VIA EMAIL (rule-comments@sec.gov)

September 3, 2024

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

Re: File No. SR-CBOE-2024-008; Cboe Exchange, Inc.: 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

Dear Ms. Countryman:

On February 13, 2024, Cboe Exchange, Inc. ("Cboe" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b-4 thereunder,[2] a proposed rule change (the "Proposal") to adopt a new rule regarding order management and execution management systems ("OEMS"). The Proposal was published for comment in the Federal Register on March 25, 2024.[3] On April 16, 2024, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] The Commission received three comment letters regarding the Proposal.[6] Cboe responded to the comments on April 19, 2024.[7] On May 24, 2024, the Commission received a comment letter in response to Cboe's response letter.[8] On May 31, 2024, the Commission

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] Securities Exchange Act Release No. 99620 (February 28, 2024), 89 FR 15907 (March 5, 2024) ("Notice").

[4] 15 U.S.C. 78s(b)(2).

[5] Securities Exchange Act Release No. 99963 (April 16, 2024), 89 FR 29389 (April 22, 2024).

[6] See letters to Vanessa Countryman, Secretary, Commission, from: Tyler Gellasch, President and CEO, Healthy Markets Association, dated March 25, 2024 ("Healthy Markets Letter"); Jim Considine, Chief Financial Officer, McKay Brothers, LLC, dated March 26, 2024 ("McKay Letter"); and Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P, dated March 26, 2024 ("Bloomberg Letter").

[7] See letter to Vanessa Countryman, Secretary, Commission, from Laura G. Dickman, Vice President, Associate General Counsel, Cboe Global Markets, Inc., dated April 24, 2024 ("Exchange Response").

[8] See letter to Vanessa Countryman, Secretary, Commission, from: Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., dated May 24, 2024 ("Bloomberg Response Letter").

instituted proceedings under Section 19(b)(2) of the Act[9] to determine whether to approve or disapprove the Proposal ("OIP").[10] The Commission received two comment letters in response to the OIP.[11]

The OIP seeks additional analysis of, and input from commenters with respect to whether the Proposal is consistent with the Act, or the rules thereunder. Specifically, the OIP requests comment on whether the OEMS proposal is consistent with Sections 6(b)(5)[12] and 6(b)(8)[13] of the Act. Section 6(b)(5) of the Act requires that the rules of a national securities exchange be designed, among other things, 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. Section 6(b)(8) of the Act requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The OIP also seeks comment on whether there are any potential competitive advantages that could be realized by an Exchange-affiliated OEMS "facilitating transactions in securities"[14] that could arise from that OEMS operating outside the Commission review process.[15]

Comments in response to the OIP raised several arguments with respect to the Proposal, including that (1) an exchange-affiliated OEMS falls within the Act's definition of an "exchange" and a "facility" of an exchange, including with respect to the D.C. Circuit's opinion in *Intercontinental Exch., Inc. v. SEC* (the "*ICE*" case), (2) the Proposal would remove exchange-affiliated OEMSs from Commission oversight, (3) there are potential competitive advantages for the Exchange that could arise from an exchange-affiliated OEMS operating outside the Commission review process, and (4) Cboe has not demonstrated that the Proposal is consistent with Sections 6(b)(5) and 6(b)(8) of the Act.

As discussed below, Cboe submits this letter to respond to topics raised in the OIP and the comments filed to date in response to the OIP.

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[9] 15 U.S.C. 78s(b)(2)(B).

[10] Securities Exchange Act Release No. 100256 (May 31, 2024), 89 FR 48463 (June 6, 2024).

[11] See letter to Vanessa Countryman, Secretary, Commission, from Ellen Greene, Managing Director, SIFMA, dated June 18, 2024 ("SIFMA OIP Letter"); letter to Vanessa Countryman, Secretary, Commission, from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., dated June 27, 2024 ("Bloomberg OIP Letter").

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78f(b)(8).

[14] 15 U.S.C. 78f(b)(5).

[15] See OIP at 48465-48466.

A. A Rule 3.66 OEMS does not fall within the definition of "exchange" or a "facility" of an "exchange."

The Proposal is fully consistent with the text, structure, and purposes of the Act in two independent ways: first, properly understood, an OEMS platform is not a "facility" of an "exchange," full stop; second, even if affiliated OEMSs were deemed to be facilities of an exchange, as structured by proposed Rule 3.66's safeguards, a proposed Rule 3.66 OEMS would not be a "facility" of an "exchange." The contrary arguments by Bloomberg and SIFMA fail to grapple with critical statutory and regulatory text, and they misread the D.C. Circuit's decision in *ICE*. Finally, Cboe's position is amply supported by Commission precedent.

1. An OEMS is not a "facility" of an "exchange."

To start, although the Commission need not resolve the issue in order to approve the Proposal in light of the safeguards in proposed Rule 3.66 (discussed below), an OEMS is not a "facility" of an "exchange," regardless of whether the OEMS provider is affiliated or not with an exchange.[16]

Because Bloomberg's and SIFMA's comments confuse things, a few critical points about what an OEMS is and is not bear emphasis. An OEMS is a consumer-facing product. A user who purchases an OEMS, whether a Cboe Trading Permit Holder ("TPH") or not, typically pays a monthly fee based on the number of login IDs for those individuals who access the platform. An OEMS is a desktop, software product that market participants or others purchase off the shelf.[17] The software assists users in carrying out a range of functions, including creating and routing orders; accessing market data; and managing trading activity (through risk management and analytics tools).[18] But an OEMS itself does not provide transmission capability (that is, connectivity) to or from an exchange.[19] When purchased, an OEMS (including a Cboe-affiliated OEMS) has no connection whatsoever to the Exchange and, thus, an OEMS user has no ability to effect a transaction on the Exchange (or any exchange). Put differently, although an OEMS platform is a software tool that allows users to manage trading activity, including to create orders, an OEMS on its own does not provide a user the ability to transmit information (including orders) to or from an exchange. To transmit information to an exchange for the purpose of transacting on the exchange, a user of an OEMS must separately purchase the necessary physical infrastructure

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[16] <u>See</u> Proposal at 10 n.15 ("The Exchange notes it may be possible for an OEMS platform provided by an Exchange affiliate or an entity with which the Exchange has a business relationship to satisfy a subset of these criteria or a different set of criteria and still not be a facility of the Exchange."); <u>id.</u> at 23-24 (arguing that OEMS functionality does not fit within Rule 3b-16 or satisfy the statutory definition of "exchange").

[17] <u>See, e.g.</u>, Cboe Silexx User Manual at 6, 8 (Mar. 2, 2023) ("User Manual") (showing how to download Silexx software from an installation link), *at* https://cdn.cboe.com/resources/silexx/Cboe_Silexx_User_Manual-v1.0.7.pdf.

[18] Proposal at 4. It is possible that a market participant may use an OEMS solely for the risk management and analytical tools and not use the OEMS for order routing.

[19] <u>See, e.g.</u>, User Manual at 7 (detailing system connectivity requirements required to "run Cboe Silexx").

(whether wireline or wireless) to directly access the exchange or send the order to another market participant such as a broker, which may then transmit that information to an exchange.

Thus, as Cboe has explained, when a user purchases OEMS software, including from an Exchange affiliate, the product is not "integrated with the ports, or any other part of the Exchange's trading systems."[20] In fact, because only a TPH may purchase a port to connect directly to the Exchange and because anyone can purchase an Exchange-affiliated OEMS (whether a TPH or not), many users of an Exchange-affiliated OEMSs (who are not TPHs) are unable to have a direct connection to the Exchange.[21] An OEMS should thus not be confused with and is fundamentally different from transmission facilities that connect to or near an exchange, such as the wireless services at issue in *ICE* (as explained further below).

Critically, moreover, OEMSs re competitively available. As Cboe explained and no one contests, a "variety of OEMS software for securities is available in the industry."[22] An OEMS is thus not exclusively provided by exchanges (and the majority of OEMSs are offered by non-exchanges). And it is not a product that exchanges have historically offered. Furthermore, when non-exchanges provide OEMS, Cboe is not aware of anyone taking the position that those providers are offering an exchange function that should be regulated under the Act.[23] To the contrary. When an OEMS is provided by a non-Cboe affiliate, the Commission did not impose a rule filing requirement.[24] It was only when Cboe acquired an OEMS provider that Commission staff took that view. That regulatory history is a tacit admission that what drives the Commission's position is corporate affiliation; not whether an OEMS provides a marketplace facility within the meaning of the Act.

That position, however, conflicts with the Commission's own regulations. In 1998, the Commission established a new framework for applying the Act's "facility" and "exchange" definitions. The Commission's goal was to issue a "more comprehensive and meaningful interpretation of what an exchange is in light of today's markets."[25] In doing so, the Commission was clear that it was enacting a functional, activities-based approached through its new Rule 3b-16. The Commission explained, for example, that "Rule 3b-16 defines terms in the statutory definition of exchange to include markets that engage in *activities functionally equivalent* to

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[20] Proposal at 5; see id. at 15 (OEMS users must "separately purchas[e] a port from the Exchange and connect[] their systems on which OEMSs lie to that port").

[21] See id. at 16 n.28. With respect to Silexx, the only OEMS currently offered by an affiliate of the Exchange, the majority of off-floor users are not associated with a TPH.

[22] Id. at 5; see id. at 5-6 n.5 (listing non-affiliated OEMS providers). SIFMA is therefore wrong to assert that the Proposal would "enable exchanges to shift functionality that has traditionally been considered part of the exchange outside of the exchange," SIFMA OIP Letter at 4, as OEMS has traditionally been provided by non-affiliated providers, not registered exchanges).

[23] Proposal at 7 ("OEMSs are generally not subject to the rule filing requirements under Section 19(b) of the Act.").

[24] Id. at 7 n.8.

[25] 63 Fed. Reg. at 70847.

markets currently registered as national securities exchanges."[26] The Commission added that Rule 3b-16(a) is "descriptive of those *activities* the Commission considers to be the activities of a 'market' where buyers and sellers meet"[27] and that its new Rule "more accurately describes the range of markets that perform exchange *functions* as understood today."[28]

Consistent with the Commission's aim of adopting a functional, activities-based definition, the text of Rule 3b-16 explains that an organization or group of persons "shall be considered to constitute, maintain, or provide 'a market place or facilities for bringing together purchasers and sellers of securities" if the organization or group: "(1) Brings together the orders for securities of multiple buyers and sellers; and (2) Uses established, non-discretionary methods … under which such orders interact with each other."[29] Rule 3b-16 also contains an express exemption of "activities" that should not be considered exchange functions, including for "rout[ing] orders to a national securities exchange."[30]

In accord with the Commission's regulations, the threshold question here is: does an OEMS platform provide an exchange function? Put differently, does an OEMS enable activity integral to the marketplace activity of bringing together buyers and sellers of securities? If it does, it should be regulated under the Act. If it does not, then it should not be so regulated—regardless of corporate affiliation.

An OEMS platform does not qualify as an exchange function under Rule 3b-16 for at least two reasons. First, Rule 3b-16 provides that the concept of "bringing together purchases and sellers" reaches only systems that permit orders to interact with each other subject to nondiscretionary trading rules. The Commission was clear that a service must represent or otherwise indicate trading interest to users and permit orders to interact.[31] Even that is not enough: the order interaction must be governed by nondiscretionary rules that dictate the terms of trading among buy and sell orders.[32] An OEMS itself does none of that, as Cboe has explained and no one contests.[33] An OEMS is not a trading platform; it does not set or apply any nondiscretionary trading rules.[34] Use of an OEMS is, and decisions regarding where orders entered into an OEMS

[26] Id. at 70848 (emphasis added).

[27] Id. at 70849 (emphasis added).

[28] Id. at 70900 (emphasis added).

[29] 17 C.F.R. § 240.3b-16 ("Definitions of terms used in Section 3(a)(1) of the Act").

[30] Id. § 240.3b-16(b).

[31] 63 Fed. Reg. at 70849.

[32] Id. at 70850.

[33] Proposal at 24 (explaining that OEMS does not bring orders together for execution; instead, OEMS may route orders to trading systems "where the buy order is matched with a sell order and the sell order is matched with a buy order in accordance with the exchange's nondiscretionary methods used to match buyers and sellers").

[34] Cboe notes that its currently affiliated OEMS, Silexx, offers no algorithmic capabilities.

are made, in fact, entirely within the discretion of *the user and its broker*. Decisions regarding the routing of orders occur solely in accordance with their instructions — Cboe has absolutely no control over to where any orders from any OEMS (including its affiliated OEMS) are routed for execution. Additionally, proposed Rule 3.66 would prevent Cboe from applying any such discretion to an affiliated OEMS. It is Cboe that "handles and executes all orders it receives in a nondiscretionary manner."[35] True, an OEMS can enable users to "route orders" to an exchange, but Commission regulations establish that activity is *not* an exchange function, as Cboe has explained.[36] Additionally, such ability to route orders directly to an exchange (rather than to another user) from an OEMS cannot occur unless a user obtains separate functionality.

In response, Bloomberg seizes on the word "solely" in the Rule 3b-16 order-routing exclusion, arguing that because there is a "national securities exchange at the heart of the corporate group around the Exchange, the Rule 3b-16 exclusion does not" apply."[37] This is circular expansive reasoning. Indeed, the position leads to the irrational result that *all* property of and services provided by *any* corporate affiliate of a registered exchange are facilities because of affiliation with a registered exchange. That is not a sensible reading of the statute, as the Commission has long recognized. For example, the Act's "facility" definition expressly includes "premises" and "tangible or intangible property." Under an acontextual, hyper-literal reading of that definition, would the "premises" and "property" of any Cboe affiliate become exchange facilities subject to regulation under the Act? An affiliated broadcast company? A real-estate investment firm? A futures exchange regulated by the CFTC? Obviously not. The Commission has rightly sought to avoid those untenable results by properly reading the statute, as reflected in Rule 3b-16, to reach only those activities and functions that constitute *marketplace* activities under the Act. The Rule 3b-16 exclusion for order routing carves out that specific function from the range of exchange functions that should be regulated under the Act. Because OEMSs fit squarely within that exclusion, an OEMS should not be regulated as a "facility" of an "exchange."

SIFMA and Bloomberg are also wrong that this interpretation of the Commission's regulations is inconsistent with the statute.[38] The facility definition states:

> '[F]acility' when used with respect to an exchange includes [a] its premises, [b] tangible or intangible property whether on the premises or not, [c] any right to the use of [i] such premises or property or [ii] 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

[35] Id. at 14.

[36] Id. at 25.

[37] Bloomberg OIP Letter at 8.

[38] Bloomberg OIP Letter at 3-4.

> otherwise, maintained by or with the consent of the exchange), and [d] any right of the exchange to the use of any property or service.[39]

The facility definition does not fairly support their position.

Under the statute and the Commission's regulations, it is not enough to be a "facility" to be regulated under the Act. Instead, a facility must be used in a particular way—as a "market facilit[y]" that helps bring together purchasers and sellers in a marketplace, physical or virtual. The Act's definition of "exchange" makes this linkage clear: "'exchange' means 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 … and includes the market place and the *market facilities* maintained by such exchange."[40] In other words—the statute recognizes that not all facilities will perform exchange functions; that is why only "market facilities" are regulated under the Act. SIFMA and Bloomberg seek to read the definitions of "exchange" and "facility" in isolation, ignoring that the statute includes as part of the exchange only those facilities that are "market facilities," which demands a connection to marketplace activities (that is, bringing together buyers and sellers of securities).

That all makes good sense. As explained above, if everything included in the "facility" definition of a Cboe-affiliate could be regulated under the Act, the statute would have an utterly implausible reach that Congress could not have intended. All real property, for example, of any Cboe affiliate would be an exchange facility, whether or not the property had any connection at all to marketplace activity.[41] After all, under SIFMA's and Bloomberg's boundless interpretation, such property would be the "premises" or "tangible … property" owned by a corporate affiliate that is part of "a group of persons" operating an exchange. That obviously cannot be the law, which is why the Commission's regulations embrace a functional approach that looks to the conduct at issue and asks whether that conduct is exchange activity.

Even apart from the functional approach embodied in the regulations, SIFMA and Bloomberg misread the statute in claiming that an OEMS is "a service … for the purpose of effecting or reporting a transaction on the exchange."[42] Cboe has no "right to use" OEMSs "for purposes of effecting or reporting a transaction on an exchange," as Cboe has described.[43] Neither SIFMA nor Bloomberg has a good answer. To the extent that Bloomberg believes that the "right

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[39] 15 U.S.C. § 78c(a)(2) (brackets and numbering added).

[40] Id. § 78(c)(a)(1) (emphasis added).

[41] Bloomberg's example illustrates the absurd breadth of this position in asserting that the operator of an OEMS itself as a subsidiary is "property" of Cboe's parent and thus a facility of an exchange. Bloomberg OIP Letter at 6. If that were true, the property and services of any Cboe-affiliate could be regulated as an exchange facility. That cannot be the law.

[42] 15 U.S.C. § 78c(a)(2).

[43] See Proposal at 14.

to the use" clause does not modify "any service … for the purpose of effecting" an exchange transaction,[44] it ignores the grammatical structure of the "facility" definition.

2. A Rule 3.66 OEMS is not a "facility" of an "exchange."

Even if an affiliated-OEMS generally were considered to be "facility" of an "exchange," an affiliated-OEMS as proposed by Rule 3.66 would certainly not be. To start, "[f]rom a business perspective, an OEMS and the Exchange have different primary goals and thus a lack of unity of interests."[45] But the Commission need not rely alone on those evident differences alone. Instead, proposed Rule 3.66 imposes robust safeguards reasonably designed to cause an affiliated-OEMS to be "operated in manner independent from the Exchange despite affiliation with the Exchange" would be established.[46] Those guardrails operate to take the Cboe affiliate outside the Act's "group of persons" provision — which is the only possible basis for regulating OEMSs as an exchange facility. (To Cboe's knowledge, the Commission, after all, has never sought to regulate *un*affiliated OEMSs under the Act.)

The Act does not define "group of persons." In Cboe's view, the Commission misinterprets the statute to treat that phrase as a proxy for corporate affiliation. The definition of "exchange" says "group of persons" not, as the Commission would read it, "group of related corporations." Just as a "group of natural persons" would include an assembly of unrelated persons, a gathering of family members, or both, "group of persons" naturally includes entities providing exchange functions without regard to their legal affiliation.

But even crediting the Commission's view, the D.C. Circuit stressed that "vigilance" is "necessary to ensure that the term is not stretched too far."[47] The court emphasized that "[w]hether two or more persons are or may be *acting in concert* is likely the key consideration."[48] The Proposal is carefully designed to provide that, when it comes to providing a Rule 3.66 OEMS, Cboe and its affiliates would not be "acting in concert" as it relates to the operation of the exchange. Under the Proposal, an affiliated OEMS will not be regulated as a facility of an exchange if, but *only* if, critical safeguards are adhered to, including that (1) use of "the OEMS is voluntary . . . and not required for a TPH to access to the Exchange"; (2) "if a TPH using the OEMS establishes a direct connection to the Exchange via an Exchange port, that connection is established in the same manner and in accordance with the same terms, conditions, and fees as any third-party OEMS"; (3) "any fees charged to a user of the OEMS are unrelated to that user's Exchange activity or to Exchange fees set forth on the Exchange's fees schedule;" (4) "the OEMS and its users use any premises or service from the Exchange that is a facility, such as market data, pursuant to the same

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[44] See Bloomberg OIP Letter at 4-5 (claiming the right to use an OEMS to effect or report transactions "is beside the point").

[45] Proposal at 26.

[46] Id. at 9.

[47] 23 F.4th at 1025.

[48] Id. at 1024 (emphasis added).

terms, conditions, and fees as any other user of Exchange premises and services as set forth in the Exchange's Rules, technical specifications, and Fees Schedule"; and (5) "the Exchange has established and maintains procedures and internal controls reasonably designed to prevent the OEMS from receiving any competitive advantage or benefit as a result of its affiliation/relationship with the Exchange, including the provision of information to the entity or personnel operating the OEMS regarding updates to the System … until such information is available generally to similarly situated market participants."[49]

Neither SIFMA nor Bloomberg offer any persuasive argument for why those controls would not be sufficient. And these controls would prevent Cboe from providing preferential treatment to affiliated OEMSs.[50] The controls also provide that, when it comes to exchange activity, Cboe and its affiliate are not "acting in concert," but independently. SIFMA responds that being operated independently is not a "legally relevant distinction,"[51] but that is obviously wrong. The controls essentially sever the unity of interest that is required to deem Cboe and its affiliate part of the same group of persons when it comes to operating an exchange.[52]

Finally, SIFMA and Bloomberg engage in hyperbole in arguing the Proposal would exclude an exchange-affiliated OEMS "from oversight entirely"[53] or that the Commission would have no "role assessing" the "asserted independence."[54] The Commission would maintain control over Cboe, including compliance with proposed Rule 3.66, as discussed below.[55]

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[49] Proposal at 9-10; see also id. Ex. 5 (proposed Rule 3.66). The Commission has long recognized the importance and effectiveness of strong information barriers in preventing the inappropriate sharing of information within firms. See, e.g., SEC staff, Summary Report on Examinations of Information Barriers: Broker-Dealer Practices Under Section 15(g) of the Securities Exchange Act of 1934 (2012) (discussing the importance of broker-dealer information barriers to control the dissemination of material nonpublic information); see also, e.g., Rule 8.10 (pursuant to which the Exchange requires TPHs to adopt written policies and procedures "reasonably designed" to prevent misuse of material, nonpublic information).

[50] If such preferential treatment caused an OEMS to fall within the definition of facility of an exchange, Cboe would be required to submit a rule filing to establish any such preferential treatment.

[51] SIFMA OIP Letter at 4.

[52] Proposal at 25-29.

[53] SIFMA OIP Letter at 5.

[54] Id.

[55] See Proposal at 59 n.57 ("If the Commission approves this proposed rule change, Rule 3.66 would be subject to SEC oversight. As a result, the Commission would have the ability to confirm that the Exchange is complying with the requirements set forth in Rule 3.66 with respect to any affiliated OEMSs and thus ensure that the Exchange is operating with respect to such OEMSs in the same manner as it would with respect to any third-party OEMS."); see also 15 U.S.C. 78s(g)(1) (which requires Cboe, as a self-regulatory organization, to comply with its own rules).

3. The *ICE* decision supports, not undermines, the Proposal.

In opposing the Proposal, SIFMA and Bloomberg lean heavily of the D.C. Circuit's *ICE* decision. But that reliance is fundamentally misplaced. Properly understood, the decision supports, not undermines, the Proposal.

First, SIFMA and Bloomberg cannot credibly dispute that the D.C. Circuit applied a two-part test, analyzing whether the wireless connections, first, were a "facility" and, second, whether they were the type of facility that fit within the "exchange" definition.[56] To be sure, in doing so, the D.C. Circuit stated that both parties agreed that "satisfying the statutory definition of 'facility' … is necessary but not sufficient to subject a facility to the jurisdiction of the Commission; it must also be the type of facility that Section 3(a)(1) includes in the term 'exchange.'"[57] On that basis, the court assumed "without deciding whether SEC jurisdiction depends upon this analysis."[58] But although the court did not ultimately decide whether this two-step framework is required by the statute, that is the only reasonable interpretation of the statute; otherwise, all property owned by any Cboe affiliate would be regulated as a facility of the exchange regardless of its connection to buying and selling securities.

Second, in claiming that *ICE* forecloses the Proposal, Bloomberg and SIFMA ignore very different competitive circumstances. Perhaps most importantly, Cboe has specifically structured the Proposal to prevent Cboe from using any control it may have to provide preferential treatment to an OEMS affiliate vis-à-vis unaffiliated providers. By contrast, the Commission in *ICE* focused on supposed "competition and efficiency concerns" arising from control over the exchange premises (Mahwah) as well as wireless connections necessary for high-frequency traders to connect to the exchange.[59] As the Commission stated in that context, "[i]f the Exchanges could charge . . . facility fees without public notice and Commission oversight, they could exploit their control over the market place to increase the costs of or limit access to the most efficient methods of data transmission."[60] More concretely, the Commission focused on ways in which ICE had purportedly given affiliated providers a leg up in competition with non-affiliated providers through the placement of a pole on the Mahwah property.[61] There is no realistic, remotely comparable concern here because the Proposal eliminates any ability to leverage any control of the exchange to benefit the affiliated OEMS or to disadvantage unaffiliated OEMSs. For that reason, SIFMA's conclusory claim that that Proposal would "allow the Exchange … to advantage its affiliated OEMSs

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56 Id. at 13.

57 23 F.4th at 1024; see Bloomberg OIP Letter at 8 (claiming that Cboe "presents *ICE Wireless* incorrectly")

58 Id.

59 SEC *ICE* Br. 4.

60 Id. at 4.

61 Id. at 17.

over unaffiliated OEMSs and create competitive advantages for its affiliated OEMSs" cannot be credited and ignores the actual Proposal.[62]

Third, there are other key differences between *ICE* and the Proposal. Unlike wireless connectivity, OEMS software is standalone functionality that does not touch the premises or property of the Exchange.[63] As noted above, an OEMS itself is not physical infrastructure that connects to an exchange. It is therefore not a "vital and proximate link in a system of communication that directly connects a market participant to the matching engine of an exchange."[64] A Rule 3.66 OEMS user would either have to separately purchase physical infrastructure necessary to transmit orders to the Exchange or send an order to a broker for further transmission to the Exchange for execution. An OEMS (even an Exchange-affiliated OEMS) is, at most, software that "incidentally facilitate[s] the trading of securities," which the D.C. Circuit stated would not be regulated as an exchange activity, not a system that "invariably forms the penultimate link in a direct connection to the matching engine of an exchange."[65] Unlike physical transmission infrastructure designed to transmit data to or from an exchange, neither a Rule 3.66 OEMS (nor any OEMS) is "required to access the Exchange."[66] An OEMS is decidedly not a "penultimate link" in any direct communication chain. As Cboe explained and no one has contested, "[n]o OEMS platform is required to access the Exchange and thus is not a necessary link in this chain, even an OEMS platform [that] happens to be offered by an Exchange affiliate."[67] That factual difference is critical.

Fourth, SIFMA's and Bloomberg's claim that the D.C. Circuit conclusively determined that all close corporate affiliates are part of a "group of persons" vastly overreads the decision.[68] In addition to recognizing that "unity of interests" was perhaps the key statutory criterion and that the test would be one of facts-and-circumstances, the D.C. Circuit did not address corporate affiliation in the context of concrete, enforceable structural separations designed to prevent

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[62] SIFMA OIP Letter at 2; see also Bloomberg OIP Letter at 5.

[63] The Exchange notes that floor brokers on its trading floor have Silexx installed on their workstations. If the Commission approves the Proposal, the Exchange intends to continue to operate the on-floor version of Silexx as a facility of the exchange (and thus proposed Rule 3.66 would exclude the off-floor version of Silexx from being operated as a facility). Additionally, as described above and in the Proposal, TPHs that are also users of Silexx have the option to separately purchase a port from the Exchange if they want to send orders directly from Silexx to the exchange; however, this is no different than how a TPH using any other OEMS would connect directly to Cboe. However, there is no requirement to do so.

[64] *ICE*, 23 F.4th at 1024-25.

[65] Id.

[66] Proposal at 20.

[67] Proposal at 20. A proposed Rule 3.66 OEMS, unlike the wireless connections at issue in the *ICE* case, may serve many purposes other than sending orders to the Exchange for execution. As Cboe has noted, it is possible a user of a Rule 3.66 OEMS never submits a single order to Cboe for execution. Id. at 15.

[68] E.g., Bloomberg OIP Letter at 9.

anticompetitive conduct. The Proposal accomplishes just that, rendering the D.C. Circuit's statement about "closely connected corporate affiliates" inapplicable here.

4. Commission precedent supports the Proposal.

The Proposal is also supported by Commission regulatory precedent. The Commission has recognized a national securities exchange's affiliation with an entity providing services related to the exchange does not necessarily equate to the affiliate being deemed a facility of the exchange. Specifically, in approving a proposed rule change of the Pacific Exchange, Inc. ("PCX") to establish the Archipelago Exchange ("ArcaEx") trading facility, the Commission evaluated three aspects of the "Wave" broker-dealer.[69] Wave was a wholly owned subsidiary of Archipelago Holdings LLC[70] and proposed to engage in three functions that were evaluated by the Commission. First, Wave proposed to register as an Equity Trading Permit ("ETP") Holder for and act as an introducing broker for customers that were not ETP Holders. Second, Wave would provide an optional routing service for ArcaEx, and, as necessary, would route orders to other market centers from ArcaEx. Finally, Wave would operate an ECN trading securities ineligible for trading on ArcaEx.[71]

The Commission first assessed and found that by functioning as an order routing mechanism for ArcaEx, Wave would operate as a "system of communication to or from PCX for the purpose of effecting a transaction on the exchange."[72] Notably, the Commission pointed out that, when acting in this order routing capacity, Wave would *receive instructions from ArcaEx*, *would route orders away in accordance with such instructions*, and would be responsible for reporting resulting executions back to ArcaEx. Under these circumstances, the Commission found Wave's order routing function to be a facility of the PCX. Wave's order routing function is akin to Cboe's use of Cboe Trading, Inc., a registered broker-dealer and FINRA member that serves as a limited purposes routing facility of Cboe.[73]

By contrast, the Commission found that Wave's proposed operation as an introducing broker for ArcaEx did not raise facility issues. In its introducing broker role, Wave would be acting as a user/member of ArcaEx "on precisely the same terms as any other member."[74] Wave would not be the sole source of sponsored access to ArcaEx; all other ETP Holders could readily provide similar services on behalf of their customers, and PCX was subject to statutory standards that prohibited denials of access and other discrimination against any member regarding access to PCX services. PCX also instituted safeguards to segregate Wave's introducing broker function from the operation of PCX and its facilities so that Wave would not receive any informational advantages

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[69] Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001).

[70] Archipelago Holdings LLC would own both ArcaEx, a facility of PCX, and Wave. Id. at 55233.

[71] Id.

[72] Id. at 55234.

[73] See Cboe Rules 3.63 and 3.64.

[74] Id.

from its affiliation with ArcaEx and PCX. In light of these factors, the Commission concluded that "[despite Wave's affiliation with the PCX, the Commission does not believe that Wave's introducing broker function should necessarily be viewed as constituting a facility of the PCX."[75] The Commission noted that this analysis would change, however, should Wave become the sole or predominant source of sponsored access to ArcaEx, or should the PCX's information barriers prove to be ineffective.[76]

The Commission's assessment of the activities of Wave are instructive with respect to the Proposal and supports the conclusion that Rule 3.66 OEMSs are not facilities of Cboe. First and foremost, the Commission's assessment indicates that affiliation alone is not determinative with respect to facility status.[77] In addition, unlike Wave's order routing function that the Commission found to be a facility of PCX, Rule 3.66 OEMSs will not take instructions from Cboe or route orders in accordance with such instructions. Rather, all order handling instructions for OEMSs will come from the users of such systems (and their brokers, if applicable). Indeed, the operation of Rule 3.66 OEMSs will involve many of the factors found relevant to the Commission's determination that Wave's introducing broker function would not constitute a facility. Users of Rule 3.66 OEMSs would operate those OEMSs with respect to Cboe exchange activities on precisely the same terms as users of any other OEMSs.[78] Relatedly, Rule 3.66 OEMSs would not be the sole source of access to Cboe,[79] and use of a Rule 3.66 OEMS would be completely voluntary and not required to access Cboe. Further, through the multiple conditions and safeguards that must be satisfied by proposed Rule 3.66 OEMSs, proposed Rule 3.66 is designed to preclude Cboe from providing such OEMSs with unfair, preferential access or any advantages as a result of their affiliation with Cboe.[80]

The Commission also has permitted national securities exchanges to remove references to fees charged for services once thought to be facilities from their rule books. In 2008, the Nasdaq Stock Market ("Nasdaq") filed a proposed rule change to remove from its rulebook references to fees charged for index and ETF values disseminated through its index dissemination service.

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[75] Id. The Commission also determined that Wave's third role, operator of an ECN for securities ineligible for trading on ArcaEx, did not present facility concerns. Id. at 55235.

[76] Id.

[77] This was true despite the fact that an introducing broker function involved the routing of orders for the purpose of effecting a transaction on an exchange.

[78] See id. at 55234 (upon its finding that Wave's introducing broker function was not a facility of PCX, the Commission noted that "Wave would be acting as a user/member of the ArcaEx on precisely the same terms as any other member"). In this regard, commenters have noted that Cboe currently provides a fee waiver to Silexx users. See Bloomberg OIP Letter at 13 (which fee waiver was filed with the Commission). If the Proposal is approved, Cboe would submit a separate rule filing to eliminate off-floor Silexx from Exchange rules and discontinue this fee waiver, which would cause off-floor Silexx to be consistent with Rule 3.66.

[79] Id. (the Commission noted that "Wave would not be the sole source of sponsored access to ArcaEx; all other ETP Holders could readily provide similar services on behalf of their customers").

[80] Id. (where the Commission noted that PCX "instituted safeguards to ensure . . . that Wave would not receive any informational advantages from its affiliation with ArcaEx and the PCX").

Noting that the index dissemination service did not appear to be a facility of Nasdaq (even though it had previously been filed as a Nasdaq rule pursuant to Rule 19b-4 under the Act), the Commission approved the proposal, noting that if Nasdaq were to propose to tie pricing for the index dissemination service to Nasdaq exchange services, condition a company's inclusion in the index on that company's listing market, or otherwise modify the index dissemination service such that it fell within the definition of a facility of an exchange Nasdaq would have to file a proposed rule change with the Commission. In similar fashion, Cboe would not tie pricing of a Rule 3.66 OEMS to any Cboe exchange activity; indeed, such pricing is explicitly precluded by proposed Rule 3.66. Nor would Cboe in any way condition the use of a Rule 3.66 OEMS to the use of Cboe's exchange services.

Additionally, as noted in the Proposal,[81] the Commission previously determined that certain order routing systems operated by an exchange are outside the definition of a facility. Specifically, in approving a Nasdaq proposed rule change to delete references to its ACES communication system from its rulebook, the Commission determined that ACES was a neutral communication system rather than a facility of Nasdaq.[82] Commenters have sought to distinguish ACES from a Rule 3.66 OEMS, noting that ACES did not allow Nasdaq members to route orders to the Nasdaq Market Center and suggesting that a proposed Rule 3.66 OEMS would route orders to Cboe.[83] To the contrary, a Rule 3.66 OEMS on its own provides users with no ability to route orders directly to Cboe (or any exchange) for execution. A Rule 3.66 OEMS user may route orders from the OEMS directly to Cboe for execution only if the user separately purchases physical infrastructure necessary to obtain direct access to the Exchange.[84] Without doing so, a user of a Rule 3.66 OEMS (like the user of any OEMS) has no way to route orders from that OEMS directly to the Exchange and, thus, could route orders from that OEMS only to a broker or another user.[85] By itself, a Rule 3.66 OEMS is indistinguishable from a third-party OEMS. Additionally, like ACES, a Rule 3.66 OEMS itself does not effect transactions or report transactions to the consolidated tape and is not itself linked with the Exchange's automated system for order execution and trade reporting. Further, once an order has been routed through a Rule 3.66 OEMS, (1) if by a TPH directly to the Exchange for execution, or (2) if to a TPH broker, which broker then routes the order to the Exchange for execution, the Exchange would handle the order in nondiscriminatory manner in accordance with its Rules. Cboe does not and would not control the routing of orders by a Rule 3.66 OEMS. Ultimately, an order is routed from a Rule 3.66 OEMS solely in accordance with the instructions of a user and its broker, who may route the order in a manner and to any

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[81] Proposal at n. 29.

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

[83] Bloomberg OIP Letter at 12.

[84] Only TPHs may purchase ports that establish direct connectivity to the Exchange from Cboe in accordance with its Fees Schedule. A TPH may still route orders to the Exchange indirectly through other market participants or through connectivity purchased from third-party resellers.

[85] As noted above, with respect to Silexx, the majority of off-floor users are not associated with a TPH and thus have no ability to purchase a port from the Exchange. Therefore, most Silexx users are able to route orders through Silexx only to other Silexx users. See supra note 21.

market for execution it deems appropriate (and with respect to a broker, in a manner consistent with best execution and other applicable regulatory obligations). Therefore, like third-party OEMSs and ACES, Rule 3.66 OEMSs are neutral communication systems with respect to the Exchange rather than facilities of the Exchange.

B. The Commission would retain oversight of the Exchange's compliance with proposed Rule 3.66.

Commenters suggest that proposed Rule 3.66 is intended to "… remove the investor protections of the Act and otherwise limit the Commission's oversight."[86] These comments are inaccurate and ignore the full scope of the Commission's oversight of national securities exchanges. First, the current rulemaking proceeding ensures that Rule 3.66 will only be approved after having undergone not only the traditional notice and comment period of Section 19(b) and Rule 19b-4, but also after the public has had additional time to consider and comment on the OIP. If approved, no changes could be made to Rule 3.66 without the filing of a proposed rule change by Cboe, which filing also would be subject to public comment and review by the Commission. Moreover, even absent any proposed changes, if the Commission approves Rule 3.66, Commission staff will have authority to subject Cboe to regular, ongoing, and rigorous review and examination (as Commission staff currently does) regarding whether the Exchange is complying with the terms of the rule.[87] Any deficiencies identified by Commission staff in this regard would need to be promptly addressed by Cboe.

In this regard, Rule 3.66 would be no different from any other rule of the Exchange. It is simply incorrect and inflammatory to imply that approval of the Proposal would remove the investor protections of the Act.

C. There are no potential competitive advantages for the Exchange that could arise from an Exchange-affiliated OEMS "operating outside the Commission review process."

In the OIP, the Commission asks whether there are any 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?[88] The answer is no. The Exchange does not believe that such advantages would exist under proposed Rule 3.66. By design, proposed Rule 3.66 is meant not only to provide clear and enforceable guidelines for Exchange-affiliated OEMSs, but also to provide that such OEMSs do not receive advantages by virtue of their affiliation with the Exchange that are not available to other OEMSs.

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[86] Bloomberg OIP Letter at 10; see also SIFMA OIP Letter at 1-2 ("Moreover, if approved, proposed Rule 3.66 would remove 'affiliated OEMSs' from the Commission's critical oversight of the Exchange . . . .)

[87] See 15 U.S.C. 78s(g)(1) (which requires Cboe, as a self-regulatory organization, to comply with its own Rules).

[88] OIP at 48466.

Under proposed Rule 3.66(a), use of an Exchange-affiliated OEMS must be voluntary and not required for a TPH to access the Exchange.[89] Thus, it would be entirely within the discretion of a TPH to use a Rule 3.66 OEMS, and a TPH could choose any other OEMS. Under the Proposal, Rule 3.66 OEMSs will not be the exclusive means to access the Exchange.

TPHs using a Rule 3.66 OEMS that also determine to establish a direct connection to the Exchange via an Exchange port will have such connection established in the same manner and in accordance with the same terms, conditions, and fees as a TPH using any third-party OEMS as set forth in the Exchange Rules, technical specifications, and fees schedule.[90] Thus, there will be no incentive for a TPH to establish a direct connection to the Exchange by virtue of a Rule 3.66 OEMS vs. a third-party OEMS.

OEMSs under Rule 3.66 could not be registered as or owned by a registered broker-dealer. This condition effectively restricts the types of activities that an Exchange-affiliated OEMS can engage in, as well as the type of fees that such an OEMS may charge.[91] For example, unlike certain third-party OEMSs, a Rule 3.66 OEMS would not charge transaction-based fees to its users. Additionally, the Rule 3.66 OEMS would have no ability to determine where orders are routed; routing instructions for orders submitted through a Rule 3.66 OEMS would be solely within the discretion of users and their brokers.[92] In this regard, Rule 3.66 OEMSs will have *less flexibility* than many third-party competitors.

Users of Rule 3.66 OEMSs and their brokers will be solely responsible for routing decisions for any orders routed through the OEMS to the Exchange. Thus, such users will not benefit at all in making such routing decisions by virtue of the fact that a Rule 3.66 OEMS is affiliated with the Exchange. Moreover, orders received by the Exchange by virtue of a Rule 3.66 OEMS must be processed by the Exchange in the same manner as other orders received by the Exchange.[93] Users of such OEMSs gain no preferential treatment with respect to Cboe's exchange activities as a result of using such systems.[94]

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[89] See proposed Rule 3.66(a).

[90] See proposed Rule 3.66(b).

[91] See proposed Rule 3.66(c).

[92] Cboe notes again that its currently affiliated OEMS, Silexx, offers no algorithmic capabilities.

[93] The Exchange notes again its matching engine is incapable of determining from what OEMS an order originated so would not be able to apply different rules to orders from any specific OEMS, including an affiliated one.

[94] Proposed Rule 3.66(d).

As noted above, all fees charged by a Rule 3.66 OEMS must be unrelated to a user's activity on the Exchange or to other Exchange fees.[95] Users of Rule 3.66 OEMSs will get no benefit or subsidy based on other activity on the Exchange.[96]

Rule 3.66 OEMSs using any other Exchange premises or services (e.g., market data) may do so only pursuant to the same terms, conditions, and fees as any other users of such Exchange services or premises.[97] Again, no preferential treatment of users of Rule 3.66 OEMSs.

Each of these requirements, along with a requirement that third parties not required to register as national securities exchanges are able to offer a similar OEMS,[98] is designed to prevent a Rule 3.66 OEMS from receiving any competitive advantages based on its affiliation with the Exchange. Proposed Rule 3.66 further addresses this concern of the Commission more broadly. If approved, proposed Rule 3.66 would require the Exchange to establish and maintain internal controls reasonably designed to prevent the OEMS from receiving any competitive advantage or benefit as a result of its affiliation with the Exchange (including the provision of information to an OEMS regarding updates to the Exchange that may require an OEMS to make corresponding updates, such as a new order type, until such information is generally available to similarly situated market participants).[99]

More fundamentally, and as discussed above, the Exchange takes issue with the suggestion that a Rule 3.66 OEMS would operate "outside the Commission review process." While an OEMS meeting the requirements of Rule 3.66 would not be subject to the rule filing process under Section 19(b) of the Act because it would not be a facility of the Exchange, the Proposal has been subject to extensive review by the Commission. Any changes to the operation of an Exchange-affiliated OEMS not consistent with the Commission-approved rule causing the OEMS to fall within the definition of a facility of an exchange would require the Exchange to submit and the Commission to review a proposed rule change. Moreover, the Exchange's compliance with Rule 3.66 would be subject to the Commission's ongoing examination oversight.

It also is worth noting that the OEMS market is highly competitive. Exchange-affiliated OEMSs compete with several third-party OEMSs (none of which are regulated by the Commission as exchange facilities), including systems offered by SS&C Technologies (Eze), FlexTrade Systems (FlexTRADER and other products), TS Imagine (TS One and Trades Mart), LSEG Data & Analytics (formerly Refinitiv) (REDI), Bloomberg (execution management system), Factset (formerly Portware) (execution management system), Neovest (execution management systems), Dash Financial Technologies (DASH OMS), TRAFiX LLC (OMS and EMS), and Wolverine

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[95] Proposed Rule 3.66(e).

[96] As previously noted, if the Commission approves the Proposal, Cboe intends to submit a rule filing to eliminate the current fee waiver for users of Silexx (as would be required by Rule 3.66 for off-floor Silexx to not be considered a facility of the Exchange).

[97] Proposed Rule 3.66(f).

[98] Proposed Rule 3.66(g).

[99] Proposed Rule 3.66(h).

Execution Services (WEX Trading Platform). Rule 3.66 is designed to allow Rule 3.66 OEMSs to operate more effectively in this highly competitive market, subject to compliance with the enumerated restrictions of the rule, pursuant to which users of OEMSs would receive no competitive advantage over users of other systems.

D. Proposed Cboe Rule 3.66 Is Consistent with Sections 6(b)(5) and 6(b)(6) of the Act and Should be Approved by the Commission.

Proposed Rule 3.66 also is consistent with Sections 6(b)(5) and 6(b)(8) of the Act. Section 6(b)(5) requires, among other things, that the rules of a national securities 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. Proposed Rule 3.66 aligns with these requirements.

First, given their similar functions, proposed Rule 3.66 is designed to put Exchange-affiliated OEMSs on the same competitive footing as third-party OEMSs. Not to advantage Exchange-affiliated OEMSs, but to allow them to offer services to broker-dealers and their customers in a manner that provides greater flexibility with respect to the timing of such services. Currently, the Exchange is required to file proposed rule changes for its affiliated OEMS, significantly slowing the introduction of new features or pricing – even though such changes do not provide competitive advantages to users of the OEMSs. In fact, this is a competitive disadvantage given the need to for the Exchange to submit rule filings to, for example, make pricing changes and be subject to public comment and Commission review, and potential suspension by the Commission. Third-party OEMSs, on the other hand, can modify pricing for customers at any time and in any manner they choose. Permitting OEMSs to compete more effectively under conditions expressly prohibiting any advantages to Exchange-affiliated OEMSs will promote choice among broker-dealers and investors. As in other areas, promoting choice by enhancing competition typically leads to better services and lower costs to broker-dealers and investors. In this manner, proposed Rule 3.66 is consistent with perfecting a free and open market and is in the interests of investors. By its terms, proposed Rule 3.66 prohibits any discrimination between Exchange affiliated OEMSs and other OEMSs, as discussed above.

While the Exchange has demonstrated that the Proposal satisfies Section 6(b)(5), we note that neither commenter on the OIP has given any persuasive argument for why the Proposal is inconsistent with that part of the Act. Bloomberg inaccurately asserts that the Proposal eliminates Commission oversight and exposes investors to risks that such oversight is designed to guard against.[100] As noted above, the Commission would retain oversight over the Exchange to ensure it is operating in compliance with Rule 3.66 with respect to any Cboe-affiliated OEMSs, and the proposed rule precludes any measures to advantage OEMSs operating under it.[101] Bloomberg also argues that the filing of proposed fees for Commission review cannot be a burden on competition. Cboe disagrees. In the context of a competitive market for OEMS services, the cost and delay

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[100] Bloomberg OIP Letter at 10.

[101] See supra at n. 83.

associated with filing proposed fees and other system changes matters. Proposed Rule 3.66 addresses concerns in this regard by ensuring that all fees charged by a Rule 3.66 OEMS must be unrelated to a user's activity on the Exchange or to other Exchange fees.[102] Similarly, fees charged to TPHs for purchasing an Exchange port must be the same for users of a Rule 3.66 OEMS and users third-party OEMS. Given these requirements, and the ability of users to choose from any number of providers in the competitive OEMS market, it is difficult to see why the rule filing process of Section 19(b) would be necessary.

SIFMA states that "Exchange-affiliated OEMSs not subject to the SRO rule filing process could adopt rules, create new order types, raise fees, or implement news or different tiers of service to benefit the Exchange."[103] SIFMA also states that an Exchange-affiliated OEMS and the Exchange could force market participants to purchase and use the Exchange's affiliated OEMS to maintain access to the Exchange.[104] These comments ignore the clear provisions of proposed Rule 3.66, which explicitly preclude the Exchange from providing any competitive advantage to an OEMS based on its affiliation with the Exchange, and which require that the Exchange adopt internal controls designed in this regard. Rule 3.66 also is explicit in stating that use of an Exchange-affiliated OEMS must be voluntary and not required for a TPH to access the Exchange.[105] Proposed Rule 3.66 also requires that a user of an OEMS seeking to establish a direct connection to the Exchange via an Exchange port will have such connection established in the same manner and in accordance with the same terms, conditions, and fees as the user of any third-party OEMS as set forth in the Exchange rules, technical specifications, and fees schedule. Given the enhanced competition to broker-dealers and other investors when choosing OEMSs, Cboe believes that commenters opposing the rule need to describe how the *rule as proposed* is inconsistent with the Act rather than present concerns the Exchange directly addressed in the Proposal.

Proposed Rule 3.66 also is consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, Proposed Rule 3.66 is designed specifically to prevent OEMSs operating pursuant to the rule from obtaining any advantage by virtue of an affiliation with the Exchange or otherwise unnecessarily burdening competition. If approved, Proposed Rule 3.66 would *eliminate* a current burden on competition imposed exchange-affiliated OEMSs and *enhance* competition among OEMSs by putting Exchange-affiliated OEMSs on equal footing with competitors providing similar services while prohibiting activities that would provide an unfair advantage to such Exchange affiliated OEMSs. Statements from commenters that the Proposal would allow the Exchange to engage in activities that would force market participants to use Rule 3.66 OEMSs or use such systems to inappropriately benefit the Exchange run counter to the express prohibitions of the rule.

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[102] Proposed Rule 3.66(e).

[103] SIFMA OIP Letter at 7.

[104] Id.

[105] See Proposed Rule 3.66(a).

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Cboe appreciates the opportunity to respond to the Commission's OIP and related letters from commenters. For the reasons described in the Proposal, the Exchange Response, and above, Cboe strongly urges the Commission to approve the Proposal without undue delay. The Proposal is consistent with the Act, including judicial and Commission interpretations of the Act, and would not convey any competitive advantages to an OEMS based on its affiliation with the Exchange. The Commission would retain oversight of any proposed changes to proposed Rule 3.66 through the Act's rule filing process and would retain oversight of the Exchange's compliance with Rule 3.66 through its regular examination of the Exchange. If approved, proposed Rule 3.66 would enhance competition within the OEMS market and ultimately benefit investors while prohibiting activities that would inappropriately advantage the Exchange or Rule 3.66 OEMSs.

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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