

("OPRA Plan" or "Plan").³ The proposed amendment would revise the manner in which OPRA engages in capacity planning and allocates capacity among the exchanges that are parties to the Plan. On July 16, 2003, OPRA submitted Amendment No. 1 to the proposal.⁴ On October 12, 2003, OPRA submitted Amendment No. 2 to the proposal.⁵ This order approves the proposal as modified by Amendments No. 1 and 2 for a temporary period not to exceed 120 days, and solicits comment on the proposal, as amended by Amendments No. 1 and 2.⁶ The text of the proposed Plan amendment, as amended, is available at OPRA, the Commission's Public Reference Room, and on the Commission's Web site.

II. Description and Purpose of the Amendment

Under the proposed Plan amendment, OPRA proposes to revise the manner in which OPRA engages in capacity planning and allocates its available system capacity among the exchanges that are parties to the Plan. OPRA also proposes to amend Subsections I(a) and I(b) of the OPRA Plan to make it clear that participation in OPRA is limited to those self-regulatory organizations ("SROs") that are engaged in the business of providing a market for the trading of securities options and other eligible securities under the OPRA Plan.

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 five participants to the OPRA Plan are the American Stock Exchange LLC ("Amex"), the Chicago Board Options Exchange, Inc. ("CBOE"), the International Securities Exchange, Inc. ("ISE"), the Pacific Exchange, Inc. ("PCX"), and the Philadelphia Stock Exchange, Inc. ("Phlx").

⁴ See letter from Michael L. Meyer, Counsel to OPRA, Schiff, Hardin & Waite, to Deborah Flynn, Assistant Director, Division of Market Regulation ("Division"), Commission, dated July 15, 2003, replacing in its entirety the initial proposal filed on April 15, 2003 ("Amendment No. 1"). In Amendment No. 1, OPRA provides additional discussion of the proposed Capacity Guidelines that describe the function, authority, and procedures of the Independent System Capacity Advisor ("ISCA") and clarified in the proposed Plan's language and corresponding discussion that the selection of the ISCA is subject to being filed with the Commission as an amendment to the Plan, to be put into effect upon filing.

⁵ See letter from Michael L. Meyer, Counsel to OPRA, Schiff, Hardin & Waite, to Deborah Flynn, Assistant Director, Division, Commission, dated October 15, 2003 ("Amendment No. 2"). In Amendment No. 2, OPRA specifies in the proposed Plan's language and the proposed Capacity Guidelines the ISCA's obligation to maintain the confidentiality of the information entrusted to it by OPRA's participants in the capacity planning process.

⁶ 17 CFR 240.11Aa3-2(c)(4).

The principal purpose of the proposed amendment is to revise the OPRA Plan in response to the Commission's Order instituting public administrative proceedings against four of OPRA's participant exchanges (Amex, CBOE, PCX and Phlx, referred to collectively as the "respondent exchanges") pursuant to Section 19(h)(1) of the Act,⁷ and specifically in response to Section IV.B.c. of the Order (the "Undertaking"). The Undertaking requires each of the four respondent exchanges, acting jointly with all other options exchanges,⁸ to modify the structure and operation of OPRA in various ways that would eliminate much of the need for joint and collective action in the capacity planning and allocation process. The three specific requirements of the Undertaking and the manner in which the proposed amendment is intended to satisfy these requirements are described below.

The respondent exchanges must establish a system for procuring and allocating options market data transmission capacity that eliminates joint action by the participants in OPRA in determining the amount of total capacity procured and the allocation thereof, and provides that each participant in OPRA would independently determine the amount of capacity it would obtain.

The proposed amendment to the OPRA Plan (reflected in proposed new Section III(g) and related definitions) would require each party to the Plan from time to time to independently project the capacity it would need and to privately submit requests for capacity based on its projections to an ISCA, which would maintain these individual capacity projections and requests in confidence. The proposed definition of the ISCA in Section II(m) of the Plan would require the ISCA to maintain the confidentiality of this information, consistent with the provisions of Section III(g) of the Plan.⁹ Revised Section III(g) of the Plan would clarify that confidential capacity-related information obtained by the ISCA would not be used by the ISCA in any of its other business activities in a

manner that may result in the information being made available to any of the parties to the Plan, or to use it in any manner that is otherwise inconsistent with the ISCA's obligation to hold the information in confidence.¹⁰ The ISCA may share this information with the parties only in the form of aggregate capacity requests that do not identify the individual capacity requests of any of the parties. The ISCA would then determine how and when to modify the OPRA System in order to provide to each party the capacity it has requested and how the cost of such modifications is to be allocated among the parties all in accordance with and subject to the proposed Capacity Guidelines that are incorporated in the Plan as part of the proposed amendment. Under the proposed amendment, each party would be entitled to the capacity it has requested and would be obligated to authorize and fund the modifications of the OPRA System in accordance with the ISCA's determinations and the specific cost allocation provisions of the proposed Capacity Guidelines.

The proposed Capacity Guidelines describe the function and authority of the ISCA and its procedures in greater detail than in the Plan itself. Under the procedures specified in the proposed Capacity Guidelines, the ISCA would promptly review the capacity projections and requests it receives from the parties, would discuss proposed modifications with OPRA's Policy and Technical Committees and the OPRA Processor, and would discuss with each party that has requested additional capacity the ISCA's estimate of the cost to that party of providing the capacity it requested. In every case, the ISCA would report to OPRA concerning any modifications to the OPRA System that it believes are called for in response to the parties' aggregate projections and requests. In these discussions and reports, no information from any party would be disclosed to any other party except in the form of aggregate projections or requests. In addition, OPRA proposes in Guideline No. 1 of the Capacity Guidelines to require the ISCA to maintain internal safeguards and procedures adequate to assure that the requirements of the Plan pertaining to the confidentiality of information provided to the ISCA would be satisfied.¹¹ Under the proposed amendment to the Plan, the person designated to act as the ISCA, before it begins to act in that capacity, would be required to furnish a written description

⁷ Order Instituting Public Administrative Proceedings Pursuant to Section 19(h)(1) of the Act, Making Findings and Imposing Remedial Sanctions. Securities Exchange Act Release No. 43268, dated September 11, 2000 and Administrative Proceeding File 3-10282 ("Order").

⁸ ISE is not a respondent exchange subject to the Order. Nevertheless, as a party to the OPRA Plan, ISE participated fully in all of the discussions that led to the approval of the proposed amendment, and it joined with the other parties in approving the proposed amendment and authorizing its filing with the Commission.

⁹ See Amendment No. 2, *supra* note 5.

¹⁰ *Id.*

¹¹ *Id.*