

MEMO# 31457

October 24, 2018

SEC Sets Aside Certain Market Data Fees of NYSE Arca and Nasdaq

[31457]

October 24, 2018 TO: Equity Markets Advisory Committee RE: SEC Sets Aside Certain Market Data Fees of NYSE Arca and Nasdaq

The Securities and Exchange Commission (SEC) recently took two actions with respect to the regulation of market data fees—*i.e.*, the fees that national security exchanges charge market participants for market data. In the first action, the Data Fee Decision, the SEC set aside certain fees imposed by NYSE Arca (Arca) and Nasdaq Stock Market LLC (Nasdaq) for depth-of-book data products.[\[1\]](#) In the second, the Remanding Order, the SEC remanded industry challenges to other market data and access fees for further review in light of the Data Fee Decision.[\[2\]](#)

Data Fee Decision

In May 2013, the Securities Industry and Financial Markets Association (SIFMA) challenged fees imposed by Arca and Nasdaq for access to their respective depth-of-book data products. Depth-of-book data consists of best bids and offers available on an exchange and outstanding limit orders to buy stocks at prices lower, or sell stocks at prices higher, than the best prices on each exchange. Depth-of-book data is necessary to understand the liquidity in an exchange's order books at multiple price levels. Each exchange is the exclusive source of depth-of-book data on orders from its limit order books.

The SEC set aside the challenged fees after finding that the exchanges failed to demonstrate that the fees were “fair and reasonable” as required by the Securities Exchange Act of 1934 (“Exchange Act”). The Data Fee Decision expresses no views on the merits of the challenged fees, *e.g.*, whether the fees themselves are unreasonably discriminatory or otherwise would violate the Exchange Act.

Remanding Order

While the application for review that SIFMA filed in May 2013 awaited a ruling by the SEC, SIFMA and Bloomberg L.P. filed challenges to over 400 fee changes submitted by national securities exchanges and the securities information processors (SIPs), arguing that the fee changes are improper limitations or prohibitions on access to the services of exchanges and SIPs.

The SEC remanded these challenges to the respective exchanges (or SIP governing

committees, as appropriate) for their consideration in light of the Data Fee Decision. The Remanding Order directs each national securities exchange and each SIP to develop or identify procedures for assessing the challenged fee changes as potential denials or limitations of access to services as required under section 6(b)(7) of the Exchange Act and Rule 608(a)(5) of Regulation NMS, respectively. The Remanding Order further requires each exchange and each SIP to provide written notice to the Commission of the procedures that it has developed or identified to comply with section 6(b)(7) and Regulation NMS, respectively, within six months. The exchanges and SIPs must complete the process of applying the respective section 6(b)(7) and Regulation NMS procedures to the challenged fee changes within one year.

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endnotes

[1] See In the Matter of the Application of Securities Industry and Financial Markets Association, SEC Release No. 84432 (Oct. 16, 2018), *available at* <https://www.sec.gov/litigation/opinions/2018/34-84432.pdf>.

[2] See In the Matter of the Applications of the Securities Industry and Financial Markets Association and Bloomberg L.P., SEC Release No. 84433 (Oct. 16, 2018), *available at* <https://www.sec.gov/litigation/opinions/2018/34-84433.pdf>. SEC Chairman Jay Clayton issued a statement summarizing, and SEC Commissioners Hester Peirce and Elad Roisman issued a joint statement concurring with, the Data Fee Decision and Remanding Order. See Statement on Market Data Fees and Market Structure, SEC Chairman Jay Clayton (Oct. 16, 2018), *available at* https://www.sec.gov/news/public-statement/statement-chairman-clayton-2018-10-16#_ftnr [ef3](#); Joint Statement on the Application of SIFMA for Review of Action Taken by NYSE Arca, Inc., and NASDAQ Stock Market LLC, SEC Commissioners Hester Peirce and Elad Roisman (Oct. 16, 2018), *available at* <https://www.sec.gov/news/public-statement/peirce-roisman-statement-101618>.

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