



June 20, 2019

**VIA HAND DELIVERY AND FACSIMILE**

Vanessa Countryman  
Acting Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

Re: Order Granting Petition for Review and Scheduling Filing of Statements, Release No. 85927, File Nos. SR-BOX-2018-24, SR-BOX-2018-37, and SR-BOX-2019-04

Dear Ms. Countryman:

BOX Exchange LLC (the “Exchange”) appreciates the opportunity to comment on the Securities and Exchange Commission’s Order granting the Exchange’s petition for review of the decision of the Division of Trading and Markets disapproving the Exchange’s proposals to amend the fee schedule for the BOX Market LLC (“BOX”) options facility (the “BOX Proposal”). The Exchange submits this letter to reiterate briefly and supplement the arguments set forth at greater length in its petition for review in this matter. If additional statements are submitted regarding the Division’s disapproval of the BOX Proposal, the Exchange reserves the right to file a response to those statements.

In its order disapproving the BOX Proposal,<sup>1</sup> the Division prevented the Exchange from charging a reasonable connectivity fee—lower than comparable fees charged by several other exchanges—to recoup the costs associated with providing a high-quality network for market participants, as well as from reclassifying BOX’s existing High Speed Vendor Feed Fee. The Commission should vacate the Disapproval Order and approve the BOX Proposal for three reasons: (1) the BOX Proposal has been deemed approved by operation of law because the Commission failed to approve or disapprove the rule change within 240 days of the Exchange’s initial filing; (2) the Division arbitrarily and capriciously singled out the Exchange for disparate treatment; and (3) the BOX Proposal is consistent with the Securities Exchange Act (the “Act”).

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<sup>1</sup> Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network, Release No. 85459, 84 Fed. Reg. 13,363 (Apr. 4, 2019) (“Disapproval Order”).

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*First*, the BOX Proposal has been deemed approved by operation of law because the Commission failed to act on the Exchange’s first fee filing within the 240-day period authorized by statute. Section 19(b)(3)(C) of the Act authorizes the Commission to temporarily suspend an immediately effective fee filing, such as the BOX Proposal, and institute proceedings pursuant to Section 19(b)(2)(B) to determine whether to approve or disapprove the proposed rule change. 15 U.S.C. § 78s(b)(3)(C). Section 19(b)(2)(B)(ii), in turn, provides that the Commission “shall issue an order approving or disapproving the proposed rule change” no later than “180 days after the date of publication” of the proposed rule change in the *Federal Register*, and that the “Commission may extend the period for issuance . . . by not more than 60 days.” *Id.* § 78s(b)(2)(B)(ii). Finally, Section 19(b)(2)(D)(ii) states that if the Commission fails to approve or disapprove the proposed rule change within that time period, the rule change is “deemed . . . approved.” *Id.* § 78s(b)(2)(D).

The Commission failed to approve or disapprove the first version of the BOX Proposal within the 240-day period mandated by the Act. The statutorily prescribed time period for the Commission’s consideration of the proposed rule change began when the rule change was published in the *Federal Register* on August 2, 2018.<sup>2</sup> After temporarily suspending the rule, the Division published a notice on January 25, 2019, in which it exercised its delegated authority to extend the time for the Commission to issue an order approving or disapproving the proposed rule change by 60 days, “designat[ing] March 29, 2019, as the date by which the Commission shall either approve or disapprove the proposed rule change.”<sup>3</sup> On March 29, 2019, the Division, again acting pursuant to its delegated authority, issued its order disapproving the BOX Proposal. *See* Disapproval Order.

Although the Division disapproved the first version of the BOX Proposal within the 240-day period prescribed by the Act, the Commission itself did not act before that period expired, and the BOX Proposal is therefore “deemed to have been approved by the Commission.” 15 U.S.C. § 78s(b)(2)(D)(ii). The Act is clear that the “*Commission*”—not the Commission’s staff—“shall issue an order approving or disapproving the proposed rule

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<sup>2</sup> Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC (“BOX”) Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network, Release No. 83728, 83 Fed. Reg. 37,853 (Aug. 2, 2018).

<sup>3</sup> Notice of Designation of Longer Period for Commission Action on Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network, Release No. 84989, 84 Fed. Reg. 858, 859 (Jan. 31, 2019).

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change” within the statutorily prescribed period. *Id.* § 78s(b)(2)(B)(ii) (emphasis added). To be sure, the Commission has the authority to “delegate . . . its functions” to the staff, *id.* § 78d-1(a), but, where it does so, the Act states that “the Commission shall retain a discretionary right to review the action of any such division of the Commission,” *id.* § 78d-1(b). In those circumstances, “the action of any such division of the Commission . . . shall . . . be deemed the action of the Commission” *only* “[i]f the right to exercise such review is declined, or if no such review is sought within the time stated in the rules promulgated by the Commission.” *Id.* § 78d-1(c).

Here, the Exchange filed a timely petition for review of the Disapproval Order, and the Commission has granted that petition. The Disapproval Order therefore is not “the action of the Commission.” 15 U.S.C. § 78d-1(c). Accordingly, there has been no Commission decision on the Exchange’s first version of the BOX Proposal within 240 days of the proposed rule change’s publication in the *Federal Register*. In the absence of a timely decision by the Commission approving or disapproving the first version of the BOX Proposal, that proposed rule change was “deemed to have been approved by the Commission” upon the expiration of the statutorily prescribed approval-or-disapproval period on March 29, 2019. *Id.* § 78s(b)(2)(D).<sup>4</sup>

*Second*, the Order is arbitrary and capricious because the Division failed to acknowledge or explain its departure from prior agency practice and subjected the Exchange to less favorable treatment than other exchanges. Under the Administrative Procedure Act (the “APA”), the agency must “examine the relevant data and articulate a satisfactory explanation for its action.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Where an agency changes its position on an issue, it must “display awareness that it *is* changing position,” and may not “depart from a prior policy *sub silentio*.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

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<sup>4</sup> The second version of the BOX Proposal has also been deemed approved by operation of law because it was published in the *Federal Register* on December 20, 2018, more than 180 days ago. *See* Notice of Filing of a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change, Release No. 84823, 83 Fed. Reg. 65,381 (Dec. 20, 2018) (“Second Order Instituting Proceedings”). The Commission did not grant itself a 60-day extension of time to approve or disapprove the proposed rule change, and, in light of its order granting review of the Division’s Disapproval Order, has not approved or disapproved the proposed rule change within the statutorily prescribed time period. *See* 15 U.S.C. § 78d-1(c).

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For years, the Commission has permitted other exchanges to charge connectivity fees comparable to (or higher than) the fees proposed by the Exchange. Prior to September 17, 2018, the Commission had not rejected *any* of the prior 95 exchange filings related to connectivity fees.<sup>5</sup> Less than two months before the Exchange filed the BOX Proposal, the Cboe exchange group filed *eight* immediately effective rule changes increasing connectivity fees by up to 25%, but neither the Commission nor the Division disapproved any of those rule changes.<sup>6</sup> Yet, in suspending and then disapproving the BOX Proposal, the Division offered no explanation for its abrupt policy change and, in fact, did not even acknowledge that the Disapproval Order represents a fundamental shift in the Commission's regulatory approach to connectivity fees. The APA prohibits that type of tacit reversal of longstanding agency policy. *See Fox Television Stations*, 556 U.S. at 515.

That the Division has adopted a new policy approach—without acknowledgment or justification—is made abundantly clear by its recent publication of “Staff Guidance” regarding fee filings made by self-regulatory organizations.<sup>7</sup> Under the guise of nonbinding “guidance,”

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<sup>5</sup> *See* Commissioner Robert J. Jackson Jr., *Unfair Exchange: The State of America's Stock Markets* n.33 (Sept. 19, 2018), <https://www.sec.gov/news/speech/jackson-unfair-exchange-state-americas-stock-markets>.

<sup>6</sup> *See* Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for BYX, Release No. 83441, File No. SR-CboeBYX-2018-006 (June 14, 2018); Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for BZX, Release No. 83442, File No. SR-CboeBZX-2018-037 (June 14, 2018); Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for BZX Options, Release No. 83429, File No. SR-CboeBZX-2018-038 (June 14, 2018); Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for C2, Release No. 83455, File No. SR-C2-2018-014 (June 15, 2018); Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for Cboe Options, Release No. 83453, File No. SR-CBOE-2018-041 (June 15, 2018); Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for EDGA, Release No. 83449, File No. SR-CboeEDGA-2018-010 (June 15, 2018); Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for EDGX Options, Release No. 83430, File No. SR-CboeEDGX-2018-017 (June 14, 2018); Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Physical Port Fees for EDGX, Release No. 83450, File No. SR-CboeEDGX-2018-016 (June 15, 2018).

<sup>7</sup> Division of Trading and Markets, *Staff Guidance on SRO Rule Filings Relating to Fees* (May 21, 2019), <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

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the Division has announced new substantive requirements for exchanges' fee filings, with a special emphasis on connectivity-fee filings.<sup>8</sup> The Staff Guidance lays bare that the suspension and disapproval of the BOX Proposal signaled a dramatic, but unacknowledged, shift in the Division's scrutiny of connectivity fees.

The Division further violated the APA because it treated the Exchange differently from similarly situated entities. It is well-established that "[a]n agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so." *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996). "Government is at its most arbitrary when it treats similarly situated people differently." *Etelson v. Office of Pers. Mgmt.*, 684 F.2d 918, 926 (D.C. Cir. 1982).

The Disapproval Order arbitrarily and inequitably treats the Exchange differently from each of the other exchanges that submitted immediately effective connectivity-fee filings that were not suspended or disapproved by the Commission. The Division did not even mention the eight immediately effective connectivity-fee increases filed by the Cboe exchange group less than two months before the Exchange filed the BOX Proposal, nor did it acknowledge any of the dozens of other immediately effective connectivity-fee filings left in force by the Commission without further scrutiny. The Division provided no explanation for its disparate treatment of the Exchange, which is particularly inappropriate in light of the Exchange's limited market share.<sup>9</sup>

This disparate treatment was exacerbated by the Commission's Remand Order, which allowed *every other* fee filing challenged by the Securities Industry and Financial Markets Association ("SIFMA") and Bloomberg L.P. to remain in force while the various exchanges develop and apply procedures to assess the merits of SIFMA's and Bloomberg L.P.'s challenges to those fees.<sup>10</sup> The Commission made clear in its Remand Order that it was expressing "no view regarding the merits of the parties' challenges to the rule changes" and that the order did "not set aside the challenged rule changes." Remand Order at 2. Yet, the BOX Proposal, unlike every other fee filing subject to the Remand Order, *has* been set aside. The Division failed to provide a legally sufficient justification for this disparate treatment, claiming that its singling out of the BOX Proposal "is a consequence of the procedural posture

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<sup>8</sup> Although the Staff Guidance applies to all fee filings, it refers to connectivity fees or products eleven times.

<sup>9</sup> As of August 2018, the Exchange constituted only 2.3% of the options market by volume. See Tabb Group, *Options LiquidityMatrix* (Sept. 17, 2018).

<sup>10</sup> See *In re Applications of Sec. Indus. & Fin. Mkts. Ass'n & Bloomberg L.P.*, Release No. 84433 (Oct. 16, 2018) ("Remand Order").

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of the rule changes at the time that separate order issued.” Disapproval Order, 84 Fed. Reg. at 13,370. This explanation ignores that the “procedural posture” of the BOX Proposal is entirely of the Division’s own making.

*Finally*, the BOX Proposal is consistent with the Act. The connectivity fees established by the BOX Proposal are equitable, reasonable, and nondiscriminatory, and do not impose any undue burden on competition, thereby satisfying all applicable requirements of the Act. *See* 15 U.S.C. § 78f(b)(4), (b)(5), (b)(8). As explained in the BOX Proposal, the proposed connectivity fees are “expected to offset the costs both the Exchange and BOX incur in maintaining and implementing ongoing improvements to the trading systems.”<sup>11</sup> These improvements include “connectivity costs, costs incurred on software and hardware enhancements and resources dedicated to software development, quality assurance, and technology support.”<sup>12</sup> The Exchange has a greater need than other exchanges to charge connectivity fees because it “does not own and operate its own data center and therefore cannot control data center costs.”<sup>13</sup>

The reasonableness of the proposed connectivity fees is made clear by the fact that the Exchange is proposing to set these fees at a level *lower* than the connectivity fees charged by several other exchanges.<sup>14</sup> Just like those fees, the fees proposed here apply evenhandedly to all market participants who choose to connect to the Exchange and do not unfairly discriminate against any class of market participants. Nor is there any burden on competition because market participants who are price-sensitive have the option of connecting to BOX through a third-party connectivity provider who can offer the same connectivity services at a lower price.

The Division dismissed this evidence as “insufficient,” faulting the Exchange for failing to offer “information as to the level of . . . costs” to be recouped by the proposed fees. Disapproval Order, 84 Fed. Reg. at 13,368. But the Division cited no authority for the

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<sup>11</sup> Second Order Instituting Proceedings, 83 Fed. Reg. at 65,383.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 65,382.

<sup>14</sup> *See, e.g.*, Cboe Exchange, Inc. Fees Schedule 14 (Apr. 25, 2019), <http://www.cboe.com/publish/feeschedule/cboefeeschedule.pdf>; Nasdaq Stock Market LLC Rules, General 8 Connectivity, Section 1(b) (Nov. 19, 2018), <http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F1%5F4&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2DIlcrules%2F>; NYSE American Options Fee Schedule 37-38 (June 12, 2019), [https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE\\_American\\_Options\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf).

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proposition that an exchange is invariably required to provide a detailed analysis of costs in support of a proposed fee change. Unlike in *Susquehanna International Group, LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017), cited by the Division, the Exchange has not asked the Commission to place “unquestioning reliance” on the Exchange’s assertion of compliance with the Act, *id.* at 448, but rather has provided independent evidence that the BOX Proposal satisfies each requirement of the Act. The Division’s demand for additional evidence in the Disapproval Order puts the Exchange at a competitive disadvantage relative to its peers because it is being asked to expose sensitive information about the Exchange’s costs, operations, and future strategic planning, even though none of the Exchange’s competitors was required to produce similar information when establishing its own connectivity fees.

Moreover, the proposed fees are constrained by competition. As the Exchange explained to the Division, the existence of robust competition among exchanges to attract order flow requires exchanges to keep prices for all of their joint services—including connectivity to the exchanges’ networks—at a pro-competitive level. This conclusion is substantiated by the report prepared by Professor Janusz A. Ordover and Gustavo Bamberger addressing the theory of “Platform Competition” and its application to the pricing of exchanges’ services, including connectivity services.<sup>15</sup> Although the Ordover/Bamberger Statement focuses on the pricing of connectivity services by Nasdaq-affiliated equities exchanges, its “overarching conclusion . . . that the pricing of connectivity services should not be analyzed in isolation” applies with equal force to the BOX Proposal.<sup>16</sup> Accordingly, because BOX is engaged in rigorous competition with other exchanges to attract order flow, it is constrained in its ability to price its joint services—including connectivity services—at supracompetitive levels.

The Division dismissed the Ordover/Bamberger Statement and its discussion of platform theory because “it is not specific to BOX and analyzes the equities markets, not the options market.” Disapproval Order, 84 Fed. Reg. at 13,369 n.118. But the Division did not explain or support its unsubstantiated assertion that competition among options exchanges is different from competition among equities exchanges. The Division further criticized the Exchange for not providing “information regarding the extent to which the establishment of connectivity fees on the Exchange impacted order flow on the Exchange.” *Id.* at 13,369. That order-flow data is unavailable, however, at the time of an initial fee filing. In any event, there is no dispute that “competition for order flow is ‘fierce.’” *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Order Setting Aside Action by Delegated Authority and

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<sup>15</sup> See Attachment to Letter from Lisa J. Fall, BOX, to Brent J. Fields, Secretary, Securities and Exchange Commission (Feb. 19, 2019), <https://www.sec.gov/comments/sr-box-2018-24/srbox201824-4945872-178516.pdf>.

<sup>16</sup> *Id.* ¶ 52.

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Approving Proposed Rule Change Relating to NYSE Arca Data, Release No. 59039, 73 Fed. Reg. 74,770, 74,782 (Dec. 9, 2008)). There is no need for the Exchange to provide additional evidence of competition when the existence of competition has already been acknowledged by both the Commission and the D.C. Circuit.

In addition, the Exchange provided information about market participants' reaction to the BOX Proposal, explaining that "no Participant subject to the new fees for connecting to BOX's network has complained to the Exchange about the fees either formally or informally, and no challenges to those fees have been initiated with the Exchange."<sup>17</sup> The only entity that complained to the Exchange was a non-Participant connectivity provider that ultimately terminated its connection to BOX, underscoring that customers are not required to connect to all exchanges and are free to disconnect if they are unhappy with an exchange's connectivity fees.<sup>18</sup>

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Because the Commission has not acted on the BOX Proposal within the maximum 240-day period prescribed by statute, the rule change has been deemed approved by operation of law. Moreover, even if the Proposal is not already in force, the Disapproval Order arbitrarily treats the Exchange differently from other exchanges and disregards the BOX Proposal's compliance with all aspects of the Act. The Commission should vacate the Disapproval Order and approve the BOX Proposal.

Respectfully submitted,



Amir C. Tayrani

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<sup>17</sup> Letter from Lisa J. Fall, BOX, to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission 2 (Mar. 25, 2019), <https://www.sec.gov/comments/sr-box-2018-24/srbox201824-5190026-183594.pdf>.

<sup>18</sup> Letter from Stefano Durdic, R2G, to Vanessa Countryman, Acting Secretary, Securities and Exchange Commission (Mar. 27, 2019), <https://www.sec.gov/comments/sr-box-2019-04/srbox201904-5214039-183647.pdf>.