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Giles Ward  
International Organization of Securities Commissions (IOSCO)  
Calle Oquendo 12  
28006 Madrid  
Spain

**Re: Public Comment on Principles on Outsourcing**

Mr. Ward,

Cboe Global Markets (“Cboe”) greatly appreciates the opportunity to respond to IOSCO’s Consultation Report on Principles on Outsourcing (the “Principles”).<sup>1</sup> As a global exchange operator and leader in exchange-traded equities, options, and futures Cboe understands the benefits that can accrue to investors through improved operational efficiencies as a result of outsourcing arrangements. Of course, outsourcing can raise certain risks, and we welcome the further development of best practices in the area of outsourcing risk mitigation.

As noted in our response to ESMA’s draft guidelines<sup>2</sup> on outsourcing to cloud service providers, we believe it is critically important that outsourcing guidelines are not overly prescriptive or require rote implementation. This would harm the ability of firms and local regulators to achieve proportionate outcomes with regards to outsourcing oversight. Our strong belief is that guidelines must be truly flexible and principles-based in order to allow individual participants to design risk mitigation processes specific to their operations. We therefore fully support IOSCO’s stated intent of the Principles, which is to “provide regulated entities with sufficient flexibility to implement them according to the nature and size of their business model.”<sup>3</sup> Moreover, we encourage IOSCO members to emphasize flexibility when adopting outsourcing guidelines locally.

Below please find for your consideration our general recommendations and feedback on the Principles:

Definition of Outsourcing: IOSCO defines “outsourcing” as “a business practice in which a regulated entity uses a service provider to perform tasks, functions, processes, services or activities (collectively,

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<sup>1</sup> IOSCO, Principles on Outsourcing Consultation Report, May 2020, *available at*, <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD654.pdf>.

<sup>2</sup> See Letter from David Howson, President, Cboe Europe in response to ESMA’s Draft Guidelines on Outsourcing to Cloud service Providers (September 1, 2020), *available at*, <http://www.cboe.com/aboutcboe/government-relations/pdf/ESMA-Outsourcing.pdf>.

<sup>3</sup> Principles at 4.

“tasks”) that would, or could in principle, otherwise be undertaken by the regulated entity itself.”<sup>4</sup> This definition importantly recognizes that not all third-party service providers are providing outsourced services. In fact, many everyday activities of businesses are supported by service providers (including those offering software as a service) that do not resemble an outsourcing arrangement. Thus, we encourage IOSCO and its members to adopt a common sense approach to the bounds of outsourcing guidance.

Outsourcing to Affiliates: It is important to recognize, as IOSCO does, that when considering the risks associated with outsourcing that the “[r]isks may, in certain cases, not be as pronounced within an affiliated group.”<sup>5</sup> We strongly agree with this assessment and support IOSCO’s view that the application of the Principles “should take into account the organisation and control structures and arrangements between the regulated entity and its affiliates.”<sup>6</sup> As noted in our ESMA Letter, outsourcing to affiliates requires different analysis to that of an external provider and will often lead to risk mitigation processes that differ from those applicable to non-affiliates. Mandating a complex system of contracts between affiliates, for example, would be unnecessary, inefficient, and costly where risks are mitigated through other means such as organizational governance and management oversight. In recognition of the unique circumstance presented by outsourcing to affiliates IOSCO states that the Principles may need to be assessed and applied to affiliate outsourcing arrangements with some modification. We encourage IOSCO and its members to support the adoption of similar language when outsourcing guidelines are implemented locally. This will help prevent rote application of guidelines to affiliate outsourcing relationships, where such application would be unnecessary and unduly burdensome.

Outsourcing to Regulated Entities: As noted above, the Principles explicitly recognize that risks may not be as pronounced when outsourcing to affiliates. The risks may also not be as pronounced when a firm outsources to another regulated entity. Thus, we recommend the Principles explicitly note that when developing risk management processes a firm may take into account the fact that the entity to which they are outsourcing is itself a similarly regulated entity. We believe this would appropriately acknowledge that in many instances outsourcing to a regulated entity presents less pronounced risks than outsourcing to an unregulated entity.

Written Contracts: Principle 2 requires regulated entities to enter into legally binding written contracts with service providers. While we agree that written, legally enforceable contracts are appropriate for third party service providers, our concern lies with the ever-expanding list of mandatory contractual terms that are to be included in such agreements. In some cases, such as with cloud service providers, market participants do not have sufficient negotiating power to ensure particular contractual terms are included in a contract. It would be undesirable to prevent firms from receiving the benefits of outsourcing simply because a written contract did not have particular contractual terms; provided, of course, that the limitations of the written contract are understood and risks are mitigated by other means. To the extent authorities believe more guidance is necessary in this area, rather than mandating

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<sup>4</sup> *Id.* at 6.

<sup>5</sup> *Id.* at 12.

<sup>6</sup> *Id.*

additional contractual terms we believe it would be more beneficial for authorities to consider publishing Standard Model Clauses that can be *voluntarily* adopted by providers and regulated entities. This would help level the playing field between provider and regulated entity and bring an additional measure of consistency and harmonization to the implementation of outsourcing guidelines. We recommend Principle 2 be amended consistent with our position and encourage IOSCO and its members to promote this view when adopting outsourcing guidelines locally.

Concentration Risk: Principle 5 requires regulated entities to assess the risks posed by the concentration of outsourcing arrangements. While we agree that a regulated entity should be aware of the risks posed from an outsourcing arrangement and should manage those risks effectively where it is dependent on a service provider for material or critical outsourced tasks, we disagree with the adoption of Principle 5 insofar as it requires a specific assessment of industry or intra-group concentration risk. First, individual firms do not have access to the data necessary to assess the potential concentration of supply of services within a specific sector. Industry concentration would have to be evaluated, if at all, by regulatory authorities. However, it's unclear what criteria would be applied by authorities; what criteria would be appropriate; and how such regulations would interact with competition law in different jurisdictions. Second, with regards to intra-group service providers it is important that regulated entities are generally permitted to use the same service providers across many affiliates. Once a preferred supplier is identified groups seek to maximize the advantages of using that supplier by consolidating services across affiliates where feasible. This results in large scale operational and cost efficiencies—the benefits of which accrue to investors. Using non-preferred suppliers to avoid a potential concentration risk is not, in our opinion, a better outcome.

Moreover, the suggestion in Principle 5 that concentration risk could be mitigated by designating a primary and secondary provider is concerning. The process of onboarding service providers (due diligence, contract negotiations, technological connections, etc.) is a comprehensive, time-consuming endeavor. Requiring regulated entities to then maintain additional secondary service providers could make outsourcing itself prohibitively expensive. Based on the above concerns we recommend Principle 5 be amended to remove any requirement to specifically assess industry and intra-group concentration risk or to maintain secondary service providers.

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Cboe greatly appreciates the opportunity to provide comments on the Principles. It is paramount that outsourcing guidance is clear and flexibly applied, and we hope the above recommendations help ensure IOSCO as a global standard setter is able to achieve that goal.

Sincerely,



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