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May 20, 2024

Ms. Sherry R. Haywood, Assistant Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090

**Re: Joint Industry Plan; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a National Market System Plan Regarding Consolidated Equity Market Data – Release No. 34-100017; File No. 4-757**

Dear Ms. Haywood:

Cboe Global Markets, Inc. (“Cboe”)<sup>1</sup> appreciates the opportunity to provide comments to the U.S. Securities and Exchange Commission (the “SEC” or the “Commission”) regarding its institution of proceedings<sup>2</sup> pursuant to Rule 608(b)(2)(i) of Regulation NMS<sup>3</sup> and Rules 700 and 701 of the Commission’s Rules of Practice<sup>4</sup> to determine whether to approve or disapprove the new national market system plan regarding consolidated equity market data submitted by the exchanges and the Financial Industry Regulatory (“FINRA”) (each an “SRO”, and collectively, the “SROs”)<sup>5</sup> on October 23, 2023 (the “Plan”).<sup>6</sup> Despite the significant concerns raised by Cboe,<sup>7</sup> the NYSE

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<sup>1</sup> Hereinafter, all references to Cboe are in reference only to Cboe Global Markets, Inc.’s U.S. equities exchanges that trade National Market System stocks: BZX Exchange, Inc., BYX Exchange, Inc., EDGA Exchange, Inc., and EDGX Exchange, Inc.

<sup>2</sup> See Securities Exchange Act Release No. 100017 (April 23, 2024), 89 FR 33412 (April 29, 2024), File No. 4-757 (“Order Instituting Proceedings” or “OIP”).

<sup>3</sup> 17 CFR 242.608.

<sup>4</sup> 17 CFR 201.700; 17 CFR 201.701.

<sup>5</sup> Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Investors Exchange LLC, Long Term Stock Exchange, Inc., MEMX LLC, MIAAX Pearl LLC, Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq PHLX, LLC, Nasdaq Stock Market, LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National Inc.

<sup>6</sup> See Securities Exchange Act Release No. 99403 (January 19, 2024), File No. 4-757 (“Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data”).

<sup>7</sup> See Comment Letter from Patrick Sexton, EVP, General Counsel & Corporate Secretary, Cboe Global Markets, January 26, 2024, available at: <https://www.sec.gov/comments/4-757/4757-417779-985642.pdf>.

Group, Inc. (“NYSE”),<sup>8</sup> and the Nasdaq Stock Market, LLC (“Nasdaq”)<sup>9</sup> with respect to the Plan’s flawed voting framework, it is not clear whether the Commission plans to address those important issues, as the Commission failed to specifically solicit comments on the Plan’s voting structure in its recent Order Instituting Proceedings.<sup>10</sup>

Cboe believes that the Plan under consideration fails to comply with the standards set forth in Rule 608(b)(2) and approving the Plan would be arbitrary and capricious under the Administrative Procedure Act (“APA”), because the Commission’s mandated allocation of voting power lacks any rational connection to Cboe’s consolidated equity market share. Rather, the Commission unreasonably allocates votes amongst the SRO Groups<sup>11</sup> and Non-Affiliated SROs<sup>12</sup> based on an arbitrary threshold of consolidated equity market share of 15% that distorts downward Cboe’s voting power, simply to favor the Non-Affiliated SROs and ensure that the SRO Groups do not possess a majority of the Plan’s voting power. As Cboe previously noted,<sup>13</sup> the Commission cannot establish a voting framework that is wholly unsupported by a reasonable analysis.

As we explained in our previous comment letter,<sup>14</sup> the consolidated equity market share statistics simply do not support allocating to Cboe the same one vote that would be allocated to each of the smaller, Non-Affiliated SROs. Below, we have refreshed the consolidated equity market share calculations for each of the SRO Groups and Non-Affiliated SROs, using data for year-to-date (“YTD”) through March 2024, and that data supports Cboe’s proposal. For ease of reference, we have also reproduced the 2023 consolidated equity market share calculations previously provided by Cboe in its earlier comment letter.<sup>15</sup>

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<sup>8</sup> See Comment Letter from Hope Jarkowski, General Counsel, New York Stock Exchange, February 26, 2024, available at: <https://www.sec.gov/comments/4-757/4757-440059-1094822.pdf>.

<sup>9</sup> See Comment Letter from Erika Moore, Vice President & Corporate Secretary, Nasdaq, Inc., February 26, 2024, available at: <https://www.sec.gov/comments/4-757/4757-435519-1080362.pdf>.

<sup>10</sup> Supra note 2.

<sup>11</sup> “SRO Group” means a group of Members that are Affiliates. See proposed Limited Liability Company Agreement of CT Plan LLC, at A-8, available at: <https://www.sec.gov/files/rules/sro/nms/2024/34-99403.pdf>.

<sup>12</sup> “Non-Affiliated SRO” means a Member that is not affiliated with any other Member. See Limited Liability Company Agreement of CT Plan LLC, at A-6, available at: <https://www.sec.gov/files/rules/sro/nms/2024/34-99403.pdf>. The term, “non-affiliated exchanges,” is intended to refer to the independent exchanges, MEMX, IEX, MIAX, and LTSE. Whereas the term, “Non-Affiliated SROs,” refers to MEMX, IEX, MIAX, and LTSE, as well as FINRA

<sup>13</sup> Supra note 7.

<sup>14</sup> Id.

<sup>15</sup> Id.



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| SRO Groups          | 2023 Full Year             | YTD Mar 2024*             | 2023          | YTD Mar 2024  |
|---------------------|----------------------------|---------------------------|---------------|---------------|
| NYSE                | 26,487,792,441,969         | 7,560,376,449,417         | 20.6%         | 19.8%         |
| Nasdaq              | 24,975,760,649,539         | 7,433,360,568,727         | 19.4%         | 19.5%         |
| Cboe                | 15,030,132,621,825         | 4,358,289,414,381         | 11.7%         | 11.4%         |
| <b>Subtotal</b>     | <b>66,493,685,713,333</b>  | <b>19,352,026,432,525</b> | <b>51.7%</b>  | <b>50.8%</b>  |
|                     |                            |                           |               |               |
| Non-Affiliated SROs | 2023 Full Year             | YTD Mar 2024*             | 2023          | YTD Mar 2024  |
| MEMX                | 3,325,310,821,750          | 892,835,983,062           | 2.6%          | 2.3%          |
| IEX                 | 3,513,158,829,159          | 897,773,164,460           | 2.7%          | 2.4%          |
| MIAX                | 1,566,392,596,487          | 440,539,729,240           | 1.2%          | 1.2%          |
| LTSE                | 3,176,781,255              | 1,616,999,526             | 0.0%          | 0.0%          |
| <b>Subtotal</b>     | <b>8,408,039,028,651</b>   | <b>2,232,765,876,289</b>  | <b>6.5%</b>   | <b>5.9%</b>   |
| TRF                 | 53,757,534,755,930         | 16,542,881,736,946        | 41.8%         | 43.4%         |
| <b>Total</b>        | <b>128,659,259,497,913</b> | <b>38,127,674,045,760</b> | <b>100.0%</b> | <b>100.0%</b> |

Whether one analyzes 2023 or YTD March 2024, it remains clear that the Commission’s allocation of voting power lacks any rational connection to Cboe’s consolidated equity market share, relative to that of the NYSE and Nasdaq SRO Groups, on the one hand, or to the non-affiliated exchanges, on the other hand. Instead, the proposed Plan violates the APA because it lacks a rational basis and both treats the Cboe SRO Group the same as dissimilarly situated non-affiliated exchanges, while also treating the Cboe SRO Group differently from similarly situated NYSE and Nasdaq SRO Groups. *See, e.g., Etelson v. Off. Of Pres. Mgmt.*, 684 F.2d 918, 926 (D.C. Cir. 1982) (agency action is at its “most arbitrary when it treats similarly situated people differently”). Again, Cboe urges the Commission to consider the following noteworthy statistics, which make our view even more evident.

- For YTD March 2024, Cboe’s consolidated equity market share was approximately 11.4%, MEMX 2.3%, IEX 2.4%, MIAX 1.2%, and LTSE 0.0%. Cboe’s consolidated equity market share is more than 4x that of MEMX (11.4% vs 2.3%) and IEX (11.4% vs. 2.4%), almost 10x more than MIAX (1.2%), and approaching more than 2700x more volume than LTSE (11.4% vs. 0.00%)
- Notably, even the **combined** consolidated equity market share for each of the non-affiliated exchanges for YTD 2024 – 5.9% - fell well short of Cboe’s 11.4%.
- The non-affiliated exchanges **combined** possess a little more than 50% (.5 x 11.4% = 5.7%) of the consolidated equity market share (5.9%) maintained by Cboe (11.4%) – i.e., even

when considered together, the individual exchanges' consolidated equity market share comprises only slightly more than 50% of Cboe's consolidated equity market share alone. By allocating the non-affiliated exchanges 4 total votes, and Cboe 1 vote, the Commission has given the non-affiliated exchanges effectively 8x more voting power for their market share relative to Cboe. Such a result is wholly unsupported by reasoned analysis, and approving the Plan with its current voting structure would be arbitrary and capricious.

Moreover, as the Commission is aware, 24X National Exchange LLC ("24X") recently filed its application for registration as a national securities exchange under Section 6 of the Act.<sup>16</sup> Should the Commission approve 24X's application, the mandated Plan would, on Day 1 of 24X's status as a national securities exchange, award 24X the same one vote allocated to Cboe. This would be the case regardless of 24X's consolidated equity market share on Day 1 of their status as a national securities exchange. Such a result is antithetical to the Commission's own rationale that SRO voting should reflect the "significance within the national market system of those exchanges that, in their roles as SROs, oversee trading activity that generates a significant amount of equity market data."<sup>17</sup>

As such, Cboe strongly urges the Commission to recognize what is so plainly evident - the Plan's voting structure is fundamentally flawed because it unjustifiably equates Cboe's significance to the market, and its oversight of trading activity and contribution of equity market data, to that of the much smaller, non-affiliated exchanges. This is illogical, and violative of the APA. Accordingly, the Plan's allocation of voting power must be replaced with a revised and more balanced approach to SRO voting, such as that proposed by Cboe in its January 26, 2024 comment letter.<sup>18</sup> A summary of Cboe's proposed voting framework, which is discussed in detail in Cboe's previous comment letter, can be found in the attached Appendix 1.

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Cboe believes that Plan governance is critical, but that the voting framework in the proposed Plan is fundamentally flawed, and arbitrary and capricious in violation of the APA. Therefore, Cboe once again urges the Commission to consider the reasoning set forth in this letter, and to use Cboe's proposal as the template to change the voting framework in the Plan so that the approved voting structure is consistent with the Commission's stated goal of reflecting the significance of the

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<sup>16</sup> Available at: <https://www.sec.gov/rules/other/2024/24x-form-1>.

<sup>17</sup> See Securities Exchange Act Release No. 92586 (August 6, 2021), 86 FR 44142 (August 11, 2021) ("Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data"), at 44164.

<sup>18</sup> Supra note 7,



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exchanges that oversee trading activity that generates a significant amount of equity market data and allocates voting power equitably among similarly situated exchanges..

Sincerely,

*/Patrick Sexton*

Patrick Sexton  
EVP, General Counsel & Corporate Secretary

### Appendix 1

| Exchange Group             | 2023 Full Year             | YTD Mar 2024*             | With 50% TRF Haircut |                     |
|----------------------------|----------------------------|---------------------------|----------------------|---------------------|
|                            |                            |                           | 2023                 | YTD Mar 2024        |
| NYSE                       | 26,487,792,441,969         | 7,560,376,449,417         | 26.0%                | 25.3%               |
| Nasdaq                     | 24,975,760,649,539         | 7,433,360,568,727         | 24.5%                | 24.9%               |
| Cboe                       | 15,030,132,621,825         | 4,358,289,414,381         | 14.8%                | 14.6%               |
| <b>Subtotal</b>            | <b>66,493,685,713,333</b>  | <b>19,352,026,432,525</b> | <b>65.3%</b>         | <b>64.8%</b>        |
| <b>Non-Affiliated SROs</b> | <b>2023 Full Year</b>      | <b>YTD Mar 2024*</b>      | <b>2023</b>          | <b>YTD Mar 2024</b> |
| MEMX                       | 3,325,310,821,750          | 892,835,983,062           | 3.3%                 | 3.0%                |
| IEX                        | 3,513,158,829,159          | 897,773,164,460           | 3.5%                 | 3.0%                |
| MIAX                       | 1,566,392,596,487          | 440,539,729,240           | 1.5%                 | 1.5%                |
| LTSE                       | 3,176,781,255              | 1,616,999,526             | 0.0%                 | 0.0%                |
| <b>Subtotal</b>            | <b>8,408,039,028,651</b>   | <b>2,232,765,876,289</b>  | <b>8.3%</b>          | <b>7.5%</b>         |
| TRF                        | 53,757,534,755,930         | 16,542,881,736,946        | 26.4%                | 27.7%               |
| <b>Total</b>               | <b>128,659,259,497,913</b> | <b>38,127,674,045,760</b> | <b>100.0%</b>        | <b>100.0%</b>       |

Based on these consolidated equity market share statistics, Cboe proposes a voting structure in which SRO Groups and Non-Affiliated SROs would receive either 1, 2, or 3 votes, with a two-thirds majority of such votes needed for Plan action. Cboe also supports the mandated Plan's provision that an exchange would be eligible to vote on the Plan's operating committee only if it operates a trading venue. Finally, Cboe proposes that the votes would be allocated based on the following three tiers:

- <5% consolidated equity market share: 1 vote
- 5%-15% consolidated equity market share: 2 votes
- >15% consolidated equity market share: 3 votes

As explained in Cboe’s January 26, 2024 comment letter, because FINRA’s Trade Reporting Facility does not quote, but only collects trade reports, Cboe proposes applying a 50% haircut to the TRF volume,<sup>19</sup> and, applying that methodology, the Operating Committee votes using 2024 YTD data would be as follows:

| <b>SRO GROUP</b>                      | <b>Vote(s)</b> |
|---------------------------------------|----------------|
| <b>NYSE</b>                           | <b>3</b>       |
| <b>Nasdaq</b>                         | <b>3</b>       |
| <b>SUBTOTAL</b>                       | <b>6</b>       |
| <b>Cboe</b>                           | <b>2</b>       |
| <b>SRO GROUP TOTAL VOTES</b>          | <b>8</b>       |
| <b>NON-AFFILIATED SROs</b>            |                |
| <b>MEMX</b>                           | <b>1</b>       |
| <b>IEX</b>                            | <b>1</b>       |
| <b>LTSE</b>                           | <b>1</b>       |
| <b>MIAX</b>                           | <b>1</b>       |
| <b>FINRA</b>                          | <b>1</b>       |
| <b>NON-AFFILIATED SRO TOTAL VOTES</b> | <b>5</b>       |
| <b>GRAND TOTAL</b>                    | <b>13</b>      |

Cboe believes that its proposed voting framework would have the following benefits:

1. It would be more representative of the consolidated equity market share for each SRO or SRO Group. Under the proposed Plan, every exchange is awarded the same one vote as Cboe, even if an SRO accounts for essentially 0% of consolidated equity market share, and Cboe accounts for 11.4% (without a 50% TRF haircut). Indeed, Cboe is allocated one vote, despite individually accounting for more consolidated equity market share (11.4%) than the four smaller exchanges combined (5.9%, without a 50% TRF haircut). While Cboe’s suggested alternative would separate Cboe from the non-affiliated exchange, Cboe’s approach also provides a meaningful opportunity for smaller exchanges that experience

<sup>19</sup> For reference, the mandated Plan calculates consolidated equity market share as: *Average daily dollar equity trading volume of eligible securities of an SRO Group or non-affiliated SRO* / (*Average daily dollar equity trading volume of all the SRO Groups and non-affiliated SROs*). Cboe is proposing that consolidated equity market share be calculated with a 50% haircut being applied to the TRF volume included in the mandated Plan’s denominator. Applying this logic, consolidated equity market share would be calculated as: *(Average daily dollar equity trading volume of eligible securities of an SRO Group or non-affiliated SRO) / [(0.50)(TRF) + (Average daily dollar trading volume of all the SRO Groups and non-affiliated SROs)]*.

growth to increase their voting representation if they reach the much more attainable 5% threshold.

2. Additionally, Cboe's framework would also have the benefit of driving consensus amongst the SROs. As illustrated above, with the current number of SROs there would be 13 votes under Cboe's framework. A 2/3 majority would require 9 votes for Plan action. In this regard, Cboe's alternative framework parallels the Commission's goal of preventing the SRO Groups from "command[ing] a majority of votes and thereby control[ling] significant Equity Data Plan actions."<sup>20</sup> Instead, some level of consensus would be required from at least one of the Non-Affiliated SROs in order for a measure to be approved by the Plan's operating committee. Notably, this would still be the case if Cboe were ever to rise into the >15% tier and earn 3 votes instead of 2, or a new SRO (e.g., 24X) were to commence trading. In either scenario, the total number of votes would then increase to 14, with 10 votes required to meet the 2/3 threshold for Plan action. In that scenario, the SRO Groups would still not have the requisite 10 votes for Plan action on their own, and they would need to garner consensus with the Non-Affiliated SROs.