

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-84168; File No. SR-BOX-2018-24)

September 17, 2018

Self-Regulatory Organizations; BOX Options Exchange LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network

I. Introduction

On July 19, 2018, BOX Options Exchange LLC (“BOX” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change (File No. SR-BOX-2018-24) to amend the BOX fee schedule to establish certain connectivity fees and reclassify its high speed vendor feed (“HSVF”) connection as a port fee. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.³ The proposed rule change was published for comment in the Federal Register on August 2, 2018.⁴ The Commission has received one comment letter on the proposal⁵ and one response letter from the Exchange.⁶ Under Section 19(b)(3)(C) of the Act,⁷

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ See Securities Exchange Act Release No. 83728 (July 27, 2018), 83 FR 37853 (“Notice”).

⁵ See Letter from Tyler Gellasch, Executive Director, The Healthy Markets Association, to Brent J. Fields, Secretary, Commission, dated August 23, 2018 (“Healthy Markets Letter”).

⁶ See Letter from Lisa J. Fall, President, BOX, to Brent J. Fields, Secretary, Commission, dated September 12, 2018 (“BOX Response Letter”).

⁷ 15 U.S.C. 78s(b)(3)(C).

the Commission is hereby: (i) temporarily suspending the proposed rule change; and (ii) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to amend its fee schedule to establish connectivity fees for Participants⁸ and non-Participants who connect to the BOX network. Specifically, the Exchange proposes to charge Participants and non-Participants with 10 Gigabit connections a monthly fee of \$5,000 per connection, and Participants and non-Participants with non-10 Gigabit connections a monthly fee of \$1,000 per connection. The Exchange would charge the applicable connectivity fee for each calendar month to any Participant or non-Participant connected as of the last trading day of that month.

The Exchange also proposes to amend its fee schedule to reclassify the HSVF connection as a port fee and to state that subscribers must be credentialed by the Exchange to receive the HSVF. According to the Exchange, the HSVF subscription is not dependent on a physical connection to the Exchange, and thus is a port and not a physical connectivity option.⁹ The amount of the HSVF fee would remain unchanged, and the Exchange would continue to assess an HSVF port fee of \$1,500 per month for each month a Participant or non-Participant is credentialed to use the HSVF port.

⁸ A participant is defined under BOX Rule 100(a)(41) as a firm or organization that is registered with the Exchange pursuant to the BOX Rule 2000 Series for purposes of participating in trading on a facility of the Exchange (“Participant”).

⁹ See Notice, supra note 4, at 37853.

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,¹⁰ at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Act,¹¹ the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (“SRO”) if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change’s consistency with the Act and the rules thereunder.

As noted above, the Commission received one comment letter on the proposal¹² and one response letter from the Exchange.¹³ The commenter argues that the Exchange did not provide sufficient information in its filing to support a finding that the proposal is consistent with the Act.¹⁴ Specifically, the commenter objects to the Exchange’s reliance on the fees of other exchanges to demonstrate that its fee increases are consistent with the Act. In addition, the commenter argues that the Exchange did not offer any details to support its basis for asserting that the proposed fees are consistent with the Act.¹⁵ The commenter further argues that the requirement that Participants or non-Participants be credentialed to use the HSVF port, added in connection with the redesignation of the HSVF fee, appears to discriminate between market

¹⁰ 15 U.S.C. 78s(b)(3)(C).

¹¹ 15 U.S.C. 78s(b)(1).

¹² See Healthy Markets Letter, supra note 5.

¹³ See BOX Response Letter, supra note 6.

¹⁴ See Healthy Markets Letter, supra note 5, at 4-5.

¹⁵ See id. at 5-6, 10.

participants.¹⁶ In its response letter, the Exchange rejects the commenter’s suggestion that the Exchange should be required to provide additional information to support its belief that the proposed rule change is consistent with the Act. In addition, the Exchange argues that additional review, as requested by the commenter, is unnecessary because the Exchange submitted its proposal as an immediately effective rule change under the Act.¹⁷

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange’s present proposal, they are required to provide a statement supporting the proposal’s basis under the Act and the rules and regulations thereunder applicable to the exchange.¹⁸ The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement “should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.”¹⁹

Among other things, exchange proposed rule changes are subject to Section 6 of the Act, including Sections 6(b)(4), (5), and (8), which requires the rules of an exchange to: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange’s facilities;²⁰ (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair

¹⁶ See id. at 4.

¹⁷ See BOX Response Letter, supra note 6, at 1.

¹⁸ See 17 CFR 240.19b-4 (Item 3 entitled “Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change”).

¹⁹ See id.

²⁰ 15 U.S.C. 78f(b)(4).

discrimination between customers, issuers, brokers, or dealers;²¹ and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.²²

In temporarily suspending the Exchange's fee change, the Commission intends to further consider whether assessing the proposed fees to connect to the Exchange is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.²³

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.²⁴

IV. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C)²⁵ and 19(b)(2)(B) of the Act²⁶ to determine whether the proposed rule change should be approved or

²¹ 15 U.S.C. 78f(b)(5).

²² 15 U.S.C. 78f(b)(8).

²³ See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

²⁴ For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁵ 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

²⁶ 15 U.S.C. 78s(b)(2)(B).

disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,²⁷ the Commission is providing notice of the grounds for possible disapproval under consideration:

- Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities,”²⁸
- Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to perfect the operation of a free and open market and a national market system” and “protect investors and the public interest,” and not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers,”²⁹ and
- Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”³⁰

As noted above, the proposal imposes new fees for physical connections to the Exchange.

The Exchange states that these fees would allow the Exchange to recover costs associated with

²⁷ 15 U.S.C. 78s(b)(2)(B).

²⁸ 15 U.S.C. 78f(b)(4).

²⁹ 15 U.S.C. 78f(b)(5).

³⁰ 15 U.S.C. 78f(b)(8).

offering connections.³¹ In addition, the Exchange believes that it does not have market power necessary to set fees that would be inconsistent with the Act.³² The commenter, among other concerns, asserts that the Exchange has not offered sufficient detail to support that the proposed fees are consistent with the Act and, in particular, whether the proposed fees are reasonable.³³

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”³⁴ The 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,³⁵ and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.³⁶

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated; be designed to perfect the mechanism of a free and open market and the national market system, protect investors and the public interest, and not be unfairly

³¹ See Notice, supra note 4, at 37854.

³² See id.

³³ See Healthy Markets Letter, supra note 5, at 5-6, 10.

³⁴ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

³⁵ See id.

³⁶ See id.

discriminatory; or not impose an unnecessary or inappropriate burden on competition.³⁷

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register]. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.³⁸

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-BOX-2018-

³⁷ See 15 U.S.C. 78f(b)(4), (5), and (8).

³⁸ 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

24 on the subject line.

Paper comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-BOX-2018-24. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BOX-2018-24 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,³⁹ that File No. SR-BOX-2018-24 be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁰

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Assistant Secretary

³⁹ 15 U.S.C. 78s(b)(3)(C).

⁴⁰ 17 CFR 200.30-3(a)(57) and (58).