SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-81437; File No. SR-BatsBZX-2017-34)

August 18, 2017

Self-Regulatory Organizations; Bats BZX Exchange, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Introduce Bats Market Close, a Closing Match Process for Non-BZX Listed Securities Under New Exchange Rule 11.28

I. Introduction

On May 5, 2017, Bats BZX Exchange, Inc. (the "Exchange" or "BZX") filed with the Securities and Exchange Commission (the "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to adopt Bats Market Close, a closing match process for non-BZX listed securities. The Commission published notice of filing of the proposed rule change in the Federal Register on May 22, 2017.[3] On July 3, 2017, the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved.[4] As of August 16, 2017, the Commission has received forty-six comment letters on the Exchange's proposed rule change, including a response from the Exchange.[5] This order institutes proceedings under Section

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 80683 (May 16, 2017), 82 FR 23320 ("Notice").

4 See Securities Exchange Act Release No. 81072, 82 FR 31792 (July 10, 2017).

5 See Letters to Brent J. Fields, Secretary, Commission, from: (1) Donald K. Ross, Jr., Executive Chairman, PDQ Enterprise, LLC, dated June 6, 2017 ("PDQ Letter"); (2) Edward S. Knight, Executive Vice President and General Counsel, Nasdaq, Inc., dated June 12, 2017 ("NASDAQ Letter"); (3) Ray Ross, Chief Technology Officer, Clearpool Group, dated June 12, 2017 ("Clearpool Letter"); (4) Venu Palaparthi, SVP, Compliance, Regulatory and Government Affairs, Virtu Financial, dated June 12, 2017 ("Virtu

Letter"); (5) Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, dated June 13, 2017 ("SIFMA Letter"); (6) Elizabeth K. King, General Counsel and Corporate Secretary, New York Stock Exchange, dated June 13, 2017 ("NYSE Letter 1"); (7) John M. Bowers, Bowers Securities, dated June 14, 2017 ("Bowers Letter"); (8) Jonathan D. Corpina, Senior Managing Partner, Meridian Equity Partners, dated June 16, 2017 ("Meridian Letter"); (9) Fady Tanios, Chief Executive Officer, and Brian Fraioli, Chief Compliance Officer, Americas Executions, LLC, dated June 16, 2017 ("Americas Executions Letter"); (10) Ari M. Rubenstein, Co-Founder and Chief Executive Officer, GTS Securities LLC, dated June 22, 2017 ("GTS Securities Letter"); (11) John Ramsay, Chief Market Policy Officer, Investors Exchange LLC, dated June 23, 2017 ("IEX Letter"); (12) Jay S. Sidhu, Chairman, Chief Executive Officer, Customers Bancorp, Inc., dated June 27, 2017 ("Customers Bancorp Letter"); (13) Joanne Freiberger, Vice President, Treasurer, Masonite International Corporation, dated June 27, 2017 ("Masonite International Letter"); (14) David B. Griffith, Investor Relations Manager, Orion Group Holdings, Inc., dated June 27, 2017 ("Orion Group Letter"); (15) Kieran O'Sullivan, Chairman, President and CEO, CTS Corporation, dated June 28, 2017 ("CTS Corporation Letter"); (16) Sherri Brillon, Executive Vice-President and Chief Financial Officer, Encana Corporation, dated June 29, 2017 ("Encana Letter"); (17) Steven C. Lilly, Chief Financial Officer, Triangle Capital Corporation, dated June 29, 2017 ("Triangle Capital Letter"); (18) Robert F. McCadden, Executive Vice President and Chief Financial Officer, Pennsylvania Real Estate Investment Trust, dated June 29, 2017 ("Pennsylvania REIT Letter"); (19) Andrew Stevens, General Counsel, IMC Financial Markets, dated June 30, 2017 ("IMC Letter"); (20) Daniel S. Tucker, Senior Vice President and Treasurer, Southern Company, dated July 5, 2017 ("Southern Company Letter"); (21) Cole Stevens, Investor Relations Associate, Nobilis Health, dated July 6, 2017 ("Nobilis Health Letter"); (22) Mehmet Kinak, Head of Global Equity Market Structure & Electronic Trading, et, al, T. Rowe Price Associates, Inc., dated July 7, 2017 ("T. Rowe Price Letter"); (23) David L. Dragics, Senior Vice President, Investor Relations, CACI International Inc., dated July 7, 2017 ("CACI Letter"); (24) Mark A. Stegeman, Senior Vice President & CFO, Turning Point Brands, Inc., dated July 12, 2017 ("Turning Point Letter"); (25) Jon R. Moeller, Vice Chair and Chief Financial Officer, and Deborah J. Majoras, Chief Legal Officer and Secretary, The Proctor & Gamble Company, dated July 12, 2017 ("P&G Letter"); (26) Christopher A. Iacovella, Chief Executive Officer, Equity Dealers of America, dated July 12, 2017 ("EDA Letter"); (27) Rob Bernshteyn, Chief Executive Officer, Chairman Board of Directors, Coupa Software, Inc., dated July 12, 2017 ("Coupa Software Letter"); (28) Sally J. Curley, Senior Vice President, Investor Relations, Cardinal Health, Inc., dated July 14, 2017 ("Cardinal Health Letter"); (29) Mickey Foster, Vice President, Investor Relations, FedEx Corporation, dated July 14, 2017 ("FedEx Letter"); (30) Alexander J. Matturri, CEO, S&P Dow Jones Indices, dated July 18, 2017 ("SPDJI Letter"); (31) John L. Killea, Chief Legal Officer, Stewart Information Services, dated July 19, 2017 ("Stewart Letter"); (32) M. Farooq Kathwari, Chairman, President &CEO, Ethan Allen Interiors, Inc., dated July 24, 2017 ("Ethan Allen Letter"); (33) Jeff Green, Founder, Chief Executive Officer and Chairman of the Board of Directors, The Trade Desk Inc., dated July 26, 2017 ("Trade Desk Letter"); (34)

19(b)(2)(B) of the Exchange Act[6] to determine whether to approve or disapprove the proposed rule change.

II. Summary of the Proposed Rule Change

As described in more detail in the Notice, the Exchange proposes to introduce Bats Market Close, a closing match process for non-BZX listed securities. For non-BZX listed securities only, the Exchange's System[7] would seek to match buy and sell Market-On-Close ("MOC")[8] orders designated for participation in Bats Market Close at the official closing price for such security published by the primary listing market.

James J. Angel, Associate Professor, McDonough School of Business, Georgetown University, dated July 30, 2017 ("Angel Letter"); (35) Jon Stonehouse, CEO, and Tom Staab, CFO, BioCryst Pharmaceuticals, Inc., dated July 31, 2017 ("BioCryst Letter"); (36) Peter Campbell, Chief Financial Officer, Mimecast, dated July 31, 2017 ("Mimecast Letter"); (37) Joanne Moffic-Silver, Executive Vice President, General Counsel, and Corporate Secretary, Bats Global Markets, Inc., dated August 2, 2017 ("BZX Letter"); (38) David M. Weisberger, Head of Equities, ViableMkts, dated August 3, 2017 ("ViableMkts Letter"); (39) Charles Beck, Chief Financial Officer, Digimarc Corporation, dated August 3, 2017 ("Digimarc Letter"); (40) Elizabeth K. King, General Counsel and Corporate Secretary, New York Stock Exchange, dated August 9, 2017 ("NYSE Letter 2"); (41) Representative Sean P. Duffy and Representative Gregory W. Meeks, dated August 9, 2017 ("Duffy/Meeks Letter"); (42) Michael J. Chewens, Senior Executive Vice President & Chief Financial Officer, NBT Bancorp Inc., dated August 11, 2017 ("NBT Bancorp Letter"); (43) Barry Zwarenstein, Chief Financial Officer, Five9, Inc., dated August 11, 2017 ("Five9 Letter"); (44) William A. Backus, Chief Financial Officer & Treasurer, Balchem Corporation, dated August 15, 2017 ("Balchem Letter"); (45) Raiford Garrabrant, Director, Investor Relations, Cree, Inc., dated August 15, 2017 ("Cree Letter"); and (46) Steven Paladino, Executive Vice President & Chief Financial Officer, Henry Schein, Inc., dated August 16, 2017 ("Henry Schein Letter"). All comments on the proposed rule change are available at: https://www.sec.gov/comments/sr-batsbzx-2017-34/batsbzx201734.htm

6 15 U.S.C. 78s(b)(2)(B).

7 The term "System" is defined as "the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away." See Exchange Rule 1.5(aa).

8 The term "Market-On-Close" or "MOC" means a BZX market order that is designated for execution only in the Closing Auction. See Exchange Rule 11.23(a)(15). The

Members[9] would be able to enter, cancel or replace MOC orders designated for participation in Bats Market Close beginning at 6:00 a.m. Eastern Time up until 3:35 p.m. Eastern Time ("MOC Cut-Off Time").[10] Members would not be able to enter, cancel or replace MOC orders designated for participation in the proposed Bats Market Close after the MOC Cut-Off Time.

At the MOC Cut-Off Time, the System would match for execution all buy and sell MOC orders entered into the System based on time priority.[11] Any remaining balance of unmatched shares would be cancelled back to the Member(s). The System would disseminate, via the Bats Auction Feed,[12] the total size of all buy and sell orders matched per security via Bats Market Close. All matched buy and sell MOC orders would remain on the System until the publication of the official closing price by the primary listing market. Upon publication of the official

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Exchange proposed to amend the description of Market-On-Close orders to include orders designated to execute in the proposed Bats Market Close.

9 The term "Member" is defined as "any registered broker or dealer that has been admitted to membership in the Exchange." See Exchange Rule 1.5(n).

10 Currently, the NYSE designates the cut-off time for the entry of Market At-the-Close Orders as 3:45 p.m. Eastern Time. See NYSE Rule 123C. Nasdaq, in turn, designates the "end of the order entry period" as 3:50 p.m. Eastern Time. See Nasdaq Rule 4754.

11 As set forth in proposed Interpretation and Policy .02, the Exchange would cancel all MOC orders designated to participate in Bats Market Close in the event the Exchange becomes impaired prior to the MOC Cut-Off Time and is unable to recover within 5 minutes from the MOC Cut-Off Time. The Exchange states that this would provide Members time to route their orders to the primary listing market's closing auction. Should the Exchange become impaired after the MOC Cut-Off Time, proposed Interpretation and Policy .02 states that it would retain all matched MOC orders and execute those orders at the official closing price once it is operational.

12 The Bats Auction Feed disseminates information regarding the current status of price and size information related to auctions conducted by the Exchange and is provided at no charge. See Exchange Rule 11.22(i). The Exchange also proposed to amend Exchange Rule 11.22(i) to reflect that the Bats Auction Feed would also include the total size of all buy and sell orders matched via Bats Market Close.

closing price by the primary listing market, the System would execute all previously matched buy and sell MOC orders at that official closing price.[13]

The Exchange would utilize the official closing price published by the exchange designated by the primary listing market in the case where the primary listing market suffers an impairment and is unable to perform its closing auction process.[14] In addition, proposed Interpretation and Policy .03, specifies that up until the closing of the applicable securities information processor at 8:00 p.m. Eastern Time, the Exchange intends to monitor the initial publication of the official closing price, and any subsequent changes to the published official closing price, and adjust the price of such trades accordingly. If there is no initial official closing price published by 8:00 p.m. Eastern Time for any security, the Exchange would cancel all matched MOC orders in such security.

The Exchange states that it is proposing to adopt Bats Market Close in response to requests from market participants, particularly buy-side firms, for an alternative to the primary listing markets' closing auctions that still provides an execution at a security's official closing price.[15] Moreover, the Exchange contends that the proposal would not compromise the price discovery function performed by the primary listing markets' closing auctions because Bats Market Close would only accept MOC orders, and not limit orders, and the Exchange would

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13 The Exchange would report the execution of all previously matched buy and sell orders to applicable securities information processor and will designate such trades as ".P", Prior Reference Price. See Notice, supra note 3, at 23321.

14 See proposed Interpretation and Policy .01.

15 See Notice, supra note 3, at 23321. The Exchange represented that should the Commission approve the proposed rule change, it would file a separate proposal to offer executions of MOC orders at the official closing price, to the extent matched on the Exchange, at a rate less than the fee charged by the applicable primary listing market. The Exchange also represented that it intends for such fee to remain lower than the fee charged by the applicable primary listing market. See id.

only execute those matched MOC orders that naturally pair off and effectively cancel each other out.[16]

III. Summary of the Comments

As of August 16, 2017, the Commission has received forty-six comment letters on the proposal, including a response from the Exchange.[17] Six commenters supported the proposal,[18] and thirty-six commenters opposed the proposal.[19]

Six commenters supported the proposal and stated that it would increase competition among exchanges for executions of orders at the close.[20] These commenters asserted that

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16 See id.

17 See supra note 5.

18 See PDQ Letter, supra note 5; Clearpool Letter, supra note 5; Virtu Letter, supra note 5; SIFMA Letter, supra note 5; IEX Letter, supra note 5; and ViableMkts Letter, supra note 5.

19 See NASDAQ Letter, supra note 5; NYSE Letter 1, supra note 5; Bowers Letter, supra note 5; Meridian Letter, supra note 5; Americas Executions Letter, supra note 5; GTS Securities Letter, supra note 5; Customers Bancorp Letter, supra note 5; Masonite International Letter, supra note 5; Orion Group Letter, supra note 5; CTS Corporation Letter, supra note 5; Encana Letter, supra note 5; Triangle Capital Letter, supra note 5; Pennsylvania REIT Letter, supra note 5; IMC Letter, supra note 5; Southern Company Letter, supra note 5; Nobilis Health Letter, supra note 5; T. Rowe Price Letter, supra note 5; CACI Letter, supra note 5; Turning Point Letter, supra note 5; P&G Letter, supra note 5; EDA Letter, supra note 5; Coupa Software Letter, supra note 5; Cardinal Health Letter, supra note 5; FedEx Letter, supra note 5; SPDJI Letter, supra note 5; Stewart Letter, supra note 5; Ethan Allen Letter, supra note 5; Trade Desk Letter, supra note 5; BioCryst Letter, supra note 5; Mimecast Letter, supra note 5; Digimarc Letter, supra note 5; NYSE Letter 2, supra note 5; NBT Bancorp Letter, supra note 5; Five9 Letter, supra note 5; Balchem Letter, supra note 5; Cree Letter, supra note 5; and Henry Schein Letter, supra note 5. In addition, one commenter urged the Commission to conduct a close analysis of the proposal and stated that if the Bats proposal would seriously degrade the quality of the closing price, then it should be rejected. See Angel Letter, supra note 5. Other commenters expressed concern that the proposal could disrupt the closing auction process on the primary listing markets and asked the Commission to carefully consider the impacts of the proposal and whether such impacts would be necessary and helpful to public companies. See Duffy/Meeks Letter, supra note 5, at 1-2.

increased competition could result in reduced fees for market participants.[21] Three commenters characterized the primary listing markets as maintaining a "monopoly" on orders seeking a closing price with no market competition, which they argued has, and would continue to, result in a continual increase in fees for such orders if the proposal were not approved.[22] In addition, IEX argued that the proposal does not unduly burden competition as exchanges often attempt to compete by adopting functionality or fee schedules developed by competitors.[23] ViableMkts also asserted that the proposal is not fully competitive with closing auctions, as it does not accept priced orders or disseminate imbalance information.[24] Rather, the proposal competes with other un-priced orders in closing auctions, which in its view, is not destructive to the mission of the closing auction.[25]

In contrast, other commenters argued that the proposal would impede fair competition, including by "free-riding" on the investments the primary listing markets have made in their

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20 See PDQ Letter, supra note 5; Clearpool Letter, supra note 5, at 2; Virtu Letter, supra note 5, at 2; SIFMA Letter, supra note 5, at 2; IEX Letter, supra note 5, at 1; and ViableMkts Letter, supra note 5, at 1-2.

21 See PDQ Letter, supra note 5; Clearpool Letter, supra note 5, at 2; Virtu Letter, supra note 5, at 2; SIFMA Letter, supra note 5, at 2; IEX Letter, supra note 5, at 1; and ViableMkts Letter, supra note 5, at 1.

22 See IEX Letter, supra note 5, at 3; Clearpool Letter, supra note 5, at 2; and ViableMkts Letter, supra note 5, at 1-2. However, one commenter also stated that it believes the fees charged by NYSE and NASDAQ for participating in their closing auctions are not excessive and there is no need for additional fee competition for executing orders at the official closing price. See GTS Letter, supra note 5, at 5.

23 See IEX Letter, supra note 5, at 3.

24 See ViableMkts Letter, supra note 5, at 5.

25 See id. ViableMkts also argued that the effect of this competition will most likely be increased volumes at the closing price because of lower marginal costs and the potential to attract new types of investors to transact at the closing price. See id.

closing auctions.[26] Specifically, NYSE asserted that the proposal is an unnecessary and inappropriate burden on competition as it would allow BZX to use the closing prices established through the auction of a primary listing market, without bearing any of the costs or risks associated with conducting a closing auction.[27] NYSE added that the existing exchange fees for closing auctions reflect the value created by the primary listing exchange's complex procedures and technology to determine the official closing price of a security.[28] NYSE emphasized that it has invested significantly in intellectual property and software to implement systems that facilitate orderly price discovery in the closing auction, as well as surveillance tools necessary to monitor activity leading up to, and in, the closing process.[29] NYSE also noted that the proposal differs from the NASDAQ and NYSE Arca competing auctions in securities not listed on their exchanges in that such auctions compete on a level playing field because they do not rely on prices established by the primary listing exchange and they serve as an alternative method of

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26 See NYSE Letter 1, supra note 5, at 9-10; NASDAQ Letter, supra note 5, at 6 & 9; BioCryst Letter, supra note 5, at 2; Digimarc Letter, supra note 5, at 1-2; NBT Bancorp Letter, supra note 5, at 2; Balchem Letter, supra note 5, at 2; and Cree Letter, supra note 5, at 2. See also Angel Letter, supra note 5, at 3 (calling for a rationalization of intellectual property protection in order to foster productive innovation).

27 See NYSE Letter 1, supra note 5, at 9 and NYSE Letter 2, supra note 5, at 1-3 (adding that the proposal is anti-competitive because it is proposing to sell at a lower price the closing prices produced through resources expended by NYSE).

28 See NYSE Letter 1, supra note 5, at 9. NYSE also argued that the proposal impacts competition for listings, as issuers choose where to list their securities based on how primary listing exchanges are able to centralize liquidity and perform closing auctions. See infra note 116 and accompanying text.

29 See NYSE Letter 2, supra note 5, at 2. Moreover, NYSE stated that it dedicates resources to providing systems to designated market makers ("DMMs") necessary to facilitate the closing of trading as well as to floor brokers to enter and manage their customers' closing interest. See id.

establishing an official closing price if a primary listing exchange is unable to conduct a closing auction due to a technology issue.[30]

NASDAQ also argued that the proposal would burden competition. Specifically, NASDAQ believed that the proposal undermines intra-market competition, by removing orders from NASDAQ's auction book and prohibiting those orders from competing on NASDAQ, which NASDAQ argued is necessary for the exchange to arrive at the most accurate closing price.[31] NASDAQ also stated that, by diverting orders away from NYSE and NASDAQ, the proposal would detract from robust price competition and discovery that closing auctions ensure.[32] NASDAQ further argued that in order for BZX to meaningfully enhance competition, it would have to generate its own closing price, as opposed to merely utilizing the closing price generated by a primary listing market.[33]

In addition, both NYSE and NASDAQ referenced the Commission's disapproval of NASDAQ's proposal to create a Benchmark Order as support that BZX has not sufficiently satisfied its obligation to justify that the proposal is consistent with the Act and not an inappropriate burden on competition. NYSE argued that BZX essentially proposes to compete with broker-dealer agency order matching services.[34] NYSE asserted that the Commission disapproved NASDAQ's Benchmark Order, in part because it would provide an exchange with an unfair advantage over competing broker-dealers, which was not consistent with Section

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30 See NYSE Letter 1, supra note 5, at 6 and NYSE Letter 2, supra note 5, at 3-4.

31 See NASDAQ Letter, supra note 5, at 9.

32 See NASDAQ Letter, supra note 5, at 10. See also infra notes 45-81 and accompanying text (discussing comments on the proposal's impact on price discovery).

33 See id., at 13.

34 See NYSE Letter 1, supra note 5, at 8.

6(b)(8) of the Act.[35] NASDAQ further argued that the disapproval of its Benchmark Order proposal supports the assertion that an exchange must articulate how a proposed service is consistent with the policy goals of the Act with respect to national securities exchanges.[36]

In response to commenters' contentions that the proposal would burden competition, BZX asserted that the proposal would enhance rather than burden competition.[37] In this regard, BZX argued that its proposal would promote competition in the use of MOC orders at the official closing price.[38] Further, it asserted that the Commission has approved the operation of competing closing auctions, noting in particular the closing auctions on NASDAQ, NYSE Arca, and the American Stock Exchange.[39] BZX further argued that there is precedent for an exchange to execute orders solely at reference prices while not also displaying priced orders for that security.[40]

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35 See id.

36 See NASDAQ Letter, supra note 5, at 5.

37 See BZX Letter, supra note 5, at 10-11.

38 See id., at 10. BZX further argued that NASDAQ's assertion that the proposal would undermine competition amongst orders is misplaced because BZX believes that paired MOC orders, which are beneficiaries of price discovery and not price-setting orders do not impact interactions that take place on another exchange. See id., at 11.

39 See BZX Letter, supra note 5, at 6. In addition, in response to NASDAQ's contention that it is aware of no regulator in any jurisdiction that has sanctioned a diversion of orders from the primary market close, BZX noted the Ontario Securities Commission's approval of a similar proposal by Chi-X Canada ATS, which it said is currently owned by NASDAQ, to match MOC orders at the closing price established by the Toronto Stock Exchange. See NASDAQ Letter, supra note 5, at 10; BZX Letter, supra note 5, at 7 (stating that the Ontario Securities Commission stated that the proposal would not threaten the integrity of the price formation process and would pressure the Toronto Stock Exchange to competitively price executions during their closing auction).

40 See id. at 6 (describing NYSE's after hours crossing sessions which executes orders at the NYSE official closing price and the ISE Stock Exchange functionality that only executed orders at the midpoint of the NBBO and did not display orders).

BZX also argued that, rather than looking to compete with broker-dealer services, it is seeking to compete on price with the primary listing markets' closing auctions.[41] In addition, BZX argued that, contrary to the assertions by NYSE and NASDAQ, its proposal does not implicate the same issues as NASDAQ's Benchmark Order proposal.[42]

BZX also challenged the assertion that it was "free-riding" on the primary listing exchanges' closing auctions.[43] In this regard, BZX argued that instead it was, on balance, providing a "a materially better value to the marketplace" in two ways: by not diverting price-forming limit orders away from the primary listing market; and by providing users with the official closing price because any other price would be undesirable to market participants and potentially harmful to price formation.[44]

The majority of commenters addressed the potential impacts of the proposal on price discovery in the closing auctions on the primary listing markets. Seven commenters stated that the proposal would not negatively impact price discovery in the primary listing markets' closing auctions.[45] These commenters asserted that because Bats Market Close would only execute paired MOC orders, and not limit-on-close orders, it would not impede the price discovery mechanisms of the primary listing markets' closing auctions. Three commenters referenced the current NASDAQ and NYSE Arca closing auction processes for securities listed on other

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41 See BZX Letter, supra note 5, at 10.

42 See id., at 11 (asserting that the disapproval of that proposal was primarily because it raised issues under the Market Access Rule).

43 See BZX Letter, supra note 5, at 5.

44 See id.

45 See PDQ Letter, supra note 5; Clearpool Letter, supra note 5, at 3; Virtu Letter, supra note 5, at 2; SIFMA Letter, supra note 5, at 2; IEX Letter, supra note 5, at 1-2; Angel Letter, supra note 5, at 4; and ViableMkts Letter, supra note 5, at 3-4.

exchanges, stating that these competing closing auction processes, which have been permitted by the Commission, may attract limit orders from the primary listing market and impede price discovery, unlike the BZX proposal which is limited to market orders.[46] In addition, five commenters argued that, because BZX will publish the size of matched MOC orders in advance of the primary market's cut-off time, market participants would have available information needed to make further decisions regarding order execution and thus price discovery would not be impaired.[47] Two commenters also asserted that many brokers already provide market-on-close pricing to customers through products that match orders internally, and the proposal may provide incentives for these brokers to send such orders to an exchange, thereby increasing transparency, reliability and price discovery at the close.[48]

Thirty-two commenters stated that the proposal would further fragment the markets and harm price discovery in the closing auctions on the primary listing markets.[49] For example,

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46 See Clearpool, supra note 5, at 3; IEX Letter, supra note 5, at 2; and Angel Letter, supra note 5, at 4.

47 See Clearpool Letter, supra note 5, at 3; SIFMA Letter, supra note 5, at 2; IEX Letter, supra note 5, at 2; Angel Letter, supra note 5, at 4; and ViableMkts Letter, supra note 5, at 3.

48 See Clearpool, supra note 5, at 3; and ViableMkts Letter, supra note 5, at 4-5. One commenter further argued that to the extent BZX accrues market share as a result of the proposal it will likely result from less MOC pairing executed off-exchange. See Angel Letter, supra note 5, at 4.

49 See NASDAQ Letter, supra note 5; NYSE Letter 1, supra note 5; Bowers Letter, supra note 5; Meridian Letter, supra note 5; Americas Executions Letter, supra note 5; GTS Securities Letter, supra note 5; Customers Bancorp Letter, supra note 5; Masonite International Letter, supra note 5; Orion Group Letter, supra note 5; CTS Corporation Letter, supra note 5; Encana Letter, supra note 5; Triangle Capital Letter, supra note 5; Pennsylvania REIT Letter, supra note 5; IMC Letter, supra note 5; Southern Company Letter, supra note 5; Nobilis Health Letter, supra note 5; T. Rowe Price Letter, supra note 5; CACI Letter, supra note 5; Turning Point Letter, supra note 5; P&G Letter, supra note 5; EDA Letter, supra note 5; Coupa Software Letter, supra note 5; Cardinal Health Letter, supra note 5; FedEx Letter, supra note 5; Trade Desk Letter, supra note 5; BioCryst

NASDAQ argued that BZX's MOC orders would be incapable of contributing to price discovery, and instead would further fragment the market by drawing orders and quotations away from primary closing auctions and undermine the mechanisms used to set closing prices.[50] Specifically, NASDAQ expressed concern that the availability of Bats Market Close could cause a reduction in the number of limit-on-close orders submitted to the primary listing markets' closing auctions, which NASDAQ asserted would harm price discovery at the market close.[51] Moreover, NASDAQ argued that even if the proposal only resulted in fewer market-on-close orders submitted to NASDAQ closing auctions, investors would be harmed because the official closing price could potentially represent a stale or undermined price.[52] NASDAQ asserted that its closing cross is designed to maximize the number of shares that can be executed at a single price and that the number of market-on-close orders impacts the number of shares able to execute in a closing cross.[53] Accordingly, NASDAQ argued that any attempt to divert trading

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Letter, supra note 5; Mimecast Letter, supra note 5; Digimarc Letter, supra note 5; NBT Bancorp Letter, supra note 5; Balchem Letter, supra note 5; Cree Letter, supra note 5; and Henry Schein Letter, supra note 5. See also Duffy/Meeks Letter, supra note 5, at 1 (noting that public companies are expressing concern that the proposal will further fragment the market and cause harm to the pricing of their companies' shares at the close, and as such, they are concerned the proposal may disrupt the process for determining the closing price on the primary listing market, which is viewed as "an incredibly well-functioning part of the capital markets").

50 See NASDAQ Letter, supra note 5, at 8 (noting that, for this reason NASDAQ did not believe the proposal promotes fair and orderly markets in accordance with Sections 6 and 11A of the Exchange Act).

51 See NASDAQ Letter, supra note 5, at 5 and 11. NASDAQ asserted that the impact of the proposal on the use of limit-on-close orders that may be submitted to NYSE and NASDAQ should be studied and carefully analyzed.

52 See NASDAQ Letter, supra note 5, at 12. NASDAQ also stated that a credible independent study of the potential risk to price discovery is essential in order to consider whether the proposal is consistent with the Act. See id.

53 See id., at 11.

interest, including market-on-close orders, from its closing auction would be detrimental to investors as it would inhibit NASDAQ's closing auction from functioning as intended and would negatively affect the quality of the official closing price.[54] In addition, NASDAQ stated that it considered, but chose not to, disclose segmented information, such as matched MOC or LOC shares, for its closing auction in a piece-meal fashion, because NASDAQ believed it would lead to unintended consequences and undermine price discovery in the closing auction.[55]

NYSE similarly argued that even though Bats Market Close would only accept MOC orders, it could materially impact official closing prices determined through a NYSE closing auction.[56] First, NYSE emphasized the importance of the centralization of orders during the closing auction on the primary listing exchange, noting that it allows for investors to find contra-side liquidity and assess whether to offset imbalances, and for orders to be priced based on the true supply and demand in the market.[57] NYSE explained that its designated market makers ("DMMs"), which have an obligation to facilitate the close of trading in their assigned securities, factor in the size of paired-off volume, and the composition of the closing interest, in assessing the appropriate closing price.[58] NYSE asserted that under the proposal, DMMs would lose full

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54 See id. NASDAQ also notes that while BZX does not have a responsibility to contribute to price discovery in NASDAQ's closing auction, it also is obligated to avoid affirmatively undermining price discovery. See id., at 5.

55 See id., at 4.

56 See NYSE Letter 1, supra note 5, at 3.

57 See NYSE Letter 1, supra note 5, at 4.

58 See NYSE Letter 1, supra note 5, at 4. In response to this assertion, ViableMkts argues that use of Bats Market Close is voluntary. Accordingly, if a market participant wanted a DMM to be aware of their closing activity they could still send their orders to the NYSE closing auction. See ViableMkts Letter, supra note 5, at 4.

visibility into the size and composition of MOC interest, and thus would likely have to make more risk-adverse closing decisions, resulting in inferior price formation.[59]

Second, NYSE argued that the proposal would also detrimentally impact price discovery on the NYSE Arca and NYSE American automated closing auctions. NYSE stated that in the last six months there were 130 instances where the official closing price determined through a NYSE Arca closing auction was based entirely on paired-off market order volume.[60] In those instances, pursuant to NYSE Arca rules, the official closing price is the midpoint of the auction NBBO as of the time the auction is conducted. NYSE stated that if all market orders for a NYSE Arca listed security were sent to BZX, the official closing price would instead be the consolidated last sale price, which can differ from the midpoint of the auction NBBO by as much as 3.2%.[61]

Several other commenters similarly explained how the proposal may impact the integrity of official closing prices. In particular, GTS, a DMM on NYSE, argued that market-on-close orders are a vital component of closing prices and, should those orders be diverted away from the primary listing markets as a result of the proposal, it could undermine the official closing prices.[62] Multiple commenters stated that one of the benefits of a centralized closing auction conducted by the primary listing market is that it allows market participants to fairly assess supply and demand such that the closing prices reflect both market sentiment and total market

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59 See NYSE Letter 1, supra note 5, at 4.

60 See NYSE Letter 1, supra note 5, at 5. NYSE represented that once NYSE American transitions to Pillar technology, it will conduct a closing auction in an identical manner to NYSE Arca.

61 See id.

62 See GTS Securities Letter, supra note 5, at 2-3.

participation.[63] Because the proposal may cause orders to be diverted away from the primary listing exchanges, these commenters argued that it would negatively affect the reliability and value of closing auction prices.

Some commenters further argued that because the proposal undermines the reliability of the closing process and/or the official closing price it also poses a risk to listed companies and its shareholders.[64] In addition, one commenter, SPDJI, argued that the proposal may also impact confidence in the pricing of benchmark indices as confidence in closing prices is a prerequisite for market participants to maintain confidence in the pricing of benchmark indices.[65]

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63 See Bowers Letter, supra note 5; Americas Executions Letter, supra note 5; and FedEx Letter, supra note 5. See also Coupa Software Letter, supra note 5; Trade Desk Letter, supra note 5; and Mimecast Letter, supra note 5 (arguing that gathering liquidity in a single venue ensures that the market reaches an accurate and reliable closing price for their stocks).

64 See NYSE Letter 1, supra note 5, at 3 (arguing that the proposal is indifferent to the potential risks to public companies and that the closing is the most important data point for shareholders); IMC Financial Letter, supra note 5, at 1-2; Nobilis Health Letter, supra note 5; EDA Letter, supra note 5, at 1-2; Coupa Software Letter, supra note 5; Ethan Allen Letter, supra note 5; Trade Desk Letter, supra note 5; BioCryst Letter, supra note 5; Digimarc Letter, supra note 5; Duffy/Meeks Letter, supra note 5, at 1-2 (stating that public companies are concerned the proposal will have an unforeseen effect on the pricing of their companies' shares at the close, ultimately harming a critical measure of the company's value and harming its shareholders); NBT Bancorp Letter, supra note 5; Five9 Letter, supra note 5; Balchem Letter, supra note 5; Cree Letter, supra note 5; and Henry Schein Letter, supra note 5. Several issuers also asserted that decentralizing closing auctions will increase volatility, reduce visibility, and negatively impact liquidity for equity securities. See e.g., Customers Bancorp Letter, supra note 5; Orion Group Letter, supra note 5; Nobilis Health Letter, supra note 5; Cardinal Health Letter, supra note 5; and Stewart Letter, supra note 5.

65 See SPDJI Letter, supra note 5, at 3 (stating that it relies solely on primary market auction prices to calculate the official closing index values, and that these closing index values play an important role in the markets, including use by portfolio managers to measure their funds' value and for use in calculating settlement prices for certain products); see also Coupa Software Letter, supra note 5; Trade Desk Letter, supra note 5; and Henry Schein Letter, supra note 5 (stating that the official closing price is used to value their stocks for purposes of various indexes and mutual funds).

Accordingly, SPDJI asserted that because the closing price is a critical data point for investors, great caution should be taken in any changes to the closing auction.[66]

Moreover, some commenters argued that the centralization of liquidity at the open and close of trading, and how primary listing markets perform during the opening and closing, are important factors for issuers in determining where to list their securities, and the additional risk posed to listed companies from an unreliable or unrepresentative closing price and/or process could impact an issuer's decision where to list and/or cause companies to forgo going public.[67]

In response to concerns regarding the impact of the proposal on the price discovery process, BZX argued that, because the proposal would only match MOC orders and would require the Exchange to publish the number of matched shares in advance of the primary listing markets' cut-off times, BZX believes it would avoid any impact on price discovery.[68] In addition, BZX offered to disseminate more information with regard to Bats Market Close and to disseminate such information via the applicable securities information processor, in addition to the Bats Auction Feed.[69] BZX further challenged commenters' concerns that Bats Market Close could pull all MOC orders away from the primary listing markets and alter the calculation of the

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66 See SPDJI Letter, supra note 5, at 2. In contrast, one commenter acknowledged that while impacting the quality of the closing price is an objection that deserves close analysis, as the closing price is "the most important price of the day," and would warrant rejection of the proposal, the commenter does not believe the proposal would harm the quality of the closing price. See Angel Letter, supra note 5, at 4.

67 See NYSE Letter 1, supra note 5, at 3 and 9 (noting that no single data point is more important than the closing price to the company or its shareholders); GTS Securities Letter, supra note 5, at 3-5; EDA Letter, supra note 5, at 1; Duffy/Meeks Letter, supra note 5, at 1 (stating that the closing price is a critical measure of a company's value and that public companies view the closing auction on the listing exchange as a critical aspect of listing). See also infra note 116 and accompanying text.

68 See BZX Letter, supra note 5, at 3-4.

69 See id., at 4 and 12. BZX further asserted that it believed modern software can easily and simply add this data to data disseminated by the primary listing markets. See id., at 4.

closing price, noting that such a scenario could occur today as a result of competing closing auctions and broker-dealers that offer internal MOC order matching solutions.[70] Furthermore, BZX argued that the competing auctions run by NASDAQ and NYSE Arca could not only pull all MOC interest away from the primary listing markets but could also divert all price-setting limit-on-close interest from those markets as well.[71] BZX also asserted that such competing closing auctions often may produce bad auction prices on the non-primary market, as compared to the proposed Bats Market Close which would ensure that market participants receive the official closing price.[72] Accordingly, BZX contends that the proposal would not impose fragmentation on the market at the close that does not already exist today.[73]

In response to NYSE's arguments regarding the impact on a DMM's ability to price the close, BZX argued that this point highlights what it believes to be an additional benefit of

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70 See id., at 4-5 (noting that neither NYSE nor NASDAQ prohibits their members from withholding MOC orders from their closing auctions). In response, NYSE stated that it believed such broker-dealer services degrade the public price and size discovery of the primary listing exchanges' closing auctions, but that such activities are not held to the same standards under the Act as national securities exchanges and against which the BZX proposal must be evaluated. See NYSE Letter 2, supra note 5, at 4.

71 See BZX Letter, supra note 5, at 5. BZX provided evidence of 14 instances in June 2017 where a NASDAQ-listed security had no volume in NASDAQ's closing auction but did have volume in NYSE Arca's closing auction. See id. In response, NYSE argued that it believed it was misleading to compare the proposal to the competing closing auctions because BZX would be offering neither a competing closing auction nor a facility to establish the official closing price should a primary listing exchange invoke its closing auction contingency plan. See NYSE Letter 2, supra note 5, at 3.

72 See id. at 4. BZX asserted that 86% of closing auctions conducted by NASDAQ for NYSE-listed securities in June 2017 resulted in closing prices different from the official closing price and 84% of competing closing auctions conducted by NYSE Arca for NASDAQ-listed securities in June 2017 resulted in closing prices different from the official closing price.

73 See id. at 7-8.

allowing it to compete with NYSE's closing auction.[74] Specifically, BZX argued that its proposal would provide an alternative liquidity pool that would allow users to avoid the "subjective decision making of the DMMs."[75]

With regard to concerns about the impact of the proposal on issuers and their shareholders, BZX reaffirmed that the proposal is designed not to impact the trading environment for issuers and their securities or the price discovery function of the primary listing markets' closing auction.[76]

In arguing that the proposal would cause fragmentation and thus impair the closing price, NYSE and NASDAQ also asserted that the proposal contradicts the Commission's approval of recent amendments to the National Market System Plan to Address Extraordinary Market Volatility (the "LULD Plan") which, they argue, centralize re-opening auction liquidity at the primary listing exchange by prohibiting other market centers from re-opening following a trading pause until the primary listing exchange conducts a re-opening auction.[77] Specifically, these commenters asserted that it would be inconsistent for the Commission to find it in the public interest to consolidate trading in a re-opening auction, while sanctioning fragmentation of trading in a closing auction.[78]

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74 See id. at 10.

75 Id. In response, NYSE argued that BZX's claims regarding the role of the DMM were not germane to whether the proposal is consistent with the Act and stated that it believed the scale of its closing auction and the low levels of volatility observed in the auction demonstrate its effectiveness. See NYSE Letter 2, supra note 5, at 4.

76 See BZX Letter, supra note 5, at 2 and 4.

77 See NASDAQ Letter, supra note 5, at 6; NYSE Letter 1, supra note 5, at 3.

78 See NYSE Letter 1, supra note 5, at 3.

In response, BZX argued that this comparison is misplaced.[79] Specifically, BZX said the amendment to the LULD Plan cited by NYSE and NASDAQ granted the primary listing market the ability set the re-opening price but did not mandate the consolidation of orders at the primary listing market following a trading halt.[80] Accordingly, BZX believes the proposal is consistent with the LULD Plan as it seeks to avoid producing a "bad" or "outlier" closing price and does not affect the centralization of price-setting closing auction orders.[81]

Several commenters addressed the potential impact of the proposal on market complexity and operational risk as a result of increased market fragmentation. Some of these commenters believed that the proposal would not introduce significant additional complexity or operational risk. For example, two commenters argued that the proposal could enhance the resiliency of the closing auction process by providing market participants an additional mechanism through which to execute orders at the official closing price in the event of a disruption at a primary listing market.[82] Another commenter argued that exchanges already have many market data feeds that firms must purchase to ensure that they have all of the information necessary to make informed execution decisions and that adding another data feed will not add complexity given the small amount of information that goes into the closing data feed and the current capabilities of market participants to re-aggregate multiple data feeds.[83]

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79 See BZX Letter, supra note 5, at 8-9.

80 See id.

81 See id.

82 See SIFMA Letter, supra note 5, at 2 and ViableMkts Letter, supra note 5, at 3 (further noting that once BZX is able to process MOC orders, they would be in a position to develop the capability to offer a full backup closing auction process).

83 See Clearpool Letter, supra note 5, at 2.

In contrast, other commenters argued that the proposal would add unnecessary market complexity and operational risk. In particular, two commenters noted that the proposal would require market participants to monitor an additional data feed, the Bats Auction Feed, one noting that if additional exchanges adopted similar functionality to Bats Market Close, it would require monitoring of even more data feeds.[84] These commenters argued that monitoring an additional data feed could increase operational risk by creating another point of failure at a critical time of the trading day.[85] One commenter also noted the increased complexity involved in sending order flow to more than one exchange in short periods of time near the close of the trading day.[86] This commenter argued that the proposal increases operational risk and complexity at a critical point of the trading day by forcing market participants whose orders did not match in Bats Market Close to quickly send MOC orders from one exchange to another before the cut-off time at the primary market closing auction.[87] This added complexity, GTS argued, puts additional stress on the systems of exchanges and increases the potential for disruptions.[88] Lastly, two commenters argued that the proposal could encourage other exchanges, broker-dealers, and alternative trading

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84 See NYSE Letter 1, supra note 5, at 7; IMC Letter, supra note 5, at 1.

85 See IMC Letter, supra note 5, at 1 and NYSE Letter 1, supra note 5, at 7. See also Ethan Allen Letter, supra note 5 (arguing the proposal would add a layer of complexity).

86 See GTS Letter, supra note 5, at 6.

87 See GTS Letter, supra note 5, at 6. Furthermore, NYSE argued that in certain situations, investors may not be able to participate in a closing auction on NYSE American or NYSE Arca if they wait until after their order was cancelled by BZX to send in a market-on-close order to closing auctions on NYSE Arca and NYSE American. NYSE explained that in situations where there is an order imbalance priced outside the Auction Collars, orders on the side of the imbalance are not guaranteed to participate in the closing auctions on those two exchanges. Earlier submitted market-on-close orders have priority. See NYSE Letter 1, supra note 5, at 8.

88 See GTS Letter, supra note 5, at 6.

systems to offer similar processes, which would introduce undesirable fragmentation to the market and lead to operational challenges for investors and traders.[89]

In response, BZX argued that the proposal would not increase operational risks, but rather would provide a way to address the single point of failure risk that exists for closing auctions conducted on the primary listing markets.[90] BZX argued that despite the current system of designated auction backups, market participants can be confused about whether an exchange is in fact able to conduct a closing auction.[91] BZX believes Bats Market Close could provide an alternative option for market participants to route orders, in the event there is an impairment at the primary listing market, and still receive the official closing price.[92]

In addition, as noted above, BZX stated that it would be willing to disseminate information regarding matched MOC orders, not only via the Bats Auction Feed, but also via the applicable securities information processor, if permissible.[93] BZX added that modern software can easily and simply add volume data disseminated by the primary listing markets regarding the closing auction and data regarding matched MOC orders from the Bats Market Close.[94]

Several commenters addressed the issue of whether the proposal would facilitate manipulation of both the closing auctions on the primary listing markets, as well as continuous trading during the final minutes of the trading day. Some commenters did not believe it would

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89 See T. Rowe Price Letter, supra note 5, at 1-2. See also NASDAQ Letter, supra note 5, at 8 (noting that other exchanges may propose similar offerings but choose different pairing cut-off times which could further complicate investors' decisions and programming requirements).

90 See BZX Letter, supra note 5, at 12.

91 See id.

92 See id.

93 See id., at 4 and 12.

94 See id., at 4.

do so. For example, one commenter noted that incentives to manipulate the closing price already exist and it is unlikely the proposal would result in increased manipulation of the market close.[95] In addition, IEX argued that the proposal would make manipulation of closing crosses more conspicuous.[96] IEX also claimed that the Consolidated Audit Trail would provide a new tool for detecting any such manipulation.[97]

In contrast, several commenters asserted that the proposal raises a risk of manipulation, in part due to the asymmetry of information that would be disseminated, which would allow market participants to utilize informational advantages to their own benefit. For example, NASDAQ argued that information concerning the amount of orders matched through Bats Market Close, would represent tradable information that market participants could use to "game" the closing crosses on the primary listing markets and undermine fair and orderly markets.[98] In particular, NASDAQ argued that its closing auction was designed to carefully balance the amount and timing of data released so as to reduce the risk of gaming, but that this new information regarding paired MOC orders could be used to gauge the depth of the market, the direction of existing imbalances, and the likely depth remaining at NASDAQ, creating gaming opportunities.[99] NYSE similarly argued that the proposal would increase potential manipulation.[100] First, NYSE asserted that the potential for manipulative activity at the close would increase because primary listing exchange auctions would decrease in size and thus be

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95 See Angel Letter, supra note 5, at 5.

96 See IEX Letter, supra note 5, at 2.

97 See id., at 2-3.

98 See NASDAQ Letter, supra note 5, at 8.

99 See NASDAQ Letter, supra note 5, at 8.

100 See NYSE Letter 1, supra note 5, at 6. See also Americas Executions Letter, supra note 5 (stating that the proposal creates new opportunities to possibly manipulate the close).

easier to manipulate.[101] NYSE also argued that the proposal facilitates manipulative activity by providing an incentive for market participants to inappropriately influence the closing price when they know they have been successfully paired-off on BZX.[102] NYSE further asserted that the proposal could potentially provide some market participants, such as professional traders, with useful information that other market participants do not have, such as the direction of an imbalance, which could be used to influence the official closing price.[103]

Although not citing concerns regarding manipulation specifically, T. Rowe Price similarly argued that the proposal would lead to information asymmetries that could result in changes in continuous trading behavior leading into the market close as some market participants could be trading on information gathered from Bats Market Close pairing results.[104] T. Rowe Price asserted that a market participant that is aware of the composition of volume paired through Bats Market Close at 3:35 pm would be in a position to use that information to influence its trading behavior over the next ten to fifteen minutes leading in to the closing auction cut-off times on NYSE and NASDAQ respectively.[105] T. Rowe Price argued that, as a result, the proposal could not only impact price discovery in closing auctions on the primary listing markets it could also impact continuous trading behavior.[106]

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101 See NYSE Letter 1, supra note 5, at 6.

102 See NYSE Letter 1, supra note 5, at 6.

103 See id. However, ViableMkts argued that because these market participants would not know the full magnitude of the imbalance, it does not believe the proposal creates an incremental risk of manipulation. See ViableMkts Letter, supra note 5, at 5.

104 See T. Rowe Price Letter, supra note 5, at 2-3.

105 See id.

106 See id.

NYSE also stated that identifying manipulative activity would also become more difficult under the proposal due to the time difference between the Bats Market Close and primary market closing auctions and the cross-market nature of the manipulation.[107] GTS similarly argued that the proposal would make surveillance of the market close more difficult and expensive due to fragmentation of order flow across multiple markets.[108]

In response, BZX argued that it does not believe that the proposal creates a potential for increased manipulation.[109] Should the Commission approve the proposal, BZX notes that both it and FINRA as well as other exchanges would continue to surveil for manipulative activity and "seek to punish those that engage in such behavior."[110] Furthermore, BZX argued that information asymmetries are inherent in trading, including the primary listing markets closing auctions.[111] For example, BZX argued that the current operation of d-Quotes on NYSE carries a risk of manipulation as it provides an informational advantage to NYSE DMMs and floor brokers, and allows d-Quotes to be entered, modified or cancelled up until 3:59:50 p.m. while other market participants are prohibited from entering, modifying or cancelling on-close orders after 3:45 p.m.[112] Lastly, BZX argued that the information disseminated through the Bats

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107 See NYSE Letter 1, supra note 5, at 6.

108 See GTS Securities Letter, supra note 5, at 6.

109 See BZX Letter, supra note 5, at 11-12.

110 See id., at 11

111 See id., at 11-12.

112 See id., at 12. BZX also requested that the Commission review the appropriateness of NYSE's use of the d-Quote and its potential for price manipulation of NYSE's closing prices. See id., at 9.

Auction Feed would not provide an indication of whether the cancelling of a particular side of an order is meaningful, which limits its potential to impact the official closing price.[113]

Several commenters also addressed the potential impacts of the proposal on market participants that they assert play important roles in facilitating closing auctions on NYSE. Specifically, three commenters asserted that the proposal would have potentially detrimental impacts on NYSE floor brokers.[114] Eighteen commenters asserted that the proposal would make it more difficult for Designated Market Makers to facilitate an orderly close of NYSE listed securities as they would lose the ability to continually assess the composition of market-on-close interest.[115] Many of these commenters that are issuers asserted that one of the reasons they chose to list on NYSE was the ability to have access to a DMM that is responsible for facilitating an orderly closing auction.[116]

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113 See id.

114 See Bowers Letter, supra note 5; Meridian Letter, supra note 5; and Americas Executions Letter, supra note 5.

115 See NYSE Letter 1, supra note 5, at 4; GTS Securities Letter, supra note 5, at 2-3; Customers Bancorp Letter, supra note 5; Masonite International Letter, supra note 5; Orion Group Letter, supra note 5; CTS Corporation Letter, supra note 5; Encana Letter, supra note 5; Triangle Capital Letter, supra note 5; Pennsylvania REIT Letter, supra note 5; IMC Letter, supra note 5, at 1-2; Southern Company Letter, supra note 5; Nobilis Health Letter, supra note 5; CACI Letter, supra note 5; Turning Point Letter, supra note 5; P&G Letter, supra note 5; Cardinal Health Letter, supra note 5; FedEx Letter, supra note 5; and Stewart Letter, supra note 5. See also supra notes 57 - 59 and accompanying text.

116 See GTS Securities Letter, supra note 5, at 2-3; Masonite International Letter, supra note 5; Encana Letter, supra note 5; Triangle Capital Letter, supra note 5; Pennsylvania REIT Letter, supra note 5; Nobilis Health Letter, supra note 5; CACI Letter, supra note 5; Turning Point Letter, supra note 5; P&G Letter, supra note 5; Cardinal Health Letter, supra note 5; FedEx Letter, supra note 5; and Stewart Letter, supra note 5.

Several commenters stated that the proposal could harm issuers, particularly small and mid-cap companies.[117] Many of these commenters, some of which are issuers, stated that the current centralized closing auctions on the primary listing markets contribute meaningful liquidity to a company's stock, facilitates investment in the company, and helps to lower the cost of capital. Accordingly, these commenters expressed concern that potential fragmentation caused by the proposal could negatively impact liquidity during the closing auction, causing detrimental effects to listed issuers.[118] Several commenters further argued that centralized closing auctions provide better opportunities to fill large orders with relatively little price impact.[119]

In contrast, one commenter argued that the proposal would improve aggregate liquidity at the official closing price.[120] Specifically, this commenter asserted that the lower aggregate cost of trading would likely spur incremental increases in trading volumes.[121] In addition, this

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117 See NASDAQ Letter, supra note 5, at 6-7; NYSE Letter 1, supra note 5, at 3; GTS Securities Letter, supra note 5, at 2-5; Customers Bancorp Letter, supra note 5; Orion Group Letter, supra note 5; CTS Corporation Letter, supra note 5; IMC Financial Letter, supra note 5, at 1-2; Southern Company Letter, supra note 5; Nobilis Health Letter, supra note 5; EDA Letter, supra note 5, at 1-2; Coupa Software Letter, supra note 5; Trade Desk Letter, supra note 5; Duffy/Meeks Letter, supra note 5, at 1; and Henry Schein Letter, supra note 5.

118 See Customers Bancorp Letter, supra note 5; Orion Group Letter, supra note 5; CTS Corporation Letter, supra note 5; Southern Company Letter, supra note 5; Duffy/Meeks Letter, supra note 5, at 1-2 (noting that the proposal could cause a disruption to the closing auction process, which could lead to discouraging investors from participating in and having confidence in our markets); and Five9 Letter, supra note 5.

119 See e.g., Bowers Letter, supra note 5; Americas Executions Letter, supra note 5; Customers Bancorp Letter, supra note 5; Orion Group Letter, supra note 5; and Southern Company Letter, supra note 5.

120 See ViableMkts Letter, supra note 5, at 2.

121 See id.

commenter stated that the ability to enter MOC orders into Bats Market Close with little risk of information leakage may attract an additional source of liquidity.[122]

Finally, some commenters identified areas that they believed were not adequately addressed by the proposal and/or made suggestions for modifications to the Exchange's proposal. For example, one commenter suggested that BZX extend the proposed MOC Cut-Off Time to closer to the primary market close.[123] Another commenter suggested that, as an alternative, NYSE and NASDAQ should voluntarily review and reduce their auction fee structures, or, alternatively, the Commission should impose a cap on transaction fees for closing auctions.[124] Lastly, NASDAQ also noted several areas, or scenarios, that it believed were not adequately explained by the proposal.[125]

IV. Proceedings to Determine Whether to Approve or Disapprove the BZX Proposal

The Commission hereby institutes proceedings pursuant to Section 19(b)(2) of the Act[126] to determine whether the Exchange's proposed rule change should be approved or disapproved.

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122 See id.

123 See Clearpool Letter, supra note 5, at 4.

124 See T. Rowe Price Letter, supra note 5, at 3.

125 See NASDAQ Letter, supra note 5, at 13. Specifically, NASDAQ provides several scenarios to illustrate areas in which it believes how the Bats Market Close would operate is unclear, including where: (1) NASDAQ does not conduct a closing cross; (2) the official closing price for a NASDAQ-listed security is the consolidated last sale price, which is an inferior price to the NBBO at 4:00 p.m.; and (3) the official closing price would trade through the Bats resting limit order book. In addition, NASDAQ argues that BZX did not adequately explain how it would avoid using a possibly "stale" price if there were no orders and thus no auction on a primary listing market, but there were MOC orders in Bats Market Close.

126 15 U.S.C. 78s(b)(2).

Further, pursuant to Section 19(b)(2)(B) of the Act,[127] the Commission is hereby providing notice of the grounds for disapproval under consideration. The Commission believes it is appropriate to institute proceedings at this time in view of the legal and policy issues raised by the proposal. Institution of proceedings does not indicate, however, that the Commission has reached any conclusions with respect to any of the issues involved.

In particular, the Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with: (1) Section 6(b)(5) of the Act which requires, among other things, that the rules of a national securities exchange be designed "to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, . . . to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest;"[128] and (2) Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]."[129]

As described above, BZX proposes to introduce Bats Market Close, a closing match process for non-BZX listed securities that would match MOC orders submitted to the Bats Market Close at the official closing price for such security published by the primary listing market. Under the proposal, Members would be able to submit, cancel, and replace MOC orders

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127 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. See id.

128 15 U.S.C. 78f(b)(5).

129 15 U.S.C. 78f(b)(8).

designated for the Bats Market Close up until the MOC Cut-Off Time at 3:35 p.m., after which time orders would be matched for execution and any remaining imbalance would be cancelled back to the Member(s). BZX would disseminate, via the Bats Auction Feed, the total size of all buy and sell orders matched for each security. The Exchange asserts that its proposal would increase competition and decrease fees for market participants, without impacting the price discovery process.

The Commission has consistently recognized the importance of closing auctions of the primary listing markets. For example, in its adoption of Regulation SCI, the Commission identified systems used to support closings on the primary market as "critical SCI systems," stating that "reliable … closings on the primary listing markets are key to the establishment of fair and orderly markets," and noting that "closing auctions at the primary listing markets attract widespread participation, and the closing prices they establish are commonly used as benchmarks."[130] Accordingly, the Commission is considering whether the proposal removes impediments to and perfects the mechanism of a free and open market and a national market system, and what its impact would be on the primary listing markets' closing auctions, including their important price discovery functions, or the reliability and integrity of the closing prices that they establish. Further, the Commission is considering whether the proposal imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, including the potential competitive burdens that may be created when an exchange offers market participants the ability to execute orders at a lower cost at the closing price established by another exchange, without incurring the costs of developing and operating the closing auctions

130 Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72255, 72278 (December 5, 2014).

from which the price is derived. In addition, the Commission is considering whether the proposal is designed to prevent fraudulent and manipulative acts and practices and, in particular, whether it would provide increased incentives or opportunities for inappropriate utilization of information to manipulate the closing price. Finally, the Commission is considering whether the proposal would have additional impacts on the markets, including increased complexity and operational risk, that would be inconsistent with the protection of investors and the public interest.

V. Commission's Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other relevant concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Sections 6(b)(5) and 6(b)(8) of the Act, or any other provision of the Act or rule or regulation thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.[131]

Such comments should be submitted by [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register]. The Commission asks that commenters address the

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131 Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

sufficiency and merit of the Exchange's statements in support of the proposal, which are set forth in the Notice,[132] in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment, including, where relevant, any specific data, statistics, or studies, on the following:

1. Would the proposed rule change affect price discovery in the closing auction process on each primary listing exchange? If so, how? Would any such impact be the same at each of the primary listing exchanges? What information do market participants need going into the closing auction? Would the proposed rule change affect the information available to market participants during the closing auction process? If so, how? If commenters believe the proposal would harm price discovery in the closing auction process, to the extent possible please provide specific data, analyses, or studies for support.

2. To what extent, if at all, would the availability of the Bats Market Close impact market participants' use of limit-on-close orders in the closing auction processes on the primary listing exchanges, including with respect to size and price? Please explain. Would market participants use MOC orders in the Bats Market Close as a substitute for using limit orders to participate in the closing auction processes at the primary listing exchanges? Would any such impacts be the same for each of the primary listing exchanges? Are there differences between the closing auction processes at each of the primary listing exchanges whereby the proposed Bats Market Close would have differing effects on each primary listing exchange? If so, please explain. How does information available in the closing auction process affect market participants' order submissions and/or determination of the closing price? Would the proposed rule change affect market participants' trading strategies in closing auctions? If so, how? If

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132 See Notice, supra note 3.

commenters believe the proposal would impact the use of limit-on-close orders in closing auctions, to the extent possible please provide specific data, analyses, or studies for support.

3. What analyses of available data could provide information about relationships between information disseminated during closing auctions, trading strategies in closing auctions, and closing prices? How would such analyses help estimate the impact, if any, of any changes in the availability of information under the proposed rule change on trading strategies and closing prices? In this regard, to the extent possible, please provide specific data, analyses, or studies in support.

4. What amount of trading volume at the close occurs on venues other than the primary listing exchanges (such as competing closing auctions and/or broker-dealer internal matching processes for MOC orders) and how does such closing volume compare with that of the primary listing exchanges? How does that volume impact the closing auction process on each of the primary listing exchanges? If commenters believe the proposal would impact volume in the closing auction process, to the extent possible please provide specific data, analyses, or studies for support. How does the Bats Market Close proposal differ from such existing processes (i.e., competing closing auctions and/or broker-dealer internal MOC matching processes)? Would the proposal affect the existing level of fragmentation in the market? If so, how? Please describe. Would the proposal impact the aggregate liquidity at the primary listing markets during the closing auctions? If so, how? If commenters believe the proposal would impact the existing level of fragmentation in the market or aggregate liquidity at the primary listing markets during the closing auction, to the extent possible please provide specific data, analyses, or studies for support. Would the matching of a significant amount of MOC orders at a venue other than the primary listing market affect the integrity or reliability of the official closing auction and the

resulting closing price? If so, how? Please describe in detail and provide examples if possible. Further, if commenters believe the proposal would affect the integrity or reliability of the official closing auction and the resulting closing price, to the extent possible please provide specific data, analyses, or studies for support.

5. Would the proposal have a positive, negative, or neutral impact on competition? Please explain. How would any impact on competition from the proposal benefit or harm the national market system and/or the various market participants? Please describe and explain how, if at all, aspects of the national market system and/or different market participants would be affected. What are the current costs associated with a primary listing market developing and operating a closing auction, and to what extent (and if so, how) are these costs passed on to market participants today? How do the fixed costs associated with developing closing auctions compare to the variable costs of conducting closing auctions? How do the revenues collected from closing auctions compare to these costs? Would the proposal impact the current fees charged by the primary listing markets for participation in their closing auctions? If so, how? If commenters believe the proposal would impact competition, to the extent possible please provide specific data, analyses, or studies for support.

6. What effect would the proposal have on market complexity and/or operational risk, if any? If commenters believe the proposal would impact market complexity and operational risk, to the extent possible, please provide specific data, analyses, or studies for support. Would the daily process of cancelling unmatched MOC orders back to members so that they can be routed to the primary listing markets before the closing auction cut-off times create operational or other risks for the markets or market participants? If so, please describe. Would any such risks be different than the risks that currently exist now for market participants? Are there alternative

ways of managing unmatched orders that would have different implications for the operational risks of the proposal? If so, please describe. Would the monitoring of an additional data feed be difficult or increase risk for market participants? Why or why not?

7. Would the proposal affect the potential for manipulation and, if so, what types of manipulative activity might result from, or be decreased by, the proposal? Would the proposal create informational advantages for certain market participants? If so, please detail these advantages and describe whether and how such information could be utilized to a market participant's own advantage. Would such informational advantages differ from information asymmetries that exist in the markets today? If so, please describe. Would the proposal affect surveillance for manipulation negatively or positively, and are existing surveillance tools adequate to monitor any increased risk? Please explain. If commenters believe the proposal would increase or decrease the potential for manipulative activity, to the extent possible please provide specific data, analyses, or studies for support.

8. What are the potential impacts of the proposal for listed issuers? For example, would the proposal impact the liquidity of an issuer's stock? If so, how? Would the proposal affect an issuer's decision as to whether to list their securities on a national securities exchange? If so, how? Would any impacts of the proposal affect small and mid-sized listed companies differently from larger listed companies? If so, please describe how. What other impacts, if any, could the proposal have on various other market participants, such as market makers and floor brokers, and in particular, their roles in the closing? If commenters believe the proposal would impact listed issuers or other market participants, to the extent possible please provide specific data, analyses, or studies for support.

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-BatsBZX-2017-34 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-BatsBZX-2017-34. The file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should

submit only information that you wish to make publicly available. All submissions should refer to File Number SR-BatsBZX-2017-34 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[133]

Robert W. Errett
Deputy Secretary

[133] 17 CFR 200.30-3(a)(57) and (58).