February 28, 2020

Via Electronic Submission

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

Re: Release No. 34-87906; File No. 4-757

Dear Ms. Countryman:

Cboe Global Markets, Inc. ("Cboe") appreciates the opportunity to comment on the Commission's proposed order related to the governance structure of the national market system plans ("Plans") responsible for the dissemination of U.S. equity market data through the consolidated tape ("Proposed Order").[1] The Proposed Order calls for the filing of a "New Consolidated Data Plan" that would replace the current Consolidated Tape Association Plan ("CTA Plan"), Consolidated Quotation Plan ("CQ Plan"), and Nasdaq UTP Plan ("UTP Plan"), and would include a number of proposed changes to the governance structure of the operating committees for those Plans. The Commission's focus on Plan governance is a good one, and one that is certainly shared by Cboe and our colleagues on the operating committees. Indeed, as highlighted in the recent annual letter to the industry from the operating committees' chair, Robert

[1] See Securities Exchange Act Release No. 87906 (January 8, 2020), 85 FR 2164 (January 14, 2020) (File No. 4-757). The Commission also recently published a proposed rule related to market data infrastructure. See Securities Exchange Act Release No. 88216 (February 14, 2020) (pending publication in the federal register) (File No: S7-03-20) ("Proposed Regulation NMS Amendment"). Cboe will also provide detailed comments on our recommendations for SIP enhancement in a comment letter responding to the Proposed Regulation NMS Amendment.

Books, the operating committees have also devoted their efforts to improving Plan governance over the last year.[2] This focus has resulted in a number of meaningful governance policies being adopted or filed with the Commission, including policies related to the use of executive sessions, conflicts of interest, and confidentiality. The Commission recently published Plan amendments related to two of those items along with its Proposed Order,[3] which addresses both of these topics, and a number of other governance provisions that the Commission preliminarily believes would aid in the management of the securities information processors ("SIPs") that provide market data to the public. Cboe continues to be an advocate for enhancements both to the governance structure of the Plans and to the content and delivery of market data through the consolidated tape, such as the inclusion of odd lot quotation information, as recently issued for comment by the operating committees, and the implementation of distributed SIPs to reduce geographic latency.[4]

I. Cboe's Vision for SIP Enhancement

In addition to addressing Plan governance, the Proposed Order highlights certain ideas for SIP enhancement that have been the subject of much discussion in both the industry and the operating committees, and which the Commission believes may be facilitated through its proposed governance changes. Before discussing Plan governance, Cboe believes that it is important to understand our vision for SIP enhancement. As discussed in our recent publication, *Cboe's Vision on Equity Market Structure Reform*,[5] we support a range of thoughtful changes to U.S. equity market structure that are designed to improve the markets for investors and are consistent with the important guiding principle of "do no harm."[6] Given the significance of the consolidated tape as the central public source for U.S. equity market data, several of those recommendations relate to

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2 See Annual Letter from the SIP Chairman, Robert Books, dated January 6, 2020 *available at* https://www.ctaplan.com/publicdocs/2020_Annual_Letter.pdf ("SIP Annual Letter").

3 See Securities Exchange Act Release Nos. 87908 9 (January 8, 2020), 85 FR 2202 (January 14, 2020) (S7-24-89); 87907 (January 8, 2020), 85 FR 2193 (January 14, 2020) (SR-CTA/CQ-2019-01); 87910 (January 8, 2020), 85 FR 2212 (January 14, 2020) (S7-24-89); 87909 (January 8, 2020), 85 FR 2207 (January 14, 2020) (SR-CTA/CQ-2019-04).

4 See Cboe's Vision, Equity Market Structure Reform (January 2020) *available at* https://www.cboe.com/aboutcboe/government-relations/pdf/cboes-vision-equity-market-structure-reform-2020.pdf .

5 Id.

6 Id.

the SIPs, and we look forward to working with the operating committees and the Commission to make those recommendations a reality. Getting Plan governance right is important, and Cboe applauds the efforts of both the operating committees and the Commission to improve on the governance structure of the Plans. At the same time, Cboe believes that functional improvements to the SIPs should remain in focus as these are the changes that ultimately make a difference for the millions of investors that rely on the consolidated tape to inform their trading.

As a starting point, Cboe recommends that two significant functional changes be made to the SIPs to ensure that the consolidated tape continues to serve the evolving needs of investors. First, Cboe believes that odd lot quotations should be made available on the SIPs so that investors that rely on the consolidated tape have access to this increasingly valuable information. Odd lot usage has risen significantly in recent years, in part due to a general increase in stock prices and a reduction in declared stock splits, and including odd lot quotation information on the consolidated tape would ensure that investors have access to the best prices available in the market.[7] This change would be particularly valuable for retail investors, whose orders are often executed with price improvement, and in high-priced securities where trading frequently takes place within the protected national best bid and offer. Second, Cboe believes that instances of the current SIPs should be introduced in geographically dispersed locations to reduce geographic latency and increase the value proposition of the SIP to broker-dealers and institutional investors for whom speed may be a relevant factor.[8] Although the SIPs have made significant strides in terms of reducing processor latency, geographic latency remains an impediment to further speed improvements, and should be addressed alongside enhancements to the content made available on the SIPs. Introduction of "distributed SIPs" in geographically dispersed locations would reduce this geographic latency, and add additional resiliency to the national market system. Cboe looks

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7 Cboe has also recommended changes to round lot sizes to ensure that orders in high-priced securities are displayed to retail and other investors, and facilitate the extension of order protection to a more meaningful percentage of orders in such securities.

8 Cboe's distributed SIP recommendation would involve the implementation of the current robust and resilient SIPs in geographically dispersed locations but not the introduction of potential new SIP operators, as would be the case under the "competing SIP" model discussed in the Commission's recent proposal on market data infrastructure.

forward to working with the operating committees and the Commission to bring these changes to the market so that investors can reap the benefits of a stronger SIP.

II. Proposed Governance Changes

As the Commission explains in its Proposed Order, its proposed governance changes are intended to facilitate functional improvements to the SIPs, similar to those that Cboe has recommended. Although Cboe believes that our primary focus as an industry should continue to be improving the content and delivery of U.S. equity market data through the SIPs, governance enhancements that benefit long-term investors are welcome. The views expressed in the section that follows reflect constructive changes that Cboe believes the Commission should make to its Proposed Order in order to support these enhancements to Plan governance as the operating committees work towards thoughtful changes to the SIPs that benefit the markets and investors.

Executive Session, Confidentiality, and Conflicts of Interest Policies

The Proposed Order touches on a handful of policies that have been either recently adopted by the operating committees, or are the subject of recent Plan amendments filed by the operating committees in 2019. Two of those filings, specifically the filings related to confidentiality and conflicts of interest policies, were published for comment alongside the Proposed Order so that the Commission could consider feedback on those Plan amendments contemporaneously with its Proposed Order. As an initial matter, Cboe is pleased that these Plan amendments have finally been published for comment so that the industry has an opportunity to weigh in on these matters.[9] The proposals are the product of significant time and energy spent by the operating committees, and in particular, the governance subcommittee, and Cboe believes that these policies would constitute meaningful improvements in Plan governance both on their own, and in conjunction with further enhancements suggested by the Commission in its Proposed Order.

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[9] There is currently no requirement in Rule 608 of Regulation NMS for the Commission to promptly publish Plan amendments. See Letter from Howard Kramer et al. to Vanessa Countryman, Secretary, Commission dated December 9, 2019, *available at* https://www.sec.gov/comments/s7-15-19/s71519-6520115-200368.pdf. Although the operating committees filed the Plan amendments related to conflicts of interest and confidentiality in July 2019 and November 2019, respectively, the Commission withheld the publication of those Plan amendments and released them alongside the Proposed Order.

First, with respect to the executive session policy, Cboe notes that consistent with this policy, which has been in place since November 2018, the operating committees currently use executive sessions sparingly. Today, almost all significant operating committee discussion takes place in general session with both members of the advisory committee and Commission staff present. In addition, if the Commission approves the proposed confidentiality policy, additional items that require confidential treatment could be shared with the advisors in general session. Indeed, the operating committees have already voted to share certain financial information with the advisors pending the Commission's approval of that policy. With the proposed changes to the voting structure of the operating committees in the Proposed Order, Cboe expects that additional items may be appropriate for general session, where they could be discussed openly with any non-SRO members. The SIPs generally benefit when decisions are informed by industry input, and we look forward to including non-SRO members in all relevant operating committee discussions.

Second, with respect to the confidentiality policy, Cboe believes that the policy filed by the operating committees in November 2019, and recently published by the Commission, would meaningfully improve the handling of confidential information. Broadly, the proposed confidentiality policy would establish clear procedures for the treatment of confidential information, including "restricted information," "highly confidential information," and "confidential information." This confidentiality policy is designed both to protect confidential information from misuse, and to facilitate the sharing of confidential information with the advisory committee in an effort to obtain greater industry input on Plan matters. The Proposed Order contemplates an increased role of non-SRO members, who would presumably be privy to additional confidential information to inform their voting, and changes may therefore be needed both to reflect this role and to further safeguard any sensitive information that is shared. Cboe supports both the proposed confidentiality policy and such amendments to that policy that may be needed to facilitate increased advisor involvement in the operation of the Plans.

Finally, with respect to conflicts of interest, Cboe understands that the Commission is interested in the Plans adopting a comprehensive conflicts of interest policy. Cboe is supportive of the proposed disclosure-based conflicts of interest policy, which the Plans have already implemented on a voluntary basis pending the Commission's approval of a mandatory policy. Cboe also understands the desire for a more comprehensive policy. Indeed, such a policy may

become even more important if the Commission determines to grant voting authority to non-SRO members. We have included some initial thoughts on how to address the conflicts of interest of non-SRO members through meaningful Commission oversight in the following section of this letter. Cboe strongly believes that those structural changes would be necessary in any Plan that allows non-SRO members to join the SROs in voting on matters before the operating committees. At the same time, there may be other changes related to managing conflicts of both SRO and non-SRO members of the operating committees that are worth considering as part of a comprehensive conflicts of interest policy, and we welcome continued dialogue about how to best achieve this result. For example, it has been suggested that a comprehensive policy would address the potential for recusal of specific individuals from operating committee discussion or voting on matters that implicate material conflicts beyond those inherent in the structure developed for the management of the Plans under Regulation NMS. Determining how best to manage recusal of SRO or non-SRO members is a difficult question given the proposed composition of the operating committees, and the need to ensure that representatives have the necessary expertise, but ultimately Cboe believes that some progress could be made on this front.

Voting and Commission Oversight of Non-SRO Members

Cboe has always been supportive of increased involvement of the advisory committee in Plan matters, including giving advisory committee members a voice in decisions of the operating committee.[10] The operating committees perform a crucial function in managing the operation of the consolidated tape, and the committees' decision-making is most effective when it considers input from a diverse set of knowledgeable stakeholders. This is what ultimately informed the Commission's decision in Regulation NMS to create the current advisory committee,[11] and this goal has animated recent efforts of Plan participants to increase the involvement of the advisory committee. Although the operating committees' efforts to date have focused largely on increasing industry involvement within the framework that the Commission outlined in Regulation NMS,[12]

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10 BATS Exchange, Inc. (currently Cboe BZX Exchange, Inc.) was the first SRO to use its authority under the Plans to appoint an SRO-selected member to the advisory committee in July 2015.

11 See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495 (June 29, 2005) (S7-10-04) ("Regulation NMS Adopting Release").

12 Id.

there is certainly room for additional improvements to that structure. Cboe is therefore prepared to work with the Commission towards a structure that facilitates direct involvement of the advisory committee through apportioning operating committee votes to non-SRO members.[13]

That said, given the important function performed by the operating committees, it is crucial that the Commission take steps to ensure that it can exercise appropriate oversight over any non-SRO members. As proposed, the non-SRO members would be given a full seat at the table along with the SRO members that Congress and the Commission have entrusted to manage the planning, development, and operation of the consolidated tape.[14] Yet the Proposed Order does not contemplate placing regulatory obligations or responsibilities on those non-SRO members similar to those imposed on the SRO members, nor does it provide a mechanism for subjecting those non-SRO members to direct Commission oversight. These are significant omissions. It is imperative that the Commission retain its ability to exercise its oversight responsibilities with respect to *both* SRO members and non-SRO members.

Nevertheless, there is a simple solution to this problem that would give a greater voice to the industry while ensuring that such non-SRO members are subject to appropriate oversight. Namely, the Commission should amend its proposal to limit non-SRO members to Commission-regulated entities that would be subject to the same obligations and responsibilities as SRO members. For example, rather than providing a vote to an *employee* of a broker-dealer with a predominantly retail investor customer base, acting in an individual capacity as the members of the advisory committee do today, the non-SRO member should be the broker-dealer itself, and its participation in the Plans would therefore come under direct Commission oversight. Although this

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13 Other commenters have questioned the Commission's authority under Section 11A of the Exchange Act to require the SROs to act jointly with non-SROs in the planning, development, operation, or regulation a national market system. See Letter from Elizabeth King, General Counsel and Corporate Secretary, NYSE to Vanessa Countryman, Secretary, Commission dated February 5, 2020, *available at* https://www.sec.gov/comments/4-757/4757-6779249-208168.pdf. 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.

14 See 15 U.S.C. § 78k-1; 17 CFR § 242.608.

approach may limit the categories from which advisors may be selected,[15] Cboe believes that maintaining proper oversight over the non-SRO members is essential given their expanded role.

Several commenters in the market data debate expressed concern not just with structural conflicts (*e.g.*, the SROs being responsible for the consolidated tape), but also specifically with conflicts of interest of individual representatives that vote on the operating committees. In fact, the members of the advisory committee themselves highlighted the potential conflicts of interest of individual voting representatives in their recent comment letters on the proposed confidentiality and conflicts of interest policies. For example, in their response to the proposed conflicts of interest policy, the advisors recommended that "*[i]ndividuals* participating in the activities of the committee should be required to do so in the furtherance of goals of the plan."[16] (Emphasis added) In addition, they recommended that mitigation steps include the potential recusal of an individual with a conflict during discussions or votes that implicate that conflict. Cboe believes that the same concerns would be applicable – and indeed magnified – in the case of voting non-SRO members.

Although much has been made about perceived conflicts of an SRO's representatives on the operating committees, there are important structural factors that mitigate such conflicts. First, the Participant is the SRO and not the individual representatives that participate in operating committee discussions. An SRO's vote on the operating committee therefore reflects not merely the judgment of the individual voting representative but a broader consensus of the SRO. As a result, in addition to much needed business and operational expertise, all SROs are represented by counsel tasked, among other things, with advising on the SRO's regulatory obligations and its compliance with those obligations. Second, failure by the SRO to act in accordance with its regulatory obligations could subject that SRO to regulatory action by the Commission. In turn, this further ensures that SROs take their regulatory obligations seriously, and limits the ability for an SRO to act purely in conflicted self-interest. Requiring that any non-SRO members of the

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15 Certain categories of non-SRO members, as formulated in the Proposed Order, may not represent Commission regulated entities – *i.e.*, the category for a "securities market data vendor" and a "retail investor." Given the limited means for the Commission to ensure its oversight, these categories would not be eligible to become non-SRO members. The Commission can and should, however, require that retail brokers represent the interests of their retail investor clients.

16 See Letter from CTA/UTP Advisory Committee to Vanessa Countryman, Secretary, Commission dated January 24, 2020 *available at* https://www.sec.gov/comments/sr-ctacq-2019-01/srctacq201901-6694051-205990.pdf .

operating committee also be regulated entities, rather than employees acting in an individual capacity, would reduce individual conflicts of interest by treating non-SRO members in a manner similar to how SRO members are treated today. Further, it would ensure that the Commission is able to adequately perform its oversight function, consistent with its own obligations pursuant to Section 11A of Exchange Act.

Cboe therefore urges the Commission to make this change before issuing any final order that grants voting authority on the Plans' operating committees to non-SRO members. This would preserve the ability for more active participation by advisors, including an advisor vote, while ensuring that appropriate safeguards are put in place. Given the Commission's interest in managing conflicts of interest, which may be even more significant when dealing with representatives that are not bound by any regulatory obligations, Cboe believes that this common sense solution would aid the Commission's stated goals and facilitate its ability to continue to exercise its oversight of the operating committees, including voting non-SRO members.

Changes to Exchange Voting Authority

The Proposed Order contemplates that the SROs as a group would have two-thirds of the overall voting authority of the Plans, with the remaining one-third allocated to non-SRO members. Although Cboe generally supports the introduction of voting non-SRO members so that a range of stakeholders have a voice in operating committee decisions, it is important that the SROs that are responsible for the operation of the Plans under Regulation NMS and Section 11A of the Exchange Act are ultimately empowered to act in furtherance of their regulatory obligations. Allowing non-SRO members to vote on Plan matters, while retaining significant voting authority for the SROs that the Commission and Congress have charged with the planning, development, and operation of the consolidated tape, is the best way to achieve this result. The Commission should therefore modify this proposed distribution of votes between SRO and non-SRO members in any final order so that the SROs would retain voting authority that is consistent with their overall responsibility.

The Proposed Order would also eliminate voting by individual SRO. Instead, it would give each exchange group or unaffiliated SRO a single vote, with one additional vote provided to an exchange group or unaffiliated SRO that executes more than 15% consolidated equity market share over at least four of the six calendar months preceding the vote. As an initial matter, Cboe believes

that the current voting structure works well and is consistent both with the way voting is conducted in every other national market system plan, and with the Commission's consistent holding in other matters that each exchange must be treated as an individual SRO.[17] This view, *i.e.*, that each exchange is an individual SRO with its own obligations under the Exchange Act, impacts how national securities exchanges are treated as regulated entities, and has practical implications for exchange groups. Cboe therefore believes that more analysis is needed before changing such a fundamental feature of the regulatory landscape. However, if the Commission ultimately does change its longstanding precedent, then it should address how that decision impacts its treatment of exchange groups in other situations. In addition, it should amend the proposal to more closely align the number of votes allocated to exchange groups or unaffiliated SROs with meaningful market share to their overall significance in the market. As formulated in the Proposed Order, an exchange group that operates several equities markets with a combined 14% consolidated equity market share, for example, would be allocated the same voting authority as a new exchange with less than 1% consolidated equity market share. Nothing in the Proposed Order justifies this facially questionable reallocation of voting authority to new or low volume markets.

In fact, the only justification offered for using a 15% threshold for a second vote instead of a lower threshold, such as the 10% threshold recommended by the Equity Market Structure Advisory Committee, is that the lower recommended threshold "would suggest that a third vote would be appropriate at 20% of consolidated equity market share."[18] If the Commission believes that it is appropriate to tie voting authority to market share, then it should do so in a meaningful manner, and not simply predetermine the result to favor smaller exchange groups or unaffiliated exchanges that generate a small fraction of the market data disseminated through the consolidated tape. To avoid this result, the proposal could be modified to provide for additional voting tiers that are tied to consolidated equity market share. For example, the Commission could provide a single vote to an exchange group or unaffiliated exchange with up to 5% consolidated equity market

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17 See e.g., Securities Exchange Act Release No. 72633 (July 16, 2014), 79 FR 42578 (July 22, 2014) (Order Disapproving NASDAQ OMX PHLX LLC Cross-SRO Fees).

18 See Proposed Order, supra note 1, at 2176. The Commission apparently believes that granting a third vote to larger exchange groups is somehow *de facto* untenable even though it acknowledges that an exchange group or unaffiliated exchange with significant market share should generally be afforded "extra voting power in recognition of its responsibility as an SRO for the operations of a trading platform that generates a greater share of equity market data." Id.

share, two votes to an exchange group or unaffiliated exchange with more than 5% and up to 15% consolidated equity market share, and three votes to an exchange group or unaffiliated exchange with more than 15% consolidated equity market share.

III. Commission Directed Changes to Already-Effective Plan Fees is Rulemaking and Should be Done in a Context that Addresses SRO Funding Holistically

Cboe supports efforts to improve Plan governance, but improvements to the governance structure can and should be accomplished through amendments to the current CT, CQ, and UTP Plans. As the Commission notes, its expectation is that its "New Consolidated Data Plan" would be responsible for filing new fees that would be subject to both approval by the new operating committee as well as regulatory review by the Commission. Although Cboe is willing to work with the new operating committee on potential fee changes initiated by that committee in the future, the current SIP fees have already gone through the required regulatory review process. Those fees should remain in place unless the new operating committee itself determines to change them, or the Commission exercises its authority pursuant to Rule 608 of Regulation NMS ("Rule 608"), which provides that the "[p]romulgation of an amendment to an effective national market system plan initiated by the Commission shall be by rule."[19] The Proposed Order's insistence on the re-filing of already-effective fees would evade the carefully designed framework for agency action under the Exchange Act, and is inconsistent with Commission's own rules.

If the Commission desires to amend or otherwise change the already-effective fees charged for access to U.S. equities market data through the consolidated tape then it must do so using the Congressionally-mandated process for agency rulemaking. Interestingly, on February 14, 2020, only a month after the Commission published the Proposed Order for comment, it also issued a proposed rule on market data infrastructure that would amend a number of provisions of Regulation NMS.[20] Among other things, the Proposed Regulation NMS Amendment would introduce "competing consolidators," which the Commission has suggested would address latency and other concerns, including concerns related to the cost of accessing market data. Cboe strongly believes that if the Commission wishes to revisit the fees charged for access to consolidated market

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19 See 17 CFR § 242.608(b)(2).

20 See Proposed Regulation NMS Amendment, supra note 1.

data through the SIPs, then rulemaking – such as the rulemaking that the Commission has already initiated in the Proposed Regulation NMS Amendment – is required.

The Commission also recently initiated rulemaking to amend Rule 608 to require a formal approval process for fee amendments submitted by the Plans.[21] The stated goal of that proposal is to encourage industry input on such fee changes through the process of public notice and comment. The Commission's understanding there of the importance of the public comment process is completely at odds with the Proposed Order. Specifically, under the proposed amendment to Rule 608, any change to Plan fees, no matter how significant or insignificant, would be subject to the standard process for more substantive amendments, including the requisite requirements for prior notice and comment. By contrast, the Proposed Order, which purports to require the replacement of the entire fee structure used by the SIPs, is subject to no such process. This is inconsistent with the Commission's obligations under the Exchange Act and Administrative Procedures Act.

The justification proffered by the Commission – *i.e.*, supposed inefficiencies in administering and overseeing three consolidated tape Plans that largely operate as a single entity already – is not supported by the facts, and is insufficient given the import of such a change. In fact, given the significant resources that would need to be diverted to drafting a new consolidated Plan, this effort is more likely to *increase* rather than decrease inefficiencies.[22] This is particularly true in a context where the Commission has simultaneously proposed material changes to the market data rules under Regulation NMS that, if adopted, would require that any such Plan be rewritten.[23] Further, to the extent that the Commission believes that it is administratively burdensome to consider separate filings by each of the three consolidated tape Plans, it could

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21 See Securities Exchange Act Release No. 87193 (October 1, 2019), 84 FR 54794 (October 11, 2019) (File No. S7-15-19).

22 The experience of the operating committees in working on the CTC Plan is instructive. The CTC Plan was initially discussed by the operating committees in November 2013. It took a subcommittee of nineteen individuals, as well as outside counsel, months of weekly meetings to complete an initial draft of the Plan. After significant back-and-forth with the Commission, the CTC Plan was filed in August 2015 – *i.e.*, twenty-one months after work on the project began. See Letter from Emily R. Kasparov, Chair, Operating Committees to Brent J. Fields, Secretary, Commission on the Limited Liability Company Agreement of CTC Plan, LLC, dated August 13, 2015. The Commission never published the CTC Plan for notice and comment.

23 See Proposed Regulation NMS Amendment, supra note 1.

amend its rules to allow for a single filing for all three Plans. In addition to addressing perceived inefficiencies in Plan filings pursuant to the Commission's current rules, such an approach would also allow the Commission to consider analogous inefficiencies in the SRO rule filing context.[24]

When the Commission adopted Regulation NMS, it recognized the need to address regulatory changes that impact SIP fees "in a context that looks at SRO funding as a whole."[25] Further, it found that it needed to "carefully consider"[26] the impact of such changes before mandating changes requested by commenters. Given the significance of these issues, the Commission determined to address them in a separate concept release on SRO structure,[27] which was the subject of much debate but was never acted upon by the Commission. Although Cboe acknowledges industry interest in SIP fees, the Proposed Order provides no basis for the Commission's departure from the reasoned approach it has previously determined to be required.

Indeed, the Commission spent far more time evaluating the impact of such changes when it *refrained* from taking regulatory action in Regulation NMS,[28] than it has done when proposing to take such steps today. The deeper analysis the Commission understood to be required when it enacted Regulation NMS continues to be relevant, and if the Commission feels that these issues deserve revisiting it should spend the time to get them right. A fee amendment submitted by the Plans that included no discussion about the potential impact on customers, competition, or any other information or justification, would almost certainly be subject to abrogation by the Commission. If the Commission believes that these issues are important, then it should hold itself to the same high standards that it holds the Plans and conduct formal rulemaking.

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24 For example, any inefficiencies resulting from duplicative filings would be significantly more pronounced in the context of SRO rule filings. The operating committees filed 11 Plan amendments covering four topics for all of 2019. By contrast, Cboe alone filed 386 rule filings for its U.S. equities and options markets last year.

25 See Regulation NMS Adopting Release, supra note 11, at 37560.

26 Id.

27 See Securities Exchange Act Release No. 50700 (November 18, 2004), 69 FR 71255 (December 8, 2004) (File No. S7-40-04).

28 See supra notes 25 – 27 and accompanying text.

Cboe respectfully requests that the Commission not take such significant steps without careful consideration of the issues and appropriate due process. The Proposed Order, through which the Commission intends to modernize the governance structure of the Plans, is not the right place to address market participant concerns about fees that have already gone through the required regulatory review process. Mandating that the operating committees replace already-effective SIP fees through a governance order that contains no relevant statutory analysis, discusses none of the attendant issues, and on its face addresses an entirely different set of questions, is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.[29]

IV. Conclusion

Cboe appreciates the opportunity to share its views on the Proposed Order. We have been and continue to be an advocate for enhancements to the SIP that benefit investors, such as the inclusion of odd lot quotation information and the implementation of distributed SIPs. Cboe also believes that Plan governance is important, and welcomes further discussion with the Commission and the industry about how to improve on the current governance structure, including facilitating additional industry input beyond that established in Regulation NMS. That said, we have identified elements of the Proposed Order that need to be addressed by the Commission prior to issuing any final order.

Sincerely,

/s/ Patrick Sexton

Patrick Sexton
EVP, General Counsel & Corporate Secretary

[29] 5 U.S.C. § 706.