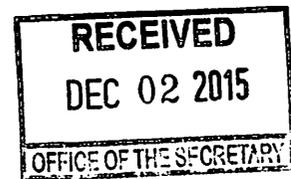


UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



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

**RESPONSE OF NYSE ARCA, INC. AND THE NASDAQ STOCK MARKET LLC TO
SIFMA NOTICE OF SUPPLEMENTAL AUTHORITY DATED NOVEMBER 25, 2015**

NYSE Arca and the Nasdaq Stock Market LLC (the “Exchanges”) respectfully submit this response to the Notice of Supplemental Authority filed by SIFMA on November 25, 2015 (the “SIFMA Notice”).¹ SIFMA’s Supplemental Notice is an attempt to bolster its argument that depth-of-book data is somehow essential for large numbers of traders, which was never supported by evidence and was so thoroughly discredited at the evidentiary hearing that SIFMA’s own expert walked away from it at the hearing. The SEC has been clear on this point: Broker-dealers are not required to purchase depth-of-book data to meet their duty of best execution,² and nothing in FINRA Regulatory Notice 15-46 (the “FINRA Notice”) alters this. As briefly demonstrated below, SIFMA’s arguments to the contrary are based on mischaracterizations of the FINRA Notice in an attempt to divert attention from the overwhelming evidence presented at the hearing that depth-of-book data prices are constrained by vigorous competition – the FINRA Notice does not alter those core facts, which compel a decision in the Exchanges’ favor.

¹ Capitalized terms not defined herein have the meanings set forth in the Post-Hearing Brief of NYSE Arca, Inc., dated June 5, 2015 (“NYSE Arca OB”).

² See, e.g., ArcaBook Order, 73 Fed. Reg. 74,770, 74,779 (Dec. 9, 2008).

First, SIFMA asserts that the FINRA Notice “confirms that the use of the Exchanges’ depth-of-book data products may be necessary to satisfy a broker-dealer’s duty of best execution.” SIFMA Notice at 1. SIFMA is wrong. What the FINRA Notice actually says is

The exercise of reasonable diligence to ascertain the best market under prevailing market conditions can be affected by the market data, including specific data feeds, *used* by a firm. *For example, a firm that regularly accesses proprietary data feeds, in addition to the SIP feed, for its proprietary trading, would be expected to also be using these data feeds to determine the best market under prevailing market conditions when handling customer orders to meet its best execution obligations.*

FINRA Notice at 3 n.12 (emphasis added). Thus, all FINRA said in that footnote was that *if* a firm regularly used proprietary data feeds for its own proprietary trading, then *that firm* would be expected to use the same feeds to determine best execution for customer orders. FINRA said nothing about firms that do not engage in proprietary trading, and nothing in the FINRA Notice requires firms that do not buy proprietary data feeds for their own proprietary trading to buy such feeds for customer best execution purposes. This highlights the undisputed fact that SIFMA members derive an extraordinary amount of profit from their uses of depth-of-book data (*see* NYSE Arca OB at 35-36), as it is only those who use the data for proprietary trading who might also be required to use it for best execution. The FINRA Notice also confirms that choice is key: Even if a firm uses certain proprietary data feeds for its own trading purposes, it might only be required to use those feeds it had already selected in its customer best execution analyses — it would not be required to buy other proprietary data feeds.³

³ Compare FINRA Notice at 3 n.12 (firm that regularly accessed proprietary data feeds for its own proprietary trading would be expected to also use “*these data feeds* to determine the best market”) (emphasis added), *with* NYSE Arca OB at 28-30 (showing that many customers buy depth-of-book data from some but not all exchanges, a number of Nasdaq depth-of-book subscribers either never subscribed or stopped subscribing to ArcaBook, and a number of subscribers treated ArcaBook and OpenBook as substitutes).

Second, SIFMA asserts that the FINRA Notice “confirms SIFMA’s showing that broker-dealers’ best execution obligations constrain their ability to route order flow away from an Exchange in response to the Exchange’s market data fees.” SIFMA Notice at 2. SIFMA is wrong again. The FINRA Notice makes clear that “cost and difficulty associated with achieving an execution in a particular market center” are relevant to the best-execution analysis, FINRA Notice at 2, and simply states that payments for order flow and trading fee structures should not *unduly* influence order routing decisions, *see id.* at 6. The FINRA Notice says nothing at all about market data fees. SIFMA once again ignores the actual evidence in this case, which is that even a large broker-dealer can move its order flow away from a market whose proprietary market data fees it does not like *without* impacting its best execution obligations. *See* NQ Ex. 505, 619; Tr. 932-36. According to SIFMA, that institution should have been disciplined (i) if it did not use proprietary data for customer best execution evaluation or (ii) for routing order flow in response to proprietary market data fees. Neither of those things happened because SIFMA’s arguments are wrong.

Third, SIFMA does not put the FINRA Notice into context. The FINRA Notice was intended to “*reiterate* the best execution obligations that apply when firms receive, handle, route, or execute customer orders in equities” and “*remind* firms of their obligations, as previously articulated by the [SEC] and FINRA, to regularly and rigorously examine execution quality likely to be obtained from the different markets trading a security.” FINRA Notice at 1 (emphasis added). Further confirming that it was not articulating new guidance with respect to equities, FINRA explained that the FINRA Notice was intended to provide “more specific guidance on issues that have recently arisen *in the fixed income market.*” *Id.* (emphasis added). The FINRA Notice thus adds nothing to SIFMA’s arguments.

For all the foregoing reasons, and those set forth in the Exchanges' Post-Hearing Briefs, the Exchanges respectfully submit that the SIFMA Application should be dismissed.

Respectfully submitted,

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Dated: December 1, 2015

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2015, I caused a copy of the foregoing Response to the Notice of Supplemental Authority filed by SIFMA on November 25, 2015 to be served on the parties listed below via the methods set forth for each recipient.

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