

SIFMA Tears Into Nasdaq Pricing In Market Data Row

Share us on:By **Michael Macagnone**

Law360, Washington (April 22, 2015, 7:34 PM ET) -- A Wall Street trade group claimed Tuesday at a U.S. [Securities and Exchange Commission](#) hearing that [Nasdaq OMX Group Inc.](#) engaged in a strategy to “harvest” revenue from existing customers by hiking the prices of proprietary market data, arguing Nasdaq and other exchanges shouldn’t have leeway to hike those fees.

Citing internal documents that laid out a strategy that included "harvesting" revenue from existing users and adding "naked price increases" to other products, the [Securities Industry and Financial Markets Association](#) questioned Nasdaq’s [contention that it constantly competes](#) against Intercontinental Exchange's NYSE Arca and other market data providers’ products in the third day of a five-day hearing at the SEC.

Michael Warden of [Sidley Austin LLP](#), arguing for SIFMA, said Nasdaq had a habit of looking at the changes in the way the market operated and charging its customers new or increased fees based on their usage.

“If Nasdaq discovered they are getting additional value from their products, then Nasdaq imposes new fees,” Warden said.

In cross-examining Oliver Albers, the senior managing director for global data products at Nasdaq, Warden zeroed in on a price increase for companies using the market data for servers doing algorithmic or high-frequency trading in 2012.

That increase raised a cap on the heaviest users of data, with hundreds of servers each, Warden said.

“Was that a naked price increase?” Warden asked.

“Yes, that was a naked price increase. People weren’t paying the value associated with that and we changed the price,” Albers said.

Servers can make exponentially more trades than a human being, Albers said, and Nasdaq felt that it was providing more value than the customers were paying.

Other examples cited by Warden were not “naked” price increases on Nasdaq’s Totalview product, the most expansive and fastest market data product, Albers said, because they either did not change the price for most users, or were entirely new uses of the product.

Albers also said the company had invested millions of dollars in creating new products and

enhancing its current ones to keep pace with the competition, and there has been a “churn” of customers adding and dropping data products or jumping from Nasdaq to NYSE.

However, SIFMA witness Bernard Donefer rebutted that notion. A lecturer at Baruch College of the City University of New York and associate director of the school’s trading floor, he said that traders basically need data feeds from every exchange to understand what is fully going on in the market.

“You don’t have enough information to properly execute trades without that depth of book data,” Donefer said.

Free options offered by Nasdaq and the New York Stock Exchange don’t cut it either, according to Donefer. A former trader at [Fidelity Investments](#), Donefer said traders executing large orders need as much information as possible about trade volume, pricing pressure and other information in order to successfully execute those trades.

The two sides have used dozens of demonstrative exhibits and held hours of highly confidential sessions with the expert witnesses in what Chief Administrative Law Judge Brenda P. Murray called an “oddball case,” with two private parties duking it out before an agency’s administrative judge.

SIFMA only turned to the agency after being turned away from the federal courts in its longtime battle against data fees. In 2013, the Wall Street lobby and with NetCoalition, an industry group representing Internet companies, lost their bid to have the case decided by the D.C. Circuit. The panel there decided that the Dodd-Frank Act gave the SEC jurisdiction over the case.

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 [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.

Correction: An earlier version of this story referred to a price increase on the wrong Nasdaq depth-of-book data product. That error has since been corrected.