

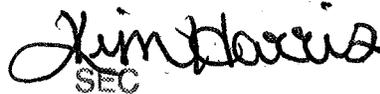
UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Petition of:

The Nasdaq Stock Market LLC

File No. SR-BatsBZX-2017-34

PETITION FOR REVIEW OF ORDER GRANTING APPROVAL OF
A PROPOSED RULE CHANGE, AS MODIFIED BY AMENDMENT NO. 1,
TO INTRODUCE CBOE MARKET CLOSE


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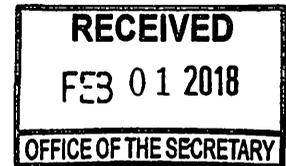
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Date: January 31, 2018

Counsel for Petitioner

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On January 17, 2018, the staff of the Division of Trading and Markets (“Staff”) of the Securities and Exchange Commission (“Commission”) issued an order approving a proposed rule change to introduce Bats Market Close (“Bats Proposal”). The Staff’s approval permits Bats to create a new order type that diverts market-on-close orders away from the closing auction of the primary exchange, hold those orders in limbo until the primary exchange executes the closing auction, and then execute them at the primary market closing auction price—all without contributing in any way to the price formation process.

This decision will harm investors and issuers by destabilizing the market at the most important moment in every trading day. The action fragments and subjects to increased manipulation the closing auctions that benefit the U.S. economy, all U.S. publicly-listed issuers, and all investors in mutual and exchange-traded funds. This action was taken despite clear evidence that consolidated auctions are critical to price formation, as well as objections from the largest U.S. equity indexer,¹ the exchanges that list over 5,000 operating companies,² dozens of individual publicly-traded companies that chose to go on the record,³ and multiple specialist and

¹ See Letter to Brent J. Fields, Secretary, Commission, from Alexander J. Maturri, CEO, S&P Dow Jones Indices, dated July 18, 2017 (“SPDJI Letter”).

² See Letters to Brent J. Fields, Secretary, Commission, from: (1) Edward S. Knight, Executive Vice President and General Counsel, Nasdaq, Inc., dated June 12, 2017 (“Nasdaq Letter 1”) and September 18, 2017 (“Nasdaq Letter 2”); (2) Jeffrey S. Davis, Vice President and Deputy General Counsel, Nasdaq, Inc., dated December 21, 2017 (“Nasdaq Letter 3”); and (3) Elizabeth K. King, General Counsel and Corporate Secretary, New York Stock Exchange (“NYSE”), dated June 13, 2017 (“NYSE Letter 1”), August 9, 2017 (“NYSE Letter 2”), November 3, 2017 (“NYSE Letter 3”), and January 12, 2018 (“NYSE Letter 4”).

³ See, e.g., Letters to Brent J. Fields, Secretary, Commission, from Sarah A. O’Dowd, Senior Vice President, Chief Legal Officer and Secretary, Lam Research Corporation, dated August 18, 2017 (“Lam Letter”); Gabrielle Rabinovitch, VP, Investor Relations, PayPal Holdings, Inc., dated September 12, 2017 (“PayPal Letter”); and Patrick L. Donnelly, Executive Vice President & General Counsel, Sirius XM Holdings Inc., dated August 17, 2017 (“Sirius Letter”).

market making firms.⁴ Nasdaq respectfully submits that the risks posed by the Staff approval conflict fundamentally with the SEC's core mission—to protect investors, maintain fair and orderly markets, and facilitate capital formation—and therefore the full Commission must review that decision pursuant to Rule 430 of the SEC Rules of Practice.

Moreover, this Staff action is directly contrary to multiple federal court decisions, most recently *Susquehanna International Group, LLP v. SEC*, 866 F.3d 442, 443 (D.C. Cir. 2017), that obligate the Commission to analyze the record evidence of risks and benefits to the public rigorously and independently. Any such analysis based on the record here leads directly to the conclusion that the highly speculative benefits of the Staff decision are minimal compared to the risk of substantial harm.

The staff decision will harm issuers and damage capital formation. Nasdaq has argued repeatedly that the Division of Trading and Markets undervalues the needs of issuers when considering market structure rules, including the Commission's own rules and those of self-regulatory organizations. This was reflected most recently in the lopsided composition of the now-defunct Equity Market Structure Advisory Committee, which included no issuer or listing-exchange representation and which, as a result, produced no recommendations even purporting to benefit listed issuers. In approving the Bats Proposal, the Staff cast aside an unprecedented expression of concern by listed companies. In light of the Commission's commitment to protecting issuers and capital formation, it should revisit this ruling.

While Nasdaq is focused on the risk of substantial harm to the public and the markets, Bats attempts to portray this as a dispute about Nasdaq's and Bats' profits and losses. Nasdaq

⁴ See, e.g., Letters to Brent J. Fields, Secretary, Commission, from 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"), and Ari M. Rubenstein, Co-Founder and Chief Executive Officer, GTS Securities LLC, dated June 22, 2017 ("GTS Securities Letter 1").

disagrees. Nasdaq is not opposed to the Bats Proposal due to concerns about its bottom line; Nasdaq is opposed to the proposal because it will have far-reaching adverse consequences for issuers, investors, and the overall functioning of the securities markets. Competition in this sector can be directed to supporting issuers. That competition can be effectuated by investing in state-of-the-art technology; by hiring and training experienced, skilled and motivated personnel to provide issuer support, analysis, and legal and regulatory functions; by developing and offering industry-leading issuer support functions such as Board portals; and by seeking out strong strategic partnerships with issuers. Competition focused on serving issuers and their shareholders will benefit issuers and their shareholders.

The version of “competition” reflected in the Bats Proposal offers nothing to support issuers or capital formation, and nothing to help retail investors. By simply copying the price determined by Nasdaq’s closing auctions, Bats free-rides on Nasdaq’s investment, innovation, and proprietary effort in developing and enhancing the closing auction. Bats does not even claim that its proposal will benefit issuers or capital formation. Nor does Bats claim that its proposal will improve market structure or offer technological enhancements. Bats’ sole argument is that fragmenting the consolidated closing auctions will introduce price competition that will benefit financial intermediaries. The Bats Proposal is not even designed to benefit issuers, but instead to initiate an execution price war with Nasdaq and NYSE, with no consideration of its impact on issuers.

If the Commission believes that the Bats Proposal will promote price competition and that such competition is necessary to constrain exchanges’ prices for the closing auctions—two contentions that Nasdaq disputes—then Nasdaq submits that the Commission has alternative tools at its disposal to restrain pricing. Fragmenting the consolidated close and harming issuers

and the investors in those issuers to provide a handful of market participants a benefit that many believe will not be passed on to the investing public cannot be an optimal or even appropriate outcome.⁵

The staff decision will harm investors, not protect them. The staff decision risks undermining the valuation of trillions of dollars of mutual- and exchange-traded funds owned by average investors. Major indexes—S&P Dow Jones, FTSE Russell, MSCI—rely exclusively on the consolidated closing auctions of the listing exchanges to set the closing and overnight value of their indexes. The importance of the consolidated closing auctions has increased as average investors have moved to passive investments tied to the major indexes. Today, trillions of dollars of investments are tied to indexes that rely on consolidated closing auctions of primary markets such as Nasdaq; these investments include the savings of millions of average investors, whose protection lies at the heart of the Commission’s core mission. The Staff decision creates the risk of undermining the primary market closing auctions and investor confidence in the valuation of investments tied to indexes.

The Staff decision underestimates the risk of manipulation. Nasdaq respectfully submits that neither the Staff nor the Commission should accept the level of risk and uncertainty created by the Bats Proposal. The Staff cursorily discounted the increased risk of cross-market manipulation that the Bats Proposal will create by adding new and gameable data into the marketplace just prior to the close. Nasdaq, NYSE, and multiple other commenters identified and gave examples of these risks. The Staff, however, has essentially refused to consider the

⁵ Nasdaq and others have contested Bats’ claims about these projected savings; many expect these savings to be minimal. For example, in a research note entitled *Cboe Market Close Approved by SEC; What It Might Mean* and dated January 18, 2018, Raymond James concluded that “[t]he reality is that a few million dollars in saved execution costs is immaterial to all of the major broker-dealers, and that the savings are highly unlikely to be passed along to the end institutional or retail investor (where they would be even more irrelevant).”

adverse consequences of a proposed action unless they *already* have occurred, essentially forcing investors and issuers to experience market losses in order for their interests to be properly weighed. The appropriate course, however, is to reach reasonable conclusions about risk and benefits *before* the Bats Proposal is implemented. The risks that Nasdaq and others have placed on the record are indisputably substantial. Meanwhile, neither the Staff nor Bats was able to identify benefits that outweigh those risks.

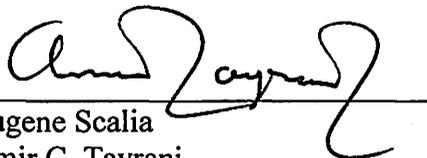
The Staff decision does not promote fair and orderly markets. Bats and the Staff have effectively conceded that the proposal does nothing to enhance market structure; the proposal does nothing more than claim to promote price competition. Promoting price competition and enhancing market structure are not the same. Nasdaq supports competition of all kinds, including price competition. However, given that the Commission's core mission is to promote fair, orderly, and efficient markets, increased price competition is not enough to justify approving the Bats Proposal. Equally important is whether that increased price competition promotes or undermines fair and orderly markets. The Staff failed to adequately address that important question.

In fact, the price competition Bats claims will come to pass would directly undermine fair and orderly markets in multiple ways. As stated earlier, fragmenting the consolidated closing auctions will have a destabilizing effect on issuers and investors that rely on closing auctions to set stable prices. Not only is Bats not contributing to price discovery at the close, but it is also impeding Nasdaq's ability to do so. By siphoning-off and isolating market-on-close orders, Bats is not promoting order interaction on its market, and it is simultaneously diminishing Nasdaq's ability to foster order interaction on Nasdaq's market. Bats is ignoring one of its core responsibilities and harming Nasdaq's ability to fulfill its own.

In addition, the Bats Proposal threatens to impair market structure improvement by permitting free-riding and thereby undermining the incentive for exchanges to innovate and improve market structure. Nasdaq has made a substantial and ongoing investment in developing and enhancing the consolidated closing auction. The Staff decision licenses an unfettered free-riding that will diminish Nasdaq's and other SROs' incentives to invest in the future.

For the above reasons and for those stated in Nasdaq's prior comment letters, Nasdaq respectfully submits that more than ample cause exists for the Commission to grant this Petition and to institute a thorough review of the Staff action. There can be no dispute that the Bats Proposal raises critical issues that demand the attention of the full Commission, rather than the action of the Staff pursuant to delegated authority.

Respectfully submitted,



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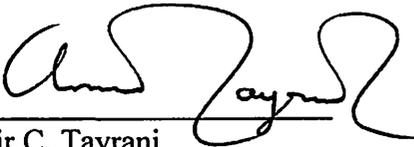
CERTIFICATE OF SERVICE

I, Eugene Scalia, counsel for The Nasdaq Stock Market LLC, hereby certify that on January 31, 2018, I served copies of the attached Petition for Review of Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Introduce Cboe Market Close as indicated below:

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
(via hand delivery)

Joanne Moffic-Silver
Executive Vice President, General Counsel,
and Corporate Secretary
CBOE BZX Exchange, Inc.
400 South LaSalle Street
Chicago, IL 60605
(via overnight mail)

Dated: January 31, 2018



Amir C. Tayrani