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By Electronic Submission

Richard Powers  
Acting Assistant Attorney General  
U.S. Department of Justice  
Antitrust Division  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530-0001

Lina Khan  
Chair  
U.S. Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Rostin Behnam  
Acting Chair  
U.S. Commodity Futures Trading Commission  
1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20581

Gary Gensler  
Chair  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

Re: Competitive Implications of Potential Merger or Acquisition between the CME Group and Cboe Global Markets, and Request for Study on Existing Concentration Problems at Derivatives Exchanges

Acting Assistant Attorney General Powers, Chair Khan, Acting Chair Benham, and Chair Gensler:

Better Markets, Inc.<sup>1</sup> and the Open Markets Institute<sup>2</sup> appreciate the opportunity to bring to your attention the significant competitive implications of a potential merger or acquisition between the CME Group and Cboe Global Markets.<sup>3</sup> The combination of these competitors, if effected, would serve as only

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<sup>1</sup> Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

<sup>2</sup> Launched as an independent organization in September 2017, Open Markets uses research and journalism to expose the dangers of monopolization, identifies changes in policy and law to address them, and educates policymakers, academics, movement groups, and other influential stakeholders to establish open, competitive markets that support a strong, just, and inclusive democracy. Open Markets focuses especially closely on the new and growing threats that online “platform monopolies” pose to the free exchange of news, information, and ideas.

<sup>3</sup> P. Stafford et al., *CME in \$16bn bid for Chicago exchange rival Cboe: Exclusive: All-share deal would combine futures and equity options specialists*, Financial Times (Aug. 18, 2021) (citing three people close to discussions in which CME Group offered .75 of its own shares for every Cboe Global Markets share, with a valuation of \$150 or 21 percent higher than the then-market price). The *Financial Times* reporting was remarkably specific with respect to the terms of the transaction. *But see* R. Channick, *CME denies report it is seeking to buy rival Chicago trading exchange Cboe in \$16 billion all-stock offer*, Chicago Tribune (Aug. 18, 2021); C. McCabe, *CME and Cboe Stock Respond to Media Report of Deal Talks*, Wall Street Journal (Aug. 18, 2021); M. Leising et al., *CME Denies It's in Talks for \$16 Billion Takeover of Cboe*, Bloomberg (Aug. 18, 2021) (noting that CME itself emailed

the most recent event in a multi-decade series of transactions consolidating U.S. securities and derivatives exchanges and concentrating trading and clearing activities across our financial markets.

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**Such a merger would inflict significant harm on consumers, a wide array of businesses, and others.**

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The potential harms to the public, investors, businesses, and innovators would be substantial and undeniable. Consolidation in these financial markets harms the public by concentrating risk, market making services, information, and control in ways that increase volatility and the likelihood of disruptions. Additional consolidation would also harm investors by reducing choice, potentially raising prices, and exacerbating the anti-competitive lock-in effect of the vertical integration of clearing. It could hamper mechanisms for price discovery by consolidating control of volatility products at a single entity, and it may lead to the manipulation of volatility index and related contracts. The added concentration could also make it easier for large corporations and speculators to attempt to manipulate and increase the prices for the services, goods, and commodities traded on these markets.

Farmers, consumers, businesses, and investors all rely on well-functioning commodity markets. Farmers rely on well-functioning derivatives markets with appropriate competition in order to bring their products to market and hedge their risks. Consumers and businesses are reliant on commodities used in everything from soybeans for oil, animal feed, and industrial uses<sup>4</sup> to aluminum cans for beer.<sup>5</sup> History has shown that even the smallest disruptions can increase prices for businesses and consumers, as occurred in 2011 when artificial delivery bottlenecks at metal warehouses owned by Goldman Sachs led to increased operational costs that hit Coca-Cola and MillerCoors.<sup>6</sup> Finally, investors rely on fair and efficient derivatives markets in order to diversify and balance their portfolios.

Many of these problems of consolidation already exist. The CME Group already facilitates at least 92 percent of U.S. exchange-traded derivatives volumes.<sup>7</sup> In many contracts on critical agricultural, financial, and energy underliers, the CME Group essentially *is* the market, facilitating all or almost all U.S. trading across U.S. designated contract markets (U.S. futures exchanges). In light of the CME Group's already dominant position, a combination of the CME Group and Cboe Global Markets—one of the CME Group's few meaningful competitors—would likely further diminish competition and responsible innovation, and ultimately, operate to the detriment of all market participants. In addition to bringing two

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a statement emphasizing that “CME Group denies all rumors that is [sic] in conversations to acquire Cboe Global Markets” and clarifying that “[t]he company has not had any discussions with Cboe whatsoever”).

<sup>4</sup> NC Soybean Producers Association, *Uses of Soybeans*.

<sup>5</sup> United States Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, *Wall Street Bank Involvement with Physical Commodities: Majority and Minority Staff Report* (2014).

<sup>6</sup> Omarova, Saule T., *The Merchants of Wall Street: Banking, Commerce, and Commodities* (November 24, 2012). Minnesota Law Review, Vol. 98, 2013, available at SSRN: <https://ssrn.com/abstract=2180647> or <http://dx.doi.org/10.2139/ssrn.2180647>.

<sup>7</sup> This represents a conservative estimate of the CME Group's market share with respect to aggregate 2020 trading volumes across active U.S. designated contract markets. See, e.g., Futures Industry Association, *Global futures and options trading reaches record level in 2020* (Jan. 21, 2021).

of the few remaining exchange competitors under common control, the potential combination would extend the CME Group's existing monopoly and near-monopoly power in multiple segments of the U.S. derivatives markets to contracts currently *traded outside* of the CME Group. Examples of such contracts include Cboe Global Markets' two most frequently traded products: VIX Index contracts<sup>8</sup> and options contracts on the S&P 500 that compete directly with the CME Group's futures contracts.<sup>9</sup>

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**If reports of a possible merger are accurate, then an investigation into the profoundly adverse impact such a conglomeration would have on competition in critical financial markets would be essential.**

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The *Financial Times*' reporting on the potential CME Group-Cboe Global Markets transaction was remarkably specific. If, as therefore seems likely, the reports are correct, an investigation of the possible combination and its potential adverse competitive effects would be a public-interest imperative. Such a transaction, at the very minimum, would demand a thorough and impartial fact-finding investigation and due consideration of the potential adverse consequences that would foreseeably arise from the CME Group's consolidation with a sixth major derivatives exchange complex in 15 years (*see below*). If anything, the reports of a possible merger between CME Group and Cboe Global Markets underscore a broader need to better understand the harms that have already been created by consolidation of trading into a few super-exchanges. We encourage the agencies to closely examine such a merger, should it move forward. In addition, in order to provide the public an opportunity to assess any findings arising from such investigation, we ask the agencies to undertake a public industry study of the existing concentration problems at derivatives exchanges, and the impacts of fifteen years of consolidation.

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**The CME Group is a product of dozens of mergers and acquisitions in the past 15 years, and it has monopoly or near-monopoly power in numerous critical futures contracts and markets.**

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The U.S. derivatives exchanges have significantly consolidated since the passage of the Commodity Futures Modernization Act of 2000.<sup>10</sup> Until the 2000s, when they demutualized and

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<sup>8</sup> VIX Index contracts provide market participants exposure to a measure of volatility in the U.S. equities markets. *See, e.g.,* T. Edwards, H. Preston, *A Practitioner's Guide to Reading VIX®* (December 2017); *see also* Cboe Exchange, Inc., Cboe VIX Index, *Turn Volatility to Your Advantage* (2021) ("Volatility measures the frequency and magnitude of price movements, both up and down, that a financial instrument experiences over a certain period of time. The more dramatic the price swings in that instrument, the higher the level of volatility. Volatility can be measured using actual historical price changes (realized volatility) or it can be a measure of expected future volatility that is implied by option prices. The VIX Index is a measure of expected future volatility.").

<sup>9</sup> The S&P 500 is an index of public companies with a substantial market capitalization, and it is often used to gauge broad directional trends in the equities markets. Cboe Global Markets' S&P 500 options compete directly with the CME Group's substantial S&P 500 and related equities-based futures and options products. *See, e.g.,* Cboe Exchange, Inc., *Cboe: S&P 500 Index Options* (2021); CME Group Inc., *S&P Index Futures and Options on Futures* (2021).

<sup>10</sup> Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000).

consolidated,<sup>11</sup> three dominant U.S. derivatives exchanges (the so-called “Big Three”) each had trading liquidity, clearing and risk management expertise, and resources to compete for market share in futures and options contracts. The primary competing exchanges were the following:

- The Board of Trade of the City of Chicago (“CBOT”): Although it continues to facilitate trading in some grains and other agricultural underliers that were part of the exchange’s origin story, in recent decades, the CBOT has pivoted to financial futures and options, including those on U.S. treasuries.
- The Chicago Mercantile Exchange (“CME”): The CME similarly continues to facilitate trading in numerous agricultural products (milk, cheese, livestock) but has developed into a diversified marketplace for futures and options on equity indices, currency pairs (foreign exchange), interest rate products (Eurodollar futures), and cryptocurrencies (Bitcoin).
- The New York Mercantile Exchange (“NYMEX”): The NYMEX moved from potatoes and other agricultural products primarily to energy futures, including crude oil, natural gas, coal, and numerous refined products. The NYMEX also owns the Commodity Exchange (“COMEX”), which facilitates trading primarily in the metals futures complex (gold, silver, copper, aluminum), so it might be contended that the Big Three, in reality, used to be the Big Four.

*During the past 15 years, these previously competing Big Three derivatives exchanges have become the Big One.* The CME, CBOT, NYMEX, and COMEX are now subsidiaries of one exchange holding company, the CME Group Inc., facilitating the overwhelming majority (almost all) trading and clearing across the U.S. futures and options markets and controlling data relating to the transactions giving rise to these derivatives positions.

The pace and extent of this transformation of the competitive environment for U.S. futures trading has been remarkable. The CME acquired CBOT Holdings, Inc. (the holding company for the CBOT) in 2007.<sup>12</sup> It acquired NYMEX Holdings, Inc. (the holding company for NYMEX and COMEX) in 2008.<sup>13</sup>

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<sup>11</sup> “Demutualization” is the process by which a securities or derivatives exchange transitions from a mutual association of members operating on a not-for-profit basis to a for-profit company owned by and answerable to shareholders. See, e.g., Roberta S. Karmel, *Turning Seats Into Shares: Causes and Implications of Demutualization of Stock and Futures Exchanges*, 53 Hastings L.J. 367, 401 (2002). The CME demutualized in 2000 and completed its initial public offering in 2002. For a brief description of the CME Group’s evolution, see, e.g., CME Group Inc., *Form 10-K*, Annual Report For the Fiscal Year Ended December 31, 2020 (2021). The Board of Trade of the City of Chicago demutualized in 2005 and merged with the CME in 2007. See CME Group Inc., *Timeline of CME Achievements* (2021). The New York Mercantile Exchange, owner of the Commodity Exchange, demutualized in 2000 and was acquired by the CME Group in 2008. *Id.* These represent a fraction of the CME Group’s total merger and acquisition activities. The CME Group has also acquired multiple global exchanges and execution platforms, for example the NEX Group, extending its market power and integrating certain front, middle, and back-office functions critical to the exchange-traded and over-the-counter derivatives and securities markets. See CME Group, *CME Group Complete Acquisition of NEX, Creating a Leading Global Markets Company Across Futures, Cash, and OTC* (Nov. 2, 2018).

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

<sup>13</sup> *Id.*

It acquired the Kansas City Board of Trade in 2012.<sup>14</sup> These are only the CME Group’s mergers and acquisitions relating to the major U.S. futures exchanges. The resulting *super-exchange* is comprised of these five derivatives exchanges, each with a monopoly, or near-monopoly, on critical derivatives contracts used to establish the prices of agricultural, energy, and financial inputs to production across the U.S. economy.

The CME Group’s five dominant exchanges also share an infrastructure that controls execution, clearing, and data gateways to U.S. derivatives markets and which, again, represent more than 92 percent of total trading volume. These gateways provide the CME Group market power and mechanisms to limit access to (or to establish terms of access to) trading, clearing, and data services necessary to participate in the U.S. derivatives markets, including certain non-CME-Group markets.<sup>15</sup> *These execution, clearing, and data gateways, in many cases, provide market participants the sole avenues to trade and/or clear derivatives on critical underliers and/or to do so with indispensable proprietary data generated through and controlled solely by the CME Group.*<sup>16</sup> Extreme consolidation in derivatives products makes the impact of market manipulation practices like spoofing (where a trader places bids to buy or offers to sell contracts with the intent to cancel them prior to execution) more drastic.<sup>17</sup>

Consider the licensing arrangements involving CME Globex (“Globex”), the CME Group’s execution gateway. Globex provides electronic trading connectivity to derivatives traded exclusively through the CME Group’s five major exchanges as well as a small number of derivatives traded through other exchanges.<sup>18</sup> Most relevant for present purposes, the Minneapolis Grain Exchange, Inc. (“MGEX”)

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<sup>14</sup> See, e.g., CME Group Inc., *CME Group Completes Acquisition of Kansas City Board of Trade* (Dec. 3, 2012) (noting that the CME Group’s acquisition of the wheat futures contract traded through the Kansas City Board of Trade would provide significant value to market participants on multiple CME Group exchanges, which would “immediately benefit from the ability to trade each other’s wheat futures and options products in a more cost-effective manner”).

<sup>15</sup> This trading, clearing, and data infrastructure also provides economies of scope and scale that the CME Group’s competitors cannot approximate, much less achieve, thereby amplifying the anti-competitive forces that already must be overcome to compete for trading liquidity all but locked in by network effects. See, e.g., A. Okuliar, *Financial Exchange Consolidation and Antitrust: Is There a Need for More Intervention?*, 28 *Antitrust, Am. Bar Ass.* (Spring 2014) (noting that “[e]xchanges also benefit from economies of scale and scope, meaning that the larger they are the more efficient they become for trading and for such ancillary services as listings, order matching and routing, execution, and the aggregation and provision of market data”).

<sup>16</sup> As we further discuss below, financial markets data is a lucrative business, in part, because of the control dominant exchanges have over the data uniquely generated through their platforms and monopolies or near-monopolies on individual contracts.

<sup>17</sup> There’s already been a history of traders attempting to defraud others and manipulate markets on the CME: To take just three examples, in 2020, two former Deutsche Bank traders were convicted of fraud for their role in spoofing on the Commodity Exchange Inc., an exchange run by CME Group; the CFTC settled charges in late 2020 against traders found to be spoofing in the CME’s lean hogs and live cattle futures contracts; and in 2016, the CME suspended a futures trader for spoofing in the CME’s gold and natural gas markets. See Department of Justice, *Two Former Deutsche Bank Traders Convicted of Engaging in Deceptive and Manipulative Trading Practices in U.S. Commodities Markets* (2020); CFTC, *CFTC Orders Chicago Prop Firm and 3 Traders to Pay \$745,000 for Spoofing in Agricultural and Metals Futures* (2020); and Reuters, *CME Group urgently suspends trader for spoofing* (2016).

<sup>18</sup> See CME Group, *The World’s Leading Electronic Platform: CME Globex* (2019).

lists and clears volatility derivatives, called SPIKES,<sup>19</sup> through its own exchange and clearinghouse, but reaches U.S. market participants through trading applications tied to the Globex platform. The SPIKES contracts are designed to facilitate exposures to an equity-markets volatility measure in direct competition with Cboe Global Markets' dominant VIX Index currently traded outside of the CME Group's platforms.<sup>20</sup>

The SPIKES offering provides useful insights into the market structures that limit competition between U.S. exchanges, as well as the gatekeeper power CME Group holds today and the discriminatory tolls and self-preferencing it is able to enact. In the very few cases where there is *any* competitor to the CME Group's derivatives offerings—as would be the case with respect to the MGEX's SPIKES contracts in the event of a merger or acquisition bringing the Cboe Global Markets' VIX Index contracts into the CME Group—the CME Group controls a critical execution gateway that it could shut down, along with meaningful competition, at any time. The CME Group also retains a *de facto* option to exact discriminatory tolls on competing product offerings or to otherwise preference its own contracts or exchanges. Further consolidation undoubtedly would render what little competition, innovation, transparency, access, and choice exists in volatility markets a practical fiction.

Moreover, the CME Group operates the largest U.S. derivatives clearinghouse in conjunction with its execution gateways. There are already extremely high barriers to entry for potential competitors, as the CME clearing division clears all contracts listed by the CME Group's exchanges as well as certain over-the-counter derivatives and contracts traded through other global exchanges.<sup>21</sup> In the U.S. futures markets, such clearing systems, called derivatives clearing organizations (“DCOs”),<sup>22</sup> are almost always vertically integrated with one or more affiliated listing exchanges.<sup>23</sup> Thus, at the CME Group's exchanges, for example, the CME clearing division provides the *exclusive* means for mandatorily clearing each CME Group exchange's listed derivatives. The vertical integration of clearing and the CME Group's overwhelming market power in trading markets (where it has monopoly or near-monopoly power over numerous contracts that, in turn, *must be cleared by the CME DCO*) both create and exacerbate network and lock-in effects that prevent other exchanges from gaining a foothold in competing contracts. This vertical integration also concentrates risk and may make it more difficult for regulators to mitigate these risks.

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<sup>19</sup> The SPIKES Volatility Index is a measure of the expected 30-day volatility derived from options on the largest exchange-traded fund, the SPDR S&P 500 ETF. *See, e.g.,* Miami International Holdings, Inc., *Spikes Futures Summary*, Futures Offered by MGEX (2021).

<sup>20</sup> One demonstration of the challenges associated with launching a competing product to the CME Group's derivatives offerings is that MGEX launched the new Spikes complex with “zero exchange fees” to encourage the migration of some trading activities from Cboe Global Markets' VIX Index complex. *See* Miami International Holdings, Inc., *SPIKES Futures Trading Fees*, Futures Offered by MGEX (2021).

<sup>21</sup> *See, e.g.,* CME Group, Inc., *CME ClearPort* (2021); *see also, e.g.,* CME Group, Inc., *CME Clearing: Principles for Financial Market Infrastructures Disclosure* (Nov. 30, 2019) (“CME Clearing also has arrangements to provide clearing services for the Dubai Mercantile Exchange”).

<sup>22</sup> *See* 17 C.F.R. Part 39.

<sup>23</sup> Prior to the 2008 financial crisis, the U.S. Department of Justice raised serious concerns with respect to the vertical integration of clearing with the U.S. derivatives exchanges. *See* Comments of the United States Department of Justice, *Before the Department of the Treasury: Review of the Regulatory Structure Associated with Financial Institutions*, TREAS-DO-2007-0018 (Jan. 31, 2008).

Today, the CME Group has little reason to prevent MGEX from accessing markets through Globex; it currently does not have a volatility product to compete with the Cboe Global Markets' VIX Index complex. However, the MGEX's ability to compete with Cboe Global Markets' VIX Index complex is practically dependent on the CME Group's discretionary willingness to provide access to the SPIKES complex through the Globex system; and to provide it on competitive terms. *The combination of Cboe Global Markets and the CME Group could lead to structurally dangerous monopolization, as the latter undoubtedly would seek to protect what would become its volatility contract complex—a significant profit center for Cboe Global Markets—thus jeopardizing MGEX's access to markets and its ability to compete effectively for liquidity in the volatility derivatives markets.*

This scenario reflects the current state of competition in the U.S. derivatives markets, not merely theoretical harms, and it can only reduce competition, innovation, and choice for derivatives market participants and markets. The importance of competition, innovation, and choice is highlighted by recent allegations that the Cboe Global Markets' VIX Index complex suffers (or at least suffered) from numerous methodological flaws that facilitate (or at least facilitated) manipulation of the index and related contracts.<sup>24</sup>

One particularly notable example of an anti-competitive lock-in effect relates to margin offsetting within the CME Group's clearing system.<sup>25</sup> Cleared derivatives involve the posting of initial and variation margin to limit credit and market risks, respectively. These margin amounts are reduced, however, by certain inversely related exposures within a market participant's derivatives portfolio. Accordingly, there are significant financial incentives for the most active derivatives market participants to clear as much of their portfolio in one place as possible. Market participants with offsetting positions would pay significantly higher margin costs to distribute their portfolios across competing exchanges and clearinghouses, essentially locking in not only clearing services but the trading volume leading to such clearing as well.<sup>26</sup>

In other words, the CME clearing division's domination of a key clearing gateway dramatically weakens competition for liquidity in individual contracts listed by the CME Group's exchanges.<sup>27</sup> In

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<sup>24</sup> See G. Banerji, *Regulator Looks Into Alleged Manipulation of VIX, Wall Street's 'Fear Index'*, Wall Street Journal (Feb. 13, 2018); see also, e.g., S. Iqbal Ahmed, *Whistleblower alleges manipulation of Cboe volatility index*, Reuters (Feb. 13, 2018); D. Harty, *Report: SEC, CFTC investigating possible manipulation of volatility index*, S&P Global Market Intelligence (May 3, 2018); P. Devlin, *Is the VIX Fixed? A Look at Wall Street's 'Fear Gauge'*, Law360 (Feb. 27, 2018); M. DeCambre et al., *How Wall Street's 'fear gauge' is being rigged, according to one whistleblower*, Marketwatch (Feb. 14, 2018); B. Pisani, *Volatility index manipulation contributed to the market plunge last week, whistleblower alleges in interview*, CNBC (Feb. 13, 2018).

<sup>25</sup> *Id.* at 1-2 (“In contrast to futures exchanges, equity and options exchanges do not control open interest, fungibility, or margin offsets in the clearing process. This lack of control appears to have facilitated head-to-head competition between exchanges for equities and options, resulting in low execution fees, narrow spreads, and high trading volume. Equities and options execution systems are also very sophisticated and feature-rich, more so than futures contract execution systems. Although characteristics of the equities and options markets differ from those of financial futures markets, the clearing processes and related regulatory framework in equities and options markets appear to provide useful lessons in the futures arena. In light of the potential competitive benefits that could flow from regulatory changes that would facilitate competition in financial futures exchange markets, the Department recommends that Treasury propose a thorough review of futures clearing and its alternatives.”)

<sup>26</sup> This fact is not in dispute; indeed, the CME Group openly advertises it. See, e.g., CME Group Inc., *S&P Index Futures and Options on Futures* (2021) (“With margin offsets of up to 84% with other CME Group Equity Index products, S&P 500 futures are a cost-effective way to manage U.S. index exposure.”).

<sup>27</sup> *Id.*

combination with other measures (like trading incentive programs and fee rebates designed to further increase *switching costs* and the CME Group's control of liquidity), the vertical clearing silos and margin efficiencies available only when trading through already dominant markets explain why few challengers attempt the Sisyphean task of directly competing with the CME Group complex at all. *Indeed, far too often, the only way to "compete" with the CME Group is to enter into licensing and clearing arrangements to exclusively use the CME Group.*

This, again, is not merely theoretical. Ten years ago, the Eris Exchange, an upstart U.S. futures exchange, listed an interest rate swap futures product that competed not only with the CME Group's traditional interest rate complex (*e.g.*, Eurodollar futures) but also the CME Group's own version of the Eris swap futures contract.<sup>28</sup> Although the Eris Exchange facilitated trading through its own designated contract market, it initially cleared its contracts through the CME clearing division, at least in part because doing so would permit market participants to benefit from margin offsetting against the CME Group's dominant interest rate complex. By mid-2018, the Eris Exchange's contracts were migrated to the CME Group. Today, the momentary competition that existed between the Eris Exchange and the CME Group has ceased; the swap futures designed by the Eris Exchange are now traded and cleared solely through the CME Group.<sup>29</sup>

The CME Group's control over data gateways damage competition in the U.S. derivatives markets as well. Because it facilitates almost all of the trading volume across the U.S. exchange-traded derivatives markets, the CME Group has unique access to (and control of) order book and transactional data generated through its five dominant exchanges. No active market participant in the electronically traded U.S. derivatives markets today can fairly and meaningfully interact with the market without this information, creating huge barriers to entry. This leaves the CME Group with market power to exact monopoly pricing for the essential trading data uniquely in its control.

Furthermore, the CME Group engages in tying practices with respect to this data. Although market participants can build or purchase their own front-end trading applications to access CME Globex (usually at significant expense), the CME Group provides market participants its own proprietary front-end system, CME Direct. To the best of our understanding, the CME Direct front-end trading application, in turn, requires subscriptions for real-time professional data generated through trading on each of its major U.S. exchanges, unless market participants meet certain trading thresholds to qualify for market-data fee waivers (thereby further locking in liquidity to the CME Group's exchanges).<sup>30</sup> In addition, the CME Direct application has been designed to exclude delayed market data that is otherwise available free or at lower cost through other means.

These gateways and related arrangements entrench the CME Group's market power as a trading, clearing, and data platform at the center of the U.S. derivatives markets. The CME Group metaphorically gets three bites at the apple:

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<sup>28</sup> For current specification of the Eris interest rate swap futures contracts, *see* CME Group Inc., *Eris USD Swap Futures* (2019).

<sup>29</sup> *See* CME Group Inc., *Eris Swap Futures to CME Group Transition Overview* (June 4, 2018); *see also, e.g.*, H. McDowell, *Eris swap futures volumes surge following CME migration*, *The Trade* (Mar. 19. 2019) (noting that "average daily volume of . . . swap futures surpassed 10,500 contracts daily in March month-to-date, more than five times the average for 2018 and prior to the CME Group migration").

<sup>30</sup> *See* CME Group Inc., *CME Direct Registration FAQ* (2021).



1. Once when market participants seek access to the markets, where the CME Group can assess trading fees reflecting the limited competition supported by network and lock-in effects;
2. Again, when transactions are cleared by its monopoly clearing services provider, the CME clearing division; and
3. Finally, when market participants seek a necessary informational basis for their trading activities by subscribing to data and data gateways controlled solely by the CME Group.

These hallmarks of the current U.S. derivatives markets demonstrate that, too often, there is little more than an illusion of competition, innovation, transparency, access, and choice. Through one mechanism or another, futures trading is almost always facilitated, cleared, or supported by the five major derivatives exchanges owned by the CME Group.

The major exchange consolidation in the past 15 years is a critical public-interest concern because, among other things, only exchanges (designated contract markets, or “DCMs,” in regulatory terms<sup>31</sup>) are authorized to list new and competing futures and options on futures products under the Commodity Exchange Act.<sup>32</sup> With respect to that regulatory category of authorized competitors, the concentration of the futures markets and the lack of meaningful competition is simply undeniable.

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## Conclusion

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The CME Group’s domination of the U.S. derivatives markets would only be exacerbated by a merger or acquisition with Cboe Global Markets and would also permit the CME Group to capture a critical, currently competing marketplace.<sup>33</sup> It would, in fact, threaten to leave few avenues for meaningful competition between exchanges, undermining the very premise of the Commodity Exchange Act’s framework for regulation of exchanges.<sup>34</sup>

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<sup>31</sup> See 17 C.F.R. Part 38.

<sup>32</sup> See Commodity Futures Trading Commission, *Designated Contract Markets* (accessed September 15, 2021) (“Any market that seeks to provide a trading facility for non-eligible contract participants to trade futures, options on futures or options on commodities must apply to the Commission to be designated as a contract market (DCM), unless some exemption or exclusion would apply to the facility.”).

<sup>33</sup> Cboe Global Markets is itself a product of multiple mergers and acquisitions in the past 15 years, including its 2017 acquisition of Bats Global Markets, which itself had merged with Direct Edge in 2014. As such, Cboe Global Markets represents a significant exchange complex in both the U.S. derivatives and equities markets. It demutualized its flagship options exchange and conducted an initial public offering in 2010. See Cboe Global Markets, *2020 Annual Report: Defining Markets*, at 7 (Apr. 1, 2021).

<sup>34</sup> The CFTC actions and CME Group and Cboe Global Markets rule changes that would be required to effect elements of the possible consolidation implicate at least four provisions of the Commodity Exchange Act relevant to competition in the U.S. derivatives markets. See 7 U.S.C. § 5 (To foster . . . public interests, it is . . . the purpose of this chapter to . . . to promote responsible innovation and fair competition among boards of trade, other markets and market participants.”); see also 7 U.S.C. § 19(b) (“The [CFTC] shall take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of this chapter, as well as the policies and purposes of this chapter, in issuing any order or adopting

The CME Group has unequivocally denied the reported transaction.<sup>35</sup> Yet, the *Financial Times* reporting was remarkably specific with respect to the terms of the potential deal, and the transaction would be consistent with a longstanding CME Group strategy to dominate the U.S. derivatives markets through precisely these types of mergers and acquisitions. Even if the reports of the transaction are not true, it highlights the damages caused by unrelenting series of mergers and acquisitions in just the past 15 years that has made the CME Group a monopoly in numerous critical derivatives markets. It also underscores the need for a fundamental restructuring of these markets to ensure competition, innovation, transparency, access, and choice.

Any potential merger of two of the few remaining competitors in the U.S. derivatives markets must be reviewed with an exacting scrutiny commensurate with the potential implications for our economy, financial markets, and working families. Regardless of whether the potential merger or acquisition comes to pass, we request that the agencies assess the potential anti-competitive burdens that might be associated with such a merger. We also request that the agencies conduct a public industry study examining the existing concentration problems at derivatives exchanges, and what the impact of fifteen years of consolidation has been, along with sufficient data for the public to assess any related conclusions.

Both Better Markets and The Open Markets Institute thank you very much for your time. Please do not hesitate to reach out to discuss these or related issues.

Sincerely,

Stephen Hall  
Legal Director and Securities Specialist  
Better Markets, Inc.  
1825 K Street, NW, Suite 1080  
Washington, DC 20006  
(202) 618-6422  
[shall@bettermarkets.com](mailto:shall@bettermarkets.com)  
[www.bettermarkets.com](http://www.bettermarkets.com)

Alexis Goldstein  
Director of Financial Policy  
Open Markets Institute

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any [CFTC] rule or regulation (including any exemption under section 6(c) or 6c(b) of this title), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 21 of this title.”); 7 U.S.C. § 19(a) (“Before promulgating a regulation . . . or issuing an order . . . the [CFTC] shall consider the costs and benefits of the . . . proposed [CFTC] action[,] [which] shall be evaluated in light of. . . considerations of the efficiency, competitiveness, and financial integrity of futures markets . . .”); 7 U.S.C. § 7(d)(19) (“Unless necessary or appropriate to achieve the purposes of this chapter, the board of trade shall not—(A) adopt any rule or taking [1] any action that results in any unreasonable restraint of trade; or (B) impose any material anticompetitive burden on trading on the contract market.”).

<sup>35</sup> On August 18, 2021, the Cboe’s shares declined substantially when the CME Group issued a press release emphasizing that it “denies all rumors that [it] is in conversations to acquire Cboe Global Markets” and bluntly stating that “[t]he company has not had any discussions with Cboe whatsoever.” CME Group, *CME Group Denies Rumors of a Bid for Cboe Global Markets*, Cision PR Newswire (Aug. 18, 2021). An affirmative denial of this sort made by a public company must be fully true as a matter of law, and the SEC would be reasonable to inquire about its content under the circumstances.

U.S. Department of Justice et. al.  
November 8, 2021  
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655 15th St NW, Suite 800  
Washington, DC 20005  
202-701-1606  
[agoldstein@openmarketsinstitute.org](mailto:agoldstein@openmarketsinstitute.org)  
[openmarketsinstitute.org](http://openmarketsinstitute.org)