

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 99399 / January 19, 2024

Admin. Proc. File No. 3-21779

In the Matter of

CBOE BZX EXCHANGE, INC., CBOE EXCHANGE,
INC., CBOE C2 EXCHANGE, INC., and CBOE EDGX
EXCHANGE, INC.

ORDER DIRECTING FILING OF ADDITIONAL BRIEFS

On September 29, 2023, Cboe BZX Exchange, Inc., Cboe Exchange, Inc., Cboe C2 Exchange, Inc., and Cboe EDGX Exchange, Inc. (collectively, “Cboe”), filed an application with the Securities and Exchange Commission for review of action taken by Options Price Reporting Authority, LLC (“OPRA”), pursuant to Rule 608(d)(1) of Regulation NMS of the Securities Exchange Act of 1934. We believe that it would aid the Commission’s consideration of this matter for the parties to file briefs on the issues specified in this order.

Through its Rule 608(d)(1) application, Cboe seeks to challenge OPRA’s interpretation of Section 5.2(c)(iii) of OPRA’s Limited Liability Company Agreement (“OPRA Plan”). Section 5.2(c)(iii) provides, in relevant part, that an OPRA member may disseminate information pertaining to quotations and transactions in its market (“proprietary data”) only to other members and persons who have “equivalent access” to “consolidated Options Information disseminated by OPRA.” On September 6, 2023, a majority of OPRA’s management committee voted to interpret the phrase “equivalent access” in Section 5.2(c)(iii) to require that non-OPRA-member users receiving a streaming, real-time proprietary data product also receive streaming, real-time data from OPRA. Cboe voted to reject that interpretation, instead asserting that the “equivalent access” requirement is satisfied if such a user has only usage-based access to OPRA consolidated Options Information. According to the minutes of the September 6 meeting, a “sub-committee will be formed to draft a policy regarding equivalent access,” and the “draft policy approved by the Equivalent Access Subcommittee would be presented to the full Committee for discussion, approval and then filing” with the Commission.¹

¹ On November 8, 2023, Cboe submitted to the Commission’s Office of the Secretary a proposed amendment to Section 5.2(c)(iii) of the OPRA Plan, pursuant to Rule 608(a)(1). Cboe’s proposed amendment would provide that usage-based access to OPRA consolidated

(continued . . .)

I.

As a threshold matter, we note that Rule 608(d) provides that “[t]he Commission may, in its discretion, entertain appeals in connection with the implementation or operation of any effective national market system plan.”² The Commission has held that review under Rule 608(d) is discretionary.³ We thus believe that the Commission would benefit from briefing on whether the Commission should exercise this discretion to consider Cboe’s application for review.

In determining whether to exercise this discretion, the Commission has previously considered whether the application “implicate[s] any of the broad objectives of the national market system—the public interest, the protection of investors, or the maintenance of fair and orderly markets.”⁴ The Commission has also considered whether the application challenges an action that may undermine the “establishment of a national market system” or “competition in the securities industry,” as opposed to an “ordinary commercial dispute,” “individual financial interests,”⁵ or an “internal business controversy.”⁶ And the Commission has considered whether resolution of the application might entail “fundamental structural and regulatory changes to the national market system,” such that a review proceeding may not provide the “wide-based participation needed to consider this range of policy matters.”⁷ Finally, the Commission has examined whether the application presents a matter ripe for resolution on an adequately

Options Information satisfies the “equivalent access” standard. The Commission published notice of the filing on January 16, 2024. *See Options Price Reporting Authority; Notice of Filing of Proposed Amendment to Modify Section 5.2(c)(iii) of the OPRA Plan Relating to Dissemination of Exchange Proprietary Data*, Exchange Act Release No. 99345 (Jan. 16, 2024). This order expresses no view as to the determinations that the Commission may make under Rule 608(b) in connection with Cboe’s proposal or any proposal that OPRA may submit in view of the Equivalent Access Subcommittee’s work.

² 17 C.F.R. § 242.608(d).

³ *See Boston Stock Exch., Inc.*, Exchange Act Release No. 58191, 2008 WL 2783572, at *1 & n.5, *5 & n.28 (July 18, 2008); *Nat’l Ass’n Secs. Dealers, Inc.*, Exchange Act Release No. 48573, 2003 WL 22250397, at *3 (Sept. 30, 2003) (hereinafter “NASD”) (so holding with respect to Rule 608(d)’s predecessor, Rule 11Aa3-2(e), which contained materially identical language); *Am. Stock Exch., Inc.*, Exchange Act Release No. 42312, 2000 WL 3804, at *3–4 (Jan. 4, 2000) (same).

⁴ *Am. Stock Exch.*, 2000 WL 3804, at *4; *see also Boston Stock Exch.*, 2008 WL 2783572, at *5 (noting the Commission’s interest in “fair administration” and “in policing against self-dealing” to ensure that a national market system plan is “operated in furtherance of the statutory objectives of the national market system”).

⁵ *Am. Stock Exch.*, 2000 WL 3804, at *4.

⁶ *Boston Stock Exch.*, 2008 WL 2783572, at *6.

⁷ *NASD*, 2003 WL 22250397, at *3 (internal quotation marks omitted).

developed record,⁸ as well as the alternative remedies that would be available in the event that the Commission declined review.⁹

The preceding discussion, although neither controlling nor limiting the Commission's discretion, illustrates the range of considerations that the Commission has previously found relevant when deciding whether to exercise its discretion to entertain applications for review under Rule 608(d).

II.

We also believe that the Commission would benefit from briefing on the procedures that should govern this appeal in the event that review is granted.¹⁰ Rule 608(d)(3) directs the Commission to make its findings after notice and opportunity for hearing and upon consideration of other data, views, and arguments that it deems relevant.¹¹ But although Rule 608(d)(3) provides for a hearing, it does not specify the nature of that hearing or the applicable procedural rules.

The Commission's Rules of Practice do not specifically address the procedure in Rule 608(d) proceedings either.¹² Consequently, among other things, it is unclear whether (a) such a proceeding should be conducted in a manner similar to an appeal of a prohibition or limitation of access by a self-regulatory organization action under Exchange Act Section 19(f) and Rules of Practice 420 and 421;¹³ (b) evidence should be taken (and, if so, in what manner); (c) interested entities that may not be parties should be invited to participate in the proceeding; (d) the

⁸ See *Boston Stock Exch.*, 2008 WL 2783572, at *6 (noting that the inquiry was "limited by the record"); *NASD*, 2003 WL 22250397, at *3 (noting that proposal was "a draft," "incomplete," and that a "variety of provisions" were potentially under development).

⁹ See *Cincinnati Stock Exch.*, Exchange Act Release No. 43316, 2000 WL 1363274, at *1 n.5 (Sept. 21, 2000); *Am. Stock Exch.*, 2000 WL 3804, at *5 & n.36.

¹⁰ This order expresses no view regarding whether the Commission will exercise its discretion to entertain the review proceeding or the merits of Cboe's contentions.

¹¹ 17 C.F.R. § 242.608(d)(3).

¹² See Rule of Practice 101(a)(9)(vii), 17 C.F.R. § 201.101(a)(9)(vii) (stating that an application for review under Rule 608(d) initiates a "proceeding" generally within the scope of the Rules of Practice); Rule of Practice 202(a), 17 C.F.R. § 201.202(a) (providing for motions to "specify the procedures necessary or appropriate for the proceeding").

¹³ 15 U.S.C. § 78s(f); 17 C.F.R. §§ 201.420, .421.

Commission should solicit public comment by notice in the Federal Register or otherwise; or (e) some other procedure would be appropriate.¹⁴

* * *

Under the circumstances, we consider it appropriate for Cboe and OPRA to file briefs addressing the above issues. In doing so, we believe the Commission would be aided by the parties in particular addressing:

- (1) whether the Commission should exercise its discretion to entertain Cboe's application for review under Rule 608(d), particularly in light of the procedures under Rule 608(b) for Commission consideration of a proposed amendment to the OPRA Plan;¹⁵
- (2) what procedural rules are appropriate to govern any proceedings in the event that the Commission grants review; and
- (3) the remedies available, if any, to the parties in the event that the Commission declines to review this matter.

We further invite any other interested entity, including our Division of Trading and Markets,¹⁶ to address any or all of the issues set forth above.

Accordingly, it is ORDERED that briefs limited to addressing the above-listed issues shall be filed as follows: Cboe shall file its opening brief by February 23, 2024; OPRA shall file its response brief by March 29, 2024; any other interested entity, including the Division of Trading and Markets, may file an *amicus* brief addressing any or all of the issues by April 12, 2024; and Cboe and OPRA may file simultaneous reply briefs by April 26, 2024. Opening,

¹⁴ See, e.g., *Cincinnati Stock Exch.*, 2000 WL 1363274, at *3 n.19 (noting variety of procedures that the Commission has employed in proceedings under Exchange Act Section 11A(b)(5)).

¹⁵ See *supra* note 1.

¹⁶ See, e.g., *NASD*, 2003 WL 22250397, at *1 (noting that Division of Market Regulation filed an *amicus* brief); *Cincinnati Stock Exch.*, 2000 WL 1363274, at *1 (same); see also *Nasdaq Stock Market, LLC*, Exchange Act Release No. 55909, 2007 WL 1725775, at *8 (June 14, 2007) (similar).

response, and *amicus* briefs shall each be limited to 7,000 words, and reply briefs, if any, shall each be limited to 3,000 words.¹⁷

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Vanessa A. Countryman
Secretary

¹⁷ The Commission believes that the briefing schedule set forth in this order provides an appropriate framework for resolving the issues implicated by Cboe's application for review. We therefore deny Cboe's motion for expedited entry of a briefing schedule.