

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98514; File No. SR-OPRA-2023-01)

September 25, 2023

Joint Industry Plan; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Amendment to Modify the Options Price Reporting Authority's Fee Schedule Regarding Caps on the Amounts of Certain Port Fees

I. INTRODUCTION

On July 14, 2023, the Options Price Reporting Authority (“OPRA”), pursuant to Section 11A of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 608 of Regulation National Market System (“Regulation NMS”) thereunder,² filed with the Securities and Exchange Commission (“Commission”) a proposed amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (“OPRA Plan”).³ The proposed OPRA Plan amendment (“Proposed Amendment”) would amend the OPRA Fee Schedule to reflect the applicable monthly fee caps on certain connectivity ports that are used to access OPRA data. The Proposed Amendment was published for comment in the Federal Register on August 2, 2023.⁴ The Commission has not received any comments on the Proposed Amendment.

This order institutes proceedings, under Rule 608(b)(2)(i) of Regulation NMS,⁵ to determine whether to approve or disapprove the Proposed Amendment or to approve the

¹ 15 U.S.C 78k-1.

² 17 CFR 242.608.

³ The OPRA Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 608 thereunder. See Securities Exchange Act Release No. 17638 (Mar. 18, 1981), 22 S.E.C. Docket 484 (Mar. 31, 1981). The full text of the OPRA Plan and a list of its participants are available at <https://www.opraplan.com/>. The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the participant exchanges.

⁴ See Securities Exchange Act Release No. 98012 (July 27, 2023), 88 FR 50939 (“Notice”).

⁵ 17 CFR 242.608(b)(2)(i).

Proposed Amendment with any changes or subject to any conditions the Commission deems necessary or appropriate after considering public comment.

II. SUMMARY OF THE PROPOSED AMENDMENT⁶

OPRA states that the Proposed Amendment is designed to amend the OPRA Fee Schedule to provide public notice that OPRA negotiated terms in the 2021 Processor Services Agreement (the “2021 Processor Agreement”) between OPRA and the Securities Industry Automation Corporation (“SIAC”) that impose caps on certain port fees that can be charged per month when SIAC, either directly or through a third party, provides direct access to OPRA data to any person authorized by OPRA to receive direct access to OPRA data.⁷ OPRA further states that, under the 2021 Processor Agreement, SIAC is OPRA’s “processor,” meaning that SIAC gathers the last sale and quote information from each of the OPRA members, consolidates that information, and disseminates the consolidated OPRA data.⁸ According to OPRA, as the processor, SIAC works directly with OPRA members and data vendors to provide connectivity to SIAC, and connectivity to SIAC is currently provided by an affiliate of SIAC, the ICE Global Network (“IGN”), which both sets and charges the port fees associated with that connectivity.⁹

OPRA states that recipients of OPRA data can access that data using a 10 gigabit (“Gb”), 40 Gb, or 100 Gb network connection. OPRA further states that it has contractually capped the connectivity or “port” fees that SIAC, or any third party utilized by SIAC, may charge to provide direct connectivity to OPRA data using a 10 Gb or 40 Gb connection and that it has “the right to

⁶ The full text of the Proposed Amendment appears as Attachment A to the Notice. See Notice, supra note 4, 88 FR at 50941–42.

⁷ See id. at 50939.

⁸ See id.

⁹ See id.

approve a cap on port fees that could be charged for ... higher capacity ports” in the event that such higher capacity ports become available in the future.¹⁰

OPRA states that the negotiated port fee caps of \$16,000 per month per 10 Gb port and \$20,500 per month per 40 Gb port were established as part of the 2015 Processor Agreement between OPRA and SIAC.¹¹ OPRA further states that these caps were retained in the 2021 Processor Agreement,¹² and that OPRA’s Management Committee subsequently approved the \$30,000 per month port fee cap with respect to the 100 Gb port in September 2021 in accordance with the terms of the 2021 Processor Agreement.¹³

OPRA states that it does not provide access ports, does not itself charge any port fees, does not collect any fees on behalf of OPRA members in connection with access to SIAC, and does not receive any portion of port fees charged by other entities.¹⁴ OPRA further states that it does not believe the caps that it negotiated with SIAC concerning “the amount of port fees that can be charged either (1) establishes or changes a fee or charge collected on behalf of the members of the OPRA Plan in connection with access to, or use of, any OPRA facilities or (2) represents a fee or charge imposed by OPRA as contemplated by Rule 608(a)(5)(ii) of Regulation NMS.”¹⁵ OPRA states that it submitted the Proposed Amendment to “provide notice

¹⁰ See id.

¹¹ See id.

¹² See id. at 50939–40 (stating OPRA “used the negotiation process as an opportunity to ensure that SIAC’s ability to increase the amount of port fees would be capped during the term of the 2015 Processor Agreement for all OPRA data recipients, including OPRA members, who were authorized to receive direct access to OPRA data.”).

¹³ See id.

¹⁴ See id. at 50939.

¹⁵ Id.

of the contractual fee caps it negotiated with SIAC” and because Commission staff requested that it do so.¹⁶

III. PROCEEDINGS TO DETERMINE WHETHER TO APPROVE OR DISAPPROVE THE PROPOSED AMENDMENT

The Commission is instituting proceedings pursuant to Rule 608(b)(2)(i) of Regulation NMS,¹⁷ and Rule 700 of the Commission’s Rules of Practice,¹⁸ to determine whether to approve or disapprove the Proposed Amendment or to approve the Proposed Amendment with any changes or subject to any conditions the Commission deems necessary or appropriate after considering public comment. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the Proposed Amendment to inform the Commission’s analysis.

Rule 608(b)(2) of Regulation NMS provides that the Commission “shall approve a ... proposed amendment to an effective national market system plan, with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such ... amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.”¹⁹ Rule 608(b)(2) further provides that the Commission shall disapprove a proposed amendment if it does not make such a finding.²⁰ Pursuant to Rule 608(b)(2)(i) of Regulation

¹⁶ Id.

¹⁷ 17 CFR 242.608(b)(2)(i).

¹⁸ 17 CFR 201.700.

¹⁹ 17 CFR 242.608(b)(2).

²⁰ See id.

NMS,²¹ the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Proposed Amendment is consistent with Rule 608 of Regulation NMS. Specifically, whether the Proposed Amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.²²
- Whether, consistent with Rule 603(a) and 614(d)(3) of Regulation NMS, the Proposed Amendment provides for the distribution of information with respect to quotations for and transactions in NMS stocks on terms that are fair and reasonable and not unreasonably discriminatory.²³
- Whether the Proposed Amendment is consistent with Rule 608(a)(4)(C) of Regulation NMS requiring every amendment to a national market system plan be accompanied by, among other things, an analysis of the impact on competition of implementation of the amendment.²⁴
- Whether the Proposed Amendment is consistent with Rule 608(a)(5) of Regulation NMS requiring every amendment to a national market system plan include a description of the manner in which any facility contemplated by the plan or amendment will be operated and further requiring that any such description include, to the extent applicable, the method by which any fees or charges collected on behalf

²¹ 17 CFR 242.608(b)(2)(i). See also Commission Rule of Practice 700(b)(2), 17 CFR 201.700(b)(2).

²² See 17 CFR 242.608(b)(2).

²³ See 17 CFR 242.603(a), 614(d)(3).

²⁴ See 17 CFR 242.608(a)(4)(C).

- of all of the sponsors and/or participants in connection with access to, or use of, any facility contemplated by the plan or amendment will be determined and imposed (including any provision for distribution of any net proceeds from such fees or charges to the sponsors and/or participants) and the amount of such fees or charge.²⁵
- Whether modifications to the Proposed Amendment, or conditions to its approval, would be required to make the Proposed Amendment necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.²⁶
 - Whether the Proposed Amendment is consistent with Congress's finding, in Section 11A(1)(C)(iii) of the Act, that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to ensure “the availability to brokers, dealers, and investors or information with respect to quotations for and transactions in securities.”²⁷
 - Whether, consistent with the purposes of Section 11A(c)(1)(B) of the Act,²⁸ the Proposed Amendment's provisions are drafted to support the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in NMS securities, and the fairness and usefulness of the form and content of such information.

²⁵ See 17 CFR 242.608(a)(5).

²⁶ See CFR 242.608(b)(2).

²⁷ 15 U.S.C. 78k-1(a)(1)(C)(iii).

²⁸ 15 U.S.C. 78k-1(c)(1)(B).

Under the Commission’s Rules of Practice, the “burden to demonstrate that a NMS plan filing is consistent with the Exchange Act and the rules and regulations issued thereunder ... is on the plan participants that filed the NMS plan filing.”²⁹ The description of the NMS plan filing, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding, and “[a] mere assertion that the NMS plan filing is consistent with those requirements is not sufficient.”³⁰ Any failure of the plan participants that filed the NMS plan filing to provide such detail and specificity may result in the Commission not having a sufficient basis to make an affirmative finding that the NMS plan filing is consistent with the Act and the applicable rules and regulations thereunder.³¹

IV. COMMISSION’S SOLICITATION OF COMMENTS

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other comments or concerns they may have regarding the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 11A or any other provision of the Act, or the rules and regulations thereunder, and the Commission asks that commenters address the sufficiency and merit of OPRA’s statements in support of the Proposed Amendment.³²

Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will

²⁹ 17 CFR 201.700(b)(3)(ii).

³⁰ Id.

³¹ See id.

³² See Notice, supra note 4, 88 FR at 30989.

consider, pursuant to Rule 608(b)(2)(i) of Regulation NMS,³³ any request for an opportunity to make an oral presentation.³⁴

Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-OPRA-2023-01 on the subject line.

Paper Comments:

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-OPRA-2023-01. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and

³³ 17 CFR 242.608(b)(2)(i).

³⁴ Rule 700(c)(2) of the Commission's Rules of Practice provides that "[t]he Commission, in its sole discretion, may determine whether any issues relevant to approval or disapproval would be facilitated by the opportunity for an oral presentation of views." 17 CFR 201.700(c)(2).

3 p.m. Copies of the filing also will be available for inspection and copying at the Participants' principal offices. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-OPRA-2023-01 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁵

Sherry R. Haywood,

Assistant Secretary.

³⁵ 17 CFR 200.30-3(a)(85).