



December 10, 2018

VIA HAND DELIVERY AND FACSIMILE

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

Re: Order Granting Petition For Review Of Order Temporarily Suspending BOX Exchange LLC's Proposal To Amend The Fee Schedule On BOX Market LLC, Release No. 84614, File No. SR-BOX-2018-24 (Nov. 16, 2018)

Dear Mr. Fields:

BOX Exchange LLC (the "Exchange") appreciates the opportunity to comment on the Securities and Exchange Commission's Order granting the Exchange's petition for review of the decision of the Division of Trading and Markets temporarily suspending the Exchange's proposal to amend the fee schedule for the BOX Market LLC ("BOX") options facility (the "BOX Proposal"). The Exchange submits this letter to reiterate briefly the arguments set forth at greater length in its petition for review in this matter and to supplement that petition with additional information from the Exchange's refile of its proposal on November 30, 2018. If additional statements are submitted regarding the Division's temporary suspension of the BOX Proposal, the Exchange reserves the right to file a response to those statements.

In issuing its Order temporarily suspending the BOX Proposal pursuant to its delegated authority,¹ the Division prevented the Exchange from charging 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 from reclassifying BOX's existing High Speed Vendor ("HSVF") fee. The Commission should vacate the Division's Order for three reasons: (1) the Division applied the incorrect legal standard; (2) the BOX Proposal is consistent with the Securities Exchange Act (the "Act"); and (3) the Division arbitrarily and capriciously singled out the Exchange for disparate treatment.

¹ 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).

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First, the Division applied the wrong legal standard. In its Order, the Division stated 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 and that the “description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding.” Order, 83 Fed. Reg. at 47,948–49. That is incorrect. Although such independent review is mandated when an exchange submits a rule change to the Commission for approval under Section 19(b)(2) of the Act, *see* 15 U.S.C. § 78s(b)(2), no such searching examination is required 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 id.* § 78s(b)(3)(A). Instead, when a rule is submitted under Section 19(b)(3)(A), the Commission “summarily *may* temporarily suspend the change in the rules . . . if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes” of the Act. *Id.* § 78s(b)(3)(C) (emphasis added). 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) (explaining that the substantive standard governing the Commission’s approval of market-data fees established in its earlier opinion in *NetCoalition I* does not apply when determining whether to temporarily suspend an immediately effective fee filing because “Congress has since jettisoned the requirement that the Commission approve [such] . . . rule changes”).

The Division ignored this distinction by declaring that, in order to leave an immediately effective rule change in place, it needed “a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.” Order, 83 Fed. Reg. at 47,949. The language of the Act and D.C. Circuit precedent make clear that no such “affirmative finding” is required under Section 19(b)(3)(A).

The distinction between the standards applicable under Sections 19(b)(2) and 19(b)(3)(A) is significant because the Act’s authorization for exchanges to implement immediately effective rule changes, without the need for the Commission to make affirmative findings, encourages innovation and competition. The Division’s failure to recognize these distinct standards when temporarily suspending the BOX Proposal undermined Congress’s legislative objectives and resulted in the imposition of an unduly high legal burden on the Exchange.

Second, even if the Division were required to make affirmative findings when deciding not to temporarily suspend an immediately effective rule change, the BOX Proposal is

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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 cover some of 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 charge \$1,000 per month for each non-10 Gigabit connection and \$5,000 per month for each 10 Gigabit connection.² 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

² 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 (\$1,100/1 Gigabit, \$5,500/10 Gigabit); Nasdaq PHLX LLC Rules, General 8, Section 1(b), http://nasdaqphlx.cchwallstreet.com/NASDAQPHLXTools/TOCChapter.asp?manual=/nasdaqphlx/phlx/phlx-llcrules/chp_1_1/default.asp&selectedNode=chp_1_1 (\$2,500/1 Gigabit, \$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 (\$14,000/10 Gigabit).

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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 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.

Third, the Division's Order is 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). The Exchange has been treated differently from its competitors. As Commissioner Jackson has acknowledged, the Commission did not reject *any* 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.³

³ *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-

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This disparate treatment of the Exchange is also 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 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 and singles out the Exchange for disparate treatment because the Exchange—unlike every other exchange whose rule changes were the subject of the remand ruling—is not 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—is arbitrary, unfair, and irrational.

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).

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The Division's Order is impossible to reconcile with the requirements of the Securities Exchange Act or the Administrative Procedure Act. The Commission should vacate the order and allow the Exchange's equitable, reasonable, and nondiscriminatory proposal to take effect.

Respectfully submitted,



Amir C. Tayrani