

Section 19(b)(2) of the Act<sup>4</sup> provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is March 1, 2024.

The Commission is extending this 45-day time period. The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to section 19(b)(2) of the Act,<sup>5</sup> designates April 15, 2024, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR-CboeBZX-2023-107).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>6</sup>

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Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-99620; File No. SR-CBOE-2024-008]

### Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Adopt a New Rule Regarding Order and Execution Management Systems (“OEMS”)

February 28, 2024.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 13, 2024, Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in

Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) proposes to adopt a new rule regarding order and execution management systems (“OEMS”). The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange proposes to adopt a rule regarding OEMSs. An OEMS is a software product that market participants may install on their computer systems<sup>3</sup> and use to enter and route orders to trade securities (and non-securities)<sup>4</sup> for execution as well as manage their executions and perform other tasks related to their trading activities.<sup>5</sup> OEMSs generally permit

<sup>3</sup> For example, the Silexx front-end and back-end platforms constitute a software application that is installed locally on a user’s desktop.

<sup>4</sup> Many OEMSs provide execution and management functionality for multiple asset classes, including U.S. securities, non-U.S. securities, and non-securities. This filing focuses on OEMS functionality related to U.S. securities, which are within the jurisdiction of the Act and the Securities and Exchange Commission (the “Commission”).

<sup>5</sup> This additional functionality is not subject to rule filing requirements of section 19(b) of the

users to route orders to other market participants that use the same OEMS platform or directly to trading venues. OEMS platforms generally provide their users with the capability to create orders, route them for execution, and input parameters to control the size, timing, and other variables of their trades. OEMSs may also provide users with access to real-time options and stock market data, as well as certain historical data. Additionally, OEMSs may offer their users a variety of other tools to manage their trading, such as risk management tools, analytics, and algorithms. OEMS platforms generally consist of a “front-end” order execution and management trading platform. These platforms may also include a “back-end” platform that provides a connection to the infrastructure network of the OEMS (and thus permits users to send orders to other users of that OEMS).

An OEMS is designed generally to permit a user to route orders through the platform (1) to an executing broker of that user’s choice with connectivity to the platform, which broker may then send the orders to any U.S. exchange or trading center of which it is a member, including Cboe Options (if the broker is a Trading Permit Holder (“TPH”)); or (2) to any U.S. exchange or trading center of which the user is a member and to which it has established direct connectivity. On the Exchange, a TPH user may only establish this direct connectivity if it separately purchased a port from the Exchange pursuant to the Exchange’s Fees Schedule.<sup>6</sup> An OEMS is merely software that a TPH can install on its computer system and use to route orders to ports it purchases separately from the Exchange—this software is not integrated with ports, or any other part of the Exchange’s trading systems. Thus,

Securities Exchange Act of 1934 (the “Act”). See, e.g., Securities Exchange Act Release Nos. 82088 (November 15, 2017), 82 FR 55443, 55444 at note 8 (November 21, 2017) (SR-CBOE-2017-068) (“Silexx Approval Order”); and 75302 (June 25, 2015), 80 FR 37685, 37687 at note 10 (July 1, 2015) (SR-CBOE-2015-062) (“Livevol Approval Order”). The Exchange notes any real-time or other market data that is subject to these rule filing requirements is purchased by the OEMS provider in accordance with the Exchange’s (or other national securities exchanges’) fees schedules.

<sup>6</sup> For example, the Financial Information eXchange (“FIX”) protocol is a vendor-neutral electronic communications protocol for the exchange of securities order and transaction messages. A TPH may establish direct connectivity to the Exchange by purchasing a FIX port or Binary Order Entry (“BOE”) port, depending on the connection type of its OEMS. The Silexx platform currently permits connection to an exchange, including Cboe Options, via FIX ports. A Silexx user that is a member of another securities exchange may separately purchase a FIX port from that exchange and directly send orders from its Silexx software to that exchange.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

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

<sup>6</sup> 17 CFR 200.30-3(a)(31).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

if [sic]TPH user wants to send an order to the Exchange for execution from an OEMS platform, it can only do so if it purchases a port from the Exchange. If a user that is not a broker or TPH wants to send an order for execution at the Exchange through an OEMS, the user must route its order from its OEMS software to a broker that is also a TPH, which broker can then route the order to the Exchange for execution—either through the same OEMS or a different OEMS. This is true for OEMSs in general, regardless of whether an OEMS is offered by an Exchange affiliate or a third-party OEMS. Specifically, if a non-TPH market participant wants to send an order from its OEMS software, which happens to be offered by an Exchange affiliate, for execution at the Exchange, that market participant must route the order to a TPH, which TPH can then route the order to the Exchange for execution using its OEMS platform, which may or may not be the same OEMS platform as used by the initial market participant, through its separately purchased port.

There is a variety of OEMS software for securities available in the industry, which may be offered by technology vendors, broker-dealers, or national securities exchanges (or their affiliates).<sup>7</sup> The Exchange does not require the use of any specific OEMS to access the Exchange.<sup>8</sup> TPHs and other market participants may use any OEMS software to send orders to the Exchange for execution and manage those orders. The Exchange handles all orders it receives in the same manner, regardless of how those orders were sent to the

<sup>7</sup> For example, Cboe Silexx, LLC (“Cboe Silexx”), which is a wholly owned, direct subsidiary of Cboe Global Markets, Inc. (“CGM”) (of which the Exchange is also a wholly owned subsidiary) develops, offers, and maintains an OEMS platform. CGM owns or has owned or contracted with entities that offered OEMSs (such as Livevol and PULSe) for which it submitted rule filings. See, e.g., Silexx Approval Order; Livevol Approval Order; and Securities Exchange Act Release no. 62286 (June 11, 2010), 75 FR 34799 (June 18, 2010) (SR-CBOE-2010-051) (“PULSe Approval Order”). The Exchange is aware of only one other national securities exchange that offers an OEMS. See Nasdaq Precise, information available at Nasdaq Precise | Nasdaq. Examples of non-U.S. securities exchange affiliated providers (the majority of which are broker-dealers) of OEMSs that compete with Cboe Silexx include SS&C Technologies (Eze), FlexTrade Systems (FlexTRADER and other products), TS Imagine (TS One and TradeSmart), LSEG Data & Analytics (formerly Refinitiv) (REDI), Bloomberg (execution management system), Factset (formerly Portware) (execution management system), Neovest (execution management systems), Dash Financial Technologies (execution management systems), and Wolverine Execution Services (WEX Trading Platform).

<sup>8</sup> For example, use of the Silexx platform (and prior OEMSs offered by Exchange affiliates) is optional and completely within the discretion of the user and is not required to access the Exchange.

Exchange. As noted above, TPHs may send orders in the form of FIX or BOE messages. Once the Exchange’s system receives an order (regardless of whether it is in FIX or BOE form), the Exchange’s system (including the ports through which orders are routed to the Exchange for execution) is unable to identify in what manner the order was sent. For example, if a TPH submits an order from its OEMS platform, even if such OEMS platform is offered by an Exchange affiliate, the Exchange’s system has no way to identify what OEMS(s) was used to submit that order to the Exchange. The Exchange’s system only sees orders as BOE or FIX messages.<sup>9</sup> The Exchange handles all orders in a nondiscretionary manner and in accordance with its Rules as required by the Act.<sup>10</sup>

OEMSs are generally not subject to the rule filing requirements under section 19(b) of the Act.<sup>11</sup> Historically, however, when CGM (or its predecessor) acquired entities or assets that have included OEMS platforms (such as Silexx and Livevol)—thus causing those entities or assets to become owned by the Exchange or an Exchange affiliate—Commission staff advised the Exchange that affiliation with those entities caused the OEMSs to be considered “facilities” under the Act because it *could* be used to route orders to the Exchange and thus subject to the rule filing requirements under section 19(b) of the Act.<sup>12</sup> Consideration of such platforms as facilities solely because of Exchange affiliation causes the providers of the these platforms to operate at a competitive disadvantage compared to other OEMS providers that are not subject to section 6(b) or 19(b)

<sup>9</sup> For example, orders submitted to the Exchange via Silexx are handled in the same manner by the Exchange as orders submitted to the Exchange via any other OEMS platform. All OEMSs that offer the ability to establish connectivity to the Exchange use the same technical specifications to submit messages through those connections. See Cboe US Options FIX Specification, available at: US Options FIX Specification (cboe.com); and Cboe Options Exchange Binary Order Entry Specification, available at: US Options BOE Specification (cboe.com). Per these specifications, FIX and BOE messages contain no fields or indicators for which OEMS platform was used to send the order to the Exchange.

<sup>10</sup> 17 CFR 240.3b–16(a)(2). What OEMS platform was used to generate and send an order for execution is unrelated to how that order will be handled and executed on the Exchange.

<sup>11</sup> For example, prior to their acquisitions by CGM (or its predecessor) in 2015 and 2017, the Livevol and Silexx platforms, respectively, were offered in substantially the same manner as they are offered as part of the CGM organization. However, the prior owners of those platforms did not have to submit rule filings to operate or enhance those platforms and were not otherwise subject to the requirements of the Act.

<sup>12</sup> See, e.g., Silexx Approval Order and Livevol Approval Order.

of the Act, despite offering substantially similar products and services, connecting to the Exchange in the same manner, and receiving no benefits or advantages from the Exchange despite its affiliation.<sup>13</sup>

Based on its review of relevant facts and circumstances, and as discussed further below, the Exchange believes an OEMS platform offered by an Exchange affiliate or pursuant to a contractual relationship (such as a joint venture) but that is ultimately operated as a separate business from the Exchange, and thus is operated with respect to the Exchange on the same terms as third-party OEMSs, is not a facility of the Exchange within the meaning of the Act and, thus, is not subject to the rule filing requirement.<sup>14</sup> The Exchange believes the rules and fees related to such an OEMS platform are not the “rules of an exchange”<sup>15</sup> required to be filed with the Commission under the Act. Such an OEMS platform receives no advantage over other OEMS platforms as a result of its affiliation with the Exchange and orders from such an OEMS are handled by the Exchange pursuant to its Rules in

<sup>13</sup> The Exchange notes it currently offers certain port fee waivers to users of the Silexx platform and different pricing for certain functionality to TPHs and non-TPHs. Because the Commission has required the Exchange to submit rule filings regarding the Silexx platform due to the Commission’s view that it is a facility of the Exchange, Cboe Silexx operated at a competitive disadvantage compared to its competitors as a result of it being subject to rule filing requirements. At the Commission’s request, in connection with representations Cboe Options made in prior rule filings, Cboe Options and Cboe Silexx adopted procedures and internal controls reasonably designed to prevent Cboe Silexx from unfairly receiving an advantage due to receipt of confidential information as a result of its relationship with Cboe Options in connection with the platform or any other business activities. Therefore, despite being a facility of the Exchange, Cboe Silexx was still required to be on the same footing as a similarly situated third-party vendor with respect to things such as system updates. To offset this competitive disadvantage, the Exchange adopted port fee waivers. While the Exchange acknowledges the ability to provide this pricing may demonstrate that the Exchange’s ability to act with Cboe Silexx, the Exchange notes affiliation is not required to offer such pricing, as it would be technologically possible to provide port fee waivers to users of any OEMS, as the Exchange could request what type of OEMS would be connected to a port when such port is purchased in the same manner it did to determine that a port was for a Silexx platform (such pricing would be subject to Commission review in the same manner as the Silexx pricing was). However, as discussed below, if the Exchange adopted procedures and internal controls in accordance with proposed Rule 3.66, those barriers would prevent Cboe Silexx or any other Exchange-affiliated OEMS to adopt such fees without submission of a rule filing.

<sup>14</sup> See 15 U.S.C. 78c(a)(1) and (2) (definitions of “exchange” and “facility”).

<sup>15</sup> See 15 U.S.C. 78c(a)(27) (definition of “rules of an exchange”).

the same manner as orders from any other OEMSs.

To provide clarity and transparency within its Rulebook, the Exchange proposes to adopt Rule 3.66 to provide that an OEMS platform operated in a manner independent from the Exchange despite affiliation with the Exchange will not be deemed a facility of the Exchange. Specifically, proposed Rule 3.66 provides that for so long as the Exchange provides or is affiliated with any entity that provides, or the Exchange or an affiliate has a contractual relationship with any entity that provides, an OEMS platform, such OEMS will not be regulated as a facility of the Exchange (as defined in section 3(a)(2) of the Act) and thus not subject to section 6 of the Act if:

(a) use of the OEMS is voluntary (*i.e.*, solely within the discretion of a TPH) and not required for a TPH to access to the Exchange (*i.e.*, the OEMS is a nonexclusive means of access to the Exchange);

(b) if a TPH using the OEMS establishes a direct connection to the Exchange via an Exchange port, that connection is established in the same manner and in accordance with the same terms, conditions, and fees as any third-party OEMS as set forth in the Exchange's Rules, technical specifications, and Fees Schedule;

(c) the OEMS (or the entity that owns the OEMS) is not a registered broker-dealer;

(d) for any orders ultimately routed through the OEMS to the Exchange:

(1) users and their brokers are solely responsible for routing decisions; and

(2) the Exchange processes those orders in the same manner as any other orders received by the Exchange (*i.e.*, orders submitted through the OEMS to the Exchange receive no preferential treatment on the Exchange);

(e) any fees charged to a user of the OEMS are unrelated to that user's Exchange activity or to Exchange fees set forth on the Exchange's fees schedule;

(f) the OEMS and its users use any premises or service from the Exchange that is a facility, such as market data, pursuant to the same terms, conditions, and fees as any other user of Exchange premises and services as set forth in the Exchange's Rules, technical specifications, and Fees Schedule;

(g) a third-party not required to register as a national securities exchange under section 6 of the Act can offer a similar OEMS; and

(h) the Exchange has established and maintains procedures and internal controls reasonably designed to prevent the OEMS from receiving any

competitive advantage or benefit as a result of its affiliation/relationship with the Exchange, including the provision of information to the entity or personnel operating the OEMS regarding updates to the System (such as technical specifications) until such information is available generally to similarly situated market participants.<sup>16</sup>

The Exchange believes proposed Rule 3.66 will provide clarity regarding when an OEMS platform does not constitute a facility of the Exchange in a manner that ensures an OEMS platform (and orders its[sic] ends[sic] to the Exchange) would receive no advantage over any other OEMS platform (and orders send[sic] from that platform to the Exchange), regardless of its affiliation or relationship with the Exchange.<sup>17</sup>

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.<sup>18</sup> Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)<sup>19</sup> requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)<sup>20</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

<sup>16</sup> This proposed rule change refers to any OEMS that satisfies the criteria of proposed Rule 3.66 as a ("Rule 3.66 OEMS"). If the Commission approves this rule filing, the Exchange intends to propose in a separate rule filing to delete the Silexx Fee Schedule from its Rules, as the Exchange believes the Silexx platform is a Rule 3.66 OEMS.

<sup>17</sup> The Exchange notes it may be possible for an OEMS platform provided by an Exchange affiliate or an entity with which the Exchange has a business relationship to satisfy a subset of these criteria or a different set of criteria and still not be a facility of the Exchange. However, the proposed rule provides certainty with respect to the non-facility status of an OEMS provided by an Exchange affiliate or an entity with which the Exchange has a business relationship that meets this set of criteria.

<sup>18</sup> 15 U.S.C. 78f(b).

<sup>19</sup> 15 U.S.C. 78f(b)(5).

<sup>20</sup> *Id.*

In particular, the Exchange believes proposed Rule 3.66 is consistent with the Act, because it promotes just and equitable principles of trade and removes impediments to and perfects the mechanism of a free and open market and a national market system. It will permit substantially similar OEMS platforms in the industry to compete on equal footing if they operate with respect to securities exchanges in the same manner, regardless of their affiliation or other relationship with a securities exchange. While the rules of an exchange generally impose requirements on its members and not itself, the Exchange believes it is appropriate to adopt proposed Rule 3.66, despite it describing circumstances in which the Exchange will not submit rule filings.<sup>21</sup> The Exchange believes it is appropriate to adopt Rule 3.66 as a stated interpretation of the Exchange, as it will provide transparency and certainty regarding when an OEMS platform offered by an affiliate or otherwise by the Exchange is not a facility of the exchange. The Exchange believes[sic] will benefit the public as it will contribute to the provision of a competitive market for these important tools used by market participants, thus making it appropriate to be filed as a rule of the Exchange.<sup>22</sup> Similarly, the Exchange believes descriptions of functionality and fees regarding Rule 3.66 OEMSs, despite their relationship with the Exchange, do not constitute "rules of an exchange,"<sup>23</sup> as such OEMSs are not facilities of an exchange and thus are not subject to regulation by the Commission under section 6(b)(5) or section 19(b) of the Act.

## D.C. Circuit Test

Based on the Exchange's review of relevant facts and circumstances, the Exchange has concluded that a Rule 3.66 OEMS would not be a facility that is part of the Exchange, and thus is not subject to the SRO rule filing requirements under the Act. To determine whether a service or property is a facility of the Exchange subject to the rule filing requirements of section 19(b) of the Act, it must be determined

<sup>21</sup> Other Rules impose certain restrictions on the Exchange, including with respect to permissible affiliations. *See, e.g.*, Rule 3.62 (which restricts the Exchange's ability to acquire or maintain an interest in a TPH).

<sup>22</sup> 15 U.S.C. 78c(a)(27) (defines the term "rules of an exchange" to include, among other things, the "stated policies, practices, and interpretations of such exchange . . . as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules of such exchange . . .").

<sup>23</sup> *Id.*

whether the service or property satisfies a two-pronged test (“D.C. Circuit Test”):

1. the service or property must fall within the definition of “facility” in section 3(a)(2) of the Act; and
2. the service or property must be the type of facility that is part of the definition of “exchange” in section 3(a)(1) of the Act.<sup>24</sup>

#### D.C. Circuit Test Prong 1: A Rule 3.66 OEMS Does Not Fall Within the Definition of “Facility”

Pursuant to the first prong of the D.C. Circuit Test, the Exchange first considers whether a Rule 3.66 OEMS fits within the definition of a facility. Section 3(a)(2) of the Act defines “facility” as follows:

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.<sup>25</sup>

#### The Exchange Has No Right To Use a Rule 3.66 OEMS for Purposes of Effecting or Reporting a Transaction

The Exchange asserts that it does not have any right to use a Rule 3.66 OEMS for the purpose of effecting or reporting a transaction on an exchange nor is a Rule 3.66 OEMS a system of communication to or from the Exchange maintained by or with the consent of the Exchange. As discussed above, one main function of an OEMS platform is for market participants to use it to create, enter, and route orders to trade securities (and non-securities) for execution (either directly to trading venues or to other market participants).<sup>26</sup> Market participants may, among other things, use OEMS platforms to enter and route orders for ultimate execution at a trading venue, which may cause an OEMS to be deemed to be used for the “purpose of effecting or reporting a transaction on an exchange” under the facility definition. However, the Exchange has no right to use a Rule 3.66 OEMS (or any OEMS) for that purpose. Use of an OEMS for purposes of effecting or reporting a

transaction to the Exchange (or any exchange) is solely within the discretion of the OEMS user. The Exchange does not handle any orders for the purpose of execution until those orders are received by its order handler and matching engine system. As further discussed below, this happens after an order message passes through an Exchange port and into the Exchange’s core trading system. Such an order message has no indication of from which OEMS the order message originated, including if it was from a Rule 3.66 OEMS, and thus the Exchange’s handling an execution of the message occurs in accordance with its Rules. As proposed in Rule 3.66, a Rule 3.66 OEMS would have in place procedures and internal controls that would prevent the OEMS from receiving any competitive advantage as a result of its affiliation or relationship with the Exchange.<sup>27</sup> Because the Exchange (as further discussed below) handles and executes all orders it receives in a nondiscretionary manner pursuant to its Rules, the Exchange has no influence over or right to use a Rule 3.66 OEMS for purposes of effecting or reporting transactions.

#### A Rule 3.66 OEMS Is Not a System of Communication Maintained by or With the Consent of the Exchange

Similarly, the Exchange notes that a Rule 3.66 OEMS is not a system of communication to or from the Exchange maintained by or with the consent of the Exchange. As noted above, users of OEMS platforms<sup>28</sup> may establish direct connectivity from the computer systems on which those platforms reside to the Exchange—only after separately purchasing a port from the Exchange and connecting their systems on which the OEMSs lie to that port. While it is possible this may cause the OEMS to be deemed part of a “system of communication to or from the exchange,” a Rule 3.66 OEMS is still not maintained with the consent of the Exchange, as required by the facility definition. Such an OEMS is not a system of communication to or from the Exchange provided for the purpose of executing and managing securities trades on the Exchange,<sup>29</sup> but rather on an exchange (or other trading venue). As required by proposed Rule 3.66(a), a Rule 3.66 OEMS (and OEMS platform,

for that matter) is a voluntary, nonexclusive means of access to the Exchange. Market participants may or may not use a specific OEMS, including a Rule 3.66 OEMS, to submit orders for execution at the Exchange. For example, it is possible that a user of a Rule 3.66 OEMS never has a single order it sends from that OEMS execute on the Exchange. Additionally, use of a Rule 3.66 OEMS (or any OEMS for that matter) is not required to access the Exchange.

#### Use of a Rule 3.66 OEMS Is Not Required To Access the Exchange

Use of a Rule 3.66 OEMS does not require the user to establish a direct connection to the Exchange or any other trading venue. In fact, many users of a Rule 3.66 OEMS may not establish a direct connection to the Exchange<sup>30</sup> and instead will use an OEMS platform to route orders to other market participants (such as brokers) for ultimate routing for execution, which may be done through the same or different OEMS platform.<sup>31</sup> In this case, the OEMS platform would have no connectivity in any form to the Exchange’s core trading system and thus does not fall within the definition of a facility.<sup>32</sup> Unlike what is required for a product or service to be considered a facility, with respect to execution of orders, the purpose of providing an OEMS platform (including a Rule 3.66 OEMS) is not to effect a transaction on the Exchange specifically; the primary

<sup>30</sup> In other words, users of a Rule 3.66 OEMS may decide to not purchase a port from the Exchange, which is required to submit an order to the Exchange for execution. Purchase of a port from the Exchange is a separate from and unlinked[sic] to the purchase of a Rule 3.66 OEMS. Additionally, only a TPH may purchase a port from the Exchange, so users of an OEMS that are not TPHs may never establish direct connectivity to the Exchange.

<sup>31</sup> The SEC previously determined that a neutral communications service that allows an exchange’s members to and non-members to route orders to one another and to execute orders they receive through that system as they deem fit, but which service does not effect trade executions or report executed trades to the consolidated tape[sic]. See Securities Exchange Act Release No. 56237 (August 9, 2007), 72 FR 46118 (August 16, 2007) (SR-NASDAQ-2007-043) (the Commission noted that it was “not possible for an order to be routed to the Nasdaq Market Center via the ACES system”). Any OEMS user that does not establish direct connectivity to an Exchange (which is the case for the vast majority of current Silexx users) would thus be using that OEMS merely to route orders, which according to the Commission would cause the OEMS to not be a facility of the Exchange. See *id.* The Exchange notes that as of January 30, 2024, of the approximately 700 Silexx platform user log-ins, only 275 of those users have access to a FIX port that connects to the Exchange, and thus the majority of Silexx platform users are able to use Silexx only as a communications service to route orders to other users, which use the Commission has already deemed to be outside the definition of a facility of an Exchange.

<sup>32</sup> See *id.*

<sup>24</sup> *Intercontinental Exch., Inc. (ICE), et al. v. SEC*, 23 F.4th 1013, 1024 (D.C. Cir. 2022) (“... only the rules of an SRO are subject to a filing requirement, and the rules of a facility are not rules of an SRO unless that facility is part of an SRO.”)

<sup>25</sup> 15 U.S.C. 78c(a)(2).

<sup>26</sup> As noted above, OEMS platform provides users with additional functionality.

<sup>27</sup> The Exchange notes Silexx and other OEMS previously operated by an affiliate of the Exchange have adopted information barriers that satisfy this proposed requirement.

<sup>28</sup> This includes Silexx as well as third-party OEMSs that have no affiliation or contractual relationship with the Exchange.

<sup>29</sup> See *ICE*, 23 F.4th at 1023.

purpose instead is to effect a transaction at any applicable trading venue. Moreover, the market for OEMS platforms is diverse enough such that, even if the Exchange did not submit rule filings related to a Rule 3.66 OEMS (such as for fees to use the OEMS), the Exchange would not be able to exploit its control over the marketplace for OEMS platforms to increase the costs of or limit access to the Exchange. Market participants would be able to use other OEMSs to access the Exchange in the same manner as a Rule 3.66 OEMS.<sup>33</sup>

Even if a TPH using a Rule 3.66 OEMS purchases a port from the Exchange and establishes a direct connection between its computer systems on which the OEMS platform has been installed and the Exchange, the Rule 3.66 OEMS is still not connected to the Exchange's core trading system (see diagram below). Instead, the connection occurs at the Exchange customer switch. It is at this switch where TPHs may purchase and obtain access to ports from the Exchange, through which order messages are sent into the Exchange's order handler and matching engine. A port ultimately creates a connection between two separate systems—the TPH's system on which an OEMS may reside and the Exchange's core trading system. If a TPH has a Rule 3.66 OEMS installed on its

computer system, the TPH could determine to separately purchase a port and connect that port to that computer system. The port is a system of communications to the Exchange that transmits messages from the connecting TPH's system (on which an OEMS platform may be installed) to the Exchange's order handler and matching engine, where orders are actually handled and executed, which port is maintained with the consent of the Exchange and thus constitutes a facility of the Exchange.<sup>34</sup> On the other hand, the OEMS platform (which software was installed on the TPH's computer system—a non-Exchange system) that connects to the port (*i.e.*, an Exchange-maintained system of communication) does not cause the OEMS software (including if a Rule 3.66 OEMS) to become integrated with (and thus part of) that system of communication. As discussed above, ports receive and route to the appropriate place within the Exchange's core trading system FIX or BOE messages that contain no information identifying from what OEMS the messages originated. In other words, ports are Exchange-provided conduits through which messages are sent from a non-Exchange system (the TPH's system, which may contain an OEMS platform, including a Rule 3.66 OEMS platform) to an Exchange system

(the Exchange's order handler and matching engine system). A Rule 3.66 OEMS and an Exchange port are independently maintained and operated systems—the port by the Exchange and the Rule 3.66 OEMS by the OEMS provider<sup>35</sup> and OEMS user. Any TPH may establish direct connectivity to the Exchange by obtaining a port and connecting at the customer switch, regardless of what OEMS or other product it uses to submit orders to the Exchange. While the connection must occur with the consent of the Exchange, because a TPH must purchase a port from the Exchange, and the Exchange must then assist with establishing the physical connection at the customer switch, any TPH that purchases a port establishes this physical connection at the same place and in the same manner (and subject to the same fees set forth in the Exchange's Fees Schedule), regardless of the OEMS that TPH uses.

As noted above, the purchase of a port from the Exchange is a separate transaction from the purchase of a Rule 3.66 OEMS log-in.<sup>36</sup> The port itself is a facility of the Exchange (and thus subject to rule filings), but a port and a computer system on which an OEMS is installed that connects to the customer switch to access a port are completely separate systems, as demonstrated below:



The port is ultimately an Exchange-provided conduit through which messages a TPH wants to send to the Exchange (including order messages sent for execution on the Exchange) travel. The Exchange takes no part in the creation or submission of those messages, which is within the TPH's sole discretion. In this sense, a TPH using a Rule 3.66 OEMS connects to the Exchange's trading system with the Exchange's consent, but it does so in the same way that a TPH using any OEMS platform connects to the Exchange with its consent and is untethered to the TPH's usage of an OEMS.<sup>37</sup> The systems on which OEMS platforms reside are

outside of the Exchange's trading systems and infrastructure. Ultimately, the Exchange's consent to sell a port to a TPH is what permits a TPH to establish a connection to the Exchange's core trading system, which consent is unrelated to any software (including a Rule 3.66 OEMS) or hardware the TPH uses to submit an order to the Exchange through that port. While a system does not need to be directly connected to the Exchange's matching engine to be deemed a facility, it needs to be part of a necessary link in the chain of communication that facilitates access to, and trading activity on, the Exchange.<sup>38</sup> An OEMS platform, including a Rule

3.66 OEMS, is not a necessary link in this chain, as it is not required to access the Exchange or engage in trading on the Exchange. Instead, a Rule 3.66 OEMS (or any OEMS for that matter) is one possible means for a TPH to access the chain of communication that facilitates access to, and trading activity on, the Exchange. A market participant's purchase of an OEMS log-in, even if a Rule 3.66 OEMS, is unrelated to whether the market participant intends to engage in trading options on the Exchange. Unlike an Exchange port, which a TPH likely purchases for the specific reason of submitting orders to the Exchange for execution (as the port

<sup>33</sup> Contrast with SEC Reply Brief, *ICE v. SEC* at 4.

<sup>34</sup> See Cboe Fees Schedule (which contains fees for various ports).

<sup>35</sup> As required by proposed Rule 3.66, the Exchange would have in place procedures and internal controls that would prevent it from providing an affiliated OEMS provider with any competitive advantage over other OEMS providers. Additionally, proposed Rule 3.66 would codify that

users and their brokers are solely responsible for routing decisions of orders through a Rule 3.66 OEMS (this is true today of any OEMS) and that the Exchange processes all orders it receives in the same manner (which is also true today).

<sup>36</sup> As the Commission previously stated, it would be possible to tie fees of a non-facility to fees for, or usage of, any Exchange services, which fees would then be subject to the rule filing requirements of section 19(b) of the Act. See *id.* at

46119. Therefore, the fact that, for example, the Exchange adopted fees that tied the Silcex platform to an Exchange usage fee (as noted above) does not on its face cause the Silcex platform to become a facility of the Exchange. Rather, it would just require the Exchange to file the fee with the Commission.

<sup>37</sup> See proposed Rule 3.66(b).

<sup>38</sup> See SEC Reply Brief, *ICE v. SEC* at 33.

would serve no purpose other than for the TPH to submit orders to the Exchange), a TPH (or any market participant) purchases an OEMS log-in for the specific reason of creating and submitting securities orders (as well as non-securities), which orders may execute only after being routed to a broker or with submission into a separately purchased exchange port—the OEMS can serve this purpose for any execution venue and not solely the Exchange. In the chain of communication that facilitates access to, and trading activity on, the Exchange, an Exchange-provided port is the first necessary link in this chain. No OEMS platform is required to access the Exchange and thus is not a necessary link in this chain, even an OEMS platform happens to be offered by an Exchange affiliate.

Further, because any Rule 3.66 OEMS would not be a registered broker-dealer,<sup>39</sup> any order submitted for execution from an OEMS platform would need to be handled and submitted to the Exchange for execution only by a TPH (which must be a broker-dealer). Many OEMS users are non-brokers, which would require an interim step for those users' orders to take before those orders could possibly end up at the Exchange for execution. Additionally, only a TPH may submit an order into the Exchange for execution, which could create an additional step that needs to be taken before an order can ultimately end up at the Exchange.<sup>40</sup> The OEMS user and its broker, if applicable, that ultimately routes an order for execution have sole responsibility for any routing decision for that order, including the decision regarding to where the orders should be routed for execution (to the Exchange or elsewhere).<sup>41</sup> Entry into an OEMS is merely one of many steps in an order's path to ultimate execution at a trading venue, which occurs outside of the Exchange's core system and outside the data centers at which the Exchange's system equipment resides (such as NY4).<sup>42</sup>

<sup>39</sup> See proposed Rule 3.66(c).

<sup>40</sup> For example, suppose a non-broker customer uses an OEMS (including an OEMS offered by an Exchange affiliate, such as Silexx). If that customer wanted to execute an order on the Exchange, it would first need to route the order from its OEMS to its broker. At that point, the broker, if a TPH that has established connectivity to the Exchange, can route the order to the Exchange (through the same or different or another OEMS); if not a TPH, the broker must route the order to a TPH (through the same or another OEMS), which TPH can then submit the order for execution on the Exchange (through the same or another OEMS).

<sup>41</sup> See proposed Rule 3.66(d).

<sup>42</sup> Compare with SEC Reply Brief, *ICE v. SEC* at 31 (stating that the exchanges and its affiliates

While purchase of an Exchange port by a TPH using a Rule 3.66 OEMS would establish a connection from that TPH's computer system operating the OEMS software to the Exchange's trading system, it is not required or vital and is in fact explicitly not required to access the Exchange's trading system.<sup>43</sup> Any TPH that establishes a direct connection between its computer systems operating any OEMS does so only upon purchase of a port from the Exchange with the Exchange's consent, in the same manner, and at the same customer-facing location within the Exchange's data center cage (the customer switch). Purchase of a log-in for a Rule 3.66 OEMS does not on its own establish access to the Exchange's trading system. A TPH using a Rule 3.66 OEMS would need to receive separately from the Exchange the same consent (*i.e.*, sale of a port) to establish this connection as a TPH using any other OEMS. Additionally, a Rule 3.66 OEMS could exist without the consent of an Exchange and does not owe its existence to the consent of the Exchange.<sup>44</sup> For example, if CGM sold Cboe Silexx, it would have no material impact on how the Silexx platform is operated or maintained. Further, if the Exchange shutdown, the Silexx platform would continue to be used in the same manner as it is today, with one fewer ultimate execution venue.

#### D.C. Circuit Test Prong 2: A Rule 3.66 OEMS Does Not Fall Within the Definition of "Exchange"

Even if it is determined that an OEMS fits within the statutory definition of "facility," "satisfying the statutory definition of 'facility' in Section 3(a)(2) [of the Act] is . . . not sufficient to subject a facility to the jurisdiction of the Commission; it must also be the type of facility that section 3(a)(1) [of the Act] includes in the term 'exchange.'" <sup>45</sup>

together provide the infrastructure at the exchanges' data centers that facilitate interactions between buyers and sellers). A Rule 3.66 OEMS is operated outside of the Exchange's data center, the "nerve center" of the Exchange's operations. See *id.* at 38.

<sup>43</sup> See *ICE*, 23 F.4th at 1023 (finding that a connection being a "vital and proximate link in a system of communication" is a factor as to whether the functionality is a facility of the exchange).

<sup>44</sup> See *id.* This is evidenced by the fact that OEMSs provided by entities that became affiliated with the Exchange (such as Silexx and Livevol) due to acquisition by the Exchange's parent company operated in a substantially similar manner after such acquisition as they did prior to such acquisition (when they were unaffiliated with the Exchange). Any upgrades made to those platforms after becoming affiliated with the Exchange, such as added functionality, could have occurred in the same manner if the Exchange's parent company had never purchased the entities providing those OEMSs.

<sup>45</sup> See *id.* at 1024.

section 3(a)(1) of the Act defines "exchange" as follows:

The term "exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.<sup>46</sup>

Rule 3b–16 under the Act provides further clarity regarding what does and does not constitute an exchange for purposes of the Act. It states that "[a]n organization, association, or group of persons shall be considered to constitute, maintain, or provide 'a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange,' as those terms are used in [S]ection 3(a)(1) of the Act . . . if such organization, association, or group of persons: (1) [b]rings together the orders for securities of multiple buyers and sellers; and (2) [u]ses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade."<sup>47</sup> It goes on to state that "[a]n organization, association, or group of persons shall not be considered to constitute, maintain, or provide 'a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange,' solely because such organization . . . [r]outes orders to a national securities exchange . . . ." <sup>48</sup>

The Exchange believes a Rule 3.66 OEMS is outside the definition of an exchange, as (1) Rule 3b–16 explicitly excludes OEMS functionality from that definition and (2) the provider of such an OEMS (Cboe Silexx or otherwise) and the Exchange together do not constitute a "group of persons" that is providing a marketplace for the purpose of "bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange . . . ." <sup>49</sup>

<sup>46</sup> 15 U.S.C. 78c(a)(1).

<sup>47</sup> 17 CFR 240.3b–16(a).

<sup>48</sup> 17 CFR 240.3b–16(b).

<sup>49</sup> As noted above, Cboe Silexx is an affiliate of the Exchange that offers and operates the Silexx

### A Rule 3.66 OEMS Is Excluded From the Definition of Exchange

The Exchange asserts that OEMS functionality is excluded from the definition of an Exchange. First, the development, maintenance, and sale of an OEMS does not fit within the definition of an exchange. An OEMS does not bring together purchasers and sellers of securities. Rather, market participants use an OEMS to route their securities orders (directly or indirectly) for execution at a facility that can match those purchasers and sellers (such as the Exchange, another national securities exchange, or trading venue). As discussed above, an order submitted through an OEMS may need to go through multiple steps and handled by multiple parties (including through a broker and TPH) before it may be executed on the Exchange, and such execution may ultimately take place on any exchange. If one market participant submits a buy order for a security and another market participant submits a sell order for the same security that is marketable with the buy order, despite those two orders being within the same OEMS network, the OEMS cannot bring those orders together for execution; instead, the OEMS sends those orders to trading venues (in accordance with the instructions of the users and their brokers), where the buy order is matched with a sell order and the sell order is matched with a buy order in accordance with the exchange's nondiscretionary methods used to match buyers and sellers.<sup>50</sup>

Second, the Act recognizes that order entry and routing to a national securities exchange for execution is not a function commonly performed by [an exchange]. As noted above, Rule 3b-16 under the Act states that an organization is not considered to provide a marketplace or facility for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange "*solely because such organization . . . [r]outes orders to a national securities exchange . . .*"<sup>51</sup>

platform. However, the Exchange is not arguing that being owned and operated by an entity separate from the Exchange is sufficient reason for an OEMS to not be considered a facility of an exchange. The Exchange is arguing, rather, that an entity operates an OEMS that satisfies the specified proposed criteria is not part of a group of persons with the Exchange.

<sup>50</sup> As set forth in proposed Rule 3.66(d)(2), the Exchange's system processes all orders it receives in the same manner, regardless of the OEMS used to submit the orders (the Exchange's order handler and matching engine are unable to distinguish from which OEMS and order was submitted, as order messages are submitted in the same format).

<sup>51</sup> 17 CFR 240.3b-16(b) (emphasis added).

An OEMS platform's interaction with the Exchange is solely its ability to route orders to the Exchange (and can only route orders directly to the Exchange if the TPH separately purchased an Exchange port, as discussed above). The Act explicitly excludes this function from the definition of an exchange, demonstrating the Commission's intent that systems whose purpose was to route orders to an exchange should not be subject to the rule filing process.

### A Rule 3.66 OEMS Provider Is Not Part of a Group of Persons With the Exchange

The Exchange also asserts that a Rule 3.66 OEMS is not part of a group of persons with the Exchange that together is performing and facilitating exchange functions and thus is not considered an exchange. An entity does not automatically become part of a group of persons with an exchange because such entity is affiliated with the exchange. As noted above, Commission staff previously advised the Exchange that its parent's acquisitions of entities that offered OEMS platforms was sufficient for those OEMS platforms to become Exchange facilities, despite those acquisitions resulting in no material changes to the operation of those platforms, and thus subjected to regulation by and the submission of rule filings to the Commission.<sup>52</sup> However, corporate affiliation is not determinative of what constitutes a "group of persons"; instead, the facts and circumstances around the relationship must be considered.<sup>53</sup> A Rule 3.66 OEMS is not maintained by the Exchange and is not part of a group of persons with the Exchange.

From a business perspective, an OEMS and the Exchange have different primary goals and thus a lack of unity of interests.<sup>54</sup> Despite being owned by the same parent, the Exchange and a Rule 3.66 OEMS are not closely

<sup>52</sup> Prior to their acquisitions by CGM's predecessor in 2015 and 2017, Livevol and Silexx, respectively, each were operated by a third-party entity in substantially the same manner as they were operated after the acquisitions (the Exchange notes it no longer offers a Livevol OEMS). The Exchange began filing rules for these OEMSs solely because their operated became affiliated with the Exchange. See Livevol Approval Order and Silexx Approval Order.

<sup>53</sup> "Unaffiliated entities engaged in joint ventures or other concerted activity may or may not, depending upon the circumstances, be considered a 'group of persons' . . . . On the other hand, one corporation that is affiliated with but not controlled by another may or may not, depending upon the circumstances, be considered a 'group of persons' . . . ." See *ICE*, 23 F.4th at 1024.

<sup>54</sup> See *ICE*, 23 F.4th at 1024-1025 (finding that a unity of interests between the affiliates was an important component of the finding that the affiliates were acting as a group of persons).

connected, as they have different principal functions. Specifically, the Exchange's principal function is to operate its market in accordance with the Act while a Rule 3.66 OEMS's function is to develop, maintain, and sell the OEMS platform for market participants (both TPHs and non-TPHs) to execute orders at one of many trading venues, which may or may not include the Exchange. The Exchange's business benefits from increased volume on its market (due to transaction fees), while an OEMS's business benefits from increased numbers of users (a user's executed volume generally has no impact on fees that user pays to the OEMS, which fees are generally based on log-ins and add-on functionality). While it is possible an increase in a Rule 3.66 OEMS users could lead to increased volume on the Exchange, it is also possible that such an increase in users results in no increase in volume on the Exchange.<sup>55</sup> Use of a Rule 3.66 OEMS would not be Exchange-specific, as users can ultimately send orders from a Rule 3.66 OEMS to execute on any exchange or trading venue. For example, if a market participant uses a Rule 3.66 OEMS, that market participant has the discretion to ultimately send no orders to the Exchange for execution. Additionally, proposed Rule 3.66 would require that any fees charged to a user of the OEMS are unrelated to that user's Exchange activity or to Exchange fees set forth in the Exchange's Fees Schedule.

Further, as noted above and as set forth in proposed Rule 3.66, use of a Rule 3.66 OEMS would be voluntary and not required to access the Exchange (as discussed above). The act of entering an order into and sending an order from a Rule 3.66 OEMS for execution would be one of many steps an order must take before potential execution at the Exchange (and one within sole discretion of the OEMS user and its broker), and that step often precedes other steps that other parties and other systems must take before ultimate execution at the Exchange. This is true even if the Rule 3.66 OEMS user is a TPH that has purchased a port to access the Exchange; market participants often connect to multiple trading venues, particularly brokers who need to seek best execution for their customers. The different primary business functions between the Exchange and a Rule 3.66 OEMS are ultimately not aligned and

<sup>55</sup> As noted above, the Exchange's system has no way to determine how many orders it receives from a specific OEMS, and the user of an OEMS may ultimately send no orders to the Exchange for execution.



thus demonstrate a lack of unity of interests between the Exchange and an OEMS affiliate. Under these circumstances, a Rule 3.66 OEMS would not be an integral part of the Exchange's system and, in fact, would be merely one of many options available for customers to use for execution and management of orders for securities.

Pursuant to proposed Rule 3.66, a Rule 3.66 OEMS would operate on a level-playing field with other OEMSs. Specifically:

- a user of a Rule 3.66 OEMS would establish connectivity to the Exchange in the same manner as a user of another OEMS;
- to the extent an order entered into a Rule 3.66 OEMS ultimately executes on the Exchange, the Exchange would process that order in the same manner as all other orders (the Exchange's order handling system and matching engine have no way to determine through what OEMS an order was entered);
- fees charged to the user of a Rule 3.66 OEMS would be unrelated to activity on the Exchange;
- access to Exchange market data through the OEMS would occur in accordance with the same terms and conditions applicable to any other user of that market data; and
- the Exchange would adopt information barriers designed to prevent the Rule 3.66 OEMS from receiving a competitive advantage or benefit based on its affiliation or relationship with the Exchange.<sup>56</sup>

The proposed criteria set forth in proposed Rule 3.66 would prevent the Exchange from acting in concert with a Rule 3.66 OEMS.<sup>57</sup> Despite being under the same corporate umbrella, these vastly different businesses would not be acting in concert, as they have completely different objectives.<sup>58</sup>

#### Elimination of Unfair Discrimination

Finally, the Exchange believes the proposed rule change is designed to

<sup>56</sup> See proposed Rule 3.66(b), (d)–(f), and (h). Information barriers are generally viewed as sufficient for TPHs to maintain different businesses. See, e.g., Rule 8.10 (which requires TPHs to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, nonpublic information by such TPH or persons associated with such TPH). The Exchange notes it already has such information barriers in place with respect to Silexx.

<sup>57</sup> If the Commission approves this proposed rule change, Rule 3.66 would be subject to SEC oversight. As a result, the Commission would have the ability to confirm that the Exchange is complying with the requirements set forth in Rule 3.66 with respect to any affiliated OEMSs and thus ensure that the Exchange is operating with respect to such OEMSs in the same manner as it would with respect to any third-party OEMS.

<sup>58</sup> See *ICE*, 23 F.4th at 1024.

prevent unfair discrimination between customers, issuers, brokers, and dealers. As noted above, requiring the Exchange to submit rule filings for a Rule 3.66 OEMS causes operation of the OEMS to operate at a competitive disadvantage within the market. Elimination of this rule filing requirement will eliminate this discrimination against such an OEMS operator to the benefit of OEMS customers based on nothing more than corporate affiliation, despite such OEMS interacting with the Exchange in the same manner as any other OEMS that is subject to no rule filing requirement. The Exchange would ultimately treat a Rule 3.66 OEMS operator (and any messages it receives from that OEMS) in the same manner as any other OEMS operator.

#### B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, as it has no impact on TPHs' or any market participants' ability to submit and execute orders on the Exchange. Market participants that are users of a Rule 3.66 OEMS would be able to use that platform in the same manner as they would if the OEMS were otherwise deemed a facility. As set forth in proposed Rule 3.66, the Exchange will handle all orders it receives in a nondiscretionary manner as set forth in its Rules, regardless of through which OEMSs the orders were submitted to the Exchange. Only TPHs will continue to be able to submit orders directly to the Exchange (using any OEMSs they choose) by purchasing ports in the same manner and in accordance with the Exchange Fees Schedule to establish a direct connection to the Exchange.

The Exchange does not believe the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, as the Exchange believes it would improve competition among OEMSs and permit similarly situated products to compete on equal footing, ultimately benefitting all market participants that use these important tools. Other exchanges may adopt similar rules to establish the same clarity regarding affiliated OEMSs. This would ensure that all exchanges with affiliated OEMSs

will be subject to the same rule filing, or lack of rule filing, requirements.

The Exchange believes that the proposed rule change will relieve any burden on, or otherwise promote, competition. Other market participants (such as broker-dealers and market participants) generally offer OEMS platforms in the market. If an OEMS platform is deemed a facility of the Exchange solely because of its affiliation or relationship with the Exchange but is otherwise operating on equal terms as other OEMS platforms available in the market, that facility determination ultimately burdens competition within the OEMS market. The Exchange would be required to submit rule filings with respect to the OEMS platform's functionality and fees despite receiving no benefit from its relationship with the OEMS platform nor having any right to use the OEMS platform. However, other providers of OEMS platforms that compete with the Exchange-affiliated OEMS platform would not be subject to rule filing requirements or the other obligations to which exchanges are subject. The Exchange believes this competitive disadvantage for Exchange-affiliated OEMS platforms harms competition within the OEM market to the detriment of customers of these products. The Exchange believes the proposed rule change will level the playing field among OEMS platforms that are operating with respect to the Exchange in accordance with the same terms and conditions, which ultimately benefits customers.

#### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received written comments on the proposed rule change.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

A. by order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.



#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-CBOE-2024-008 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-CBOE-2024-008. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CBOE-2024-008 and should be submitted on or before March 26, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>59</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2024-04548 Filed 3-4-24; 8:45 am]

**BILLING CODE 8011-01-P**

#### SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 35150; File No. 812-15381]

#### First Trust Real Assets Fund, et al.

February 28, 2024.

**AGENCY:** Securities and Exchange Commission ("Commission" or "SEC").

**ACTION:** Notice.

Notice of application for an order under section 17(d) and 57(i) of the Investment Company Act of 1940 (the "Act") and rule 17d-1 under the Act to permit certain joint transactions otherwise prohibited by section 17(d) and 57(a)(4) of the Act and rule 17d-1 under the Act.

**Summary of Application:** Applicants request an order to permit certain business development companies ("BDCs") and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment entities.

**Applicants:** First Trust Real Assets Fund; First Trust Private Credit Fund; First Trust Private Assets Fund; First Trust Alternative Opportunities Fund; Infinity Core Alternative Fund; Destiny Alternative Fund LLC; First Trust Hedged Strategies Fund; First Trust Capital Management L.P.; FT Alternative Platform I LLC; FT Offshore I LP; VCM Core Opportunities Fund LLC; FT Private Investment Platform I LLC; FT Real Estate Platform I LLC; Cornerstone Diversified Portfolio LP; Highland Capital Management Institutional Fund II LLC; Destiny Alternative Fund II LLC; CP Special Assets Fund LLC; Park Shore Multi Asset Strategy Fund LLC; FT Vest Hedged Equity Enhanced Income Fund LLC; Destiny Target Outcome Fund 2024-1 LLC; and Vivaldi Capital Management LP.

**Filing Dates:** The application was filed on August 23, 2022, and amended on January 19, 2023, and February 7, 2024.

**Hearing or Notification of Hearing:** An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may

request a hearing on any application by emailing the SEC's Secretary at [Secretaries-Office@sec.gov](mailto:Secretaries-Office@sec.gov) and serving the Applicants with a copy of the request by email, to the email address listed below for the relevant Applicant. Hearing requests should be received by the Commission by 5:30 p.m. on March 25, 2024 and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at [Secretaries-Office@sec.gov](mailto:Secretaries-Office@sec.gov).

**ADDRESSES:** The Commission: [Secretaries-Office@sec.gov](mailto:Secretaries-Office@sec.gov). Applicants: Marc D. Bassewitz, Esq., [mbssewitz@firsttrustcapital.com](mailto:mbssewitz@firsttrustcapital.com), and Veena K. Jain, Esq., [veena.jain@faegredrinker.com](mailto:veena.jain@faegredrinker.com).

**FOR FURTHER INFORMATION CONTACT:** Stephan N. Packs, Senior Counsel, or Terri G. Jordan, Branch Chief, at (202) 551-6825 (Division of Investment Management, Chief Counsel's Office).

**SUPPLEMENTARY INFORMATION:** For Applicants' representations, legal analysis, and conditions, please refer to Applicants' Second Amended and Restated Application, dated February 7, 2024, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system. The SEC's EDGAR system may be searched at <http://www.sec.gov/edgar/searchedgar/legacy/companysearch.html>. You may also call the SEC's Public Reference Room at (202) 551-8090.

For the Commission, by the Division of Investment Management, under delegated authority.

**Sherry R. Haywood,**

*Assistant Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-770, OMB Control No. 3235-0750]

#### Proposed Collection; Comment Request; Extension: Rule 18a-8

*Upon Written Request, Copies Available From:* Securities and Exchange Commission, Office of FOIA

<sup>59</sup> 17 CFR 200.30-3(a)(12).