

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

April 12, 2024

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

**BRIEF OF THE DIVISION OF TRADING AND MARKETS
*AS AMICUS CURIAE***

DAVID SALTIEL
Deputy Director

DAVID S. SHILLMAN
Associate Director

MICHAEL E. COE
Assistant Director

LEAH MESFIN
Special Counsel

INTEREST OF THE DIVISION OF TRADING AND MARKETS

The Division of Trading and Markets (“Division”) has been invited by the Securities and Exchange Commission (“Commission”) to submit a brief in connection with the application filed by Cboe BZX Exchange, Inc., Cboe Exchange Inc., Cboe C2 Exchange, Inc., and Cboe EDGX Exchange, Inc. (collectively, “Cboe”) for review of an action taken by the management committee of the Options Price Reporting Authority (“OPRA”).¹ OPRA is the national market system plan (“NMS plan”) responsible for the collection, processing, and dissemination of consolidated options market data, and the Division, as part of its responsibilities, oversees the operation of the NMS plans for consolidated market data, including OPRA, on behalf of the Commission.

STATEMENT BY THE DIVISION

In its Order Directing the Filing of Additional Briefs, the Commission invited the Division, along with any other interested entity, to address any or all of the following issues:

(1) whether the Commission should exercise its discretion to entertain Cboe’s application for review under Rule 608(d), particularly in light of the procedures under Rule 608(b) for Commission consideration of a proposed amendment to the OPRA Plan;

(2) what procedural rules are appropriate to govern any proceedings in the event that the Commission grants review; and

(3) the remedies available, if any, to the parties in the event that the Commission declines to review this matter.²

¹ See Order Directing Filing of Additional Briefs at 4, Release No. 93999 (Jan. 19, 2024) (Admin. Proc. File No. 3-21779).

² *Id.*

Regarding the Commission’s *first question*, the Division believes that the Commission should exercise its discretion to entertain Cboe’s application for review.

Rule 608(d) under the Securities Exchange Act of 1934 (“Exchange Act”) provides that any person aggrieved by any action taken or failure to act by any person in connection with an effective NMS plan (other than certain prohibitions or limitations of access) may apply to the Commission for a review of that action.³ Here, Cboe states that it has been aggrieved by a particular action of the OPRA management committee, which comprises all the self-regulatory organizations (“SROs”) that are OPRA participants. Specifically, Cboe alleges that the OPRA management committee has adopted an interpretation of the term “equivalent access” in Section 5.2(c)(iii) of the Limited Liability Company Agreement of Options Price Reporting Authority, LLC (“OPRA Plan”)⁴ that “defies the plain meaning” of that provision.⁵ The Division believes that a petition for review under Rule 608(d) is the appropriate means for the resolution of just such a dispute—an allegation by an NMS plan participant that the other participants have improperly interpreted the terms of the plan to its disadvantage—and the Division therefore believes that the Commission should exercise its discretion to entertain Cboe’s application for review.

³ See 17 CFR 242.608(d). Rule 608(d) excludes review of “a prohibition or limitation of access reviewable by the Commission pursuant to section 11A(b)(5) or section 19(d) of the Act (15 U.S.C. 78k–1(b)(5) or 78s(d)),” which is not at issue here.

⁴ See Cboe BZX Exchange, Inc., Cboe Exchange, Inc., Cboe C2 Exchange, Inc., and Cboe EDGX Exchange, Inc.’s Brief Supporting Exercise of Commission Discretion Under Rule 608(d) at 1 (Admin. Proc. File No. 3-21779) (“Cboe Brief”).

⁵ See *id.* at 10.

The “equivalent access” language at issue here was added to the OPRA Plan in 2001 as a plan amendment that was approved by the Commission.⁶ And Rule 608(a)(3)(iii) expressly authorizes SROs to act jointly in “implementing or administering” an NMS plan.⁷ Thus, the Division believes that the question presented by Cboe’s petition is, simply put, whether the OPRA management committee has adopted an interpretation of “equivalent access” that is consistent with the language of the OPRA Plan as approved by the Commission. The Division, however, does not believe that a Rule 608(d) petition would be the appropriate means to address broader policy disagreements regarding what provision for proprietary market data an NMS plan for consolidated data *should* contain. Again, the question here is whether the OPRA management committee has properly interpreted the language of the OPRA Plan.

Regarding the Commission’s *second question*, the Division does not have a view on what procedural rules would be appropriate for proceeding in the event that the Commission grants review.

And regarding the Commission’s *third question*, because the Division believes that the Commission should entertain Cboe’s petition, the Division does not believe it is necessary to suggest alternative remedies. Additionally, because a proposed amendment of the OPRA Plan by Cboe has been noticed but is still pending before the Commission,⁸ the Division does not believe

⁶ See Securities Exchange Act Release No. 44580 (July 20, 2001), 66 FR 39218 (July 27, 2001).

⁷ See 17 CFR 242.608(a)(3).

⁸ See Securities Exchange Act Release No. 99345 (Jan. 16, 2024), 89 FR 3963 (Jan. 22, 2024).

that it is appropriate at this time to offer a view on other remedies that might be available if the Commission declines to entertain Cboe's petition.

Respectfully submitted,

By 

David Saltiel
Deputy Director
Division of Trading and Markets
100 F Street NE
Washington, DC 20549
Tel.: 202 551 7422
SaltielD@sec.gov

CERTIFICATE OF SERVICE

I, Michael E. Coe, certify that on this day of April 12, 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

Kelly P. Dunbar
Wilmer Cutler Pickering Hale and Dorr LLP
Counsel for Cboe
2100 Pennsylvania Ave, NW
Washington, DC 20037
kelly.dunbar@wilmerhale.com

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

/s/ Michael E. Coe
Michael E. Coe
Dated: April 12, 2024

CERTIFICATE OF COMPLIANCE

I, Michael E. Coe, certify that this Brief of the Division of Trading and Markets as *Amicus Curiae*, 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 that this brief contains 825 words, excluding the cover page, table of contents, and table of authorities.

/s/ Michael E. Coe
Michael E. Coe
Dated: April 12, 2024

17 C.F.R. § 201.151(e) Certificate

I, Michael E. Coe, 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/ Michael E. Coe
Michael E. Coe
Dated: April 12, 2024