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October 17, 2024

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

Via Electronic Submission

Re: Notice of Designation of a Longer Period for Commission Action on 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 13, 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 (the "Exchange Act").[2] 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 Exchange Act would no longer apply to market participants with respect to those services. The Proposal continues to receive substantial opposition from commenters[3] and no comments have been submitted supporting it, other than two letters

[1] *See Notice of Filing of a Proposed Rule Change to Adopt a new Rule Regarding Order and Execution Management Systems ("OEMS"),* Securities Exchange Act Release No. 99620 (February 28, 2024), (the "Proposal") available at https://www.sec.gov/files/rules/sro/cboe/2024/34-99620.pdf.

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

[3] *See* Letter from Tyler Gellasch, President and CEO, Healthy Markets Association, to Vanessa Countryman, Secretary, Securities and Exchange Commission (Mar. 25, 2024) available at https://www.sec.gov/comments/sr-cboe-2024-008/srcboe2024008-450319-1152502.pdf; Letter from Jim Considine, Chief Financial Officer, McKay Brothers, LLC, to Vanessa Countryman, Secretary, Securities and Exchange Commission (Mar. 26, 2024) available at https://www.sec.gov/comments/sr-cboe-2024-008/srcboe2024008-450740-1153362.pdf; Letters from Ellen Greene, Managing Director, Equities and Options Market Structure, and Joseph Corcoran, Managing Director, Associate General Counsel, SIFMA, to Vanessa Countryman, Secretary, Securities and Exchange Commission (Jun. 18, 2024) available at https://www.sec.gov/comments/sr-cboe-2024-008/srcboe2024008-483351-1382614.pdf, and (Oct. 14, 2024) available at https://www.sec.gov/comments/sr-cboe-2024-008/srcboe2024008-528955-1521342.pdf.

submitted by Cboe. [4]

On May 31, 2024, the Commission issued an order instituting proceedings to determine whether to approve or disapprove the proposed rule changes (the "Order").[5] On August 30, 2024, the Commission issued a notice designating a longer period within which to issue an order approving or disapproving the proposed rule change (the "Extension").[6] Cboe subsequently submitted its second letter.

Bloomberg L.P.[7] continues to stand by the concerns raised in our prior letters[8] and respectfully submits this letter to the Commission to address certain new issues raised in the Second Cboe Letter. Specifically, this letter seeks to address:

1. The Exchange introduces two new alleged examples of Commission "precedent" in support of its proposal, neither of which supports Cboe's position that an affiliated OEMS that offers the ability to route orders to the exchange is not a facility of the exchange; and
2. The Exchange states that it now intends to apply the proposed Rule 3.66 to only "off-floor Silexx" and "intends to continue to operate the on-floor version of Silexx as a facility of the exchange" – an application of the rule that was not articulated in the Proposal and raises

[4] Letters from Laura Dickman, Vice President, Cboe Global Markets, Inc., to Vanessa Countryman, Secretary, Securities and Exchange Commission (April 19, 2024) ("First Cboe Letter"), available at https://www.sec.gov/comments/sr-cboe-2024-008/srcboe2024008-460951-1202654.pdf and (September 3, 2024) ("Second Cboe Letter"), available at https://www.sec.gov/comments/sr-cboe-2024-008/srcboe2024008-515315-1487482.pdf.

[5] *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*, Securities and Exchange Commission, Exchange Act Release No. 100256 (May 31, 2024), *available at* https://www.sec.gov/files/rules/sro/cboe/2024/34-100256.pdf.

[6] *Notice of Designation of a Longer Period for Commission Action on 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. 100880 (August 30, 2024) available at https://www.sec.gov/files/rules/sro/cboe/2024/34-100880.pdf.

[7] 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.

[8] Letters from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., to Vanessa Countryman, Secretary, Securities and Exchange Commission (March 25, 2024) ("First Bloomberg Letter"), available at https://www.sec.gov/comments/sr-cboe-2024-008/srcboe2024008-450419-1152642.pdf; (May 24, 2024) ("Second Bloomberg Letter"), available at https://www.sec.gov/comments/sr-cboe-2024-008/srcboe2024008-477711-1366834.pdf; and (June 27, 2024) ("Third Bloomberg Letter"), available at https://www.sec.gov/comments/sr-cboe-2024-008/srcboe2024008-485751-1388615.pdf.

questions as to whether the Proposal has been sufficiently articulated.[9]

The Proposal rule would carve out from the Exchange Act's statutory definition of facility any OEMS that is affiliated with an exchange, even an OEMS that provides users with the ability to route orders directly to the exchange. As described further below, the Commission has consistently interpreted the definition of facility to include exchange affiliated services that provide the user with an ability to route orders to the exchange. The precedent that CBOE has offered does not support the exchange's position and is easily distinguishable from the facts at hand.

Further, and concerningly, Cboe now appears to be changing the Proposal and articulating a new position that proposed Rule 3.66 would not be applied to "on-floor" Silexx, thus acknowledging it is, in fact, a facility of the Exchange, and now represents that it intends to apply proposed Rule 3.66 only to "off-floor" Silexx. This appears to be a materially different application of the original Proposal and a distinction that has not been fully articulated or explained to the Commission in the filings to date. Moreover, that such a revelation was made in a comment letter – more than 6 months after it was first proposed – raises serious concerns about how the Rule would be administered in practice – as the sole purpose of the rule appears to be to remove the Commission's ability to oversee these activities. It also calls into question whether the Proposal, as currently articulated, comports with the Commission's Rules of Practice.[10] It further highlights the concerns Bloomberg and other commentors have made – that removing OEMS rule and fee changes from the public comment process and Commission oversight weakens the investor protections provided by the Act and allows the exchange to interpret the application of the Exchange Act to its activities.

1. Cboe's new examples of Commission "precedent" are factually distinguishable from the current Proposal and do not support the Exchange's interpretation.

The second Cboe comment letter introduces two new alleged examples of Commission "precedent" for approval of its Proposal. These alleged examples are: (i) the Commission's 2001 approval of the Pacific Exchange's proposed rule to establish the Archipelago Exchange ("ArcaEx") as a new electronic trading facility of the exchange; [11] and (ii) the Commission's 2008

[9] Second Cboe Letter at 11 n. 63, at 13 n. 78, and at 17 n.96.

[10] 17 CFR 201.700(b)(3)(i) ("The burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder… is on the self-regulatory organization that proposed the rule change… the description of the proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be *sufficiently detailed and specific* to support an affirmative Commission finding.") (emphasis added).

[11] *See Order Approving Proposed Rule Change by the Pacific Exchange, Inc., as Amended, and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 4 and 5 Concerning the Establishment of the Archipelago Exchange as the Equities Trading Facility of PCX Equities, Inc., 66 Fed. Reg. 55225 (November 1, 2001)* (the "ArcaEx Approval"), available at https://www.govinfo.gov/content/pkg/FR-2001-11-01/pdf/01-27417.pdf.

approval of Nasdaq's proposed rule to eliminate certain index-related fees from its rulebook.[12]

Neither of these approval orders are helpful "precedent" in support of the Exchange's Proposal. If anything, these orders highlight that that the Commission has carefully and consistently maintained an appropriately tailored interpretation of the Exchange Act's definition of facility.

(A) ArcaEx and Wave broker-dealer approval

Between 2000 and 2001, Pacific Exchange ("PCX") filed and amended a proposed rule to establish ArcaEx as a new electronic trading facility of its subsidiary, PCX Equities.[13] Nasdaq opposed the ArcaEx filing on several fronts, including "facility" concerns regarding the role Wave Securities ("Wave"), a broker-dealer subsidiary of ArcaEx, would have in the newly established electronic trading facility.[14] As proposed, Wave would serve three functions for ArcaEx and its members: (i) Wave would be an "optional mechanism for routing the orders of ArcaEx users to other market centers" [15]; (ii) Wave would register as an Equity Trading Permit ("ETP") Holder and "act as an introducing broker for customers that are non-ETP Holders"[16]; and (iii) Wave would operate an electronic communications network ("ECN") trading only securities that were ineligible for unlisted trading privileges on ArcaEX.[17]

The Commission ultimately approved the ArcaEx proposal, as amended. Importantly, when it came to Wave, the Commission required its routing functionality to be operated as a facility of an exchange, noting that "In the Commission's view, by functioning as an order routing mechanism for ArcaEx, Wave would operate as a 'system of communication' *to or from* the PCX for the purpose of effecting a transaction on the exchange. Specifically, pursuant to contract, Wave would receive instructions from ArcaEx, would route orders away in accordance with those instructions, and would be responsible for reporting resulting executions back to ArcaEx. "[18] The Commission clearly held the same view as it does today – that order routing functionality, *when combined with exchange affiliation*, meets the statutory definition of a "facility" of an Exchange.

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[12] *See* Second Cboe Letter at 13-14. The Exchange does not provide any citation for its Nasdaq index-related alleged example of "precedent." As best as can be determined, it appears that Cboe is referring to Securities Exchange Act Release No. 58897 (November 3, 2008) ("Nasdaq Approval"), available at https://www.sec.gov/files/rules/sro/nasdaq/2008/34-58897.pdf.

[13] *See* ArcaEx Approval at 55225.

[14] *Id* at 55228 and 55235.

[15] *Id* at 55226 and 55233.

[16] *Id* at 55233.

[17] *Id.*

[18] *Id* at 55234 (emphasis added).

Cboe attempts to distinguish the Commission's unfavorable Wave "routing" finding (that Wave's order routing mechanism was a facility of the exchange) and Silexx by focusing on the "instructions" analysis of the Commission.[19] However, this ignores the additional findings of the Commission that, despite PCX's representations that "information barriers would be maintained", "[t]he Commission believes that, although Wave's routing services are optional, Wave's order-routing function occupies a special position with respect to ArcaEx. In the Commission's view, Wave *is uniquely linked to and endorsed by ArcaEx* to provide its outbound routing functionality. Therefore, the Commission believes, and the PCX agrees, that the PCX application of the Wave order-routing function falls within the definition of a facility under the Act."[20]

Cboe further claims that Silexx is more closely related to Wave's introducing broker ("IB") function. However, as the Commission's approval notes, Wave as an IB was a member of PCX and thus subject to the rules governing Members of the exchange and subject to the Exchange Act requirement that PCX not be able to unfairly advantage one member over another.[21] Silexx is not a registered broker-dealer and not a TPH holder and none of the protections or safeguards of the Exchange Act, either those that apply to exchanges or broker-dealers, would apply to the Exchange-affiliated OEMS in its relationship with the Exchange under the Proposal.

In addition to this vital distinction, in approving Wave's IB functionality, the Commission noted in 2001 that, should most participants choose to utilize Wave's IB functionality, the Commission's views would change.[22] As our previous letter (and Cboe's own filings) note, Silexx is used by, at minimum, 100% of Cboe Floor Broker TPHs.[23] Even if the Commission's approval of Wave's IB function was analogous to Silexx, which it is not, it would fail to meet the criteria set forth by the Commission in 2001 and would likely have been required to be operated as a facility of an exchange.

Finally, the Commission notes that Wave "in its introducing broker role [] would be acting as a user/member of the ArcaEx on precisely the same terms as any other member." [24] Yet, Section (c)

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[19] Second Cboe Letter at 12.

[20] ArcaEx Approval at 55234 (emphasis added).

[21] *Id* at 55234-55235 ("ownership of Wave, combined with Wave's role as an introducing broker to ArcaEx, raises the question whether Wave in this role should be considered a facility of the PCX. 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. In its introducing broker role, Wave would be acting as a user/member of the ArcaEx on precisely the same terms as any other member.")

[22] *Id* at 55235 ("This analysis would change, however, should Wave become the sole or predominant source of sponsored access to ArcaEx… In that case, the potential advantages provided to Wave in its operation as an introducing broker from its affiliation with the PCX may cause Wave to be considered a facility of the PCX…)

[23] *See* Third Bloomberg Letter at 13 n. 53 and at 14 n. 57. *See also* Second Cboe Letter at 11 n. 63.

[24] *See* supra note 21.

of proposed Rule 3.66 also requires that "the OEMS (or the entity that owns the OEMS) is not a registered broker-dealer."

Cboe ignores the Commission's full analysis (as it has repeatably done with regards to the ICE Wireless case) and misapplies it to its proposed Rule 3.66. Ultimately, Silexx is not a registered broker-dealer, is not a TPH, and this alleged "precedent" is not relevant.

(B)Nasdaq index-related fees approval

In 2008, Nasdaq filed a proposed rule change to remove references from its rulebook to certain index-related fees.[25] Specifically, Nasdaq sought to remove fees for receiving Nasdaq-calculated index values (the "index dissemination service") of proprietary and nonproprietary indices.[26]

Importantly, there was no disagreement between the Commission and Nasdaq in their understanding of the statutory and regulatory requirements of the index dissemination service. As noted in the Proposal:

> "It is Nasdaq's understanding that license fees that Nasdaq and its competitors charge for the actual use of their respective indexes in connection with the creation or trading of financial products linked to such indexes have never been subject to Commission oversight. However, Nasdaq's former corporate parent, then known as the National Association of Securities Dealers, Inc. ("NASD"), historically included in its rule book charges for distributing index values, and this practice carried over into the Nasdaq rule book when Nasdaq was registered as a national securities exchange in 2006."[27]

The Commission agreed with this assessment in the Nasdaq Approval:

> "The Commission believes that it is reasonable for Nasdaq to delete the portion of Rule 7019(b) that relates to fees for the index dissemination service, as, based on representations made by Nasdaq, the index dissemination service does not appear to be a facility of a national securities exchange within the meaning of the Act." [28]

So, the index dissemination service in question was never required to be included in Nasdaq's rulebook. The only reason it ever was included is because it has been included in Nasdaq's predecessor entity, which was not an exchange. And the grounds for removing the service from

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[25] *See* Notice of Filing of Proposed Rule Change and Amendments No. 1 and 2 Thereto to Remove from Rule 7019 the Fees for Receiving Index Values, Securities Exchange Act Release No. 58666 (September 26, 2008) (the "Nasdaq Proposal"), available at https://www.sec.gov/files/rules/sro/nasdaq/2008/34-58666.pdf. *See also* Nasdaq Approval.

[26] Nasdaq Approval at 1-2. *See* supra note 12.

[27] Nasdaq Proposal at 3-4.

[28] Nasdaq Approval at 2.

the rulebook were entirely consistent with the Commission's reasonable interpretation of the Exchange Act definition of facility.

It is also important to highlight that the manner in which Nasdaq sought to remove from Commission oversight the index dissemination service is markedly different from the approach Cboe has taken in regard to Silexx. As our previous letters have stated, Cboe's Proposal seeks to reserve to the Exchange itself the right to determine, under its own rulemaking process, how the definition of "facility" will be interpreted going forward – it seeks to unilaterally offer itself exemptive relief from Congressional statutes and Commission rules.[29] And there is significant disagreement between the Commission and the Exchange on whether exchange-affiliated OEMSs meet the statutory definition of facility of an exchange.[30]

In contrast, the Nasdaq Proposal sought to, in a limited and targeted fashion, remove specific index-related fees from its rulebook. The Nasdaq Proposal required no further application or interpretation of statutory definitions by the very entity that would be required to adhere to the requirements flowing from those interpretations. Cboe attempts to twist the Nasdaq Approval as creating Commission "precedent" for its Proposal. As demonstrated above, these are not comparable filings and certainly do not establish grounds for approval.

But going further, in the Nasdaq Approval, the Commission notes that:

> "If, however, Nasdaq were to propose to tie pricing for the index dissemination service to exchange services, or otherwise modify the index dissemination service such that it falls within the definition of facility of an exchange in the Act, Nasdaq would have to file a proposed rule change with the Commission."[31]

To address this section of the Nasdaq Approval, the Second Cboe Letter states that "[i]n similar fashion, Cboe would not tie pricing of a Rule 3.66 OEMS to any Cboe exchange activity…" [32] However, as our previous letters have noted, Cboe currently offers just that by offering various fee waivers for exchange services to users of Silexx (and thereby advantaging its own affiliated product), which undoubtedly contributed to the universal adoption of Silexx among Cboe TPHs.[33]

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[29] *See* First Bloomberg Letter at 7 and Second Bloomberg Letter at 5.

[30] Cboe argues in its Proposal that it files Silexx-related rule changes with the Commission because it had received guidance that staff viewed the OEMS as a facility of an exchange, but that the ICE Wireless case changed that. *See* Proposal at 5 and 22.

[31] Nasdaq Approval at 2.

[32] Second Cboe Letter at 14.

[33] *See* Third Bloomberg Letter at 13 n. 53-54.

The Exchange continues to insist that proposed Rule 3.66 would offer greater safeguards against the very practices it is currently engaged in to advantage its affiliated product – going so far as to state that "…the Commission need not resolve [whether a proposed Rule 3.66 OEMS is a facility of the Exchange] in order to approve the Proposal in light of the safeguards in proposed Rule 3.66…"[34] Having advantaged its own product to the point of achieving universal adoption among TPHs, the Exchange now seeks to (under proposed Rule 3.66) remove this advantage and to trade its removal for reduced Commission oversight of its now universally adopted product.[35] The Exchange created this conflict, and now serendipitously offers a proposed rule to prohibit such practices moving forward.

Overall, the Commission's approval of the Nasdaq Proposal provides no such "precedent" that an exchange may, by the addition of a new exchange rule in its rulebook, decide whether a product offered by a corporate affiliate does not meet the statutory definition of a "facility". To the contrary, it establishes that the Commission has not taken an overly broad view of the definition of "facility" as Cboe argues.

2. Cboe states that it now intends to apply Proposed Rule 3.66 in a manner that was inconsistent with the Proposal and raises questions as to whether the Proposal has been sufficiently explained to the Commission.

In its second letter, the Exchange now represents that "floor brokers on its trading floor have Silexx installed on their workstations" and that "[i]f 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)."[36] The text of Rule 3.66 makes no distinction between "on-floor" and "off-floor" Silexx, and these terms are not mentioned in the Proposal.[37] The term "floor broker" also does not appear in the Proposal.[38] **Therefore, the Proposal, as written, would clearly apply to all use cases of Silexx without regard to where or how it is used.**

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[34] Second Cboe Letter at 3.

[35] Silexx has, at minimum, been adopted by 100% of Cboe Floor Broker TPHS. *See* supra note 23.

[36] Second Cboe Letter at 11 n. 63. *See also* supra notes 9 and 23.

[37] While these terms are not defined in the Proposal, the Second Cboe Letter appears to suggest that this separation (between on-floor and off-floor Silexx) occurs when the Silexx user is physically present on the Exchange trading floor. *See* supra note 9.

[38] A floor broker is defined by Cboe Rule 3.50 as "an individual (either a Trading Permit Holder or a nominee of a TPH organization) who is registered with the Exchange for the purpose, while on the Exchange floor, of accepting and executing orders received from Trading Permit Holders or from registered broker-dealers." *See Rules of Cboe Exchange, Inc.,* (October 1, 2024) available at https://cdn.cboe.com/resources/regulation/rule_book/C1_Exchange_Rule_Book.pdf.

With just the limited information presented in the Second Letter – that "on-floor" Silexx at minimum represents its use by Cboe Floor Brokers – this is a dramatic reversal of the Exchange's previous position and raises significant concerns regarding how the rule would be applied in practice.

(A) Cboe's changing interpretation exposes the risks associated with removing affirmative Commission oversight.

The Proposal argues at length that Silexx does not form a "necessary link in the chain of communication that facilitates access to, and trading activity on, the Exchange" and that "an Exchange-provided port is the first necessary link in this chain."[39] If this held true, then anything on the trading floor (and perhaps the floor itself) would not be a facility. Yet now the Exchange has reason to believe that – again, at minimum – Silexx used by floor brokers *does* constitute a facility of an exchange.

Cboe has misinterpreted both the legal and statutory requirements surrounding its OEMS product (and therefore construction of its own proposed rule) to such a degree as to raise questions as to how the Exchange would be expected to impartially govern the operation of an affiliated product absent the benefit of affirmative Commission oversight and of public comment.

In its first comment letter, Cboe states "[w]hile Cboe Options appreciates any guidance Commission staff provides on any matter, we may not always agree with that guidance, and such informal guidance does not ultimately "settle" a matter…" [40] While disagreement and debate are healthy, such disagreement is of particular importance when the question at hand is whether the oversight responsibility of Silexx should be shifted from the Commission (as a "facility") to the Exchange (under its own interpretation of its own rules). In defense of its proposal, Cboe notes that SROs are required to adhere to their rules.[41] Yet a fundamental requirement of adherence is accurate interpretation, and we note that there is a track record of exchanges failing to fully adhere to their regulatory requirements and own rules – by failure to accurately interpret or otherwise.[42]

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[39] Proposal at 17.

[40] *See* First Cboe Letter at 2.

[41] Second Cboe Letter at 9 n. 55 and at 15 n.87.

[42] *See* Securities Exchange Act Release No. 69726, In the Matter of Chicago Board Options Exchange, Incorporated and C2 Options Exchange, Incorporated (settled action: June 11, 2013), available at: http://www.sec.gov/litigation/admin/2013/34-69726.pdf (the "Cboe Order"). In the Cboe Order, the Commission notes that "C[boe]'s failures cut across all aspects of its regulatory, business and exchange operations… C[boe] failed to adequately enforce its own rules." Further, section 65 of Cboe Order notes that "C[boe] made several financial accommodations… that were not authorized by existing rules… made for business reasons and were authorized by senior C[boe] business executives who lacked an understanding of C[boe]'s legal obligations as a self-regulatory organization."

The Commission has long recognized "an inherent conflict exists within every SRO between the regulation of its members and its business interests" and that "unchecked conflicts… can result in under zealous enforcement of rules… and **less robust rulemaking**."[43]

(B) Cboe's reversal highlights the importance of public comment and Commission oversight.

The Exchange now wishes to materially modify its proposal, after the public had been provided the opportunity to provide public comment. It is entirely reasonable to believe that, had the proposal not received the benefit of public comment, all use cases of Silexx would be applicable to proposed Rule 3.66. As Bloomberg and other commentors have noted in previous letters, there has been no convincing argument advanced by Cboe that would outweigh the potential risks associated with removing modifications of Silexx from public review. And the Second Cboe Letter does the Exchange no favors in this regard. **It is only after the benefit of public inspection and comment that Cboe has decided to revise the application of proposed Rule 3.66.**

(C) Cboe's reversal does not comply with the Commission's Rules of Practice.

Cboe has made material changes to the purpose and intent of proposed Rule 3.66 in its second comment letter, and such changes are not reflected in the text of proposed Rule 3.66.

The Commission's Rules of Practice places the burden on the SRO to demonstrate its proposed rule's compliance with the Act (via sufficient detail in their filings).[44] Specifically, Section (b)(3)(i) notes that "the description of the proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding."[45] This has not happened. Rather, the Exchange now seeks to make last minute material changes to its proposal via several footnotes in a *comment letter*.

The onus is on the Exchange to demonstrate compliance with the Act. Cboe has clearly not done so.

Conclusion

Bloomberg L.P. continues to stand by the concerns raised in our previous comment letters, and this letter is intended to address the new information presented in the Second Cboe Letter. As described above, the two alleged examples of Commission "precedent" are distinguishable from the Proposal. And even if they were not, the facts of each alleged example do not support Cboe's

[43] *Id* at 2.

[44] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[45] *Id.*

position. Indeed, the facts of these alleged examples appear to strongly support the positions of Bloomberg L.P., other commenters, and the Commission itself – that is, an exchange-affiliated OEMS is a facility of an exchange, and that the Commission has historically taken a nuanced, fact-based approach when deciding how exchange products and services fit within the statutory and regulatory landscape. Additionally, that Cboe now attempts to make material modifications to the Proposal (through a comment letter on its own proposal) following public comment underscores the importance of the public comment process and maintaining the investor protections provided under the Exchange Act for exchange-affiliated OEMSs.

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.