

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

**OPPOSITION TO REQUEST BY NASDAQ STOCK MARKET LLC
AND NYSE ARCA, INC. FOR MODIFICATION OF
DECEMBER 19, 2014 DISCOVERY ORDER**

On December 14, 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 a subpoena each directed to the Nasdaq Stock Market LLC (“Nasdaq”) and NYSE Arca, Inc. (“NYSE Arca”) (collectively, the “Exchanges”). After a prehearing conference on December 18, 2014, Chief Administrative Law Judge Brenda P. Murray (the “Chief ALJ”) orally granted several of the document requests with certain modifications.¹

The following day, before the transcript had been prepared, the Chief ALJ issued an order to memorialize her rulings during the prehearing conference (“December 19 Order”). The Chief ALJ expressly noted that because the transcript was not yet available, corrections to the Order might be necessary and that the parties “should file proposed modifications ASAP” in the event

¹ On December 19, 2014, SIFMA submitted amended subpoena requests that narrow Document Request Numbers 4, and 6-9. Those requests are the subject of a prehearing conference scheduled for December 30, 2014.

they do not believe the order “reflect[s] the substance of what was agreed to.” December 19 Order at 1 n.1. This was not an invitation for the parties to seek reconsideration. Nonetheless, the following week—on the afternoon of December 24—the Exchanges filed a letter (“December 24 Letter”) requesting, *inter alia*, that the Chief ALJ further modify Document Request Numbers 1 and 2 in a manner that goes well beyond what the Court ordered or “what was agreed to” in the December 18 conference. SIFMA opposes this request. Nasdaq’s proposed modifications are inconsistent with the Chief ALJ’s rulings during the conference and would significantly narrow the scope of discovery that the Chief ALJ ordered.²

During the December 18 conference, the Chief ALJ modified Document Request Numbers 1 and 2 to require only the production of information relating to the specific products and fees at issue in this proceeding. *See* Pre-Hearing Conference Trans. (“Trans.”) at 11:12–17, 25:9–26:2 (Dec. 18, 2014). For Nasdaq, the rule change at issue is Release No. 34-62907, File No. SR-NASDAQ-2010-110 (Sept. 14, 2010), which established two sets of access and distributor fees—one for “NASDAQ-listed security depth entitlements” and another for “Non NASDAQ-listed security depth entitlements.” The former set of fees is paid by subscribers to Nasdaq’s TotalView and Level 2 products. *See* Nasdaq Rule 7023(a)(1)(A), (C). The latter set of fees is paid by subscribers to Nasdaq’s OpenView product. *See* Nasdaq Rule 7023(a)(1)(B). Accordingly, fees for all three products—TotalView, OpenView, and Level 2—are paid pursuant

² In addition, SIFMA reserves any objections it has raised to the modifications of its Document Requests. SIFMA today is filing a separate notice of supplemental authority to alert the Chief ALJ to a recent order by the Commission in this proceeding, issued after the Chief ALJ’s December 18 and 19 orders, which pertains to the scope of discovery, among other things. As SIFMA explains in the notice, the Commission’s order makes clear that the scope of relevant material is broader than the Exchanges have argued and warrants revisiting the modifications to SIFMA’s Document Requests.

to the rule change at issue, and discovery regarding each of these products is required pursuant to the Chief ALJ's December 18 rulings.

In its December 24 Letter, however, Nasdaq requests that the Chief ALJ further modify Document Request Numbers 1 and 2 to limit its discovery obligations to only a *subset* of the products at issue—namely, by allowing it to produce only information pertaining to the Level 2 product, and to withhold information pertaining to the TotalView and OpenView products. That request is flatly inconsistent with the Chief ALJ's rulings, which required discovery pertaining to “the products we have at issue in this specific proceeding,” Trans. at 11:12–14, not a subset of those products. Not once during the conference did Nasdaq argue that discovery should be limited to only a subset of the products at issue in the challenged rule changes. Indeed, with respect to Document Request Number 1, there was a colloquy in which counsel for SIFMA and the Chief ALJ agreed that, in limiting the request to the products at issue in this proceeding, Nasdaq would not be obligated to produce documents relating to products offered by affiliated entities. *See* Tr. At 12:7–10 (Mr. Warden: “To the extent that there’s some way the subpoena [as] drafted could be read to include NASDAQ Philadelphia or NASDAQ Boston, we’re not seeking that.”); *id.* at 13:4–5 (Chief ALJ: “Okay. I’ve got you on the products thing.”). The Chief ALJ directly asked counsel for the Exchanges “given the on-the-record comments by SIFMA’s counsel to the limitations that he is willing to put on document request in Number 1, are you folks still oppose[d] to that?” *Id.* at 13:20–24. Counsel for Nasdaq expressed *no* objection to the request as limited, instead asserting that discovery should be reciprocal. *Id.* at 13:25–14:11. And Nasdaq certainly did not claim—as it now does—that Request 1 should be limited to just one of the three products at issue that Nasdaq itself offers.

In addition, Nasdaq's new-found argument is inconsistent with multiple orders in which the Commission made clear that it referred to the Chief ALJ's responsibility to review the fees for *all* of the products at issue in the challenged rule change, not just those charged for Level 2. *See* Order Establishing Procedures and Referring Applications for Review to Administrative Law Judge for Additional Proceedings 21, Rel. No. 34-72183, Admin. Proc. File Nos. 3-15350, 3-15351 (May 16, 2014) (consolidating and referring to the Chief ALJ "the challenge to the fees for Nasdaq's depth-of-book data *products*" (emphasis added)); Order Denying Consolidating Motions 2, Rel. No. 34-73922, Admin. Proc. File Nos. 3-15350, 3-15351, 3-15773, 3-16006 (Dec. 23, 2014) ("The second challenge concern[s] an amendment to a fee rule applicable to NASDAQ depth-of-book data *products*." (emphasis added)). Given that the Commission already has ruled that the scope of the rule change includes multiple products, Nasdaq has no basis for asking the Chief ALJ to limit discovery to a single product.

Finally, in addition to the foregoing, SIFMA disagrees with the Exchanges' position regarding Document Request Number 3. The December 19 Order presently states that the Chief ALJ denied this request during the December 18 conference, and SIFMA has requested that the order be corrected to reflect that during the conference the third document request was granted with a modified response date of January 20, 2015. *See* Trans. at 49:24 ("We have granted 1, 2, and 3 with modification."); *see also id.* at 33:6–17 (agreeing to modify the document request to accommodate a production date of January 20, 2015). The Exchanges agree with SIFMA that Document Request Number 3 was not denied, December 24 Letter at 4 (an "accurate modification ... would be simply to strike the language, 'the third request was denied'"), but nonetheless ask the Chief ALJ to refrain from acknowledging that she granted the request, *id.* That position is inconsistent with the Commission's Rules of Practice, which require that the

production of documents responsive to a party's document requests be done pursuant to a subpoena duces tecum issued by the presiding hearing officer. *See* SEC Rule of Practice 232 (“[A] party may request the issuance of ... subpoenas requiring the production of documentary or other tangible evidence returnable at any designated time or place.”); *id.* 111(b) (“The powers of the hearing officer include ... issuing subpoenas authorized by law and revoking, quashing, or modifying any such subpoena”); *see also id.* 221(c)(11) (“At a prehearing conference consideration may be given and action taken with respect to ... prehearing production of documents in response to subpoenas duces tecum as set forth in Rule 232”). Because Document Request Number 3 was not denied, any production responsive to that request should be made pursuant to a subpoena issued under Rule 232.

CONCLUSION

Based on the foregoing, SIFMA respectfully opposes the modifications requested by the Exchanges to the discovery order issued by the Chief ALJ on December 19, 2014.

Dated: December 29, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2014, I caused a copy of the foregoing Opposition to Request by Nasdaq Stock Market LLC and NYSE Arca, Inc. for Modification of December 19, 2014 Discovery Order 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:

Brent J. Fields
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Dated: December 29, 2014


HL Rogers

Exhibit A:

NASDAQ Rules 7019 and 7023 (Excerpts)

NASDAQ Rule 7019. Market Data Distributor Fees

* * *

(b) The charge to be paid by Distributors of the following Nasdaq Market Center real time data feeds shall be:

	Monthly Direct Access Fee	Monthly Internal Distributor Fee	Monthly External Distributor Fee
Issue Specific Data			
Dynamic Intraday			
NASDAQ-listed security depth entitlements	\$2,000	\$1,000	\$2,500
Non NASDAQ-listed security depth entitlements	\$1,000	\$500	\$1,250

* * *

Nasdaq Rule 7023. NASDAQ Depth-of-Book Data

(a) Definitions applicable to this Rule.

(1) Depth-of-Book refers to data feeds containing price quotations at more than one price level. The Depth-of-Book data feeds are:

(A) NASDAQ Level 2 means, with respect to stocks listed on NASDAQ, the best-priced orders or quotes from each NASDAQ member displayed in the NASDAQ Market Center;

(B) NASDAQ OpenView means, with respect to stocks listed on an exchange other than NASDAQ, all orders and quotes from all NASDAQ members displayed in the NASDAQ Market Center as well as the aggregate size of such orders and quotes at each price level in the execution functionality of the NASDAQ Market Center; and

(C) NASDAQ TotalView means, with respect to stocks listed on NASDAQ, all orders and quotes from all NASDAQ members displayed in the NASDAQ Market Center as well as the aggregate size of such orders and quotes at each price level in the execution functionality of the NASDAQ Market Center.

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