United States Court of Appeals

for the

Seventh Circuit

Case No. 24-3316

CBOE EXCHANGE, INC.,

Petitioner,

– v. –

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON APPEAL FROM AN ORDER OF THE
SECURITIES AND EXCHANGE COMMISSION

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF RESPONDENT FOR AFFIRMANCE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-3316

Short Caption: Cboe Exchange, Inc. v. SEC

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Frederic M. Kreiger Date: 6/6/2025

Attorney's Printed Name: Frederic M. Krieger

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Signature: /s/ Mark M. Attar Date: 6/6/2025

Attorney's Printed Name: Mark M. Attar

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Steven D. Feldman Date: 6/6/2025

Attorney's Printed Name: Steven D. Feldman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Attorney's Signature: /s/ Samantha K. Krasker Date: 6/6/2025

Attorney's Printed Name: Samantha K. Krasker

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

Attorney's Signature: /s/ Susan E. Sidd Date: 6/6/2025

Attorney's Printed Name: Susan E. Sidd

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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E-Mail Address: ssidd@stradley.com

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CBOE EXCHANGE, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 24-3316
	)	
SECURITIES AND EXCHANGE COMMISSION,	)	
	)	
	)	
Respondent.	)	

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF RESPONDENT

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Securities Industry and Financial Markets Association ("SIFMA") respectfully moves for leave to file the attached Brief as amicus curiae in support of Respondent.

SIFMA is the leading securities industry trade association that represents the interests of hundreds of securities firms, banks, and asset managers. On behalf of the industry's approximately one million employees, SIFMA advocates on legislation and policy affecting business and investment interests. SIFMA's mission is to support a strong financial industry, while promoting investor opportunity, capital

formation, job creation, economic growth, and trust and confidence in the financial markets.

SIFMA has a strong interest in this case. A central goal of SIFMA is to ensure that market regulations foster an environment of fairness and transparency. SIFMA believes that the SEC Order disapproving Cboe Exchange Inc.'s ("Cboe") proposed Rule 3.66 (the "Proposed Rule"), in which Cboe attempted to exclude its Order and Execution Management System, Silexx, from being classified as a facility of the exchange is proper based on the plain meaning of the statutory language. *See* Order Disapproving a Proposed Rule Change to Adopt a New Rule Regarding Order and Execution Management Systems, 89 Fed. Reg. 88,080 (Nov. 6, 2024) (the "SEC Disapproval Order"). Further, the SEC Disapproval Order reflects the SEC's exercise of necessary and appropriate oversight over exchange activity in furtherance of competitive fairness in the United States securities markets and is consistent with the intent of the Exchange Act.

For these reasons, and those set forth in greater detail in the attached proposed brief, Amicus respectfully submits that the attached brief will be of aid to the Court in considering this petition for review.

Respectfully submitted,

Dated: June 6, 2025

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Counsel for Amicus Curiae, Securities Industry and Financial Markets Association

CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion for Leave to File Brief of Amicus Curiae the Securities Industry and Financial Markets Association in Support of Respondent complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 7th Cir. R. 29 because it contains 334 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f). I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6).

Dated: June 6, 2025

/s/ Frederic M. Krieger
Frederic M. Krieger

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2025, I electronically filed the foregoing Motion for Leave to File Brief of Amicus Curiae the Securities Industry and Financial Markets Association in Support of Respondent with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit using the Court's CM/ECF system, and counsel for all parties will be served by the CM/ECF system.

Dated: June 6, 2025 */s/ Frederic M. Krieger*
Frederic M. Krieger

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Attorney's Signature: /s/ Frederic M. Kreiger Date: 6/6/2025

Attorney's Printed Name: Frederic M. Krieger

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Attorney's Signature: /s/ Steven D. Feldman Date: 6/6/2025

Attorney's Printed Name: Steven D. Feldman

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Attorney's Signature: /s/ Samantha K. Krasker Date: 6/6/2025

Attorney's Printed Name: Samantha K. Krasker

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i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Susan E. Sidd Date: 6/6/2025

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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No party has authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief, and no other person, other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

INTEREST OF AMICUS CURIAE

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 the industry's one million employees, SIFMA advocates for legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. SIFMA also provides a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the United States regional member of the Global Financial Markets Association.

A central goal of SIFMA is to ensure that market regulations foster an environment of fairness and transparency. To that end, SIFMA respectfully submits this amicus curiae brief to the United States Court of Appeals for the Seventh Circuit in support of affirming the order of the Securities and Exchange Commission ("SEC") that appropriately categorizes an order and execution management system ("OEMS") under

common ownership with the Cboe Exchange, Inc. ("Cboe" or the "Exchange") as a "facility" of an "exchange" under Sections 3(a)(1) and (2) of the Securities Exchange Act of 1934 (the "Exchange Act"). 15 U.S.C. §§ 78c(a)(1), (2).

SUMMARY OF ARGUMENT

There are two issues for the Court to consider. The threshold question is whether an OEMS affiliated with an Exchange that enables its users to route orders directly to the exchange for execution falls squarely within the Exchange Act definition of a "facility" of an "exchange." A related, equally important issue is one of process—whether an Exchange's self-regulatory organization ("SRO") can simply craft its own rules to self-declare a statutory exemption—in this case what classes of its services are excluded from the statutory definition of "facility" of an "exchange" and exempt from Commission oversight.

In its Disapproval Order, the SEC rejected Cboe's proposed Rule 3.66 (the "Proposed Rule"), in which Cboe attempted to exclude its OEMS, Silexx, from being classified as a facility of an exchange. Silexx is owned by Cboe Silexx, LLC, which, like Cboe, is owned by Cboe Global Markets, Inc. The SEC also found that the proposed Rule 3.66 would

improperly remove the Exchange-affiliated OEMS Silexx from the statutory rule filing requirement and that was inconsistent with Section 6(b) of the Exchange Act. *See* Order Disapproving a Proposed Rule Change to Adopt a New Rule Regarding Order and Execution Management Systems, 89 Fed. Reg. 88,080 (Nov. 6, 2024) (the "SEC Disapproval Order").

SIFMA urges the Seventh Circuit to affirm the SEC's determination that Silexx is a facility of an exchange under Sections 3(a)(1) and (2) of the Exchange Act, based upon the plain meaning of the statutory language. SIFMA submits that the SEC Disapproval Order reflects the SEC's exercise of necessary and appropriate oversight of exchange activity in furtherance of competitive fairness in the United States securities markets and is consistent with the intent of the Exchange Act. If Cboe's affiliated OEMS, Silexx, were found not to be a facility of the exchange, or that an exchange can simply self-declare a statutory exemption, there would be no meaningful regulatory oversight of its operations, allowing Cboe to potentially engage in uneven pricing practices and implement design advantages over competitive OEMSs offered by other market participants. Exchanges, in general, offer a

monopoly product. In addition, the Cboe is the exclusive execution venue for S&P 500, Russell 2000 E-mini, VIX, and other equity index options. Only appropriate SEC oversight helps to ensure that exchanges do not exploit special privileges – in this case, that Cboe's affiliation with Silexx does not result in unfair discrimination against Cboe's members, customers, or other market participants.

ARGUMENT

In the SEC Disapproval Order, the SEC determined that Silexx, an OEMS owned by an affiliate of Cboe, is a facility of the Exchange, and thus subject to SEC regulation, pursuant to Section 3(a)(2) of the Exchange Act. *See* SEC Disapproval Order.

The SEC Disapproval Order determined that Silexx is a "facility" of an "exchange" under the definitions of those terms in Section 3 of the Exchange Act, and, as such, 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.

The SEC stated that Cboe has not met its burden to demonstrate that the Proposed Rule complies with the requirements of the Exchange

Act and the applicable rules and regulations governing national securities exchanges, particularly Section 6(b) of the Exchange Act.[1] *Id.*

In 2017, Silexx was acquired by Cboe Silexx, LLC, a wholly owned subsidiary of Cboe Global Markets, Inc., which also owns Cboe. Until last year, Cboe treated Silexx as a facility of an exchange, and accordingly, submitted proposed rule changes to the SEC concerning Silexx's operation. SEC Disapproval Order, at 88,080. SIFMA understands that this approach was based on guidance provided by the SEC staff. Petitioner's Opening Brief, Doc. 16 at 2. However, with the filing of its Proposed Rule, Cboe attempts to create an exception to the facility definition, while implicitly acknowledging that Silexx is a "facility" of an "exchange."

I. Standard of Review

Pursuant to the Administrative Procedure Act, reviewing circuit courts of appeals "hold unlawful and set aside agency action" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *FDA v. Wages and White Lion*

[1] Section 6(b) sets forth the core requirements of a national securities exchange, including the requirement that the rules of an exchange must provide for the equitable allocation of fees, and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Investments, L.L.C., 604 U.S. ___, 145 S.Ct. 898, 916-17 (2025). As the Supreme Court wrote in a recent decision, "[o]ur well-worn arbitrary-and-capricious standard ensures that an administrative agency 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *FDA*, 145 S.Ct. at 917 (*quoting Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). In this case, the SEC considered the very factors Congress intended: the relevant statutory definitions and the relevant assessment on competitive burdens.[2]

II. The SEC Properly Defined Silexx as a "Facility" of an "Exchange" Under Section 3 of the Exchange Act

The SEC properly defined Silexx as a "facility" of an "exchange" under Sections 3(a)(1) and (2) of the Exchange Act.

Section 3(a)(1) of the Exchange Act defines "exchange" as follows:

> [A]ny 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 or for otherwise

[2] This Court has held that "[a]n agency decision is arbitrary and capricious when the agency 'has relied on factors which Congress had not intended it to consider.'" *Zero Zone, Inc. v. United States Department of Energy*, 832 F.3d 654, 677 (7th Cir. 2016) (*quoting Nat'l Ass'n of Home Builders v. Defs. Of Wildlife*, 551 U.S. 644, 658 (2007)).

> performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

15 U.S.C. § 78c(a)(1). Section 3(a)(2) of the Exchange Act defines "facility" as follows:

> [W]hen used with respect to an exchange includes … any service … 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.

15 U.S.C. § 78c(a)(2). An affiliated OEMS, which is owned directly or indirectly by an exchange, is a "facility" under the Exchange Act because it provides market participants with a "system of communication to or from" the exchange "for the purpose of effecting or reporting transactions" on the exchange. An OEMS owned by or under common control with an exchange, where the affiliated OEMS enables market participants to route orders for execution to that exchange or receive market data from that exchange, is therefore a "facility" of the "exchange," as those terms are defined in Section 3(a) of the Exchange Act.

Accordingly, Silexx was appropriately categorized in the SEC Disapproval Order as a facility of Cboe's exchange.

A. Ownership by an Affiliate of an Exchange Brings an OEMS Within the Definition of a Facility of the Exchange

OEMSs are software platforms used to route orders to exchanges and other venues. When an exchange owns an OEMS, the exchange may incorporate the OEMS software as one component of the exchange's infrastructure, including by facilitating the efficient execution and reporting of transactions in accordance with the exchange's structure and requirements. As such, Silexx is a "facility" under Section 3(a)(2) of the Exchange Act, given that Silexx provides a service "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…)." 15 U.S.C. § 78c(a)(2). When the OEMS is affiliated with the exchange, the OEMS fits squarely within the definition of a facility of an exchange. Under the current regulatory framework, an affiliated OEMS is properly classified as a "facility" of an exchange. Characterization as a "facility" permits appropriate regulatory oversight to guard against

anticompetitive behaviors and advantages through exchange design or sponsorship or unfair discrimination among customers.

A ruling by the D.C. Circuit Court provides reaffirmation of longstanding precedent[3] in support of the SEC's determination that Cboe's OEMS is subject to regulatory oversight due to its affiliation with the exchange. In *Intercontinental Exch., Inc. (ICE) v. SEC*, 23 F.4th 1013 (D.C. Cir. 2022) (the "*ICE*" decision), the D.C. Circuit held that functionality within the statutory definition of the term "facility" is a "facility" of an "exchange" if it is owned by an affiliate of the exchange. *Id.* at 1025. In *ICE*, the D.C. Circuit scrutinized whether a wireless data feed was a facility of an exchange. While the D.C. Circuit also expressed that the definition of both "exchange" and "facility" should be interpreted broadly under the Exchange Act, it expressed some concern that the

[3] SEC Chairman Jay Clayton expressed this "In a December 7, 2017, letter to Rep. Barry Loudermilk, the sponsor of H.R. 3555: "Our markets have evolved significantly in recent years, and we must ensure that the regulatory framework keeps pace with market developments. . . . I believe care should be taken to ensure that the Commission retains oversight of important exchange functions, such as those relating to (1) exchange market data products, (2) listing standards, (3) member and market regulation, (4) co-location and connectivity services, and (5) order routing services, and that any modifications do not inadvertently exclude from Commission oversight exchange functions that do not currently exist but that may evolve in the future." *See* "Exchange Regulatory Improvement Act", House Financial Services Report to Accompany H.R. 3555, (August 3, 2018) at 3 available at https://www.congress.gov/congressional-report/115th-congress/house-report/883/1.

scope of the outer boundary of the term "group of persons" in the statutory definition of an "exchange," "…remains murky, and vigilance is necessary to ensure the term is not stretched too far." *Id.* Cboe in this case, as with ICE in the D.C. Circuit case, is not anywhere near that outer boundary. The D.C. Circuit concluded, "[W]hatever the limits of that term may be, though, corporate affiliates…are surely well within them." *Id.* at 1024. In *ICE*, the D.C. Circuit was scrutinizing whether a wireless data feed was a "facility" of an "exchange." The data feed was owned and operated by a corporate affiliate of an exchange which connected a customer's equipment located on the premises of a third-party data center to the proprietary data feed of an exchange.

In *ICE*, the D.C. Circuit emphasized that the meaning of "facility" of an "exchange" was not based on identical ownership:

> [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 controls 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.

Id. at 1025 (citing 15 U.S.C. § 78f(b)(8)). Similarly, Silexx provides an OEMS that may be used to connect market participants with Cboe's

exchange, and Silexx is owned and controlled by the same corporation that owns and operates the Exchange. Therefore, when used in this manner, Silexx, too, is a "facility" of an "exchange" and, as such, is part of the group of persons providing a marketplace for bringing together purchasers and sellers of securities as defined in Section 3(a)(1) of the Exchange Act.

The SEC also rejected Cboe's argument that by separating Silexx from Cboe's control, Silexx could avoid being a facility of the exchange. As a practical matter, the SEC does not accept that Silexx is truly separated from Cboe—the OEMS interacts with Cboe's trading facility; the fees are also inter-related. In addition, from a corporate standpoint, Cboe and Silexx are both owned by the same parent company. Currently, they are certainly acting in concert: Cboe is providing transaction fee waivers for users of Silexx.

B. Silexx is Functionally a Facility of an Exchange

Silexx is a software product that market participants may install on their computer systems and use to enter and route orders directly to the exchange to effect trades in securities and other financial products. Cboe noted that over 40% of Silexx users access Cboe via an exchange

port established by Cboe and with the consent of Cboe to the party or parties using the port. These connections bring the Silexx services squarely within the definition of "facility" as the SEC rightly noted in the SEC Disapproval Order, at 88,084, "… 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." That Silexx can be used to route orders directly to other, unaffiliated exchanges does not change the conclusion that, with respect to Cboe, Silexx is a facility.

The SEC also rejected Cboe's argument that by separating Silexx from Cboe's control, Silexx could avoid being a facility of the Exchange. The D.C. Circuit in *ICE* found that the term "groups of persons" in the definition of exchange "certainly includes closely connected corporate affiliates." The Court reasoned that if it did not, then exchanges would be able to elude SEC jurisdiction by making a simple change to its corporate structure. Making a simple corporate structure change and an exchange amending its rules to exclude a class of services are strikingly similar. The D.C. Circuit also noted that the determination of two or more

persons acting in concert would likely depend on facts and circumstances – and the facts and circumstances here demonstrate that as a practical matter, Silexx is not truly separated from Cboe: (1) Cboe and Silexx are both owned by the same parent company; (2) the OEMS interacts directly with Cboe's trading facility; and (3) fees are interrelated – Cboe provides port fee waivers for users of Silexx, demonstrating that they are acting in concert.

A direct connection to the exchange is not required for an affiliated facility to fall within SEC oversight. 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"). Market participants purchase affiliated OEMSs like Silexx to create orders that will be routed to exchanges for execution and for receiving market data from exchanges, not for the direct connection to the exchange. Moreover, passage of the orders through a port between the affiliated OEMS and the exchange does not break the communication

link between the two or lessen the ability of the exchange to preference its affiliated OEMS.

The SEC also did not agree with Cboe's proposed distinction that on-floor use of Silexx was a facility of an exchange and that off-floor use was not. The SEC found that any use of Silexx was a facility of an exchange. SIFMA agrees with the SEC's observation that "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." *Id.* That functionality applies to both the off-floor and on-floor use of Silexx.

III. Cboe's Affiliated OEMS Must be Regulated by the SEC to Preserve Competitive Fairness and Even-handed Treatment of Members, Customers, and Other Market Participants

As a for-profit exchange, Cboe has a financial interest in advancing its affiliated OEMS. Cboe is the "largest options exchange in the U.S."[4] It also serves as the exclusive execution venue for S&P 500, Russell 2000 E-mini, VIX, and other equity index options.[5] Under Cboe's Proposed

[4] *Cboe Options Exchanges*, CBOE, https://www.cboe.com/us/options/.

[5] *Cboe Introduces Enhanced Margin Treatment for Index Options Overwriting Strategies*, CBOE (Mar. 20, 2024), 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) ("Cboe is the exclusive home for S&P Dow Jones, FTSE

Rule, there would be no SEC oversight of Silexx. Even without the added leverage of being the sole execution venue for the most important and active equity market related option contracts, Cboe could steer market participants to favor Silexx by system modifications, conveying to Silexx knowledge of exchange system behavior, and disparate use of price discounts. Cboe's Proposed Rule, if enacted, sets the precedent for exchange-affiliated OEMSs, not subject to the rule filing process, to benefit the OEMSs and their owner exchanges through use of information about new or complex order types, differential fees, preferential routing access, and new or different tiers of service. Allowing exchanges to adopt overly narrow interpretations of what constitutes an exchange facility would enable exchanges to reclassify core exchange functions as outside of the exchange itself, thereby circumventing SEC oversight and undermining the regulatory framework established by the Exchange Act. Such preferential treatment or other barriers to accessing exchanges could result in unfair discrimination among exchange members, customers, or other market participants and impose

Russell and MSCI index options, along with options on the Cboe Volatility Index (VIX)").

unnecessary burdens on competition in violation of Section 6(b) of the Exchange Act.

Cboe's current pricing model foreshadows its ability to impose fees that favor use of its own facility. Cboe currently offers certain port fee waivers to users of Silexx, but Cboe does not provide fee waivers to Cboe floor brokers or any other market participants who may use or wish to use a competitive OEMS. *See* SEC Disapproval Order at 88,087.

It is already the case that Cboe is financially incentivized to push its member firms to choose Silexx over other OEMSs and can do so effectively via its regulatory oversight of those member firms (*e.g.*, by signaling to member firms that Silexx is a favored system for meeting regulatory obligations or subjecting non-Silexx-using member firms to more stringent examinations). Removing SEC oversight of Silexx itself only increases the risks that harms caused by this conflict of interest can remain hidden within Silexx.

IV. SEC Oversight of Silexx is Necessary and Appropriate

Cboe claims it is placed at a competitive disadvantage because, unlike other market participants providing OEMSs, it is subject to exchange rule filing requirements for Silexx. Requiring continued SEC

oversight can create a potential delay in approval of a rule change under Section 19 of the Exchange Act ("Section 19"). As an initial matter, other OEMS technology suppliers, competing with Silexx, do not have the market power of the exchange "group." However, the SEC has broad powers to exempt individuals and firms from the application of the securities laws. The SEC has detailed procedures for considering and acting upon such requests (15 U.S.C. § 78mm(a)(1)), but Cboe has not followed any of them. It should be noted that "speed of deployment" is not a justification to avoid SEC oversight: there are processes under Section 19 that permit filings to be effective upon filing and to be approved on an accelerated basis, in appropriate circumstances. The fact that appropriate oversight is imposed should not be considered an unfair competitive burden. Further, nothing in Section 6 of the Exchange Act contemplates that exchange rules should address competition between regulated and unregulated entities such as OEMSs not affiliated with an exchange.

Broker-dealers' OEMSs are subject to oversight and review by the SEC and self-regulatory organizations, including exchanges, to which broker-dealers belong. Regulated entity systems and their operation and

behavior are, as they should be, under regulatory oversight. If Cboe's OEMS were somehow excepted from being a "facility" of an "exchange", it would anomalously and uniquely avoid any oversight.

Congress expressed its intent that operations and pricing of facilities of an exchange must be subject to public comment and SEC oversight to ensure that exchanges operate fairly for all market participants and are priced equitably and without impositions of inappropriate competitive burdens. In current times, where exchanges are for-profit enterprises, SEC oversight over facilities of an exchange are particularly important to guard against favoritism and untoward burdens on competition.

The Exchange Act definitions of "exchange" and "facility" in Sections 3(a)(1) and (2) and the requirements of Section 6(b) work together to protect against the risk that exchanges will be tempted to discriminate among users of exchange services or functions, such as an affiliated OEMS, that serve as an access point for bringing together buyers and sellers of securities on the exchange.

In sum, in approving an exchange rule, the SEC must find that the rule, among other requirements, must "provide for the equitable

allocation of reasonable dues, fees, and other charges among … persons using its facilities," "promote just and equitable principles of trade," and not "impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act]." *ICE*, 23 F.4th at 1016-17 (*quoting* 15 U.S.C. §§ 78f(b)(4), (5), (8)). This oversight is the safeguard Congress intended for the protection of the integrity of our securities markets and for the protection of investors. Affirming the SEC Disapproval Order will further the SEC's important role in overseeing this activity.

CONCLUSION

SIFMA respectfully urges this Court to affirm the SEC Disapproval Order rejecting Cboe's Proposed Rule. The SEC Disapproval Order is not arbitrary and capricious. It is consistent with the Exchange Act and judicial precedent, and it properly permits the SEC to conduct its oversight over Silexx, as a facility of an exchange.

Respectfully submitted,

Dated: June 6, 2025

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 7th Cir. R. 29 because it contains 3883 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6).

Dated: June 6, 2025

/s/ Frederic M. Krieger
Frederic M. Krieger

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2025, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the appellate CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the CM/ECF system.

Dated: June 6, 2025 */s/ Frederic M. Krieger*
Frederic M. Krieger