

**UNITED STATES OF AMERICA  
BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION**



In the Matter of the Petition of:

BOX Exchange LLC

File Nos. SR-BOX-2018-24;  
SR-BOX-2018-37;  
SR-BOX-2019-04

**PETITION FOR REVIEW OF ORDER DISAPPROVING  
BOX EXCHANGE LLC'S PROPOSAL TO AMEND  
THE FEE SCHEDULE ON BOX MARKET LLC**

Alanna Barton  
BOX Exchange LLC  
101 Arch Street  
Suite 610  
Boston, MA 02110  
(617) 235-2239

Amir C. Tayrani  
Joshua M. Wesneski  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 955-8500

*Counsel for Petitioner*

Date: April 8, 2019

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## INTRODUCTION

BOX Exchange LLC (the “Exchange”) submits this petition for review of an order by the Division of Trading and Markets (the “Division”) disapproving immediately effective rule changes amending the fee schedule for the BOX Market LLC (“BOX”) options facility. In its three fee filings (the “BOX Proposal”), the Exchange proposed (1) to establish new fees, consistent with fees assessed by other exchanges, for market participants who connect to BOX’s network (the “Connectivity Fees”), and (2) to reclassify BOX’s existing High Speed Vendor Feed charge as a port fee without changing the amount of that charge (the “HSVF Port Fee”).<sup>1</sup> On March 29, 2019, the Division, acting pursuant to delegated authority, issued an order disapproving the rule changes.<sup>2</sup>

For multiple reasons, the Commission should grant review, vacate the Division’s Disapproval Order, and approve the BOX Proposal. First, the Division departed, without explanation, from its years-long practice of permitting other exchanges to charge similar, or higher,

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<sup>1</sup> See Notice of Filing of 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; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change (“Third Order Instituting Proceedings”), Release No. 85201, File No. SR-BOX-2019-04 (Feb. 26, 2019); Notice of Filing of 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; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change (“Second Order Instituting Proceedings”), Release No. 84823, File No. SR-BOX-2018-37, 83 Fed. Reg. 65,381 (Dec. 14, 2018); Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC Options Facility, Release No. 83728, File No. SR-BOX-2018-24 (July 27, 2018).

<sup>2</sup> See Order Disapproving Proposed Rule Changes 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 (“Disapproval Order”), Release No. 85459, File Nos. SR-BOX-2018-24; SR-BOX-2018-37; and SR-BOX-2019-04 (Mar. 29, 2019).



connectivity fees. An administrative agency is required to explain its reasons for departing from prior practice, but the Division failed even to acknowledge its change in position—let alone provide a cogent explanation for deviating from the Commission’s well-settled regulatory approach to connectivity fees. The arbitrary nature of the Division’s unacknowledged about-face is exacerbated by the fact that the Division’s heightened regulatory scrutiny of the BOX Proposal treats the Exchange less favorably than other exchanges that are permitted to charge comparable, or higher, connectivity fees. The Division’s disapproval of the BOX Proposal also places the Exchange at a competitive disadvantage to those exchanges whose fee filings have been permitted to remain in effect pending resolution of the denial-of-access proceedings initiated by the Securities Industry and Financial Markets Association (“SIFMA”) and Bloomberg L.P., where the Exchange’s first connectivity-fee proposal is under review along with hundreds of other fee filings by other exchanges that, unlike the BOX Proposal, currently remain in force. *See In re Applications of Securities Industry and Financial Markets Association and Bloomberg L.P.* (“Remand Order”), Release No. 84433 (Oct. 16, 2018).

Second, the Exchange has submitted ample evidence demonstrating that the BOX Proposal is consistent with the Exchange Act. The Division cited no authority for requiring the Exchange to divulge its accounting records and other proprietary information detailing the costs associated with providing connectivity services, and it ignored the Exchange’s substantial evidence that robust platform-level competition among exchanges constrains their pricing of connectivity fees.

Because the Division’s Disapproval Order is an arbitrary and capricious departure from the requirements of reasoned decision-making and from the substantive requirements of the Exchange Act, the Commission should grant the petition for review and approve the BOX Proposal.

## BACKGROUND

### I. The BOX Proposal

In each of the three fee filings at issue, the Exchange has proposed two amendments to the fee schedule for the BOX options facility.

*First*, the Exchange proposes to add Connectivity Fees for both Participants and non-Participants.<sup>3</sup> These Connectivity Fees apply to every market participant who seeks physical access to BOX's network. The Connectivity Fees are intended to offset the costs BOX incurs in providing and improving its trading network, including connectivity costs as well as costs incurred with respect to software and hardware enhancements, quality assurance, and technology support.

The Connectivity Fees are assessed upon those market participants who are connected to BOX's network as of the last trading day of each month and are based upon the amount of bandwidth used by the market participant. BOX proposes to charge \$1,000 per month for each non-10 Gigabit connection and \$5,000 per month for each 10 Gigabit connection.

Other exchanges charge connectivity fees at comparable, or higher, prices. For example, Cboe Exchange charges market participants \$1,500 per month for a 1 Gigabit connection to its network and \$5,000 for a 10 Gigabit connection. *See* Cboe Exchange, Inc. Fees Schedule 14.<sup>4</sup> The Miami International Securities Exchange LLC ("MIAX") currently sets its fees at \$1,400 for a 1 Gigabit connection and \$6,100 for a 10 Gigabit connection. *See* MIAX Options Fee Schedule

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<sup>3</sup> A "Participant" is a "firm, or organization that is registered with [BOX] . . . for purposes of participating in trading on a facility of [BOX]." BOX Exchange LLC Rules, Rule 100(a)(41), <http://rules.boxoptions.com/browse/4e260fc07d1b10009f6f90b11c2ac4f101>.

<sup>4</sup> <http://www.cboe.com/publish/feeschedule/cboefeeschedule.pdf>.

19.<sup>5</sup> Nasdaq PHLX charges its subscribers \$10,000 each month for a 10 Gigabit fiber connection to its network. *See* Nasdaq Stock Market LLC Rules, General 8, Section 1(b).<sup>6</sup> And the NYSE American Options Exchange charges \$14,000 a month for a 10 Gigabit circuit. *See* NYSE American Options Fee Schedule 37-38.<sup>7</sup>

*Second*, the Exchange proposes to redefine BOX's HSVF Connection Fee as a Port Fee.<sup>8</sup> This classification is more accurate because an HSVF subscription does not require a physical connection to BOX. Although market participants must be credentialed by BOX to receive the HSVF, anyone can become credentialed by submitting the required documentation. *See Trading Interface Specifications*, BOX Options, <https://boxoptions.com/technology/trading-interface-specifications/>. The Exchange does not propose to alter the amount of the existing HSVF fee; subscribers to the HSVF will continue to pay \$1,500 per month. As with the Connectivity Fees, BOX's HSVF Port Fee is in line with industry practice. *See* Cboe Data Services, LLC (CDS) Fee

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<sup>5</sup> [https://www.miaxoptions.com/sites/default/files/fee\\_schedule-files/MIAX\\_Options\\_Fee\\_Schedule\\_04012019.pdf](https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Options_Fee_Schedule_04012019.pdf).

<sup>6</sup> <http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F1%5F4&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2DIlcrules%2F>; *see also* Nasdaq PHLX LLC Rules, General 8, <http://nasdaqphlx.cchwallstreet.com/NASDAQPHLXTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F1%5F2&manual=%2Fnasdaqomxphlx%2Fphlx%2Fphlx%2DIlcrules%2F> (providing that the rules contained in The Nasdaq Stock Market LLC General 8 are incorporated by reference into the Nasdaq PHLX LLC Rules).

<sup>7</sup> [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).

<sup>8</sup> HSVF is “the protocol for receiving BOX market data directly from BOX rather than via one of the commercial data vendor suppliers.” *Trading Interface Specifications*, BOX Options, <https://boxoptions.com/technology/trading-interface-specifications/>.

Schedule § VI (charging \$500 per month for up to five users to access the Enhanced Controlled Data Distribution Program).<sup>9</sup>

## II. Procedural History

The Exchange first submitted the BOX Proposal on July 19, 2018.<sup>10</sup> On September 17, 2018, the Division, acting pursuant to delegated authority, issued an order temporarily suspending the BOX Proposal and instituting proceedings to determine whether to approve or disapprove the proposed rule change.<sup>11</sup>

The Exchange submitted a timely notice of intention to petition for review of the First Order Instituting Proceedings and filed its petition for review on September 26, 2018. The Commission granted the petition but vacated the automatic stay of the Division's suspension of the BOX Proposal. *See In re BOX Exchange LLC*, Release No. 84614, 83 Fed. Reg. 59,432 (Nov. 16, 2018).

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<sup>9</sup> <https://www.cboe.org/publish/mdxfees/cboe-cds-fees-schedule-for-cboe-datafeeds.pdf>.

<sup>10</sup> *See* Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC Options Facility, Release No. 83728, File No. SR-BOX-2018-24 (July 27, 2018).

<sup>11</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 (“First Order Instituting Proceedings”), Release No. 84168, File No. SR-BOX-2018-24, 83 Fed. Reg. 47,947, 47,948 (Sept. 17, 2018). The same day the Division suspended the BOX Proposal, it also suspended proposed rule changes from MIAX and MIAX PEARL that increased their connectivity fees. *See* Miami International Securities Exchange LLC, Release No. 84175, File No. SR-MIAX-2018-19, 83 Fed. Reg. 47,955 (Sept. 17, 2018); MIAX PEARL, LLC, Release No. 84177, File No. SR-PEARL-2018-16, 83 Fed. Reg. 47,953 (Sept. 17, 2018).

On November 30, 2018, the Exchange filed a second version of the BOX Proposal, which provided additional detail regarding the basis for the proposed fees. The Division temporarily suspended the second version of the BOX Proposal on December 14, 2018. *See Second Order Instituting Proceedings*. On February 13, 2019, the Exchange filed the third version of the BOX Proposal. *See Third Order Instituting Proceedings*.

On February 25, 2019, the Commission affirmed the Division's First Order Instituting Proceedings. *See In re BOX Exchange LLC*, Release No. 85184 (Feb. 25, 2019). According to the Commission, the Division "properly concluded that it was appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the [Exchange] Act to temporarily suspend the proposed rule change." *Id.* at 4. At the same time, the Commission emphasized that it "ha[d] not reached any conclusion with respect to" the "substantive issues raised by the filing." *Id.* at 5. The next day, the Division temporarily suspended and instituted proceedings to determine whether to approve or disapprove the third BOX Proposal. *See Third Order Instituting Proceedings*. The Exchange filed a timely notice of intention to petition for review and a petition for review from the Order, which the Commission granted in an order that also simultaneously affirmed the Division's Third Order Instituting Proceedings. *See In re BOX Exchange, LLC*, Release No. 85399 (Mar. 22, 2019).

On March 29, 2019, the Division issued its Order disapproving each iteration of the BOX Proposal. According to the Division, it had insufficient information "to support a finding that the proposed rules changes are consistent with the requirements of the [Exchange] Act." Disapproval Order at 16-18. First, the Division stated that the Exchange had not provided sufficient information to support its argument that the Connectivity Fees are necessary to offset the costs incurred by

BOX in maintaining and implementing ongoing improvements to its trading systems. *Id.* at 18-19. The Division reasoned that the Exchange had failed to offer “any information as to the level of those costs or any other supporting factual basis for its conclusion,” *id.* at 22, and that the Exchange had not addressed “how its costs to maintain and implement ongoing improvements to the trading systems relate to connectivity and whether, for example, transaction fees or other fees offset those improvements to the trading systems,” *id.* at 23. Second, the Division concluded that the Exchange had not adequately supported its argument that competition constrains its Connectivity Fees, *see id.* at 24-25, and rejected application of the “total platform theory” of competition, because the expert analysis submitted by the Exchange was not “specific to BOX and analyzes the equities markets, not the options markets,” *id.* at 27 n.118.

Finally, the Division justified the fact that the BOX Proposal has been treated differently from the other fee filings subject to the Remand Order—which, unlike the BOX Proposal, will remain in force during the pendency of the denial-of-access proceedings initiated by SIFMA and Bloomberg—on the ground that the disparate treatment is attributable to the “procedural posture of the rule changes at the time [the Remand Order] issued.” Disapproval Order at 32. Nowhere in the Disapproval Order, however, did the Division acknowledge that, in suspending and disapproving the BOX Proposal, it was departing from the Commission’s years-long practice of permitting comparable, and higher, connectivity fees from other exchanges to remain in effect, or provide any explanation for its new policy of applying heightened regulatory scrutiny to the BOX Proposal.

The Exchange filed a timely notice of intention to petition for review on April 1, 2019.

## ARGUMENT

The Commission should grant this petition and approve the BOX Proposal because the Disapproval Order departs from prior agency practice without acknowledgment or explanation and arbitrarily and capriciously treats the Exchange differently from other exchanges, and because there is sufficient evidence in the record to demonstrate that the BOX Proposal is consistent with the Exchange Act.

**I. The Disapproval Order Is Arbitrary And Capricious Because The Division Failed To Acknowledge Or Explain Its Departure From Prior Agency Practice And Subjected The Exchange To Less Favorable Treatment Than Other Exchanges.**

The Administrative Procedure Act (“APA”) prohibits arbitrary and capricious agency action. *See* 5 U.S.C. § 706. The Disapproval Order violates this requirement in multiple respects.

**A. The Disapproval Order Is An Unacknowledged And Unexplained Deviation From The Commission’s Treatment Of Prior Connectivity-Fee Filings.**

To comply with the APA, an agency must “examine the relevant data and articulate a satisfactory explanation for its action.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The APA’s requirement of reasoned decision-making has particular force where an agency changes position on an issue; it “demand[s],” as a threshold matter, that the agency “display awareness that it *is* changing position.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Thus, “[a]n agency may not, for example, depart from a prior policy *sub silentio*.” *Id.* In addition, beyond simply acknowledging the change in position, the agency also “must show that there are good reasons for the new policy.” *Id.*; *see also Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 278 (D.C. Cir. 2001) (“[I]t is axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent.” (internal quotation marks omitted)).

In the Disapproval Order, the Division violated these basic principles of reasoned decision-making by departing, without any acknowledgment or explanation, from the Commission's years-long practice of permitting exchanges to charge comparable (or higher) connectivity fees. As highlighted by Commissioner Jackson, between the beginning of 2016 and the submission of the three immediately effective rule changes from the Exchange, MIAX, and MIAX PEARL that the Division temporarily suspended on September 17, 2018, the Commission had not rejected *any* of the prior 95 exchange filings related to connectivity. *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>. For example, in June 2018, the Cboe exchange group filed *eight* immediately effective rule changes increasing connectivity fees by up to 25%,<sup>12</sup> but neither the Commission nor the Division temporarily suspended—let alone disapproved—any of those rule changes (despite a comment

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<sup>12</sup> *See* Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for BYX, Release No. 83441, File No. SR-CboeBYX-2018-006 (June 14, 2018); Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for BZX, Release No. 83442, File No. SR-CboeBZX-2018-037 (June 14, 2018); Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for BZX Options, Release No. 83429, File No. SR-CboeBZX-2018-038 (June 14, 2018); Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for C2, Release No. 83455, File No. SR-C2-2018-014 (June 15, 2018); Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for Cboe Options, Release No. 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 EDGA, Release No. 83449, File No. SR-CboeEDGA-2018-010 (June 15, 2018); Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for EDGX Options, Release No. 83430, File No. SR-CboeEDGX-2018-017 (June 14, 2018); Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for EDGX, Release No. 83450, File No. SR-CboeEDGX-2018-016 (June 15, 2018).



letter from Healthy Markets raising objections similar to those it raised in a comment letter objecting to the first BOX Proposal).<sup>13</sup> And the Cboe rule changes—like a number of the 95 prior connectivity-related filings—established connectivity fees *higher* than those established in the BOX Proposal.

The Division did not provide any explanation in the Disapproval Order for its abrupt departure from this long track record of leaving in place comparable (and higher) connectivity fees. Indeed, the Division did not even acknowledge that the Disapproval Order represents a fundamental shift in the Commission’s regulatory approach to connectivity fees. The Division’s unacknowledged and unexplained decision to cast aside settled regulatory practice and to apply a previously unknown form of exacting scrutiny to the BOX Proposal is manifestly incompatible with the APA. *See Fox Television Stations*, 556 U.S. at 515.

Moreover, heightened review of an agency’s change of position is appropriate where, as here, the agency’s “prior policy has engendered serious reliance interests that must be taken into account.” *Fox Television Stations*, 556 U.S. at 515; *see also Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (“[C]hange that does not take account of legitimate reliance on prior interpretation may be ‘arbitrary, capricious or an abuse of discretion.’” (citations and alteration omitted)). In reliance on the Commission’s prior policy of permitting exchanges to charge comparable (and higher) connectivity fees, BOX has expended substantial funds maintaining and improving its trading systems. At the time those costs were incurred, BOX anticipated, based on

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<sup>13</sup> *Compare* Healthy Markets Comment Letter on CBOE Filings (July 26, 2018), <https://www.sec.gov/comments/sr-cboebyx-2018-006/cboebyx2018006-4127982-171758.pdf>, *with* Healthy Markets Comment Letter on BOX Proposal (Aug. 23, 2018), <https://www.sec.gov/comments/sr-box-2018-24/srbox201824-4258035-173056.pdf>.

the Commission's settled regulatory approach to connectivity fees, that it would be able to recoup some of those costs through its proposed Connectivity Fees. The Division's sudden break from prior practice, however, has deprived BOX of an anticipated revenue stream on which it relied in deciding to invest in improvements to its trading infrastructure. That is unfair, unreasonable, and unjustified.

**B. The Disapproval Order Arbitrarily Subjects The Exchange To Disparate Treatment.**

The arbitrary nature of the Division's unanticipated change in position is compounded by the fact that the Division is treating the Exchange differently from similarly situated entities. It is well-established that "[a]n agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so." *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996). "Government 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); *see also Steger v. Def. Investigative Serv. Dep't of Def.*, 717 F.2d 1402, 1406 (D.C. Cir. 1983) ("The [agency] cannot, despite its considerable discretion, treat similar situations dissimilarly and, indeed, can be said to be at its most arbitrary when it does so.").

The Division's Disapproval Order arbitrarily and inequitably treats the Exchange differently from each of the other exchanges that submitted prior immediately effective connectivity-fee filings that were not suspended or disapproved by the Commission. The Division provided no explanation for subjecting the BOX Proposal to more rigorous scrutiny than other exchanges' connectivity fees. Indeed, the Division's application of its heretofore-unknown mode of heightened regulatory review to the BOX Proposal is particularly misplaced and unfair given that the Exchange is much smaller than its competitors—it constituted only 2.3% of the options

market by volume as of August 2018<sup>14</sup>—and, unlike its competitors, the Exchange is not a member of a multi-exchange group. The Division’s decision to disapprove the BOX Proposal using an onerous form of review not applied to other exchanges’ connectivity-fee filings has placed the Exchange at a serious competitive disadvantage.

The Division’s disparate treatment of the Exchange was exacerbated by the fact that the Division acted to disapprove the BOX Proposal even though the proposal is also the subject of the Commission’s Remand Order, which allowed *every other* fee filing challenged by SIFMA and Bloomberg to remain in force during the remand proceedings. 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 SIFMA had challenged as alleged prohibitions or limitations on access under Section 19(d) of the Exchange 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 purported to “remand” several hundred other fee challenges—including SIFMA’s application challenging the first iteration of 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 and NMS plans to assess SIFMA’s and Bloomberg’s arguments and issue written decisions determining whether the fees should be set aside, *see Remand Order* at 2-4. The Commission directed each exchange and NMS plan to file a notice with the Commission within six months apprising the Commission of the procedures it had developed or identified to assess the issues raised by SIFMA and Bloomberg,

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<sup>14</sup> *See Tabb Group, Options LiquidityMatrix* (Sept. 17, 2018).

and gave the exchanges and NMS plans twelve months to apply those procedures to each of the pending rule changes. *Id.* at 2. The Commission emphasized that it was expressing “no view regarding the merits of the parties’ challenges to the rule changes” and that its order did “not set aside the challenged rule changes.” *Id.*

Yet, the BOX Proposal *has* been set aside by the Disapproval Order. By disapproving the BOX Proposal, the Division singled out the Exchange for disparate treatment because, unlike the other exchanges whose fees have been challenged by SIFMA and Bloomberg, BOX is not permitted to continue charging its Connectivity Fees during the remand proceedings. Indeed, that disparity has been exacerbated by recent Commission action: On December 14, 2018, the Commission issued an order denying a motion filed by the New York Stock Exchange and other exchanges to stay the Remand Order pending judicial resolution of challenges to that order. *See In re Applications of Securities Industry and Financial Markets Association and Bloomberg L.P.*, Release No. 84827 (Dec. 14, 2018). In denying the motion, however, the Commission stated that the six-month and twelve-month deadlines established by the Remand Order will be tolled “pending resolution of the motions for reconsideration that are currently before the Commission with respect to the Remand Order.” *Id.* at 4. That tolling ruling means that the exchanges and NMS plans subject to the Remand Order will have more than a year to complete the remand proceedings and that, *with the exception of the BOX Proposal*, the challenged rules will remain in force at least until the now-tolled deadlines for completion of the remand proceedings have lapsed.

The Division failed to provide a legally sufficient justification for its disparate treatment of the Exchange. The Division did not even attempt to identify relevant distinctions between the prior 95 connectivity-fee filings that the Commission permitted to remain in force and the BOX

Proposal that the Division suspended and subsequently disapproved. And while the Division pointed out that fee filings from MIAX and MIAX PEARL were also suspended at the same time as the BOX Proposal, Disapproval Order at 32, it made no mention of the eight immediately effective connectivity-fee increases filed by members of the Cboe exchange group in June 2018 that the Commission permitted to remain in effect. Moreover, MIAX and MIAX PEARL subsequently refiled the proposed fee changes cited in the Disapproval Order, and, unlike the second and third versions of the BOX Proposal, the Division did *not* immediately suspend those filings and instead permitted them to remain in effect during the comment period.<sup>15</sup> Thus, far from demonstrating that BOX has received evenhanded treatment, the Division’s regulatory approach to MIAX and MIAX PEARL further underscores that BOX is being treated less favorably than other exchanges.

The Division’s discussion of the Remand Order is equally deficient. According to the Division, “that BOX is not permitted to continue charging its fees during the proceedings subject to the Remand Order is a consequence of the procedural posture of the rule changes at the time that separate order issued.” Disapproval Order at 32. But that explanation ignores the fact that the “procedural posture of the rule changes” is entirely of the Division’s own making. The Division could have put other fee filings that are the subject of the Remand Order in a similar “procedural posture” to the BOX Proposal by temporarily suspending or disapproving those rules, but it did not. Instead, the Division relegated only the BOX Proposal to the procedural posture of

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<sup>15</sup> See Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Its Fee Schedule, Release No. 85318, File No. SR-MIAX-2019-10 (Mar. 14, 2019); Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the MIAX PEARL Fee Schedule, Release No. 85317, File No. SR-PEARL-2019-08 (Mar. 14, 2019).

temporary suspension—and, now, disapproval—in advance of the Remand Order. Yet, the Division has never explained why suspension and disapproval were appropriate for the BOX Proposal but not any of the 95 connectivity-fee filings that preceded it.

Finally, the Division emphasizes that the “Remand Order did not change the status of any of the challenged rule changes or plan amendments at the time of the remand.” Disapproval Order at 32. But that is precisely the point—the Commission affirmatively stated in the Remand Order that it was expressing “no view regarding the merits of the parties’ challenges to the rule changes” and “not set[ting] aside the challenged rule changes.” Remand Order at 2. By disapproving the BOX Proposal, however, the Division *has* expressed a view on whether the Exchange’s Connectivity Fees are consistent with the Exchange Act and has set aside the BOX Proposal, and it has done so without any explanation for why the BOX Proposal should be treated differently from other fee filings subject to the Remand Order. The APA prohibits agencies from drawing such unreasoned and unwarranted distinctions among regulated parties.<sup>16</sup>

## **II. The BOX Proposal Is Consistent With The Exchange Act.**

In addition to its unexplained departure from prior practice and its disparate treatment of the Exchange, the Division also improperly discounted the Exchange’s evidence demonstrating that the BOX Proposal is consistent with the Exchange Act. The Connectivity Fees established by the BOX Proposal are equitable, reasonable, and nondiscriminatory, and do not impose any undue burden on competition—and therefore satisfy all applicable requirements of the Exchange Act

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<sup>16</sup> The Division also points out that “the Remand Order allows BOX to continue to collect *other* challenged fees.” Disapproval Order at 33 (emphasis added). BOX’s ability to collect other, unrelated fees has no bearing on, and provides no justification for, the Division’s disparate treatment of the BOX Proposal.

identified by the Division, *see* 15 U.S.C. § 78f(b)(4), (b)(5), (b)(8)—because they are designed to allow BOX to offset its costs incurred in maintaining and implementing ongoing improvements to its trading systems and because the fees are constrained by competition.<sup>17</sup>

**A. The Connectivity Fees Offset The Costs Of Maintaining And Implementing Ongoing Improvements To BOX’s Trading Systems.**

The Connectivity Fees represent an equitable allocation of reasonable fees and are not unfairly discriminatory because they are “expected to offset the costs BOX incurs in maintaining, and implementing ongoing improvements to the trading systems.” BOX Proposal at 5. These improvements include “connectivity costs, costs incurred on software and hardware enhancements and resources dedicated to software development, quality assurance, and technology support.” Second Order Instituting Proceedings, 83 Fed. Reg. at 65,383. The fees are necessary to help cover the “significant costs associated with various projects and initiatives to improve overall network performance and stability, as well as costs paid [by BOX] to the third-party data center for space rental, power used,” and other services. *Id.* at 65,382. In fact, the Exchange has a greater need for 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 reasonable nature of the Exchange’s Connectivity Fees is clear from the fact that the Exchange is proposing to set these fees at a level *lower* than the connectivity fees charged by several other exchanges. *Compare* BOX Proposal 3 (\$1,000/\$5,000), *with* Cboe Exchange, Inc.

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<sup>17</sup> The Disapproval Order does not include any analysis of the BOX Proposal’s redefinition of the existing HSVF fee as a “port fee.” In fact, none of the Division’s or the Commission’s orders has substantively addressed the HSVF fee. Thus, at the very least, that aspect of the BOX Proposal should be permitted to take effect.

Fees Schedule 14 (\$1,500/\$5,000), MIAX Options Fee Schedule 19 (\$1,100/\$5,500), Nasdaq PHLX LLC Rules, General 8 (\$2,500/\$10,000), *and* NYSE American Options Fee Schedule 37 (\$5,000/\$14,000). It cannot be unreasonable for the Exchange to charge Connectivity Fees that are less than the fees charged by other exchanges—especially given that neither the Commission nor the Division temporarily suspended or disapproved the rule changes establishing the other exchanges’ higher fees.<sup>18</sup>

Furthermore, nothing in the BOX Proposal compels market participants to pay the Connectivity Fees. Market participants remain free not to connect to BOX. Indeed, the possibility that market participants will respond to an exchange’s price increase by terminating their connections to the exchange is a substantial constraint on exchanges’ ability to increase connectivity fees. This is not merely a theoretical constraint: A commenter on the BOX Proposal expressly warned that “[i]f this fee increase goes in effect,” they “wouldn’t be able to subscribe to BOX” and that they have “stopped [their] access to BOX” pending the outcome of the Commission proceedings.<sup>19</sup>

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<sup>18</sup> The Division discounted this evidence on the ground that “a ‘mere assertion . . . that another self-regulatory organization has a similar rule in place’ is ‘not sufficient’ to ‘explain why the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a self-regulatory organization.” Disapproval Order at 25 (alteration in original) (quoting 17 C.F.R. § 201.700(b)(3)). But even if the existence of similar rules is not sufficient, standing alone, to establish that a proposed rule is consistent with the Exchange Act, the fact that the Commission did not disapprove other exchanges’ *higher* connectivity fees—and has not taken any other regulatory action with respect to those fees—is plainly probative of the BOX Proposal’s validity and, when considered together with the Exchange’s other evidence, makes clear that the proposal is consistent with the Exchange Act.

<sup>19</sup> Letter from Anand Prakash to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission (Mar. 27, 2019), <https://www.sec.gov/comments/sr-box-2019-04/srbox201904-183648.htm>. The Exchange notes that Mr. Prakash is employed by the Cutler



Nor is there any basis for concluding that BOX's Connectivity Fees are inequitable or discriminatory. The Connectivity Fees apply evenhandedly to all market 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. And because market participants with a 10 Gigabit connection use more bandwidth than market participants with a non-10 Gigabit connection, there is nothing inequitable or discriminatory about setting a higher fee for those market participants with a 10 Gigabit connection.

Finally, the Connectivity Fees will not burden competition. There is no burden on competition between market participants because market participants who are particularly price-sensitive have the option of connecting to BOX through a third-party connectivity provider, some of whom may charge fees that are lower than BOX's Connectivity Fees. The Connectivity Fees also promote competition among exchanges because they enable BOX to offset its costs and invest in improvements to its software, hardware, quality assurance, and technology support. These investments make BOX a more attractive trading platform for market participants and a more effective competitor.

The Division dismissed all of this evidence as "insufficient" to support a finding that the BOX Proposal is consistent with the Exchange Act. Disapproval Order at 17. The Division faulted the Exchange for failing to offer "any information as to the level of . . . costs" to be recouped by the Connectivity Fees. *Id.* at 22. But the Division cited no authority for the proposition that an exchange is invariably required to provide a detailed analysis of costs in support of a proposed fee

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Group LP, a previous BOX Participant that ended membership in April 2018, three months before the Connectivity Fees were announced and implemented.

filing. The principal authority invoked by the Division is *Susquehanna International Group, LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017), where the D.C. Circuit vacated the Commission’s approval of a self-regulatory organization’s proposed rule change on the ground that the Commission had “effectively abdicated [its] responsibility to” the self-regulatory organization, *id.* at 446, and had exhibited “unquestioning reliance” on its representations, *id.* at 448. But nowhere did the D.C. Circuit suggest that the “independent review” required by the Exchange Act must encompass a consideration of detailed cost evidence. *Id.* at 446 (internal quotation marks omitted).

Likewise, in *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010), the D.C. Circuit *rejected* the argument that the Exchange Act mandates a cost-based assessment of market-data fees and endorsed the Commission’s two-part ArcaBook standard, which provides that a fee is consistent with the Exchange Act where the exchange has “provide[d] a substantial basis . . . in its proposed rule change demonstrating that the terms of the proposal are equitable, fair, reasonable, and not unreasonably discriminatory.” *Id.* at 532 (quoting Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data, Release No. 59039, 73 Fed. Reg. 74,770, 74,781 (Dec. 9, 2008) (“ArcaBook Order”)). Nothing in *NetCoalition* indicates that this “substantial basis” must include detailed information about an exchange’s cost structure.

The Division’s requirement that the Exchange produce extensive cost data as a condition of obtaining approval of its Connectivity Fees therefore lacks any footing in the Exchange Act or D.C. Circuit precedent. And imposing that requirement would put the Exchange at a significant competitive disadvantage because it would expose sensitive information about the Exchange’s costs, operations, and future strategic planning to public scrutiny, even though none of the

Exchange's competitors was required to produce similar information when establishing its own connectivity fees. *See* Disapproval Order at 24 (demanding "information as to whether the monthly costs associated with connectivity always exceed the projected monthly revenues from connectivity . . . [and] the frequency of the costs").

The Division further criticized the Exchange for not providing an adequate "analysis into the level of the particular fees at issue here . . . and whether they are reasonable and equitable." Disapproval Order at 23. In reality, the Exchange provided ample evidence that other exchanges charge *higher* fees for the *same* service.<sup>20</sup> Those fees were not suspended or disapproved by the Commission, and thus strongly support the conclusion that the Exchange's lower fees are fair, reasonable, and equitable.

The Division also stated that the Exchange did "not address how its costs to maintain and implement ongoing improvements to the trading systems relate to connectivity and whether, for example, transaction fees or other fees offset those improvements to the trading systems." Disapproval Order at 23. But this again ignores the record developed by the Exchange. In its second fee filing, the Exchange explained that it is beginning to "charg[e] for this physical connectivity to partially offset the costs associated with maintaining and enhancing a state-of-the-art exchange network infrastructure." Second Order Instituting Proceedings, 83 Fed. Reg. at 65,382. Thus, while transaction fees may also offset *some* of those costs, the Exchange's submission makes clear that the Connectivity Fees will offset "part[ ]" of those costs. Nothing in

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<sup>20</sup> *See* Petition for Review of Order Temporarily Suspending BOX Exchange LLC's Proposal to Amend the Fee Schedule on BOX Market LLC ("First Petition") 10, File No. SR-BOX-2018-24 (Sept. 26, 2018).

the Exchange Act prohibits an exchange from drawing on the revenues generated by multiple types of fees in order to cover the expenses associated with operating and improving its trading platform.

**B. The Connectivity Fees Are Constrained By Competition.**

The Exchange's Connectivity Fees are also consistent with the Exchange Act for a second and independent reason: Competitive forces constrain the Exchange's ability to set its connectivity fees, which prevents the Exchange from setting those fees at unreasonable or inequitable levels. The Division's contrary conclusion is squarely rebutted by the record.

As the Exchange explained to the Division, the existence of robust competition between exchanges to attract order flow requires exchanges to keep prices for all of their joint services—including connectivity to the exchanges' networks—at a pro-competitive level.<sup>21</sup> This conclusion is substantiated by the report prepared by Professor Janusz A. Ordover and Gustavo Bamberger addressing the theory of "Platform Competition" and its application to the pricing of exchanges' services, including connectivity services.<sup>22</sup> In the report, Ordover and Bamberger explain that "the provision of connectivity services . . . is inextricably linked to the provision of trading services, so that, as a matter of economics, it is not possible to appropriately evaluate the pricing of connectivity services in isolation from the pricing of trading and other 'joint' services offered by" an exchange. Ordover/Bamberger Statement ¶ 5. Ordover and Bamberger state that "connectivity services are an 'input' into trading" and that "excessive pricing of such services would raise the costs of trading

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<sup>21</sup> Letter from Lisa J. Fall, BOX, to Brent J. Fields, Secretary, Securities and Exchange Commission (Feb. 19, 2019), <https://www.sec.gov/comments/sr-box-2018-24/srbox201824-4945872-178516.pdf>.

<sup>22</sup> See Attachment to Letter from Lisa J. Fall, *supra* note 21 ("Ordover/Bamberger Statement").

on [an exchange] relative to its rivals and thus discourage trading on” that exchange. *Id.* As a result, “competition among exchanges and other rivals can be expected to constrain the aggregate return that [an exchange] earns from its sale of a portfolio of products, including trading and connectivity services.” *Id.* “Regulatory forbearance” as to an exchange’s pricing of its connectivity services “is thus fully warranted in the absence of any showing of a lack of competition at the exchange level.” *Id.* ¶ 8.

Although the Ordover/Bamberger Statement focuses on the pricing of connectivity services by Nasdaq-affiliated equities exchanges, its “overarching conclusion . . . that the pricing of connectivity services should not be analyzed in isolation” applies with equal force to the BOX Proposal and is confirmed by other parts of the record pertaining to specific BOX customers. Ordover/Bamberger Statement ¶ 52; *see also supra* note 19 and *infra* note 24. As with Nasdaq’s pricing, the “proper approach from the economics and public policy standpoint is to view connectivity as one of the services that [BOX] offers that is related to its trading function and which is produced on a platform that is characterized by joint and common costs.” Ordover/Bamberger Statement ¶ 52. Because BOX is engaged in rigorous competition with other exchanges to attract order flow to its platform, BOX is constrained in its ability to price its joint services—including connectivity services—at supracompetitive levels. That competition ensures that BOX’s Connectivity Fees are set at levels that are consistent with the requirements of the Exchange Act.

The Division’s reasons for rejecting this evidence of competitive constraints cannot withstand scrutiny. First, the Division cursorily dismissed the significance of the Ordover/Bamberger Statement because “it is not specific to BOX and analyzes the equities

markets, not the options markets.” Disapproval Order at 27 n.118. But the Division failed to offer any reasoning to support its unsubstantiated assertion that competition among options exchanges is different from competition among equities exchanges, and that the robust competition for order flow that constrains the pricing decisions of equities exchanges is somehow inapplicable in the options setting. The Division’s *ipse dixit* is insufficient to support its back-of-the-hand treatment of the Ordovery/Bamberger Statement. See *Sorenson Commc’ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014) (“deference” to an agency’s judgment is appropriate only where the agency’s decision was “based on some logic and evidence, not sheer speculation” (internal quotation marks omitted)).

Second, the Division reasoned that the Exchange did not “provide information regarding the extent to which the establishment of connectivity fees on the Exchange impacted order flow on the Exchange,” did not “provide information regarding the extent to which BOX Participants are continuing to purchase connectivity services from the Exchange,” and did not “discuss whether there are alternatives to the Exchange-provided connectivity services.” Disapproval Order at 29-30. Each of these observations is inaccurate or irrelevant.

The Exchange does not need to produce order-flow data to substantiate that the pricing of its Connectivity Fees is constrained by order-flow competition. As both the D.C. Circuit and the Commission have recognized, “[n]o one disputes that competition for order flow is ‘fierce.’” *NetCoalition*, 615 F.3d at 539 (quoting *ArcaBook Order*, 73 Fed. Reg. at 74,782). As a result of this “fierce” competition, the Exchange would not have set the Connectivity Fees at unreasonable levels because doing so would have driven away valuable order flow. Actual order-flow data from the period after the Exchange began to charge the Connectivity Fees is therefore unnecessary (and,

in any event, would invariably be unavailable at the time an exchange first submitted an immediately effective fee filing).

In addition, contrary to the Disapproval Order, the record contains information about market participants' reaction to the BOX Proposal. The Exchange explained in a comment letter that "no Participant subject to the new fees for connecting to BOX's network has complained to the Exchange about the fees either formally or informally, and no challenges to those fees have been initiated with the Exchange."<sup>23</sup> The only entity that complained to the Exchange was a non-Participant connectivity provider that ultimately terminated its connection to BOX, which underscores that customers are not required to connect to all exchanges and are free to disconnect if they are uncomfortable with an exchange's connectivity fees.<sup>24</sup>

Finally, the Exchange did discuss alternatives to direct connection to BOX's network. In its first Petition for Review, the Exchange explained that "market participants who are particularly price-sensitive have the option of connecting to BOX through a third-party connectivity provider," and that "BOX charges only a single connectivity fee to each third-party provider—regardless of the number of market participants who connect to BOX through that provider—which enables these providers to charge fees that may be lower than BOX's Connectivity Fees." First Petition at 12. The Division simply ignored this aspect of the record.

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<sup>23</sup> Letter from Lisa J. Fall, BOX, to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission (Mar. 25, 2019), <https://www.sec.gov/comments/sr-box-2018-24/srbox201824-5190026-183594.pdf>.


<sup>24</sup> Letter from Stefano Durdic, R2G, to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission (Mar. 27, 2019), <https://www.sec.gov/comments/sr-box-2019-04/srbox201904-5214039-183647.pdf>.

## CONCLUSION

The Disapproval Order contravenes the APA and the Exchange Act in multiple respects: It departs from the Commission's previously settled approach to connectivity fees without acknowledging or explaining its deviation from prior practice, it unjustifiably subjects the Exchange to treatment that is far less favorable than the treatment afforded to the Exchange's competitors, and it ignores the substantial record evidence demonstrating that the Exchange's proposed Connectivity Fees are equitable, reasonable, nondiscriminatory, and pro-competitive.

The Commission should grant the petition for review, vacate the Disapproval Order, and approve the BOX Proposal.

Respectfully submitted,



Amir C. Tayrani  
Joshua M. Wesneski  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 955-8500

Alanna Barton  
BOX Exchange LLC  
101 Arch Street  
Suite 610  
Boston, MA 02110  
(617) 235-2239

*Counsel for Petitioner*

Date: April 8, 2019



**CERTIFICATE OF SERVICE**

I, Amir C. Tayrani, counsel for BOX Exchange LLC, hereby certify that on April 8, 2019,

I served copies of the attached Petition for Review of BOX Exchange LLC as indicated below:

Vanessa Countryman  
Acting Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549  
*(via hand delivery and facsimile)*

Dated: April 8, 2019



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Amir C. Tayrani