



August 5, 2019

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

Ms. Vanessa Countryman
Director, Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Exch. Act Rel. No. 86335; File No. SR-BOX-2019-22;
Exch. Act Rel. No. 86342; File No. SR-MIAX-2019-31;
Exch. Act Rel. No. 86343; File No. SR-PEARL-2019-21; and
Exch. Act Rel. No. 86344; File No. SR-EMERALD-2019-24.

Dear Ms. Countryman:

The Healthy Markets Association appreciates the opportunity to comment on the above-referenced immediately effective exchange filings,¹ which seek to increase the connectivity fees to BOX and the MIAX family of exchanges.

The exchanges are remarkably similarly situated. Both BOX and MIAX have each made several attempts over the past year to increase their connectivity fees, only to have many of those filings suspended or withdrawn. Similarly, both sets of exchanges are legacy options exchanges. And both are smaller market participants, as measured by their collective trading volume market shares. Further, the connectivity fees may be significant sources of revenue for the exchanges.

In many ways, the questions presented by the BOX Filing and MIAX Filings are also remarkably similar: what is a sufficient justification under the law and Commission rules for an exchange to increase its connectivity fees?

In the pages that follow, we will walk through the procedural history of the BOX and MIAX Filings. We then examine the standard of review of exchange fee filings. While we take no position on whether the MIAX Filings have met the burdens imposed by law and Commission rules, we have significant concerns with both the BOX Filing and the dysfunctional procedures that have brought us to this point. We urge the Commission to

¹ For ease of reference, unless otherwise specified, the filing contained in Exchange Act Rel. No. 86335 is hereinafter referred to as the BOX Filing. The filings contained in Exchange Act Rel. Nos. 86342, 86343, and 86344 are hereinafter referred to as the MIAX Filings.

work with all deliberate speed to propose reforms (including, if necessary, notifying relevant Congressional committees of any potential statutory concerns and potential legislative fixes). Exchanges should not be permitted to subject investors and other market participants to paying fees that the Commission has already suspended or disapproved based on procedural quirks.

BOX Filing History

The BOX Filing is just the latest attempt by BOX to increase its connectivity fees. BOX has consistently used the procedures provided by the SEC to maximize its revenues in collecting higher connectivity fees that have been repeatedly rejected by the Commission staff and Commission itself.

On July 19, 2018, BOX made its first filing to impose connectivity fees (which it pointed out were routinely charged by other securities exchanges).² After objections were raised by Healthy Markets on August 23rd,³ the fee increases were temporarily suspended by the Commission on September 17, 2018, and proceedings were initiated to approve or disapprove the filings.⁴

On September 19, 2018, BOX filed its notice of intention to petition the Commission to reverse the staff's order.⁵ According to the Commission's Rules of Procedure, the staff's suspension order was then automatically stayed pending the appeal to the full Commission.⁶ On November 16, 2018, the Commission granted BOX's Petition for Review, but discontinued the automatic stay of the staff's suspension order.⁷ In explicitly reinstating the suspension of the higher fees, the Commission expressed that it

believes the continued suspension of the proposed rule change while the Commission conducts proceedings to

² *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC ("BOX") Options Facility to Establish BOX Connectivity Fees for Participants and NonParticipants Who Connect to the BOX Network*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 83728, July 27, 2019, available at <https://www.sec.gov/rules/sro/box/2018/34-83728.pdf>.

³ Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, Sec. and Exch. Comm'n, Aug. 23, 2018, available at <https://www.sec.gov/comments/sr-box-2018-24/srbox201824-4258035-173056.pdf>.

⁴ *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*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 84168, Sept. 17, 2018, available at <https://www.sec.gov/rules/sro/box/2018/34-84168.pdf>.

⁵ Letter from Amir Tayrani, Gibson, Dunn & Crutcher LLP, to Brent J. Fields, Sec. and Exch. Comm'n, Sept. 19, 2018, available at <https://www.sec.gov/rules/sro/box/2018/box201824-intentiontopetition.pdf>.

⁶ 17 CFR 201.431.

⁷ *In the Matter of the BOX Exchange LLC*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 84614, Nov. 16, 2018, available at <https://www.sec.gov/rules/other/2018/34-84614.pdf> (BOX November 2018 Order).

consider the Exchange’s proposal will allow the Commission to further consider the proposed fees’ consistency with the Exchange Act without the risk of allowing a fee that is potentially inconsistent with the Exchange Act to remain in effect.⁸

Despite that clear language, on November 30, 2018, BOX filed yet again to impose the same connectivity fees.⁹ The filing was again immediately effective. On December 14th, the Commission staff suspended filing and initiated proceedings for approval or disapproval.¹⁰ Again, Healthy Markets objected.¹¹

On March 29, 2019, the Commission staff disapproved the filing.¹² On April 1st, BOX filed a notice of its intention to petition the staff’s disapproval.¹³ Pursuant to the Commission’s Rules of Procedure,¹⁴ that staff order was stayed pending review by the full Commission.¹⁵

Between the staff suspension and the subsequent disapproval, on February 13, 2019, BOX filed for the connectivity fee a third time.¹⁶ On February 26th, the Commission staff suspended the filing and initiated proceedings for approval or disapproval.¹⁷ That same

⁸ BOX November 2018 Order.

⁹ *Notice of Filing of a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC (“BOX”) 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*, Sec. and Exch. Comm’n, Sec. and Exch. Act Rel. No. 84823, Dec. 14, 2018, available at <https://www.sec.gov/rules/sro/box/2018/34-84823.pdf> (BOX December 2018 Order).

¹⁰ BOX December 2018 Order.

¹¹ Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, Sec. and Exch. Comm’n, Jan. 2, 2019, available at <https://www.sec.gov/comments/sr-box-2018-24/srbox201824-4842084-177140.pdf>.

¹² *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*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 85459, Mar. 29, 2019, available at <https://www.sec.gov/rules/sro/box/2019/34-85459.pdf> (“BOX March Disapproval Order”).

¹³ Letter from Amir Tayrani, Gibson, Dunn & Crutcher, LLC, to Vanessa Countryman, Sec. and Exch. Comm’n, Apr. 1, 2019, available at <https://www.sec.gov/rules/sro/box/2019/box-2019-04-notice-of-intention-to-petition-for-review-040119.pdf>.

¹⁴ 17 CFR 201.431.

¹⁵ Letter from Eduardo Aleman, Sec. and Exch. Comm’n, to Alana Barton, BOX Exchange LLC, Apr. 1, 2019, available at <https://www.sec.gov/rules/sro/box/2019/box-2019-04-acknowledgement-letter-032819.pdf>.

¹⁶ *Notice of Filing of a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC (“BOX”) 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*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-85201 (Feb. 26, 2019), available at <https://www.sec.gov/rules/sro/box/2019/34-85201.pdf>.

¹⁷ *Notice of Filing of a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC (“BOX”) Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who*

day, on February 26, 2019, BOX provided notice of its intent to appeal the decision to the full Commission.¹⁸ Again, Healthy Markets objected.¹⁹ On March 7, 2019, the Commission notified BOX that, pursuant to Commission Rules of Procedure, the BOX February 2019 Order was stayed pending full Commission review.²⁰

The BOX March Disapproval Order also covered this filing. However, as mentioned above, that order was stayed on April 1st.

Now, most recently, on June 26th, BOX filed its fourth attempt to impose the connectivity fee.²¹ This filing, which follows the May 21st Staff Guidance, contains a brief discussion of the platform theory, as well as some very limited information on BOX's costs. For example, the BOX Filing explains

A more detailed breakdown of the annual operational expense in 2018 includes over \$2.8 million for space rental, power used, connections, etc. at the Exchange's data centers, over \$1.1 million for data center support and management of third party vendors, over \$700,000 in technological improvements to the data center infrastructure, over \$1.4 million for resources for technical and operational services for the Exchange's data centers and \$400,000 in market data connectivity fees. Of note, regarding market data connectivity fees, this is the cost associated with BOX consuming connectivity/content from the equities markets in order to operate the Exchange, causing BOX to effectively pay its competitors for this connectivity.²²

All told, as best as we can determine, through four different immediately effective rule filings and appeals, BOX has imposed increased connectivity fees for the periods from

Connect to the BOX Network; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-85201 (Feb. 26, 2019), available at <https://www.sec.gov/rules/sro/box/2019/34-85201.pdf>.

¹⁸ Letter from Amir Tayrani, Gibson, Dunn & Crutcher, LLC, to Brent J. Fields, Feb. 26, 2019, available at <https://www.sec.gov/rules/sro/box/2019/box201904-intentiontopetition.pdf>.

¹⁹ Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, Sec. and Exch. Comm'n, Mar. 19, 2019, available at <https://www.sec.gov/comments/sr-box-2018-24/srbox201824-5151485-183409.pdf>.

²⁰ Letter from Brent J. Fields, Sec. and Exch. Comm'n, to Alana Barton, BOX Exchange LLC, Mar. 7, 2019, available at <https://www.sec.gov/rules/sro/box/2019/box-2019-04-acknowledgement-letter-030719.pdf>.

²¹ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Options Market LLC ("BOX") Facility to Establish BOX Connectivity Fees for Participants and NonParticipants Who Connect to the BOX Network*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-86335, Jul. 9, 2019, available at <https://www.sec.gov/rules/sro/box/2019/34-86335.pdf>.

²² BOX Filing, at 14.

- July 19, 2018 to September 17, 2018 (when stopped by staff suspension order);
- September 19, 2018 to November 16, 2018 (when stopped by Commission order);
- November 30, 2018 until December 14, 2018 (when stopped by staff suspension order);
- February 13, 2019 until February 26, 2019 (when stopped by staff suspension order);
- February 26, 2019 until March 29, 2019 (when stopped by staff disapproval order);²³ and
- April 1, 2019 until present.

MIAX Filings History

The MIAX Filings are now the fifth attempt by the exchange family to impose higher connectivity fees. This process has, in many ways, run parallel with the similar BOX Filings.

On July 31, 2018, MIAX proposed connectivity fee increases,²⁴ which were effective as of August 1, 2018. Healthy Markets objected.²⁵ On September 17, 2018, the Commission staff suspended the filings and initiated proceedings to approve or disapprove them.²⁶ These filings were subsequently withdrawn.²⁷

The day after its initial filings were suspended, on September 18, 2018, MIAX filed a second round of filings to increase the connectivity fees, with essentially the identical information as the first set of filings.²⁸ The Commission staff suspended those filings and

²³ Notably, BOX's notice of its intention to petition the decision was submitted on February 26th, but the Commission staff's acknowledgement letter was not made until March 7th. We do not know if the suspension of the fees has been viewed as permitted or not during the several intervening days, but assume that BOX was permitted to charge the higher fees during that period.

²⁴ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Its Fee Schedule, Sec. and Exch. Comm'n*, Exch. Act Rel. No. 83786, Aug. 7, 2018, available at <https://www.sec.gov/rules/sro/miax/2018/34-83786.pdf>.

²⁵ Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, Sec. and Exch. Comm'n, Sept. 4, 2018, available at <https://www.sec.gov/comments/sr-miax-2018-19/srmiac201819-4300775-173209.pdf>.

²⁶ *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule Regarding Connectivity Fees for Members and Non-Members*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 84175, Sept. 17, 2018, available at <https://www.sec.gov/rules/sro/miax/2018/34-84175.pdf>.

²⁷ *Notice of Withdrawal of a Proposed Rule Change to Amend the Fee Schedule Regarding Connectivity Fees for Members and Non-Members*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 84398, Oct. 10, 2018, available at <https://www.sec.gov/rules/sro/miax/2018/34-84398.pdf>.

²⁸ *Notice of Filing of a Proposed Rule Change to Amend the Fee Schedule Regarding Connectivity Fees for Members and Non-Members; Suspension of and Order Instituting Proceedings to Determine Whether*

initiated proceedings to approve or disapprove them on October 3, 2018.²⁹ On November 23, 2018, the filings were withdrawn.³⁰

On March 1, 2019, MIAX tried to increase its connectivity fees a third time.³¹ This time, however, its filing included significantly more information than its prior filings, as we noted in our April 18th letter to the Commission.³² MIAX then supplemented its filing on April 5th, providing yet more information,³³ expressly in response to questions raised by the Commission staff by the separate BOX March Disapproval Order. On April 29, 2019, MIAX withdrew this filing.³⁴

The next day, on April 30th, MIAX made its fourth attempt at increasing connectivity fees, again making them immediately effective.³⁵

Then, on June 26, 2019, MIAX made its fifth filing,³⁶ which expressly provides yet more information in response to questions raised by the intervening Staff Guidance. Notably, this filing includes, for example, the explicit revenues and costs of providing “network connectivity services”, including projections.

All told, as best as we can determine, through five different immediately effective rule filings, MIAX has imposed increased connectivity fees for the periods from

to Approve or Disapprove the Proposed Rule Change, Sec. and Exch. Comm’n, Exch. Act Rel. No. 84357, Oct. 3, 2018, available at <https://www.sec.gov/rules/sro/miax/2018/34-84357.pdf>.

²⁹ Id.

³⁰ Notice of Withdrawal of a Proposed Rule Change To Amend the Fee Schedule Regarding Connectivity Fees for Members and Non-Members, Sec. and Exch. Comm’n, Exch. Act Rel. No. 84650, Nov. 26, 2018, available at <https://www.sec.gov/rules/sro/miax/2018/34-84650.pdf>.

³¹ Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Its Fee Schedule, Sec. and Exch. Comm’n, Exch. Act Rel. No. 85318, Mar. 14, 2019, available at <https://www.sec.gov/rules/sro/miax/2019/34-85318.pdf>.

³² Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, Sec. and Exch. Comm’n, Apr. 18, 2019, available at <https://www.sec.gov/comments/sr-miax-2019-10/srmiax201910-5388978-184130.pdf>.

³³ Letter from Joe Ferraro, MIAX, to Vanessa Countryman, SEC, Apr. 5, 2019, available at <https://www.sec.gov/comments/sr-miax-2019-10/srmiax201910-5329048-183970.pdf>.

³⁴ SR-MIAX-2019-10. It appears as though this filing was withdrawn and refiled as SR-MIAX-2019-23. ; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Its Fee Schedule, Sec. and Exch. Comm’n, Exch. Act Rel. 85836, May 10, 2019, available at <https://www.sec.gov/rules/sro/miax/2019/34-85836.pdf>. This filing then appears to have been withdrawn and refiled as SR-MIAX-2019-31. That said, we have had trouble identifying all of the relevant filings on the Commission’s website or the Federal Register.

³⁵ Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Its Fee Schedule, Sec. and Exch. Comm’n, Exch. Act Rel. No. 85836, May 10, 2019, available at <https://www.sec.gov/rules/sro/miax/2019/34-85836.pdf>.

³⁶ Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Its Fee Schedule, Sec. and Exch. Comm’n, Exch. Act Rel. No. 86342, July 10, 2019, available at <https://www.sec.gov/rules/sro/miax/2019/34-86342.pdf>.



- August 1, 2018 until September 17, 2018 (when stopped by staff suspension order);
- September 18, 2018 until October 3, 2018 (when stopped by staff suspension order); and
- March 1, 2019 until Present.

Standard of Review Applicable to the BOX Filing and MIAX Filings

The Commission is obligated to review SRO filings and determine that those filings are consistent with the Exchange Act,³⁷ including, inter alia, that an exchange's rules:

- “perfect the mechanism of a free and open market and a national market system,”³⁸
- “protect investors and the public interest,”³⁹
- “not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;⁴⁰ and
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act.⁴¹

The Commission's Rules of Practice clearly place the “burden to demonstrate that a proposed rule change is consistent with the [Exchange Act] and the rules and regulations issued thereunder” on the Exchange proposing a rule change.⁴² In addition

[t]he 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, and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.⁴³

³⁷ See *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017).

³⁸ 15 U.S.C. § 78f(b)(5).

³⁹ 15 U.S.C. § 78f(b)(5).

⁴⁰ 15 U.S.C. § 78f(b)(5).

⁴¹ 15 U.S.C. § 78f(b)(8).

⁴² Rule 700(b)(3), Commission Rules of Practice, Sec. and Exch. Comm'n, 17 CFR 201.700(b)(3).

⁴³ *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Amending the Fee Schedule Assessed on Members to Establish a Monthly Trading Rights Fee*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 86236, at 7, June 28, 2019, available at <https://www.sec.gov/rules/sro/cboeedga/2019/34-86236.pdf>.

The BOX March Disapproval Order also outlined what the Commission staff expects exchanges to provide when seeking to establish compliance with the Exchange Act.⁴⁴ Nevertheless, the BOX March Disapproval Order left significant ambiguities. On April 18, 2019, we asked the Commission to

provide greater detail as to what is required of exchanges to satisfy the Exchange Act. Exchanges and other market participants need a clear standard to which the exchanges may be held accountable.⁴⁵

On May 21st, the Commission staff issued guidance on SRO fee filings (“Staff Guidance”).⁴⁶ While the Staff Guidance does not have the force of law or rules, the Guidance offers a comprehensive framework for evaluating an exchange’s compliance with the law and Commission rules.⁴⁷

Conclusion

We wish to begin by thanking the Commission and staff for increasingly scrutinizing filings of exchanges, including those that are immediately effective. While the Commission and staff now clearly believe that the historical status quo on filings is inadequate to establish compliance with the Exchange Act, the Commission is now wrestling with determining what is adequate.

The Commission is presented with two very different sets of filings that have taken remarkably similar paths. Neither BOX nor MIAX initially provided any significant information with which the Commission could have determined that they complied with their statutory obligations and Commission rules. But, over time, their two paths have diverged.

BOX has generally exploited Commission procedures to fight the Commission and market participants, without providing any significant additional information. Essentially,

⁴⁴ *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*, SEC, Exch. Act Rel. No. 34-85459, Mar. 29, 2019, available at <https://www.sec.gov/rules/sro/box/2019/34-85459.pdf> (order disapproving three separate, but substantively identical connectivity fee filings).

⁴⁵ Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, Sec. and Exch. Comm’n, Apr. 18, 2019, available at <https://www.sec.gov/comments/sr-miax-2019-10/srmiac201910-5388978-184130.pdf>.

⁴⁶ *Staff Guidance on SRO Rule Filings Related to Fees*, Sec. and Exch. Comm’n, May 21, 2019, available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

⁴⁷ Statement of Hon. Jay Clayton, Chairman, *Statement on Division of Trading and Markets Staff Fee Guidance*, June 12, 2019, available at <https://www.sec.gov/news/public-statement/statement-division-trading-and-markets-staff-fee-guidance>.

the exchange seems to be content to fight it out in court--while continuing to collect (however briefly) fees that have been repeatedly shot down.

MIAX, by contrast, after its initial filings were stopped, has elected to provide additional information at each subsequent stage, including adding information in response to intervening Commission actions (the BOX March Disapproval Order and the Staff Guidance). Put simply, it appears as though MIAX is operating in good faith to provide what the Commission, its staff, and market participants the information needed to appropriately assess the filings. Unquestionably, MIAX has offered far more information than BOX (or other exchanges historically) related to its connectivity fee filing, including details related to its associated revenues.

Substantively, the BOX Filing remains facially inadequate to comply with the Exchange Act or the Commission Rules of Procedure, as clarified by the Staff Guidance. MIAX, by contrast, has provided significantly more information, but it is unclear whether it has met its burden.

But perhaps more importantly, the tortured procedural history of these two sets of exchanges' connectivity fee increases lays bare a weakness in the Commission's process of evaluating immediately effective filings by exchanges. In the case of BOX, for example, the exchange filed essentially the same filing, again and again, knowing full well that the Commission staff -- and later, Commission -- had deemed it inadequate. Even more stunningly, the files were submitted as "initial" filings each time. Nevertheless, the exchange was able to collect fees during the brief periods between when the filings were made and when they were suspended or disapproved. The Commission should review its rules and the law, and take any necessary action to prevent this type of market abuse. Further, if reforms require legislative changes, the Commission should inform Congress of this concern and request a fix.

Thank you for the opportunity to offer our thoughts on these exchange connectivity filings. Should you have any questions or seek further information please contact me at

[REDACTED]

Sincerely,



Tyler Gellasch
Executive Director