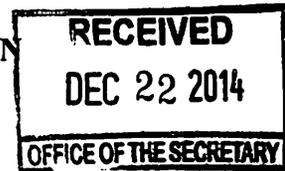


UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



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

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

On December 4, 2014, the Securities Industry and Financial Markets Association (“SIFMA”) submitted a request pursuant to Rule 232 of the Securities and Exchange Commission’s (“SEC” or “Commission”) Rules of Practice for issuance of one subpoena each directed to the Nasdaq Stock Market LLC (“Nasdaq”) and NYSE Arca, Inc. (“NYSE Arca”) (collectively, the “Exchanges”). The two proposed subpoenas, which were virtually identical to one another, contained ten Document Requests. During two teleconferences with the Exchanges, SIFMA offered several ways to narrow the scope of the subpoenas to address any potential burden. The Exchanges rejected those offers, insisting that discovery was not available and the subpoenas should not issue.

During a December 18, 2014 prehearing conference to address the subpoenas, Honorable Brenda P. Murray, Chief Administrative Law Judge (the “Chief ALJ”), rejected the suggestion that discovery was not available, explaining that it was “par for the course.” Pre-Hearing Conference Trans. at 9:25–10:1 (Dec. 18, 2014). The Chief ALJ and the parties addressed Document Request Nos. 1–3 and 5 from the proposed subpoenas, and the Chief ALJ modified

them and ordered the Exchanges to comply with the modified requests. In addition, SIFMA agreed to withdraw Document Request No. 10. SIFMA offered to narrow the scope of Document Requests Nos. 4 and 6-9 along the lines that it had previously suggested in its meet-and-confer with the Exchanges, and the Court directed that SIFMA file its proposed modifications to those specifications.

Set forth below are modifications to Document Request Nos. 4, 6, 7, and 9. SIFMA withdraws Request No. 8. SIFMA has narrowed and modified each of its remaining requests in the following ways to minimize any perceived burden on the Exchanges:

First, to the extent the requests seek documents held by individual custodians, they seek only those documents held by the key person or persons within the Exchanges with primary responsibility over requested subject matter.

Second, the requests seek only those books, records, or individually-held documents as are created or maintained in the ordinary course of business. SIFMA therefore does not envision that the collection of such documents would require an expansive records search or the creation of any documents, nor does SIFMA request direct access to any custodian(s).

Finally, based on the Exchanges' assertion at the December 18 conference that compliance with document requests focused on key employees might somehow divert their attention from assisting the Exchanges with their prehearing submissions, SIFMA will agree to extend the compliance deadline for Document Request Nos. 4 and 9 until February 9, 2015, so as to minimize any potential interference. The remaining two requests—Document Request Nos. 6 and 7—request books and records information that other employees can gather and that SIFMA's expert(s) will need to analyze. Accordingly, they have a requested completion deadline

of January 20, 2015.¹

In addition, SIFMA is narrowing individual requests in the following ways and sets forth below why such discovery is necessary:

A. Document Request No. 4

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

Revised Request: Existing non-public Documents provided to Your decision-makers on setting fees for Your depth-of-book products challenged in this proceeding sufficient to identify Your considerations and reasons for setting or maintaining the fees for those products, including Documents sufficient to identify: Your reasons for setting prices at a particular level; and/or the relationship between Your challenged depth-of-book data fees and Your order flow.

SIFMA has significantly narrowed the scope of this request in the ways discussed above. In addition, SIFMA further is narrowing the scope of this request to eliminate the request for documents concerning the extent to which those prices enable the Exchanges to recover the costs of providing their depth-of-book data products.

This request, as narrowed, seeks documents that are directly relevant to this proceeding and will not unduly burden any party. *See* SEC Rule of Practice 232(b). The Exchanges are

¹ As SIFMA agreed during the December 18 conference, it is narrowing its remaining Document Requests to seek information pertaining only to the depth-of-book data products at issue in this proceeding, and it does not seek information on products offered by the Exchanges' affiliated entities. With respect to the fees charged for those products, SIFMA maintains—as it explained during the December 18 conference, *see* Pre-Hearing Conference Trans. at 20:19–21:2, 22:9–17, 24:7–25:8 (Dec. 18, 2014)—that all of the fees charged for those products are relevant to the question immediately before the Chief ALJ, *i.e.*, whether the particular fees challenged in this proceeding are constrained by competitive forces. The Chief ALJ limited the scope of Document Request No. 2 to the particular fees challenged in this proceeding. *Id.* at 25:9–27:5.

likely to argue in this proceeding, as they have in the past, that their depth-of-book data fees are constrained by competition for trade execution orders. In *NetCoalition v. SEC (NetCoalition I)*, 615 F. 3d 525 (D.C. Cir. 2010), however, the D.C. Circuit held that this “theory” was “at odds with” actual practice when evaluating a rule change substantively identical to the NYSE Arca rule change at issue here. *Id.* at 540. It is, therefore, directly relevant to this proceeding whether the theoretical justifications the exchanges provide in this proceeding are consistent *in practice* with the internal analyses the Exchanges actually performed when setting and maintaining the fees at issue. Such internal analyses are available only to the Exchanges and are necessary for the Chief ALJ to evaluate, consistent with the requirements of *NetCoalition I*, whether the Exchanges’ theoretical arguments accord with actual practice.

B. Document Request No. 6

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

Revised Request: Documents ordinarily maintained as part of Your books and records that are sufficient to identify the costs of Your data collection and distribution infrastructure used to provide subscribers the depth-of-book data for the products challenged in the above-captioned proceeding.

SIFMA has significantly narrowed the scope of this request in the ways discussed above. In addition, the revised request seeks only documents concerning those costs borne by the Exchanges *exclusively* in collecting and distributing the data products at issue in this proceeding. As NYSE Arca recently acknowledged in a fee rule change filing, the “costs of [an exchange’s] data distribution infrastructure” are distinguishable from “the costs of designing, maintaining, and operating the exchange’s transaction execution platform and the cost of regulating the exchange.” 79 Fed. Reg. 8217, 8220 (Feb. 11, 2014). SIFMA is seeking costs only in the former

category—*i.e.*, the costs of the Exchanges’ “data distribution infrastructure.” This narrowing will relieve the Exchanges of any potential burden from having to allocate common costs attributable to other parts of the Exchanges’ businesses.

This request, as narrowed, seeks only documents sufficient to identify the cost to the Exchanges of collecting and distributing the data at issue in this proceeding—information that the D.C. Circuit expressly held to be relevant to whether the Exchanges’ fees are constrained by competition. In *NetCoalition I*, the D.C. Circuit *rejected* the argument that “a cost analysis is irrelevant” to the market-based justifications the Exchanges have stated they intend to offer in this proceeding, and explained that, “[o]n the contrary, in a competitive market, the price of a product is supposed to approach its marginal cost, *i.e.*, the seller’s cost of producing one additional unit.” 615 F.3d at 537. Indeed, *NYSE Arca itself* has conceded that “costs are relevant in assessing the reasonableness of its fees.” *Id.* at 538. (quoting NYSE Arca’s stated belief that “the proposed market data fees would reflect an equitable allocation of its overall costs to users of its facilities”); *see also id.* (quoting NYSE Corporate Secretary as stating that “in setting fee levels NYSE Arca ... noted ‘market data revenues compare favorably to the markets’ cost of producing the data’”). Moreover, the relevance of cost information does not depend on whether the Exchanges intend to rely on this information as part of their affirmative case. To the contrary, cost information is necessary to evaluate whether the challenged fees are restrained by competition in *practice*. *See id.* at 537 (explaining that “[s]upracompetitive pricing may be evidence of ‘monopoly,’ or ‘market,’ power”).

Given SIFMA’s significant narrowing of this request to minimize the burden on the Exchanges, and directly controlling precedent which expressly recognizes the relevance of the requested information, a ruling that SIFMA is not entitled to the information requested would be

contrary to law. *See In the Matter of Putnam Inv. Mgmt., LLC (“Putnam II”)*, Admin. Proc. Rel. No. 614, Admin. Proc. File No. 3-11317 (April 7, 2004) (explaining that although the relevancy standard under the SEC Rules is broad, “the standard of relevance is *even broader* when it comes to document subpoenas” (emphasis added)) (denying SEC motions to quash subpoena); *In the Matter of Monetta Fin. Servs.*, Admin. File. No. 3-9546, 1998 WL 211406, at *4 (Apr. 21, 2004) (explaining 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” (quoting 9 C. Wright & A. Miller, Fed. Practice & Proc. § 2008 (2d ed. 1994)) (emphasis added)).

Finally, SIFMA emphasizes that in requesting this information, it is not seeking to transform this proceeding into anything akin to cost-based ratemaking. To the contrary, what SIFMA requests, and the law requires, is simply a review of the relationship between price and marginal cost, which should be similar in a competitive market. *See NetCoalition I*, 615 F.3d at 537. If it turns out that the costs of collecting and distributing the data are trivial compared to the fees the exchanges are charging—which may well be why the Exchanges so staunchly resist disclosing them—that would be sufficient to show the fees are not constrained by competition. *See id.*

C. Document Request No. 7

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

Revised Request: Documents ordinarily maintained as part of Your books and records that are sufficient to identify the profitability and revenue of Your depth-of-book data products challenged in the above-captioned proceeding.

This request is similar to Document Request No. 6 but requests existing information on profitability rather than cost. The revised request has been narrowed in a manner analogous to Document Request No. 6, and the request is similarly justified.

D. Document Request No. 8

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

Revised Request: Withdrawn.

SIFMA is withdrawing this request to further minimize any possible burden on the Exchanges in complying with SIFMA's other requests.

E. Document Request No. 9

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

Revised Request: Documents ordinarily maintained by the individual (or individuals) who is primarily responsible for maintaining, creating, or tracking the information sought that are sufficient to identify which products You have identified as competitive or substitute products for Your depth-of-book data products challenged in the above-captioned proceeding, as well as Your pricing strategy for competing against those competitive or substitute products.

SIFMA has significantly narrowed the scope of this request in the ways discussed above. The revised request seeks only those documents created or maintained in the ordinary course of business for the purpose of analyzing competitors' depth-of-book data offerings, such as the final versions memoranda or presentations to management providing a summary, assessment, or analysis of competition or substitute products for depth-of-book data products.

The Exchanges are likely to argue in this proceeding, as they have in the past, that their depth-of-book data fees are constrained by the availability of substitute data products. This request seeks information on which products, if any, the Exchanges view internally as substitutes for their depth products, which is necessary to evaluate whether the Exchanges *in practice* view their products as having competitive substitutes that constrain pricing.

CONCLUSION

Based on the foregoing, SIFMA respectfully requests the issuance of the subpoenas duces tecum directed to the Nasdaq Stock Market LLC and NYSE Arca, Inc., as modified during the December 18, 2014 telephonic conference and as further modified above.

Dated: December 19, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2014, I caused a copy of the foregoing Request For Issuance Of Subpoenas Pursuant To Rule 232 Of The Commission's Rules Of Practice by SIFMA to be served on the parties listed below via First Class Mail. Service was accomplished on the Exchanges via First Class Mail because of the large service list:

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Dated: December 19, 2014


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