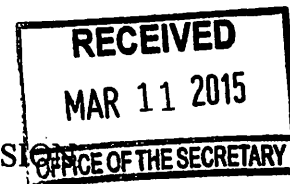


UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



In The Matter of the Application of:

SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION

for Review of Actions Taken by Self-Regulatory
Organizations

Admin. Proc. File No. 3-15350

The Honorable Brenda P. Murray,
Chief Administrative Law Judge

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

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

The Subpoena contains a single request that is necessary to evaluate and respond to the arguments made by the Securities Industry and Financial Markets Association ("SIFMA"), its members, and its expert witness, Bernard S. Donefer. Because the Subpoena request is relevant and narrowly tailored, it should be granted.

ARGUMENT

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

I. The Subpoena Seeks Evidence Generally Relevant To This Proceeding

The Exchanges' Subpoena should be issued because it seeks evidence relevant to the upcoming hearing and the substantive issues raised by SIFMA's applications—that is, whether “the challenged rules should be vacated under the statutory standard set forth in Exchange Act Section 19(f)—as informed by the two-part test set out in [the Commission's] 2008 ArcaBook Approval Order, the D.C. Circuit's decision in *NetCoalition I*, and appropriate briefing from the parties . . .” *Order Establishing Procedures and Referring Applications for Review*, Admin. Proc. File Nos. 3-15350 & 3-15351 (May 16, 2014), at 19-22. SIFMA noted in its own subpoena requests that the concept of “relevance,” as a general matter, is “much broader than that concept under the Federal Rules of Evidence.” *In the Matter of City of Anaheim*, 71 S.E.C. 191 & nn. 5-7 (1999); *In the Matter of Charles P. Lawrence*, 43 S.E.C. 607, 612-13 (1967) (“[A]ll evidence which can conceivably throw any light upon the controversy should normally be admitted.”). SIFMA's subpoena requests have also noted that a request for discovery is relevant “if there is any possibility that the information sought may be relevant to the subject matter of the action.” *In the Matter of Monetta Fin. Servs.*, Admin. File. No. 3-9546, 1998 WL 211406, at *4 (Apr. 21, 2004) (internal quotations omitted).

The Subpoena seeks the recording and transcript of an FISD conference held on February 24, 2015, as well as specific other documents relating to Mr. Donefer's participation in that conference. FISD is an industry forum devoted to business and technical issues that affect the administration, distribution, and utilization of market data.¹ At the February 24 conference, a panel discussion concerning traders' use of market data was moderated by Bernard Donefer, who a short time later submitted a proposed expert report in support of SIFMA's rule challenges and has been designated by SIFMA as a testifying expert witness in this proceeding. *See Expert Report of Bernard S. Donefer*

¹ See <http://www.siiia.net/Divisions/FISD-FinancialInformationServicesAssociation/About.aspx> (last visited March 6, 2015).

(Mar. 6, 2015); *SIFMA List of Proposed Hearing Witnesses* (Mar. 6, 2015). The panel moderated by Mr. Donefer featured, among other panelists, a representative of Liquidnet, Inc.—one of the nine SIFMA members that submitted a jurisdictional declaration in this proceeding. *See SIFMA's Brief Regarding Satisfaction of Jurisdictional Requirements*, Admin. Proc. File 3-15350, Ex. 7 (July 28, 2014). Mr. Donefer engaged the panelists in a discussion concerning the utility and value of depth-of-book data to investors. In addition, Steve Listhaus of Wells Fargo & Company—the Wells Fargo representative who signed one of the jurisdictional declarations submitted by SIFMA in this proceeding (*see id.* at Ex. 9)—raised questions and made comments to the panel regarding Regulation NMS compliance and whether or not the Commission had ever enforced best execution rules or completed an audit of the best execution practices of any firm.

The Exchanges' Subpoena thus seeks the recording and transcript (if there is one) of the FISD panel discussion, as well as any presentation materials, handouts, and moderator or panelist communications, questions or talking points related to the panel discussion. These materials are relevant to testing the assertions made in Mr. Donefer's expert report. They are also relevant to testing SIFMA members' claims, submitted via their nine declarations, that they are "aggrieved because [they] believe[] that the level of the prices charged [for the relevant data products] is so high as to be outside a reasonable range of fees" under the Exchange Act. *See, e.g., id.* at Exs. 7, 9.

II. The Subpoena Is Narrow In Scope

The Exchanges have taken appropriate steps to limit the scope of the Subpoena to a single request. The Subpoena requests only the recording and transcript of the FISD panel (to the extent they exist) and a handful of panel-related documents. Because the Subpoena requests only a narrow universe of newly created, easily-accessible documents that does not require an extensive search of FISD's files, the Exchanges ask that the Subpoena be returnable on or before March 17, 2015.

CONCLUSION

Based on the foregoing, the Exchanges respectfully request the issuance of the enclosed Subpoena.

Respectfully submitted,

p.p. Boris Espinoza

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Dated: March 10, 2015

CERTIFICATE OF SERVICE

I Boris Espinoza hereby certify that on March 10, 2015, I caused a copy of the foregoing Request For Issuance Of Subpoena Pursuant To Rule 232 Of The Commission's Rules Of Practice to be served on the parties listed below via Courier Service.

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Michael D. Warden
HL Rogers
Eric D. McArthur
Lowell J. Schiller
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005

W. Hardy Callcott
Sidley Austin LLP
555 California Street, Suite 2000
San Francisco, CA 94104

Custodian of Records
FISD
1090 Vermont Ave, NW #600
Washington, DC 20005

Dated: March 10, 2015

P.P. Boris Espinoza
Patrick Marecki
Baker Botts L.L.P.
30 Rockefeller Plaza
New York, N.Y. 10112
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patrick.marecki@bakerbotts.com

Exhibit A

UNITED STATES OF AMERICA
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SECURITIES AND EXCHANGE COMMISSION

In The Matter of the Application of:

SECURITIES INDUSTRY AND FINANCIAL
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for Review of Actions Taken by Self-Regulatory
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Admin. Proc. File No. 3-15350

The Honorable Brenda P. Murray,
Chief Administrative Law Judge

SUBPOENA DUCES TECUM

TO: Custodian of Records
FISD
1090 Vermont Ave, NW #600
Washington, DC 20005

YOU MUST PRODUCE everything specified in the Attachment to this Subpoena

to: Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue,
N.W. Washington, DC 20036

and

Baker Botts LLP
30 Rockefeller Plaza
New York, NY 10112

by the date of March 17, 2015.

Dated: March ____, 2014.

By:

Honorable Brenda P. Murray
Chief Administrative Law Judge

**ATTACHMENT TO SUBPOENA TO FINANCIAL INFORMATION SERVICES DIVISION
OF THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION**

DEFINITIONS AND INSTRUCTIONS

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

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

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

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

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

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

7. If a portion of an otherwise responsive document contains information subject to a claim of privilege, only those portions of the document subject to the claim of privilege shall be deleted or redacted from the document and the rest of the document shall be produced. If any portions of any otherwise responsive documents are deleted or redacted, those portions are to be included on the log of privileged documents and identified as required by instruction 6.

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

DOCUMENT REQUEST

1. The recording and transcript of the “Trading in Today’s Environment” panel discussion moderated by Bernard S. Donefer of the FISS Issue Brief & Networking Reception Conference held on February 24, 2015, in New York, NY, and any presentation materials, handouts, moderator or panelist questions or talking points, discussion topics, notes, and emails or other communications between Bernard Donefer and the panelists and/or FISS members and employees relating to same.