

June 13, 2023

Via electronic submission to rule-comment@sec.gov

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

Re: File No. S7-07-23; Securities Exchange Act Release No. 34-97143 (“Regulation Systems Compliance and Integrity”)

Dear Ms. Countryman,

Cboe Exchange, Inc. (“CBOE”), Cboe C2 Exchange, Inc. (“C2”), Cboe BZX Exchange, Inc. (“BZX”), Cboe BYX Exchange, Inc. (“BYX”), Cboe EDGA Exchange, Inc. (“EDGA”), and Cboe EDGX Exchange, Inc. (“EDGX”, or collectively, the “Exchange”), appreciate the opportunity to provide comments on the Securities and Exchange Commission’s (the “SEC” or “Commission”) recent Regulation Systems Compliance and Integrity proposal (the “Proposal”).¹ Cboe Global Markets operates six national securities exchanges in the United States, representing a sizeable portion of the total average daily volume in the U.S. equities and options markets. The Exchange has been subject to the current iteration of Regulation Systems Compliance and Integrity (“Regulation SCI”) since its inception in 2014.² Based on its status as an SCI entity, the Exchange is in a strong position to provide feedback to the Commission on the Proposal.

The Exchange submits this comment letter to address concerns with three aspects of the Proposal. First, the Exchange does not support applying the proposed third-party provider management program to providers that provide indirect support to SCI systems. Second, the Exchange does not believe that it is necessary to amend the definition of systems intrusion to capture non-material cybersecurity events or a “significant attempted unauthorized entry” into SCI systems. And finally, the Exchange is concerned with the overlap of certain items within the Proposal with the Commission’s Cybersecurity Risk Management Rule for Broker-Dealers, Clearing Agencies, Major Security-Based Swap Participants, the Municipal Securities Rulemaking Board, National Securities Associations, Security-Based Swap Data Repositories, Security-Based Swap Dealers, and Transfer Agents (the “Cybersecurity Proposal”).³

While the Exchange supports amending Regulation SCI to account for technological changes and advancements since Regulation SCI’s inception where necessary, the Exchange believes that the Proposal must be limited in application to those SCI entities and third-party providers who operate SCI systems on behalf of an SCI entity while simultaneously tailored to address only those events that cause a material impact to SCI systems. The Exchange also is concerned that this rulemaking will result in unclear regulatory

¹ See Securities Exchange Act Release No. 97143 (March 15, 2023) (“Regulation Systems Compliance and Integrity”).

² See 17 CFR 242.1000 – 1007. See also Securities Exchange Act Release No. 73639 (November 19, 2014) (“Regulation Systems Compliance and Integrity”) (the “Adopting Release”).

³ See Securities Exchange Act Release No. 97142 (March 15, 2023).

responsibilities for SCI entities to adhere to, the scope of which will not become apparent until the Commission issues additional guidance or enforces its rules through examination.

Third-Party Provider Management

As proposed, Rule 1001(a)(2)(ix) (the “Management Program”) would expand the scope of third-parties subject to the Exchange’s oversight to include third parties that “provide functionality, support or service, *directly or indirectly* (emphasis added), for its SCI systems....” This language is a significant expansion of Regulation SCI, which currently applies to third-party providers who operate systems on behalf of an SCI entity.⁴ The Exchange requests that the final rule be revised to exclude the term “indirectly”. As currently drafted, the Management Program’s scope would significantly increase to include third-party providers who provide support that is only tangentially related to the relevant SCI system. This, in turn, would significantly expand the scope of providers that the SCI entity is required to include under the proposed Management Program. Such a significant scope expansion will create undue burdens on SCI entities while providing a minimal, at most, benefit to the SEC.

The Commission has previously indicated that the systems of certain vendors providing indirect support to SCI systems do not qualify as SCI systems and therefore are not subject to Regulation SCI. The Commission makes clear in its “Responses to Frequently Asked Questions Concerning Regulation SCI” (the “FAQs”) that there are certain systems provided by third parties, such as utility providers, that indirectly support the computer, network, electronic, technical, automated, or similar systems of, or operated on behalf of, an SCI entity.⁵ These utilities, according to the Commission, are systems that support the functions of an SCI system as they provide products or services that are necessary for the SCI systems to operate, but are not systems that perform the core functions of an SCI system.⁶ The Commission even goes so far in its FAQs as to describe the systems of utility providers as systems that “indirectly support” SCI systems.⁷

To ensure consistency of application, the Exchange recommends that the Commission remove from coverage of the Management Program third parties that indirectly support SCI systems and whose systems do not rise to the level of an SCI system required to comply with the requirements of Regulation SCI.

Additionally, the Exchange requests that the final rule be revised to grant SCI entities more flexibility in creating a management program that is capable of assisting the SCI entity in determining whether the SCI entity can manage the third-party relationship to satisfy the requirements of Regulation SCI. The Exchange believes the proposed Management Program is too prescriptive in the manner in which it instructs SCI entities to manage its third-party provider relationships, specifically in requiring periodic review of contracts and conducting risk-based assessments with certain required elements. The Exchange believes that a more pragmatic approach wherein SCI entities create a third-party provider management

⁴ See 17 CFR 242.1000 (“Critical SCI systems”, “Indirect SCI systems”, and “SCI systems”); See also Adopting Release at page 93.

⁵ See “Responses to Frequently Asked Questions Concerning Regulation SCI,” Question 2.05 (available at <https://www.sec.gov/divisions/marketreg/regulation-sci-faq.shtml>).

⁶ Id.

⁷ Id.

program where the SCI entity retains flexibility in how to best satisfy certain elements, would be more appropriate than the Management Program set forth in the Proposal.

The Definition of Systems Intrusions Should Not be Amended

The Commission has proposed a change to the definition of systems intrusion under Rule 1000 of Regulation SCI⁸ to include two additional prongs. The Exchange offers its views on both prongs below.

The new second prong is intended to capture “any cybersecurity event that disrupts, or significantly degrades, the normal operation of an SCI system.”⁹ The Exchange respectfully submits that this new second prong is duplicative because Regulation SCI already addresses systems disruptions as “an event in an SCI entity’s SCI systems that disrupts, or significantly degrades, the normal operation of an SCI system.”¹⁰ The Commission acknowledges within its proposal that it is utilizing language similar to that used in the definition of systems disruption and would require SCI entities to mark the SCI event as both a systems intrusion and a systems disruption.¹¹ The Exchange does not believe there is a benefit either for the Commission or SCI Entities in requiring duplicate notification of cybersecurity events as both systems intrusions and systems disruptions.

The proposed third prong seeks to introduce an action that is already covered by Regulation SCI’s definition of systems disruption. The proposed third prong would include “any significant attempted unauthorized entry into the SCI systems or indirect systems of an SCI entity...”¹² The Exchange believes that the term “significant attempted unauthorized entry” should be removed from the final rule, as it does not align with the concept of materiality that is widely used throughout the federal securities laws.¹³ The Exchange does not consider events that do not disrupt or significantly degrade the normal operation of an SCI system to be material, and therefore under the proposed third prong the Exchange does not believe any events would qualify as a systems intrusion that would not already be captured by the existing definition of systems disruption.¹⁴ Furthermore, an attempted entry means that no entry into SCI systems occurred and thus no systems intrusion has occurred. Expanding the definition of systems intrusion to include significant attempted unauthorized entries would result in overly burdensome reporting for SCI entities for events that ultimately did not disrupt, or significantly degrade, the normal operation of SCI systems.

⁸ See 17 CFR 242.1000 (“Systems intrusion”).

⁹ Supra note 1 at page 133.

¹⁰ See 17 CFR 242.1000 (“Systems disruption”).

¹¹ Supra note 1 at footnote 332.

¹² Id. at page 134.

¹³ See e.g., 17 CFR 230.405 and 17 CFR 240.12b-2, which generally define materiality as information to which there is a substantial likelihood that a reasonable investor would attach importance in its investment decision. See also, Securities Exchange Act Release No. 89670 (August 26, 2020) (“Modernization of Regulation S-K Items 101, 103, and 105”), adopting a proposal to “change the standard for disclosure from the ‘most significant’ risks to ‘material’ risks to focus registrants on disclosing the risks to which reasonable investors would attach importance in making investment or voting decisions.”

¹⁴ Supra note 10.

Should the Commission decide to retain the “significant attempted unauthorized entry” definition, the Exchange recommends retention and application of the de minimis reporting exception. The exclusion of de minimis systems intrusion events is intended to result in a less burdensome reporting framework for SCI entities as compared to more significant SCI events.¹⁵ Without the de minimis reporting exception, SCI entities will spend additional hours devoting their attention to systems intrusions with little to no impact and take away focus from other, more material events that should demand additional resources. While the Exchange recognizes the potential for systems intrusions that occur wherein the full impact is not immediately known, the Exchange believes that the existing de minimis reporting exception still affords the Commission ample notice that a potential intrusion has occurred and more information may be forthcoming.

Overlap with Proposed Rule 10

The Exchange has identified overlap between this Proposal and the Cybersecurity Proposal that is included within Proposed Rule 10, particularly for SCI entities that are also Covered Entities under the Cybersecurity Proposal.¹⁶ Most notably, the Commission attempts to revise Regulation SCI in order to provide additional cybersecurity protections while simultaneously introducing the Cybersecurity Proposal which seeks to accomplish many of the same goals on a larger scale.¹⁷ Duplication across the two final rules should be avoided as much as possible in order to ensure consistency of application of both rules and enable SCI entities that are also Covered Entities to have a greater ability to know their obligations under each rule. The final rule should contain only the proposed updates to Regulation SCI that are outside the scope of the Cybersecurity Proposal and which require updates to the Exchange’s Regulation SCI policies and procedures.¹⁸

The Exchange also notes that there are duplicative reporting requirements to the SEC that would be required on Form SCI and proposed Form SCIR. Duplicate reporting creates an unnecessary burden for multiple parties – SCI entities, covered entities, and the Commission.

The Exchange appreciates the Commission noting that Form SCI would capture different information than Form SCIR given that Form SCI is specifically designed for SCI entities, but the Exchange believes there are more efficient ways to capture the desired information rather than requiring two separate reports to be completed. Specifically, if the SCI entity is also a covered entity, it would be appropriate to have a checkbox on Form SCIR indicating as such, therefore alerting the Commission to the covered entity’s dual status and indicating that only one report would be forthcoming, essentially providing an exception to needing to submit Form SCI given that the SCI entity is also a covered entity. If the SCI entity is also a covered entity and selects this option on Form SCIR, Form SCIR should be dynamic enough to ask the relevant questions about any SCI systems that may have been impacted as part of the cybersecurity incident. Even if the Commission views the cybersecurity incident in question as a systems intrusion or systems disruption to an SCI system, if the Cybersecurity Proposal requires reporting on Form SCIR then that particular form should be developed in a manner in which all relevant information about a systems intrusion or systems disruption can be provided in a single filing rather than multiple filings involving multiple parties at the SCI entity level.

¹⁵ Adopting Release at page 261.

¹⁶ See Cboe Global Markets, Inc. Comments on Proposed Rule 10 (June 5, 2023), available at <https://www.sec.gov/comments/s7-06-23/s70623-199719-399842.pdf>

¹⁷ Supra note 1 at page 160.

¹⁸ Id. at page 164.

Conclusion

The Exchange appreciates the opportunity to provide comments on the Proposal. While cybersecurity is an important topic in today's regulatory environment, the Exchange believes that any changes to Regulation SCI must be targeted to address only those events that cause a material impact to SCI systems and should be limited in application to those SCI entities and third-party providers who operate SCI systems on behalf of an SCI entity. As stated previously, the Exchange is concerned that this rulemaking is another attempt by the Commission to provide vague regulatory responsibilities for SCI entities to comply, the scope of which will not become clear until the Commission issues additional guidance or enforces its rules through examination. At a minimum, the Commission should put forth regulations that are easily interpreted and provide clear and consistent guidance to SCI entities.

Sincerely,

/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