



September 12, 2018

Via Electronic Delivery

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Release No. 34-83728, File No. SR-BOX-2018-24

Dear Mr. Fields:

We write in further support of the immediately effective rule change submitted by BOX Exchange LLC (“BOX”) to amend the Fee Schedule on the BOX Options Market LLC options facility¹ and in response to the comment letter filed by the Healthy Markets Association (“Health Markets”).² The Exchange believes the rule filing at issue met all the statutory requirements of the Act and no further action by the Commission is required. Further, the searching review of the rule change that the comment letter urges the Commission to undertake is not required where, as here, an exchange has submitted an immediately effective rule change under Section 19(b)(3) of the Exchange Act.³

Healthy Markets asserts that the Commission must “take action against” BOX’s immediately effective rule change by undertaking a comprehensive assessment of its “compliance with the Exchange Act.”⁴ The extensive scrutiny that Healthy Markets advocates is indistinguishable from the “independent review” of proposed self-regulatory organization (“SRO”) rule changes required by the D.C. Circuit’s decision in *Susquehanna International Group, LLP v. SEC*.⁵ But that type of exacting, *de novo* review is inapplicable to the Commission’s decision whether to suspend an SRO’s immediately effective rule filing.

In *Susquehanna*, the Commission was not reviewing an immediately effective SRO rule change under Section 19(b)(3) of the Exchange Act. It was instead reviewing an SRO rule submitted for approval by a clearing agency under Section 19(b)(2),⁶ which

¹ BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC (“BOX”) Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network, Exch. Act Rel. No. 34-83728 (July 27, 2018).

² Letter from Tyler Gellach, Executive Director, Healthy Markets Association, to Brent J. Fields, Secretary, Securities and Exchange Commission (Aug. 23, 2018) (“Comment Letter”).

³ 15 U.S.C. § 78s(b)(3).

⁴ Comment Letter at 2.

⁵ 866 F.3d 442, 446 (D.C. Cir. 2017).

⁶ *Id.* at 447.

provides 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.⁷ The D.C. Circuit faulted the Commission for “grant[ing] approval without itself making the findings and determinations prescribed by the” Exchange Act.⁸ The court emphasized that “[w]hen a statute requires an agency to make a finding as a prerequisite to action, it must do so.”⁹ The D.C. Circuit concluded that the Commission had failed to make the findings that Section 19(b)(2) of the Exchange Act prescribes as a prerequisite to approval of a proposed SRO rule change. The court explained that the SEC’s “unquestioning reliance on [the SRO’s] defense of its own actions [was] not enough to justify approving” the SRO’s proposed rule, and that the Commission should have “critically reviewed [the SRO’s] analysis or performed its own.”¹⁰

Unlike Section 19(b)(2) of the Exchange Act, Section 19(b)(3) does not “require[]” the Commission “to make a finding as a prerequisite to” the nonsuspension of an immediately effective SRO rule filing. Section 19(b)(3) simply provides that the Commission “summarily *may* temporarily suspend the change in the rules of the [SRO] . . . if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes” of the Act.¹¹ The Act does not prescribe any findings that the Commission must make before deciding to leave an immediately effective rule filing in force. Accordingly, the “independent review” mandated by *Susquehanna*, and urged by Healthy Markets, has no applicability here, where the Commission is not required to make any “findings and determinations” as a prerequisite to the nonsuspension of BOX’s immediately effective rule filing.¹²

That conclusion is confirmed by the D.C. Circuit’s decision in *NetCoalition II*, where the court held that it lacked jurisdiction to review the Commission’s nonsuspension of an immediately effective SRO rule filing based on language in the Exchange Act stating that such action “shall not be reviewable.”¹³ In rejecting the petitioners’ alternative request for mandamus, the court explained that the substantive standard governing the Commission’s approval of exchanges’ market-data fees set forth in its earlier decision in *NetCoalition I*¹⁴ “no longer applies at this stage of the SRO rulemaking process” because, by authorizing immediately effective rule filings, “Congress has since jettisoned the requirement that the Commission approve the type of rule changes under review in *NetCoalition I*.”¹⁵ “Because the Commission is no longer

⁷ 15 U.S.C. § 78s(b)(2)(C)(i); *see also id.* § 78q-1(b)(3) (requiring the SEC to “determine[],” among other things, that a clearing agency’s rules “provide for the equitable allocation of reasonable dues, fees, and other charges”).

⁸ *Susquehanna*, 866 F.3d at 443.

⁹ *Id.* at 446 (internal quotation marks omitted).

¹⁰ *Id.* at 447.

¹¹ 15 U.S.C. § 78s(b)(3)(C) (emphases added).

¹² 866 F.3d at 442, 443.

¹³ *NetCoalition v. SEC*, 715 F.3d 342, 353 (D.C. Cir. 2013); *see also* 15 U.S.C. § 78s(b)(3)(C).

¹⁴ *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010).

¹⁵ *NetCoalition II*, 715 F.3d at 354.

required to approve an SRO's fee rule before it becomes effective," the court concluded, "*NetCoalition I* is, to that extent, inoperative" where the Commission has declined to suspend an immediately effective SRO rule.¹⁶

NetCoalition II therefore makes clear that the Commission is not required to determine that an SRO's immediately effective rule filing complies with the substantive requirements of the Exchange Act before deciding not to suspend the rule filing.

* * *

We would be pleased to answer any questions in connection with this letter.

Sincerely,



Lisa J. Fall
President
BOX

¹⁶ *Id.*