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 REPLY IN SUPPORT OF MOTION FOR EXPEDITED ENTRY OF A BRIEFING SCHEDULE

Cboe BZX Exchange, Inc., Cboe Exchange, Inc., Cboe C2 Exchange, Inc., and Cboe EDGX Exchange, Inc. (collectively, "Cboe") respectfully submit this Reply in support of their Motion for Expedited Entry of a Briefing Schedule ("Motion").

On December 1, 2023, Cboe filed a short, straightforward scheduling motion asking the Commission to enter a briefing schedule that would allow "prompt resolution" of Cboe's Rule 608(d) petition. Mot. 2. OPRA responded to that run-of-the-mill procedural request with a nine-page Opposition, substantively briefing the very issues on which Cboe requested a briefing schedule. Attempting to short-circuit the Commission's consideration of the important questions raised by Cboe's petition, OPRA also requested that the Commission decline to review Cboe's petition without allowing the parties to engage in full briefing of the petition.

OPRA's request seeks to flip the process on its head. The Commission has typically ordered briefing before determining whether to exercise discretion over Rule 608(d) petitions—a question that is necessarily and inextricably intertwined with the merits. As OPRA's Opposition illustrates, Cboe's petition raises significant, contested legal questions. Given that OPRA has

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already previewed its view on the merits of this dispute, the most fair and logical course would be to follow the Commission's ordinary approach of permitting full briefing on whether to exercise review of the appeal as well as the merits of the dispute.

I. The Commission Should Reject OPRA's End-Run Around Merits Briefing

OPRA's Opposition seeks to force (abbreviated) substantive briefing into ordinary scheduling motions practice, attempting to deny the Commission and the parties full briefing on the important legal questions raised in Cboe's petition. OPRA insists that the Commission should not enter a briefing schedule until it determines "whether it will exercise its discretion to review Cboe's petition," Opp. 1, and it asks the Commission to deny review of CBOE's petition. But this requested approach puts the cart before the horse and contradicts how the Commission has addressed past Rule 608(d) petitions—including in the cases upon which OPRA relies. It also conflicts with the Commission's consideration of this appeal to date and the Commission's standard briefing practices, which generally permit parties 30 days—not the three-business-day timeline that OPRA attempts to force here—to brief issues raised in Rule 608(d) petitions.

A. The Commission Should Follow Its Regular Approach To Briefing

The Commission typically affords parties the opportunity to brief substantive issues raised in Rule 608(d) petitions before it determines whether to hear an appeal. That is for good reason. Whether to exercise jurisdiction over a Rule 608(d) petition is entwined with the merits of the petition—namely, whether the national market system plan action at issue aligns with or impairs statutory interests that the Commission is entrusted to protect. The Commission's regulation itself ties the questions together; where the Commission finds an act is "in accordance with the applicable provisions of [the] plan" and is "applied in a manner consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets, and the

removal of impediments to … the perfection … of a national market system," then it "shall dismiss the proceeding." 17 C.F.R. § 608(d)(3). The merits of OPRA's actions and the considerations governing the Commission's determination of whether to exercise jurisdiction accordingly go hand in hand and should be resolved together.

The very cases that OPRA cites are case in point. *See* Opp. 2 (citing *American Stock Exchange*, 2000 WL 3804, Exchange Act Release No. 42312 (Jan. 4, 2000); *Boston Stock Exchange et al.*, 2008 WL 2783572, Exchange Act Release No. 58191 (July 18, 2008)). In neither of those cases did the Commission decline to exercise jurisdiction *before* considering the parties' briefs. For example, in *Boston Stock Exchange*, the Commission declined to exercise jurisdiction to entertain a Rule 608(d) petition only after briefs were filed. The Commission considered the "nexus between the statutory policy [on regulating national markets] and the issues raised [on] appeal," making clear that the merits of the petition were inherently related to the Commission's decision. *Boston Stock Exchange*, 2008 WL 2783572, at * 6. Other cases are in accord. *See American Stock Exchange*, 2000 WL 3084, at *3 (reflecting the Commission requested briefing in part to decide whether to grant review); *Nat. Ass'n of Sec. Dealers, Inc.*, 2003 WL 22250397, Exchange Act Release No. 48573 (Sept. 30, 2003), at *1 (reflecting the parties engaged in briefing before the Commission determined whether to grant review). The Commission should follow that same logical, orderly sequence here, because it ensures that all parties have a full and fair opportunity to make their case and that the Commission receives the benefit of that briefing and has a full record upon which to make a reasoned determination.[1]

[1] OPRA incorrectly asserts that, under SEC Rule of Practice 450(a), "a scheduling order is issued only after 'the Commission determines to grant review as a matter of discretion[.]'" Opp. 1. That rule mandates that the Commission "shall" enter a briefing schedule in certain

B. Procedural Motions Practice Is Not A Fair Substitute For Full Briefing

OPRA's effort to derail the ordinary briefing process would also be inequitable, as it would effectively compress merits briefing into procedural motions practice. SEC Rule of Practice 450 directs that a party should generally be afforded 30 days to submit a brief. *See* 17 C.F.R. § 201.450(a). By attempting to use its Opposition to a routine procedural motion as a short-cut to brief the merits, OPRA has forced Cboe to respond to its Opposition in three business days. *See id*. § 201.154 (granting only three business days to reply to a motion).

This approach affords Cboe neither sufficient time nor a fair opportunity to brief the merits, and the unfairness of this approach is another reason to reject OPRA's proposal. The Commission should instead adhere to its ordinary course and enter a briefing schedule that allows Cboe the opportunity to fully present its arguments regarding whether its petition warrants the exercise of the Commission's discretion, as well as related questions on the merits—rather than decide these issues without the benefit of full briefing. If the Commission nevertheless determines that now is the time to brief all of those issues, Cboe respectfully requests the opportunity to file a supplemental brief.

II. OPRA's Premature Substantive Arguments Confirm The Need For Full Briefing

Cboe has much to say about OPRA's substantive points, and it will fully develop its responses when the Commission enters a briefing schedule. But Cboe wishes to make a few

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circumstances; it does not restrict the Commission's practice of inviting briefing regarding Rule 608(d) petitions to determine whether to exercise jurisdiction. Indeed, the Commission has already demonstrated its intent to follow its usual practice here, explaining that "[a] separate order directing and scheduling the filing of briefs will follow in due course." Order Regarding The Certified Copy Of The Record, 2 & n.4. Nothing in the Opposition justifies a different path forward.

high-level observations now to make clear why OPRA is decidedly wrong that the Commission can properly decide these issues in OPRA's favor based on the limited filings to date.

To start, Cboe would demonstrate in its brief that its petition sets forth a proper interpretation of OPRA's Equivalent Access Provision that directly advances Congress's and the Commission's objectives underlying the national market system, including by increasing the affordability of and access to options market data for all investors. That is because, read in accord with its plain text, the OPRA Plan permits proprietary data subscribers to access a lower-cost, usage-based data option that gives them equivalent access to the same real-time data as the full OPRA streaming data feed—rather than requiring subscribers to obtain a more expensive full streaming feed that they may not need or want. On the other hand, OPRA's atextual reading of the Plan would illogically require subscribers to purchase a full streaming data feed in all cases, which would deprive investors of the option to access more affordable alternatives better suited to their needs and could preclude some investors—particularly, retail investors—from accessing proprietary options data at all given the costs associated with the full OPRA stream.

Seeking to downplay the substantial public interest underlying Cboe's interpretation of the Plan, OPRA's Opposition disparages the petition as related only to Cboe's private financial interests. *See* Opp. 2. That is manifestly wrong. As Cboe would develop and explain in briefing these issues, there is far more at stake in this case than Cboe's private financial interests—including, for example, the clear benefits that would accrue to investors from Cboe's interpretation, benefits that closely align with the objectives of the national market system.

Full briefing is also important to explain why OPRA's interpretation is divorced from the language of the Plan itself. The text of the Equivalent Access Provision in no way requires recipients to receive the full feed of streaming, real-time data from OPRA where usage-based

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access provides recipients with the equivalent ability to query, and thus access, real-time OPRA data. OPRA's contrary interpretation defies the plain language of the provision and appears to rely principally on OPRA's unsupported assertion (Opp. 2) that "equivalent access" is a "term of art" that should not be interpreted in accord with the phrase's plain meaning. Cboe requests full briefing to explain why that "term of art" theory is fundamentally misplaced.

In addition, OPRA's Opposition leans on the assertion that, as a purported exception to limits on proprietary data products, the OPRA Plan provision at issue should be read "narrowly." Opp. 8. But that contradicts the Supreme Court's recent admonition that "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.'" *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2181 (2021). Full briefing is necessary for Cboe to explain this and other analytical as well as doctrinal flaws in OPRA's position.

* * *

In short, as OPRA's eagerness to brief the merits suggests, Cboe's appeal raises important questions about the proper interpretation of the Equivalent Access Provision and how Cboe's interpretation advances the interests of retail investors. As full briefing would make clear, these are precisely the types of questions that the Commission should use the Rule 608(d) process to address. Cboe thus respectfully requests that the Commission follow the ordinary course and enter a briefing schedule as outlined in its Motion. If the Commission elects to forgo the ordinary briefing process, Cboe alternatively requests the Commission grant Cboe an additional 30 days to respond fully to the arguments OPRA raised prematurely in its Opposition.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Kelly P. Dunbar, certify that on this day of December 13, 2023, 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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