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March 25, 2024

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Submitted via email: rule-comments@sec.gov

Re: Notice of Filing of a Proposed Rule Change to Adopt a New Rule Regarding Order and Execution Management Systems (File No. SR-CBOE-2024-008)

Dear Ms. Countryman:

Bloomberg L.P.[1] respectfully submits this letter to the U.S. Securities and Exchange Commission in response to the above-referenced proposal (the "Proposal") by the Cboe Exchange, Inc. (the "Exchange"). The Exchange is proposing to adopt a new rule that would deem certain Exchange-owned services, despite their affiliation with the Exchange, to be considered outside the scope of a "facility" of the Exchange. Such services, therefore, would not be regulated as a facility of the Exchange and those regulatory protections would no longer apply to market participants in connection with the use of these services.[2]

BACKGROUND

At issue is an Exchange-owned order and execution management systems ("OEMS"). An OEMS is a software product that market participants may use to enter and route orders for executions, as well as manage executions and perform other tasks related to their trading activities.[3] There are presently a number of OEMS systems available in the market that are offered by a variety of technology vendors and market participants.[4] When an OEMS provider is also a wholly owned, direct subsidiary of an exchange (or similarly close relationship), the Commission has rightfully recognized the significance of the unique relationship that flows from this combination of market

[1] Bloomberg – the global business, financial information, and news leader – increases access to market data by connecting market participants of all stripes to a dynamic network of information, people, and ideas. The company's strength – quickly and accurately delivering data, news, and analytics through innovative technology – is at the core of the Bloomberg Terminal. The Terminal provides financial market information, data, news, and analytics to banks, broker-dealers, institutional investors, governmental bodies, and other business and financial professionals worldwide.

[2] *See* Securities Exchange Act Release No. 34-99620 (February 28, 2024), 89 Fed. Reg. 15907 (March 5, 2024).

[3] Proposal at 2.

[4] Proposal at 4, FN 7.

function and affiliation.[5] These exchange-owned OEMSs therefore have historically been regarded by the Commission as "facilities" of an exchange under the Exchange Act due to their affiliation with the exchange when coupled with an ability to route orders to the exchange.

The Exchange has acquired two such OEMS platforms, Silexx and LiveVol. At the time of acquisition, the Commission staff advised the Exchange that affiliation with those entities combined with their ability to route orders to the Exchange caused the OEMSs to be considered "facilities" under the Act.[6]

In the instant filing, the Exchange now wishes to continue providing the same services to the Exchange by simply re-defining "facility" in a manner that removes these Exchange-affiliated OEMSs from the ambit of "facility," thus moving these services outside of the SEC's historic regulatory umbrella.[7] The Exchange is claiming that these services are not "facilities of an exchange" and are not subject to that regulation by the Commission under the Exchange Act.

This Proposal would, as the Proposal's lengthy discussion of the D.C. Circuit's ICE Wireless decision indicates, redefine the well-established definition of "facility" and "exchange" that was recently affirmed by the D.C. Circuit, and radically alter the Commission's jurisdiction and ability to oversee exchanges.[8] This Proposal, if approved, would not only diminish the Commission's ability to oversee exchanges in this context, but the logic and reasoning applied here would extend to any context in which an exchange seeks to limit Commission oversight by simply asserting that the instant activities are deemed "not facilities."

"THE DEFINITION OF "FACILTY" IS CRITIALLY IMPORTANT AS IT SETS THE SCOPE OF COMMISSION JURISDITION OVER EXCHANGES"[9]

This is not a standard exchange proposal to offer services accompanied by text asserting the specific service comports with the Exchange Act.[10] Rather, this is a proposal to exclude a class of

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[5] Proposal at 5. *See also* Notice of Filings of Partial Amendment No. 3 and Order Granting Accelerated Approval to Proposed Rule Changes, each as Modified by Partial Amendment No. 3, to Establish a Wireless Fee Schedule Setting Forth Available Wireless Bandwidth Connections and Wireless Market Data Connections, Securities Exchange Act Release No. 34-90209, Oct. 15, 2020, *available at* https://www.sec.gov/files/rules/sro/nyse/2020/34-90209.pdf.

[6] *Id.*

[7] Proposal at 7.

[8] *See Intercontinental Exch., Inc., et al. v. SEC*, No. 20-1470 (D.C. Cir. 2022), *available at* https://law.justia.com/cases/federal/appellate-courts/cadc/20-1470/20-1470-2022-01-21.html.

[9] *See Letter regarding the statutory definition of facility and H.R. 3555* from Jay Clayton, Chairman, Commission, to Rep. Barry Loudermilk, (December 7, 2017).

[10] Bloomberg offers an OMS service. As this submission makes clear, Bloomberg's concerns with this Proposal go well beyond its particulars relating to OMS.

services offered by an exchange from the core statutory definition of "exchange." We believe this effort is without precedent.

The articulated rationale is also effectively a promise to eviscerate the concept of "facilities" – despite its centrality to the statutory definition of an exchange since 1934.

Henceforth, in the short run judgements as to whether an exchange-affiliated OEMS is governed in a way that is in the public interest – as to competitive consequences and market benefits – would be made by exchanges, not by the SEC as envisioned by statute. Far more importantly, in the long run, the door to circumventing the protections provided for 90 years by the facilities language would be opened.

For the following reasons, we believe the proposed rule change should be disapproved by the Commission. Indeed, as the Commission is being asked to redefine a term in a manner that is on its face inconsistent with the statute, we believe the Commission cannot permit this Proposal to advance.

HISTORICAL CONTEXT

Congress passed the Securities Exchange Act in 1934 to establish a comprehensive regulatory scheme for securities market participants, including national securities exchanges. The Exchange Act grants the SEC broad authority over exchanges, including the authority to regulate both the "marketplace" and "facilities" of an exchange.[11] The definition of a "facility" is therefore a key pillar of the SEC's regulatory framework, as it is an important component in setting the scope of the SEC's authority over exchanges.

Section 3(a)(2) of the Exchange Act defines facility in the context of the exchange definition:

> [t]he term 'facility' when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.[12]

[11] 15. U.S.C. § 78c(a)(1).

[12] *Id*. § 78c(a)(2).

Introduction of the "Exchange Regulatory Improvement Act"

In July 2017, H.R. 3555 (the "Exchange Regulatory Improvement Act") was introduced in Congress.[13] H.R. 3555 would have narrowed the definition of a "facility" of an exchange and similarly reduced the SEC's authority to regulate core exchange activities, such as market data, the infrastructure used in the provision of market data, co-location services, order types, and even obligations under the consolidated audit trail.

At the time H.R. 3555 was introduced – and throughout the debate – supporters of the bill provided no concrete examples of a specific exchange business that was unfairly regulated by the SEC as a result of being included within the definition of facility, nor did they provide examples of a specific exchange activity that would be "potentially" covered by the proposed legislation. In sum, H.R. 3555 was introduced to amend a key term that constitutes a cornerstone of the Exchange Act, without any defined purpose or justification offered.

Ultimately a broad array of market participants pushed back against this legislation, noting that the limitations of the SEC's authority would remove oversight of core exchange functions, such as market data, co-location, connectivity services, order types, and the general obligation to provide a level playing field in accessing the services of the exchange. [14]

Then-Chairman of the Commission Jay Clayton, in a letter responding to an inquiry from one of the bill's sponsors, stated that "the definition of "facility" is critically important as it sets the scope of Commission jurisdiction over exchange", noting in particular the import of exchange market data products and order routing services. [15] Chairman Clayton was joined in his expression of grave concern by a broad coalition including Americans for Financial Reform, Consumer Federation of America, the AFL-CIO, and the North American Securities Administrators Association.[16] Faced with broad opposition, the proposed legislation did not advance in 2017.[17] Similar legislation was introduced in 2022 and again this Congress in 2023, without advancing. The ongoing legislative effort to change the statutory definition of "facility" – prompted by the larger exchanges – would seem to underscore an understanding that the definition of facility cannot simply be defined out of the statute by an amendment to an exchange's rulebook.

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[13] Exchange Regulatory Improvement Act, H.R. 3555, 115th Cong. (2017-2018).

[14] For a discussion of the import of the "facilities" definition, and significance of changing that definition *see Potential Ramifications of The Exchange Regulatory Improvement Act* (November 14, 2017), *available at* https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2017-general-pdfs/hr-3555.pdf?la=en

[15] *See Letter regarding the statutory definition of facility and H.R. 3555* from Jay Clayton, Chairman, Commission, to Rep. Barry Loudermilk.

[16] *See Potential Ramifications of The Exchange Regulatory Improvement Act.*

[17] In 2018, the bill was reintroduced and amended so that it no longer changed the definition of "facility" but rather directed the Commission to engage in a rulemaking on the scope of the definition of facility. The 2018 version was included in a larger legislative package which passed in the House but was not taken up in the Senate.

NYSE Wireless Proposal

In January 2020, NYSE sought to establish a wireless network to transmit market data from its exchange data center in Mahwah, New Jersey directly to other data centers throughout the country.[18] NYSE maintained that the proposed wireless connections were not facilities of the exchange within the meaning of the Exchange Act and therefore did not need to be included within the exchange's rules. Only after the staff of the Commission advised NYSE that it believed the wireless connections were facilities of the exchange, and therefore must be filed as part of its rules, was NYSE convinced to file a proposed rule change. The wireless network, which would be operated by ICE Data Services, would have enjoyed a positional advantage adjacent to the NYSE data center that was not offered to other "competing" vendors. NYSE argued in the filing that the proposed services were not facilities of the exchange.[19]

The Commission disagreed with NYSE's interpretation. Comments on the NYSE Wireless Proposal overwhelmingly supported the Commission's interpretation of facilities, and further noted that the proposed wireless configurations did not comport with the requirements of the Exchange Act.[20] Supportive letters were submitted by the Futures Industry Association ("FIA"), McKay Brothers LLC ("McKay Brothers"), Healthy Markets Association, Securities Industry and Financial Markets Association ("SIFMA"), Virtu Financial, Inc. ("Virtu"), IMC Financial Markets, XR Securities LLC, Citadel Securities LLC, and Bloomberg.

NYSE subsequently modified the proposal in light of the SEC's and commenters' concerns and refiled.[21] The proposed rule, as refiled, was approved by the SEC, which held that the wireless network was not independent of the exchange and the offered services must be regulated as "facilities of the exchange" – and therefore must be made available on terms that are fair and reasonable and without unreasonable discrimination.[22]

Intercontinental Exchange, Inc. v. Securities and Exchange Commission

Following the Commission's approval in October 2021, NYSE, the Intercontinental Exchange, Inc. ("ICE"), and seven of its wholly owned subsidiaries subsequently sued the Commission in the U.S. Court of Appeals for the District of Columbia to overturn the Commission's approval order

[18] *See* Notice of Filing of Proposed Rule Change to Establish a Schedule of Wireless Connectivity Fees and Charges with Wireless Connections, Exchange Act Release No. 88168; File No. NYSE-2020-05 (February 11, 2020), *available at* https://www.sec.gov/rules/sro/nyse/2020/34-88168.pdf (the "NYSE Wireless Proposal").

[19] NYSE Wireless Proposal at 2.

[20] *See* comment letters submitted on the NYSE Wireless Proposal, *available at* https://www.sec.gov/comments/sr-nyse-2020-05/srnyse202005.htm.

[21] *See* Securities Exchange Act Release No. 89458 (Aug. 3, 2020), 85 Fed. Reg. 48045 (Aug. 7, 2020).

[22] Notice of Filings of Partial Amendment No. 3 and Order Granting Accelerated Approval to Proposed Rule Changes to Establish a Wireless Fee Schedule Setting Forth Available Wireless Bandwidth Connections and Wireless Market Data Connections, Securities Exchange Act Release No. No. 34-90209 at 17 (Oct. 15, 2020) *available at* https://www.sec.gov/files/rules/sro/nyse/2020/34-90209.pdf.

of NYSE's own filing and to seek clarification that the proposed services were not in fact facilities of the exchange.. There was no amicus support for NYSE and ICE. By contrast, the Commission received amicus support from FIA, SIFMA, McKay Brothers, Quincy Data LLC, Virtu, Jump Trading, LLC, and Bloomberg. [23]

In a unanimous opinion issued January 21, 2022, the Court unambiguously rejected NYSE's arguments, underscoring that the proposed wireless services offered by ICE Data Services fall squarely within the definition of a facility of the exchange.[24] For good measure, the Court underscored that market data is a facility of the exchange.[25]

CBOE PROPOSAL

The instant CBOE Proposal falls squarely within this history of the exchanges' unrelenting efforts to limit the Commission's authority to oversee core exchange functions. In the wireless case, NYSE asserted that the wireless connections were not a "facility" and hence didn't need SEC approval. However, the D.C. Circuit Court and the Commission – supported by a multitude of market participants in each proceeding – found the wireless services were squarely within the definition of facility. It is sobering to note that – if NYSE had simply amended its rulebook to declare that "wireless connections" are not a facility of the exchange in the way that CBOE is proposing to amend its rulebook – this "filing out" would present substantial obstacles to enforcing the Exchange Act and would undermine future scrutiny by the Commission, market participants, and the courts.

As an initial matter, the staff of the Commission apparently disagrees with CBOE's overall analysis. The Proposal notes that the Commission staff previously "advised the Exchange that affiliation with those entities caused the OEMSs to be considered "facilities" under the Act because it could be used to route orders to the Exchange and thus subject to the rule filing requirements under Section 19(b) of the Act.[26]

We fully support the staff in its position that the Exchange-affiliated OEMS is a facility of the Exchange. As a matter of statutory interpretation, the Exchange-affiliated OEMS fall squarely within the definition of facilities under the Exchange Act. As noted above, the definition of a facility of an exchange is quite broad and includes the premises, tangible or intangible property whether on the premises or not, and any right to use such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange. The OEMS is a form

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[23] *Intercontinental Exch., Inc., et al. v. SEC*, No. 20-1470, at 12, (D.C. Cir. 2022), *available at* https://law.justia.com/cases/federal/appellate-courts/cadc/20-1470/20-1470-2022-01-21.html

[24] *Id*. at 8.

[25] *Id*. at 10. The court noted that a proprietary market data feed does not directly connect purchasers and sellers of securities and therefore, it is difficult to square ICE's concession that sale of such data is subject to jurisdiction as a "facility of an exchange" with ICE's reading of the statute.

[26] Proposal at 5.

of tangible or intangible property that is owned or made available by the exchange. The OEMS also constitutes a "service for the purpose of effecting or reporting a transaction on an exchange."

Finally, these exchange-affiliated OEMSs have been considered for some time, including in prior Exchange filings, to fall within the definition of facility.[27] The acceptance of this new position – allowing the exchanges to not only be the final arbiter of what is a "facility" but also to overturn a settled Commission decision in doing so – would be an enormous departure from established precedent.

As the Proposal seeks to reserve to the Exchange itself the right to determine, via the Exchange's rulemaking process, how the definition will be interpreted going forward, why do we think an Exchange won't get it wrong in other future contexts – as was the case in the wireless transmission context? How does a rule that flatly carves out an entire class of Exchange-affiliated businesses serve the public interest or permit the Commission to continue to thoroughly exercise its oversight functions? Will all exchanges be permitted to offer themselves unilateral exemptive relief from Congressional statutes and Commission rules for other products or services – like market data or order types – that are facilities of the exchange?

As a general matter, the Commission does not, and does not have authority to, regulate activities, such as connectivity services, outside of the Commission's statutory mandate. However, if a service, such as a wireless transmission service, were owned by an exchange and served a function that meets the definition of a facility of an exchange, then the Commission should rightly require it to be treated as such. And when – as in the NYSE wireless case – a proposed use exploits the exchange's monopoly to disadvantage markets and competitors, it is important for the Commission to have the ability to step in and act. It is not surprising that an exchange-affiliated OEMS is a facility of an exchange. It is equally not surprising that an OEMS that is not affiliated with an exchange is not a facility of an exchange.

It is important for a variety of reasons to ensure that the Commission's jurisdiction is preserved and that the Commission retains the tools necessary to fulfill its requirements under the Exchange Act.

It is worth noting that, as observed above, the Commission is obligated to ensure that any proposed rule change is consistent with the Section 6(b)(5) requirement to ensure that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.[28] It would be difficult, if not impossible, for the Commission to discharge this mission without fully understanding the full scope of services offered on the Exchange. For example, the Exchange notes in the Proposal that most OEMSs currently in existence are registered broker-

[27] *See, e.g.,* Securities Exchange Act Release Nos. 82088 (November 15, 2017), 82 FR 55443, 55444 at note 8 (November 21, 2017) (SR-CBOE-2017-068) ("Silexx Approval Order"); and 75302 (June 25, 2015), 80 FR 37685, 37687 at note 10 (July 1, 2015) (SR-CBOE-2015-062) ("LiveVol Approval Order").

[28] Exchange Act § 6(b)(5).

dealers.[29] However, one of the Exchange's conditions to exemption include that the OEMS is not registered as a broker-dealer.[30] How is the Commission to evaluate whether a particular proposed rule would create unfair discrimination if the Commission doesn't have line of sight into the full activities of the Exchange?

We believe the Proposal should be disapproved on the grounds that the Exchange has not met its burden of demonstrating that the proposed rule change – which proposes to allow an Exchange via its rulebook to re-define a key statutory term of the Act – can possibly be consistent with the Exchange Act.

The "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change."[31]

Under the Exchange Act's framework, the Commission may approve the Exchange's rules only upon a finding that such rules are consistent with the Exchange Act. In relevant part, this includes that the rules are designed to:

- "to protect investors and the public interest"[32] and
- not "to permit unfair discrimination".[33]

In making the findings outlined above, it is not sufficient for the Exchange to merely state that the proposed rule is consistent with the Exchange Act. The SEC 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.[34]

One of the key components under the Exchange Act, as noted above, is demonstrating that a particular rule is "designed to protect investors and the public interest." The Proposal contains no information as to how either of these goals are accomplished, and it is not otherwise obvious how removing Commission jurisdiction benefits either the public interest or protects investors.[35]

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[29] Proposal at 4, FN 7.

[30] *See* Proposed Rule 3.66(c).

[31] 17 C.F.R. §201.700(b)(3).

[32] Exchange Act § 6(b)(5).

[33] *Id*.

[34] *See* Susquehanna Int'l Grp., LLP v. SEC, 866 F.3d 442 (D.C. Cir. 2017)

[35] Proposal at 6, FN 13. The Exchange offers only that "Consideration of an OEMS as a facility of the Exchange solely because of the Exchange's affiliation with the OEMS places the provider of the OEMS at a competitive disadvantage compared to other OEMS providers that are not subject to Sections 6(b) or 19(b) of the Act." The Exchange further notes that the Exchange is required to submit rule filings regarding the OEMSs, but the Exchange fails to identify any additional facts indicating any type of burden or undue hardship placed on the Exchange or the Exchange-affiliated

Congress has not moved to change the facilities definition despite exchange-led efforts for years to enact such destructive legislation. The CBOE's attempt at a "hat trick" – circumventing the Congress, the Commission, and the Court – is ill-advised and inconsistent with settled and clear law.

CONCLUSION

It may be possible for CBOE to make a case that an OEMS system – though clearly a "facility" of the exchange – comports with the Exchange Act and may be operated in a fair, reasonable, and non-discriminatory fashion. The Exchange hasn't made that case, but perhaps it is possible such a case could be made.

That is not the question before the Commission. The question before the Commission presently is whether the foundational definition of "exchange" – that has consisted of a marketplace and facilities for 90 years – can be fundamentally altered in a manner that vastly reduces the Commission's authority and the public's rights by the expedient of amending an Exchange rulebook. We believe the answer to that is an emphatic "no".

We appreciate the Commission's efforts in this matter, and we appreciate the Commission's careful and consistent interpretation of the definition of "facility" over the years. We urge the Commission to disapprove this Proposal and reaffirm the long-held standards that have served the market well. We would be pleased to discuss any question that the Commission may have with respect to this letter. Thank you again for the Commission's efforts.

Very truly yours,

Gregory Babyak
Global Head of Regulatory Affairs, Bloomberg L.P.

OEMSs flowing from their status as a facility of the Exchange. This is obviously insufficient for the Commission to make a meaningful assessment as to whether this extraordinary Proposal is in any way justified.