

participants (except for information that may be shared in connection with joint activities permitted as necessary to fulfill the functions and objectives of OPRA as stated in the Plan).

As noted in the discussion above, the proposed amendment would require each party's individual capacity projections and requests to be submitted to the ISCA in confidence, and the ISCA would be expressly prohibited from sharing this information with any of the other parties, except in the form of aggregate information that does not identify the individual capacity requests of any of the other parties. The ISCA would be required under Section II(m) of the Plan to maintain the confidentiality of this information, consistent with the provisions of Section III(g) of the Plan, which would specify that confidential capacity-related information obtained by the ISCA would not be used by the ISCA in any of its other business activities in a manner that may result in the information being made available to any of the parties to the Plan, or to use it in any manner that is otherwise inconsistent with the ISCA's obligation to hold the information in confidence.<sup>17</sup> Furthermore, Guideline No. 1 of the proposed Capacity Guidelines would require the ISCA to maintain internal safeguards and procedures adequate to assure that the requirements of the Plan pertaining to the confidentiality of information provided to the ISCA would be satisfied.<sup>18</sup> A written description of these internal safeguards and procedures would have to be furnished to the Commission before the ISCA begins to act in that capacity.<sup>19</sup>

In addition, OPRA proposes to amend Section III(b) of the Plan to make explicit the requirement that each person who performs administrative functions for OPRA, including its Executive Director and other officials and its processor, shall agree that any nonpublic business information pertaining to any party shall be held in confidence and not be shared with the other parties, except for information that may be shared in connection with permitted joint activities. Finally, OPRA proposes to make explicit in the preamble to the Plan that the parties themselves are each obligated to take reasonable steps to insure that their nonpublic business information remains segregated and confidential from the other parties, except for information that may be shared in connection with permitted joint activities.

*The respondent exchanges must set forth a statement of OPRA's functions and objectives as permitted under the Exchange Act, and provide for rules and procedures that limit any joint action with respect to OPRA by the participants in OPRA to circumstances in which such joint action is necessary in order to fulfill the stated functions and objectives.*

The functions and objectives of OPRA are specifically set forth in the OPRA Plan as it is proposed to be amended, most particularly in the preamble to the Plan and in Section III(b) thereof. These functions and objectives include: (1) Determining the manner in which last sale reports, quotation information, and other market information will be collected, consolidated, and disseminated in satisfaction of the requirements of the Act and establishing the formats for such consolidated information; (2) contracting for and maintaining facilities to support these activities, prescribing forms of contracts to be entered into by vendors, subscribers, and other persons, and making policy determinations pertaining to such contracts; (3) establishing standards concerning the qualifications of different categories of recipients of consolidated information; (4) determining fees to be paid for access to consolidated information as permitted under the Act; (5) determining policy questions pertaining to OPRA's budgetary and other financial matters; (6) managing the capacity of the OPRA System in accordance with determinations made by the ISCA as described above; and (7) otherwise making all policy decisions necessary in furtherance of the objectives of the Act. The proposed amendment makes explicit in the preamble to the Plan that joint action by the parties to the Plan is limited to those matters as to which they share authority under the Plan, and then only to circumstances where such joint action is necessary in order to fulfill the functions and objectives of OPRA as stated in the Plan.

In addition to the above described amendments pertaining directly to OPRA's capacity planning and allocation functions and conforming definitional and editorial modifications, OPRA also proposes to amend subsections I(a) and I(b) of the OPRA Plan to make it clear that a party to the OPRA Plan ceases to be a party at such time as it ceases to maintain a market for the trading of standardized options. This aspect of the amendment is directed at the anomalous situation that recently confronted OPRA when the New York Stock Exchange, Inc.

("NYSE"), after it disposed of its entire options trading program and thereby ceased to have any interest in the activities of OPRA, nevertheless remained a party to the OPRA Plan with the same voting rights and other rights of participation in OPRA as every other party to the Plan.

Although the situation pertaining to the status of the NYSE as a party to the OPRA Plan was recently resolved when the NYSE voluntarily withdrew from OPRA, the current parties to the Plan believe it is necessary to amend the Plan to clarify the status under the Plan of exchanges that continue to have rules governing the trading of options even though they no longer are involved in options trading. The parties believe it is especially important to clarify the matter of eligibility to be a party to the Plan in light of the other amendments to the OPRA Plan that are proposed herein dealing with capacity planning and capacity allocation. The parties believe that only those exchanges that actually maintain a market for the trading of standardized options should have a voice in these critical capacity-related issues.

The parties to the OPRA Plan believe it is consistent with Section 11A of the Act<sup>20</sup> and Rule 11Aa3-2 thereunder<sup>21</sup> to limit participation in OPRA to those SROs that provide a market in the types of securities that are covered by the OPRA Plan. OPRA believes that subparagraph (a)(3)(B) of Section 11A<sup>22</sup> authorizes the Commission, "in furtherance of the directive in paragraph (2) of this subsection [which includes the directive to assure the availability to brokers, dealers and investors of information with respect to quotations for and transactions in securities] \* \* \* to authorize or require [SROs] to act jointly with respect to *matters as to which they share authority under this title* in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one of more facilities thereof." [Emphasis supplied.] Similarly, OPRA believes that paragraph (b)(3) of Rule 11Aa3-2 under the Act<sup>23</sup> authorizes SROs "to act jointly in (i) planning, developing, and operating any national market subsystem or facility contemplated by a national market system plan \* \* \* or (iii) implementing or administering an effective national market system plan." OPRA believes that if an SRO does not share authority for national market system activities in respect of a particular type of security

<sup>17</sup> See Amendment No. 2, *supra* note 5.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> 15 U.S.C. 78k-1.

<sup>21</sup> 17 CFR 240.11Aa3-2.

<sup>22</sup> 15 U.S.C. 78k-1(a)(3)(B).

<sup>23</sup> 17 CFR 240.11Aa3-2(b)(3).