



December 7, 2018

**VIA ELECTRONIC DELIVERY**

Mr. Brent J. Fields  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

Re: Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network, Release No. 34-84168, File No. SR-BOX-2018-24 (Sept. 17, 2018)

Dear Mr. Fields:

BOX Exchange LLC (the “Exchange”) appreciates the opportunity to comment on the Division of Trading and Markets’ Order<sup>1</sup> instituting proceedings to determine whether to approve or disapprove the Exchange’s proposed rule change to amend the fee schedule for the BOX Market LLC (“BOX”) options facility (the “BOX Proposal”).<sup>2</sup> The Exchange submits this letter in support of the BOX Proposal and to supplement the

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<sup>1</sup> Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network, Release No. 34-84168, File No. SR-BOX-2018-24, 83 Fed. Reg. 47,947 (Sept. 17, 2018).

<sup>2</sup> The Division’s Order was issued on September 17, 2018, with instructions that comments be submitted within 21 days of the date of publication in the Federal Register. Before the Order was published in the Federal Register, however, the Exchange submitted a petition for review on September 26, 2018. See Petition for Review of Order Temporarily Suspending BOX Exchange LLC’s Proposal to Amend the Fee Schedule on BOX Market LLC, File No. SR-BOX-2018-24 (Sept. 26, 2018). Pursuant to 17 C.F.R. § 201.431(e), the Division’s Order was stayed immediately upon the filing of the petition for review. The Order was thereafter published in the Federal Register on September 21, 2018. The stay was lifted on November 16, 2018, when the Commission granted the petition for review but ordered that the Division’s Order temporarily suspending the BOX Proposal “shall remain in effect.” Order Granting Petition for Review and Scheduling Filing of Statements, Release No. 84614, File No. SR-BOX-2018-24, 83 Fed. Reg. 59,432, 59,432 (Nov. 16, 2018). The lifting of the stay initiated the 21-day period for submitting comments relating to the Division’s Order. This comment letter is timely because it is being filed on December 7, 2018, which is 21 days after November 16, 2018.

record with additional information from the Exchange’s refiling of its proposal on November 30, 2018.

The Exchange seeks to charge a reasonable connectivity fee—lower than comparable fees charged by several other exchanges—to recoup the costs associated with providing a high-quality network for market participants, as well as to reclassify BOX’s existing High Speed Vendor (“HSVF”) fee. The Commission should approve the BOX Proposal because it is consistent with the Securities Exchange Act (the “Act”) and because disapproval of the BOX Proposal would be arbitrary and capricious.<sup>3</sup>

*First*, the BOX Proposal is consistent with the Act. The Connectivity Fees are equitable, reasonable, and nondiscriminatory because they are designed to “offset the costs BOX incurs in maintaining, and implementing ongoing improvements to the trading systems.” Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC Options Facility at 4, Release No. 34-83728, File No. SR-BOX-2018-24 (July 27, 2018). The Exchange has subsequently clarified that these improvements include “connectivity costs, costs incurred on software and hardware enhancements and resources dedicated to software development, quality assurance, and technology support.” Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Options Market LLC (“BOX”) Options Facility at 8, File No. SR-BOX-2018-37 (Nov. 30, 2018). The Connectivity Fees are necessary to offset the “significant costs associated with various projects and initiatives to improve overall network performance and stability, as well as costs paid to the third-party data center for space rental, power used, etc.” *Id.* at 7. In fact, the Exchange is more in need of connectivity fees than other exchanges because it “does not own and operate its own data center and therefore cannot control data center costs.” *Id.*

The propriety of the proposed Connectivity Fees is reinforced by the fact that not only do other exchanges charge fees for similar services, but many of those exchanges charge fees that are *higher* than the fees proposed by the Exchange, which proposes to

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<sup>3</sup> As described more fully in the Exchange’s petition for review, these proceedings should not have been instituted in the first place because the Division applied the wrong legal standard. Contrary to the Division’s statement that, when determining whether to temporarily suspend an immediately effective rule change, it must “make an affirmative finding” about whether the rule change is consistent with the Act, Order, 83 Fed. Reg. at 47,948–49, that type of “independent review” is mandated only when an exchange submits a rule change to the Commission under Section 19(b)(2) of the Act, not when an exchange submits an immediately effective rule change “establishing or changing a due, fee, or other charge” under Section 19(b)(3)(A) of the Act, *see* 15 U.S.C. § 78s(b)(3)(A). The Act does not prescribe any affirmative findings that the Commission must make before deciding to leave an immediately effective rule change in effect. This distinction between the standards applicable under Sections 19(b)(2) and 19(b)(3)(A) has been recognized by the D.C. Circuit. *See NetCoalition v. SEC*, 715 F.3d 342, 354 (D.C. Cir. 2013).

charge \$1,000 per month for each non-10 Gigabit connection and \$5,000 per month for each 10 Gigabit connection.<sup>4</sup> The fees charged by those exchanges are not inequitable, unreasonable, or discriminatory—as made clear by the fact that the Commission did not temporarily suspend or disapprove any of them—and neither are the Connectivity Fees proposed by the Exchange. In addition, market participants are not required to connect to BOX and can decide not to do so if the Exchange sets its Connectivity Fees at an unreasonably high level. If a market participant does decide to connect to BOX, it will pay the same Connectivity Fees as every other market participant with a non-10 Gigabit or 10 Gigabit connection to BOX.

Likewise, the HSVF Port Fee is equitable, reasonable, and nondiscriminatory. The BOX Proposal does not increase the amount of the existing fee, which has never been questioned. The BOX Proposal simply reclassifies the fee, consistent with industry practice. Moreover, anyone who completes the publicly available documentation to become credentialed by BOX can access the HSVF.

Nor is there any evidence that the BOX Proposal will impose an undue burden on competition. The Connectivity Fees proposed are lower than the same fees charged by other exchanges, and the fees are applied evenhandedly to all participants who connect to BOX through a non-10 Gigabit connection and to all market participants who connect to BOX through a 10 Gigabit connection. Market participants can also choose to connect through a third-party provider, which may offer lower prices than BOX's Connectivity Fees, and to obtain BOX market data from a commercial data provider without paying the HSVF Port Fee. The fees, in fact, are pro-competitive because they enable the Exchange to pay for improvements to its network and offer participants higher quality software, hardware, quality assurance, and technology support.

*Second*, disapproval of the BOX Proposal would be arbitrary and capricious. The Administrative Procedure Act prohibits arbitrary and capricious agency action, *see* 5 U.S.C. § 706, and “[g]overnment is at its most arbitrary when it treats similarly situated people differently,” *Etelson v. Office of Personnel Mgmt.*, 684 F.2d 918, 926 (D.C. Cir. 1982). As Commissioner Jackson has acknowledged, the Commission did not reject *any*

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<sup>4</sup> *See, e.g.*, Cboe Exchange, Inc. Fee Schedule 14, <http://www.cboe.com/publish/feeschedule/cboefeeschedule.pdf> (\$1,500/1 Gigabit, \$5,000/10 Gigabit); MIAX Options Fee Schedule 19, [https://www.miaxoptions.com/sites/default/files/fee\\_schedule-files/MIAX\\_Options\\_Fee\\_Schedule\\_09182018.pdf](https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Options_Fee_Schedule_09182018.pdf) (\$1,100/1 Gigabit, \$5,500/10 Gigabit); Nasdaq PHLX LLC Rules, General 8, Section 1(b), <http://nasdaqphlx.cchwallstreet.com/NASDAQPHLXTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F1%5F2&manual=%2Fnasdaqomxphlx%2Fphlx%2Fphlx%2Dllcrulles%2F> (\$10,000/10 Gigabit); *Price List – Trading Connectivity*, Nasdaq, <http://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2> (\$2,500/1 Gigabit, \$10,000/10 Gigabit); NYSE American Options Fee Schedule 35, [https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE\\_American\\_Options\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf) (\$14,000/10 Gigabit).

of the prior 95 immediately effective rule changes regarding connectivity fees before temporarily suspending the BOX Proposal and two rule changes by MIAX and MIAX Pearl. See Commissioner Robert J. Jackson Jr., *Unfair Exchange: The State of America's Stock Markets* n.33 (Sept. 19, 2018), <https://www.sec.gov/news/speech/jackson-unfair-exchange-state-americas-stock-markets>. And a review of those prior filings reveals that few, if any, of the rule changes seeking to increase connectivity fees provided the type of extensive evidentiary support and analysis demanded by the Division in its Order.<sup>5</sup> If the Commission were to break with its past practice and disapprove the BOX Proposal, it would arbitrarily and capriciously subject the Exchange to disparate treatment in comparison with other exchanges permitted to charge similar, or higher, fees.

That disparate treatment of the Exchange would also be inconsistent with the Commission's own orders. On October 16, 2018, the Commission issued an order setting aside two market-data rule changes by The Nasdaq Stock Market LLC and NYSE Arca, Inc. that the Securities Industry and Financial Markets Association ("SIFMA") had challenged as alleged prohibitions or limitations on access under Section 19(d) of the Act. *In re Application of Securities Industry and Financial Markets Association*, Release No. 84432, Admin. Proc. File No. 3-15350 (Oct. 16, 2018). The same day, the Commission remanded several hundred other fee challenges—including SIFMA's application challenging the BOX Proposal under Section 19(d), see *In re Securities Industry and Financial Markets Association*, Admin. Proc. File No. 3-18680 (Aug. 24, 2018)—to the respective exchanges to assess SIFMA's arguments and issue written decisions determining whether the fees should be set aside. *In re Applications of Securities Industry and Financial Markets Association and Bloomberg L.P.*, Release No. 84433 (Oct. 16, 2018). In so doing, the Commission emphasized that it was expressing "no

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<sup>5</sup> See Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Physical Port Fees for EDGX, Release No. 34-83450, File No. SR-CboeEDGX-2018-016 (June 15, 2018); Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for Cboe Options, Release No. 34-83453, File No. SR-CBOE-2018-041 (June 15, 2018); Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for BZX Options, Release No. 34-83429, File No. SR-CboeBZX-2018-038 (June 14, 2018); Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Pricing Schedule, Release No. 34-83016, File No. SR-Phlx-2018-26 (Apr. 9, 2018); Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Modify Fees for Connectivity and Its Communication and Routing Service Known as Bats Connect, Release No. 34-79758, File No. SR-BatsBZX-2016-89 (Jan. 9, 2017); Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Its Fee Schedule to Modify the Exchange's Connectivity Fees, Release No. 34-79666, File No. SR-MIAX-2016-47 (Dec. 22, 2016); Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Its Fee Schedule to Modify the Exchange's Connectivity Fees, Release No. 34-78919, File No. SR-MIAX-2016-32 (Sept. 23, 2016).

view regarding the merits of the parties' challenge to the rule changes" and that its order did "not set aside the challenged rule changes." *Id.* at 2.

Yet, the BOX Proposal *has* effectively been set aside (at least temporarily), which is inconsistent with the Commission's intent to leave the challenged fees in place during the pendency of the remand proceedings. If the Commission were to resolve this proceeding by disapproving the BOX Proposal, the Exchange—unlike every other exchange whose rule changes were the subject of the remand ruling—would not be permitted to continue charging the challenged fees during the remand proceedings. This unexplained differential treatment of the Exchange—particularly in light of the fact that, unlike its competitors, the Exchange is not a member of a multi-exchange group and the fact that the Exchange has proposed Connectivity Fees lower than those charged by its competitors—would be arbitrary, unfair, and irrational.

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Because the BOX Proposal is consistent with the Act, and because disapproval would be arbitrary and capricious, the Commission should lift its temporary suspension of the BOX Proposal and approve the proposed rule change.

Respectfully submitted,



Lisa J. Fall  
President  
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