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February 2, 1978

Mr. Roger D. Blanc
Chief Counsel
Division of Market Regulation
Securities and Exchange Commission
500 North Capitol Street
Washington, D.C. 20549

Re: Options Price Reporting Authority —
Revised Vendors' Agreements

Dear Mr. Blanc:

This letter relates to certain actions taken by the Options Price Reporting Authority ("OPRA") in connection with the implementation of OPRA's high speed system for consolidated reporting of options last sale reports and the revision of OPRA's contracts with vendors of securities information, and is in response to a letter to Mr. Fitzsimmons from Allen R. Frischkorn, Jr., attorney for GTE Information Systems Incorporated ("GTE/IS"), dated December 15, 1977 (the "Frischkorn letter"), and a letter to Mr. Rappaport from M. Sumner, Securities Industries Liaison, Bunker Ramo Corporation ("Bunker Ramo"), dated December 22, 1977 (the "Sumner letter").

OPRA was created in October, 1974, in response to the Commission's request that the American Stock Exchange, Inc. and the Chicago Board Options Exchange, Incorporated develop a system of consolidated reporting of transactions in option contracts traded upon the exchanges. OPRA is a securities information processor registered under Section 11A(b) of the Securities Exchange Act of 1934 (the "Act").

Shortly after its formation, OPRA entered into identical agreements with various vendors of securities information, including GTE/IS and Bunker Ramo, providing for the transmission of options last sale reports and other information from each of the exchanges to the vendors. Under these agreements, last sale reports were furnished to vendors without charge, and OPRA agreed to assume each vendor's line costs within a 100 mile radius of New York City. The agreements prohibited vendors from retransmitting the information in the form of a continuous tape. These agreements were terminable by either party upon 30 days' written notice.

In late 1976, by which time there were five participant exchanges comprising OPRA, each sending its own last sale reports to each of the several vendors, OPRA determined to develop a single, consolidated high speed transmission that would be sent by a central processor to each vendor. This decision was made in order to limit the number and standardize the format of inputs that vendors must process, to assure common and accurate time sequencing of reports disseminated to all vendors, and to provide the expanded capability needed to process the increasing volume of options transactions in a timely manner. For this purpose, on the basis of competitive bids, OPRA selected the Securities Industry Automation Corporation ("SIAC") to develop the necessary data processing system and to serve as OPRA's processor. At the same time, OPRA determined that the costs of the central processor in operating the system would be passed on to vendors, news services and others having access to the high speed transmission, in the form of an access charge, and that OPRA would no longer pay the vendors' line costs from the central processor to each vendor. (Each exchange would, however, continue to collect transaction reports and transmit them to the processor at its own expense.)

In developing its high speed consolidated transmission and in charging an access fee to all persons having direct access to the transmission, OPRA followed the pattern previously set by the Consolidated Tape Association ("CTA") in respect of its consolidated high speed stock transmission. CTA also uses SIAC as its central processor and CTA imposes a charge on vendors and others who access stock last reports on a consolidated high speed basis.

In order to implement these and other changes in the vendor agreements (such as elimination of the restriction on continuous retransmission), OPRA arranged a series of meetings with vendors during the fall of 1977 for the purpose of notifying each vendor that the existing agreements would be terminated in accordance with their terms, and in September, 1977, OPRA sent a proposed draft of a new vendor agreement to each vendor. After making certain changes in response to comments received from the vendors, OPRA submitted a revised agreement to each of the vendors for execution. The revised vendor agreement provides, inter alia, that each vendor shall be responsible for its own line costs to SIAC and that each vendor shall pay an access charge, presently set at $500 per month, representing each vendor's proportionate share of the costs of operating the high speed consolidated reporting system.

In a letter accompanying the revised agreement sent to the vendors for execution, OPRA notified each vendor that the then existing vendor agreement would be terminated as of the date upon which the new consolidated high speed line would become available at SIAC, which date was more than 30 days after the date of the letter. This notification was given by OPRA pursuant to Section 16 of the prior vendor agreement.

All vendors except GTE/IS and Bunker Ramo have executed revised vendor agreements. In order to be able to provide data to GTE/IS and Bunker Ramo during the period of further negotiations, OPRA has offered to continue to supply information to them, provided they would agree to handle OPRA data in accordance with the terms of the prior vendor agreement during such period of negotiations, and provided that later execution of the revised agreement would be retroactive to the date of termination of the prior agreement so that OPRA would be able to treat all vendors on the same basis. GTE/IS and Bunker Ramo have agreed to this approach, except that Bunker Ramo questions the need for retroactive effectiveness of the revised agreement.

The Frischkorn letter and the Sumner letter raise certain questions regarding the legality of the actions taken by OPRA, as outlined above, particularly with reference to the ability of OPRA to charge vendors an access fee and to discontinue paying the vendors' line costs. Both letters request that the Commission find that OPRA cannot impose upon the vendors access charges or require vendors to assume their own costs of establishing communications facilities (i.e., costs of transmission lines and related equipment) between SIAC and the vendors, and that the imposition of these contractual provisions be stayed. OPRA, by this letter, responds to certain points raised in the above letters, and submits that no grounds exist which would support any stay by the Commission.

I. Neither the Act nor the OPRA Plan Prohibit OPRA From Implementing the Access Charges and Other Conditions Contained in the Revised Vendor Agreements.

A. The Act.

At the outset, it is important to distinguish between the $500 per month access charge imposed by OPRA and the separate

requirement that vendors and others each pay the costs of communications lines from OPRA's processor to their own facilities. These matters are discussed separately and in turn.

The Act both permits and contemplates that a securities information processor will charge fees to vendors in connection with the processing and distribution of data. The legislative history of the Securities Acts Amendments of 1975 makes it quite clear that the Commission is empowered to promulgate rules with respect to the reasonableness of the fees charged to a securities information processor, such as a vendor. Senate Report No. 94-75, Report of the Committee on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. (1975) (the "Senate Report"), which report accompanied S.249, the source of the present Section 11A, expressly addressed this point:

> "With respect to securities information processors generally . . . the bill would direct the Commission . . . to assure that exchange members, brokers, dealers, securities information processors, and investors may obtain on terms which are not unreasonably discriminatory information with respect to quotations for and transactions in such securities published or distributed by any self-regulatory organization or securities information processor;
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> Although the existence of a monopolistic processing facility does not necessarily raise antitrust problems, serious antitrust questions would be posed if access to this facility and its services were not available on reasonable and nondiscriminatory terms to all in the trade or if its charges were not reasonable. Therefore, in order to foster efficient market development and operation and to provide a first line of defense against anti-competitive practices, Sections 11A(b) and (c)(1) would grant the SEC broad power over any exclusive processor and impose on that agency a responsibility to assure the processor's neutrality and the reasonableness of charges in practice as well as in concept." Senate Report, pp. 10-12. (Emphasis added.)

Since the Act grants the Commission the authority to adopt regulations governing the reasonableness of the charges imposed upon securities information processors by an exclusive securities information processor for access to its services, the Act clearly cannot be read to prohibit such charges.

It is suggested in the Frischkorn letter, however, that while Congress may have intended everyone but vendors to share the costs associated with the collection, processing and distribution of transaction reports, Congress intended that vendors alone not be required to share these costs. Briefly stated, this argument is that Section 20(A)(d)(3) of H.R. 4111, which listed the categories of persons among whom these kinds of costs (as well as the costs associated with the development of a national market system) could be allocated, did not expressly include vendors. The short answer to this contention is that Section 20(A)(d)(3) of the House Bill was rejected by the Conference Committee and is not contained in the enacted version of the Securities Acts Amendments of 1975. Instead, the legislation that was adopted includes Section 11A from the Senate Bill (S. 249), described above, that contemplates reasonable charges imposed by exclusive processors. The argument that the substance of Section 20(A)(d)(3) is embodied in Sections 6(b)(4) and 15A(b)(5) of the Act is not supported by the legislative history, and, further, is irrelevant with respect to OPRA's ability to impose an access charge. Sections 6(b)(4) and 15A(b)(5) are applicable only to the rules of national securities exchanges and national securities associations, respectively. OPRA, as a registered securities information processor, is subject to Section 11A, but not to Sections 6(b)(4) or 15A(b)(5).

As pointed out above, Section 11A does permit OPRA to impose access charges upon vendors, since it contemplates that the Commission may make rules and regulations governing the reasonableness of such charges. As of this date the Commission has yet to promulgate any rules with respect to the reasonableness of such charges. Thus the access charges required under the revised vendor agreements do not contravene any regulations under the Act and are not illegal.

Even if the question of reasonableness was at issue here, there is no indication that the proposed access charges

are unreasonable. The access charges are designed solely to reimburse OPRA for the continuing costs of operation of the consolidated reporting system. The Frischkorn letter "questions" the reasonableness of the access charges on the ground that the consolidated reporting system should produce cost savings since the exchanges will no longer incur line costs from each exchange to the vendors' premises. This contention ignores, however, that OPRA has costs beyond the amounts it pays to SIAC for acting as processor, and that each exchange will continue to pay its costs for collecting transaction reports and transmitting them to the processor.

Finally, GTE/IS and Bunker Ramo also charge that the provisions of the revised vendor agreements which require the vendors to pay the line costs between the processor and the vendors' premises are contrary to the Act and illegal. These costs are not imposed by OPRA, but represent telephone company charges billed directly to vendors for communications lines and peripheral equipment. Vendors have always paid their own line costs with respect to CTA's consolidated high speed stock transmission, but in the early stages of OPRA's operations, OPRA decided, for marketing purposes, to bear a portion (the first 100 miles) of the costs of lines between New York City and the vendors' premises. OPRA certainly did not contemplate, however, that it would continue forever to pay this portion of the vendors' expenses, and accordingly provided that the vendor agreement could be terminated upon 30 days' notice. To argue that Section 11A of the Act imposes a perpetual duty upon OPRA to continue to pay each vendors' line costs is simply absurd.

B. The OPRA Plan.

The OPRA Plan is an agreement between the participant exchanges setting forth their mutual rights and duties. Vendors are not parties to the OPRA Plan, and rights and duties running between vendors and OPRA are found in the vendor agreements, and not in the OPRA Plan. In any event, the provisions of the revised vendor agreements with respect to access fees and vendor responsibility for line costs are not inconsistent with any provisions of the OPRA Plan.

It is argued that Section V(a) of the OPRA Plan limits the ability of OPRA to require the vendors to pay their own

line costs between the processor and the vendors' premises. Section V(a) reads as follows:

> "Each party shall be responsible for paying the full cost incurred by it in collecting and reporting to the Processor or vendor last sale price information in eligible securities for dissemination through the Options Price Reporting System."

Section V(a) is contained in that part of the Plan that governs how revenues and expenses are allocated among the parties (i.e., the exchanges), and has no bearing whatsoever upon charges imposed on third parties. Section V(a), in particular, states that each exchange will be responsible for collecting and reporting its own last sale information ". . . to the Processor or vendor. . ." (as opposed to the allocation of other costs among the exchanges in proportion to their volume), and this continues to be the way these costs are handled by the parties. The alternative reference to "Processor or vendor" reflects that before the establishment of a consolidated high speed system utilizing a central processor, the exchanges sent transaction information directly to vendors. The Plan did contemplate, however, that at a future date there would be a central processor at which time direct transmission to vendors would no longer be required.

Thus Section V(a) of the OPRA Plan in no way prohibits OPRA from charging the vendors an access fee. The access fee represents each vendor's proportionate share of the costs of the central processing and is not related to the exchanges' costs of collecting and reporting information to the processor.

In addition, the Frischkorn letter states that Section IV(e) of the OPRA Plan allows OPRA to terminate vendor agreements "only" upon certain conditions. Section IV(e) of the OPRA Plan, however, relates only to termination of approval of vendors. Termination of approval of a vendor would mean that the vendor may no longer contract with OPRA for the receipt of options information, and must be distinguished from the requirement that all approved vendors (and subscribers) enter into and comply with uniform, non-discriminatory contracts governing their receipt of options information.

Finally, even if there might be any ambiguity with respect to any of the provisions of the OPRA Plan, this can be remedied merely by an amendment to the Plan agreed to by the exchanges. While any such amendment would be filed with the Commission, the Act and the Regulations thereunder do not limit the terms of the Plan with respect to any of the matters involved here.

II. OPRA Has Not Prohibited or Limited Any Person in Respect of Access to Services Offered.

Section 11A(b)(5)(A) of the Act requires notice and provides for Commission review whenever a registered securities information processor ". . . prohibits or limits any person in respect of access to services offered . . . by such securities information processor . . . ." Section 11A(b)(5)(A) has no application here since the actions of OPRA and the terms of the revised vendor agreements do not prohibit or limit the access of any person with respect to the services offered by OPRA.

Section 11A(b)(5)(A) does not describe the services or the terms of service which must be offered, but only requires that no person be prohibited or limited with respect to services actually offered. OPRA is offering the same services to all vendors upon identical terms and thus is not prohibiting or limiting any person's access to its services.

Several statements contained in the Senate Report confirm that the scope of Section 11A(b)(5) is limited to discriminatory or exclusionary practices by a securities information processor. Concerning the authority of the Commission to regulate the activities of registered securities information processors, the Senate Report states:

> "In addition, the Commission would be authorized to review and set aside any exclusionary action by a registered securities information processor. (Section 11A(b)(5))." Senate Report, p. 10. (Emphasis added.)

And in the section-by-section analysis of Section 11A(b)(5), the Senate Report states that the Commission shall dismiss its review proceeding when the prohibition or limi-

tation is consistent with the Act, and when the ". . . aggrieved party has not been discriminated against unfairly." Senate Report, p. 103.

Clearly only exclusionary or discriminatory practices with respect to the type or amount of services offered are encompassed in the meaning of a prohibition or limitation of access to services offered within Section 11A(b)(5). By way of illustration, both CTA and OPRA have, on an occasional but routine basis, refused to allow further transmission of trading data to subscribers who had failed to pay their subscription charges. It has never been suggested that such actions should require notice and review under Section 11A(b)(5), since, in such a case, the subscriber is not the victim of exclusionary or discriminatory practices, but is simply required to comply with the same terms applicable to all other subscribers.

Likewise here the revised vendor agreements do not prohibit or limit any person's access to data, but in fact provide full access to all data to all vendors upon uniform and nondiscriminatory terms. OPRA has not acted in an exclusionary manner since it has offered and continues to offer the same terms to all vendors. Consistent with this, OPRA believes that it is not required to furnish information to those vendors that have not executed revised vendor agreements, although it has agreed to continue to provide information to these vendors on an interim basis pending further contract negotiations.

III. Conclusion.

The Congressional findings associated with the enactment of the Securities Acts Amendments of 1975 indicate that Congress desired to assure fair competition among brokers and dealers and among exchange markets; the availability to brokers, dealers, and investors of information with respect to transactions in securities; and the practicability of brokers executing orders in the best market. (Section 11A(a)(1)(C)). Establishment of the consolidated high speed reporting system by OPRA enhances attainment of these goals, and the access charge provisions and the other terms of the revised vendor agreements in no way frustrate their attainment.

Nor do the terms of the revised agreements have any anticompetitive effect. The charges are reasonable and non-discriminatory. All vendors are treated identically, and, therefore, none can complain of being placed at a competitive disadvantage.

In light of the above, and in light of the clear absence of any illegality with respect to the terms of the revised vendor agreements, it is OPRA's position that there is no basis for the Commission to act with respect to access fees and line costs. OPRA intends to continue to provide options transactions data to GTE/IS and Bunker Ramo on an interim basis during the period of negotiations, and OPRA is hopeful that these negotiations will lead to a resolution of all differences between the parties at an early date.

Very truly yours,

Michael L. Meyer

MLM:wpc

cc: Mr. Sheldon Rappaport
Mr. Allen R. Frischkorn, Jr.
Mr. Murray Sumner

Attachment A

SPECIFICATIONS FOR INTERFACE

BETWEEN

OPRA PROCESSOR AND VENDORS

OPTIONS PRICE REPORTING AUTHORITY

FEBRUARY 9, 1977
REVISED MARCH 15, 1977
REVISED JUNE 9, 1977

12 RETRANSMISSION CAPABILITY

The OPRA processor will log messages transmitted to the Vendors within a single trading day. The log will provide a limited facility for message retransmission.

A Vendor may request retransmission of a single message, a group of sequentially numbered messages, or all messages transmitted during the previous half-hour by placing a telephone call to the OPRA processor and providing the first message number and the last message number in the sequence to be retransmitted.

The Retransmission Request field in the message header associated with each message to be retransmitted will contain a single alpha character identifying the Vendor requesting the message retransmission. Retransmitted messages will be received by all Vendors. It will be the responsibility of each Vendor to ignore retransmitted messages not requested by him.

The Message Sequence Number field in the message header associated with each message retransmitted will contain the sequence number of the message originally transmitted.

When a Vendor requests retransmission of more than one-hundred messages, the first one-hundred messages will be assembled and transmitted. Requests from other Vendors will then be similarly processed in turn before the balance, or next one-hundred, of the original Vendor's series is transmitted.

Messages retrieved for retransmission will be transmitted on a low priority basis.