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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: Order Instituting Proceedings to Determine Whether to Approve or Disapprove 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 28, 2024, Cboe Exchange, Inc. ("Cboe," which together with a group of entities constitutes the "Exchange") filed a proposed rule change[1] with the Securities and Exchange Commission (the "Commission") to deem certain Cboe-affiliated services, despite their affiliation with Cboe, to be outside the scope of the definition of "facility" as defined in Section 3(a)(2) of the Securities Exchange Act of 1934[2] (the "Proposal"). Cboe would presumably no longer submit rule filings for review by the Commission in connection with those services, and the Exchange expects the regulatory protections of the Securities Exchange Act of 1934 (the "Exchange Act") would no longer apply to market participants with respect to those services. The Proposal received substantial opposition from several commenters and no comments were submitted supporting it, other than a letter submitted by Cboe.[3]

[1] Notice of Filing of a Proposed Rule Change to Adopt a New Rule Regarding Order and Execution Management Systems, SEC Exch. Act Rel. No. 34-99620 (Feb. 28, 2024), *available at* https://www.sec.gov/files/rules/sro/cboe/2024/34-99620.pdf (the "Proposal").

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

[3] Letter from Laura Dickman, Vice President, Cboe Global Markets, Inc., to Vanessa Countryman, Secretary, Securities and Exchange Commission (Apr. 19, 2024), *available at* https://www.sec.gov/comments/sr-cboe-2024-008/srcboe2024008-460951-1202654.pdf ("Cboe Letter").

On May 31, 2024, the Commission issued an order instituting proceedings to determine whether to approve or disapprove the proposed rule changes (the "Order").[4] In particular, the Commission's Order seeks comment on:

- Whether the Exchange has demonstrated that the proposal is consistent with Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of the exchange be designed to "promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest" and not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers;"[5]
- Whether the Exchange has demonstrated that the proposal is consistent with Section 6(b)(8) of the Exchange Act, which requires that the rules the exchange "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act];"[6] and
- Whether there are any potential competitive advantages that could be realized by an Exchange-affiliated OEMS "facilitating transactions in securities" that could arise from that OEMS operating outside the Commission review process.[7]

Bloomberg L.P.[8] respectfully submits this letter to the Commission in response to the Order and addresses each of these questions in turn.

Background

As we noted in our prior letters, at issue are two Cboe-affiliated order and execution management systems ("OEMSs"). The Exchange's OEMSs enable users to route orders to other market participants or to route orders directly *to Cboe* for execution. OEMSs have historically been regarded by the Commission as "facilities" of an exchange under the Exchange Act when they are (i) affiliated directly with the exchange and (ii) provide the users with the ability to

[4] SEC Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Adopt a New Rule Regarding Order and Execution Management Systems, Exchange Act Release No. 34-100256 (May 31, 2024), *available at* https://www.sec.gov/files/rules/sro/cboe/2024/34-100256.pdf (the "Order").

[5] Order at 12.

[6] *Id*.

[7] *Id*.

[8] 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.

connect to the exchange.[9] The Exchange's two OEMS platforms do just this.[10] As described in the Proposal, a significant portion of the customers of these exchange-affiliated OEMSs have the ability to route orders directly to the Exchange – thus bringing both these platforms in scope of the definition of "facility," under the Commission's longstanding interpretation of that term, and consistent with the D.C. Circuit's opinion in *Intercontinental Exch., Inc. v. SEC* (the "*ICE Wireless*" case).[11]

Therefore these exchange-affiliated services have been subject to the rule-approval requirements under Section 19(b) of the Exchange Act and subject to the statutory and regulatory requirements that flow from exchange regulation, in particular Sections 6(b)(5) and 6(b)(8) which require an exchange's rules to promote just and equitable principles of trade, protect investors and the public interest, and not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Cboe continues to misinterpret the definition of "exchange".

The definition of a "facility" is 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 Exchange Act grants the SEC broad authority over exchanges, including the authority to regulate both the "marketplace" and "facilities" of an exchange.[12]

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.[13]

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[9] 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.

[10] *Id*. At the time the Exchange's parent acquired these OEMSs, 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 Exchange Act.

[11] *Intercontinental Exch., Inc. v. SEC*, 23 F.4th 1013, 455 U.S. App. D.C. 309 (D.C. Cir. 2022).

[12] 15 U.S.C. § 78c(a)(1).

[13] 15 U.S.C. § 78c(a)(2).

Cboe itself describes the services as "a software product that market participants may… use to enter and route orders to trade securities… for execution as well as manage their executions and perform other tasks related to their trading activities."[14] The Exchange further notes that "[t]he Silexx platform currently permits connection to an exchange, including Cboe Options…"[15]

Under the Exchange Act definition of "facility", these services fall squarely within the statutory construct. The OEMSs are an example of "tangible or intangible property" or "any right to the use of such premises or property or any service thereof *for the purpose of effecting… a transaction on an exchange*…" It is hard to see how entering and routing orders for securities on an exchange, which Cboe identified as the leading purpose of its OEMSs, is not a service for effecting a transaction on an exchange. This is precisely why the Commission has long held that this service is a facility of the Exchange.

Cboe insists the Exchange-affiliated services should not be considered a "facility" because they are, it says, "operated in a manner independent from the Exchange." 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. Instead, Cboe seems to think that this "independent" manner makes the OEMSs somehow not part of the Exchange. But as the D.C. Circuit noted in the *ICE Wireless* decision, an exchange is a "group of persons" that "maintains or provides a market place or *facilities*." Cboe believes the D.C. Circuit relaxed the standard by acknowledging that mere corporate affiliation, in general, does not necessarily make a given affiliate part of the group constituting an exchange. But *ICE Wireless* made clear that it was simply remaining agnostic about the range of relationships constituting affiliation, such as "one corporation that is affiliated with but not controlled by another."[16] That reservation is irrelevant here, because – whatever purported independence the companies maintain at an operational level – Cboe and the OEMSs are both controlled by the same parent company. As *ICE Wireless* also explained, "[w]hatever the outer bounds of the undefined term 'group,' it certainly includes closely connected corporate affiliates."[17] Cboe and the OEMSs are both wholly owned by their corporate parent;[18] there is no closer connection possible. *ICE Wireless* does not leave room for an exception just because the corporate enterprise decides to operate one of its facilities in a way it claims will prevent

[14] Proposal at 2.

[15] Proposal at 3 n.6.

[16] *Ice Wireless,* 23 F.4th at 1024.

[17] *Id.*

[18] Cboe made that representation when it filed rule changes reflecting the acquisition of the OEMSs. *E.g.* Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Describe Functionality of and Adopt Fees for a New Front-End Order Entry and Management Platform, SEC Exch. Act Rel. No. 34-82088 (Nov. 15, 2017), *available at* https://www.sec.gov/files/rules/sro/cboe/2017/34-82088.pdf (the "November 2017 Filing").

competitive advantage to the facility.[19] The "internal controls" that Cboe offers would be needed precisely *because* the OEMSs are "closely connected corporate affiliates with Cboe. So the statute makes them part of the Exchange.

Independent operation, in whatever sense, may well be a sound policy requirement for an exchange's facility like an OEMS. Or independent operation might, in some circumstances, be pertinent for assessing a given exchange rule regarding the facility. But it cannot be a basis for simply excluding the facility from oversight entirely. What brings the OEMS within the umbrella of the overall "exchange" is the reality that it is a functionality used for effecting trades, and it is part of the corporate group that operates the exchange. That affiliation provides ample incentive and opportunity for the exchange to exploit the OEMS unfairly to its benefit, and the detriment of investors. What Cboe is asking in its Proposal is that, if Cboe remains convinced, for itself, that the OEMSs remain sufficiently independent, then they can continue to operate outside of Sections 6 and 19 of the Exchange Act, and without oversight. The Commission would not have a role assessing that asserted independence, or seeing whether the Exchange was improperly exploiting the OEMSs. This is backwards. Given the functionality of the OEMSs and given their affiliation with Cboe, for each rule change proposed for the OEMSs, Cboe must continue to get Commission approval, based on an adequate justification, which might include a showing of OEMS independence to the degree pertinent for any given substantive rule.

The staff's longstanding interpretation continues to be correct – that the Exchange-affiliated OEMSs are "facilities" of the Exchange – and Cboe's argument to the contrary is apparently based on misunderstanding the D.C. Circuit's recent *ICE Wireless* decision.

Cboe also asserts that it has no right to use its OEMSs to effect or report transactions. But that right, or not, is beside the point. Cboe acknowledges, as it must, that "one main function of an OEMS platform is for market participants to use it to create, enter, and route orders to trade securities . . . for execution."[20] Indeed, Cboe recognizes that an OEMS is "use[d] . . . to route and enter orders for ultimate execution at a trading venue," and thus an OEMS is used for the "purpose of effecting or reporting a transaction on an exchange."[21] Given that recognition, the conclusion is straightforward that these OEMSs are facilities of the exchange. They are "service[s] thereof for the purpose of effecting or reporting a transaction."[22] That is precisely what the definition covers.

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[19] Cboe's Proposal says the OEMSs will be "operated in a manner independent from the Exchange." Proposal at 9. In the criteria listed in the proposed rule text, the one that apparently constitutes the "manner independent" is that the Exchange "maintains procedures and internal controls reasonably designed to prevent the OEMS from receiving any competitive advantage . . . as a result of its affiliation/relationship with the Exchange." Proposal at 10.

[20] Proposal at 11.

[21] *Id.*

[22] 15 U.S.C. § 78c(a)(2).

Cboe emphasizes that it has no right to use the OEMSs for such purposes. But a "right of the exchange to the use of any property or service" is only one of several kinds of facilities. Showing that the OEMSs are not that kind says nothing about whether they are a service for effectuating trades.

Cboe does not mention the fact that the OEMSs are, in a straightforward way, the property of the "exchange." The "exchange," in the statutory definition, is not Cboe, the entity that filed this rule proposal. It is the whole "group" that provides the facilities for bringing together purchasers and sellers.[23] And that "group" unquestionably owns the OEMSs, in a literal and direct sense; they are wholly-owned subsidiaries of Cboe's parent company. Thus, the OEMSs, as "its tangible or intangible property whether on the premises or not" – "its" referring to the "exchange" – are surely "facilities."

Cboe also ignores the fact that a customer of the OEMSs receives permission to use the OEMSs. They therefore qualify as an additional kind of facility, namely a "right to the use of such . . . property."[24]

Cboe seems to think 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. After all, the statutory definition calls out "any right of the exchange to the use of any property or service" separately, later in the paragraph. The clause referring to the exchange's own property, and rights to use that property, would be meaningless, and superfluous against that later clause, if it only covered the *exchange*'s rights to use property.

Beyond being, straightforwardly, the property of the Exchange, the OEMSs are also a facility in that they are a service of the Exchange for effecting transactions on the Exchange. As noted above, Cboe acknowledges that the OEMSs can be and are used for that purpose. But it insists that they must not be facilities because they are not exclusive. They are not exclusive because one can use them for purposes besides sending orders to the Exchange; and they are not exclusive in that one can send orders to the Exchange without using the OEMSs. Moreover, Cboe points out, they are not necessary or sufficient; a trader could not complete an order submission using only the OEMS.

ICE Wireless forecloses all these arguments. All those characteristics were true of the communications service at issue in *ICE Wireless*, yet the D.C. Circuit had no trouble agreeing that service was a facility. The exchanges in ICE Wireless argued the service was not a facility "because the Wireless Connections are not directly connected to the Exchanges . . . and are but a single link in the chain of communication."[25] No matter, the D.C. Circuit said: "[T]here is no reason to think the plain meaning of a system of communication 'to or from the exchange' is

[23] *ICE Wireless*, 23 F.4th at 1024 (discussing 15 U.S.C. § 78c(a)(1)).

[24] 15 U.S.C. § 78c(a)(2).

[25] *ICE Wireless*, 23 F.4th at 1022.

limited to a system that provides a direct connection to the matching engine of an exchange."[26] Nor was the ICE Wireless service exclusive; other firms "offer competing connectivity services."[27] Nor was it exclusive in the other sense: "[t]echnically, the Wireless Bandwidth Connection could be used for non-market related communications."[28]

Cboe contends that "[u]nlike what is required for a product or service to be considered a facility, with respect to execution of orders, the purpose of providing an OEMS platform (including a Rule 3.66 OEMS) is not to effect a transaction on the Exchange specifically."[29] That word "specifically" is not in the statute, and Cboe provides no authority for the amendment it offers. It cites no decision by the Commission or by any court showing that a service for effectuating transactions on an exchange fails to qualify as a facility because that was not *specifically* the purpose.

Finally, Cboe suggests that the OEMSs are not maintained with its "consent." This is not actually a necessary prerequisite. The statutory definition covers all services of the exchange for the purposes of effecting transactions on the exchange, "including" communications systems maintained with the exchange's consent, but the word "including" is almost never read exclusively. That the OEMSs are services of the exchange for effecting transactions is enough to make them facilities. The Commission need not particularly conclude they are communications systems maintained with the exchange's consent.

But at any rate, the OEMS service is very much maintained with the Exchange's consent. For one thing, the "exchange" refers, as noted above, to the "group," and Cboe's parent company has obviously consented to the provision of the OEMS services. Cboe has said: "The Exchange is offering each type of additional functionality as a convenience."[30] As Cboe has further explained, "the Exchange believes that offering the platform and all other functionality to market participants protects investors and is in the public interest, because it will allow the Exchange to directly offer users an order entry and management system in addition to the technology products it currently offers."[31] Cboe also told the Commission and the public that Cboe, along with the Silexx entity, "will be responsible for the marketing of the platform," and for "providing, supporting and maintaining the technology for the platform."[32] So Cboe, too, has consented to the provision of the OEMS services.

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[26] *Id.* at 1023.

[27] *Id.* at 1020.

[28] *Id.* at 1023. Cboe asserts that customers might use the OEMSs for purposes other than submitting offers to the Exchange, but it offers no evidence that is a substantial portion of the actual usage.

[29] Proposal at 14.

[30] November 2017 Filing at 10.

[31] *Id.* at 14.

[32] *Id.* at 12 n.18.

Moreover, Cboe points out that an OEMS user would need to connect the OEMS to a port of the Exchange's trading system, which would involve the Exchange's consent.[33] Cboe believes this kind of consent does not matter because the Exchange makes such consent available for connecting with unaffiliated OEMSs. But the statutory definition turns on whether the exchange provides its consent for communication through the service that the exchange provides, not on whether the exchange provides a consent uniquely or solely to a type of service provided by the exchange. That the Exchange consents to the use of other communication services offered by others unaffiliated with the Exchange is not germane. That circumstance might be relevant for the assessment of a proposed substantive rule governing the OEMS services. It does not take the services, pertaining directly, as they do, to the trading of securities, out of the Commission's view.

Cboe then characterizes the D.C. Circuit as establishing a two-part test, of which the second part asks whether the facility is part of an exchange.[34] This presents *ICE Wireless* incorrectly; in fact the D.C. Circuit assessed the "exchange" definition only because both sides to the case assumed that analysis would matter, and the court stated explicitly that it was not "deciding whether SEC jurisdiction depends upon this analysis."[35]

Cboe then contends that it is not part of an "exchange" with the OEMSs because Rule 3b-16 excludes an OEMS from the definition of "exchange."[36] That is not actually what Rule 3b-16 says. In reality, the regulation says an organization does not constitute an exchange "solely because such organization . . . [r]outes orders to a national securities exchange."[37] Obviously, the exchange at issue here – the Exchange – does more than "solely" "route[] orders." It includes a national securities exchange registered as such with the SEC. Given the presence of that national securities exchange at the heart of the corporate group around the Exchange, the Rule 3b-16 exclusion does not exclude the OEMSs from the "exchange" simply because they are routing services. Similarly, a communications system is not, in and of itself, an exchange, and the private market competing services in *ICE Wireless* were surely not exchanges. But the communications services that were part of the ICE corporate group were part of the exchange, just as the OEMSs here are part of the CBOE "exchange." The definition of "exchange" explicitly – in the statute and the regulation – includes the facilities of the exchange, which of course go beyond the direct matching of buyers and sellers. Cboe is asking the Commission to rewrite Section 3 itself.[38]

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[33] Proposal at 19.

[34] *Id.* at 20-21.

[35] *ICE Wireless*, 23 F.4th at 1024.

[36] Proposal at 22.

[37] 17 C.F.R. § 240.3b-16(b).

[38] *ICE Wireless* rejected the same idea that the Exchange is pushing here. 23 F.4th at 1025.

Cboe further notes that, under *ICE Wireless*, corporate affiliation is not necessarily enough to render the affiliates part of a "group" that constitutes an "exchange."[39] The Exchange thinks it lacks a unity of interests with the OEMSs because they have somewhat different businesses. The D.C. Circuit did not suggest that a close "unity of interests" is a prerequisite. Rather, it indicated that corporate affiliates might in theory fall outside the concept of "group," because after all there are many degrees of affiliation. The court spoke specifically about "one corporation that is affiliated with *but not controlled* by another."[40] That is not the case here. The OEMSs are wholly-owned subsidiaries, fully controlled by the holding company that also controls Cboe as another wholly-owned subsidiary. This is just as close a relationship as what the D.C. Circuit addressed. "Whatever the outer bounds of the undefined term 'group,' it certainly includes closely connected corporate affiliates."[41] "If it did not," the D.C. Circuit observed, "then a party would be able to elude SEC jurisdiction by making simple changes to its corporate structure."[42] Remarkably, the effort that the D.C. Circuit predicted, and attempted to foreclose, is what Cboe now attempts. At any rate, beyond being formally controlled by the same holding company, Cboe and the OEMSs do have a close unity of interests. The management of both companies is ultimately acting for the interests of the common owner. The notion that two wholly-owned subsidiaries do not have a close unity of interests simply because they are in different business lines would be unfamiliar to any ordinary business executive.

For the reasons set forth above, we believe the Commission should continue its longstanding and unambiguously correct interpretation of "facility" and "exchange" to ensure that these Exchange-affiliated OEMSs remain within the Commission's regulatory umbrella and the protections and procedural safeguards of Sections 6 and 19 with respect to the OEMS services.

Cboe has not demonstrated that the Proposal is consistent with Sections 6(b)(5) and 6(b)(8) of the Exchange Act.

Section 6 requires, among other things, that the rules of the exchange be designed to "promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest" and not be designed to "permit unfair discrimination between customers, issuers, brokers, or dealers"[43] Cboe has not demonstrated that the Proposal is consistent with these requirements. In addition, Cboe has not demonstrated that the Proposal is consistent with Section 6(b)(8) of the Exchange Act, which requires that the rules of the exchange "not impose any

[39] Proposal at 23.

[40] *Ice Wireless,* 23 F.4th at 1024.

[41] *Id.*

[42] *Id.*

[43] Order at 10.

burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]."[44]

As the Commission notes, "the burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization is on the self-regulatory organization that proposed the rule change."[45]

Cboe 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.

Cboe ignores completely the benefit to investors from Commission oversight of the exchange-affiliated OEMSs. That oversight protects investors from having the OEMSs operated in ways that might not allocate fees fairly and equitably; might not promote just and equitable trading principles; might inadequately protect against fraud or manipulation; or might otherwise be inconsistent with Section 6.[46] Exchanges cannot be assumed to work constantly in compliance with the Exchange Act, and the Commission has, properly, never given them that assumption – witness the multiple occasions on which the Commission has rejected proposed rules from various exchanges. To eliminate the Commission's oversight from an exchange facility means exposing investors to the very risks that the Commission is mandated to guard against. That is a significant cost of the Exchange's proposal, a cost that the Commission must consider. Cboe does not even address it, a defect that on its own bars the approval of the proposal.

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

The only substantive burden that Cboe identifies is the fact that the OEMS is currently subject to exchange rule filing requirements. Cboe offers no information about what expense or burden the Exchange faces from having to operate the OEMSs under a system of rules, or from having to file those rules for the Commission's approval. It is hard to see how the simple step of filing is so burdensome that it justifies this radical step of completely removing an activity from the purview of the Exchange Act.

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[44] *Id*.

[45] 17 C.F.R. §201.700(b)(3)

[46] Floor brokers are members of the exchange and are regulated by the SRO. Under the Exchange Act, the Commission protects participants from facilities that could be used for fraud or manipulation. Without the OEMS being a facility of the exchange, there is a conflict of interest of SRO oversight of the members and the exchange-provided technology it uses.

One thing that is certain is that the substantive obligations of Section 6, as applied to the pricing of the OEMSs, cannot seriously be a burden on competition, and Cboe does not provide any real argument that they could be. The Commission has long had policies to allow competitive pricing for facilities that are subject to genuine competition.[47] To the extent the Exchange is unable to enjoy the Commission's competitive-pricing rubric, that inability must mean its affiliated OEMSs are not truly subject to competitive pressures – so that it would hardly be a burden on competition for the Commission to review fee changes to ensure they fairly and equitably reflect costs. Thus, Cboe can at best mean that the supposed competitive burden of the *status quo* arises from the obligation to operate the OEMSs under a rule-based regime, to post their fees as part of the rules, and to file its fee changes for Commission review.

The claim that these obligations are a burden on competition should be deeply troubling to the Commission. Cboe's contentions beg the questions: What would the Exchange want to do with the OEMSs, particularly their prices, that it cannot do at present under a rules-based regime? What are the steps it would want to take that the Commission would disallow under Sections 6 and 19? And why would it further competition and the protection of investors to allow the Exchange to do those things? Cboe offers no answer. It pretends that the filing obligations themselves are obviously a burden but gives the Commission no information or data showing what the cost or benefit would be from exempting the exchange affiliated OEMSs from the Section 6 or 19 requirements.

Strikingly, 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.[48] 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.

Other than complying with rule filing requirements, Cboe has not offered any explanation of how the burdens that are associated with the status quo should lead to the conclusion that this rule filing should be approved.

In truth though, the cost-benefit analysis is simple. If the OEMSs are facilities of the Exchange, they are that, and Cboe cannot change that reality by stating the contrary in an Exchange rule. Nothing in the Exchange Act empowers an exchange to determine or define for itself the scope of the Commission's authority. Thus, if the OEMSs are facilities of the Exchange as maintained here, Cboe's rule will be simply an incorrect statement in its rulebook, providing misinformation

[47] Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), *available at* https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.

[48] *See* Proposal at 6 n.13.

for the public—surely not a benefit for competition. And Cboe will be proclaiming that the Exchange fails to comply with the law regarding one of its facilities, also a situation inimical to competition. If, on the other hand, the OEMSs are not facilities of the Exchange as Cboe maintains, then Cboe's rule is unnecessary. Stating the supposed fact in the rulebook generates no benefit in this case either.

In *ICE Wireless*, the D.C. Circuit held the Commission was not obligated to consider the effects on competition from its insistence the ICE Wireless services were facilities of the exchange.[49] In recognizing the scope of its authority as conferred by statute, the Commission was not engaged in a rule approval/disapproval process, so it had no occasion to do a cost-benefit analysis, the court held.[50] Cboe has evidently taken the wrong lesson, and thinks it can demand a cost-benefit analysis by asking the "is it a facility" question in a rule proposal. In reality, there is still no real benefit to be assessed. The Commission is not authorized to disclaim a regulatory authority and mandate established by Congress. A statement in a rule of the Exchange must, if it is to be accurate, comport with the actual Exchange Act, and there is no economic benefit from reiterating the law.

There are potential competitive advantages for the Exchange that could be realized by an Exchange-affiliated OEMS "facilitating transactions in securities" that could arise from that OEMS operating outside the Commission review process.

Cboe 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. Cboe points to one prior Nasdaq rule proposal, which Cboe 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.[51] Yet the Nasdaq example provides no support for making that determination, because the Nasdaq service was never a facility to begin with. The Nasdaq service in question was a neutral communications service – a "pure router" – that allowed market participants to route orders to one another. It 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 [Nasdaq service], and therefore it was appropriately deemed out of scope of the definition of facility.[52] The character of the OEMS services is the opposite of what the Commission dealt with regarding Nasdaq's service.

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[49] *Ice Wireless,* 23 F.4th at 1026.

[50] *Id.*

[51] *See* Order Approving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, to Remove Provisions Governing the Operation of the ACES System, SEC Exch. Act Rel. No. 34-56237 (Aug. 9, 2007), *available at* https://www.sec.gov/files/rules/sro/nasdaq/2007/34-56237.pdf (the "Nasdaq Proposal").

[52] *Id.*

Notwithstanding the unprecedented nature of the Proposal and the lack of analogous prior examples, the potential unfair competitive advantages for the Exchange are significant.

First, Cboe'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. Recent filings have indicated that the activities of the OEMSs and that of the Exchange have been coordinated to favor the Exchange's own offering. In a 2023 rule change, for example, Cboe emphasized that a particular change regarding complex orders would be straightforward for brokers to comply with because, it said, every floor broker trading permit holder "has a Silexx workstation, which can be used to systematize orders."[53]

Second, as the Order explains, the Exchange "notes it currently offers certain port fee waivers to users of the Silexx platform… and different pricing for certain functionality to [Trading Permit Holders]", the brokers that have approved connections to trade on the Exchange, but the Exchange does not provide fee waivers to OEMS users not affiliated with Silexx.[54] The Proposal explains this coordination as an effort to combat the perceived disadvantage that Cboe Silexx is subject to as a result of its status as a facility of the exchange. 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, but it also indicates the potential to advantage its own offering, and consequently, disadvantage a competitor.

More broadly, the Proposal indicates that the Exchange and the OEMS are acting in concert and share common economic and competitive interests arising from their unique relationship. Common interests may result in Cboe providing Silexx with development and deployment advantages, for example by providing early product development notices or system specification changes to the OEMS, enabling better or faster integration with the exchange systems.

For example, the Exchange has stated in the past that "Silexx will be the avenue through which people will trade FLEX options. FLEX options have seen a very nice uptick in the first half of this year. And that will go along with the platform migration in October. So*, we're fully integrating these smaller acquisitions as we integrate the larger ones for one cohesive strategy of organic growth*."[55] In addition, the Exchange has previously indicated that "[Silexx is] literally embedded, integrated within the operating segments. Such that it would be hard for me if you

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[53] *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, Exchange Act Release No. 34-98216, File No. SR-CBOE-2023-041 (Aug, 24, 2023) at 5 n. 4, at 7, at 16 n.8, and at 19, *available at* https://cdn.cboe.com/resources/regulation/rule_filings/approved/2023/SR-CBOE-2023-041.pdf ("2023 Rule Change").

[54] Order at 4.

[55] *See* Q2 2019 Earnings Call, CBOE Global Markets, Inc. (Aug. 2, 2019).

pressed me and say, well, tell me exactly what was the financials on Livevol only or on Silexx only."[56]

The Exchange has also previously noted that every "Floor Broker [Trading Permit Holder] currently has a Silexx terminal," and the software comes preloaded on every Exchange-issued device.[57] The SROs have a special status conferred by law, and the Commission's mandate is to ensure they use it responsibly. At a minimum, the existing arrangements for the exchange-affiliated SROs certainly do not indicate that the exchange-affiliated OEMS are being operating in an independent manner, to the contrary, it appears to indicate that the two entities have a combined set of interests and are providing exchange services as a group.

These statements and, in Cboe 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.[58] But it also evidences a level of coordination, and an ability to advance its own affiliated service, to the detriment of competitors.

Finally, there are significant harms that may flow from this Proposal by removing all Commission oversight from the provision of these services.

CONCLUSION

For the reasons set forth above, we believe the Exchange has not demonstrated that the Proposal is consistent with the Exchange Act. The Exchange has not demonstrated that the Proposal is consistent with either Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of the exchange be designed to "promote just and equitable principles of trade," and "to protect investors and the public interest," and is not consistent with Section 6(b)(8) of the Exchange Act, which requires that the rules of the exchange "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]."[59] In addition, should this be approved, there are unfair competitive advantages that could be realized by an Exchange-affiliated OEMS that could arise from that OEMS operating outside the Commission review process.

But at a more basic level, 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 simply amending an Exchange rulebook. We continue to believe the answer to that is an emphatic "no".

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[56] *Id.*

[57] *See* 2023 Rule Change at n.4.

[58] Proposal at 7.

[59] Order at 9-10.

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.