

**VIA ELECTRONIC MAIL**

February 23, 2024

Vanessa Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-0609

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:

Cboe Exchange, Inc., Cboe BZX Exchange, Inc., Cboe C2 Exchange, Inc. and Cboe EDGX Exchange, Inc. (collectively, the “Cboe Exchanges”) appreciate the opportunity to respond to comments on the above-referenced proposed amendment (“Proposed Amendment”) to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (“OPRA Plan”).<sup>1</sup> As discussed below, the Cboe Exchanges believe that (1) the Proposed Amendment was appropriately filed pursuant to Rule 608(a)(1) of Regulation NMS under the Securities Exchange Act of 1934 (“Exchange Act”); and (2) the Proposed Amendment will spur competition among market data providers, advancing the objectives of Regulation NMS, while protecting OPRA’s role in providing consolidated data.

**1. The Proposed Amendment was Appropriately Filed Pursuant to Rule 608(a)(1) of Regulation NMS**

While the Cboe Exchanges filed the Proposed Amendment pursuant to Rule 608(a)(1) of Regulation NMS, OPRA and Nasdaq argue that an amendment to the OPRA Plan may only be filed after receiving the affirmative vote of all OPRA Plan members pursuant to Section 10.3 of the OPRA Plan.<sup>2</sup> Following Section 10.3 is *one* method for seeking to amend the OPRA Plan; however, Regulation NMS specifically provides at least two additional methods to do so. Those routes do not require the affirmative vote of all of the members of the OPRA Plan. First, the Securities and Exchange Commission (“SEC” or “Commission”) itself may propose amendments

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<sup>1</sup> Exchange Act Release No. 99345 (Jan. 16, 2024), 89 Fed. Reg. 3963 (Jan. 22, 2024).

<sup>2</sup> Letter from James P. Dombach, Davis Wright Tremaine, LLP, to Vanessa Countryman, Secretary, SEC (Feb. 12, 2024) (“OPRA Letter”); Letter from Greg Ferrari, Vice President, U.S. Options, Nasdaq, to Vanessa Countryman, Secretary, SEC (Feb. 12, 2024) (“Nasdaq Letter”).

to the OPRA Plan pursuant to Rule 608(a)(2) of Regulation NMS.<sup>3</sup> No vote by the members of the OPRA Plan is required for such a proposal. A third method is reliance on Rule 608(a)(1) under Regulation NMS, which the Cboe Exchanges followed in this instance. This method also does not require a vote by the members of the OPRA Plan. The fact that this process has not previously been utilized does not negate its availability for use by self-regulatory organizations acting jointly.

Rule 608(a)(1) provides:

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.<sup>4</sup>

The Proposed Amendment satisfied each of the requirements of Rule 608(a)(1). First, more than two self-regulatory organizations filed the Proposed Amendment. Indeed, four self-regulatory organizations—Cboe Exchange, Inc., Cboe BZX Exchange, Inc., Cboe C2 Exchange, Inc. and Cboe EDGX Exchange, Inc.—“act[ed] jointly” in filing the Proposed Amendment.<sup>5</sup> Second, the Proposed Amendment seeks to amend the OPRA Plan, which is “an effective national market system plan.”<sup>6</sup> Third, the Cboe Exchanges satisfied the requirement to “submit[] 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.”<sup>7</sup> Under this provision, there is no requirement to separately satisfy the voting requirements of the OPRA Plan. Accordingly, the Proposed Amendment was appropriately filed pursuant to Rule 608(a)(1) of Regulation NMS.

OPRA and Nasdaq argue that the Proposed Amendment is nonetheless deficient because Rule 608(c) of Regulation NMS directs that “[e]ach self-regulatory organization shall comply with the terms of any effective national market system plan of which it is a sponsor or a participant.”<sup>8</sup> But the OPRA Plan nowhere directs that its amendment avenue is the *only* path to propose an amendment; rather, its amendment provision states: “This Agreement may be

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<sup>3</sup> Rule 608(a)(2) of Regulation NMS states that “[t]he Commission may propose amendments to any effective national market system plan by publishing the text thereof, together with a statement of the purpose of such amendment, in accordance with the provisions of paragraph (b) of this section.” 17 C.F.R. § 242.608(a)(2).

<sup>4</sup> 17 C.F.R. § 242.608(a)(1).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> 17 C.F.R. § 242.608(c); *see also* OPRA Letter at 2; Nasdaq Letter at 2.

amended from time to time when authorized by the affirmative vote of all of the Members, subject to the approval of the Securities and Exchange Commission.”<sup>9</sup> That language does not foreclose any other route, let alone one authorized by Commission regulation. As such, by following the regulation, the Cboe Exchanges complied with both the OPRA Plan and Regulation NMS.

That interpretation by no means renders the OPRA Plan amendment provision superfluous. To the contrary, the OPRA Plan amendment path provides a route for OPRA as an entity to offer an amendment, unanimously. Rule 608(a)(1) of Regulation NMS offers an amendment path where exchanges, without unanimous consent of OPRA members, wish to bring a proposed amendment to the Commission’s and public’s attention. That is exactly what the Cboe Exchanges have done here.

Contrary to the assertions by OPRA and Nasdaq, the use of the Rule 608(a)(1) process to propose an OPRA Plan amendment would not have “a deleterious effect[.]”<sup>10</sup> Rather, the process would allow for the public consideration of proposals that have broad industry support but not the *unanimous* support of all members of the OPRA Plan. Rule 608(a)(1) requires “two or more” self-regulatory organizations to act jointly in proposing an amendment.<sup>11</sup> In this case, *four* self-regulatory organizations jointly submitted the Proposed Amendment. OPRA expressed alarm that two exchanges could propose an amendment “without input” from the industry;<sup>12</sup> to the contrary, the Rule 608(a)(1) process ensures that a proposed amendment can receive industry input, as it specifically requires that interested persons be provided an opportunity to submit written comments—which, here, resulted in five very positive letters to date, demonstrating significant support for the Proposed Amendment from the industry.<sup>13</sup> Moreover, the Rule 608(a)(1) process allows only for the *filing* of proposed amendments. No such amendment can be adopted until published for public comment and then evaluated and approved by the Commission. Further, any such approval may only be granted where the Commission 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

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<sup>9</sup> OPRA Plan § 10.3.

<sup>10</sup> OPRA Letter at 2.

<sup>11</sup> 17 C.F.R. § 242.608(a)(1).

<sup>12</sup> OPRA Letter at 2.

<sup>13</sup> Letter from Tobin McDaniel, President, SoFi Securities, to Sherry R. Haywood, Assistant Secretary, SEC (Feb. 1, 2024); Letter from Yochai Korn, Group Head of Market Data, Interactive Brokers Group, to Vanessa Countryman, Secretary, SEC (Feb. 7, 2024) (“IBKR Letter”); Letter from Praneil Ladwa, Chief Product Officer & Head, International Operations, Questrade Financial Group, to Vanessa Countryman, Secretary, SEC (Feb. 7, 2024); Letter from Matt Billings, President, Robinhood Financial, to Vanessa Countryman, Secretary, SEC (Feb. 12, 2024) (“Robinhood Letter”); Letter from Scott Sheridan, Chief Executive Officer, tastytrade, Inc., to Vanessa Countryman, Secretary, SEC (Feb. 12, 2024) (“tastytrade Letter”).

mechanisms of, a national market system, or otherwise in furtherance of the purposes of the [Exchange] Act.”<sup>14</sup>

## 2. The Proposed Amendment Advances the Public Interest

The Proposed Amendment clarifies the scope of Section 5.2(c)(iii) of the OPRA Plan to forestall “disagreement over the meaning of the current plan.”<sup>15</sup> That clarification is beneficial in and of itself. But, to the extent the Commission disagrees and views the Proposed Amendment as a substantive change, adopting it is even more critical. As the Cboe Exchanges explained in proposing it, the Proposed Amendment would increase investors’ accessibility to options data, in turn furthering the objectives of the national market system by spurring competition among data providers, lowering prices, and providing investors with the agency to access data in the way that best suits their needs. Without the Proposed Amendment, constrained competition will prevent market data products from being optimized and efficiently priced, as well as deprive market participants of choice.

Here, the proof is in the pudding: five different market participants have already devoted time and ink to explain how the Proposed Amendment would “pave the way forward for further democratization of data”<sup>16</sup> and “promote equitable and cost-effective access to markets and market data and facilitate low-cost access to options trading by retail options traders.”<sup>17</sup> In addition, those commenters noted how the Proposed Amendment would “increase competition,” with the “potential to improve the speed, quality and affordability of [] data.”<sup>18</sup> Those commenters also recognized that the Proposed Amendment would support the Commission’s goal to provide choice to “different market participants [who] need differing amounts of information to meet differing trading objectives.”<sup>19</sup> The strong support for the Proposed Amendment among market participants illustrates how it would further the public interest and the perfection of the national market system.

Nasdaq nonetheless complains that the Proposed Amendment promotes undue competition with OPRA.<sup>20</sup> But the Commission has endorsed broader accessibility to data and made clear 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” “adequate safeguards” ensure an

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<sup>14</sup> 17 C.F.R. § 242.608(b).

<sup>15</sup> Exchange Act Release No. 99345 (Jan. 16, 2024), 89 Fed. Reg. 3963 (Jan. 22, 2024), at 3964.

<sup>16</sup> tastytrade Letter at 1.

<sup>17</sup> IBKR Letter at 1.

<sup>18</sup> Robinhood Letter at 4.

<sup>19</sup> *Id.* at 3 (quoting Exchange Act Release No. 90610 (Dec. 9, 2020), 86 Fed. Reg. 18596 (April 9, 2021), at 18607).

<sup>20</sup> Nasdaq Letter at 5.

appropriate balance between proprietary data products and consolidated data.<sup>21</sup> Those adequate safeguards include that “consolidated information is readily available either on the same terminal or on a separate terminal or device at the same workstation,” and “that all market data provided to the OPRA system be as timely as the market data provided directly to participant members.”<sup>22</sup> Those measures contemplate that members might indeed disseminate proprietary products alongside OPRA—so long as (1) the member complies with the timing constraint, and (2) the data recipient maintains appropriate access to an OPRA product—as the Proposed Amendment would require. In short, the Proposed Amendment is fully in line with those safeguards—if approved, it would ensure that proprietary data products are available to market participants while maintaining the appropriate balance between those products and consolidated OPRA data.

Again acting to facilitate greater accessibility to market data in 2003, the Commission approved an amendment to the OPRA Plan recognizing that a wide range of market participants “may benefit from having access to the party’s electronic network,” as well as from “the dissemination of proprietary information over systems that are separate from the OPRA System.”<sup>23</sup> And, more broadly, the Commission has engaged in consistent efforts to expand access to data and increase competition across the market.

Last, Nasdaq suggests that the Proposed Amendment would “disrupt[]” OPRA’s funding.<sup>24</sup> That vague assertion, devoid of any analysis or supporting facts, is incorrect. Under the Proposed Amendment, all proprietary data recipients must subscribe to one of OPRA’s products: either the full OPRA stream or the usage-based alternative. Nasdaq fails to plausibly suggest how the Proposed Amendment would dry up OPRA’s revenue where all recipients of proprietary data must pay for one or the other of those OPRA products. Nasdaq also assumes that the Proposed Amendment would shift a set population of users away from the OPRA full stream and to proprietary products.<sup>25</sup> That assumption overlooks that greater accessibility to market data *increases* market participation—that is, investors that do not currently purchase and stream the full OPRA feed may elect to purchase a proprietary product along with the OPRA usage-based feed, expanding both access to data and subscribers to OPRA products. Indeed, commentators recognized that the Proposed Amendment has the potential to increase net growth in the options industry and thus “create more subscribers for OPRA as new entrants decide that the full OPRA feed best serves their expanding firms.”<sup>26</sup>

The Cboe Exchanges appreciate the opportunity to respond to comments on the Proposed Amendment and to demonstrate both why the Proposed Amendment was properly filed and how

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<sup>21</sup> Exchange Act Release No. 44580 (July 20, 2001), 66 Fed. Reg. 39218 (July 27, 2001), at 39219.

<sup>22</sup> *Id.*

<sup>23</sup> Exchange Act Release No. 48822 (Nov. 21, 2003), 68 Fed. Reg. 66892 (Nov. 28, 2003), at 66896.

<sup>24</sup> Nasdaq Letter at 6.

<sup>25</sup> *Id.*

<sup>26</sup> tastytrade Letter at 2.

the Proposed Amendment will benefit the public interest and perfect the national market system. Please do not hesitate to contact us with any further inquiries or if any additional information is required.

Sincerely,

*Corinne Klott*

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