



March 26, 2024

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090

Re: Notice of Filing of a Proposed Rule Change to Adopt a New Rule Regarding
Order and Execution Management Systems (SR-CBOE-2024-008)

Dear Ms. Countryman:

McKay Brothers LLC (“McKay”) and its affiliate Quincy Data LLC (“**Quincy**”) (collectively, the “**Firm**”)¹ appreciate the opportunity to provide comment on the above referenced proposed rule change (the “**Proposal**”) by Cboe Exchange, Inc. (“**Cboe**” or the “**Exchange**”).² The Proposal would create new Rule 3.66, which would set forth criteria for which an order execution and management system platform (“**OEMS**”) provided by the Exchange or an Exchange affiliate would not be considered a “facility”³ of the Exchange and consequently subject to the rule filing process under Section 19 of the Securities Exchange Act of 1934, as amended (“**Exchange Act**”).⁴

Some exchanges have historically taken an improperly narrow reading of the definition of a “facility,” which has had the effect of excluding certain services, systems, and functionality (and associated fees) (collectively “**Services**”) from Commission oversight and the protections afforded by the Exchange Act.⁵ When such Services are not subject to the Exchange Act as a facility of the relevant exchange, it has allowed such exchange to provide Services in an unfairly discriminatory manner among market participants, impose unnecessary/inappropriate burdens on

¹ Quincy is a market data distributor that provides equal access to low latency US equities market data that helps subscribers make tighter markets. McKay is a telecommunications service provider, affiliated with Quincy and using various technologies – often wireless – to offer low-latency data transport services, which likewise allow subscribers to manage risk more effectively and make tighter markets. We offer services on a level-playing field basis—meaning we make our best latencies available to all subscribers. We also provide small firm discounts to support greater diversity of market participants with access to low latency market data.

² Securities Exchange Act Release No. [99620](#), 89 FR 15907 (Mar. 5, 2024) (SR-CBOE-2024-008).

³ 15 U.S.C. 78c(a)(2).

⁴ 15 U.S.C. 78s.

⁵ See, e.g., Letters to Vanessa Countryman, Secretary, Commission, from Jim Considine, Chief Financial Officer, McKay Brothers, LLC re: SR-NASDAQ-2024-007 and SR-NASDAQ-2024-013 (March 22, 2024) (regarding an expansion of The Nasdaq Stock Market LLC’s (“**Nasdaq**”) expansion of a new colocation facility and continued operation of wireless connectivity services with out an appropriate rule filing), <https://www.sec.gov/comments/sr-nasdaq-2024-007/srnasdaq2024007-449159-1150442.pdf>; Jim Considine, Chief Financial Officer, McKay Brothers, LLC (Dec. 10, 2020) (detailing why Nasdaq’s wireless connectivity services are a facility of Nasdaq) (Dec. 10, 2020), <https://www.sec.gov/comments/4-729/4729-8131081-226476.pdf>; Exchange Act Release No. [90209](#), 85 FR 67044 (Oct. 21, 2020) (SR-NYSE-2020-05; SR-NYSE-2020-11) (relating to neutralizing the latency advantage of NYSE wireless bandwidth and wireless market data services). See also [Intercontinental Exchange, Inc. et al v. SEC](#), No. 20-1470 (D.C. Cir. 2022) (the “**Facility Decision**”).

competition and impede a free and open market in contravention of Sections 6(b)(5) and (8) of the Exchange Act.⁶ Certain exchanges have also used affiliates and third-party service providers to obfuscate whether a Service is a facility of an exchange. As the D.C. Circuit noted in the Facility Decision, excluding services provided by an affiliate or other person with a unity of interest can allow an exchange “to evade SEC oversight.”⁷

In light of these concerns, the Firm believes that it is imperative that the Commission carefully scrutinize the Proposal to ensure that it does not facilitate evasion of Exchange Act requirements. The Commission has previously stated that a smart order router (“SOR”), which can have similar functionality to an OEMS,⁸ could represent part of the functionality of an “exchange” under Rule 3b-16 of the Exchange Act⁹ depending on the facts and circumstances.¹⁰ Thus, there are at least some circumstances in which an OEMS or SOR may be considered part of an exchange and/or a facility of an exchange.

* * *

In light of historic (and ongoing) practices by some exchanges to exclude certain Services from regulation under the Exchange Act, we urge the Commission to carefully consider the Proposal and any precedent that it may set. Any exception or carve out from what might ordinarily be considered a facility of an exchange should be narrowly drawn and have safeguards to ensure that: (a) Exchange Act protections will be preserved; and (b) exchanges are not able to misuse such exception or otherwise evade appropriate Commission regulation.

Thank you again for the opportunity to comment on these developments. Please contact us with any questions at (312) 948-9188.

Sincerely,



Jim Considine
Chief Financial Officer
McKay Brothers, LLC

⁶ 15 U.S.C. 78f(b)(5) and (8).

⁷ Facility Decision at 20.

⁸ See Exchange Act Release No. [76474](#), 80 FR 80998, 81052 (Dec. 28, 2015) (“**NMS Stock ATS Proposing Release**”) (describing a SOR (or similar functionality as “an automated system used to route orders or other trading interest among trading centers . . . to carry out particular trading instructions or strategies of a broker-dealer.”).

⁹ 17 CFR 240.3b-16 (further defining an “exchange” under Section 3(a)(1) of the Exchange Act).

¹⁰ NMS Stock ATS Proposing Release at 81053 (“to the extent that a SOR (or similar functionality) or algorithm operates jointly with, or performs a function of, the NMS Stock ATS to bring together the orders for securities of multiple buyers and sellers using established nondiscretionary methods, the SOR (or similar functionality) or algorithm may be considered part of the NMS Stock ATS.”).