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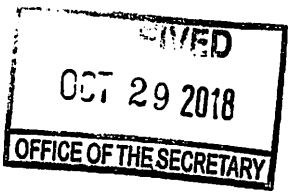

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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 Nos. 3-16330; 3-16423; 3-16490; 3-16724; 3-17040; 3-17105; 3-17787; 3-17841; 3-18094; 3-18144; 3-18310; 3-18345; 3-18362; 3-18383; 3-18441; 3-18525; 3-18572

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Cboe Exchange, Inc., Cboe C2 Exchange, Inc., Cboe BZX Exchange, Inc., Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe EDGX Exchange, Inc. (collectively, "Cboe") respectfully move for reconsideration of the Commission's October 16, Order, Release No. 84433 (the "Order") under Rule of Practice 470 to the Commission's Rules of Practice.[1]

INTRODUCTION

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

The Order contravenes the process the Commission itself had previously established pursuant to the Securities Exchange Act of 1934 ("Exchange Act"). Instead of following that process, the Order requires an entirely new procedure which is imposed upon exchanges 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 Cboe to "develop or identify fair procedures" to resolve the challenges brought by SIFMA and Bloomberg L.P., provide notice of those procedures to the Commission within six

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[1] Despite not having an opportunity to participate or advance Cboe's positions prior to the issuance of the Remand Order, Cboe submits this Motion to Reconsider. This present motion is being filed out an abundance of caution in the event a court determines that moving for reconsideration under Rule of Practice 470 is necessary in order for Cboe 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 Cboe rule filings.

months, and apply those procedures to the challenges within twelve months. Order, Release No. 84433, at 2. The Order requires Cboe to promulgate new rules to anticipate how to address SIFMA's novel denial of access challenges in respect of the rule changes. Specifically, any "stated policy, practice, or interpretation" of an SRO that is not "reasonably and fairly implied" by an existing rule of the SRO, or concerned solely with its administration, is deemed by the Commission to be a proposed rule change. 17 C.F.R. 240.19b-4(c). Although by its terms the Order states that Cboe may "identify" existing procedures rather than promulgate new rules, Cboe's extant rules 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 a generally applicable fee rule change could constitute a "denial of access." Put differently, Cboe's rules, 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 Cboe either "develop or identify" such procedures therefore effectively orders Cboe to promulgate new rules.

Cboe was never afforded due process regarding the basis for instituting or the formulation of this new procedure, or on the underlying merits of the claim. The Commission never adjudicated any of the challenges to Cboe's rule changes. Instead, this Order effectively prejudges those rule challenges as meritorious and purports to require Cboe to develop wholesale new processes, procedures, and rules that Cboe believes are inconsistent with the Exchange Act. This is all the more improper given that, even with respect to the non-Cboe rule 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 Cboe 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 rule changes meet the statutory standard prior to instituting a procedure that treats such rule changes as a denial of access.

The mandate in the Order that Cboe develop new rules 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 Cboe to create new rules, and there certainly was no process to which Cboe was a party. Cboe therefore respectfully requests that the Commission reconsider and vacate the Order.

BACKGROUND

This proceeding concerns challenges under Section 19(d) of the Exchange Act brought by SIFMA to several self-regulatory organization ("SRO") rule changes affecting fees that the SROs charge for both core and non-core market data, as well as fees for market access. As a national securities exchange registered with the Commission, Cboe is required under the Exchange Act to file rule changes with the Commission. *See* 15 U.S.C. § 78s(b)(l). Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, SRO rule changes establishing or changing fees are immediately effective. *Id.* § 78s(b)(3)(A).

SIFMA has challenged over 400 SRO filings to modify fees charged for market data and market access, including challenges to more than fifty of Cboe's rule changes (the "Cboe Rule Challenges"). SIFMA's challenges allege that these SRO rule changes constitute a denial of access to SRO services under Section 19(d) 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 over 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 non-Cboe challenges should be adjudicated first, followed by SIFMA's remaining challenges. The Order Establishing Procedures set forth the procedure to be applied to the two non-Cboe 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 brought challenges to Cboe's rule changes. Based on the Order Establishing Procedures, it was apparent that the Cboe Rule Challenges would be adjudicated after adjudication of the two non-Cboe challenges (including any petitions for review or appeals thereof).

On June 1, 2016, the Chief Administrative Law Judge issued the decision in the non-Cboe challenges, rejecting SIFMA's 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.[3]

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 rule changes, including more than fifty Cboe Rule Challenges. Those challenged rule changes were never subjected to any form of review by the Commission, as the two non-Cboe challenges had been. Instead, the Order effectively predetermined that SIFMA's challenges to Cboe's rule changes had merit. Cboe was never provided notice or afforded the opportunity to be heard by way of briefing, the submission of evidence, or oral argument on any of the issues raised in the Order. The Order, entered without due process to Cboe, requires Cboe to create and apply—to more than fifty fee filings—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 Cboe to resolve the challenges as denials of access.

[3] *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).

Specifically, the Order imposes a novel process for the Cboe Rule Challenges, by requiring that Cboe develop its own rules and procedures for resolving the Cboe Rule Challenges. The Order requires that Cboe develop those new procedures within six months and that Cboe apply those new procedures to the Cboe Rule Challenges within twelve months. Cboe was never given an opportunity to make argument or comment on a requirement that Cboe develop new rules to address the Cboe Rule Challenges. Nor was Cboe given the opportunity to brief the important legal issue of whether Section 19(d) to the Exchange Act provides for 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 Cboe no process whatsoever to participate as a party. Second, the Commission exceeded its statutory authority by ordering Cboe 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 Cboe to promulgate are not supported by or consistent with the Exchange Act. Third, the Commission's dictate that Cboe 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 several additional fundamental deficiencies, which Cboe never had an opportunity to present to the Commission, namely that the Commission lacks jurisdiction to consider the Cboe Rule Challenges and that SIFMA lacks standing to bring the Cboe Rule Challenges.

I. The Order Failed To Afford Cboe Adequate Process

In issuing the Order, the Commission failed to afford Cboe any process whatsoever, let alone due process. The Commission never provided notice to Cboe that it was considering ordering Cboe to promulgate new rules. The Commission never provided Cboe an opportunity to appear before an administrative law judge or the Commission, to present evidence, to file briefs, or otherwise participate as a party. Cboe 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 Cboe 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 Cboe Rule Challenges without affording Cboe any participation as a party. Cboe was not a party to the proceedings resulting in the SIFMA Decision. The SIFMA Decision addressed two challenges brought against rule changes filed by two other exchanges. Cboe is of course a party to the Cboe Rule Challenges, but in those proceedings the Commission never adjudicated the merits of any of Cboe's rule changes. Importantly, the Commission never provided Cboe an opportunity to be heard on the threshold question of whether the challenged rule changes actually constitute a denial of access. Even if Sections 19(d) and 19(f) of the Exchange Act could be stretched to encompass such a novel claim (which Cboe strongly disputes), any procedure instituted under those sections would first require a finding that such a denial of access in fact existed prior to instituting a review of such denial of access. Cboe 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 and NYSE Arca 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, Cboe was afforded no such right to participate at all as a party.

Instead of adjudicating the Cboe Rule Challenges on the merits as contemplated by the 2014 Order Establishing Procedures, the Commission has prejudged merit in the Cboe Rule Challenges and imposed a new process for Cboe to address it, as if determining that Cboe would have lost the Cboe Rule 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 significant competitive forces are lacking or that the rules at issue were unfair or unreasonable. SIFMA Decision, Release No. 84432, at 2, 28.

II. The Commission Exceeded Its Statutory Authority By Ordering Cboe To Promulgate New Rules

The Order requires that Cboe promulgate new rules and create an entirely new process, imposing upon Cboe the responsibility in the first instance to address the Cboe Rule Challenges before they have been considered by the Commission on the merits. Sections 19(b) and 19(c) establish the Commission's authority over SRO rulemaking and the process for handling such rulemaking. *See* 15 U.S.C. § 78s. Nowhere in Section 19 or elsewhere in the Exchange Act is the Commission authorized to compel exchanges to promulgate new rules, let alone to do so in the expedited fashion set forth in the Order.

Section 19(b) sets forth the process that an SRO must follow to change, add, or delete the SRO's rules. An SRO is required to, among other things, provide notice of any proposed rule change, allow the Commission to receive and consider comments on the proposed rule change, and then await approval from the Commission before the proposed rule may take effect (unless the SRO has designated the rule change as immediately effective). *See id.* § 78s(b). In contrast, the Order requires Cboe to develop rules establishing procedures for addressing challenged rule changes as potential denials or limitations of access, to submit written notice of those rules to the Commission within six months, and to apply those new rules to the challenged rule changes within one year. Because the Order is inconsistent with Section 19(b), Cboe is placed in a position of regulatory peril if Cboe follows the requirements of the Order.

The Order also violates Section 19(c). Section 19(c) sets forth how the Commission itself under certain circumstances may "abrogate, add to, and delete from" SRO rules, but that section requires that such change be made "by rule." *Id.* § 78s(c) (emphasis supplied). Thus, the

Commission must follow the specific rulemaking procedures set forth in Section 19(c), which include notice and comment. *Id.* § 78s(c); *see also Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 667 (1975). The Order attempts to circumvent the requirements of Section 19(c) by purporting to impose on SROs the obligation to add rules without following the process set forth in Section 19(c).

The Order therefore is an improper circumvention of the Exchange Act. Moreover, there is nothing in Section 19(b) or 19(c) that authorizes the Commission to force an SRO 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 Cboe to promulgate its own rules to address the challenged rule changes as potential denials of access.

Even if the Exchange Act were to be deemed to authorize the Commission to order Cboe to promulgate new rules addressing the Cboe Rule Challenges, the new rules ordered by the Order are not supported by or consistent with the Exchange Act. Sections 19(d) and (f) contemplate that the appropriate regulatory agency, *i.e.*, the *Commission*, will provide "notice and opportunity" for hearing, which plainly has not been done with respect to the Cboe Rule Challenges. 15 U.S.C. § 78s(d),(f). The Commission's Order therefore violates Section 19(f) by purporting to require that *Cboe* be the one to develop rules to provide the "notice and opportunity" for hearing that the Exchange Act requires the *Commission* itself to provide. In other words, Section 19 does not permit or contemplate that the Commission may delegate to Cboe the Commission's duty to provide "notice and opportunity" for hearing.

Furthermore, the procedures applicable to limitations on access set forth in Exchange Act § 6(d)(2) do not logically apply to a fee filing for at least two reasons. First, the Order conflicts with Section 6(d)(2) concerning when its procedures will apply. Section 6(d)(2) specifies

procedures that an exchange must apply in "any proceeding . . . to determine whether a person shall be . . . limited" with respect to exchange services. 15 U.S.C. § 78f(d)(2). This statutory provision therefore contemplates a procedure that will apply *before* the limitation is imposed, because it contemplates a process "to determine whether" a person that should be subject to a limitation to which the person is not yet subject. However, the procedure the Commission requires in the Order would occur *after* the fee filing, when that person has chosen to challenge an already effective rule. The procedure the Order imposes therefore is not the type of procedure that the Exchange Act contemplates for limitation of access challenges under Section 19(d).

Second, the Order conflicts with Section 6(d)(2) regarding who must be notified—and who has standing to complain—about a limitation of access. Under Section 6(d)(2), the exchange would have to provide notice to the person that will be subject to the limitation of access. Under the Commission's formulation in the Order, a fee supposedly limits all persons, because the limitation is inherent in the fact that the fee must be paid in order to have access. Under Section 6(d)(2) and the new procedures that the Commission would require SROs to adopt, the SRO would need to notify and provide the required dispute process to all persons who may have to pay the fee. It would be impossible for an exchange to comply with that notice obligation, which demonstrates that the Commission's Order does not make logical sense under the Exchange Act's statutory scheme. Moreover, under the approach required under the Order, the obligation to notify would not be imposed when someone *challenges* the fee, but when the fee is actually imposed. That procedure is not what is contemplated by Section 6(d)(2) of the Exchange Act or by Dodd-Frank's dictate that rule changes for fees are immediately effective. *See infra*, Section IV.A.

Furthermore, Cboe's own existing rules, approved previously by the Commission as being "consistent with the requirements" of the Exchange Act, 15 U.S.C. § 78s(b)(1)(C), do not contemplate treating rule changes establishing fees for market data or market access as denial of access challenges.[4]

In sum, the Commission lacks authority to compel Cboe 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 Cboe promulgate new rules constitutes "rulemaking" as defined in the APA: the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). A "rule" 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).

Here, the Order's dictate that Cboe and the other exchanges promulgate their own rules bears the classic indicia of rulemaking: (1) it is generally applicable to a particular group of

[4] 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 19(d) framework. Relatedly, the Commission's prior approval of Cboe'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 Cboe's and other exchange's rules that lack a procedure for addressing whether fees constitute denials of access.

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 Cboe and other exchanges to promulgate new rules to address denial of access challenges. The effect of the Order is therefore generally applicable to a particular groups of persons, *i.e.*, the exchanges. *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 Cboe and dictating that Cboe promulgate new rules, the Order 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 Cboe 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 Cboe Was Never Provided An Opportunity To Present To The Commission

As noted *supra* in Section I, Cboe has never been afforded an opportunity to address the lack of merit in the Cboe Rule 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 Cboe's defenses. Notwithstanding this, and given the peculiar posture of the Cboe Rule Challenges and likely appellate review, Cboe will present some threshold issues to preserve the points.

A. The Commission Lacks Jurisdiction To Consider The Cboe Rule Challenges As Purported Denials Of Access Under Section 19(d)

The Commission lacks jurisdiction to consider the Cboe Rule Challenges. The Cboe Rule Challenges were brought under Section 19(d) as denial of access claims. Section 19(d) proceedings are an improper vehicle to challenge an exchange's rule changes for immediately effective fees for market data and market access.

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, namely an action that: "[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." 15 U.S.C. § 78s(d); *see also In re Application of Allen Douglas Securities, Inc.*, Exchange Act Rel. No. 50513, 2004 WL 2297414, at *2 (Oct. 12, 2004). The Cboe Rule 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).

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 Cboe Rule 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 establishing fees for market data or access services may be challenged as denials or limitations of access to services.

Furthermore, permitting SIFMA to proceed with the Cboe Rule Challenges under Section 19(d) directly contradicts the plain language and intent of the Dodd-Frank amendments. In 2010, Congress amended the Exchange Act so that SRO rule changes regarding fees were effective upon filing. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 916, 124 Stat. 1376, 1833-36 (2010). The intent behind this amendment was to reduce perceived inefficiencies and permit SROs to make changes to fees and bring new products to market without going through the notice and comment process. 15 U.S.C. § 78s(b)(3)(A); *see also* S. Rep. No. 111-176, 2010 WL 1796592, at *106 (2010). This purpose is reflected in amended Section 19(d)(2), which provides that the mechanism to review immediately-effective SRO fee changes is for the *Commission* to institute proceedings. 15 U.S.C. § 78s(b). Congress chose not to provide for further review when it enacted Dodd-Frank. Congress also chose not to provide that immediately-effective rule changes could later be challenged as purported denials of access.

In its Order, 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 Cboe Rule Challenges, the Commission should dismiss them.

B. SIFMA Is Not An "Aggrieved" Party Under Section 19(d) And Therefore Lacks Standing

Section 19(d) of the Exchange Act provides for review of an alleged denial of access "upon application by any person aggrieved thereby." 15 U.S.C. § 78s(d)(2). SIFMA in its rule challenges failed to adequately allege that it is an "aggrieved" person. Section 19(d) does not permit associational standing. In any event, SIFMA failed to adequately allege associational standing in its rule 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 in the Order, 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 Cboe Rule Challenges that the challenges be "held in abeyance" pending resolution of the two non-Cboe challenges).

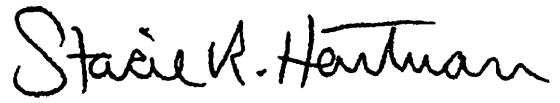
Adjourning the effect of the Order also accords with Rule of Practice 100, which provides that the Commission, "upon its determination that to do so would serve the interests of justice and not result in prejudice to the parties to the proceeding, may by order direct, in a particular

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 Cboe. If the Order is found on reconsideration (or any appeal arising therefrom) to have been in error, then Cboe's efforts to comply with the Order by developing, implementing, and applying new rules and procedures would be for naught.

CONCLUSION

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

Respectfully submitted,



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Dated: 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 5,654 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).

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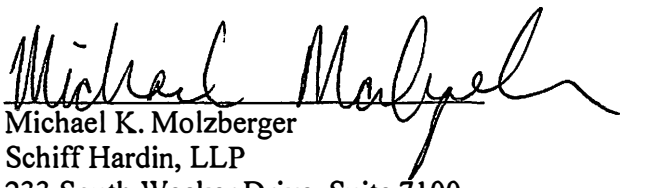

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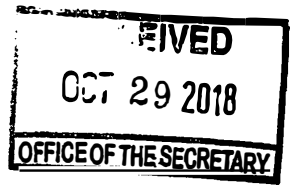
UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION



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 Nos. 3-16330; 3-16423; 3-16490; 3-16724; 3-17040; 3-17105; 3-17787; 3-17841; 3-18094; 3-18144; 3-18310; 3-18345; 3-18362; 3-18383; 3-18441; 3-18525; 3-18572

NOTICE OF FILING

TO: See Attached Certificate of Service.

PLEASE TAKE NOTICE that on October 26, 2018, Cboe Exchange, Inc., Cboe C2 Exchange, Inc., Cboe BZX Exchange, Inc., Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe EDGX Exchange, Inc. 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 Additional Counsel of Michael K. Molzberger of Schiff Hardin LLP.

Dated: October 26, 2018

Respectfully submitted,

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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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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 Nos. 3-16330; 3-16423; 3-16490; 3-16724; 3-17040; 3-17105; 3-17787; 3-17841; 3-18094; 3-18144; 3-18310; 3-18345; 3-18362; 3-18383; 3-18441; 3-18525; 3-18572

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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October 26, 2018

VIA FACSIMILE AND FEDEX

Brent J. Fields
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Re: 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; Administrative Proceeding File Nos. 3-16330; 3-16423; 3-16490; 3-16724; 3-17040; 3-17105; 3-17787; 3-17841; 3-18094; 3-18144; 3-18310; 3-18345; 3-18362; 3-18383; 3-18441; 3-18525; 3-18572

Dear Mr. Fields:

Enclosed are copies of the following documents that we filed with your office by facsimile transmission to facsimile number 202-772-9324 on October 26, 2018.

(1) Notice of Filing;

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

(3) Appearance by Additional Counsel

Sincerely,

Michael K. Molzberger

Enclosures