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 OPPOSITION TO MOTION FOR EXPEDITED ENTRY OF A BRIEFING SCHEDULE

The Operating Committee of the Options Price Reporting Authority ("OPRA") respectfully submits this opposition to Cboe's motion for expedited entry of a briefing schedule.

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 below, 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.

I. Cboe's Petition is Motivated by its Own Financial Interests.

Cboe is attempting to upend OPRA's funding mechanism by permitting it to sell its data feed in a manner that has been prohibited for decades. As detailed below, the OPRA Plan's language requires a user receiving a streaming, real-time proprietary data product to also receive streaming, real-time data from OPRA. Cboe's interpretation, however, would allow it to have

OS Received 12/08/2023

undue market power by allowing it to sell its streaming data feed without a market data user having to request a comparative product through OPRA.

The Commission has historically declined to exercise discretion in reviewing Rule 608 petitions where the petition is motivated by the financial interests of a member of an NMS Plan. For instance, in *American Stock Exchange*, AMEX sought discretionary review of CTA action to exclude from the calculation of AMEX's annual share of CTA revenue transactions in a derivative product.[1] In declining the review, the Commission noted that the petition "concern[ed] individual financial interests, and not the broad objectives of the national market system."[2] The Commission stated that it was not "the arbiter of individual competitive interests . . . ."[3] Similarly, in *Boston Stock Exchange et al.*, the Commission declined to exercise discretion where the petitioning participants alleged that the Network Administrator failed to follow the directive of a majority vote of participants to deduct legal expenses incurred in connection with a settlement prior to allocating the settlement proceeds among the participants.[4] The Commission noted that the issue was an internal business dispute regarding the correct interpretation of the Plans, and as such, did not exercise its discretion. Similarly, and as detailed below, this matter involves a Plan interpretation where the petitioner is motivated by private financial interests rather than concerns over the proper operation of the national market system.

By way of background, OPRA (like most market data providers) offers two types of data streams: (1) a streaming, real-time data feed, and (2) a query-based system where data is provided only upon request. Why would a user utilize one over the other? A driving reason is

[1] See 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").
[2] Id. at 500.
[3] Id. at 499-500 (quoting Procedures and Requirements for National Market System Plans, Exchange Act Rel. No. 17580 (Feb. 26, 1981), 22 SEC Docket 195, 198 (footnote omitted)).
[4] See Exchange Act Release No. 58191 (July 18, 2008).

OS Received 12/08/2023

cost, where a streaming, real-time data feed generally will cost more than a query-based system. The other reason is functionality: a streaming, real-time data feed provides continuous input and updates regarding the options market, while a query-based system will only provides updates where queried by the market data user. Cboe's interpretation would allow a market data user to pay Cboe the higher fee for its streaming, real-time data feed while paying a much lower fee to OPRA for the query-based system. Given Cboe's unique position in the options space, such an interpretation would harm OPRA's funding mechanism and only serve Cboe's private financial interests.

Unlike in the equities space where most (if not all) listed equities trade on all exchanges, in the options space, some of the most widely-traded options trade exclusively on Cboe—in particular, VIX, SPX, and XSP. Because of the unique monopoly that Cboe has with respect to these high-volume options, if it were permitted to sell its streaming feed without a corresponding requirement to obtain the streaming OPRA feed, OPRA's funding would be significantly affected, disrupting its operation and future development. OPRA's decades-old prohibition on the sale of proprietary data products appears to acknowledge this concern, and the lifting of that restriction via the eventually codified exemption order was appropriately narrow.

Prior to amendments in 2001, OPRA was the exclusive provider of information regarding options quotes and transactions; OPRA members could not sell proprietary market data products. In 2001, the SEC approved amendments to the OPRA Plan that lifted that complete prohibition, and which were designed to codify prior exemptions provided to ISE and CBOE in 2000.[5] The approval order is terse in its description of the new language—it does not

[5] *See* Securities Exchange Act Release No. 44580 (July 20, 2001), 66 FR. 39218 (July 27, 2001) (SR-OPRA-2001-02).

OS Received 12/08/2023

discuss if or how OPRA's funding would be affected by the new language. That lack of detail is telling—had the approval order been designed to upend OPRA's funding mechanism, it would have (and should have) explained in detail why such an approach was consistent with Section 11A of the Exchange Act.

If the Commission exercised its discretion, it would only further exacerbate the problem that Cboe's interpretation has never been publicly noticed. Any final decision will not be subject to notice and comment or industry input, and presumably, Cboe will not be required to provide an explanation as to why its financial motivations outweigh the potential harm flowing from the disruption to OPRA's funding. If Cboe desires such a drastic change to OPRA's and the industry's operation, it should go through the proper venues: (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).

Through its petition, Cboe is attempting to exploit its monopoly power and take revenue from OPRA and put it into its own coffers. Because the adopted interpretation continues the status quo that has been in place for decades and one that ensures the continued funding of OPRA--thereby providing retail investors with continued access to a consolidated options market data feed—the Commission should not exercise its discretion to review Cboe's petition.

II. The SEC Should Not Exercise its Discretion Because the Adopted Interpretation is Correct

In addition to the fact that Cboe's petition is motivated by its private financial interests, the Commission should not exercise its discretion to review because the interpretation adopted by OPRA is correct. Granting review would waste scarce Commission and OPRA resources since any proceeding would come to the same conclusion.

OS Received 12/08/2023

To properly interpret the relevant provisions of the OPRA Plan, OPRA engaged an outside attorney to analyze the relevant language and give an informed opinion on the meaning of the relevant text. The result of that analysis was a memorandum provided to OPRA that was reviewed and approved during OPRA's quarterly meeting.[6] As reflected in the memo prepared for OPRA, the key term is "equivalent access" found within Section 5.2(c)(iii) of the OPRA Plan, which provides in relevant part:

> (iii) A Member may disseminate its Proprietary Information in pursuant to subparagraph (ii) of this paragraph (c) provided that:
>
> (A) such dissemination is limited to other Members and to persons who also have equivalent access to consolidated Options Information disseminated by OPRA for the same classes or series of options that are included in the Proprietary Information. For purposes of this clause (A), "consolidated Options Information" means consolidated Last Sale Reports combined with either consolidated Quotation Information or the BBO furnished by OPRA, and access to consolidated Options Information and access to Proprietary Information are deemed "equivalent" if both kinds of information are equally accessible on the same terminal or work station . . . .

As detailed in the memorandum and further discussed below, "equivalent access" must be interpreted to require a user receiving a streaming, real-time proprietary data product to also receive streaming, real-time data from OPRA.

As it has repeatedly done in past submissions, Cboe presents the plain language meaning of "access" in interpreting the "equivalent access" provision. It is important to note, however, that "access" is a term of art that is used both within the OPRA Plan as well as in market data generally (appearing also in the equity market data plans). Therefore, according to rules of statutory construction, the term of art should be interpreted in accordance with its technical sense within this specific field.[7]

[6] *See* Record Item No. 1.
[7] *See, e.g.*, *U.S. v. Cuomo*, 525 F.2d 1285 (5th Cir. 1976) ("The sense of a word that is commonly used as a term of art in a particular discipline is the relevant sense for purposes of statutory construction, where the statute being construed deals with that discipline.").

OS Received 12/08/2023

Importantly, the term “access” is frequently associated with the manner and type of data feed that a user receives. For instance, the OPRA Plan refers to both direct and indirect access, whereby direct access is data received directly from OPRA and indirect access is data received through a vendor. Additionally, in both the equity and options space, access fees are charged based on the type of data feed product being received. For instance, receipt of full data streams from both the equity and options market data plans can result in access fees, while the receipt of data in a manner that only allows the display of data does not result in access fees. For example, the OPRA fee schedule references the fact that a professional subscriber could be assessed an indirect access fee where they receive “a data feed transmission” from an OPRA vendor; a similar access fee is not charged to those receiving OPRA data on a usage basis. As a result, instead of interpreting “access” in accordance with its dictionary definition, it should be interpreted in the context of market data, being a reference to the manner and type of data feed being received. When combined with the term “equivalent,” the entire phrase should be interpreted to refer to a requirement that a user receives a data feed from OPRA that is equivalent to the data feed being received through a proprietary data product.

Those receiving streaming real-time data are receiving access to data in a manner substantially different from those receiving data through usage-based access. In particular, entities receiving streaming, real-time data receive the full set of data available from OPRA. In fact, the OPRA fee schedule reflects the fact that individuals receiving a streaming, real-time data feed would be charged the “Subscriber Indirect Access Fee” except for the fact that the data feed transmission is provided to a subscriber (i) that receives a data feed transmission on a single, stand-alone computer for the sole purpose of providing a single-screen display of OPRA Data for the subscriber's internal use, (ii) whose access and entitlement to OPRA Data received

OS Received 12/08/2023

via a data feed transmission is controlled by an authorized control service provider or by the vendor furnishing the data feed transmission, or (iii) that receives a data feed transmission solely for any Non-Display Use. On the other hand, entities taking advantage of the lower usage-based fees are not receiving that same level of access to the data, and as a result, there is no need for an explanation as to why such entities are not charged the access fee. Instead, each time a request is made, the request is sent to the vendor and the vendor responds with the requested information. As a result, receipt of streaming, real-time data is not equivalent to the receipt of data through query-based usage.

Further, the above differences highlight that receiving data on a usage basis is not equally accessible as receiving streaming real-time data on the same terminal or workstation, the standard referenced in the OPRA Plan as to when access is deemed equivalent. When receiving a streaming real-time data feed, the data is always available on a terminal or workstation, with the full data stream continually being provided to the user's system. On the other hand, usage-based access to data means that the user has to query to gain access to a specific piece of information at a given time.

Cboe's interpretation would essentially make the term "equivalent" redundant and unnecessary. According to rules of statutory construction, the interpretation of the term "equivalent access" should not be read as to make "equivalent" meaningless.[8] A subscriber has two means to "access" OPRA Plan's market data, either via the streaming, real-time data feed or through usage-based access. Had the OPRA Plan only required that a subscriber be able to either have access to the real-time streaming data feed or through usage-based access, then the

[8] *See, e.g.,* U.S. ex rel. Schweizer v. Oce N.V., 67 F.3d 1228 (D.C. Cir. 2012) (stating it is a "longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous.").

OS Received 12/08/2023

OPRA Plan could have simply used the term "access" rather than "equivalent access". In fact, the term "access" is used throughout the OPRA Plan to refer to someone who is receiving data from OPRA or a vendor.[9] Since the term "equivalent" was added, rules of statutory construction weigh in favor of supporting an interpretation that gives that term meaning, which in turn leads to interpretation that requires a person receiving a streaming, real-time proprietary data product to also receive streaming, real-time data from OPRA.

Finally, Cboe has suggested that ambiguity flowing from the 2001 approval order and OPRA Plan's text requires the filing of a plan amendment to impose a condition that all persons who use exchange proprietary data products must also take streaming real-time data from OPRA. However, it is a canon of statutory interpretation that, where an exception is ambiguous, the exception should be narrowly construed to preserve the original intent of the broader rule.[10] In this case, the original rule was the prohibition of any sale of a proprietary data product, and the exception expressed those circumstances where proprietary data product could be sold alongside OPRA Plan data. As a result, the ambiguity must be resolved in limiting the circumstances where proprietary data product could be sold rather than broadening the scope.

III. The Above Interpretation Comports with SEC Staff's Interpretation of "Equivalent Access"

During multiple calls with Division of Trading and Markets Staff, they expressed their viewpoint that the equivalent access provision would require the receipt of streaming, real-time data from OPRA alongside the receipt of a streaming, real-time proprietary data product. The

[9] *See, e.g.*, Section 5.4(d)(i) ("OPRA may impose information fees and/or facilities charges upon all persons who have access to Options Information . . . .")

[10] *See, e.g.*, *Maracich v. Spears*, 570 U.S. 48 (2013) ("An exception to a 'general statement of policy' is 'usually read ... narrowly in order to preserve the primary operation of the provision.'"); *C.I.R. v. Clark*, 489 U.S. 726 (1989) ("In construing provisions such as § 356, in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.").

OS Received 12/08/2023

plan amendment in 2001 was a codification of an exemption issued by the Division of Market Regulation (now the Division of Trading and Markets). As such, in effect, the Division of Trading and Markets Staff has provided an interpretation of the scope of the exemption that they granted to ISE and CBOE prior to the exemptions' codification in the OPRA Plan.

IV. Conclusion

Based on 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

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OS Received 12/08/2023

CERTIFICATE OF SERVICE

I, James Dombach, certify that on this day of December 8, 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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By: ___*/s/ James P. Dombach*___

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Dated: December 8, 2023

OS Received 12/08/2023