



May 7, 2021

Ms. Vanessa Countryman
Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington DC 20850

Re: Order Scheduling Filing of Statements on Review, Securities Exchange Act of 1934, Release No. 91501; and Order Scheduling Filing of Statements on Review, Securities Exchange Act of 1934, Release No. 91502

Dear Ms. Countryman:

On behalf of our client, Volatility Shares LLC (“Volatility Shares”), we submit this statement in support of the actions on March 5, 2021, whereby the U.S. Securities and Exchange Commission (the “Commission”), through delegated authority to the Commission’s Division of Trading and Markets (“Trading and Markets”), approved a proposed rule change by Cboe BZX Exchange, Inc. (the “Listing Exchange”) to list and trade shares of the -1x Short VIX Futures ETF (“SVIX”)¹ and 2x Long VIX Futures ETF (“UVIX”).²

We also submit this statement, with respect to the Commission’s ongoing review³ of the Approval Orders pursuant to Rule 431(c) of the Commission’s Rules of Practice,⁴ to set out our view that: i) the listing application, as amended, for UVIX (the “UVIX Listing Application”) should be deemed approved under Section 19(b)(2)(D)(ii) of the Securities Exchange Act of 1934 (the “1934 Act”) given that the stay of the UVIX Approval Order has resulted in ineffective

¹ See Securities Exchange Act of 1934 Release No. 91264 (March 5, 2021), 86 FR 13939 (March 11, 2021) (the “SVIX Approval Order”).

² See Securities Exchange Act of 1934 Release No. 91265 (March 5, 2021), 86 FR 13922 (March 11, 2021) (the “UVIX Approval Order”, and together with the SVIX Approval Order, the “Approval Orders”).

³ See Order Scheduling Filing of Statements on Review, Securities Exchange Act of 1934 Release No. 91501 (April 7, 2021) (the “UVIX Scheduling Order”) and Order Scheduling Filing of Statements on Review, Securities Exchange Act of 1934 Release No. 91502 (April 7, 2021) (the “SVIX Scheduling Order”) (together, with the UVIX Scheduling order, the “Scheduling Orders”).

⁴ 17 CFR 201.431.

Commission action by the mandated timeframes of Section 19(b);⁵ and that ii) the stays of the Approval Orders are unlawful and violate Section 19(b) of the 1934 Act to the extent they conflict with the statutory deadlines for Commission action established thereunder.⁶

Substantive Record In Support of the Approval Orders

For the reasons discussed in the record of the Approval Orders, including in: i) all presentations, memoranda, electronic communications, comment letters and other materials made or submitted by the Listing Exchange, Volatility Shares LLC, VS Trust, or counsel thereto; and ii) the Approval Orders and any related materials submitted to the Commissioners or the Commission by Trading and Markets staff, all of which are incorporated herein by reference, we support the Approval Orders and associated actions taken by Trading and Markets staff thereby.

After extensive notice, comment and review, the Trading and Markets staff determined that the Rule Changes were consistent with applicable requirements under Section 6(b)(5) of the 1934 Act. To reach that determination, staff from Trading and Markets, the Listing Exchange and Volatility Shares – the sponsor of UVIX and SVIX – have worked together for more than two years to shape the features of UVIX and SVIX so that all parties could expect minimal impacts to the underlying VIX futures markets and also help ensure that the market disruptions experienced by previous VIX-based exchange-traded products (“VIX ETPs”) would not be experienced by UVIX and SVIX. We believe that work, which began in January 2019 and culminated in the Approval Orders, properly achieved those goals, as more specifically outlined below.

Past and existing VIX ETPs rebalance or roll their futures contracts according to a methodology linked to the VIX futures’ settlement each day. This focus on the daily settlement price has resulted in funds competing to execute their daily rebalance at a single point in time. This concentrated activity erodes returns and may have contributed to at least one major market disruption. Previous attempts at reducing this concentration on the VIX futures settlement by deleveraging existing inverse and leveraged VIX ETPs has only slowed the progression of market crowding. Delevered VIX ETPs can over time attract proportionally larger inflows, which in turn will require larger and larger rebalances at the same crowded settlement time.

Volatility Shares addressed this market crowding by developing a new methodology for UVIX and SVIX that differs from that used by all previous and existing VIX ETPs in four important ways:

⁵ The SVIX Approval Order will follow a similar path as the UVIX Approval Order, unless acted upon by May 21, 2021, which is the 240th day from the date that the listing application for SVIX (the “SVIX Listing Application”) was published in the Federal Register. The SVIX Listing Application and the UVIX Listing Application are hereinafter, the “Listing Applications”).

⁶ Section 19(b), which was amended by Section 916(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. 78o) (“Dodd-Frank”), sets forth various statutory deadlines for filings by self-regulatory organizations as discussed further herein.

1. Daily valuation is calculated from the average futures prices over a wider period instead of exclusively at the 4:00 pm (Eastern time) futures settlement price.
2. That wider period of rebalancing should distribute trading volume in VIX futures away from the 4:00 pm (Eastern time) settlement market, resulting in a healthier and more stable market.
3. The rebalance period is more flexible, allowing for an extension of the rebalance period to reduce market impact if required.
4. Volatility Shares has committed to a methodology for minimizing market impact while performing the Fund's rebalance (*i.e.*, all VIX ETPs offered by Volatility Shares will not take up more than 10% of the trading volume of VIX futures during any rebalance period).

When taken together, these methodology differences should make a healthy contribution to the VIX ecosystem and lead to an execution method that minimizes market impact and meaningfully lowers the chances of either UVIX or SVIX experiencing a significant disruption.

The UVIX Listing Application Should be Deemed Approved and the Stay of Each Approval Order Violates Section 19(b) of the 1934 Act

Background on Dodd-Frank and the SEC Rules of Practice

Section 916 was included in Dodd-Frank in order to “respond to industry concerns that the [Commission] has not always approved (or disapproved) proposed rules in a timely manner.”⁷ As a result, Congress saw fit to enact specific timeframes by which the Commission must act on a rule change proposed by a self-regulatory organization (“SRO”).

More specifically, Section 916 amended Section 19(b) of the 1934 Act by requiring, in pertinent part, that the Commission approve or disapprove a proposed rule change submitted by an SRO, including a national securities exchange, not later than 240 days after the date of publication of the proposed rule change in the Federal Register.⁸ Notably, Section 19(b) utilizes the terms “approve” and “disapprove” without qualification and provides absolutely no allowances for elongation or other extensions beyond the 240th day. A failure to issue an effective approval or disapproval order within the time limits set forth under Section 19(b) triggers Section 19(b)(2)(D)(ii) of the 1934 Act, which provides that, if the Commission fails to approve or disapprove a proposed rule change within the 240-day period, the proposed rule change shall be deemed to have been approved by the Commission.

In satisfaction of this requirement, the Commission adopted new Rules of Practice 700 and 701 to formalize the process it would use when conducting proceedings to determine

⁷ Congressional Research Service Report for Congress, The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title IX, Investor Protection (November 24, 2010); available at: <https://www.llsdc.org/assets/DoddFrankdocs/crs-r41503.pdf>

⁸ See 15 U.S.C. 78s(b).

whether an SRO's proposed rule change should be disapproved under Section 19(b)(2) of the 1934 Act.⁹ The new Rules of Practice were intended to “add transparency to the Commission’s conduct”¹⁰ of the newly outlined Section 19(b)(2) proceedings and address the process that the Commission would follow when instituting proceedings and providing notice of the grounds for disapproval under consideration, as well as when providing interested parties with an opportunity to submit written materials to the Commission.

In the Rules of Practice Adopting Release, the Commission also amended its Rules of Practice to incorporate Rule of Practice 103 (Construction of Rules), which states: “In any particular proceeding, to the extent that there is a conflict between these rules and a procedural requirement contained in any statute, or any rule or form adopted thereunder, the latter shall control.”¹¹ Although the Commission could have considered, as part of the proposal in the Rules of Practice Adopting Release, incorporating Rule of Practice 431, it did not.

The UVIX Listing Application Should be Deemed Approved

In this matter, the Commission, pursuant to authority delegated to Trading and Markets, issued the UVIX Approval Order on March 5, 2021, which was the 238th day after the Listing Application was published in the Federal Register on July 10, 2020.¹² Simultaneously, on March 5, 2021, the Assistant Secretary of the Commission stayed the UVIX Approval Order indefinitely pursuant to paragraph (c) of Commission Rule of Practice 431. The UVIX Scheduling Order was issued on April 7, 2021 and continued the indefinite stay of the UVIX Approval Order.

Although the UVIX Approval Order was issued by the statutorily mandated 240th day,¹³ the stay of the UVIX Approval Order has rendered it ineffective under Rule of Practice 431. An approval or disapproval order that is not effective (*e.g.*, an approval order that is stayed) does not constitute a valid Commission action under Section 19(b) of the 1934 Act. Accordingly, because the Commission did not effectively approve or disapprove the UVIX Order by the 240th day, the mandates of Section 19(b)(2) have not been satisfied and Section 19(b)(2)(D)(ii) requires that the UVIX Listing Application be deemed approved and a like approval will occur for the SVIX Approval Order (unless the Commission acts by May 21, 2021).¹⁴

⁹ Rules of Practice, Rel. No. 34-63723 (January 14, 2011) (“Rules of Practice Adopting Release”); available at: <https://www.sec.gov/rules/final/2011/34-63723.pdf>

¹⁰ *Id.* at p.1.

¹¹ 17 CFR 201.103(b); available at: <https://www.sec.gov/about/rulesprac072003.htm#103>.

¹² The SVIX Approval Order was issued on March 5, 2021, which was the 163rd day after the SVIX Listing Application was published in the Federal Register on September 23, 2020.

¹³ The 240th day for the UVIX Listing Application was March 7, 2021 and the 240th day for the SVIX Listing Application will be May 21, 2021.

¹⁴ See note 17 below (regarding the reasons for concluding that the approval of the SVIX Listing Application should be deemed already to have occurred on March 22, 2021).

The Commission Has No Authority to “Stay” Approval of the Listing Applications Because They Conflict with Relevant Statutory Deadlines

The Commission cannot defeat this result by reference to Rule 431. It is well known that an agency rule cannot be used to abrogate or modify the provisions of an otherwise unambiguous statutory provision. Not only would that violate principles of statutory construction,¹⁵ but also the Commission’s own Rules of Practice.¹⁶ In other words, to the extent that Rule 431 extends, changes or otherwise conflicts with the timetable established under Section 19(b)(2), the latter controls.

In this case, Section 916 of Dodd-Frank is in clear conflict with the use of Rule 431 to elongate or modify the review period of the Listing Applications. The review of the UVIX Listing Application under Rule 431 on its face impermissibly elongates the maximum period prescribed by Section 19(b)(2). And review of the SVIX Listing Application has impermissibly altered the substantive provisions prescribed by Section 19(b)(2).¹⁷

Discretionary review under Rule 431 cannot create an exemption to extend or modify the SRO approval process where there is otherwise no statutory basis to do so.¹⁸ As noted above, Section 916 of Dodd-Frank does not provide for any exception, modification or elongation of the timeframes and deadlines except as expressly set forth therein. As used in this case, the use of Rule of Practice 431 elongates those timeframes and modifies substantive requirements implicated when periods are extended within the 240-day window, all of which runs counter to the very purpose of Section 916 and the very clearly articulated and unambiguous language of the statute. Accordingly, both rules of statutory construction and the Commission’s very own Rule of Practice 103, which has been incorporated into this process by the Commission itself,

¹⁵ An agency has no power to negate the provisions of a statute. Rules made by an agency should not contradict a law created by the legislature. If a rule conflicts with a statute, the statute will prevail. *See generally* Texas v. United States, 497 F.3d 491 (5th Cir. Tex. 2007).

¹⁶ *See supra* notes 8-9 and accompanying text.

¹⁷ Section 19(b)(2)(B)(ii)(II) of the 1934 Act provides that the Commission may extend, one final time, the time period of the 180th day after the date of publication of notice of the filing of the proposed rule change to the 240th day, but only if: “the Commission determines that a longer period is appropriate and publishes the reasons for such determination; or the [SRO] that filed the proposed rule change consents to the longer period.” The 180th day after the SVIX Listing Application was published in the Federal Register was March 22, 2021, well after March 5, 2021 date that the stay became effective. No such action was taken by March 22nd and there is thus also a substantial basis to conclude that any stay beyond that date is ineffective (and that the SVIX Listing Application also should be deemed approved by the date, as discussed above).

¹⁸ The Commission itself recognized that “[t]he Dodd-Frank Act’s amendments to Section 19 may increase the number of proceedings that the Commission determines to institute [and that] provision, together with the new statutory deadlines applicable to Commission review and publication of an SRO’s proposed rule change, will further increase the Commission’s workload [and that] consequent constraints on Commission resources would be compounded to the extent that the Commission continues to receive an increasing number of proposed rule changes from an increasing number of SROs” (see Rules of Practice Adopting Release at p. 5). This is wholly consistent with the view that Section 916’s timeframes cannot be avoided by operation of a Commission Rule of Practice, triggered on a wholly discretionary basis.

demand that the Rule 431 is unavailable to the Commission or any individual Commissioner in this case because the use of such Rule in this case clearly conflicts with the statute.

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Please do not hesitate to contact me at [REDACTED], or Giovanni P. Prezioso (special regulatory counsel to Volatility Shares) at [REDACTED], if you should have any questions or would like to discuss this matter.

Sincerely,

Barry Pershkov

Barry Pershkov
Partner, Chapman and Cutler LLP

cc: Chairman Gary Gensler
Commissioner Caroline A. Crenshaw
Commissioner Allison Herren Lee
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