIONERS

MR. PHILLIPS: Thank you, Your Honor. I appreciate it. I will try to be brief. Your Honor, first of all, Judge Garland, you asked the question about the tail wagging the dog

in this particular context, and I think ultimately that's the core problem with the Commission's approach in this case, because what it's basically saying is that this is too small an enterprise for us to spend any time worrying about it. Candidly, that sounds an awful lot like what the Federal Energy Regulatory Commission said about in the Texaco case, which is that the small producers are just too small, and it's too important for us to let them go out and handle their operations, so what we're going to do is we're just going to deregulate it. And what the Supreme Court said there was that's fine, go tell Congress that you have the authority to deregulate it, and then you can proceed along that path. But what you can't do is set up a scheme in which you're supposed to make a determination of the fair and reasonableness of the rates, and then decide unilaterally that you're not going to do that because either they're too small, or too unimportant under these circumstances.

The reality is there is a market there, there are people, they are captive, they have to go and look at depth of book data as their own marketing materials say, and it may not be true for everyone, but for those for whom it is true they are subject to the monopoly pricing. You specifically asked the question how do we know that there is no cross-subsidization going on here? The answer is we can't know because we have no idea what the costs are, and under those

circumstances the assumption ought to be that there is the possibility of cross-subsidization, something specifically that Congress precludes in this particular scheme.

I see my time is up. I'd urge the Court to set aside the Commission's order.

JUDGE HENDERSON: All right.

JUDGE GARLAND: Thank you.

MR. PHILLIPS: Thank you.

JUDGE HENDERSON: Thank you.

(Recess.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Paula Underwood

Paula Underwood

February 28, 2010

DEPOSITION SERVICES, INC.

Exhibit B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW, Suite 7100
Washington, DC 20530

Plaintiff,

v.

DEUTSCHE BÖRSE AG,
Mergenthalerallee 61
65760 Eschborn
Germany

and

NYSE EURONEXT,
11 Wall Street
New York, NY 10005

Defendants.

Case:
Assigned To:
Date:
Description: Antitrust

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action pursuant to the antitrust laws of the United States to enjoin the proposed merger of Deutsche Börse AG ("DB") and NYSE Euronext ("NYSE") and to obtain such other equitable relief as the Court deems appropriate. The United States alleges as follows:

NATURE OF ACTION

1. DB is among the largest operators of financial exchanges in the world. While most of its businesses are in Europe, DB, through various subsidiaries, is also the largest unitholder of Direct Edge Holdings LLC ("Direct Edge"), the fourth-largest operator of stock exchanges in the United States. Direct Edge competes head-to-head with NYSE and is an exchange innovator, leading in technology, pricing, and in the development of exchange models.

2. NYSE operates some of the oldest, largest, and most prestigious stock exchanges in the United States. It stands at the center of American financial markets, with its exchanges handling roughly a third of the equities traded daily in the United States, and considerably more for certain equities and certain times of day. NYSE exchanges list the vast majority of the listed exchange-traded products, including the majority of exchange-traded funds, and they supply key market data to customers making investment decisions.

3. On February 15, 2011, NYSE and DB agreed to merge in a transaction worth roughly $9 billion. NYSE and DB propose to combine under a new Dutch holding company ("NewCo"), which would be the largest exchange group in the world, with dual headquarters in Frankfurt and New York. NewCo would own 100% of NYSE and 31.54% of Direct Edge.

4. The proposed transaction would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, because it would substantially lessen competition and potential competition in at least three lines of commerce in the United States: (a) displayed equities trading services; (b) listing services for exchange-traded products ("ETPs"), including exchange-traded funds ("ETFs"); and (c) real-time proprietary equity data products.

JURISDICTION, VENUE AND COMMERCE

5. The United States brings this action under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain defendants from violating Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

6. The Court has subject matter jurisdiction over this action and the defendants pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337(a), and 1345. NYSE and DB provide and sell displayed equity trading services and real-time proprietary equities trading data. NYSE also provides and sells listing services for exchange traded products. Sales of these services in the United States represent a regular, continuous, and substantial flow of interstate commerce, and have a substantial effect upon interstate commerce.

7. This Court has personal jurisdiction over each defendant and venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. §§ 1391(b)(1) and (c). Defendants transact business within the District of Columbia. DB and NYSE acknowledge personal jurisdiction in this District and consent to venue.

DEFENDANTS AND THE TRANSACTION

8. DB is a German *Aktiengesellschaft* that operates financial exchanges and related businesses in the United States and Europe. It generates revenue from, among other things, listing fees, stock trading transaction fees, market data licensing fees, and technology licensing arrangements. Through its subsidiaries, DB is the largest holder of equity in Direct Edge, a leading stock exchange operator in the United States. DB owns 50% of the equity and controls Frankfurt-based Eurex Group, a leading European derivatives exchange operator. DB has announced an agreement to buy the remaining equity in Eurex after DB completes its merger

with NYSE. Eurex owns International Securities Exchange Holdings, Inc. ("ISE"), a leading options exchange in New York that also owns a 31.54% equity interest in Direct Edge. In 2010, DB's subsidiaries earned substantial revenues from sales in the United States.

9. NYSE is a publicly traded Delaware corporation with its principal place of business located in New York, New York. The company operates financial exchanges in the United States and Europe. In the United States, NYSE operates three stock exchanges: (i) the New York Stock Exchange LLC; (ii) NYSE Arca, Inc., an all-electronic exchange; and (iii) NYSE Amex LLC, an exchange that lists the stock of primarily small- and medium-sized companies. NYSE generates revenue from, among other things, listing fees, stock trading transaction fees, market data licensing fees, and technology licensing arrangements. In 2010, NYSE earned over $3 billion in total revenues from within the United States.

10. Direct Edge is a Delaware limited liability company with its principal place of business in Jersey City, New Jersey. Direct Edge, through its subsidiary Direct Edge Holdings, Inc., owns and operates two leading U.S. stock exchanges, EDGA Exchange, Inc. and EDGX Exchange, Inc. Direct Edge is majority-owned by a group including ISE, Goldman Sachs Group Inc., Citadel Investment Group LLC, and Knight Capital Group Inc. ISE owns 31.54% of Direct Edge and holds certain key voting and special veto rights, such as the right to veto entry by Direct Edge into options trading. ISE also has the right to appoint three members to the Direct Edge board of managers and one member to each of the corporate boards of EDGA Exchange, Inc. and EDGX Exchange, Inc. Goldman Sachs, Citadel, and Knight each own 19.9% of Direct Edge. The remaining 8.76% is owned by a group of five brokers, including affiliates of JP Morgan Chase & Co. (through LabMorgan Corp.), Bank of America (through Merrill Lynch L.P. Holdings, Inc.), Nomura Securities International, Inc., Deutsche Bank USA (through DB US

Financial Markets Holding Corporation), and Sun Partners LLC. Direct Edge's exchanges compete head-to-head with the NYSE exchanges. In 2010, Direct Edge earned substantial revenues in the United States.

11. DB and NYSE have proposed to merge into a NewCo that will house all their current corporate holdings. NewCo will be a Dutch holding company, with dual headquarters in New York City and outside Frankfurt, Germany. Combined annual net revenues of NewCo are expected to be over $5 billion, with revenue sources including market data and technology; equities trading and listings; derivatives trading and listings; and settlement and custody. NewCo will own many of the world's leading brands in finance. Its post-merger leadership will be split between former executives from both NYSE and DB. The current DB Chief Executive Officer will stay on as Chairman, and the current NYSE CEO will remain CEO of the combined entity.

RELEVANT MARKETS

Displayed Equities Trading Services

12. Displayed equities trading services comprise a relevant antitrust product market and a "line of commerce" within the meaning of Section 7 of the Clayton Act. These services include providing mechanisms and ancillary services to facilitate the public purchase and sale of exchange-traded stocks (those defined as "NMS stock" under Rule 600(b)(47) of Regulation NMS, 17 C.F.R. § 200 *et. seq.*). These services are offered mainly by national stock exchanges registered under Section 6 of the Securities Exchange Act of 1934, 15 U.S.C. § 78f, and also by electronic communications networks ("ECNs") regulated by Regulation ATS, 17 C.F.R. §242.300 *et seq.*

13. Several key attributes separate displayed from undisplayed or "dark" equities trading services, including the continuous pre-trade publication of the best-priced quotations for buying and selling exchange-traded stocks in a national consolidated data stream, the display of certain customer limit orders (offers to buy and sell stock at particular prices), and the provision of deep and reliable liquidity for a broad array of exchange-traded stocks. Displayed trading venues, in particular those operated by NYSE, The NASDAQ OMX Group, Inc., Direct Edge, and BATS Global Markets, Inc. form the backbone of the American national market system and over the past several years have accounted for roughly 65% to 75% of the overall average daily trading volume in the United States. Broker-dealers, institutional investors, and other customers rely on displayed trading venues to provide meaningful price discovery for exchange-traded stocks and to act as exchanges of last resort, especially for thinly traded stocks, in times of market volatility or stress.

14. Undisplayed trading services account for roughly 25% to 35% of total average daily trading volume and serve a very different purpose for investors: to allow for anonymous matching of orders without publicly revealing the intention to trade before execution. Institutional investors and other traders use these services to minimize the likelihood that their trades will cause the stock price to move against their interest. Most of the undisplayed trading centers offer less liquidity on most stocks (indeed, an alternative trading system providing undisplayed trading must account for less than 5% trading volume in a stock or the venue automatically becomes displayed by regulations promulgated by the U.S. Securities and Exchange Commission ("SEC")) and base their prices on those prevailing in the displayed equities trading centers.

15. The relevant geographic market is the United States. Trading equities on a foreign exchange is not an adequate substitute for trading on an exchange in the United States. Trading on an exchange outside the United States exposes traders to risks like foreign exchange risk, country risk, reputational risk, different or potentially lax regulatory environments for trading, lack of analyst coverage, different accounting standards, time differences, and language differences, among other things. Additionally, the majority of American companies choose to list on domestic exchanges. Therefore, to trade most publicly-listed American stocks, investors must use stock exchanges located in the United States.

16. The market for displayed equities trading services in the United States satisfies the hypothetical monopolist test. A profit-maximizing monopolist in the offering of displayed equities trading services in the United States likely would impose at least a small but significant and non-transitory increase in the price of such services. Not enough customers would switch to alternative means of trading equities in undisplayed trading centers or foreign exchanges to render this price increase unprofitable.

Listing Services for Exchange-Traded Products

17. The provision of ETP listing services constitutes a relevant antitrust product market and a "line of commerce" within the meaning of Section 7 of the Clayton Act. An ETP is typically an exchange-listed equity security instrument other than a standard corporate cash equity, the performance of which is designed to track another specific instrument, asset or group of assets, such as a market index or a selected basket of corporate stocks. ETPs are typically sponsored by firms that monitor and manage the composition and performance of the ETP. The most popular type of ETP today is an exchange-traded fund, an equity fund with a form of exchange-listed securities (often trust units) that can be traded like a stock but that is also

benchmarked against another stock, index or other asset. Buying an ETP offers a simple way for investors to diversify their portfolios without having to buy each individual corporate stock or other financial instrument directly. For instance, the SPDR S&P 500 exchange-traded fund tracks the S&P 500 U.S. stock index, which comprises widely held American stocks. ETFs and other ETPs are very popular and serve as the cornerstone of many individual investors' portfolios.

18. The relevant geographic market is the United States. Listing an ETP on a foreign exchange is not an adequate substitute for listing on an exchange in the United States. U.S. sponsors of ETPs overwhelmingly choose to list domestically, because it allows them to build brand awareness and reputation and stay close to U.S. capital markets and investors in the United States considering the purchase and sale of ETFs and other ETPs, as well as the analysts that cover ETPs and ETFs and, in many cases, the underlying or related assets, indexes, or products.

19. The market for ETP listing services in the United States satisfies the hypothetical monopolist test. A profit-maximizing monopolist that was the only present and future firm in the offering of ETP listing services in the United States likely would impose at least a small but significant and non-transitory increase in the price of ETP listings. Not enough customers would switch to alternatives to render this price increase unprofitable.

Real-time Proprietary Equity Data

20. Real-time proprietary equity data is a relevant antitrust product market and a "line of commerce" within the meaning of Section 7 of the Clayton Act. Access to affordable, reliable and timely data about the stock market is essential for informed stock trading. NYSE and Direct Edge are among only four major competitors that aggregate and disseminate certain market data to brokers, dealers, investors, and news organizations. They sell (or with little lead time could

easily sell) competing proprietary market data products derived from trading activities occurring both on and off their exchanges.

21. The product market for real-time proprietary equity data consists of what is commonly referred to in the industry as "non-core" data. Market participants generally refer to two broad categories of critical market data: "core" and "non-core." Core data refers to the transaction data the SEC requires stock exchanges to report to securities information processors for consolidation and public distribution, including the current best bid and offer for each stock on every exchange and information on each stock trade, including the last sale. Non-core data includes trading volume and "depth of book" data that certain exchanges collect and sell, *i.e.*, the underlying quotation data on any given exchange. Non-core data helps traders determine where liquidity for a given stock exists during the day and the depth of that liquidity. Each exchange (or other trading platform) owns non-core data and can distribute it voluntarily for a profit in competition with data from other exchanges. Non-core data products can be made to replicate core data and exchanges can package and sell both core and non-core data together.

22. The market for real-time proprietary equity data satisfies the hypothetical monopolist test. A profit-maximizing monopolist in the offering of real-time proprietary equity data likely would impose at least a small but significant and non-transitory increase in the price of its equity data products. Not enough customers would switch to other products or services to render this price increase unprofitable.

23. The relevant geographic market is the United States. Real-time proprietary equity data in this context relate only to domestic trading of U.S.-listed stock. Customers needing real-time proprietary equity data relating to U.S.-listed stocks cannot turn to foreign alternatives.

ANTICOMPETITIVE EFFECTS

NYSE and Direct Edge Are Head-to-Head Competitors

24. NYSE and Direct Edge compete head-to-head in displayed equities trading services and in the provision of real-time proprietary equity data products. Direct Edge over the years has been a force in modernizing stock trading with cutting edge technology, faster trading times, lower prices, and new market models. Direct Edge began in 1998 as an electronic communication network named Attain. By 2007, it was a major trading venue owned and supported by broker-dealers Knight Capital, Citadel and Goldman Sachs. These broker-dealers used Direct Edge as a counterweight to the exchange duopoly of NYSE and NASDAQ. In December 2008, Direct Edge and ISE agreed that ISE would buy part of Direct Edge and Direct Edge would take control of the struggling ISE Stock Exchange. In March 2010, Direct Edge received approval from the SEC to convert its two ECNs into national securities exchanges under Section 6 of the Securities Exchange Act of 1934 ("Exchange Act").

25. Direct Edge was first to offer two trading platforms using the same technology, but with different pricing schemes. EDGA historically has been operated as a lower cost exchange, being typically free or nearly free for many traders to make offers to buy or sell stock at certain posted prices (*i.e.*, "post liquidity") as well as for customers to trade against these offers and buy and sell stock (*i.e.*, "take liquidity"), making EDGA attractive to traders sensitive to execution charges. Approximately one-third of Direct Edge volume trades over EDGA. EDGX historically has offered a more traditional pricing structure whereby the exchange normally pays customers to post liquidity and charges a fee for them to take liquidity. Although the two platforms have different pricing structures and cater to different segments, they share technology, support, code, and data centers.

26. NYSE has responded to Direct Edge's aggressive tactics in part by improving its own technology and changing its pricing. For example, NYSE in 2009 replaced its trading system in an effort to regain business lost mainly to the sophisticated electronic platforms at Direct Edge and BATS. The new system was faster, reducing transaction processing time to less than 10 milliseconds, which at the time made NYSE roughly as fast as its rivals. NYSE largely was able to stabilize its share of trading volume by implementing a new market model and introducing a new pricing scheme, which gave rebate incentives to certain designated market makers (*i.e.*, those market participants that agreed to buy and sell particular stocks at certain prices for certain amounts of time).

27. Direct Edge's investors, mainly broker-dealers, use its exchanges to put downward pressure on trading fees at NYSE and other exchanges. When possible, Direct Edge's broker-dealer investors often send trades to a Direct Edge exchange in order to keep their overall transaction costs down. In this way, Direct Edge helped spur a 2009 pricing war that substantially reduced the cost of trading stocks in the United States.

28. NYSE and Direct Edge also are head-to-head competitors in the provision of real-time proprietary equity data. Both are well-situated to offer new real-time equity data products and equity data products that replicate portions of core data offerings, but with even faster feeds.

Direct Edge Is A Potential Competitor to NYSE In Listing Services for Exchange-Traded Products

29. Direct Edge is a potential competitor to NYSE in listing services for ETPs. An ETP, including an ETF, must be listed on a registered stock exchange in order to be widely-traded in the United States. Exchanges typically compete for listings based on market structure, market maker incentives, marketing, and other associated services.

30. NYSE dominates the business of providing listing services for ETPs. NYSE's major competitors are NASDAQ, with a small share, and recent entrant BATS. Direct Edge, as a leading operator of registered stock exchanges, is uniquely situated for entry and already imposes competitive discipline on NYSE: its potential entry has already affected NYSE decisions to innovate and its pricing decisions in its ETP listings business.

This Merger Would Substantially Lessen Competition

31. NYSE and Direct Edge are currently vigorous competitors and closely monitor each other's competitive positions in at least two highly-concentrated markets. They are also close potential competitors in a third highly-concentrated market, listing services for ETPs, in which NYSE is a dominant player. Upon consummation of the proposed transaction, NewCo would own NYSE and would be able to control NYSE's management decisions.

32. Upon consummation of the proposed transaction, NewCo also would become, through ISE, the largest equity owner and most influential member of Direct Edge. NewCo would be able to appoint three of the eleven Direct Edge managers, and one representative to each of the EDGA and EDGX exchange's respective corporate boards. NewCo would have important ancillary rights at Direct Edge: veto rights over certain major corporate actions, representation on key committees, and shareholder rights under corporate law, such as the right

to file shareholder derivative lawsuits. NewCo also would have access to Direct Edge's non-public, competitively sensitive information, and to the company's officers and employees. NewCo's ownership interests and associated rights would give it influence over Direct Edge's management decisions.

33. NewCo's presence on the Direct Edge boards would also likely chill board-level discussions of competition with NYSE. Direct Edge was formed, in part, as a customer-owned foil to NYSE and NASDAQ. When NYSE or NASDAQ fails to innovate or price competitively, broker-dealers can encourage Direct Edge to innovate or can shift their business to Direct Edge. If a NYSE-affiliate were sitting on Direct Edge boards, the broker-dealer board members would likely not want to discuss or reveal Direct Edge's potential innovations or other competitive initiatives targeting NYSE.

34. NewCo would have the incentive and ability to use its ownership, influence, and access to information as to both NYSE and Direct Edge to reduce competition between the companies in markets where they are significant competitors or potential competitors, resulting in an increase in prices or a reduction in innovation and quality for a significant number of trading, listings, and data customers.

ENTRY

35. Supply responses from competitors or entry of new potential competitors in the relevant markets—displayed equities trading services, ETP listing services, and real-time proprietary equity data—would not prevent the likely anticompetitive effects of the proposed merger. The merged firm would possess significant advantages that any new or existing competitor would have to overcome to successfully compete with the merged firm.

36. Barriers to entry into each of these markets are formidable. In the market for displayed equities trading services, any entrant would have to overcome hurdles of reputation, scale and network effects to successfully challenge the incumbents. In ETP listing services, any entrant would have to overcome numerous barriers to successfully challenge NYSE, including regulation, reputation, scale, and liquidity. Direct Edge is in a strong position to enter because it is already a registered stock exchange with reputation, scale and liquidity. Finally, competition in real-time proprietary equity data is largely limited to registered securities exchanges, and is closely linked to and derived from an exchange's presence in trading and market data collection. Only four exchange operators today have large enough public trading volume and existing facilities for collecting, aggregating, and disseminating data to meaningfully compete. They enjoy a significant advantage over any possible entrant.

VIOLATIONS ALLEGED

37. The United States incorporates the allegations of paragraphs 1 through 36.

38. The proposed transaction between DB and NYSE would substantially lessen competition in interstate trade and commerce in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

39. Unless restrained, the transaction will have the following anticompetitive effects, among others:

a. Actual and potential competition between NYSE and Direct Edge in displayed equities trading services and real-time proprietary equity data products in the United States will be substantially lessened;

b. Potential competition between NYSE and Direct Edge in ETP listing services in the United States will be substantially lessened;

c. Prices for displayed equities trading services, ETP listing services, and real-time proprietary equity data products likely will increase; and

d. Innovation in displayed equities trading services, ETP listing services, and real-time proprietary equity data products likely will decrease.

RELIEF REQUESTED

40. The United States requests that:

a. the proposed merger of NYSE and DB be adjudged to violate Section 7 of the Clayton Act, 15 U.S.C. §18;

b. DB and NYSE be enjoined from carrying out the proposed merger or carrying out any other agreement, understanding, or plan by which DB and NYSE would acquire, be acquired by, or merge with each other;

c. The United States be awarded the costs of this action; and

d. The United States receives such other and further relief as the case requires and the Court deems just and proper.

Dated: December 22, 2011

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

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Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. **DEUTSCHE BÖRSE AG,** and **NYSE EURONEXT,** Defendants.	Case: Assigned to: Assign. Date: Description: Antitrust

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THIS PROCEEDING

On February 15, 2011, NYSE Euronext ("NYSE") and Deutsche Börse AG ("DB"), two of the world's leading owners and operators of financial exchanges, agreed to merge in a transaction valued at approximately $9 billion. NYSE and DB are seeking to combine their businesses and create the largest exchange group in the world under a new Dutch holding company ("NewCo"). NewCo would have dual headquarters in Frankfurt and New York.

Both NYSE and DB have substantial operations in the United States, including between them interests in five major American stock exchanges. NYSE is one of the two largest and most prestigious stock exchange operators in the United States. It owns the New York Stock Exchange LLC, NYSE Arca, Inc., and NYSE Amex LLC. DB, through a series of subsidiaries, is the largest unitholder of Direct Edge Holdings LLC ("Direct Edge"), which operates the EDGA and EDGX electronic exchanges and is the fourth largest stock exchange operator in the United States by volume of shares traded. Direct Edge is considered an innovator in the exchange space and a competitive constraint on NYSE. This transaction therefore poses a significant risk that NewCo could use its influence to dampen the competitive zeal of Direct Edge. The United States brought this lawsuit on December 22, 2011, seeking to enjoin the proposed transaction. After a thorough investigation, the United States believes that the likely effect of the merger would be to lessen substantially competition and potential competition in displayed equities trading services, listing services for exchange-traded products, including exchange-traded funds, and real-time proprietary equity data products in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

Simultaneous with the filing of the complaint, the United States filed a proposed Final Judgment designed to remedy the Section 7 violation. Under the proposed Final Judgment, which is explained more fully below, Defendants are subject to affirmative obligations to divest DB of its holdings in Direct Edge and to immediately eliminate DB's ability, through its subsidiaries, to influence the business and governance of Direct Edge.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that this

Court would retain jurisdiction to construe, modify, or enforce the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

DB is a German *Aktiengesellschaft* that runs financial exchanges and ancillary businesses in the United States and Europe. DB generates revenue from several sources, including fees for securities listings and trading, fees for market data, and charges for licensing of exchange-related technology. DB, through its subsidiaries, is the largest holder of equity in Direct Edge, a leading stock exchange operator in the United States. DB owns 50% of the equity and controls Frankfurt-based Eurex Group, a leading European derivatives exchange operator. DB has announced an agreement to buy the remaining equity in Eurex after DB completes its merger with NYSE. Eurex owns International Securities Exchange Holdings, Inc. ("ISE"), a leading options exchange in New York that also owns a 31.54% equity interest in Direct Edge. In 2010, DB's ISE and Eurex subsidiaries earned substantial revenues from sales in the United States.

NYSE is a publicly traded Delaware corporation with its principal place of business in New York, New York. NYSE operates financial exchanges in the United States and across Europe. In the United States, NYSE operates the New York Stock Exchange, which is the storied hybrid exchange with both trading floor and electronic components; NYSE Arca, which is an all-electronic exchange; and NYSE Amex, the former American Stock Exchange, which targets mainly small- and medium-sized companies. NYSE also generates revenue from a wide range of exchange-related businesses, including securities listings, trading, data licensing,

and technology licensing. In 2010, NYSE earned more than $3 billion in total revenues from within the United States.

Direct Edge is a Delaware limited liability company with its principal place of business in Jersey City, New Jersey. Direct Edge, through its subsidiary Direct Edge Holdings, Inc., owns and operates two leading U.S. stock exchanges, EDGA Exchange, Inc. and EDGX Exchange, Inc. Direct Edge is majority-owned by ISE, Goldman Sachs Group Inc., Citadel Investment Group LLC, and Knight Capital Group Inc. ISE owns 31.54% of Direct Edge and holds certain key voting and special veto rights, such as the right to veto entry by Direct Edge into options trading. ISE also has the right to appoint three members to the Direct Edge board of managers and one member to each of the corporate boards of EDGA Exchange, Inc. and EDGX Exchange, Inc. Goldman Sachs, Citadel, and Knight each own 19.9% of Direct Edge. The remaining 8.76% is owned by a group of five brokers, including affiliates of JP Morgan Chase & Co. (through LabMorgan Corp.), Bank of America (through Merrill Lynch L.P. Holdings, Inc.), Nomura Securities International, Inc., Deutsche Bank USA (through DB US Financial Markets Holding Corporation), and Sun Partners LLC. Direct Edge's exchanges compete head to head with the NYSE exchanges. In 2010, Direct Edge earned substantial revenues from within the United States.

B. Relevant Markets

Antitrust law, including Section 7 of the Clayton Act, protects consumers from anticompetitive conduct, such as a firm's acquisition of the ability to raise prices or reduce innovation. Market definition assists antitrust analysis by focusing attention on those markets where competitive effects are likely to be felt. Well-defined markets include both sellers and buyers, whose conduct most strongly influences the nature and magnitude of competitive

effects. Defining relevant markets in merger cases frequently begins by identifying a collection of products or set of services over which a hypothetical profit maximizing monopolist likely would impose at least small but significant and non-transitory increase in price. Defining markets in this way ensures that antitrust analysis takes account of a broad enough set of products to evaluate whether a transaction is likely to lead to a substantial lessening of competition.

Here, the investigation revealed three relevant markets. The first is displayed equities trading services, which includes stock trading services offered by trading venues that publicly disclose certain key information about quotes and transactions. Registered stock exchanges and electronic communication networks offer such displayed trading services. Displayed trading services are accompanied by the continuous pre-trade publication of the best-priced quotations for buying and selling exchange-traded stocks in a national consolidated data stream, the display of certain customer limit orders (offers to buy and sell stock at particular prices), and the provision of deep and reliable liquidity for a broad array of exchange-traded stocks. Displayed equities trading services form the backbone of the American national market system and facilitate equity price discovery in the United States. Displayed services are by their nature very different from undisplayed equity trading services, like dark pools, which offer no pre-trade transparency and cater mainly to institutional traders looking to buy or sell large volumes of stock while minimizing stock price movement.

A second relevant market consists of the listing services for exchange-traded products ("ETPs"). An ETP is typically an exchanged-listed equity security instrument other than a standard corporate cash equity, the performance of which is designed to track another specific instrument, asset or group of assets, such as a market index or a specific basket of corporate

stocks. ETPs typically are sponsored by firms that determine the composition of the ETP and then manage it for investors. The most popular type of ETP today is an exchange-traded fund ("ETF"), which is a security traded like a stock that is designed to replicate the returns of a stock, index or similar asset. Exchanges compete to list, or offer for trading, ETPs in exchange for listing fees and fees for ancillary services. Exchanges compete for listings mainly on the basis of their market structure, market maker incentives, marketing, and other associated services. ETP listings are a separate relevant market because there are no reasonable substitutes for listing an ETP if a sponsoring firm wants a widely-traded product with access to the liquidity offered by exchanges. In addition to which, only registered exchanges can offer these listing services.

A third relevant market encompasses real-time proprietary equity data products comprised of non-core data. There are two general types of equity data: "core" and "non-core." Core data refers to the transaction data the U.S. Securities and Exchange Commission requires stock exchanges to aggregate and distribute publicly, including the current best bid and offer for each stock on every exchange and information on each stock trade, including the last sale. Non-core data includes trading volume and "depth of book" data that certain exchanges collect and sell, *i.e.*, the underlying quotation data on any given exchange. Non-core data helps traders determine where liquidity for a given stock exists during the day and the depth of that liquidity. Access to market data is critical to many market participants and followers, who are willing to pay a premium for the best price, quote, volume, and other data available about exchange-listed equities being traded on the exchanges. Each exchange (or other trading venue) owns its non-core data and can distribute it for a profit. Proprietary data products can be made to replicate core data and exchanges can package and provide both core

and non-core data together. NYSE and Direct Edge, as registered exchange operators, are among only four major competitors supplying real-time proprietary equity data products derived from trading activities.

Antitrust analysis must also consider the geographic dimensions of competition. Here, the relevant geographic markets exist within the United States and are not affected by competition outside the United States. The competitive dynamics for each of the three markets is distinctly different outside the United States.

C. Competitive Effects

NewCo would have the incentive and ability to significantly influence the competitive conduct of Direct Edge through ISE's voting interest, governance rights, or other shareholder rights under corporate law, like the right to file shareholder derivative suits. NewCo would likely use its influence to induce Direct Edge to compete less aggressively, to coordinate Direct Edge's conduct with the NYSE exchanges, or to disrupt day-to-day business activities at Direct Edge.

NewCo's presence on the Direct Edge boards would chill discussion of head-to-head competition with the NYSE stock exchanges. Direct Edge was formed, in part, by a group of broker-dealers intending to constrain the two large stock exchange operators in the United States, NYSE and NASDAQ. The broker-dealer owners of Direct Edge, and others, can and do turn their trades to Direct Edge when NYSE or NASDAQ fails to compete aggressively.

Finally, NewCo also would gain access to non-public, competitively sensitive information about Direct Edge. This access would likely enhance NewCo's ability to coordinate the behavior of the NYSE and Direct Edge exchanges, or make the accommodating responses of NYSE faster and more targeted. And if Direct Edge gained access to

competitively sensitive NYSE information, it would further elevate the risk of coordinated effects.

Finally, even if it were unable to influence Direct Edge, NewCo would likely have, as a result of the partial ownership interest in Direct Edge, a reduced incentive to direct the NYSE exchanges to compete as aggressively against the Direct Edge exchanges. Since NewCo would share Direct Edge's losses inflicted by the NYSE exchanges, this may lead NewCo to behave in ways that would reduce those losses.

Supply responses from competitors or entry of potential competitors in any of the relevant markets would not prevent the likely anticompetitive effects of the proposed merger. The merged firm would possess significant advantages that any new or existing competitor would have to overcome to successfully compete with the merged firm. Entrants face significant entry barriers including hurdles of reputation, scale and network effects to successfully challenge the incumbents in the markets for displayed equities trading services, listing services for ETPs, and real-time proprietary equity data products.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment is designed to preserve competition in displayed equities trading services, listing services for exchange-traded products, and real-time proprietary equity data products by restricting NewCo's ability to influence Direct Edge and by eliminating NewCo's equity stake in Direct Edge. The proposed Final Judgment has two principal requirements: (1) the complete divestiture of Defendants' equity stake in Direct Edge, and (2) the immediate suspension of Defendants' ability to participate in the governance or business of Direct Edge. The proposed Final Judgment also has several sections designed to ensure its effectiveness and adequate compliance. Each of these sections is discussed below.

Before closing the DB-NYSE transaction, the proposed Final Judgment requires the Defendants provide a written plan explaining the steps they will take to render DB's interest in Direct Edge passive until such time as the divestiture occurs. Defendants must also certify that the plan complies with all applicable laws and that all voting, director, or other rights DB held have been eliminated, except as otherwise been provided for in the order. Within two calendar days of closing the transaction, any DB officer, director, manager, employee, affiliate, or agent must resign from the boards of all Direct Edge entities.

Further, from the date of the filing of the Final Judgment, the Defendants are prohibited from suggesting or nominating any candidate for election to the board of any Direct Edge entities or having any officer, director, manager, employee, or agent serve as an officer, director, manager, employee with or for any Direct Edge entities. The Defendants are also prohibited from any participation in a nonpublic meeting of any Direct Edge entities or in otherwise receiving any nonpublic information from any Direct Edge employee or board member, except to the extent necessary to fulfill the provisions of the proposed Final Judgment or to fulfill financial reporting obligations. The Defendants are further prohibited from voting except to the extent necessary to fulfill the provisions of the proposed Final Judgment, in which case they must vote their shares in proportion to how the other owners vote.

The Defendants are also prohibited from using their ownership interest in Direct Edge to exert any influence over it or to prevent it from making any necessary changes to its corporate governance documents to comply with the Final Judgment. The proposed Final Judgment provides that the Defendants must continue to provide regulatory and backup facility services to Direct Edge pursuant to existing contracts, and requires that the Defendants implement a firewall to prevent any inappropriate use of information gained by the Defendants

about Direct Edge's business as a result of those contracts. The firewall requires that only the employees of the Defendants specifically necessary to provide the agreed upon services may receive any information from Direct Edge under those agreements, and those employees are prohibited from using any such information for any purpose other than providing the agreed upon services. This provision will allow Direct Edge to continue to receive its contracted services while reducing the opportunities for the Defendants to misuse any information provided by Direct Edge under the agreement. The anticipated effect of all these provisions is to maintain Direct Edge as an independent and viable competitor.

The proposed Final Judgment provides a two-year period, which the United States in its sole discretion may extend up to three additional years, for Defendants to divest all equity ownership in Direct Edge. The assets may be divested by open market sale, public offering, private sale, private placement, or repurchase by Direct Edge. If the assets are divested by private sale or private placement the United States must, in its sole discretion, approve the buyers of the assets. This provision ensures that the divestiture itself does not create any competitive issues. To maintain the complete independence of Direct Edge after the divestiture, the proposed Final Judgment prohibits the Defendants from financing any part of any purchase made pursuant to the Final Judgment.

In the event that Defendants are unable to take the steps required by the proposed Final Judgment to render their Direct Edge interest passive or create a plan demonstrating their compliance with the proposed Final Judgment, or do not accomplish the divestiture as prescribed in the proposed Final Judgment, Section VII of the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture upon the request of the United States. If a trustee is appointed, the proposed Final Judgment provides

that Defendants will pay all costs and expenses of the trustee. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

The proposed Final Judgment lasts for ten years, and prohibits the Defendants from acquiring any additional equity interest in Direct Edge during that time. It also provides procedures for the United States to access the Defendants' records and personnel in order to secure compliance with the terms of the Final Judgment.

The proposed Final Judgment will eliminate the anticompetitive effects of the acquisition by maintaining Direct Edge as an independent and vibrant competitive constraint in displayed equities trading services, listing services for exchange-traded products, and real-time proprietary equity data products in the United States.

IV. REMEDIES APPLICABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES APPLICABLE FOR APPROVAL OR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

James J. Tierney
Chief, Networks & Technology Enforcement Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 7100
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, seeking preliminary and permanent injunctions against Defendants' transaction and proceeding to a full trial on the merits. The United States is satisfied, however, that the relief in the proposed Final Judgment will preserve competition in the markets for displayed equities trading services, listing services for exchange-traded products, and real-time proprietary equity data products. Thus, the proposed Final Judgment would protect competition as effectively as would any remedy available through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the United States is entitled to "broad discretion to settle with the Defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").[1]

Under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to

[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

> the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is '*within the reaches of the public interest.*' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

In addition, "a proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the

[2] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'").

consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged."). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d. at 1459-60. Courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to

engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 *Cong. Rec.* 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the Court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[3]

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that the United States considered in formulating the proposed Final Judgment.

[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

Dated: December 22, 2011

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

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