UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 88493 / March 27, 2020

In the Matter of the

BOX Exchange LLC

Regarding

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 (File Nos. SR-BOX-2018-24, SR-BOX-2018-37, and SR-BOX-2019-04)

ORDER AFFIRMING ACTION BY DELEGATED AUTHORITY AND DISAPPROVING PROPOSED RULE CHANGES RELATED TO CONNECTIVITY AND PORT FEE

This matter comes before the Securities and Exchange Commission ("Commission") on a petition to review the Division of Trading and Markets's disapproval, by delegated authority, of proposed rule changes filed by the BOX Exchange LLC ("BOX" or "Exchange"). BOX proposed to amend the fee schedule on the BOX options facility to establish certain connectivity fees and reclassify its high-speed vendor feed connection as a port fee (File Nos. SR-BOX-2018-24, SR-BOX-2018-37, and SR-BOX-2019-04). The three filings propose identical rule changes.

The Division of Trading and Markets, acting for the Commission pursuant to delegated authority, disapproved the proposed rule changes. Pursuant to Section 4A of the Securities Exchange Act of 1934, and Commission Rules of Practice 430 and 431, we have conducted a de novo review of the record. For the reasons discussed below, we conclude that BOX has not met its burden to demonstrate that the proposed rule changes are consistent with the Exchange Act. Nor do BOX's other arguments convince us that its proposed rule changes should be approved. Accordingly, we disapprove the proposed rule changes.

I. Background

A. The Proposed Rule Changes

1. BOX 1

On July 19, 2018, BOX filed with the Commission, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 and Rule 19b-4 thereunder,[1] a proposed rule change to amend the BOX fee schedule to establish certain connectivity fees and to reclassify its high speed vendor feed connection fee as a port fee (SR-BOX-2018-24) ("BOX 1"). BOX 1 was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Exchange Act,[2] and was published for comment in the Federal Register on August 2, 2018.[3]

BOX proposed to amend its fee schedule to establish connectivity fees for Participants and non-Participants who connect to the BOX network based on the amount of bandwidth made available to them.[4] Participants and non-Participants with 10 Gigabit Connections to the Exchange would be charged $5,000 per connection per month, while those with slower, non-10 Gigabit Connections would be charged $1,000 per connection per month. Prior to its filing of BOX 1, BOX did not impose any fees for these connections. BOX also proposed to amend its fee schedule to reclassify its existing High Speed Vendor Feed ("HSVF") connection fee as a port fee, rather than a connectivity fee (as it had previously been described), and to clarify that subscribers must be credentialed by BOX to receive the feed. BOX explained that it "believe[d] this reclassification is more accurate, as HSVF subscription is not dependent on a physical connection to the Exchange."[5] Though the nomenclature would change, the amount of the HSVF port fee would remain at $1,500 per month for every month a Participant or non-Participant is credentialed to use the HSVF port.

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1 15 U.S.C. § 78s(b)(1); 17 C.F.R. § 240.19b-4.

2 15 U.S.C. § 78s(b)(3)(A).

3 Exchange Act Release No. 83728 (July 27, 2018), 83 Fed. Reg. 37,853 (Aug. 2, 2018), https://www.govinfo.gov/content/pkg/FR-2018-08-02/pdf/2018-16531.pdf.

4 *See* BOX Rule 100(a)(41) (defining a Participant as a firm or organization that is registered with the Exchange for purposes of participating in trading on a BOX facility).

5 83 Fed. Reg. at 37,853.

On September 17, 2018, the Division of Trading and Markets, acting for the Commission by delegated authority, issued an order temporarily suspending BOX 1 pursuant to Sectio 19(b)(3)(C) of the Exchange Act and simultaneously instituting proceedings under Section 19(b)(2)(B) to determine whether to approve or disapprove BOX 1 ("OIP 1").[6]

Two days later, BOX filed a notice of intent to petition for review of OIP 1. The notice triggered an automatic stay of the delegated action under Commission Rule of Practice 431(e)—meaning that the suspension of BOX 1 was stayed and BOX was able to continue charging fees.[7] BOX filed its petition for review of OIP 1 on September 26, 2018.

We granted BOX's petition on November 16, 2018.[8] At that time, we discontinued the stay of the suspension order and thus reinstated the suspension of BOX 1.[9] After allowing additional statements to be filed in support of or in opposition to the suspension and institution of proceedings, we issued an order affirming OIP 1 on February 25, 2019.[10]

2. BOX 2 and BOX 3

On November 30, 2018, less than two weeks after we granted its petition for review of OIP 1 (and reinstated the suspension of BOX 1), and while that petition was pending before the

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[6] *See* 15 U.S.C. §§ 78s(b)(3)(C), (b)(2)(B); Exchange Act Release No. 84168 (Sept. 17, 2018), 83 Fed. Reg. 47,947 (Sept. 21, 2018), https://www.govinfo.gov/content/pkg/FR-2018-09-21/pdf/2018-20548.pdf. The Division also took similar action with respect to connectivity fees of other exchanges. That same month, the Division, again acting for the Commission by delegated authority, suspended immediately effective proposed rule changes submitted by the Miami International Securities Exchange, LLC ("MIAX") and MIAX PEARL, LLC ("PEARL") to increase their respective connectivity fees, and instituted proceedings to determine whether to approve or disapprove them. *See* Exchange Act Release No. 84175 (Sept. 17, 2018), 83 Fed. Reg. 47,955 (Sept. 21, 2018), https://www.govinfo.gov/content/pkg/FR-2018-09-21/pdf/2018-20547.pdf; and Exchange Act Release No. 84177 (Sept. 17, 2018), 83 Fed. Reg. 47,953 (Sept. 21, 2018), https://www.govinfo.gov/content/pkg/FR-2018-09-21/pdf/2018-20545.pdf. The filings were later withdrawn. MIAX, PEARL, and their affiliate exchange, MIAX Emerald, LLC ("Emerald"), have continued to file similar rule changes involving connectivity fees, but have withdrawn them before the Commission has acted on them. On December 20, 2019, MIAX, PEARL, and Emerald filed their most recent proposed rule changes involving connectivity fees, SR-MIAX-2019-51, SR-PEARL-2019-36, and SR-EMERALD-2019-39. Those filings were not withdrawn, and the Commission did not suspend them within sixty days.

[7] 17 C.F.R. § 201.431(e).

[8] *See* Exchange Act Release No. 84614 (Nov. 16, 2018), 83 Fed. Reg. 59,432 (Nov. 23, 2018), https://www.govinfo.gov/content/pkg/FR-2018-11-23/pdf/2018-25471.pdf.

[9] *Id*. at 59,432.

[10] *See* Exchange Act Release No. 85184 (Feb. 25, 2019), 84 Fed. Reg. 6842 (Feb. 28, 2019), https://thefederalregister.org/2019-02-28/2019-03543.pdf.

Commission, BOX filed a second proposed rule change (SR-BOX-2018-37) ("BOX 2").[11] BOX 2 proposed fees that were identical to those proposed in BOX 1 and was also immediately effective upon filing, thus enabling BOX to continue charging the proposed fees. The Forms 19b-4 BOX submitted for the two filings were substantively identical, except that the BOX 2 filing added a list of categories of BOX's costs to offer connectivity services and stated that the proposed fees would "offset" the Exchange's costs in "maintaining and enhancing a state-of-the-art exchange network infrastructure in the U.S. options industry."[12]

On December 14, 2018, the Division, acting for the Commission by delegated authority, issued an order temporarily suspending BOX 2 and instituting proceedings to determine whether to approve or disapprove it ("OIP 2").[13] BOX did not seek Commission review of OIP 2.

On February 13, 2019, BOX filed a third proposed rule change (SR-BOX-2019-04) ("BOX 3") to amend the BOX fee schedule to establish the same fees proposed by BOX 1 and BOX 2. The proposed fees in BOX 3 were identical to those proposed in BOX 1 and 2, and the Forms 19b-4 for the filings were substantively identical. Again, BOX 3 was effective upon filing, enabling BOX to charge the proposed fees.

On February 26, 2019, the Division, acting for the Commission by delegated authority, issued an order temporarily suspending BOX 3 and instituting proceedings to determine whether to approve or disapprove it ("OIP 3").[14] That same day, BOX filed a notice of intent to petition for review of OIP 3—which again triggered an automatic stay of the delegated action—and filed the petition on March 5, 2019. On March 22, 2019, the Commission issued an order simultaneously granting BOX's petition, lifting the automatic stay of the suspension, and affirming the determination to suspend and institute proceedings in OIP 3.[15]

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11 *See* Exchange Act Release No. 84823 (Dec. 14, 2018), 83 Fed. Reg. 65,381 (Dec. 20, 2018), https://www.govinfo.gov/content/pkg/FR-2018-12-20/pdf/2018-27512.pdf.

12 *See id.* at 65,382.

13 *See id.* at 65,383.

14 *See* Exchange Act Release No. 85201 (Feb. 26, 2019), 84 Fed. Reg. 7146 (Mar. 1, 2019), https://www.govinfo.gov/content/pkg/FR-2019-03-01/pdf/2019-03706.pdf.

15 *See* Exchange Act Release No. 85399 (Mar. 22, 2019) 84 Fed. Reg. 11,850 (Mar. 28, 2019), https://www.govinfo.gov/content/pkg/FR-2019-03-28/pdf/2019-05912.pdf.

3. The Disapproval Order

On March 29, 2019, the Division, acting for the Commission by delegated authority, issued an order disapproving the proposed rule changes in BOX 1, BOX 2, and BOX 3 ("Disapproval Order").[16] The Disapproval Order analyzed whether the proposed changes in BOX 1, BOX 2, and BOX 3 ("Proposed Rule Changes") were consistent with the requirements of the Exchange Act, including the Act's requirements that the rules of an exchange "provide for the equitable allocation of reasonable . . . fees" and not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers."[17] The Disapproval Order recognized that BOX attempted to justify its fees under the market-based test that the Commission has historically applied to assess the equitableness and reasonableness of market data fees, and that BOX also presented a cost-based justification for its fees.[18] The Disapproval Order analyzed both sets of arguments and concluded that BOX failed to provide sufficient information to show that the Proposed Rule Changes were consistent with the requirements

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16 *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,* Exchange Act Release No. 85459 (Mar. 29, 2019), 84 Fed. Reg. 13,363 (Apr. 4, 2019), https://www.govinfo.gov/content/pkg/FR-2019-04-04/pdf/2019-06519.pdf.

17 *See* Exchange Act Section 19(b)(2)(C), 15 U.S.C. § 78s(b)(2)(C) (stating that the Commission "shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of" the Exchange Act); Exchange Act Sections 6(b)(4)-(5), 15 U.S.C. §§ 78f(b)(4)-(5).

18 *See* Disapproval Order, 84 Fed. Reg. at 13,367-70 (discussing BOX's market-based and cost-based arguments).

of the Exchange Act under either a market-based or cost-based test. On April 8, 2019, BOX filed a petition for review of the Disapproval Order, which the Commission granted on May 23, 2019.[19]

B. The Relevant Precedent

Recent decisions by the Court of Appeals for the D.C. Circuit and the Commission guide our review of the Proposed Rule Changes. We summarize that relevant precedent here.

1. The *NetCoalition* litigation

In 2010, the D.C. Circuit vacated the Commission's approval of a fee rule for market data filed by NYSE Arca, Inc. ("NYSE Arca").[20] 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 pursuant to the Exchange Act, 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.

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[19] Exchange Act Release No. 85927 (May 23, 2019), https://www.sec.gov/rules/sro/box/2019/34-85927.pdf. On March 27, 2019, BOX filed a fourth proposed rule change (SR-BOX-2019-09) ("BOX 4"), but withdrew this filing on March 29, 2019. *See BOX Regulation, Rule Filings*, http://rules.boxoptions.com/rulefilings (last visited Mar. 25, 2020). On June 26, 2019, BOX filed a fifth proposed rule change (SR-BOX-2019-22) ("BOX 5"), but withdrew it on August 22, 2019. Exchange Act Release No. 86835 (Aug. 30, 2019), 84 Fed. Reg. 47,009 (Sept. 5, 2019), https://www.govinfo.gov/content/pkg/FR-2019-09-06/pdf/2019-19223.pdf. That same day, BOX filed a sixth proposed rule change (SR-BOX-2019-25) ("BOX 6"), but withdrew it on September 5, 2019. *See BOX Regulation, Rule Filings*, http://rules.boxoptions.com/rulefilings (last visited Mar. 25, 2020). Also on September 5, 2019, BOX filed a seventh proposed rule change (SR-BOX-2019-27) ("BOX 7"), Exchange Act Release No. 87014 (Sept. 19, 2019), 84 Fed. Reg. 50,534 (Sept. 25, 2019), https://www.govinfo.gov/content/pkg/FR-2019-09-25/pdf/2019-20706.pdf, but withdrew it on November 1, 2019. BOX filed an eighth proposed rule change (SR-BOX-2019-32) ("BOX 8") on October 31, 2019, a ninth proposed rule change (SR-BOX-2019-38) ("BOX 9") on December 20, 2019, a tenth proposed rule change (SR-BOX-2019-39) ("BOX 10") on December 31, 2019, and an eleventh proposed rule change (SR-BOX-2020-01) ("BOX 11") on January 15, 2020, which were withdrawn on December 23, 2019, December 31, 2019, January 15, 2020, and January 29, 2020, respectively. The Division did not suspend BOX 4 through 11 before they were withdrawn. On January 29, 2020, BOX filed a twelfth proposed rule change (SR-BOX-2020-03) ("BOX 12"). Because each proposed rule change is immediately effective upon filing, BOX has been able to charge these fees despite the suspension and subsequent disapproval of BOX 1, 2, and 3.

[20] *NetCoalition v. SEC*, 615 F.3d 525, 534-35, 539-44 (D.C. Cir. 2010) ("*NetCoalition I*").

Subsequently, NYSE Arca filed with the Commission a new rule that imposed the same fees that had been vacated by the D.C. Circuit and designated the filing as effective immediately pursuant to Sections 19(b)(3)(A) and (C), which were amended as part of the Dodd-Frank Act in 2010.[21] The Commission did not suspend that filing, and another petition for review to the D.C. Circuit ensued. On that petition, the court held that it lacked jurisdiction to consider challenges to the Commission's non-suspension of the fees under Exchange Act Section 19(b).[22] 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."[23]

Following that decision, the Securities Industry and Financial Markets Association ("SIFMA") filed a challenge with the Commission to NYSE Arca's 2010 fee rule under Exchange Act Section 19(d) on the ground that it was an improper limitation of access to exchange services. We consolidated that challenge with a challenge to a 2010 Nasdaq fee rule.[24]

On October 16, 2018, we issued our decision in the consolidated proceeding ("SIFMA Decision").[25] We held that the exchanges failed to meet their burden of establishing that the challenged fees were consistent with the purposes of the Exchange Act—that the fees were fair and reasonable and not unreasonably discriminatory. We noted that we were not making a determination that the fees themselves were not fair and reasonable. Rather, we explained that it was possible the challenged fees could be shown to be fair and reasonable and otherwise consistent with the Exchange Act, but that the evidence submitted by the exchanges failed to satisfy their burden on the existing record. Accordingly, we set those fees aside. The exchanges filed a petition for review of the SIFMA Decision with the D.C. Circuit and the case remains pending.

During the pendency of the challenge that led to the SIFMA Decision, over 60 related challenges to national securities exchange rule changes and National Market System ("NMS")

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21 Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010); *see also* Exchange Act Sections 19(b)(3)(A), (C), 15 U.S.C. §§ 78s(b)(3)(A), (C) (permitting self-regulatory organizations ("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]").

22 *NetCoalition v. SEC*, 715 F.3d 342, 351 (D.C. Cir. 2013) ("*NetCoalition II*").

23 *Id.* at 353.

24 *See Sec. Indus. & Fin. Mkts. Ass'n*, Exchange Act Release No. 72182, 2014 WL 1998525, at *6, 11-13 (May 16, 2014) (identifying Nasdaq fee rule for Level 2 depth-of-book data product).

25 *See Sec. Indus. & Fin. Mkts. Ass'n*, Exchange Act Release No. 84432, 2018 WL 5023228 (Oct. 16, 2018), *petition for review filed*, No. 18-1292 (D.C. Cir. docketed Oct. 23, 2018).

plan amendments were filed with the Commission.[26] Contemporaneously with the SIFMA Decision, we issued a separate order ("Remand Order") remanding those related challenges to the respective exchanges and NMS plan participants and instructing the exchanges and plan participants to consider the impact of the SIFMA Decision on the challengers' assertions that the contested rule changes and plan amendments should be set aside.[27] We further directed the exchanges and NMS plans to identify or develop fair procedures for them to use in assessing the challenged rule changes and NMS plan amendments as potential denials or limitations to services. Several exchanges and plan participants moved for reconsideration of the Remand Order. We denied reconsideration on May 7, 2019, but we tolled the deadlines set in the Remand Order until after the resolution of the appeal of the SIFMA Decision in the D.C. Circuit.[28]

2. *Susquehanna*

In August 2017, the D.C. Circuit issued a decision in *Susquehanna International Group v. SEC*.[29] There, the court held that the Commission's order approving a proposed rule change filed by the Options Clearing Corporation ("OCC")—its "Capital Plan"—failed to meet the standards of the Administrative Procedure Act ("APA").[30] In so ruling, the court found that the Commission's analysis was flawed in that the Commission relied too heavily on OCC's representations rather than performing an independent analysis of the Capital Plan or critically evaluating OCC's analysis of the Plan.[31] 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."[32] Nor, according to the court, could the Commission reach a conclusion "unsupported by substantial evidence."[33] The D.C. Circuit remanded for further proceedings.

Following the remand, the Commission disapproved the OCC Capital Plan, finding that the information OCC submitted before the Commission was insufficient to support a finding that the Plan was consistent with the Exchange Act.[34] In reaching this determination, the Commission reiterated the D.C. Circuit's holding that it must "critically evaluate the

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26 *Sec. Indus. & Fin. Mkts. Ass'n*, Exchange Act Release No. 84433, 2018 WL 5023230, at *3-6 (Oct. 16, 2018) (listing challenges).

27 *Id*.

28 *Sec. Indus. & Fin. Mkts. Ass'n*, Exchange Act Release No. 85802, 2019 WL 2022819, at *3 (May 7, 2019). Oral argument on the appeal was held on February 18, 2020.

29 866 F.3d 442 (D.C. Cir. 2017).

30 *Id*. at 447 (citing *NetCoalition I*).

31 *Id*.

32 *Id*.

33 *Id*. at 447-48.

34 *See* Exchange Act Release No. 85121 (Feb. 13, 2019), 84 Fed. Reg. 5157 (Feb. 20, 2019) (SR-OCC-2015-02), https://www.govinfo.gov/content/pkg/FR-2019-02-20/pdf/2019-02731.pdf.

representations made and the conclusions drawn" by the self-regulatory organization ("SRO") in determining whether a proposed rule change is consistent with the Exchange Act.[35] OCC subsequently submitted a new proposal to adopt a capital management policy, which the Commission approved after a comprehensive analysis and review of the record.[36]

II. Analysis

Our Rules of Practice set forth procedures for reviewing actions made pursuant to delegated authority.[37] Pursuant to Rule 431(a), the Commission may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the action made pursuant to delegated authority. Here, we conducted a de novo review of both the Disapproval Order and the record, which includes, among other items: (1) the Proposed Rule Changes and attachments thereto, as well as supplemental information submitted by BOX; (2) comments received in connection with the Proposed Rule Changes, including responses from BOX; (3) orders issued in connection with the Proposed Rule Changes and comments received in connection with them; and (4) BOX's petitions for review and related arguments. As a result of that de novo review, we affirm the action disapproving the Proposed Rule Changes for the reasons expressed below.

A. BOX has not met its burden to demonstrate that the Proposed Rule Changes are consistent with the Exchange Act.

Under Section 19(b)(2)(C) of the Exchange Act, the Commission must approve an SRO's proposed rule change if it finds that it is consistent with the applicable requirements of the Exchange Act and the rules and regulations thereunder; if it does not make such a finding, the Commission must disapprove the proposed rule change.[38] Here, the applicable provisions of the Act include Section 6, which requires that an exchange's rules provide for the "equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities," do not "permit unfair discrimination between customers, issuers, brokers, or dealers," and do "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Exchange Act.[39]

Additionally, under Rule of Practice 700(b)(3), the "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change."[40] 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

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35 *See id.* at 5157.

36 *See* Exchange Act Release No. 88029 (Jan. 24, 2020), 85 Fed. Reg. 5500 (Jan. 30, 2020), https://www.govinfo.gov/content/pkg/FR-2020-01-30/pdf/2020-01643.pdf.

37 *See* 17 C.F.R. § 201.431.

38 15 U.S.C. § 78s(b)(2)(C).

39 15 U.S.C. §§ 78f(b)(4), (5), (8).

40 17 C.F.R. § 201.700(b)(3).

support an affirmative Commission finding.[41] Any failure of an SRO to provide the requisite information may result in the Commission not having a sufficient basis to find that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations issued thereunder.[42]

The Commission has historically applied a "market-based" test in assessing whether exchanges' market data fees satisfy the requisite Exchange Act requirements.[43] Under that test, we consider whether an exchange "was subject to significant competitive forces in setting the terms of its proposal for [market data], including the level of any fees."[44] If an exchange meets that burden, we will find that the rule is consistent with the Exchange Act unless there is "a substantial countervailing basis to find that the terms" of the rule violate the Exchange Act or the rules thereunder.[45] BOX asserts that the Proposed Rule Changes satisfy the market-based test.

An exchange may "provide a substantial basis, other than competitive forces, . . . demonstrating that the terms of the [fee] proposal are equitable, fair, reasonable, and not unreasonably discriminatory."[46] We have recognized "that sufficient evidence may be presented for the Commission to sustain or strike the fee on other grounds."[47] It is the exchange's prerogative to choose what basis to provide, and a cost-based argument could be one such basis.[48] But whatever the bases, it is the exchange's burden to show that its proposed fees are

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41 *See* Exchange Act Release No. 63723 (Jan. 14, 2011), 76 Fed. Reg. 4066, 4071 (Jan. 24, 2011), https://www.sec.gov/rules/final/2011/34-63723fr.pdf (release accompanying amendments to Rules of Practice) ("2011 Rule Amendments Adopting Release").

42 *See id*.

43 *Cf. NetCoalition I*, 615 F.3d at 532, 534-35, 537 (finding Commission's use of market-based test—one that relies primarily on the effect of competitive forces to assess the terms on which market data is made available to investors—to be permissible). The Disapproval Order noted that market data fees and connectivity fees "present similar issues" and so merit similar assessment under a market-based test. *See* Disapproval Order, 84 Fed. Reg. at 13,367. Because BOX presents a market-based argument in support of its connectivity fees, we assess that argument under a market-based test.

44 Exchange Act Release No. 59039 (Dec. 2, 2008), 73 Fed. Reg. 74,770, 74,781 (Dec. 9, 2008), https://www.govinfo.gov/content/pkg/FR-2008-12-09/pdf/E8-28908.pdf ("2008 ArcaBook Approval Order").

45 *Id*. at 74,781; *see also* SIFMA Decision, 2018 WL 5023228, at *12 (citing same).

46 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,781; *see also* SIFMA Decision, 2018 WL 5023228, at *12 (citing same).

47 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,781; *see also* SIFMA Decision, 2018 WL 5023228, at *12 (citing same).

48 We, and the D.C. Circuit, have also recognized that an exchange's costs of providing data could be relevant to the fairness of the fees charged under the market-based approach. *See* SIFMA Decision, 2018 WL 5023228, at *33 (citing *NetCoalition I*, 615 F.3d at 537).

consistent with the Exchange Act.[49] BOX invokes both a cost-based and market-based justification for the Proposed Rule Changes, and so we evaluate both here.

1. BOX has not demonstrated, as it asserts, that the Proposed Rule Changes are consistent with the Exchange Act as an offset of costs.

In each of its filings under review, BOX begins by raising a cost-based argument. BOX states that the fees will "allow the Exchange to recover costs associated with offering access through the network connections, . . . 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."[50] The information BOX has provided is insufficient to support these assertions, and so BOX has failed to meet its burden to demonstrate that the Proposed Rule Changes are consistent with the Exchange Act on this cost basis.

BOX has not submitted the requisite information for us to evaluate the reasonableness of the fees being charged on the basis of cost. We have explained that a cost-based approach contemplates consideration of whether the fees "bear at least some relationship to costs."[51] BOX fails to provide the information necessary to determine whether there is any relationship between the amounts that it anticipates it will collect from the fees and the costs that it asserts it will offset through those fees. Indeed, BOX fails to identify either the amount of these total revenues or the amount of the specific costs they will offset. Nor does BOX identify the frequency of these purported costs (such as one-time implementation costs, fixed costs, etc.), or the expected revenues from the Proposed Rule Changes. We therefore have no basis upon which to evaluate BOX's argument that the fees established by the Proposed Rule Changes are necessary to offset its costs,[52] and we have no way to ascertain the relationship, if any, between the connectivity fees and the costs they purport to offset.

We also lack the information necessary to evaluate whether these fees are being allocated equitably.[53] Because BOX fails to explain why these enumerated costs are appropriately offset by connectivity fees (as opposed to some other fees), nor to what extent fees charged for other

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49 *See* Rule of Practice 700(b)(3), 17 C.F.R. § 201.700(b)(3); *see also* 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,781; General Instructions for Form 19b-4, Sec. I.3, https://www.sec.gov/files/form19b-4.pdf.

50 *See* 83 Fed. Reg. at 37,854 (BOX 1); *see also* 83 Fed. Reg. at 65,383 (same as to BOX 2); 84 Fed. Reg. at 7148 (same as to BOX 3).

51 *Bloomberg L.P.*, Exchange Act Release No. 83755, 2018 WL 3640780, at *9 & n.63 (July 31, 2018).

52 *See* 15 U.S.C. § 78f(b)(4) (requiring that an exchange's rules provide for "reasonable" fees).

53 *See id.* (requiring that an exchange's rules "provide for the equitable allocation" of its fees).

services and products (such as data products and trading services) offset them, we are unable to determine whether the costs attributable to supporting connectivity are being equitably allocated to those using that connectivity. BOX also provides no explanation for how it arrived at the specific amounts of the fees ($5,000 per month for 10 Gb connections and $1,000 per month for non-10 Gb connections) nor the disparity between them, beyond noting that one connection "use[s] more bandwidth." Consequently, we are unable to determine whether the pricing unfairly discriminates between different groups using connectivity.[54]

BOX argues that the Disapproval Order "cited no authority for the proposition that an exchange is invariably required to provide a detailed analysis of costs in support of a proposed fee filing." Although BOX is correct that we do not require a cost-based justification in support of a proposed fee filing, BOX, in its filings, chose to justify its Proposed Rule Changes as reasonable in light of its claimed costs. Having done so, BOX must present sufficient evidence to demonstrate that the Proposed Rule Changes are consistent with the Exchange Act under a cost-based theory.[55] An "unquestioning reliance on" an SRO's "defense of its own actions is not enough"; rather, we must "critically review[the] analysis or perform [our] own."[56] BOX has not provided sufficient evidence for us to discharge our review function, and so we must disapprove these Proposed Rule Changes under a cost-based analysis.

BOX also attempts to support its cost-based argument by asserting that the proposed fees are reasonable because they are equal to or lower than competitors' fees.[57] 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

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54 *See* 15 U.S.C. § 78f(b)(5) (requiring that an exchange's rules not be designed "to permit unfair discrimination between customers, issuers, brokers, or dealers").

55 BOX also argues that providing more detailed information would put it at a "significant competitive disadvantage because it would expose sensitive information." BOX is free to seek confidential treatment of any such information under Rule of Practice 190, 17 C.F.R. § 201.190.

56 *See Susquehanna*, 866 F.3d at 447; *see also* 15 U.S.C. § 78s(b)(2)(C) (stating that the Commission "shall disapprove a proposed rule change" of an SRO "if it does not make a *finding*" of consistency with the Exchange Act (emphasis added)); *cf. Eagle Supply Grp., Inc.*, Exchange Act Release No. 39800, 1998 WL 133847, at *4 (Mar. 25, 1998) (remanding under Section 19(f) of the Exchange Act so that NASD could "provide a sufficient basis for its decision to enable us to make the requisite determination"); *Jonathan Feins*, Exchange Act Release No. 37091, 1996 WL 169441, at *2 (Apr. 10, 1996) (stating, in reviewing SRO disciplinary action, that "it is important that a self-regulatory organization clearly explain the bases for its conclusions" and that if it "fails to do so, we cannot discharge properly our review function").

57 *See* 83 Fed. Reg. at 37,854 (BOX 1); *see also* 83 Fed. Reg. at 65,382-83 (same as to BOX 2), 84 Fed. Reg. at 7148 (same as to BOX 3).

with the requirements of the Act and the rules and regulations thereunder applicable to a self-regulatory organization."[58] BOX cites no contrary authority and provides no explanation as to why, without providing sufficient cost information, its comparison of its own fees to a competitor's fees is sufficient here.[59] The mere fact that another exchange charges similar fees does not demonstrate that BOX's fees are reasonable.[60] The circumstances that would make another exchange's fees reasonable (assuming they are) would not necessarily be the same for BOX.

BOX argues that it did not need to submit additional information because it submitted its proposals as immediately effective rule changes. According to BOX, *Susquehanna* presented a different situation than the one here because it involved a rule change submitted for approval under Exchange Act Section 19(b)(2) rather than an immediately effective rule filing under Section 19(b)(3). But when the Commission suspends an immediately effective rule filing, Section 19(b)(3) requires that the Commission institute proceedings to determine whether the proposed rule change should be approved or disapproved under Section 19(b)(2)(B)—the same provision at issue in *Susquehanna*.[61] Once the Commission did so here, the Exchange Act's requirements for approving a proposed rule change apply equally, regardless of whether the Proposed Rule Rules were initially filed pursuant to Section 19(b)(2) or 19(b)(3).

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[58] 17 C.F.R. § 201.700(b)(3). *See* Exchange Act Section 19(b)(2)(C)(i), 15 U.S.C. § 78s(b)(2)(C)(i) ("The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this chapter *and the rules and regulations issued under this chapter that are applicable to such organization*.") (emphasis added); *see also* Exchange Act Section 19(b)(2)(F), 15 U.S.C. § 78s(b)(2)(F) (requiring Commission to "promulgate rules setting forth the procedural requirements of the proceedings required" for SRO rule review); 2011 Rule Amendments Adopting Release, 76 Fed. Reg. at 4067 (adopting release for Rule 700 noting the rules are being promulgated to fulfill the requirements of Exchange Act Section 19(b)(2)(F)). To the extent that BOX points to other exchanges' fees to argue that the amounts of the Proposed Rule Changes are constrained by competition, with no further showing of competitive forces, we reject this argument for the same reason.

[59] We also note that some of those other fees BOX cites are the subject of pending proceedings to determine if they are fair and reasonable and otherwise consistent with the Exchange Act. *See* Remand Order, 2018 WL 5023230.

[60] 2011 Rule Amendments Adopting Release, 76 Fed. Reg. at 4071 (stating that rather than a "mere assertion" that another SRO has a similar rule in place, the SRO must provide a "legal analysis" of the proposed rule change's "consistency with applicable requirements" that is "sufficiently detailed and specific to support an affirmative Commission finding").

[61] *See* 15 U.S.C. § 78s(b)(3)(C).

2. BOX has not demonstrated that the fees established by the Proposed Rule Changes are constrained by competition to equitable and reasonable levels.

BOX also argues under the market-based test that its services are subject to sufficient competition to render its fees equitable, reasonable, and otherwise consistent with the Exchange Act. BOX has not, however, provided the evidence necessary to support the Proposed Rule Changes or its arguments. Consequently, BOX has failed to meet its burden to demonstrate that the fees established by the Proposed Rule Changes are equitably allocated, not unfairly discriminatory, and do not impose an unnecessary or inappropriate burden on competition.

a. BOX has not demonstrated that total platform theory demonstrates that the fees established by the Proposed Rule Changes are constrained by competition.

BOX argues that the "total platform" theory demonstrates that its fees are constrained by competition. The premise of the theory is that an exchange is a platform with joint products and joint costs.[62] In the context of market data fees, the D.C. Circuit has stated that the theory posits that "[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."[63]

BOX relies on platform theory to assert that because a market is competitive on a platform basis, the fees charged by the platform are consistent with the Exchange Act. An SRO that relies on 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.[64] It remains true that an SRO must establish by a preponderance of the record that the fee is "reasonable,"[65] and that it is neither unfairly discriminatory nor an undue burden on competition.[66]

BOX argues that its exchange is a trading platform, and so its ability to price its joint products, including the connectivity services at issue here, is constrained by competition for order flow. In particular, BOX claims that the competition it faces for order flow ensures that its proposed connectivity fees are reasonable and otherwise consistent with the requirements of the Exchange Act. BOX has failed to show that platform theory has any applicability here.

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62 *See* SIFMA Decision, 2018 WL 5023228, at *14, 23 (citing *NetCoalition I*, 615 F.3d at 542 n.16).

63 *Id.* at *14 (quoting *NetCoalition I*, 615 F.3d at 542 n.16).

64 *Id.* at *17-19, 23 (finding that the exchange presenting the platform theory argument did not substantiate its assertions with evidence sufficient to support its platform-based arguments).

65 *See* Exchange Act Section 6(b)(4), 15 U.S.C. § 78f(b)(4).

66 *See* Exchange Act Sections 6(b)(5), (8), 15 U.S.C. §§ 78f(b)(5), (8).

BOX supports its argument by relying on an economic analysis of the extent to which competitive forces constrain the prices of connectivity services offered by Nasdaq (the "Nasdaq Statement").[67] The Nasdaq Statement argues that Nasdaq's provision of connectivity services is "inextricably linked" to its provision of trading services such that it is not possible to evaluate Nasdaq's pricing of connectivity services in isolation from the trading and other "joint" services it offers. The Nasdaq Statement also argues that Nasdaq is subject to significant competition from other trading exchanges and rivals that can be expected to constrain Nasdaq's aggregate return from its joint products. Because connectivity services are an "input" into trading, the Nasdaq Statement contends, competition for equity trading will thus constrain the pricing of connectivity services. Neither the Nasdaq Statement itself nor the arguments BOX makes based on it establish that BOX's Proposed Rule Changes are consistent with the Exchange Act.[68]

i. The Nasdaq Statement does not establish that BOX has met its burden of demonstrating that the Proposed Rule Changes are consistent with the Exchange Act.

The Nasdaq Statement does not establish that the Proposed Rule Changes are consistent with the Exchange Act for several reasons. First, the Nasdaq Statement does not establish that the fact that an exchange offers multiple products constrains its pricing of connectivity fees to reasonable levels. In explaining how equity exchanges like Nasdaq offer joint products to their customers and have joint costs to do so, the Nasdaq Statement repeatedly compares Nasdaq to a fitness center competing for members with other centers. But this analogy is not apt. Consumers rarely are members of more than one fitness center, but many traders trade at multiple exchanges. Traders may make trades at or close to the same time on different exchanges and regularly pay for data and connectivity services at some or all of the exchanges.[69] In contrast, if Gym A raises its rates for some fees, this may drive some of its members to Gym B because the

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67 *See* Attachment to Letter from Jeffrey S. Davis, Nasdaq, Inc., to Brent J. Fields, Secretary, Securities and Exchange Commission (Feb. 13, 2019), https://www.sec.gov/comments/4-729/4729-4930892-178427.pdf.

68 BOX also does not explain whether, if it charges fees for connectivity based on the fact that it also offers other "joint" services that are "inextricably linked," consumers receive any benefit for paying fees that are priced in this manner.

69 *See, e.g.,* SIFMA Decision, 2018 WL 5023228, at *5 (noting that companies subscribe to multiple exchanges to take advantage of "valuable trading opportunities") and *29 (noting that traders engaging in high-frequency or algorithmic trading usually require "depth-of-book data from multiple exchanges" to pursue their trading strategies); *see also, e.g.,* Letter from Theodore R. Lazo and Ellen Greene, SIFMA, to Brent J. Fields, Secretary, Securities and Exchange Commission (Oct. 15, 2018) at 2, https://www.sec.gov/comments/sr-box-2018-24/srbox201824-4530417-176029.pdf (positing that it is necessary for certain firms to connect to numerous—if not all—exchanges and obtain their depth-of-book data to effectuate their trading strategies or meet their execution obligations); Letter from Tyler Gellasch, Health Markets, to Brent J. Fields, Secretary, Securities and Exchange Commission (Aug. 23, 2019) at 6-7 & n.22, 12 & n.35, https://www.sec.gov/comments/sr-box-2018-24/srbox201824-4258035-173056.pdf (same).

total cost of Gym A's platform has increased. A similar example involving Exchanges A and B does not necessarily hold because traders are frequently customers of multiple exchanges. Exchange customers may need to connect to both Exchange A and B, as well as others, for a variety of reasons (e.g., to ensure best execution, to implement profitable trading strategies based on access to complete market data, to provide competitive trade execution, to comply with regulatory obligations such as the Order Protection Rule). Thus, an increase in Exchange A's connectivity fees might simply increase the cost of trading, rather than drive market participants to Exchange B.

Second, BOX has not demonstrated the relevance of the Nasdaq Statement's reliance on economic theory relating to two-sided transaction platforms. Under that theory, because two-sided transaction platforms "facilitate a single, simultaneous transaction" between two participants, they "cannot raise prices on one side without risking a feedback loop of declining demand."[70] "Price increases on one side of the platform . . . do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services."[71] As a result, it is necessary to "evaluat[e] both sides of a two-sided transaction platform . . . to accurately assess competition."[72] The Nasdaq Statement asserts that equity exchanges are two-sided markets to the extent that they bring together liquidity providers (those market participants that provide liquidity by posting quotes on exchanges) with liquidity takers (those market participants that take liquidity by trading against posted quotes).

BOX fails to establish that there is a two-sided market for its connectivity services. Consumers purchase connectivity services from BOX, but BOX does not bring together buyers and sellers of connectivity. As a result of failing to establish that a two-sided market for its connectivity services exists, BOX has not demonstrated that the framework for evaluating competition with respect to a two-sided transaction platform has relevance here.

Third, the Nasdaq Statement is inapposite to our analysis of the fees at issue here because it addresses the equities market and opines on Nasdaq's connectivity services rather than the options market and BOX's connectivity services.[73] We reject BOX's argument that the Nasdaq

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70 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285-86 (2018).

71 *Id.* at 2286.

72 *Id.* at 2287.

73 Because the equities market and connectivity offerings of Nasdaq's equities exchanges are not at issue here, we need not (and do not) determine whether the underlying conclusions of the Nasdaq Statement are correct with respect to Nasdaq.

Statement's conclusions necessarily apply to the options market and BOX's connectivity services.[74] BOX has not demonstrated that the analysis of the equities market in the Nasdaq Statement is applicable in the context of the options market. BOX asserts that it is the Commission's burden to demonstrate that the conclusions of the Nasdaq Statement do not apply here, but this is not correct. Rather, as Commission Rule of Practice 700(b)(3) provides, "[t]he burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization is on the self-regulatory organization that proposed the rule change."[75] And because "[t]he self-serving views of the regulated entities . . . provide little support to establish that significant competitive forces affect their pricing decisions," BOX's assertion that the Nasdaq Statement applies to the fees at issue here does not discharge its burden.[76] BOX may not simply assert that the conclusions of the Nasdaq Statement apply to its market; it must substantiate that assertion and show that they do. As the D.C. Circuit has recognized, the Commission cannot "merely accept" BOX's unsupported assertions.[77]

ii. The arguments BOX makes based on the Nasdaq Statement do not establish that the fees established by the Proposed Rule Changes are consistent with the Exchange Act.

We reject BOX's assertion in its petition for review that the conclusions of the Nasdaq Statement are "confirmed by other parts of the record pertaining to specific BOX customers." BOX relies on a comment submitted by an individual that it asserts is employed by a previous BOX Participant that ended its membership three months before the connectivity fees were announced and implemented. The comment expresses concern that BOX's connectivity fees are excessive.[78] BOX also relies on a comment from a former BOX customer objecting to the level of BOX's fees, challenging BOX's assertion that no one complained about the fees, and

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74 For this same reason, we reject BOX's reliance on the fact that both the Commission and the D.C. Circuit have acknowledged the existence of "fierce" competition for order flow. *See NetCoalition I*, 615 F.3d at 539 ("No one disputes that competition for order flow is 'fierce.'") quoting 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,782)). These authorities addressed competition for order flow among equity exchanges and other trading venues, not competition for connectivity in options markets.

75 *See* Rule of Practice 700(b)(3), 17 C.F.R. § 201.700(b)(3).

76 *NetCoalition I*, 615 F.3d at 541; *accord Susquehanna*, 866 F.3d at 447, 450 (citing *NetCoalition I* for same proposition); *see also id.* at 443 (finding that by "grant[ing] approval [of the SRO rule change] without itself making the findings and determinations prescribed by" the Exchange Act, the Commission "effectively abdicated that responsibility" to the SRO).

77 *Susquehanna*, 866 F.3d at 447.

78 Comment from Anand Prakash (Mar. 27, 2019), https://www.sec.gov/comments/sr-box-2019-04/srbox201904-183648.htm ("If this fee increase goes in effect, we wouldn't be able to subscribe to BOX market data as the cost of access will go higher and as such, we wouldn't be able to participate in trades on BOX. As of now, we have stopped our access to BOX as we await for a decision on this fees increase.").

explaining that the fees had caused the commenter to terminate service.[79] But these two comments are insufficient to demonstrate that BOX's total return across the platform remains the same regardless of whether it charges more for connectivity fees and less for transaction fees or vice versa. The actions of one or two customers are insufficient to establish that the fees in the Proposed Rule Changes are reasonable as required by the Exchange Act.

BOX also affirmatively attempts to distinguish itself from the exchanges discussed in the Nasdaq Statement. BOX argues that it is in particular need of connectivity fees compared to other exchanges because it "does not own and operate its own data center and therefore cannot control data center costs."[80] But BOX does not explain how this difference in its cost structure might affect the applicability of the Nasdaq Statement's analysis, which involves balancing the exchange's total joint costs against the services offered.

Finally, BOX argues, based on the Nasdaq Statement, that "regulatory forbearance" is appropriate because there purportedly is no economically rational way for an exchange to allocate its joint costs since it offers joint products. This argument effectively urges the Commission not to review the fees BOX charges for connectivity. But as the D.C. Circuit stated in *NetCoalition I*, "an agency may not shirk a statutory responsibility simply because it may be difficult."[81] Indeed, as the D.C. Circuit later emphasized in *Susquehanna*, "[w]hen a statute requires an agency to make a finding as a prerequisite to action, it must do so."[82] We must have a basis for approving BOX's proposed fee changes, and BOX has not demonstrated that its inability to allocate its costs to those fees is such a basis.

b. BOX has not otherwise offered evidence that the Proposed Rule Changes are constrained by competition.

BOX also argues that competitive forces separate from those related to platform theory also constrain their connectivity fee pricing. But, again, BOX fails to provide sufficient factual support for these assertions and so fails to meet its burden of establishing that the Proposed Rule Changes are consistent with the Exchange Act.

BOX argues that market participants do not need to connect to BOX, and that "the possibility that market participants will discontinue routing orders to a trading platform if it sets its connectivity fees at an unreasonably high level is a substantial constraint on exchanges' ability to increase connectivity fees." But BOX does not address the effects of regulatory obligations, such as best execution and trade-through requirements associated with the Order Protection Rule, which suggest that, at least under certain circumstances, firms would be limited

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79 Comment from Stefano Durdic, former owner of R2G Services, LLC (Mar. 27, 2019), https://www.sec.gov/comments/sr-box-2019-04/srbox201904-5214039-183647.pdf.

80 83 Fed. Reg. at 65,382 (BOX 2).

81 615 F.3d at 539.

82 866 F.3d at 446 (quoting *Gerber v. Norton*, 294 F.3d 173, 185-86 (D.C. Cir. 2002)).

in their ability to discontinue routing orders to BOX.[83] Moreover, as we stated in the SIFMA Decision, there "must be evidence that competition will in fact constrain pricing . . . before the Commission approves a fee . . . premised on a competitive pricing model."[84] And BOX does not establish that connectivity to BOX is unnecessary in the options market or that market participants would, in fact, discontinue routing orders to it if it sets its connectivity fees at an unreasonably high level such that this behavior would constrain its pricing decisions.[85]

BOX also argues that the Proposed Rule Changes will not impose an unnecessary or inappropriate burden on competition because as a "small Exchange in the already highly competitive environment for options trading, BOX does not have the market power necessary to set prices for services that are unreasonable or unfairly discriminatory."[86] It argues that because market participants are not required to connect to BOX, they simply will not do so if its connectivity fees are unreasonably high, and that those that do need to connect can do so through third parties. But as explained above, BOX has not established that firms may simply refrain from connecting to BOX (or connect through a third party with attendant lag time) without running afoul of applicable regulatory obligations or failing to take steps necessary to meet customer needs. Nor has BOX offered any information regarding the effect of the connectivity fees on its market share over the months in which the fees were charged since BOX filed its initial fee filing.[87]

The record does not support BOX's position that the connectivity fees at issue satisfy the market-based test. BOX has provided inadequate information regarding the competiveness of the market for connectivity services. This does not mean that the fees are not consistent with the

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83 *See Options Order Protection and Locked/Crossed Market Plan* (2009) Section 5, https://www.theocc.com/components/docs/clearing/services/options_order_protection_plan.pdf; *see also* Rule 611 of Regulation NMS, 17 C.F.R. § 242.611 (Order Protection Rule for equities market).

84 *See* SIFMA Decision, 2018 WL 5023228, at *18; *see also id*. at *17-22 (analyzing exchanges' arguments regarding link between order flow and market data fee prices and finding exchanges failed to meet their burden in part due to regulatory constraints on firms' ability to move order flow).

85 *Cf. NetCoalition I*, 615 F.3d at 541 (dismissing examples provided in 2008 ArcaBook Approval Order as "two anecdotes" that "say nothing about whether an exchange like NYSE Arca is constrained to price its depth-of-book data competitively").

86 83 Fed. Reg. at 37,854 (BOX 1).

87 *See supra* note 19. We calculate that from July 2018, when BOX 1 was filed, through February 2020, BOX has been authorized to collect these fees for at least fifteen of these twenty months, including nine of the eleven months after issuance of the Disapproval Order.

Exchange Act, but we cannot approve them under the market-based test unless BOX establishes that significant competitive forces limit its ability to set unreasonable prices.[88]

B. Disapproval is not arbitrary and capricious.

BOX argues that the Disapproval Order should be vacated because it arbitrarily and capriciously treats BOX differently from other exchanges and "represents a fundamental shift in the Commission's regulatory approach to connectivity fees." According to BOX, "in suspending and then disapproving" the Proposed Rule Changes, the Division departed from a policy of allowing other immediately effective exchange rule filings to go into effect. BOX points to instances in which the Commission—by delegated authority or otherwise—did not suspend and institute proceedings on immediately effective connectivity fee (and data fee) filings by other exchanges. But neither the Commission's actions regarding OIP 1, OIP 2, and OIP 3, nor the disapproval of the Proposed Rule Changes, constitute an impermissible change in policy or otherwise arbitrary or capricious action.

First, BOX's primary complaint is not about the merits of the Disapproval Order but about the decisions to suspend BOX's rule filings and institute proceedings to consider whether to approve or disapprove them. These are the decisions that BOX contends depart from prior Commission practice, and which, it claims, have caused BOX to be treated unfairly compared with other exchanges.[89] But Exchange Act Section 19(b)(3) states that the determination of whether to suspend an immediately effective rule filing and institute proceedings is not reviewable under Section 25 of the Exchange Act and is not "final agency action" for purposes of review.[90] As the D.C. Circuit explained in *NetCoalition II,* the plain language was "clear and convincing evidence of the Congress's intent to preclude" judicial review of the Commission's determination whether to suspend an SRO rule filing or to allow it to become effective without instituting a rule disapproval proceeding.[91] Thus, neither the previous determinations to not suspend other fee filings nor the determination to suspend here—including whether those decisions departed from any prior practice—constitute reviewable agency action.[92] It is the decision whether to approve or disapprove the Proposed Rule Changes, after the Proposed Rule

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88 *See NetCoalition I,* 615 F.3d at 539-44 (vacating rule approval because market-based test had not been satisfied).

89 We note that since July 2018, when BOX 1 was filed, BOX has filed over forty additional immediately effective rule filings. Other than BOX 2 and 3, none of those rule filings have been suspended. *See* SR-BOX-2018-25, 26, 27, 28, 30, 32, 33, 34, 35, 36, 38, 39; SR-BOX-2019-01, 02, 03, 05, 07, 08, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 25, 27, 28, 30, 31, 32, 33, 34, 35, 36, 38, 39; SR-BOX-2020-01, 02, 03, 05, 06, 07.

90 15 U.S.C. § 78s(b)(3)(C).

91 715 F.3d at 351 (internal quotation marks and citations omitted).

92 *Id*. at 353 ("We make clear that [Exchange Act] section 19(b)(3)(C) imposes a *jurisdictional* bar to our review of the Commission's decision not to suspend a proposed rule change.") (emphasis in original); *see also supra* note 90 (Commission's decision to suspend a rule change is not reviewable).

Changes have been suspended and proceedings instituted, and not the decision whether to suspend BOX's rule filings and institute proceedings to determine whether they should be approved or disapproved, that is relevant here and that would be reviewable.

Second, BOX points to no formal Commission policy regarding the suspension of immediately effective rule filings and, in fact, there is none.[93] Rather, the determination whether to suspend an immediately effective exchange fee filing and institute proceedings to determine whether it is consistent with the Exchange Act occurs on a case-by-case basis. As BOX itself emphasizes in its filings, Section 19(b)(3) does not require the Commission to take any action or form any conclusion about the Proposed Rule Changes BOX filed or about any other exchange's filing. The determination not to suspend a fee filing does not constitute reviewable Commission action or require an explanation from the Commission.[94] When the Commission does determine to suspend an immediately effective rule change and institute proceedings to determine whether to approve or disapprove a fee, the Commission does explain the specific issues in that case that led to its conclusion, as occurred in the current instance.[95] The Commission's exercise of discretion is consistent with the Exchange Act's provisions.[96]

BOX bases its argument on its observation that before OIP 1 issued on September 17, 2018, the Commission had not suspended any immediately effective exchange fee filings regarding connectivity fees. It is true that recently, the Commission's case-by-case review of these filings has led to the Commission suspending more immediately effective filings than previously. But BOX's argument that our treatment of previous filings renders disapproval of

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[93] BOX refers to the staff guidance the Division issued to assist SROs in preparing fee filings that would meet their burdens under the Exchange Act and related rules. *See* "Staff Guidance on SRO Rule Filings Related to Fees" (May 21, 2019), https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees. But this document makes no mention of any previous purported policy to not suspend rule filings, nor any new policy to do otherwise now. And, as the staff guidance itself makes clear, it represents only the views of the staff of the Division of Trading and Markets—not the Commission—and the Commission neither approved nor disapproved its contents. *Id.* at n.1.

[94] Although a determination not to suspend a proposed fee rule change would not be reviewable, the enforcement of a rule that has gone into effect could still be challenged as a limitation of access to exchange services through an application for review to the Commission under Exchange Act Section 19(d), 15 U.S.C. § 78s(d). *See Sec. Indus. & Fin. Mkts. Ass'n*, 2014 WL 1998525, at *6-11 (explaining jurisdictional limits of Section 19(d) and setting forth framework for determining whether fees are reviewable as limitations of access under the Exchange Act and referencing timeliness requirement).

[95] *See, e.g.*, OIP 1, 83 Fed. Reg. at 47,948 (explaining reasoning for suspension). And once the Commission issues a final approval or disapproval order, that order could then be appealed.

[96] *See* 15 U.S.C. § 78s(b)(3)(C) ("[T]he 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 this chapter.").

the Proposed Rule Changes at issue here arbitrary and capricious ignores the need for the Commission to respond to intervening legal developments. As discussed above, in the *NetCoalition* litigation, as well as in *Susquehanna,* the D.C. Circuit has recently reiterated the Commission's obligation to examine the factual support for assertions that competitive forces constrain fees and emphasized the need for the Commission to "critically review[]" an SRO's analysis.[97]

Consistent with the court's directives, following *Susquehanna* and prior to OIP 1, the Commission issued several orders indicating a need for further substantiation of various fee filings.[98] After OIP 1 was issued on September 17, 2018, the Division suspended other immediately effective exchange fee filings regarding connectivity fees.[99] For example, as discussed above, the Division suspended effective upon filing rule changes to increase connectivity fees submitted by MIAX and PEARL around the same time as OIP 1.[100]

As the D.C. Circuit stated in *Road Sprinkler Fitters Local Union 669 v. Herman*, it is not "arbitrary and capricious for an agency to change its position in response to new legal developments."[101] And here, to the extent that the treatment of immediately effective rule filings

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97 866 F.3d at 447.

98 *See, e.g.*, Exchange Act Release No. 83148 (May 1, 2018), 83 Fed. Reg. 20,126 (May 7, 2018), https://www.govinfo.gov/content/pkg/FR-2018-05-07/pdf/2018-09579.pdf; Exchange Act Release No. 83149 (May 1, 2018), 83 Fed. Reg. 20,129 (May 7, 2018), https://www.govinfo.gov/content/pkg/FR-2018-05-07/pdf/2018-09580.pdf (orders summarily abrogating immediately effective NMS plan amendments regarding fees because of concerns that there was not enough information provided to show consistency with the Exchange Act); *Bloomberg L.P.*, 2018 WL 3640780, at *9 (staying the effectiveness of NMS Plan amendments because the filings did "not identify any basis by which [the] fee changes could be assessed for fairness and reasonableness" beyond an "unsupported declaration" to that effect).

99 *See, e.g.,* Exchange Act Release No. 85152 (Feb. 15, 2019), 84 Fed. Reg. 5737 (Feb. 22, 2019), https://www.govinfo.gov/content/pkg/FR-2019-02-22/pdf/2019-03041.pdf (suspending proposed rule changes filed by Nasdaq BX, Inc. and Nasdaq PHLX LLC involving port fees). The filings were later withdrawn.

100 *See supra* note 6. BOX argues that the Division's approach to MIAX and PEARL "further underscore[s] that BOX is being treated less favorably than other exchanges" because the Division did not immediately suspend refiled versions of those rule proposals "and instead permitted them to remain in effect during the comment period." BOX ignores the fact that MIAX and PEARL withdrew their rule proposals before resubmitting them, meaning that, unlike with respect to BOX, proceedings were not pending when they filed new versions of their proposed rules. Moreover, the Division has not immediately suspended any of BOX's subsequent versions of the Proposed Rule Changes; instead, BOX, like MIAX and PEARL, has continued to withdraw them. In many instances, all of these exchanges, including BOX, have not withdrawn their proposed rules until the very end of the comment period, enabling them to charge the proposed fees. *See supra* note 87.

101 234 F.3d 1316, 1320 (D.C. Cir. 2000).

has changed, that change was prompted by recent case law. Under these circumstances, our action in suspending the Proposed Rule Changes was not arbitrary or capricious.[102]

C. The Proposed Rule Changes are not currently in effect.

BOX also asserts that its Proposed Rule Changes have been "deemed approved by operation of law" pursuant to Exchange Act Section 19(b)(2)(B). That section requires the Commission to "issue an order" approving or disapproving a proposed rule change within, at most, 240 days of the proposed rule change's filing.[103] If the Commission fails to issue an order within that period, the proposed rule change is deemed to have been approved.[104] BOX argues that because the Division by delegated authority, and not the Commission itself, issued the Disapproval Order within the required 240-day period, the Proposed Rule Changes have been deemed approved.[105] This argument lacks merit.

The Commission complied with the requirements of the statute. Section 19(b)(2)(D) requires only that the Commission "issue an order" approving or disapproving the proposed rule change within 240 days. The Disapproval Order was issued within that period.

Although orders issued by delegated authority are issued by Commission staff, they are issued with the full authority of the Commission and are signed by the Secretary's office on behalf of the Commission. Section 4A of the Exchange Act authorizes the Commission to delegate certain functions—including approval or disapproval of proposed rule changes under Section 19—to a "division of the Commission."[106] And the Commission's Rules of Practice make clear that "an action made pursuant to delegated authority shall have immediate effect and be deemed the action of the Commission."[107]

Moreover, Congress was aware of the Commission's ability to delegate authority to approve SRO rule filings when the time restrictions in Exchange Act Section 19(b)(2)(D) were

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102 BOX also argues that the Remand Order—which remanded immediately effective rule changes and NMS plan amendments challenged as improper limitations of access to services under Exchange Act Sections 19(d) and 11A—exacerbated its allegedly disparate treatment by allowing other exchanges' fees to remain in effect. But the determination to suspend BOX 1 was made before the Remand Order issued, so that order had no effect on BOX's treatment here.

103 *See* 15 U.S.C. § 78s(b)(2)(B)(ii).

104 *See* 15 U.S.C. § 78s(b)(2)(D).

105 BOX cited BOX 1 and BOX 2 as having been deemed approved since the relevant period had not yet elapsed for BOX 3 when it made its argument.

106 *See* 15 U.S.C. § 78d-1(a).

107 *See* Commission Rule of Practice 431(e), 17 C.F.R. § 201.431(e). *See also, e.g.*, Rule of Practice 430(c), 17 C.F.R. § 201.430(c) (referring to "a final order entered pursuant to [delegated authority]"); Rule of Practice 431(f), 17 C.F.R. § 201.431(f) (giving an order by delegated authority operative effect, even when review has been sought, until a person receives actual notice that it was been stayed, modified, or reversed on review).

enacted. Yet it did not indicate that a delegated order would not comply with the statutory deadlines. Congress authorized actions taken by delegated authority in 1962,[108] added the 240-day requirement for approving or disapproving a proposed rule change in 1975,[109] and added the provision that a proposed rule change is deemed approved if the Commission fails to act in that time in 2010.[110] Indeed, Congress amended the delegated authority provisions at the same time it enacted the majority of the current review provisions for SRO proposed rule changes.[111]

To construe Section 19(b)(2), as BOX does, to require Commission review of an order by delegated authority to be completed within 240 days "would undermine both the specific deadlines set forth in the statute and the Commission's ability to delegate functions."[112] Exchange Act Section 4A makes clear that, when it delegates an action, the Commission retains a discretionary right to review staff action, either on its own initiative or at the request of a party to that action.[113] If action taken by delegated authority were insufficient to meet the statutory deadline, the Commission would either be unable to delegate this function, or be faced with the possibility that this right of review would be thwarted; action taken by delegated authority close to the end of the statutory period would leave insufficient time for either the Commission or outside parties to seek review. Alternatively, to avoid this result, an action taken by delegated authority would have to be taken well before the end of the statutory period so the Commission could complete any review of the action before the underlying proposed rule change was deemed approved. And the Commission might have to issue its decision with insufficient time to engage

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108 *See* "An Act to Authorize the Securities and Exchange Commission to Delegate Certain Functions," Pub. L. No. 87-592, 76 Stat. 394, 394-95 (1962).

109 *See* Securities Act Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97.

110 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Commission Rule of Practice 431(e), which states that actions performed by delegated authority shall be deemed the actions of the Commission, was originally enacted in 1963, and in its current form in 1995. *See* Exchange Act Release No. 35833 (June 9, 1995), 60 Fed. Reg. 32,738, 32,823 (June 23, 1995), https://www.govinfo.gov/content/pkg/FR-1995-06-23/pdf/95-14750.pdf (noting that Rule of Practice 431(e) replaced previous Rule 26(e)); Exchange Act Release No. 7031, 1963 WL 64555, at *12 (Mar. 8, 1963) ("Any determination at a delegated level shall have immediate effect and be deemed the action of the Commission.").

111 *See* Securities Act Amendments of 1975, 89 Stat. 97.

112 *See Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and No. 2, Regarding the Acquisition of CHX Holdings, Inc. by North America Casin Holdings, Inc*., Exchange Act Release No. 82727 (Feb. 15, 2018) at 21-23, https://www.sec.gov/rules/sro/chx/2018/34-82727.pdf.

113 *See* 15 U.S.C. § 78d-1(b).

in the independent and thoughtful analysis required by both the Exchange Act and the APA or otherwise have the order deemed approved before completing its deliberations.[114]

Nor does Exchange Act Section 4A(c) support BOX's argument. That provision states: "If the right to exercise such review is declined, or if no such review is sought within the time stated in the rules promulgated by the Commission, then the action [taken by delegated authority] shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission."[115] Contrary to BOX's assertion, this does not mean that an action taken by delegated authority shall "'be deemed the action of the Commission' *only* '[i]f the right to exercise such review is declined, or if no such review is sought within the time stated in the rules promulgated by the Commission.'"[116] Section 4A is silent on the effect of a delegated action when Commission review is sought and granted.[117] And the Commission employed the rulemaking authority granted by Section 4A(b) to promulgate Rule 431(e), which provides that actions made pursuant to delegated authority are deemed actions of the Commission.[118]

III. Conclusion

For the reasons set forth above, the Commission does not find, pursuant to Section 19(b)(2) of the Exchange Act, that BOX has met its burden of demonstrating that the Proposed Rule Changes are consistent with the requirements of the Exchange Act and the rules and

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114 *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

115 15 U.S.C. § 78d-1(c).

116 The emphasis and alteration are in BOX's filing. The language in the internal quotation marks is in Section 4A(c), 15 U.S.C. § 78d-1(c). The word "only" is not. *Id.*

117 *Cf. Indiana Bell Telephone Co., Inc. v. McCarthy*, 362 F.3d 378, 387 (7th Cir. 2004) (noting that decisions made pursuant to delegated authority represent actions of the agency).

118 *See* Exchange Act Section 4A(a), 15 U.S.C. § 78d-1(a) ("[T]he Commission shall have the authority to delegate, by published order or rule, any of its functions . . . ."); *see also* Exchange Act Release No. 35833 (June 9, 1995), 60 Fed. Reg. 32,738, 32,777 (June 23, 1995), https://www.govinfo.gov/content/pkg/FR-1995-06-23/pdf/95-14750.pdf (noting that Commission was relying on the authority granted by Exchange Act Section 4A, among other provisions, in promulgating the Rule 430 series); Exchange Act Release No. 7031, 1963 WL 64555, at *1 (Mar. 8, 1963) (noting that original rule relied on same language from Section 4A(a)).

regulations thereunder applicable to a national securities exchange. IT IS THEREFORE ORDERED, pursuant to Rule 431 of the Commission's Rules of Practice, that the Proposed Rule Changes (SR-BOX-2018-24; SR-BOX-2018-37; SR-BOX-2019-04) be, and hereby are, disapproved.

By the Commission.

J. Matthew DeLesDernier
Assistant Secretary