

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

OPERATING COMMITTEE'S REPLY TO BRIEF OF THE DIVISION OF TRADING AND
MARKETS AS AMICUS CURIAE

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INTRODUCTION

Contrary to the Division's belief, the Commission should not exercise discretion and review Cboe's petition. Although the Commission *may* exercise its discretion to entertain appeals in connection with the implementation or operation of any effective national market system plan,¹ the Commission has historically declined to do so in most circumstances.² In its Brief, the Division states that the Commission should exercise its discretion to review a petition to resolve allegations by an national market system ("NMS") participant, which is an over-broad interpretation of the Commission's discretionary authority. Under the Division's rationale, the Commission would exercise its discretion every time there is a dispute involving the NMS, which is clearly not the case.³

Moreover, Cboe claims that it is aggrieved by the actions of the OPRA Committee and that OPRA's interpretation of the "equivalent access provision" "defies the plain meaning" of the provision but nothing could be further from the truth. The reality is that Cboe's petition, at its core, is an attempt to sell its private market data feed to market data participants in a manner that would undermine the fair and orderly operation of the OPRA Plan. Cboe's proposal would enable market data participants to obtain a data feed from Cboe without obtaining a comparable product from OPRA. The result would undoubtedly cause OPRA's funding to be diverted directly to Cboe's coffers. This type of private economic interest is not, *and never has been*, appropriate for consideration as part of a Rule 608(d) proceeding. Further, Cboe's proposed interpretation would

¹ See 17 CFR 242.608(d) (emphasis added).

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

³ See *Id.* See also *In the Matter of the Application of Boston Options Exchange Group, LLC* for Review of Action Taken by OPRA, Exchange Act Release No. 34-59927, 2009 WL 1347419, at * 1 (May 14, 2009) (dismissing the Boston Options Exchange Group, LLC's application for review); *American Stock Exchange*, 54 S.E.C. 491, 497-99 (2000) (dismissing appeal and declining to exercise discretion under former Exchange Act Rule 11Aa3-2(e) to review action taken at CTA meeting concerning calculation of revenue generated from the sale of transaction information in derivative product known as "Diamonds").

undermine OPRA's funding mechanism while bolstering Cboe's economic interests, which would be antithetical to the purposes of Rule 608 specifically, and administrative law jurisprudence generally. Exercising discretion under Rule 608(d) is simply not the appropriate remedy for this kind of dispute.

I. THE DIVISION'S BELIEF THAT THE COMMISSION SHOULD EXERCISE ITS DISCRETION TO ENTERTAIN CBOE'S APPLICATION FOR REVIEW IS MISGUIDED AND ERRONEOUS.

Pursuant to Section 11A of the Securities Exchange Act of 1934 ("Act") and Rule 608(d) thereunder, "[t]he Commission *may*, in its discretion, entertain appeals in connection with the implementation or operation of any effective national market system plan."⁴ However, pursuant to *In re Nat. Ass'n of Securities Dealers, Inc.*⁵, when self-regulatory organizations ("SROs") have proposed a plan amendment that would result in a fundamental structure and regulatory change to a national market system plan, the Commission has declined to exercise its discretion.⁶ In this matter, Cboe claims that it is aggrieved by the actions of the OPRA management committee, but at its core, Cboe has proposed to replace OPRA, the public market data stream, with its own product. As articulated in *NASD*, such a proposal would *and should* require "careful study and consideration of the potential effects, taking into account the input of market participants and other interested parties."⁷ This is precisely why a rulemaking process with notice and comment would be appropriate. Because the critical facts in these circumstances are analogous to those in *NASD*, the Division's view is erroneous, and the Commission should not exercise its discretion to entertain Cboe's application for review.

⁴ See 17 CFR 242.608(d) (emphasis added).

⁵ *Nat'l Ass'n of Secs. Dealers*, Exchange Act Release No. 48573, 2003 WL 22250397, at *3 (Sept. 30, 2003).

⁶ *Id.*

⁷ *Id.*

As OPRA previously articulated in its Opposition Brief to Cboe, if Cboe desires to implement a fundamental and structural change to OPRA's and the industry's operation, it should: (1) seek full OPRA approval of its proposed amendment to the OPRA Plan text (which would then be subject to notice and comment), or (2) file a petition for rulemaking with the Commission (which would then be subject to notice and comment if acted upon). A discretionary Rule 608(d) proceeding is not a substitute for a rulemaking process that is subject to notice and comment, which is designed to protect investors, promote fair and orderly markets, and protect the public interest. Cboe's proposed interpretation of a provision to a national market system should require the same "wide-based participation" called for in *NASD*, which cannot be accomplished through a discretionary appeal under Rule 608(d).

II. THERE ARE NO BROADER POLICY QUESTIONS AT ISSUE AND OPRA'S INTERPRETATION OF THE PROVISION IS CONSISTENT WITH THE OPRA PLAN

As the Division correctly points out, the *only* question here is 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. And the answer to that question is definitely yes. OPRA clearly articulated this position in its Opposition Brief. That said, there are no broader policy issues or disagreements to be decided, and as described above, such broader policy issues are inappropriate for consideration as part of a discretionary appeal under Rule 608(d).

CONCLUSION

For the reasons stated above, OPRA disagrees with the Division and believes that the Commission should *not* exercise its discretion to review Cboe's petition to implement fundamental and structural change to the national market system under Rule 608(d).

Dated: April 26, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, James Dombach, 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:

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Dated: April 26, 2024

CERTIFICATE OF COMPLIANCE

I, James P. Dombach, certify that this Reply to Brief Of The Division Of Trading And Markets As Amicus Curiae, 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 in verifying this brief contains 1309 words.

By: /s/ James P. Dombach

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