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June 18, 2024

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

RE: File No. SR-CBOE-2024-008; Cboe Exchange, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Adopt a new Rule Regarding Order and Execution Management Systems

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association ("SIFMA")[1] respectfully submits this comment letter to the U.S. Securities and Exchange Commission (the "Commission") in response to the Commission's Order Instituting Proceedings to determine whether to approve or disapprove a rule filing by Cboe Exchange, Inc. (the "Exchange" or "Cboe Options") to add proposed Rule 3.66 to its rulebook to reclassify order execution management systems ("OEMSs") under the common control of the Exchange's parent company to no longer be considered a "facility" of the Exchange, as that term is defined in the Exchange Act.[2] For the reasons discussed below, the Commission should disapprove the Exchange's proposed rule.[3] An OEMS affiliated with the Exchange that enables market participants to route orders for execution to or receive market data from the Exchange falls squarely within the Exchange Act definition of an exchange "facility." Approval of the proposal to exclude affiliated OEMSs from the definition of facility thus would directly contravene the Exchange Act. Moreover, if approved,

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[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] 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, Exchange Act Release No. 100256, File No. SR-CBOE-2024-008 (May 31, 2024), 89 Fed. Reg. 48463 (June 6, 2024).

[3] Notice of Filing of a Proposed Rule Change to Adopt a new Rule Regarding Order and Execution Management Systems (''OEMS''), Exchange Act Release No. 99620, File No. SR-CBOE-2024-008 (Feb. 28, 2024), 89 Fed. Reg. 15907 (Mar. 5, 2024) ("Cboe Options Filing").

proposed Rule 3.66 would remove "affiliated OEMSs" from the Commission's critical oversight of the Exchange, which could allow the Exchange, acting through its parent company, to advantage its affiliated OEMSs over unaffiliated OEMSs and create competitive advantages for its affiliated OEMSs through fees or other methods that have the effect of leaving members with no choice but to use those affiliated OEMSs. Any of these outcomes would violate the Exchange Act.

An affiliated OEMS is a "facility" as defined by Section 3(a)(2) of the Exchange Act.

The Exchange's parent company, Cboe Global Markets, Inc. ("CGM"), owns two affiliated OEMSs.[3] The Exchange stated that in the past, Commission staff advised the Exchange that its ownership or affiliation with the OEMSs "caused the OEMSs to be considered 'facilities' under the [Exchange] Act because [the OEMSs] *could* be used to route orders to the Exchange . . . ."[4] Like other commenters,[5] SIFMA agrees with Commission staff that an OEMS owned by or under common control with a registered national securities exchange, where the affiliated OEMS enables its users to route orders for execution to that exchange or receive market data from that exchange, is a "facility" of the "exchange," as those terms are defined in the Exchange Act and rules promulgated thereunder.

Section 3(a)(2) defines the term "facility," "when used with respect to an exchange" to include "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) . . . ."[6] The Exchange describes an OEMS, including an affiliated OEMS, as a "software product market participants may install on their computer systems and use to enter and route orders to trade securities (and non-securities) for execution as well as manage their executions and perform other tasks related to their trading activities."[7]

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[3] In addition to Cboe Options, CGM also owns and operates three other U.S. options exchanges, four U.S. equities exchanges, and a U.S. futures exchange. See https://www.cboe.com/markets/.

[4] Cboe Options Filing, 89 Fed. Reg. at 15908 (emphasis in original).

[5] See letter from Tyler Gellasch, President and CEO, Healthy Markets Association, to Vanessa Countryman, Secretary, SEC, dated Mar. 25, 2024; letters from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., to Vanessa Countryman, Secretary, SEC, dated Mar. 25, 2024, and May 24, 2024.

[6] 15 U.S.C. § 78c(a)(2).

[7] Cboe Options Filing, 89 FR at 15907; see also, id. ("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 . . . [and] may also provide users with access to real-time options and stock market data, as well as certain historical data."); id. at 15910 ("As discussed above, one main function of an OEMS platform is for market participants to use it to create, enter, and route orders to trade securities (and non-securities)

A market participant may use an affiliated OEMS as a "system of communication to or from the exchange" to effect or report transactions on the Exchange in at least two ways.[8] First, where the market participant is a trading permit holder ("TPH") of the Exchange, it may use an affiliated OEMS to route orders for execution to the Exchange or receive market data from the Exchange through its ability to connect directly to the Exchange. Second, a market participant that is not an Exchange TPH may use an affiliated OEMS to connect to a TPH that also uses the same affiliated OEMS.[9] In this scenario, the TPH may then use the affiliated OEMS and its direct Exchange connection to route to the Exchange the non-TPH's orders for execution and relay Exchange market data back to the non-TPH. Therefore, an affiliated OEMS, which through its affiliation with the Exchange is maintained by or with the consent of the Exchange,[10] is a "facility" under the Exchange Act because it provides users with a "system of communication to or from" the Exchange "for the purpose of effecting or reporting transactions" on the Exchange.[11]

Despite the clear statutory language, the Exchange argues that an affiliated OEMS is not a facility within the meaning of the Exchange Act by focusing on whether there is a direct technological connection between the affiliated OEMS and the Exchange's "core trading system"[12] and downplaying an affiliated OEMS's importance in the overall chain of connection to an exchange.[13] The Exchange also asserts that its "facility" consists only of the "port" that

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for execution (either directly to trading venues or to other market participants). 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.").

[8] See generally, Cboe Options Filing, 89 Fed. Reg. at 15910-15912 (explaining the various ways market participants may use OEMSs to route orders for execution to the Exchange).

[9] A non-TPH market participant could utilize an affiliated OEMS to effect or report transactions on the Exchange, or receive market data from the Exchange, even if the non-TPH's affiliated OEMS was two or more OEMS connections away from a TPH's affiliated OEMS.

[10] See Intercontinental Exch., Inc., et al. (ICE) v. Sec. and Exch. Comm'n (SEC), 23 F.4th 1013, 1023 (D.C. Cir. 2022) (contrasting communications systems operated by an affiliate of national securities exchanges, which "could not exist without the consent of the Exchanges," with "[c]ommunications systems that incidentally facilitate the trading of securities, [which] do not owe their existence to the consent of any exchange, nor are they maintained by any exchange").

[11] 15 U.S.C. § 78c(a)(2).

[12] Cboe Options Filing, 89 Fed. Reg. at 15910 (stating that an affiliated OEMS is not an exchange facility because such an OEMS is not required to access "a direct connection to the Exchange or any other trading venue," and in certain configurations "would have no connectivity in any form to the Exchange's core trading system . . ."); id. at 15912 (arguing that "[n]o OEMS platform is required to access the Exchange and thus is not a necessary link in [the chain of communication that facilitates access to, and trading activity on, the Exchange], even an OEMS platform [that] happens to be offered by an Exchange affiliate").

[13] See, e.g., Cboe Options Filing, 89 Fed. Reg. at 15907 ("An OEMS is merely software that a TPH can install on its computer system and use to route orders to ports it purchases separately from the Exchange—this software is not

connects the Exchange's matching system and trading engine to a TPH's system, which may or may not contain an OEMS.[14]

However, the Exchange's arguments are inconsistent with Section 3(a)(2) of the Exchange Act, which does not confine the term "facility" only to systems that have a direct connection to a national securities exchange's core trading system or that are a necessary link without which Exchange access is not possible.[15] Moreover, as discussed below, 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.

An OEMS affiliated with a registered national securities exchange is part of the group of persons providing a market place for bringing together purchasers and sellers of securities as defined by Section 3(a)(1) of the Exchange Act

Section 3(a)(1) of the Exchange Act defines the term "exchange" as "any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities . . . and includes the market place and the market facilities maintained by such exchange."[16] An OEMS affiliated with a registered national securities exchange through the common control of the same parent company, where the OEMS enables its users to route orders for execution to the affiliated exchange and receive market data from the affiliated exchange (which, as described above, would cause the affiliated OEMS to fall under the statutory definition of "facility"), together with the affiliated exchange is part of the group of

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integrated with ports, or any other part of the Exchange's trading systems."); id. at 15912 ("Entry into an OEMS is merely one of many steps in an order's path to ultimate execution at a trading venue, which occurs outside of the Exchange's core system and outside the data centers at which the Exchange's system equipment resides (such as NY4)").

[14] Id. at 15911 ("The port itself is a facility of the Exchange (and thus subject to rule filings), but a port and a computer system on which an OEMS is installed that connects to the customer switch to access a port are completely separate systems . . . .").

[15] Accord ICE, 23 F.4th at 1023 ("The statutory definition of 'exchange' encompasses more than just the matching engine, so there is no reason to think the plain meaning of a system of communication 'to or from the exchange' is limited to a system that provides a direct connection to the matching engine of an exchange.").

[16] 15 U.S.C. § 78c(a)(1); see also, 17 C.F.R. § 240.3b-16(a) (2024) ("An organization, association, or group of persons shall be considered to constitute, maintain, or provide 'a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange,' as those terms are used in section 3(a)(1) of the Act, (15 U.S.C. 78c(a)(1)), if such organization, association, or group of persons: (1) Brings together the orders for securities of multiple buyers and sellers; and (2) Uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade.").

persons "providing a market place … for bringing together purchasers and sellers of securities" for purposes of Section 3(a)(1).[17]

The Exchange's April 19, 2024, comment letter puts misplaced focus on one statement in the D.C. Circuit's opinion in *ICE v. SEC*, which the Exchange relies on to support its conclusion that an affiliated OEMS is not a facility of an exchange. Specifically, the Exchange asserted: "the D.C. Circuit stated that 'the term group of persons is [not] synonymous with corporate affiliation,' which is contrary to the previous Commission staff guidance."[18] As the Exchange is aware,[19] the D.C. Circuit's opinion did not set out a brightline test that the definition of "group of persons" in Section 3(a)(1) turns on corporate affiliation; rather, the D.C. Circuit opinion notes that the definition in some instances could depend on the facts and circumstances.[20] However, the opinion also states that a facts and circumstances analysis might not be necessary for "closely connected corporate affiliates," such as the Exchange and its affiliated OEMSs.[21]

As described above, the Exchange and the affiliated OEMSs are closely connected by virtue of their ownership by the same parent company, CMG. In addition, the facts and circumstances here, especially that the 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 (meeting the definition of "facility" in Section 3(a)(2)), make it clear that the Exchange and its affiliated OEMSs constitute a "group of persons" within the meaning of Section 3(a)(1) because the Exchange and the affiliated OEMSs are engaged in concerted activity to bring together purchasers and sellers of securities.[22] For example, users of an Exchange-affiliated OEMS may buy or sell securities on the Exchange and may receive

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[17] See ICE, 23 F.4th 1013, 1024 (D.C. Cir. 2022) ("closely connected corporate affiliates" are "certainly include[d]" within the term "group" as used in the statutory definition of exchange).

[18] Cboe Options letter to the Commission, at p. 2 (Apr. 19, 2024) (quoting ICE v. SEC).

[19] Cboe Options Filing, 89 Fed. Reg. at 15913 ("[C]orporate affiliation is not determinative of what constitutes a 'group of persons;' instead, the facts and circumstances around the relationship must be considered.").

[20] ICE, 23 F.4th at 1024 (explaining that unaffiliated entities "may or may not, depending upon the circumstances, be considered a 'group of persons' for purposes of" the Exchange Act, while an affiliated corporation that is "not controlled by another may or may not, depending upon the circumstances, be considered a 'group of persons' for purposes of" the Exchange Act.).

[21] See, id. ("Whatever the outer bounds of the undefined term 'group,' it certainly includes closely connected corporate affiliates . . . . If it did not, then a party would itself be able to elude SEC jurisdiction by making simple changes to its corporate structure, an obviously untenable result."); id. at 1025 ("[T]he outer boundary of the term 'group of persons' remains murky, and vigilance is necessary to ensure the term is not stretched too far. Whatever the limits of that term may be, though, corporate affiliates . . . are surely well within them.").

[22] Furthermore, unlike an alternative trading system registered with the Commission pursuant to Regulation ATS, a registered national securities exchange, such as Cboe Options, exercises self-regulatory powers over its members. Relatedly, Cboe does not address whether it believes its rules-based limitation of liability provision would apply to its affiliated OEMSs under the proposal.

market data from the Exchange. This is enough to fall under the well-defined Exchange Act terms "exchange" and "facility."

The Exchange's proposal also incorrectly focuses on whether an OEMS that routes orders to an affiliated exchange receives preferential treatment from the Exchange. The proposal asserts that an exchange-affiliated OEMS "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." But whether an exchange-affiliated OEMS or another system of communication to or from an exchange is advantaged or disadvantaged is not one of the considerations included in the Exchange Act definitions of "facility" and "exchange."[23]

The Exchange also asserts that proposed Rule 3.66 will provide "clarity and transparency within its Rulebook"[24] as well as "transparency and certainty regarding when an OEMS platform offered by an affiliate or otherwise by the Exchange is not a facility of the Exchange."[25] However, the Exchange Act already provides this clarity, transparency, and certainty by defining the terms "facility" and "exchange" to capture any systems of a registered national securities exchange, which would include affiliated OEMSs, that enable users to communicate with the exchange for the purpose of effecting or reporting transactions on the exchange.

Therefore, the Commission should disapprove the Exchange's proposed Rule 3.66 because the Exchange's affiliated OEMSs fall under the Exchange Act definitions of facility and exchange.

The Commission should disapprove the proposed rule because it is inconsistent with the Exchange Act.

In addition to the reasons supporting disapproval of proposed Rule 3.66 discussed above, the Commission cannot approve the proposed rule because it would contravene the expansive oversight the Commission is given over national securities exchanges under the Exchange Act.

Exchange Act Section 5 requires any "exchange," as the term is defined in Section 3(a)(1), to register with the Commission as a national securities exchange.[26] Exchange Act Section 6 sets out the standards for national securities exchanges to become registered with the

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[23] Accord ICE, 23 F.4th at 1026 (noting that Congress, not the SEC, is tasked with "deciding whether subjecting an organization to the rule-approval process would burden its ability to compete").

[24] Cboe Options Filing, 89 Fed. Reg. at 15909.

[25] Id.

[26] 15 U.S.C. § 78e.

Commission.[27] It also includes requirements exchanges must meet when they submit proposed rule changes with the SEC. In this respect, exchanges are obligated to file proposed rule changes with the Commission under Section 19(b) of the Exchange Act.

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.[28] Through 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, which is not only the largest options exchange in the U.S.,[29] but also serves as the exclusive execution venue for S&P 500, Russell 2000 E-mini, VIX, and other equity index options.[30] Such preferential treatment or other barriers to accessing the Exchange could result in inequitable allocations of fees among 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.

Therefore, the Commission should disapprove the Exchange's proposed Rule 3.66.

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[27] 15 U.S.C. § 78f(b).

[28] See ICE, 23 F.4th at 1025 ("[O]verlooking corporate affiliation here would allow a company that controls an exchange to evade SEC oversight by making a simple change to its corporate structure; it could then use its control over access to exchange facilities to gain a competitive advantage for its subsidiary, which would be directly at odds with one purpose of the Exchange Act, viz., to prevent the imposition of unnecessary burdens upon competition.").

[29] See https://www.cboe.com/us/options/.

[30] "Cboe is the exclusive home for S&P Dow Jones, FTSE Russell and MSCI index options, along with options on the Cboe Volatility Index (VIX)." https://ir.cboe.com/news/news-details/2024/Cboe-Introduces-Enhanced-Margin-Treatment-for-Index-Options-Overwriting-Strategies/default.aspx#:~:text=Cboe%20is%20the%20exclusive%20home,Cboe%20Volatility%20Index%20(VIX).

SIFMA appreciates the opportunity to submit this letter to the Commission regarding the Exchange's rule proposal. For the reasons discussed above, SIFMA urges the Commission to disapprove the Exchange's proposed Rule 3.66. If you have any questions or need any additional information, please contact Ellen Greene at (212) 313-1287 or Joe Corcoran at (202) 962-7383.

Sincerely,

Ellen Greene

Ellen Greene
Managing Director
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Joseph P. Corcoran

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