

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79153; File No. SR-OPRA-2016-02)

October 25, 2016

Options Price Reporting Authority; Notice of Filing and Immediate Effectiveness of Proposed Amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information to Amend OPRA's Non-Display Use Fees

Pursuant to Section 11A of the Securities Exchange Act of 1934 ("Act")¹ and Rule 608 thereunder,² notice is hereby given that on September 29, 2016, 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 OPRA Plan Amendment would implement changes to OPRA's Non-Display Use Fees on November 1, 2016. The Commission is publishing this notice to provide interested persons an opportunity to submit written comments on the 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 fourteen participants to the OPRA Plan are BATS BZX Exchange, Inc., BATS EDGX Exchange, Inc., BOX Options Exchange, LLC, Chicago Board Options Exchange, Incorporated, C2 Options Exchange, Incorporated, International Securities Exchange, LLC, ISE Gemini, LLC, ISE Mercury, LLC, Miami International Securities Exchange, LLC, NASDAQ BX, Inc., NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, NYSE MKT LLC, and NYSE Arca, Inc.

I. Description and Purpose of the Plan Amendment

OPRA proposes to amend footnotes 10 and 11 in the OPRA Fee Schedule to clarify the application of OPRA’s “Non-Display Use” fees in certain respects.⁴ OPRA is not proposing any changes in the Non-Display Use fees themselves, although OPRA does propose to add the word “Monthly” to the first phrase in the Non-Display Use Fee entry in the Fee Schedule.

(a) Elimination of the Term “Datafeed”

OPRA proposes to eliminate the use of the term “datafeed” in footnotes 10 and 11. Some OPRA Vendors have argued that the use of the term “datafeed” in these footnotes provides a basis for saying that the Non-Display Use fees are not applicable to their downstream OPRA data recipients. That argument is based on a separate OPRA Policy entitled “Datafeeds.”⁵ In that Policy, the term “datafeed” is defined as “any uncontrolled retransmission of OPRA market data.” The argument has been that an OPRA Vendor and its downstream data recipients are not making Non-Display Use of OPRA data if the Vendor “controls” – that is, entitles – the server on which the Non-Display Use of the OPRA data is made.

From OPRA’s perspective, this is clearly incorrect. The Datafeeds Policy is directed to describing how OPRA data is received, in order to explain the circumstances in which an OPRA data recipient needs to be a party to a “Vendor Agreement”, a “Direct Access Rider” and/or an “Indirect Access Rider”. The Datafeeds Policy is not relevant to the question of how OPRA data is used, specifically the question of whether a particular use of OPRA data constitutes “Non-Display Use.” OPRA believes that the Datafeeds Policy is irrelevant to the question of the applicability of Non-Display Use fees.

⁴ OPRA proposed its current Non-Display Use fees in Securities Exchange Act Release No. 77584 (April 12, 2016), 81 FR 22670 (April 18, 2016) (File No. OPRA-2015-01).

⁵ This Policy is available on the OPRA website under the “Policies” tab.

Nonetheless, OPRA recognizes that the use of the term “datafeed” in separate OPRA documents with different meanings carries the potential for confusion and that the description of OPRA’s fees should be as clear as possible. Accordingly OPRA is proposing to amend footnotes 10 and 11 in its Fee Schedule so that the term “datafeed” is no longer used in the footnotes.

(b) Exception for Category 1 Non-Display Use by a Single UserID on Behalf of Certain Data Recipients

OPRA also proposes to add a sentence in footnote 10 to state that the Category 1 Non-Display Use Fee⁶ does not apply to an OPRA data recipient during a calendar month if the data recipient: “(i) has a single UserID that uses OPRA data for Non-Display Use and (ii) is not a broker-dealer and does not place more than 390 orders in listed options per day on average during the calendar month (counting orders for this purpose in accordance with the rules of the OPRA Participant exchanges to which it submits orders during the month) for its own beneficial account(s).” This sentence is intended to provide relief from the Category 1 Non-Display Use Fee for a data recipient that has a single UserID (a single natural person) that uses OPRA data for Category 1 Non-Display Use, unless the OPRA data recipient is acting as a broker-dealer or is submitting orders to the OPRA Participant exchanges at a rate (390 orders per day on average over a calendar month) that indicates that it is making extensive use of OPRA data. Clause (ii) of this sentence is phrased to take advantage of language in the rules of the various OPRA Participant exchanges that uses the “390 orders per day on average during the calendar month” concept for purposes of determining whether a person submitting trades to the exchanges is subject to rules applicable to public customers or to professional traders. OPRA understands the rules of the various exchanges to be similar enough in substance to allow for effective and

⁶ “Category 1” Non-Display Use is defined in footnote 10 to refer to Non-Display Use of OPRA data by a recipient of the data “on its own behalf.”

meaningful counting of orders sent to all of the OPRA Participant exchanges, even though these rules are not stated in identical language.⁷ OPRA believes that the same concept provides a reasonable basis for distinguishing data recipients that are appropriately exempted from the Category 1 Non-Display Use fee.⁸ OPRA believes that this exemption from the application of the Category 1 Non-Display Use Fee would be similar to one of the exemptions stated in the OPRA Fee Schedule from the Subscriber Indirect Access Fee, which states that the Subscriber Indirect Access Fee “shall not apply to a subscriber ... that receives a data feed transmission on a single, stand-alone computer for the sole purpose of providing a single-screen display of OPRA Data for the subscriber’s internal use.”

(c) Clarification with Respect to Non-Display Use Fees and Professional Subscriber Device-Based Fees

OPRA is also proposing a separate change in footnote 10 to the OPRA Fee Schedule for a purpose relating to the administration of the Non-Display Use Fees. A few OPRA data recipients have tried to suggest that if a device is subject to the Professional Subscriber Device-Based Fees it is immune from Non-Display Use Fees, and that therefore by attaching a display monitor to a server an OPRA data recipient can avoid payment of Non-Display Use Fees even if

⁷ Although the precise language used by the various exchanges to make this distinction varies from one to the next, all of the exchanges use the “390 orders per day on average during the calendar month” concept, and their specific provisions for counting orders are similar enough to permit accurate counting of orders across exchanges for the purposes of the distinction described in the text. See, for example, Bats BZX Rules 16.1(a)(46) and Interpretations and Policies .01 to Rule 16.1; BOX Options Exchange LLC Rule 100(a)(50); CBOE Rule 1.1(ggg); ISE Rule 100(a)(37A) and Rule 100(a)(37C); MIAX Rule 100 (definition of “Priority Customer” including Interpretation and Policy .01); Nasdaq PHLX LLC Rule 1000(b)(14); and NYSE Arca, Inc. Rule 6.1A(a)(4A).

⁸ OPRA believes that it is not appropriate to make the same distinction for Category 2 Non-Display Use fees (Category 2 Non-Display Use is Non-Display Use of OPRA data on behalf of clients of the OPRA data recipient) or for Category 3 Non-Display Use fees (Category 3 Non-Display Use is for the purpose of internally matching buy and sell orders within the OPRA data recipient).

the server is used for Non-Display Use of OPRA data. OPRA believes that this is clearly incorrect, and that this can be clearly seen in the first sentence of footnote 10 in its current form (“Non-Display Use refers to the accessing, processing or consuming ... of OPRA market data ... for a purpose other than in support of the datafeed recipient’s display or further internal or external redistribution.” (Emphasis added.)) Nonetheless, OPRA believes that it is appropriate to make changes in footnote 10 to make clearer that a device is subject both to the Professional Subscriber Device-Based Fees and to Non-Display Use Fees if it is used both to display OPRA data and for Non-Display Use of OPRA data.

(d) Addition of the Word “Monthly” in the Non-Display Use Fee Entry in the Fee Schedule

OPRA proposes to add the word “Monthly” to the heading of the Non-Display Use Fee entry in its Fee Schedule, so that the entry reads “Monthly Non-Display Use Fees.” The absence of this word was recently brought to the attention of OPRA staff. The word is used in the other entries in OPRA’s Fee Schedule that are for monthly fees, and OPRA believes that for clarity the word should be used in this entry as well.⁹ So far as OPRA staff is aware, no OPRA data recipient has relied on the absence of the word to conclude that the Non-Display Use fees are payable on any basis other than monthly.

(e) Effect on OPRA Revenue of Proposed Changes; Discussions with Data Recipients

OPRA does not anticipate any material increase in its revenues as a result of the changes described in this filing – indeed, on balance, OPRA may not experience any increase at all in its

⁹ OPRA’s original filing for Non-Display Use did clearly identify the fees as monthly. See Securities Exchange Act Release No. 77584, 81 FR 22760 at 22762 (“The OPRA Plan amendment adopted fees for Non-Display Use as follows: A monthly fee of \$2,000/Enterprise for Category 1 ...; a monthly fee of \$2,000/Enterprise for Category 2 ...; and a monthly fee of \$2,000/Platform for Category 3 ...”).

revenues as a result of the changes described in this filing. A few OPRA data recipients that have resisted payment of Non-Display Use fees on the basis of the assertion that they are not receiving the data through “datafeeds” will no longer be able to make that assertion, possibly resulting in a small increase in OPRA’s revenues. On the other hand, there may be recipients of OPRA data that have been paying Category 1 Non-Display Use fees and that may no longer pay them as a result of the express exemption from Category 1 Non-Display Use fees for certain data recipients with a single UserID that use OPRA data for Category 1 Non-Display Use. OPRA believes that the change described in this filing to make more explicit that payment of Device-based Fees does not make Non-Display Use fees inapplicable will have no material effect on its revenues.

OPRA believes that the most important of these changes is the deletion of the term “datafeed” in the footnotes to its Fee Schedule, not because of its effect on OPRA revenues, but because of concerns expressed to OPRA staff by data recipients that have been paying the Non-Display Use fees and have recently been told that their competitors may not be paying the fees on the basis of the “datafeed” argument. OPRA recognizes that equal treatment for persons similarly situated is an essential aspect of its operations, and believes that elimination of the word “datafeed” is important to providing equal treatment for persons making Non-Display Use of OPRA data. Similarly, OPRA believes that it is appropriate to provide relief from the Non-Display Fee for all data recipients that make limited Category 1 Non-Display Use of OPRA data within the scope of the exception. Finally, OPRA believes that it is appropriate to reinforce the concept that Non-Display Use Fees would be applicable if Non-Display Use is being made of OPRA data, even if the Non-Display Use is being made on a device that is subject to

Professional Subscriber Device-Based Fees, again in furtherance of the fundamental concept that persons similarly situated should be treated equally.

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

II. Implementation of the OPRA Plan Amendment

Pursuant to paragraph (b)(3)(i) of Rule 608 of Regulation NMS under the Act, OPRA designated this amendment as establishing or changing fees or other charges collected on behalf of all of the OPRA Participant exchanges in connection with access to or use of OPRA facilities. OPRA proposes to implement the revisions in the Non-Display Use Fee footnotes that are described in this amendment on November 1, 2016. According to OPRA, implementation of the revisions as of that date will permit OPRA to provide persons that may be affected by these changes with thirty days' notice of the changes.

The Commission may summarily abrogate the amendment within sixty days of its filing and require refiling and approval of the amendment by Commission order pursuant to Rule 608(b)(2) under the Act¹⁰ if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or 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.¹¹

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the OPRA Plan amendment is consistent with the Act.

¹⁰ See 17 CFR 242.608(b)(2).

¹¹ See 17 CFR 242.608(b)(3)(iii).

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-2016-02 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-2016-02. 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 OPRA Plan amendment that are filed with the Commission, and all written communications relating to the OPRA 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-2016-02 and should be submitted on or before [insert 21 days from date of publication in the Federal Register].

By the Commission.

Robert W. Errett
Deputy Secretary