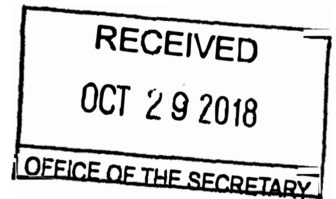


UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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. 3-15350; 3-15351; 3-15364; 3-15394; 3-15773; 3-16006; 3-16188; 3-16320; 3-16330; 3-16356; 3-16574; 3-16724; 3-16918; 3-16960; 3-17000; 3-17040; 3-17066; 3-17105; 3-17138; 3-17176; 3-17208; 3-17244; 3-17663; 3-17738; 3-17787; 3-17877; 3-18248; 3-18286; 3-18310; 3-18345; 3-18383; 3-18525; 3-18572; 3-18680

MOTION FOR EXPEDITED RECONSIDERATION BY NEW YORK STOCK EXCHANGE LLC, NYSE ARCA, INC., NYSE AMERICAN LLC, AND NYSE NATIONAL, INC.

Pursuant to Rule 470(a) of the Commission's Rules of Practice, New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC, AND NYSE National, Inc., (the "Exchanges"), move 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 (the "Order"), , available at https://www.sec.gov/litigation/opinions/2018/34-84433.pdf, "remanding" challenges to certain fee filings to the respective exchanges and directing the exchanges to develop or identify procedures for assessing whether the challenged fees should be set aside. The Exchanges request expedited consideration of this motion, as the Order requires the Exchanges to perform several complex activities within six months. The Exchanges further request that the Commission adjourn the dates set in the Order until it has considered and ruled on this motion.

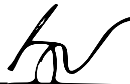
As set forth in the accompanying Memorandum of Law, the Commission should reconsider the Order because, *inter alia*, the Commission erroneously concluded that it could "remand" the

challenges to exchanges and require them to undertake what are essentially notice-and-comment procedures before implementing fee changes; the Commission erroneously concluded that a notice-and-comment process was required without making any findings that the rule changes should be temporarily suspended; the Commission erroneously concluded that it had the authority to order the Exchanges to implement a notice-and-comment process; and the Commission erroneously concluded that it could adjudicate challenges to generally applicable fee rules under Section 19(d).

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

The Exchanges respectfully request 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,



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Dated: October 26, 2018

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2018, I caused a copy of the foregoing Motions by New York Stock Exchange LLC, et al. 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:

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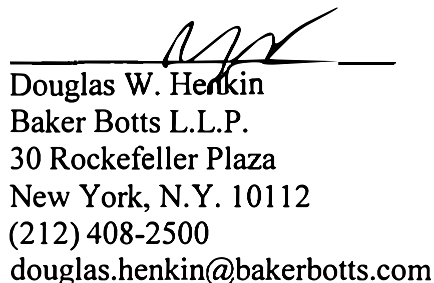

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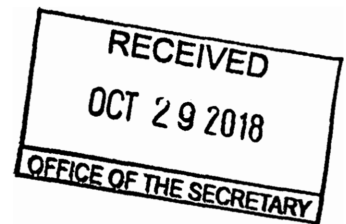

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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. 3-15350; 3-15351; 3-15364; 3-15394; 3-15773; 3-16006; 3-16188; 3-16320; 3-16330; 3-16356; 3-16574; 3-16724; 3-16918; 3-16960; 3-17000; 3-17040; 3-17066; 3-17105; 3-17138; 3-17176; 3-17208; 3-17244; 3-17663; 3-17738; 3-17787; 3-17877; 3-18248; 3-18286; 3-18310; 3-18345; 3-18383; 3-18525; 3-18572; 3-18680

BRIEF IN SUPPORT OF MOTION FOR EXPEDITED RECONSIDERATION BY NEW YORK STOCK EXCHANGE LLC, NYSE ARCA, INC., NYSE AMERICAN LLC, AND NYSE NATIONAL, INC.

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Registered securities exchanges New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC, and NYSE National, Inc. (the "Exchanges") file this brief in support of their 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] The Exchanges request that this motion be expedited, as the Order requires the Exchanges 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. The Exchanges also request 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 the Exchanges duties that are expressly assigned by statute to the Commission. Because the Commission did not even hint at the possibility it would issue the Order or in any way express that the Exchanges might have any responsibility to "develop or identify fair procedures for assessing" challenged rule changes beyond the internal deliberative procedures they already use, Order at 2, the Exchanges were never given the opportunity to address those issues. Because the Commission issued the Order *sua sponte*—and made this remedy the centerpiece of the Order—the Exchanges file this motion for reconsideration to allow the Commission "a chance to address [the Exchanges'] claims before 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

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[1] The Exchanges seek reconsideration of the Order as to all fee filing challenges applicable to them and believe they have identified all such challenges by Filing No. in the case caption. If any such challenge is missing from the caption, it is inadvertent and does not indicate that the Exchanges do not seek reconsideration as to that challenge.

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. 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* suspend or set aside any challenged Exchange fee filings: "We express no view regarding the merits of the parties' challenges to the rule changes. We also note that this order does not set aside the challenged rule changes." Order at 2.

Section 19 of the Securities Exchange Act of 1934 ("Exchange Act") unquestionably authorizes the Commission to suspend fee filings, as well as to decline to suspend them. *See* 15 U.S.C. § 78s(b)(3). The Commission also "maintains that section 19(d) of the Exchange Act provides for review" of a fee filing by the Commission as an action by a self-regulatory organization (SRO) "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 suspend 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 to the respective exchanges the challenges to the rule changes." Order at 2. The Commission's invention of a "remand to the exchanges" procedure contemplated nowhere in the statutory process constitutes a manifest error of law that warrants reconsideration.

B. The Order foists on the Exchanges duties that statutes place on the Commission.

The Commission compounded its error by going beyond merely remanding to the Exchanges

the challenges to their fee filings; the Commission then actually ordered the Exchanges to perform the duties that are statutorily assigned to the Commission with respect to evaluating the propriety of the fee filings. Specifically, the Commission ordered the Exchanges to "develop or identify fair procedures for assessing the challenged rule changes as potential denials or limitations of access to services"—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.

The only duties the Exchange Act imposes that even resemble what the Order purports to require of the Exchanges are to "give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change," 15 U.S.C. § 78s(b)(1)-(2), and to provide "notice and opportunity for hearing" for alleged denials of access. *Id.* § 78s(d)(2), (f). But crucially, none of those duties are assigned to the Exchanges; they are assigned to the Commission as part of its regulatory role. *Id.* § 78s(b)(1) ("The Commission shall give interested persons an opportunity . . . ."); *id.* § 78s(b)(2) ("the Commission shall provide to the [SRO] that filed the proposed rule change . . . ."); *id.* § 78s(d)(2) (placing duty on "the appropriate regulatory agency").

Neither the Exchange Act nor any other statute imposes these notice-and-comment type procedures on exchanges before they can submit fee filings to the Commission. Rather, the Dodd-Frank Act provides that an exchange fee filing shall take effect immediately upon the exchange filing it with the Commission, so long as it has been designated as immediately effective. *See NetCoalition II*, 715 F.3d at 344. The *only* duties of exchanges when making fee filings are to file "copies" of the proposed changed fee "accompanied by a concise general statement of the basis and purpose of such proposed rule change." 15 U.S.C. § 78s(b)(1). There is no contention that the Exchanges 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). And nothing in the Exchange Act or the Dodd-

Frank Act amendments says anything that could be reasonably construed as requiring exchanges to use notice-and-comment procedures during their own *internal* deliberations *before* submitting a fee filing to the Commission. Any notice-and-comment procedures rest, if anywhere, solely with the Commission under the governing statutes, and those processes apply, if at all, *after* an exchange has made a filing. The Commission's foisting that duty on the Exchanges is a manifest error of law that warrants reconsideration of the Order.

C. The Order ignores that suspension by the Commission of a fee filing is the trigger for 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 proceedings. The Commission has the authority to temporarily suspend a fee filing within 60 days "if it appears to the Commission that such action is necessary or appropriate to the public interest, for the protection of investors, or otherwise in furtherance of the purposes of" the Exchange Act. *NetCoalition II*, 715 F.3d at 344 (discussing 15 U.S.C § 78s(b)(3)(C)). The Commission's actual suspension of a proposed rule change 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 notice-and-comment approval proceedings." *Id.* 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 instituting notice-and-comment proceedings. Because the Commission found no basis to temporarily suspend the fee filings, there was no basis to institute notice-and-comment proceedings before *any* entity.

Despite having expressly *not* done the one thing that triggers notice-and-comment proceedings, the Commission nevertheless insists in the Order that such proceedings occur—and occur immediately—and that they occur before the Exchanges, without the Commission's

involvement. The statutorily prescribed order of operation—Commission determination that temporary suspension is warranted for the protection of investors, followed by Commission-driven notice-and-comment proceedings "to determine whether the proposed rule should be approved or disapproved"—is not a suggestion, it is a congressional mandate. 15 U.S.C. § 78s(b)(3)(C). The Order ignores that mandate and turns the process on its head, requiring proceedings to be instituted without the Commission having made any determination that such proceedings are necessary.

D. 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 the Exchanges to engage in further analysis before the Commission finds that a proposed change should be suspended and reviewed. Nor do the rules require exchanges to use any particular procedures (notice-and-comment or otherwise) for their own deliberations before submitting fee filings to the Commission.

Indeed, the Commission's rules do not establish *any* additional process that exchanges must undertake before submitting fee filings. Rather, those rules spell out the required procedures "[i]f the Commission determines to initiate proceedings to determine whether a self-regulatory organization's proposed rule change should be disapproved." 17 C.F.R. § 201.700(b)(1). Those procedures include *Commission* notice, "a brief statement of the matters of fact and law on which *the Commission* instituted the proceedings," a comment period, a possible oral hearing, and a record compiled *by the Commission*. *Id.* § 201.700(b), (c), (d) (emphases added). Like the statute, the Commission's rules confirm that it is the Commission—not the Exchanges—that undertakes these notice-and-comment procedures if *the Commission* wishes to initiate proceedings and further evaluate whether a particular fee filing should be approved or disapproved.

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.*[2]

Because the Commission did none of these things, it had no authority—under statutes or its own rules—to order the Exchanges 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 the Exchanges use notice-and-comment procedures for their internal deliberations before submitting a fee filing or proposed rule change to the Commission.

E. The Order violates the Commission's practice since enactment of the Dodd-Frank Act with respect to challenges to exchange rule filings.

The Commission has—on numerous occasions after Dodd-Frank's passage—instituted proceedings to evaluate and ultimately set aside proposed rule changes submitted by exchanges. The Commission has thus shown that it understands the relevant law and that its statutory and regulatory obligations are not impossible to fulfil. Its departure from that practice here further demonstrates the manifest errors of law contained in the Order.

For instance, on January 10, 2011, NASDAQ Stock Market LLC filed a proposed rule change that sought to link market data fee discounts to transaction volume. *See* Securities Exchange

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[2] This is also why the Commission's actions violate Exchange Act Section 19(c), which allows the Commission to abrogate, add, to, or delete from an exchange's rules. However, the Commission can only do so "by rule," which means that notice and comment rulemaking is required under Section 19(c). Thus, any attempt by the Commission to create new rules applicable to exchanges would require notice and comment rulemaking, which the Commission made no attempt to do. *See* 15 U.S.C. § 78s(c).

Act Release No. 63745 (Jan. 20, 2011), https://www.sec.gov/rules/sro/nasdaq/2011/34-63745.pdf. The Commission recognized that the "proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A)," but issued an order (1) temporarily suspending the proposed rule change and (2) instituting proceedings to determine whether to approve or disapprove the rule change. *See* Securities Exchange Act Release No. 63796 (Jan. 28, 2011), https://www.sec.gov/rules/sro/nasdaq/2011/34-63796.pdf. The Commission provided notice of the grounds for its action in the same order and then solicited written and rebuttal comments. *See Id.* at 5-8. The Commission received three comment letters and a response letter from NASDAQ. *See* Securities Exchange Act Release No. 65362 (Sept. 20, 2011), https://www.sec.gov/rules/sro/nasdaq/2011/34-65362.pdf. On September 10, 2011, the Commission issued an order disapproving of the rule change and providing the grounds for that action. *See id.*

More recently, on November 13, 2013, NASDAQ OMX PHLX filed a proposed rule change that sought to offer certain customers a rebate. *See* Securities Exchange Act Release No. 70866 (Nov. 13, 2013), https://www.sec.gov/rules/sro/phlx/2013/34-70866.pdf. The Commission recognized that the proposed rule change was "immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A)," but issued an order (1) temporarily suspending the proposed rule change and (2) instituting proceedings to determine whether to approve or disapprove of the change. *See* Securities Exchange Act Release No. 70940 (Nov. 25, 2013), https://www.sec.gov/rules/sro/phlx/2013/34-70940.pdf. The Commission provided notice of the grounds for its action in the same order and then solicited written and rebuttal comments. *See id.* at 5-8. The Commission received a total of six comment letters and a response from NASDAQ OMX PHLX. *See* Securities Exchange Act Release No. 72633 (July 16, 2014), https://www.sec.gov/rules/sro/phlx/2014/34-72633.pdf. On July 16, 2014, the Commission issued an order

disapproving of the rule change and providing the grounds for that action. *See id.*

These and other examples confirm that the Commission knows how to and can follow the requirements for instituting proceedings to evaluate other rule changes filed by exchanges. The Commission has not before purported to conscript exchanges into instituting proceedings that the Commission has available to itself (upon the requisite predicate findings). Nor has the Commission before ignored the proper order of operation—filing of a rule change by an exchange with immediate effectiveness, followed by temporary suspension and institution of proceedings by the Commission, followed by a determination by the Commission of the rule's ultimate fate. That the Commission has repeatedly shown its knowledge of and proper application of the law further confirms the Order's manifest errors of law.

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 its short deadlines or give any guidance as to how the Exchanges 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, the Exchanges have 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 two statutes in the Order that it contends support requiring the Exchanges to create pre-submission notice-and-comment processes for fee filings, but neither statute supports such a duty. *See* Order at 2, n.3.

A. The statutes the Commission cites do not permit the Commission to require exchanges to develop any particular internal review processes.

First, 15 U.S.C. § 78f(b)(7) describes the requirements for an exchange to be "registered as a national securities exchange." It does not prescribe internal processes exchanges must use before submitting fee filings with the Commission after registration has occurred. One of these requirements is that "[t]he rules of the exchange . . . provide a fair procedure for . . . the prohibition or limitation by the exchange of any person with respect to services offered by the exchange or a member thereof." Setting aside that the establishment of fees for non-core information—data not required to be included in the consolidated data stream or made available to an investor at the time of trade execution—is not a prohibition or limitation on services offered (rendering this provision

inapplicable here), this provision requires no more than a "fair procedure," which the exchange already provides. The Exchanges have always prepared fee filings internally and submitted them to the Commission under Section 19, and the Commission's acquiescence in that process for decades makes clear that in granting each Exchange's registration, it found that their procedures already complied with Section 6(b)(7). Given this history and prior action by the Commission in granting registration, "fair" 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 an exchange 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 exchange fee filings could be properly classified as "prohibit[ions] or limit[ations] with respect to access to services offered by the exchange" such that the cited provisions applied, *see* Part II.B *infra*, the most that 15 U.S.C. § 78f(d)(2) could require is that an exchange "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). That provision, by its own terms, cannot possibly transform every exchange fee filing into its own notice-and-comment rulemaking at the exchange level. If it did, it would render unnecessary the provisions expressly referring to adjudication of SRO actions by the Commission.

B. Because fee filings are not prohibitions or limitations on access under 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, Section 19(d) does not apply to fee filings submitted by exchanges. 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. § 19(d). Such actions are self-evidently disciplinary, or "quasi-adjudicatory"—directed at individual members to address misbehavior—not fees for services exchanges are not even required to provide and that are provided to the market as a whole. 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).

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 the Exchanges' 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 exchange that affect all market participants.

Section 19(d)'s express process confirms its poor fit with exchange-submitted fee filings. The requirement that an SRO "promptly file notice" when it prohibits or limits a person's access makes no sense in the context of fee filings because an exchange has no way to know when it submits a fee filing which person or persons might elect to subscribe to the product or consider the fee a prohibition or limitation of service. 15 U.S.C. § 78s(d)(1). Second, with fee filings, there is no "record before the" exchange for the Commission to review, as there is in a disciplinary proceeding. *Id.* § 78s(e)(1), (f). The Order, essentially requiring that the Exchanges prepare a record for it to review each of the fee filings at issue, makes no sense and tries to pound a square peg into a round hole. Order at 2. Third, even if the Commission could review fee filings in this way, it could provide no meaningful relief. The relief specified in Section 19(f) is by its plain terms limited to providing relief to *individuals* the Commission concludes were improperly disciplined. 15 U.S.C. § 78s(f). 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 Section 19(d) when exchanges submit fee filings undermines precisely the efficiencies the Dodd-Frank Act intended when it made such fee filings effective upon filing. *See* 15 U.S.C. § 78s(b)(3)(A).

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 Section 19(d) framework, instead purporting to "remand" a vast group of fee-filing challenges to the Exchanges "so they can consider the impact of the SIFMA Decision, as well as SIFMA's and Bloomberg's contentions that the challenged rule changes should be set aside under Exchange Act Section 19." Order at 2. By attempting to foist its Rule 19(d) duties onto the Exchanges, the Commission not only implicitly concedes how ill-suited Section 19(d) is 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

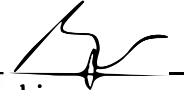
this motion would both serve the interests of justice and avoid prejudice to the parties.

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.* This is crucial given the *ultra vires* and entirely unanticipated obligations that the Order seeks to place on the Exchanges and the extremely short time the Order purports to give the Exchanges to accomplish what the two concurring 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, the Exchanges 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 the Exchanges did devote, or expenses that they 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,



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Dated: October 26, 2018

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2018, I caused a copy of the foregoing Motions by New York Stock Exchange LLC, et al. 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:

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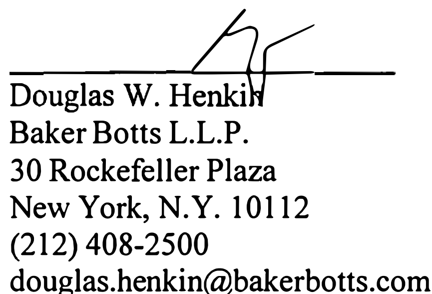

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