

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11893

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
November 9, 2007

SECURITIES & EXCHANGE COMMISSION
MAILED FOR SERVICE

NOV 13 2007

FIRST CLASS

In the Matter of :
 :
 :
 DAVID A. FINNERTY, DONALD R. FOLEY II, :
 SCOTT G. HUNT, THOMAS J. MURPHY, JR., :
 KEVIN M. FEE, FRANK A. DELANEY IV, :
 FREDDY DeBOER, TODD J. CHRISTIE, : ORDER
 JAMES V. PAROLISI, ROBERT W. LUCKOW, :
 PATRICK E. MURPHY, ROBERT A. JOHNSON, JR., :
 PATRICK J. McGAGH, JR., JOSEPH BONGIORNO, :
 MICHAEL J. HAYWARD, RICHARD P. VOLPE, :
 MICHAEL F. STERN, WARREN E. TURK, :
 GERARD T. HAYES, and ROBERT A. SCAVONE, JR. :

The Securities and Exchange Commission (Commission) commenced this proceeding on April 12, 2005, with an Order Instituting Proceedings (OIP) that alleges that each Respondent engaged in interpositioning and/or trading ahead while associated with one of five specialist firms at the New York Stock Exchange (NYSE). The proceeding has been stayed pending the prosecution of parallel criminal proceedings against fifteen Respondents.¹ David A. Finnerty, Admin. Proc. No. 3-11893 (A.L.J. June 7, 2005) (unpublished). The stay was previously modified as to fourteen of the twenty Respondents with reference to their filing Answers and motions, the Division of Enforcement's (Division) production of documents, pursuant to 17 C.F.R. § 201.230, and other discovery, and the hearing is scheduled to commence on February 11, 2008, in New York City.

¹ The criminal proceedings have been resolved except for: Freddy DeBoer, a fugitive; Michael J. Hayward and Michael F. Stern, who appealed their convictions; and David A. Finnerty, in whose case the presiding judge set aside the jury's verdict of guilty, entered a judgment of acquittal, and conditionally granted his request for a new trial in the event the judgment of acquittal is later vacated or reversed. United States v. Finnerty, 05 Crim. 393 (S.D.N.Y. Feb. 21, 2007), appeal pending, No. 07-1104 (2d Cir.). Oral argument is currently scheduled to take place on or after December 17. The proceeding has ended as to Respondents Patrick J. McGagh, Jr. and Joseph Bongiorno. David A. Finnerty, Securities Act Release Nos. 8805, 8806 (May 23, 2007).

At issue is the fourteen active Respondents' October 26, 2007, Application for Subpoena to Staff (Subpoena) and responsive submissions (the Division's October 29 letter, Respondents' October 30 Reply to Division's October 29 letter, the NYSE's October 31 letter [corrected version], and Respondents' October 31 Reply to NYSE's Letter).

The Subpoena grew out of a discussion at the October 22, 2007, prehearing conference, at which Respondents, the Division, and the NYSE appeared, concerning discovery related to the ten-second parameter and false positives. The NYSE represented that it had produced to Respondents all documents related to the ten-second parameter. The Division represented that it had produced transcripts of investigative testimony of thirty-five NYSE officials concerning this issue that were taken in an investigation (related to the investigation that led to this proceeding) into what was described as "the failure of the NYSE to properly detect, investigate, and discipline widespread unlawful proprietary trading by specialists on the floor of the NYSE." New York Stock Exch., Inc., 85 SEC Docket 714, 715 (Apr. 12, 2005) (settling a proceeding against the NYSE and requiring various undertakings). While the Division suggested that it may have made available all material it possesses related to the ten-second issue, Respondents indicated that they would clarify this by means of a subpoena. The Subpoena, as requested, however, is unreasonable, excessive in scope, and unduly burdensome, and it must be modified, pursuant to 17 C.F.R. § 201.232, as discussed below.²

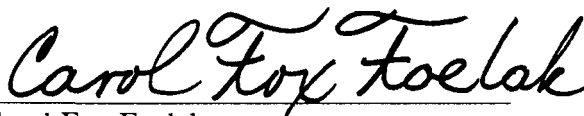
The Division intends to present evidence as to each Respondent's alleged "trading ahead" trades identified by exception reports based on the ten-second parameter. Respondents intend to show that the ten-second parameter produces many, perhaps exclusively, false positives. In 2002 and prior years, the NYSE used a sixty-second or longer parameter in its surveillances of specialist trades, which the Commission criticized as "captur[ing] only a small portion of the misconduct." New York Stock Exch., Inc., 85 SEC Docket at 715. During the NYSE investigation, the NYSE defended itself by arguing, *inter alia*, that the ten-second parameter produced too many false positives and that the sixty-second parameter it was using was appropriate. In this proceeding, the relative accuracy or inaccuracy of the ten-second parameter is at issue; the sixty-second parameter is not. Therefore, generally, to the extent that the Subpoena seeks documents related to the sixty-second parameter (or any parameter other than ten seconds), it must be modified as unreasonable, excessive in scope, and unduly burdensome. Specifically, Item 1 must be limited to documents concerning the ten-second parameter.³ Items 2 and 3 concern the sixty-second parameter and must be excluded. Concerning Items 4 and 5, the Division has agreed to identify the seventy specialists and

² The Division argues that the Subpoena is an improper end run around 17 C.F.R. § 201.230 (Rule 230), which it suggests is the sole vehicle of discovery from the Division for Respondents. This viewpoint is incorrect. See Rules of Practice, 60 Fed. Reg. 32738, 32762 (June 23, 1995) ("Rule 230 is not the exclusive means by which a respondent may obtain access to or production of documents. Production of documents . . . may be sought by subpoena pursuant to Rule 232 or through other procedures.").

³ The Division need not produce documents pursuant to the Subpoena that have already been produced to Respondents.

specialist clerks to which Item 4 refers; documents recording or summarizing the statements of these or any other specialists and clerks are protected from production by the work product privilege. Additionally, Item 5 is overbroad. Item 6 refers to a ninety-second parameter and must be excluded. Items 7 and 8 must be limited to the ten-second parameter and false positives. Item 9 (Wells submissions obtained from the NYSE or individuals or other entities in the NYSE investigation in connection with the same specialist conduct charged in the present proceeding) must be excluded as overbroad and unreasonable. Item 10, a catch-all request, is excessive in scope and unduly burdensome.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Carol Fox Foelak". The signature is written in a cursive, flowing style with a horizontal line underneath the name.

Carol Fox Foelak
Administrative Law Judge