



SECURITIES AND EXCHANGE COMMISSION

[Release No. 85399]

Securities Exchange Act of 1934

March 22, 2019

In the Matter of the

BOX Exchange LLC

Regarding a 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 (File No. SR-BOX-2019-04)

Order Granting BOX Exchange LLC's Petition for Review of Division of Trading and Markets Order by Delegated Authority Temporarily Suspending and Instituting Proceedings on SR-BOX-2019-04; Affirming the Division's Order; and Lifting the Automatic Stay

I. Background

On February 13, 2019, BOX Exchange LLC ("BOX" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change (SR-BOX-2019-04) ("BOX 3") to amend the fee schedule on the BOX Market LLC options facility to establish certain connectivity fees and reclassify its high speed vendor feed connection as a port fee. On February 26, 2019, the Division of Trading and Markets ("Division"), acting pursuant to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

delegated authority,³ issued a notice of the proposed rule change and order temporarily suspending the proposed rule change pursuant to Section 19(b)(3)(C) of the Act and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove the proposed rule change.⁴ The Commission received one comment letter on the proposal supporting the suspension and institution of proceedings.⁵

On February 26, 2019, pursuant to Rule 430 of the Commission's Rules of Practice,⁶ the Exchange filed a notice of intention to petition for review of the Order Instituting Proceedings. Pursuant to Rule 431(e) of the Commission's Rules of Practice,⁷ a notice of intention to petition for review results in an automatic stay of the action by delegated authority. On March 5, 2019, the Exchange filed a petition for review of the Order Instituting Proceedings.⁸

The proposed fees in the proposed rule change are identical to those proposed in two prior BOX proposed rule changes, both of which were similarly suspended by delegated authority.⁹ The Forms 19b-4 for all three filings are substantively identical, except SR-BOX-2018-37 ("BOX 2") and BOX 3 identify the broad categories of the Exchange's costs to offer connectivity services and state that the proposed fees would "offset" the Exchange's costs.

³ 17 CFR 200.30-3(a)(12), (57) and (58).

⁴ See Securities Exchange Act Release No. 85201, 84 FR 7146 (March 1, 2019) ("Order Instituting Proceedings").

⁵ See letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Vanessa Countryman, Acting Secretary, Commission, dated March 12, 2019.

⁶ 17 CFR 201.430.

⁷ 17 CFR 201.431(e).

⁸ Petition for Review of Order Temporarily Suspending BOX Exchange LLC's Proposal to Amend the Fee Schedule on BOX Market LLC, dated March 5, 2019 ("Petition").

⁹ See Securities Exchange Act Release Nos. 84168 (September 17, 2018), 83 FR 47947 (September 21, 2018) (SR-BOX-2018-24) ("BOX 1") and 84823 (December 14, 2018), 83 FR 65381 (December 20, 2018) (SR-BOX-2018-37) ("BOX 2").

As with the instant proposal, the Exchange challenged the Division's delegated authority to suspend and institute proceedings on BOX 1.¹⁰ On November 16, 2018, the Commission granted the Exchange's petition to review BOX 1 and discontinued the automatic stay of the delegated action.¹¹ On February 25, 2019, the Commission issued an order affirming the action by delegated authority in BOX 1.¹² The Order Affirming the BOX 1 OIP also re-opened the comment and rebuttal periods for BOX 1 to March 8, 2019 and March 15, 2019, respectively.

II. Discussion

Pursuant to Rule 431 of the Commission Rules of Practice,¹³ the Exchange's Petition is granted. The Commission is not providing for a time period during which any party to the action or other person may file a written statement in support of or in opposition to the Order Instituting Proceedings.¹⁴ The Commission believes that the issues raised by the Exchange's Petition were presented during the course of the Commission's review of the Exchange's petition to review the delegated action in BOX 1 temporarily suspending and instituting proceedings, in which two statements were received and considered by the Commission in its order affirming the delegated

¹⁰ See letter from Amir C. Tayrani, Partner, Gibson, Dunn & Crutcher LLP, to Brent J. Fields, Secretary, Commission, dated September 19, 2018; Petition for Review of Order Temporarily Suspending BOX Exchange LLC's Proposal to Amend the Fee Schedule on BOX Market LLC, dated September 26, 2018. The Commission notes that the Exchange did not challenge the Division's action by delegated authority to suspend and institute proceedings on BOX 2.

¹¹ See Securities Exchange Act Release No. 84614 (November 16, 2018), 83 FR 59432 (November 23, 2018).

¹² See Securities Exchange Act Release No. 85184, 84 FR 6842 (February 28, 2019) ("Order Affirming SR-BOX-2018-24 OIP").

¹³ 17 CFR 201.431.

¹⁴ 17 CFR 201.100(c).

action.¹⁵ The Commission therefore does not believe the Petition presents any new issues that would benefit from an additional period for written statement and believes that no time period for the filing of statements is necessary for this review.

The Commission's Rules of Practice set forth procedures for the review of actions made pursuant to delegated authority. Rule 431(a) provides that the Commission may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, any action made pursuant to authority delegated in 17 CFR 200.30-1 through 200.30-18.¹⁶ For the reasons discussed below, the Commission affirms the temporary suspension of the proposed rule change and the institution of proceedings.

Instituting proceedings and keeping in place the temporary suspension provides a process for the Commission to further consider whether the proposed rule change is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, this approach will allow the Commission to consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that (i) an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; (ii) do not permit unfair discrimination between customers, issuers, brokers, or dealers; and (iii) do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.¹⁷ Accordingly, the Order Instituting Proceedings properly concluded that it was appropriate in the public interest, for the protection

¹⁵ See Order Affirming SR-BOX-2018-24 OIP, supra note 12. See also letters to Brent J. Fields, Secretary, Commission, from Lisa J. Fall, President, BOX, dated December 7, 2018 and Amir C. Tayrani, Gibson, Dunn & Crutcher LLP, dated December 10, 2018.

¹⁶ See 17 CFR 201.431(a).

¹⁷ See Order Instituting Proceedings, supra note 4, at 7150.

of investors, and otherwise in furtherance of the purposes of the Act to temporarily suspend the proposed rule change and to institute proceedings to determine whether the proposed rule change should be approved or disapproved in view of the significant legal and policy issues raised by the proposal.¹⁸

Further, suspending the filing and instituting proceedings constitutes an interim step in the Commission's consideration of the substantive issues raised by the filing, and does not constitute a final disposition of the proposed rule change. As reflected in the Order Instituting Proceedings, the Commission has not reached any conclusions with respect to the issues involved.¹⁹ To the contrary, the Commission sought additional comment with respect to the concerns raised by the filing,²⁰ and noted that the institution of proceedings provides the Commission the opportunity to more fully assess the issues raised.

As noted above, during the proceedings the Commission will consider whether the proposal satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; 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 Act.

Further, the Commission finds that it is in the public interest to lift the stay during the pendency of the Commission's review. The Commission believes the continued suspension of the proposed rule change while the Commission conducts proceedings to consider the

¹⁸ See id.

¹⁹ See id.

²⁰ See id.

Exchange's proposal will allow the Commission to further consider the proposed fees' consistency with the Exchange Act without the risk of allowing a fee that is potentially inconsistent with the Exchange Act to remain in effect. The Commission also does not believe that lifting the stay precludes meaningful review of the Order Instituting Proceedings.

For the reasons stated above, it is hereby:

ORDERED that the Exchange's petition for review of the Division's action, by delegated authority, temporarily suspending the proposed rule change and simultaneously instituting proceedings to determine whether to approve or disapprove the proposed rule change be GRANTED; and

It is further ORDERED that the Division's Order Instituting Proceedings by delegated authority is hereby affirmed; and

It is further ORDERED that the automatic stay of delegated action pursuant to Commission Rule of Practice 431(e)²¹ is hereby discontinued.

The order temporarily suspending such proposed rule change and instituting proceedings to determine whether to approve or disapprove such proposed rule change shall remain in effect. By the Commission.

Eduardo A. Aleman,

Deputy Secretary.

²¹ 17 CFR 201.431(e).

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