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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-85459; File Nos. SR-BOX-2018-24; SR-BOX-2018-37; and SR-BOX-2019-04]

### **Self-Regulatory Organizations; BOX Exchange LLC; 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**

March 29, 2019.

#### I. Introduction

On July 19, 2018, BOX 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”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change (SR-BOX-2018-24) (“BOX 1”) to amend the BOX fee schedule to establish certain connectivity fees and reclassify its high speed vendor feed (“HSVF”) connection as a port fee. BOX 1 was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.<sup>3</sup> BOX 1 was published for comment in the Federal Register on August 2, 2018.<sup>4</sup> The

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

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

Commission initially received one comment letter on BOX 1<sup>5</sup> and one response letter from the Exchange.<sup>6</sup> On September 17, 2018, the Division of Trading and Markets (the “Division”), acting on behalf of the Commission by delegated authority, issued an order temporarily suspending BOX 1 pursuant to Section 19(b)(3)(C) of the Act<sup>7</sup> and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Act<sup>8</sup> to determine whether to approve or disapprove BOX 1 (“Order Instituting Proceedings I”).<sup>9</sup> The Commission thereafter received three additional comment letters on BOX 1<sup>10</sup> and one additional response letter from the Exchange.<sup>11</sup>

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

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

<sup>7</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>8</sup> 15 U.S.C. 78s(b)(2)(B).

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

<sup>10</sup> See Letters from Theodore R. Lazo, Managing Director and Associate General Counsel, and Ellen Greene, Managing Director, Financial Services Operations, Securities Industry and Financial Markets Association (“SIFMA”), to Brent J. Fields, Secretary, Commission, dated October 15, 2018 (“SIFMA Letter I”); Tyler Gellasch, Executive Director, The Healthy Markets Association, to Brent J. Fields, Secretary, Commission, dated January 2, 2019 (“Healthy Markets Letter II”); 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 (“Spatt Letter”).

<sup>11</sup> See Letter from Lisa J. Fall, President, BOX, to Brent J. Fields, Secretary, Commission, dated February 19, 2019 (“BOX Response Letter II”).

On September 19, 2018, pursuant to Rule 430 of the Commission’s Rules of Practice,<sup>12</sup> the Exchange filed a notice of intention to petition for review of Order Instituting Proceedings I.<sup>13</sup> Such action preserved the Exchange’s right to file a petition to review the Division’s action by delegated authority and, pursuant to Rule 431(e) of the Commission’s Rules of Practice, triggered an automatic stay of the action by delegated authority, which reinstated the Exchange’s authority to charge the connectivity fees at issue.<sup>14</sup> On September 26, 2018, the Exchange filed a petition for review of Order Instituting Proceedings I.<sup>15</sup> On November 16, 2018, the Commission granted the BOX 1 Petition and discontinued the automatic stay of the delegated action,<sup>16</sup> thereby suspending the Exchange’s ability to charge the connectivity fees at issue while the Commission conducts proceedings to consider the proposed fees’ consistency with the Act. In its order granting the BOX 1 Petition, the Commission also ordered that any party or other person could file a statement by December 10, 2018, in support or in opposition to the

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<sup>12</sup> 17 CFR 201.430.

<sup>13</sup> See Letter from Amir C. Tayrani, Partner, Gibson, Dunn & Crutcher LLP, to Brent J. Fields, Secretary, Commission, dated September 19, 2018. Pursuant to Rule 431(e) of the Commission’s Rules of Practice, a notice of intention to petition for review results in an automatic stay of the action by delegated authority. 17 CFR 201.431(e).

<sup>14</sup> 17 CFR 201.431(e).

<sup>15</sup> See 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 (“BOX 1 Petition”).

<sup>16</sup> See Securities Exchange Act Release No. 84614 (November 16, 2018), 83 FR 59432 (November 23, 2018).

action made by delegated authority.<sup>17</sup> The Commission received two such statements from the Exchange.<sup>18</sup> On January 25, 2019, pursuant to Section 19(b)(2) of the Act,<sup>19</sup> the Commission designated a longer period within which to approve or disapprove BOX 1.<sup>20</sup> On February 25, 2019, the Commission issued an order affirming the staff’s action by delegated authority, temporarily suspending the rule filing and instituting proceedings.<sup>21</sup>

On November 30, 2018, the Exchange filed with the Commission a second proposed rule change (SR-BOX-2018-37) (“BOX 2”) to amend the BOX fee schedule to establish the same fees established by BOX 1.<sup>22</sup> BOX 2 was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.<sup>23</sup> On December 14, 2018, the Division, acting on behalf of the Commission by delegated authority, issued a notice of BOX 2

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<sup>17</sup> See id.

<sup>18</sup> See Letter from Lisa J. Fall, President, BOX, to Brent J. Fields, Secretary, Commission, to Brent J. Fields, Secretary, Commission, dated December 7, 2018 (“BOX Statement”); and Letter from Amir C. Tayrani, Gibson, Dunn & Crutcher LLP, to Brent J. Fields, Secretary, Commission, dated December 10, 2018 (“Gibson Dunn Statement”) (submitted on behalf of the Exchange by its counsel).

<sup>19</sup> 15 U.S.C. 78s(b)(2).

<sup>20</sup> See Securities Exchange Act Release No. 84989, 84 FR 858 (January 31, 2019). The Commission designated March 29, 2019, as the date by which the Commission would approve or disapprove BOX 1.

<sup>21</sup> See Securities Exchange Act Release No. 85184, 84 FR 6842 (February 28, 2019).

<sup>22</sup> The Commission notes that the proposed fees in BOX 2 are identical to those proposed in BOX 1 and the Form 19b-4 for the two filings are substantively identical, except BOX 2 also identifies the categories of the Exchange’s costs to offer connectivity services and states that the proposed fees would “offset” the Exchange’s costs.

<sup>23</sup> 15 U.S.C. 78s(b)(3)(A).

and order temporarily suspending BOX 2 pursuant to Section 19(b)(3)(C) of the Act<sup>24</sup> and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Act<sup>25</sup> to determine whether to approve or disapprove BOX 2 (“Order Instituting Proceedings II”).<sup>26</sup> The Commission received two comment letters on BOX 2.<sup>27</sup>

On February 13, 2019, the Exchange filed with the Commission a third proposed rule change (SR-BOX-2019-04) (“BOX 3” and, together with BOX 1 and BOX 2, the “proposed rule changes”) to amend the BOX fee schedule to establish the same fees proposed by BOX 1 and BOX 2.<sup>28</sup> BOX 3 was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.<sup>29</sup> On February 26, 2019, the Division, acting on behalf of the Commission by delegated authority, issued a notice of BOX 3 and order temporarily suspending BOX 3 pursuant to Section 19(b)(3)(C) of the Act<sup>30</sup> and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Act<sup>31</sup> to determine whether to approve or disapprove BOX 3

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<sup>24</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>25</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>26</sup> See Securities Exchange Act Release No. 84823 (December 14, 2018), 83 FR 65381 (December 20, 2018) (“BOX 2 Notice and OIP”).

<sup>27</sup> See Healthy Markets Letter II, supra note 10; Spatt Letter, supra note 10. The Commission notes that these two letters were also submitted on BOX 1.

<sup>28</sup> The Commission notes that the proposed fees in BOX 3 are identical to those proposed in BOX 2 and the Form 19b-4 for the two filings are substantively identical.

<sup>29</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>30</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>31</sup> 15 U.S.C. 78s(b)(2)(B).

(“Order Instituting Proceedings III”).<sup>32</sup> On February 26, 2019, pursuant to Rule 430 of the Commission’s Rules of Practice,<sup>33</sup> the Exchange filed a notice of intention to petition for review of Order Instituting Proceedings III.<sup>34</sup> Such action preserved the Exchange’s right to file a petition to review the Division’s action by delegated authority and, pursuant to Rule 431(e) of the Commission’s Rules of Practice, triggered an automatic stay of the action by delegated authority, which reinstated the Exchange’s authority to charge the connectivity fees at issue.<sup>35</sup> On March 5, 2019, the Exchange filed a petition for review of Order Instituting Proceedings III.<sup>36</sup> On March 12, 2019, the Commission received a comment letter on BOX 3, supporting the Division’s action to suspend and institute proceedings in BOX 3.<sup>37</sup> On March 19, 2019, the Commission received another comment letter on the proposed rule changes expressing further

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<sup>32</sup> See Securities Exchange Act Release No. 85201, 84 FR 7146 (March 1, 2019).

<sup>33</sup> 17 CFR 201.430.

<sup>34</sup> See Letter from Amir C. Tayrani, Partner, Gibson, Dunn & Crutcher LLP, to Brent J. Fields, Secretary, Commission, dated February 26, 2019. Pursuant to Rule 431(e) of the Commission’s Rules of Practice, a notice of intention to petition for review results in an automatic stay of the action by delegated authority. 17 CFR 201.431(e).

<sup>35</sup> 17 CFR 201.431(e).

<sup>36</sup> See Petition for Review of Order Temporarily Suspending BOX Exchange LLC’s Proposal to Amend the Fee Schedule on BOX Market LLC, dated March 5, 2019 (“BOX 3 Petition”).

<sup>37</sup> See Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Vanessa Countryman, Acting Secretary, Commission, dated March 12, 2019 (“SIFMA Letter II”).

concerns about the proposals<sup>38</sup> and an additional response letter from BOX.<sup>39</sup> On March 22, 2019, the Commission granted the BOX 3 Petition, issued an order affirming the action by delegated authority, and lifted the stay.<sup>40</sup> On March 27, the Commission received an additional comment letter on the proposed rule changes arguing that the exchange has not provided necessary information showing how the proposed connectivity fees comply with the Act and challenging factual statements made in BOX's third response letter.<sup>41</sup> The Commission received an additional comment letter on March 28, 2019 opposing BOX 3.<sup>42</sup>

The proposed rule changes are therefore before the Commission pursuant to Order Instituting Proceedings I, Order Instituting Proceedings II and Order Instituting Proceedings III.

This order disapproves the proposed rule changes.

## II. Description of the Proposed Rule Changes

The Exchange proposes to amend its fee schedule to establish connectivity fees for

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<sup>38</sup> See Letter from Tyler Gellasch, Executive Director, The Healthy Markets Association, to Brent J. Fields, Secretary, Commission, dated March 19, 2019 (“Healthy Markets Letter III”).

<sup>39</sup> See Letter from Lisa J. Fall, President, BOX, to Brent J. Fields, Secretary, Commission, dated March 25, 2019 (“BOX Response Letter III”).

<sup>40</sup> See Securities Exchange Act Release No. 85399, 84 FR11850 (March 28, 2019).

<sup>41</sup> See Letter from Stefano Durdic, R2G, to Vanessa Countryman, Acting Secretary, Commission, dated March 27, 2019 (“R2G Letter”).

<sup>42</sup> See Letter from Anand Prakash, Managing Partner & Director of Software Development, Cutler Group, LP, to Vanessa Countryman, Acting Secretary, Commission, dated March 28, 2019 (“Prakash Letter”).

Participants<sup>43</sup> 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.<sup>44</sup> 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.

### III. Discussion and Commission Findings

Under Section 19(b)(2)(C) of the Act,<sup>45</sup> the Commission shall approve a proposed rule change of a self-regulatory organization (“SRO”) if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are

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<sup>43</sup> 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”).

<sup>44</sup> See Notice, *supra* note 4, at 37853.

<sup>45</sup> 15 U.S.C. 78s(b)(2)(C).

applicable to such organization.<sup>46</sup> The Commission shall disapprove a proposed rule change if it does not make such a finding.<sup>47</sup> Rule 700(b)(3) of the Commission’s Rules of Practice states that the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change” and that a “mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.”<sup>48</sup> Rule 700(b)(3) also states that “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.”<sup>49</sup> Both the D.C. Circuit and the Commission have recently addressed the application of these and analogous standards, and the decision to disapprove the proposed rule changes is best understood in the context of that precedent.

A. The relevant precedent

1. The *NetCoalition* litigation

In 2010, the D.C. Circuit vacated the Commission’s approval of a fee rule filed by NYSE Arca, Inc. (“NYSE Arca”)<sup>50</sup> The court held that focusing on whether competitive market forces constrained the exchange’s pricing decisions was an acceptable basis for assessing the fairness

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<sup>46</sup> 15 U.S.C. 78s(b)(2)(C)(i).

<sup>47</sup> 15 U.S.C. 78s(b)(2)(C)(ii); see also 17 CFR 201.700(b)(3).

<sup>48</sup> 17 CFR 201.700(b)(3).

<sup>49</sup> Id.

<sup>50</sup> NetCoalition v. SEC, 615 F.3d 525, 534-35, 539-44 (D.C. Cir. 2010) (“NetCoalition I”).

and reasonableness of the fees, but determined that the record did not factually support the conclusion that significant competitive forces limited NYSE Arca's ability to set unfair or unreasonable prices. The D.C. Circuit vacated and remanded for further proceedings.

Subsequently, NYSE Arca filed with the Commission a new rule that imposed the same fees that had been vacated by the D.C. Circuit, but that designated the filing as effective immediately pursuant to a change in the law made by the Dodd-Frank Act.<sup>51</sup> The Commission did not suspend that filing, as Dodd-Frank permitted, and another appeal to the D.C. Circuit ensued. In that appeal, the court held that it lacked jurisdiction to consider challenges to the Commission's non-suspension of the fees under Section 19(b) of the Act.<sup>52</sup> But the court, in so holding, "[took] the Commission at its word" that the Commission would "make the [Exchange Act] section 19(d) process available to parties" seeking to challenge fees as improper limitations or prohibitions of access to exchange services, and recognized that this Commission process would "open[] the gate to [judicial] review."<sup>53</sup>

Following that decision, SIFMA filed a challenge with the Commission to NYSE Arca's 2010 fee rule under Section 19(d) of the Act on the ground that the fee rule was an improper

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<sup>51</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111–203, 124 Stat. 1376 (July 21, 2010); see also 15 U.S.C. 78s(b)(3)(A) (permitting SROs to designate as immediately effective rule changes "establishing or changing a due, fee, or other charge imposed by the [SRO] on any person, whether or not the person is a member of the [SRO]").

<sup>52</sup> NetCoalition v. SEC, 715 F.3d 342 (D.C. Cir. 2013) ("NetCoalition II").

<sup>53</sup> NetCoalition II, 715 F.3d at 353.

limitation of access to exchange services. The Commission consolidated that challenge with another challenge to a fee rule filed by The Nasdaq Stock Market LLC.<sup>54</sup>

On October 16, 2018, the Commission issued its decision in the consolidated proceeding.<sup>55</sup> The Commission held that in that case the exchanges had failed to meet their burden of establishing that certain challenged fees were consistent with the purposes of the Act. Specifically, the Commission concluded that the exchanges had not established that competitive forces constrained their pricing decisions with respect to the fees at issue and that the fees were fair and reasonable and not unreasonably discriminatory. In so finding, the Commission stated specifically that it was not making a determination that the fees themselves were not fair and reasonable. Rather, the Commission explained that it was possible the challenged fees could be shown to be fair and reasonable and otherwise consistent with the Act, but that the evidence provided by the exchanges failed to satisfy their burden on the existing record. The opinion reviewed each of the exchanges' arguments and explained why it was insufficient to justify approving the fees. Accordingly, the Commission set those fees aside.<sup>56</sup> During the pendency of this Section 19(d) challenge, over 60 related challenges to exchange rule changes and NMS plan amendments were filed with the Commission. Contemporaneously with the Commission's

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<sup>54</sup> See In the Matter of the Application of SIFMA, Securities Exchange Act Release No. 72182, 21 (May 16, 2014), available at <https://www.sec.gov/litigation/opinions/2014/34-72182.pdf>.

<sup>55</sup> See In the Matter of the Application of SIFMA, Securities Exchange Act Release No. 84432 (October 16, 2018), available at <https://www.sec.gov/litigation/opinions/2018/34-84432.pdf> (“SIFMA Decision”).

<sup>56</sup> Id. at 17-54.

October 16, 2018 decision, the Commission issued a separate order (“Remand Order”) remanding those related challenges to the respective exchanges and NMS plan participants and instructed the exchanges and plan participants to consider the impact of the October 16, 2018 decision on the challengers’ assertions that the contested rule changes and plan amendments should be set aside under Section 19(d) of the Act.<sup>57</sup> The Commission further directed the exchanges and NMS plan participants to develop or identify fair procedures for assessing the challenged rule changes and NMS plan amendments as potential denials or limitations of access to services.<sup>58</sup>

## 2. Susquehanna

In August 2017, the D.C. Circuit issued its decision in Susquehanna International Group v. SEC.<sup>59</sup> There, the court held that the Commission’s order approving a proposed rule change filed by the Options Clearing Corporation (“OCC”)—its “Capital Plan”—did not provide the reasoned analysis required under the Act and the Administrative Procedure Act, instead relying too heavily, the court said, on OCC’s findings and determinations.<sup>60</sup> The court emphasized that the Commission’s “unquestioning reliance on OCC’s defense of its own actions is not enough to justify approving the Plan”; rather, the Commission “should have critically reviewed OCC’s

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<sup>57</sup> See In the Matter of the Applications of SIFMA and Bloomberg L.P., Securities Exchange Act Release No. 84433 (October 16, 2018), available at <https://www.sec.gov/litigation/opinions/2018/34-84433.pdf> (“Remand Order”).

<sup>58</sup> Id.

<sup>59</sup> 866 F.3d 442 (D.C. Cir. 2017).

<sup>60</sup> Id. at 447 (citing NetCoalition I).

analysis or performed its own.”<sup>61</sup> Nor, according to the court, could the Commission reach a conclusion “unsupported by substantial evidence.”<sup>62</sup> The D.C. Circuit remanded the case to the Commission for further proceedings.

Following the remand, the Commission disapproved the OCC Capital Plan because it determined that the information OCC submitted before the Commission was insufficient to support a finding that the plan was consistent with the Act.<sup>63</sup> In reaching this determination, the Commission reiterated the D.C. Circuit’s holding that it must “critically evaluate the representations made and the conclusions drawn” by the SRO in determining whether a proposed rule change is consistent with the Act.<sup>64</sup>

### 3. NMS plan orders and fee filings

On May 1, 2018, the Commission issued orders summarily abrogating immediately effective plan amendments that the Consolidated Tape Association (“CTA”)/Consolidated Quotation (“CQ”) Plan and Nasdaq Unlisted Trading Privileges (“UTP”) Plan filed regarding certain fees.<sup>65</sup> Each order explained that “[t]he Commission is concerned that the information

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<sup>61</sup> Id.

<sup>62</sup> Id. at 447-48.

<sup>63</sup> See Securities Exchange Act Release No. 85121 (February 13, 2019), 84 FR 5157 (February 20, 2019) (SR-OCC-2015-02).

<sup>64</sup> See Securities Exchange Act Release No. 85121 (February 13, 2019), 84 FR 5157 (February 20, 2019) (SR-OCC-2015-02).

<sup>65</sup> See Securities Exchange Act Release No. 83148 (May 1, 2018), 83 FR 20126 (May 7, 2018) (SR-CTA/CQ-2018-01) (“CTA/CQ Order”) (Order of Summary Abrogation of the Twenty-Third Charges Amendment to the Second Restatement of the CTA Plan and the Fourteenth Charges Amendment to the Restated CQ Plan); Securities Exchange Act

and justifications provided . . . are not sufficient for the Commission to determine whether the Amendment is consistent with the Act”—specifically, the amendments raised questions “as to whether the changes will result in fees that are fair and reasonable, not unreasonably discriminatory, and that will not impose an undue or inappropriate burden on competition under Section 11A of the Act.”<sup>66</sup> The Commission determined that the procedures in Rule 608(b)(2) of Regulation NMS, which are similar to those for SROs under Section 19(b)(2)(B) of the Act, would provide a better mechanism to make those determinations.<sup>67</sup>

In addition, on July 31, 2018, the Commission issued an order staying the effectiveness of CTA/CQ plan amendments regarding certain fees after Bloomberg filed an application for review and requested a stay.<sup>68</sup> The order stated that the fairness and reasonableness of an amendment “must be explained and supported in such a manner that the Commission has sufficient information before it to satisfy its statutorily mandated review function.”<sup>69</sup> But CTA’s filing did “not identify any basis by which CTA’s fee changes could be assessed for fairness and

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Release No. 83149 (May 1, 2018), 83 FR 20129 (May 7, 2018), (S7-24-89) (“UTP Order”)(Order of Summary Abrogation of the Forty-Second Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis).

<sup>66</sup> See CTA/CQ Order, *supra* note 65, at 20128; UTP Order, *supra* note 65, at 20130.

<sup>67</sup> See 17 CFR 242.608(b)(2); 15 U.S.C. 78s(b)(2)(B).

<sup>68</sup> See *In the Matter of Bloomberg L.P.*, Securities Exchange Act Release No. 83755 (July 31, 2018), available at <https://www.sec.gov/litigation/opinions/2018/34-83755.pdf>.

<sup>69</sup> *Id.* at 14-15.

reasonableness.”<sup>70</sup> The Commission found that CTA’s “unsupported declaration” that it “believe[d] that the proposed amendment[s are] fair and reasonable and provide[] for an equitable allocation of . . . fees” was not adequate.<sup>71</sup> Following the stay order, the plan participants rescinded the amendments.<sup>72</sup>

After Susquehanna, and about the same time the Commission instituted proceedings on BOX 1, the Commission also instituted proceedings on proposed rule changes submitted by the Miami International Securities Exchange LLC (“MIAX”) and MIAX PEARL LLC (“PEARL”) to increase their respective connectivity fees.<sup>73</sup> In instituting proceedings on the MIAX and PEARL connectivity filings, the Commission noted that exchange statements in support of their

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<sup>70</sup> Id. at 15.

<sup>71</sup> Id. at 14.

<sup>72</sup> See Securities Exchange Act Release No. 84194 (September 18, 2018), 83 FR 48356 (September 24, 2018) (SR-CTA/CQ-2018-03).

<sup>73</sup> See Securities Exchange Act Release Nos. 84175 (September, 17, 2018), 83 FR 47955 (September 21, 2018) (SR-MIAX-2018-19); and 84177 (September 17, 2018), 83 FR 47953 (September 21, 2018) (SR-PEARL-2018-16) (orders suspending and instituting proceedings to determine whether to approve or disapprove connectivity fees, which were filed by MIAX and PEARL on July 31, 2018). Both filings were withdrawn on October 5, 2018. MIAX and PEARL submitted the proposed connectivity fees again on September 18, 2018. In those filings, MIAX and PEARL stated that the fee increase would partially offset costs associated with maintaining and expanding a team of highly-skilled network engineers, increasing fees charged by the Exchange’s third-party data center operator, and costs associated with projects and initiatives designed to improve overall network performance and stability. The Division, acting on behalf of the Commission by delegated authority issued orders temporarily suspending the new connectivity fee filings and simultaneously instituting proceedings to determine whether to approve or disapprove the new connectivity fee filings. See Securities Exchange Act Release Nos. 84357 (October 3, 2018), 83 FR 50976 (October 10, 2018) (SR-MIAX-2018-25); and 84358 (October 3, 2018) 83 FR 51022 (October 10, 2018) (SR-PEARL-2018-19). MIAX and PEARL withdrew their respective filings on November 23, 2018.

proposals should be sufficiently detailed and specific to support a finding that the proposed rules are consistent with the Act.<sup>74</sup> The Commission also stated that it intended to further consider whether increasing certain connectivity fees to the exchange is consistent with the statutory requirements applicable to a national securities exchange under the Act.<sup>75</sup>

B. The proposed rule changes at issue here

The Commission has historically applied a “market-based” test in its assessment of market data fees, which we believe present similar issues as the connectivity fees proposed herein. Under that test, the Commission considers “whether the exchange was subject to significant competitive forces in setting the terms of its proposal for [market data], including the level of any fees.”<sup>76</sup> If an exchange meets this burden, the Commission will find that its fee rule is consistent with the Act unless “there is a substantial countervailing basis to find that the terms” of the rule violate the Act or the rules thereunder.<sup>77</sup> If an exchange cannot demonstrate that it was subject to significant competitive forces, it must “provide a substantial basis, other than competitive forces, . . . demonstrating that the terms of the [fee] proposal are equitable, fair,

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<sup>74</sup> See Securities Exchange Act Release Nos. 84175 (September, 17, 2018), 83 FR 47955 (September 21, 2018) (SR-MIAX-2018-19); and 84177 (September 17, 2018), 83 FR 47953 (September 21, 2018) (SR-PEARL-2018-16).

<sup>75</sup> See Securities Exchange Act Release Nos. 84175 (September, 17, 2018), 83 FR 47955 (September 21, 2018) (SR-MIAX-2018-19); and 84177 (September 17, 2018), 83 FR 47953 (September 21, 2018) (SR-PEARL-2018-16).

<sup>76</sup> Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (“2008 ArcaBook Approval Order”).

<sup>77</sup> Id. See also SIFMA Decision, supra note 55, at 22.

reasonable, and not unreasonably discriminatory.”<sup>78</sup> The Exchange’s initial proposal, comment responses, and statements on review focused on an alternative basis other than competitive forces, namely, a cost-based justification, for its proposed connectivity fees. In its latest comment letter, the Exchange also presents a market-based argument. Therefore, the Commission’s discussion below begins with the Exchange’s cost-based argument<sup>79</sup> before moving on to consider its market-based argument.<sup>80</sup>

After careful consideration, the Commission is disapproving the proposed rule changes because the information before us is insufficient to support a finding that the proposed rules changes are consistent with the requirements of the Act under either argument. Specifically, the Commission is unable to find that the proposed rule changes are consistent with: (1) Section 6(b)(4) of the Act,<sup>81</sup> 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; (2) Section 6(b)(5) of the Act,<sup>82</sup> which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market

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<sup>78</sup> 2008 ArcaBook Approval Order, supra note 76, at 74781. See also SIFMA Decision, supra note 55, at 22.

<sup>79</sup> See infra Section III.B.1.

<sup>80</sup> See infra Section III.B.2.

<sup>81</sup> 15 U.S.C. 78f(b)(4).

<sup>82</sup> 15 U.S.C. 78f(b)(5).

system, and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and (3) Section 6(b)(8) of the Act,<sup>83</sup> which requires that the rules of a national securities exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Because an inability to make any of these determinations under the Act independently necessitates disapproving the proposals, the Commission disapproves the proposed rule changes.<sup>84</sup>

1. The Exchange’s cost-based argument in support of the proposed rule changes lacks sufficient information for the Commission to determine whether the proposed rule changes are consistent with the Act

Prior to its second response letter, the Exchange primarily raised a cost-based argument in support of the proposed rule changes. Specifically, the Exchange states that the fees will “allow the Exchange to recover costs associated with offering access through the network connections,” that the fees would “offset the costs BOX incurs in maintaining, and implementing

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<sup>83</sup> 15 U.S.C. 78f(b)(8).

<sup>84</sup> In disapproving the proposed rule changes, the Commission has considered the proposed rules’ impact on efficiency, competition, and capital formation, see 15 U.S.C. 78c(f), and the Exchange’s assertion that its proposal would enhance competition because the fees would enable the Exchange to pay for improvements to its network and offer participants higher quality software, hardware, quality assurance, and technology support. See BOX 1 Petition, supra note 15, at 12-13 and BOX Statement, supra note 18, at 3. The Exchange did not provide any specific information to directly support its assertion that the proposal would enhance competition other than the general statement that the proposed fees would allow for the Exchange to pay for such improvements. But even if the proposals have the potential to enhance competition, for the reasons discussed throughout, the Commission must disapprove the proposed rule changes in light of its inability, on the current record, to find that they are consistent with the Act.

ongoing improvements to the trading systems, including connectivity costs, costs incurred on software and hardware enhancements and resources dedicated to software development, quality assurance, and technology support.”<sup>85</sup> The Exchange also attempts to support its cost-based argument by asserting that the proposed fees are “reasonable in that they are competitive with those charged by another exchange.”<sup>86</sup>

Three commenters argue that the Exchange does not provide sufficient information in its filing to support a finding that the proposal is consistent with the Act.<sup>87</sup> Specifically, two commenters object to the Exchange’s reliance on the fees of other exchanges to demonstrate that its fee increases are consistent with the Act.<sup>88</sup> One of these commenters argues that simply comparing the proposed fees to those charged by other exchanges and stating that they are designed to recover costs to the Exchange is insufficient to demonstrate that the fees are reasonable, equitable, and not unfairly discriminatory.<sup>89</sup> This commenter states that the Exchange does not assess any differences among exchanges in the use and value of their connectivity, or provide any information about the magnitude or allocation of the applicable costs on the

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<sup>85</sup> See Notice, supra note 4, at 37854.

<sup>86</sup> See id.

<sup>87</sup> See Healthy Markets Letter I, supra note 5, at 4-5; SIFMA Letter I, supra note 10, at 2; Spatt Letter, supra note 10, at 1 and 3.

<sup>88</sup> See Healthy Markets Letter I, supra note 5, at 5-7 (stating that the fees appear to be “completely arbitrary” and noting that “[e]ven if the fees were somehow viewed as ‘similar’ to those charged by other [ ] exchanges, that does not mean that they are reasonable.”); Spatt Letter, supra note 10, at 1.

<sup>89</sup> See Spatt Letter, supra note 10, at 1.

Exchange.<sup>90</sup> The other commenter argues that “similarity” between fees does not mean they are reasonable.<sup>91</sup> Specifically, this commenter argues that connectivity charges outside of the exchange context are significantly lower and that the Exchange does not explain the reasons for the Exchange’s upcharge.<sup>92</sup> Further, one commenter stated its belief that the actual impact of the proposed fees would be “extremely inequitable” and the Exchange made “no attempt . . . to explore how the burdens of the fees will be applied across its customer base.”<sup>93</sup> In this regard, a commenter states that the proposed connectivity pricing is not associated with the relative usage of various market participants and may impose a large fixed barrier to entry to smaller participants.<sup>94</sup>

In its first response letter, the Exchange rejects the 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 one commenter,<sup>95</sup> is unnecessary because the Exchange submitted its proposal as an immediately

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<sup>90</sup> See id.

<sup>91</sup> See Healthy Markets Letter I, supra note 5, at 7.

<sup>92</sup> See id.

<sup>93</sup> See id. at 9-10 (noting that BOX did not “provide information about how many subscribers currently purchase either level of connectivity. . . does not provide details of how much revenues will be generated from the changes . . . [n]or . . . offer any specific details for how those revenues would be spent (and to whose benefit.”).

<sup>94</sup> See Spatt Letter, supra note 10, at 2.

<sup>95</sup> See Healthy Markets Letter I, supra note 5.

effective rule change under the Act.<sup>96</sup> Further, in response to the comments that questioned whether the Exchange provided sufficient information to demonstrate that its proposed fees are consistent with the Act, the Exchange reiterated without elaboration the arguments from its original filing comparing the proposal to fees of certain other options exchanges, provided general statements regarding the categories of costs that comprise its total market connectivity expense, and, in its second letter, claimed that platform theory constrains its ability to price its connectivity services.<sup>97</sup> The Exchange, however, did not respond to the comments that argued the connectivity fees are inequitable in that they fail to account for the relative usage of different market participants and the disparate barrier to entry that certain connectivity fees may impose on market participants of different sizes.

The Commission also received one comment letter in response to the Gibson Dunn Statement.<sup>98</sup> This commenter argued that the Commission is obligated to ensure all exchange proposed rule changes, including the fees subject to this proposal, are consistent with the Act.<sup>99</sup> The commenter further argued that the Exchange has provided no additional information necessary to support its conclusions and evaluate its proposal's consistency with the Act, such as the number or types of firms impacted by the fee changes or the quantitative and qualitative

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<sup>96</sup> See BOX Response Letter I, supra note 6, at 1.

<sup>97</sup> See BOX Statement, supra note 18, at 2-3; Gibson Dunn Statement, supra note 18, at 3-4; BOX 2 Notice and OIP, supra note 26, at 65382; BOX Response Letter II, supra note 11, at 1-2.

<sup>98</sup> See Healthy Markets Letter II, supra note 10.

<sup>99</sup> See id. at 3-5.

impacts of the fee changes on market participants and the Exchange.<sup>100</sup>

As noted above, Section 6 of the Act requires that the rules of a national securities exchange provide for, among other things, “the equitable allocation of reasonable dues, fees and other charges” and be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.<sup>101</sup> These requirements, which apply to the rules of an exchange, apply regardless of whether a proposed rule change is filed pursuant to Section 19(b)(2) or 19(b)(3)(A) of the Act. And, because the proposed fees are now before the Commission pursuant to the Orders Instituting Proceedings I-III, the Commission can approve them only if it finds that they are consistent with these requirements. The Commission is unable to make such a finding based on the record before us.

As noted above, the Exchange makes a cost-based argument for why the proposed fees are reasonable. Specifically, the Exchange identifies the categories of costs it incurs and states that the proposed fees would “offset” the Exchange’s costs, without providing any information as to the level of those costs or any other supporting factual basis for its conclusion. This is insufficient. In making any finding or determination, the Commission cannot “[s]imply accept what [the SRO] has done,” and cannot have an “unquestioning reliance” on an SRO’s

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<sup>100</sup> See *id.* at 5-6.

<sup>101</sup> 15 U.S.C. 78f(b)(4) and (5).

representations in a proposed rule change.<sup>102</sup> And, while stating the categories of costs and that the fees will offset those costs could support the application of a fee, without more it does little to inform the analysis into the level of the particular fees at issue here (\$5,000 per month for 10 Gb connections and \$1,000 per month for non-10 Gb connections) and whether they are reasonable and equitable.

In addition, in enumerating the categories of costs, the Exchange includes the cost of maintaining and implementing ongoing improvements to the trading systems, including connectivity costs, costs incurred on software and hardware enhancements, and resources dedicated to software development, quality assurance, and technology support. The Exchange, however, does not explain why it is appropriate to consider such cost items when evaluating whether the connectivity fees are consistent with the Act. The Exchange does not address how its costs to maintain and implement ongoing improvements to the trading systems relate to connectivity and whether, for example, transaction fees or other fees offset those improvements to the trading systems. Similarly, the Exchange does not offer any explanation for why the fee for 10 Gb connections is five times the fee for non-10 GB connections or why the disparity is reasonable and equitable. In addition, as stated by one commenter, the filing does not support the reasonableness of the fees by, for example, discussing “the relative benefits to users of the various potential exchange connectivity offerings, such as subscribing to the 10 gigabit

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<sup>102</sup> See Susquehanna, 866 F.3d at 446-47.

connection, the Non-10 gigabit connection, or connecting through a third party.”<sup>103</sup> Nor does the Exchange offer any information that would support a claim that its connectivity services are becoming more costly to produce.<sup>104</sup>

Further, the Exchange does not provide any support for its assertion that the proposed fees will offset the Exchange’s costs. For example, the Exchange did not provide any information as to whether the monthly costs associated with connectivity always exceed the projected monthly revenues from connectivity or provide any detail as to the frequency of the costs (e.g., whether the costs are all marginal costs, fixed costs, or one-time implementation costs). Further, the Exchange did not provide information about whether any of the costs could be characterized as fixed costs that do not vary if there are more connections. As stated by commenters,<sup>105</sup> the Exchange has not provided information sufficient to address the questions raised above and to support a basis for a Commission finding that the proposed fees are consistent with the Act.

2. The Exchange’s competition-based argument in support of the proposed rule changes lacks sufficient information for the Commission to determine whether the proposed rule changes are consistent with the Act

The Exchange argues that the proposed fees are consistent with the Act because they are

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<sup>103</sup> See Healthy Markets Letter I, supra note 5, at 6-7.

<sup>104</sup> See id. at 5.

<sup>105</sup> See id. at 5-6, 10; Healthy Markets Letter II, supra note 10, at 5-6; Spatt Letter, supra note 10, at 1.

“competitive with those charged by another exchange”<sup>106</sup> and that they are “comparable to and generally lower than the fees charged by other options exchanges for the same or similar services.”<sup>107</sup> But Rule of Practice 700(b)(3) provides that a “mere assertion . . . that another self-regulatory organization has a similar rule in place” is “not sufficient” to “explain why the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a self-regulatory organization.”<sup>108</sup> As stated by the commenters,<sup>109</sup> the Exchange does not explain why a comparison of its proposed fees to those of another exchange is relevant for purposes of determining whether the Exchange’s fees are consistent with the Act. The Exchange also does not discuss whether it faces similar costs as the other exchange.

Further, in its second response letter, the Exchange claims that its connectivity services are just one set of services that are related to its trading function and “produced on a platform that is characterized by joint and common costs,” and therefore its ability to price its joint services, including connectivity services, is constrained by robust order flow competition.<sup>110</sup> Under the total platform theory, some products, such as market data and trade executions, are “‘joint products’ with ‘joint costs’ at each trading ‘platform,’ or exchange.”<sup>111</sup> If the theory applies,

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<sup>106</sup> See Notice, supra note 4, at 37854.

<sup>107</sup> See id.

<sup>108</sup> 17 CFR 201.700(b)(3).

<sup>109</sup> See Healthy Markets Letter I, supra note 5, at 5-7; Spatt Letter, supra note 10, at 1.

<sup>110</sup> See BOX Response Letter II, supra note 11, at 2.

<sup>111</sup> SIFMA Decision, supra note 55, at 25 (quoting NetCoalition v. SEC, 615 F.3d 525, 542 n.16 (D.C. Cir. 2010)).

“[a]lthough an exchange may price its trade execution fees higher and its market data fees lower (or vice versa), because of ‘platform’ competition the exchange nonetheless receives the same return from the two ‘joint products’ in the aggregate.”<sup>112</sup>

In support of its platform theory argument, the Exchange attached to its letter a statement (“Statement”) prepared for Nasdaq Inc. on the extent to which competitive forces constrain the prices of connectivity services offered by Nasdaq Inc. for its equities market.<sup>113</sup> This Statement argues that connectivity pricing in the equities market must be considered in tandem with its pricing for trading and other “joint” services.<sup>114</sup> Therefore, the Exchange concludes that the competition it faces for order flow ensures that its proposed connectivity fees are reasonable, equitable, and not unfairly discriminatory and do not impose an unnecessary or inappropriate burden on competition.<sup>115</sup> The Exchange also concludes that it is unnecessary to provide detailed cost information in order to justify its proposed fees.<sup>116</sup>

The total platform theory, however, does not necessarily apply to every example of a platform offering joint products with joint costs. The Commission previously has stated that an assertion based on “total platform theory” i.e., that an SRO’s aggregate return across multiple product lines, such as transactions, market data, connectivity, and access, is constrained by

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<sup>112</sup> Id.

<sup>113</sup> See BOX Response Letter II, supra note 11.

<sup>114</sup> See id. at 1-2.

<sup>115</sup> See id.

<sup>116</sup> See id. at 3-4.

competition at the platform level is insufficient unless the SRO demonstrates that the theory applies in fact to the fee at issue.<sup>117</sup> An SRO that wishes to rely on total platform theory to support a proposed fee change must provide data and analysis demonstrating that these competitive forces are sufficient to constrain the SRO's pricing. In this context, the Commission would need to consider whether the platform theory satisfies the exchange's burden of establishing that the fee meets the Act's requirements, among others, of being equitably allocated, not unreasonably discriminatory, and not an undue burden on competition for market participants with varying levels of trading on the SRO. Here, the Exchange did not discuss the direction and strength of the competitive forces that operate between and among various products provided by the platform in the context of the options market, and in application to the Exchange itself.<sup>118</sup> In doing so, the Exchange could have provided some quantitative or qualitative support for its assertions. The Exchange, however, has not established that its theory of competition reflects market realities and satisfies the market-based test with respect to the connectivity fees.<sup>119</sup>

Three commenters question the competitiveness of the market for connectivity

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<sup>117</sup> SIFMA Decision, supra note 55, at 28, 29, 36 (finding that the exchange presenting the platform theory argument did not substantiate its assertions with evidence sufficient to support its platform-based arguments).

<sup>118</sup> The Statement is not sufficient to support BOX's position because, among other things, it is not specific to BOX and analyzes the equities markets, not the options markets.

<sup>119</sup> See supra notes 111 and 112, and accompanying text.

services.<sup>120</sup> Specifically, one commenter argues that the Exchange has market power with respect to its direct connectivity, unlike the competitive market for trading, and that the Exchange does not provide sufficient information to assess the competitiveness of the market for connectivity.<sup>121</sup> The other commenter argues that the exchanges' market data fees are not constrained by significant competitive forces and therefore the fairness and reasonableness of market data fee increases should be justified with information regarding the cost of producing the market data.<sup>122</sup> In a subsequent letter, the commenter asserts that connectivity fees cannot be based on the "market value" of the connection because broker-dealers are effectively required to connect to each market for fear of violating order protection requirements or sacrificing execution quality.<sup>123</sup> As a result, this commenter argues that "there is little opportunity for market forces to determine overall levels of fees" and thus the exchange should be required to provide cost information to establish why its connectivity fees are reasonable.<sup>124</sup>

The Commission recognizes the possibility that the connectivity fees at issue may satisfy

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<sup>120</sup> See Healthy Markets Letter I, supra note 5, at 11; Spatt Letter, supra note 10, at 2; SIFMA Letter I, supra note 10, at 2.

<sup>121</sup> See Spatt Letter, supra note 10, at 2.

<sup>122</sup> See SIFMA Letter I, supra note 10, at 2. The commenter argues that the Exchange's proposed connectivity fees present a comparable situation to the market data fees it describes. See id. The commenter also stated that the Commission should establish a framework – based on direct costs – for determining whether fees for exchange products and services are reasonable when those products and services are not constrained by significant competitive forces. See id.

<sup>123</sup> See SIFMA Letter II, supra note 37, at 1-2.

<sup>124</sup> Id.

the Commission’s market-based test (for example, because the theory of platform competition is in fact applicable to the Exchange). But the Exchange has not provided information to establish that competition constrains the Exchange’s pricing decisions. For example, the Exchange does not provide information regarding the extent to which the establishment of connectivity fees on the Exchange impacted order flow on the Exchange. Nor does the Exchange provide information regarding the extent to which BOX Participants are continuing to purchase connectivity services from the Exchange.<sup>125</sup> The Exchange also does not discuss whether there

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<sup>125</sup> The Commission notes that, because the Exchange challenged the Division’s action by delegated authority to institute proceedings on February 13, 2019, which triggered an automatic stay of the action by delegated authority, the Exchange was permitted to charge the connectivity fees on February 28, 2019. Similarly, because of the Exchange’s earlier challenge to BOX 1, the Exchange could have charged its proposed fees on September 30, 2018 and October 31, 2018. One commenter expressed concern that, by filing substantially identical filings in this manner, the Exchange was “exploiting the Commission’s procedures in a manner that is contrary to the Commission’s intent, protecting investors, the public interest, and the law.” Specifically, the commenter expressed its view that even though the Commission has directly suspended the proposed rule changes, the Exchange continues to file substantively identical fee filings and bill its customers for the higher fees despite the suspensions. See Healthy Markets Letter III, supra note 38, at 2-3. The commenter also expressed concern that “at least one of BOX’s customers has expressed frustration, and has challenged the imposition of the repeatedly suspended fees.” Id. at 3. Finally, the commenter noted that BOX responded to these complaints by changing the procedures through which customers may dispute its fees.” Id. at 3-4. The Exchange responded by stating that no Participant has complained to the Exchange about the fees and further stated that no challenges to its fees have been initiated. See BOX Response Letter III, supra note 39, at 2. The Exchange also noted that it recently filed a proposed rule change to amend its procedures regarding invoice disputes, but stated that that filing is unrelated to its connectivity fee proposals. Id. On March 27, 2019, a former customer of BOX submitted a comment letter, which, among other things, contested the veracity of certain statements in BOX Response Letter III. Specifically, the commenter indicated that it had in fact challenged the imposition of BOX’s connectivity fees on August 18, 2018, and further stated that it found the timing

are alternatives to the Exchange-provided connectivity services and, if so, how many BOX Participants pursue those alternatives. Finally, the Exchange does not provide any data or analysis concerning the Exchange's sources and amounts of revenue, costs, and gross margin that would bear on the issue of whether the Exchange's aggregate return on joint products is constrained by competition at the platform level and that the total platform theory applies to the Exchange.

Before the Commission may approve a fee for access or market data based on a competitive pricing model, as noted above, there must be evidence that competition will constrain its pricing.<sup>126</sup> The same analysis applies here to the market connectivity fees at issue. The Commission recently found that two exchanges' statistical analyses were insufficient to support a finding that competition for order flow constrains their market data prices.<sup>127</sup> In the same opinion, the Commission addressed a similar platform-based theory as the one the Exchange presents in its second response letter and found that the exchange presenting the platform theory argument did not substantiate its assertions with evidence sufficient to support

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of BOX's changes to its fee dispute process concerning. The commenter also indicated that, as a result of the proposed fees, it was forced to terminate being a vendor of record for the HSVF feed. See R2G Letter, supra note 41, at 1-2. Another commenter represented that it would be significantly affected by the proposed fee and noted that the amount of the fee would prohibit it from participating in trades on BOX. As a result, the commenter stated that it had terminated its access to BOX pending the Commission's decision on the proposed rule changes. See Prakash Letter, supra note 42.

<sup>126</sup> See SIFMA Decision, supra note 55, at 29.

<sup>127</sup> See id. at 31-32.

its platform-based arguments.<sup>128</sup> Because the Exchange has not provided sufficient evidence to establish that competitive forces constrain its ability to price its connectivity fees, it must provide an alternative basis to support the proposed fees.<sup>129</sup> As described above, however, the Exchange has not met that burden here.

Finally, in the BOX 1 Petition and BOX 3 Petition, the Exchange asserts that its smaller market share and the fact that it 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” in its analysis of the Exchange’s proposed rule changes.<sup>130</sup> The Exchange also argues that Order Instituting Proceedings I and Order Instituting Proceedings III are inconsistent with the Commission’s Remand Order with respect to the related proceedings that remained pending before the Commission issued its October 16, 2018 decision, discussed above.<sup>131</sup> Specifically, BOX asserts that Order Instituting Proceedings I and Order Instituting Proceedings III “single[] 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

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<sup>128</sup> See id. at 36.

<sup>129</sup> See id. at 50 (quoting 2008 ArcaBook Approval Order, supra note 76, at 74781 (“[T]he exchanges still may meet their burden to demonstrate consistency with the [Act] by establishing ‘a substantial basis, other than competitive forces, . . . demonstrating that the terms of the proposal are equitable, fair, reasonable, and not unreasonably discriminatory.’”)).

<sup>130</sup> See BOX 1 Petition, supra note 15, at 14; BOX 3 Petition, supra note 36, at 9.

<sup>131</sup> See supra notes 57 and 58 and accompanying text.

continue charging the challenged fees during the remand proceedings.”<sup>132</sup>

To the extent that the Exchange is asserting that BOX 1, BOX 2 and BOX 3 should be approved on these bases, the Commission disagrees. The Remand Order did not alter the applicable Exchange Act standards. And, as described throughout this order, we are unable to find that the proposed rule changes before us meet those standards based on the current record.

Nor has the Exchange been singled out for disparate treatment. As discussed above, Order Instituting Proceedings I is not the only order suspending a proposed fee change and instituting proceedings. Indeed, two other orders instituting proceedings were issued the same day with respect to proposed rule changes filed by MIAX and PEARL. Nor did the Order Instituting Proceedings I treat BOX differently with respect to the Remand Order because that Order did not issue until a month later.

Moreover, that BOX is not permitted to continue charging its fees during the proceedings subject to the Remand Order is a consequence of the procedural posture of the rule changes at the time that separate order issued—in this case, the Commission’s separate determination under Exchange Act Section 19(b)(3)(C) that the suspension was necessary and appropriate “to allow for additional analysis of the proposed rule change’s consistency with the [Exchange] Act and the rules thereunder.”

The Remand Order did not change the status of any of the challenged rule changes or plan amendments at the time of the remand. Some of those rule changes and plan amendments

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<sup>132</sup> See Gibson Dunn Statement, supra note 18, at 5; BOX 3 Petition, supra note 36, at 10.

had instituted new fees for market data and market access, and some did not. Some of those rule changes and plan amendments involved fees currently in force, and some did not. The Remand Order did not distinguish between any of the challenged filings. Nor did the Remand Order create any new opportunities for exchanges or plans to charge fees; it only maintained the status quo during the remand. In the instance of the proposed rule changes at issue here, the status quo was determined by the suspension order instituted the previous month – proceedings under Section 19(b) had already been instituted.

Finally, the Remand Order allows BOX to continue to collect other challenged fees. Six proposed rule changes filed by BOX were challenged by SIFMA over the past three years.<sup>133</sup> Five of these rule changes went into effect without being suspended. These rule changes, among other things, instituted or raised port fees. The Remand Order maintains the status quo and allows BOX to continue charging any of these fees still in force as it conducts proceedings on remand. It was only in the sixth instance that the Commission suspended the proposed rule changes and instituted proceedings. BOX has not been singled out for disparate treatment.<sup>134</sup>

#### IV. Conclusion

For the reasons set forth above, the Commission does not find that the proposed rule

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<sup>133</sup> SR-BOX-2018-24 (challenged by File No. 3-18680 (filed Aug. 24, 2018)); SR-BOX-2018-16 (challenged by File No. 3-18572 (filed July 2, 2018)); SR-BOX-2018-15 (challenged by File No. 3-18525 (filed May 31, 2018)); SR-BOX-2017-31 (challenged by 3-18286 (filed Nov. 17, 2017)); SR-BOX-2016-40 (challenged by File No. 3-17663 (filed Nov. 8, 2016)); SR-BOX-2015-39 (challenged by File No. 3-17040 (filed Jan. 8, 2016)).

<sup>134</sup> The Commission notes that BOX 2 and BOX 3 were both filed after the Remand Order and therefore are not subject to the Remand Order.

changes are consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, Sections 6(b)(4), 6(b)(5), and 6(b)(8) of the Act.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>135</sup> that the proposed rule changes (SR-BOX-2018-24, SR-BOX-2018-37, and SR-BOX-2019-04) be, and hereby are, disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>136</sup>

**Eduardo A. Aleman,**

*Deputy Secretary.*

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<sup>135</sup> 15 U.S.C. 78s(b)(2).

<sup>136</sup> 17 CFR 200.30-3(a)(12).

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