



Greg Ferrari
Vice President
151 WEST 42ND STREET
NEW YORK, NY 10036

February 12, 2024

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F. Street NE.
Washington, DC 20549

Re: Modification to Section 5.2(c)(iii) of the OPRA Plan Relating to Dissemination of Exchange Proprietary Data Information, File No. 4-820

Dear Ms. Countryman:

The Nasdaq Stock Market LLC, Nasdaq PHLX LLC, Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq GEMX, LLC, and Nasdaq MRX, LLC markets (collectively, “Nasdaq”) respectfully seek to comment on a recently filed amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (“OPRA Plan”)¹ by the Cboe BZX Exchange, Inc., Cboe Exchange, Inc., Cboe C2 Exchange, Inc. and Cboe EDGX Exchange, Inc. (collectively, “Cboe”).

Nasdaq objects to Cboe’s proposed amendment to the OPRA Plan (hereinafter “Plan Amendment”) and requests that the Securities and Exchange Commission (“Commission”) disapprove the Plan Amendment on the grounds that the Plan Amendment does not comply with Section 10.3 of the OPRA Plan and does not represent the action of self-regulatory organizations acting jointly with respect to matters as to which they share authority in planning, developing, operating, or regulating a national market system.

Cboe’s Plan Amendment Does Not Comply with the Rules Governing OPRA Plan Amendments

While Cboe filed this Plan Amendment pursuant to Rule 608(a)(1) under Regulation

¹ 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 SEC. 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.

NMS,² the Plan Amendment did not receive the affirmative vote of all of the members of the OPRA Plan pursuant to Section 10.3 of the OPRA Plan. Additionally, Rule 608(c) under Regulation NMS provides that, “Each self-regulatory organization shall comply with the terms of any effective national market system plan of which it is a sponsor or a participant. Each self-regulatory organization also shall, absent reasonable justification or excuse, enforce compliance with any such plan by its members and persons associated with its members.”³ By failing to obtain the affirmative vote of all OPRA Members pursuant to the OPRA Plan, Cboe’s submission of the Plan Amendment violated Rule 608(c).

Congress directed self-regulatory organizations to act **jointly** with respect to matters as to which they share authority in planning, developing, operating, or regulating a national market system.⁴ Rule 608(a)(1) and the OPRA Plan specify the mechanism for that joint action. Cboe did not comply with that specified mechanism.

As Cboe itself notes, all OPRA Members not affiliated with Cboe disagreed with Cboe’s interpretation of Section 5.2(c)(iii) of the OPRA Plan and rejected the identical Plan Amendment.⁵ Nonetheless, Cboe moved forward with this Plan Amendment pursuant to Rule 608(a)(1), claiming that the proposed Plan Amendment is simply a clarification.⁶

Cboe’s reading of Rule 608(a)(1)—that it alone can move to amend the OPRA Plan without regard to the views of other OPRA members—is nonsensical, contrary to Rule 608 as a whole, and, if accepted by the Commission, would undermine the ability of all national market system plans to govern themselves. Cboe is contending, in effect, that any two SROs disappointed in the outcome in any NMS plan deliberations should be able to file their proposal with the Commission and rehash the same debate in a different forum. This will inject uncertainty in all NMS plan operations, and unnecessarily complicate the plan amendment process.

The OPRA Plan establishes a clear process by which to amend. Cboe did not meet the requirements of that process because the Plan Amendment did not receive the affirmative vote of

² 17 CFR 242.608(a)(1). Rule 608(a)(1) provides that, “Any two or more self-regulatory organizations, acting jointly, . . . may propose an amendment to an effective national market system plan (“proposed amendment”) by submitting the text of the . . . amendment to the Commission by email, together with a statement of the purpose of such . . . amendment and, to the extent applicable, the documents and information required by paragraphs (a)(4) and (5) of this section.”

³ 17 CFR 242.608(c).

⁴ 15 U.S. Code § 78k-1.

⁵ See Securities Exchange Act Release No. 99345 (January 16, 2024), 89 FR 3963 at 3965 (January 22, 2024) (File No. 4-820).

⁶ Id. at 3964.

all of the members of the OPRA Plan, and the Plan Amendment should be disapproved on that basis.

In the event the Commission determines that the Plan Amendment should be substantively considered for adoption and not disapproved on the grounds that it did not receive the affirmative vote of all of the members of the OPRA Plan pursuant to Section 10.3 of the OPRA Plan, Nasdaq strongly objects to the Plan Amendment. Cboe's interpretation is contrary to the plain language, history and spirit of the OPRA Plan, and should not be adopted.

The Plan Amendment Is Not A Clarification

First, the Plan Amendment is not a clarification to the plain text of 5.2(c) of the OPRA Plan.⁷ Today, the OPRA Plan clearly requires equivalent access. Cboe continues to reference *usage* of the data in its argument and ignores *access* to the data. Usage is entirely irrelevant to the topic at issue—the meaning of “equivalent *access*” is at the heart of the interpretation. The insertion of the word “equivalent” within Section 5.2(c)(iii) of the OPRA Plan was purposeful and makes clear the meaning of the language.

By way of background, in 2001, the provision of the OPRA Plan that required the parties to use the OPRA System as the exclusive means for the dissemination of options last sale reports and quotation information (the “exclusivity clause”) was modified so that each OPRA participant could disseminate its own market information by means of communication networks separate from the OPRA System under certain conditions.⁸ The approved modification required

⁷ Section 5.2(c) of the OPRA Plan, titled “Dissemination of Last Sale Reports, Quotation Information and Other Information,” provides for the uniform, nondiscriminatory dissemination of consolidated Options Information, and states within Section 5.2(c)(iii) that, “[a] Member may disseminate its Proprietary Information 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; and (B) a Member may not disseminate its Proprietary Information on any more timely basis than the same information is furnished to the OPRA System for inclusion in OPRA’s consolidated dissemination of Options Information [emphasis added].”

⁸ See Securities Exchange Act Release No. 44580 (July 20, 2001), 66 FR 39218 (July 27, 2001) (SR-OPRA-2001-02) (Order Granting Partial Approval to the Portion of an Amendment to OPRA Plan To Permit Exchanges To Disseminate Unconsolidated Market Information to Certain of Their Members Under Certain Circumstances) (“2001 Order”).

equivalent access to consolidated options market information disseminated by OPRA for the same classes or series of options that are included in the market information.⁹ The Commission noted that access would be deemed to be “equivalent” if the information were equally accessible on the same terminal or workstation.¹⁰ The Commission opined that there is no clear policy reason to justify limiting the market information made available to the members of a particular market, so long as consolidated information is *readily* available either on the same terminal or on a separate terminal or device at the same workstation.¹¹ A streaming, real-time data feed provides continuous inputs and updates regarding the options market whereas query-based data only provides data when requested by the user. A full data feed, unlike query-based data, provides the equivalent classes or series of options that would be provided by a proprietary data feed. The equivalent access provision is satisfied when a recipient of a proprietary data feed subscribes to OPRA’s streaming, real-time data feed. The query-based data subscription does not meet the Commission’s intended goal of ensuring that there is **equivalent** access to consolidated market information.

OPRA Should Remain the Primary Source of Market Data

Second, the Plan Amendment contravenes the intended goal of establishing a reliable, consistent source for market information for options. In the 2001 Order, the Commission did not approve a provision of the proposed amendment to the OPRA Plan that would permit the dissemination of proprietary information through means other than the OPRA System that is additional or updated more frequently than the information disseminated through OPRA, such as information relating to the size associated with an exchange’s quotes.¹² The Commission stated that, “... because the proposed amendment would permit an OPRA participant to provide market information through a network separate from the OPRA System that is in addition to or different from the information furnished to the OPRA System, the Commission finds that this provision is inconsistent with the Quote Rule, promulgated under Section 11A of the Act.”¹³ The Commission clearly intended to limit an exchange’s ability to compete with OPRA and maintained that the Quote Rule prevented an exchange from offering additional or different information from what is on display on OPRA. The 2001 Order stated that the restrictions on the dissemination of unconsolidated market data coupled with the conditions that each member to which an OPRA participant disseminates its proprietary information has equivalent access to consolidated options market information disseminated by OPRA for the same classes or series of options that are included in the proprietary information and that all market data provided to the OPRA system be as timely as the market data provided directly to participant members should provide adequate safeguards to ensure that the use of unconsolidated market information is

⁹ Id.

¹⁰ Id.

¹¹ Id. at 39219.

¹² Id. at 39219.

¹³ Id. at 39219.

appropriately limited.¹⁴ The Commission intended for OPRA to remain the primary source of information for market data in options and for proprietary data feeds to be a supplemental source of information for market participants. The restrictions imposed by the Commission on proprietary data feeds were designed to prevent those data feeds from competing with OPRA data.

Cboe's Plan Amendment would allow it to effectively compete with OPRA. Cboe's proposal to require a user that subscribes to a proprietary market data feed to only be required to subscribe to a query-based subscription to OPRA data would be a change to the current requirements of the OPRA Plan. Cboe argues that "...all investors receiving exchange proprietary data will continue to have access to OPRA data should they so choose."¹⁵ Cboe's proposal does not foster competition, rather it displaces OPRA as the primary source of options data and, in its place, seeks to insert exchange proprietary market data feeds. Given Cboe's exclusive rights to trade options on various proprietary products (VIX, SPX and XSP), Cboe would benefit from its interpretation of the OPRA Plan.¹⁶ In its own words, "Cboe is the largest U.S. options market operator, which is why data consumers rely on Cboe for a comprehensive view of the U.S. options market."¹⁷ Cboe itself advertises that its Cboe One data feed provides cost-effective, high-quality reference quotes and trade data for market participants looking for comprehensive, real-time market data.¹⁸ The 2001 Order, which set restrictions to limit the use of proprietary market data, clearly did not intend for proprietary market data feeds to be substituted for OPRA data.

¹⁴ Id. at 39219. Of note, OPRA indicated that the proposed amendment, in part, would modify the exclusivity clause to incorporate two conditional, temporary exemptions from the exclusivity clause that the Commission previously granted to the ISE and the Cboe. OPRA cited to letters from Robert L.D. Colby, Deputy Director, Division of Market Regulation, Commission, to Michael J. Simon, Senior Vice President and General Counsel, ISE, dated May 25, 2000, and Edward J. Joyce, President, Cboe, dated November 6, 2000. See Securities Exchange Act Release No. 44347 (May 24, 2001), 66 FR 29612 (May 31, 2001) (SR-OPRA-2001-02) (Notice of Filing of Amendment to OPRA Plan to Permit Exchanges to Disseminate Unconsolidated Market Information to Certain of Their Members).

¹⁵ See Securities Exchange Act Release No. 99345 (January 16, 2024), 89 FR 3963 at 3966 (January 22, 2024) (File No. 4-820).

¹⁶ The Cboe One market data feed would contain all multiply-listed options traded on Cboe as well as Cboe's proprietary options products.

¹⁷ https://www.cboe.com/market_data_services/us/options/.

¹⁸ https://www.cboe.com/market_data_services/us/options/.

OPRA's Funding Mechanism Should Not Be Disrupted

Third, Cboe's arguments surrounding costs and the burdens of technologically processing OPRA data ignore the fact that a subscriber to a proprietary data feed has been required to subscribe to OPRA's full data feed since 2001. While contradicting the current requirements of the OPRA Plan, Cboe's arguments also distract from the fact that the proposed Plan Amendment would impact OPRA's funding mechanism disrupting its operation and the future development of the consolidated options market data feed. In fact, if permitted, funding that is utilized by OPRA to provide a reliable source of market data to market participants could result in more subscriptions to Cboe's new market data feed, the Cboe One Feed,¹⁹ in light of the lower fee that would need to be paid to OPRA.

Nasdaq appreciates the opportunity to comment on the Plan Amendment. If you have any additional questions, please do not hesitate to contact us.

Sincerely,



Greg Ferrari
Vice President, U.S. Options

cc: Michal Coe

¹⁹ Cboe notes that, "The Cboe One Options Feed is a consolidated, real-time options market data feed from the largest U.S. options exchange operator." See https://www.cboe.com/market_data_services/us/options/cboe_one/#:~:text=The%20Cboe%20One%20Options%20Feed%20gives%20you%20a%20comprehensive%20view,Cboe%20EDGX%C2%AE%20Options%20Exchange.