UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

BOX Holdings Group LLC, BOX Options Market LLC, and Luc Bertrand

For Review of Action Taken by

BOX Exchange LLC

File No. 3-20860

BOX HOLDINGS GROUP LLC, BOX OPTIONS MARKET LLC, AND LUC BERTRAND'S OPPOSITION TO BOX EXCHANGE LLC'S MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Administrative Decisions

OS Received 07/25/2022

Statutes and Regulations

Other Authorities

INTRODUCTION

BOX Exchange LLC's ("BOX Exchange") motion to dismiss ("Motion") is a transparent attempt to evade review of its improper assertion of the regulatory authority delegated to it by the Commission as a self-regulatory organization ("SRO") to impose disciplinary sanctions on BOX Holdings Group LLC ("BOX Holdings"), BOX Options Market LLC ("BOX Market"), and Luc Bertrand (together, "Applicants"). Dissatisfied with certain employee compensation disputes at BOX Market—a separate corporate entity from BOX Exchange over whose personnel affairs BOX Exchange has no regulatory authority—BOX Exchange invoked the regulatory authority delegated to it by the Commission to threaten and then impose on Applicants what it described as "disciplinary sanctions" without providing Applicants any opportunity to be heard. These sanctions, which (unless otherwise noted below) remain in effect today, include orders:

1. prohibiting the BOX Holdings—the parent company of BOX Market—and BOX Market Boards from acting via written consent;

2. prohibiting the BOX Holdings and BOX Market Boards from delegating any authority to their respective executive committees;

3. requiring that any action requiring the deliberation or vote of either Board be taken at a meeting of the full Board;

4. requiring *each* Director of BOX Market to provide notice of and allow the Regulatory Director of BOX Exchange to participate in *any* oral communication (and to provide notice of any written communication between any Director) related to BOX Exchange or BOX Market;

5. finding that Luc Bertrand, who served as Chair or Interim Chair of the BOX Holdings and BOX Market Boards during all relevant periods, violated BOX Exchange's rules, acted and is continuing to act in a manner that is not in the best interest of BOX Exchange, in bad faith, and in deliberate breach of his duties to BOX Exchange;

6. imposing a $25,000 fine on Mr. Bertrand (since "lifted"); and

7. suspending Mr. Bertrand from any involvement—formal or informal—with BOX Exchange, BOX Holdings, or BOX Market (since "lifted").[1]

Even if there were a factual basis for any of the remaining sanctions (there is not), no regulatory or contractual authority gives BOX Exchange the power to impose any of these sanctions. The sanctions directed against BOX Holdings and BOX Market effectively amend their LLC Agreements, both of which are deemed by the Commission to be rules of BOX Exchange, without the necessary approvals of BOX Market's and BOX Holding's owners, and without the notice, comment, and Commission approval required under Section 19(b) of the Securities Exchange Act ("Exchange Act")—an improper arrogation to itself of Commission authority. And BOX Exchange did not provide to any Applicant the type of notice and opportunity to be heard required by due process and the Exchange Act prior to imposing the sanctions.

Having invoked the regulatory authority delegated to it by the Commission, arrogated to itself the Commission's authority to approve amendments of BOX Market's and BOX Holdings' LLC Agreements, and acted without any semblance of due process, BOX Exchange now seeks to insulate its exercise of supposed regulatory authority from Commission review—and instead subject its conduct to review by a private panel of arbitrators—by: (1) rewriting history and ignoring legal precedent to recharacterize to the Commission as "remedial measures" which it previously described to Applicants as "disciplinary sanctions;" (2) asserting that BOX Exchange can "lift" sanctions—but not predicate findings—at its whim to strip the Commission of jurisdiction; (3) asserting that the Commission has no jurisdiction under Section 19(d) of the Exchange Act to review BOX Exchange's inappropriate exercise of its Commission-delegated and Congressionally authorized regulatory authority to impose disciplinary sanctions; and (4)

[1] BOX Exchange also "suspended the voting power of" one of its owners, MX US 2. Attach. 6; *BOX Options Exchange LLC for Registration as a National Securities Exchange*, Release No. 66871, at 33-34 (Apr. 27, 2012) ("SEC Order").

suggesting that Applicants' proper recourse for the improper exercise of regulatory authority granted to it by the Commission is private arbitration pursuant to the Facility Agreement between BOX Exchange and BOX Market—to which neither BOX Holdings nor Mr. Bertrand is a party. BOX Exchange's efforts to evade Commission review of its improper assertion of regulatory authority have no merit. BOX Exchange's Motion must be denied.

BACKGROUND

I. BOX Exchange's Regulatory Authority

Pursuant to an order issued by the Commission in 2012, BOX Exchange is a national securities exchange and self-regulatory organization under Sections 6 and 19 of the Exchange Act. SEC Order at 3-4. BOX Market is a third-party corporation that owns and operates an options trading platform that is a facility of BOX Exchange. *Id.* at 33. BOX Holdings is the sole owner of BOX Market. *Id.* at 4. Luc Bertrand has, at all relevant times, served as Chair or Interim Chair of the BOX Holdings and BOX Market Boards.

As an SRO, BOX Exchange is responsible under the Exchange Act and SEC Order for regulating its options trading facility, including by "enforc[ing] compliance by its members, and persons associated with its members, with the federal securities law and the rules of the exchange." *Id.* at 27 (citing 15 U.S.C. §§ 78f(b)(1), 78s(g)); *see also id.* at 12. Like all SROs, however, BOX Exchange derives its regulatory authority from the Commission and Exchange Act, and its regulatory authority is subject to Commission oversight. *See id.* at 3 (granting BOX Exchange's application for registration and explaining that BOX Exchange "will be a self-regulatory organization … under the [Exchange] Act"); Senate Report on 1975 Amendment to Exchange Act, S. Rep. No. 94-75, (Apr. 14, 1975) [hereinafter, "Senate Report"] (SROs are "subject to SEC oversight" and have "no authority to regulate independently of the SEC's control"). BOX Exchange's LLC Agreement, BOX Exchange's Bylaws, the rules promulgated by BOX Exchange

("BOX Exchange Rules"), as well as certain provisions of BOX Market's and BOX Holdings' LLC Agreements, "are designed to facilitate the ability of BOX Exchange and the Commission to fulfill their regulatory obligations." SEC Order at 12.

Among the regulatory authority delegated to BOX Exchange by the Commission is its disciplinary power. As explained by the Commission, "BOX Exchange's rules codify BOX Exchange's disciplinary jurisdiction over its members," allowing it "to enforce its members' compliance with its rules and the federal securities laws." *Id.* at 59. Specifically, BOX Exchange Rules 12000 et seq. "permit [BOX Exchange] to sanction members for violations of its rules and violations of the federal securities laws by, among other things, expelling or suspending members, limiting members' activities, functions, or operations; fining or censuring members; suspending or barring a person from being associated with a member; or any other … sanction." *Id.*[2] BOX Exchange may impose sanctions only "after" it provides the alleged violator with "notice and opportunity for a hearing." BOX Exchange Rule 12000(a).

BOX Exchange's regulatory authority over Applicants, however, is limited and does not include any power to impose disciplinary sanctions. BOX Exchange's regulatory authority extends, at most, to BOX Market actions related to BOX Market's ownership and operation of the options trading facility; BOX Exchange's authority does not extend to non-regulatory matters (or "Non-Market Matters"), such as marketing, administrative matters, personnel matters, social or team-building events, meetings of BOX Holdings, communication with BOX Holdings, finance, location and timing of board meetings, market research, real property, equipment, furnishings,

[2] The SEC Order's use of the term "member" is interchangeable with "participant" as used in the BOX Exchange Rules. *Compare* SEC Order at 59 (citing Rules 12000 et seq.) *with* Rules 12000 et seq. BOX Exchange Rules define "participant" as "a firm, or organization that is registered with [BOX] Exchange pursuant to the Rule 2000 Series for purposes of participating in trading on a facility of [BOX] Exchange." BOX Exchange Rule 100(42).

OS Received 07/25/2022

personal property, intellectual property, insurance, and contracts unrelated to the operation of the options trading facility. BOX Market LLC Agreement, Article 3.2(a)(ii) (defining aforementioned categories as "***Non-Market Matters***" and noting that BOX Exchange is not entitled to notice of actions taken by BOX Market with regard to such matters);[3] *see also id.* at Article 1.1 ("Regulatory Deficiency" relates only to "operation of BOX Market … ***in connection with matters that are not Non-Market Matters***"); SEC Order at 35 n.138 (BOX Exchange must be "kept informed about BOX Market's commercial operations that might be of regulatory concern" and "sufficiently empowered, and have the ability, to assure that the trading platform and related services are operated in accordance with the [Exchange] Act," but citing Article 3.2(a)(ii) of BOX Market's LLC Agreement and noting that BOX Exchange is not entitled to notice of "***Non-Market Matters***"). And no BOX Exchange Rule, Bylaw, LLC Agreement, or provision of the Facility Agreement between BOX Exchange and BOX Market grants BOX Exchange disciplinary authority over BOX Market, BOX Holdings, or any of their Directors—including Mr. Bertrand.

II. BOX Exchange Purports To Assert Disciplinary Authority Over Applicants Through Disciplinary Sanctions

In late 2021, a compensation dispute arose between BOX Market and its then-President, Lisa Fall. *See* Attach. 5.[4] Ms. Fall concurrently served (and continues to serve) as President of BOX Exchange. *See id.* Although the compensation dispute between BOX Market and Ms. Fall was a personnel matter that squarely fell within the Non-Market Matters that are not subject to BOX Exchange's regulatory authority, BOX Exchange initiated a regulatory inquiry and sent a letter to Mr. Bertrand on December 7, 2021, requesting that he, on behalf of BOX Market, identify

[3] All emphasis is added unless otherwise noted.

[4] Citations to Attachments 1-11 refer to the attachments to Applicants' Application for Review. Attachments A-B are attachments to this Opposition.

persons who had allegedly obtained BOX Exchange's "confidential information." *Id.* at 2. After BOX Market terminated Ms. Fall on January 11, 2022, BOX Exchange sent another inquiry letter to BOX Market and Mr. Bertrand on February 4, reiterating its earlier demands and threatening to employ "***sanctions*** including ***fines, suspension of voting rights and other measures***" if it deemed the response dissatisfactory. *Id.*

After BOX Market responded to these initial inquiry letters, BOX Exchange sent a third inquiry letter to Mr. Bertrand and the BOX Market Board on March 1, declaring their initial response to be insufficient. *See* Attach. 1. The letter accused Mr. Bertrand, who was acting at all times for and at the direction of the BOX Market Board, of "fail[ing] to recognize" the "regulatory program applicable to [BOX Market] generally and to you as its Chairman," and ordered that: (1) Mr. Bertrand provide a complete response to BOX Exchange's inquiry; (2) Mr. Bertrand, BOX Market, and BOX Holdings cease and desist from sharing BOX Exchange's allegedly confidential information (which, according to BOX Exchange, includes "any confidential information of [BOX Market]," apparently irrespective of whether it pertains to Non-Market Matters) with any third party; and (3) Mr. Bertrand and BOX Market cease and desist from "circumventing the Exchange's surveillance and oversight protocols by engaging the services of third parties." *Id.* at 1-2. The letter also warned that "[f]ailure to comply with [its] instructions … will result in [BOX] Exchange taking action against [Mr. Bertrand]" and "[***d***]***isciplinary action*** may also be taken with respect to other directors, affiliates, attorneys, agents and employees of [BOX Market]." *Id.* at 1.

On March 3, BOX Exchange sent letters to Mr. Bertrand and BOX Market's Board purporting to impose disciplinary sanctions on them. These letters asserted that BOX Exchange had "f[ou]nd[]" that BOX Market's Directors had "***violat***[***ed***]" BOX Exchange's rules by "attempt[ing] to … prevent [BOX Exchange's Regulatory Director]" from "surveill[ing]"

OS Received 07/25/2022

"deliberations" of BOX Market's Executive Committee. Attachs. 2-3. Accordingly, and without providing an opportunity to be heard, BOX Exchange purported to impose three sanctions by:

1. ordering Mr. Bertrand to pay a "***fine***" of $25,000 to BOX Exchange, even though Mr. Bertrand never took any action individually or without the full knowledge and support of the BOX Market Board;

2. ordering Mr. Bertrand and each Director of BOX Market to provide BOX Exchange's Regulatory Director with "reasonably advance notice of, and … invite and allow the Regulatory Director to participate in, any oral communication, deliberation or vote related to [BOX] Exchange or [BOX Market] in which a Director participates" and that "[t]he Regulatory Director be simultaneously copied on any written communication or vote related to [BOX] Exchange or [BOX Market] in which a Director participates," even though doing so would contravene the BOX Market LLC Agreement; and

3. prohibiting BOX Market's Board, including any committee of the Board, from taking "any action by written consent outside of a duly called meeting," even though such action was expressly permitted by the BOX Market LLC Agreement.

Id. BOX Exchange warned that failure to comply "will result in [BOX] Exchange taking additional action against [Mr. Bertrand] and any other Directors, attorneys or other individuals involved," and that "[f]urther ***violations*** of [BOX] Exchange rules will carry additional ***penalties***, which may include without limitation ***fines***, ***suspensions*** and ***removal*** from office." *Id.*

On March 4, BOX Market sent a letter responding to BOX Exchange's March 1 letter, setting out that it "strongly disagree[d] with [BOX] Exchange's assertion that BOX Market ha[d] shared confidential information in contravention of [BOX] Exchange rules." Attach. 4 at 1. BOX Market explained that it had shared "commercial information … unrelated to the self-regulatory function of [BOX] Exchange with its upstream owners," which is permitted "without the consent of [BOX] Exchange" under "the rules of [BOX] Exchange and the pronouncements of the SEC, as well as basic principles of corporate governance." *Id.* at 2.

On March 10, BOX Market sent BOX Exchange another letter, responding to BOX Exchange's March 3 letters. *See* Attach. 5. In this letter, BOX Market stated that BOX Exchange's

March 3 letters "reflect[ed] a troubling escalation in [BOX] Exchange's ongoing abuse of its quasi-governmental authority to harass and attempt to intimidate BOX Market while it is engaged in an ongoing employment compensation dispute with Lisa Fall, the current President of [BOX] Exchange (who also formerly served as President of BOX Market)." *Id.* at 1. This letter also noted that BOX Exchange purported to impose disciplinary sanctions in its March 3 letters without having previously presented its allegations or "findings" to BOX Market and without affording BOX Market (or Mr. Bertrand) any opportunity to be heard. *Id.* at 4.

On April 15, BOX Exchange sent letters to Applicants, accusing them of having committed "***violations*** of the rules of the Exchange" by allegedly not cooperating "fully" with BOX Exchange's inquiries and not paying the $25,000 fine. Attachs. 6-7. On the basis of these purported violations, and consistent with its March 3 threat of imposing additional "***disciplinary sanctions***," BOX Exchange imposed several disciplinary sanctions on Applicants, including:

1. "***suspen***[***sion***]" of the power of BOX Holdings' and BOX Market's Boards to "act[] by written consent";

2. "***suspen***[***sion***]" of the power of BOX Holdings' and BOX Market's Boards to "delegate[e] … authority … to an executive committee";

3. requiring all actions requiring the deliberation or vote of the Boards of BOX Holdings or BOX Market to be taken only at a meeting of the full Board of each respective company;

4. finding that Mr. Bertrand "violat[ed] … the rules of [BOX] Exchange," "acted in and is continuing to act in a manner that is not in the best interests of [BOX] Exchange" and "in bad faith," and "deliberately breached and is continuing to breach his duty to [BOX] Exchange;" and

5. "***suspension***" of Mr. Bertrand from "involvement with BOX Exchange, any facility of [BOX] Exchange" and any [owner] of the foregoing entities," including involvement in any capacity with BOX Market and BOX Holdings.

Id.

On April 18, BOX Exchange sent a letter to Applicants, citing Section 5.05 of BOX Exchange's Bylaws as the basis for its purported authority to take the "***disciplinary actions***" and noting that Section 5.05 "empower[s]" BOX Exchange "to prescribe and impose ***penalties*** for failure to comply with its orders." Attach. 9 at 4.

On April 21, BOX Market and BOX Holdings sent BOX Exchange a letter, supplementing their earlier responses to BOX Exchange's inquiries with the understanding from discussions with BOX Exchange that had taken place over the preceding week that BOX Exchange would "dismiss without prejudice" ***all*** sanctions previously imposed. *See* Attach. A (April 21 Letter). In return, later that day, BOX Exchange sent a letter "lifting" some of the "sanctions" imposed against Mr. Bertrand, including his suspension and the $25,000 fine. Attach. 10. The letter did not, however, withdraw the unsupported findings that Mr. Bertrand (who at all times acted with the full knowledge and support of the BOX Market and BOX Holdings Boards) had violated the rules of BOX Exchange, and had acted in bad faith, in deliberate breach of his duties to BOX Exchange, and not in BOX Exchange's best interest. The letter also did not dismiss any of the sanctions imposed on the BOX Holdings and BOX Market Boards.

On May 16, Applicants filed the present Application with the Commission.

ARGUMENT

Despite BOX Exchange's efforts to evade Commission oversight of its improper assertion of delegated regulatory authority, the Commission has jurisdiction pursuant to Section 19(d)(2) to hear Applicants' appeal because BOX Exchange is purporting to invoke its regulatory authority delegated to it by the Commission to impose disciplinary sanctions on Applicants. BOX Exchange's own characterization of its conduct makes clear that it has purported to impose "disciplinary sanctions" on Applicants—not, as it now claims, simply "remedial" measures. None of these "disciplinary sanctions" are moot, as many have not been withdrawn and others are at risk

of being reinstated if BOX Exchange's approach to its regulatory authority goes unchecked. And because BOX Exchange has purported to impose these disciplinary sanctions on Applicants pursuant to regulatory authority delegated to it by the Commission, and as a result of purported violations of rules and governance documents approved by the Commission, the Commission has—indeed, must have—jurisdiction under Section 19(d)(2) to review them.

I. BOX Exchange Imposed Disciplinary Sanctions Against Applicants

There can be no dispute that BOX Exchange has purported to impose "disciplinary sanctions" on Applicants—not, as it now belatedly asserts, "remedial" measures—as a result of alleged violations of BOX Exchange's rules.

Disciplinary sanctions under Section 19(d) include SRO actions taken in response to purported violations of the Exchange Act, Commission rules, or the SRO's own rules. *See e.g.*, *Pac. Stock Exch.'s*, Release No. 31666, 1992 WL 400646, at *4 (Dec. 29, 1992) ("disciplinary action[s] … involve[] … violation[s] of specific provisions under the [Exchange] Act, the rules thereunder or the rules of the Exchange"). Disciplinary sanctions include actions in which "a punishment or sanction is sought or intended" for rule violations, including suspensions, fines, or censure. *Tague Sec. Corp.*, Release No. 18510, 1982 WL 32205, at *2 (Feb. 25, 1982). Although not necessarily dispositive, when evaluating whether SRO action is a "disciplinary sanction," the Commission considers how the SRO itself has characterized the action. *See id.* at *2 (concluding that SRO's action was not disciplinary where SRO characterized action as "not … disciplinary"). Here, there is no question that BOX Exchange's actions against Applicants were intended as punitive measures in response to alleged violations of BOX Exchange's rules.

Prior to this appeal, and plainly evidencing an intent to punish Applicants for alleged rule violations, BOX Exchange itself repeatedly characterized its actions as "sanctions," "disciplinary

action[s]," "suspensions," or "fines" imposed "as a result" of Applicants' alleged violations of BOX Exchange's rules:

- In its February 4 letter, BOX Exchange warned that, if it deemed BOX Market's response to its inquiry to be insufficient, it would employ "***sanctions*** including ***fines***, ***suspension*** of voting rights and other measures." Attach. 5 at 2.

- In its March 1 letter, BOX Exchange warned that "[f]ailure to comply with instructions contained in this letter will result in the Exchange taking action against [Mr. Bertrand]," and that "[***d***]***isciplinary action*** may also be taken with respect to other directors, affiliates, attorneys, agents and employees of [BOX Market]." Attach. 1 at 1.

- In its March 3 letters, BOX Exchange told BOX Market and Mr. Bertrand that it "f[ou]nd" them to have taken "***actions*** … ***in violation of [BOX] Exchange's rules***" and, "[a]ccordingly," took action against them, including: (1) a $25,000 ***fine*** assessed to Mr. Bertrand, (2) an order prohibiting BOX Market from taking any action by written consent, and (3) an order requiring each Director of BOX Market to provide notice and allow the Regulatory Director of BOX Exchange to participate in any oral communication (and provide notice of any written communication involving any BOX Market Director) related to BOX Exchange or BOX Market. Attach. 2-3.

- In its March 3 letters, BOX Exchange warned BOX Market and Mr. Bertrand that failure to comply with the letters' orders "will result in the Exchange taking additional action against you and any other Directors, attorneys or other individuals involved" and that "[***f***]***urther violations of the Exchange rules will carry additional penalties***, which may include without limitation ***fines***, ***suspensions*** and removal from office." *Id.* at 2.

- In its April 15 letters, BOX Exchange accused Applicants of having committed "***violations of the rules of the Exchange***" by allegedly not cooperating "fully" with BOX Exchange's inquiries, and by failing to pay the $25,000 fine. Attachs. 6-7. "As a result," BOX Exchange took action against Applicants, including by: (1) "***suspend***[***ing***]" the power of BOX Holdings' and BOX Market's Boards from acting via written consent, (2) "***suspend***[***ing***] the power of BOX Holdings' and BOX Market's Boards to delegate authority to an executive committee of the respective Boards, (3) requiring that any action requiring the deliberation and/or vote of either Board be taken at a meeting of the full Board, (4) finding that Mr. Bertrand violated the rules of BOX Exchange, and acted and is continuing to act in a manner that is not in the best interest of BOX Exchange, in bad faith, and in deliberate breach of his duties to BOX Exchange, and (5) "***suspen***[***ding***]" Mr. Bertrand from involvement with BOX Exchange, BOX Market, and BOX Holdings. *Id.*

- In its April 18 letter, BOX Exchange cited Section 5.05 of BOX Exchange's Bylaws as the purported authority for the actions taken, explaining that "[t]he Board of Directors of [BOX] Exchange is empowered to prescribe and ***impose penalties for failure to comply with its orders***." Attach. 9 at 4. The letter excerpted Section 5.05, which provides that "[t]he Board may prescribe and ***impose penalties for violations of these Bylaws or the Rules***, for neglect or refusal to comply with orders, directions or decisions of the Board or any other offenses against the Exchange." *Id.*

BOX Exchange's own words, laid out expressly in letters spanning three months, confirm that its actions were disciplinary sanctions intended to punish Applicants for alleged violations of BOX Exchange's rules.[5]

BOX Exchange's belated attempt to recast its actions as "remedial," Br. 16, has no merit. As an initial matter, BOX Exchange does not contest that its actions taken against Mr. Bertrand were disciplinary sanctions. But even the authority cited by BOX Exchange does not support its argument that its actions taken against BOX Market and BOX Holdings—including various "suspensions"—were remedial rather than disciplinary. For instance, in *Tower Trading, L.P.*, Release No. 47537, 2003 WL 1339179 (Mar. 19, 2003), the Commission denied review of an SRO's decision to terminate a member for consistently receiving poor performance evaluations from other members because the SRO's action was "based upon [the applicant's] poor performance, [and] ***not violations of …*** [***the SRO***] ***rules***." *Id.* at *4. The Commission explained that it had no jurisdiction under Section 19(d) because the SRO's action was "remedial"—not "disciplinary." *Id.* Here, by contrast, BOX Exchange has repeatedly and expressly asserted that its actions were based on Applicant's alleged violations of BOX Exchange's rules. BOX Exchange's reliance on *Tague* is equally misplaced. Like *Tower Trading*, *Tague* did not involve any alleged violation of any rules. Rather, in *Tague*, the Commission found that it lacked

[5] Contrary to BOX Exchange's assertion, *see* BOX Exchange's Brief ("Br.") at 17 n.5, it cannot evade Commission review by failing to identify the specific BOX Exchange rule violations underlying the disciplinary sanctions it imposed.

jurisdiction where "the action taken with respect to [the applicant] … was not an attempt to penalize or discipline," because the SRO "simply applied its expertise to a trade dispute that had arisen with respect to the guidelines [the SRO] had promulgated and the [SRO] sought to resolve that dispute." 1982 WL 32205, at *2.

BOX Exchange's contention that its actions were remedial rather than disciplinary is a bald attempt to evade Commission review and is entirely inconsistent with how BOX Exchange had previously sought to justify its actions. Accordingly, however convenient its contention may be for purposes of this Motion, it has no merit.

II. BOX Exchange's Sanctions Are Not Moot

BOX Exchange's assertion that the disciplinary sanctions are "moot" also has no merit. The Commission has "considerable discretion in determining whether an appeal is moot," *Interactive Brokers LLC*, Release No. 39765, 1998 WL 117627, at *3 n.14 (Mar. 17, 1998), and is "not bound by the 'case or controversy' limitation imposed on federal courts pursuant to Article III," *Blinder, Robinson & Co.*, Release No. 29496, 1991 WL 285002, at *2 (July 29, 1991). The Commission will also exercise jurisdiction over disputes where the controversy is "capable of repetition and [where] important policy questions are implicated." *Interactive Brokers*, 1998 WL 117627, at *3 n.14. Here, none of the sanctions are moot: they either remain live or are capable of repetition and implicate important policy questions.

First, there is no dispute that BOX Exchange continues to impose suspensions against BOX Market and BOX Holdings. Any dispute regarding mootness is, therefore, limited to the sanctions imposed against Mr. Bertrand.

Second, the sanctions against Mr. Bertrand all remain ripe for review. The findings as to Mr. Bertrand—*i.e.*, that his actions "constitute violations of the rules of [BOX] Exchange," that he "acted and is continuing to act in a manner that is not in the best interest of [BOX] Exchange" and

"in bad faith," and that he "deliberately breached and is continuing to breach his duty to [BOX] Exchange," Attach. 6 at 1—have never been withdrawn. These findings are akin to a censure or letter of caution, both of which are consistently reviewed by the Commission under Section 19(d). *See e.g.*, *Martin Lee Eng*, Release No. 42962, 2000 WL 781329 (June 20, 2000) (accepting jurisdiction based on "letter of caution" issued after SRO found violation of rule); *Philip L. Spartis*, Release No. 64489, 2011 WL 1825026 (May 13, 2011) (reviewing censure despite lifting of corresponding suspension).

BOX Exchange's $25,000 fine and suspension of Mr. Bertrand, while currently "lifted," are equally reviewable because they are sanctions that are capable of repetition and implicate important policy questions. *See Interactive Brokers*, 1998 WL 117627, at *3 n.14; *Beatrice J. Feins & Jonathan E. Feins*, Release No. 33374, 1993 WL 538913, at *2 n.8 (Dec. 23, 1993). There is no question that these sanctions are capable of repetition. Indeed, given that BOX Exchange's underlying findings remain intact, BOX Exchange could purport to reimpose its fine and suspension at any time—all while continuing to deny Mr. Bertrand the right to any process. And BOX Exchange may be particularly emboldened to continue its misuse of its regulatory and disciplinary authority if it can defeat the Commission's oversight of BOX Exchange's regulatory authority simply by "lifting" a sanction when challenged. *See Fields v. Speaker of Pennsylvania House of Representatives*, 936 F.3d 142, 161 (3d Cir. 2019) ("Voluntary cessation of challenged

activity will moot a case only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'").[6]

There is similarly no question as to the significance of the policy questions raised by Mr. Bertrand's application. The application to review Mr. Bertrand's sanctions, and this appeal more generally, raise critical questions regarding SROs' ability to discipline non-members and the extent to which they can effectively circumvent Section 19(b)'s requirement that relevant organization agreements be modified only pursuant to notice, comment, and Commission approval. As other SROs have used facility ownership structures similar to BOX Exchange, *see, e.g.*, *Pac. Exch., Inc*., Release No. 44983, 2001 WL 1327090 (Oct. 25, 2001) (concerning establishment of Archipelago Exchange as equities trading facility of PCX), this question is likely to recur in contexts other than this dispute. The Commission therefore has "an interest in clarifying the issues presented in this appeal." *Interactive Brokers*, 1998 WL 117627, at *3 n.14.

Finally, there is no merit to BOX Exchange's arguments that the Application for Review was untimely with respect to two sanctions—the suspension of BOX Market and BOX Holdings' power to act by written consent and the requirement to provide certain notices to BOX Exchange's Regulatory Director—because it was filed more than 30 days after the sanctions were imposed. Br. 15 n.4. The 30-day window for review begins "after the notice of the determination is filed with the Commission" pursuant to Section 19(d)(1). 17 C.F.R. 201.420(b); *see also* 15 U.S.C. § 78s(d)(2) ("[T]hirty days after the date such notice was filed with such appropriate regulatory

[6] The Commission decisions cited by BOX Exchange are not to the contrary. For example, in *Alpine Sec. Corp.*, Release No. 89685, 2020 WL 5076741 (Aug. 26, 2020), the Commission dismissed an action for lack of a live sanction because the disciplined member had altered its conduct such that there was no longer a factual predicate for any sanction. By contrast, the findings against Mr. Bertrand—*i.e.*, the predicate for any fine or further disciplinary action—remain in place, permitting BOX Exchange to reimpose sanctions upon dismissal of this Appeal.

agency"). Because no notice of determination was ever filed with the Commission by BOX Exchange, the 30-day window has not been triggered.[7]

III. The Commission Has Jurisdiction Pursuant To Section 19(d) Because BOX Exchange Purports To Have Acted Pursuant To Its Regulatory Authority

Finally, because BOX Exchange has purported to discipline Applicants pursuant to its regulatory authority delegated to it by the Commission, and for alleged violations of BOX Exchange rules approved by the Commission, there can be no doubt that BOX Exchange was required to file a notice with the Commission under Section 19(d)(1) and that the Commission has jurisdiction under Section 19(d)(2) and SEC Rule of Practice 19d-3 to review BOX Exchange's purported exercise of that authority.[8]

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[7] Indeed, BOX Exchange's effort to rely on aspects of Section 19(d) where it suits its purpose, while ignoring others, highlights the problematic nature of its arguments.

[8] Applicants have repeatedly asked BOX Exchange to clarify whether BOX Exchange purports to impose the challenged sanctions pursuant to delegated regulatory authority or pursuant to contractual authority. *See* Attach. 4 at 4; Attach. 5 at 4; June 8, 2022 Letter from Applicants to SEC at 3. Notwithstanding these requests, BOX Exchange has refused to clearly state whether it is purporting to act pursuant to regulatory or private contractual authority—including in the present Motion. *See* Br. 14 (contending that "BOX Exchange took the actions complained of under the authority granted by the Exchange's Bylaws and the relevant LLC agreements" but that it does not matter whether this is characterized as regulatory or contractual authority).

Such refusal to explain the purported legal basis for its actions cannot justify evading Commission review. Either BOX Exchange acted pursuant to purported regulatory authority delegated to it by the Commission, in which case the Commission must have authority to review this action pursuant to Section 19(d); or BOX Exchange acted pursuant to purported private contractual authority, in which case the Commission would not have authority to reverse the sanctions. *See City of Providence, Rhode Island v. Bats Glob. Markets, Inc.*, 878 F.3d 36, 40, 48 (noting that SROs are "non-governmental entities that function both as regulators and regulated entities" and that "[w]hen an exchange engages in conduct to operate its own market that is distinct from its oversight role, it is acting as a *regulated* entity—not a *regulator*"). As the record set forth above makes clear, BOX Exchange has repeatedly invoked (and misused) its regulatory authority. Nevertheless, should the Commission determine that it does not have jurisdiction, Applicants respectfully request that the Commission expressly find that BOX Exchange's conduct was not undertaken pursuant to any regulatory authority delegated by the Commission.

As an SRO, BOX Exchange's exercise of regulatory authority, including any disciplinary powers, is "subject to SEC oversight" and it has "no authority to regulate independently of the SEC's control." Senate Report at 201; *see also Automated Matching Sys. Exch., LLC v. United States Sec. & Exch. Comm'n*, 826 F.3d 1017, 1022 (8th Cir. 2016) ("In 1975, Congress amended the Act to ensure that registered national securities exchanges 'follow effective and fair procedures ... and that the Commission's oversight powers are ample and its responsibility to correct self-regulatory lapses is unmistakable.'" (citing Senate Report at 201)); *Automated Matching Systems Exchange, LLC*, Release No. 75157, 2015 WL 3747375, at *34769 (June 11, 2015) (noting that "Congress intentionally created a highly regulated environment in which SROs must be subject to close oversight by the Commission" and that "any such [SRO] should be subject to full Commission oversight to assure its performance of such functions is consistent with the protection of investors and the public interest"); *Nat'l Ass'n of Sec. Dealers*, Release No. 32019, 1993 WL 88943, at *6 (Mar. 19, 1993) ("SRO's, however, exercise authority subject to Commission oversight and have no authority to regulate independently of the Commission's oversight"). Indeed, federal courts have repeatedly explained that an SRO exercises authority delegated from the Commission when it engages in its quasi-governmental regulatory functions. *See, e.g.*, *D'Alessio v. New York Stock Exchange, Inc.*, 258 F.3d 93, 105 (2d. Cir. 2001) (recognizing that an SRO "stands in the shoes of the SEC" when it "performs quasi-governmental functions pursuant to the broad authority delegated to it by the Exchange Act"); *City of Providence,* , 878 F.3d at 40 (explaining that SROs are "non-governmental entities that function both as regulators and regulated entities" and that "[a]s regulated entities, they are subject to SEC oversight and must comply with the securities laws as well as the exchanges' own rules" and, "as regulators, they are delegated the authority by the SEC to oversee and discipline their member broker-dealers").

Thus, because BOX Exchange purported to impose the challenged sanctions pursuant to its delegated regulatory authority, these actions necessarily fall within the purview of Commission review. Indeed, the regulatory framework created by Congress codifies the need for Commission oversight, including review of any disciplinary action taken by an SRO pursuant to its regulatory authority—whether imposed on an SRO member or on a non-member subject to the SRO's regulatory authority. *See Tower Trading*, 2003 WL 1339179, at *3 ("Congress intended the resulting Commission review provision, Section 19(d), to encompass all final quasi-adjudicatory actions [by SROs] affecting members and non-members." (internal citations omitted)). Specifically, the Exchange Act defines "member," for purposes of the notice an SRO must file with the Commission when imposing a final disciplinary sanction on a "member" or "person associated with a member" under Section 19(d)(1) and the SEC's authority to review the imposition of such sanctions under Section 19(d)(2), as extending to "any person required by the Commission to comply with [exchange] rules pursuant to section 6(f) of this title." 15 U.S.C. § 78c(a)(3)(A).[9] This expansive statutory definition of "member" is a clear acknowledgement by Congress that the Commission must have authority to review any disciplinary action taken by an SRO pursuant to its delegated regulatory authority. In other words, a person can only be subject to a SRO's quasi-governmental disciplinary authority if that person can properly seek Commission

[9] Section 6(f), in turn, provides that the Commission may require "***any person not a member*** . . . of a national securities exchange ***effecting transactions*** on such exchange . . . to comply with such rules of such exchange as the Commission may specify." 15 U.S.C. § 78f(f). Accordingly, notwithstanding that BOX Market is not a member of BOX Exchange, it nevertheless falls within the statutory definition of "member" for purposes of Section 19(d) because it provides the means for effecting transactions on BOX Exchange via its operation of the electronic trading system, and the Commission has specified that BOX Market "must cooperate with . . . BOX Exchange pursuant to and to the extent of [its] regulatory authority." SEC Order at 23. Moreover, because BOX Exchange purported to use its regulatory disciplinary authority against Applicants, it effectively treated them as members (although without the notice and procedural protections required when SROs exercise their delegated disciplinary authority).

review of the exercise of that very delegated authority pursuant to Section 19(d). To find otherwise would permit an SRO to abuse its delegated authority to impose whatever sanction it saw fit without process to or recourse by the party subject to the sanction. Because BOX Exchange purported to exercise its delegated regulatory authority to impose sanctions on Applicants, it cannot now rely on an improper reading of the relevant statutory definition of "member" to argue that the Commission has no jurisdiction over its exercise of that regulatory authority.[10]

BOX Exchange's arguments against jurisdiction ignore Congress' intent and raise significant questions regarding the proper delegation of authority from the Commission to SROs.

First, BOX Exchange's narrow construction of Section 19(d), which does not allow for Commission review of SRO disciplinary actions taken against non-members who are purportedly subject to the SRO's regulatory disciplinary authority, would subvert the regulatory framework of the Exchange Act and Congress' intent. Such a gap in the SEC's regulatory oversight is inconsistent with Congress' decision to define the term "member" expansively for purposes of Section 19(d). Moreover, such a gap would raise questions about whether the Commission exceeded its authority by delegating regulatory authority to an SRO that the Commission does not have or by delegating authority to an SRO without retaining the oversight required by Congress.

Second, BOX Exchange's position suggests that an SRO can take disciplinary action pursuant to its delegated regulatory authority without affording any of the due process protections designed to reasonably constrain government (and quasi-governmental) action. The notion that

[10] For the avoidance of doubt, Applicants' position on the merits is that BOX Exchange exceeded the scope of the regulatory authority delegated to it by the Commission when it imposed the sanctions in question. However, *ultra vires* regulatory action undertaken by an SRO should not escape Commission review because it falls outside the proper scope of the SRO's regulatory authority. This perverse outcome would be contrary to Congress' intent and allow SROs to run roughshod over aggrieved parties' rights without fear of admonishment.

BOX Exchange can exercise delegated regulatory authority without providing Applicants the due process of a hearing and opportunity to be heard, without adhering to the requirements of Sections 6(d) and 19(d)(1), and without any avenue for Applicants to seek redress flies in the face of Congress' intent and implicates Applicants' rights to due process and fundamental fairness. *See* Senate Report at 201 ("Recognizing that the self-regulatory organizations utilize governmental-type powers in carrying out their responsibilities under the Exchange Act highlights the fact that these organizations must be required to conform their activities to fundamental standards of due process."); *cf. Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) ("Due process requires that an [SRO] rule give fair warning of prohibited conduct before a person may be disciplined for that conduct.").

Finally, BOX Exchange's suggestion that the Facility Agreement between BOX Exchange and BOX Market provides an avenue for redress, including dispute resolution procedures culminating in binding arbitration administered by the American Arbitration Association ("AAA"), Br. 14, is absurd. As an initial matter, neither BOX Holdings nor Mr. Bertrand is a party to the Facility Agreement and, thus, that agreement's dispute resolution procedures cannot afford them redress. *See* Attach. B (Facility Agreement). Moreover, as BOX Exchange concedes, the Facility Agreement's dispute resolution provision only relates to disputes "among the Parties arising out of or relating to this Agreement, or breach thereof." Br. 14. But the Facility Agreement does not contemplate disciplinary sanctions imposed by BOX Exchange pursuant to regulatory authority delegated by the Commission, nor has BOX Exchange claimed that the Facility Agreement provides such authority. *Cf. id.* And, even if the Facility Agreement did provide for review of BOX Exchange's purported exercise of regulatory authority, the Commission cannot cede its Congressionally-mandated oversight responsibility to a panel of AAA arbitrators,

especially where resolution of this dispute by arbitrators in favor of BOX Exchange would result in changes to BOX Holdings' and BOX Market's LLC Agreements in circumvention of the Commission approval required under Section 19(b). *Cf. Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 61-62 (2015) (Alito, J., concurring) (noting that "it is hard to imagine how delegating 'binding' tie-breaking authority to resolve a dispute between Amtrak and the FRA could be constitutional" and that "[n]o private arbitrator can promulgate binding metrics and standards for the railroad industry"); *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1136 (9th Cir. 2005) ("allow[ing] states to define by common law the regulatory duties of [a SRO is] a result which cannot co-exist with the Congressional scheme of delegated regulatory authority under the Exchange Act" (internal citations and quotation marks omitted)).

Equally absurd is BOX Exchange's argument that there is no harm in denying jurisdiction here because "the appeals process outlined in Section 19(d) is just one—not the only or even the primary—tool the Commission possesses to ensure that SROs fulfill their regulatory responsibilities." Br. 13. The ability to petition for review of an SRO's disciplinary action is the only avenue that aggrieved parties—like Applicants here—have to seek redress of an SRO's misuse of regulatory authority. BOX Exchange's blithe attitude toward Applicants' rights to be heard speaks volumes about how it may continue to misuse its regulatory authority if jurisdiction is denied.

CONCLUSION

For the foregoing reasons, BOX Exchange's Motion must be denied.

Date: July 25, 2022

Respectfully Submitted,

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OS Received 07/25/2022

CERTIFICATE OF COMPLIANCE

Pursuant to the Commission's Rule of Practice 151(e)(3), I hereby certify that I have omitted or redacted any sensitive personal information, as defined by Rule of Practice 151(e), from this filing. I further certify that this brief contains 6,997 words, excluding the parts exempted by Rule of Practice 154(c), and thus that this filing complies with the length limitation set forth in that Rule.

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2022, I caused a true and correct copy of the foregoing to be electronically filed using the Commission's Electronic Filings in Administrative Proceedings (eFAP) system. I further certify that I caused a true and correct copy of the foregoing to be served by electronic mail on the following:

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

BOX Holdings Group LLC, BOX Options Market LLC, and Luc Bertrand

For Review of Action Taken by

BOX Exchange LLC

File No. 3-20860

APPLICANTS' INDEX OF ATTACHMENTS TO OPPOSITION TO BOX EXCHANGE LLC'S MOTION TO DISMISS

Attachment	Description
A	April 21, 2022 Letter from BOX Market LLC and BOX Holdings Group LLC to BOX Exchange LLC
B	May 10, 2012 Facility Agreement by and between BOX Options Exchange LLC and BOX Market LLC

Attachment A

WILMERHALE

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April 21, 2022

VIA EMAIL

Anthony McCormick
Chief Executive Officer
BOX Exchange LLC

RE: Supplemental Responses to Exchange Inquiry Letters

Dear Mr. McCormick,

On behalf of BOX Options Market LLC ("BOX Market") and BOX Holdings Group LLC ("BOX Holdings"), this letter is further to our prior correspondence and our discussions with outside counsel to BOX Exchange LLC (the "Exchange").

You have requested that we further supplement our March 4, 2022 response (the "March 4 Response") to the Exchange's prior information requests. For ease of reference, we have reproduced the Exchange's request, followed by our further supplemental response. In keeping with our prior correspondence, we understand that the Exchange's inquiry addresses information disclosed relating to the executive employment and compensation arrangements of certain BOX Market executives.

1. *Please identify each person who is not a direct employee, officer or director of the Facility to whom you have disclosed, or who has otherwise received, confidential information of the SRO ("SRO Confidential Information"). Please describe the SRO Confidential Information disclosed to such person*.

We provided in our March 4 Response to Item 2 a list of persons who provided services to the direct and indirect owners of BOX Market in connection with reviewing the executive employment and compensation arrangements for certain BOX Market executives.

Specifically, those persons received certain documents relating to the executive employment and compensation arrangements for Lisa Fall, Ed Boyle, and other BOX Market executives. The documents provided include employment agreements, the text of an executive rights plan, and similar materials. Those persons also may have participated in oral discussions regarding the same subject matter. In addition, Scalar, LLC, Stout Risius Ross, LLC, and Duff & Phelps d/b/a

Kroll, LLC were engaged to provide valuation services relating to BOX Market and were provided with financial information and related information necessary to performing such valuation services.

Certain documents and information described in this response were shared in connection with seeking legal advice and thus we believe are privileged and subject to work-product protection. WilmerHale retained Deloitte to conduct a privileged analysis related to its representation of BOX Market, and disclosed certain documents and information to Deloitte in connection with that engagement. In addition, BOX Holdings informed certain of its owners of the existence and status of the Exchange's inquiry into BOX Market.

As previously described, BOX Market has not disclosed any information related to the self-regulatory function of the Exchange or BOX Market to any person who is not a direct employee, officer or director of BOX Market.

2. *If any of the persons named in your responses is involved in the affairs of the Facility pursuant to a written agreement, please provide a copy of the agreement.*

We are providing engagement letters for the following persons who have provided services relating to the matters described above:

- Hugessen Consulting Inc.
- Heidrick & Struggles
- Wilmer Cutler Pickering Hale and Dorr LLP
- Scalar, LLC
- Stout Risius Ross, LLC
- Duff & Phelps d/b/a Kroll, LLC

****

We will continue to evaluate whether there are other materials outstanding that are responsive to the Exchange's requests. We understand the Exchange will be providing us with its evaluation of any other materials it believes are outstanding.

BOX Holdings, BOX Market and their Board members recognize the important role that the Exchange plays as a self-regulatory organization. BOX Holdings, BOX Market and their Board members are committed to cooperating with all lawful requests for documents and information as authorized by the relevant BOX governance agreements in the performance of the Exchange's lawful functions.

We also understand that, upon receipt of this letter, the Exchange Board will dismiss with prejudice all purported sanctions against BOX Market, BOX Holdings, the Members of such

entities, and any and all of their directors, officers, and affiliates, including, without limitation, the sanctions set forth in your various letters of March 3, 2022 and April 15, 2022.

Very truly yours,

William R. McLucas
WilmerHale

cc: Andrew P. Blake, Esq.
Glen Openshaw, Esq.

Enclosures

Attachment B

FACILITY AGREEMENT

This Facility Agreement (this "Agreement"), dated as of May 10, 2012 (the "Effective Date"), is by and between BOX Options Exchange LLC, a Delaware limited liability company (the "Exchange"), and BOX Market LLC, a Delaware limited liability company ("BOX").

WHEREAS, the Exchange is a registered national securities exchange, as defined in Section 6 of the Securities Exchange Act of 1934 (the "Act"), and a self-regulatory organization, as defined in Section 3(a)(26) of the Act (an "SRO"), subject to regulation by the Securities and Exchange Commission (the "SEC") under the Act; and

WHEREAS, the Exchange is responsible for fulfilling certain regulatory obligations and performing certain regulatory functions with respect to BOX and the electronic trading system it operates (the "Trading System") under the Act;

WHEREAS, pursuant to the Limited Liability Company Operating Agreement of BOX dated as of May 10, 2012, as amended from time to time (the "BOX LLC Agreement"), and pursuant to Section 3(a)(2) of the Act, BOX operates the Trading System for trading options on Individual U.S. Equities, U.S. equity indices and U.S. Exchange Traded Funds;

WHEREAS, this Agreement is supplemental to and shall be read in conjunction with: (i) the Technical and Operational Services Agreement (the "Market TOSA") between Bourse de Montréal Inc., a company incorporated in Quebec, Canada ("MX") and BOX; and (ii) the User Agreements (together with the Market TOSA, the "Related Agreements") between BOX and BOX approved participants ("BOX Options Participants"); and (iii) the BOX LLC Agreement;

NOW, THEREFORE, in consideration of the recitals and the mutual covenants and agreements hereinafter set forth, the parties hereto (each a "Party" and collectively the "Parties") hereby agree as follows:

1. Services.

A. Exchange Has All Power to Regulate BOX. The Exchange shall act as the SEC-approved SRO by providing the regulatory structure for the Trading System and ongoing oversight of the market operations and regulatory functions of BOX and its BOX Options Participants. The Exchange will exercise regulatory control and monitor the trading of the Trading System. Subject to the oversight of the SEC, the Exchange shall have sole power to

determine Regulatory Purpose. Subject to the oversight of the SEC, the Board of Directors of the Exchange shall have the final decision-making authority on all matters that are subject to the discretion of the Exchange. All actions of the Exchange shall serve the Regulatory Purpose relating to BOX and the Exchange shall not undertake activities that are not in furtherance of the Regulatory Purpose, as determined by the board of directors of the Exchange (the "Exchange Board"). The Exchange shall not regulate another market or exchange without the prior written consent of BOX. BOX acknowledges and agrees that it is permitted to operate the Trading System only as a facility of the Exchange and that BOX is not an SRO. The Exchange shall have all power and authority of an SRO existing under the Act and the rules promulgated thereunder to regulate BOX. BOX shall comply with all demands of the Exchange made pursuant to such authority. For the avoidance of doubt, such demands may include halting trading on the Trading System. The Parties hereby agree that nothing contained in this Agreement will impede the ability of the Exchange to regulate BOX or the Trading System.

B. Approvals. The Exchange will determine all necessary approvals from the SEC or any other Governmental Authority (the "Approvals") that are required in order for the Exchange to exercise its authority as the SRO for BOX (including the Trading System), which operates as a facility of the Exchange, and to provide the Services. The Exchange will obtain, maintain and comply with all Approvals.

C. Rules. The Exchange will seek SEC approval for such changes to the Rules, as are:

1. Drafted and requested by BOX, and that the Exchange determines to be consistent with the Act; and

2. Drafted and requested by the Exchange as it determines to be consistent with the Act and necessary or advisable for regulatory purposes.

D. SRO Jurisdiction. Pursuant to the Rules, the books, records, premises, officers, directors, agents, and employees of BOX shall be deemed to be the books, records, premises, officers, directors, agents, and employees of the Exchange for purposes of, and subject to oversight pursuant to, the Act and this Agreement. The books and records of BOX shall be subject at all times to inspection and copying by the Exchange and the SEC at no additional cost to the Exchange or the SEC. The Exchange hereby

agrees to inspect, copy and/or review the books and records of BOX, and to use any information obtained thereby, only for purposes of fulfilling its regulatory obligations and for no other purpose. For the avoidance of doubt, BOX shall not be entitled to refuse the inspection, review and/or copying of its books and records by the Exchange as provided in this Section but shall be entitled to damages in the event any inspection, copying or review of BOX books and records by the Exchange is, in whole or in part, used by the Exchange or any of its Affiliates for any purpose other than to fulfill the Exchange's regulatory obligations. BOX must maintain and make reasonably available all books and records related to the regulation of BOX within the United States, and the Exchange shall ensure that is has real time on-line access to BOX trading activities at all times.

E. Dual Employment. BOX acknowledges that directors, officers and employees of the Exchange may engage in outside activities, including employment with third parties; provided, however, that such individuals may not engage in any employment with, or on behalf of, any Person or enterprise that is a competitor of BOX. The Exchange shall ensure that all directors, officers and employees of the Exchange shall sign (i) an agreement to abide by the applicable restrictions contained in this Section 1.E and (ii) an annual attestation of compliance with such restrictions. The Exchange shall (x) audit (not less than annually) compliance with the restrictions contained in this Section 1.E, (y) promptly investigate any reports it receives concerning violations of the restrictions contained in this Section 1.E and (z) promptly provide, to BOX, reports detailing such audits, investigations and violations.

F. The Services. Except for those services provided by MX pursuant to the Market TOSA, the Exchange shall provide to BOX all of those services and responsibilities necessary pursuant to Section 19(g)(1) of the Act, and the rules and regulations thereunder, to examine for and enforce compliance by BOX Options Participants and persons associated with its BOX Options Participants with the Act, the rules and regulations thereunder, and the Rules. In addition, the Exchange shall use commercially reasonable efforts to provide the services consistent with this Agreement and regulatorily required efforts to fulfill the its obligations under the Act. The Exchange shall exercise regulatory authority over BOX (including the Trading System) and BOX Options Participants in order to provide the regulatory oversight of BOX as it deems necessary to fulfill its SRO obligations under the Act, including but not limited to, obtaining and complying with the

Approvals and those services set forth in Sections 1 and 2 and in Schedule A (collectively, the "Services"). All Services shall serve the Regulatory Purpose. The Services will be performed at the premises of BOX or at such other site(s) as mutually agreed upon by the Parties. Any deliverables resulting from such Services, including any documentation related thereto, will hereafter be referred to collectively as the "Deliverables."

2. Additional Services

A. Required Changes. The Exchange may make such changes to the Services, allocate such resources, and provide such additional Services as it, in its reasonable judgment, determines must be made to ensure that: (i) the Exchange's ability to exercise its authority and obligation as an SRO pursuant to the Act is maintained or (ii) the provision of the Services continues in accordance with this Agreement (each such change, a "Required Change"). The Exchange may make such Required Changes as it deems, in its reasonable discretion, are necessary, provided that it notifies BOX that it has made such Required Changes, as soon as it is reasonably able to do so, but in no case later than immediately prior to the Exchange making such Required Changes, except when conditions exist that would allow the Exchange to halt trading pursuant to Rule 7080(a)(iii) and (iv) of the BOX Rules, in which case the Exchange must notify BOX that it has made Required Changes as soon as it is reasonably able to do so. The Parties will consult as to the best means to implement such Required Changes if it is feasible for them to do so. The Exchange agrees to provide reasonable documentation to BOX of any such Required Change. As used in this Section 2.A, notification may include a telephone call or e-mail to either of the Chief Executive Officer ("CEO"), Chief Information Officer ("CIO") or General Counsel of BOX, or other reasonable means available to the Exchange at the time intended to inform senior BOX management.

B. Other Changes. The Exchange will promptly notify BOX of any material change, including, but not limited to, any change that would increase costs by ten percent (10%) or more, in the provision of the Services, except as provided under Section 2.A. The Exchange will submit any material change that is not a Required Change and that could reasonably be expected to result in an increase in the Exchange's cost of providing the Services to BOX for BOX's review and approval prior to implementing such change. The Exchange agrees to provide reasonable documentation to BOX of any such change.

C. Professional Services. BOX acknowledges that the Exchange may be required to obtain Professional Services to effectively perform the Services contemplated herein. Unless the Exchange determines that obtaining Professional Services is necessary to effect a Required Change in the Services pursuant to Section 2.A., the Exchange agrees to obtain prior approval from BOX before obtaining Professional Services that would result in a material increase in any cost of providing the Services. If the Exchange determines that obtaining Professional Services is necessary to effect a Required Change in the Services pursuant to Section 2.A, the Exchange agrees to notify BOX as soon as it is reasonably able to do so, but in no case later than immediately prior to obtaining Professional Services that would result in a substantial material increase in BOX's expenses hereunder. The Exchange agrees to provide reasonable documentation to BOX of any Professional Services provided pursuant to this Section 2.C.

3. BOX's Obligations

In addition to the obligations of BOX otherwise set forth in this Agreement, including but not limited to the reimbursement responsibilities set forth in Section 9 herein, BOX shall comply at all times with Section 3.2(a)(ii) of the BOX LLC Agreement and shall use regulatorily required and commercially reasonable efforts to: (a) provide to the Exchange all reasonable assistance requested by the Exchange in connection with the provision of the Services for BOX consistent with the authority and obligation of an SRO; and (b) to the fullest extent permissible under the Market TOSA and/or the User Agreements, as applicable, provide to the Exchange access to and use of the software included within the Market TOSA and any and all other components of the services provided under the Market TOSA to which BOX may have a right or license to access and or use.

A. Reports. Without limiting the generality of Section 1.D, upon request for Regulatory Purposes, BOX will make available promptly to the Exchange any files, surveillance reports, market data, order and trade audit trail information, termination notices, investigative material, financial, operational, or related report filed with BOX by a BOX Options Participant, or other documents involving compliance with the federal securities laws and regulations and the Rules by a BOX Options Participant, or other documents in the possession of BOX relating to any BOX Options Participant to assist the Exchange in fulfilling its self-regulatory responsibilities, obligations, and functions allocated under this Agreement. The Parties agree that BOX will, upon request, make available its employees to the Exchange as necessary to assist the

Exchange in fulfilling the self-regulatory responsibilities required under this Agreement.

B. Regulatory Referrals. If BOX receives any information that may be indicative of a violation of the Act or an Exchange or BOX rule by BOX or a BOX Options Participant, including, without limitation, a customer complaint relating to a BOX Options Participant's activity or conduct, BOX will promptly provide such information to the Exchange.

4. Ownership and Use of Data

A. Ownership of BOX Market Data. Subject to any regulatory requirements imposed on the Exchange under Section 17 of the Act and SEC Rule 17a-1 thereunder, all BOX Market Data is, and will be and will remain, the property of BOX and will be deemed Confidential Information of BOX. Without BOX's approval (in its sole discretion), BOX Market Data may not be: (a) used by the Exchange other than: (i) in connection with providing Services; or (ii) pursuant to the Exchange's regulatory activities and responsibilities related to BOX; (b) disclosed, sold, assigned, leased or otherwise provided to third parties by the Exchange; or (c) otherwise commercially exploited by or on behalf of the Exchange.

B. Use of BOX Market Data. The Exchange may use BOX Market Data solely for Regulatory Purposes relating to BOX and to comply with any requests for information from governmental agencies that oversee the Trading System. BOX Market Data shall not be used by the Exchange in the regulation or oversight of any other market or securities exchange. The Exchange may also manipulate or process BOX Market Data to produce derivative information solely as may be necessary for Regulatory Purposes and BOX shall be the sole owner of such derivative information. BOX shall also be able to create derivative information and shall be the owner of such derivative information.

C. Return of BOX Market Data. Subject to any regulatory requirements imposed on the Exchange under Section 17 of the Act and SEC Rule 17a-1 thereunder, upon termination of this Agreement and upon request of BOX at any time during the term of this Agreement, the Exchange will promptly erase, destroy or return to BOX, in the format and on the media requested by BOX, all but one copy (which will be retained solely for compliance purposes) of all or any part of the BOX Market Data to the extent requested by BOX.

D. Reports; Obligation to Correct Errors. BOX shall produce reports regarding BOX Market Data upon request by the Exchange. BOX will, as promptly as reasonably practicable: (i) correct any errors, gaps, or inaccuracies in the BOX Market Data or such reports upon its becoming aware of such errors, gaps, or inaccuracies; and (ii) notify the Exchange that it has undertaken such corrections.

E. Maintenance of Information Systems. BOX will be responsible for maintaining, supporting, and, if necessary, changing such BOX systems (including, without limitation, the System) as may be required by BOX to furnish such data to the Exchange as the Exchange may require for regulatory purposes. The Exchange will participate in any decisions involving the modification or replacement of such systems in accordance with Section 3.2(a)(ii) of the BOX LLC Agreement.

F. Data Security. The Exchange will maintain safeguards to protect the integrity and confidentiality of BOX Market Data ("Data Safeguards") that will be no less rigorous than data security policies in effect at BOX operations center facilities. The Exchange will revise and maintain such Data Safeguards as necessary to fulfill its obligations under this Agreement. In the event the Exchange discovers or is notified of a breach or potential breach of security relating to BOX Market Data, the Exchange will immediately: (i) notify BOX of such breach or potential breach, (ii) investigate and remediate the effects of the breach or potential breach and (iii) cooperate with BOX and allow BOX to assist in such investigation and remediation.

5. Notification of Participants

BOX will notify BOX Options Participants of the general terms of this Agreement, when it becomes effective, and its impact on BOX Options Participants. The notice will be sent on behalf of all parties, and prior to it being sent, the Exchange will review and approve the notice.

6. Sharing of Resources

A. Use of Facilities. Any Party may allow the other Party to use a portion of any of its office facilities to further the performance of this Agreement. Such facilities may be either leased or owned by the Parties. The use of such facility by another Party does not constitute a leasehold interest in favor of such Party. The Parties further agree that they will adhere to the following guidelines when using another Party's facility:

1. the facilities will be used in an efficient manner.

2. the Party using the facility will keep the facilities in good order, not commit or permit waste or damage to such facility, comply with any applicable lease covenants, not use such facility for any unlawful purpose and comply with all of the other Party's standard policies and procedures for the use of the facility that are in effect from time to time, including procedures for the physical security of the facility.

3. the Party using the facility will not make any improvements or changes involving structural, mechanical or electrical alterations to it without the other Party's prior written approval.

4. when the facility is no longer required for performance of the Services, the facility will be returned to the other Party in the same condition as when such usage began, ordinary wear and tear excepted.

5. the Parties will evaluate whether such usage should continue on a quarterly basis. If the Parties agree to increase the amount of space to be allocated and the Party providing the facility is unable to provide such additional space, then the Party using such space will: (i) allocate the required amount of additional space at its own facility; or (ii) if the Party is unable to provide such space at its own facility, it may procure such space from a third party. The Party procuring such space from a third party may request that the pricing methodology for the Services provided through that space be adjusted to incorporate the incremental cost of such space. All such requests must be submitted for approval by the Parties.

B. Use of Other Resources. The Parties may also agree to provide any of their other respective resources to another Party on a temporary basis, upon such terms and conditions as the Parties may mutually agree upon, to further the performance of this Agreement.

7. Service Locations

A. Service Locations. The Exchange will give BOX prior notice of any proposed addition, deletion, rearrangement or relocation of the facilities used by the Exchange to provide the Services to BOX.

B. Security Procedures. The Exchange will maintain and enforce security procedures at the facilities used by the Exchange to provide the Services that are at least equal to industry standards for locations similar to the Exchange facilities.

8. Personnel

A. Conduct of Personnel. Each Party agrees that, while on-site at a facility of another Party, its directors, officers, employees and agents will comply with the security policies and regulations pertinent to each of the other Party's facilities they visit.

B. Improper Securities Transactions and Holdings. The Exchange shall develop and enforce a securities transaction policy for employees of BOX and the Exchange. In the event the Exchange suspects that any employee of BOX or the Exchange has access to BOX information and has been involved in improper, illegal or unethical use of any BOX Market Data or other information gained from such access, the Exchange will notify BOX of such suspicions (except to the extent the Exchange determines, in its sole discretion, such disclosure would jeopardize its investigation) and conduct an investigation of such individual. BOX will provide such assistance to the Exchange in its investigation as the Exchange may reasonably request.

9. Fees and Payment Terms

A. The parties hereto hereby acknowledge that the Exchange has the right to receive all fees, fines and disgorgements imposed upon BOX Options Participants with respect to the Trading System and all market data fees and OPRA tape revenue ("Fees") to be used by the Exchange for Regulatory Purposes. In the event the Exchange, at any time, does not hold sufficient funds to meet all Regulatory Purposes, as determined in the sole discretion of the Exchange, BOX shall promptly reimburse the Exchange for all such costs and expenses upon request by the Exchange Board. The Exchange shall also reimburse BOX for BOX's costs and expenses incurred for Regulatory Purposes.

B. The Exchange shall account for all fees collected from Options Regulatory Fees ("ORF"), fines and disgorgements (collectively, "Regulatory Fees"). Costs and expenses of the Exchange and reimbursement of BOX for BOX's costs and expenses incurred for Regulatory Purposes

(collectively, "Regulatory Expenditures") shall be paid by the Exchange (i) first, from Regulatory Fees until all Regulatory Fees shall have been exhausted, (ii) second, from other Fees, funds or other property held by the Exchange until all such Fees, funds and property not retained by the Exchange to meet Regulatory Purposes shall have been exhausted and (iii) third, by reimbursement from BOX. In the event aggregate Regulatory Expenditures exceed aggregate Regulatory Fees (a "Regulatory Deficit"), any subsequent collections of Regulatory Fees shall be applied to reduce such Regulatory Deficit.

C. The Exchange, in its sole discretion, shall determine the funds that shall be retained by the Exchange for Regulatory Purposes. All funds and property, other than Regulatory Fees, held by the Exchange that are not necessary for Regulatory Purposes shall promptly be remitted to BOX and an accounting provided to BOX, including unaudited financial statements of the Exchange, not later than five (5) business days after the end of each calendar month. All property of the Exchange shall be the property of BOX and shall be returned to BOX upon termination of this Agreement.

D. BOX shall receive prior notice of all expenses related to the payment of severance ("Severance Packages") to departing employees of the Exchange and BOX's consent shall be required before payment of any such Severance Package if it is materially more expensive than those paid to BOX employees generally.

E. BOX shall not reimburse the expense of any legal or regulatory settlements by the Exchange, including but not limited to, penalties, disgorgement, audits or consultant expenses, to which BOX is not a party; provided, however, that BOX shall bear the cost of a settlement related to BOX to the extent BOX consents to such settlement, which consent shall not be unreasonably withheld.

F. At the start of each fiscal year, the Exchange will provide to BOX a projection of its annual costs, including estimates for the number of full time employees and part time employees with average estimated hours. The Exchange will also notify BOX of any material changes to such estimates of which the Exchange becomes aware

throughout the year. Itemized statements and reasonable documentation of all Exchange expenses, including source and use of funds consistent with Section 9.C will be issued monthly by the Exchange to BOX not later than five (5) business days after the end of each calendar month and any reimbursement by BOX required pursuant to Section 9.B(iii) shall be payable by BOX to the Exchange within thirty (30) days of receipt of each invoice.

10. Audits of Books and Records

A. Services. Upon reasonable prior notice from the other Party, each Party will provide the other Party and such other Party's directors, officers, employees and agents with reasonable access to such Party's books and records and any reasonable assistance that they may require for the purpose of performing audits or inspections of the business related to the Services. The scope of such an audit by the Exchange may include, without limitation, an audit of the operation of the System and the extent to which the operation of the System conforms to the Rules. Nothing herein shall be construed as to diminish or hinder the powers of the SEC pursuant to the Act. The Party conducting an audit will do so in a manner that is consistent with the provisions of Section 14 (Confidentiality) herein.

B. Books and Records. The Exchange will maintain complete and accurate records in connection with this Agreement and all transactions related thereto, including all records and supporting documentation that are reasonably appropriate or necessary to document the Services and the expenses and reimbursements paid or payable pursuant to this Agreement. The books, records, premises, directors, officers, employees and agents of BOX shall be deemed to be the books, records, premises, directors, officers, employees and agents of the Exchange for purposes of, and subject to oversight pursuant to, the Act. The books and records of BOX shall be subject at all times to inspection and copying by the Exchange and the SEC. BOX must maintain or make readily available all books and records related to BOX within the United States.

C. Facilities. Each Party that is being audited under this Section will temporarily provide the Party conducting the audit and its representatives with: (i) a reasonable amount of work space on its premises; (ii) office furnishings (including lockable cabinets if possible); (iii) telephone and facsimile services; (iv) utilities; and (v) such office-related equipment and duplicating services as the

Party conducting the audit or its designated representatives may reasonably require to perform the audits described in this Section.

11. Term and Termination

A. This Agreement will begin as of the Effective Date and will continue in effect for twenty (20) years thereafter (the "Initial Term"), unless sooner terminated in accordance with this Section 11. The Initial Term shall be renewed automatically for additional one (1) year periods (each a "Renewal Term").

B. This Agreement may be terminated as follows:

1. Termination By BOX. BOX may terminate this Agreement for any reason or for no reason by providing written notice to the Exchange (a "Termination Notice") thereof and such termination shall take effect on the date set forth in the notice, which date shall be no sooner than thirty (30) days after the date of the Termination Notice.

2. No Termination By the Exchange. The Exchange may not terminate this Agreement without the prior written consent of BOX; provided, however, that nothing in this Section 11.B.2 shall limit the Exchange's regulatory authority with respect to BOX so long as this Agreement remains in effect.

3. Disputes. Any Dispute as to whether any termination of this Agreement was effective, or whether there was an adequate basis for such termination, will be resolved using the arbitration proceedings set forth in Section 19 below.

4. Automatic Termination.

(i) This Agreement will terminate automatically upon dissolution of BOX pursuant to the BOX LLC Agreement unless otherwise agreed by the Parties.

(ii) This Agreement shall terminate automatically on the 180th calendar day following the date BOX (including the Trading System) is no longer a facility of the Exchange pursuant to Section 3(a)(2) of the Act.

12. Consequences of Termination

A. Payment. Upon termination of this Agreement, all Regulatory Expenditures shall be paid as provided in Section 9.B. In the event any Regulatory Fees remain after payment or reimbursement for Regulatory Expenditures, such Regulatory Fees shall be transferred by the Exchange to the SRO with the obligation to regulate BOX for use only to pay future regulatory costs related to the Trading System.

B. Survival. The termination of this Agreement for any reason will not affect the accrued rights of the Parties or the right of either Party to sue for damages arising from a breach of this Agreement. Sections 1.E (other than 1.E(vi), 12.C (and 9, to the extent referenced therein), 13, 14 and 16 through 20 will survive the termination of this Agreement.

C. Termination Assistance.

For a period of six (6) months after the termination date of this Agreement, the Exchange will provide, if requested by BOX, assistance to aid BOX in the orderly transition and migration of the Trading System to a new regulatory service provider (the "Termination Assistance"). Any expenses incurred by the Exchange in providing requested Termination Assistance shall be paid in accordance with the provisions of Section 9.B.

13. Proprietary Rights

A. Created Property. In the case of patentable or copyrightable ideas, writings, drawings, inventions, designs, parts, machines or processes that are developed as a result of, or in the course of, Services rendered to BOX by the Exchange ("Created Property"), all right, title and interest in and to such Created Property shall be and remain vested in BOX.

B. BOX Property. Notwithstanding the foregoing, as between BOX and the Exchange and subject to the terms of any trademark licenses and any regulatory requirements imposed on the Exchange under Section 17 of the Act and SEC Rule 17a-1 thereunder, all right, title and interest in and to all physical assets or other forms of property acquired by the Exchange but paid for by BOX; all Deliverables; all Confidential Information of BOX; all BOX Market Data; technology; any additional property used by BOX in association with the Trading System; the System; and, subject to Section 14, any and all intellectual property which accrues to

BOX, including all copyrights, trademarks, and other intellectual property inherent in or appurtenant to the foregoing (collectively, "BOX Property") shall be and remain vested in BOX. To the extent, if any, that ownership of the BOX Property does not automatically vest in BOX by virtue of this Agreement or otherwise, the Exchange hereby transfers and assigns to BOX all right, title and interest which the Exchange may have in and to such BOX Property. As between the Exchange and BOX, all right, title and interest in and to the trademark licenses for "BOX," the "Boston Options Exchange," and the BOX logo shall be and remain vested in BOX. Notwithstanding the foregoing, prior to transferring such revenue or fees to BOX, the Exchange may offset the amount of any reimbursement due under Section 9, unless such fees are the subject of a bona fide Dispute by BOX. BOX shall send written notice to the Exchange of invoice Disputes, pursuant to Section 21.H.

14. Confidentiality

A. Confidential Information. Each Party shall treat as confidential all private, proprietary or confidential information of another party (including, but not limited to, BOX Confidential Information and the information and materials BOX has obtained rights to use hereunder) which the Exchange and BOX may receive or have access to pursuant to the performance of this Agreement ("Confidential Information"), and shall not divulge such Confidential Information of such other party to anyone, other than its directors, officers, employees and agents to whom such disclosure is necessary to facilitate the performance of this Agreement, without such other party's prior written consent.

B. Exclusions. Notwithstanding this Section 14, but subject to the provisions of the Rules, Confidential Information will not include information the receiving party can show: (a) was independently developed by the receiving Party without reference to the Confidential Information or is lawfully received free of restriction from another source having the right to furnish such information; (b) that has become generally available to the public by acts not attributable to the receiving Party or its employees, agents or contractors; (c) at the time of disclosure to the receiving Party, was known to the receiving Party free of restriction and evidenced by documentation in the receiving Party's possession; or (d) is required to be disclosed to federal or state regulatory authorities or law enforcement agencies in response to a subpoena or regulatory access request, or to other self-regulatory organizations in response to a regulatory access request, provided that the receiving Party

provides the other Party with sufficient prior notice, if allowed under applicable law or regulation, to allow the other Party to contest such request, requirement or order or seek protective measures.

C. Permitted Disclosure. Notwithstanding this Section 14, any Party shall be entitled to disclose any and all relevant information, including Confidential Information of BOX, to any Person as required pursuant to the Approvals, the federal securities laws and regulations or the BOX Rules and such Party shall have no liability whatsoever arising solely by reason of such disclosure.

15. Warranties

A. The Exchange. The Exchange hereby represents and warrants that: (a) it has the legal right to execute and perform this Agreement; and (b) its execution and performance of its duties hereunder will not violate any other agreement or obligation to which it is bound.

B. Approvals. Each Party hereby represents and warrants that it will, at its sole expense, comply with all applicable laws, regulations and requirements, and that its performance of the Agreement will not cause it to violate any state, federal or local laws. Each Party will obtain and maintain all licenses, permits or government approvals as may be necessary for it to perform in accordance with this Agreement. The Exchange warrants that it will obtain and maintain all Approvals, and exercise such SRO authority, to ensure maintenance of such Approvals. Each Party further covenants that it will use its best efforts to cooperate with and assist the other Party in obtaining and maintaining any such Approvals as applicable: (a) if requested to do so by another Party in writing; and (b) without limiting the requesting Party's obligations under this Agreement.

16. Indemnification

A. BOX and its Affiliates shall indemnify, defend, and hold harmless the Exchange and its Affiliates, directors, officers, employees and agents with respect to any and all claims, demands, causes of action, debts, liabilities, fees, expenses, costs, amounts paid in settlement and all other losses (including, without limitation, reasonable attorneys' fees and court costs) based upon or in any way related to the performance of the Services (including, without limitation, a material breach by BOX or its Affiliates of this Agreement), provided that the same were not the result of gross negligence or willful misconduct of the Exchange.

The Exchange and its Affiliates shall indemnify, defend, and hold harmless BOX and its Affiliates, directors, officers, employees and agents with respect to any and all claims, demands, causes of action, debts, liabilities, fees, expenses, costs, amounts paid in settlement and all other losses (including, without limitation, reasonable attorneys' fees and court costs) based upon or in any way related to (a) gross negligence or willful misconduct of the Exchange; (b) gross negligence or willful misconduct on the part of any the Exchange personnel performing services on BOX's or any authorized user's premises, and/or (c) any material breach by the Exchange or its Affiliates of this Agreement.

B. Notice of Claims. Within ten (10) days after the receipt by an indemnified Party of notice of any Claim against an indemnified Party, as the case may be, or of the commencement of any action or proceeding against an indemnified Party, as the case may be, an indemnified Party, as the case may be, shall, if a Claim with respect thereto is or may be made against any Party pursuant to this Section, give such Party written notice thereof. The failure to give any notice required by this Section shall not relieve any Party of any obligations contained in this Section except and only to the extent that the failure to give such notice actually and materially prejudices the rights of such Party.

17. Defense of Claims

A. Control By Indemnifying Party. The indemnifying Party shall, at its expense, conduct and control the defense of each Claim and/or the negotiation of settlement or other compromise thereof provided that: (i) each Indemnitee and/or its legal counsel or any other Person authorized by the Indemnitee to act on behalf of the Indemnitee may participate in the defense and/or negotiation of settlement or other compromise at the Indemnitee's election and expense in which case the indemnifying Party shall cooperate with the Indemnitee; and (ii) if the Indemnitee chooses not to participate in the defense and/or negotiation of compromise, it shall, at the Indemnitee's expense, provide the indemnifying Party all reasonable assistance in defending and/or negotiating a compromise of the Claim as the indemnifying Party may request. Notwithstanding the foregoing, the indemnifying Party shall enter into a settlement or other compromise of a Claim only with the prior written consent of the relevant Indemnitee(s) (which shall not be unreasonably withheld).

B. Control By Indemnitee. Notwithstanding Section 16, an Indemnitee may assume defense of a Claim against such Indemnitee upon written notice to the indemnifying Party within thirty (30) days of the Indemnitee's receipt of notice of the Claim: (i) if and only if the Indemnitee has determined, in the exercise of its reasonable discretion based upon a legal opinion of its counsel that a conflict of interest makes separate representation by the Indemnitee's counsel advisable or upon the written consent of the indemnifying Party; and (ii) the Indemnitee provides the indemnifying Party with a complete release of the indemnifying Party's obligations to the Indemnitee with respect to the Claim pursuant to this Section 17, including any obligation by the indemnifying Party to defend, indemnify or hold the Indemnitee harmless from and against all Damages arising by reason of the Claim.

18. Liability

A. Specific Limitations. The Exchange and its Affiliates shall have no liability to BOX for any breach of this Agreement or claim of Damages arising directly or indirectly from:

1. any Force Majeure Event or other cause beyond the reasonable control of the Exchange, and the Exchange shall be entitled to suspend its obligations under this Agreement during the period and to the extent that the Exchange is prevented from or hindered in complying therewith by any such cause;

2. any action by the Exchange after termination of this Agreement for any reason under Section 11 above, except as may relate to the breach of any obligation that, by its terms, survives the termination or expiration of this Agreement and except in the event of a breach by the Exchange as provided in Section 11.B.3; or

3. any act or omission of the Exchange which is done or omitted to be done as a result of the Exchange's exercise of its SRO authority in good faith and in accordance with the applicable provisions of the Exchange Rules or other applicable federal or state securities rules, regulations or laws;

4. any claim arising in connection with any advice or information given or omitted to be given by BOX to the Exchange, its officers, employees, agents, or representatives relating to the Services.

B. General Limitation. EXCEPT AS SET FORTH OTHERWISE IN THIS AGREEMENT, the Exchange DISCLAIMS ALL IMPLIED CONDITIONS AND WARRANTIES RESPECTING THE SERVICES PROVIDED UNDER THIS AGREEMENT, INCLUDING ALL IMPLIED CONDITIONS AND WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, NO PARTY SHALL HAVE ANY LIABILITY TO ANOTHER PARTY FOR ANY LOSS, DAMAGE OR INJURY, DIRECT OR INDIRECT, WHETHER OR NOT CAUSED BY THE NEGLIGENCE OF THE PARTY, ITS OFFICERS, EMPLOYEES, AGENTS OR REPRESENTATIVES, *EXCEPT THAT* THE PARTY SHALL ACCEPT LIABILITY FOR DEATH, PERSONAL INJURY AND DIRECT PHYSICAL DAMAGE TO THE TANGIBLE PROPERTY OF ANOTHER PARTY CAUSED BY THE NEGLIGENCE OF THAT PARTY, ITS OFFICERS, EMPLOYEES, AGENTS OR REPRESENTATIVES. NOTWITHSTANDING THE FOREGOING OR ANY OTHER PROVISION OF THIS AGREEMENT, NO PARTY SHALL BE LIABLE TO ANOTHER PARTY FOR ANY INDIRECT OR CONSEQUENTIAL LOSS, OR FOR LOSS OF PROFITS, GOODWILL OR CONTRACTS, WHETHER ARISING FROM NEGLIGENCE, BREACH OF CONTRACT OR OTHERWISE, AND WHETHER OR NOT EITHER PARTY SHALL HAVE BEEN ADVISED OF OR OTHERWISE MIGHT HAVE ANTICIPATED THE POSSIBILITY OF SUCH DAMAGES.

C. Claims Against Individuals. Where the liability of a Party (including, but not limited to, any liability with respect to its officers, employees, agents or representatives) has been excluded or restricted hereunder, each Party agrees that it shall not bring any claim against any officers, employees, agents or representatives of the other Party or join such officers, employees, agents or representatives of the other Party to any claim such that the liability of such officers, employees, agents or representatives and the other Party, when taken together, would be greater than the liability of the other Party hereunder.

19. Dispute Resolution

A. Dispute Between the Parties. This Section governs any dispute, disagreement, claim and/or controversy (hereinafter collectively referred to as a "Dispute") among the Parties arising out of or relating to this Agreement, or breach thereof. A Party must file, with any other involved Party, written notice of any Dispute prior

to the institution of the following Dispute resolution process. The Parties shall act in good faith and use commercially reasonable efforts to resolve between them any Dispute and other matters in question among the Parties arising out of or relating to this Agreement or the breach thereof (*excluding* any Claim made by third parties against the Exchange or BOX which are subject to Section 16 *but including* any disagreements as to the settlement or other compromise of any Claim subject to Section 16).

B. Negotiation. In the event any Dispute arises out of or relates to this contract, or the breach thereof, the Parties to this Agreement shall use their best efforts to settle any Dispute through negotiation. If the Parties do not reach a resolution of the Dispute through negotiation within a period of fifteen (15) days from the initial notification of this Dispute then either Party may appeal to the Exchange Board. Within thirty (30) days after written notice of such appeal by a Party to the other Party, a special meeting of the full Exchange Board shall be held to hear the matter in an attempt to resolve the Dispute.

C. Appeal to the Exchange Board. Representatives of each Party shall be permitted to attend and speak at the special meeting of the full Exchange Board for the purpose of presenting each such Party's position with respect to the Dispute. If the Parties do not reach a resolution of the Dispute at the special meeting of the Exchange Board, upon written notice by either Party, the Dispute will be submitted to mediation.

D. Mediation. In the event that any Dispute is submitted to mediation, the Parties agree that the mediation will be administered under the American Arbitration Association's (AAA) Commercial Mediation Rules. If, within thirty (30) days after service of a written demand for mediation, the Parties fail to settle the Dispute to each of its mutual satisfaction, any remaining Dispute shall be settled by arbitration. Any Dispute submitted to mediation shall suspend the requirements for filing a notice of claim until the conclusion of the mediation process.

E. Binding Arbitration. Absent settlement by negotiation or mediation, the Parties agree that compulsory, binding arbitration will be the exclusive means of resolving any Dispute. The Parties may not commence arbitration of a Dispute until they have exhausted all reasonable efforts to resolve such Dispute through negotiation and mediation pursuant to this Section 19. The parties further agree that any arbitration shall be held in Boston, MA, conducted by a panel of three arbitrators (one arbitrator selected by each Party and the third selected by agreement of the two initial

arbitrators) and will be administered by the AAA in accordance with its Commercial Arbitration Rules, and that judgment on the award of the arbitrator(s) may be rendered in any court having jurisdiction thereof.

F. Continuity of Services. Each Party acknowledges that the timely and complete performance of its obligations pursuant to this Agreement is critical to the business and operations of the other Party. In the event of a Dispute between BOX and the Exchange the Parties will continue to perform their respective obligations under this Agreement in good faith during the resolution of such Dispute unless and until this Agreement expires or is terminated in accordance with its provisions. Nothing in this Section will interfere with BOX's right to terminate this Agreement as set forth in this Agreement.

20. Definitions

Capitalized terms used herein but not otherwise defined herein shall have the meaning as defined in the BOX LLC Agreement. Unless otherwise defined in this Agreement or the BOX LLC Agreement, or unless the context otherwise requires, the terms used in this Agreement shall have the same meaning as they have under the Act and the rules and regulations thereunder.

In this Agreement, the following capitalized terms shall have the following respective meanings:

"BOX Market Data" means data and other information (including derivative works and information, whether derived by BOX, the Exchange or another Person) relating to: (i) transactions in securities or other financial instruments, products, vehicles or devices executed in the Trading System; (ii) Persons employed by BOX or the activities of such Persons; (iii) information gathered by BOX or the Exchange from other sources that is reasonably required by the Exchange to provide the Services; or (iv) data derived by BOX or the Exchange using Trading System data or the System and applications, but shall not include: (a) Exchange confidential information or (b) Exchange proprietary information.

"BOX LLC Agreement" has the meaning set forth in the recitals.

"Claim" means any claim, allegation, cause of action or demand for Damages or other remedy.

"**Damages**" means all costs, claims, demands, expenses, damages, debts and liabilities of any nature whatsoever, including costs of collections and reasonable attorneys fees.

"Deliverables" has the meaning set forth in Section 1.F of this Agreement.

"*Force Majeure* Event" means any cause beyond the reasonable control of a Party which could not have been avoided by such Party by the exercise of due care, including, but not limited to, flood, riot, fire or act of God.

"Governmental Authority" means any Federal, state, municipal, local, territorial or other governmental department, regulatory authority, judicial or administrative body, whether domestic, foreign or international.

"**Law**" means any declaration, decree, directive, legislative enactment, order, ordinance, regulation, rule or other binding restriction of or by any Governmental Authority.

"Professional Services" means services performed by outside counsel, consultants, Regulatory Outsourcing, or subcontractors for the benefit of BOX.

"**Regulatory Outsourcing"** shall mean all BOX-related regulatory functions that are outsourced by the Exchange to another service provider that is an SRO.

"**Regulatory Purpose"** shall be determined in the sole discretion of the Exchange and include (i) fulfilling the Exchange's responsibilities as a self-regulatory organization as set forth in the Exchange Act, (ii) supporting the operation, regulation, and surveillance of the Trading System, (iii) preventing fraudulent and manipulative acts and practices, promoting just and equitable principles of trade, fostering cooperation and coordination with persons engaged in regulating, clearing, settling or processing information with respect to, and facilitating transactions in securities, removing impediments to and perfecting the mechanisms of a free and open market and a national market system and protecting investors and the public interest and (iv) supporting the various elements of the national market system pursuant to Section 11A of the Exchange Act and the rules thereunder.

"Rules" means the rules of the Exchange that apply to BOX or the Trading System.

"Services" has the meaning set forth in Section 1 of this Agreement.

"Trading System" has the meaning set forth in the recitals.

"U.S." means the United States of America.

"User Agreements" means the User Agreements entered into between BOX and BOX Options Participants.

21. Miscellaneous Provisions

A. Assignment and Sublicensing. Except as expressly provided herein, neither the Exchange nor BOX, shall assign (by operation of law or otherwise), sublicense, transfer, change or part with the possession of the benefits and obligations of this Agreement without the prior written consent of the other except, for BOX only, pursuant to a merger or other sale or transfer of substantially all of the capital securities, assets or business of BOX.

B. Subcontractors. Subject to Section 2.C herein and Section 3.2(a)(v) of the BOX LLC Agreement, the Exchange shall be entitled to appoint such subcontractors as it shall deem fit to carry out the whole or any part of its obligations hereunder *provided that* the Exchange shall be responsible for all activities of such subcontractors.

C. Force Majeure. Except for the payment of any fees or expenses due hereunder, if the performance of this Agreement by any Party is prevented, hindered, delayed or otherwise made impracticable by reason of any Force Majeure Event, that Party shall be excused from such performance to the extent that it is prevented, hindered or delayed by such cause.

D. Entire Agreement. This Agreement, together with the BOX LLC Agreement and the Related Agreements, constitutes the entire understanding between the Parties hereto with respect to the subject matter hereof and supersedes all prior representations, agreements (*excluding* any Related Agreements), negotiations and discussions between the Parties.

E. Amendments. Except as expressly provided for herein, this Agreement may be amended only by an instrument in writing signed on behalf of each of the Parties and in compliance with Law.

F. Captions. The captions are inserted for convenience of reference only and are in no way intended to describe, interpret, define, or limit the scope, extent or intent of this Agreement or any provision hereof.

G. Waiver. The failure of a Party to exercise or enforce any right conferred upon it by this Agreement shall not be deemed to be a

waiver of any such right or to operate as a bar to the exercise or enforcement thereof at any time or times hereafter.

H. Notices. Except as otherwise expressly provided herein, all notices, certifications, requests, demands, payments and other communications hereunder: (i) shall be in writing; (ii) may be delivered by certified or registered mail, postage prepaid, by hand, by facsimile, or by any internationally recognized private courier; (iii) shall be deemed to be given: (a) if mailed, on the date two (2) business days after the date of mailing or (b) if sent via facsimile, hand delivered or delivered by private courier, on the date of delivery or confirmation of a successful facsimile transmission, as applicable; and (iv) shall be addressed as follows:

If to the Exchange, addressed as follows:

BOX Options Exchange LLC
101 Arch Street, Suite 610
Boston, Massachusetts 02110
Attention: President
Fax: 617-235-2253

If to BOX, addressed as follows:

BOX Market LLC
101 Arch Street, Suite 610
Boston, Massachusetts 02110
Attention: Chief Legal Officer
Fax: 617-235-2253

In each case, with a copy addressed as follows:

Bingham McCutchen LLP
One Federal Street
Boston, Massachusetts 02110
Attention: Glen R. Openshaw
Fax: 617-345-5032

or to such other address or addresses as may hereafter be specified by notice given by one Party to the other.

I. Remedies Not Exclusive. No remedy conferred by any of the provisions of this Agreement is intended to be exclusive of any other remedy (including, but not limited to, any remedy or rights under the Rules), except as expressly provided in this Agreement, and each and every remedy shall be cumulative and shall be in

addition to every other remedy given hereunder or now or hereafter existing in law or in equity or by statute or otherwise.

J. Governing Law. The validity and effectiveness of this Agreement shall be governed by and construed and enforced in accordance with the internal laws of the State of Delaware without giving effect to the provisions, policies or principles of any state law relating to choice or conflict of laws.

K. Relationship. The Parties intend to create an independent contractor relationship and nothing contained in this Agreement will be construed to cause either BOX or any of its Affiliates, or the Exchange or any of its Affiliates, to become partners, joint venturers, principals, or agents of the other. The Exchange and its personnel in performance of this Agreement, are acting as independent contractors and not as employees or agents of BOX. Neither Party shall have any right, power or authority, express or implied, to bind the other. The Exchange will provide all insurance coverage required by applicable laws, regulations, or employment agreements, including, without limitation, medical and workman's compensation. Subject to reimbursement by BOX pursuant to Section 9, the Exchange will be responsible for payment of all unemployment, social security, and other payroll taxes and all benefits of all individuals who are engaged in the performance of the Services. If, at any time, any liability is asserted against BOX for unemployment, social security or any other payroll tax related to the Exchange or any individuals or subcontractors employed by or associated with the Exchange, then the Exchange will indemnify and hold harmless BOX from any such liability, including, without limitation, any such taxes, any interest or penalties related thereto, and reasonable attorney's fees and costs, except for reimbursement obligations required pursuant to this Agreement.

L. Publicity. Each Party will: (i) submit to the other Party all advertising, written sales promotions, press releases and other publicity matters relating to this Agreement in which the other Party's name or Mark(s) is/are mentioned or which contains language from which the connection of said name or marks may be inferred or implied (in each instance, including the Marks); and (ii) not publish or use such advertising, sales promotions, press releases or publicity matters without the other Party's prior written consent.

M. Interpretation.

1. Headings and Gender. References to sections and schedules are to sections of and schedules to this Agreement. The masculine gender shall include the feminine and the singular number shall include the plural, and vice versa.

2. Inconsistency. In the event of any inconsistency between this Agreement and/or the schedules attached hereto and the Rules, the Rules shall govern to the extent of the inconsistency.

3. Further Assurances. The Parties shall execute all such further documents and do all such further acts as may be necessary to carry the provisions of this Agreement into full force and effect.

[Remainder of page intentionally left blank. Signature page follows.]

IN WITNESS WHEREOF, the Parties have executed and delivered this Facility Agreement as of the Effective Date.

BOX MARKET LLC

By: _____
Name: Anthony D. McCormick
Its: Chief Executive Officer

BOX OPTIONS EXCHANGE LLC

By: _____
Name: Lisa J. Fall
Its: President

SCHEDULE A

SERVICES

Service	Description
Regulatory	· Exercise regulatory control and monitor the trading of the Trading System. · Provide regulatory, surveillance, compliance and enforcement of all Trading System activities. File for SEC approval for new and amended Rules as provided in Section 1.C.· Administer and update the Rules. · Attend national industry meetings (*e.g.*, OPRA, ISG, ORSA, OLA and OCC) representing BOX or delegate to a BOX representative, to the extent permissible.
Surveillance/ Market Oversight	· Establish surveillance procedures and processes. · Surveillance of all trading activity to ensure compliance with the Rules, including monitoring of BOX Options Participant financial responsibilities and clearing obligations. · Process inquiries from other market centers and investigate post trade inquiries of Trading System trading activity. · Review periodic exception reports generated from System provided by MX pursuant to the Market TOSA. · Review trading alerts related to market quality issues. · Ensure compliance with any notifications, filings, and/or approvals required for publication or advertising of the Trading System.
Enforcement	· Establish disciplinary procedures for BOX Options Participant infractions. · Develop, maintain and enforce a minor rule violation plan.
Examinations	· Perform routine, cause, and special examinations of BOX Options Participants for compliance with federal securities laws and regulations, and the Rules.
BOX Options Participants Account Management	· Provide administrative support for various BOX Options Participant related functions including applications, acceptance, set-up, compliance, etc. · Work jointly with MX and BOX personnel in the administration of BOX Options Participant entitlements regarding trading on the Trading System.

Service	Description
	· Provide BOX Options Participant firm oversight to ensure proper BOX Options Participant qualifications, financial requirements, and maintenance of proper books and records.
Record Keeping	· Create and maintain appropriate records in the course of exercising the Exchange's SRO authority pursuant to Section 17 of the Act and Rule 17a-1.
Listings	· Administer applications and requirements for listing options to be traded on BOX. · Maintain and enforce listing standards.
SEC/OPRA/OCC	· Develop and implement new systems consistent with SEC requirements or new initiatives from OPRA or OCC etc.
Other	· Any regulatory and/or surveillance services required by the SEC or other regulatory authority, not currently covered in this Agreement, deemed proper and necessary for the continuation of Trading System trading as a competitive market.