SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-100256; File No. SR-CBOE-2024-008)

May 31, 2024

Self-Regulatory Organizations; 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

I. Introduction

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 proposal to adopt a new rule regarding order and execution management systems ("OEMS"). The proposed rule change was published for comment in the Federal Register on March 5, 2024.[3] On April 16, 2024, pursuant to Section 19(b)(2) of the Exchange 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 has received four comment letters regarding the proposed rule change.[6] Cboe

---

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

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 99620 (February 28, 2024), 89 FR 15907 ("Notice").

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

5 See Securities Exchange Act Release No. 99963 (February 13, 2020), 89 FR 29389 (April 22, 2024). The Commission designated June 3, 2024, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

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"); Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P, dated March 26, 2024 ("Bloomberg Letter"); Gregory Babyak, Global head of Regulator Affairs, Bloomberg L.P., dated May 24, 2024. Comment letters can be accessed at SEC.gov | Comments on SR-CBOE-2024-008.

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]

This order institutes proceedings under Section 19(b)(2)(B) of the Exchange Act[9] to determine whether to approve or disapprove the proposed rule changes.

II. Description of the Proposed Rule Changes

The Exchange proposes to adopt Rule 3.66 to provide that an OEMS[10] operated in a manner independent from the Exchange despite affiliation with the Exchange will not be deemed a facility of the Exchange as that term is defined in the Act. Section 3(a)(2) of the Act defines "facility" as follows:

> The term "facility" when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.[11]

The Exchange's proposed Rule 3.66 would provide that for so long as the Exchange provides or is affiliated with any entity that provides, or the Exchange or an affiliate has a contractual relationship with any entity that provides, an OEMS platform, such OEMS will not be

---

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"). The Exchange Response is available on the Commission's website at: srcboe2024008-460951-1202654.pdf (sec.gov).

8 See letter to Vanessa Countryman, Secretary, Commission, from: Gregory Babyak, Global head of Regulator Affairs, Bloomberg L.P., dated May 24, 2024 ("Bloomberg Response Letter"). Comment letters can be accessed at SEC.gov | Comments on SR-CBOE-2024-008.

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

10 For a description of the functionalities of an OEMS, see Notice at 89 FR 15907-08.

11 15 U.S.C. 78c(a)(2).

regulated as a "facility" of the Exchange and thus not subject to Section 6 of the Act if it meets certain conditions. These proposed conditions are:

(a) use of the OEMS is voluntary (i.e., solely within the discretion of a TPH) and not required for a TPH to access to the Exchange (i.e., the OEMS is a nonexclusive means of access to the Exchange);

(b) 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 as set forth in the Exchange's Rules, technical specifications, and Fees Schedule;

(c) the OEMS (or the entity that owns the OEMS) is not a registered broker-dealer;

(d) for any orders ultimately routed through the OEMS to the Exchange:

(1) users and their brokers are solely responsible for routing decisions; and

(2) the Exchange processes those orders in the same manner as any other orders received by the Exchange (i.e., orders submitted through the OEMS to the Exchange receive no preferential treatment on the Exchange);

(e) 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;

(f) 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 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;

(g) a third-party not required to register as a national securities exchange under Section 6 of the Act can offer a similar OEMS; and

(h) 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 (such as technical specifications) until such information is available generally to similarly situated market participants.

The Exchange notes generally that OEMSs as such are not subject to the rule filing requirements of Section 19(b) of the Act. In limited instances however when the Exchange or an Exchange affiliate owns an OEMS platform, Commission staff has advised the Exchange that affiliation with those entities caused the OEMSs to be considered "facilities" under the Act and are thus subject to the rule filing requirements under Section 19(b) of the Act.[12] The Exchange, however, believes that even if an OEMS is offered by an Exchange affiliate, if it is operated as a separate business from the Exchange and is operated on the same terms as OEMSs that are not offered by the Exchange or an Exchange affiliate, it is not a facility as defined by the Act. The Exchange seeks to codify this interpretation of the Act in its rulebook. The Exchange states that such an OEMS platform receives no advantage over other OEMS platforms as a result of its affiliation with the Exchange and orders from such an OEMS are handled by the Exchange pursuant to its Rules in the same manner as orders from any other OEMSs. The Exchange also "notes it currently offers certain port fee waivers to users of the Silexx platform [affiliated with the Exchange] and different pricing for certain functionality to TPHs and non-TPHs."[13] The Exchange does not provide fee waivers to OEMS users not affiliated with Silexx.

---

12 15 U.S.C. 78s(b)(1).

13 Notice at n.13.

III. Summary of Comments Received and Exchange's Response

The Commission has received several comment letters regarding this proposal.[14] All commenters expressed concern regarding this proposal's position regarding what is considered a "facility" with respect to an "exchange" and encouraged the Commission to consider any precedent that this proposal may set.[15] Two commenters recommended that the Commission should reject or disapprove this proposal.[16]

One commenter stated that the definition of a "facility" is a key pillar of the Commission's regulatory framework and a vital component in setting the Commission's scope of authority over exchanges.[17] The commenter further stated that this proposal falls squarely within a history of the exchanges' efforts to limit the Commission's authority to oversee core exchange functions[18] and that this proposal would redefine the well-established definition of a "facility" and "exchange" that was recently affirmed by the D.C. Circuit.[19] Two commenters found that the affiliated OEMS clearly falls under the statutory definition of a "facility" of an "exchange" and that these exchange-affiliated OEMSs have been considered for some time, to fall within the definition of "facility."[20]

In response to the commenters, the Exchange stated that its proposal, contrary to commenters' views, does not attempt to redefine the term "facility" and that its proposal applies the definition of "facility," which it notes predates the existence of OEMSs, "as interpreted by

---

14 See supra notes 6, 8.

15 See Bloomberg Letter, Healthy Markets Letter, and McKay Letter.

16 See Bloomberg Letter and Healthy Markets Letter.

17 See Bloomberg Letter, at 3.

18 See Bloomberg Letter, at 6.

19 See Bloomberg Letter, at 2-3.

20 See Bloomberg Letter, at 7. See also Healthy Markets Letter, at 4

the D.C. Circuit, to a specific modern trading tool."[21] The Exchange further stated that the recent D.C. Circuit decision supports the Exchange's view that "OEMSs operated by the Exchange or an Exchange affiliate but independently from the Exchange are not facilities of an exchange as defined in the Act."[22] In response to the Exchange's statements, a commenter reiterated its assertion that these affiliated OEMSs are clearly in scope of the definition of "facility" and posited that "[a]t heart, the Exchange wishes to continue providing the same OEMS services…yet simply re-define 'facility' in a manner that removes these Exchange-affiliated OEMSs from the ambit of 'facility.'"[23] The commenter also explained that allowing the Exchange to "exempt themselves" out of the applicable statute would effectively permit the Exchange "to change the contours of the statute" with broad implications.[24] The commenter stated that the Exchange completely misinterpreted the D.C. Circuit decision and that the Court instead expressly determined that the definition of both "exchange" and "facility" should be interpreted broadly under the Act.[25] The commenter further stated that "[t]he Exchange's central factual argument [,] that the exchange-owned OEMSs are independently operated from the interests and control of the Exchange appears to be without merit and contrary to the facts provided in the proposal.[26]

In addition, the commenter stated that acceptance of the position put forth in this proposal to allow exchanges to be the final arbiter of what is a "facility" and to also overturn a settled

---

21 See Exchange Response, at 1-2.

22 See Exchange Response, at 2.

23 See Bloomberg Response Letter, at 2-3.

24 See Bloomberg Response Letter, at 5.

25 See Bloomberg Response Letter, at 7-9.

26 See Bloomberg Response Letter, at 12-13.

Commission decision would be an enormous departure from established precedent.[27] One commenter cautioned that when exchange services are excluded from the definition of a "facility" and are not subject to the Act and Commission oversight, exchanges are allowed to provide services in an unfairly discriminatory manner, impose unnecessary and inappropriate burdens on competition and impede a free and open market in contravention of Sections 6(b)(5) and (8) of the Act.[28] The commenter further cautioned that exchanges have used affiliates and third-party service providers to obscure whether a service is a "facility" of an exchange.[29] In addition, one commenter stated that this proposal is the Exchange's attempt to offer OEMS services free from Commission oversight and the obligations imposed upon exchanges by the Act.[30] Commenters also stated that the Exchange failed to provide the Commission or the public with sufficient information with which to perform its analysis with respect to whether this proposal is consistent with the Act.[31] These commenters further stated that without the essential details of the Exchange's OEMS and the scope of services offered on the Exchange, it would be difficult, if not impossible, for the Commission to ensure that this proposal is consistent with the Act and the rules and regulations thereunder.[32] One commenter also stated that this proposal contains no information as to how the particular rule is designed to protect investors and the public interest, as required under the Act.[33]

---

27 See Bloomberg Letter, at 7.

28 See McKay Letter, at 1-2.

29 See McKay Letter, at 2.

30 See Healthy Markets Letter, at 3.

31 See Bloomberg Letter, at 7-8. See also Healthy Markets Letter, at 8-9.

32 See Bloomberg Letter, at 7-8. See also Healthy Markets Letter, at 8-9.

33 See Bloomberg Letter, at 8.

The Exchange responded that its proposal is nothing more than a proposed rule change as required by the Commission's rule filing process[34] and that the proposal includes sufficient information describing the proposed rule change and why it is consistent with Section 6(b) of the Act.[35] The Exchange further stated that the proposal describes the primary functions of an OEMS with a similar level of detail as prior Cboe Options rule filings regarding OEMSs, none of which, as stated by the Exchange, were disapproved or suspended by the Commission or commented on as being inconsistent with the Act's rule filing requirements.[36] In its response letter, a commenter stated that the Exchange has not provided any meaningful explanation as to why the proposal is consistent with the Act and further that the proposal appears to remove the investor protections of the Act and otherwise limit Commission oversight.[37] The commenter also reiterated that these exchange-affiliated OEMSs have been considered by the Commission for some time to fall within the definition of a "facility" under the Act.[38]

One commenter stated that the Exchange is improperly seeking a statutory exemption for which the Commission has detailed procedures that the Exchange has not followed.[39] The commenter explained that while it would object to the Commission granting such an exemption, requesting exemptive relief would at least be within the Commission's authority. The commenter further stated that the Exchange however is not asking the Commission for exemptive relief and is instead asking the Commission to "ignore the plain language of the statute."[40]

---

34 See Exchange Response, at 3.

35 See Exchange Response, at 4.

36 See Exchange Response, at 4.

37 See Bloomberg Response Letter, at 11-12.

38 See Bloomberg Response Letter, at 6.

39 See Healthy Markets Letter, at 7.

40 See Healthy Markets Letter, at 7-8.

In response, the Exchange stated that commenters' views that exemptive relief is needed are unwarranted and "[a]n exemption is unnecessary if the statute is inapplicable to that product or service, as the Exchange asserts is the case for a Rule 3.66 OEMS."[41]

IV. Proceedings to Determine Whether to Approve or Disapprove SR-CBOE-2024-008 and Grounds for Disapproval under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act[42] to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposal.

Pursuant to Section 19(b)(2)(B) of the Exchange Act,[43] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the consistency of the proposal with Sections 6(b)(5)[44] and 6(b)(8)[45] 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

---

41 See Exchange Response, at 5.

42 15 U.S.C. 78s(b)(2)(B).

43 Id.

44 15 U.S.C. 78f(b)(5).

45 15 U.S.C. 78f(b)(8).

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.

As discussed above, the Exchange is proposing to codify in its rulebook that OEMSs that meet the conditions described above will be not considered "facilities" as that term is defined by the Act even if they are operated by the Exchange or an Exchange affiliate. The Commission received comment letters that express concern regarding the proposal, including that the Exchange did not provide sufficient information to establish that the proposal is consistent with the Act.

The Commission notes that, under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder . . . is on the self-regulatory organization ['SRO'] that proposed the rule change."[46] The description of a 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,[47] and any failure of an SRO to provide this information may result in the Commission not having sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rule and regulations.[48]

---

46 Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

47 See id.

48 See id.

The Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act[49] to determine whether the proposal should be approved or disapproved. The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposal is consistent with the Act.

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their data, views, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is consistent with the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of data, views, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,[50] any request for an opportunity to make an oral presentation.[51]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. The Commission asks that commenters address the sufficiency of the Exchange's

---

49 15 U.S.C. 78s(b)(2)(B).

50 17 CFR 240.19b-4.

51 Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants to the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

statements in support of the proposal, which are set forth in the Notice.[52] In particular, the Commission seeks comment on the following questions:

1. Has the Exchange demonstrated how the proposal is consistent with Section 6(b)(5) of the Act, which 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"[53] Are there additional facts that commenters believe the Commission should consider to assess whether the proposal is consistent with Section 6(b)(5)? If so, please provide.

2. Has the Exchange demonstrated how the proposal 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]."[54] Are there additional facts that commenters believe the Commission should consider in order to assess whether the proposal is consistent with Section 6(b)(8)? If so, please provide.

3. Are there any potential competitive advantages that could be realized by an Exchange-affiliated OEMS "facilitating transactions in securities"[55] that could arise from that OEMS operating outside the Commission review process? If so, please

---

52 See Notice, supra note 3.

53 15 U.S.C. 78f(b)(5).

54 15 U.S.C. 78f(b)(8).

55 15 U.S.C. 78f(b)(5).

identify these potential advantages. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-CBOE-2024-008 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-CBOE-2024-008. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright

protection. All submissions should refer to file number SR-CBOE-2024-008 and should be submitted by [insert date 21 days from the date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[56]

Sherry R. Haywood,

Assistant Secretary.

[56] 17 CFR 200.30-3(a)(57).