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January 28, 2016

Equity Market Structure Advisory Committee
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: <u>File No. 265-29 – Comments of Chicago Board Options Exchange Regarding Securities Market Fee Structures as well as the Regulatory Structure of Trading Venues</u>

Dear Committee Members:

Chicago Board Options Exchange, Incorporated ("CBOE") appreciates the opportunity to comment on the important issues under consideration by the Securities and Exchange Commission's ("SEC's" or "Commission's") Equity Market Structure Advisory Committee ("EMSAC" or "Committee"). Prior to the initial EMSAC meeting in May 2015, CBOE submitted a letter[1] to the Committee stressing: (1) the structural differences between the option and equity markets and why we believe the option marketplace is more balanced and structurally sound; (2) that the potential impact on the derivative markets be carefully considered before the Committee recommends structural changes to the equity market; and (3) that the longstanding tenet of customer limit order protection in our national market system be preserved.[2]

In October 2015, the Committee held its second meeting and discussed the access fee component of SEC Rule 610 under Regulation NMS as well as the regulatory structure of trading venues. CBOE understands that the Committee has formed four subcommittees that will convene privately to discuss the following four topic areas: trading venue regulation, retail customer issues (including payment for order flow), potential changes to Regulation NMS, and market quality generally (including high frequency trading and its impact on market quality). CBOE would welcome the opportunity to participate in any of the subcommittee meetings. CBOE's participation would not only provide the Committee with an important perspective that is not currently represented on the Committee, but would also be warranted because CBOE is an entity that is directly affected by many of the proposals/concepts under consideration. Indeed, CBOE believes the Committee should establish an additional subcommittee to consider the effects of the various reforms being discussed by the EMSAC on derivative securities (including options and ETFs).

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[1] *See* Letter dated May 11, 2015 from Edward T. Tilly, CEO, CBOE, to Stephen I. Luparello, Director, Division of Trading and Markets.

[2] The initial EMSAC meeting focused on SEC Rule 611 under Regulation NMS (the Order Protection Rule).

In this letter, we comment on the topics of trading venue regulation and access fee caps/structures, both of which were discussed at the October 27, 2015 EMSAC meeting. As we discuss more fully below, we believe the liability and immunity protections afforded to registered securities exchanges are warranted; and, while CBOE is not a major proponent of the maker-taker fee structure, we believe that access fee *caps* of any sort are inappropriate and unnecessary. CBOE intends to submit additional letters as more information becomes available on future Committee and subcommittee topics. We appreciate the Committee's consideration of our perspective and welcome a dialogue with all of the EMSAC members, the Commission, and the Commission staff.

<u>Regulatory Structure of Trading Venues</u>

At the October 27, 2015 EMSAC meeting, the Committee received an SEC staff presentation and heard from guest panelists on numerous issues related to trading venue regulation, including the following: whether the governance structure of National Market System ("NMS") plans (particularly the stock Securities Information Processor ("SIP") plan) should be revised to include voting representation from member trading firms; whether the disparate regulatory regimes of exchanges and Alternative Trading Systems ("ATSs") is appropriate; whether self-regulatory organization ("SRO") limitations on liability foster risky software implementation decision making; and whether exchange limitations on liability and regulatory immunity are appropriate given the for-profit status of exchanges and the trend to "outsource" regulation to the Financial Industry Regulatory Authority, Inc. ("FINRA").

NMS Plan Representation

NMS plans are plans established and operated by the SROs. Some of these plans are operational in nature while others are surveillance oriented. We question the appropriateness of allowing trading firms voting privileges when it comes to surveillance-type NMS plans. We further question the utility of allowing trading firms voting privileges for any NMS plan.

We understand that trading firm interest in NMS plan participation primarily centers on the equity market SIP plans. Industry participants have expressed frustration with the speed and infrastructure of the SIPs and have intimated that having voting rights on SIP plans would address the perceived "slowness" of the SIPs. However, during the October 27, 2015 EMSAC meeting, panelists expressing concern over the investment in SIP infrastructure also noted that customer demands dictate that firms use the exchanges' data feeds because they are more efficient. Receiving market information from a SIP, which must get the information from exchanges before distributing to users, will always involve one more step than receiving that information directly from the exchanges. No amount of voting power in support of SIP technology enhancements will change that fact. We, therefore, question what would be accomplished by allowing trading firms voting rights in SIP plans they neither own nor operate.

Of course, a larger question for the Committee and Commission to consider is whether many of the functions of existing NMS plans should have been implemented via the NMS plan structure. In many cases, it would seem more transparent and prudent for the SEC to adopt rules on particular matters instead of encouraging the establishment of additional NMS plans (e.g. consolidated audit trail; limit-up, limit-down; and options linkage).

Inconsistent Regulatory Structures of Exchanges and ATSs

As we stated in our first letter to the Committee, we believe that the detrimental aspects of ATSs outweigh any benefits of ATSs. They are trading centers with opaque rules, memberships, and order handling processes. They extract value from the lit trading centers but offer no comparable value in return. We reiterate that the option market and its participant interaction mix are healthier due to the lack of option ATSs.

When it comes to regulatory structure, we believe it is unfair for stock exchanges to be subject to a more stringent regulatory regime than stock ATSs. Exchanges must file proposed rule changes with the Commission, which often take months to be implemented (and can sometimes be disapproved). ATSs, on the other hand, do not make their trading rules publicly known. These rules are not filed with the SEC for approval, and they likely do not meet the rule standards required of exchanges by the Securities Exchange Act of 1934 (the "Exchange Act" or "Act"), including that the rules not be unfairly discriminatory. The Commission's recently proposed amendment to Regulation ATS is a step in the right direction in that it adds transparency to the workings of certain ATSs, but a more level playing field between stock exchanges and stock ATSs is warranted.[3]

SRO Immunity and Limitations on Liability

Some industry commentators have called on the Commission to request that Congress revise the existing self-regulatory system so that exchanges no longer have a regulatory role and will thereby lose the "benefit" of the immunity doctrine. The justifications that those commentators have advanced in support of their proposal do not withstand scrutiny.

These critics of immunity claim that, because exchanges have "outsourced" some of their regulatory responsibilities to the Financial Industry Regulatory Authority, those exchanges no longer act as regulators. That argument ignores the fact that an exchange remains responsible for ensuring that its regulatory duties are discharged, even if the exchange, with the SEC's approval, has entered into a regulatory services agreement with another SRO.[4]

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[3] We note that it is appropriate for the Commission to lead the effort to harmonize regulation between stock exchanges and stock ATSs. So-called "grand bargains" between these competitors seem ill-advised at best.

[4] *See, e.g.*, Order Granting Approval to Proposed Rule Change by the American Stock Exchange LLC to Amend Article II, Section 3 of the Exchange Constitution, Securities Exchange Act Release No. 34-50122 (July 29, 2004) (stating that the Exchange Act requires "ultimate responsibility and primary liability for self-regulatory failures" to rest with the exchange that has contracted with another SRO to provide regulatory services to the exchange); In the Matter of the Application of The International Securities Exchange LLC ("ISE") for Registration as a National Securities Exchange; Findings and Opinion of the Commission, Securities Exchange Act Release (continued)

Moreover, even when an exchange has entered into a regulatory services agreement, the scope of such an agreement generally is limited to a subset of an exchange's regulatory activities (such as conducting market surveillance, conducting member firm examinations or conducting disciplinary proceedings), and the exchange continues to perform other regulatory functions (such as promulgating new rules, amending existing rules, and overseeing the day-to-day operations of its market). Exchanges that have entered into regulatory services agreements also continue to lend their expertise and judgment on regulatory issues, such as how their rules should be interpreted, how regulatory responsibilities will be discharged, and what regulatory priorities should be established. In sum, exchanges retain their regulatory responsibilities and perform regulatory functions even when they have entered into a regulatory services agreement with another SRO, because the regulatory responsibilities of exchanges include much more than rule enforcement and disciplinary proceedings.

Commentators also have claimed that, because exchanges have demutualized, most of their activities have become commercial in nature and they no longer deserve immunity. That argument is a red herring, because it is well-settled that immunity only applies to acts that are *regulatory* in nature. Immunity never has been applied to a situation where an exchange is engaged in unrelated and purely *commercial* activity.[5]

Similarly, commentators have asserted that exchanges face irreconcilable conflicts of interest when performing their regulatory duties, because they are now for-profit entities. Courts have repeatedly recognized that an exchange's for-profit status is irrelevant to the immunity analysis, because immunity turns on whether an SRO is performing a regulatory function as a quasi-governmental authority and not on the for-profit status of an SRO.[6] Additionally, when the self-regulatory model was first adopted (and thereafter), Congress decided in the Exchange Act that the benefits of self-regulation outweighed the risks posed by such potential conflicts of

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No. 34-42455 (Feb. 24, 2000) (disagreeing with commentators who suggested that ISE was "attempting to abdicate its self-regulatory responsibilities by contracting out many of these functions to another SRO" and concluding that, under the Exchange Act, "the ultimate responsibility and primary liability for self-regulatory failures [rests] with the Exchange itself, rather than [on] the SRO retained to perform the disciplinary and enforcement functions"); *see also* CBOE Rule 15.9 (providing that regulatory actions taken by other SROs on CBOE's behalf "shall be deemed to be an action taken [by CBOE]" and that CBOE "shall retain ultimate legal responsibility for, and control of, its self-regulatory responsibilities").

[5] *See Sparta Surgical Corp. v. NASD*, 159 F.3d 1209 (9th Cir. 1998) (recognizing that SROs do not enjoy complete immunity from suits and that "[w]hen conducting private business, they remain subject to liability"); *see, e.g., Weissman v. National Association of Securities Dealers. Inc., 500 F.3d 1293, 1297 and 1299 (11th Cir. 2007)* (advertisements promoting the sale of a particular stock are not regulatory activity entitled to immunity).

[6] *See, e.g., Dexter v. Depository Trust and Clearing Corp.*, 406 F. Supp. 2d 260, 263 (S.D.N.Y. 2005), *aff'd*, 219 F. App'x 91 (2d Cir. 2007) (recognizing that SROs do not "lose their immunity because, in addition to their regulatory functions, they also are profit-making and profit-seeking enterprises" because the "immunity [analysis] is driven by the SRO's *function* as a quasi-governmental authority") (emphasis in original).

interest. Congress addressed those risks by imposing on each exchange an affirmative duty to enforce compliance by their members with the Exchange Act, the Commission's rules, and the exchange's rules, and by giving the Commission robust powers to punish exchanges who fail in that obligation.[7]

Federal appellate courts continuously have held that exchanges should have immunity from private claims arising out of the performance of regulatory functions delegated to them under the Exchange Act.[8] As one court explained, "Congress and the SEC have delegated significant responsibility for regulation of the securities markets to SROs, operating under the supervision of the SEC. . . . Because the SEC would enjoy absolute immunity from suit if it carried out these responsibilities itself, SROs have similar immunity when exercising functions delegated to them by the SEC."[9] That court also recognized that regulatory immunity "is an integral part of the American system of securities regulation."[10] This applies to situations when exchanges are performing enforcement[11] and non-enforcement functions, including functions involving the structure, operation and oversight of the exchange function under the Exchange Act (such as the interpretation of exchange rules), and the listing or delisting of securities.[12]

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[7] *See* 15 U.S.C. § 78s(g)(1)(A) and (h)(1).

[8] *See D'Alessio v. New York Stock Exchange, Inc.*, 258 F.3d 93, 105 (2d Cir. 2001) (exchanges are absolutely immune "from suit for conduct falling within the scope of the SRO's regulatory and general oversight functions"); *DL Capital Group, LLC v. Nasdaq Stock Market, Inc.*, 409 F.3d 93, 97 (2d Cir. 2005) ("There is no question that an SRO and its officers are entitled to absolute immunity when they are, in effect, 'acting under the aegis' of their regulatory duties."); *In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 113 (D.C. Cir. 2008) (exchange immunity applies to claims "based on duties arising under the Exchange Act"); *Austin Mun. Securities, Inc. v. National Ass'n of Securities Dealers, Inc.*, 757 F.2d 676, 692 (5th Cir. 1985) (holding that NASD and its business conduct committee are entitled to immunity for actions taken within the scope of their disciplinary duties); *Partnership Exchange Securities Co. v. National Ass'n of Securities Dealers, Inc.*, 169 F.3d 606, 608 (9th Cir. 1999) (NASD protected by absolute immunity for "action . . . taken under the aegis of the Exchange Act's delegated authority") (internal quotation marks and citation omitted); *Weissman* 500 at 1296 (recognizing that exchanges "are protected by absolute immunity when they perform their statutorily delegated . . . regulatory . . . functions").

[9] *Dexter*, 406 F. Supp. 2d at 263.

[10] *Id.*

[11] *See, e.g.*, *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49, 58 (2d Cir. 1996) (holding that the NYSE "is absolutely immune from damages claims arising out of the performance of its federally-mandated conduct of disciplinary proceedings"); *Partnership Exchange*, 169 F.3d at 608 (NASD entitled to absolute immunity for claims alleging that it improperly initiated and prosecuted disciplinary proceedings against a member firm); *Austin Mun. Securities*, 757 F.2d at 692 (NASD disciplinary panel members entitled to absolute immunity for "actions taken within the outer scope of their disciplinary duties").

[12] *See D'Alessio*, 258 F.3d at 97, 104-06 (rejecting the argument that immunity is limited to conduct related to disciplinary hearings and holding that immunity also barred claims that an (continued)

Further, regulatory immunity is limited in scope because it bars only civil claims brought by private litigants. Exchanges remain subject to pervasive regulation by the Commission. Among other things, the Commission: (1) may bring an enforcement action against an exchange that fails adequately to comply, or enforce compliance by its members, with the requirements of the Exchange Act, Commission rules, or exchange rules[13]; (2) may obtain injunctions if "necessary or appropriate in the public interest or for the protection of investors"[14]; (3) may regulate or prohibit certain securities transactions if appropriate to protect the public interest or to maintain a fair and orderly market[15]; and (4) may take any other action involving exchanges that the Commission deems "necessary or appropriate" to implement its functions under the

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SRO improperly interpreted federal securities laws because that "conduct fall[s] within the scope of the SRO's regulatory and general oversight functions"); *Sparta*, 159 F.3d at 1214-15 (immunity barred claims that an SRO improperly suspended trading and delisted a stock, because the SRO's rules governing the listing and delisting of stocks were issued in conformance with the Exchange Act and those rules invested the SRO with "enormous discretionary authority concerning stock listing and delisting"); *see also Standard Inv. Chartered, Inc. v. NASD*, 637 F.3d 112, 116 (2d Cir. 2011) (per curiam) (immunity barred claims alleging that there were misstatements in a proxy solicitation related to an SRO's amendment of its by-laws, because the amendment was part of the SRO's statutory rule-making authority and was therefore a delegated regulatory function); *In re Series 7*, 548 F.3d at 115 (immunity barred claims related to the scoring of a qualification examination, because the SEC delegated to NASD the responsibility of devising and administering the examination); *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89, 91, 93, 99-101 (2d Cir. 2007) (immunity barred claims alleging "wide-ranging manipulative, self-dealing, deceptive and misleading conduct," because the essence of those claims was that the SRO had "abandoned its regulatory role to maintain a fair and orderly market," and immunity applies to claims that fall within the ambit of an SRO's delegated regulatory power); *DL Capital*, 409 F.3d at 97-98 (immunity barred claims challenging the manner in which an SRO announced regulatory decision to suspend trading and to cancel trades, because the announcement of regulatory decisions is consistent with the regulatory power to inform the public of actions taken in the interest of maintaining a fair and orderly market and to protect investors and the public interest); *Dexter*, 406 F. Supp. 2d at 263 (immunity applied to claims that an SRO improperly set an ex-dividend date, required shares to be accompanied by due bills and authorized trading to continue, because those acts all arose "out of the discharge of the [SRO's] duties under the Exchange Act") (quoting *D'Alessio*, 258 F.3d at 104).

[13] 15 U.S.C. § 78s(h)(1); *see also In re NYSE Specialists,* 503 F.3d at 101 (noting that there is an alternative to private damage suits to redress wrongful conduct in situations when immunity applies because the SEC "retains formidable oversight power to supervise, investigate, and discipline [an exchange] for any possible wrongdoing or regulatory missteps"); *DL Capital*, 409 F.3d at 95 (recognizing that "the SEC has extensive involvement with, and broad oversight of, SROs," including suspending or revoking an SRO's registration if the SRO have violated or is unable to comply with its obligations under federal law or its own rules).

[14] 15 U.S.C. § 78u(d)-(f).

[15] 15 U.S.C. § 78k(a)(2).

Exchange Act.[16] The Commission indeed has exercised these powers against exchanges on several occasions in the recent past.[17]

Courts also have recognized that the regulatory immunity doctrine is critical to achieving several important policy objectives. First, because the exchanges stand in the shoes of the SEC when they regulate their markets and perform tasks that would otherwise fall to the government, fairness dictates that exchanges receive the same immunity that would apply to the government if it performed those tasks.[18] Second, affording immunity to exchanges is necessary because, in the absence of immunity, the exchanges' performance of their quasi-governmental functions would be hampered by the specter of civil litigation.[19] Third, because one of the purposes of the 1975 Amendments to the Exchange Act was to vest more control in the SEC over exchanges by subjecting them to increased SEC oversight, regulatory immunity ensures that the SEC, and not private litigants, defines the regulatory duties of exchanges, instead of subjecting exchanges to potentially competing mandates imposed by different courts and juries throughout the many state and federal systems.[20]

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[16] 15 U.S.C. § 78w(a).

[17] *See, e.g., In the Matter of EDGA Exchange, Inc., et al.*, Securities Exchange Act Release No. 34-74032 (January 12, 2015) (failure to have rules that accurately described how exchange's displayed price sliding process actually functioned); *In the Matter of NASDAQ Stock Market, LLC, et al.*, Securities Exchange Act Release No. 34-69655 (May 29, 2013) (for failure to have adequate systems and for poor decision making in connection with the Facebook initial public offering that lead to securities laws violations); *In the Matter of Chicago Stock Exchange, Inc.*, Securities Exchange Act. Release No. 34-70214 (August 15, 2013) (failure to implement policies and procedures reasonably designed to detect and prevent violations of Regulation NMS and to implement sufficient surveillance procedures to monitor or enforce institutional brokers' compliance with certain exchange rules); *In the Matter of New York Stock Exchange LLC, et al.*, Securities Exchange Act Release No. 34-67857 (Sept. 14, 2012) (failure to distribute market data on terms that were "fair and reasonable" and "not unreasonably discriminatory").

[18] *See, e.g., D'Alessio*, 258 F.3d at 105 (because exchanges stand in the shoes of the SEC in interpreting the securities laws and in monitoring compliance with those laws, "[i]t follows that the [exchanges] should be entitled to the same immunity enjoyed by the SEC when [they are] performing functions delegated to [them] under the SEC's broad oversight functions").

[19] *In re NYSE Specialists*, 503 F.3d at 97 ("the purpose of immunity is to give governmental officials – or those acting with the express delegation of the government, as with SROs – breathing room to exercise their powers without fear that their discretionary decisions may engender endless litigation"); *D'Alessio v. NYSE, Inc.*, 125 F.Supp.2d 656, 658 (S.D.N.Y. 2000) (affording exchanges and exchange employees the same absolute immunity that would be afforded the SEC when carrying out regulatory functions "is not simply a matter of logic but of intense practicality, since, in the absence of such immunity, the Exchange's exercise of its quasi-governmental functions would be unduly hampered by disruptive and recriminatory lawsuits").

[20] *In re Series 7*, 548 F.3d at 114 (recognizing that "the Exchange Act reveals a deliberate and careful design for regulation of the securities industry" that "depends on the SEC's delegation of certain governmental functions to private SROs"); *Sparta*, 159 F.3d at 1214-15 (recognizing that (continued)

Rules Limiting Liability

Some commentators have complained about exchange rules limiting an exchange's liability to its members. Those rules are fair and appropriate, because they serve important goals under the Exchange Act. In particular, those rules ensure that adequate resources remain available to allow exchanges to fulfill their regulatory responsibilities, and that exchanges avoid a scenario where they are impaired in discharging their regulatory responsibilities because of the time and cost of defending claims brought by their members.[21]

Critics also have complained that liability limitation rules are unfair because they claim exchanges and broker-dealers now compete in certain areas, and broker-dealers must negotiate with their customers if they wish to limit their liability. This argument ignores the fact that exchanges are not *permitted* to negotiate liability limitation rules with their members. A broker-dealer is free to impose any liability limitations to which its customer can be induced to agree, because of the broker-dealer's leverage or otherwise. In contrast, the Exchange Act requires that exchange rules "not [be] designed to permit unfair discrimination between customers, issuers,

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the 1975 Amendments to the Exchange Act were intended to vest more control in the SEC over the securities industry and that immunity is necessary to avoid a scenario where states could "define by common law the regulatory duties of a self-regulatory organization, a result which cannot co-exist with the Congressional scheme of delegated regulatory authority under the Exchange Act").

[21] *See, e.g.,* Order Granting Approval to Proposed Rule Change by the Pacific Stock Exchange, Inc., Relating to the Liability of the Exchange and its Governors, Officers and Agents, Securities Exchange Act Release No. 34-37563 (August 14, 1996) (finding that rules limiting the exchange's liability with respect to certain types of claims will reduce the costs of responding to claims and lawsuits "thereby permitting the resources of the Exchange to be better utilized for promoting just and equitable principles of trade and for protecting investors and the public interest" and that rules limiting claims against exchange officials "will help ensure that the covered persons will be able to carry out their duties under the Act, and to enforce compliance with the Act and the rules thereunder, as well as the rules of the Exchange, without the threat of personal liability"); Order Granting Approval to Proposed Rule Change by the Chicago Board Options Exchange, Inc., Relating to the Liability of the Exchange and its Directors, Officers, Employees, and Agents, Precluding Certain Types of Legal Actions by Members Against Such Persons, and Requiring members to Pay the Exchange's Costs of Litigation Under Specified Circumstances, Securities Exchange Act Release No. 34-37421 (July 11, 1996) (finding that, "by limiting the liability of the Exchange and its directors, officers, employees, and agents, by precluding certain types of legal actions by members against such persons individually, and by discouraging frivolous lawsuits against the Exchange, the costs of the Exchange in responding to claims and lawsuits will be reduced, thereby permitting the resources of the Exchange to be better utilized for promoting just and equitable principles of trade and for protecting investors and the public interest" and that rules limiting the personal liability of exchange officials will ensure that those officials can carry out their regulatory duties without the threat of personal liability).

brokers, or dealers."[22] Unlike broker-dealers negotiating with their customers, an exchange therefore is not permitted to use any real or perceived business leverage to negotiate special liability limitations with individual members. Instead, an exchange must enact a uniform rule and obtain Commission approval of that rule. In other words, enacting liability limitations by rule is a competitive restriction on exchanges, not a competitive advantage to them, when compared to the flexibility that broker-dealers enjoy in dealing with their customers.

Lastly, with respect to the comment that was made during the October 2015 EMSAC meeting that exchanges may rush software implementations because liability limitation rules will insulate the exchanges from liability if anything goes wrong, we could not disagree more. CBOE is very deliberate regarding systems changes and we *never* factor liability limitations into our scheduling or decision making. Furthermore, many systems changes are subject to the SEC rule filing process which provides for public comment and Commission approval.

Equity Access Fees

The Committee meeting on October 27, 2015 also focused on the SEC Access Fee Rule and whether the Commission should take action regarding the maker-taker fee structure. The SEC staff presentation discussed various actions the Commission could take to counter some of the consequences of maker-taker.[23] The possible Commission actions included lowering the $0.003/per share access fee cap in SEC Rule 610 under Regulation NMS, banning maker-taker rebates, requiring that rebates be passed through to the customer, incorporating fees into the disseminated quotation, issuing "best-execution" guidance, or doing nothing.

CBOE believes that the Commission should do nothing or, instead, should abolish the equity fee cap and require ATSs to file fee changes for SEC review like exchanges do. As we urged in our June 21, 2010 letter to the Commission regarding a proposed amendment to Rule 610 to include an options fee cap, the imposition of federal price controls is a drastic measure. These controls conflict with the very concept of a market-based system and with Congress's and the Commission's expressed preference for relying on competition to determine prices in our national market system for securities. Moreover, such price controls proved to be unwarranted in the listed options market, and we believe they are unnecessary in the equity market. Competition is healthy between the various equity trading platforms (i.e. *venue* competition) and, more importantly, considerable and meaningful *order* competition exists. Orders are continuously competing to interact with other orders, and this robust competition ensures that pricing for investors is aggressive and beneficial.

Importantly, we note that the Commission is able to suspend any exchange fees that it deems in conflict with the Act. This measure provides ample protection to ensure that exchanges do not implement pricing that is inconsistent with the Order Protection Rule of Regulation NMS

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[22] 15 U.S.C. § 78f(b)(5).

[23] These consequences include added market complexity, an increased number of exchanges (which, in turn, contributes to fragmentation), increased locked markets, and reduced price transparency.

or the Act generally. We suggest that it would be prudent for the Commission to impose a similar fee filing requirement on stock ATSs than to impose broad and arbitrary price controls on the entire equity market.

Conclusion

As discussed above, CBOE believes the protections afforded to registered exchanges are appropriate and consistent with the intentions of Congress. We also believe mandated transaction fee caps of any sort are unnecessary and can adversely affect competition. A process already exists for Commission review of SRO fee changes as well as for public comment on those changes. We appreciate the Committee's efforts and its consideration of our views and we look forward to continuing a dialogue on these important topics. If you have any questions, please contact Joanne Moffic-Silver, General Counsel and Corporate Secretary, at [redacted] or Angelo Evangelou, Deputy General Counsel, at [redacted].

Sincerely,

Edward T. Tilly

cc: Mary Jo White, Chair
Michael S. Piwowar, Commissioner
Kara M. Stein, Commissioner