

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-67210; File No. SR-OPRA-2012-03)

June 15, 2012

Options Price Reporting Authority; Notice of Filing and Immediate Effectiveness of Proposed Amendment to the Plan to Revise the Definition of the Term “Nonprofessional”

Pursuant to Section 11A of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 608 thereunder,² notice is hereby given that on May 31, 2012, the Options Price Reporting Authority (“OPRA”) submitted to the Securities and Exchange Commission (“Commission”) an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (“OPRA Plan”).³ The proposed amendment would revise OPRA’s definition of the term “Nonprofessional.” The Commission is publishing this notice to solicit comments from interested persons on the proposed OPRA Plan amendment.

I. Description and Purpose of the Plan Amendment

The purpose of the proposed amendment is to revise OPRA’s definition of the term “Nonprofessional.”

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 (formerly Rule 11Aa3-2). See Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.C. Docket 484 (March 31, 1981). The full text of the OPRA Plan is available at <http://www.opradata.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. The ten participants to the OPRA Plan are BATS Exchange, Inc., BOX Options Exchange, LLC, Chicago Board Options Exchange, Incorporated, C2 Options Exchange, Incorporated, International Securities Exchange, LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX, Inc., NASDAQ Stock Market LLC, NYSE Amex, LLC n/k/a NYSE MKT LLC, and NYSE Arca, Inc.

A person may become an OPRA “Subscriber” in one of two ways.⁴ The first way is that the person may sign a “Professional Subscriber Agreement” directly with OPRA. In this case, the person pays fees directly to OPRA on the basis of the number of the person’s “devices” and/or “UserIDs.”

The second way is that the person may enter into a “Subscriber Agreement,” not directly with OPRA, but with an OPRA “Vendor” – an entity that has entered into a “Vendor Agreement” with OPRA authorizing the entity to redistribute OPRA Data to third persons. In this case, OPRA collects fees from the Vendor with respect to the receipt of the OPRA Data by the person entering into the Subscriber Agreement. If the person qualifies as a “Nonprofessional Subscriber,” OPRA caps the fee that it charges the Vendor, and the fees that the person is required to pay to the Vendor may be less than they would be if the person is classified as a “Professional Subscriber.”⁵

OPRA’s current definition of the term “Nonprofessional” is set out in an “Addendum for Nonprofessionals” that is attached to its Electronic Form of Subscriber Agreement and its Hardcopy Form of Subscriber Agreement. These two forms, in turn, are Attachments B-1 and B-2 to OPRA’s form of Vendor Agreement.⁶

⁴ OPRA defines a “Subscriber,” in general, as an entity or person that receives OPRA Data for the person’s own use.

⁵ OPRA’s Fee Schedule provides that a Vendor may determine the fee that it pays with respect to its distribution of current OPRA data to a Nonprofessional Subscriber in one of two ways: either the Vendor may pay OPRA’s flat monthly Nonprofessional Subscriber Fee (currently \$1.25/month), or the Vendor may count the Nonprofessional Subscriber’s queries for OPRA data and pay Usage-based Vendor Fees based on the actual usage of OPRA data by the Nonprofessional Subscriber, subject to a cap that OPRA has always set at the amount of the flat Nonprofessional Subscriber Fee.

⁶ These forms are posted on OPRA’s website, www.opradata.com. OPRA most recently amended them in File No. SR-OPRA-2008-02; Release No. 34-58434 (August 27, 2008).

One element of OPRA’s current definition of the term “Nonprofessional” specifies that to qualify as a “Nonprofessional” a person must not be “a securities broker-dealer, investment advisor, futures commission merchant, commodities introducing broker or commodity trading advisor, member of a securities exchange or association or futures contract market, or an owner, partner, or associated person of any of the foregoing.”⁷ For persons employed by securities broker-dealers, OPRA has interpreted the term “associated person” in this language with reference to the definition of the term “associated person of a broker or dealer” in Section 3(a)(18) of the Securities Exchange Act of 1934 (the “Act”).⁸ That definition includes within its scope “any employee” of a broker or dealer, and accordingly employees of broker/dealers have not been eligible to be Nonprofessionals.

Two inconsistencies created by this language have been brought to OPRA’s attention. First, OPRA’s language on this point is different from the counterpart language in the definition of “Nonprofessional” used by the Consolidated Tape Association (“CTA”) and the “Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis” (“Nasdaq/UTP Plan”). CTA and the Nasdaq/UTP Plan define the term “Nonprofessional” substantially identically, and by reference to whether the person seeking to qualify as a Nonprofessional is required to register in some capacity, not by reference

⁷ See Paragraph 1(c) in each Addendum for Nonprofessionals (emphasis added).

⁸ The complete definition of the term “associated person” in the Act is: “The term “person associated with a broker or dealer” or “associated person of a broker or dealer” means any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer, except that any person associated with a broker or dealer whose functions are solely clerical or ministerial shall not be included in the meaning of such term for purposes of section 15(b) of this title (other than paragraph (6) thereof).” (Emphasis added.)

to whether the person is an associated person of an entity or person that is required to register in some capacity.⁹ Second, because the definition of the term “associated person” is defined differently in the commodity futures industry, a person who is employed by a commodity futures merchant (subject to regulation under the Commodity Exchange Act) may be able to qualify as a Nonprofessional under the language of the current OPRA definition even though a person who is employed by a securities broker to perform identical functions cannot.¹⁰

⁹ The term “Nonprofessional Subscriber” is defined by CTA as follows:

“Nonprofessional Subscriber” refers to any natural person who receives market data solely for his/her personal, non-business use and who is not a Securities Professional, meaning that the person is:

(a) not registered or qualified with the Securities and Exchange Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange/association, or any commodities/futures contract market/association

(b) not engaged as an “investment adviser,” as that term is defined in Section 202(a)(11) of the Investment Advisers Act of 1940 (whether or not registered or qualified under that Act); and

(c) not employed by a bank or other organization exempt from registration under Federal and/or state securities laws to perform functions that would require him/hr to be so registered or qualified if he/she were to perform such functions for an organization not so exempt.

See the CTA “Nonprofessional Subscriber Policy,” available at <http://www.nyxdata.com/Docs/Market-Data/Policies>.

¹⁰ For example, the term “Associated Person” is defined in the Regulations of the Commodity Futures Trading Commission (the “CFTC”) with respect to a futures commission merchant as follows:

(aa) Associated person. This term means any natural person who is associated in any of the following capacities with:

(1) A futures commission merchant as a partner, officer, or employee (or any natural person occupying a similar status or performing similar functions), in any capacity which involves (i) the solicitation or acceptance of customers' or option customers' orders (other than in a

In order to eliminate these inconsistencies, OPRA proposes to replace paragraphs 1(c) and 1(d) of each Addendum for Nonprofessionals with a new paragraph 1(c) that tracks the counterpart language used by CTA and the UTP/Nasdaq Plan. In essence the revised language will allow a person who is not himself or herself registered in some capacity with the Commission or the CFTC, but who is employed by an entity that is so registered, to qualify as a “Nonprofessional” for purposes of the person’s personal, non-business-related, investment activities. OPRA believes that the changes that it is proposing in its definition of the term “Nonprofessional” will add clarity to the definition and more closely align the language of the definition with the definitions used by CTA and the UTP/Nasdaq Plan.

OPRA believes that, in the vast majority of cases, its definition of the term “Nonprofessional” and those of CTA and the UTP/Nasdaq Plan have always classified Subscribers as Professionals or Nonprofessionals consistently. OPRA believes that revising its definition in the manner described in this filing will reduce the small subset of cases in which its definition and those of CTA and the UTP/Nasdaq Plan generate different results.

The text of the proposed amendment to the OPRA Plan is available at OPRA, the Commission’s Public Reference Room, <http://opradata.com>, and on the Commission’s website at www.sec.gov.

II. Implementation of the OPRA Plan Amendment

OPRA is proposing to begin to permit Vendors to use revised versions of its Electronic Form of Subscriber Agreement and its Hardcopy Form of Subscriber Agreement as soon as this

clerical capacity) or (ii) the supervision of any person or persons so engaged[.]

17 CFR 1.3(aa). The definition defines the term “associated person” in a similar manner for natural persons associated with other entities that are subject to regulation under the Commodity Exchange Act.

filing has been approved by the Commission in accordance with paragraph (b)(1) of Rule 608 of Regulation NMS under the Securities Exchange Act of 1934. OPRA will send notice to Vendors advising them of the change and informing them that, if they believe that they have Subscribers who can be classified as Nonprofessionals under the revised definition, they may reclassify them after the Subscribers have agreed to a new Subscriber Agreement that includes a revised Addendum for Nonprofessionals. The change in the definition will not require Vendors to take any action with respect to their existing populations of Nonprofessionals, since all persons who qualify as Nonprofessionals under OPRA's current definition will continue to qualify under the revised definition.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed OPRA Plan amendment is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-OPRA-2012-03 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-OPRA-2012-03. This file number should be included on the subject line if e-mail 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 (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed plan amendment that are filed with the Commission, and all written communications relating to the proposed plan amendment 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 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of OPRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-OPRA-2012-03 and should be submitted on or before [insert 21 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Kevin M. O'Neill
Deputy Secretary

¹¹ 17 CFR 200.30-3(a)(29).