



November 12, 2020

Via Electronic Submission

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

Re: Release No. 34-90096; File No. 4-757

Dear Ms. Countryman:

Cboe Global Markets, Inc. (“Cboe”) appreciates this opportunity to comment on the proposed new single national market system (“NMS”) plan governing the public dissemination of real-time consolidated equity market data for NMS stocks (the “CT Plan” or the “Plan”), which was published for notice and comment on October 13, 2020 (the “CT Plan Notice”).¹ In an order issued on May 6, 2020 (the “Governance Order”), the Commission mandated that certain exchanges and other self-regulatory organizations (“SROs”) involved in the dissemination of U.S. equities market data prepare and submit the CT Plan on an expedited basis, with a deadline of August 11, 2020.² As the CT Plan Notice acknowledges, the SROs owned by Cboe and several

¹ See Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-90096 (October 6, 2020), 85 Fed. Reg. 64565 (October 13, 2020) (File No. 4-757).

² See Order Directing the Exchanges and the Financial Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-88827 (May 6, 2020), 85 Fed. Reg. 28702 (May 13, 2020) (File No. 4-757). On June 1, 2020, Nasdaq,

other SROs have petitioned for review of the Governance Order, and that appeal is pending in the Court of Appeals for the D.C. Circuit.³ Although the SROs owned by Cboe participated in the drafting of the CT Plan in order to comply with the Governance Order, Cboe believes that the CT Plan is fundamentally flawed, inconsistent with the Exchange Act, and contrary to the Commission's own rules and regulations. As a result, the CT Plan should be disapproved.

First, the CT Plan violates Section 11A of the Exchange Act because the Commission required that the Plan grant individuals representing non-SROs voting representation on the operating committee of the Plan. Section 11A, however, authorizes the Commission to direct only SROs to jointly develop and operate NMS plans.⁴ Therefore, the Commission does not have the authority to require that individuals representing non-SROs be given voting power on the operating committees of such NMS plans.⁵

Nasdaq BX, Inc., and Nasdaq PHLX LLC petitioned for review of the Governance Order and, on June 3, 2020, those entities filed a motion requesting that the Commission stay the Governance Order pending resolution of that appeal. On June 12, 2020, the Commission denied Nasdaq's motion to stay. *See* Order Denying Stay, Release No. 89066 (June 12, 2020), 85 Fed. Reg. 36921 (June 18, 2020) (File No. 4-757).

³ *See* CT Plan Notice, *supra* note 1, 85 Fed. Reg. at 64567 n.7. The three petitions for review of the Governance Order filed by Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., The Nasdaq Stock Market LLC, Nasdaq BX, Inc., Nasdaq PHLX LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. have been consolidated into Case No. 20-1881, pending in the United States Court of Appeals for the D.C. Circuit (the "Governance Order Appeal"). On November 3, 2020, the petitioner exchanges filed their opening brief in the Governance Order Appeal, and the Cboe petitioners reserve their right to make arguments in that appeal that are not set forth or discussed in detail in this letter.

⁴ *See* 15 U.S.C. § 78k-1(a)(3)(B).

⁵ *See* Opening Brief for Petitioners in the Governance Order Appeal (Document # 1869613), Case No. 20-1811 (D.C. Cir. November 3, 2020) (the "Petitioner's Brief") at 28-40. Cboe also notes that it and other commenters raised questions during the comment process for the Governance Order regarding the Commission's authority under Section 11A of the Exchange Act. *See* Letter from Patrick Sexton, EVP, General Counsel and Corporate Secretary, Cboe Global Markets, Inc. to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (Feb. 28, 2020),

The plans that govern the dissemination of equity market data to public investors serve an important purpose in the national market system, and Congress determined to entrust the planning, development, operation, and regulation of NMS plans to SROs that have specific regulatory obligations to act in the furtherance of the public interest.⁶ Although Cboe continues to believe that the industry should have some voice in the operation of the equity data plans, the Exchange Act contemplates different roles for SROs that are subject to its comprehensive regulatory framework designed to protect investors and the public interest, and non-SROs to which such obligations do not apply.⁷ Indeed, not only would the Governance Order framework incorporated into the CT Plan provide a role to non-SROs that is inconsistent with the comprehensive regulatory framework implemented by Congress in the Exchange Act, it would further erode that framework by entrusting important matters to individuals within those non-SROs who are not subject to any Commission oversight.⁸

The requirement that voting rights be provided to individuals representing non-SROs also violates Rule 608 of Regulation NMS, which is derived from Section 11A and similarly provides

available at [sec.gov/comments/4-757/4757-6891283-210918.pdf](https://www.sec.gov/comments/4-757/4757-6891283-210918.pdf) (the “Governance Order Letter”) (“Although Cboe supports greater industry participation in Plan matters, the Commission should ensure that any steps it takes to further this participation are within its statutory mandate.”).

⁶ For example, SROs are required to “protect investors and the public interest.” 15 U.S.C. §§ 78f(b)(5), 78o-3(b)(6), 78q-1(b)(3)(F).

⁷ In Section 11A(a)(3)(A), Congress authorized the creation of advisory committees, which may include individuals representing non-SROs, to provide input on national market system issues. *See* 15 U.S.C. § 78k-1(a)(3)(A). In addition, Section 11A(d) requires the creation of a National Market Advisory Board consisting of “persons associated with brokers and dealers . . . and persons not so associated who are representative of the public.” *Id.* § 78k-1(d)(1). These provisions illustrate that Congress envisioned that non-SROs would have an advisory role in developing and implementing the national market system that is different from the role contemplated for SROs.

⁸ *See* Petitioners’ Brief, *supra* note 5, at 38-39.

that only SROs have the authority to act jointly to file or amend national market system plans, and to thereafter implement or administer an effective plan.⁹ Put simply, neither Section 11A nor Rule 608 authorize individuals representing non-SRO constituencies to have voting rights on the operating committee of the CT Plan.

Second, the CT Plan also violates the Exchange Act because it includes voting provisions mandated by the Commission that require that votes be allocated to so-called “exchange groups” instead of allocating such votes to individual SROs as is the case under the current equity data plans and every other NMS plan. An “exchange group” as defined by the Commission would consist of multiple individual SROs operating under one corporate “umbrella,” and such a group would be allocated a single vote, with the possibility of being allocated a second vote if that exchange group has consolidated equity market share of more than fifteen percent during four of the six calendar months preceding a vote. The concept of “exchange groups,” however, is found nowhere in the Exchange Act, and combining individual SROs into exchange groups is contrary to the Commission’s settled practice of treating individual SROs as separate entities.¹⁰ In addition, the Commission’s mandate that votes be allocated by exchange group would prevent SROs from fulfilling their duty under the Exchange Act to act jointly to implement the proposed CT Plan. This is because that voting structure could result in a situation where actions and plan amendments might be approved by the individuals representing non-SROs and a minority of the SROs, even if those actions or amendments were opposed by a *majority* of the individual SROs.¹¹

⁹ See 17 C.F.R. §§ 242.608(a)(1) and (a)(3)(ii)-(iii).

¹⁰ See Petitioners’ Brief, *supra* note 5, at 48-50 (discussing examples where the Commission has required that SROs operating under the same corporate umbrella maintain their separate identities and has disapproved proposed rules that would apply across affiliated exchanges).

¹¹ See Petitioners’ Brief, *supra* note 5, at 43-47 (“For example, a proposal that is supported by all of the non-SRO voting representatives (a total of five and a half votes), the five unaffiliated SROs,

Third, in the CT Plan Notice, the Commission requests comment as to whether each of the five actions specified in paragraph (c) of the Recitals of the proposed CT Plan should be required to be completed before that Plan becomes operative. Cboe believes that each of the specified actions are absolutely necessary before the CT Plan can become operative and, given the scope of the changes from the existing plans, there is no way of knowing when those actions can be completed. For example, it will take a significant amount of time and resources to identify a new administrator for the proposed CT Plan and transition the administrative services provided by the current administrators to that entity – an effort that would be necessary because the Commission has required that the current, experienced administrators be replaced with a new administrator that is not owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own proprietary data products.¹² Similarly, the Commission’s mandate to create a new consolidated NMS plan instead of amending the current equity data plans would require significant effort to enter into new contracts with market data vendors and subscribers so that public investors can continue to receive market data from the Securities Information Processors (“SIPs”). And, the Commission’s requirement that this new operating committee determine applicable fees and file such fees with the Commission for approval pursuant to Rule 608 of Regulation NMS may similarly require significant efforts, despite the fact that the current equity data plans already have

and the Nasdaq-affiliated exchange group (with two votes for its three exchanges) would have sufficient support to be adopted under the Commission’s voting framework. But assuming that the five SROs affiliated with Intercontinental Exchange, Inc. and the four SROs affiliated with Cboe Global Markets, Inc. each opposed the proposal, the proposal would be supported by only eight out of the seventeen individual SROs.”).

¹² We note that transitioning these administrative services to a new entity may require significant effort to ensure that the transition is seamless for market participants and does not create new, potentially disruptive inefficiencies in the administration of the Plan.

fee structures in place that have gone through the required Commission review.¹³ If the Commission ultimately approves the proposed CT Plan, it is essential that each of the steps listed in paragraph 2(c) of the Recitals each be completed before the operative date of the Plan to ensure that there is no disruption in the distribution of core market data to public investors pursuant to Regulation NMS. Indeed, Cboe is concerned that the Commission's questions about the operative date of the CT Plan indicate that it may be vastly underestimating the amount of work required to implement the Plan, a matter that should have been carefully analyzed before it issued the Governance Order, and that should be considered prior to any approval of the Plan.¹⁴

Fourth, Cboe is concerned that the Commission required that the CT Plan contain the same vague and onerous conflict of interest and confidentiality policies that the Commission mandated be included in the existing equity data plans. Although Cboe has always supported the operating committees' work to improve the governance structure of the equity data plans, which resulted in the filing of the policies that the Commission eventually approved with significant amendments, care must be taken to avoid impairing the SROs' ability to conduct important plan business. Unfortunately, the Commission's amendments to those policies do not meet that standard.

Therefore, Cboe's exchanges, along with several other SROs, have petitioned for review of the Commission's approval orders, which included significant substantive amendments to the

¹³ In our Governance Order Letter, *see supra* note 5, Cboe explained that any changes to the governance of the SIP operating committees should be made through amendments to the current equity data plans, which, among other things, are already subject to fees that have gone through the required regulatory review process. The Commission instead determined to require the filing of a completely new NMS plan, and much of the work that would have to be undertaken before that plan can become operative is a direct consequence of the Commission's choice. We continue to believe that the fees charged under the current equity data plans are appropriate.

¹⁴ The Commission is required to assess the expected costs and benefits of its actions. *See, e.g., Bus. Roundtable v. SEC*, 647 F.3d 1144, 1149 (D.C. Cir. 2011).

policies proposed by the SROs without following the notice and comment rulemaking procedures required by the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*¹⁵ Cboe believes that the conflict of interest and confidentiality policies included in the proposed CT Plan are similarly impermissibly vague. In fact, representatives for the current equity data plans have been engaged in ongoing discussions with Commission staff for six months to establish how the policies applicable to those plans should be interpreted. Those efforts, however, have been particularly fraught as the SROs and the staff attempt to preserve the ability of the operating committees to conduct required business when in many cases the plain language of the policies, as amended by the Commission, arguably inhibit the SROs from doing so. Although we appreciate the efforts of the staff to work with the current operating committees to ensure that needed work continues, this exercise, which requires significant case-by-case determinations by the operating committees and the staff, significantly impedes the ability of the operating committees to conduct their business.

Unfortunately, far from facilitating the work of the operating committees by addressing concerns related to conflicts of interest and confidentiality, the main impact of the Commission's amendments has been to stall progress on a number of projects while the operating committees continue to work with the staff to determine how to comply with the vague and onerous policies imposed by the Commission without inadvertently running afoul of those policies when

¹⁵ The petitions for review filed by Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., The Nasdaq Stock Market LLC, Nasdaq BX, Inc., Nasdaq PHLX LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. from the Commission's orders approving and amending the conflicts of interest and confidentiality policies proposed by the current equity data plans have been consolidated into Case No. 20-1242, pending in the United States Court of Appeals for the D.C. Circuit. The Cboe petitioners reserve their rights to make arguments in the appeal that are not set forth or discussed in detail in this letter, and Cboe's participation in drafting the CT Plan should not be taken as a waiver of Cboe's rights.

conducting plan business.¹⁶ The policies, which are also reflected in the CT Plan, would similarly unnecessarily hamper the ability of the SROs to fulfill their statutory mandate to ensure that the Plan is operated in conformance with the Exchange Act. For example, the policies at issue would largely limit access to certain confidential information to the particular individual who is representing an SRO, and those policies would limit the ability of an individual SRO representative to share information and consult with other employees of the SRO that is the actual plan participant, notwithstanding the fact that the SRO is responsible, as an entity, to ensure that the CT Plan operates in a manner consistent with the Exchange Act and Regulation NMS. In essence, the policies that the Commission required be included in the CT Plan would put the individual representing an SRO on the operating committee on an “informational island,” without the ability to consult with other employees of the SRO to ensure that he or she is acting in accordance with the SRO’s direction and that the CT Plan is complying with the Exchange Act. In addition, the language included by the Commission in its amendments to these policies, and incorporated into the CT Plan, could be read to prohibit the sharing of certain types of confidential information with outside legal counsel, auditors, and other service providers that have a need to access that information. This is simply not what is contemplated by the Exchange Act or Regulation NMS, which together vest the SROs with the important responsibility for governing these NMS plans.

Finally, the fact that the Commission requested that commentators share their views in response to dozens of questions in the CT Plan Notice – without any indication of the

¹⁶ In fact, the operating committees were unable to hold their second quarterly meeting this year due to the confusion created by the amended policies, which were adopted without notice to the SROs. Since then, the operating committees have only been able to have minimal subcommittee meetings, primarily meetings of a technical subcommittee limited to advising the SIPs on purely technical matters, as well as the legal subcommittee to, among other things, determine how to interpret these policies without obstructing the operating committees’ important work.

Commission's own views or any proposed changes – suggests that the Commission might make substantial modifications to the proposed CT Plan in an order purporting to approve the Plan, without providing prior notice of the Commission's specific modifications and affording commenters the opportunity to state their views with respect to those modifications, as required by the Administrative Procedure Act. Cboe urges the Commission not to proceed in such a manner.

* * *

Cboe appreciates the opportunity to comment on the proposed CT Plan and share its concerns regarding the Plan. Although Cboe has been, and continues to be, an advocate for amendments to the existing framework for the dissemination of equity market data to investors, Cboe believes that the proposed CT Plan is both contrary to law and fundamentally flawed in other respects. As a result, Cboe urges the Commission to disapprove the CT Plan.

Sincerely,

/s/ Patrick Sexton

Patrick Sexton
EVP, General Counsel & Corporate Secretary