April 19, 2024

VIA ELECTRONIC DELIVERY

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Securities Exchange Act Release No. 99620; File No. SR-CBOE-2024-008

Dear Ms. Countryman:

Cboe Exchange, Inc. ("Cboe Options" or "Exchange") appreciates the opportunity to respond to comments on the above-referenced proposed rule change (the "Proposal")[1] in which the Exchange proposes to adopt Rule 3.66, which would provide that an order execution and management system ("OEMS") platform operated by the Exchange or an Exchange affiliate in an independent manner is not a "facility" of the Exchange as defined in Section 3(a)(2) of the Securities Exchange Act of 1934 (the "Act").[2] As discussed in the Proposal and further below, (1) the Proposal is consistent with the Act's definition of facility; (2) Cboe Options submitted the Proposal in accordance with the Act and the rules and regulations thereunder and included sufficient detail demonstrating the Proposal's consistency with the Act; and (3) the Proposal is consistent with the recent U.S. Court of Appeals, D.C. Circuit ("D.C. Circuit") decision regarding the definition of a facility of an exchange.[3] For the reasons set forth below and in the Proposal, the Exchange urges the Securities and Exchange Commission (the "Commission") to promptly approve the Proposal.

1. The Proposal is consistent with the Act's definition of facility.

The Proposal clarifies in a manner consistent with the Act's definition of facility the scope of the Commission's authority with respect to OEMSs offered by the Exchange or an Exchange affiliate. Contrary to commenters' views, the Proposal in no way attempts to redefine the term "facility."[4] Cboe Options agrees with Bloomberg that the "definition of 'facilty' [SIC] is critially [SIC] important as it sets the scope of Commission jurisdition [SIC] over exchanges."[5] In fact, Cboe Options submitted the Proposal in light of this view. As commenters noted, the Act's definition

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1 Capitalized terms in this letter have the meanings set forth in the Proposal.

2 15 U.S.C. 78c(a)(2).

3 Intercontinental Exch., Inc. (ICE), et al. v. SEC, 23 F.4th 1013 (D.C. Cir. 2022) ("ICE Decision").

4 Letter from Tyler Gellasch, President and CEO, Healthy Markets Association ("Healthy Markets"), to Vanessa Countryman, Secretary, Securities and Exchange Commission (March 25, 2024) ("Healthy Markets Letter"); Letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P. ("Bloomberg"), to Vanessa Countryman, Secretary, Securities and Exchange Commission, at 8 (March 25, 2024) ("Bloomberg Letter").

5 See Bloomberg Letter at 2.

of "facility" is decades old,[6] which means it predates the existence of OEMSs and many other aspects of the modern securities markets. The Proposal does nothing more than apply this older definition, as interpreted by the D.C. Circuit, to a specific modern trading tool. Understanding the scope of the definition is as critical as the definition itself to ensure that Commission oversight of exchanges is inclusive of, but also limited to, the properties and services over which Congress intended the Commission to have jurisdiction.[7]

When it is unclear to Cboe Options whether a new product or service would constitute a facility and thus be subject to the Act's rule filing process, Cboe Options may engage in discussions with Commission staff to obtain its view. This was the case with respect to certain OEMSs acquired by the Exchange (or its affiliates), including Silexx and Livevol.[8] While Cboe Options appreciates any guidance Commission staff provides on any matter, we may not always agree with that guidance, and such informal guidance does not ultimately "settle" a matter as Bloomberg suggests.[9] In the cases of the Silexx and Livevol OEMSs, despite our disagreement with Commission staff guidance, Cboe Options proceeded with the submission of rule filings for those OEMSs based on that guidance. The recent ICE Decision, however, supersedes (and conflicts) with that guidance and supports the Exchange's view that OEMSs operated by the Exchange or an Exchange affiliate but independently from the Exchange are not facilities of an exchange as defined in the Act. Specifically, the D.C. Circuit stated that "the term 'group of persons' is [not] synonymous with corporate affiliation,"[10] which is contrary to the previous Commission staff guidance. Given the ICE Decision, the Exchange believed it to be reasonable and appropriate to submit the Proposal to codify that the facility definition does not apply to an OEMS that satisfies the criteria in proposed Rule 3.66. Nowhere does the Proposal suggest alternate wording to the statutory definitions of facility or exchange. Instead, unlike commenters, who merely state without analysis or support that the Proposal is inconsistent with the ICE Decision, the Proposal (as further discussed below) thoroughly applies the D.C. Circuit's legal analysis regarding what constitutes a facility of an exchange to a Rule 3.66 OEMS.

2. Cboe Options submitted the Proposal in accordance with the Act and the rules and regulations thereunder and included sufficient detail demonstrating the Proposal's consistency with the Act.

Cboe Options submitted the Proposal in accordance with Section 19(b) of the Act.[11] The Proposal asks the Commission to approve a rule related to one specific service. If approved by the

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6 See Healthy Markets Letter, at 3; and Bloomberg Letter, at 2.

7 National securities exchanges may offer products and services that are not within the scope of the definition of facility and thus not subject to Commission oversight. For example, "The Options Institute" is the educational division of Cboe Options, which offers educational programs to investors regarding the trading of exchange-listed options. Cboe Options does not believe the Commission expects the Exchange to submit rule filings regarding The Options Institute offerings despite them arguably falling within the definition of "facility." This example demonstrates the need to apply context and appropriate limits when applying the definition of facility to the property and services of an exchange and its affiliates. See ICE Decision, at 17 (where the D.C. Circuit states that analyzing whether the service at issue in that case "without regard to the context in which it operates makes no sense").

8 See Proposal, at 7.

9 See Bloomberg Letter, at 7.

10 ICE Decision, at 19.

11 15 U.S.C. 78s(b).

Commission, the Proposal would affect only OEMSs operated by the Exchange or an Exchange affiliate.[12] As the scope of the Proposal is quite narrow, Cboe Options is perplexed by certain commenters' hyperbolic statements that Commission approval of the Proposal would somehow, among other things, "eviscerate the concept of 'facilities'," [13] "radically alter the Commission's jurisdiction and ability to oversee exchanges," [14] "usurp the Exchange Act," [15] and permit exchanges to "offer themselves unilateral exemptive relief from Congressional statutes and Commission rules for other products or services." [16]

Given these commenters' apparent lack of understanding of the rule filing process and the Commission's authority over national securities exchanges, Cboe Options believes it would benefit these commenters for the Exchange to provide an overview of this process and authority. National securities exchanges, such as Cboe Options, must "file with the Commission . . . any proposed rule or any proposed change in, addition to, or deletion from the rules of such [exchange] . . . accompanied by a concise general statement of the basis and purpose of such proposed rule change." [17] A "stated policy, practice, or interpretation" of the Exchange is deemed a proposed rule change subject to this rule filing requirement if, among other things, it is a "statement made generally available to . . . persons seeking access . . . to facilities of the [exchange] . . . that establishes or changes any standard, limit, or guideline with respect to . . . [t]he meaning, administration, or enforcement of an existing rule." [18]

The Proposal is nothing more than such a proposed rule change. As noted in the Proposal and above, Cboe Options submitted rule filings for OEMSs it acquired from third parties in response to prior Commission staff guidance that such OEMSs became facilities of the Exchange upon their acquisition by the Exchange. The Exchange believes the ICE Decision changed the prior interpretation provided by Commission staff that Exchange ownership of or affiliation with an OEMS caused it to be a facility of the Exchange. As noted above, the Act requires an exchange to submit to the Commission as a rule filing a change to the interpretation of a rule, so Cboe Options submitted the Proposal to do just that. It is not unprecedented for an exchange to submit a filing to provide that products or services previously subject to rule filing requirements are no longer facilities of an exchange subject to those requirements.[19] Like any other rule filing submitted to the Commission pursuant to Section 19(b) of the Act, Cboe Options expects the Commission to carefully review the Proposal and approve the Proposal if the Commission finds it consistent with the Act. Therefore, Cboe Options is not acting unilaterally or outside of the statute and is overtly doing the opposite. Commenters' dire warnings about the impact that approval of the Proposal would have are grossly exaggerated. Contrary to Bloomberg's views, the only

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12 The Proposal, if approved, would have no impact on connectivity services such as co-location and ports or the offering of real-time Exchange market data, which services and data are facilities of the Exchange.

13 Bloomberg Letter, at 3.

14 Bloomberg Letter, at 2.

15 Healthy Markets Letter, at 7.

16 Bloomberg Letter, at 7.

17 15 U.S.C. 78s(b)(1).

18 17 CFR § 240.19b-4(a)(6) and (b).

19 See, e.g., Securities Exchange Release Act No. 56237 (August 9, 2007), 72 FR 46118 (August 16, 2007) (SR-NASDAQ-2007-043) (Commission found that a communication system for which Nasdaq Stock Market LLC previously filed rules was not a facility of the exchange and thus not subject to rule filing requirements).

question before the Commission is whether the Proposal is consistent with the Act.[20] It is nonsensical to believe a single rule filing limited to whether one specific product is a facility of an exchange can "fundamentally alter . . . the Commission's authority" with respect to exchange oversight.[21]

Furthermore, the Proposal contains sufficient information describing the proposed rule change and why it is consistent with Section 6(b) of the Act.[22] The Proposal describes the primary functions of an OEMS with a similar level of detail as prior Cboe Options rule filings regarding OEMSs, none of which were disapproved or suspended by the Commission or commented on as being inconsistent with the Act's rule filing requirements.[23] Proposed Rule 3.66 sets forth specific criteria an affiliated OEMS must satisfy to not be deemed a facility of Cboe Options, which criteria will ensure that such an OEMS would receive no benefit over competing products due to any Exchange affiliation.[24] The Proposal includes statements as to why that criteria would result in independent operation of an affiliated OEMS and that OEMS operating on a level playing field with third-party OEMSs. The Proposal explains how subjecting an independently operated OEMS that happens to be operated by the Exchange or an Exchange affiliate harms competition within the OEMS space.[25] For example, the Exchange must submit rule filings subject to Commission review if, for example, an affiliate that operates an OEMS wants to modify pricing for that OEMS (as Cboe Options does for Silexx), because the OEMS is deemed a facility of the Exchange solely due to exchange affiliation. In contrast, a party not affiliated with an exchange that operates an OEMS, such as Bloomberg, may change pricing for that OEMS in any manner that party chooses, including differentiated pricing based on individual negotiation with customers, without any regulatory oversight. Unlike the Proposal, the Healthy Markets and Bloomberg Letters included no facts or reasons as to how a Rule 3.66 OEMS not being subject to rule filing requirements would benefit from, or have a competitive advantage as a result of, its exchange affiliation. Given that Bloomberg, which is a member of Healthy Markets, also offers an OEMS, Cboe Options views the comments of these two parties as nothing more than attempts to continue to keep a competitive product at a disadvantage.

Commenters' discussions of efforts to modify the definition of facility through legislation are irrelevant to the Commission's consideration of the Proposal, and the Commission should disregard those discussions[26] Cboe Options supports amendment of the Act's definition of facility

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20 See Bloomberg Letter at 9.

21 See id.

22 15 U.S.C. 78f(b).

23 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); and 75302 (June 25, 2015), 80 FR 37685, 37687 at note 10 (July 1, 2015) (SR-CBOE-2015-062). Since Healthy Markets has supposedly reviewed and analyzed over 10,000 self-regulatory organization rule filings, Cboe Options presumes that Healthy Markets is familiar with the Exchange's prior OEMS filings.

24 While Cboe Options does not believe an OEMS operated by the Exchange or an Exchange affiliate must satisfy the criteria set forth in proposed Rule 3.66 to not be deemed a facility of the Exchange, the Exchange included the criteria in the Proposal in good faith to demonstrate that a Rule 3.66 OEMS would be operated in a manner independent from the Exchange.

25 See Proposal, at 29 – 31.

26 See Healthy Markets Letter, at 3 – 4; Bloomberg Letter at 4.

to align that decades-old definition with modern securities markets,[27] but any proposed legislation not enacted by the U.S. Congress, including any legislation supported by Cboe Options, is just a bill[28] and, therefore, has no bearing as to whether the Proposal is consistent with the Act. It is nothing more than hubris for a commenter to presume to know Congress's reasons for not passing a bill.[29] The lack of passage of a proposed bill to become law is immaterial to the application of a current law — the Proposal is nothing more than a request for the Commission to do that.

Cboe Options further believes commenters' views that it needed to seek a statutory exemption are unwarranted.[30] A party generally seeks a statutory exemption when, for example, that party seeks to have a law that applies to a product or service to not apply for specified reasons. An exemption is unnecessary if the statute is inapplicable to that product or service, as the Exchange asserts is the case for a Rule 3.66 OEMS.

3. The Proposal is consistent with the recent D.C. Circuit decision regarding the definition of a facility of an exchange.

As noted above, Cboe Options' submission of the Proposal was prompted, in part, by the ICE Decision, which overruled prior Commission staff verbal guidance regarding the facility status of affiliated OEMSs.[31] The two-prong analysis applied by the D.C. Circuit in the ICE Decision demonstrates that a Rule 3.66 OEMS is not a facility of the Exchange given the relevant facts and circumstances.[32] Contrary to commenters' suggestions, the ICE Decision on its face does not clearly include affiliated OEMSs within the definition of facility of an exchange. The only thing the ICE Decision found on its face was that wireless services of another exchange based on the facts and circumstances regarding those services fell within the definition of a facility of an exchange. A Rule 3.66 OEMS is a distinctly different product than the wireless services at issue in the ICE matter.[33] The D.C. Circuit itself distinguished products that generate, route, and execute

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[27] For example, in 2023, a bill was introduced in the House of Representatives on a bipartisan basis to accomplish this. See Exchange Regulatory Improvement Act of 2023, H.R.6027, 118th Cong. (2023), available at https://www.congress.gov/bill/118th-congress/house-bill/6027/text?s=3&r=1&q=%7B%22search%22%3A%22exchange+regulatory%22%7D. The Proposal is consistent with that bill, which Cboe Options supports and explicitly includes in the definition of facility what Bloomberg described as core exchange functionality (market data, co-location, connectivity services, and order types). See Bloomberg Letter at 4.

[28] See I'm Just a Bill, Schoolhouse Rocks, available at https://youtu.be/OgVKvqTItto.

[29] See Healthy Markets Letter, at 4; Bloomberg Letter, at 4 and 9.

[30] See Healthy Markets Letter, at 7; Bloomberg Letter, at 8.

[31] Compare Proposal, at 7 (describing Commission staff guidance that an OEMS becomes a facility because its operator becomes affiliated with an Exchange) with ICE Decision, at 19 – 20 (stating that "the term 'group of persons" is [not] synonymous with corporate affiliation"). Given that statement by the D.C. Circuit in the ICE Decision, the prior informal Commission staff guidance that is inconsistent with that statement is moot, despite commenters support of that prior staff guidance. See Bloomberg Letter at 6.

[32] See ICE Decision, at 20.

[33] Similarly, a Rule 3.66 OEMS is vastly different than the products cited by McKay Brothers LLC ("McKay Brothers") as attempts by other exchanges to exclude certain services from Commission oversight. See Letter from Jim Considine, Chief Financial Officer, McKay Brothers, LLC, to Vanessa Countryman, Secretary, Securities and Exchange Commission (March 26, 2024) ("McKay Letter"), at 2. As noted above, efforts of other exchanges to exclude services from the definition of facility are not relevant to whether the Proposal is consistent with the Act. A

orders (the primary functions of an OEMS) from technology serving a core exchange function.[34] Further, the arguments Cboe Options put forth in the Proposal to demonstrate that a Rule 3.66 OEMS is not a facility of the Exchange are completely different from those put forth by the parties in the ICE matter.[35]

The Proposal extensively analyzed the specific facts and circumstances related to a Rule 3.66 OEMS to demonstrate that such a product is not a facility of an exchange, applying the same analysis used by the D.C. Circuit in the ICE Decision,[36] making the Proposal wholly consistent with the ICE Decision.[37] In stark contrast, commenters' assertions that the ICE Decision rejected the arguments in the Proposal were devoid of both legal analysis and supporting facts.[38] Given commenters' lack of analysis and omission of reasons supporting why a Rule 3.66 OEMS should be deemed a facility of an exchange, Cboe Options does not believe it needs to repeat its own analysis in this letter. Cboe Options, however, takes this opportunity to reiterate the following critical factors:

- an OEMS does not serve a core exchange function[39];
- a user of a Rule 3.66 OEMS that chooses to directly connect to the Exchange would do so in the same way as a user of any other OEMS;
- use of a Rule 3.66 OEMS is voluntary and not required to access the Exchange;

Rule 3.66 OEMS has no impact on latency or access to market data offered by the Exchange. Further, a Rule 3.66 OEMS is not a smart order router, as it makes no decisions regarding where an order will be routed for execution given that it is not a broker-dealer – all such routing decisions are within the discretion of Rule 3.66 OEMS users and their brokers. Proposed Rule 3.66 would prevent an affiliated OEMS from being a registered broker-dealer and thus from acting as a smart order router.

[34] See ICE Decision, at 4 (noting that exchanges compete with respect to technologies and matching algorithms used for core exchange functions while brokers and traders rely upon technology to "generate, route, and execute orders").

[35] See ICE Decision at 16. Nowhere does the Proposal state that an OEMS should not be a facility because it is offered by an Exchange affiliate, because it is a service, or because it is not connected directly to the Exchange's matching engine. In fact, a Cboe Options affiliate, Cboe Data Services, LLC, licenses Cboe Options' real-time data to customers. Cboe Options submits rule filings for that market data, which is a facility of the Exchange, and Cboe Options does not believe having an affiliate offer that data causes it to not be classified as such.

[36] See Proposal, at 12 – 29.

[37] See, e.g., ICE Decision, at 17 (noting that context must be considered when analyzing whether a product or service falls within the definition of facility); and 20 (noting that, in certain circumstances, corporate affiliates may not be a "group of persons" under the Act). Cboe Options notes Healthy Markets "irreverence" to facts, given the false statement it made three times that Cboe Options participated in the ICE matter when, in fact, it did not. Compare Healthy Markets Letter, at 6, 7, and 9 with D.C. Circuit General Docket, ICE v. SEC, 23 F.4th 1013 (D.C. Cir. 2022) (listing the following parties as Amici Curiae: McKay Brothers, Quincy Data LLC, Virtu Financial, Inc., Jump Trading, LLC, Securities Industry and Financial Markets Association, FIA Principal Traders Group, and Bloomberg).

[38] While Healthy Markets believes that any analysis of whether an OEMS is a facility of an exchange should stop with the definition of facility (see Healthy Markets Letter at 4), the D.C. Circuit explicitly stated that any analysis of whether a product or service is a facility of an exchange should not stop there. See ICE Decision, at 18 (where the D.C. Circuit states that its analysis does not end with looking at the definition of "facility").

[39] Cboe Options notes that the OEMS currently owned and operated by an Exchange affiliate (i.e., Silexx) operates in a manner substantially similar to how it operated prior to such affiliation with the Exchange.

- a user of a Rule 3.66 OEMS may submit orders from that OEMS to market centers other than the Exchange;

- Rule 3.66 OEMS users and their brokers are responsible for decisions regarding where any orders entered through that OEMS are routed for execution;

- the Cboe Options matching engine handles any order that originated from a Rule 3.66 OEMS in the same manner as an order that originated from any other OEMS; and

- a user of a Rule 3.66 OEMS would receive no advantage — latency or otherwise — over a user of any other OEMS.

The two-prong analysis used by the D.C. Circuit applied to these facts and circumstances demonstrates that, despite affiliation with the Exchange, a Rule 3.66 OEMS is not a facility of the Exchange.

Conclusion

For the reasons described in the Proposal and above, Cboe Options strongly urges the Commission to approve the Proposal without undue delay. The Proposal is consistent with the rule filing requirements of the Act and the Act's definitions of "facility" and "exchange," and describes why, if approved, it would, among other things, improve competition within the OEMS market and ultimately benefit investors.

Please feel free to contact Patrick Sexton at (312) 786-7467 or me at (312) 786-7572 if you have any further questions related to this matter.

Respectfully submitted,

/s/ Laura G. Dickman

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