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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:

On February 13, 2024, Cboe Exchange, Inc. (the "Exchange" or "Cboe") filed a proposed rule change[1] with the Securities and Exchange Commission (the "Commission") to deem certain Exchange-owned services, despite their affiliation with the Exchange, to be outside the scope of the definition of "facility" as defined in Section 3(a)(2) of the Securities Exchange Act of 1934 (the "Exchange Act").[2] Such Exchange services, therefore, would not be regulated as a facility of the Exchange, the Exchange would no longer submit rule filings for review by the Commission in connection with those services, and the regulatory protections of the Exchange Act would no longer apply to market participants with respect to those services.

Bloomberg L.P.[3] respectfully submits this letter to the Commission in response to the Proposal and in response to the Exchange's recent letter submitted in support of the Proposal (the "Response Letter").[4]

We believe the Exchange continues to misunderstand the fundamental issue – that the Exchange Act, and ultimately Congress, sets the scope of activity that is regulated as an "exchange." An exchange may not simply declare itself no longer in scope of the relevant statutory framework,

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[1] *See* Securities Exchange Act Release No. 99620 (February 28, 2024), 89 Fed. Reg. 15907 (March 5, 2024) (the "Proposal").
[2] 15 U.S.C. 78c(a)(2).
[3] 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.
[4] Letter from Laura G. Dickman, Vice President, Cboe Global Markets, Inc. (April 19, 2024), *available at* https://www.sec.gov/comments/sr-cboe-2024-008/srcboe2024008-460951-1202654.pdf.

and the Commission cannot approve a rule filing that re-defines a key statutory term for the sole purpose of exempting an activity that otherwise requires registration as an exchange.

While nothing in Cboe's Proposal effectively addresses these points, the Proposal and Response letter do raise side issues that should be noted:

- the Exchange has failed to articulate any material harm or existing burden on competition that would justify this radical departure from the established definition of facility. To the contrary, we believe that there are significant risks associated with permitting this arrangement to go forward free from Commission oversight;
- the Exchange completely misinterprets the ICE Wireless Decision on a number of levels in an effort to roll back the Court's express determination that the definition of both "exchange" and "facility" should be interpreted broadly under the Exchange Act;[5]
- the Exchange's central factual argument - that the exchange-owned OEMSs are independently operated from the interests and control of the Exchange - appears to be without merit and contrary to the facts provided in the Proposal; and
- the Exchange provides no prior instances in which the Commission has previously permitted an exchange to own and operate an affiliate in this manner outside of the scope of the Commission's oversight.

BACKGROUND

As we noted in our prior letter, at issue is an Exchange-owned order and execution management system ("OEMS"). An OEMS is a software product that market participants may use to enter and route orders for execution, as well as manage executions and perform other tasks related to their trading activities.[6] OEMSs may permit users to route orders to other market participants or to route orders directly to trading venues for execution. There are presently a number of OEMSs available in the market that are offered by a variety of technology vendors and market participants.[7] There are also several OEMSs that are owned by, or affiliated with, an exchange.

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 function and affiliation – particularly when the OEMS permits users to route orders to the exchange.[8] OEMSs therefore have historically been

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[5] *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 (the "Ice Wireless Decision").

[6] Proposal at 2.

[7] Proposal at 4, FN 7.

[8] Proposal at 5. *See also Order Approving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, to Remove Provisions Governing the Operation of the ACES System,* Securities Exchange Act Release No. 56237 (August 9, 2007), 72 FR 46118 (August 16, 2007) (SR-NASDAQ-2007-043), available at https://www.sec.gov/files/rules/sro/nasdaq/2007/34-56237.pdf; *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*

regarded by the Commission as "facilities" of an exchange under the Exchange Act when they are (i) owned by the exchange and (ii) provide the users with the ability to connect directly to the exchange.[9] This interpretation of facility aligns closely with the statutory definition of "facility" as defined in Section 3(a)(2) of the Exchange Act.

The Exchange has acquired two such OEMS platforms, Silexx and LiveVol.[10] As described in the Proposal, a significant portion of the customers of these exchange-owned OEMSs have the ability to route orders directly to the Exchange – thus bringing them in scope of the definition of "facility," and in line with the Commission's longstanding interpretation of that term. Thus, these exchange-owned services have been subject to the rule filing requirements under Section 19(b) of the Act and subject to the statutory and regulatory requirements that flow from exchange regulation.

Through the Proposal, the Exchange now wishes for the Commission to adopt a radically different approach. At heart, the Exchange wishes to continue providing the same OEMS services, including providing the ability to route orders directly to the Exchange, yet simply re-define "facility" in a manner that removes these Exchange-affiliated OEMSs from the ambit of "facility." These services would therefore be moved outside of the SEC's regulatory umbrella.[11]

The Exchange provides little substantive support for this newfound position. Rather than address the core issue – that the exchange-affiliated OEMS provides a direct connection to the Exchange, thus bringing it within the definition of "facility" – the Exchange raises a number of unrelated observations. However, these observations do not rebut the simple fact that the services fall within the statutory facility definition and should be regulated as such.

During the Commission's initial comment period, three commenters, including Bloomberg, submitted letters in opposition to the Proposal and specifically opposition to the Proposal's attempt to re-define facility in the context of an exchange rule filing. Commenters also broadly expressed concern with the implications of the Proposal on future proposals and the overall market structure implications. Should the Exchange be permitted to exempt itself from the substantive requirements of the Exchange Act, the commenters observed, the potential ramifications are significant.

Commenters also questioned whether the Commission has the authority to approve such a filing, as the scope and requirements of the Exchange Act are statutory obligations, and it is not within the Commission's remit to reinterpret or amend the Exchange Act through an SRO rule filing.[12]

While the Proposal received substantial opposition, no comments were submitted in support of the Proposal other than a letter submitted by the Exchange itself.

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*

[9] Proposal at 5.

[10] *Id*. 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.

[11] Proposal at 7.

[12] *See* Letter from Tyler Gellasch, President and CEO, Healthy Markets Association, to Vanessa Countryman, Secretary, Securities and Exchange Commission (March 25, 2024) at 7.

DEFINITION OF EXCHANGE

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.[13] 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.

The Proposal sets forth two foundational questions before the Commission – neither of which were addressed, let alone answered by the Exchange. The first question is whether an SRO can, via an amendment to its rule book, exclude a class of services from the "facilities" definition when those services otherwise fall within the statutory definition. The second question is whether the SEC can approve such a rule change that seems facially inconsistent with the clear language of the statute.

THE EXCHANGE CANNOT EXEMPT ITSELF FROM THE SUBSTANTIVE STATUTORY REQUIREMENTS.

As we noted in our prior letter, this is not a standard exchange proposal to offer services accompanied by text asserting the specific service comports with the Exchange Act.[14] Rather, this is a proposal to exclude a class of services offered by an exchange from the core statutory definition of "exchange." We believe this effort is without precedent.

Exchanges, at heart, offer a monopoly product. The Exchange Act and the Commission's rules thereunder convey special privileges on exchanges to publish quotes, enjoy limits on liability, bind market participants to trades, and compel market participants to provide market data immediately and without compensation. With these special privileges attach certain obligations: to be subject to Commission oversight, to establish rules that "provide for the equitable allocation of reasonable dues, fees, and other charges among . . . persons using its facilities,"[15] "promote just and equitable principles of trade,"[16] and not "impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Securities Exchange Act of 1934]."[17]

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[13] 15. U.S.C. § 78c(a)(1).

[14] Bloomberg offers an OMS service. Cboe asserts that that fact diminishes the validity of Bloomberg's concerns – and somehow the validity of Healthy Markets' concerns as well. While there is nothing surprising about an OMS operator being concerned about the proposed diminution of the protections of the 1934 Act, as this submission makes clear, Bloomberg's concerns with this Proposal go well beyond its particulars relating to OMS. Bloomberg has engaged with the Commission on issues relating to the definition of a "facility" for decades. The fact that the Cboe initiative is allegedly anchored in the ICE Wireless Decision, a matter in which Bloomberg filed three comment letters and an amicus brief, suggest that Bloomberg's interest is a good deal broader than its provision of an OMS. HMA has likewise engaged with the Commission on the ICE Wireless proceeding and has historic interests in the facility debate that long precede this Proposal and touch facilities well beyond OMS.

[15] 15 U.S.C.§ 78f(b)(4)

[16] 15 U.S.C.§ 78f(b)(5).

[17] 15 U.S.C.§ 78f(b)(8).

The substantive rationale for this overarching framework is to ensure that market participants have access to the services and facilities of the exchange on terms that are fair and reasonable and equally subject to Commission review. The fundamental point of this framework is that exchanges – whether acting as an organization, association, or group of persons – are subject to the framework and have the legal responsibility to abide by the Exchange Act requirements with regard to the services covered.

Again, the broader question before the Commission is not whether this particular OEMS – as a facility of the exchange – is being offered in a manner consistent with the Exchange Act requirements. For the reasons set forth below, we believe that it is not. But Cboe has chosen not to put that question before the Commission. The question is whether a self-regulatory organization can via a rule change exempt a class of services from the law. The answer to this question is no.

The Exchange claims in its Response Letter that it is not actually seeking to redefine the term "facility," but rather it is seeking to "clarif[y] 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."[18] We believe this to be a distinction without a difference. "Clarifying" the definition of facility in a manner that results in a novel interpretation of the definition is substantively the same as "redefining" the term. As then-Chairman of the Commission Jay Clayton stated – in responding to an exchange-led legislative effort to eviscerate the statutory facilities language – "the definition of facility is critically important as it sets the scope of Commission jurisdiction over exchanges." Market data products and order routing services were highlighted as particularly critical.[19] We think Chair Clayton understood the contours of the Commission's authority. The Exchange's reinterpretation constitutes a significant departure from the Commission's previously articulated position as well as all prior interpretations.

In its Response Letter, the Exchange states that it is "perplexed" by the reaction that the Proposal has drawn as the Exchange claims the Proposal is "quite narrow."[20] We disagree. Were the Commission to approve this filing and enable regulated entities to exempt themselves out from under a previously applicable statute, the Exchange would effectively be permitted to change the contours of the statute. The implications of that would be quite broad.

The Proposal itself cuts against the Exchange's own argument that this is a "quite narrow" interpretation in its purported reliance on the ICE Wireless Decision. Cboe inaccurately asserts that the ICE Wireless 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."[21] But the ICE Wireless Decision had nothing to do with OEMS. Cboe's assertion is, in fact, based on the premise that changes in process and procedures relating to one facility of one exchange are applicable to entirely different classes of facilities on an entirely different exchange. So the Exchange is trying to have it both ways. The Exchange is trying to claim that this is a

[18] Response Letter at 1.
[19] *See Letter to Rep Barry Loudermilk regarding the statutory definition of facility and H.R. 3555*, Jay Clayton, Chairman, Securities and Exchange Commission (December 7, 2017).
[20] Response Letter at 3.
[21] Response Letter at 3.

narrowly focused interpretation that will have little impact outside of OEMS, but simultaneously misreading the ICE Wireless Decision to argue it fundamentally changed the regulatory landscape and has now afforded exchanges broadly the opportunity to challenge the Commission's long-settled authority.

This reference to the ICE Wireless decision makes clear that the Exchange's position in the Response Letter that the Proposal is "quite narrow" and that the commenters "grossly exaggerate[e]" the potential impact of the Proposal is nonsensical. Again, it is worth noting the ICE Wireless Decision had nothing to do with an OEMS. It was not referenced once in the decision, and the underlying exchange proposals at issue in the decision did not involve nor mention OEMSs. However, despite this, the Exchange is now offering up the ICE Wireless Decision – a decision that resoundingly supported the SEC and its historic position on facilities - as a foundational justification for the Exchange's new interpretation.

THESE SERVICES HAVE BEEN DEEMED BY THE COMMISSION TO BE A FACILITY AS THEY MEET THE STATUTORY CRITERIA

An OEMS, among other things, is a software product that market participants may use to enter and route orders, including routing to a trading venue, for execution.

The Commission staff has previously advised the Exchange that the affiliation between an OEMS and an exchange, combined with the OEMS's ability to route orders to the Exchange results in the OEMS being considered, and falling within the definition of, a "facility" of the Exchange under the Exchange Act. This is clearly a correct interpretation of the statute. The exchange-affiliated OEMS provides the ability to route orders to the exchange trading system and is thus a service offered by the exchange "*for the purpose of effecting… a transaction on an exchange*…" In addition, the OEMS is "a system of communication to or from the exchange… maintained by or with the consent of the exchange" that is offered "for the purpose of effecting or reporting a transaction on the exchange." This is precisely why the Commission has long held that this service is a facility of the Exchange.[22]

Cboe attempts to muddy the waters surrounding this straightforward interpretation by maintaining that the Exchange-affiliated services are "operated in a manner independent from the Exchange," and thus should not be considered a facility.[23] Whatever this means in practice, and to the extent it is even true that it is independently operated, neither the Exchange Act, nor the Commission, nor the D.C. Circuit have recognized this as a legally relevant distinction as to whether a particular service, when offered by an exchange, does or does not fall within the definition of facility. As the D.C. Circuit noted in the ICE Wireless Decision, the Exchange includes a "group of persons" that together "maintains or provides a market place or *facilities*." This is true even where the services

[22] *See also Regulation of Exchanges and Alternative Trading Systems*, Securities Exchange Act No. 40760 (December 8, 1998), 63 FR 70844 at 70891(December 22, 1998) (the "Reg ATS Adopting Release") ("A subsidiary or affiliate of a registered exchange could not integrate, or otherwise link the alternative trading system with the exchange, including using the premises or property of such exchange for effecting or reporting a transaction, without being considered a 'facility of the exchange.'").
[23] Proposal at 7.

are collectively offered by the Exchange and an exchange affiliate. Cboe has not identified any compelling reason why the D.C. Circuit's understanding of facility as articulated in the ICE Wireless Decision should be overturned here.

The Response Letter also notes that the definition of facility is decades old and was formulated prior to the existence of an OEMS. While this is true, it indicates primarily that the definition is sufficiently flexible, provides an appropriate framework, and has stood the test of time. This is likely why Congress has not – over a 90-year span – changed the definition despite importuning from the exchanges to do so. The standard articulated by the Exchange – that regulation of services that did not exist in 1934 are suspect – would, for example, arguably place regulation of electronic trading on exchanges outside the scope of the Commission's authority.

The Exchange completely misinterprets the ICE Wireless Decision on a number of levels in an effort to roll back the Court's express determination that the definition of both "exchange" and "facility" should be interpreted broadly under the Exchange Act.

Section 3(a) of the Exchange Act defines "exchange" as "any organization, association, or group of persons . . . which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange."[24]

Under the definition, an "exchange" consists of both the "marketplace" and the "facilities" of the exchange.

Section 3(a)(2) of the Exchange Act defines "facility" as follows:

> The 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.[25]

The recent ICE Wireless Decision affirmed several key points regarding the definition of "exchange" and "facility" under the Exchange Act and are directly relevant to the arguments advanced in the Proposal and the Response Letter.

First, the D.C. Circuit found that the term "group of persons" in the definition of exchange "certainly includes *closely connected corporate affiliates."*[26] The Court reasoned that if it did not, then exchanges would be able to elude SEC jurisdiction by making a simple change to its corporate structure. Further, the Court noted that the key consideration in determining group status is whether

[24] 15 U.S.C. § 78c(a)(1).
[25] 15 U.S.C. § 78c(a)(2).
[26] ICE Wireless Decision at 19.

two or more persons are or may be *acting in concert*.[27] The court also noted that the determination would likely depend on the facts and circumstances, but the outer bounds of the definition were not confronted in the present case.[28]

The Proposal argues that, regarding the definition of group, "the recent ICE Decision…supersedes (and conflicts) with" the Commission staff guidance previously provided.[29]

The ICE Wireless Decision did no such thing. The Court's decision expressly stated that "group" *certainly* includes closely connected corporate affiliates, which is the case here. The OEMSs connect to the Exchange's trading systems, Exchange fees are structured to compensate for perceived competitive disadvantages, and information is shared across the enterprise in a manner that indicates the entities are acting in concert. This is indicative of operating in a closely connected manner and the relationship falls squarely within the category that the D.C. Circuit characterized as "certainly" acting as a group.

The Court further indicated that a key consideration for "group" status, outside of the closely connected corporate affiliate determination, is whether "two or more persons are or may be acting in concert." This is also certainly the case here as the OEMS provides connectivity to the Exchange, enjoys preferable fees from the Exchange, and shares information with the Exchange. Even if the entities are not closely connected, they are certainly acting in concert.

The Exchange seizes on one sentence of the opinion, taken in isolation, to imply that the ICE Wireless Decision diminished or created a conflict with a prior understanding of the term "group."[30] The statement however, which was taken out of context, actually supports the notion that "group" should be interpreted quite broadly. The court goes on to say that the key consideration is most likely whether the persons are or may be acting in concert. As we noted above, these entities certainly are. It is also worth noting that the court expressly stated that this issue (i.e., the outer bounds of the term group) was not before the Court and so the discussion regarding that boundary has been left unchanged – and certainly does not "supersede" or "conflict" with prior Commission interpretations.

It is also worth noting that the Proposal and the Response Letter repeatedly indicate that the exchange-owned OEMS is operated in an "independent" manner from the Exchange. "Independent" manner was not mentioned in the ICE Wireless Decision. To the extent that an independent manner is meant to imply that the OEMSs are not "closely connected corporate affiliates" or "not acting in concert," the facts indicate otherwise. Either way, these are not relevant distinctions that the D.C. Circuit raised in the ICE Wireless Decision.

Second, the Exchange simply misinterprets the plain meaning of the facility definition.

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[27] Id. at 20.
[28] Id. at 20-21.
[29] Response Letter at 2.
[30] Proposal at 23. (Noting that the ICE Wireless Decision did not suggest "that term group of persons is synonymous with corporate affiliation.")

As noted above, Section 3(a)(2) of the Exchange Act defines "facility" as follows:

> The 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.

The Proposal asserts that "[the Exchange] does not have any right to use a Rule 3.66 OEMS for the purpose of effecting or reporting a transaction on an exchange."[31] This may be true enough. But the exchange incorrectly interprets the facility definition to include only "any right *of the Exchange to use* the premises, property, or services of the exchange."

This interpretation is not supported in the text of the statute or by the 90 years of application of the statute. To the contrary, the right to use the premises, property, or service under the definition extends broadly to "*any* right" that is created in connection with the use of the premises, property, or service. It is not limited to rights that *belong* to the exchange or are *used by* the exchange as the Proposal would have it.

The purpose of this section of the definition is to ensure that the facility covers not only the premises, property, and services *but also* the rights to the use of the premises, property, and services. For example, in the context of a physical trading floor, the physical trading floor is covered by the definition as the premises or property of the exchange, but the *right to use* the trading floor is separately covered by the second portion of the definition. The Proposal tries to advance the novel theory that the only rights that are covered under the facility definition are those that are created for use by the exchange. This is contrary to the plain meaning of the statute and contrary to the well-established interpretation of facility.

In addition, the Exchange's interpretation on this point would lead to absurd results. The physical property would be regulated as an exchange, but any rules associated with what transpires on the property (i.e. the right to use the services of the exchange) would not be covered.

The Proposal's reading of the definition is also inconsistent with the final clause of the facility definition, which separately notes that "facility" includes "any right *of the exchange* to the use of any property or service." This final clause, which specifically references the rights *of the exchange*, is in addition to the prior section of the definition that more broadly refers to "any right" to use the premises, property, or services. If the Exchange's interpretation of the first part of the definition is accepted, the final clause of the definition serves no purpose and would be entirely redundant.

[31] Proposal at 11.

The Exchange provides no prior instances in which the Commission has previously permitted an exchange to own and operate an affiliate in this manner outside of the scope of the Commission's oversight.

In support of its Proposal, the Exchange points to a Nasdaq filing which the Exchange offers as an example of a prior instance in which the Commission allowed an exchange to remove a facility from its rulebook through the rule filing process (the "Nasdaq Proposal").[32] However, the Nasdaq Proposal provides no support for the Exchange's position.

In the Nasdaq Proposal, the service in question was never a facility to begin with. At the time of the filing, Nasdaq operated the ACES communications service, which was a communications service that allowed market participants to route orders to one another. Importantly ACES did not effect trade executions, and it did not report executed trades to the tape. Thus, it did not fall within the definition of facility as it did not provide a service "for the purpose of effecting or reporting a transaction on an exchange," a key component of the facility definition. The Commission approved the Nasdaq Proposal noting that it was "not possible" for an order to be routed to the Nasdaq Market Center via the ACES system, and therefore it was appropriately deemed out of scope of the definition of facility.[33] Additionally, the Commission noted the ACES system was not linked with the Exchange's core systems or the Exchange's automated system for order execution and trade reporting.

The facts of the Nasdaq Proposal are materially different from the Cboe Proposal. According to the Cboe Proposal, the OEMS services do provide the ability to connect to the exchange trading systems, and a significant portion, almost 40% of the current OEMS users connect directly to the Exchange. Moreover, in a 2023 Proposal to amend its rules regarding complex orders, Cboe noted that "Each Floor Broker TPH has a Silexx workstation, which can be used to systematize orders. Therefore, each Floor Broker TPH will be able to immediately comply with the proposed rule change."[34]

As noted above, these connections bring the service squarely within the definition of facility and the Commission has rightly recognized that these services should therefore be included in the Exchange's rulebook. The Exchange cites no prior instances in which the Commission has departed from this well-established policy and approved a rule filing that would allow an exchange to remove a facility from its rulebook.

ISSUE TWO – THE COMMISSION IS NOT EMPOWERED TO APPROVE A RULE FILING THAT CATEGORICALLY EXEMPTS AN EXCHANGE FROM THE SUBSTANTIVE REQUIREMENTS OF THE EXCHANGE ACT.

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[32] See Securities Exchange Act Release No. 56237 (August 9, 2007), 72 FR 46118 (August 16, 2007) (SR-NASDAQ-2007-043).

[33] https://www.sec.gov/files/rules/sro/nasdaq/2007/34-56237.pdf

[34] *See Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Rules in Connection with the Number of Legs of a Complex Order that may be Entered on a Single Order Ticket at the Time of Systemization, Sec. and Exch. Comm'n, Exch. Act Rel No. 98216 (Aug 24, 2023), at 5, available at* https://cdn.cboe.com/resources/regulation/rule_filings/approved/2023/SR-CBOE-2023-041.pdf.

As discussed in our earlier submission, the instant Cboe Proposal falls squarely within the history of the exchanges' unrelenting effort to limit the Commission's authority to oversee core exchange functions.

The exchanges have been engaged in a longstanding effort to narrow the definition of a "facility" of an exchange and thereby reduce the Commission'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. Having failed to amend the statute, they urge the Commission to ignore the statute. But the statute is unequivocally clear on the questions raised by this Proposal.

As a general matter, the Commission does not, and does not have authority to, regulate activities outside of the Commission's statutory mandate. By contrast, the Commission has authority to, and is required to exercise its authority, over services that are in scope of its remit.

The instant Cboe Proposal falls squarely within both the Commission's authority and the history of the exchanges' unrelenting efforts to limit that authority to oversee core exchange functions – as detailed in our prior letter.

The Exchange has failed to articulate any material harm or existing burden on competition that would justify this radical departure from established precedent, and to the contrary, we believe that there are significant risks associated with permitting this arrangement to go forward free from Commission oversight.

Aside from the issues noted above as to whether the Exchange should be able to amend the definition of facility through a rule filing and whether the Commission has the ability to approve such a filing, the Exchange has not provided any meaningful explanation as to why the proposed rule change is consistent with the Exchange Act. The Commission is responsible for reviewing proposed rules to ensure that they are consistent with the requirements of the Exchange Act. Specifically, the rules of the exchange must:

- not be "designed to permit unfair discrimination"[35]
- "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act;[36] and
- be designed to protect investors and the public interest.[37]

Under the Commission's Rules of Practice, "the burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issues thereunder that are

[35] 15 U.S.C.§ 78f(b)(5).
[36] 15 U.S.C.§ 78f(b)(8).
[37] 15 U.S.C.§ 78f(b)(5).

applicable to the self-regulatory organization is on the self-regulatory organization that proposed the rule change."[38]

The Exchange has not provided any explanation as to how this Proposal is designed to protect investors and the public interest. To the contrary, it seems the entire purpose of the Proposal is to remove the investor protections of the Exchange Act and otherwise limit the Commission's oversight. In fact, the only substantive burden that the Exchange identifies is the fact that the OEMSs are currently subject to exchange rule filing requirements. This leads to the conclusion that somehow the act of filing, without any further explanation or articulation of a substantive burden on competition, justifies this radical step of completely removing the activity from the purview of the Exchange Act.

Finally, to the extent that the filing obligations, which are one of the central obligations of an exchange, result in a perceived competitive disadvantage, the Proposal indicates that the Exchange has counteracted these effects by awarding itself favorable fee waivers.[39] So not only do these fee waivers undercut the central argument that the OEMS service is operating at a competitive disadvantage, it also undercuts the entire premise of the Proposal – that the OEMS is operated in a manner that is independent from the Exchange. This fee waiver also raises concerns surrounding how the existing fees are not "designed to permit unfair discrimination" and "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act.

The Exchange's central factual argument – that the exchange-owned OEMSs are independently operated from the interests and control of the Exchange appears to be without merit and contrary to the facts provided in the Proposal.

The central premise of the Exchange's Proposal is that exchange-affiliated OEMSs that are "operated as a separate business from the Exchange," and thus operated with respect to the Exchange on the same terms as third-party OEMSs, should not be considered a facility of the Exchange. The Proposal notes that such OEMSs receive no advantages over other OEMSs as a result of its affiliation with the Exchange.

However, based on the Proposal itself, it does not appear that the exchange-affiliated OEMSs are, in fact, "operated as a separate business from the Exchange." First, the Proposal indicates that the Exchange and the OEMS are acting in concert and share common economic and competitive interests. As the Proposal indicates, in order to combat the perceived disadvantage that Cboe Silexx is subject to as a result of its status as a facility of the exchange, "the Exchange adopted port fee waivers."[40] In other words, the Exchange believed that its own OEMS was being put at a competitive disadvantage to other OEMSs, so it rewarded itself a discount on pricing to make up for the perceived disadvantage. This is obviously not a model of independence. The Exchange appears to be acutely aware of the optics here and attempts to explain that "it would be technologically possible to provide port fee waivers to users of any OEMS." While true that the Exchange *could* provide fees to all participants in a manner that does not advantage its own

[38] 17 C.F.R. §201.700(b)(3)
[39] Proposal at 6, FN 13.
[40] Id.

products (as arguably it is already required to do under the Exchange Act), it appears that it currently does not. In any event, it is clear that the Exchange and the OEMS are acting in concert and have incentives that are aligned or closely affiliated. The Proposal notes that, under Proposed Rule 3.66 the Exchange would not be able to take advantage of these incentives, but whether the two entities are able to leverage these incentives to the detriment of other market participants is beside the point – they are acting as a group and thus should be treated as such.

Aside from the Proposal, the facts on the ground indicate the two entities attempt to leverage a competitive advantage through their unique relationship. For example, the Exchange has stated in the past that Silexx has been promoted as the avenue through which people will trade certain exchange products and there have been Befforts to more fully integrate these within the operating segments of the overall business.[41]

These statements and Cboe's prior rule proposals where Silexx was used to demonstrate Floor Broker TPH compliance clearly suggest Silexx has not been, and is not intended to be, "operated in a manner independent from the Exchange" as Cboe claims in its Proposal.

CONCLUSION

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.

[41] See Q2 2019 Earnings Call, CBOE Global Markets, Inc. (August 2, 2019).