UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

| | |
|---|---|
| In The Matter of the Applications of:<br><br>SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION<br><br>and<br><br>BLOOMBERG, L.P.<br><br>For Review of Actions Taken by Various National Securities Exchanges and National Market System Plans in Their Role as Registered Securities Information Processors | Admin. Proc. File Nos. 3-16220; 3-17943; 3-17951; 3-18314; 3-18316 |

**MOTION FOR EXPEDITED RECONSIDERATION BY THE CONSOLIDATED TAPE ASSOCIATION**

Pursuant to Rule 470(a) of the Commission's Rules of Practice, the Consolidated Tape Association ("CTA"), through New York Stock Exchange LLC, acting in its capacity as Network Administrator of the Consolidated Tape Association and Consolidated Quotation Plan (the "Administrator"), moves the Commission for expedited reconsideration of its October 16, 2018 order in *In the Matter of the Applications of Securities Industry and Financial Markets Association*, Exchange Act Release No. 84433, available at https://www.sec.gov/litigation/opinions/2018/34-84433.pdf (the "Order"), "remanding" challenges to certain fee filings and plan amendments to the respective NMS plan participants. CTA requests expedited consideration of this motion, as the Order requires it to perform several complex activities within six months. CTA further requests that the Commission adjourn the dates set in the Order until it has considered and ruled on this motion.

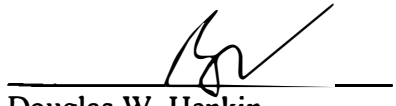
As set forth in the accompanying Memorandum of Law, the Commission should reconsider the Order because, *inter alia*, the Commission erroneously concluded that it could "remand" the challenges to NMA Plan participants and require CTA to undertake what are essentially notice-

and-comment procedures before implementing fee changes; the Commission erroneously concluded that it could order CTA to undertake this process despite CTA having had no involvement in the briefing leading up to the Commission's issuance of the Order; the Commission erroneously concluded that a notice-and-comment process was required without making any findings that the rule changes or plan amendments should be abrogated; the Commission erroneously concluded that it had the authority to order CTA to implement a notice-and-comment process; and the Commission erroneously concluded that it could adjudicate challenges to generally applicable fee rules and plan amendments under Section 19(d).

Although CTA does not believe it is required to file a motion for reconsideration before seeking judicial review of the Order, *see* 5 U.S.C. § 704, it is doing so to afford the Commission an opportunity to correct its erroneous Order.

The Administrator respectfully requests, on behalf of CTA, that the Commission reconsider its Order and either dismiss the applications or retain jurisdiction over the applications and resolve them itself, and further respectfully requests that the Commission adjourn the effect of its Order until the Commission has considered and ruled on this motion for reconsideration.

Respectfully submitted,



Douglas W. Henkin
Seth T. Taube
Baker Botts L.L.P.
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 408-2500
douglas.henkin@bakerbotts.com

Scott A. Keller
Baker Botts L.L.P.
1299 Pennsylvania Ave. NW
Washington, D.C. 20004

(202) 639-7700
*Admitted only in Texas. Not admitted in the District of Columbia. Practicing under the supervision of principals of the firm who are members of the District of Columbia bar.

Evan A. Young
Baker Botts L.L.P.
98 San Jacinto Blvd, #1500
Austin, TX 78701
(512) 322-2500

Benjamin A. Geslison
Baker Botts L.L.P.
910 Louisiana St.
Houston, TX 77002
(713) 229-1241

*Attorneys for Administrator of the Consolidated Tape Association Plan and the Consolidated Quotation Plan*

Dated: October 26, 2018

## CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2018, I caused a copy of the foregoing Motions by Consolidated Tape Association Regarding The United States Securities And Exchange Commission's October 16, 2018 Order (Release No. No. 84433, October 16, 2018) to be served on the parties listed below as follows:

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
*(via hand delivery)*

Michael D. Warden
Kevin P. Garvey
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
*(via hand delivery)*

Daniel G. Swanson
Eugene Scalia
Joshua Lipton
Amir C. Tayrani
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
*(via hand delivery)*

Stephen D. Susman
Jacob W. Buchdahl
Susman Godfrey LLP
1000 Louisiana, Suite 5100
Houston, TX 77002
*(via first class mail)*

Benjamin Beaton
Squire Patton Boggs (US) LLP
2550 M Street, N.W.
Washington, D.C. 20037
*(via hand delivery)*

Dated: October 26, 2018

Douglas W. Henkin
Baker Botts L.L.P.
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 408-2500
douglas.henkin@bakerbotts.com

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

| | |
|---|---|
| In The Matter of the Applications of:<br><br>SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION<br><br>and<br><br>BLOOMBERG, L.P.<br><br>For Review of Actions Taken by Various National Securities Exchanges and National Market System Plans in Their Role as Registered Securities Information Processors | Admin. Proc. File Nos. 3-16220; 3-17943; 3-17951; 3-18314; 3-18316 |

**BRIEF IN SUPPORT OF MOTION FOR EXPEDITED RECONSIDERATION BY THE CONSOLIDATED TAPE ASSOCIATION**

## TABLE OF CONTENTS


I. Reconsideration is warranted because the Order is an invalid agency action. ..... 1

A. Because CTA was not permitted a chance to brief any of the issues, application of the Order is improper. ..... 2

B. The Order creates a "remand" procedure—even though the Commission has not suspended any of the challenged fee filings—that is not authorized by applicable law. ..... 2

C. The Order foists on CTA duties that the regulations and statutes place on the Commission. ..... 3

D. The Order ignores that abrogation by the Commission of a CTA fee filing is the trigger for any notice-and-comment proceedings, and thus reverses the process for addressing challenges to fee filings. ..... 4

E. The Order violates the Commission's own rules. ..... 6

F. The Order is quintessentially arbitrary agency action. ..... 7

II. The authority on which the Commission relies for the Order is inapposite. ..... 8

A. The authority the Commission cites does not permit the Commission to require CTA to develop any particular internal review processes. ..... 8

B. Because fee filings are not prohibitions or limitations on access under Section 11A or Section 19(d), the Commission lacks jurisdiction under that provision to review the denial-of-service applications. ..... 9

III. The Commission should adjourn the effect of the Order until it has considered and ruled on the motion for reconsideration. ..... 12

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

*Am. Fed'n of Gov't Employees, AFL-CIO, Local 3090 v. Fed. Labor Relations Auth.*, 777 F.2d 751 (D.C. Cir. 1985) ..... 6

*Am. Petroleum Inst. v. EPA*, 216 F.3d 50 (D.C. Cir. 2000) ..... 6, 7

*Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281 (1974) ..... 7

*FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) ..... 7

*In re Higgins*, Exchange Act Rel. No. 24429, 1987 WL 757509 (May 6, 1987) ..... 10

*In re Setay Co., Inc.*, 14 S.E.C. 814 (Dec. 1, 1943) ..... 12

*In re Tower Trading, L.P.*, Exchange Act Rel. No. 47537 (Mar. 19, 2003) ..... 9, 10

*KPMG, LLP v. SEC*, 289 F.3d 109 (D.C. Cir. 2002) ..... 2

*LaChance v. Erickson*, 522 U.S. 262 (1998) ..... 2

*Liff v. Office of Inspector Gen. for U.S. Dep't of Labor*, 881 F.3d 912 (D.C. Cir. 2018) ..... 2

*NetCoalition v. SEC*, 715 F.3d 342 (D.C. Cir. 2013) (*Net Coalition II*) ..... 3, 11

*Williams v. City of St. Louis*, 783 F.2d 114 (8th Cir. 1986) ..... 2

*Yates v. U.S.*, -- U.S. ---, 135 S.Ct. 1074 (2015) ..... 10

**STATUTES**

5 U.S.C. § 706(2)(A) ..... 6

15 U.S.C. § 78f(d)(2) ..... 8

15 U.S.C. § 78k-1(b)(5) ..... 4, 8-11

15 U.S.C. § 78s(d) ..... *passim*

15 U.S.C. § 78s(e) ..... 10

15 U.S.C. § 78s(f) ..... 2, 3, 10, 11

**OTHER AUTHORITIES**

17 C.F.R. § 201.100(c) ..... 12

17 C.F.R. § 201.103(a) ..... 12

17 C.F.R. § 201.470 ..... 2

17 C.F.R. § 242.608(a) ..... 4, 8

17 C.F.R. § 242.608(b) ..... *passim*

*Statement on the Application of SIFMA for Review of Action Taken by NYSE Arca, Inc., and NASDAQ Stock Market LLC, Statement of Comm'rs Peirce and Roisman* (Oct. 16, 2018) ..... 7

The Consolidated Tape Association ("CTA"), through New York Stock Exchange LLC, acting in its capacity as Network Administrator of the Consolidated Tape Association and Consolidated Quotation Plan (the "Administrator"), files this brief in support of its motion for expedited reconsideration of the Commission's October 16, 2018 order in *In the Matter of the Applications of Securities Industry and Financial Markets Association*, Exchange Act Release No. 84433 (the "Order").[1] CTA requests that this motion be expedited, as the Order requires it to perform several complex activities within a mere six months, which would require immediate dedication of resources and prompt preparation for completing those actions were the Commission to deny the motion. CTA also requests that the Commission adjourn the dates set in the Order until it has considered and ruled on this motion.

## I. Reconsideration is warranted because the Order is an invalid agency action.

The Order is an invalid agency action that exceeds the Commission's statutory authority and purports to foist on effected entities such as CTA duties that are expressly assigned by statute to the Commission. Not only did the Commission give no hint of the possibility it would issue the Order (or in any way express that it might seek to assign to CTA any responsibility to "develop or identify fair procedures for assessing" challenged rule changes beyond the internal deliberative procedures it already uses), CTA was not even involved in the briefing before the Commission leading to the Order (which occurred prior to 2014), and yet finds itself subject to the Order's onerous burdens. Order at 3. Because the Commission issued the Order *sua sponte*, made this remedy the centerpiece of the Order, and did so without giving CTA the opportunity to even brief any issues, CTA files this motion for reconsideration to allow the Commission "a chance to address [CTA's] claims before

[1] CTA seeks reconsideration of the Order as to all fee filing challenges applicable to it and believes it has identified all such challenges by Filing No. in the case caption. If such challenge is missing from the caption, it is inadvertent and does not indicate that CTA does not seek reconsideration as to that challenge.

being challenged on them in court." *KPMG, LLP v. SEC*, 289 F.3d 109, 117 (D.C. Cir. 2002). As discussed below, the Order constitutes a "manifest error of law" in various ways that each independently warrants reconsideration and vacatur of the Order. *In re Mitchell M. Maynard & Dorice A. Maynard*, Release No. 2901 (July 16, 2009); *see* 17 C.F.R. § 201.470.

**A. Because CTA was not permitted a chance to brief any of the issues, application of the Order is improper.**

In addition to the manifest errors of law described below, the Order violates the most basic and fundamental tenets of fairness with respect to CTA because the Order was issued without the Commission allowing CTA any opportunity to brief any of the issues before the Commission, let alone the ones forming the basis of the Order. "[A]t minimum," the Commission "should have provided [CTA] with notice of its intention . . . and with a meaningful opportunity to address th[ose] issue[s]." *Williams v. City of St. Louis*, 783 F.2d 114, 116 (8th Cir. 1986). Indeed, the "core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998); *see also* 15 U.S.C. § 78s(f) (guaranteeing parties "notice and opportunity for hearing" before the Commission rules on a § 19(d) application); *Liff v. Office of Inspector Gen. for U.S. Dep't of Labor*, 881 F.3d 912, 919 (D.C. Cir. 2018) (parties "should not be surprised by a decision without having had an opportunity to address the issue being decided"). Because CTA received *no* process, it necessarily did not receive *due* process.

**B. The Order creates a "remand" procedure—even though the Commission has not suspended any of the challenged fee filings—that is not authorized by applicable law.**

The Order expressly did *not* abrogate or set aside any challenged fee filings: "This order expresses no view regarding the merits of the parties' challenges to the plan amendments. Nor does it set the challenged plan amendments aside." Order at 3.

Rule 608 unquestionably authorizes the Commission to abrogate CTA fee filings, as well

as to decline to abrogate them. *See* 17 C.F.R. § 242.608(b)(3)-(5). The Commission also "maintains that section 19(d) of the Exchange Act provides for review" by the Commission of a fee filing as an "SRO action that denies any person 'access to services offered by' the SRO." *NetCoalition v. SEC*, 715 F.3d 342, 352 (D.C. Cir. 2013) (*Net Coalition II*) (quoting 15 U.S.C. § 78s(d)(1), (2)). Section 19(d) authorizes the Commission to set aside an SRO action that is inconsistent with the Exchange Act and decline to set aside one that is not inconsistent with the Exchange Act. *See* 15 U.S.C. § 78s(d)-(f).

What the law does *not* authorize is what the Commission did here, namely decline to abrogate or set aside fee filings and then, rather than dismissing the challenges to the fee filings, as Section 19 requires when the Commission takes no action, *see id.* § 78s(f), instead "remand those challenges to the plan participants." Order at 3. The Commission's invention of a "remand to the SIPs" procedure contemplated nowhere in the statutory or regulatory process constitutes a manifest error of law that warrants reconsideration.

### C. The Order foists on CTA duties that the regulations and statutes place on the Commission.

The Commission compounded its error by going beyond merely remanding to CTA the challenges to its fee filings; the Commission then actually ordered CTA to perform the duties that are assigned to the Commission with respect to evaluating the propriety of its fee filings. Specifically, the Commission ordered it to "develop or identify specific procedures and standards for assessing the challenged plan amendments as potential denials or limitations of access"—that is, "to provide notice and an opportunity to be heard to those involved, to develop a record, and to "explain their conclusions, based on that record, in a written decision." Order at 2, 3.

The only duties imposed by Rule 608 and the Exchange Act that even resemble what the Order purports to require of CTA are to "provide interested persons an opportunity to submit

written comments" concerning any proposed amendments, 17 C.F.R. § 242.608(b)(1)-(2), and to provide "notice and opportunity for hearing" for alleged denials of access. 15 U.S.C. § 78k-1(b)(5); § 78s(d)(2), (f). But crucially, none of those duties are assigned to CTA; they are assigned to the Commission as part of its regulatory role. 17 C.F.R. § 242.608(b)(1) ("The Commission . . . shall provide interested persons an opportunity . . . ."); 15 U.S.C. § 78k-1(b)(5) (placing the duty on "the Commission"); *id.* § 78s(d)(2) (placing the duty on "the appropriate regulatory agency").

Neither Rule 608 nor any statute imposes these notice-and-comment type procedures on CTA before it can submit fee filings to the Commission. Rather, the laws and regulations provide that a CTA fee filing takes effect immediately upon its being filed with the Commission, so long as it has been designated as immediately effective. *See* 17 C.F.R. 242.608(b)(3)(i). CTA's *only* duties when making fee filings are to submit "the text of the [proposed] plan or amendment" . . . together with a statement of the purpose of such plan or amendment." 17 C.F.R. § 242.608(a)(1). There is no contention that CTA failed to satisfy these obligations here. *See, e.g.*, SIFMA Opening Br., File No. 3-15350 (Sep. 22, 2016); SIFMA Reply Br., File No. 3-15350 (Dec. 7, 2016).[2] And nothing in Rule 608 or the Exchange Act says anything that could be reasonably construed as requiring CTA to use notice-and-comment procedures during its own *internal* deliberations *before* submitting a fee filing to the Commission. Any notice-and-comment procedures rest, if anywhere, solely with the Commission, and those processes apply, if at all, *after* CTA has made a filing. The Commission's foisting that duty on CTA is a manifest error of law that warrants reconsideration of the Order.

**D. The Order ignores that abrogation by the Commission of a CTA fee filing is the trigger for any notice-and-comment proceedings, and thus reverses the process for addressing challenges to fee filings.**

The Order also gets backward the whole process for instituting notice-and-comment

[2] Of course CTA was not a party to the 3-15350 proceeding either.

proceedings for CTA fee filings. The Commission has the authority to "summarily abrogate the amendment and require that such amendment be refiled . . . if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets". 17 C.F.R. § 242.608(b)(3)(iii). If an abrogated CTA fee filing is then re-filed, it must be re-filed subject to notice-and-comment. In any such case, the Commission's actual abrogation of a CTA fee filing based on that appearance of necessity (which obviously requires some deliberation by the Commission with respect to a specific filing) is what triggers the requirement for any notice-and-comment approval proceedings. But here, the Commission expressly disclaimed having any "view regarding the merits of the parties' challenges to the rule changes" or making any finding as to suspension or setting aside of those rule changes. Order at 2. In other words, it deliberately decided not to do the only thing that can be a basis for creating a need for notice-and-comment proceedings relating to a CTA fee filing. Because the Commission found no basis to temporarily suspend the challenged fee filings, there was no basis to institute notice-and-comment proceedings before *any* entity.

Despite having expressly *not* done the one thing that could trigger notice-and-comment proceedings for a CTA fee filing, the Commission nevertheless insists in the Order that such proceedings occur—and occur immediately—and that they occur before CTA, without the Commission's involvement. The statutorily prescribed order of operation—Commission determination that abrogation is warranted, followed by re-filing by CTA (if CTA so chooses), followed then by Commission-driven notice-and-comment proceedings "to determine whether the proposed rule should be approved or disapproved"—is what the Commission's own rules prescribe. The Order ignores that fact and turns the process on its head, requiring proceedings to be instituted without the Commission having made any determination that could trigger such proceedings.

### E. The Order violates the Commission's own rules.

Even beyond the various statutes discussed above, the Commission's own rules provide no basis to require CTA to engage in further analysis before the Commission finds that a fgee filing should be suspended and reviewed. Nor do the rules require CTA to use any particular procedures (notice-and-comment or otherwise) for its own deliberations before submitting fee filings to the Commission.

Because it contradicts the Commission's existing rules, the Order is an invalid agency action. If an agency wishes to create new procedural requirements beyond those already created through prior rulemaking, it must go through agency notice-and-comment rulemaking: "An agency seeking to repeal or modify a rule promulgated by means of notice and comment rulemaking must undertake similar procedures to accomplish such modification or repeal." *Am. Fed'n of Gov't Employees, AFL-CIO, Local 3090 v. Fed. Labor Relations Auth.*, 777 F.2d 751, 759 (D.C. Cir. 1985) (citing *Action on Smoking and Health v. Civil Aeronautics Board*, 713 F.2d 795, 798–801 (D.C. Cir. 1983)). The Agency must also "provide a reasoned explanation for the change addressing with some precision any concerns voiced in the comments received." *Id.*[3]

Because the Commission did none of these things, it had no authority—under statutes or its own rules—to order CTA to do what the Order purports to require, especially before actually finding that any specific fee filings warrant further scrutiny. In no event does the Commission have authority to require that CTA use notice-and-comment procedures for its internal deliberations before submitting a fee filing or proposed rule change to the Commission.

---

[3] This is also why the Commission's actions violate Rule 608(b)(2), which allows the Commission to abrogate, add, to, or delete from a SIP's rules, but the Commission can only do so "by rule." 17 C.F.R. 242.608(b)(2). This means that notice and comment rulemaking is required under Rule 608(b). Thus, any attempt by the Commission to create new rules applicable to SIPs would require notice and comment rulemaking, which the Commission made no attempt to do.

### F. The Order is quintessentially arbitrary agency action.

Finally, in addition to the reasons explained above, the Order is the epitome of arbitrary agency action, which the Commission has a statutory duty to avoid. *See* 5 U.S.C. § 706(2)(A). An act is arbitrary when it "fail[s] to provide a rational explanation for its decision." *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 58 (D.C. Cir. 2000). Although courts typically will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974), the Commission has not provided any reasoning here from which to reasonably discern its path. *See also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) ("And of course the agency must show that there are good reasons for the new policy.").

At no point did the Commission solicit or receive any briefing or argument from the parties on what became the basis of the Order. Nor did the Order provide reasoning for it short deadlines or give any guidance as to how CTA should develop and implement these procedures. In a concurring statement, two Commissioners conceded that "[t]he Commission's opinion gives little guidance as to what standards or analysis the exchanges should consider as they undertake this momentous task." *Joint Statement on the Application of SIFMA for Review of Action Taken by NYSE Arca, Inc., and NASDAQ Stock Market LLC, Statement of Comm'rs Peirce and Roisman* (Oct. 16, 2018) ("SIFMA Concurrence"), https://www.sec.gov/news/public-statement/peirce-roisman-statement-101618. And yet, the concurring Commissioners still voted to impose that "momentous task" with no reasoned explanation. With no record or reasoned explanation for the Order, CTA has little basis to challenge the Commission's procedure in reaching its decision. This frustrates effective judicial review and underscores that the deadlines imposed in the Order are quintessentially arbitrary action—"fail[ing] to provide a rational explanation" for the Commission's decision. *Am. Petroleum Inst.*, 216 F.3d at 58.

## II. The authority on which the Commission relies for the Order is inapposite.

The Commission cited statutes and regulations in the Order that it contends support requiring CTA to create pre-submission notice-and-comment processes for proposed rule changes, but neither the statutes nor the regulations supports such a duty. *See* Order at 2-3.

### A. The authority the Commission cites does not permit the Commission to require CTA to develop any particular internal review processes.

First, NMS Rule 608(a)(5), on which the Order relies for authority, describes the requirements for filing NMS plans or amendments, but in no way prescribes internal processes that CTA must use before submitting fee filings with the Commission. This provision requires only that CTA file "a description of the manner in which any facility contemplated by the plan or amendment will be operated," which includes "to the extent applicable," the terms and conditions governing access and the methods by which fees are determined, performance of the plan processor is evaluated, and disputes arising from the plan's operation are resolved. 17 C.F.R. §242.608(a)(5). CTA has always prepared fee filings internally and submitted them to the Commission that contain that information to the extent applicable, and the Commission's acquiescence in that process for decades makes clear that, to whatever extent it may have been necessary, CTA's procedures already comply with Rule 608(a)(5). Given this history, that rule cannot possibly require a full notice-and-comment process (including a full opportunity for unidentified entities to be heard, the creation of a record, and a written decision) before CTA can even submit a fee filing to the Commission, and then still have challenges raised through Commission adjudication after a fee filing is submitted. This is especially true given that current law requires no such pre-submission procedure, as explained above.

Second, even if CTA fee filings could be properly classified as "prohibit[ions] or limit[ations]" with respect to "access to services offered" by an exchange or SIP, such that the cited statutory provisions applied (CTA is, to be sure, not an exchange), *see* Part II.B *infra*, the *most* that

either Section 11A or Section 19 could require is that CTA "notify" the person purportedly being denied access, "give him an opportunity to be heard," "keep a record," and issue a "statement setting forth the specific grounds on which the . . . prohibition or limitation is based." 15 U.S.C. § 78f(d)(2); *see id.* § 78k-1(b)(5) (requiring only that the SIP "file notice thereof with the Commission" when prohibiting or limiting a person's access). Those provisions, by their own terms, cannot possibly transform every CTA-submitted fee filing into its own notice-and-comment rulemaking at the CTA level. If it did, it would render unnecessary the provisions expressly referring to adjudication of covered actions by the Commission (and again, this requires the assumption that actions by CTA, which is not an exchange, are even covered by Section 19(d)).

### B. Because fee filings are not prohibitions or limitations on access under Section 11A or Section 19(d), the Commission lacks jurisdiction under that provision to review the denial-of-service applications.

More fundamentally, the Commission's prior argument to the D.C. Circuit notwithstanding, neither Section 11A nor Section 19(d) applies to fee filings submitted by CTA. By its plain terms, Section 19(d) applies to SRO actions that impose a "final disciplinary sanction" on members, "den[y] membership or participation," "prohibit[] or limit[] any person in respect to access to services offered," or bar someone from association. 15 U.S.C. § 78s(d). Such actions are self-evidently disciplinary, or "quasi-adjudicatory"—directed at individual members to address misbehavior—not fees for services provided to the market as a whole by an entity that is not an exchange. The Commission itself has recognized, and indeed has "observed previously" its understanding that "Congress intended . . . Section 19(d), 'to encompass all final quasi-adjudicatory actions [by SROs] affecting members and non-members.'" *In re Tower Trading, L.P.*, Exchange Act Rel. No. 47537 (Mar. 19, 2003). Section 11A gives no indication that prohibitions or limitations on access by SIPs are to be viewed any differently than such actions by exchanges. *See* 15 U.S.C. § 78k-1(b)(5).

The Commission's present position, that "prohibit[ing] or limit[ing] . . . access to services" can be read to mean anything that imposes any burden on any market participant, rather than to mean one of an enumerated list of disciplinary actions, violates the most elementary canons of statutory construction. In interpreting lists like that in Section 19(d), one must "rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'" *Yates v. U.S.*, -- U.S. ---, 135 S.Ct. 1074, 1085 (2015) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)).

The current challenges to CTA's fee filings are nothing like the actions the Commission has in the past reviewed under Section 19(d). Those included, for example, NYSE's decision denying the request of two members to install telephones allowing them direct access to their non-member customers from the NYSE trading floor, *see In re Higgins*, Exchange Act Rel. No. 24429, 1987 WL 757509 (May 6, 1987), or CBOE's termination of a firm's DMM appointment for failure to meet minimum performance standards. *See In re Tower Trading*, Exchange Act Rel. No. 47537. In each instance, the Commission reviewed a specific SRO action that affected specific members for specific reasons, not generally applicable rules submitted by a SIP that affect all market participants.

The express process described in Sections 19(d) and 11A confirms its poor fit with CTA-submitted fee filings. The requirement that an exchange or SIP "promptly file notice" when it prohibits or limits a person's access makes no sense in the context of CTA fee filings because CTA has no way to know when it submits a fee filing which person or persons might consider the fee a prohibition or limitation of service. 15 U.S.C. § 78s(d)(1), § 78k-1(b)(5). Second, with fee filings, there is no "record before the" exchange (CTA is, again, not an exchange) for the Commission to review, as there is in a disciplinary proceeding. 15 U.S.C. § 78s(e)(1), (f). The Order, essentially

requiring that CTA prepare a record for it to review each fee filing at issue, makes no sense and tries to pound a square peg into a round hole. Order at 3. Third, even if the Commission could review fee filings in this way, it could provide no meaningful relief. The relief specified in Sections 19(f) and 11A(b)(5) is by its plain terms limited to providing relief to *individuals* the Commission concludes were improperly disciplined or denied access. 15 U.S.C. § 78s(f), § 78k-1(b)(5)(B). There is no relief provision that can fairly be read to apply market-wide, as fee filings do. *Id.* Finally, the burdensome process that the Commission insists is required by Sections 11A and 19(d) when CTA submits fee filings undermines precisely the efficiencies the Commission intended when it permitted such fee filings to become effective upon filing. *See* 17 C.F.R. § 242.608(b)(3).

Indeed, the Order merely confirms that the denial-of-access route is ill-suited to fee filings. When arguing that the D.C. Circuit lacked jurisdiction in *NetCoalition II*, the Commission represented expressly to the court that review of fee filings would be available as challenges to "an SRO action that denies any person 'access to services offered by' the SRO." *NetCoalition II*, 715 F.3d at 352. Citing the Commission's brief, the court stressed that it "take[s] the Commission at its word, to wit, that *it* will make the section 19(d) process available to parties seeking review of unreasonable fees charged for market data, thereby opening the gate to our review." *Id.* (Emphasis added.) The Order makes clear that, contrary to its representation to the D.C. Circuit, the Commission is abdicating its role in the promised denial-of-access framework, instead purporting to "remand" a vast group of fee-filing challenges to CTA and the exchanges so they "can consider the impact of the SIFMA Decision on them, as well as SIFMA's and Bloomberg's contentions that the challenged plan amendments should be set aside under Exchange Act Sections 11A or 19." Order at 3. By attempting to foist its Section 11A or 19(d) duties onto CTA, the Commission not only implicitly concedes how ill-suited those sections are for fee filings, but also attempts once more to insulate its actions from judicial review—

contrary to the D.C. Circuit's understanding that the institution of proceedings under Section 19(d) *before the Commission* would "open[] the gate to our review." *NetCoalition II*, 715 F.3d at 352.

## III. The Commission should adjourn the effect of the Order until it has considered and ruled on the motion for reconsideration.

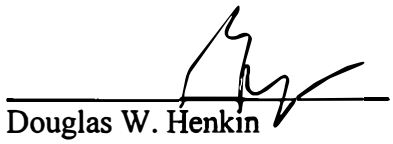
Regardless of whether it grants the reconsideration motion, the Commission should adjourn the effect of its Order until it has reviewed and ruled on this motion. Such a course accords with Commission procedure and best addresses the particularities of the situation. *See, e.g.*, *In re Application of Sec. Indus. & Fin. Markets Assoc. for Review of Actions Taken by Self-Regulatory Organizations*, Release No. 72182 (May 16, 2014) (withholding issuance of an order governing further proceedings until after resolution of the consolidated proceeding); *In re Setay Co., Inc.*, 14 S.E.C. 814 (Dec. 1, 1943) (Commission held order in abeyance until party filed formal proof). Indeed, no specific procedure for adjourning the effect of the Order is necessary here, because under its Rule of Practice 100, the Commission, "upon its determination that to do so would serve the interests of justice and not result in prejudice to the parties to the proceeding, may by order direct, in a particular proceeding, that an alternative procedure shall apply . . . ." 17 C.F.R. § 201.100(c). As discussed below, adjourning the Order's effect while the Commission decides this motion would both serve the interests of justice and avoid prejudice to the parties.

Adjourning the Order's effect pending resolution of this motion is also consistent with the Commission's practice in its May 16, 2014 order in Release No. 72182, where it "determine[d] that it is appropriate to withhold issuance of an order governing further proceedings in the remainder of the '51 Proceeding until after the resolution of the consolidated '50 Proceeding." *In re Application of Sec. Indus. & Fin. Markets Assoc.*, Release No. 72182, at 21. Relying on Rule of Practice 103(a), 17 C.F.R. § 201.103(a) (requiring that Rules "be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding"), the Commission found that such an

abeyance would "provide the opportunity to address the common substantive legal issues," would "serve the interests of all parties and conserve resources," and not prejudice any party. *Id.* at 21-22.

Similarly here, abating the effective date of the order while the Commission addresses this motion will provide "the additional opportunity to directly participate in the resolution of the relevant issues," *id.*, an opportunity CTA never had. This is crucial given the *ultra vires* and entirely unanticipated obligations that the Order seeks to place on CTA and the extremely short time the Order purports to give CTA to accomplish what two Commissioners called a directive that gives "little guidance." SIFMA Concurrence, https://www.sec.gov/news/public-statement/peirce-roisman-statement-101618. To satisfy those substantial obligations on such a short timeline, CTA would have to begin as soon as possible developing procedures to comply with the Order, with "little guidance" from the Commission. *Id.* If the Commission were to grant this motion and decide on reconsideration that the Order is deficient, then—absent an abeyance of the Order's effective date—any time CTA did devote, or expenses that it did incur, in complying with the Order will have been wasted, in violation of Rule 103(a). If, on the other hand, the Commission summarily dismisses the motion, no party is prejudiced by holding the Order in abeyance, or adjourning the effective date of the Order, until the Commission's decision.

Respectfully submitted,



Douglas W. Henkin
Seth T. Taube
Baker Botts L.L.P.
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 408-2500
douglas.henkin@bakerbotts.com

Scott A. Keller
Baker Botts L.L.P.
1299 Pennsylvania Ave. NW
Washington, D.C. 20004
(202) 639-7700
*Admitted only in Texas. Not admitted in the District of Columbia. Practicing under the supervision of principals of the firm who are members of the District of Columbia bar.

Evan A. Young
Baker Botts L.L.P.
98 San Jacinto Blvd, #1500
Austin, TX 78701
(512) 322-2500

Benjamin A. Geslison
Baker Botts L.L.P.
910 Louisiana St.
Houston, TX 77002
(713) 229-1241

*Attorneys for the Administrator of the Consolidated Tape Association Plan and the Consolidated Quotation Plan*

Dated: October 26, 2018

## CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2018, I caused a copy of the foregoing Motion by Consolidated Tape Association Regarding The United States Securities And Exchange Commission's October 16, 2018 Order (Release No. No. 84433, October 16, 2018) to be served on the parties listed below as follows:

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
*(via hand delivery)*

Michael D. Warden
Kevin P. Garvey
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
*(via hand delivery)*

Daniel G. Swanson
Eugene Scalia
Joshua Lipton
Amir C. Tayrani
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
*(via hand delivery)*

Stephen D. Susman
Jacob W. Buchdahl
Susman Godfrey LLP
1000 Louisiana, Suite 5100
Houston, TX 77002
*(via first class mail)*

Benjamin Beaton
Squire Patton Boggs (US) LLP
2550 M Street, N.W.
Washington, D.C. 20037
*(via hand delivery)*

Dated: October 26, 2018

Douglas W. Henkin
Baker Botts L.L.P.
30 Rockefeller Plaza
New York, N.Y. 10112
(212) 408-2500
douglas.henkin@bakerbotts.com