UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of CBOE BZX EXCHANGE, INC., CBOE EXCHANGE, INC., CBOE C2 EXCHANGE, INC., and CBOE EDGX EXCHANGE, INC.	Admin. Proc. File No. 3-21779

CBOE BZX EXCHANGE, INC., CBOE EXCHANGE, INC., CBOE C2 EXCHANGE, INC., AND CBOE EDGX EXCHANGE, INC.'S BRIEF SUPPORTING EXERCISE OF COMMISSION REVIEW UNDER RULE 608(d)

Colleen M. Campbell
Wilmer Cutler Pickering
Hale and Dorr LLP
1225 Seventeenth St.
Suite 2600
Denver, CO 80202
(t) (720) 274-3135
(f) (720) 274-3133
colleen.campbell@wilmerhale.com

Kelly P. Dunbar
Andre Owens
Wilmer Cutler Pickering
Hale and Dorr LLP
2100 Pennsylvania Ave., NW
Washington, DC 20037
(t) (202) 663-6000
(f) (202) 663-6363
kelly.dunbar@wilmerhale.com
andre.owens@wilmerhale.com

Cherie Weldon
Wilmer Cutler Pickering
Hale and Dorr LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007
(t) (212) 230-8800
(f) (212) 230-8888
cherie.weldon@wilmerhale.com

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Counsel for Applicants

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INTRODUCTION

This appeal presents important questions about how the Commission can best ensure that investors have access to real-time information about the operation of national securities markets to help guide investment decisions in a cost-effective manner. Cboe, like many of its peers, offers proprietary options data products designed to provide market participants high-quality and cost-effective data offerings. These offerings are undeniably pro-competitive and pro-investor. The Options Price Reporting Authority ("OPRA"), however, has recently interpreted the OPRA national market system plan, or "OPRA Plan," in a way that disregards the Plan's text and that would needlessly bar options exchanges, including Cboe, from offering these beneficial proprietary data products unless market participants also purchase OPRA's real-time, full streaming consolidated options data feed, a product certain market participants may not want or need, and that may be cost prohibitive. This interpretive dispute between Cboe and OPRA—a dispute involving a national market system plan ("NMS plan") that directly implicates the public

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interest as well as the Commission's statutory mandate to protect investors and ensure fair and orderly markets—is just the type of case for which the Commission designed Rule 608(d).[1]

Under the operative OPRA Plan, a national securities exchange member may "disseminate" proprietary market data to market participants who, among other things, have "equivalent access" to consolidated market data "disseminated by OPRA."[2] The Plan, moreover, defines precisely what it means by "equivalent access": access is "deemed 'equivalent'" if, from the perspective of the market participant, both proprietary data and consolidated data "are equally accessible on the same terminal or workstation."[3] Consistent with the plain text of the OPRA Plan, then, an exchange may offer proprietary data so long as the receiving market participant has access to OPRA consolidated data on the same terminal or work station, whether through usage-based subscription or a full-stream subscription.

OPRA has interpreted the OPRA Plan differently. As OPRA sees it, only one way of accessing consolidated options data satisfies the provision. For nearly 30 years, OPRA has offered access to consolidated data in two ways: first, through a usage-based, per-query subscription that enables access to select, real-time data ("usage-based subscription") or, second, through a subscription to a real-time, full stream of options data ("full-streaming subscription").[4] OPRA has claimed that, in order to obtain any exchange proprietary product, a market participant must also purchase the full-streaming subscription. Access through a usage-based subscription, according to OPRA, is insufficient. OPRA's interpretation thus requires market

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1 *See* 17 C.F.R. §242.608(d).

2 Cboe Supp. Rec. No. 10 ("OPRA Plan" §5.2(c)(iii)).

3 *Id.*

4 *See* OPRA Fee Schedule, 1, https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5bf2f4661faec762fa07826a_OPRA_Fee_Schedule.pdf.

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participants to purchase the full-streaming subscription—even where subscribers may not need it or want it—to receive potentially redundant market data and at a potentially higher cost.

OPRA's counterintuitive interpretation not only clashes with the plain meaning of the Plan, but it is also decidedly contrary to the public interest, as explained further below. Cboe thus respectfully requests that the Commission exercise its authority under Rule 608(d) to review and set aside OPRA's flawed Plan interpretation. Rule 608(d) review is appropriate for many reasons. To begin with, the question presented by Cboe's petition directly implicates the Commission's experience with and statutory charge to superintend the national market system, including by ensuring access to market data.[5] And while the interpretive dispute is cabined, the real-world consequences of Cboe's dispute with OPRA for investors and the public interest are quite significant. Cboe's interpretation of the Plan directly advances statutory interests Congress has entrusted the Commission to safeguard—including protecting investors, promoting competition, and avoiding unjustified discrimination between market participants. OPRA's interpretation, by contrast, would restrict investor choice and impair needed competition in providing market data, including in a cost-effective manner.

The Commission should therefore set aside OPRA's interpretation under Rule 608(d).

BACKGROUND

Cboe Global Markets, Inc. operates four U.S. options exchanges—Cboe Options, C2 Options, BZX Options, and EDGX Options (collectively, "Cboe")—each of which is a member of OPRA. OPRA is a securities information processor that consolidates and disseminates options trading data.[6] OPRA's membership consists of the exchanges approved by the

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5 *E.g.*, 15 U.S.C. §78k-1(a)(2).

6 *See id.* §78c(a)(22)(A); §78k-1(b).

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Commission to offer options trading. The Commission authorizes OPRA's member exchanges to act jointly as parties to an NMS plan—here, the Liability Company Agreement of Options Price Reporting Authority, LLC or OPRA Plan.[7] Overseen by the Commission, the OPRA Plan governs how options market data from member exchanges is collected, consolidated, and disseminated.[8] As relevant here, OPRA offers access to consolidated market data through a cost-effective, usage-based subscription or through a full-streaming subscription; the latter is generally costlier than the former, depending on the number of queries.

The OPRA Plan is no ordinary commercial contract. Instead, it is part and parcel of the national market system, through which the Commission seeks to ensure "[t]he widespread availability of timely [national market system] information" that is "critical to the ability of market participants to participate effectively in the U.S. securities markets."[9]

I. EFFORTS BY THE COMMISSION TO EXPAND ACCESS TO MARKET DATA

In 1975, "Congress expanded the authority of the SEC through a major overhaul of the Exchange Act" by, among other things, "direct[ing] the SEC to facilitate the establishment of a 'national market system for securities' … to link securities markets nation-wide in order to distribute market data economically and equally and to promote fair competition among all market participants."[10] Consistent with that statutory charge, the Commission has generally worked to expand access to market data, including through approving NMS plans (such as the

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7 *See id.* §78k-1(a)(3)(B).

8 *E.g.*, 17 C.F.R. §242.608.

9 86 Fed. Reg. 18596, 18598 (Apr. 9, 2021).

10 *NetCoalition v. SEC*, 615 F.3d 525, 528 (D.C. Cir. 2010), *superseded by statute as recognized in* 715 F.3d 342 (D.C. Cir. 2013).

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OPRA Plan) governing the dissemination of consolidated market data as well as lifting restrictions on providing proprietary market data.

With respect to options data specifically, a provision in the OPRA Plan generally made OPRA the exclusive provider of options data prior to 2001. In 2000, however, the Commission granted two exchanges, ISE and Cboe, "conditional, temporary exemptions" from that provision.[11] Those exemptions allowed ISE and Cboe to provide unconsolidated, market-specific data to their respective exchange members when any member receiving proprietary data had equivalent access to consolidated options data from OPRA for the same classes and series of options. Further, ISE and Cboe could not provide market-specific data on a more timely basis than the information was provided to OPRA.[12]

In 2001, the Commission approved an amendment to the OPRA Plan allowing all other exchanges to disseminate market-specific options data to members of those exchanges.[13] The Commission concluded that so long as proprietary data and consolidated data are accessible to members "on the same terminal or on a separate terminal or device at the same workstation," there is "no clear policy reason to justify limiting the market information made available to members of a particular market."[14] Further, given the prior exemptions, the Commission explained the amendment would "place all of the parties to the OPRA plan on equal footing … thereby fostering fair and equal competition among all of the parties."[15]

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11 Cboe Supp. Rec. No. 1 (66 Fed. Reg. 39218, 39218 (July 27, 2001)).

12 *Id.*

13 *Id.*

14 *Id.* 39219.

15 *Id.*

Two years later, in 2003, the Commission "expand[ed] the types of persons to whom a party may disseminate proprietary information" beyond exchange members—so long as those persons also had "equivalent access" to the consolidated data provided by OPRA.[16]

Section 5.2 of the current OPRA Plan governs the dissemination of options data and includes the so-called "Equivalent Access Provision." Under that provision, an exchange "may disseminate its Proprietary Information" to market participants "who … have equivalent access to consolidated Options Information disseminated by OPRA for the same classes or series of options that are included in the Proprietary Information."[17] Leaving nothing to doubt, the provision defines its key phrases. "'[C]onsolidated Options Information' means consolidated Last Sale Reports[18] combined with either consolidated Quotation Information[19] or the BBO [Best Bid and Offer][20] furnished by OPRA."[21] And "access to consolidated Options Information and access to Proprietary Information are deemed 'equivalent' if both kinds of information are equally accessible on the same terminal or work station."[22]

II. CBOE LAUNCHES CBOE ONE IN RESPONSE TO MARKET DEMAND FOR COST-EFFECTIVE OPTIONS MARKET DATA

In 2023, Cboe announced its plan to launch a "Cboe One Options Feed," a product designed to provide investors with real-time market data consolidated from Cboe's four

16 Cboe Supp. Rec. No. 2 (68 Fed. Reg. 66892, 66896 (Nov. 28, 2003)).

17 OPRA Plan §5.2(c)(iii)(A).

18 *Id.* §1.1 (defining "Last Sale Reports").

19 *Id.* (defining "Quotation Information").

20 *Id.* (defining "BBO").

21 *Id.* §5.2(c)(iii)(A).

22 *Id.*

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exchanges.[23] Cboe One marries two ideas: that "[r]eal-time pricing is an essential component of the investing and trading process" and that "customers are seeking more choice in how they receive options market data."[24] Demand from market actors—including retail-brokerage firms seeking a "high-quality, cost-effective and reliable alternative to existing offerings"—drove Cboe to offer the product.[25] Cboe has explained to the Commission how the product would advance the objectives of the national market system by "broaden[ing] the availability of U.S. option market data;" "enabl[ing] investors to better monitor trading activity;" and "foster[ing] competition by providing an alternative market data product."[26]

Apparently concerned about the possibility of more market data competition, some OPRA members claimed that Cboe's product would violate the Equivalent Access Provision unless market participants receiving Cboe One (or other proprietary products) *also* received OPRA's full-streaming subscription.[27] It was not sufficient, they argued, for a Cboe One subscriber to have access to OPRA consolidated data through a usage-based subscription.

OPRA retained outside counsel, who adopted that interpretation.[28] And in September 2023, the OPRA Management Committee formally adopted that view.[29]

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23 Cboe, *Cboe Global Markets to Launch Cboe One Option Feed, A New, Real-Time U.S. Options Market Data Solution* (Feb. 15, 2023), https://ir.cboe.com/news/news-details/2023/Cboe-Global-Markets-to-Launch-Cboe-One-Options-Feed-A-New-Real-Time-U.S.-Options-Market-Data-Solution-02-15-2023/default.aspx.

24 *Id.*

25 *Id.*

26 Cboe Supp. Rec. No. 3 ("Jan. 30, 2023 Form 19b-4," at *11, *18).

27 Cboe Supp. Rec. No. 4 ("Feb. 23, 2023 Nasdaq Letter).

28 OPRA Cert. Rec. No. 1 ("Dombach Memo.").

29 OPRA Cert. Rec. No. 2 ("Sept. 6, 2023 OPRA Meeting Minutes," at *2).

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III. CBOE'S APPEAL OF OPRA'S PLAN INTERPRETATION

Because OPRA's interpretation defies the plain meaning of the Plan and given the public interests at stake, Cboe timely appealed OPRA's decision under Rule 608(d).

Cboe also filed a proposed amendment to the Plan with the Commission.[30] The purpose of the amendment, Cboe explained, is to clarify that "the Equivalent Access Provision is satisfied where a recipient of an exchange proprietary data product also is simultaneously authorized and entitled to receive OPRA data in one of the ways that OPRA makes its data available," including by "having the ability to query OPRA data on a usage-basis[.]"[31] Despite significant support for the Plan amendment from broker-dealers,[32] OPRA has opposed the amendment on the ground that the Rule 608(b) amendment process is not available.[33] That process remains ongoing.

With respect to the Rule 608(d) appeal, in January 2024, the Commission issued a briefing order directing the parties to address, among other things, whether the Commission should exercise discretion to entertain Cboe's Rule 608(d) petition; "what procedural rules are appropriate to govern any proceedings" if the Commission grants review; and alternative remedies if the Commission declines review.[34] This is Cboe's responsive brief.

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30 *See* 89 Fed. Reg. 3963 (Jan. 22, 2024).

31 *Id.* 3964.

32 Letter from Tobin McDaniel, SoFi Securities, to Sherry R. Haywood, Assistant Secretary, SEC (Feb. 1, 2024); Letter from Yochai Korn, Interactive Brokers Group, to Vanessa Countryman, Secretary, SEC (Feb. 7, 2024); Letter from Praneil Ladwa, Questrade Financial Group, to Vanessa Countryman, Secretary, SEC (Feb. 7, 2024); Letter from Matt Billings, Robinhood Financial, to Vanessa Countryman, Secretary, SEC (Feb. 12, 2024); Letter from Scott Sheridan, tastytrade, to Vanessa Countryman, Secretary, SEC (Feb. 12, 2024) (all located at https://www.sec.gov/comments/4-820/4-820.htm).

33 Letter from James P. Dombach, Davis Wright Tremaine, LLP, to Vanessa Countryman, Secretary, SEC (Feb. 12. 2024) ("Dombach Letter"), https://www.sec.gov/comments/4-820/4-820.htm.

34 January 19, 2024 Order ("Order") 4.

ARGUMENT

Congress has charged the Commission with the duty to oversee a national market system for securities that advances "the public interest, the protection of investors, and the maintenance of fair and orderly markets."[35] Rule 608(d) facilitates the Commission's ability to fulfill that statutory charge by empowering it to review acts—or failures to act—in violation of NMS plans. In that way, Rule 608(d) is a critical adjunct and gives teeth to the regulatory requirement that organizations such as OPRA "shall comply with the terms of any effective [NMS] plan."[36]

In determining whether to exercise Rule 608(d) review, the Commission has said that it considers whether the petition "implicate[s] … the broad objectives of the national market system—the public interest, the protection of investors, or the maintenance of fair and orderly markets"—and thus falls within the Commission's ken.[37] If the Commission grants review, the Commission has said that similar considerations inform its disposition: the Commission considers whether the challenged act "is in accordance with the applicable provisions of [the] plan" and whether those provisions "were[] applied in a manner consistent with the public interest, the protection of investors, [and] the maintenance of fair and orderly markets."[38]

Consistent with that precedent, the Commission should review Cboe's petition and set OPRA's interpretation aside for two reasons. First, as explained in Part I below, while Cboe's petition presents a straightforward legal question—does access to OPRA consolidated data through a usage-based subscription satisfy the Equivalent Access Provision?—the answer to that

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35 15 U.S.C. §78k-1(a)(2).

36 17 C.F.R. §242.608(c).

37 *American Stock Exchange*, *Inc.*, Exchange Act Release No. 42312, 2000 WL 3804, at *4 (Jan. 4, 2000).

38 *See* 17 C.F.R. §242.608(d).

question dictates how broadly and cost-effectively market participants may access market data. In that way, resolution of this appeal implicates Congress's statutory objectives and the Commission's specialized expertise as the primary regulator of the securities markets with oversight of market data. Second, as explained in Part II below, OPRA's interpretation defies the plain meaning of the Equivalent Access Provision and the Commission's review is needed to correct that flawed interpretation and to safeguard the public interest.

Finally, in Part III, Cboe addresses other questions posed by the Commission.

I. DISCRETIONARY FACTORS COMPEL COMMISSION REVIEW

Cboe's petition raises a text-book example of a legal question that the Commission can, and should, resolve under Rule 608(d). That is so for many reasons.[39]

Critically, the subject matter of Cboe's petition directly implicates the Commission's statutory responsibilities and expertise. The petition asks the Commission to interpret a provision of a Commission-approved NMS plan that has a direct nexus to a core statutory objective—the efficient dissemination of market data. Congress has found, for example, that "[i]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure … the availability to brokers, dealers, and investors of

[39] Cboe acknowledges the Commission has held that review under Rule 608(d) is "discretionary," *Am. Stock Exchange*, 2000 WL 3804, at *3, notwithstanding regulatory language directing that "[a]ny action taken or failure to act … in connection with an effective national market system plan … shall be subject to review by the Commission," 17 C.F.R. §242.608(d)(1). The Commission's position conflicts with the ordinary mean of "shall," *see Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) ("'shall' usually connotes a requirement") and is in significant tension with role that Congress assigned to the Commission in overseeing the national market system. Leaving national market decisions by private organizations such as OPRA unreviewed appears out of keeping with that congressional design. Although the case for discretionary review here is compelling, Cboe preserves for further review the position that the Commission's appellate responsibility under Rule 608(d) is mandatory, not permissive.

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information with respect to quotations for and transactions in securities."[40] The Equivalent Access Provision is closely linked to that purpose, as it both authorizes and limits the provision of market data. The subject matter of the plan provision at issue, in other words, is not one of cost-sharing[41] or expense and revenue accounting[42]—which might primarily relate to the financial interests of plan members—but a topic (market data regulation) that falls within the heartland of the Commission's statutory responsibilities under the Exchange Act.

It is also a topic on which the Commission has special expertise.[43] The Commission has developed market data policy over decades, including through multiple rulemakings and otherwise.[44] Indeed, as the Commission has said, "market information … has been subject to comprehensive regulation under the Exchange Act, particularly the national market system requirements of [the Exchange Act.]"[45] The Commission is thus well positioned to analyze the

40 15 U.S.C. §78k-1(a)(1)(C)(ii); *id.* §78k-1(a)(1)(D).

41 *Compare Am. Stock Exchange*, 2000 WL 3804, at *4-5 (declining review over dispute regarding revenue-sharing calculation where "primary issue raised by [the appeal] [was] whether" "license agreement" between a member and third-party granted the member "exclusive right to trade" a derivative product).

42 *Compare Boston Stock Exchange*, *Inc.*, Exchange Act Release No. 58191, 2008 WL 2783572, at *6 (July 18, 2008) (declining review over dispute implicating internal business decision regarding calculation of settlement funds and legal expenses, explaining there was no "nexus between the statutory policy and the issues raised by [the] appeal").

43 *Cf. id.* (dispute did not implicate "Commission's expertise in securities law").

44 *See, e.g.*, 86 Fed. Reg. 18596; SEC, Division of Trading and Markets, *Staff Guidance on SRO Rule Filings Relating to Fees* (May 21, 2019), https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees (guidance on rules relating to proprietary data products).

45 64 Fed. Reg. 70613, 70615 (Dec. 17, 1999).

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statutory and regulatory context governing market data, context that should inform a proper interpretation of the Equivalent Access Provision.

Furthermore, the policy implications of the parties' dueling interpretations of the Equivalent Access Provision strengthen the case for the Commission's review, as explained below.[46] On the one hand, Cboe advances an interpretation that would allow market participants to subscribe to OPRA's more cost-effective, lower bandwidth, usage-based subscription. That would expand access to proprietary data by allowing exchanges to disseminate such data more readily and to a broader set of market actors. By contrast, OPRA's interpretation needlessly requires market participants to access OPRA's full-streaming subscription (which is generally less cost-effective and more bandwidth intensive) as a condition of receiving proprietary data. That interpretation restricts or may even preclude access to proprietary data for many market participants who cannot afford the full-streaming subscription or lack the operational ability to receive it. Resolution of the parties' dispute thus fits hand and glove with the Commission's role in overseeing the national market system with "due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets."[47]

Relatedly, the Commission's review is justified because, left standing, OPRA's interpretation will restrict investor choice, unduly burden competition, and lead to unfair discrimination, as explained further below.[48] Each of those outcomes would countermand

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46 *See infra*, Part II.C.

47 15 U.S.C. §78k-1(a)(2).

48 *See infra*, pp.21-25.

Congress's express objectives in creating a national market system.[49] And each of those outcomes illustrates why the Commission has the expertise, and duty, to decide the petition.

Given all of that, Cboe's petition is worlds removed from cases in which the Commission has declined to exercise jurisdiction over "ordinary commercial dispute[s]."[50] Those cases implicated the narrow interests of members—matters that the Commission said "should be left to the courts, which have experience in adjudicating such issues"[51]—rather than questions tightly tied to the Commission's statutory mission to oversee market data dissemination. There is no meaningful sense in which this case presents the type of ordinary commercial dispute that should be left to an Article III court rather than this Commission to address in the first instance.

In inviting briefing, the Commission asked about "alternative remedies," including the plan amendment process under Rule 608(b), if the Commission denied review.[52] Respectfully, the possibility of plan amendment should not weigh against the Commission's review. This appeal asks the Commission to interpret an *existing* provision of an NMS plan; Cboe's plan amendment seeks a *modification* of plan language. Rule 608 expressly contemplates that both paths would be available in circumstances such as this—each with distinct relief, and there is no sound reason for the Commission to treat them as mutually exclusive. In fact, nothing in either Rule 608(b) or Rule 608(d) supports the conclusion that the paths are exclusive.

Nor would it make sense to treat them that way. Foreclosing Commission review because a plan could be amended would effectively write the Rule 608(d) process out of the

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49 *E.g.*, 15 U.S.C. §78k-1(a)(1)(D).

50 *Am. Stock Exchange*, 2000 WL 3804, at *4-5.

51 *Boston Stock Exchange*, 2008 WL 2783572, at *6.

52 Order 3.

regulations. At least where the challenged act is a plan interpretation, it would always be the case that a plan could be amended. But just as the possibility that a legislative body could amend a law does not preclude a court from interpreting existing law, the possibility of a plan amendment under Rule 608(b) should not be a substitute for Rule 608(d) review. It would be particularly inequitable to deny review here based on the possibility of plan amendment given OPRA's already-expressed position that the amendment process is not available to Cboe.[53] While Cboe emphatically disagrees, OPRA's argument confirms the wisdom of the Commission's choice to establish tools both to amend plans as well as to interpret existing plans, consistent with national market system objectives.[54]

Finally, in its briefing order, the Commission cited to *NASD*,[55] where the Commission declined to exercise jurisdiction in part on the ground that the issues raised required more "wide-based participation" than those afforded in a Rule 608(d) appeal.[56] That result does not fit here. In *NASD*, the Commission concluded the challengers effectively asked the Commission to "'adopt' or 'promulgate'" an amendment to a plan.[57] As the Commission emphasized, the challengers did not ask the Commission to "review a particularized action or failure to act in

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53 Dombach Letter.

54 Proceeding first to an Article III court is not a sensible path here. Not only would that risk inconsistent judicial interpretations of the OPRA Plan, but any such suit would face a risk of being dismissed on exhaustion or primary jurisdiction grounds given the Commission's significant role in overseeing the national market system. *Cf. Lanier v. Bats Exch., Inc.*, 838 F.3d 139, 157 (2d Cir. 2016).

55 Order 2 n.3 (citing *Nat'l Ass'n of Secs. Dealers*, Exchange Act Release No. 48573, 2003 WL 22250397, at *3 (Sept. 30, 2003) ("*NASD*")).

56 *NASD*, 2003 WL 22250397, at *3.

57 *Id.*

connection with a … plan that is alleged to result in a harm to the applicant."[58] Those circumstances bear no resemblance to here, where an injured party (Cboe) asks the Commission to review a particularized decision by OPRA (one on which other OPRA members have weighed in) based on a claim that the decision fails to "conform[] to the provisions of the plan."[59]

In short, the case for the Commission's review of this matter is compelling. This is a situation "[w]here the statutory objectives of the national market system are implicated" and "the Commission's oversight of the administration" of the OPRA Plan "gives [the Commission] a compelling interest in ensuring that" OPRA "carries out its duties equitably and commensurately with those statutory objectives."[60] If this is not a case in which the Commission exercises discretion to resolve Cboe's Rule 608(d) petition, that provision would appear to be all but a dead letter—an outcome that would raise serious concerns as to whether the Commission has abdicated its responsibilities to superintend the national market system.

II. OPRA'S PLAN INTERPRETATION IS WRONG AND CONTRARY TO THE PUBLIC INTEREST

In addition, Rule 608(d) review is necessary because OPRA's interpretation of the Equivalent Access Provision is incorrect and decidedly contrary to the public interest.

A. The OPRA Plan Permits Dissemination Of Proprietary Data Where Market Participants Have Access To Consolidated Data, Whether Through Full-Streaming Or Usage-Based Subscriptions

The Equivalent Access Provision is unambiguous: an exchange member "may disseminate" proprietary market data to any market participant "who also [has] equivalent access to consolidated Options Information disseminated by OPRA for the same classes or series of

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58 *Id.*

59 *Id.*

60 *Boston Stock Exchange*, 2008 WL 2783572, at *6.

options that are included in the Proprietary Information."[61] The provision defines *what* types of data must be accessible to a market participant through OPRA and through the proprietary feed: for "the same classes or series of options that are included in the Proprietary Information," the market participants must have access to "consolidated Last Sale Reports combined with either consolidated Quotation Information or the BBO furnished by OPRA."[62] The provision further defines *how* a market participant will be deemed to have "equivalent access" to proprietary data and consolidated data—when "both kinds of information" (proprietary and consolidated) "are equally accessible on the same terminal or work station."[63]

The plain meaning of "access," when it as used as a noun, is that a person has "permission, liberty, or ability to … communicate with a person or thing" or the "freedom or ability to … make use of something."[64] Similarly, data is "accessible" when it is "capable of being used or seen."[65] By its terms, the Equivalent Access Provision is satisfied when a market participant subscribing to proprietary data is equally able to retrieve, on the same terminal or work station that it receives such data, consolidated options data from OPRA covering the same class of options included in the proprietary product.

That condition is satisfied when a market participant has "access" to consolidated OPRA data through a usage-based subscription, no less so than when a market participant has "access"

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61 OPRA Plan §5.2(c)(iii).

62 *Id.*

63 *Id.*

64 *Access*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/access; *see also Access*, Webster's Third New Int'l Dictionary, 11 (2002) ("freedom or ability to obtain or make use of").

65 *Accessible*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/accessible.

to consolidated data through a full-streaming subscription. First, in terms of content, OPRA's usage-based subscription provides access to "all last sale and quotation information pertaining to equity options and index options," provided as a "quote packet" or "options chain."[66] A usage-based subscriber can thus access the "last sale" and the "bid/ask" (BBO), in response to a user query.[67] That is the same type of information a subscriber to a proprietary data product, such as Cboe One, receives for the same class or series of options.

Second, either a usage-based or full-streaming subscription to OPRA data provides "equivalent access" to proprietary data. Again, the Plan makes clear that "equivalent access" is satisfied when "both kinds of information" (consolidated and proprietary data) "are equally accessible on the same terminal or work station." That is the case here: subscribers to OPRA's usage-based option have the "ability to obtain or make use" of OPRA's consolidated data by submitting a query and then receiving real-time access to the same data content. In other words, the same data is always available via both services. Thus, so long as a market participant receiving a proprietary feed has access to OPRA consolidated data (whether through a usage-based or full-streaming subscription) on the same work station or terminal that receives the proprietary feed, this condition is also satisfied. That result—allowing reliance on usage-based data—comports with the Commission's recognition since at least 1995 that usage-based access is "designed to accommodate the information needs of individual investors," "provide[s] individual investors cost-effective access to market data without requiring … expensive hardware," and helps prevent "rel[iance] on stale market data."[68]

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66 *See* OPRA Fee Schedule, 1 & n.1, n.5.

67 *Id.* 1 n.5.

68 60 Fed. Reg. 27148, 27148 (May 22, 1995).

Prior to this dispute, other OPRA members appeared to agree. For example, in 2009, when Nasdaq PHLX filed a proposed rule change related to a proprietary data product, TOPO, it stated: the "TOPO data feed offers a competitive, lower-priced *alternative* to the consolidated data OPRA feed for users and situations where consolidated data is unnecessary."[69] PHLX relied on that interpretation in a later rule filing seeking to change the fees it charged for its proprietary products. PHLX stated that its products "offer a comprehensive, competitive *alternative* to the consolidated data OPRA feed for users and situations where consolidated data is unnecessary."[70] And the NASDAQ Stock Market has similarly described proprietary data as a "substitute" for the consolidated stream offered by OPRA, stating: "[m]any customers that obtain information from OPRA do not also purchase" NASDAQ's products, and that such customers "may shift the extent to which they purchase *one or the other* based on price changes."[71]

OPRA has rightly acknowledged that these statements "appear to be inconsistent with a requirement that a person receiving a proprietary data feed also receive streaming real-time data from OPRA."[72] These statements thus establish that other OPRA members have long understood the plain meaning of the Equivalent Access Provision.

B. OPRA's Contrary Interpretation Is Wrong

In rejecting Cboe's interpretation, OPRA has not disputed Cboe's plain-meaning reading. Indeed, it rightly concedes that "Cboe presents the plain language meaning of 'access.'"[73] That

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69 74 Fed. Reg. 32675, 32677 (July 8, 2009) (emphasis added).

70 78 Fed. Reg. 1886, 1889 (Jan. 9, 2013) (emphasis added).

71 81 Fed. Reg. 92935, 92936-37 (Dec. 20, 2016) (emphasis added).

72 Dombach Memo. 4.

73 *Id.* 1.

should be end of the matter. As the Supreme Court has "explained many times over [the] years," "when the meaning of [a] statute's terms is plain," the interpretive "job is at an end."[74]

Resisting the plain meaning of "equivalent access," OPRA claims that "access" is a "term of art" that refers only to the "manner and type of data feed that a user receives."[75] OPRA's specialized meaning theory is triply flawed. *First*, OPRA ignores that "equivalent access" is defined by the OPRA Plan. The function of a "definition" is to "give[] meaning to a term,"[76] and there is no need to seek out purportedly specialized meanings undefined in the text. Under the definition specified in the Plan, Cboe's reading prevails, as explained above.

Second, OPRA's interpretation is self-defeating on its own terms. OPRA claims that "access" refers to "the manner and type of data feed being *received*" and that "equivalent access" refers to the "data feed being *received* through a proprietary data product."[77] But whether something is received is obviously very different from whether something is accessible. For a library-card holder, books on the shelves of a public library are accessible, even if those books are never checked out. OPRA's reading of "access" wrongly conflates access and receipt.

Third, the bar for overcoming plain meaning is high, and OPRA does not come close to satisfying it. A "term of art" has "a specific, precise meaning in a given specialty, apart from its

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74 *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020). OPRA's Plan interpretation rests on the assumption that the Equivalent Access Provision should be construed by reference to principles of statutory interpretation. Dombach Memo. 2-4 (citing statutory construction principles). Cboe thus also relies on statutory construction principles. But similar principles would also apply under contract law. *See* OPRA Plan §10.2 (Delaware law governs, as well applicable provisions of the Exchange Act and the Commission's rules); *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010) ("When the contract is clear and unambiguous, we will give effect to the plain-meaning of the contract's terms and provisions").

75 Dombach Memo. 2.

76 *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 583 U.S. 416, 428 (2018).

77 Dombach Memo. 2 (emphases added).

general meaning in ordinary contexts."[78] In the context of trade usage, courts accept specialized definitions over plain meaning based on either (1) parties' actual knowledge (a predicate not relevant here) or (2) when "usage is of so long continuance, so well established, so notorious, so universal and so reasonable in itself" that the use of a specialized definition was self-evident.[79]

OPRA does not even attempt to satisfy that standard. In fact, it does not cite a single example of market participants treating "access" as having a distinct meaning from its ordinary usage. If "access" were a term of art, OPRA members themselves would presumably have said so. But, as explained above, prior rule filings point in the opposite direction.[80]

The best OPRA can do is argue that the OPRA Plan refers to "direct" versus "indirect" "access" and that the fee schedule charges different fees based on the type of recipient (professional versus nonprofessional), as well as the manner and content of data received.[81] This is all beside the point. Of course, "access" to something can be direct or indirect. A library card holder might be said to have direct access to books at a public library, while the spouse of the card holder might be described as having indirect access. But that hardly changes the meaning of "access." The fact that the OPRA Plan recognizes that vendors may have direct access to consolidated data while vendor customers have indirect access is equally unilluminating.

Indeed, the cited materials simply reinforce the point that the word "access" in the OPRA Plan refers to the ability to retrieve or obtain data, which could occur in a number of ways

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78 *Term of art*, Black's Law Dictionary (11th ed. 2019).

79 *Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116, 119 (S.D.N.Y. 1960) (internal quotation omitted); *see also British Int'l Ins. Co. v. Seguros la Republica, S.A.*, 342 F.3d 78, 84 (2d Cir. 2003) (similar).

80 *See supra*, p.18.

81 Dombach Memo. 2.

(directly or indirectly, via a stream or by user demand) and to different market participants (vendors or retail investors, professionals or nonprofessionals). OPRA also overlooks ways in which the OPRA Plan undercuts its position. For example, the Plan empowers OPRA to set fees "upon all persons who have access to Options Information."[82] If OPRA were correct that usage-based subscribers do not have access to consolidated data, OPRA would seemingly lack the authority to set and collect fees from usage-based subscribers.

OPRA also contends that a full-streaming subscription provides access to "the full set of data available from OPRA," while a usage-based subscription does not.[83] That mixes apples and oranges. Access is the *ability* to ask for and receive data, and a usage-based subscriber has the *ability* to access any and all of OPRA's consolidated stream. By analogy, someone has access to Disney programming whether such programming is accessed through an on-demand streaming service or through a cable subscription to the Disney channel. The same is true here. So long as a market participant subscribing to a proprietary product can access the same type of information through a usage-based subscription to OPRA, the Equivalent Access Provision is satisfied.

C. OPRA's Interpretation Is Contrary To The Public Interest

Because OPRA's interpretation rewrites, rather than faithfully applies, the Plan, the Commission should set aside its interpretation. In addition, the adverse policy consequences of OPRA's reading confirm why the Commission should reject it.[84]

First, OPRA's reading effectively increases the costs of proprietary data by requiring a subscription to a potentially more expensive consolidated feed that may not be necessary for—or

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82 OPRA Plan §5.4(d)(i); *accord id.* §4.1(d).

83 Dombach Memo. 2.

84 *See* 17 C.F.R. §242.608(d)(3) (referencing public interest and burdens on competition).

sought by—some market participants.[85] That needlessly restricts choice. In contrast, Cboe's interpretation allows market participants more freedom to choose how they access data based on their own needs, the trades they execute, and their financial and technological capabilities.[86] That is presumably why broker-dealers have lined up in emphatic support of Cboe's position.[87]

Second, OPRA's interpretation unduly burdens competition.[88] Cboe's reading would encourage the development of additional proprietary products, increasing market competition for data.[89] Such competition would encourage OPRA to provide better products so that it can continue to meet the changing needs of market participants. The Commission has previously recognized that competition lowers prices; helps to ensure reliable, accurate and prompt data; and ensures that providers adapt to the needs of market participants.[90]

Third, OPRA's interpretation risks unfair discrimination. Under OPRA's interpretation, only market participants who do not subscribe to exchange proprietary data products may avail themselves of OPRA's potentially more cost-effective usage-based subscription, since those that subscribe to proprietary market data products would be required to maintain and pay for the more expensive full-streaming subscription regardless of need. For cost-sensitive or

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85 86 Fed. Reg. at 18607, 18748 n.1897 (recognizing both that "different market participants need differing amounts of information to meet different trading objectives" and that "a significant portion of market participants (particularly retail investors) access SIP data on a per query basis").

86 Jan. 30, 2023 Form 19b-4, at *11, *18.

87 *See supra*, p.8, n.32 (discussing supportive comments).

88 15 U.S.C. §78k-1(a)(1)(C), (2).

89 *See* 70 Fed. Reg. 37496, 37498-99 (June 29, 2005) (one of the goals of the national market system is "promoting fair competition among individual markets" because "[v]igorous competition" "promotes more efficient and innovative trading services").

90 *E.g.*, 86 Fed. Reg. at 18596, 18601, 18779.

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technologically limited market participants, OPRA's interpretation may also block access to market data. Cost-sensitive participants—for example, smaller broker-dealers and retail investors—may be unable to afford a full-streaming subscription. Moreover, some may not have the technological capability to process it. If those persons are effectively prohibited from using more affordable or lower-bandwidth products, they may be deprived of access to any timely market data. That result is unreasonably discriminatory because it would establish at least two disparate classes of market participants: (1) those who can afford and have the technology to use proprietary data products and OPRA streaming data, and (2) those who cannot use such data. A proper interpretation of the Plan avoids that discrimination and places investors with different cost profiles and technology services on more equal footing.

III. CBOE'S POSITION ON THE COMMISSION'S ADDITIONAL QUESTIONS

Finally, the Commission asked the parties to address "what procedural rules are appropriate to govern any proceedings in the event that the Commission grants review."[91] While other Rule 608(d) appeals could require additional steps, this petition is ripe for decision now.

Cboe's appeal implicates a discrete, albeit significant, legal issue—the proper interpretation of the Equivalent Access Provision. Resolution of that question turns on the text the Plan,[92] as well as the broader statutory and regulatory backdrop governing market data. And the record contains extensive briefing regarding those points.[93] What is more, the record includes sufficient material regarding the background of the dispute as well as the policy implications of the competing interpretations for the national market system, including written

91 Order 4.

92 OPRA Plan §5.2(c)(iii).

93 *E.g.*, Cboe Application for Review; Dombach Memo.

views of OPRA, Cboe, and other OPRA members; relevant meeting minutes; Cboe's regulatory filings; and pertinent regulatory history of the Equivalent Access Provision.[94]

The merits of Cboe's petition are therefore ripe for resolution now. If the Commission disagrees and identifies an unresolved fact question or undeveloped legal issue, it should invite the submission of additional evidence or briefing. Rule 608(d) does not mandate any specific procedures for doing so, but permits the Commission to consider "the record of any proceedings," to allow "an opportunity for the presentation of reasons supporting or opposing [the challenged] action," or to invite "such other data, views, and arguments as it deems relevant."[95] Thus, if the Commission needs additional facts or legal argument to decide the appeal, Rule 608(d) gives it ample flexibility to do so.

More generally, the Commission asked the parties about "what procedural rules are appropriate to govern" Rule 608(d) proceedings.[96] In general, Cboe does not believe that a one-size-fits-all framework is necessary. Rather, the Commission should use procedures tailored to the specific issues presented in each appeal. Where, as here, a dispute is fully briefed and there are no outstanding questions of fact, the Commission can both grant review and resolve the proceedings on the briefing and submitted record. Other cases may differ. For example, the procedures "under Exchange Act Section 19(f) and Rules of Practice 420 and 421" may offer an appropriate model for Rule 608(d) appeals that require additional briefing, but not factual

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94 Cboe Application for Review; Cboe Mot. for Briefing Sch.; OPRA Opp. to Mot. for Briefing Sch.; Cboe Reply ISO Mot. for Briefing Sch.; Dombach Memo.; Cboe Supp. Rec. No. 8 ("Aug. 7, 2023 Cboe Letter"); Feb. 23, 2023 Nasdaq Letter; Cboe Supp. Rec. No. 6 ("March 1, 2023 OPRA Meeting Minutes"); *id.* No. 7 ("April 13, 2023 OPRA Meeting Minutes"); Jan. 30, 2023 Form 19b-4; Cboe Supp. Rec. No. 5 ("Feb. 27, 2023 Form 19b-4"); 66 Fed. Reg. at 39218; 68 Fed. Reg. at 66896.

95 17 C.F.R. §242.608(d)(3).

96 Order 4.

development.[97] By contrast, the Commission might consider referring certain questions to an Administrative Law Judge when a petition presents fact issues needing development—a course the Commission has taken in similar appeals under Section 11A(b)(5)(A).

As to the participation of interested non-parties,[98] allowing amicus briefing seems appropriate, and aligns with the Commission's practice of allowing interested non-parties to participate as amici in proceedings under Section 19(f) and Section 11A(b)(5)(A). Beyond that, Cboe does not believe that the Commission needs to "solicit public comment by notice in the Federal Register or otherwise" in Rule 608(d) appeals.[99] Such appeals involve effective plans, which have already been approved by the Commission after notice and comment. For example, the Commission went through notice and comment when approving the current version of the Equivalent Access Provision in 2003. There is no need to do so now, especially where the question is one of plan interpretation. Further, to Cboe's knowledge, the Commission has not solicited public comment in either Section 19(f) or Section 11A(b)(5)(A) proceedings. The Commission should follow the same course under Rule 608(d).

CONCLUSION

The Commission should decide Cboe's appeal and set aside OPRA's Plan interpretation.

Dated: February 23, 2024

Respectfully Submitted,

/s/ Kelly P. Dunbar
Kelly P. Dunbar
Andre Owens
Wilmer Cutler Pickering
Hale and Dorr LLP

97 *Id.* 3.

98 *Id.*

99 *Id.* 3-4.

2100 Pennsylvania Ave., NW
Washington, DC 20037
(t) (202) 663-6000
(f) (202) 663-6363
kelly.dunbar@wilmerhale.com
andre.owens@wilmerhale.com

Colleen M. Campbell
Wilmer Cutler Pickering
Hale and Dorr LLP
1225 Seventeenth St.
Suite 2600
Denver, CO 80202
(t) (720) 274-3135
(f) (720) 274-3133
colleen.campbell@wilmerhale.com

Cherie Weldon
Wilmer Cutler Pickering
Hale and Dorr LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007
(t) (212) 230-8800
(f) (212) 230-8888
cherie.weldon@wilmerhale.com

Counsel for Applicants

CERTIFICATE OF SERVICE

I, Kelly P. Dunbar, certify that on this day of February 23, 2024, I caused a copy of the foregoing to be filed through the SEC's eFAP system and served by electronic mail on:

The Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915
Washington, DC 20549
By eFAP: www.sec.gov/eFAP

James P. Dombach
Davis Wright Tremaine, LLP.
Counsel for OPRA
1301 L St. N.W.
5th Floor
Washington, DC 20001
JamesDombach@dwt.com

/s/ Kelly P. Dunbar
Kelly P. Dunbar
Dated: February 23, 2024

CERTIFICATE OF COMPLIANCE

I, Kelly P. Dunbar, certify that this Brief Supporting Exercise Of Commission Review Under Rule 608(d), Administrative Proceeding No. 3-21779, complies with the length limitations set forth in the Securities and Exchange Commission's Order Directing Filing of Additional Briefs dated January 19, 2024. I have relied on the word count feature of Microsoft Office for Word 365 in verifying this brief contains 6,925 words, excluding the cover page, table of contents, and table of authorities.

/s/ Kelly P. Dunbar
Kelly P. Dunbar
Dated: February 23, 2024

17 C.F.R. § 201.151(e) Certificate

I, Kelly P. Dunbar, pursuant to 17 C.F.R. § 201.151(e)(3), certify that this Brief Supporting Exercise Of Commission Review Under Rule 608(d), Administrative Proceeding No. 3-21779, does not contain sensitive personal information as defined in 17 C.F.R. § 201.151(e).

/s/ Kelly P. Dunbar
Kelly P. Dunbar
Dated: February 23, 2024