III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act and Rule 19b–4(f)(6) thereunder.28 Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.29 At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change 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. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)30 of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, 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 email to rule-comments@sec.gov. Please include File Number SR–NYSE–2019–07 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549–1090. All submissions should refer to File Number SR–NYSE–2019–07. This file number should be included on the subject line if email 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–NYSE–2019–07 and should be submitted on or before April 25, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.31

Eduardo A. Aleman,
Deputy Secretary.

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION


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”), and Rule 19b–4 thereunder,2 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.3 BOX 1 was published for comment in the Federal Register on August 2, 2018.4 The Commission initially received one comment letter on BOX 1 5 and one response letter from the Exchange.6 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 Act7 and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Act8 to determine whether to approve or disapprove BOX 1 ("Order Instituting Proceedings I").9 The Commission thereafter received three additional comment letters on BOX 1 10 and one

---

additional response letter from the Exchange.\textsuperscript{11} On September 19, 2018, pursuant to Rule 430 of the Commission’s Rules of Practice,\textsuperscript{12} the Exchange filed a notice of intention to petition for review of Order Instituting Proceedings I.\textsuperscript{13} 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.\textsuperscript{14} On September 26, 2018, the Exchange filed a petition for review of Order Instituting Proceedings I.\textsuperscript{15} On November 16, 2018, the Commission granted the BOX 1 Petition and discontinued the automatic stay of the delegated action,\textsuperscript{16} 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 action made by delegated authority.\textsuperscript{17} The Commission received two such statements from the Exchange.\textsuperscript{18} On January 25, 2019, pursuant to Section 19(b)(2) of the Act,\textsuperscript{19} the Commission designated a longer period within which to approve or disapprove BOX 1.\textsuperscript{20} 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.\textsuperscript{21} 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.\textsuperscript{22} BOX 2 was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.\textsuperscript{23} On December 14, 2018, the Division, acting on behalf of the Commission by delegated authority, issued a notice of BOX 2 and order temporarily suspending BOX 2 pursuant to Section 19(b)(3)(C) of the Act\textsuperscript{24} and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Act\textsuperscript{25} to determine whether to approve or disapprove BOX 2 ("Order Instituting Proceedings II").\textsuperscript{26} The Commission received two comment letters on BOX 2.\textsuperscript{27} 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.\textsuperscript{28} BOX 3 was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.\textsuperscript{29} 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\textsuperscript{30} and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Act\textsuperscript{31} to determine whether to approve or disapprove BOX 3 ("Order Instituting Proceedings III").\textsuperscript{32} On February 26, 2019, pursuant to Rule 430 of the Commission’s Rules of Practice, the Exchange filed a notice of intention to petition for review of Order Instituting Proceedings III.\textsuperscript{33} 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.\textsuperscript{34} On March 5, 2019, the Exchange filed a petition for review of Order Instituting Proceedings III.\textsuperscript{35} 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.\textsuperscript{36} On March 19, 2019, the Commission received another comment letter on the proposed rule changes expressing further concerns about the proposals\textsuperscript{37} and an additional response letter from BOX.\textsuperscript{38} On March 22, 2019, the Commission granted the BOX 3 Petition, issued an order affirming the action by delegated authority, and lifted the stay.\textsuperscript{39} On March 27, the Commission received an additional comment letter on the proposed rule changes arguing that the exchange has not provided necessary information

\textsuperscript{11} See Letter from Lisa J. Fall, President, BOX, to Brent J. Fields, Secretary, Commission, dated December 10, 2018 ("Gibson Dunn Statement") (submitted on behalf of the Exchange by its counsel).

\textsuperscript{12} Pursuant to Rule 431(e) of the Commission’s Rules of Practice, a notice of intention to petition for review of a proposed rule change must be provided to the Division which reinstated the Exchange’s authority to charge the connectivity fees at issue.

\textsuperscript{13} See Letter from Lisa J. Fall, President, BOX, to Brent J. Fields, Secretary, Commission, dated October 15, 2018 ("Gibson Dunn Letter I"); Tyler Gellasch, Executive Director, The Healthy Markets Association, to Brent J. Fields, Secretary, Commission, dated January 2, 2019 ("Healthy Markets Letter I"); 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").

\textsuperscript{14} See Petition for Review of Order Instituting Proceedings I, filed with the 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.

\textsuperscript{15} 17 CFR 201.431(e).

\textsuperscript{16} See Petition for Review of Order Instituting Proceedings I. The Commission’s authority to charge the connectivity fees at issue remains suspended during the pendency of this proceeding.

\textsuperscript{17} 17 CFR 201.431(e).

\textsuperscript{18} See Petition for Review of Order Instituting Proceedings I.


\textsuperscript{21} 17 CFR 201.431(e).

\textsuperscript{22} 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 substantially 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.


\textsuperscript{26} See Petition for Review of Order Instituting Proceedings I.

\textsuperscript{27} 17 CFR 201.431(e).

\textsuperscript{28} See Petition for Review of Order Instituting Proceedings III.

\textsuperscript{29} 17 CFR 201.431(e).


\textsuperscript{33} 17 CFR 201.431(e).

\textsuperscript{34} 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.

\textsuperscript{35} 17 CFR 201.431(e).

\textsuperscript{36} See Petition for Review of Order Instituting Proceedings III. The notice of intention to petition for review results in an automatic stay of the action by delegated authority.

\textsuperscript{37} 17 CFR 201.431(e).

\textsuperscript{38} See Petition for Review of Order Instituting Proceedings III. The notice of intention to petition for review results in an automatic stay of the action by delegated authority.

\textsuperscript{39} 17 CFR 201.431(e).

\textsuperscript{40} 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 I").

\textsuperscript{41} See Letter from Tyler Gellasch, Executive Director, The Healthy Markets Association, 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).

\textsuperscript{42} See Letter from Lisa J. Fall, President, BOX, 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).
proposed rule change of a self-
regulated 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 applicable to such
organization. The Commission shall
disapprove a proposed rule change if it
does not make such a finding. 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 all those
requirements . . . is not sufficient.”48
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.”49 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”))50 The court held that focusing
on whether competitive market forces
constrained the exchange’s pricing
decisions was an acceptable basis for
assessing the fairness 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.51 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)(b) of the Act.52
But the court, in so holding, “[t]ook 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.”53

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
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.54

On October 16, 2018, the Commission
issued its decision in the consolidated
proceeding.55 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’

43 See Letter from Stefano Durdic, R2G, to
Vanessa Countryman, Acting Secretary,
44 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”).
45 A participant is defined under BOX Rule
100(b)(41) as a firm or an 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”).
46 See Notice, supra note 4, at 37653.
48 17 CFR 201.700(b)(3).
49 Id.
51 Dodd-Frank Wall Street Reform and Consumer
Protection Act of 2010, Public Law 111–203, 124

arguments and explained why it was insufficient to justify approving the fees. Accordingly, the Commission set those fees aside. 56 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 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. 57 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 procedures for assessing the challenged rule changes. 58

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 Quote (“CQ”) Plan and Nasdaq Unlisted Trading Privileges (“UTP”) Plan filed regarding certain fees. 60 Each order explained that “[t]he Commission is concerned that the information 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 change 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.” 66 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. 67

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. 68 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.” 69 But CTA’s filing did “not identify any basis by which CTA’s fee changes could be assessed for fairness and reasonableness.” 70 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. 71 Following the stay order, the plan participants rescinded the amendments. 72

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. 73 In instituting proceedings on the MIAX and PEARL connectivity filings, the Commission noted that exchange statements in support of their proposals should be sufficiently detailed and specific to support a finding that the proposed

66 See CTA/CQ Order, supra note 65, at 20128; UTP Order, supra note 65, at 20130.
rules are consistent with the Act.\textsuperscript{74} 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.\textsuperscript{75}

\textbf{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.”\textsuperscript{76} 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.\textsuperscript{77} 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, reasonable, and not unreasonably discriminatory.”\textsuperscript{78} 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\textsuperscript{79} before moving on to consider its market-based argument.\textsuperscript{80}

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,\textsuperscript{81} 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,\textsuperscript{82} 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 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)(6) of the Act,\textsuperscript{83} 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.\textsuperscript{84}

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 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.”\textsuperscript{85} 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.”\textsuperscript{86}

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.\textsuperscript{87} 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.\textsuperscript{88} 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.\textsuperscript{89} 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 Exchange.\textsuperscript{90} The other commenter argues that “similarity” between fees does not mean they are reasonable.\textsuperscript{91} 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.\textsuperscript{92} 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.”

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.

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, is unnecessary because the Exchange submitted its proposal as an immediately effective rule change under the Act. 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.

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 in response to the Gibson Dunn Statement. 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. 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 impacts of the fee changes on market participants and the Exchange.

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. 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 representations in a proposed rule change. 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 connection, the Non-10 gigabit connection, or connecting through a third party.” Nor does the Exchange offer any information that would support a claim that its connectivity services are becoming more costly to produce.

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, 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.

---

93 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 . . . offer any specific details for how those revenues would be spent (and to whose benefit.”).
95 See Healthy Markets Letter I, supra note 5.
96 See BOX Response Letter I, supra note 6, at 1.
97 See BOX Statement, supra note 18, at 2–3; Gibson Dunn Statement, supra note 18, at 3–4; BOX Notice and OIP, supra note 26, at 65382; BOX Response Letter II, supra note 11, at 1–2.
99 See id. at 3–5.
100 See id. at 5–6.
101 15 U.S.C. 78b(b)(4) and (5).
102 See Susan Kahan, 866 F.3d at 446–47.
104 See id. at 5.
105 See id. at 5–6; Healthy Markets Letter II, supra note 10, at 5–6; Spatt Letter, supra note 10, at 1.
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 “competitive with those charged by another exchange” and that they are “comparable to and generally lower than the fees charged by other options exchanges for the same or similar services.” 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.” As stated by the commenters, 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. 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. If the theory applies, “[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.”

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. This Statement argues that connectivity pricing in the equities market must be considered in tandem with its pricing for trading and other “joint” services. 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. The Exchange also concludes that it is unnecessary to provide detailed cost information in order to justify its proposed fees.

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 competition at the platform level is insufficient unless the SRO demonstrates that the theory applies in fact to the fee at issue. 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. 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. 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 competitive market for connectivity. 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. 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. 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.

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

---

106 See Notice, supra note 4, at 37854. 107 See id. 108 17 CFR 201.700(b)(3). 109 See Healthy Markets Letter I, supra note 5, at 5–7; Spatt Letter, supra note 10, at 1. 110 See BOX Response Letter II, supra note 11, at 2. 111 SIFMA Decision, supra note 55, at 25 (quoting NetCoalition v. SEC, 615 F.3d 525, 542 n.16 (DC Cir. 2010)). 112 Id. 113 See BOX Response Letter II, supra note 11. 114 See id. at 1–2. 115 See id. 116 See id. at 3–4. 117 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). 118 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. 119 See supra notes 111 and 112, and accompanying text. 120 See supra note 10, at 2; Spatt Letter, supra note 10, at 2. 121 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. 122 See SIFMA Letter II, supra note 37, at 1–2. 123 See Spatt Letter, supra note 10, at 2.

---
are continuing to purchase connectivity services from the Exchange.\textsuperscript{125} The Exchange also does not discuss whether there 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.\textsuperscript{126} 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.\textsuperscript{127} 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 platform theory argument did not substantiate its assertions with evidence sufficient to support its platform-based arguments.\textsuperscript{128} 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.\textsuperscript{129} 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.\textsuperscript{130} 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.\textsuperscript{131} 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 continue charging the challenged fees during the remand proceedings.”\textsuperscript{132}

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 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 effect, 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.\textsuperscript{133}
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.134

IV. Conclusion

For the reasons set forth above, the Commission does not find that the proposed rule 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,135 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.136

Eduardo A. Aleman,
Deputy Secretary.

[FR Doc. 2019–06519 Filed 4–3–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85474; File No. SR–
CboeBZX–2019–019]

Self-Regulatory Organizations; Cboe
BZX Exchange, Inc.; Notice of Filing
and Immediate Effectiveness of a
Proposed Rule Change Relating To
Make Certain Changes to the Listing
Rule Governing the Listing and
Trading of the Shares of the
WisdomTree Japan Multifactor Fund
and the WisdomTree Europe
Multifactor Fund of the WisdomTree
in Order for Such Funds To Be Listed and
Traded on the Exchange Under Rule
14.11(i) ("Managed Fund Shares")

March 29, 2019.

Pursuant to Section 19(b)(1) of the
Securities Exchange Act of 1934 (the
"Act"),1 and Rule 19b–4 thereunder,2 notice is hereby given that on March 15,
2019, Cboe BZX Exchange, Inc. (the
"Exchange" or "BZX") filed with the
Securities and Exchange Commission (the "Commission") the proposed rule
change as described in Items I and II
below, which Items have been prepared
by the Exchange. The Exchange filed the
proposal as a "non-controversial"3
proposed rule change pursuant to
Section 19(b)(3)(A)(iii) of the Act4 and
Rule 19b–4(f)(6) thereunder.5 The
Commission is publishing this notice to
solicit comments on the proposed rule
change from interested persons.

I. Self-Regulatory Organization's
Statement of the Terms of Substance of
the Proposed Rule Change

Cboe BZX Exchange, Inc. (the
"Exchange" or "BZX") is filing with the
Securities and Exchange Commission
("Commission") a proposal to make
certain changes to the listing rule
governing the listing and trading of the
shares of the WisdomTree Japan
Multifactor Fund and the WisdomTree
Europe Multifactor Fund of the WisdomTree in order for these Funds to be listed and traded on the Exchange under Rule 14.11(i) ("Managed Fund Shares").

The text of the proposed rule change is also available on the Exchange’s website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.


134 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.


II. Self-Regulatory Organization’s
Statement of the Purpose of, and
Statutory Basis for, the Proposed Rule
Change

In its filing with the Commission, the
Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's
Statement of the Purpose of, and the
Statutory Basis for, the Proposed Rule
Change

1. Purpose

The shares of the Funds (the "Shares") are currently listed and traded on the Exchange pursuant to the generic listing standards under Rule 14.11(c), which governs the listing and trading of Index Fund Shares on the Exchange. The Exchange is proposing to continue listing and trading the Shares on the Exchange with certain changes to each Fund’s potential holdings, but under Rule 14.11(i), which governs the listing and trading of Managed Fund Shares on the Exchange. The Exchange submits this proposal in order to allow the Funds to hold OTC currency swaps in a manner that does not comply with Exchange Rule 14.11(i)(4)(C)(v).

The Shares are offered by the WisdomTree Trust, which was established as a Delaware statutory trust on December 15, 2005. WisdomTree Asset Management, Inc. (the "Adviser") acts as adviser to the Funds. Mellon Investments Corporation acts as sub-adviser (the "Sub-Adviser") to the Funds. The Trust is registered with the Commission as an investment company and has filed two Form 497 Supplements to its registration statement on Form N–1A ("Registration Statement") with the Commission on behalf of the Funds outlining the changes described herein.6

Exchange Rule 14.11(i)(7) provides that, if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect and maintain a “fire wall” between the investment adviser and the

6 See Registration Statement for the Trust (File Nos. 333–132380 811–21864) and Form 497 Supplements dated January 18, 2019. The descriptions of the Funds and the Shares contained herein are based on information in the Registration Statement.