

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-67589; File No. SR-OPRA-2012-03)

August 2, 2012

Options Price Reporting Authority; Order Approving an Amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information to Revise the Definition of the Term “Nonprofessional”

I. Introduction

On May 31, 2012, the Options Price Reporting Authority (“OPRA”) submitted to the Securities and Exchange Commission (“Commission”), pursuant to Section 11A of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 608 thereunder,² an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (“OPRA Plan”).³ The proposed OPRA Plan amendment would revise OPRA’s definition of the term “Nonprofessional.” The proposed OPRA Plan amendment was published for comment in the Federal Register on June 22, 2012.⁴ The Commission received no comment letters in response to the Notice.

This order approves the proposed OPRA Plan amendment.

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 (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 LLC, NASDAQ Stock Market LLC, NYSE Amex, LLC n/k/a NYSE MKT LLC, and NYSE Arca, Inc.

⁴ See Securities Exchange Act Release No. 67210 (June 15, 2012), 77 FR 37720 (“Notice”).

II. Description of the Proposal

The purpose of the proposed amendment is to revise OPRA's definition of the term "Nonprofessional."⁵

A person may become an OPRA "Subscriber" in one of two ways.⁶ 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."

Under OPRA's current definition, 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

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 (collectively, "Addenda"). These two forms, in turn, are Attachments B-1 and B-2 to OPRA's form of Vendor Agreement. See www.opradata.com.

⁶ OPRA defines a "Subscriber," in general, as an entity or person that receives OPRA Data for the person's own use.

foregoing.”⁷ For persons employed by securities broker-dealers, OPRA has interpreted the term “associated person” by reference to the definition of the term “associated person of a broker or dealer” in Section 3(a)(18) of the Act.⁸ According to OPRA, that definition includes “any employee” of a broker or dealer, and accordingly employees of broker-dealers have not been eligible to be treated as Nonprofessionals.

According to OPRA, two inconsistencies result from this language. First, OPRA’s language on this point differs from 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”). The 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 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

⁷ See Addenda, ¶ 1(c), supra note 5.

⁸ Section 3(a)(18) of the Act provides as follows: “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.)

⁹ See the CTA “Nonprofessional Subscriber Policy,” available at <http://www.nyxdata.com/Docs/Market-Data/Policies>. See also Notice, supra, note 4 at 37721, n.9.

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

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 language used by the CTA and the UTP/Nasdaq Plan. The revised definition would 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. According to OPRA, the changes that it is proposing in its definition of the term “Nonprofessional” will add clarity to the definition and more closely align the OPRA Plan definition with the definitions used by the CTA and the UTP/Nasdaq Plan.¹¹

III. Discussion

After careful review, the Commission finds that the proposed OPRA Plan amendment is consistent with the requirements of the Act and the rules and regulations thereunder.¹² Specifically, the Commission finds that the proposed OPRA Plan amendment is consistent with

¹⁰ See Notice, supra, note 4 at 37721, n.10.

¹¹ According to OPRA, in the vast majority of cases, its definition of the term “Nonprofessional” and those of the 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 the CTA and the UTP/Nasdaq Plan generate different results.

¹² In approving this proposed OPRA Plan Amendment, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Section 11A of the Act¹³ and Rule 608 thereunder¹⁴ in that it is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, and to remove impediments to, and perfect the mechanism of, a national market system. The Commission notes that OPRA’s proposed changes to the definition of the term “Nonprofessional” are designed to add clarity to the definition and eliminate any inconsistencies between OPRA’s definition and the definitions used by the CTA and the UTP/Nasdaq Plan. The revised language would allow a person who is not registered in some capacity with the Commission or the CFTC, but who is employed by an entity that is required to so register to qualify as a “Nonprofessional” and therefore gain access to OPRA data at a potentially reduced cost. Accordingly, the Commission believes that the proposal may increase certain market participant’s ability to access OPRA data on a timely basis. Therefore, the Commission believes that OPRA’s proposal is consistent with Section 11A of the Act¹⁵ and Rule 608 thereunder.¹⁶

¹³ 15 U.S.C. 78k-1.

¹⁴ 17 CFR 242.608.

¹⁵ 15 U.S.C. 78k-1.

¹⁶ 17 CFR 242.608.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 11A of the Act,¹⁷ and Rule 608 thereunder,¹⁸ that the proposed OPRA Plan amendment (SR-OPRA-2012-03) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Kevin M. O'Neill
Deputy Secretary

¹⁷ 15 U.S.C. 78k-1.

¹⁸ 17 CFR 242.608.

¹⁹ 17 CFR 200.30-3(a)(29).