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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

In the Matter of the Applications of SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION and BLOOMBERG L.P. 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 No. 3-18286

MOTION FOR RECONSIDERATION AND MEMORANDUM OF LAW IN SUPPORT

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Options Price Reporting Authority, LLC ("OPRA") respectfully moves for reconsideration of the Commission's October 16, 2018 Order, Release No. 84433 (the "Order") under Rule of Practice 470 to the Commission's Rules of Practice.[1]

INTRODUCTION

The Order applies to two OPRA fee filings, both challenged by the Securities Industry and Financial Markets Association ("SIFMA") in Admin. Proc. File No. 3-18286 (November 17, 2017). These fee filings are SR-OPRA-2017-01, Release No. 34-81899 (October 19, 2017) and SR-OPRA-2017-02, Release No. 34-34-81900 (October 19, 2017). Both of these filings were published for comment, and neither SIFMA nor anyone else objected to, or otherwise commented on, either one of them.

The Order represents an unprecedented, extraordinary overreach of the Commission's authority to address the numerous market data fee challenges filed by SIFMA.[2] The Commission previously had established procedures for resolving denial of access challenges to various exchanges' rule changes regarding fees charged for market data and market access, beginning with first resolving two challenges to rule changes for non-core market data and then later resolving the remaining challenges.

Moreover, the Order contravenes the process the Commission itself had previously established pursuant to the Securities Exchange Act of 1934 ("Exchange Act"). Instead of

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[1] Despite not having an opportunity to participate or advance OPRA's positions prior to the issuance of the Remand Order, OPRA submits this Motion to Reconsider. This present motion is being filed out of an abundance of caution in the event a court determines that moving for reconsideration under Rule of Practice 470 is necessary in order for ORPA to preserve and raise such issues on a petition for review.

[2] The Order also applies to challenges filed by Bloomberg, L.P., but those applications were not made against OPRA fee filings.

following that process, the Order requires an entirely new procedure which is imposed upon security information processors such as OPRA without any process or opportunity to be heard—and is inconsistent with both the Exchange Act and the process set forth in the Commission's previous order establishing procedures. Specifically, the Order commands OPRA to "develop or identify fair procedures" to resolve the challenges brought by SIFMA, provide notice of those procedures to the Commission within six months, and apply those procedures to the challenges within twelve months. Order, Release No. 84433, at 2. The Order requires OPRA to promulgate new rules to anticipate how to address SIFMA's novel denial of access challenges in respect of the rule changes. Although by its terms the Order states that OPRA may "identify" existing procedures rather than promulgate new procedures, OPRA's extant procedures do not include a process for resolving the challenges because it was never before contemplated by anyone—including the Commission—or by the Exchange Act that imposing a generally applicable fee could constitute a "denial of access." Put differently, OPRA's plan, approved previously by the Commission as consistent with the Exchange Act, do not currently include a process for resolving the challenges. The Order's mandate that OPRA either "develop or identify" such procedures therefore effectively orders OPRA to amend its plan.

OPRA was never afforded due process regarding the basis for instituting or the formulation of these new procedures and standards, or on the underlying merits of the claim. The Commission never adjudicated the challenges to OPRA's fee filings. Instead, the Order effectively prejudges those challenges as meritorious and purports to require OPRA to develop wholesale new processes and procedures that OPRA believes are inconsistent with the Exchange Act. This is all the more improper given that, even with respect to the two challenges that the Commission *did* adjudicate, the Commission found only a lack of sufficient evidence; the Commission did not find that the

rule changes constitute a denial of access. The Commission afforded OPRA no voice and no process in the formulation of the new procedures mandated by the Order, and no opportunity to provide evidence that the challenged fee filings meet the statutory standard prior to instituting a procedure that treats such fee filings as a denial of access.

The mandate in the Order that OPRA develop new specific procedures and standards to address fee challenges contravenes the process for resolving the rule changes that the Commission established in its own May 2014 order pursuant to the requirements of the Exchange Act; it is not otherwise contemplated by the Exchange Act; and it constitutes *de facto* rulemaking in violation of the Administrative Procedures Act ("APA") and the Exchange Act. There was no process whatsoever before the Commission ordered OPRA to create new rules, and there certainly was no process to which OPRA was a party. OPRA therefore respectfully requests that the Commission reconsider and vacate the Order.

BACKGROUND

This proceeding concerns challenges under Sections 19(d) and 11A of the Exchange Act[3] brought by SIFMA to several self-regulatory organization ("SRO") rule changes and securities information processor fee filings affecting fees that the SROs and national market system plans charge for both core and non-core market data, as well as fees for market access. As a securities information processor registered with the Commission, OPRA is required under the Exchange Act to make filings with the Commission to make changes in the OPRA national market system plan, including changes in OPRA's fee schedule.

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[3] OPRA understands the relevant "denial of access" provision of the Exchange Act for OPRA to be Section 11A(b)(5) and that the relevant "denial of access" provision of the Exchange Act for the SROs that are also parties to this proceeding to be Section 19(d). In circumstances in which a reference to one of these provisions is made, the intention is to refer to the provision applicable for the type of entity to which reference is made.

SIFMA has challenged over 400 SRO and securities information processor filings to modify fees charged for market data and market access, including challenges to the two OPRA filings referred to above (the "OPRA Fee Challenges").[4] SIFMA's challenges, as they relate to OPRA, allege that these filings constitute limitations on access to OPRA's services, presumably under Section 11A of the Exchange Act.

In May of 2014, the Commission established, pursuant to the Exchange Act, the process to address SIFMA's challenges, which at the time were hundreds fewer than the current roster of 400 challenges. Specifically, the Commission issued its Order Establishing Procedures and Referring Applications for Review to Administrative Law Judge for Additional Proceedings (the "Order Establishing Procedures"). *See In re Application of SIFMA*, Exchange Act Release No. 72182 (May 16, 2014). The Order Establishing Procedures consolidated two specific rule challenges brought by SIFMA claiming that certain fees imposed by two national securities exchanges, NYSE Arca, Inc. ("NYSE Arca") and Nasdaq Stock Market LLC ("Nasdaq"), were improper limitations or prohibitions of access to services offered by those exchanges. The Commission determined that those two challenges should be adjudicated first, followed by SIFMA's remaining challenges. The Order Establishing Procedures set forth the procedures to be applied to the two initial challenges and the remaining rule challenges: (1) development of an evidentiary record, (2) a hearing by an administrative law judge, (3) an initial decision by the administrative law judge, and (4) the right to appeal the initial decision to the Commission. *Id.* at 19-21. After issuance of the Order Establishing Procedures, SIFMA initiated the OPRA Fee Challenges. Based on the Order

[4] SIFMA never properly served OPRA with these challenges. The certification of service in the proceedings file recites that service was not made upon a representative of OPRA, or anyone authorized to accept service on OPRA's behalf, but rather on the general counsel of Chicago Board Options Exchange, Incoporated. OPRA did not become aware of the proceedings against OPRA until October 23, 2018, well after the Order was issued.

Establishing Procedures, it was apparent that the OPRA Fee Challenges would be adjudicated after adjudication of the two initial challenges (including any petitions for review or appeals thereof).

On June 1, 2016, the Chief Administrative Law Judge issued the decision in the two initial challenges, rejecting SIFMA's fee rule challenges. SIFMA petitioned the Commission to review this decision. On October 16, 2018, the Commission issued its decision on SIFMA's challenges to the two Nasdaq and NYSE Arca respective rules (the "SIFMA Decision"). *See In re Application of SIFMA*, Exchange Act Release No. 84432 (Oct. 16, 2018). The SIFMA Decision held that NYSE Arca and Nasdaq did not provide sufficient evidence to establish that the challenged fees were consistent with the purposes of the Exchange Act. *Id.* at 2, 28. The SIFMA Decision expressly did not find that the challenged fees were unfair or unreasonable, unreasonably discriminatory, or otherwise failed to meet any statutory requirement. *Id.* Instead, the Commission found only that the factual record put forward by NYSE Arca and Nasdaq was insufficient as to the two challenged rules. NYSE Arca and Nasdaq each have petitioned the Circuit Court of Appeals for the D.C. Circuit to review and reverse the SIFMA Decision.[5]

Also on October 16, 2018, the Commission issued its Order that is the subject of this motion. *See In re Applications of SIFMA & Bloomberg*, Exchange Act Release No. 84433 (Oct. 16, 2018). The Order addressed an additional 61 applications for review that challenged over 400 fee filings, including the two OPRA fee filings referred to above. OPRA's two fee filings were never subject to any form of review by the Commission, as the two initial challenges had been. Instead, the Order effectively predetermined that the OPRA Fee Challenges had merit. OPRA was never provided notice or afforded the opportunity to be heard by way of briefing, the submission

[5] *See The Nasdaq Stock Market, LLC v. SEC*, No. 18-1292 (D.C. Cir. filed Oct. 23, 2018); *NYSE Arca, Inc. v. SEC*, No. 18-1293 (D.C. Cir. filed Oct. 23, 2018).

of evidence, or oral argument on any of the issues raised in the Order. The Order, entered without due process to OPRA, requires OPRA to create and apply—to the fee filings—the procedures that would be applicable to an actual limitation of access, because the Order assumes that the fees are in fact a limitation of access. The Order imposes an entirely new process as if the challenges had been adjudged as being meritorious by requiring OPRA to resolve the challenges as denials of access.

Specifically, the Order imposes a novel process for the OPRA Fee Challenges, by requiring that OPRA develop its own rules and procedures for resolving the OPRA Fee Challenges. The Order requires that OPRA develop those new procedures within six months and that OPRA apply those new procedures to the OPRA Fee Challenges within twelve months. OPRA was never given an opportunity to make argument or comment on a requirement that OPRA develop new rules to address the OPRA Fee Challenges. Nor was OPRA given the opportunity to brief the important legal issue of whether Exchange Act Section 11A(b)(5) may be stretched to encompass challenges to immediately-effective fee changes.

LEGAL STANDARD

In considering motions for reconsideration, the Commission looks to settled principles of federal court practice. *KPMG Peat Marwick LLP*, Order Denying Request for Reconsideration, 55 S.E.C. 1, 3 n.7 (2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002). Although reconsideration is generally regarded as an extraordinary remedy, reconsideration is particularly appropriate when a court or agency rules on grounds not advanced by the parties. *See, e.g.*, *Yacobo v. Achim*, No. 06 C 1425, 2008 WL 907444, at *1 (N.D. Ill. Mar. 31, 2008) ("Basing a ruling on issues not raised through the adversarial process . . . would most likely qualify as a manifest error of law."); *DirecTV, Inc. v. Hart*, 366 F. Supp. 2d 315, 318 (E.D.N.C. 2004) (granting

reconsideration where "the parties were not able to brief and argue the issues upon which the order . . . ultimately was decided"); *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983) (observing that reconsideration is appropriate when a court "has made a decision outside the adversarial issues presented to the Court by the parties").

ARGUMENT

The Commission's Order should be vacated for four principal reasons. First, the Commission afforded OPRA no process whatsoever to participate as a party. Second, the Commission exceeded its statutory authority by ordering OPRA to promulgate new rules, both because the Exchange Act does not authorize the Commission to order SROs to promulgate rules and because the rules that the Commission ordered OPRA to promulgate are not supported by or consistent with to the Exchange Act. Third, the Commission's dictate that OPRA promulgate new rules constitutes *de facto* "rulemaking" under the APA, but the Commission did not comply with the procedural requirements applicable to rulemaking. Fourth, there are additional fundamental deficiencies, which OPRA never had an opportunity to present to the Commission, namely that the Commission lacks jurisdiction to consider the OPRA Fee Challenges and that SIFMA lacks standing to bring the OPRA Fee Challenges.

I. The Order Failed to Afford OPRA Adequate Process

In issuing the Order, the Commission failed to afford OPRA any process whatsoever, let alone due process. The Commission never provided notice to OPRA that it was considering ordering OPRA to promulgate new procedures and standards for assessing challenged fee filings as potential denials or limitations of access. The Commission never provided OPRA an opportunity to appear before an administrative law judge or the Commission, to present evidence, to file briefs, or otherwise participate as a party. OPRA was not provided notice or an opportunity to be heard on any of the issues that are the subject of the Order. The Commission failed to afford

OPRA the basic components of required due process under the U.S. Constitution and the APA, including the basic requirements of notice and an opportunity to be heard. *See, e.g.*, *Londoner v. City and Cty. of Denver*, 210 U.S. 373, 386 (1908); *LaChance v. Erickson*, 522 U.S. 262, 266 (1998); *Butte Cty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010).

The Order improperly pre-judged the OPRA Fee Challenges without affording OPRA any participation as a party. OPRA was not a party to the proceedings resulting in the SIFMA Decision. The SIFMA Decision only addressed two challenges brought against rule changes filed by two exchanges. OPRA is of course a party to the OPRA Fee Challenges, but in those proceedings the Commission never adjudicated the merits of either of OPRA's challenged fee filings. Importantly, the Commission never provided OPRA an opportunity to be heard on the threshold question of whether the challenged fee filings actually constitute a denial of access. Even if Section 11A(b)(5) of the Exchange Act could be stretched to encompass such a novel claim (which OPRA strongly disputes), any procedure instituted under that section would first require a finding that such a denial of access in fact existed prior to instituting a review of such denial of access. OPRA has not been heard on this important threshold question. The Commission has previously recognized the importance of affording such opportunity, as it is required to do; for example, the Commission noted in its Order Establishing Procedures that consolidating the Nasdaq rule challenge and NYSE rule challenges would provide Nasdaq the "additional opportunity to directly participate in the resolution" of the challenge adjudicated by the SIFMA Decision. Order Establishing Procedures, Release No. 72182, at 22. In contrast, OPRA was afforded no such right to participate at all as a party.

Instead of adjudicating the OPRA Fee Challenges on the merits as contemplated by the 2014 Order Establishing Procedures, the Commission has prejudged merit in the OPRA Fee

Challenges and imposed a new process on OPRA, as if it had determined that OPRA would have lost the OPRA Fee Challenges at a hearing on the merits that never took place. This is notable not only for the complete absence of process; it is all the more remarkable in light of the Commission's express statement in the SIFMA Decision that it had determined only a lack of evidence, not that the fees at issue were unfair or unreasonable. SIFMA Decision, Release No. 84432, at 2, 28.

II. The Commission Exceeded Its Statutory Authority By Ordering OPRA To Promulgate New Procedures and Standards

The Order requires that OPRA promulgate new procedures and standards and create an entirely new process, imposing on OPRA the responsibility in the first instance to address the OPRA Fee Challenges before they have been considered by the Commission on the merits. 17 C.F.R. 242.608 ("Rule 608") establishes the Commission's authority over national market system plans and the process for handling plan amendments. Although Rule 608(a)(2) authorizes the Commission to propose plan amendments, and sets forth procedures for assessing those proposals, nowhere does Rule 608 or any other Commission rule or provision of the Exchange Act authorize the Commission to compel a national market system plan to promulgate particular plan amendments, let alone to do so in the expedited fashion set forth in the Order.

Rule 608(b) sets forth the process that a national market system plan must follow when considering plan amendments. A national market system plan is required to, among other things, provide notice of any proposed plan amendment, allow the Commission to receive and consider comments on the proposed plan amendment, and then await approval from the Commission before the proposed amendment may take effect (unless the national market system has designated the plan amendment as immediately effective or the Commission finds that effectiveness upon publication of notice is appropriate). *See* Rule 608(b). In contrast, the Order requires OPRA to develop procedures for addressing challenged fee changes as potential denials or limitations of

access, to submit written notice of those procedures to the Commission within six months, and to apply those new procedures to the challenged fee filings within one year. Because the Order is inconsistent with Rule 608(b), OPRA would be placed in a position of regulatory peril if it follows the requirements of the Order.

The Order is also inconsistent with Rule 608(a)(2). That rule sets forth how the Commission itself under certain circumstances may propose plan amendments and describes the procedure for doing so, which include publication and the opportunity for comments,. The Order attempts to circumvent these requirements by purporting to impose on national market system plan the obligation to add procedures without following the process set forth in Rule 608(a).

The Order therefore is an improper circumvention of the Exchange Act and the Commission's rules. Moreover, there is nothing in Rule 608 or any other Commission rule or Exchange Act provision that authorizes the Commission to force a national market system plan to engage in its own rulemaking, much less engage in rulemaking on an expedited basis as set forth in the Order. The Commission therefore exceeded its authority by ordering OPRA to promulgate its own rules to address the challenged rule changes as potential denials of access to services.

, The new procedures ordered by the Order are not supported by or consistent with the Exchange Act and the Commission's rules. Section 11A(b)(5) contemplates that the Commission will provide "notice and opportunity" for hearing, which plainly has not been done with respect to the OPRA Fee Challenges. 15 U.S.C. § 78k-1(b)(5). The Commission's Order therefore violates Section 11A(b)(5) by purporting to require that *OPRA* be the one to develop procedures and standards to provide the "notice and opportunity" for hearing that the Exchange Act requires the *Commission* itself to provide. In other words, Section 11A does not permit or contemplate that the

Commission may delegate to OPRA the Commission's duty to provide "notice and opportunity" for hearing.

Furthermore, OPRA's national market system plan, approved previously by the Commission pursuant to Section 11A(a)(3)(B) of the Exchange Act, have never contemplated treating increases in OPRA's fees as subject to as denial of access challenges.[6]

In sum, the Commission lacks authority to compel OPRA to promulgate the rules contemplated in the Order and those contemplated rules are not logically applicable to and contravene the Exchange Act.

III. The Order Failed To Comply With The Requirements Applicable To Rulemaking

The Commission's Order also violates the procedural requirements applicable to rulemaking and adjudication under the APA and the Exchange Act. The portion of the Order requiring that OPRA promulgate new procedures constitutes "rulemaking" as defined in the APA: the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). The term "rule" for this purpose is defined "very broadly," *Safari Club Int'l v. Zinke*, 878 F.3d 316, 332 (D.C. Cir. 2017), to mean "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4).

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[6] This further underscores that the Exchange Act and the Commission's own prior interpretations of the Exchange Act do not contemplate treating denials of access challenges for broadly applicable fee rules under the Section 11A(b)(5)(A) framework. Relatedly, the Commission's prior approval of OPRA's rules for denial of access challenges shows that the Commission's Order constitutes a reversal in policy made without acknowledgement and without any explanation, and the Order is therefore arbitrary and capricious. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position."). If the Commission had considered that challenges to non-core market data were governed by the Section 19(d) framework, then the Commission would not have approved OPRA's rules that lack a procedure for addressing whether fees constitute denials of access.

Here, the Order's dictate that OPRA promulgate new rules bears the classic indicia of rulemaking: (1) it is generally applicable to a particular group of persons, and (2) it is concerned with future effect rather than retroactive application of the law to past actions. *See Safari Club Int'l v. Zinke*, 878 F.3d 316, 332 (D.C. Cir. 2017); *see also United States v. Florida East Coast Railway*, 410 U.S. 224 (1973). The Order establishes an entirely new regime and framework by ordering OPRA and other national market system plans to promulgate new procedures to address denial of access challenges. The effect of the Order is therefore generally applicable to a particular groups of persons, *i.e.*, national market system plans. *See, e.g., Neustar, Inc. v. FCC*, 857 F.3d 886, 893 (D.C. Cir. 2017) ("Rulemaking scenarios generally involve broad applications of more general principles rather than case-specific individual determinations."); *Am. Airlines v. CAB*, 359 F.2d 624, 636 (D.C. Cir. 1966) *cert. den.*, 385 U.S. 843 (1966) ("Rulemaking is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class.").

The effect of the Order is also plainly concerned with the future rather than the past. By remanding the rule challenges to OPRA and dictating that OPRA promulgate new rules, the Order necessarily is intended to have prospective effect.

The Commission further failed to comply with the required rulemaking procedures because it failed to provide a general notice of proposed rulemaking, failed to give interested persons an opportunity to participate in the rulemaking, failed to consider and respond to significant comments, and failed to include in the final rule a concise general statement of its basis and purpose. *See* 5 U.S.C. § 553; *see also Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Furthermore, the Commission failed to consider whether any rule would "impose a burden on competition not necessary or appropriate" to further the purposes of the securities laws. *Nat'l Ass'n*

of Mfrs. v. S.E.C., 800 F.3d 518, 552 (D.C. Cir. 2015) (quoting 15 U.S.C. § 78w(a)(2)). The Commission also failed to consider "whether the action will promote efficiency, competition, and capital formation." *Id.* (quoting 15 U.S.C. § 78c(f)). The Commission also never conducted the required cost-benefit analysis. *See Bus. Roundtable v. SEC,* 647 F.3d 1144 (D.C. Cir. 2011); *Am. Equity Inv. Life Ins. Co. v. SEC,* 613 F.3d 166 (D.C. Cir. 2010); *Chamber of Commerce v. SEC,* 412 F.3d 133 (D.C. Cir. 2005). It is indisputable that the Commission's Order failed to comply with the procedural rulemaking requirements of the APA and the Exchange Act.

The failure of the Commission to comply with the rulemaking process harms OPRA and undermines the policy rationales underlying the rulemaking requirements, which are designed to assure fairness and substantive consideration of generally applicable rules. *See N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *Am. Bus. Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) (noting that Congress chose notice and comment procedures to ensure that agency policy decisions are "both informed and responsive").

The Order therefore constitutes improper *de facto* rulemaking and is invalid. *See United States v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 384 (8th Cir. 1992) ("A regulation not promulgated pursuant to the proper notice and comment procedures has no 'force or effect of law' and therefore is void ab initio.") (quoting *Chrysler Corp. v. Brown,* 441 U.S. 281, 313 (1979)); 5 U.S.C. § 706(2)(A).

IV. The Commission's Order Should Be Vacated For Additional Reasons, Which OPRA Was Never Provided An Opportunity To Present To The Commission

As noted *supra* in Section I, OPRA has never been afforded an opportunity to address the lack of merit in the OPRA Fee Challenges. A motion to reconsider, and one due ten days from the date of the order, is not an appropriate or sufficient time to develop and argue all of OPRA's

defenses. Notwithstanding this, and given the peculiar posture of the OPRA Fee Challenges and likely appellate review, OPRA will present some threshold issues to preserve the points.

A. The Commission Lacks Jurisdiction To Consider The OPRA Fee Challenges As Purported Denials Of Access Under Section 11A(5)(A)

The Commission lacks jurisdiction to consider the OPRA Fee Challenges. The OPRA Fee Challenges were brought under Section 11A as denial of access claims. Section 11A proceedings are an improper vehicle to challenge a national market system's fee filings that are immediately effective.

Denial of access under Section 11A is a comparable concept to denial of access by exchanges, under Section 19(d) of the Exchange Act, and the language of the two provisions on denial of access is nearly identical. Section 19(d) therefore provides context to the Commission's denial of access jurisdiction under Section 11A. Section 19(d) authorizes the Commission to review four enumerated types of action taken by an SRO—none of which includes challenges to rule changes regarding fees effective upon filing: "[1] imposes any final disciplinary sanction on any member or person associated with a member; [2] denies membership or participation to any applicant; [3] prohibits or limits any person in respect to access to services offered by such organization or member thereof; or [4] bars any person from becoming associated with a member." *In re Application of Allen Douglas Securities, Inc.*, Exchange Act Rel. No. 50513, 2004 WL 2297414, at *2 (Oct. 12, 2004); *see also* 15 U.S.C. § 78s(d). The OPRA Fee Challenges should be dismissed on this basis alone. *See In re Application of Larry A. Saylor*, Exchange Act Release No. 51949, 2005 WL 1560275, at *2-3 (June 30, 2005).

Furthermore, the four categories of challenges that are permitted under Section 19(d) are each quasi-adjudicatory in nature, permitting challenges brought by specific individuals to particular actions affecting those individuals in a particularized fashion. *See, e.g.*, *In re Application*

of Tower Trading, L.P., Exchange Act Release No. 47537, 2003 WL 1339179, at *3 (Mar. 19, 2003) ("Congress intended . . . Section 19(d), 'to encompass all final quasi-adjudicatory actions[.]'"); *see also* S. Rep. No. 94-75, 1975 WL 12347, at *26 (1975) ("Section 19(d) would require the self-regulatory organizations to file with the appropriate regulatory agency . . . notice of all final quasi-adjudicatory actions."); *id.* (referring to a "limitation or prohibition of a person's access to requested services" as a "quasi-adjudicatory" proceeding); *id.* at *131 (same). These quasi-adjudicatory procedures are the opposite of the OPRA Fee Challenges, which challenge generally applicable fees charged for market data and market access. Nowhere in Section 19(d), in the remainder of the Exchange Act, or in the legislative history of the Exchange Act is it permitted or contemplated that an SRO's generally applicable rule changes for non-core market data may be challenged as denials or limitations of access to services.

Moreover, permitting SIFMA to proceed with the OPRA Fee Challenges as a denial of access directly contradicts Rule 608. Rule 608(b)(3)(i) permits fee filings to be effective upon filing. 17 C.F.R. 242.608(b)(3)(i). Rule 608(b)(3)(iii) provides that the mechanism to review immediately-effective fee changes is for the *Commission* to abrogate the amendment. The Commisison chose not to provide for further review when it enacted this procedure. 17 C.F.R. 242.608(b)(3)(iii). In its Order, however, the Commission has acted contrary to the plain language of Section 19(d) and the plain language and intent of the Dodd-Frank amendments to Section 19. Because the Commission lacks jurisdiction over the OPRA Fee Challenges, the Commission should dismiss them.

B. SIFMA Is Not An "Aggrieved" Party Under Section 11A(b)(5)) And Therefore Lacks Standing

Section 11A(b)(5) of the Exchange Act provides for review of an alleged denial of access "upon application by any person aggrieved thereby." 15 U.S.C. § 78k-1(b)(5). SIFMA in its rule

challenges failed to adequately allege that it is an "aggrieved" person. Section 11A(b)(5) does not permit associational standing. In any event, SIFMA failed to adequately allege associational standing in its fee challenges under the three-part framework adopted by the Commission in its Order Establishing Procedures. *In re Application of SIFMA*, Exchange Act Release No. 72182, at 11 (May 16, 2014).

V. The Commission Should Adjourn The Effect Of The Order

In light of the serious substantive and procedural issues raised in the Motion for Reconsideration and the short deadlines imposed, the Commission should adjourn the effect of the Order pending resolution of this Motion for Reconsideration. This is in accord with the Commission's historical practices. *See, e.g.*, *In re Setay Co., Inc.*, 14 S.E.C. 814 (Dec. 1, 1943) (Commission held order in abeyance until party filed formal proof). Furthermore, and consistent with the Order Establishing Procedures, the Commission should adjourn the effect of the Order pending resolution of any petition for review arising from any denial of the Motion for Reconsideration and pending resolution of the petitions for review of the SIFMA Decision underlying the Order (this also is consistent with SIFMA's request in each of the OPRA Fee Challenges that those challenges be "held in abeyance" pending resolution of the two initial challenges).

Adjourning the effects of the Order also accords with Rule of Practice 100, which provides that 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). Here, adjourning the effectiveness of the Order serves the interests of justice and prevents prejudice to OPRA. If the Order is found on reconsideration (or any appeal arising therefrom) to have been in

error, then OPRA's efforts to comply with the Order by developing, implementing, and applying new procedures would be for naught.

CONCLUSION

For the foregoing reasons, OPRA respectfully requests that the Commission reconsider and vacate the Order. Further, OPRA respectfully requests that the Commission adjourn the dates set forth in the Order by which OPRA is to adopt the new procedures regarding the OPRA Fee Challenges and apply those new procedures, pending resolution of this Motion for Reconsideration, pending resolution of any petition for review of the SIFMA decision.

Respectfully submitted,

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October 26, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion For Reconsideration And Memorandum Of Law In Support complies with the length limitations set forth in Commission Rule of Practice 154(c) and contains 5,265 words, exclusive of pages containing the table of contents and table of authorities. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this Motion For Reconsideration And Memorandum Of Law In Support.

Dated: October 26, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2018, I caused a copy of the foregoing **Motion For Reconsideration And Memorandum Of Law In Support** to be served on the parties listed below via First Class Mail. Although this filing was completed by facsimile, service was completed via First Class Mail because of the relatively large number of required recipients. *See* Rule of Practice 151(d).

Michael D. Warden
Carter G. Phillips
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Dated: October 26, 2018

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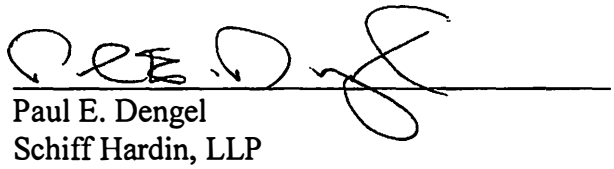

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HARD COPY

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

In the Matter of the Applications of SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION and BLOOMBERG L.P. 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 No. 3-18286

NOTICE OF FILING

TO: See Attached Certificate of Service.

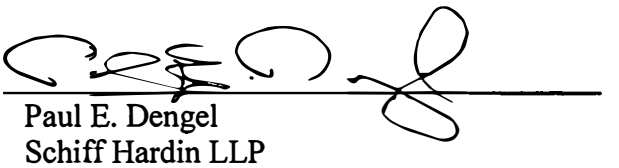
PLEASE TAKE NOTICE that on October 26, 2018, Options Price Reporting Authority, LLC ("OPRA") filed the following documents with the United States Securities and Exchange Commission:

(1) Motion for Reconsideration and Memorandum of Law in Support; and

(2) The Appearance by Counsel of Paul E. Dengel of Schiff Hardin LLP.

Dated: October 26, 2018

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2018, I caused a copy of the foregoing **Notice of Filing** to be served on the parties listed below via First Class Mail.

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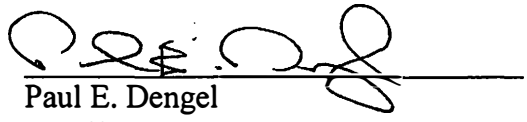

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