

Public Policy 280

Professor Bushouse

Module 4 Team Project

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We, the SWARM ThinkTank, believe (1) that the NASDAQ Stock Market LLC (“NASDAQ”) does have the authority to restructure the fee schedule for depth-of-book information in accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), and (2) that the Securities and Exchange Commission (“SEC”) should not interfere in this case. The following are our arguments in support of the above.

- (1)** The Dodd-Frank Act amends Section 19(b)(3) of the Securities and Exchange Act of 1934 in such a way that NASDAQ, as a Self-Regulatory Organization (“SRO”), may restructure its fee schedule without prior approval from the SEC (O’Neill 2012). This implementation of the Dodd-Frank Act is justified since Dodd-Frank amends the Securities and Exchange Act to allow a “due, fee or other charge imposed by the self regulatory organization” to be placed “on any person, whether or not the person is a member of the self regulatory organization” (United States, 460). As a team, we agree that this means that since NASDAQ is a SRO, the amendment included in Dodd-Frank gives authority to NASDAQ allowing them to adjust their fee schedule as they deem necessary.
- (2)** There is a caveat, however: although the fee restructuring takes immediate effect upon its passage, the SEC does have the authority to disallow the fee change within sixty days if they believe it unduly stifles competition (Mark 2011). As a team, we agree that although the SEC has the power to regulate NASDAQ’s fee rescheduling and prevent their proposed changes, it is not necessary in this case. We believe this because “Firms are not required to purchase Depth-of-Book data or to utilize any specific pricing alternative if they do choose to purchase Depth-of-Book data. NASDAQ is not required to make Depth-of-Book data available or to offer specific pricing alternatives for potential purchases.” (O’Neill, 2012, 21127). Therefore, if businesses (such as news corporations that currently use this data) decide to stop purchasing this information from NASDAQ as a result of the fee increase, they may do so. Market decisions like these then in turn pressure NASDAQ to decrease its fees if it wants to retain customers. Thus, it is our opinion that the SEC need not regulate NASDAQ’s fee scheduling and should instead trust the power of the free market to set its price through the law of supply and demand.

To conclude, we, the SWARM ThinkTank, are in favor of this particular implementation of the Dodd-Frank Act. The language of the Act described in (1) above gives authority to NASDAQ to restructure its fee schedules, and, as discussed in (2), we do not think that the SEC need intervene in this case. Thus, we do not think that any changes need to be made for the final draft of this rule before it goes back to the Office of Information and Regulatory Affairs (OIRA) in OMB.

## Summary of Team Discussion

At first, the SWARM was unsure of our stance and the impact of the NASDAQ Stock Market LLC rule in accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. We decided to meet with Mr. Mintz to get a better understanding of the rule's impact and to spark our discussion and debate. Mr. Mintz helped us understand the content of the rule change: that the rule was aiming to change their fees for depth-of-book information that traders and news organizations purchase. He further explained that NASDAQ is using the Dodd-Frank Act in order to justify the increase of their fees. After we had a better understanding of the rule, we discussed our opinions of whether NASDAQ has the authority to write their own rules. Ms. Power and Mr. Kurkul believed that as long as NASDAQ does not stifle its competition that it should be able to write its own rules and set its own prices for its products, even if the product is market information.

However, in our initial meeting, Mr. Labib argued that NASDAQ's fee increases were, without a doubt, going to stifle competition. In the past NASDAQ has twice promised the SEC to refrain from the controversial practice of "bundling" with its listing fees. (Hershberg 2012). Yet despite these continuous promises, NASDAQ continues to engage in its anti-competitive practices. By manipulating the Dodd-Frank Act, NASDAQ will be able to undermine the SEC to hike up fees on product market information that should be free to everyone. With two promises in the past and no actions taken, it is clear that NASDAQ will continue its anti-competitive practices to benefit nobody but itself, Mr. Labib argued.

Ms. Meiler and Mr. Child responded by arguing that the language of the Dodd-Frank Act does allow NASDAQ to increase its fees because it is an SRO. And, since the free market should function efficiently, the SEC need not intervene to stop the fee increases. Mr. Duarte added that Adam Smith's invisible hand of supply and demand will help adjust the price as firms stop purchasing NASDAQ's information if they believe the information to be overpriced.

Ms. Dunn further argued that most of the people who seek to purchase this depth-of-book information are professional subscribers (versus nonprofessional subscribers) (O'Neill 2012). Therefore, isn't NASDAQ justified in increasing its prices for this information since the professional subscribers are, after all, looking to make some sort of profit off of this information themselves? Indeed, it would only be fair that the NASDAQ would charge other parties, such as professional subscribers, for access to their information if the other parties are going to benefit by making a profit from it.

In a later meeting, Mr. Labib proceeded to argue with the rest of the group about whether or not what NASDAQ was doing under the Dodd-Frank Act was a good idea. Mr. Carvalho finally convinced him that, even if the fees do stifle competition, under the language of the Dodd-Frank Act, NASDAQ is legally justified in adjusting them. In addition, the sixty-day provision of the SEC provides a safety net: if after the fees take place the SEC learns that competition is being unduly hindered, they do have the power to step in to remove the fees.

Thus the SWARM eventually came to a consensus that this implementation of the Dodd-Frank Act was both (1) legally justified, and (2) not a major hindrance to competition in the free market.

## Works Cited

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