



SECURITIES AND EXCHANGE COMMISSION

Securities Exchange Act of 1934

Release No. 34-85184 / February 25, 2019

In the Matter of the

BOX Exchange LLC

Regarding a 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 (File No. SR-BOX-2018-24)

Order Affirming Order by Delegated Authority Temporarily Suspending and Instituting Proceedings on SR-BOX-2018-24 and Notice of Additional Comment Period for the Proceedings

I. Background

On July 19, 2018, BOX Exchange LLC (f/k/a 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 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change (SR-BOX-2018-24) to amend the fee schedule on the BOX Market LLC options facility to establish certain connectivity fees and reclassify its high speed vendor feed connection as a port fee. The proposed rule change was published in the Federal Register on August 2, 2018.³ The Commission received one comment letter on the proposal urging the Commission to suspend the proposal and institute proceedings.⁴ BOX submitted a response to comments on September 12, 2018.⁵

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 83728 (July 27, 2018), 83 FR 37853.

⁴ See letter to Brent J. Fields, Secretary, Commission, from Tyler Gellasch, Executive Director, The Healthy Markets Association, dated August 23, 2018.

⁵ See letter to Brent J. Fields, Secretary, Commission, from Lisa J. Fall, President, BOX, dated September 12, 2018.

On September 17, 2018, the Division of Trading and Markets (“Division”), pursuant to delegated authority,⁶ issued an order temporarily suspending the proposed rule change pursuant to Section 19(b)(3)(C) of the Act⁷ and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Act⁸ to determine whether to approve or disapprove the proposed rule change (“Order Instituting Proceedings”).⁹ On October 17, 2018, the Commission received an additional comment letter in response to the Order Instituting Proceedings, supporting the decision to suspend and institute proceedings on the proposed fee changes.¹⁰

On September 19, 2018, pursuant to Rule 430 of the Commission’s Rules of Practice,¹¹ the Exchange filed a notice of intention to petition for review of the Order Instituting Proceedings. Pursuant to Rule 431(e) of the Commission’s Rules of Practice,¹² a notice of intention to petition for review results in an automatic stay of the action by delegated authority. On September 26, 2018, the Exchange filed a petition for review of the Order Instituting Proceedings.¹³

On November 16, 2018, the Commission granted BOX’s Petition. Further, the Commission discontinued the automatic stay of the delegated action. In addition, the Commission ordered that any party or other person could file a statement in support or in opposition to the action made by delegated authority provided such statement was filed on or before December 10, 2018.¹⁴

On December 7, 2018, the Commission received a statement from BOX opposing the action made by delegated authority and urging the Commission to lift the suspension and approve the proposed rule change.¹⁵ In its letter, BOX reiterates the arguments from its Petition that its proposed fees are lower than comparable fees charged by other exchanges and are

⁶ 17 CFR 200.30–3(a)(57) and (58).

⁷ 15 U.S.C. 78s(b)(3)(C).

⁸ 15 U.S.C. 78s(b)(2)(B).

⁹ See Securities Exchange Act Release No. 84168 (September 17, 2018), 83 FR 47947 (September 21, 2018).

¹⁰ See letter to Brent J. Fields, Secretary, Commission, from Theodore R. Lazo, Managing Director and Associate General Counsel, and Ellen Greene, Managing Director, Financial Services Operations, Securities Industry and Financial Markets Association, dated October 15, 2018.

¹¹ 17 CFR 201.430.

¹² 17 CFR 201.431(e).

¹³ Petition for Review of Order Temporarily Suspending BOX Exchange LLC’s Proposal to Amend the Fee Schedule on BOX Market LLC, dated September 26, 2018 (“Petition”).

¹⁴ See Securities Exchange Act Release No. 84614 (November 16, 2018), 83 FR 59432 (November 23, 2018).

¹⁵ See letter to Brent J. Fields, Secretary, Commission, from Lisa J. Fall, President, BOX, dated December 7, 2018.

designed to offset costs of maintaining and improving its trading systems.¹⁶ BOX's letter also includes additional statements describing in general terms the types of costs its proposed fees are intended to support. Specifically, BOX states that these may include costs related to connectivity, software and hardware enhancements, software development, quality assurance, technology support, network performance and stability improvements, and third-party data center rental and utilities.¹⁷ On December 10, 2018, the Commission received a second statement from BOX making identical arguments.¹⁸

On January 2, 2019, the Commission received two additional comment letters further commenting on BOX's proposed connectivity fees and arguing that the Exchange has not provided sufficient information to allow the Commission to assess whether the proposed fees are consistent with the Act.¹⁹

On January 25, 2019, pursuant to Section 19(b)(2) of the Act,²⁰ the Commission designated a longer period within which to approve the proposed or disapprove the proposed rule change.²¹

On February 19, 2019, the Commission received another letter from BOX.²² In its letter, BOX argues that its provision of connectivity services is related to its trading function. BOX asserts that competition for order flow with other exchanges constrains its ability to price its services, including connectivity.²³ Therefore, BOX claims such competition ensures that its proposed fees are reasonable, equitable, and not unfairly discriminatory and do not impose an

¹⁶ See id. at 2-3.

¹⁷ See id. at 2.

¹⁸ See letter to Brent J. Fields, Secretary, Commission, from Amir C. Tayrani, Gibson, Dunn & Crutcher LLP, dated December 10, 2018.

¹⁹ See letters to Brent J. Fields, Secretary, Commission, from Tyler Gellasch, Executive Director, The Healthy Markets Association, dated January 2, 2019 and Chester Spatt, Pamela R. and Kenneth B. Dunn Professor of Finance, Tepper School of Business, Carnegie Mellon University, to Brent J. Fields, Secretary, Commission, dated January 2, 2019.

²⁰ 15 U.S.C. 78s(b)(2).

²¹ See Securities Exchange Act Release No. 84989 (January 25, 2019), 84 FR 858 (January 31, 2019). The Commission noted that March 30, 2019, is a Saturday and, therefore, the Commission designated March 29, 2019, as the date by which the Commission shall either approve or disapprove the proposed rule change.

²² See letter to Brent J. Fields, Secretary, Commission, from Lisa J. Fall, President, BOX, dated February 19, 2019.

²³ See id. at 2.

unnecessary or inappropriate burden on competition.²⁴ As a result, BOX claims it is unnecessary to provide detailed cost information in order to justify its proposed fees.²⁵

II. Discussion

The Commission's Rules of Practice set forth procedures for the review of actions made pursuant to delegated authority. Rule 431(a) provides that the Commission may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, any action made pursuant to authority delegated in 17 CFR 200.30-1 through 200.30-18.²⁶ For the reasons discussed below, the Commission affirms the temporary suspension of the proposed rule change and the institution of proceedings.

Instituting proceedings and keeping in place the temporary suspension provides a process for the Commission to further consider whether the proposed rule change is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, this approach will allow the Commission to consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that (i) an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; (ii) do not permit unfair discrimination between customers, issuers, brokers, or dealers; and (iii) do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.²⁷ Accordingly, the Order Instituting Proceedings properly concluded that it was 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 change and to institute proceedings to determine whether the proposed rule change should be approved or disapproved in view of the significant legal and policy issues raised by the proposal.²⁸

The Commission recognizes the issues and views raised by the commenters and BOX as to the impact of and justification for the proposed fee changes. Instituting proceedings provides an opportunity for additional comment on, and Commission consideration of, these matters, as well as an opportunity for the Commission to more fully assess whether the filing is consistent with the Act.

Further, suspending the filing and instituting proceedings constitutes an interim step in the Commission's consideration of the substantive issues raised by the filing, and does not constitute a final disposition of the proposed rule change. As reflected in the Order Instituting Proceedings, the Commission has not reached any conclusions with respect to the issues involved.²⁹ To the contrary, the Commission sought additional comment with respect to the

²⁴ See id.

²⁵ See id. at 3-4.

²⁶ See 17 CFR 201.431(a).

²⁷ See Order Instituting Proceedings, supra note 9, at 47948.

²⁸ See id.

²⁹ See id.

concerns raised by the filing,³⁰ and noted that the institution of proceedings provides the Commission the opportunity to more fully assess the issues raised. In addition, as discussed below, the Commission is providing an additional comment and rebuttal period in this order. This will help the Commission further assess the proposed rule change and inform its ultimate decision as to whether the proposed rule change is consistent with the Act.

As noted above, during the proceedings the Commission will consider whether the proposal 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.

The Commission also believes it is appropriate to provide that (1) interested persons may submit comments related to SR-BOX-2018-24 until 8 days from publication of this order in the Federal Register and (2) rebuttal comments may be submitted until 15 days from publication of this order in the Federal Register.

For the reasons stated above, it is hereby:

ORDERED that the Division's Order Instituting Proceedings by delegated authority is hereby affirmed; and

It is further ORDERED that interested persons may submit comments related to SR-BOX-2018-24 until 8 days from publication in the Federal Register; rebuttal comments may be submitted until 15 days from publication in the Federal Register

By the Commission.

Eduardo A. Aleman,
Deputy Secretary.

³⁰ See id.

