SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-101491; File No. SR-CBOE-2024-008)

October 31, 2024

Self-Regulatory Organizations; Cboe Exchange, Inc.; Order Disapproving 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 "Exchange Act" or "Act"),[1] and Rule 19b-4 thereunder,[2] a proposal to adopt a new rule regarding order and execution management systems ("OEMSs"). 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 approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.[5] On May 31, 2024, the Commission instituted proceedings under section 19(b)(2)(B) of the Exchange Act[6] to determine whether to approve or disapprove the proposed rule change.[7] The Commission received comment letters in response to the Notice and the OIP.

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

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 99620 (Feb. 28, 2024), 89 FR 15907 (Mar. 5, 2024) ("Notice"). Comments received can be found on the Commission's website at: https://www.sec.gov/comments/sr-cboe-2024-008/srcboe2024008.htm.

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

5 See Securities Exchange Act Release No. 99963 (Apr. 16, 2024), 89 FR 29389 (Apr. 22, 2024).

6 15 U.S.C. 78s(b)(2)(B).

7 See Securities Exchange Act Release No. 100256 (May 31, 2024), 89 FR 48463 (June 6, 2024) ("OIP").

On August 30, 2024, the Commission issued a notice of designation of a longer period of time within which to approve or disapprove the proposed rule change.[8] For the reasons discussed below, this order disapproves the proposed rule change.[9]

II. Description of the Proposed Rule Change

Nine years ago, the Exchange's parent company, Cboe Global Markets, Inc, first acquired an OEMS, followed by another OEMS approximately two years later.[10] Since the acquisition of these assets, Cboe has submitted filings for each OEMS (which can be used to route orders to the Exchange).[11] Now, as described in more detail in the Notice, the Exchange seeks Commission approval of a rule providing that any OEMS[12] that meets the conditions in proposed Rule 3.66 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.[13]

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8 See Securities Exchange Act Release No. 100880 (Aug. 30, 2024), 89 FR 72537 (Sept. 5, 2024).

9 In disapproving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f). See infra notes 130-138 and accompanying text.

10 See Notice, 89 FR at 15907 n.5.

11 Id.

12 "OEMSs generally permit users to route orders to other market participants that use the same OEMS platform or directly to trading venues. OEMS platforms generally provide their users with the capability to create orders, route them for execution, and input parameters to control the size, timing, and other variables of their trades." Notice, 89 FR at 15907-08. For additional description of the functionalities of an OEMS, see id.

13 15 U.S.C. 78c(a)(2). Section 3(a)(1) defines an "exchange" as "any organization, association, or group of persons ... which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions

The Exchange's proposal would apply to, among others, the Exchange-affiliated OEMS known as Silexx.[14] Silexx is developed, offered, and maintained by Cboe Silexx, LLC. The Exchange and Cboe Silexx, LLC are each a wholly-owned subsidiary of Cboe Global Markets, Inc.[15]

The Exchange states that a function of OEMSs (such as Silexx) is to allow market participants to enter and route orders to trade securities for execution on any U.S. exchange, including the Exchange.[16] The Exchange acknowledges that this function of Silexx has been subject to the rule filing requirements of section 19(b) of the Exchange Act since 2017.[17] The Exchange seeks to remove certain OEMSs, including Silexx, from the rule filing requirements of section 19(b), and therefore Commission oversight, if the Exchange and any affiliated OEMS are "ultimately operated as a separate business."[18]

To accomplish this, the Exchange proposes new Rule 3.66, which 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 (hereafter an "Exchange-affiliated OEMS") will not be regulated as a "facility" of

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commonly performed by a stock exchange." The statute then specifically provides that an exchange "includes ... the market facilities maintained by such exchange." 15 U.S.C. 78c(a)(1).

14 See infra note 19 and accompanying text defining the term "Exchange-affiliated OEMS".

15 References to "Silexx" are to the OEMS Silexx (the Silexx system) that is provided by the legal entity, Cboe Silexx, LLC.

16 See Notice, 89 FR at 15907 and n.3.

17 See Notice, 89 FR at 15907, n.4-5 (distinguishing use of an OEMS to enter and route orders from use of an OEMS to manage executions and perform other tasks); See also id. at 15910 (stating "market participants may, among other things, use OEMS platforms to enter and route orders for ultimate execution at a trading venue, which may cause an OEMS to be deemed to be used for the "purpose of effecting or reporting a transaction on an exchange" under the facility definition).

18 See Notice, 89 FR at 15908.

the Exchange and thus not subject to section 6 of the Act if it meets certain conditions.[19] The proposed conditions would provide that:

(a) use of the OEMS is voluntary (i.e., solely within the discretion of a Trading Permit Holder ("TPH")[20]) and not required for a TPH to access to the Exchange (i.e., the OEMS is a nonexclusive means of access to the Exchange);[21]

(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;[22]

(c) the OEMS (or the entity that owns the OEMS) is not a registered broker-dealer;[23]

(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);[24]

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19 Id. at 15909.

20 See Cboe By-Laws Section 1.1 (defining the term to mean any individual, corporation, partnership, limited liability company or other entity authorized by the Rules that holds a Trading Permit. Pursuant to Cboe Rule 1.1, a Trading Permit is a license issued by the Exchange that grants the holder the right to access one or more of the facilities of the Exchange for the purpose of effecting transactions in securities traded on the Exchange without the services of another person acting as broker, and otherwise to access the facility of the Exchange for purposes of trading or reporting transactions or transmitting orders or quotations in securities traded on the Exchange.).

21 See proposed Rule 3.66(a).

22 See proposed Rule 3.66(b).

23 See proposed Rule 3.66(c).

24 See proposed Rule 3.66(d).

(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;[25]

(f) the OEMS uses 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;[26]

(g) a third-party not required to register as a national securities exchange under section 6 of the Act can offer a similar OEMS;[27] 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.[28]

In the Notice, the Exchange states that unaffiliated OEMSs are generally not subject to the rule filing requirements of section 19(b) of the Act, and further states that when the Exchange or an Exchange affiliate owns an OEMS platform, the Exchange has been advised by Commission staff that Exchange affiliation with an OEMS causes the OEMS routing functionality to be considered a "facility" under the Act and thus subject to the rule filing

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25 See proposed Rule 3.66(e).

26 See proposed Rule 3.66(f).

27 See proposed Rule 3.66(g).

28 See proposed Rule 3.66(h).

requirements under section 19(b) of the Act.[29] The Exchange states that this should not be so: that even if an OEMS is offered by the Exchange, an Exchange affiliate, or pursuant to a contractual relationship, if it is operated as a separate business from the Exchange and is operated on the same terms as third-party OEMSs, it is not a facility as defined by the Act.[30] The Exchange seeks to incorporate in its rulebook its interpretation of the definitions of a "facility" of an "exchange" as set forth in sections 3(a)(2) and (3)(a)(1) of the Act, respectively.

The Exchange states that an OEMS that is offered by the Exchange, an Exchange affiliate, or pursuant to a contractual relationship with the Exchange, and that is operated as a separate business from the Exchange, receives no competitive advantage over other OEMS platforms as a result of its affiliation with the Exchange as long as the conditions of proposed Rule 3.66 are followed.[31] The Exchange also "notes it currently offers certain port fee waivers to users of Silexx."[32] However, the Exchange does not provide fee waivers to third party OEMS users that are not Silexx customers.[33]

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29 See Notice, 89 FR at 15908-15914.

30 See Notice, 89 FR at 15908-09. Since 2017, however, the Exchange has been submitting rule filings pursuant to the requirements of section 19(b) of the Act in connection with its OEMS Silexx and in connection with another previously-offered OEMS platform. See Securities Exchange Act Release Nos. 82088 (Nov. 15, 2017), 82 FR 55443 (Nov. 21, 2017) (SR-CBOE-2017-068); and 75302 (June 25, 2015), 80 FR 37685 (July 1, 2015) (SR-CBOE-2015-062).

31 See Notice, 89 FR at 15908-09.

32 Notice, 89 FR at 15908, n.13.

33 Pursuant to the Exchange's fee schedule, port fee waivers are only available to Silexx users. See Cboe Options Exchange Fee Schedule at https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf. (last visited Oct. 16, 2024).

III. Discussion and Commission Findings

A. The Applicable Standard for Review

Under Section 19(b)(2)(C) of the Exchange Act, [34] the Commission shall approve a proposed rule change of a self-regulatory organization ("SRO") if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to such organization.[35] The Commission shall disapprove a proposed rule change if it does not make such a finding.[36] Rule 700(b)(3) of the Commission's Rules of Practice states that 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" and that a "mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient."[37] Rule 700(b)(3) also states that "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."[38] Any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.[39] Moreover, "unquestioning reliance" on an SRO's

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34 15 U.S.C. 78s(b)(2)(C).

35 15 U.S.C. 78s(b)(2)(C)(i).

36 15 U.S.C. 78s(b)(2)(C)(ii); see also 17 CFR 201.700(b)(3).

37 17 CFR 201.700(b)(3).

38 Id.

39 See id.

representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.[40]

B. Overview

Whether an Exchange-affiliated OEMS is a facility of the Exchange is a threshold question.[41] If an Exchange-affiliated OEMS satisfies the statutory definitions of "facility" of an "exchange" in section 3 of the Exchange Act, then the facility is a part of the Exchange and is subject to Commission oversight.[42] When it enacted section 6 of the Exchange Act, Congress required exchanges to register with the Commission in order to ensure more oversight than had previously existed.[43] Section 19(b) of the Exchange Act[44] requires that an SRO file with the Commission proposed rules or any proposed changes in, additions to, or deletions from its rules, and establishes the process and standard for Commission review of these rule filings. During that process, the Commission reviews whether such rule filings, including rule filings regarding exchange facilities, are consistent with the requirements of the Exchange Act, particularly section 6.[45] Section 6(b)(4) requires that the rules of an exchange "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;" section 6(b)(5) requires, among other things, that the rules of an

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40 Susquehanna Int'l Group, LLP v. Securities and Exchange Commission, 866 F.3d 442, 447 (D.C. Cir. 2017).

41 See Intercontinental Exch., Inc. (ICE), et al. v. SEC, 23 F.4th 1013 (D.C. Cir. 2022), at 1026 ("ICE Decision").

42 See 15 U.S.C 78(c)(a)(2) and (1) (defining "facility" and "exchange").

43 See 4 T. Hazen, LAW OF SECURITIES REGULATION, § 14.8 (2024); S. Rep. No. 73-792, at 4, 6 (Apr. 17, 1934).

44 See 15 U.S.C. 78s(b)(1) (governing the requirements for Commission process and review of proposed rule changes); 17 CFR 240.19b-4 (setting forth the requirements for submitting proposed rule changes).

45 See 15 U.S.C. 78f(b)(4), (b)(5), and (b)(8) (setting forth some of the requirements applicable to a national securities exchange).

exchange be designed 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 are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers"; and section 6(b)(8) requires that the rules of the exchange not "impose any burden on competition not necessary or appropriate in furtherance of the purposes" of the Exchange Act.[46]

The Exchange has previously filed proposed rule changes in connection with its affiliated OEMSs,[47] but here proposes a rule that would provide that its affiliated OEMSs are not subject to regulation by the Commission under section 6(b) or section 19(b) of the Act.[48] As such, the instant proposal presents three questions: (1) whether the Exchange-affiliated OEMS (Silexx) for which the Exchange has been submitting rule filings is a "facility" of the Exchange; (2) if so, whether proposed Rule 3.66 alters that conclusion; and (3) whether proposed Rule 3.66 is consistent with the Exchange Act, including section 6(b). We conclude that the Exchange-affiliated OEMS Silexx is a facility of the Exchange under section 3 of the Exchange Act. We also conclude that the Exchange has not met its burden to demonstrate that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations

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46 15 U.S.C. 78f(b)(4), (5) and (b)(8).

47 See, e.g., Securities Exchange Act Release Nos. 82088 (Nov. 15, 2017), 82 FR 55443 (Nov. 21, 2017) (SR-CBOE-2017-068) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Describe Functionality of and Adopt Fees for a New Front-End Order Entry and Management Platform); and 75302 (June 25, 2015), 80 FR 37685 (July 1, 2015) (SR-CBOE-2015-062) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Front-End Order Entry and Management Tools in Connection With Purchase of Livevol Assets). These filings were submitted pursuant to section 19(b)(3)(A) of the Act for immediate effectiveness. Relatedly, the Commission has long considered the relationship between services offered by affiliates of a registered national securities exchange. See Regulation of Exchanges and Alternative Trading Systems, Securities Exchange Act No. 40760 (Dec. 8, 1998), 63 FR 70844 at 70891 (Dec. 22, 1998) ("A subsidiary or affiliate of a registered exchange could not integrate, or otherwise link the alternative trading system with the exchange, including using the premises or property of such exchange for effecting or reporting a transaction, without being considered a 'facility of the exchange.'"). See also infra note 59 (citing other examples where the Commission has considered services offered by affiliates of a registered national securities exchange).

48 See Notice at 89 FR at 15909.

thereunder applicable to a national securities exchange, and in particular, with section 6(b) of the Exchange Act.

As discussed further below, because the Commission has determined that the Exchange-affiliated OEMS Silexx is a facility of the Exchange, the terms on which it is offered to market participants are "rules of an exchange," subject to the rule filing requirement under section 19(b) of the Exchange Act.[49] Because the Exchange proposes a rule that improperly would remove the Exchange-affiliated OEMS Silexx from the statutory rule filing requirement, the Commission cannot conclude that the proposed rule is consistent with the Act, and in particular, with section 6(b) of the Act.[50]

C. Exchange-Affiliated OEMSs as Facilities

Cboe is proposing a rule change that would have the effect of interpreting section 3(a)(2) of the Act to place certain Exchange-affiliated OEMSs outside the statutory definition of facility.[51] The Commission received several comments stating that an Exchange-affiliated OEMS is within the statutory definition of a "facility" of an "exchange," and opposing Cboe's proposal.[52]

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

50 15 U.S.C. 78f(b).

51 See proposed Rule 3.66.

52 See Letter from Tyler Gellasch, President and CEO, Healthy Markets Association, to Vanessa Countryman, Secretary, Securities and Exchange Commission (Mar. 25, 2024) ("Healthy Markets Letter"); Letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., to Vanessa Countryman, Secretary, Securities and Exchange Commission (Mar. 26, 2024) ("Bloomberg Letter I"); Letter from Jim Considine, Chief Financial Officer, McKay Brothers, LLC, to Vanessa Countryman, Secretary, Securities and Exchange Commission (Mar. 26, 2024) ("McKay Brothers Letter"); Letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., to Vanessa Countryman, Secretary, Securities and Exchange Commission (May 24, 2024) ("Bloomberg Letter II"); Letter 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) ("SIFMA Letter I"); Letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., to Vanessa Countryman, Secretary, Securities and Exchange Commission (Jun. 27, 2024) ("Bloomberg Letter

One commenter states 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.[53] The commenter states that the proposal falls squarely within a history of the exchanges' efforts to limit the Commission's authority to oversee core exchange functions[54] and that this proposal, if approved, would redefine the well-established definitions of a "facility" and "exchange" that were recently affirmed by the D.C. Circuit.[55] The commenter further states that the Exchange essentially seeks to "re-define 'facility' in a manner that removes these Exchange-affiliated OEMSs from the ambit of 'facility,'"[56] and that exchanges cannot effectively "exempt themselves" out of the statutory definition, as doing so would "change the contours of the statute" with broad implications.[57] Another commenter states that "allowing exchanges to craft rules to adopt overly narrow interpretations of what constitutes an exchange facility would enable exchanges to shift functionality that has traditionally been considered part of the exchange outside of the exchange and beyond the Commission's oversight."[58]

III"); Letter 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 (Oct. 14, 2024) ("SIFMA Letter II"); and Letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., to Vanessa Countryman, Secretary, Securities and Exchange Commission (Oct. 17, 2024) ("Bloomberg Letter IV").

53 See Bloomberg Letter I at 3 (stating the services provided by Silexx (i.e., allowing users to enter and route order to trade securities) fall under the "facility" definition). See also Bloomberg Letter III at 3, 4.

54 See Bloomberg Letter I at 6.

55 See Bloomberg Letter I at 2-3.

56 Bloomberg Letter II at 2-3.

57 See Bloomberg Letter II at 5.

58 See SIFMA Letter I at 4. See also McKay Brothers Letter at 2.

Whether a service or other product is a facility of an exchange requires an analysis of the particular facts and circumstances,[59] and the D.C. Circuit's ICE Decision provides a recent example of this analysis.[60]

In the ICE Decision, the D.C. Circuit, reviewing a Commission order, analyzed whether a service or property provided by a corporate affiliate of a registered national securities exchange was a facility of that exchange subject to the rule filing requirements of section 19(b) of the Act.[61] Consistent with the Commission's analysis of the facts in that order,[62] the D.C. Circuit assessed whether an exchange-affiliate's service offering was: (1) a service or property that falls within the definition of "facility" in section 3(a)(2) of the Act; and (2) the type of facility that is part of the definition of "exchange" in section 3(a)(1) of the Act (i.e., a *market* facility).[63] The

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59 See Securities Exchange Act Release No. 76127 (Oct. 9, 2015), 80 FR 62584, 62586, n.9 (Oct. 16, 2015) (SR-NYSE-2015-36) (Order Approving Proposed Rule Change amending Section 907.00 of the Listed Company Manual). In addition, the Commission has found that where a system of communication occupies a "special position" with respect to the exchange, such that it is "uniquely linked to and endorsed by" that exchange to provide such function, then that function will constitute a "facility" under the Act. See, e.g., Securities Exchange Act Release No. 44983 (Oct. 25, 2001), 66 FR 55225 (Nov. 1, 2001) ("PCX Order") (considering the introducing broker function, order routing function, and electronic communications network ("ECN") for trading securities ineligible for trading on ArcaEx provided by Wave, a broker-dealer in which the PCX exchange had an indirect ownership interest and that was affiliated with PCX's ArcaEx electronic trading facility, and determining that the optional order-routing functionality was a facility of PCX, but the introducing broker and ECN functions were not). See also Securities Exchange Act Release No. 63241 (Nov. 3, 2010), 75 FR 69792 (Nov. 15, 2010) (stating that, in general, the outbound order routing service provided to exchanges by broker-dealers is regulated as a facility of the exchange); 90209 (Oct. 15, 2020), 85 FR 67044 (Oct. 21, 2020) (concluding that certain wireless connections are facilities because they represent premises and property of the exchanges). But compare Securities Exchange Act Release No. 44201 (Apr. 18, 2001), 66 FR 21025, 21029 (Apr. 26, 2001) (File No. 79-9) (Order Granting Application for a Conditional Exemption by the National Association of Securities Dealers, Inc. Relating to the Acquisition and Operation of a Software Development Company by the Nasdaq Stock Market, Inc.).

60 See ICE, et al. v. SEC, 23 F.4th 1013.

61 See id. at 1022-1024.

62 See Securities Exchange Act Release No. 90209 (October 15, 2020), 85 FR 67044, 67049 (October 21, 2020) (SR-NYSE-2020-05, SR-NYSEAMER-2020-05, SR-NYSEARCA-2020-08, SR-NYSECHX-2020-02, SR-NYSENAT-2020-03, SR-NYSE-2020-11, SR-NYSEAMER-2020-10, SR-NYSEArca-2020-15, SR-NYSECHX-2020-05, SR-NYSENAT-2020-08) (Order Granting Accelerated Approval to Establish a Wireless Fee Schedule Setting Forth Available Wireless Bandwidth Connections and Wireless Market Data Connections) ("Wireless Approval Order").

63 See ICE, et al. v. SEC, 23 F.4th 1013, at 1022-1024.

D.C. Circuit found two types of wireless connectivity services offered by three data service affiliates ("IDS") of the New York Stock Exchange LLC, and its affiliated registered national securities exchanges (collectively, the "NYSE Exchanges" or "NYSE") to be facilities of the NYSE Exchanges.[64]

Statutory Analysis

As stated above, section 3(a)(2) of the Act provides that 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.[65]

Section 3(a)(1) defines an "exchange" as "any organization, association, or group of persons ... which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange."[66] The statute then specifically provides that an exchange "includes ... the market facilities maintained by such exchange."[67]

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64 Specifically, and as discussed further below, the Court found that each wireless connectivity service was within the definition of "facility" in section 3(a)(2) of the Act; and, further, the Court agreed with the Commission that IDS and the NYSE Exchanges form a "group of persons" that together "maintains or provides a market place or facilities," rendering the wireless connectivity services to be within the definition of an "exchange" in section 3(a)(1) of the Act. See ICE, et al. v. SEC, 23 F.4th 1013, at 1022-1024.

65 15 U.S.C. 78c(a)(2).

66 15 U.S.C. 78c(a)(1).

67 Id.

Consistent with the text of the statute and the ICE Decision interpreting that text, an OEMS owned or operated by a national securities exchange or its affiliate is a facility of an exchange within the meaning of section 3 of the Act when it enables users to enter or route orders to the exchange for execution or receive market data from the exchange. This is because the OEMS is a "system of communication to or from the exchange ... maintained by or with the consent of the exchange" offered "for the purpose of effecting or reporting a transaction" on the exchange. A national securities exchange and its affiliated OEMS provider, when the OEMS enables users to enter or route orders to the exchange for execution or receive market data from the exchange, together constitute a "group of persons" that "maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities…."

In the ICE Decision, the D.C. Circuit first considered whether wireless connectivity services offered by a corporate affiliate of the NYSE Exchanges satisfied the definition of facility, and concluded that such services are "facilities of an exchange" because they are "system[s] of communication to or from the exchange ... maintained by or with the consent of the exchange" offered "for the purpose of effecting or reporting transactions on the exchange."[68] In particular, the Court stated that the statutory definition of facility describes the Wireless Bandwidth Connections "to a tee,"[69] as they "allow[] a market participant to transmit data, including price quotes and orders, between the participant's co-located equipment at the Mahwah data center and the participant's co-located equipment at a third-party data center, and thus to

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68 ICE, et al. v. SEC, 23 F.4th 1013, at 1022.

69 Id. In the ICE matter, there were two types of wireless connections under consideration: (i) bandwidth connections ("Wireless Bandwidth Connections") that enable market participants to send trading orders and relay market data between their equipment in the Mahwah data center and third party data centers; and (ii) market data connections ("Wireless Market Data Connections") that enable market participants in a third party data center to receive connectivity to certain proprietary market data feeds from one or more of the NYSE Exchanges. See id. at 1018.

effect or report transactions on the [NYSE] Exchanges."[70] The Court focused on the purpose of the service, unpersuaded by the NYSE Exchanges' view that it was meaningful that the service was offered separately from other services needed to access the matching engine.[71] Specifically, it was not important that the connections ran between NYSE's Mahwah data center and a third-party data center, or that the connections did not connect a market participant's equipment directly to the NYSE Exchanges' matching engines.[72] Considering the statutory language in section 3(a)(2) of the Act, which provides that a facility is "for the purpose of effecting or reporting a transaction on an exchange" and includes "any system of communication to or from the exchange . . . maintained by or with the consent of the exchange," the D.C. Circuit focused on "system of communication," "consent of the exchange" and "for the purpose of effecting or reporting transactions."[73] Regarding "consent of the exchange," the Court reasoned that because the wireless connectivity services were offered by an affiliate of the NYSE Exchanges, these services, "could not exist without the consent of the [NYSE] Exchanges."[74]

Next, the D.C. Circuit considered whether the subject wireless connectivity services were "the type of facility" that section 3(a)(1) of the Exchange Act includes in the definition of "exchange." Even though the wireless connections were provided and maintained by a corporate affiliate of the NYSE Exchanges (IDS), and not by the NYSE Exchanges themselves, the Court observed that IDS and the NYSE Exchanges are "closely connected corporate affiliates" and

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70 Id. at 1022.

71 See id.

72 Id.

73 Id.

74 Id. at 1023. Regarding "system of communication" and "for the purpose of effecting or reporting transactions," see text accompanying supra notes 68-69 (summarizing why the D.C. Circuit concluded that the definition of facility described the Wireless Bandwidth Connection "to a tee."). See also text accompanying infra notes 76-77.

"certainly" were a "group of persons" that together "maintains or provides a market place or facilities."[75]

Using the framework from the ICE Decision, we consider whether the Exchange-affiliated OEMS Silexx is a facility of Cboe based on the facts presented and conclude that it is. As an OEMS offered by a corporate affiliate of Cboe, Silexx allows a market participant to "create orders, route them for execution, and input parameters to control the size, timing, and other variables of their trades."[76] Market participants may use Silexx to, among other things, enter and route orders to Cboe and other exchanges, as well as access and transmit exchange and market data.[77] Silexx therefore provides functionality that is for the purpose of "effecting or reporting" transactions in securities on Cboe. The fact that the OEMS can also be used for the purpose of effecting or reporting transactions on other exchanges does not change this outcome. Therefore, Silexx is a system of communication, maintained by or with the consent of an exchange, namely Cboe, which can be used for the purpose of effecting or reporting a transaction on Cboe. It fits squarely within the definition of a facility.

The Exchange states that Rule 3b-16, which further defines the statutory definition of "exchange," contains an express exemption for "activities" that should not be considered exchange functions (and therefore should not be deemed to be facilities), including for "rout[ing]

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75 Id. at 1024.

76 See Notice, 89 FR at 15907.

77 See Notice, 89 FR at 15907, 15909. See also e.g., Cboe | Silexx, FAQ, https://help.silexx.com/faq ("SILEXX OEMS Obsidian API offers a complete solution for data and execution services for a low monthly fee. This allows traders to maintain full control of their proprietary strategy, while giving them full access to market data and execution.") (last visited Oct. 30, 2024).

orders to a national securities exchange."[78] Contrary to the Exchange's view that an Exchange-affiliated OEMS such as Silexx is not a facility since it only routes orders and therefore falls under Rule 3b-16's exception, Rule 3b-16 states that an "organization, association, or group of persons shall not be considered to constitute, maintain, or provide 'a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange,' *solely because*," inter alia, it "[r]outes orders to a national securities exchange, a market operated by a national securities association, or a broker-dealer for execution."[79]

The qualifier "solely because" means that engaging in order routing is not by itself sufficient to render a service provider an exchange. As the D.C. Circuit observed, "[where services] are included in the statutory definition of exchange because they are part of a group of persons that together perform and facilitate exchange functions going far beyond merely routing orders . . . , [it is not required that] every part of an exchange, nor every person that is part of a group that constitutes an exchange, must have all [the characteristics of] an exchange."[80] The Court stated further, "[t]hat the Wireless Connections lack [all] these characteristics, therefore, does not preclude their being regulated as part of an exchange."[81] Further, while the NYSE Exchanges suggested to the D.C. Circuit that the Commission's position could lead to a result in which all property of and services provided by any corporate affiliate of a registered exchange

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78 See Letter from Laura G. Dickman, Vice President, Associate General Counsel, Cboe Global Markets, Inc., to Vanessa Countryman, Secretary, Securities and Exchange Commission (Sept. 3, 2024) ("Exchange Response II") at 7.

79 Rule 3b-16, 17 CFR 240.3b-16(b) (emphasis added).

80 See ICE, et al. v. SEC, 23 F.4th 1013, at 1027. See also SIFMA Letter II at 3 (stating that any analysis under section 3(a)(1) and Rule 3b-16 requires a review of the relationships among the "organization, association, or group of persons" involved to determine whether, acting together, they "constitute, maintain, or provide" a service that facilitates securities transactions or the communication of market data).

81 See ICE, et al. v. SEC, 23 F.4th 1013, at 1027.

are facilities because of affiliation with a registered exchange, the D.C. Circuit rejected this concern, instead finding that the closely connected corporate affiliates' activities were the relevant consideration.[82] In this case, there similarly can be closely connected activity between the Exchange-affiliated OEMS Silexx and Cboe. As discussed below, the Cboe group markets Silexx to its market participants (i.e., traders) as a data and access system, describing it as a system to "easily trade equities, options, futures, and options on futures from a single platform – giving you speed to market with powerful order-entry tools."[83] Accordingly, Cboe itself describes Silexx as providing more than solely order routing. As a result, Cboe cannot avail itself of Rule 3b-16's order routing exception to claim that Silexx is not a facility under the Exchange Act.

Proposed Rule 3.66 Fails to Ensure that the Exchange and Exchange-affiliated OEMS are Separate Businesses that Operate in a Manner Independent from one Another

Cboe maintains that proposed Rule 3.66, if approved, would alter the section 3 analysis because its requirements would establish sufficient separation between the Exchange-affiliated OEMS and Cboe, and that it would render the businesses "independent" from one another.[84] According to Cboe, because of the Rule 3.66 conditions, an Exchange-affiliated OEMS provider would not be part of the group of persons providing an exchange (and therefore the OEMS would not be a facility). As described further below, with reference to the ICE Decision, Rule 3.66 fails to achieve its purported goal of ensuring that the Exchange and Exchange-affiliated OEMS are separate businesses that operate in a manner independent from one another.

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82 See ICE, et al. v. SEC, 23 F.4th 1013, at 1024-25.

83 Cboe Silexx: Global markets at your fingertips, https://www.cboe.com/services/silexx/ (last visited Oct. 1, 2024).

84 Notice, 89 FR at 15909. "[T]he Exchange proposes to adopt Rule 3.66 to provide that an OEMS platform operated in a manner independent from the Exchange despite affiliation with the Exchange will not be deemed a facility of the Exchange." Id.

In the Notice, Cboe states that in the case of a "Rule 3.66 OEMS,"[85] Cboe would not have any right to use a Rule 3.66 OEMS for the purpose of effecting or reporting a transaction on an exchange; nor would a Rule 3.66 OEMS be a system of communication to or from Cboe maintained by or with the consent of the Cboe.[86] In support of these views, Cboe states that use of a Rule 3.66 OEMS for purposes of effecting or reporting a transaction on Cboe is solely within the discretion of the OEMS user, and the OEMS offers a non-exclusive means to access the Exchange.[87] Cboe states that the need for a TPH to purchase a port to connect the Exchange-affiliated OEMS to the Exchange's core trading system delinks the OEMS and the Exchange core trading system and therefore the OEMS is not a system of communication to or from the Exchange maintained by or with the consent of the Exchange.[88] These arguments are not persuasive for the same reason that the D.C. Circuit rejected similar arguments in the ICE Decision. For instance, the Wireless Bandwidth Connection was characterized by NYSE and IDS as optional, as not providing exclusive access to any exchange, and as a system solely within the discretion of a market participant choosing to connect its equipment in two data centers.[89] Yet, the D.C. Circuit determined that the connection was an important link (in fact, a "vital and proximate link") in a chain to the NYSE matching engines and that this was the case though a

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85 Herein, the term "Rule 3.66" OEMS refers to an "Exchange-affiliated OEMS" that meets the proposed Rule 3.66 conditions.

86 See Notice, 89 FR at 15910.

87 Id.

88 See Notice, 89 FR at 15911; See Letter from Laura G. Dickman, Vice President, Associate General Counsel, Cboe Global Markets, Inc., to Vanessa Countryman, Secretary, Securities and Exchange Commission (Apr. 19, 2024) ("Exchange Response I") at 4-6.

89 See Wireless Approval Order, supra note 62, 85 FR at 67044 at n.23 (citing the notice of NYSE's proposal in which NYSE described the Wireless Bandwidth Connection as part of a chain of connections: "At either end of a Wireless Bandwidth Connection, a market participant uses a cross connect or other cable to connect its equipment to the wireless equipment in the Mahwah Data Center and Third Party Data Center. Cross connects in the Mahwah Data Center lead to the market participant's server in co-location, [and from there to the trading and execution systems of the NYSE Exchanges]").

market participant would require additional connections from a NYSE Exchange in order to access the matching engine.[90] Similarly, a Rule 3.66 OEMS such as Silexx would provide to its users a vital and proximate link in a chain to the Cboe matching engine[91] even though a market participant would require ports from Cboe to access the matching engine and could use alternatives to do so.

Several commenters state that Cboe's arguments about delinking are not persuasive. As one commenter states, a direct connection to an exchange is not required by the definitions in sections 3(a)(1) or (a)(2).[92] We agree. Rather, what matters is whether market participants purchasing the services of an Exchange-affiliated OEMS are doing so for the purpose of creating orders that will be entered or routed to exchanges, including the Exchange, for execution, and for receiving market data from the Exchange, even if they also trade elsewhere.[93] While Cboe characterizes an OEMS as having a range of uses, it downplays Silexx's role as a system to create and route orders to and access liquidity on Cboe and other exchanges, particularly options exchanges.[94] While Cboe rejects the idea that Silexx has been and will be used as a system of

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90 See ICE, et al. v. SEC, 23 F.4th 1013 at 1023-1024.

91 Bloomberg Letter IV at 7 (observing "the universal adoption of Silexx among Cboe TPHs.").

92 See SIFMA Letter II at 3. See also SIFMA Letter I at 3 ("[T]he Exchange argues that an affiliated OEMS is not a facility…by focusing on whether there is a direct technological connection between the affiliated OEMS and the Exchange's 'core trading system' and downplaying an affiliated OEMS's importance in the overall chain of connection to an exchange.") See SIFMA Letter I at 3.

93 See also SIFMA Letter I at 5 (stating (i) the Exchange and affiliated OEMSs (such as Silexx) are closely connected by virtue of their ownership by the same parent company; (ii) the facts and circumstances indicate that "affiliated OEMSs have the ability to function as 'systems of communication' to or from the Exchange 'for the purpose of effecting or reporting a transaction' on the Exchange" (satisfying section 3(a)(2)); (iii) this makes clear that the Exchange and affiliated OEMSs constitute a "group of persons" (within the meaning of section 3(a)(1)).

94 It should be noted that "The Option Chain is the most widely utilized module within the SILEXX OEMS Platform." Cboe | Silexx, Option Chain, https://help.silexx.com/modules/option-chain (last visited Oct. 27, 2024). Meanwhile, "Cboe is the largest U.S. options market operator" according to Cboe. Cboe U.S. Options, https://www.cboe.com/market_data_services/us/options/ (last visited Oct. 27, 2024).

communication,[95] as already discussed, its functions include the routing of orders and providing access to liquidity on Cboe.[96]

Cboe states that even if provided directly by the Exchange (as opposed to an exchange affiliate or contractor), an OEMS would not be a facility if an OEMS and an Exchange port are independently maintained and operated systems.[97] As already discussed, NYSE argued that IDS was independent of the NYSE Exchanges to no avail. The D.C. Circuit determined that the "closely connected corporate affiliates" were a group of persons within the meaning of the definition of exchange in section 3(a)(1) of the Act;[98] and that IDS was part of a group that directly brings together purchasers and sellers of securities, and was offering services in the form of a system of communication (wireless connections) *for the purpose of* bringing together purchasers and sellers of securities.[99] The provision of a system of communication by an affiliate *for the purpose of* bringing together purchasers and sellers of securities on the NYSE Exchanges (and elsewhere) was sufficient to satisfy the statutory definition of "facility" of an "exchange." Cboe attempts to distinguish OEMSs and thereby avoid a similar conclusion. But its arguments are not persuasive.

First, Cboe seeks to distinguish an OEMS from wireless connections like those at issue in the ICE Decision, stating that "an OEMS platform is a software tool that allows users to manage trading activity, but does not on its own provide a user the ability to transmit information

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95 See Notice, 89 FR at 15910.

96 See supra note 94.

97 See Notice, 89 FR at 15911.

98 ICE, et al. v. SEC, 23 F.4th 1013, at 1024.

99 ICE, et al. v. SEC, 23 F.4th 1013, at 1025 (emphasis in original).

(including orders) to or from an exchange."[100] According to Cboe, an OEMS is "fundamentally different from transmission facilities that connect to or near an exchange, such as the wireless services at issue in [the D.C. Circuit decision]…."[101] While an OEMS is not the same as a wireless connection, it is comparable in terms of how it fits within the statutory definition of facility. As previously stated, Cboe markets Silexx as a data and access system to "easily trade equities, options, futures, and options on futures from a single platform – giving you speed to market with powerful order-entry tools."[102] Like a wireless connection, an OEMS is a system of communication that requires a market participant to make other purchases of equipment and services to reach an exchange's matching engine. Neither a Wireless Bandwidth Connection, a Wireless Market Data connection, nor an OEMS is sufficient on its own to enable a market participant to conduct trading on an exchange. What each has in common, however, is that it exists to enable market participants to enter and route orders to trade securities efficiently on a variety of U.S. exchanges, including the affiliated exchange. In short, while the Exchange-affiliated OEMS has multiple uses, one of those uses is "effecting or reporting transactions" on Cboe, which places it within the definition of a facility.[103]

Second, the Exchange states that its proposal is supported by Commission precedent. The Exchange points to the PCX Order in which "the Commission…recognized a national securities exchange's affiliation with an entity providing services related to the exchange does not

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100 Exchange Response II at 3.

101 Id. at 4.

102 Cboe Silexx: Global markets at your fingertips, https://www.cboe.com/services/silexx/ (last visited Oct. 1, 2024).

103 See, e.g., Bloomberg Letter I at 6-7; Bloomberg Letter II at 6; SIFMA Letter I at 3.

necessarily equate to the affiliate being deemed a facility of the exchange."[104] While it is correct that not every affiliate providing exchange-related services has been determined to be a facility of that exchange, affiliates providing routing services (which enable market participants to enter and route orders to trade securities efficiently on a variety of U.S. exchanges) routinely have.[105] As explained further by a commenter, Cboe's reliance on the PCX Order is misplaced because an affiliated OEMS's functions are more akin to an optional order routing function—which was determined to be an exchange facility, than to an introducing broker-function—which was determined not to be an exchange facility.[106]

The Exchange also points to two examples where the Commission determined that services offered by the Nasdaq Stock Market ("Nasdaq") were not facilities of an exchange because they were not providing an exchange function.[107] With respect to Nasdaq ACES, that system was designed to permit the routing of orders to a broker-dealer for handling consistent with that broker-dealer's best execution and other regulatory obligations; it was not designed to enable access to the exchange.[108] In contrast, Silexx is designed to enable users to enter or route orders to the Exchange for execution or receive market data from the Exchange, even though that

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104 See Exchange Response II at 12 (discussing the PCX Order establishing the Archipelago Exchange trading facility). See id. at 12-15.

105 See supra note 59 (discussing the PCX Order and outbound router examples).

106 See SIFMA Letter II at 5 (stating that the PCX Order is distinguishable because an affiliated OEMS does not function in a manner similar to an introducing broker providing sponsored access to an exchange which did not "route" orders but merely allowed sponsored non-members to electronically connect to exchange trading facility ArcaEx to enter their own orders through broker-dealer Wave's membership in the exchange, whereas affiliated OEMS's functions are more akin to Wave's optional order routing function, which the Commission found to be an exchange facility.)

107 See Exchange Response I at 4; See also Exchange Response II at 13-15. The Exchange discusses two separate Nasdaq proposed rule changes where Nasdaq proposed to remove from its rulebook references to fees charged for index and ETF values disseminated through its index dissemination service and where Nasdaq proposed to delete references to its ACES communication system from its rulebook.

108 See generally Securities Exchange Act Release No. 56237 (Aug. 9, 2007), 72 FR 46118 (Aug. 16, 2007) (SR-NASDAQ-2007-043).

may not be its only use. With respect to Nasdaq's index dissemination service, Cboe focuses on the Commission's statement that if Nasdaq were to "tie pricing" of the service to Nasdaq exchange services, or condition a company's inclusion in an index on a Nasdaq listing, then the index dissemination service would become a Nasdaq facility.[109] However, the Commission did not say the inverse, that for a service to be a facility, there must be a pricing or some other explicit linkage to the exchange. As discussed above, the particular facts and circumstances are key. Like a wireless connection, the services provided by an OEMS are purchased for the purpose of effecting transactions on exchanges, including Cboe.

Proposed Rule 3.66 Fails to Achieve it Purported Goal Because its Conditions Are Insufficient to Establish Independence

Cboe states that Rule 3.66 would provide for the independence of the OEMS from the Exchange.[110] One commenter states "[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."[111] We agree.

Cboe states that in the ICE Decision whether there is a "'unity of interests' was perhaps the key statutory criterion."[112] More specifically, Cboe states that its proposal is consistent with

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109 See Exchange Response II at 14 (quoting from Securities Exchange Act Release No. 58897 (Nov 3, 2008), 73 FR 66952 (Nov. 12, 2008) (SR-NASDAQ-2007-018).

110 Exchange Response II at 8. The Exchange states that the proposed Rule 3.66 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. Id.

111 Bloomberg Letter II at 12-13. See also Bloomberg Letter III at 4-5 (adding that independence from the Exchange at an operational level "cannot be a basis for simply excluding the facility from oversight entirely"). The commenter went on to state that the affiliation with the corporate group that operates the exchange "provides ample incentive and opportunity for the exchange to exploit the OEMS unfairly to its benefit, and the detriment of investors." Bloomberg Letter III at 5.

112 Exchange Response II at 11.

the following statement in the ICE Decision: "[O]ne corporation that is affiliated with but not controlled by another may or may not, depending upon the circumstances, be considered a 'group of persons' for the purposes of the statute."[113] According to Cboe, Rule 3.66 would establish "concrete, enforceable structural separations between Cboe and any affiliated OEMS (including Silexx) that are designed to prevent anticompetitive conduct" and would "render[] the D.C. Circuit's statement about 'closely connected corporate affiliates' inapplicable here."[114] Cboe states that because the proposed Rule 3.66 conditions would establish that the Exchange and affiliated OEMS are not "closely connected corporate affiliates," they are not a "group of persons" within the meaning of section 3(a)(1) of the Act.[115] After careful consideration, including consideration of the comments received, proposed Rule 3.66 fails at its purported goal of establishing the independence of an affiliated OEMS from the Exchange business.

The stated purpose of proposed Rule 3.66 is "to provide that [the Exchange-affiliated] OEMS platform operate[s] in a manner independent from the Exchange despite affiliation with the Exchange."[116] We understand that the goal of proposed Rule 3.66 is to establish that corporate affiliation notwithstanding, if Cboe and an affiliated OEMS (e.g., Silexx) comply with the proposed rule they could not "act in concert," and therefore the OEMS would not be a "facility" of Cboe. As a result, according to the Exchange, an Exchange-affiliated OEMS should be able to operate without being subjected to Commission oversight, including rule filing

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113 See ICE, et al. v. SEC, 23 F.4th 1013, at 1024.

114 See Exchange Response II at 11-12.

115 See Exchange Response II at 8-9.

116 Notice, 89 FR at 15909.

requirements.[117] But proposed Rule 3.66 does not establish that an affiliated OEMS and the Exchange are prevented from acting in concert.

Historically, there has been a close connection in the operation of the Exchange and Exchange-affiliated OEMSs. For example, since 2019, the Exchange has provided for a logical port fee waiver for Exchange-affiliated OEMS users and has not provided a similar waiver for users of other OEMSs. In justifying this fee waiver in 2019, the Exchange viewed OEMS subscription fees as "inclusive of fees to access the exchange."[118] The Exchange has traditionally considered the relationship it has with customers as inclusive of both their use of Exchange and Exchange-affiliated OEMS services, demonstrating the close connection between the affiliates. In its proposal, the Exchange offers a new and different rationale from that used in its 2019 filing, but the implication of this rationale is the same: the Exchange and Exchange-affiliated OEMSs enjoy a close connection and work with each other to achieve their aligned interests. In the proposal, the Exchange explains that the fee waiver exists to "offset" the "competitive disadvantage" of the Exchange-affiliated OEMS having to comply with section 19(b) rule filing requirements.[119] In the Exchange's view, disadvantages borne by an Exchange-affiliated OEMS can be offset by a subsidy in the form of a fee waiver borne by the Exchange.[120]

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117 Id.

118 See Securities Exchange Act Release No. 87727 (Dec. 12, 2019), 84 FR 69428, 69439 (Dec. 18, 2019).

119 Notice, 89 FR at 15908, n.13.

120 We do not find compelling the Exchange's argument that the Exchange-affiliated OEMS operate at a competitive disadvantage. First, the Exchange has been submitting rule filings for several years, and it has not demonstrated that its affiliated OEMS has been disadvantaged compared to unaffiliated OEMSs that operate in the same market. See Notice, 89 FR at 15907, n.4-5. Second, the Exchange provided no information that would indicate that its efforts to mitigate this concern through the Exchange's Silexx user logical port fee waiver is inadequate. Id. at n.13. Finally, the Exchange did not demonstrate that a burden on competition on a "facility" or unregulated affiliate is a material consideration under section 6(b) of the Act. A commenter opines that "nothing in Section 6 of the Exchange Act contemplates that exchange rules should address competition between unregistered and unregulated entities such as OEMSs." SIFMA Letter II at 7. Moreover, as the D.C. Circuit states in the ICE Decision: "The SEC is not tasked with deciding

If, however, the Exchange and OEMS operated independently, there would be separate and independent relationships between the Exchange and its customers on the one hand and the Exchange-affiliated OEMS and its customers on the other. In its second comment letter, the Exchange has offered to "discontinue this fee waiver [for] off-floor Silexx",[121] because Silexx on-floor users, i.e., floor brokers, are utilizing a facility of the Exchange while off-floor Silexx users are not. The distinction between on-floor and off-floor versions of the Exchange-affiliated OEMS is not explained in the proposed rule[122] and the impact of the withdrawal discussed in the Exchange's second response letter on the Exchange and the Exchange-affiliated OEMS and their mutual customers appears to be limited.[123] This retention of the fee waiver for on-floor users provides further indication of a close connection between the Exchange and Silexx. Moreover the Exchange's intention to preserve, at least in large part,[124] this preferential fee waiver for on-

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whether subjecting an organization to the rule-approval process would burden its ability to compete. That decision was made by the Congress [and b]ecause the Wireless Connections satisfy the statutory definitions in Sections 3(a) and (b), its rules must be filed with and approved by the SEC — full stop." ICE, et al. v. SEC, 23 F.4th 1013, at 1026.

121 See Exchange Response II at 13, n.78. It appears the Exchange changed its position on the Silexx fee waiver during the course of the proceedings related to the proposal. In the proposal, the Exchange concedes that "the ability to provide this pricing may demonstrate that the Exchange's ability to act with Cboe Silexx," but because it was subject to section 19(b) rule filing it would be permissible, i.e., "if the Exchange adopted procedures and internal controls in accordance with proposed Rule 3.66, those barriers would prevent Cboe Silexx [sic] or any other Exchange-affiliated OEMS [sic] to adopt such fees without submission of a rule filing." Notice, 89 FR at 15908, n.13. Meanwhile, in its second comment letter, the Exchange indicates that it "intends to continue to operate the on-floor version of Silexx as a facility of the exchange" if the proposal is approved without any proposed rule text mentioning, let alone distinguishing between, the on-floor and off-floor Silexx versions. See Exchange Response II at 11, n.63.

122 A commenter observed the Exchange's changing positions on the Silexx fee waiver represents a "materially different application of the original Proposal and a distinction that has not been fully articulated or explained" in the proposal. Bloomberg Letter IV at 3. If the Exchange's intention is to change its position, we agree with the commenter that the Exchange failed to meet its burden to provide a proposed rule change "sufficiently detailed and specific to support an affirmative Commission finding." Id. (citing 17 CFR 201.700(b)(3)(i)).

123 See Exchange Response II at 13, n.78. Notably, Cboe states that "with respect to Silexx, the majority of off-floor users are not associated with a TPH" and are therefore generally not subject to logical port fees. See Exchange Response II at 14, n.85.

124 See Exchange Response II at 13, n.78.

floor Silexx customers provides an example of how the two entities would continue to "act in concert" even if the proposed rule were approved.[125] The impact of the Exchange's fee waiver has been and is likely to remain (if the proposed rule is approved) significant with one commenter stating this fee waiver "undoubtedly contributed to the universal adoption of Silexx among Cboe TPHs."[126]

The Exchange's view that the Silexx for on-floor users is a facility of the Exchange while Silexx for off-floor users is not a facility of the Exchange is not the only inconsistency in the proposed rule. Many of the proposed rule's conditions run counter to its purported goal of independence. For example, proposed Rule 3.66(b) provides that 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.[127] Relatedly, proposed Rule 3.66(g) would provide that a third-party not required to register as a national securities exchange under section 6 of the Act can offer a *similar* OEMS.[128]

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125 See ICE, et al. v. SEC, 23 F.4th 1013, at 1025. In the ICE Decision the D.C. Circuit commented that in the case of "one corporation that is affiliated with but not controlled by another" these affiliates "may or may not, depending upon the circumstances, be considered a 'group of persons' for the purposes of the statute." Id. at 1025. "Whether two or more persons are or may be acting in concert is likely the key consideration. These, however, are possibilities we need not confront in the present case." Id. We note that the Exchange's intention to retain a fee waiver to benefit solely on-floor customers it shares with the affiliated OEMS is an indication that the proposed rule is not designed to prevent further acts in concert of the two affiliates' mutual commercial interests. As mentioned above, no other third-party OEMS' customers enjoy a similar waiver from the Exchange.

126 Bloomberg Letter IV at 7. See also Bloomberg Letter II at 11 (stating, "[N]ot only do these fee waivers undercut the central argument that the OEMS service is operating at a competitive disadvantage, it also undercuts the entire premise of the Proposal – that the OEMS is operated in a manner that is independent from the Exchange. This fee waiver also raises concerns surrounding how the existing fees are not 'designed to permit unfair discrimination' and 'not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.'").

127 See Exchange Response II at 8.

128 Id. at 17.

These provisions fall short of addressing how *users* of a third party OEMS would be assured that their access to the Exchange is not disadvantaged by choosing a third-party OEMS over an affiliated OEMS. Additionally, the requirement that a third-party OEMS is *similar* would not necessarily mean the user of the third party OEMS would not be disadvantaged as compared to the user of an affiliated OEMS.

In addition, proposed Rule 3.66(e) would require that "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."[129] Nothing in this provision would preclude an Exchange-affiliated OEMS from charging a different price to each user, thereby effectively establishing different prices to access the Exchange, and potentially unfairly discriminating against certain users without being required to provide any justification.[130] As one commenter states, under the proposed rule, the Exchange-affiliated OEMS becomes "an unregulated entity that, among other things, can separately negotiate terms with each user."[131] The commenter observes that as a consequence "each OEMS user would not necessarily be 'on precisely the same terms' with the Exchange as other users and would not be protected by Exchange Act 'standards that prohibit denials of access and other unfair discrimination against any member regarding access to' Cboe's services."[132]

Further, proposed Rule 3.66(h) would require that "the Exchange has established and maintains procedures and internal controls reasonably designed to prevent the *OEMS* from

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129 Id. at 16.

130 See 15 U.S.C. 78f(b)(5). Should this differential pricing benefit the Exchange with additional trading resulting in increased liquidity and fees, this would be an advantage to the Exchange resulting from business ties to, or enterprise relationship with the Exchange-affiliated OEMS.

131 SIFMA Letter II at 4.

132 Id. at 4-5.

receiving any competitive advantage or benefit as a result of its affiliation/relationship with the *Exchange,* 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."[133] However, this provision runs in only one direction. It does not similarly require that there be policies and procedures in place to prevent the *Exchange* from receiving any competitive advantage as a result of its affiliation/relationship with the *OEMS* thus failing to satisfy the requirements of section 6(b) that the rules of an exchange not impose a burden on competition that is not necessary or appropriate.[134]

Commenters observe that it is not just the Exchange-affiliated OEMS that can benefit from the affiliation with the Exchange, but the Exchange can benefit from the affiliation with the OEMS as well.[135] As one commenter states, "Exchange-affiliated OEMSs not subject to the SRO rule filing process could adopt rules, create new order types, raise fees, or implement new or different tiers of service to benefit the Exchange."[136] The commenter further states "[t]hrough these or other mechanisms, the affiliated OEMS and the Exchange, together as a group, could effectively force market participants, including broker-dealers which are obligated to obtain best execution for customer orders, to purchase and use (regardless of the cost or other conditions) the Exchange's affiliated OEMS to maintain access to the Exchange…[s]uch preferential treatment or other barriers to accessing the Exchange could result in inequitable allocations of fees among

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133 Notice, 89 FR at 15909 (emphasis added).

134 See 15 U.S.C. 78f(b)(8). For example, as written, proposed Rule 3.66 would not preclude the Exchange-affiliated OEMS from offering discounts on its pricing to incentivize routing of orders to the Exchange or prevent the Exchange-affiliated OEMS from providing lower fees or rebates for large market makers that happen to represent significant proportions of Exchange volumes. See generally, proposed Rule 3.66.

135 See e.g., Bloomberg Letter II at 13.

136 SIFMA Letter I at 7.

members, impediments to a free and open market and national market system, unfair discrimination among customers, and unnecessary burdens on competition, in violation of Section 6(b) of the Exchange Act."[137]

The proposal's elimination of a publicly available Exchange-affiliated OEMS fee schedule could permit the Exchange-affiliated OEMS to engage in unfair discrimination among Exchange customers. This is because the Commission would not be reviewing whether any differences in the application of a fee or rebate are based on meaningful distinctions between customers, issuers, brokers or dealers and whether those meaningful distinctions are unfairly discriminatory between customers, issuers, brokers or dealers.[138] In sum, we agree with commenters that because proposed Rule 3.66 does not aim to prevent *the Exchange* from receiving any competitive advantage from its affiliation/relationship with *the OEMS* it would not establish the independence as purported.

Additionally, proposed Rule 3.66 requires reliance on the Exchange's enforcement of the conditions of Rule 3.66 against a proposed-to-be unregulated Exchange-affiliated OEMS. One commenter states that "it is unclear how the Exchange would enforce the proposed rule or even monitor for compliance with it[,]."[139] Cboe did not address this concern directly and it remains unclear how Cboe would monitor for compliance.

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137 SIFMA Letter I at 7. See also Bloomberg Letter II at 13 (citing Q2 2019 Earnings Call, CBOE Global Markets, Inc. (Aug. 2, 2019) stating, "Aside from the Proposal, the facts on the ground indicate the two entities attempt to leverage a competitive advantage through their unique relationship. For example, the Exchange has stated in the past that Silexx has been promoted as the avenue through which people will trade certain exchange products and there have been efforts to more fully integrate these within the operating segments of the overall business.").

138 See 15 U.S.C. 78f(b)(5). As such, we cannot conclude that the proposed rule is not designed to permit unfair discrimination customers, issuers, brokers or dealer as required by section 6(b)(5).

139 SIFMA Letter II at 6 (citing 15 U.S.C. 78f(b)(1), which requires that a registered exchange have "the capacity to be able to carry out the purposes of [the Exchange Act] and to comply, and . . . to enforce compliance by its members and persons associated with its members, with the provision of [the Exchange Act], the rules and regulations thereunder, and the rules of the exchange.").

For all of the foregoing reasons, we cannot find that the proposal to allow the Exchange-affiliated OEMSs to not be regulated as a facility of the Exchange and not be subject to section 6 of the Act is consistent with the requirements of section 6 of the Act.

IV. Conclusion

For the reasons set forth above, the Commission does not find, pursuant to section 19(b)(2) of the Exchange Act,[140] that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with sections 3(a)(1), 3(a)(2), and 6(b) of the Exchange Act.[141]

IT IS THEREFORE ORDERED, pursuant to section 19(b)(2) of the Exchange Act,[142] that proposed rule change (SR-CBOE-2024-008) be, and it hereby is, disapproved.

By the Commission.

Vanessa A. Countryman,

Secretary.

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140 15 U.S.C. 78s(b)(2).

141 15 U.S.C. 78c(a)(1), (a)(2), and 15 U.S.C. 78f(b).

142 15 U.S.C. 78s(b)(2).