

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 Amendments of the
NASDAQ/Unlisted Trading Privileges Plan
Limiting Access to its Services.

Admin. Proc. File No. 3-18365

RESPONSE TO NASDAQ'S MOTION TO HOLD PROCEEDING IN ABEYANCE

The Securities Industry Financial Markets Association ("SIFMA") submits this response, under Rule 154 of the Rules of Practice, to Nasdaq's motion to hold this proceeding in abeyance.

This proceeding challenges the lawfulness of fees for core or top-of-book market data supplied exclusively by Nasdaq. SIFMA's application asks the Commission to set aside, under Section 11A of the Securities Exchange Act of 1934, Nasdaq's amendment adopting a "Multiple Instance, Single User" ("MISU") program, which would increase the professional subscriber device fee, change how users could report their net subscribers, and impose certain participation and reporting requirements. *See* SEC Release No. 34-82440; File No. S7-24-89 (Jan. 3, 2018).

Nasdaq's February 8, 2018, motion asks the Commission to hold SIFMA's application for review in abeyance pending the Commission's resolution of *In re Application of SIFMA*, No. 3-15350. Nasdaq's motion states that the decision in *In re SIFMA* is "likely to inform the parties' arguments and the Commission's decision in this matter," Mot. 1, based on the Initial Decision's conclusion that "the exchanges are 'subject to significant competitive forces in setting fees' for market data, including 'the availability of alternatives' to the exchanges' products and

the ‘need to attract order flow from market participants,’” Mem. at 4 (quoting Initial Decision at 31).

In re SIFMA and the competition arguments Nasdaq cites are inapposite. *In re SIFMA* concerns depth-of-book data fees. This proceeding, by contrast, concerns core or top-of-book data, which is offered on an exclusive basis by exchanges acting jointly through UTP. Top-of-book data indisputably is not subject to competitive forces, product substitution, or competition to attract order flow. As the Commission and the courts have recognized many times, core data fees raise anticompetitive concerns that warrant more stringent review.¹ The issues Nasdaq cites from the depth-of-book *In re SIFMA* Initial Decision, therefore, do not concern “common substantive legal issues” with this UTP matter, Mem. at 2, and simply are not “relevant to whether the fees challenged by SIFMA in this proceeding are consistent with the Exchange Act,” Mem. at 4.


Nevertheless, SIFMA currently does not oppose Nasdaq’s request to hold SIFMA’s application in abeyance. At this time, Nasdaq has not provided SIFMA or other affected parties with sufficient information to evaluate this amendment. Accordingly, SIFMA does not oppose the Commission’s holding this proceeding in abeyance, provided that any such action is without prejudice to SIFMA’s future ability to pursue Commission review of its application.

¹ See, e.g., *NetCoalition v. SEC*, 615 F.3d 525, 536 (D.C. Cir. 2010) (citing Regulation of Market Information Fees and Revenues, Release No. 34-42208, 64 Fed. Reg. 70,613 (Dec. 17, 1999)); *NetCoalition v. SEC*, 715 F.3d 342, 345 (D.C. Cir. 2013); NYSE ArcaBook Order, 73 Fed. Reg. 74770, 74779 (Dec. 9, 2008); Regulation NMS, 70 Fed. Reg. 37,496, 37,558 (June 29, 2005).

Dated: February 22, 2018

Respectfully submitted,

SIDLEY AUSTIN LLP


Michael D. Warden
Benjamin Beaton
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
bbeaton@sidley.com

Counsel for SIFMA

Rule of Practice 420(c) Statement: Service upon the applicant may be accomplished by serving their attorneys at the address listed above.

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Admin. Proc. File No. 3-18313


CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2018, I caused a copy of the foregoing Response to Nasdaq's Motion to Hold Proceedings in Abeyance to be served on the parties listed below by hand delivery.

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

Eugene Scalia
Amir C. Tayrani
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave N.W.
Washington, D.C. 20036

Dated: February 22, 2018



Benjamin Beaton