May 13, 2024

Submitted via CFTC Portal

Office of the Secretariat
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street
Washington, DC 20581

Re: Requirements for Designated Contract Markets and Swap Execution Facilities Regarding Governance and the Mitigation of Conflicts of Interest Impacting Market Regulation Functions (RIN 3038–AF29)

Dear Mr. Kirkpatrick:

Cboe Global Markets, Inc. ("Cboe") appreciates the opportunity to provide comments to the Commodity Futures Trading Commission ("CFTC" or "Commission") regarding its proposed rulemaking related to governance and conflicts of interest ("Proposal").[1] The Proposal seeks public comment regarding proposed new regulations and amendments to the CFTC's existing regulations for designated contract markets ("DCMs") and swap execution facilities ("SEFs," collectively, "registered entities") that would establish governance and fitness requirements with respect to market regulation functions, as well as related conflict of interest standards.

Cboe operates four CFTC-registered entities: two DCMs (Cboe Futures Exchange, LLC and Cboe Digital Exchange, LLC), a SEF (Cboe SEF, LLC), and a derivatives clearing organization ("DCO") (Cboe Clear Digital, LLC). Accordingly, Cboe is well-suited to provide comments on the Proposal, specifically from the DCM and SEF perspective.

While Cboe supports sound governance principles and the management of conflicts of interest, we believe the Proposal suffers from a pair of contradictory flaws. It is too vague in articulating the perceived problems it seeks to address and at the same time too prescriptive in its proposed revisions to existing regulations – regulations that currently function quite well. The Commission's goals would be better served by an inversion of these flaws in the Proposal. That is, there should be a clear expression of the perceived problem(s) to be addressed, more focus on the high-level principles at issue, and less prescription. In addition, some of the proposed regulations are problematic because they intrude on complex corporate governance structures. These regulations seek to impose requirements in areas that are typically in the domain of state corporate governance law which is the primary body of law in relation to corporate governance. For example, more than once the Proposal dictates precisely how registered entities should memorialize particular issues in its board of director meeting minutes.

The Proposal also eviscerates one of the core tenants of the CFTC's regulatory regime, found in Sections 5(d)(1)(B) and 5h(f)(1)(B) of the CEA, which provide that unless otherwise determined by the

[1] Requirements for Designated Contract Markets and Swap Execution Facilities Regarding Governance and the Mitigation of Conflicts of Interest Impacting Market Regulation Functions, 89 Fed. Reg. 19646 (Mar. 19, 2024).

Commission by rule or regulation, a registered entity "shall have reasonable discretion in establishing the manner in which [it] complies with the core principles described in [the CEA]." For nearly fifty years, the Commission has embraced principles-based regulation because it allows for flexibility and evolution as circumstances and the marketplace change and evolve. Much of the Proposal, however, *codifies* the DCM Acceptable Practices to Core Principle 16 (Conflicts of Interest), thereby elevating what had been acceptable practices and guidance to prescriptive regulations and stripping registered entities of the appropriate discretion with which they have been exercising. As Commissioner Pham noted in her statement regarding the Proposal, "haphazardly codify[ing] guidance as rules . . . goes against the very essence of the statutory framework to regulate derivatives markets under the Commodity Exchange Act (CEA)."[2] Cboe agrees. DCMs and SEFs should be able to comply with the Core Principles applicable to them in a manner that works best for their individual structures and unique facts and circumstances instead of the one-size-fits-all approach reflected in the Proposal, which is overly prescriptive and does not allow for any variation in the manner of compliance.

Not only does the Proposal seek to codify existing acceptable practices, in many instances it also seeks to broaden and expand those practices, but nowhere does the Proposal address why it is doing so now or why the current acceptable practices are lacking. The Proposal does not discuss actual conflicts of interest, perceived conflicts of interest, current or future problems in the market as a result of these conflicts, and how the codification of these principles will fix these issues. To the contrary, Cboe believes the current acceptable practices are sufficient. As the Commission observed in the Proposal, all DCMs have chosen to adopt the acceptable practices under Core Principle 16.[3] Again, as Commissioner Pham noted, when it first adopted DCM rules in 2012 and decided to leave certain areas as guidance on acceptable best practices, the Commission "examined each regulation and explained where guidance was more appropriate than a rule in recognition of the need to maintain flexibility for DCMs to establish rules that are appropriate for their products, markets, and participants, including associated risks."[4] Cboe shares Commissioner Pham's "serious concerns with the CFTC proceeding down a path to finalizing a rule that is overly prescriptive and unsupported by data or other evidence."[5]

In addition, the Proposal does not address the more significant threat to the management of conflicts of interest at registered entities – the operation of a registered entity and of a broker or liquidity provider that trade on or is regulated by the same registered entity.[6] Registered entities without this type of vertical integration do not have the most significant potential conflicts of interest, raising the question of what problems the Commission seeks to solve with this Proposal and why it seeks to do so now.

The Proposal also fails to differentiate between a registered entity that is privately owned and a registered entity that is owned by a public company. Cboe believes this distinction is an important one

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[2] 89 Fed. Reg. at 19725.
[3] 89 Fed. Reg. at 19682.
[4] 89 Fed. Reg. at 19725.
[5] *Id*.
[6] *See*, *e.g.*, Statement of Commissioner Goldsmith Romero, dissenting from approval of Bitnomial application (noting vertical integration of intermediaries and market makers with DCMs and DCOs could "potentially upend[] the CFTC's regulatory ecosystem of checks and balances" and therefore requires the Commission to holistically determine "the appropriate regulatory framework to address those risks").

because public companies already are subject to strong standards regarding governance, transparency, controls, and the mitigation of conflicts of interest. High-level principles would naturally account for this important distinction by granting registered entities sufficient discretion to comply as they see fit. The Commission's prescriptive approach in the Proposal imposes rigid, onerous, and sub-optimal requirements on all registered entities regardless of their unique structures and circumstances. Likewise, the Proposal also fails to differentiate a registered entity that has an affiliated broker or liquidity provider that trades on or is regulated by the registered entity and a registered entity that does not have this type of affiliation. The Proposal also will significantly increase the burden on market participants as well as on Commission staff, who likely will need to be consulted on the implementation by registered entities of many of the new proposed requirements. Finally, because the Proposal calls for significant changes to registered entities' governance structures, Cboe supports the Commission's proposed effective date of 60 days after publication in the Federal Register and proposed compliance date of one-year after the effective date of the final regulations.

Cboe also wishes to share its views regarding several key elements of the Proposal. Cboe has the following comments regarding specific aspects of the Proposal:

The Definition of Market Regulation Functions is Overbroad

The Proposal's definition of Market Regulation Functions is overbroad. Proposed Regulations 37.1201(b)(9) and 38.851(b)(9) would respectively define "market regulation functions" as those registered entity functions required by SEF Core Principles 2, 4, 6, 10 and the applicable Commission regulations thereunder or DCM Core Principles 2, 4, 5, 10, 12, 13, 17 and the applicable Commission regulations thereunder. The preamble in the Proposal is a bit more precise, defining "market regulation functions" as the "responsibilities related to trade practice surveillance, market surveillance, real-time market monitoring, audit trail data and recordkeeping enforcement, investigations of possible SEF or DCM rule violations, and disciplinary actions." Both definitions are overbroad, potentially capturing groups and individuals that traditionally have not been and should not be considered regulatory staff.

For example, "real-time market monitoring" should not be defined as a market regulation function. As set forth in Commission Regulations 37.203(e) and 38.157, registered entities must monitor all trading activity to not only identify "disorderly trading" but also "any market or system anomalies" – i.e., ensure the market runs smoothly in real-time. CFE, Cboe SEF, and Cboe Digital each operate close to 24/5 markets. Accordingly, Cboe treats real-time market monitoring as an operational issue requiring 24/5 monitoring by Cboe's technical and operations Trade Desk staff in contrast to the T+1 surveillance of Regulation. Thus, while Compliance assists the Trade Desk in administering the real-time market monitoring program and Trade Desk staff make referrals to Regulation regarding real-time market monitoring observations as appropriate, Cboe ultimately treats real-time market monitoring as an adjacent function operated by a non-regulatory, operations team.[7] Cboe believes this is the right approach for its markets, especially where two of the three elements of a proper real-time market

[7] We understand other DCMs similarly separate the real-time market monitoring function from the Market Regulation function for the same reasons. We have no objection with a registered entity determining real-time market monitoring is a core self-regulatory function. Cboe merely believes it best for individual registered entities to decide this question based upon their specific circumstances.

monitoring program ("market and system anomalies") are better handled by operations as opposed to self-regulatory staff. Cboe also believes its approach is consistent with maintaining regulatory independence because the Cboe Trade Desk staff that perform real-time market monitoring functions also perform business related functions such as providing operational and technical support to market participants. It would be inconsistent with Cboe regulatory independence policies, impractical, inefficient, and cumbersome for Cboe to have personnel that conduct real-time market monitoring that is not specifically related to regulatory market surveillance report to Cboe's Chief Regulatory Officer ("CRO"). Additionally, the Commission has not identified in the Proposal any reason why the current approach that Cboe has employed for more than twenty years is not appropriate.

Likewise, both definitions of market regulation function in the Proposal create ambiguity and confusion regarding registered entity audit trail practices. Cboe agrees that a registered entity's "audit trail data and recordkeeping enforcement" of its members constitutes a core market regulation function. However, the reference to SEF Core Principle 4 and DCM Core Principle 4 would seemingly capture, among other things, Commission Regulations 37.406 and 38.256, which require registered entities to "have the ability to comprehensively and accurately reconstruct all trading on its trading facility." A registered entity's duty to accurately retain all audit trail data is not a core market regulation function and would inappropriately capture Cboe's Data Platform Engineering team(s). Sweeping a core technology function within the definition of market regulation function undermines as opposed to strengthens effective supervision by stretching the responsibilities of a CRO to cover not only self-regulatory responsibilities but also core Information technology support duties. Likewise, the reference to DCM Core Principle 17 in the definition of market regulation function is similarly problematic, where the core principle merely provides that the governance arrangements of a DCM "shall be designed to permit consideration of the views of market participants." Having the CRO be responsible for a corporate governance function such as Core Principle 17 is not consistent with the role of the CRO which is focused on regulation and not the governance processes of a registered entity.

We believe the Commission's effort to define market regulation functions is misguided and will lead to unintended consequences. The better – more flexible – approach is to leave it to registered entities in consultation with their Regulatory Oversight Committees ("ROCs") to define what market regulation functions should be the domain of the CRO and the ROC. In the alternative, the Commission should adopt the more specific definition from the preamble minus the reference to "real-time market monitoring."

The Commission's Approach to Beneficial Ownership is Not Practical

Cboe believes the Proposal's approach to beneficial ownership is not practical. Proposed Regulations 37.5(c)(1) and 38.5(c)(1) would require a registered entity to report "any anticipated change in the ownership or corporate or organizational structure" in its or its respective parent(s) that would result in at least a 10 percent change in ownership. This proposed approach to beneficial ownership suffers from two issues that render compliance impractical: (1) it does not account for the realities of public stock ownership; and (2) "anticipated change" is a vague term.

First, Cboe believes that where the registered entity is a public company or is owned by a public company, the Commission should change from 10 to 25 percent the proposed threshold for when to

notify the Commission of indirect ownership changes. Public companies have no control over who owns their publicly listed shares, often have no relationship with public shareholders, and generally have no ability to obtain information from public shareholders. Moreover, public companies do not know when the 10% ownership threshold is crossed until after the fact – i.e., 45 days after the end of each fiscal quarter when parties file Forms 13F with the SEC. In addition, it is not uncommon for passive asset managers to own more than 10 percent of a public company's shares. For each of these reasons, Cboe believes a threshold of 25 percent is the more appropriate standard in line with the level at which control is assumed under the Bank Secrecy Act's control definitions. *See*, *e.g.*, 31 USC § 5336.

Second, Cboe believes the "anticipated change" threshold for notifying the Commission establishes a vague standard that makes compliance challenging and impractical. This imprecise standard begs the question of when does a registered entity anticipate a potential change in ownership or organizational structure? The dictionary definition of "anticipate" is not helpful. "Anticipate" can mean either "to give advance thought, discussion, or treatment to" or "to look forward to as certain."[8] Clearly, a registered entity gives advance thought to a potential change in ownership when it first engages with a potential investor or acquirer. However, preliminary discussions are quite distinct from expecting something "as certain." Further, even as discussions advance, it is not uncommon for negotiations to break down or accelerate quickly at a late stage. Cboe believes a better standard for notification would be when there is a signed agreement to effectuate such a change in ownership or organizational structure.

The Proposal's Approach to Minimum Fitness Standards is Unduly Burdensome

While Cboe supports fitness standards for officers, directors, and other appropriate individuals, the Proposal's approach to minimum fitness standards is unduly burdensome. Proposed Regulations 37.207(a) and 38.801(a) would apply fitness standards requirements to a large group of parties, including a registered entity's officers; members of its board of directors, committees, and disciplinary panels; members of the registered entity; any person with direct access to the market; any person who owns 10 percent or more of the registered entity and who, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the management or policies of the registered entity; and any party affiliated with any party included in the foregoing list.

To require that fitness standards be applied to any party affiliated with the already large group included in the foregoing list is vague, overly broad, and unwieldy and creates an exponentially large universe to which the Commission is proposing to apply the provisions for the collection and verification of information by registered entities with respect to this universe (since these requirements would apply not only to the parties enumerated in the list but also to any party affiliated with any of the enumerated parties).

Consistent with Cboe's comments above in relation to owners of 10 percent or more of a registered entity that is a public company or is owned by a public company, Cboe believes a better threshold for the application of fitness standards to indirect owners of a registered entity in that context is 25 percent for the same reasons as are noted above.

[8] Merriam-Webster, https://www.merriam-webster.com/dictionary/anticipate.

Cboe also requests that the Commission clarify that these fitness standards would not apply to advisory committees. This is a step too far that impedes the right of registered entities to determine in their best judgment who to appoint to advisory committees to seek input from market participants. It is also goes beyond the current iteration of these provisions. DCM Core Principle 15 and CFTC Regulation 1.63 do not apply to advisory committees. In relation to committees, DCM Core Principle 15 applies to disciplinary committees and CFTC Regulation 1.63 references disciplinary committees, arbitration panels, and oversight panels. None of these are advisory committees. Additionally, none of the reasons stated in the Proposal for applying fitness standards are applicable with respect to advisory committees.[9] Advisory committees are solely advisory in nature and have no authority to act on behalf of a registered entity. In particular, they do not have obligations regarding a registered entity's governance or disciplinary process and do not have the ability to exercise control over the registered entity.

Proposed Regulations 37.207(d)(1) and 38.801(d)(1) would require registered entities to establish appropriate procedures for the collection and verification of information supporting compliance with fitness standards. If the proposed regulations stopped there, that would be consistent with principles-based regulation. However, the Proposal goes further, including four subparts that prescribe how each registered entity should go about establishing those procedures. For example, verifying compliance for all officers (who owe fiduciary duties to the registered entities) on an annual basis is burdensome and unnecessary. Cboe believes a better approach would be to permit registered entities to exercise their reasonable discretion as contemplated by Regulations 37.100(b) and 38.150(b) in devising appropriate procedures. Alternatively, initial verification and having a requirement that parties subject to fitness standards notify the entity in situations outlined in proposed regulations 37.207(c) and 38.801(c) should be sufficient.[10]

Finally, the Commission seeks comment on whether it should implement a "sufficiently good repute" standard as an additional fitness standard and further whether the Commission should define "good repute." Cboe believes the Commission has sufficiently established six bright line fitness standards under subpart (c) that are easily implemented, and which have already been implemented by registered entities. Accordingly, the Commission should refrain from mandating the addition of a seventh less clear "good repute" standard. Cboe believes it should be left to registered entities to decide whether to add such a standard. In addition, defining an inherently subjective standard such as "good repute" can be difficult, and this standard could be reasonably defined differently by different registered entities. Thus, Cboe believes it is best left to registered entities that elect to include such a standard to also define it.

The Proposal's Approach to Conflicts of Interest is Too Prescriptive

The Proposal's approach to conflicts of interest in decision-making is too prescriptive. Proposed Regulations 37.1202(b) and 38.852(b) would require designated entities to document their processes for

[9] 89 Fed. Reg. at 19657 (stating §§ 37.207(a) and 38.801(a) are reasonably necessary where individuals have "(1) obligations with respect to a SEF's or DCM's governance or disciplinary process; or (2) the ability to exercise control over a SEF or DCM.")

[10] To the extent the Commission finalizes this rule notwithstanding Cboe's comments, it should be sufficient to check names against NFA Basic and FINRA CRD. Otherwise, conducting additional background checks can become administratively burdensome and expensive without adding materially more information.

complying with these conflict-of-interest rules and would set forth specific documentation requirements. Specifically, designated entities must document (1) the names of all members and officers who attended the relevant meeting in-person or who otherwise were present by electronic means and (2) the names of any members and officers who voluntarily recused themselves or were required to abstain from deliberations or voting on a matter and the reason for the recusal or abstention. While Cboe does not disagree with the principle at issue, as noted above, Cboe believes the Proposal impedes the discretion of registered entities to define the process that works best for their unique circumstances. Dictating how a registered entity documents an internal procedure instead of merely requiring the act of documentation cuts against the fundamental concept of principles-based regulation. Likewise, as discussed elsewhere in this letter, Cboe believes it is a mistake for the Commission to dictate how a committee records its meeting minutes.

Separately, the Commission notes in the Proposal that proposed Regulations 37.1202(b) and 38.852(b) borrow heavily from 1.69(b)(2). However, while 1.69(b)(3) permits members of governing boards, disciplinary committees, or oversight panels, who otherwise would be required to abstain from deliberations and voting on a matter because of a conflict under Commission regulation § 1.69(b)(2), to deliberate but not vote on the matter, the Commission declined to propose adopting this exemption.

Cboe believes this is a mistake because it diminishes the discretion of a governing board, disciplinary committee, or oversight panel to decide what is best in the specific circumstances before it. That is, it interferes with an independent board's judgment as to what it should review before making a decision. A flaw inherent to prescriptive regulation is that it cannot anticipate every permutation and development. Cboe ultimately believes the Commission should defer to the sophistication, expertise, and ethics of a registered entity's governing boards. An independent board can evaluate whether it has sufficient expertise. This issue further demonstrates why acceptable practices are useful, nimble, and preferable in most situations.

The Proposal's Approach to Trading Prohibitions is Not Feasible

The Proposal's approach to trading prohibitions is not feasible or practicable. Proposed Regulations 37.1203(b) and 38.853(b) would prohibit employees from certain types of trading. Cboe has no objection to the principles set forth in these proposed regulations. However, Cboe notes that enforcing trading restrictions in the futures and swaps markets is far more challenging than in the equity and fixed income markets. Many broker-dealers offer securities trade-data feeds that third party vendors can automatically reconcile against employee data. This is generally not the case with respect to futures and swaps trading. Thus, registered entities are left with highly manual processes that are challenging to implement. The Commission also has not identified what scenarios have arisen to give it cause for concern surrounding this kind of trading.

Proposed Regulations 37.1203(c) and 38.353(c) would allow registered entities to grant employees certain permitted exemptions from the trading prohibitions set forth in subsection(b). Among other things, such exemptions must be administered on a case-by-case basis and approved by the registered entities' ROCs. Cboe believes the currently drafted exemptions are too narrowly crafted to be of any practical use. In lieu of these ad hoc exemptions, Cboe agrees with the Commission that "it would be appropriate to grant an employee an exemption to trade in a pooled investment vehicle organized and

operated as a commodity pool within the meaning of § 4.10(d) of the Commission regulations."[11] For that reason, Cboe believes a better approach would be to expand as generally applicable the exemption permitted in (c)(4), which would permit an employee to participate in a pooled investment vehicle where the employee has no direct or indirect control with respect to transactions executed for or on behalf of such vehicles.

Proposed Regulations 37.1203(d) and 38.353(d) would require monitoring of exemptions granted pursuant to Regulations 37.1203(c) and 38.353(c). Consistent with its earlier comment, Cboe does not believe granting ad hoc exemption and monitoring such trading is feasible or desirable and further notes that monitoring of exempt trading via a pooled investment vehicle is unnecessary. This would create an additional, ongoing burden with no palpable improvement.

Proposed Regulations 37.1203(e) and 38.353(e) would prohibit board members, committee members, employees, consultants, and those with an ownership interest of 10 percent more from certain trading on the basis of material non-public information. The Proposal does not address indirect control of the registered entities and therefore it is unclear if proposed Regulations 37.1203(e) and 38.353(e) would apply to a 10 percent owner of a public company (which as noted above, often can be a passive asset manager). Consistent with its earlier comment, Cboe believes for registered entities that are public companies or owned by public companies, the indirect ownership threshold should be raised to 25 percent. Regarding the proposed regulations' application to consultants, this requirement should not apply to lawyers and accountants that already owe a professional duty not to use confidential information in this manner – they would violate these standards and compromise their own livelihoods if they misuse such information.

The Proposal's Provisions Relating to Boards of Directors Should Be Further Refined

Proposed Regulations 37.1204(b) and 38.854(b) would require that each member of a registered entity's board of directors have relevant expertise to fulfill the roles and responsibilities of serving on the board. Cboe has no objection so long as the registered entity retains the discretion to determine what is relevant expertise to its own business and circumstances.

Proposed Regulations 37.1204(d) and 38.854(d) would require the board of directors of a registered entity conduct an annual self-assessment and further would require a registered entity to document such self-assessments and make it available to the Commission for inspection. Cboe sees value in conducting such annual self-assessments. Indeed, each of its registered entities' boards currently conducts an annual self-assessment and finds them useful, but those discussions are effective, fulsome, and value enhancing because the dissemination is strategically limited. Cboe believes providing self-assessments to the Commission will have the unintended consequence of chilling candid discussions.

DCMs and SEFs Should Not Be Required to Have Nominating Committees

Cboe strongly objects to the Proposal's requirement that a registered entity establish a board-level nominating committee. Proposed Regulations 37.1205 and 38.855 would require a registered entity to establish board-level nominating committees to identify a diverse panel of individuals qualified to serve

[11] 89 Fed. Reg. at 19665, n.178.

on the board of directors and that reflect the views of market participants. Such nominating committee also would administer a process for the nomination of individuals to the board of directors.

Cboe agrees with the importance of ensuring that a registered entity's board is made up of a diverse set of qualified candidates. However, the creation of a nominating committee adds significant additional administration without any tangible benefit. The same objective can be achieved via a more principles-based approach. For example, DCOs are not required to establish nominating committees. Instead, Regulations 39.24(c)(2) and 39.26 require DCOs to maintain policies to make certain that the board "consists of suitable individuals having appropriate skills and incentives" and to ensure that the composition of the board "includes market participants and individuals who are not executives, officers, or employees" of the DCO or an affiliate. Such a principles-based approach would provide each registered entity with the discretion to comply in the way that works best for its unique facts and circumstances. For instance, CFE and Cboe SEF utilize an internal process which also leverages public input from the independent Lead Director and independent Chair of the Nominating Committee of their public parent company when appointing new directors.

Separately, the Commission should proceed cautiously in requiring that a registered entity specifically nominate individuals that reflect the views of market participants. Cboe agrees with the Commission's high-level principle that a board of a registered entity should hear and consider the views of market participants. Cboe, however, also believes that requiring current or former market participants serve on boards can lead to significant, actual conflicts of interest and can make managing the sharing of non-public, material information challenging – especially information relating to the self-regulatory functions of the registered entity.[12]

There are other governance frameworks designed to balance independence while also ensuring that a board consider and reflect upon the views of market participants. For example, CFE has established an independent board with all public directors except for one executive management director. Such a structure is designed to ensure independence. Separately, CFE has established a Trading Advisory Committee ("TAC"), whose mandate is to provide advice to the Board and CFE management regarding issues of interest to CFE Trading Privilege Holders and market participants. In particular, the TAC provides advice regarding trading procedures, trading functionality, products, service offerings, rule changes, market structure, futures industry issues and proposals, and potential CFE public director candidates. In addition, the CFE Board receives regular reports regarding input provided at TAC meetings and a TAC member attends a CFE Board meeting on an annual basis to provide input directly to the board. Cboe believes this governance structure more than sufficiently meets the goals articulated in the Proposal. Other structures could also achieve the same outcome. The Proposal should be revised to be more principles based so that it would permit such structures to persist in lieu of requiring the board to have market participants serve on the board.

[12] Cboe believes Commission Regulation 39.26 is not apt precedence for requiring DCMs to have market participants on a registered entities' board because market participants and DCOs share an alignment on risk management that is not present in the relationship between registered entities and their market participant members – who do not have skin in the game via contributions to a guaranty fund.

The Proposal's Codification of
Acceptable Practices Regarding the Chief Regulatory Officer Role Go Too Far

Cboe believes some of the proposed acceptable practices regarding the CRO role go too far and are unnecessary. For example, Cboe objects to the requirement in proposed Regulation 38.856(a)(1)(ii) that a CRO have supervisory authority over all staff performing the DCM's market regulation functions in so far as the Proposal's definition of those functions is overbroad. There is no good reason for the CRO to supervise functions and groups that provide services ancillary to a DCM's core market regulation function – e.g., Trade Desk staff or technology staff that maintains audit trails. As stated previously, registered entities should have the discretion articulated in Regulations 37.100(b) and 38.150(b) to design management frameworks (including the scope of the CRO's authority) that best work for them while also complying with the core principles described in the Proposal.

Proposed Regulation 38.856(b) would require a CRO to report directly to the Board of Directors or the senior officer of the DCM. Cboe disagrees with the Commission's upending of the status quo in this regard. A registered entity should be able to choose to have its CRO report to the ROC as currently set forth in the existing DCM acceptable practices, which has worked well. The Board is responsible for supervising all aspects of a registered entity's business whereas a ROC's scope of responsibilities is solely limited to the registered entity's self-regulatory program and its compliance with the CEA and Commission regulations. Accordingly, a ROC may have more time than a board to focus on and devote to interaction with the CRO.

The Commission has not addressed why this current acceptable practice is no longer sufficient. In Cboe's experience, the ROC is the better forum and the directors who sit on the ROC are better situated to supervise the CRO. This is doubly so where the ROC is a subset of the full board and therefore the board has significant visibility into the work of the ROC. Additionally, Cboe notes that in its experience having the CRO report to the ROC with an administrative reporting line to the General Counsel is a better approach than having the CRO report to the senior officeer of the DCM to preserve regulatory independence. DCMs like CFE should be able to maintain having the CRO report to the ROC which in its view poses less conflicts than one of the CRO reporting line alternatives that the Commission is proposing.

Proposed Regulation 38.856(d) would require the board of directors or the senior officer of the DCM, in consultation with the ROC, to approve the compensation of the CRO. Cboe disagrees with the Commission's proposed update. The ROC should be able to approve the CRO's compensation without involving its board. Again, the existing acceptable practices permits this arrangement, it has worked well, and the Commission has not articulated why this is no longer sufficient or what perceived problem this update seeks to rectify. Cboe sees no need for introducing an additional layer of administrative burden that provides no benefit.

Proposed Regulation 856(e) and proposed Regulations 37.1206(d) and 38.857(d) would require the CRO and SEF and DCM ROCs, respectively, to have oversight duties over the market regulation functions. Cboe provides the same comment as is provided above in response to Regulation 38.856(a)(ii). The CRO should only be required to have supervision over core regulatory staff and the scope of market regulation functions in relation to ROC oversight should be made consistent with that approach.

Regulation 38.857(d)(4) and Regulation 37.1206(d)(4) would require that a ROC consult with the CRO for a DCM or the CCO for a SEF in managing and resolving conflicts of interest involving market regulation functions. This provision is overly prescriptive. Depending on the nature of a potential conflict of interest, it may be appropriate for the ROC to consult with the CRO, CCO, General Counsel, and/or others. The ROC should have discretion to determine those with which the ROC consults regarding managing and resolving actual or potential conflicts of interest. Both Regulation 38.857(d)(4) and Regulation 37.1206(d)(4) also speak in terms of consultation on "any" actual or potential conflicts of interest involving market regulation functions. This language is overly broad. There can be a number of less material potential conflicts of interest that can be resolved at a staff level without bringing every potential conflict of interest matter to the ROC for consultation as to its resolution. Whether a conflict of interest matter should be addressed with the ROC depends on the nature of the conflict or potential conflict and the parties involved. The CRO, CCO, and ROC should have appropriate discretion to determine when that should occur depending on the applicable facts and circumstances.

The Proposal's Requirement that a ROC Review "All Regulatory Proposals" is Overbroad

Proposed Regulation 38.857(d)(6) provides that a ROC must review "all regulatory proposals prior to implementation." In proposing to adopt the acceptable practices under Core Principle 16, the Commission has added the qualifier "all." Cboe believes this is a mistake and the language should revert to that of the current DCM acceptable practices. Cboe is concerned that it is possible that the proposed requirement could potentially be construed broadly to encompass day-to-day, routine regulatory operations, notices, circulars, and rule amendments. Cboe believes that such an interpretation would be cumbersome and ultimately slow down and hinder the timeliness and effectiveness of the regulatory process, especially when coupled with a requirement that all regulatory proposals be reviewed by the ROC prior to implementation. Significant changes should be brought to the ROC, **not** all changes. Many changes are routine and non-material and the CRO should be able to implement such changes without ROC involvement.

A ROC cannot be engaged in day-to-day management of a CRO and his or her market regulation department. Indeed, the Commission acknowledges as much: "ROCs conduct oversight and review, and are not intended to assume managerial responsibilities or to perform direct compliance work."[13] And yet, this proposal would impede the day-to-day operation of the market regulation function. For example, the ROC should not be approving surveillance parameters or mechanisms. Nor does it have the expertise to do so. Also, bringing every change to the ROC in advance is neither practical nor efficient. Similarly, the ROC only should have to bring very significant items to the Board and should be able to act on its own in most cases. The Commission does not explain or justify the addition of this incredibly broad "all" standard.

Cboe also believes that the addition of the word "all" in this provision is inconsistent with the stated approach of the Commission in its originally adopted acceptable practices applicable to ROCs. In that adopting release, the Commission repeated from its proposing release for the acceptable practices that the purpose of the substantially similar provision was that ROCs should be given the opportunity to review, and, if they wish, present formal opinions to management and the Board of Directors on any

[13] 89 Fed. Reg. at 19671.

proposed rule or programmatic changes originating outside of the ROCs, but which they or their CRO believe may have a significant regulatory impact.[14] The Commission also made clear in that adopting release that ROCs are oversight bodies and are not expected to perform managerial responsibilities or direct compliance work.[15] Cboe agrees with these clarifying statements and requests that the Commission clarify that they are applicable to proposed Regulation 38.857(d)(6) as well so that it is clear that the types of regulatory proposals that a ROC is required to review prior to implementation are those with a significant regulatory impact.

The Proposal's Requirement that ROCs Meet Quarterly Is Too Prescriptive

Proposed Regulations 37.1206(f) and 38.857(f) would require SEF and DCM ROCs to meet quarterly. Cboe objects to this proposal as overly prescriptive. ROCs should not be required to meet on any set schedule. Independent ROCs and Boards should have the discretion to establish their own regular meeting cadence, which may be supplemented by ad hoc meetings and communications, based upon the unique facts and circumstances of the registered entity. At Cboe, the CFE and Cboe SEF ROCs have chosen to have three regular meetings a year, with special meetings as needed. The timing of any ad hoc meetings can vary depending on when issues arise. The regularly scheduled meetings are thorough and typically last between two and three hours. It should be acceptable for a ROC to determine that three regular lengthier meetings that allow the ROC to get into greater detail regarding the items presented rather than meeting on a quarterly basis for far less total time. It is arbitrary to require that ROC meetings occur each quarter instead of as determined as necessary by the ROC.

Proposed Regulations 37.1206(f)(1)(iii) and 38.857(f)(1)(iii) would require that the following information be included in ROC meeting minutes: (a) list of the attendees; (b) their titles; (c) whether they were present for the entirety of the meeting or a portion thereof (and if so, what portion); and (d) a summary of all meeting discussions. As noted above, prescribing what a particular committee includes in its written meeting minutes is overly prescriptive and intrudes on the judgment of well-qualified independent directors. More specifically, requiring minutes to list the title of each attendee is unnecessary. It increases the length of the minutes with no tangible benefit. Again, the Commission has not articulated what deficiency it has encountered in registered entity minutes or any problem that this requirement is designed to address. A registered entity keeps a record of employee and officer titles in other ways. Likewise, requiring the minutes to indicate what portion of a meeting each person attended also is overly prescriptive, burdensome, and unnecessary. CFE, Cboe SEF, and Cboe Digital Exchange indicate who was present for each executive session and who was present during regular session. That should be sufficient. Attendees come and go during regular session depending on for which agenda

[14] Final Rules Conflicts of Interest in Self-Regulation and Self-Regulatory Organizations, 72 Fed. Reg. 6936, 6950, n.77 (Feb. 14, 2007) (citing Proposed Rules, Conflicts of Interest in Self-Regulation and Self-Regulatory Organizations, 71 Fed. Reg. 38740 (July 7, 2006)).

[15] 72 Fed. Reg. at 6951, n.80 ("This two-way relationship—delegation of certain responsibilities from the ROC to the CRO combined with supervision of the CRO by the ROC—is a key element of the insulation and oversight provided by the ROC structure. It permits regulatory functions and personnel, including the CRO, to continue operating in an efficient manner while simultaneously protecting them from any improper influence which could otherwise be brought to bear upon them.").

items they are slated to present. The further comings and goings of participants need not be tracked in the minutes.

Cboe Disagrees with the Proposal's Requirement that SEFs Prepare a ROC Report

Cboe disagrees with the proposed requirement that SEFs prepare an annual ROC Report in addition to an annual CCO Report ("ACR"). Proposed Regulation 37.1206(g) would require a SEF to prepare and file a ROC report in addition to an ACR. When the Commission adopted Part 37 and created the SEF regulatory regime, it stated the ACR was designed so that the "Commission can determine the effectiveness of a SEF's compliance and self-regulatory programs."[16] In the Proposal, the Commission states it believes a ROC report is a "mechanism to enhance the accountability of the ROC and promote transparency for all stakeholders."[17] The same can be said for the ACR. Cboe believes the overlap between the ACR and a ROC report is significant, making this new proposed requirement unnecessary and unduly burdensome.

The Commission has not articulated why a ROC Report is required in addition to an ACR. Both the ROC Report and the ACR are independent reports that assess the effectiveness of the SEF's (1) compliance with Commission regulations and (2) self-regulatory program. Further, both reports must be presented to the Board before the registered entity provides the reports to the Commission. The Commission barely addresses the overlap between a ROC report and an ACR, except to note (1) in a footnote the "ROC annual report will provide a critically important independent perspective to assess the market regulation function, including the CCO" and (2) a ROC report is "less extensive and burdensome to prepare" than the ACR. These are insufficient rationales for imposing the ROC Report requirement on SEFs. These references also fail to adequately explain what insufficiencies the Commission has observed in the more extensive ACR, how the ACR fails to achieve its goal of permitting the Commission to determine the effectiveness of a SEF's compliance and self-regulatory programs, or what missing information the Commission has seen addressed in DCM ROC reports. Nor does the Commission address whether there are more incremental changes it could make to existing ACR requirements to address these purported shortcomings. Cboe believes the ACR report is fit for purpose and there is no benefit to requiring a SEF to also prepare and produce a ROC report.

The Provisions of the Proposal Regarding Disciplinary Panel Composition Should Be Further Clarified

Proposed Regulations 37.1207 and 38.858 would codify with certain updates the DCM Core Principle 16 Acceptable Practices with respect to disciplinary panel composition. These provisions require that each disciplinary panel must include at least two persons, including one public participant. Cboe believes that the phrase "including one public participant" should be amended to read "including at least one public participant" to clarify that more than one public participant may serve on a disciplinary panel.

Separately, Cboe requests that the Commission to clarify the requirement to preclude any group or class of participants from dominating or exercising a disproportionate influence on a disciplinary panel. Cboe does not believe this requirement should apply to public disciplinary panel members since they are not a

[16] Final Rule, Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33476, 33546 (June 4, 2013).
[17] 89 Fed. Reg. at 19699.

class of participants on the market. Additionally, when a disciplinary panel is as small as two participants and may have as few as only one industry participant, Cboe believes no participant should be deemed to dominate or exercises a disproportionate influence on that panel. This is just the nature of having a smaller disciplinary panel. Similarly, to the extent that public participants serve on a disciplinary panel, this minimizes the influence of an industry participant or industry participants on the panel and should one of the ways in which to comply with this provision.

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Cboe appreciates the opportunity to share its views on the Proposal and welcomes the opportunity to discuss these comments further.

Sincerely,

/s/ Patrick Sexton

Patrick Sexton
EVP, General Counsel, and Corporate Secretary
Cboe Global Markets, Inc.