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June 13, 2017

VIA E-MAIL

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C., 20549-1090

Re: Securities Exchange Act Release No. 80683 (May 16, 2017), 82 FR 23320 (May 22, 2017) (SR-BatsBZX-2017-34) (the "BZX Proposal")

Dear Mr. Fields:

NYSE Group, on behalf of New York Stock Exchange LLC ("NYSE"), NYSE Arca, Inc. ("NYSE Arca"), and NYSE MKT LLC ("NYSE MKT"), appreciates the opportunity to provide comments to the Securities and Exchange Commission ("Commission") on the above-referenced proposed rule change by Bats BZX Exchange, Inc. ("BZX") to add a "Bats Market Close."

The Bats Market Close is premised on BZX accepting unpriced orders in non-BZX-listed securities until 3:35 p.m. Eastern Time, holding any paired-off quantity of such orders, and then guaranteeing those paired-off orders an after-hours execution that uses the official closing price as determined by the closing procedures of the primary listing exchange, which would be either the NYSE, NYSE Arca, NYSE MKT, or The NASDAQ Stock Market LLC ("Nasdaq").

Summary

The NYSE Group believes the Commission should not approve the BZX Proposal because it is not consistent with the Securities Exchange Act of 1934, as amended ("Exchange Act") and the Commission's rules thereunder.[1] NYSE Group believes that the BZX Proposal would:

- Introduce undesirable market fragmentation and volatility, disrupting price discovery on the primary listing exchange;
- Present new opportunities to market professionals to manipulate the closing price;

1 The BZX Proposal is not materially different from a prior proposed rule change filed by BZX's affiliate, Bats EDGX Exchange, Inc. ("EDGX"), and suffers from the same flaws. See Securities Exchange Act Release No. 67598 (August 6, 2012), 77 FR 47899 (August 10, 2012) (SR-EDGX-2012-33) ("EDGX Proposal"). NYSE and Nasdaq previously commented in opposition to the EDGX Proposal, which comments are available here: https://www.sec.gov/comments/sr-edgx-2012-33/edgx201233.shtml. EDGX ultimately withdrew its proposal. See Securities Exchange Act Release No. 68189 (November 8, 2012), 77 FR 68182 (November 15, 2012) (SR-EDGX-2012-33).

- Increase operational and regulatory risk to the detriment of investors; and
- Impose an unnecessary and inappropriate burden on competition by misappropriating the official closing price established by another exchange.

Specifically, the BZX Proposal would fragment the closing interest in a security, both by time and venue. This fragmentation would impair the closing price on which issuers and investors so heavily rely. The Commission recently recognized the importance of consolidating trading interest in the primary listing exchange's auction when it approved amendments to the Plan to Address Extraordinary Market Volatility (the "LULD Plan").[2] These amendments centralize the 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. For the same reasons that the Commission found these amendments in the public interest, the BZX Proposal is not consistent with public interest.

NYSE Group further believes the Commission must consider the potential the BZX Proposal presents for increased manipulation of the closing price. Less liquid closing auctions on the primary listing exchange will be easier to manipulate. Moreover, market participants that have paired interest in the Bats Market Close will have a new incentive to influence the official closing price, through trading prior to or during the primary listing exchange closing process.

Additionally, NYSE Group believes that the complexities that the BZX Proposal would introduce to the closing process would increase the operational and regulatory risk to the detriment of investors, including the need for investors to have to monitor multiple data points for closing auction information.

Finally, as part of the BATS Market Close, BZX would not attempt to engage in price discovery, a core exchange function, but would instead deteriorate price discovery on the primary listing exchange. The sole benefit articulated by BZX for the BZX Proposal is lower transaction fees to intermediaries—yet these lower fees are unlikely to be passed through to end investors. Moreover, the only reason that BZX would be able to offer lower fees is because it would be using a reference price its competitors are expending costs to establish. For this reason, the BZX Proposal is an unfair burden on competition that is inconsistent with the Exchange Act and should be disapproved.

The Bats Market Close Would Introduce Undesirable Market Fragmentation and Impair Price Discovery

The BZX Proposal would introduce undesirable market fragmentation that strikes at the core of the value a primary listing exchange provides to both issuers and investors, namely, pricing the single-priced opening and closing auctions in a fair and orderly manner through the centralization of liquidity in a transparent price-discovery event. While there have been many debates about U.S. equity market structure and whether there are ways to improve it, centralizing auction functions with a primary listing exchange has not been brought into question. Rather, the current auction processes of the primary listing exchanges represent the best aspect of U.S. equity market structure.

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2 See Securities Exchange Act Release No. 79845 (January 19, 2017), 82 FR 8551 (January 26, 2017) (File No. 4-631) ("LULD Approval Order").

As the Commission explained in the LULD Approval Order:

> The Commission believes that it is appropriate in the public interest, for the protection of investors and the maintenance of a fair and orderly market to provide that a Trading Pause continue until the Primary Listing Exchange has reopened trading using its established reopening procedures, even if such reopening is more than 10 minutes after the beginning of a Trading Pause, and to require that trading centers may not resume trading in an NMS Stock following a Trading Pause without Price Bands in such NMS Stock. The Commission believes that these two provisions together support a more standardized process for reopening trading after a Trading Pause has been declared.[3]

It would be inconsistent for the Commission to find it in the public interest to consolidate trading interest in a re-opening auction following a Trading Pause, but permit the de-consolidation – or fragmentation – of trading interest in a closing auction.

BZX contends its proposal would have no impact on the quality of the official closing price by removing market orders from participation in the closing auction. BZX acknowledges that siphoning limit orders that are designated for a closing auction from a primary listing exchange would distort that auction's price formation.[4] Yet, BZX contends that drawing away market orders from a closing auction would not impact pricing because market orders do not contribute to the price formation process. BZX is wrong. As explained below, siphoning off paired Market-on-Close ("MOC") orders could materially impact the closing process on a primary listing exchange.

Intermediaries supporting the BZX Proposal may reduce the explicit fees they pay to execute their customers' orders; however, NYSE Group understands that intermediaries generally would not pass through to their customers such fee reductions. At the same time, these intermediaries' customers – as well as all other market participants who rely on the primary market's official closing price – would incur implicit costs by receiving a lower quality official closing price. Despite this, BZX has not included any analysis of the potential costs to issuers and other market participants of a closing price based on a more fragmented closing auction pricing mechanism.

Crucially, the BZX Proposal is indifferent to the potential risk of a public listed company receiving an unrepresentative official closing price. No single data point is more important than the closing price to shareholders or the listed company. NYSE Group believes that the Commission should analyze the total costs and benefits of the BZX Proposal on all market participants and issuers, not only those BZX members who may choose to use the Bats Market Close.

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[3] Id. at 8552-53.

[4] BZX Proposal at 23322.

Disruption to NYSE DMM-Facilitated Closing Auctions

Currently, for NYSE-listed issuers the NYSE closing auction represents, on average, 5.8% of consolidated volume. The average size of MOC orders on the NYSE is 2,162 shares, which is roughly ten times the average fill size across the entire market. The centralization of this order flow, including large-sized orders, on the primary listing exchange allows for investors to find contra-side liquidity and to assess whether to offset imbalances, and for orders to be priced based on the true supply and demand in the market.

In the NYSE closing procedures, the designated market maker ("DMM") has an obligation to facilitate the close of trading of NYSE-listed securities assigned to that DMM as required by NYSE rules.[5] The NYSE understands that DMMs factor in the size of the paired-off volume to assess the appropriate closing price. Further, the DMMs consider the composition of the closing interest in their pricing decision.

For example, for an auction with 1,000,000 shares of paired-off MOC interest and a 50,000 share buy imbalance, the auction composition would be very different if the MOC interest to buy is composed of 20 market participants, none of which has a single order larger than 75,000 shares (scenario 1), rather than if the MOC interest to buy is from a single participant who entered an MOC to buy 1,050,000 shares (scenario 2). A concentrated, large investment decision such as in scenario 2 would indicate a greater likelihood that the security is going to continue to trade higher. As a result, the DMM might well close the stock at a higher price in scenario 2 than scenario 1.

However, if the BZX Proposal is approved, DMMs will no longer have the ability to assess the composition of MOC interest, even if they voluntarily choose to incorporate BZX's proprietary market data publishing the paired share volume. Absent full visibility into the size and composition of MOC interest, DMMs will likely have to make more risk-averse closing decisions, resulting in inferior price formation during benign conditions such as scenario 1.

In addition, investors and market participants, including the DMM, assessing whether and at what price level to enter orders to offset an imbalance also consider the size of the paired-off MOC order volume. Offsetting a 10,000 share imbalance in an auction of 500,000 shares has a very different risk profile as compared to offsetting the same-sized 10,000 share imbalance in an auction of 12,000 shares. Seeking to offset an imbalance that is small in ratio to the paired-off volume is likely a greater indicator that the imbalance is part of overall high interest in a liquid closing auction. By contrast, offsetting an imbalance that is large in comparison to the paired-off volume could indicate that the imbalance represents an anomaly of trading interest and therefore participating in the closing auction may risk receiving an execution price that would not be sustained in subsequent trading. In the latter scenario, investors seeking to offset an imbalance may consider that additional risk when determining the limit prices of their offsetting orders which would result in a different official closing price.

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[5] See NYSE Rules 104(a)(3) and 123C.

Disruption to NYSE Arca and NYSE American Automated Closing Auctions

Turning now to the NYSE Arca electronic closing process, the detrimental impact the BZX Proposal would have on market participants' pricing of imbalance offsetting orders that was described above also applies to the fully electronic auctions of NYSE Arca and, beginning in July 2017, NYSE American LLC ("NYSE American").[6]

If participation in the NYSE Arca Closing Auction consists only of paired-off MOC orders, the Official Closing Price for that auction is the midpoint of the Auction NBBO as of the time the auction is conducted.[7] By contrast, if there is no auction in a security, on NYSE Arca the Official Closing Price is the most recent consolidated last-sale eligible trade during Core Trading Hours on that trading day.[8] Accordingly, if all MOC orders were paired through an away market closing cross process, instead of in the NYSE Arca Closing Auction, it would result in a different Official Closing Price result on NYSE Arca--and the difference could be meaningful.

NYSE American is a venue for listing small- to mid-cap issuers, and the Bats Market Close would have the same impact on NYSE American closing prices that it would have on NYSE Arca closing prices.

Based on historical data, this type of closing price disruption could result in a near daily occurrence of a security's official closing price being different if all the paired-off MOC order volume were to be removed from the primary listing exchange. In the last six months, NYSE Group has identified over 130 instances when the official closing price was based on paired-off MOC order volume. In these cases, the differential between the consolidated last-sale price and the midpoint of the Auction NBBO can be by as much as 3.2%. These price differences are exacerbated in securities with less liquid trading profiles. For example:

- On January 12, 2017, inTEST Corporation (NYSEMKT:INTT) had a 2,006 share close based on paired-off MOC order volume, which represented 41% of that trading day's total volume. On that day, the consolidated last sale price differed from the midpoint of the Auction NBBO by 2.7%.

- On April 13, 2017, the NYSE Arca closing auction in the VanEck Vectors Emerging Markets High Yield Bond ETF (NYSEArca:HYEM) consisted entirely of MOC orders. The 2,646 shares in HYEM set an official closing price of $24.57 based on the midpoint of the Auction NBBO at the time of the auction. Had these MOC Orders not been available on the NYSE Arca, the official closing price would have been based on the consolidated last sale of $24.63, 24 basis points away from the realized auction price.

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6 When NYSE MKT transitions to Pillar technology in July 2017, it will be renamed NYSE American.

7 See NYSE Arca Equities Rule 7.35(a)(8)(C)(ii).

8 See NYSE Arca Equities Rule 1.1(gg)(1).

Nasdaq and NYSE Arca Auctions Compete on Level Playing Field

The BZX Proposal differs from the competing Nasdaq and NYSE Arca competing auctions in securities not listed on their exchanges in a fundamental way: under the BZX Proposal BZX would be using the price established by the primary listing exchange. The Nasdaq and NYSE Arca closing auctions, however, are important because they are available as an alternative method of establishing an official closing price if a primary listing exchange is unable to conduct a closing auction due to systems or technology issues.[9] To provide this important contingency to the market, Nasdaq and NYSE Arca expend the resources to offer closing auction processes that are rarely used.[10]

Even though rarely used, these Nasdaq and NYSE Arca closing auctions compete on a level playing field with primary listing exchange closing auctions and are not merely relying on the price established by another exchange. BZX would not be offering a competing auction mechanism on a level playing field. Rather, it is offering to sell the price established by the primary listing exchange at a lower cost than the primary listing exchange, which will continue to be required to support the technology and regulatory costs of running a closing auction.[11]

The Bats Market Close Would Increase Potential Manipulations

The availability of the Bats Market Close would increase the potential for manipulative activity on the close because primary listing exchange auctions would decrease in size and thus be easier to manipulate. If a market participant actively sought to influence the primary listing exchange close by entering orders on the Bats Market Close, it could be difficult to identify such manipulative activity because of the time difference between the Bats Market Close and the primary market closing process, as well as the cross-market nature of the manipulation. Moreover, it could be difficult to prove manipulative intent because traders could argue that something exogenous changed in the intervening period between 3:35 p.m. and the primary market close.

By way of example, a market participant that is included in the paired-off quantity of MOC orders held at BZX would have an incentive, and could seek, to influence the closing price on the primary listing exchange to benefit the price of its already matched order on BZX. Because the primary listing exchange would not have visibility into who entered paired-off MOC orders on BZX, the primary listing exchange would not be able to easily tie order behavior on its closing auction to executions on BZX.

Moreover, the BZX Proposal introduces another dimension for professional traders to obtain information other market participants do not have. For example, a market participant could seek

9 See, e.g., NYSE Rule 123C(1)(e)(ii) and (iii) and NYSE Arca Equities Rule 1.1gg(2) and (3).

10 Market participants generally do not direct closing-only interest to those auctions because of the risk of getting a different price than the official closing price of the primary listing exchange. To this end, NYSE Arca does not promote its closing auction in non-NYSE Arca listed securities; it is available so NYSE Arca can serve as a designated back-up for other exchanges.

11 The Commission must also be mindful that if it approves the BZX Proposal, any one of the twelve registered exchanges that trade NMS Stocks could – and likely would – offer their own version of the Bats Market Close.

to enter MOC orders on BZX as near to the 3:35 p.m. cutoff time as feasible. If such order is cancelled back (because it did not pair off with contra-side MOC interest), but BZX publishes that there was successfully paired-off interest in the Bats Market Close process in that security, that market participant would be aware that there was an order imbalance direction for that security. The existence of unpaired closing interest would not be publicly disseminated and such a market participant would then have information other participants do not. This asymmetric information could be used by a sophisticated market participant to influence the order imbalance on the primary listing exchange to favor that market participant's position.

Simply put, if participants begin to trade on private information gathered from disaggregated matching processes across multiple exchanges at various cutoff times, continuous trading behavior leading into the close would change, potentially increasing volatility and harming price formation in the primary listing exchange's closing auction.

The Bats Market Close Would Increase Operational and Regulatory Risk to the Detriment of Investors

The BZX Proposal introduces complexities to the closing process that would increase the operational and regulatory risk to the detriment of investors.

First, participation in the Bats Market Close would require market participants to monitor multiple trading mechanisms and build systems to route MOC orders to more than one exchange. A firm would not know until 3:35 p.m. Eastern Time whether its MOC orders would be cancelled back from BZX or if they would be included in the paired-off quantity. Customers that normally enter their MOC orders early in the trading day would have to re-enter or adjust such orders at a later time. Thus, any firm that uses the Bats Market Close would need to build systems to direct their MOC order flow to more than one exchange. NYSE Group believes that this requirement would introduce both operational and regulatory risk for the entering firm because it would increase the potential that customer MOC orders would not be properly directed to the primary listing exchange if cancelled back from BZX. This risk would be further compounded if multiple exchanges copy the BZX Proposal, as is to be expected.

Second, regardless of whether a market participant participates in the Bats Market Close, all market participants interested in monitoring the price at which a non-BZX listed security would close would need to subscribe to the Bats Auction Feed in order to properly assess the volume willing to trade in a primary listing exchange's closing process. More sophisticated market participants may be able to easily adapt to this multi-feed structure, but it would place other market participants, which may not subscribe to multiple proprietary data feeds, at a disadvantage. More specifically for NYSE, because DMMs price the close, they would need to monitor not only the NYSE book, but also subscribe to the Bats Auction Feed in order to get a truer picture of the market's interest in the close. The risk arising from this complexity would be further compounded if additional exchanges offer functionality similar to the Bats Market Close.

Third, under the BZX Proposal, MOC orders could not be cancelled after 3:35 p.m. Eastern Time, which would result in inconsistent times for when a MOC Order in a non-BZX security could be cancelled. This could harm investors and the public interest because they would be locked into the Bats Market Close earlier than on the primary listing exchange.

- For example, NYSE Arca allows for cancellation of MOC orders until 3:59 p.m. Eastern Time. NYSE Arca lists only Exchange Traded Products (ETPs). Because ETPs are derivatively priced, NYSE Arca rules allow for a later cut-off time than other primary listing exchange rules to allow for market participants to assess the impact of trading in the components of an ETP on whether they want to risk being locked in to a closing auction. By contrast, MOC Orders in NYSE Arca-listed securities would be locked in to the Bats Market Close by 3:35 p.m. Any change to market conditions between 3:35 p.m. and 3:59 p.m. would be to the disadvantage of customers that would not be able to cancel their orders in NYSE Arca-listed securities.

- The same is true for NYSE-listed securities. NYSE allows for cancellation of MOC orders up until 3:58 to correct legitimate errors. BZX would offer no such relief for customers whose orders represent legitimate errors.

Finally, for NYSE Arca-listed securities, and beginning late July for NYSE American-listed securities, later-arriving MOC orders could be disadvantaged vis-à-vis earlier-entered MOC orders in the NYSE Arca or NYSE American closing auction. Indeed, the Bats Market Close would place market participants trading in NYSE Arca-listed securities at risk of not participating in the Closing Auction at all. On NYSE Arca, if there is an order imbalance priced outside of the Auction Collars, orders on the side of the imbalance, including MOC orders, are not guaranteed to participate in the Closing Auction.[12] In such case, the MOC orders entered earlier in the day have priority over later-arriving MOC orders. If a market participant does not enter an MOC order on NYSE Arca until after such order is cancelled back by BZX at 3:35 p.m. Eastern Time and the NYSE Arca Closing Auction in that security had a significant order imbalance outside of the Auction Collars, those later-arriving MOC orders would lose priority over earlier-entered MOC Orders.

The Bats Market Close Would Impose an Unnecessary and Inappropriate Burden on Competition and Is Not Designed to Promote Just and Equitable Principles of Trade

Under the BZX Proposal, BZX would be offering a print facility for unpriced orders that closely resembles a broker-dealer matching agency orders at reference prices established by a registered exchange. In a separate context, the Commission found that when an exchange offers services that would compete with a broker-dealer, the Commission must assess whether the proposed rule change would impose an unnecessary or inappropriate burden on competition under Section 6(b)(8) of the Exchange Act.[13] NYSE Group believes that BZX's attempt to address certain broker-dealer complaints about auction pricing by offering a print facility at lower cost imposes an unnecessary and inappropriate burden on competition.

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[12] See NYSE Arca Equities Rules 7.35(a)(6) and (a)(8).

[13] See, e.g., Securities Exchange Act Release No. 68629 (January 11, 2013), 78 FR 3928, 3931 (January 17, 2013) (SR-NASDAQ-2012-059) (Order disapproving proposal to establish "benchmark orders" because, in part, the proposed functionality would create regulatory disparities that would give NASDAQ an inappropriate advantage over broker-dealers providing the same services and therefore the Commission could not find that the proposal would be consistent with Section 6(b)(8) of the Exchange Act).

The primary listing exchanges are required to support the technology and regulatory costs associated with running a closing auction and establishing an official closing price. To approve the use of this price by another exchange, which bears none of the costs or risks associated with the closing auction process, would be an unfair burden on competition.[14] Non-primary exchanges could always offer a lower price for executing paired off MOC orders because they do not bear any of the primary listing exchange's costs.

BZX concedes that the only "value" that is "materially better" on Bats Market Close would be the fee it would charge for the Bats Market Close.[15] Unlike the BZX Proposal, BZX recognizes that operating a price-formation auction reflects complex processing. Accordingly, BZX charges $0.0010 for its current closing auction. This fee is more expensive than the average NYSE fee for MOC orders and only $0.0001 less than the highest NYSE rate for its closing auctions.[16] For BZX to claim that the fees associated with the NYSE, Nasdaq, and NYSE Arca auctions are "adverse conditions" that BZX needs to rectify through its BZX Proposal is disingenuous.[17] Existing exchange fees for closing auctions, including on BZX, reflect the value created by the primary listing exchange's complex procedures and technology to determine the official closing price of a security.

Moreover, the centralization of liquidity at the open and close of trading, and how primary listing exchanges perform this function, are important factors for issuer determinations of where to list their securities. As one of the key services for issuers, the NYSE Group exchanges offer both manual and electronic auction models for managing the opening and closing auctions in a transparent manner. Companies that choose to list on the NYSE do so in part because of the DMM model, and the role that DMMs perform in facilitating the opening and closing auctions so that all MOC interest is guaranteed to participate. As a primary listing exchange, BZX has all the tools it needs to provide these same auction services to customers. Yet, having failed to

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14 Similarly, BZX's proposal raises concerns of misappropriation and unfair competition under common law. NYSE, NYSE Arca, and NYSE MKT have, and continue to invest substantial time, money, effort, creativity, and judgment in developing and maintaining its proprietary closing auction process, and in generating official closing prices daily for its listed companies. This investment has included creating and maintaining system architecture capable of receiving order data, developing and implementing proprietary software and algorithms for processing orders eligible to participate in the closing auction, managing a robust price-formation process to provide official closing prices, drafting extensive rules documenting these processes, and implementing robust surveillances to ensure the integrity of the closing auction. As a result of wide-scale adoption and use by the industry for many years, NYSE's, NYSE Arca's, and NYSE MKT's official closing prices embody substantial goodwill, and have attained a reputation in the industry as a respected and accurate measure of value. BZX's plan to offer competing financial products, while using these exchanges' official closing prices to close trades without license or other approval, raises misappropriation and unfair competition concerns.

15 See BZX Proposal at 23322.

16 NYSE member organizations that meet specified volume thresholds would be charged lower fees in connection with either MOC/LOC Tier 2 pricing of $0.0008 or MOC/LOC Tier 1 pricing of $0.0007, as applicable. The NYSE Price List is available here: https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf . The BZX Fee Schedule is available here: https://www.bats.com/us/equities/membership/fee_schedule/bzx/.

17 See BZX Proposal at 23321.

attract listings by virtue of their own services, it is now seeking to free-ride on the investments in auction services that other exchanges have made.

BZX claims that its Bats Market Close is no different than allowing an exchange to accept orders that are priced based on external reference prices, e.g. midpoint liquidity orders, which are priced based on the midpoint of the best protected quotations.[18] However, in such cases, all exchanges are contributing to the determination of the NBBO and, in turn, all exchanges have the ability to base order prices on the NBBO.[19] In its proposal, not only would BZX not be contributing to the official closing price formation of the primary listing exchange, it would also be negatively impacting that price-discovery process.

Ultimately, the Exchange believes that the BZX Proposal is antithetical to the role of a national securities exchange, which must have rules designed to promote just and equitable principles of trade. It would neither be just nor equitable to allow a registered exchange to provide a service that crosses orders without fostering the price discovery process in any meaningful manner.

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For the foregoing reasons, NYSE Group respectfully requests that the Commission disapprove the BZX Proposal.

Sincerely,

Elizabeth K. King

cc: Hon. Jay Clayton, Chairman
Hon. Michael Piwowar, Commissioner
Hon. Kara Stein, Commissioner
Heather Seidel, Acting Director of Trading and Markets
David Shillman, Associate Director of Trading and Markets

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18 See BZX Proposal at 23322.

19 Orders priced on an external reference price provide a price at which an order is *willing* to trade, but not the price at which it actually trades. By contrast, the Bats Market Close would determine the price of the trade based on an external reference price.