

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50110; File No. SR-OPRA-2004-04)

July 28, 2004

Options Price Reporting Authority; Notice of Filing and Immediate Effectiveness of Amendment to OPRA Plan Regarding the Temporary Waiver of Charges by OPRA Relating to the Dynamic Throttle

Pursuant to Section 11A of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 11Aa3-2 thereunder,² notice is hereby given that on July 9, 2004, the Options Price Reporting Authority (“OPRA”)³ 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”). On July 27, 2004, OPRA submitted Amendment No. 1 to the proposal.⁴ The proposed OPRA Plan amendment would waive temporarily the imposition of the charge that would otherwise be imposed upon a participant exchange that utilizes the “dynamic throttle” pursuant to Section III(g)(iii) of the OPRA Plan and Guideline 6(h) of the Capacity Guidelines that constitute part of the OPRA Plan. OPRA proposes to apply the waiver during a temporary period ending on September 10, 2004. The Commission is publishing this notice to solicit comments from interested persons on the proposed OPRA Plan amendment.

¹ 15 U.S.C. 78k-1.

² 17 CFR 240.11Aa3-2.

³ OPRA is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 11Aa3-2 thereunder. See Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.C. Docket 484 (March 31, 1981).

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 six participants to the OPRA Plan are the American Stock Exchange LLC, the Boston Stock Exchange, Inc. (“BSE”), the Chicago Board Options Exchange, Inc., the International Securities Exchange, Inc., the Pacific Exchange, Inc., and the Philadelphia Stock Exchange, Inc.

⁴ See letter from Michael L. Meyer, Counsel to OPRA, Schiff Hardin LLP, to Deborah L. Flynn, Assistant Director, Division of Market Regulation, Commission, dated July 26, 2004. Amendment No. 1 added specific language to Section III(g) and Capacity Guideline 6(h) of the OPRA Plan describing the temporary waiver.

I. Description and Purpose of the Amendment

The purpose of the proposed amendment to the OPRA Plan is to temporarily waive the charge imposed upon a participant exchange that utilizes the dynamic throttle feature of the OPRA System, which permits a participant to gain automatic access to unused, excess System capacity on a short-term, interruptible basis. Section III(g) of the OPRA Plan and Guideline 6(h) of the Capacity Guidelines require any participant exchange using the dynamic throttle to access additional capacity to pay for that capacity at a rate that is 150% of the fully allocated cost of that capacity, as determined by OPRA's Independent System Capacity Advisor ("ISCA").

The proposed waiver of this charge would apply during the period ending on September 10, 2004, which is the date when OPRA anticipates full implementation of an enhancement to its communications network that was recently developed by the Securities Industry Automation Corporation ("SIAC"), and designated by SIAC as the Secure Financial Transaction Infrastructure ("SFTI"). Once SFTI is fully implemented, all recipients of OPRA data would need to be able to access the data over a high bandwidth network, which certain data recipients are not yet able to do. OPRA believes that, among other things, full implementation of SFTI would permit SIAC to provide additional capacity to OPRA's participant exchanges who request it pursuant to procedures provided for in the OPRA Plan.

OPRA had originally intended to implement SFTI on June 30, 2004, after which it would cease to support lower bandwidth "legacy" connections currently relied upon by some data recipients. However, because several vendors and one OPRA participant would not be able to access the new higher bandwidth connection on June 30th, OPRA recently determined to delay the cutover to SFTI until September 10, 2004, by which time all persons who access the OPRA network would be expected to be able to connect to SFTI.

According to OPRA, as a consequence of delaying the cutover to SFTI, the date when participant exchanges would be able to increase their current allocation of System capacity by receiving an allocation of the increase through SFTI would likewise be delayed. OPRA believes that this delay could be especially problematic for a new options exchange, such as the BSE, which may need additional capacity to support its expanding options market.

Since there is unused, excess capacity presently available in the System, OPRA believes that an obvious response to this problem would be to utilize OPRA's dynamic throttle to provide temporary, additional capacity to any exchange that might need it until the System's capacity is increased on a permanent basis during the cutover to SFTI on September 10, 2004.⁵ However, as described above, the OPRA Plan and the Capacity Guidelines currently require the imposition of a charge on any participant exchange that obtains additional, temporary capacity by means of the dynamic throttle. OPRA states that the purpose of this charge is to discourage any participant exchange from submitting an unrealistically low request for permanent capacity in order to lower its costs, and then relying on the operation of the dynamic throttle to make up for any shortfall in its allocation of System capacity.

Although OPRA continues to believe that it is justified in imposing a charge on a participant exchange that makes use of the dynamic throttle under ordinary circumstances, it does not believe it would be fair to impose this charge under the present circumstances where a participant exchange could be prevented from obtaining a greater permanent allocation of capacity simply because OPRA has delayed the implementation of SFTI as an accommodation to

⁵ OPRA states that it has been advised by the Options Clearing Corporation, acting in its capacity as the ISCA, that it concurs with OPRA's decision to delay the implementation of SFTI until September 10, 2004, and expects the dynamic throttle to provide whatever additional capacity may be needed by any of the exchanges prior to the anticipated cutover to SFTI on that date.

data recipients who are not yet able to connect to the upgraded network. For this reason, OPRA proposes to waive the imposition of the special charge on exchanges that utilize the dynamic throttle until September 10, 2004, when SFTI is expected to be fully implemented.

OPRA does not anticipate any further delay in the implementation of SFTI beyond September 10, 2004, based on assurances that all data recipients would be able to connect to SFTI by that date. In the unlikely event that a further delay in the implementation of SFTI may be necessary, and if, as a result, OPRA should determine to waive the imposition of the dynamic throttle charge beyond that date, OPRA states that such a determination would be treated as a separate OPRA Plan amendment and would be the subject of a separate filing under Rule 11Aa3-2 of the Act.⁶

The text of the proposed revised Section III(g) of the Plan and Capacity Guideline 6(h) is set forth below. Proposed new language is in *italics*.

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III. Administration of the Plan

(a) – (f) [No change]

(g) Capacity Planning; Allocation of System Capacity.

(i) – (ii) [No change]

(iii) To the extent and subject to the conditions and limitations set forth in the Capacity Guidelines, under circumstances when the capacity of the System is unable to meet the aggregate requests for capacity that have been submitted to and approved by the ISCA, the ISCA shall be authorized to allocate available System capacity among the parties. In addition, the Capacity Guidelines shall provide for the utilization of a

⁶ 17 CFR 240.11Aa3-2.

“dynamic throttle” that is capable of automatically and instantaneously making available to a party with an immediate need for additional capacity, on a short-term interruptible basis, any unused capacity, subject to the conditions that the party receiving such unused capacity must pay for it at a rate that is determined by the ISCA to be greater than the fully allocated cost of such additional capacity to the extent provided in the Capacity Guidelines (except that during a temporary period ending September 10, 2004, no such payment shall be required to be made by a party receiving unused capacity by operation of the dynamic throttle), and must relinquish such capacity to the party or parties to which it had originally been allocated whenever such party or parties need it. Amounts paid by a party for the use of excess capacity made available to it by operation of the dynamic throttle shall be added to OPRA’s general revenues.

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6. Capacity Allocation.

(a) – (g) [No change]

(h) The authority of the ISCA to allocate excess capacity in accordance with paragraphs (a) – (g) of this Guideline 6 is in addition to the automatic, short-term, interruptible allocation of unused capacity that may be made by the “dynamic throttle” that is incorporated within the OPRA System. Section III(g) of the OPRA Plan provides that any party receiving an allocation of unused capacity pursuant to the operation of the dynamic throttle must pay for it at a rate determined by the ISCA, which is to exceed the fully allocated cost of such additional capacity to the extent provided in these guidelines. Section III(g) also provides that the requirement to pay for unused capacity made available by operation of the dynamic throttle does not apply during a temporary period ending September 10, 2004. Accordingly, except during the period when the

payment requirement does not apply as aforesaid, the ISCA is directed to apply a multiple of 150% to the fully allocated cost of capacity for purposes of arriving at the rate at which a party shall be charged for capacity made available to it pursuant to the operation of the dynamic throttle.

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II. Implementation of the OPRA Plan Amendment

Pursuant to paragraph (c)(3)(i) of Rule 11Aa3-2 under the Act,⁷ OPRA designates this amendment as changing the way in which costs are distributed to OPRA's participant exchanges, thereby qualifying for effectiveness upon filing. 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 11Aa3-2(c)(2) under the Act,⁸ if it appears to the Commission that such action 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 mechanisms of, a national market system; or otherwise in furtherance of the purposes of the Act.

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:

⁷ 17 CFR 240.11Aa3-2(c)(3)(i).

⁸ 17 CFR 240.11Aa3-2(c)(2).

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 Number SR-OPRA-2004-04 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-OPRA-2004-04. 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 Web site (<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 inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW, Washington, DC 20549. 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-2004-04 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁹

J. Lynn Taylor
Assistant Secretary

⁹ 17 CFR 200.30-3(a)(29).