



One Liberty Plaza / 50th Floor  
New York, NY 10006 / USA

Nasdaq.com

December 18, 2018

Mr. Brent J. Fields  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549

Re: Proposed Rule Change, File Number SR-BatsBZX-2017-34 (“Proposal”)

Dear Mr. Fields:

Cboe BZX Exchange, Inc. (“BZX”) recently amended its Proposal to introduce the Cboe Market Close, which would divert market-on-close (“MOC”) 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. Nasdaq submitted three comment letters in opposition to the Proposal,<sup>1</sup> including a data memorandum addressing BZX’s assertion that diverting MOC orders away from the primary close will have no impact on the process or outcome of those closes, and addressing BZX’s assertion that it is replicating a function that is widely used by broker-dealers today. The amendment does nothing to alter the ultimate facts: the Proposal is contrary to the Securities Exchange Act of 1934 (the “Act”), is harmful to investors and to the operation of the national market system for securities, is incomplete in several respects as it omits specific critical information regarding the Cboe Market Close, and would establish a dangerous precedent.

The amendment to the Proposal would adopt a new rule allowing BZX to reject short sale MOC orders so that BZX may comply with Rule 201 of Regulation SHO.<sup>2</sup> Nasdaq previously highlighted that the Proposal would likely result in Regulation SHO violations because BZX would be guaranteeing to execute a short MOC order for a security in a Regulation SHO state at a price that violates Regulation SHO if the security’s closing price is at or below the national

---

<sup>1</sup> See June 12, 2017, September 18, 2017, and December 21, 2017 letters (available, respectively, at <https://www.sec.gov/comments/sr-batsbzx-2017-34/batsbzx201734-1797187-153614.pdf>; <https://www.sec.gov/comments/sr-batsbzx-2017-34/batsbzx201734-2581288-161083.pdf>; and <https://www.sec.gov/comments/sr-batsbzx-2017-34/batsbzx201734-2838539-161714.pdf>).

<sup>2</sup> 17 CFR 242.201.

best bid.<sup>3</sup> BZX apparently agrees with Nasdaq that there are circumstances in which the Proposal could result in a violation of Regulation SHO. BZX notes that “rejecting these orders would ensure that market participants are provided an opportunity to enter any short interest on the primary listing market, which may be able to re-price such interest to a permitted price if a short sale circuit breaker has been triggered.”

While the proposed amendment may help BZX avoid violating Rule 201, it does nothing to address other significant issues raised by the Proposal. It does not innovate or otherwise improve the price formation process or encourage liquidity provision, and it does nothing to support issuers or capital formation, or in any way help investors. Rather, the Proposal is bad market structure that will harm investors and issuers by destabilizing the market at the most important moment in every trading day, and will harm the markets over the long term for a small benefit to BZX in the short term. As described in detail in prior comments,<sup>4</sup> the Proposal would harm the U.S. equity markets because it:

- Would negatively impact current and potential public issuers, and the U.S. economy they help to grow.
- Would reduce MOC orders in Nasdaq’s closing auction, impacting hundreds of closing auctions, potentially costing millions of dollars annually, and affecting the behavior of limit orders, which are critical to price discovery.
- Would harm competition by elevating free-riding and discouraging innovation.
- Would harm issuers by promoting fragmentation and potentially lead to a slippery slope of copy cats that will adversely impact the price formation process.
- Would increase the likelihood of, and incentives for, manipulation and, consequently, place additional burdens on the regulation of these activities that come with fragmentation.

While Nasdaq appreciates that one issue with the Proposal was addressed by BZX, it has not cured numerous flaws noted by Nasdaq and other commenters to the Proposal. In this

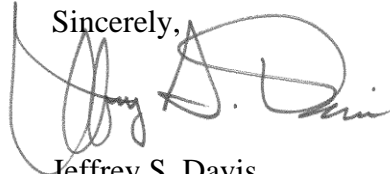
---

<sup>3</sup> Regulation SHO’s circuit-breaker rule requires that trading centers such as BZX “[p]revent the execution ... of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of that covered security decreases by 10% or more from the covered security’s closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day.” The Proposal, however, guarantees execution of all MOC orders submitted through BZX at the primary listing exchange’s closing price, which could be a short MOC order for a security in a Regulation SHO state at a price that violates Regulation SHO. See Statement of The Nasdaq Stock Market LLC in Opposition to Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Introduce Cboe Market Close, File No. SR-BatsBZX-2017-34, April 12, 2018 (available at <https://www.sec.gov/comments/sr-batsbzx-2017-34/batsbzx201734-3432889-162194.pdf>).

<sup>4</sup> See note 1, *supra*.

regard, both issuers and market participants have voiced significant concerns over the Proposal, with the Commission receiving objections from the largest U.S. equity indexer, the exchanges that list over 5,000 operating companies, dozens of individual publicly-traded companies that chose to go on the record, and multiple specialist and market making firms. The amendment does nothing to assuage these concerns. The difficult truth of the Proposal is that it siphons liquidity from a well functioning process for no other reason than to make a profit without making the U.S. markets better in any way. In short, BZX has failed to adequately address any of these issues or to show how the Proposal is consistent with the Act.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey S. Davis". The signature is fluid and cursive, with a large initial "J" and "D".

Jeffrey S. Davis  
Deputy General Counsel