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August 4, 2023

Submitted electronically

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

Re: Supplemental Information and Reopening of Comment Period for Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange," File No. S7-02-22

Cboe Global Markets, Inc. ("Cboe") submits this comment letter to the Securities and Exchange Commission ("Commission") on the above-referenced release (the "Reopening Release"), in which the Commission proposes amendments to Rule 3b-16 under the Securities Exchange Act of 1934 ("Exchange Act"). The Commission's Press Release on the Reopening Release framed the rationale for the Reopening Release and stated the following:

> The reopening release reiterated the applicability of existing rules to platforms that trade crypto asset securities, including so-called "DeFi" systems, and provides supplemental information and economic analysis for systems that would be included in the new, proposed exchange definition. The reopening release also requested information and public comment on crypto asset securities trading on such systems and certain aspects of the proposed amendments applicable to all securities.[1]

In addition, however, the Reopening Release briefly addressed the issue of whether entities affiliated with national securities exchanges should be regulated as exchanges. This is a topic of considerable significance, and Cboe believes the Commission should address this important issue in a separate, dedicated notice and comment process.

Cboe owns six national securities exchanges (the "Cboe U.S. Exchanges").[2] In 2020, Cboe acquired BIDS Trading, L.P. ("BIDS"), which is a registered broker-dealer and the operator of the

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1 *SEC Reopens Comment Period for Proposed Amendments to Exchange Act Rule 3b-16 and Provides Supplemental Information Reference to Press Release* (April 14, 2023), available at https://www.sec.gov/news/press-release/2023-77.

2 The Cboe U.S. Exchanges are Cboe Exchange, Inc., Cboe C2 Exchange, Inc., Cboe BZX Exchange, Inc., Cboe BYX Exchange, Inc., Cboe EDGA, and Cboe EDGX Exchange, Inc.

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BIDS Alternative Trading System ("ATS"). BIDS operates in the United States under independence policies and procedures designed so that BIDS is not deemed to be a facility of the affiliated Cboe U.S. Exchanges.[3]

When Cboe acquired BIDS, the only published Commission statement on the affiliation of a national securities exchange and an ATS was in the Commission's 1998 release adopting Regulation ATS. In that release, the Commission stated:

> National securities exchanges could . . . form subsidiaries or affiliates that operate alternative trading systems registered as broker-dealers . . . . [A]ny subsidiary or affiliate of a registered exchange could not integrate, or otherwise link the alternative trading system with the exchange, including using the premises or property of such exchange for effecting or reporting a transaction, without being considered a "facility of the exchange."[4]

The Commission's 1998 statement does not provide guidance around what is considered integrated or linked for purposes of determining whether an exchange-affiliated ATS would be considered a facility of the exchange. As a result, Cboe developed the independence structure for its ownership of BIDS through discussions and meetings with the Commission staff over the course of months prior to the acquisition. Cboe's independence structure is governed by a comprehensive set of policies and procedures and enforced through a rigorous set of controls. Yet, Cboe has only received informal comfort from the Commission staff on its independence structure, and there is no mechanism to pursue needed amendments to those policies and procedures.

After Cboe acquired BIDS, a significant development came on January 21, 2022, when the U.S. Court of Appeals for the District of Columbia Circuit ruled on the application of the facility definition to an affiliated entity of an exchange. In *Intercontinental Exchange, Inc. v. Securities and Exchange Commission*, the Court used a two part test to determine whether the services of an exchange-affiliated entity should be considered a facility of the exchange.

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3 Under Section 3(a)(2) of the Exchange Act:

> The term "facility" when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.

4 *Regulation of Exchanges and Alternative Trading Systems*, Exchange Act Release No. 40760 (Dec. 8, 1998)

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In the first step, the Court analyzed whether the services in question were "facilities" under the statutory definition. The Court specifically considered whether services constituted 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 or reporting transactions on the exchange." In addition, however, the Court stated that, "[o]ur analysis does not end with holding the [services] come within the definition of 'facility' in Section 3(a)(2) [of the Exchange Act]." The Court stated that, in addition to satisfying the statutory definition of "facility," the services "must also be the type of facility that Section 3(a)(1) [of the Exchange Act] includes in the term 'exchange.'" In the second step of its analysis, the Court concluded that the services in question should be considered an exchange facility because the affiliate and the exchange form a "group of persons" that together "maintains or provides a market place or facilities."

In the Reopening Release, the Commission provides its own interpretation of the term "group of persons" in connection with exchange affiliates, stating in footnote 66 that:

> In determining whether affiliated persons would be a "group of persons" for the purposes of section 3(a)(1) of the Exchange Act and Rule 3b-16 thereunder, an important factor is whether the operations and management of the affiliated persons are separate. For example, an affiliated entity of an exchange might not be considered a group of persons with that exchange if there is independent governance, management, and oversight between affiliated entities; prevention of strategic coordination or information sharing between the affiliated entities by way of information barriers and other procedures; separation of functions relating to technology, operations and infrastructure, sales and marketing, branding, and staffing; and avoidance of business links, such as routing, fees, billing, and membership.

Cboe fully supports the Commission attempting to add some clarity to determinations around affiliated persons of exchanges under the "group of persons" test established by the D.C. Circuit. Indeed, the establishment of standards, not only for exchange-affiliated ATSs but also for other types of businesses that could become subject to exchange regulation simply by virtue of being affiliated with an exchange, is critical. In our view, however, the Commission should have provided a legal analysis demonstrating how the factors listed in Footnote 66 reasonably fall within the D.C. Circuit's "group of persons" test. Cboe believes this critical issue should be addressed through Commission action involving a dedicated notice and comment process, not in a conclusory fashion in a footnote of a release addressing other issues.

In the meantime, the absence of sensible and properly articulated standards hinders the ability of exchange operators in the U.S. to bring competition to U.S.-based services outside of the

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traditional exchange sphere.[5] The Commission's current approach on this issue reduces competition and deters innovation by subjecting businesses to exchange regulation for no reason other than the business being affiliated with an exchange.[6] The question of whether an exchange affiliate is a "facility" of an exchange or part of a "group of persons" with an exchange is critical in its own right, apart from the Commission's consideration of crypto asset securities and DeFi systems. We urge the Commission to engage in separate notice and comment rulemaking to address this critical market issue.

Sincerely,

s/Patrick Sexton

Patrick Sexton
EVP, General Counsel and Corporate Secretary

CC: The Honorable Gary Gensler, Chairman, SEC
The Honorable Caroline A. Crenshaw, Commissioner, SEC
The Honorable Hester M. Peirce, Commissioner, SEC
The Honorable Jaime Lizárraga, Commissioner, SEC
The Honorable Mark T. Uyeda, Commissioner, SEC
Director Haoxiang Zhu, Division of Trading and Markets

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5 We note that no comparable restrictions exist in other countries where Cboe operates markets.

6 *See Statement on Order Approving a Wireless Fee Schedule Setting Forth Available Wireless Bandwidth Connections and Wireless Market Data Connections* (Oct. 16, 2020), available at https://www.sec.gov/news/public-statement/peirce-statement-wireless-fee-schedule.