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September 18, 2024

Submitted Electronically

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E. Washington, D.C. 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. Countryman:

Cboe Global Markets, Inc. ("Cboe")[1] appreciates the opportunity to provide additional comments to the U.S. Securities and Exchange Commission (the "SEC" or the "Commission") regarding 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")[2] on October 23, 2023 (the "Plan").[3] In particular, Cboe writes in response to the arguments raised by the Non-Legacy Exchanges[4] in their August 16, 2024 joint comment letter[5] regarding the Plan's methodology to allocate votes amongst the SROs and the

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[1] 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.

[2] 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, MIAX 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.

[3] 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").

[4] "Non-Legacy Exchanges," is a term used by the Non-Legacy Exchanges in their joint comment letter, and refers collectively to MEMX LLC ("MEMX"), Investors Exchange LLC ("IEX"), MIAX Pearl LLC ("MIAX Pearl") and Long-Term Stock Exchange, Inc. ("LTSE"). For consistency with terminology utilized by the Non-Legacy Exchanges in their joint comment letter, the term "Incumbent Exchange Groups" shall refer collectively to Cboe, NYSE Group Inc., and Nasdaq, Inc.

[5] See Comment Letter from Chris Solgan, VP, MIAX Pearl LLC; Alanna Barton, Director and Senior Counsel, Markets and Regulation, Long-Term Stock Exchange, Inc.; Adrian Griffiths, Head of Market Structure, MEMX, LLC; John Ramsay, Chief Market Policy Officer, Investors Exchange LLC, August 16, 2024,

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prior comments submitted individually by Cboe,[6] NYSE Group, Inc. ("NYSE"),[7] and Nasdaq, Inc. ("Nasdaq")[8] on that topic.

As discussed below, the Non-Legacy Exchanges' argument that the opinion in Nasdaq Stock Market, Inc. v. SEC, 38 F.4th 1126 (D.C. Cir. 2022) prohibits the Commission from considering the comments submitted by Cboe, NYSE, and Nasdaq with regard to the Plan's voting structure is wrong. The Non-Legacy Exchanges also grossly mischaracterize Cboe's proposed voting framework, and misleadingly suggest that Cboe's framework runs afoul of the SEC's policy rationale in mandating the proposed Plan.

The D.C. Circuit Court Did Not Consider, Much Less Approve, the 15% Voting Threshold

The Non-Legacy Exchanges' primary contention is that the D.C. Circuit previously considered the fifteen percent (15%) threshold used to determine the allocation of votes amongst the SROs and held that the threshold was consistent with the Exchange Act.[9] That assertion, however, is false.

In fact, the D.C. Circuit did not consider whether the 15% voting threshold was consistent with either the Exchange Act or the Administrative Procedures Act ("APA") because that issue was never presented to the Court. Instead, the Court considered three different issues related to the prior CT Plan: (1) whether representatives of non-SROs could be included as voting members of the CT Plan's operating committee; (2) the grouping of SROs based on corporate affiliation for voting and (3) the requirement that the administrator of the CT Plan be "independent."[10] In its

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available at: https://www.sec.gov/comments/4-757/4757-507775-1476102.pdf (the "Non-Legacy Exchange's Comment Letter").

6 See Comment Letter from Patrick Sexton, EVP, General Counsel & Corporate Secretary, Cboe Global Markets, May 20, 2024, available at: https://www.sec.gov/comments/4-757/4757-475151-1361814.pdf; see also 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.

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

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

9 See Non-Legacy Exchanges' Comment Letter, supra note 5, at 2 (suggesting that the Incumbent Exchange Groups "lost" a challenge related to the 15% voting threshold "in court" and that there is "no reason for the Commission to allow them to relitigate this issue"), 4 (asserting that "[t]he Incumbent Exchange Groups have already had their proverbial day in court" with regard to the voting threshold issues), 5 (claiming that the "D.C. Circuit has already ruled" that the 15% voting threshold "is consistent with the Act").

10 See Nasdaq, 38 F.4th at 1131, 1135-1142.

ruling, the D.C. Circuit held that the inclusion of representatives of non-SROs on the operating committee of the CT Plan violated the Exchange Act and denied the petition for review with respect to the final two issues.[11] In contrast to the Non-Legacy Exchanges' claim that the D.C. Circuit actually considered the propriety of the 15% threshold, that threshold was mentioned only twice in the opinion, when the Court was generally describing the features of the CT Plan that were mandated by the Commission.[12]

The Non-Legacy Exchanges err again when they suggest that the D.C. Circuit's rulings with respect to the Governance Order bar the Commission from considering the alternative voting structure proposed by Cboe.[13] As the Court noted, the Governance Order "preceded the CT Plan Order [that was at issue in the appeal] and merely directed the SROs to propose an NMS plan that included the three challenged provisions."[14] Because the Governance Order itself did not constitute final agency action by the Commission and the appeal was confined to only the three challenged provisions, the Court saw "no need to vacate those portions of [the Governance Order] that direct the SROs to include plan features we have found permissible."[15] The Court did not, however, rule that the other mandates contained in the Governance Order that were not the subject of the appeal were proper, nor does the Court's actual ruling prohibit the Commission from considering Cboe's voting tier proposal.

Moreover, Cboe's proposed voting framework does not propose to abandon SRO Group voting. Instead, Cboe's proposal maintains SRO Group voting, while suggesting a unique and more reasoned alternative to calculating a consolidated equity market share threshold that is consistent with the Commission's statement that SRO voting power 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."[16]

Finally, the D.C. Circuit ultimately vacated the prior CT Plan in its entirety, which procedurally had the effect of sending the SEC and the SROs back to the drawing board on how to structure voting under the Plan. In fact, when publishing the notice of filing of the currently proposed Plan by the SROs, the Commission did not limit the scope of the issues that could be

11 Id. at 1131, 1145.

12 Id. at 1134 and n.2.

13 See August 16 Comment Letter at 4.

14 See Nasdaq, 38 F.4th at 1131; see also id. at 1145.

15 Id., 38 F.4th at 1145.

16 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.

raised by commenters. Instead, the Commission broadly sought public comment as to whether "the proposed CT Plan is appropriately structured, and whether its provisions are appropriately drafted, to support the "prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information,"[17] and "whether modifications to the proposed CT Plan, or conditions to its approval, would be required to make the proposed [P]lan 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."[18]

In sum, the SEC has appropriately re-opened for consideration whether the entire Plan and its terms are consistent with the Act, including its voting framework. The Incumbent Exchange Groups have properly responded to the SEC's request for comment and have illustrated why the Plan's voting framework, if implemented, would violate the Securities Exchange Act of 1934 and would be arbitrary and capricious under the APA.

Cboe's Proposed Voting Framework Presents New Information Not Previously Considered by the Commission

To satisfy the "arbitrary and capricious" standard found in the APA, the SEC (like any federal agency) "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[19] Moreover, the Commission "cannot simply ignore an important aspect of the problem."[20] Here, Cboe's proposed voting framework presents a new, and unique approach to the allocation of votes under the Plan that relies, in part, on data that was generated after the prior version of the Plan was approved by the Commission in 2021. As a result, Cboe has appropriately proposed its modifications to the voting structure based on the market as it exists now and the Commission should decline the Non-Legacy Exchanges' invitation to simply ignore Cboe's proposal.

Specifically, Cboe's proposed consolidated equity market share calculation and its three-tiered voting structure are elements Cboe presented to the SEC after the SEC sought additional

[17] See Securities Exchange Act Release No. 99403 (January 19, 2024), 89 FR 5002 (January 25, 2024) ("Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data"), at 5004

[18] Id.

[19] See, e.g., Bloomberg L.P. v. SEC, 45 F.4th 462, 472 (D.C. Cir. 2022) (internal citations omitted).

[20] See, e.g., Ohio v. EPA, 144 S.Ct. 2040, 2053 (2024).

comments regarding the proposed Plan. As noted in Cboe's comment letters[21] to the Plan, Cboe believes its proposed framework provides a superior way to ensure that votes are rationally allocated to SROs based on their significance to the market, and their oversight of trading activity and contribution of equity market data to the Consolidated Tape.

In contrast, the Plan's currently mandated 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-Legacy Exchanges. As we have noted, that result is illogical, and it would be violative of the APA for the SEC to summarily dismiss Cboe's proposed framework, and the similar concerns raised by NYSE and Nasdaq, on the basis of the flawed analysis presented by the Non-Legacy Exchanges.

The Non-Legacy Exchanges Mischaracterize Cboe's Proposed Voting Framework and Recent Market Trends

The Non-Legacy Exchanges argue that "relative market share trends are by their nature fluid and subject to constant change." They further note that "[n]othing in the D.C. Circuit's ruling suggests that a transitory change in market share between competitors is relevant to the question of how to properly effectuate the SROs' shared regulatory responsibilities in the Plan's voting framework," and that as such, "the Commission is not required to now change course based on the same petitioners' self-interested complaints about current market share trends." These arguments again miss the mark because, as noted above, the D.C. Circuit did not consider the issue of the voting thresholds that were contained in the prior version of the CT Plan. In addition, the Non-Legacy Exchanges conveniently ignore the fact, unless Cboe's proposal is adopted, that post-2022 market developments are likely to result in awarding "disproportionate influence" to a voting bloc comprised of the Non-Legacy Exchanges and nascent exchanges that possess a very small percentage of the total consolidated equity market share, and voting power that would be completely incommensurate with their "significance [to] the national market system..."[22]

Contrary to the accusation that Cboe is simply acting in its own self-interest, Cboe took great effort to formulate a voting framework that preserved the key voting elements mandated by the amended Governance Order.[23] Namely, Cboe's proposal includes voting by SRO Groups and the 2/3 voting requirement. Furthermore, under our proposed framework, Cboe would only receive 2 votes – not 3 votes as allocated to NYSE and Nasdaq. More importantly, based on the

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[21] Supra note 6.

[22] Supra note 16.

[23] See Securities Exchange Act Release No. 98271 (September 1, 2023), 88 FR 61630 (September 7, 2023).

likely allocation of votes under our proposed framework,[24] consensus amongst the Non-Legacy Exchanges and Incumbent Exchange Groups would be required, because even if NYSE, Nasdaq, and Cboe voted together, the Incumbent Exchange Groups would not possess a controlling bloc of votes. This was made abundantly clear with our previous example, restated below.[25]

- "[W]ith 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… [therefore], some level of consensus would be required from at least one of the [Non-Legacy Exchanges or FINRA] 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-Legacy Exchanges or FINRA]."[26]

Given the above, it is unclear how the Non-Legacy Exchanges could suggest that Cboe's proposed voting framework is motivated by an interest in "maintain[ing] control over the Plan."[27] Rather, it is clearly in their own self-interest for the Non-Legacy Exchanges to so grossly mischaracterize Cboe's proposal which, in reality, actually preserves original elements of the CT Plan, and is designed to drive consensus.

Furthermore, while SRO market shares may fluctuate over time, the Non-Legacy Exchanges have conveniently ignored the fact that much has changed in the equities marketplace since the Commission approved the prior version of the CT Plan in 2021. Since 2022, four nascent equities exchanges are either seeking, or plan to seek, approval from the SEC to operate as national securities exchanges.[28] Should any of these exchanges be approved by the Commission, the

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24 Supra note 6.

25 Note, for this restated example the number of votes allocated to each SRO is based on Cboe's proposed voting framework, and not that mandated under the Plan. For convenience, the SRO votes would be allocated under Cboe's proposed framework, as follows: NYSE (3 votes), Nasdaq (3 votes), Cboe (2 votes), MEMX (1 vote), IEX (1 vote), MIAX (1 vote), LTSE (1 vote), and FINRA (1 vote).

26 Supra note 6, Comment Letter from Patrick Sexton, EVP, General Counsel & Corporate Secretary, Cboe Global Markets, January 26, 2024.

27 Supra note 5.

28 24X National Exchange LLC formally filed a Form1 with the SEC, seeking approval as a national securities exchange. See Securities Exchange Act Release No. 99614 (February 6, 2024), 89 FR 15621, (March 4, 2024). The Green Exchange, LLC has also filed a Form 1. See Securities Exchange Act Release No. 100547 (July 17, 2024), 89 FR 59795, (July 23, 2024). Additionally, the Texas Stock Exchange recently announced

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mandated Plan would, on Day 1 of their operation, award them the same one vote allocated to Cboe, regardless of their consolidated equity market share. While the Non-Legacy Exchanges argue that market shares are irrelevant to the allocation of votes, what they fail to consider (or purposely avoid discussing) is that the potential entry of five[29] new exchanges would result in the allocation of disproportionate voting power[30] to a voting bloc comprised of the Non-Legacy Exchanges, FINRA, and five developing securities exchanges that together possess a small percentage of the total consolidated equity market share, and in the case of the newer exchanges, lack the experience and knowledge necessary to administer the CT Plan. To illustrate the stark contrast in consolidated equity market share maintained by the Incumbent Exchange Groups, compared to that of the Non-Legacy Exchanges, consider the updated statistics previously noted[31] by Cboe:

- For YTD August 2024, Cboe's consolidated equity market share was approximately 10.8%, MEMX 2.0%, IEX 2.4%, MIAX 1.1%, and LTSE 0.0%. Cboe's consolidated equity market share is more than 5x that of MEMX (10.8% vs 2.0%), 4x more than IEX (10.8% vs. 2.4%), almost 10x more than MIAX (1.1%), and approaching more than 2600x more volume than LTSE (10.8% vs. 0.00%).

- Notably, even the combined consolidated equity market share for each of the Non-Legacy Exchanges for YTD August 2024 – 5.5% - falls well short of Cboe's 10.8%.

- The Non-Legacy Exchanges combined possess a little more than 50% (.5 x 10.8% = 5.4%) of the consolidated equity market share (5.5%) maintained by Cboe (10.8%) – i.e., even

that it intends to submit its application to the SEC later this year. See https://www.txse.com/, ("TXSE will be a fully electronic, national securities exchange that will seek registration with the U.S. Securities and Exchange Commission."). Furthermore, the Dream Exchange is preparing its Form 1 for filing with the SEC. See https://dreamex.com, ("We are preparing our application to open a national market system stock exchange…").

29 The reference to five national securities exchanges includes, 24X National Exchange LLC Green Impact Exchange, LLC, Texas Stock Exchange, and the Dream Exchange, as well as BSTX. On January 27, 2022, the Commission approved a rule proposal by BOX Exchange, LLC ("BOX"), to adopt rules governing the listing and trading of equity securities on the BOX through a facility of BOX known as BSTX LLC. While BSTX has yet to become a member of the Equity Data Plans, BSTX currently participates as an observer of SIP Operating Committee meetings.

30 Under the mandated Plan, the Incumbent Exchange Groups would possess 5 total votes (NYSE =2, Nasdaq = 2, and Cboe =1). The Non-Legacy Exchanges, the potential five new equities exchanges, and FINRA, would, together, possess 10 votes. Overall, the total number of votes would equate to, 15. Applying a 2/3 majority voting requirement, the Non-Legacy Exchanges, FINRA, and potentially five new equities exchanges would possess a controlling bloc of 10 votes.

31 Supra note 6.

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when considered together, the Non-Legacy Exchanges' consolidated equity market share comprises only slightly more than 50% of Cboe's consolidated equity market share alone. By allocating the Non-Legacy Exchanges 4 total votes, and Cboe 1 vote, the Commission has given the Non-Legacy 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.

The Commission's policy goals of addressing the disproportionate influence the Incumbent Exchange Groups allegedly exercise over plan matters, and preventing bloc voting that dilutes the voting power of the smaller exchanges, must cut both ways. Indeed, a CT Plan that would award "disproportionate influence" to exchanges that possess a small percentage of the total consolidated equity market share is irrational and indefensible. Furthermore, such a result would also directly contradict the Commission's own mandate 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."[32]

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Cboe urges the Commission to reject the Non-Legacy Exchanges' inaccurate characterization of Cboe's proposed voting framework, as well as their flawed arguments that Cboe is somehow barred from raising concerns and making an alternative proposal with respect to the Plan's voting framework. Cboe continues to believe that Plan governance is critical, but that the voting framework in the proposed Plan is fundamentally flawed. The Commission must consider the concerns set forth by Cboe, and we urge the Commission to adopt the reasoning and voting framework set forth in our prior comment letters.

Sincerely,

s/Patrick Sexton

Patrick Sexton
EVP, General Counsel & Corporate Secretary

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32 Supra note 16.