

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 SUR-REPLY TO MOTION FOR EXPEDITED ENTRY OF A
BRIEFING SCHEDULE

The Operating Committee of the Options Price Reporting Authority ("OPRA") respectfully submits this sur-reply to Cboe's motion for expedited entry of a briefing schedule. OPRA believes that it is appropriate to submit this sur-reply as Cboe raised new arguments in its reply.

As previously described, OPRA's motion for a briefing schedule is premature as the Securities and Exchange Commission (the "SEC" or the "Commission") has not yet determined, pursuant to Rule 608 of Regulation NMS, whether it will exercise discretion to review Cboe's petition. Pursuant to SEC Rules of Practice 450(a), a scheduling order is issued only after "the Commission determines to grant review as a matter of discretion" For the reasons stated in its opposition, OPRA believes that the Commission should not exercise its discretion to review Cboe's petition, and therefore, should deny Cboe's motion for an expedited entry of a briefing schedule.

In its reply brief, Cboe states that "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” and “[w]hether to exercise jurisdiction over a Rule 608(d) petition is entwined with the merits of the petition.” First, Rule 608(d) petitions are few and far between, and stating what is “typical” fails to recognize the fact that there is no set practice to handling Rule 608(d) petitions. Second, Cboe has failed to point to a single rule of practice that supports its request for a scheduling order at this time, while OPRA has pointed to Rule 450(a) governing scheduling orders that states it shall be issued after the Commission decides to exercise discretion. Further, Cboe points to an order from the Secretary’s Office (and not the Commission), stating that a scheduling order will follow in due course. Cboe, however, fails to acknowledge that the Secretary’s Office (1) previously issued an order with a very defined briefing schedule; (2) issued a subsequent order after apparently acknowledging its mistake by saying that a separate order directing and scheduling the filing of briefs will follow in due course; and (3) included in that corrected order that the Secretary’s Office “expresses no view regarding whether the Commission will exercise its discretion to entertain the review proceeding or the merits of Applicants’ contentions.”¹ But perhaps most importantly, additional briefing in this matter is not necessary as both parties have clearly provided its viewpoints on how to interpret the relevant language, and why such language should be interpreted in that manner.

Cboe states that OPRA has forced Cboe to respond to its Opposition in three business days, and that OPRA is attempting to use a routine procedural motion as a short-cut to brief the merits. Such a statement is inaccurate as both parties have fully vetted the issue multiple times and additional briefing is unnecessary. Importantly, OPRA engaged an independent third-party to analyze the language at issue and provide a reasoned interpretation. Cboe and the other

¹ Order Regarding The Certified Copy of the Record, 2 & n.4.

exchanges expressed their viewpoint to the third-party before the third-party analyzed the issue. A memo containing that analysis has been provided as part of the record of this proceeding. Additionally, Cboe has prepared multiple letters and submitted the petition starting this proceeding to explain why it believes its interpretation is accurate. Cboe's letters are part of the record. Finally, the SEC's Division of Trading and Markets has also weighed in and provided an interpretation that aligns with OPRA's interpretation. As a result, it is inaccurate for Cboe to claim it has not had the opportunity to brief the merits. As such, the Commission has received sufficient briefing to determine whether it should exercise discretion in this matter.

Based on the analysis contained in OPRA's opposition as well as the above analysis, OPRA requests that the Commission not exercise its discretion in reviewing Cboe's petition, and as a result, the Commission should deny Cboe's request for an expedited briefing schedule.

/s/ James P. Dombach

Dated: December 18, 2023

James P. Dombach
Davis Wright Tremaine LLP
1301 K St., N.W.
Suite 500 East
Washington, DC 20005
(202) 834-2080
jamesdombach@dwt.com

Counsel for OPRA

CERTIFICATE OF SERVICE

I, James Dombach, certify that on this day of December 18, 2023, 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 Dunbar
Wilmer Cutler Pickering Hale and Dorr LLP
2100 Pennsylvania Ave., NW
Washington, DC 20037
Kelly.dunbar@wilmerhale.com

By: /s/ James P. Dombach

James P. Dombach
Dated: December 18, 2023