

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION



In the Matter of the Petition of:

BOX Exchange LLC

File No. SR-BOX-2019-04

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

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INTRODUCTION

BOX Exchange LLC (the “Exchange”) submits this petition for review of an order by the Division of Trading and Markets (the “Division”) temporarily suspending an immediately effective rule change amending the fee schedule for the BOX Market LLC (“BOX”) options facility. In its filing (the “BOX Proposal”), the Exchange proposed (1) to establish new fees, consistent with fees assessed by other exchanges, for market participants who connect to BOX’s network (the “Connectivity Fees”), and (2) to reclassify BOX’s existing High Speed Vendor Feed charge as a port fee without changing the amount of that charge (the “HSVF Port Fee”). On February 26, 2019, the Division, acting pursuant to delegated authority, issued an Order temporarily suspending the proposed rule change and instituting proceedings to determine whether it should disapprove the rule change.¹

The Commission should grant review and vacate the Division’s Order. This is the third time the Exchange has submitted the BOX Proposal, and the Division has twice before temporarily suspended the BOX Proposal and instituted proceedings to determine whether to approve or disapprove the proposal.² The Exchange filed a petition for review from the First Order Instituting

¹ 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. 85201, File No. SR-BOX-2019-04 (Feb. 26, 2019) (“Order”).

² 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, File No. SR-BOX-2018-37, 83 Fed. Reg. 65,381 (Dec. 14, 2018); Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants

Proceedings. The Commission granted that petition, *see In re BOX Exchange LLC*, Release No. 84614, 83 Fed. Reg. 59,432 (Nov. 16, 2018), but affirmed the Division's order, *see In re BOX Exchange LLC*, Release No. 85184 (Feb. 25, 2019). The Exchange submits this petition to raise and reiterate arguments that the Commission failed to address in its order affirming the First Order Instituting Proceedings.³

In particular, the Commission should grant review and vacate the Order because the Division departed, without explanation, from its years-long practice of permitting other exchanges to charge similar (or higher) connectivity fees. Moreover, the Commission has allowed hundreds of other fee-related rule changes to remain in effect while the respective exchanges and National Market System ("NMS") plans develop and apply procedures for assessing the denial-of-access challenges to those rules filed by the Securities Industry and Financial Markets Association ("SIFMA") and Bloomberg L.P. *In re Applications of Securities Industry and Financial Markets Association and Bloomberg L.P.* ("Remand Order"), Release No. 84433 (Oct. 16, 2018). Unlike each of the other rule changes subject to the Commission's Remand Order, the BOX Proposal has been suspended by the Division and therefore will not remain in effect during the pendency of the

Who Connect to the BOX Network, Release No. 84168, File No. SR-BOX-2018-24, 83 Fed. Reg. 47,947 (Sept. 17, 2018) ("First Order Instituting Proceedings").

³ Although this petition does not repeat arguments that the Commission considered and rejected in its order affirming the First Order Instituting Proceedings, the Exchange continues to maintain that the Division applied the wrong legal standard in temporarily suspending the BOX Proposal and that the BOX Proposal is consistent with the Exchange Act. *See* Petition for Review of Order Temporarily Suspending BOX Exchange LLC's Proposal to Amend the Fee Schedule on BOX Market LLC 6-13, File No. SR-BOX-2018-24 (Sept. 26, 2018) ("Petition for Review of First Order Instituting Proceedings").

remand proceedings. That disparate treatment of the Exchange violates the Administrative Procedure Act (“APA”) and principles of fundamental fairness.

BACKGROUND

I. The BOX Proposal

The Exchange has proposed two amendments to the fee schedule for the BOX options facility.

First, the Exchange proposes to add new Connectivity Fees for both Participants and non-Participants.⁴ These Connectivity Fees apply to every market participant who seeks physical access to BOX’s network. The Connectivity Fees are intended to offset the costs BOX incurs in providing and improving its trading network, including connectivity costs, as well as costs incurred with respect to software and hardware enhancements, quality assurance, and technology support.

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

Other exchanges charge connectivity fees at comparable, or higher, prices. For example, Cboe Exchange charges market participants \$1,500 per month for a 1 Gigabit connection to its network and \$5,000 for a 10 Gigabit connection. *See* Cboe Exchange, Inc. Fees Schedule 14.⁵

⁴ A “Participant” is a “firm, or organization that is registered with [BOX] . . . for purposes of participating in trading on a facility of [BOX].” BOX Exchange LLC Rules, Rule 100(a)(42), <http://rules.boxoptions.com/browse/4e260fc07d1b10009f6f90b11c2ac4f101>.

⁵ <http://www.cboe.com/publish/feeschedule/cboefeeschedule.pdf>.

The Miami International Securities Exchange LLC (“MIAX”) currently sets its fees at \$1,100 for a 1 Gigabit connection and \$5,500 for a 10 Gigabit connection. *See* MIAX Options Fee Schedule 19.⁶ Nasdaq PHLX charges its subscribers \$10,000 each month for a 10 Gigabit fiber connection to its network. *See* Nasdaq Stock Market LLC Rules, General 8, Section 1(b).⁷ And the NYSE American Options Exchange charges \$14,000 a month for a 10 Gigabit circuit. *See* NYSE American Options Fee Schedule 37.⁸

Second, the Exchange proposes to redefine BOX’s HSVF Connection Fee as a Port Fee.⁹ This classification is more accurate because an HSVF subscription does not require a physical connection to BOX. Although market participants must be credentialed by BOX to receive the HSVF, anyone can become credentialed by submitting the required documentation. *See Trading Interface Specification*, BOX Options, <https://boxoptions.com/technology/trading-interface->

⁶ https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Options_Fee_Schedule_03012019.pdf. Although the current fee schedule indicates that MIAX charges \$1,400 for 1 Gigabit connections and \$6,100 for 10 Gigabit connections, the Division temporarily suspended those fee increases, *see* Miami International Securities Exchange LLC, Release No. 84175, File No. SR-MIAX-2018-19, 83 Fed. Reg. 47,955 (Sept. 17, 2018), and MIAX thereafter withdrew its proposed rule change, *see* Notice of Withdrawal of a Proposed Rule Change to Amend the Fee Schedule Regarding Connectivity Fees for Members and Non-Members, Release No. 84398, File No. SR-MIAX-2018-19, 83 Fed. Reg. 52264 (Oct. 16, 2018).

⁷ <http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=c hp%5F1%5F1%5F1%5F4&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Dlcrules%2F>.

⁸ https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf.

⁹ HSVF is “the protocol for receiving BOX market data directly from BOX rather than via one of the commercial data vendor suppliers.” *Trading Interface Specification*, BOX Options, <https://boxoptions.com/technology/trading-interface-specifications/>.

specifications/. The Exchange does not propose to alter the amount of the existing HSVF fee; subscribers to the HSVF will continue to pay \$1,500 per month. As with the Connectivity Fees, BOX's HSVF Port Fee is in line with industry practice. *See* Cboe Data Services, LLC (CDS) Fee Schedule § VI (charging \$500 per month for up to five users to access the Enhanced Controlled Data Distribution Program).¹⁰

II. Procedural History

The Exchange first submitted the BOX Proposal on July 27, 2018.¹¹ On September 17, 2018, the Division, acting pursuant to delegated authority, issued an order temporarily suspending the BOX Proposal and instituting proceedings to determine whether to approve or disapprove the proposed rule change. In explaining its decision to temporarily suspend the BOX Proposal, the Division stated that “[t]he description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding.” First Order Instituting Proceedings, 83 Fed. Reg. at 47,948. “[A]ny failure of an SRO to provide this information,” the Division continued, “may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.” *Id.* at 47,949. The Division stated that it was instituting proceedings to assess whether the BOX Proposal complies with the Act, including “its requirements that exchange fees

¹⁰ <https://www.cboe.org/publish/mdxfees/cboe-cds-fees-schedule-for-cboe-datafeeds.pdf>.

¹¹ *See* Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC Options Facility, Release No. 83728, File No. SR-BOX-2018-24 (July 27, 2018).

be reasonable and equitably allocated; . . . not be unfairly discriminatory; or not impose an unnecessary or inappropriate burden on competition.” *Id.*¹²

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

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

On February 25, 2019, the Commission affirmed the Division’s First Order Instituting Proceedings. *See In re BOX Exchange LLC*, Release No. 85184 (Feb. 25, 2019). According to the Commission, the Division “properly concluded that it was appropriate in the public interest,

¹² The same day the Division suspended the BOX Proposal, it also suspended proposed rule changes from MIAX and MIAX PEARL that increased their connectivity fees. *See Miami International Securities Exchange LLC*, Release No. 84175, File No. SR-MIAX-2018-19, 83 Fed. Reg. 47,955 (Sept. 17, 2018); *MIAX PEARL, LLC*, Release No. 84177, File No. SR-PEARL-2018-16, 83 Fed. Reg. 47,953 (Sept. 17, 2018).

¹³ *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 a Proposed Rule Change*, Release No. 84823, File No. SR-BOX-2018-37, 83 Fed. Reg. 65,381 (Dec. 14, 2018).

for the protection of investors, and otherwise in furtherance of the purpose of [Exchange] Act to temporarily suspend the proposed rule change.” *Id.* at 4. In so ruling, however, the Commission did not address the Exchange’s argument that the First Order Instituting Proceedings arbitrarily and unfairly subjects the Exchange to disfavored treatment when compared to other exchanges. *See* Petition for Review of First Order Instituting Proceedings 13-15.

The next day, the Division temporarily suspended and instituted proceedings to determine whether to approve or disapprove the third BOX Proposal, again relying on the same reasoning as in the First Order Instituting Proceedings. *See* Order at 10-15. The Exchange filed a timely notice of intention to petition for review from the Order on the same day, staying the effectiveness of the Order. *See* 17 C.F.R. § 201.431(e).

ARGUMENT

The Commission should grant this petition and vacate the Order because it arbitrarily and capriciously treats the Exchange differently from other exchanges that have recently established connectivity fees and other types of fees through immediately effective rule changes.

The APA prohibits arbitrary and capricious agency action. *See* 5 U.S.C. § 706. “Government is at its most arbitrary when it treats similarly situated people differently.” *Etelson v. Office of Personnel Mgmt.*, 684 F.2d 918, 926 (D.C. Cir. 1982). For that reason, “it is axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent.” *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 278 (D.C. Cir. 2001) (internal quotation marks omitted).

The Order treats the Exchange differently from similarly situated exchanges in two ways. *First*, as highlighted by Commissioner Jackson, between the beginning of 2016 and the submission

of the three immediately effective rule changes from the Exchange, MIAX, and MIAX PEARL that the Division temporarily suspended on September 17, 2018, the Commission had not rejected *any* of the prior 95 exchange filings related to connectivity. See Commissioner Robert J. Jackson Jr., *Unfair Exchange: The State of America's Stock Markets* n.33 (Sept. 19, 2018), <https://www.sec.gov/news/speech/jackson-unfair-exchange-state-americas-stock-markets>. For example, in June 2018, the CBOE exchange group filed eight immediately effective rule changes increasing connectivity fees by up to 25%,¹⁴ but neither the Commission nor the Division temporarily suspended any of those rule changes (despite a comment letter from Healthy Markets raising objections similar to those it raised in a comment letter objecting to the first BOX Proposal).¹⁵ And the CBOE rule changes—like a number of the other 95 prior connectivity-related filings—pertained to connectivity fees *higher* than those established in the BOX Proposal.

¹⁴ 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).

¹⁵ Compare Healthy Markets Comment Letter on CBOE Filings (July 26, 2018), <https://www.sec.gov/comments/sr-cboebyx-2018-006/cboebyx2018006-4127982-171758>.

Yet, the Division offered no explanation in the Order (or in either of its prior BOX suspension orders) for this differential treatment of the Exchange, or for its sharp departure from its prior practice of permitting connectivity fees established by immediately effective rule changes to remain in place. The Exchange's small market share—only 2.3% of the options market by volume in August 2018¹⁶—and the fact that, unlike its competitors, the Exchange is not a member of a multi-exchange group, make it especially unreasonable for the Division to subject the Exchange to more exacting regulatory scrutiny than its competitors.

Second, this disparate treatment of the Exchange is compounded by the Commission's procedures in the ongoing denial-of-access proceedings initiated by SIFMA and Bloomberg challenging fee-related rule changes of various exchanges and NMS plans. On October 16, 2018, the Commission issued an order setting aside two market-data rule changes by The Nasdaq Stock Market LLC and NYSE Arca, Inc. that SIFMA had challenged as alleged prohibitions or limitations on access under Section 19(d) of the Exchange Act. *In re Application of Securities Industry and Financial Markets Association*, Release No. 84432, Admin. Proc. File No. 3-15350 (Oct. 16, 2018). The same day, the Commission purported to "remand" several hundred other fee challenges—including SIFMA's application challenging the BOX Proposal under Section 19(d), *see In re Securities Industry and Financial Markets Association*, Admin. Proc. File No. 3-18680 (Aug. 24, 2018)—to the respective exchanges and NMS plans to assess SIFMA's and Bloomberg's arguments and issue written decisions determining whether the fees should be set aside, *see*

pdf, *with* Healthy Markets Comment Letter on BOX Proposal (Aug. 23, 2018), <https://www.sec.gov/comments/sr-box-2018-24/srbox201824-4258035-173056.pdf>.

¹⁶ *See* Tabb Group, *Options LiquidityMatrix* (Sept. 17, 2018).

Remand Order at 2-4. The Commission directed each exchange and NMS plan to file a notice with the Commission within six months apprising the Commission of the procedures it had developed or identified to assess the issues raised by SIFMA and Bloomberg, and gave the exchanges and NMS plans twelve months to apply those procedures to each of the pending rule changes. *Id.* at 2. The Commission emphasized that it was expressing “no view regarding the merits of the parties’ challenge to the rule changes” and that its order did “not set aside the challenged rule changes.” *Id.*

Yet, the BOX Proposal *has* effectively been set aside (at least temporarily), which is inconsistent with the Commission’s intent to leave the challenged fees in place during the pendency of the remand proceedings. By temporarily suspending the BOX Proposal, the Order singles out the Exchange for disparate treatment because the Exchange—unlike every other exchange whose rule changes were the subject of the remand ruling—is not permitted to continue charging the challenged fees during the remand proceedings. Indeed, that disparity has been exacerbated by recent Commission action: On December 14, 2018, the Commission issued an order denying a motion filed by the New York Stock Exchange and other exchanges to stay the Remand Order pending judicial resolution of challenges to that order. *See In re Applications of Securities Industry and Financial Markets Association and Bloomberg L.P.*, Release No. 84827 (Dec. 14, 2018). In denying the motion, however, the Commission stated that the six-month and twelve-month deadlines established by the Remand Order will be tolled “pending resolution of the motions for reconsideration that are currently before the Commission with respect to the Remand Order.” *Id.* at 4. That tolling ruling means that the exchanges and NMS plans subject to the Remand Order will have more than a year to complete the remand proceedings and that, *with the*

exception of the BOX Proposal, the challenged rules will remain in force at least until the now-tolled deadlines for completion of the remand proceedings have lapsed.

The Commission failed to address, explain, or justify this differential treatment of BOX in its Remand Order or in its order affirming the Division's First Order Instituting Proceedings. This unexplained departure from the Commission's obligation to treat all similarly situated entities equally—rather than creating one set of requirements for BOX and another, more permissive standard for all other exchanges—is arbitrary, unfair, and irrational.

CONCLUSION

For the foregoing reasons, the Commission should grant the petition for review and vacate the Division's Order temporarily suspending the BOX Proposal. In the event the Commission denies the petition for review, the Commission should extend the period for submitting comments regarding the Division's Order until 21 days after the date on which the Commission denies review.

Respectfully submitted,



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Date: March 5, 2019

CERTIFICATE OF SERVICE

I, Amir C. Tayrani, counsel for BOX Exchange LLC, hereby certify that on March 5, 2019,

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

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
(via hand delivery and facsimile)

Dated: March 5, 2019



Amir C. Tayrani