

[Securities Regulation Daily Wrap Up, EXCHANGES AND MARKET REGULATION—BOX Exchange asks Commission to review suspension of rule change on connectivity fees, \(Sept. 27, 2018\)](#)

Securities Regulation Daily Wrap Up

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By [Mark S. Nelson, J.D.](#)

BOX Exchange LLC has asked the Commission to review a decision by the Division of Trading and Markets to temporarily suspend and institute proceedings regarding a BOX proposed rule change that would impose fees on those who physically connect to the exchange while also reclassifying fees charged to high speed data feed users. The data feed fees at issue in the BOX matter have recently been the subject of attention from one SEC commissioner who noted the agency's atypical action to suspend the BOX approval and by an industry group seeking greater transparency on connectivity fees. The SEC also has suspended connectivity fee proposals by Miami International Securities Exchange LLC and MIAX PEARL, LLC, but these exchanges have not yet indicated whether they intend to petition for review by the Commission ([In the Matter of the Petition of: BOX Exchange LLC](#), September 26, 2018).

BOX says division used wrong standard. BOX [told](#) the Commission of its intent to seek review of the matter within days of the SEC's [order](#) suspending the BOX proposal. According to BOX, the rule change would impose monthly fees of \$1,000 for a less than 10 Gigabit connection and of \$5,000 for a 10 Gigabit connection. BOX said such fees are consistent with prevailing market rates and suggested that its proposed fees may be lower than the fees charged by some exchanges for comparable services. BOX also proposed to reclassify its high speed vender feed (HSVF) as a port fee. The amount of the HSVF fee would not change and, although market participants must get BOX credentials, they do not have to physically connect to BOX.

BOX argued in its petition that the SEC should not have made an "affirmative finding" about its proposal because the proposal was supposed to be immediately effective without further review, as allowed by Exchange Act Section 19(b)(3)(A); other rule change proposals must adhere to the more stringent requirements of Exchange Act Section 19(b)(2). BOX further posited that even if the tougher approval standard applied, its proposal was nevertheless equitable, reasonable, and nondiscriminatory.

With respect to the connection fee, BOX said the proposal is equitable because the fees offset its maintenance costs. BOX also asserted that the fees are reasonable because they would be lower than fees set by many other exchanges and that the ability of market participants to disconnect at will functions as an upward limit on fee increases. BOX further noted that high bandwidth users require more resources so there was nothing discriminatory about charging different fees for users at the 10 Gigabit level and those who are below that level.

BOX recited many of the same arguments regarding the equitable, reasonable, and nondiscriminatory character of the HSVF. For example, BOX noted that anyone can become credentialed to use the HSVF service by completing the required documentation. BOX also said that neither the connectivity fees nor HSVF fees would unduly burden competition, in part, because market participants have the option of connecting via third parties. Moreover, reclassification of the HSVF as a port fee, said BOX, could be "pro-competitive" because of its ability to defray costs and to allow for further development of BOX's trading systems.

Concerns over connectivity fees. The price of connecting to exchanges' data feeds is not a new issue and has been the subject to Congressional hearings and regulators' speeches. Most recently, Commissioner Robert Jackson noted the unusual nature of the order suspending the BOX proposal in a speech arguing that the current regulatory environment presented a "bipartisan" chance to reconsider how securities markets are structured.

Specifically, Jackson [observed](#) (See footnote 33 and related text) that three companies own 12 of the 13 U.S. public exchanges. He also cited exchanges' connectivity practices as an example of how market structure impacts investors. According to Jackson, technological advances have made connectivity cheaper, but the SEC continues to approve exchange rules that can keep prices high. In a footnote, Jackson cited research by his own staff that showed no SEC disapprovals of exchanges' connectivity-related rule change proposals in 99 filings by equity exchanges made between 2016 and the present, although six proposals were either withdrawn or modified. Jackson, however, noted the recent move by the SEC to suspend and institute proceedings regarding the three similar proposals submitted by BOX, [MIAX](#), and [MIAX PEARL](#).

BOX's petition for review cited Jackson's observation about connectivity fee proposals in arguing that the SEC's order in its case was arbitrary and capricious. BOX emphasized how it believed it was being treated differently than other exchanges that had made similar proposals without objection from the SEC.

Moreover, the Managed Funds Association and the Alternative Investment Management Association jointly submitted a [rulemaking proposal](#) to the SEC in August 2018 requesting that the Commission take steps to ensure greater scrutiny of connectivity fees. Specifically, the associations urged the SEC to gather cost and revenue data from exchanges. The associations said that the existing regulations may not go far enough to protect against unreasonable fees, unreasonably discriminatory fee practices, and unreasonable burdens on competition. As a result, the associations recommended that: (1) the Commission's reviews of exchange rule proposals take a "more rigorous" approach; (2) the Commission engage in cost-based reviews of securities information processor plan fees; (3) the Commission issue guidance on market data licensing; and (4) the Commission study ways to improve regulations applicable to proprietary market data feeds and the consolidated data processor model.

The petition is File [No. SR-BOX-2018-24](#).

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Companies: BOX Exchange LLC; Miami International Securities Exchange LLC; MIAX PEARL, LLC

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