March 25, 2024

Via Electronic Mail (rule-comments@sec.gov)

Ms. Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. SR-CBOE-2024-008[1]

Dear Ms. Countryman:

The Healthy Markets Association[2] writes to object to yet another unfounded effort by a registered securities exchange to illegally exclude portions of its businesses from being regulated.

Specifically, Cboe seeks to exclude its order and execution management products from Commission oversight and having to comply with the obligations imposed on exchanges by the Securities Exchange Act of 1934.

As explained below, the treatment sought by the Cboe OEMS Filing is inconsistent with the law, and should be disapproved.[3]

Background on SEC Review of Exchange Rule Proposals

The Commission is obligated to review exchange filings and determine that those filings are consistent with the Exchange Act,[4] including that an exchange's rules:

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

[2]The Healthy Markets Association is a not-for-profit member organization focused on improving the transparency, efficiency, and fairness of the capital markets. Healthy Markets promotes these goals through education and advocacy to reduce conflicts of interest, improve timely access to market information, modernize the regulation of trading venues and funding markets, and promote robust public markets. Its members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms. To learn about HMA or our members, please see our website at http://healthymarkets.org.

[3] Further, we note that Cboe has not formally petitioned the Commission for an exemption from the federal securities laws or rules, as would be required for the Commission to grant such a request.

[4] See *Susquehanna Int'l Grp., LLP v . SEC*, 866 F.3d 442 (D.C. Cir. 2017)("The SEC "shall approve" a self regulatory organization's proposed rule change only "if it finds that such proposed rule change is consistent with" provisions of the Exchange Act."). *Accord*, Remarks of Brett Redfearn, SEC, before the SEC Roundtable and Market Access and Market Data, Oct. 26, 2018, *available at* https://www.sec.gov/news/public-statement/statement-redfearn-102518 (declaring that in order for the Commission to "meet our obligations under the Exchange Act, we also need to ensure that the fees that are being charged for such important market services are fair and reasonable, not unreasonably discriminatory, and do not impose an undue or inappropriate burden on competition.").

- "provide for the equitable allocation of reasonable dues, fees, and other charges;"[5]
- not be "designed to permit unfair discrimination";[6]
- "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act;[7] and
- be designed "to protect investors and the public interest.[8]

Rule 700(b)(3) of the Commission's Rules of Practice clearly establishes that:

> The burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization is on the self-regulatory organization that proposed the rule change.[9]

In 2017, the Court of Appeals for the District of Columbia Circuit remanded the Commission's approval of another self-regulatory organization's rule change, explaining that the Administrative Procedure Act

> requires us to hold unlawful agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that is "unsupported by substantial evidence." To satisfy the "arbitrary and capricious" standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made."[10]

Put simply, the exchange must provide sufficient details to support its filing, and the Commission must examine those details and independently determine that the exchange's rule meets the requirements of the Exchange Act. While we understand that this may be difficult, given the often dozens of exchange filings per month, the Commission is nevertheless still obligated to "find" or "determine" that the rule meets the requirements of the Exchange Act.[11]

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[5] 15 U.S.C.§ 78f(b)(4).
[6] 15 U.S.C.§ 78f(b)(5).
[7] 15 U.S.C.§ 78f(b)(8).
[8] 15 U.S.C.§ 78f(b)(5).
[9] 17 C.F.R. §201.700(b)(3); *accord, Order Disapproving Proposed Rule Change To Introduce a Liquidity Provider Protection Delay Mechanism on EDGA*, SEC, Exch. Act Rel. No. 34–88261, Feb. 21, 2020, *available at* https://www.sec.gov/files/rules/sro/cboeedga/2020/34-88261.pdf.
[10] *Susquehanna*, at 445 (internal citations omitted).
[11] *Susquehanna*, at 446.

Cboe OEMS Filing

The Cboe OEMS Filing oddly claims that it is unnecessary. Specifically, Cboe explains that it

> believes an OEMS platform offered by an Exchange affiliate or pursuant to a contractual relationship (such as a joint venture) but that is ultimately operated as a separate business from the Exchange, and thus is operated with respect to the Exchange on the same terms as third-party OEMSs, is not a facility of the Exchange within the meaning of the Act and, thus, is not subject to the rule filing requirement.[12]

Put simply, the filing is ultimately little more than an attempt by Cboe to begin offering its OEMS Products free from Commission review and oversight, and free from the obligations imposed upon exchanges by the Exchange Act.

Analysis of the Cboe's Proposed Exclusion of its OEMS Products from Government Oversight

Cboe's OEMS Products are Facilities of an Exchange

The Securities Exchange Act of 1934 defines the term "facility" for an "exchange" to be the:

> 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]

This language has existed for decades, and its broad scope is well known by regulators and market participants.[14] In fact, Congress has repeatedly considered – and declined

[12] Cboe OEMS Filing, at 6.
[13] 15 U.S.C. § 78c(a)(2).
[14] *See, e.g.*, *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.*, SEC, Exch. Act Rel. No. 34-44201, Apr. 18, 2001.

to enact – legislation over the years to explicitly narrow this broad definition so as to exclude services like those contemplated here.[15]

While the Cboe OEMS Filing doesn't provide significant details regarding its OEMS products, it does offer generalized descriptions of OEMS products generally, including that:

> OEMS is a software product that 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. 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. OEMSs may also provide users with access to real-time options and stock market data, as well as certain historical data. Additionally, OEMSs may offer their users a variety of other tools to manage their trading, such as risk management tools, analytics, and algorithms. OEMS platforms generally consist of a "front-end" order execution and management trading platform. These platforms may also include a "back-end" platform that provides a connection to the infrastructure network of the OEMS (and thus permits users to send orders to other users of that OEMS).[16]

Clearly, as defined by Cboe itself, an OEMS would qualify under the statutorily definition of a "facility" of an "exchange."

That should be sufficient basis to end the Commission's analysis, and support the Commission's rejection of the Cboe OEMS Filing.

However, we wish to further examine some of the other issues raised by the Cboe OEMS Filing.

The Commission and the Court of Appeals for the DC Circuit Have Rejected Cboe's Arguments Before

Cboe is not the first exchange to attempt to exclude product offerings from the definition of a "facility" of an "exchange so as to avoid Commission oversight, and particularly the

[15] See, e.g., H.R. 3555, *Exchange Regulatory Improvement Act* (115th Cong.).
[16] Cboe OEMS Filing, at 2-3.

requirements of the Exchange Act that exchange fees be "reasonable" and "equitably allocated," not unduly burdensome on competition, and not discriminatory.

In 2020, the NYSE family of exchanges made essentially the same arguments when they sought to offer wireless connections to the exchanges through an exchange affiliate (ICE Data Services).[17] The NYSE family of exchanges asserted that their wireless connectivity products:

- were "not part of the Exchange, as they are services;"[18]
- "[did] not bring 'together orders for securities of multiple buyers and sellers,' and so [were] not an 'exchange' or part of the 'Exchange' for purposes of Rule 3b-16;"[19] and
- were not "facilities" of an exchange,[20] in part, because they were offered by an affiliate, and not the exchanges themselves.

The NYSE family of exchanges, much like Cboe in its filing, claims that the only reason that they filed with the agency was because the Commission staff had informed them that the Commission viewed the changes as involving rules of an exchange.[21]

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[17] See, *Notice of Filing of Proposed Rule Change to Establish a Schedule of Wireless Connectivity Fees and Charges with Wireless Connections*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88168, Feb. 11, 2020, *available at* https://www.sec.gov/rules/sro/nyse/2020/34-88168.pdf ("NYSE Filing I"); *Notice of Filing of Proposed Rule Change to Amend the Schedule of Wireless Connectivity Fees and Charges to Add Wireless Connectivity Services*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88237, Feb. 19, 2020, *available at* https://www.sec.gov/rules/sro/nyse/2020/34-88237.pdf ("NYSE Filing II"); *Notice of Filing of Proposed Rule Change to Establish a Schedule of Wireless Connectivity Fees and Charges with Wireless Connections*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88170, Feb. 11, 2020, *available at* https://www.sec.gov/rules/sro/nysearca/2020/34-88170.pdf; *Notice of Filing of Proposed Rule Change to Amend the Schedule of Wireless Connectivity Fees and Charges to Add Wireless Connectivity Services*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88239, Feb. 19, 2020, available at https://www.sec.gov/rules/sro/nysearca/2020/34-88239.pdf; *Notice of Filing of Proposed Rule Change to Establish a Schedule of Wireless Connectivity Fees and Charges with Wireless Connections*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88169, Feb. 11, 2020, available at https://www.sec.gov/rules/sro/nyseamer/2020/34-88169.pdf; Notice of Filing of Proposed Rule Change to Amend the Schedule of Wireless Connectivity Fees and Charges to Add Wireless Connectivity Services, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88238; File No. SR-NYSEAMER-2020-10, Feb. 19, 2020, *available at* https://www.sec.gov/rules/sro/nyseamer/2020/34-88238.pdf; *Notice of Filing of Proposed Rule Change to Establish a Schedule of Wireless Connectivity Fees and Charges with Wireless Connections*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88172, Feb. 11, 2020, *available at* https://www.sec.gov/rules/sro/nysechx/2020/34-88172.pdf; and *Notice of Filing of Proposed Rule Change to Amend the Schedule of Wireless Connectivity Fees and Charges to Add Wireless Connectivity Services*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88240, Feb. 19, 2020, *available at* https://www.sec.gov/rules/sro/nysechx/2020/34-88240.pdf.

[18] NYSE Filing II, at 8.

[19] NYSE Filing II, at 9.

[20] NYSE Filing II, at 9 (citing 15 USC §78c(a)(2)).

[21] Compare, *Intercontinental Exch., Inc., et al. v. SEC*, No. 20-1470, at 12, (D.C. Cir. 2022), *available at* https://law.justia.com/cases/federal/appellate-courts/cadc/20-1470/20-1470-2022-01-21.html and Cboe OEMS Filing, at 5 (noting that the staff viewed the OEMS Products as "facilities" of an "exchange").

HMA objected to the NYSE filings, explaining that:

> the Exchanges concocted a legal argument to erroneously assert that the law doesn't apply to them, and then have made essentially no effort to comply with it. The potentially damaging precedential impact cannot be overstated. If permitted by the Commission to stand, the Exchanges' legal interpretation could render the [wireless communications] offerings generally free from the regulatory strictures imposed by the Exchange Act -- in contravention of the law, the protection of investors, and the public interest.[22]

The Commission rightly rejected NYSE's tortured interpretation of the "facility" of an "exchange."[23] Dissatisfied, however, NYSE's parent company, the NYSE family of exchanges, and others challenged the Commission's decision in the Court of Appeals for the DC Circuit. In court, the exchanges argued that:

> (1) the SEC's assertion of jurisdiction over the services was based up on an erroneous interpretation of the statutes that define "exchange" and "facility," (2) the SEC arbitrarily and capriciously ignored the effect of the Final Rule upon the ability of the wireless services to compete, and (3) the SEC unlawfully ignored Commission regulations defining "exchange" and arbitrarily and capriciously departed, without acknowledgment and explanation, from relevant agency precedents.[24]

Cboe and Nasdaq filed as *amici* to defend NYSE's seemingly indefensible position.

The Court of Appeals for the DC Circuit was not persuaded by the exchanges. It flatly rejected NYSE's arguments that wireless communications were not part of a facility of the exchange, noting that the products were a " system of communication to or from the exchange . . . maintained by or with the consent of the exchange" that is offered "for the purpose of effecting and reporting transactions on the Exchange."[25]

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[22] Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, SEC, Mar. 9, 2020, *available at* https://www.sec.gov/comments/sr-nyse-2020-05/srnyse202005-6925373-211372.pdf.

[23] *Notice of Filings of Partial Amendment No. 3 and Order Granting Accelerated Approval to Proposed Rule Changes, each as Modified by Partial Amendment No. 3, to Establish a Wireless Fee Schedule Setting Forth Available Wireless Bandwidth Connections and Wireless Market Data Connections*, SEC, Exch. Act Rel. No. 34-90209, Oct. 15, 2020, *available at* https://www.sec.gov/files/rules/sro/nyse/2020/34-90209.pdf.

[24] *Intercontinental Exch. Inc., et al*.

[25] *Intercontinental Exch. Inc., et al.*, at 15-16.

In fact, the court explicitly – and derisively[26] – rejected each of the exchanges' core arguments, and denied the exchanges' petition to review the Commission's action.[27] Presumably, Cboe was aware that those arguments lost in court, given that it had appeared as an *amicus* in that case, but is attempting to usurp the Exchange Act in the Cboe OEMS Filing.

Cboe's argument is also inconsistent with the longstanding treatment of other trading-related products offered by exchanges, including "routers" that send orders received by an exchange to other markets, based on the member's instruction. Exchanges are not required to offer the use of routing technology, and participants are not required to use an exchange router, but neither of these facts avoid the classification of those products as facilities subject to the Exchange Act.[28]

Cboe Is Improperly Seeking a Statutory Exemption

The Commission has broad powers to exempt individuals and firms from the applications of the securities laws.[29] But the Commission also has detailed procedures for considering and acting upon request for such exemptions. Cboe hasn't followed any of them.

Instead, Cboe asserts that it:

> believes an OEMS platform offered by an Exchange affiliate or pursuant to a contractual relationship (such as a joint venture) but that is ultimately operated as a separate business from the Exchange, and thus is operated with respect to the Exchange on the same terms as third-party OEMSs, is not a facility of the Exchange within the meaning of the Act and, thus, is not subject to the rule filing requirement. The Exchange believes the rules and fees related to such an OEMS platform are not the "rules of an exchange" required to be filed with the Commission under the Act. Such an OEMS platform receives no advantage

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[26] *Intercontinental Exch. Inc., et al.*, at 16 (noting that "ICE quibbles with these simple observations" and that "ICE's narrow reading of the statute does not withstand scrutiny, and its warning about the dire consequences of a more expansive reading rings hollow.").

[27] *Intercontinental Exch. Inc., et al.*

[28] We find it notable that, when considering the exchange application of a future competitor, Investors' Exchange, LLC the competitor never questioned whether its proposed affiliated outbound "router" capability (even though not technically offered by the legal entity of the exchange) was a "facility" of an "exchange," and the Commission ultimately only approved the application after the proposed routing functionality was materially changed. See, *In the Matter of the Application of Investors' Exchange, LLC for Registration as a National Securities Exchange*, SEC, Exch. Act Rel. No. 34-78101, June 17, 2016, *available at* https://www.sec.gov/files/rules/other/2016/34-78101.pdf. Again, at no point did the exchange even publicly suggest that order management capabilities offered by an exchange could somehow escape the SEC's oversight as a "facility" of the "exchange."

[29] 5 U.S.C. 78mm(a)(1).

> 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.[30]

Rather than directly address the statutory definition of a "facility" of an "exchange," which would be instantly fatal to its claims, Cboe has instead chosen to:

- ignore the plain language of the statute,
- offer a self-interested speculation as to why it believes the statute exists, and
- assert that its own speculated intent of the law isn't served by applying the law.

Notably, the Exchange asserts that subjecting its OEMS Products to SEC oversight and the Exchange Act requirements would put it at a "competitive disadvantage" to third party OEMS providers, "despite offering substantially similar products and services, connecting to the Exchange in the same manner, and receiving no benefits or advantages from the Exchange."[31]

Under the guise of confirming its interpretation of the definition of a "facility" of an "exchange," Cboe is instead seeking a broad exemption from the application of the federal securities laws. To be clear, while we would object to the Commission granting such an exemption from the law's application in this instance because it is arguably unfair to Cboe's OEMS products, that action would at least be within the Commission's authority.[32] However, that is not what Cboe is asking the Commission to do. Rather, Cboe is asking the Commission to essentially redefine a term in a manner that is facially inconsistent with the statute.

The Cboe OEMS Filing Raises Significant, Unaddressed Issues and is Contrary to Public Policy

If we were to subject the Cboe OEMS Filing to scrutiny as a "rule of an exchange," then the next questions would naturally seem to be (1) whether the filing complies with Commission Rules, and (2) if the substance is sufficiently detailed to enable the Commission to conclude that it complies with the Exchange Act's requirements. Unfortunately, Cboe fails to provide the Commision or public with sufficient information with which to even perform the analysis to answer those questions.

For example, as discussed above, the essential details of Cboe's OEMS are not disclosed. This means that we do not know with specificity exactly what actions the

[30] Cboe OEMS Filing, at 5-6.
[31] Cboe OEMS Filing, at 5-6.
[32] See, 15 U.S.C. 78mm(a)(1). The Commission has very distinct procedures for entities seeking exemptions, none of which were followed here.

OEMS serves – other than those that are clearly included within the scope of the definition of a "facility."

And while the exchange has asserted that it has "established and maintained procedures and internal controls reasonably designed to prevent the OEMS from receiving any competitive advantage or benefit of its affiliation/relationship with the Exchange,"[33] we are left to take the exchange at its word. Given the enormous risks and conflicts of interest, as well as the clear violation of the Exchange Act's requirements related to undue burdens on competition and discrimination, the exchange must do much better than that.

Conclusion

Since our launch in 2015, HMA has reviewed and analyzed over ten thousand filings from self-regulatory organizations. The Cboe OEMS Filing reflects:

- a stunning misunderstanding of the plain language of a decades-old statute;
- an ignorance of the legislative history of the definition of a "facility" of an "exchange;"
- an irreverence to precedent from the Court of Appeals for the DC Circuit, with which the Cboe was itself engaged;
- a complete disregard of the Commission rules for seeking a statutory exemption; and
- a profound lack of detailed analysis and relevant public policy justification.

Any one of these deficiencies would doom the filing, but the ostentatious aggregation of all of these failures renders this filing amongst the most deeply flawed we have ever seen. As the Cboe OEMS Filing is contrary to the law, Commission procedures, and public policy, the Commission must reject it.

Thank you for your consideration.

Sincerely,

Tyler Gellasch
President and CEO

Cc: Hon. Gary Gensler, Chair

[33] Cboe OEMS Filing, at 8.