

SEC Told Nasdaq, NYSE Prices Hit Returns In Market Data Row

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Law360, Washington (April 23, 2015, 9:38 PM ET) -- The prices [Nasdaq OMX Inc.](#) and other exchanges charge for proprietary market data can hurt everyday investors by raising the cost of investment, a Wall Street trade group's witness told a [Securities and Exchange Commission](#) hearing over the exchanges' ability to hike data prices on Thursday.

Intercontinental Exchange's NYSE Arca and Nasdaq have been defending their pricing strategies in a weeklong hearing at the SEC against allegations from [Securities Industry and Financial Markets Association](#) members who claim the charges are not fair or reasonable for data that traders need to do their jobs.

Continuing a cross examination from Wednesday, SIFMA witness Bernard Donefer said many traders cannot do their jobs properly without access to the depth-of-book data products — Nasdaq's TotalView and NYSE's ArcaBook — and those costs can trickle down to the average investor.

The top firms pay as much as \$70,000 a month for hundreds of servers to access the realtime trading data and as much as 90 percent of trades are done by those firms, according to court testimony. Donefer, A lecturer at Baruch College of the City University of New York and associate director of the school's trading floor, said those fees, along with the costs of running the data feed add up across transactions, and they will be deducted from investors' returns.

“If it is off by a penny or two pennies it doesn't look like a lot but when you are buying a million shares and five million shares ... that adds up and it adds up real fast,” he said.

Donefer, also a former trader at [Fidelity Investments](#), said the firms have a responsibility to meet a best execution standard — finding and trading at the best possible price — which is difficult or impossible to do without the depth-of-book data. He added that many advisors or other firms that do not have the full data will use wholesalers who do when conducting trades.

“Lowering the costs to institutions will lower the costs of trading and increase the returns of investments to all of the people who put money in for when they retire,” he said.

Nasdaq attorney Steve Susman questioned Donefer's reasoning about the costs, saying those same firms controlled a huge portion of Nasdaq's order flow, which provides the market's liquidity and could move it to another exchange with cheaper data, if they wished.

“That group is able to exert pressure on prices, controls on prices because it can move its order flow,” Susman said.

Susman also said that the effect of spending \$100,000 or even \$200,000 a month on a data feed “wouldn’t fill the jet” of the CEOs of major firms like [Goldman Sachs](#), and Nasdaq has had to spend hundreds of millions of dollars in rebates to attract their business.

Throughout the week, Nasdaq and NYSE have argued they compete fiercely with each other and BATS Global Markets Inc. for data customers, innovating and trying to keep ahead of the competition.

Another SIFMA witness, Chicago University professor David Evans, said that Nasdaq’s theory hasn’t been borne out in practice. Referencing testimony from a closed-door confidential session that he said was the “gold standard in determining market power” Evans said the exchanges had shown their data sets were not substitutable products.

“The evidence in this case demonstrates significant market power,” Evans said.

Evans said that, if Nasdaq’s theory were correct, there would have been more of their customers dropping Nasdaq for NYSE or vice versa. Instead, he said they have functioned more like complementary products than substitutable ones.

“There seems to be a total absence of evidence in this case that when prices go up, customers switch,” Evans said.

The fees have long been a thorn in the side of SIFMA members, who claim the charges are not fair or reasonable and are outside the bounds of what’s allowed under the Securities Exchange Act of 1934.

NetCoalition and SIFMA first won in 2010 at the D.C. Circuit, sending the case back to the SEC, before the 2013 decision.

The trade group has argued that the pricing of the data raises barriers to entry in the market and that traders need all of the sets of data to be truly effective.

SIFMA is represented by Michael Warden, HL Rogers, Eric McArthur, Ben Beaton, Kathleen Hitchins and Jeff Young of [Sidley Austin LLP](#).

Nasdaq is represented by Josh Lipton, Dan Swanson and Gene Scalia of [Gibson Dunn](#), and Jacob Buchdahl and Steve Susman of [Susman Godfrey LLP](#).

The NYSE is represented by Douglas Henkin, Charles Loughlin and Seth Taub of [Baker Botts LLP](#).

The case In the Matter of the Application of the Securities Industry and Financial Markets Association, for Review of Actions Taken by Self-Regulatory Organizations, administrative proceeding file numbers 3-15350 and 3-15351, before the U.S. Securities and Exchange Commission.