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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 National Market System Plans in Their Role as Registered Securities Information Processors	Admin. Proc. File Nos. 3-18313; 3-18315; 3-18365

MOTION FOR RECONSIDERATION OF ORDER REMANDING CHALLENGES TO PLAN AMENDMENTS AND DIRECTING NATIONAL MARKET SYSTEM PLANS TO DEVELOP PROCEDURES

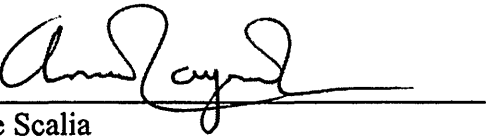
Pursuant to Rule 470(a) of the Commission's Rules of Practice, the Nasdaq Stock Market LLC ("Nasdaq"), acting as administrator of the Nasdaq/Unlisted Trading Privileges Plan (the "UTP Plan") in its role as a registered securities information processor ("SIP"), respectfully requests that the Commission reconsider its order, entered on October 16, 2018, remanding to the UTP Plan fee challenges filed by the Securities Industry and Financial Markets Association ("SIFMA") and Bloomberg L.P. ("Bloomberg") and directing the UTP Plan to develop or identify procedures for assessing whether the challenged fees should be set aside under Sections 11A or 19 of the Securities Exchange Act ("Exchange Act"). *See In re Applications of SIFMA & Bloomberg*, Exchange Act Rel. No. 84433 (Oct. 16, 2018) ("Remand Order"), available at https://www.sec.gov/litigation/opinions/2018/34-84433.pdf; *see also* 17 C.F.R. § 201.470(a).

As set forth in the accompanying Memorandum of Law, the Commission should reconsider its Remand Order because, among other reasons, it lacks jurisdiction over SIFMA's

and Bloomberg's denial-of-access applications challenging the UTP Plan's market-data fees, the UTP Plan's Commission-approved NMS plan does not provide for the procedures the Remand Order contemplates, and the Commission has no authority to order the UTP Plan to promulgate plan amendments for assessing whether its challenged fees must be set aside under Sections 11A or 19 of the Exchange Act. Although Nasdaq does not believe it is required to file a motion for reconsideration before seeking judicial review of the Remand Order, *see* 5 U.S.C. § 704, it is doing so to afford the Commission an opportunity to correct its erroneous ruling.

Nasdaq respectfully requests, on behalf of the UTP Plan, that the Commission reconsider its Remand Order and either dismiss the applications or retain jurisdiction over the applications and resolve them itself without a remand.

Respectfully submitted,



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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulation

Other Authorities

The Nasdaq Stock Market LLC ("Nasdaq"), acting as administrator of the Nasdaq/Unlisted Trading Privileges Plan (the "UTP Plan") in its role as a registered securities information processor ("SIP"), respectfully requests that the Securities and Exchange Commission (the "Commission") reconsider its order, entered on October 16, 2018, remanding to the UTP Plan fee challenges filed by the Securities Industry and Financial Markets Association ("SIFMA") and Bloomberg L.P. ("Bloomberg") and directing the UTP Plan to develop or identify procedures for assessing whether the challenged fees should be set aside under Sections 11A or 19 of the Securities Exchange Act ("Exchange Act"). *See In re Applications of SIFMA & Bloomberg*, Exchange Act Rel. No. 84433 (Oct. 16, 2018) ("Remand Order"), available at https://www.sec.gov/litigation/opinions/2018/34-84433.pdf.

BACKGROUND

On October 16, 2018, the Commission issued its decision in *In re Application of SIFMA*, Exchange Act Rel. No. 84432 (Oct. 16, 2018) ("SIFMA Opinion"), available at https://www.sec.gov/litigation/opinions/2018/34-84432.pdf. In that proceeding, SIFMA challenged certain fees that The Nasdaq Stock Market LLC and NYSE Arca, Inc., charged for their depth-of-book market data as improper prohibitions or limitations on access to their services under Section 19(d) of the Exchange Act. *See* 15 U.S.C. § 78s(d)(1), (2). Rejecting the initial decision of its own Chief Administrative Law Judge, the Commission ruled that the exchanges had failed to carry their burden of showing that the market-data fees at issue were fair and reasonable, and set aside the fees under Section 19(f) of the Exchange Act.

While that proceeding was pending before the Commission, SIFMA and Bloomberg filed three additional denial-of-access applications challenging market-data fee filings by the UTP Plan. The Commission took no action on those applications before issuing the SIFMA Opinion.

The same day that the Commission released its SIFMA Opinion, and without affording the parties an opportunity for briefing or argument, the Commission issued its Remand Order, which remands the challenges to the UTP Plan's market-data fees "to the plan participants so that they . . . can consider the impact of the SIFMA Decision . . . as well as SIFMA's and Bloomberg's contentions that the challenged plan amendments should be set aside under Exchange Act Sections 11A or 19." Remand Order at *3. The Remand Order does not set aside the plan amendments or express any view on the merits of the challenges. *Id.* The Remand Order also requires the UTP Plan to "develop or identify specific procedures and standards for assessing the challenged plan amendments as potential denials or limitations of access, as well as the method by which any disputes will be resolved, as required under Rule 608(a)(5) of Regulation NMS." *Id.* (citing 17 C.F.R. § 242.608(a)(5)). The UTP Plan is required to provide "written notice" to the Commission that it has "developed or identified" procedures "that comply with Regulation NMS and related rules and that are tailored to the challenges brought by SIFMA and Bloomberg" within six months of the Remand Order. *Id.* The UTP Plan must complete "the process of applying the procedures" to the fee challenges within one year. *Id.*[1]

As a result, the UTP Plan has until April 16, 2019, to develop entirely new procedures for assessing whether its market-data fees challenged by SIFMA and Bloomberg are consistent with the Exchange Act, and has until October 16, 2019, to complete its review of those challenges under those new procedures.

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[1] The Remand Order imposes similar requirements on several exchanges for addressing pending challenges to their market-data fees. Remand Order at *2. That portion of the Order is the subject of a separate motion for reconsideration filed by Nasdaq and other Nasdaq-affiliated exchanges on October 24, 2018. *See Motion for Reconsideration of Order Remanding Challenges to Various Rule Changes and Directing Exchanges to Develop Procedures*, Admin. Proc. File Nos. 3-15351 et al. (filed Oct. 24, 2018).

ARGUMENT

The Commission should reconsider the Remand Order and either dismiss the pending denial-of-access applications or retain jurisdiction and resolve them itself without a remand.

As an initial matter, the Commission lacks jurisdiction to hear challenges to the UTP Plan's fee filings under Sections 11A or 19 of the Exchange Act because a SIP's market-data fees do not constitute prohibitions or limitations on access to the SIP's services.

In addition, the UTP Plan's existing NMS plan—which includes a description of its procedures for granting or denying access to its services—does not provide for challenges to data fees. That NMS plan was approved by the Commission as consistent with the Exchange Act. The Commission would have withheld approval if challenges to fees were within the scope of the denial-of-access procedures established by the Exchange Act because the UTP Plan's existing NMS plan does not provide a procedure for assessing whether fees should be set aside as limitations or prohibitions on access.

Nor does the Commission have authority to compel the UTP Plan to promulgate amendments to its NMS plan for assessing fee challenges. Regulation NMS authorizes self-regulatory organizations ("SROs") that are signatories to an NMS plan to jointly propose amendments to the plan, which the Commission can approve or alter after providing notice and an opportunity for public comment. 17 C.F.R. § 242.608(a)(1), (b)(2). Regulation NMS also authorizes the Commission to propose amendments to a SIP's plan through notice-and-comment rulemaking. *See id.* § 242.608(a)(2). But nothing in Section 11A or Regulation NMS authorizes the Commission to compel SIPs, or SROs participating in a SIP plan, to promulgate new plan amendments.

Finally, the Commission acted arbitrarily and capriciously, and contrary to basic principles of procedural fairness, by entering the Remand Order without providing any

opportunity for the parties to brief whether the Commission's action would be lawful and appropriate. The UTP Plan therefore has had no prior opportunity to call the Commission's attention to the serious legal deficiencies in the Remand Order. Before requiring the UTP Plan to expend substantial amounts of time and resources in developing new procedures and applying those procedures to SIFMA's and Bloomberg's fee challenges, the Commission should allow full briefing and argument.

I. Market-Data Fees Cannot Constitute A Prohibition Or Limitation On Access Under Section 11A.

The Commission lacks jurisdiction over each denial-of-access application filed by SIFMA and Bloomberg because the text and purpose of Section 11A, as well as the structure of the Exchange Act as a whole, establish that a SIP's market-data fees cannot constitute a prohibition or limitation on access to the SIP's services.

Section 11A of the Exchange Act authorizes the Commission to review an action taken by a SIP that "prohibits or limits any person in respect of access to services offered, directly or indirectly, by such securities information processor." 15 U.S.C. § 78k-1(b)(5)(A). If an application under Section 11A challenges action that does not fall with that category, the Commission must dismiss the application. *Cf. In re Application of Larry A. Saylor*, Exchange Act Rel. No. 51949, 2005 WL 1560275, at *2-3 (June 30, 2005).

Under the plain meaning of Section 11A(b)(5), a generally applicable fee charged for a SIP's market data cannot be a prohibition or limitation on access to that data. Rather, as the legislative history makes clear, a "limitation or prohibition of a person's access to requested services" is "a type[ ] of quasi-adjudicatory" action—*i.e.*, action directed at a specific person rather than the public as a whole. S. Rep. No. 94-75, 1975 WL 12347, at *26 (1975); *see also Lansdowne On Potomac Homeowners Ass'n v. Openband At Lansdowne, LLC*, 713 F.3d 187,

201 (4th Cir. 2013) (an act is "adjudicatory" when it "resolve[s] disputes among specific individuals in specific cases," as opposed to "affect[ing] the rights of broad classes of unspecified individuals"). For example, if a SIP disconnected a person from access to its data feed, that person may be able to challenge that quasi-adjudicatory action under Section 11A. *See* S. Rep. No. 94-75, 1975 WL 12347, at *10 (Section 11A(b)(5) applies to "exclusionary action[s]" by SIPs).

The structure of the Exchange Act as a whole confirms that "prohibit[ions] or limit[ations]" on access under Section 11A refers to quasi-adjudicatory actions by SIPs, not to generally applicable fees. Congress enacted Section 11A as part of the Securities Acts Amendments of 1975, Pub. L. No. 94-29, § 7, 89 Stat 97 (1975). At the same time, Congress amended Section 19 of the Exchange Act to add Section 19(d), a provision governing Commission review of quasi-adjudicatory actions by SROs. *See id.* § 16. The operative language of the two sections is nearly identical. *Compare id.* § 7 ("If any registered securities information processor prohibits or limits any person in respect of access to services offered, directly or indirectly, by such securities information processor . . . ."), *with* § 16 ("If any self-regulatory organization . . . prohibits or limits any person in respect to access to services offered by such organization . . . ."). Thus, the two sections should be given an identical meaning. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) ("[T]he normal rule of statutory interpretation [is] that identical words used in different parts of the same statute are generally presumed to have the same meaning.").

The other categories of SRO conduct listed in Section 19(d)—all of which involve conduct directed at a specific member or applicant—make clear that Congress intended Section 19(d) to govern "quasi-adjudicatory" proceedings by SROs. *See* S. Rep. No. 94-75, 1975 WL

12347, at *26 ("With respect to all three types of quasi-adjudicatory self-regulatory proceedings—the disciplining of a member, the denial of membership, and the limitation or prohibition of a person's access to requested services—the Committee believes that final action should be open to public scrutiny."). Congress included only one of those quasi-adjudicatory actions in Section 11A—prohibitions or limitations on access to services—which reflects the differences between the activities in which SIPs and SROs engage. But that is no reason to conclude that language that plainly refers to quasi-adjudicatory action in the context of Section 19(d) refers to something entirely different in Section 11A.

Nasdaq raised similar jurisdictional objections under Section 19(d) in the proceeding that culminated in the SIFMA Order. In its May 2014 order rejecting Nasdaq's jurisdictional arguments, the Commission emphasized that Section 19(d) does not use the phrase "quasi-adjudicatory action." *In re Application of SIFMA*, Exchange Act Rel. No. 72182, 2014 WL 1998525, at *11 (May 16, 2014) ("Jurisdictional Order"). The statutory context confirms, however, that the phrase "prohibits or limits any person in respect to access to services" does not extend beyond quasi-adjudicatory action. 15 U.S.C. § 78s(d)(1). All of the surrounding phrases in Section 19(d)—"impos[ing] any final disciplinary sanction," "den[ying] membership or participation," and "bar[ring] any person from becoming associated"—unambiguously refer to quasi-adjudicatory action, and all appear under the heading "notice of disciplinary action taken by [SRO]." *Id.* Settled principles of statutory construction make clear that "prohibit[ing] or limit[ing] . . . access to services" should be read to cover the same type of quasi-adjudicatory action as the three phrases that surround it, *see United States v. Williams*, 553 U.S. 285, 294

(2008), and that the phrase should be given the same meaning in Section 11A, *see IBP*, 546 U.S. at 34.[2]

Furthermore, the structure of the Commission's rules implementing Section 11A reflects the plain meaning of the statute's text: Denial-of-access proceedings cannot be used to challenge a SIP's market-data fees. *See* 17 C.F.R. § 242.608. Rule 608 expressly distinguishes between the "terms and conditions under which brokers, dealers, and/or self-regulatory organizations will be granted or denied access," *id.* § 242.608(a)(5)(*i*), and "the amount of [any] fees or charges" collected by the SIP, *id.* § 242.608(a)(5)(*ii*). In addition, the procedure governing proposed amendments to NMS plans is set forth in Rule 608(b), which explicitly authorizes immediately effective plan amendments "[e]stablishing or changing a fee or other charge." *Id.* § 242.608(b)(3)(*i*). The Rule gives the Commission—but not private parties—the option of "summarily abrogat[ing]" an immediately effective plan amendment "if it appears to the Commission that such action is necessary or appropriate." *Id.* § 242.608(b)(3)(*iii*). Permitting

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[2] In the Jurisdictional Order, the Commission cited three orders involving Section 11A to support its conclusion that denial-of-access procedures can be used to challenge market-data fees. *See* Jurisdictional Order, 2014 WL 1998525, at *8 n.74 (citing *In re Application of the Cincinnati Stock Exchange*, Exchange Act Rel. No. 43316, 2000 WL 1363274 (Sept. 21, 2000); *Institutional Networks Corp. & Nat'l Ass'n of Secs. Dealers, Inc.*, Exchange Act Rel. No. 20874, 1984 WL 472209 (Apr. 17, 1984); and *In re Bunker Ramo Corp.*, Exchange Act Rel. No. 15372, 1978 WL 171128 (Nov. 29, 1978)). But no court has ever considered or endorsed the Commission's application of denial-of-access procedures to core-data fees, which rests on the erroneous conclusion that a SIP's core-data fees can constitute prohibitions or limitations on access under Section 11A(b)(5). *See Nat'l Ass'n of Sec. Dealers, Inc. v. SEC*, 801 F.2d 1415, 1416 (D.C. Cir. 1986) (reviewing *Institutional Networks* order without considering question of Commission's jurisdiction). The Commission also cited *In re Bloomberg, L.P.*, Exchange Act Rel. No. 49076, 2004 WL 67566 (Jan. 14, 2004), for the proposition that market-data fees are "within the scope of Section 19(d)." Jurisdictional Order, 2014 WL 1998525, at *9. In that proceeding, however, Bloomberg did not challenge a fee, but rather a quasi-adjudicatory SRO action limiting its ability to display market data. *In re Bloomberg*, 2004 WL 67566, at *2.

SIFMA and Bloomberg to use Section 11A to challenge immediately effective plan amendments establishing market-data fees would disrupt Rule 608(b)'s carefully calibrated procedures.

Finally, Section 11A is a remarkably poor fit for review of SIP fee filings. Section 11A requires a SIP to "promptly file notice" with the Commission when it prohibits or limits access to a service. 15 U.S.C. § 78k-1(b)(5)(A). That procedure makes sense in the context of a quasi-adjudicatory action that, for instance, terminates a firm's access to a SIP's data feed, but it makes no sense in the context of a generally applicable plan amendment that establishes data fees because it would be impossible for a SIP to know, at the time it established a fee, whether some subset of consumers might claim that the fee is so high as to constitute a purported denial of access. Similarly, Section 11A does not authorize the Commission to set a specific fee for SIP data, which further underscores that Congress did not design this procedure for the review of SIP fees. At most, the Commission can "set aside the prohibition or limitation and require the [SIP] to permit such person access to [its] services." *Id.* § 78k-1(b)(5)(B). But the Commission cannot establish the *terms* under which access must be provided, which means there is no mechanism under Section 11A for the Commission to alter allegedly unreasonable fees. In fact, it would violate the Exchange Act's prohibition on prices that are "unfairly discriminatory" and not "fair and reasonable" for a consumer to receive a special price merely because it disagreed with the price that its competitors willingly paid for SIP data. *Id.* §§ 78f(b)(5); 78k-1(c)(1)(D); 78s(b)(3)(C).

For all these reasons, a SIP's market-data fees cannot constitute a prohibition or limitation on access to its services under Section 11A, and a person who objects to the data fees that a SIP charges is not a "person aggrieved" within the meaning of Section 11A. The Commission should therefore dismiss all of SIFMA's and Bloomberg's denial-of-access

applications challenging the UTP Plan's market-data fee filings under Section 11A. *Cf. Saylor*, 2005 WL 1560275, at *1.[3]

II. The Commission Approved The UTP Plan's Existing NMS Plan Even Though It Does Not Contemplate Review Of Market-Data Fees As Potential Prohibitions Or Limitations On Access.

The Remand Order directs the UTP Plan to "develop or identify specific procedures and standards for assessing the challenged plan amendments as potential denials or limitations of access" and to provide written notice of those procedures to the Commission within six months. Remand Order at *3. The fact that the UTP Plan does not already have procedures in place for reviewing market-data fees as potential prohibitions or limitations on access confirms that Section 11A does not encompass challenges to market-data fees.

The Commission approved the UTP Plan's existing NMS plan, which sets out procedures for determining whether there has been a prohibition or limitation on access to its services. *See* 17 C.F.R. § 242.608(a)(8)(*i*) (plans posted on plan Web sites must be approved by the Commission). In so doing, the Commission determined that the plan fully complies with the Exchange Act. *See* 15 U.S.C. §§ 78k-1(b)(2), (3); 17 C.F.R. § 242.608(b)(1). Yet, the UTP Plan's existing NMS plan provides no mechanism for challenging market-data fees as potential prohibitions or limitations on access.

The plan provides, for example, that an "affirmative vote of a majority of the Participants entitled to vote shall be necessary to constitute the action of the Operating Committee with

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[3] SIFMA and Bloomberg also purport to challenge the UTP Plan's market-data fees under Section 19(d). But, as explained above, Sections 11A and 19(d) use materially identical language; data fees therefore cannot constitute prohibitions or limitations on access under either provision. Moreover, Section 19(d) does not apply to SIPs. Rather, Section 19 is limited to "Self-Regulatory Organizations," which the Exchange Act defines as "any national securities exchange, registered securities association, or registered clearing agency, or . . . the Municipal Securities Rulemaking Board." 15 U.S.C. § 78c(a)(26).

respect to . . . denials of access." *Joint Self-Regulatory Organization Plan*, UTP Plan, § IV.C.3.d, available at http://www.utpplan.com/DOC/Nasdaq-UTPPlan_after_43rd_Amendment-Excluding_21st_36th_38th_42nd_Amendments.pdf. In a separate section, however, the plan provides that the Operating Committee shall be responsible for "[s]etting the level of fees." *Id.* § IV.B.3. The fact that the procedures for determining denials of access and for setting levels of fees are in different sections of the plan underscores that setting fees cannot constitute a denial of access to services. Indeed, neither of these provisions—or any other provision of the plan—establishes a procedure for contesting the UTP Plan's market-data fees.

The Commission nevertheless approved the plan and, until now, has never so much as hinted that the plan was deficient because it failed to provide a mechanism for challenging market-data fees. The Commission's conclusion that the existing plan is consistent with the Exchange Act is further confirmation that market-data fees cannot constitute a prohibition or limitation on access under Section 11A.

The Remand Order directing the UTP Plan to develop procedures assessing whether its fees constitute prohibitions or limitations on access represents a sharp, unacknowledged departure from the Commission's prior interpretation of the Exchange Act. The Commission's about-face is not only inconsistent with Section 11A, *see supra* Part I, but also arbitrary and capricious because agencies have an obligation to acknowledge when they change position and to provide a reasoned explanation for doing so. *See 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."). In issuing the Remand Order, the Commission failed to disclose that it was abandoning its prior position that an NMS plan need not provide procedures for assessing whether market-data fees

should be set aside under Section 11A. That unacknowledged, unreasoned change in position is arbitrary and capricious.

III. The Commission Has No Authority To Compel The UTP Plan To Develop The Procedures The Remand Order Contemplates.

Because the UTP Plan cannot possibly "identif[y]" any existing procedures "that are tailored to the challenges brought by SIFMA and Bloomberg," the Remand Order effectively requires the Plan to engage in an expedited process to promulgate plan amendments for assessing its market-data fees "as potential denials or limitations of access." Remand Order at *3. But nothing in Section 11A or Rule 608, which sets forth a detailed framework governing the Commission's authority over plan amendments, authorizes the Commission to compel a SIP to promulgate a plan amendment. *See* 15 U.S.C. § 78k-1; 17 C.F.R. § 242.608.

Congress directed the Commission to "use its authority under [Section 11A] to facilitate the establishment of a national market system for securities." 15 U.S.C. § 78k-1(a)(2). The Commission set forth the procedure for SROs to establish the national market system in Rule 608. 17 C.F.R. § 242.608. The rule identifies detailed—and exclusive—procedures for the "[f]iling of national market system plans and amendments thereto." *Id.* § 242.608(a). Under Rule 608, SROs "*may* file a national market system plan or *may* propose an amendment to an effective national market system plan ('proposed amendment') by submitting the text of the plan or amendment to the Secretary of the Commission." *Id.* § 242.608(a)(1) (emphases added). The Commission's use of permissive language—*may* file and *may* propose—makes clear that the Commission has no authority to *require* a SIP to propose plan amendments adopting procedures for challenging its market-data fees.

Alternatively, Rule 608 specifies that the "Commission may propose amendments to any effective national market system plan." 17 C.F.R. § 242.608(a)(2). To do so, the Commission

must "publish[ ] the text" of its proposed amendment, "together with a statement of the purpose of such amendment," and then permit public comment. *Id.* §§ 242.608(a)(2), (b)(1). Nothing in these provisions—or any other provision of Rule 608 (or the Exchange Act)—authorizes the Commission to compel a SIP to promulgate amendments to its NMS plan.

Accordingly, if the Commission wishes to amend an NMS plan, it must do so itself, using the procedures it established in Rule 608. Yet, the Remand Order purports to direct the UTP Plan to adopt specific amendments to its plan that establish a mechanism for assessing whether its market-data fees constitute a prohibition or limitation on access. The UTP Plan has not proposed—and does not wish to adopt—procedures for assessing SIFMA's and Bloomberg's denial-of-access applications. And the Commission has neither published its own proposed amendments to the plan nor instituted notice-and-comment rulemaking. By using the adjudicatory process in a setting where rulemaking is required, the Commission is impermissibly violating its own rules. *See Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005) ("[A]gencies may not violate their own rules and regulations to the prejudice of others."). It is also improperly circumventing its congressionally imposed obligation to consider whether this "action will promote efficiency, competition, and capital formation." 15 U.S.C. § 78c(f); *see also Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (the Commission's "failure to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation makes promulgation of the rule arbitrary and capricious and not in accordance with law") (internal quotation marks omitted). Indeed, in light of the substantial burdens that the Remand Order will impose on the UTP Plan—which will be required to adopt new procedures, develop a record, and issue written decisions for each pending and future challenge to its fees—it is clear that the lost-efficiency costs of the Remand Order far outweigh its benefits.

Not surprisingly, the Remand Order fails to cite any statute or regulation that would permit the Commission to compel the UTP Plan to amend its own procedures—let alone on the expedited basis contemplated by the Order. Rather, the Remand Order cites language from Rule 608 requiring every NMS plan to include the "terms and conditions under which brokers, dealers, and/or self-regulatory organizations will be granted or denied access." 17 C.F.R. § 242.608(a)(5)(*i*). But the UTP Plan has already satisfied that requirement. *See Joint Self-Regulatory Organization Plan*, UTP Plan, § IV.C.3.d.

Moreover, even if the Commission had authority to compel the UTP Plan to promulgate amendments, the amendments contemplated by the Remand Order are inconsistent with the Exchange Act. The Commission failed to identify any language in Section 11A of the Exchange Act—or any other provision of the Act—that permits the agency to outsource its adjudicatory functions under Section 11A to a SIP. Indeed, Section 11A(b)(5) requires "the Commission"—not the SIP that allegedly prohibited or limited access to its services—to provide "notice and opportunity for hearing." 15 U.S.C. § 78k-1(b)(5)(B). By directing the UTP Plan to provide the notice and hearing that Congress required the Commission itself to provide, the Commission has violated Section 11A of the Exchange Act (assuming arguendo that Section 11A could be construed as applying to fee challenges).

Because the Commission lacks authority to require the UTP Plan to promulgate plan amendments—and because the amendments contemplated by the Remand Order are inconsistent with the Exchange Act—the Remand Order is arbitrary, capricious, and not in accordance with law. *See* 5 U.S.C. § 706.

IV. The Remand Order Improperly Denied The UTP Plan An Opportunity To Be Heard.

Finally, the Commission acted arbitrarily and capriciously, and disregarded fundamental principles of procedural fairness, because it did not give the parties any notice that it was considering ordering a remand, or an opportunity to raise objections to that procedure, before it issued the Remand Order.

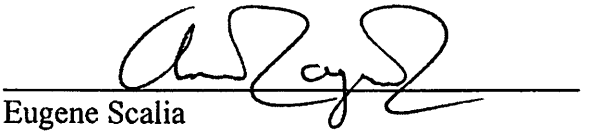
The Commission issued the Remand Order on the same day as the SIFMA Opinion, without asking the parties to submit their views on how it should resolve the other pending denial-of-access applications filed by SIFMA and Bloomberg. This summary action was procedurally improper and fundamentally unfair because it denied the UTP Plan the opportunity to be heard and to raise its arguments regarding the serious deficiencies in the Remand Order. *See LaChance v. Erickson*, 522 U.S. 262, 266 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard."); *see also* 15 U.S.C. § 78k-1(b)(5)(B) (guaranteeing parties "notice and opportunity for hearing" before the Commission rules upon a Section 11A application); *id.* § 78s(f) (same, with respect to a Section 19(d) application). Instead of taking this precipitous action, the Commission should have instructed the parties to file briefs regarding its proposed remand procedure. And in light of the absence of any record in these proceedings, as well as the significant practical burdens that the Remand Order imposes on the Plan, the Commission should have heard oral argument to aid its decision-making process and ensure full and fair consideration of the parties' views. The briefing and argument would have enabled the Commission to render a fully informed decision that, unlike the Remand Order, is consistent with the Exchange Act, the Commission's rules, and the Administrative Procedure Act.

Accordingly, at a bare minimum, the Commission should reconsider its Order and set a briefing and argument schedule to allow the parties a full opportunity to be heard.

CONCLUSION

Nasdaq respectfully requests, on behalf of the UTP Plan, that the Commission reconsider its Remand Order and either dismiss the applications or retain jurisdiction over the applications and resolve them itself without a remand.

Respectfully submitted,



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Dated: October 26, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion for reconsideration together with the memorandum in support of the motion, complies with the length limitation set forth in Rule of Practice 154(c) and contains 4,750 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 the motion and memorandum.

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 document to be served on the parties listed below via First Class Mail, except as otherwise provided.

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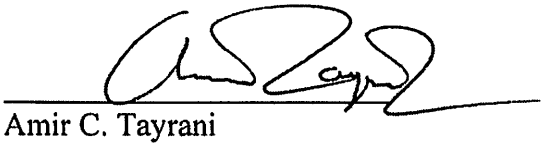

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