HEALTHY MARKETS
TRANSPARENCY & TRUST

January 2, 2019

Via Electronic Mail (rule-comments@sec.gov)

Mr. Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: BOX Connectivity Filings and Related Suspension Orders (Exch. Act. Rel. Nos. 34-83728; 34-84168; 34-84614; and 34-84823)

Dear Mr. Fields:

The Healthy Markets Association appreciates the opportunity to comment regarding the BOX Connectivity Filings[1] and related suspension orders.[2]

On December 10th, BOX's outside legal counsel, Gibson Dunn, submitted a letter to "reiterate briefly the arguments set forth at greater length in its petition for review in this matter and to supplement that petition with additional information from the Exchange's

[1] *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC ("BOX") Options Facility to Establish BOX Connectivity Fees for Participants and NonParticipants Who Connect to the BOX Network,* SEC, Rel. No. 34-83728, July 27, 2018, *available at* https://www.sec.gov/rules/sro/box/2018/34-83728.pdf (BOX Filing I); *Notice of Filing of a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC ("BOX") Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change*, SEC, Rel. No. 34-84823, Dec. 14, 2018, *available at* https://www.sec.gov/rules/sro/box/2018/34-84823.pdf (BOX Filing II and Suspension Order III). Collectively, these are hereinafter referred to as the BOX Connectivity Filings.

[2] *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network*, SEC, Rel. No. 34-84168, Sept. 17, 2018, *available at* https://www.sec.gov/rules/sro/box/2018/34-84168.pdf (BOX Suspension Order I); *In the Matter of the BOX Exchange LLC*, SEC, Rel. No. 34-84614, Nov. 16, 2018, *available at* https://www.sec.gov/rules/other/2018/34-84614.pdf (BOX Suspension Order II); BOX Filing II and Suspension Order III. Collectively, these are the "Staff and Commission Suspension Orders".

refiling of its proposal on November 30, 2018."[3] We wish to make a few observations regarding the BOX Counsel Letter.

First, with respect to the process and applicable legal standard, BOX Counsel argues that "the Division applied the wrong legal standard." BOX Counsel argues that

> although [] independent review is mandated when an exchange submits a rule change to the Commission for approval under Section 19(b)(2) of the Act, see 15 U.S.C. § 78s(b)(2), no such searching examination is required when an exchange submits an immediately effective rule change "establishing or changing a due, fee, or other charge" under Section I9(b)(3)(A) ofthe Act, see id. § 78s(b)(3)(A). Instead, when a rule is submitted under Section I9(b)(3)(A), the Commission "summarily may temporarily suspend the change in the rules ... 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. Id. § 78s(b)(3)(C) (emphasis added). *The Act does not prescribe any affirmative findings that the Commission must make before deciding to leave an immediately effective rule change in effect. (emphasis added).*[4]

BOX Counsel would have the Commission believe that the statutory permission granted to the exchanges to have certain types of filings become immediately effective upon filing also separately relieved the Commission of its obligation to ensure that those filings are consistent with the Exchange Act. The law does no such thing.

[3] Letter from Amir C. Tayrani, Gibson Dunn, to Brent J. Fields, SEC, Dec. 10, 2018, *available at* https://www.sec.gov/rules/sro/box/2018/box201824-supplemental-letter-121018.pdf (BOX Counsel Letter).
[4] BOX Counsel Letter, at 2.

Of course, the *process* by which filings made under Sections 19(b)(2) and 19(b)(3)(A) become effective is different.[5] But the *substantive requirements* of the Exchange Act[6] must still be met in either case, including that an exchange's rules:

- "provide for the equitable allocation of reasonable dues, fees, and other charges;"[7]
- not be "designed to permit unfair discrimination";[8]
- "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act;[9] and
- be designed "to protect investors and the public interest.[10]

BOX Counsel argues, much like NYSE recently argued in an unrelated filing,[11] that the Commission simply need not bother look at any immediately effective exchange filings to see if they are compliant with the Exchange Act.

We are not surprised by the fact that BOX Counsel offers no direct citation for this bold assertion. No part of the Exchange Act, including the relevant amendments included pursuant to Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, so relieves the Commission of its obligation to ensure filings comply with the Exchange Act. Section 916 expressly revised the filing procedures and timing of effectiveness for certain filings, but it *did not amend the substantive requirements for the filings themselves*.[12] The Commission is still obligated to ensure that all exchange filings are consistent with the Exchange Act.

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[5] See NetCoalition v. SEC, 715 F.3d 342, 354 (D.C. Cir. 2013).
[6] See *Susquehanna Int'l Grp., LLP v . SEC*, 866 F.3d 442 (D.C. Cir. 2017)("The SEC "shall approve" a self regulatory organization's proposed rule change only "if it finds that such proposed rule change is consistent with" provisions of the Exchange Act."). *Accord*, Remarks of Brett Redfearn, SEC, before the SEC Roundtable and Market Access and Market Data, Oct. 26, 2018, *available at* https://www.sec.gov/news/public-statement/statement-redfearn-102518 (declaring that in order for the Commission to "meet our obligations under the Exchange Act, we also need to ensure that the fees that are being charged for such important market services are fair and reasonable, not unreasonably discriminatory, and do not impose an undue or inappropriate burden on competition.").
[7] 15 U.S.C.§ 78f(b)(4).
[8] 15 U.S.C.§ 78f(b)(5).
[9] 15 U.S.C.§ 78f(b)(8).
[10] 15 U.S.C.§ 78f(b)(5).
[11] See Letter from Elizabeth King, NYSE, to Brent J. Fields, SEC, Nov. 21, 2018, *available at* https://www.sec.gov/comments/sr-nyse-2018-49/srnyse201849-4670738-176530.pdf.
[12] Section 916, *Dodd-Frank Wall Street Protection and Consumer Protection Act*, Pub. L. 111-203 (2010).

We also note that the Commission recently addressed the issue of its role in overseeing exchanges' rule filings in its Transaction Fee Pilot release, stating:

> Contrary to the commenter's suggestion, nothing in Section 19 interferes with the Commission's authority described elsewhere in the Exchange Act. Indeed, Section 19 itself makes clear that the Commission retains ultimate authority over the rules of registered exchanges, providing that "[n]o proposed rule change [by a self-regulatory organization] shall take effect unless approved by the Commission or otherwise permitted in accordance with [Section 19(b)]" and making clear that the Commission retains authority to suspend and institute proceedings to approve or disapprove even those exchange rules that are permitted to take effect upon filing with the Commission. Moreover, Section 19 explicitly permits the Commission to summarily implement or suspend any such proposed rule changes if, in the Commission's view, doing so would serve the public interest, protect investors, or assist in maintaining fair and orderly markets. And it makes clear that the Commission retains authority to amend exchanges' rules on its own initiative.[13]

Further, BOX Counsel is objecting to the Staff and Commission Suspension Orders, which are based on their inquiries into whether the BOX Connectivity Filings meet the Exchange Act's obligations. Even under BOX Counsel's flawed argument that the Commission need not review immediately effective rule filings, BOX Counsel has not argued that the Commission and staff are somehow prohibited from reviewing immediately effective rule fillings for compliance with the Exchange Act. As the Commission itself recognized in the Transaction Fee Pilot adopting release quoted above, the Commission continues to have authority to review exchange filings and take action. Although BOX Counsel disputes whether the Commission and staff must review filings, it does not dispute that the Commission and staff (1) have authority to do so, and (2) have chosen to exercise it here. Regardless of how or why the BOX Connectivity

[13] *Transaction Fee Pilot for NMS Stocks*, SEC, Rel. No. 34-84875, at 139, Dec. 19, 2018, *available at* https://www.sec.gov/rules/final/2018/34-84875.pdf.

Filings came to receive scrutiny from the Commission and staff, the BOX Connectivity Filings must now be measured against the Exchange Act.

Second, with respect to the merits of the filings' compliance with the Exchange Act's requirements, BOX Counsel again offers no new information upon which to evaluate their claims. BOX Counsel has declined to identify the number or types of firms impacted by the changes or the impacts upon them--which are essential data points for determining whether the changes are reasonable, equitable, and non-discriminatory. Instead, BOX Counsel asserts

> [t]he Connectivity Fees are equitable, reasonable, and nondiscriminatory because they are designed to offset the costs BOX incurs in maintaining, and implementing ongoing improvements to the trading systems. The Exchange has subsequently clarified that these improvements include connectivity costs, costs incurred on software and hardware enhancements and resources dedicated to software development, quality assurance, and technology support. The Connectivity Fees are necessary to cover some of the significant costs associated with various projects and initiatives to improve overall network performance and stability, as well as costs paid to the third-party data center for space rental, power used, etc.[14]

These may be useful data points, but they are facially inadequate for effectively evaluating compliance with the Exchange Act.

Further, BOX Counsel asserts that "the Exchange is more in need of connectivity fees than other exchanges because it does not own and operate its own data center and therefore cannot control data center costs."[15] We are unclear how BOX's purported dependence on the fees is relevant to the discussion. The dependence of the exchange on fees doesn't have any bearing on whether those fees are reasonable in magnitude, equitably applied, or non-discriminatory. We are aware of no relevant academic study or paper making such a connection. But even if it were somehow relevant, we are given no

[14] BOX Counsel Letter, at 3 (internal citations omitted).
[15] BOX Counsel Letter, at 3.

information with which to actually evaluate this claim, such as the magnitude of the impact on BOX or its competitiveness with other trading venues.

With respect to competitiveness, BOX Counsel boldly asserts "[n]or is there any evidence that the BOX Proposal will impose an undue burden on competition," and argued instead that the "fees, in fact, are pro-competitive because they enable the Exchange to pay for improvements to its network and offer participants higher quality software, hardware, quality assurance, and technology support."[16] The burden is on BOX to establish that the fees do not provide an undue on competition. Simply saying they don't see any burdens is inadequate. And arguing that raising fees promotes competition seems to run contrary to basic economic principles. BOX Counsel offers us no explanation for its conclusion.

We further note that neither BOX nor BOX Counsel have offered any details regarding the quantitative or qualitative impacts on market participants of BOX's dramatic fee increases. Nor has BOX offered any quantitative information related to the impact of the fee changes on BOX itself.

The BOX Connectivity Filings and BOX Counsel Letter simply ignore how the changes impact competition between other market participants. The Exchange Act is not solely concerned with burdens on competition between trading venues. It is also concerned with burdens on competition between other market participants. An exchange rule that would impose an undue burden on competition between member firms would also run afoul of the Exchange Act. BOX and BOX Counsel apparently hope the Commission will ignore this reality.

Third, when viewed collectively, BOX Counsel's arguments appear to be relatively straight-forward:

1. The Commission hasn't stopped other, similar connectivity fee filings before.[17]
2. The Commission and staff seeking to evaluate the BOX Connectivity Filings for compliance with the Exchange Act is "arbitrary and capricious."[18]

[16] BOX Counsel Letter, at 4.
[17] BOX Counsel Letter, at 3 ("The fees charged by those exchanges are not inequitable, unreasonable, or discriminatory-as made clear by the fact that the Commission did not temporarily suspend or disapprove any of them-and neither are the Connectivity Fees proposed by the Exchange.").
[18] BOX Counsel Letter, at 4.

These arguments are not surprising. In fact, we and market participants who have watched their data and connectivity fees skyrocket in recent years are acutely aware of the fact that the Commission has not historically fulfilled its responsibility to ensure self-regulatory organization filings comply with the Exchange Act. But after a striking admonition by the DC Circuit in 2017,[19] it is clear that the Commission is reviewing at least some self-regulatory organization filings for compliance with the Exchange Act now.

The law requires exchanges to establish that their rules meet certain basic substantive requirements. And the Commission is tasked with ensuring that the exchanges meet those requirements. Regardless of whether the Commission has done that adequately in the past or not, the Commission is obligated -- on a going forward basis -- to do its job. BOX Counsel's argument is not unlike a driver seeking to negate a speeding ticket because other drivers who were speeding on the same road earlier that day were not given tickets. It may be frustrating, but they must still comply with the law. And pointing to other violators is not a persuasive defense.

Put simply, BOX Counsel implies strongly that the Commission's past inaction in a given area precludes the Commission from enforcing the law. That is simply inaccurate. The Commission's authority and responsibility to continue to oversee evolving practices are not so easily and narrowly circumscribed.

Thank you for the opportunity to highlight our concerns with the BOX Connectivity Filings and BOX Counsel Letter. Should you have any questions or seek further information please contact me at (202) 909-6138.

Sincerely,

Tyler Gellasch
Executive Director

[19] *Susquehanna Int'l Grp., LLP v . SEC.*