UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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| In the Matter of<br><br>CBOE BZX EXCHANGE, INC., CBOE EXCHANGE,<br>INC., CBOE C2 EXCHANGE, INC., and CBOE EDGX<br>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 REPLY 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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**CBOE BZX EXCHANGE, INC., CBOE EXCHANGE, INC., CBOE C2 EXCHANGE, INC., AND CBOE EDGX EXCHANGE, INC.'S REPLY BRIEF SUPPORTING EXERCISE OF COMMISSION DISCRETION UNDER RULE 608(d)**

## INTRODUCTION

Cboe's petition asks the Commission to review and to set aside an erroneous interpretation of the Equivalent Access Provision of the OPRA Plan adopted by the OPRA Management Committee. The record before the Commission now fully supports Cboe's petition.

As to the first issue—whether the Commission should review Cboe's petition—the Commission's own Division of Trading and Markets, filing as an *amicus curiae* in response to the Commission's Briefing Order inviting it (and any other interested parties) to participate, unambiguously agrees with Cboe that Rule 608(d) presents "the appropriate means for the resolution of just such a dispute" and that the "Commission should exercise its discretion to entertain Cboe's application for review."[1] The Division's position is correct. OPRA's interpretation of the Plan would unnecessarily restrict investor choice in market data products, discriminate against distinct classes of investors, and curb competition between providers of market data. That result would undermine the public interest, the protection of investors, and the

[1] Division Amicus Br. at 3.



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proper functioning of the market—implicating each of the factors the Commission assesses when considering whether to exercise its discretion under Rule 608(d).

OPRA advances no persuasive argument to the contrary. It accuses Cboe of possessing a narrow economic motive and suggests that somehow forecloses review. But the Plan interpretation dispute here implicates market data and thus obviously reaches far beyond private economic interests, directly implicating the Commission's statutory duty to oversee the national market system, to ensure the orderly and efficient operation of markets, and to protect investors. OPRA alternatively claims that this dispute implicates too many interests and therefore should be rerouted to a rulemaking or amendment process. That makes little sense: through this Rule 608(d) appeal, Cboe is asking for the Commission to interpret an existing national market plan, not to amend that plan. Interpreting existing plan language is the whole point of the Rule 608(d) process, as the Division recognizes.[2] OPRA's position would effectively write Rule 608(d) out of the Commission's regulations, where (as here) the dispute regards an existing interpretation of a plan amendment that was already enacted after notice and comment.

As to the second issue—the merits of the interpretation dispute—OPRA's opposition fails to persuasively respond to Cboe's straightforward reading of the Equivalent Access Provision. OPRA principally repeats the claim that "access" is a term of art that, OPRA maintains, refers to the "manner and type of data feed that a user receives."[3] But OPRA fails to carry its heavy burden of establishing that access is, in fact, a term of art that should displace the ordinary meaning of the Equivalent Access Provision, especially given that the Plan itself defines the critical terms of the Provision. OPRA's position is particularly confusing given that OPRA

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2 *See id.* at 4.

3 OPRA Opp. at 9-10.

continues to define "access" by reference to what "a user receives"—a counterintuitive contortion of the plain meaning of "access." In ordinary English, we would readily say that a law student has access to the books in the law school library, even if those books are only infrequently checked out or used. OPRA has no answer to similar plain meaning examples, and its insistence that "access" be read inconsistent with that ordinary meaning should be rejected.

OPRA also broadly claims that the "SEC's Division of Trading and Markets has also weighed in and provided an interpretation that aligns with OPRA's Interpretation."[4] But whatever information OPRA believes it gleaned from phone calls with two staff members offering their viewpoints (without the benefit of adversarial briefing), the Division itself, in its *amicus* brief here, is conspicuously silent on the meaning of the Equivalent Access Provision. That forecloses OPRA's assertion that the Division has formally blessed its interpretation.

In sum, the record and briefing before the Commission is sufficient for it to not only exercise its discretion but also to decide the merits of this appeal as well. The Commission should grant review and set aside OPRA's erroneous interpretation under Rule 608(d).

## ARGUMENT

### I. THE RELEVANT FACTORS COMPEL COMMISSION REVIEW

Cboe explained in its opening brief why its "petition raises a text-book example of a legal question that the Commission can, and should, resolve under Rule 608(d)."[5] The Division has now agreed and also urged the Commission to "entertain Cboe's application for review."[6] As the Division correctly explains, Cboe's petition presents "an allegation by an NMS plan participant

4 *Id.* at 12.

5 Cboe Opening Br. at 10.

6 Division Amicus Br. at 3.

that the other participants have improperly interpreted the terms of the plan to its disadvantage" and "a petition for review under Rule 608(d) is the appropriate means for the resolution of just such a dispute."[7] All factors that the Commission considers when deciding whether to exercise its discretion under Rule 608(d)—"the public interest, the protection of investors, [and] the maintenance of fair and orderly markets"—support Cboe's and the Division's position.[8]

Critically, as Cboe has explained, its interpretation of the OPRA Plan protects investors, supports the public interest, and provides for better maintenance of fair and orderly markets. It would allow investors to choose the data products that best fit their needs,[9] promote competition between data providers, and ensure that all investors—including cost-sensitive or technologically-limited investors—enjoy effective access to both proprietary data streams and OPRA consolidated data.[10] And Cboe's interpretation would avoid the risk of unfair discrimination between market participants who cannot afford or do not have the technology to process both proprietary streams and OPRA's stream and those who can.[11]

The number of retail broker-dealers who have lined up in support of Cboe's efforts to expand access to proprietary data further illustrates how Cboe's interpretation advances the public interest. Those market participants described how OPRA's interpretation is "potentially

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7 *Id.*

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

9 *See* Cboe Opening Br. at 12-13; 21-23.

10 *See id.* at 22-23.

11 *Id.*



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inequitable,"[12] would "price[] many potential options data subscribers out of the market,"[13] and would "create[] a two-tiered market for options market data."[14] These statements not only demonstrate the risk that OPRA's interpretation would hamper certain market participants' ability to access needed market data, but also how OPRA's interpretation would discriminate between different classes of market participants.

OPRA's opposition fails to meaningfully address the relevant factors that the Commission relies on when determining whether to grant review. Instead, OPRA argues that Cboe's purported "private economic" motive forecloses review[15] and points to the Commission's decisions in *American Stock Exchange*[16] and *Boston Stock Exchange*.[17] But Cboe has already explained why those precedents have no application here.[18] Most significantly, those cases simply caution against the exercise of Commission discretion over "an internal business controversy" with no bearing on the broad objectives of the national market system—a far cry from the market data regulation issues directly implicated by the dispute here.[19] Nor did those cases implicate any issues over which the Commission has special expertise; here, of course, the Commission has decades of experience with market data regulation questions.

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12 Letter from Scott Sheridan, tastytrade, to Vanessa Countryman, Secretary, SEC (Feb. 12, 2024), at 2 ("tastytrade Letter") (located at https://www.sec.gov/comments/4-820/4-820.htm).

13 *Id.*

14 Letter from Matt Billings, Robinhood Financial, to Vanessa Countryman, Secretary, SEC (Feb. 12, 2024), at 3 (located at https://www.sec.gov/comments/4-820/4-820.htm).

15 OPRA Opp. at 4-6.

16 *Am. Stock Exchange*, 2000 WL 3804.

17 *Boston Stock Exchange, Inc.*, Exchange Act Release No. 58191, 2008 WL 2783572 (July 18, 2008).

18 Cboe Opening Br. at 10-13.

19 *Boston Stock Exchange*, 2008 WL 2783572, at *6; *see also Am. Stock Exchange*, 2000 WL 3804, at *4; Cboe Opening Br. at 10-13.



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In OPRA's only real effort to tie its argument to the factors the Commission considers under Rule 608(d), OPRA asserts that Cboe's "interpretation would upend OPRA's funding mechanism" and thereby "harm the public interest."[20] But OPRA provides no credible explanation, much less evidence, in support of that conclusory assertion. To the contrary, the relevant evidence (for example, OPRA's balance sheets that are reviewed at each OPRA Quarterly Management Meeting) confirms that OPRA earns substantial revenue—more than enough to both cover its operating expenses and distribute excess revenue to its members. Based on current and historical revenue streams and expenses, there is no plausible reason to believe that Cboe's interpretation would undermine OPRA revenue streams such that OPRA would no longer be properly funded or able to cover its expenses. Indeed, when OPRA sought to make its pilot program offering usage-based fees permanent in 1996, it represented to the Commission that such "fees [had] not had any significant negative impact on OPRA's overall revenues[.]"[21]

OPRA also ignores that expanding the ability of market participants to receive proprietary data streams could lead to greater market participation and thus grow revenue for all providers of market data, OPRA included. For example, one industry participant has explained that "[o]ffering the usage-based feed, in tandem with proprietary exchange feeds, … could also allow new entrants to grow their business," which "may create more subscribers for OPRA as new entrants decide that the full OPRA feed best serves their expanding firms."[22] That possibility is yet another reason why Cboe's petition supports the public interest.

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20 OPRA Opp. at 13.

21 61 Fed. Reg. 49801, 49801 (Sept. 23, 1996).

22 tastytrade Letter at 2.



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In short, as the Division has recognized in its *amicus* brief, this is precisely the type of case the Commission can and should review under Rule 608(d).

## II. OPRA'S PLAN INTERPRETATION IS WRONG

The Commission should also exercise its discretion because OPRA's interpretation is, and remains, wrong. The Equivalent Access Provision means what it says: in order to receive a proprietary service, a subscriber to proprietary data must have access to the same type of information from OPRA on the same terminal or work station. That condition is satisfied when a recipient of an exchange proprietary data product is equally able to retrieve, on the same terminal or work station, either OPRA's usage-based or full-stream product.[23]

OPRA again admits that the plain language meaning supports Cboe's interpretation. But it repeats the same stale arguments that it raised in its outside counsel memorandum[24] and its opposition to Cboe's motion for a briefing schedule.[25] Namely—that "access" is a "term of art" and that Cboe's definition would render the term "equivalent" surplusage. Cboe has already explained why each of those arguments cannot overcome the plain language of the Provision. OPRA's arguments are no more convincing now than they were before—here, the third time is not the charm.

First, OPRA fails to overcome the high bar for displacing the plain language meaning of a term.[26] Instead, OPRA continues to rely on assorted fee schedules to suggest that "access" is a term of art referring to the "type of data feed that a user receives."[27] Again, OPRA doesn't come

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23 Cboe Opening Br. at 15-18.

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

25 OPRA Opp. to Mot. for Briefing Sch. at 4-8.

26 Cboe Opening Br. at 18-19 (explaining that a statute's plain terms control).

27 OPRA Opp. at 9-10.



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close to satisfying the standard for overcoming the plain language meaning of a term.[28] It continues to ignore, for example, that the concept of what one "receives" is markedly different from what one "accesses," that it lacks a single example of market participants treating the term "access" as distinct from its ordinary meaning, and that its reliance on fee schedules simply reflects that rates may vary based on the recipient, manner, and content of data received—*not* that "access" carries a different meaning in this context.[29]

Second, OPRA overlooks the definition of "equivalent" in the Plan itself to argue that applying the plain meaning interpretation of "access" would render the term "equivalent" surplusage.[30] As we have explained, the Plan itself defines "equivalent": both types of data must be "accessible on the same terminal or work station."[31] Thus, far from being surplusage, "equivalent" does the work of specifying *where* both proprietary data and OPRA data must be accessible in order to satisfy the equivalence requirement. And, as Cboe explained, the Plan's definition controls—there is no call to strain for a term of art meaning.[32]

At the least, OPRA contends, allowing OPRA members to provide proprietary data products is an exception that should be construed narrowly to preserve an original intent of prohibiting the sale of proprietary data products.[33] But that argument fails where the Commission has historically taken steps to expand, not restrict, access to proprietary data.[34]

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28 Cboe Opening Br. at 20 & n.79.

29 *Id*. at 20-21

30 OPRA Opp. at 11.

31 Cboe Opening Br. at 16.

32 *Id.* at 19

33 OPRA Opp. at 11-12.

34 Cboe Opening Br. at 4-6.

Beyond that, even if the Equivalent Access Provision is an exception to some free-floating limit on proprietary data, "statutory exceptions are to be read fairly, not narrowly, for they 'are no less part of Congress's work than its rules and standards—and all are worthy of a court's respect.'"[35] Read fairly, the Equivalent Access Provision is satisfied when a proprietary data subscriber also has access to OPRA data through a usage-based subscription. There is no defensible basis for artificially constricting the plain meaning of the provision.

Finally, OPRA claims that the Division supports its position, referring to phone calls with two staff members who offered their viewpoints—of course, prior to any adversarial briefing.[36] But, conspicuously, the Division did *not* provide any such interpretation here, on the record in this proceeding. To the contrary: it filed an *amicus* brief taking no position on the merits. That precludes OPRA's insistence that the Division supports its interpretation.

## III. OPRA'S PROPOSED "PROCEDURES" WOULD EFFECTIVELY WRITE RULE 608(d) OUT OF THE REGULATIONS

Finally, in response to the Commission's additional questions on the appropriate procedural rules that should govern Rule 608(d) proceedings, OPRA offers none. It instead asserts that "Cboe should file a rulemaking petition with the Commission" or should "seek full OPRA approval of its proposed amendment to the OPRA Plan text," each of which would involve notice and comment.[37] This position defies logic. The 2001 plan amendment already went through notice and comment and the Commission already has found that the Equivalent Access Provision was in the public interest. Cboe is not here seeking to amend or change the

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35 *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2181 (2021).

36 OPRA Opp. at 12.

37 *Id*. at 14.

Plan in any respect. It is asking for the Commission to interpret the existing plan language. Resolving disputes about how to interpret existing plans is exactly why Rule 608(d) exists. For example, if OPRA wrongly interpreted a provision of a plan saying *X* to mean *Y*, it would be confounding to say that an aggrieved party's remedy is to amend the plan so that *X* means *X*. That aggrieved party should instead be able to seek Commission review to ensure that OPRA faithfully interprets the provision. That is just what Cboe seeks to do here.

What is more, there has already been a full and fair opportunity for broader stakeholder engagement on the questions presented by Cboe's petition. The Commission invited "any other interested entity" to "file an *amicus* brief addressing any or all of the issues."[38] Only the Division opted to offer its views, and no market participants or other parties filed an *amicus* brief. All interested entities have had ample chance to participate.

In sum, this case is ripe for decision on the record and briefing assembled. The Commission has before it all the information required to decide the question—the text of the Equivalent Access Provision, the relevant statutory and regulatory language and history, and the views of all parties who have decided to participate based on meeting minutes, opinion letters, and several rounds of briefing. OPRA itself fails to point to any need for additional briefing or taking of evidence. In these circumstances, as Cboe has requested, the Commission should both exercise discretion and expeditiously set aside OPRA's interpretation.[39]

## CONCLUSION

The Commission should grant Cboe's petition and set aside OPRA's Plan interpretation.

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38 January 19, 2024 Order at 4.

39 Cboe Opening Br. at 23-25.

Dated: April 26, 2024

Respectfully Submitted,

*/s/ Kelly P. Dunbar*
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

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*



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**CERTIFICATE OF SERVICE**

I, Kelly P. Dunbar, certify that on this day of April 26, 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

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

*/s/ Kelly P. Dunbar*
Kelly P. Dunbar
Dated: April 26, 2024

## CERTIFICATE OF COMPLIANCE

I, Kelly P. Dunbar, certify that this Reply 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 2,673 words, excluding the cover page, table of contents, and table of authorities.

*/s/ Kelly P. Dunbar*
Kelly P. Dunbar
Dated: April 26, 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 Reply 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: April 26, 2024