



August 23, 2018

Via Electronic Mail (rule-comments@sec.gov)

Mr. Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Release No. 34-83728, File No. SR-BOX-2018-24;

Dear Mr. Fields:

The Healthy Markets Association appreciates the opportunity to comment on the above-referenced immediately effective filing by the BOX exchange seeking to

- Impose a new physical connectivity fee of \$5,000.00 per month for its 10 gigabit connection,
- impose a new physical connectivity fee of \$1,000 per month fee for its non-10 gigabit connection,¹ and
- revise and reclassify its High Speed Vendor Feed (“HSVF”).

The BOX Filing does not provide sufficient information to support a finding by the Commission that the filing:

- is an equitable allocation of reasonable dues, fees, and other charges;
- does not unfairly discriminate between different exchange participants;
- does not impose burdens on competition that are not necessary or appropriate; and
- does not impose impediments to the free and open market system.

¹ *BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for BOX*, SEC, Exch. Act Rel. No. 34-83728, July 27, 2018, available at <https://www.sec.gov/rules/sro/box/2018/34-83728.pdf> (BOX Filing).

As a result, and despite contrary conclusory assertions made in the BOX Filing, the proposed fees are inconsistent with the exchange's obligations under the Exchange Act.² Accordingly, we request that the Commission suspend the BOX Filing and institute proceedings to disapprove it.

Further, the BOX Filing appears to be part of a round of dramatic increases in connectivity fees across multiple securities exchanges³--each of which appears to rely upon the others as its primary justification. Rather than evidence of a competitive market, this collection of recent unilateral connectivity fee increases appears to reflect each exchange's attempts to press the Commission and the Exchange Act as far as possible to exploit their customers. We urge the Commission to immediately take action against all such filings, and cautiously evaluate each filing's compliance with the Exchange Act.

About Healthy Markets and Our Interest in Market Data and Connectivity

The Healthy Markets Association is an investor-focused not-for-profit coalition working to educate market participants and promote data-driven reforms to market structure challenges. Our members, who range from a few billion to hundreds of billions of dollars in assets under management, have come together behind one basic principle: Informed investors and policymakers are essential for healthy capital markets.⁴

The conflicts of interest and costs associated with market data and associated connectivity to market data have been a particular concern for Healthy Markets. In November 2017, we released *US Equity Market Data: How Conflicts of Interest*

² 5 U.S.C. § 78f.

³ See, e.g., *Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Its Fee Schedule*, SEC, Exch. Act Rel. No. 34-83786, Aug. 8, 2018, available at <https://www.sec.gov/rules/sro/miex/2018/34-83786.pdf>; *BZX Options Notice of filing and Immediate Effectiveness of a Proposed Rule Change Related to Physical Port Fees for BZX Options*, SEC, Exch. Act Rel. No.34-83429, June 14, 2018, available at <https://www.sec.gov/rules/sro/cboebzx/2018/34-83429.pdf>; *NYSE Mkt LLC Notice of Filing of Proposed Change Amending the Co-location Services Offered by the Exchange to Add Certain Access and Connectivity Fees* SEC, Exch. Act Rel. No. 34-78629, August 22, 2016 available at <https://www.sec.gov/rules/sro/nysemkt/2016/34-78629.pdf>; *The NASDAQ Stock Market LLC Notice of filing and Immediate Effectiveness of Proposed Rule Change to Modify Nasdaq Rule 7051 Fees Relating to Pricing for Direct Circuit Connections*, SEC, Exch. Act Rel. No. 34-74680, April 8, 2015 available at <https://www.sec.gov/rules/sro/nasdaq/2015/34-74680.pdf>.

⁴ To learn more about Healthy Markets, please see our website at <http://www.healthymarkets.org>.

Overwhelm an Outdated Regulatory Model and Market Participants, an 80-page report that outlines the history and current issues with the provision of and conflicts regarding market data.⁵ As we explained in that report, the relationships between the public market data framework and the private market data framework are inextricably linked. Both serve as profit centers for the dominant exchanges, and both are largely under the control of the exchanges.

In January 2018, we filed a petition for a rulemaking to the Commission to address many of these concerns, including recommending more than a dozen specific improvements.⁶ In April 2018, we filed a 191-page comment letter objecting to a CTA/CQ proposal to amend the fees.⁷ In July, we filed an objection to a set of filings across the Cboe family of exchanges regarding exchange connectivity.⁸

Background

Connectivity and other associated costs are significant, and rising quickly. Much of these costs have come from connectivity features such as those that are the subject of the BOX Filing.

BOX offers two levels of connectivity: non-10 gigabit and 10 gigabit.⁹ For the non-10 gigabit connectivity, the BOX Filing proposes to increase the monthly cost from \$0.00 per connection to \$1000.00 per connection.¹⁰ For the 10 gigabit connectivity level, the BOX Filing propose to increase the monthly cost from \$0.00 per connection to \$5,000.00 per connection.¹¹ Notably, while not discussed in the BOX Filing, many market participants are compelled to maintain multiple connections to the data center so

⁵ See Healthy Markets Association, *US Equity Market Data: How Conflicts of Interest Overwhelm an Outdated Regulatory Model and Market Participants*, 4, Nov. 16, 2017 (Market Data Report).

⁶ Letter from Tyler Gellasch, Healthy Markets Association, to Hon. Jay Clayton, SEC, Jan. 17, 2018, available at <https://www.sec.gov/rules/petitions/2018/petn4-717.pdf>.

⁷ Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, Apr. 11, 2018, available at <https://www.sec.gov/comments/sr-ctacq-2017-04/ctacq201704-3420092-162185.pdf>. This letter objected to two market data-related filings, one of which was later abrogated. Healthy Markets later filed a similar objection to the analogous filing in the UTP Plan.

⁸ Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, Jul. 26, 2018, available at <https://www.sec.gov/comments/sr-cboebyx-2018-006/cboebyx2018006-4127982-171758.pdf> (Healthy Markets July 2018 Letter).

⁹ BOX Filing, at 2.

¹⁰ BOX Filing, at 2.

¹¹ BOX Filing, at 2.

as to minimize the risks of connectivity failures, meaning that the actual costs are often double the single port costs described above.

The BOX Filing also proposes to reclassify language to an existing “monthly fee of \$1,500.00 for the HSVF connection to a port fee. In doing so, the BOX filing is adding discriminatory language to the HSVF by adding that the participant must be credentialed to use the HSVF port. This language facially appears to discriminate between market participants, and appears to also run counter to BOX’s original assertion when it increased fees on the HSVF feed in February 2018 (stating that the HSVF feed is available to all market participants).¹²

Because the exchange filed the changes under Section 19(b)(3)(A)(ii) of the Exchange Act and Rule 19b-4(f)(2) thereunder, the proposed rule changes became effective upon filing with the Commission.¹³ The fee changes were filed with the Commission on July 19, 2018, although it appears the new rates commenced on July 1, 2018.¹⁴

The BOX Filing Is Inconsistent With the Exchange Act

The BOX Filing states that the proposed changes are consistent with the objectives of the Exchange Act because

¹² See *BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Amend Section VI. (Technology Fees) of the BOX Fee Schedule*, SEC, Exch. Act Rel. No. 34-82654, February 7, 2018, available at <https://www.sec.gov/rules/sro/box/2018/34-82654.pdf>.

¹³ See, e.g., BOX Filing, at 1. This truncated process, wherein rules are immediately effective, was enacted by the Dodd-Frank Wall Street Reform and Consumer Protection Act. As one of a very small number of organizations that reads every filing of every exchange each month, we believe that this process has enabled the proliferation of fees and complexity with little SEC oversight. With upwards of 200 SRO filings each month, and remarkably limited SEC staff resources, we have significant questions regarding the staff’s ability to review the filings, identify concerns, and take appropriate action to protect investors and promote fair and efficient markets on a consistent basis.

¹⁴ See, e.g., BOX Filing, at 2 (declaring the fee will be charged the applicable connectivity fee for that month). In this regard, we might think of this as a television cable company telling you in the middle of the month that your cable rate just went up 25% for that month. Setting aside the planning difficulties, it’s simply offensive to consumers, and is not the type of behavior that one would typically expect from competitive markets.

- they provide “for the equitable allocation of reasonable dues, fees, and other charges among BOX Participants and other persons using its facilities and do not unfairly discriminate between customers, issuers, brokers or dealers”,¹⁵ and
- the fees are “similar” to those charged by other exchanges.¹⁶

None of these assertions are sufficiently established so as to permit the Commission to find that the exchange’s burdens under the Exchange Act have been met.

The BOX Filing Does Not Establish That The Proposed Fees Constitute An Equitable Allocation of Reasonable Dues, Fees, and Other Charges

By law, the proposed fees must be both (1) reasonable and (2) equitably allocated.¹⁷ The BOX Filing make little attempt to demonstrate compliance with either mandate. When espousing the purported justifications, the exchange simply notes:

the proposed Connectivity Fees in general constitute an equitable allocation of fees, and are not unfairly discriminatory, because they allow the Exchange to recover costs associated with offering access through the network connections.¹⁸

It continued by asserting that “the Exchange believes that its proposed fees are reasonable in that they are competitive with those charged by another exchange.”¹⁹

The BOX Filing Does Not Establish That the Fee Changes are Reasonable

The BOX Filing does not offer any suggestion that these services, which are provided now, are becoming more costly to produce. It explains that the fees

¹⁵ See, e.g., BOX Filing, at 4.

¹⁶ See, e.g., BOX Filing, at 3 (referring to connectivity fees charged by Miami International Securities Exchange LLC) and BOX Filing, at 3 (referring to port fees charged by Cboe Data Services, LLC and Cboe Exchange Inc).

¹⁷ 5 U.S.C. § 78f.

¹⁸ See, e.g., BOX Filing, at 4.

¹⁹ BOX Filing, at 4.

are also expected to offset the costs BOX incurs in maintaining, and implementing ongoing improvements to the trading systems, including connectivity costs, costs incurred on software and hardware enhancements and resources dedicated to software development, quality assurance, and technology support.²⁰

We have no idea what that means, and the BOX Filing offers no details.²¹ Nor does the filing offer any discussion regarding the relative benefits to users of the various potential exchange connectivity offerings, such as subscribing to the 10 gigabit connection, the Non-10 gigabit connection, or connecting through a third party.²²

At root, the justification seems to really be that the proposed fees are allegedly “similar” to those of other exchanges. But even that analogy is off-base. The exchanges appear to have very significant price differences. The BOX Filing cites to the Miami International Securities Exchange LLC’s charge for a 10 gigabit connection in Metro NY/NY is \$5500 (10% more than the proposed monthly charge by BOX of \$5,000),²³ and the CBOE exchange which charges \$2,000 for a 1 gigabit connection and \$5,000 for a 10 gigabit connection.²⁴ BOX however, fails to cite to other exchanges. For example, Nasdaq PHLX charges \$10,000 for a 10 gigabit fiber connection²⁵ and the NYSE American Options Exchange charges \$14,000 per month for a 10 gigabit circuit.²⁶ So, as of June 2018, the fees have ranged from free to \$14,000 per month.

²⁰ BOX Filing, at 4.

²¹ We do note, however, that even this vacuous statement offers far more details than those offered by the even more egregious recent filings by the Cboe family of exchanges, to which we have previously objected. See, e.g., Healthy Markets July 2018 Letter, at 6-7.

²² Notably, it is likely impossible for a market participant that subscribes to these services today to meet its basic legal and business obligations without some connectivity to the exchange.

²³ Notably, nearly immediately after the BOX Filing, the Miami International Securities Exchange LLC filed on August 7, 2018 to increase the fee of the 10 gigabit connection from \$5,500 to \$6,100. See *Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Its Fee Schedule*, SEC, Exch. Act Rel. No. 34-83786, Aug. 8, 2018, available at <https://www.sec.gov/rules/sro/miiax/2018/34-83786.pdf>.

²⁴ See CBOE Exchange Fees and Charges, August 22, 2018 available at <http://www.cboe.com/publish/feeschedule/cboefeeschedule.pdf>

²⁵ Nasdaq Phlx LLC Pricing Schedule, SEC, Exch. Act Rel. No. 34-83465, available at <https://www.sec.gov/rules/sro/phlx/2018/34-83465-ex5.pdf>.

²⁶ See NYSE American Fees and Charges, NYSE American August 22, 2018, available at https://www.nyse.com/publicdocs/nyse/markets/nyse-american/NYSE_America_Equities_Price_List.pdf.

The revised fees appear to be completely arbitrary, and based largely on what the exchange believes it can sneak by its regulator without major objection--based upon its observation of other exchanges' recent efforts to raise their fees in a similar manner.²⁷

Even if the proposed fees were somehow viewed as "similar" to those charged by other monopoly exchanges, that does not mean that they are reasonable. Outside of the exchange world, where consumers have choice and corporations are subject to real competition, the costs for this level of connectivity is significantly lower. For example, a consumer can purchase a dedicated 1 gigabit line in the outside world for as little as \$850 per month.²⁸

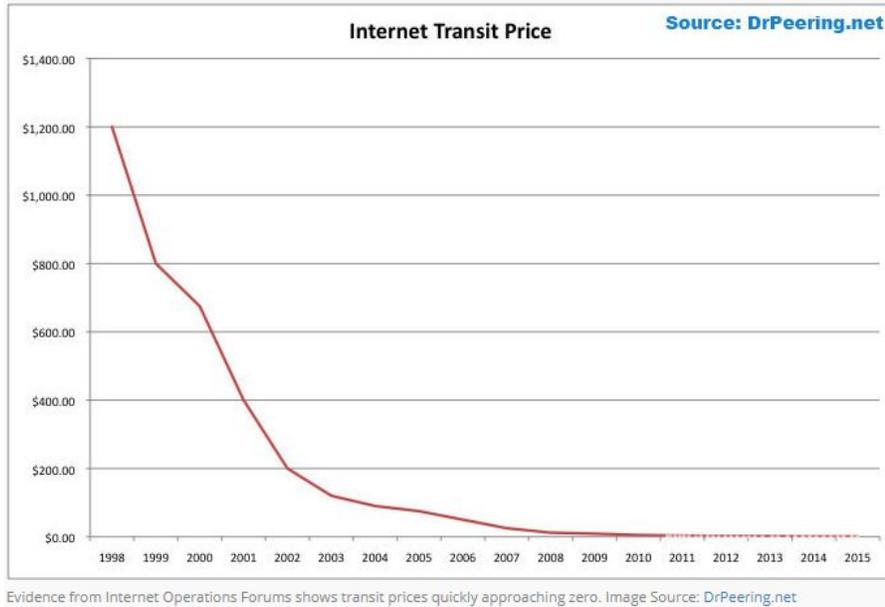
Granted, the exchange could be offering more services that might account for the massive upcharges, but the BOX Filing also fails to address the overall service specifications offered through the connectivity options. The details of the connectivity offerings are not provided in the filings, nor are any potential changes discussed. Again, in the outside world, key information would be provided such as Service Level Agreements, packet loss or network availability performance, or even if the connection is dedicated. This vital information is absent from the BOX Filing, and we were unable to readily locate any information about performance from the BOX website.

Outside of the exchange connectivity context, pricing for data transmission is generally competitive and one finds little variation from one vendor to the next. Further, rather than double and triple digit fee hikes, actual costs in the sector have been falling for data delivery.

While prices for connectivity for all areas outside of the exchange server room have fallen, they have been quite the opposite for the monopoly exchanges. Cost projections for the public "internet backbone" have fallen substantially since 1998 as depicted in the below chart:

²⁷ See, e.g., recent filings related to Nasdaq, Cboe, and MIAX.

²⁸ See e.g., Stealth Communications Price Schedule, Stealth Communications, *available at* <https://stealth.net/services/fiber/nyc/gigabit/dedicated>.



The assertion that these increases are justified by the need to “maintain and improve” technology and services is illusory. For example, on February 7, 2018, BOX filed to double the HSVF charge to \$1,500.00 per month.²⁹ The BOX Filing does not say what improvements were made to improve its market technology and services then, nor do they offer any hints as to what would now warrant yet another fee hike. In fact, it’s difficult to understand how charges could increase so dramatically in just two years for the HSVF services while the overall cost of data transmission everywhere else has gone down.

The BOX Filing offers nothing to establish how its proposed fees are reasonable, and so it should be disapproved.

The BOX Filing Does Not Establish That The Fees Are Equitably Allocated

The BOX Filing simply declares that the proposed fees “in general constitute an equitable allocation of fees ... because they allow the Exchange to recover costs associated with offering access through the network connections.”³⁰

²⁹ BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Amend Section VI. (Technology Fees) of the BOX Fee Schedule, SEC, Exch. Act Rel. No. 34-82654, February 7, 2018, available at <https://www.sec.gov/rules/sro/box/2018/34-82654.pdf>.

³⁰ BOX Filing, at 4.

A declaration about the purported use of the fees has nothing to do -- at all -- with how those fees are collected. The BOX Filing makes absolutely no attempt at all to explore how the burdens of the fees will be applied across its customer base. There is no discussion of the equitability of the fees at all.

While the *fee schedule* may apply to all members, the *actual impact of those fees* is extremely inequitable.

Under the exchanges' logic, it would be "equitable and non-discriminatory" for the exchanges to implement a fee of \$100,000 per month, if it was adopted for all members. Of course, smaller firms would be effectively prohibited from paying for the service, while larger firms would not. This would effectively exclude smaller firms from the opportunity to participate in the markets and compete, leading to greater market consolidation and weaker markets. Such a fee would be facially inequitable, discriminatory, an unnecessary barrier to competition, and contrary to fair and open markets.

The question is whether we have already reached that point with the proposed fee levels. We posit that market data and connectivity fee levels and market reactions -- including consolidation by broker-dealers and other market participants -- suggest that they have already passed that point.

It is not entirely clear what constitutes the "equitable allocation of reasonable dues, fees, and other charges" under the Exchange Act. We understand that this should mean, at a minimum, that the collection of "dues, fees, and other charges" should be both: (1) equitably allocated across different types services; and (2) equitably allocated across different types of customers of the exchange.

The BOX Filings offer no discussion as to either.

Whether for the Non-10 gigabit or the 10 gigabit connection, the connection is just that. It is, quite simply, a barrier to entry to the exchange itself. Thereafter, within each connectivity level, the amount of the fee assessed does not vary based upon usage. Of course, larger firms with more complex systems and usage are likely to subscribe to the 10 gigabit connection, while those with less demand may be more likely to subscribe to the Non-10 gigabit connection.

We might think of this as just the rental of the cable box. That gives the user access to data, but that does not yet include content. Market participants must then purchase the

data as well. They need to figure out what cable package they want. And each of those data options comes with its own significant costs.

We have no understanding as to whether the mix of fees spread between access (connectivity) and content (market data) is equitable. And that also doesn't account for actual trading costs. While all of these fees may be barriers to entry for market participants--they act in different ways. And the different impacts of different fee levels may have significantly different impacts on different firms. For example, if the connectivity fees were low, but trading fees high, then a smaller firm with infrequent trading could still access the exchange as necessitated by its best execution obligations and business competitiveness. However, if the connectivity fees are high, and trading fees low, then a smaller firm may be unable to clear the initial cost burden. Unfortunately, the exchanges fail to even offer any recognition of these impacts.

Additionally, we have significant questions about the nature of the distributive impact of the fees on different customers of the exchanges. The BOX Filing does not provide information about how many subscribers currently purchase either level of connectivity. The BOX Filing does not provide details of how much revenues will be generated from the changes to each. Nor does the BOX Filing offer any specific details for how those revenues would be spent (and to whose benefit). For example, if the majority of the fees generated were from Non-10 gigabit subscribers, and all of those revenues were used to provide commensurate new benefits for those subscribers, that would be important information for this determination. But we do not know that.

The BOX Filing proposes massive new fees for services that are currently free and to further tweak service for another product whose price was just doubled earlier this year. Unfortunately, the BOX Filings do not explain or provide any rationale as to why any of these changes are equitable. Because the BOX Filing offers nothing to establish how their proposed fees are equitable, it should be disapproved.

The Fees Impose a Burden on Competition That is Not Necessary or Appropriate, Unfairly Discriminate Between Different Exchange Participants, and Impose Impediments to the Free and Open Market System

In the BOX Filing, the exchange offers a statement on the burden on competition.



The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Unilateral action by BOX in establishing fees for services provided to its Participants and others using its facilities will not have an impact on competition. As a small Exchange in the already highly competitive environment for options trading, BOX does not have the market power necessary to set prices for services that are unreasonable or unfairly discriminatory in violation of the Exchange Act. BOX's proposed fees, as described herein, are comparable to and generally lower than fees charged by other options exchanges for the same or similar services. Lastly, the Exchange believes the proposed change will not impose a burden on intramarket competition as the proposed fees are applicable to all Participants and others using its facilities that connect to BOX.³¹

This statement is little more than the unsupported assertion that they don't "believe" the filings will impose any burden on competition and the equally unpersuasive assertion that competition for order flow is somehow competition for the services whose fees are being hiked.

We agree with the exchange's assertions that there is robust competition for options trading,³² but that is irrelevant to the issue of whether there is competition for connectivity to each of the exchanges. In the latter instance, there is no competition.

We think one assertion warrants significant discussion. The BOX Filing declares that the exchange "does not have the market power to set prices for services that are unreasonable or unfairly discriminatory in violation of the Exchange Act."³³ The exchange appears to be making a novel -- and laughable -- argument that it simply isn't big enough to discriminate or be unreasonable. The exchange's modest market share for trading has effectively no relationship to whether the exchange's fees are

³¹ BOX Filing, at 5.

³² As we have repeatedly noted, we are concerned with how the competition for order flow is also being waged, and that despite the requirements of the Exchange Act, market participants are nevertheless subjected to discriminatory and non-transparent pricing structures which often preference some market venue participants over others.

³³ BOX Filing, at 5.

discriminatory. Further we are aware of no instance in which the Commission has equated an exchange's market share with its ability to violate the law.³⁴

Connectivity to the BOX exchange is exclusively under the purview of that exchange. Market participants are effectively forced to access it.³⁵ So while market participants may freely chose to where they may send their orders in the abstract, they cannot realistically choose to not connect to an exchange.³⁶

This may be illustrated by how these fees came to be imposed. Market participants were not warned. While the fees were effective July 1st, the filings were not made to the Commission for several weeks. And even further, we are aware of at least one market participant who was not made aware of the fee increase by the exchange until receiving an invoice in mid-August 2018 reflecting that the new fees had been charged--beginning over five weeks prior. Imposing a fee of \$5,000 per month for a service that had been -- for years -- provided for free, without any notice or outreach to customers would seem an extremely uncommon tactic for a service provider to take in a competitive marketplace.

Lastly, the BOX Filing makes no effort to explain the various benefits and full costs (such as lost opportunity costs and third party fees) that are inherent in each of the different connectivity options for the relevant market participants. For example, those with faster connections may be able to act more quickly, providing them with both information and the ability to act upon it more quickly. This will likely impact their overall execution costs, and potentially even the decisions of whether to trade at all. These impacts may be increased yet again for participants who trade through third parties. And while these concerns would shed significant light on the impacts of this disparity between market participants, there is no discussion in any of the Cboe Filings of these impacts.

Because the BOX Filing imposes fees and limits impose a burden on competition that is not necessary or appropriate, unfairly discriminate between different exchange

³⁴ In fact, we may note that a small exchange seeking to lure customers may in fact be incentivized to adopt discriminatory practices.

³⁵ For example, if the venue has the best price, brokers may be obligated to not only evaluate a venue, but also connect and use it. See, e.g., *Best Execution Guidance on Best Execution Obligations in Equity, Options and Fixed Income Markets*, FINRA, Reg. Notice 15-46 (Nov. 2015), available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Notice_Regulatory_15-46.pdf.

³⁶ Notably, unlike in its February 2018 filing, the BOX Filing does not even suggest that a market participant could or would be able to opt-out or substitute connectivity.

participants, and impose impediments to the free and open market system, they should be disapproved.

Conclusion

In sum, the BOX Filing is yet another example of a conflicted process wherein an exchange has used its monopoly position to further its own benefit at the expense of other market participants and the markets overall. The BOX Filing is inconsistent with the exchange's obligations under the Exchange Act, and should be disapproved.

Further, the BOX Filing is but one of several recent connectivity fee filings--all of which have been to increase costs. While the exchanges cite to each other in support of their increases, none of them provide sufficient details to permit the Commission to find that the proposals are consistent with the Exchange Act. Accordingly, we urge the Commission to, for this and all similar filings, take any appropriate actions to pause and carefully review the filings for their compliance with the law.

Thank you for the opportunity to highlight our concerns contained within the BOX Filing. Should you have any questions or seek further information please contact Chris Nagy at [REDACTED].

Sincerely,



Tyler Gellasch
Executive Director

Cc: Hon. Jay Clayton, Chairman
Hon. Kara M. Stein, Commissioner
Hon. Hester Peirce, Commissioner
Hon. Robert J. Jackson, Jr., Commissioner
Brett Redfearn, Director of the Division of Trading and Markets
John Roeser, Associate Director, Division of Trading and Markets