

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93230; File No. SR-CboeBZX-2020-070)

October 1, 2021

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Setting Aside Action by Delegated Authority and Approving a Proposed Rule Change, as Modified by Amendment Nos. 1 and 3, to List and Trade Shares of the -1x Short VIX Futures ETF Under BZX Rule 14.11(f)(4) (Trust Issued Receipts)

I. Introduction

On September 4, 2020, Cboe BZX Exchange, Inc. (“BZX”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the -1x Short VIX Futures ETF (“Fund”), a series of VS Trust (“Trust”), under BZX Rule 14.11(f)(4).³

On March 5, 2021, the Commission, acting through authority delegated to the Division of Trading and Markets (“Division”),⁴ noticed the filing of Amendment Nos. 1 and 3 and approved

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The proposed rule change was published for comment in the Federal Register on September 23, 2020. See Securities Exchange Act Release No. 89901 (Sept. 17, 2020), 85 FR 59836 (“Notice”). On October 30, 2020, the Commission extended the time period for Commission action on the proposed rule change. See Securities Exchange Act Release No. 90292, 85 FR 70678 (Nov. 5, 2020). On December 14, 2020, the Commission instituted proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove the proposed rule change. See Securities Exchange Act Release No. 90659, 85 FR 82536 (Dec. 18, 2020) (“OIP”). On January 28, 2021, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed. On February 16, 2021, the Exchange submitted Amendment No. 2 to the proposed rule change and, on February 19, 2021, the Exchange withdrew Amendment No. 2. On February 19, 2021, the Exchange filed partial Amendment No. 3 to the proposed rule change.

⁴ 17 CFR 200.30-3(a)(12).

the proposed rule change, as modified by Amendment Nos. 1 and 3, on an accelerated basis.⁵ On March 5, 2021, the Assistant Secretary of the Commission notified BZX that, pursuant to Commission Rule of Practice 431,⁶ the Commission would review the Division’s action pursuant to delegated authority and that the Division’s action pursuant to delegated authority was stayed until the Commission ordered otherwise.⁷ On April 7, 2021, the Commission issued a scheduling order, pursuant to Commission Rule of Practice 431, providing until May 7, 2021 for any party or other person to file a written statement in support of, or in opposition to, the Approval Order.⁸

The Commission has conducted a *de novo* review of BZX’s proposal, giving careful consideration to the entire record, including all comments and statements submitted, to determine whether the proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange. Under Section 19(b)(2)(C) of the Act, the Commission must approve the proposed rule change of a self-regulatory organization (“SRO”) if the Commission finds that the proposed rule change is consistent with the requirements of the Act and the applicable rules and regulations thereunder; if it does not make such a finding, the Commission must disapprove the proposed rule change.⁹ Additionally, under

⁵ See Securities Exchange Act Release No. 91264 (Mar. 5, 2021), 86 FR 13939 (Mar. 11, 2021) (“Approval Order”).

⁶ 17 CFR 201.431.

⁷ See letter from J. Matthew DeLesDernier, Assistant Secretary, Commission, to Kyle Murray, Vice President and Associate General Counsel, Cboe Global Markets, dated March 5, 2021, available at <https://www.sec.gov/rules/sro/cboebzx/2018/34-91264-letter-from-assistant-secretary.pdf>.

⁸ See Securities Exchange Act Release No. 91502, 86 FR 19298 (Apr. 13, 2021). Comments on the proposed rule change, including statements concerning the Approval Order are available at: <https://www.sec.gov/comments/sr-cboebzx-2020-070/srcboebzx2020070.htm>.

⁹ 15 U.S.C. 78s(b)(2)(C).

Rule 700(b)(3) of the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Act and the rules and regulations issued thereunder ... is on the self-regulatory organization that proposed the rule change.”¹⁰ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding.¹¹ Any failure of a self-regulatory organization to provide the information required by Rule 19b-4 and elicited on Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the rules and regulations thereunder that are applicable to the self-regulatory organization.¹²

For the reasons discussed further herein, BZX has met its burden to show that the proposed rule change is consistent with the Act, and this order sets aside the Approval Order and approves BZX’s proposed rule change, as modified by Amendment Nos. 1 and 3. In particular, the Commission concludes that the record before the Commission demonstrates that BZX’s proposal is consistent with Section 6(b)(5) of the Act,¹³ which requires that the rules of a national securities exchange be designed, among other things, 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.

¹⁰ 17 CFR 201.700(b)(3).

¹¹ See id.

¹² See id. See also 17 CFR 240.19b-4.

¹³ 15 U.S.C. 78f(b)(5).

II. Summary of the Proposal

The Exchange proposes to list and trade the Shares under BZX Rule 14.11(f)(4), which governs the listing and trading of Trust Issued Receipts¹⁴ on the Exchange. Volatility Shares LLC (“Sponsor”) serves as the Sponsor of the Trust. The Fund’s investment objective is to provide daily investment results (before fees and expenses) that correspond to the performance of the Short VIX Futures Index (SHORTVOL) (“Index”),¹⁵ which measures the daily inverse performance of a theoretical portfolio of first- and second-month futures contracts on the Cboe Volatility Index (“VIX”).¹⁶ The Index is comprised of VIX futures contracts (“VIX Futures Contracts”).¹⁷ Specifically, the Index components represent the prices of the two near-term VIX Futures Contracts, replicating a position that rolls the nearest month VIX Futures Contract to the next month VIX Futures Contract on a daily basis in equal fractional amounts, resulting in a

¹⁴ Rule 14.11(f)(4) applies to Trust Issued Receipts that invest in “Financial Instruments,” defined in Rule 14.11(f)(4)(A)(iv) as any combination of investments, including cash; securities; options on securities and indices; futures contracts; options on futures contracts; forward contracts; equity caps, collars and floors; and swap agreements.

¹⁵ The Index is sponsored by Cboe Global Indexes (“Index sponsor”). The Index sponsor is not a registered broker-dealer, but is affiliated with a broker-dealer and has implemented and will maintain a fire wall with respect to the broker-dealer affiliate regarding access to information concerning the composition of and/or changes to the Index. In addition, the Index sponsor has implemented and will maintain procedures that are designed to prevent the use and dissemination of material, non-public information regarding the Index.

¹⁶ The Exchange states that the VIX is an index designed to measure the implied volatility of the S&P 500 over 30 days in the future. See Amendment No. 1, supra note 3, at 4, n.4. The VIX is calculated based on the prices of certain put and call options on the S&P 500. See id. The VIX is reflective of the premium paid by investors for certain options linked to the level of the S&P 500. See id.

¹⁷ The Exchange states that VIX Futures Contracts are measures of the market’s expectation of the level of VIX at certain points in the future, and as such, will behave differently than current, or spot, VIX. See id. at 8. While the VIX represents a measure of the current expected volatility of the S&P 500 over the next 30 days, the prices of VIX Futures Contracts are based on the current expectation of what the expected 30-day volatility will be at a particular time in the future (on the expiration date). See id.

constant weighted average maturity of approximately one month.¹⁸ The Index seeks to reflect the returns that are potentially available from holding an unleveraged short position in first- and second- month VIX Futures Contracts by measuring its daily performance from the weighted average price of VIX Futures Contracts.¹⁹

To pursue its investment objective, the Fund will primarily invest in VIX Futures Contracts based on components of the Index. The Fund will primarily acquire short exposure to the VIX through VIX Futures Contracts, such that the Fund has exposure intended to approximate the Index at the time of the net asset value (“NAV”) calculation of the Fund. However, in the event that the Fund is unable to meet its investment objective solely through investment in VIX Futures Contracts, it may invest in over-the-counter swaps referencing the Index or referencing particular VIX Futures Contracts comprising the Index (“VIX Swap Agreements”) or in listed VIX options contracts (“VIX Options Contracts,” and, together with VIX Futures Contracts and VIX Swap Agreements, “VIX Derivative Products”). The Fund may

¹⁸ The Exchange states that the roll period usually begins on the Wednesday falling 30 calendar days before the S&P 500 option expiration for the following month (“Cboe VIX Monthly Futures Settlement Date”) and runs to the Tuesday prior to the subsequent month’s Cboe VIX Monthly Futures Settlement Date. See id. at 10.

¹⁹ The Exchange states that because VIX Futures Contracts correlate to future volatility readings of VIX, while the VIX itself correlates to current volatility, the Index and the Fund should be expected to perform significantly differently from the inverse of the VIX over all periods of time. See id. at 9-10. Further, unlike the Index, the VIX, which is not a benchmark for the Fund, is calculated based on the prices of certain put and call options on the S&P 500. See id. at 10. According to the Exchange, while the Index does not correspond to the inverse of the VIX, because it seeks short exposure to VIX, the value of the Index, and by extension the Fund, will generally rise as the VIX falls and fall as the VIX rises. See id. at 9.

also invest in Cash or Cash Equivalents,²⁰ which may serve as collateral to the Fund's investments in VIX Derivative Products.

The Fund will seek to remain fully invested in VIX Derivative Products (and Cash and Cash Equivalents as collateral) that provide exposure to the Index consistent with its investment objective without regard to market conditions, trends or direction. The Fund's investment objective is a daily investment objective; that is, the Fund seeks to track the Index on a daily basis, not over longer periods. Accordingly, each day, the Fund will position its portfolio so that it can seek to track the Index. The direction and extent of the Index's movements each day will dictate the direction and extent of the Fund's portfolio rebalancing. For example, if the level of the Index falls on a given day, net assets of the Fund would fall. As a result, exposure to the Index, through futures positions held by the Fund, would need to be decreased. The opposite would be the case if the level of the Index rises on a given day.

The time and manner in which the Fund will rebalance its portfolio is defined by the Index methodology but may vary from the Index methodology depending upon market conditions and other circumstances including the potential impact of the rebalance on the price of the VIX Futures Contracts. The Sponsor will seek to minimize the market impact of rebalances

²⁰ "Cash and Cash Equivalents" are short-term instruments with maturities of less than 3 months, including the following: (i) U.S. Government securities, including bills, notes, and bonds differing as to maturity and rates of interest, which are either issued or guaranteed by the U.S. Treasury or by U.S. Government agencies or instrumentalities; (ii) certificates of deposit issued against funds deposited in a bank or savings and loan association; (iii) bankers' acceptances, which are short-term credit instruments used to finance commercial transactions; (iv) repurchase agreements and reverse repurchase agreements; (v) bank time deposits, which are monies kept on deposit with banks or savings and loan associations for a stated period of time at a fixed rate of interest; (vi) commercial paper, which are short-term unsecured promissory notes; and (vii) money market funds.

across all exchange traded products based on VIX Futures Contracts (“VIX ETPs”) that it sponsors (“Funds”)²¹ on the price of VIX Futures Contracts by limiting the Funds’ participation, on any given day, in VIX Futures Contracts to no more than 10% of the VIX Futures Contracts traded on Cboe Futures Exchange, Inc. (“CFE”) during any “Rebalance Period,” defined as any fifteen minute period of continuous market trading.²² To limit participation during periods of market illiquidity, the Sponsor, on any given day, may vary the manner and period over which all funds it sponsors are rebalanced, and as such, the manner and period over which the Fund is rebalanced. The Sponsor believes that the Fund will enter an Extended Rebalance Period most often during periods of extraordinary market conditions or illiquidity in VIX Futures Contracts. In the event that the Fund participates in an Extended Rebalance Period, the Fund represents that it will notify the Exchange and the Commission of such participation as soon as practicable, but no later than 9:00 a.m. ET on the trading day following the event.²³

²¹ For purposes of the filing, the Exchange states that the Funds include the Fund and the 2x Long VIX Futures ETF (“Long Fund”), but may in the future include additional VIX ETPs sponsored by the Sponsor or its affiliates. See Securities Exchange Act Release No. 93229 (Oct. 1, 2021) (SR-CboeBZX-2020-053) (“Long VIX Approval”).

²² In the event that the Funds expect to hit the 10% threshold during the primary Rebalance Period from 3:45 p.m. to 4:00 p.m. ET, the Funds will extend their respective rebalances into additional Rebalance Periods and the Trade at Settlement (“TAS”) market. It is expected that this extension will provide the Funds with the flexibility to: begin rebalancing in an earlier period, end rebalancing in a later period, and execute contracts in TAS (each “an Extended Rebalance Period” and collectively “the Extended Rebalance Period”) while remaining below the 10% cap during any 15-minute period of continuous market trading. See Amendment No. 1, supra note 3, at 11-12, n.10. The Funds will be allocated executions based on their percentage of notional transaction volume required. See id. at 12.

²³ See Amendment No. 3, supra note 3, at 5.

III. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.²⁴ The Commission therefore approves the proposed rule change, as modified by Amendment Nos. 1 and 3.

The Commission received a number of comments letters addressing the proposed rule change's consistency with the Act, specifically focusing on (1) the potential for systemic risks; and (2) investor protection concerns, in particular the potential risks posed to retail investors. The Commission addresses each of these issues below. In addition, in approving the listing and trading of the Shares, the Commission also analyzes the proposal to ensure there is an appropriate regulatory framework to support the listing and trading of the Shares. Finally, the Commission addresses the procedural argument that the proposed rule change has been deemed approved and is currently in effect.

The record demonstrates the proposal is reasonably designed to mitigate the market impact and investor protection concerns articulated in the OIP and raised by commenters, and that the Exchange has demonstrated that there is an appropriate regulatory framework to support the listing and trading of the Shares. Therefore, the Commission finds the proposal is consistent with the Act, in particular Section 6(b)(5).

²⁴ In approving this proposed rule change, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

A. Rebalance Design and Market Impact Considerations

Several of the commenters opposed to the proposal discuss the events of February 2018 as an example of the potential harm to retail investors and the potential systemic risk posed by volatility-linked exchange-traded products.²⁵ One commenter summarizes:

On February 5, 2018, after years of low market volatility, and accordingly a low VIX, the VIX doubled, a market event popularly known as “Volmageddon.” One inverted VIX exchange-traded product (“ETP”), known as the VelocityShares Daily Inverse VIX Short-Term note (“XIV”), shrunk “from \$1.9 billion in assets to \$63 million in one session.”²⁶

The commenter further states that the nature of VIX ETPs “contributed directly to the market volatility” because these types of products must rebalance in order to ensure the appropriate exposure to the index.²⁷ Two commenters describe the rebalance as a “feedback loop,” because the issuer would have to purchase additional futures that would result in further declines for an inverse product.²⁸ According to one of the commenters, this feedback loop led to “all sorts of additional knock-effects for other market participants,” including declines in major market

²⁵ See letters from Americans for Financial Reform Education Fund, dated May 7, 2021 (“AFREF”); Dennis M. Kelleher, President and CEO; Stephen Hall, Legal Director and Securities Specialist; and Jason Grimes, Senior Counsel, Better Markets, Inc., dated May 7, 2021 (“Better Markets”); Tyler Gellasch, Executive Director, Healthy Markets Association, dated May 7, 2021 (“Healthy Markets”); and Robert Rutkowski, dated May 10, 2021 (“Rutkowski”).

²⁶ Better Markets at 2.

²⁷ See Better Markets at 2.

²⁸ See Better Markets at 3 (citing Patrick Augustin, et al., Volmageddon and the Failure of Short Volatility Products (Apr. 6, 2021, Financial Analysts Journal, Forthcoming)); and AFREF at 3.

indexes and investor losses in XIV.²⁹ A commenter states that each of the products proposed “involves the sort of rebalancing that exacerbated volatility during Volmageddon.”³⁰

The Sponsor also acknowledges that “[p]ast and existing VIX ETPs rebalance or roll their futures contracts according to a methodology linked to the VIX futures’ settlement each day.”³¹ Further, according to the Sponsor, daily settlement “has resulted in funds competing to execute their daily rebalance at a single point in time” resulting in “concentrated activity [that] erodes returns and may have contributed to at least one major market disruption.”³² It describes previous attempts to reduce this concentration by reducing the leverage of other existing inverse and leveraged VIX ETPs as having “slowed the progression of market crowding,” but concludes that these deleveraged products can still require “larger and larger rebalances at the same crowded settlement time” if they attract larger inflows.³³

The Sponsor further states that commenters arguing in favor of disapproval because of the failure of other VIX ETPs “miss a key point: lessons learned from the failures of previous products are at the very heart of the new methodology underlying [the proposed products].”³⁴ The Sponsor describes four ways the proposed products differ from previous and existing VIX ETPs: (1) the valuation is an average price over a longer time period instead of exclusively at the 4:00 p.m. ET settlement price; (2) a wider rebalancing period should distribute trading volume

²⁹ AFREF at 3-4.

³⁰ Better Markets at 3.

³¹ Letter from Barry I. Pershkov, Partner, Chapman and Cutler LLP, on behalf of the Sponsor, dated May 7, 2021 (“Volatility Shares 1”) at 2.

³² Volatility Shares 1 at 2.

³³ See Volatility Shares 1 at 2.

³⁴ See letter from Stuart Barton, Chief Investment Officer, Sponsor, dated May 19, 2021 (“Volatility Shares 2”) at 2.

away from 4:00 p.m. ET, resulting in a more stable market; (3) the rebalance period may be extended to reduce market impact if required; and (4) the Sponsor has committed to a 10% participation cap for all VIX ETPs offered by the Sponsor.³⁵ The Sponsor states these differences should result in “an execution method that minimizes market impact and meaningfully lowers the chances of either [proposed product] experiencing a significant disruption”³⁶ and “less volatile products with minimal impacts to the underlying VIX futures and the broader market.”³⁷

Other commenters write in favor of the Fund’s rebalance design.³⁸ One commenter states that the “structural changes ... incorporated into the design of the [Fund] address critical shortcomings of prior short VIX products.”³⁹ One commenter states that, “although rebalancing flows from leveraged and inverse VIX products are usually absorbed in an orderly fashion... [there is] a potential benefit from distributing rebalancing flows more evenly across the trading day instead concentrating the flows around the time of the daily settlement.”⁴⁰ Another commenter asserts that the design of the product would “help insure the orderly rebalancing of this product, enhancing price discovery and liquidity of the VIX futures markets.”⁴¹ A commenter also states that the rebalance design and the participation cap dilute key information

³⁵ Volatility Shares 1 at 3.

³⁶ Volatility Shares 1 at 3.

³⁷ Volatility Shares 2 at 2.

³⁸ See letters from Soeren Bundgaard Broegger, Copenhagen Business School, dated January 1, 2021 (“Broegger”); Vance Harwood, President, Six Figure Investing, Advisory Board, Invest in Vol, dated January 4, 2021 (“Harwood”); Jim Carroll, dated January 7, 2021 (“Carroll”); and Peter Corrigan, dated January 7, 2021 (“Corrigan”).

³⁹ Carroll.

⁴⁰ See Broegger.

⁴¹ See Corrigan.

that encourages front running, liquidity withholding and other manipulative strategies, which substantially reduces the potential for fraudulent and manipulative acts and practices, and further states that the architecture of the Fund is a model for how all leveraged ETPs should be constructed.⁴²

In its proposal, as modified by Amendment Nos. 1 and 3, the Exchange states that the Sponsor's proposed methodology for the Funds seeks to reduce the dependence of VIX ETPs on TAS by seeking to execute part of the Funds' daily rebalance outside of TAS and believes that this approach will spread VIX futures trading activity over a longer period of time each day and should help to reduce market impact during periods of market turmoil or disruption.⁴³ In addition, the Exchange states that the Sponsor expects that allowing the Funds to participate in an Extended Rebalance Period will minimize the impact of the Funds' rebalance on the price of VIX Futures Contracts, and particularly minimize any impact of large rebalances during periods of market illiquidity.⁴⁴ The Exchange further states that "the rebalancing mechanism to be used by the Funds is designed to reduce the Funds' individual and collective impact on the volatility market and the associated potentially negative impact on the Funds."⁴⁵

In its assessment of the proposal, the Commission considered the potential for market disruption during periods with large percentage increases in volatility and, because of the potential for large, sudden moves in VIX levels, the potential for large spikes in rebalancing demand for VIX ETPs. As commenters note, the events of February 2018 occurred during a

⁴² See Harwood, at 1.

⁴³ See Amendment No. 1, supra note 3, at 12-13.

⁴⁴ See id.

⁴⁵ Letter from Kyle Murray, Vice President, Associate General Counsel, Cboe Global Markets, dated May 7, 2021 ("BZX Letter") at 2.

period when volatility had been relatively low and spiked, as the spot price of VIX more than doubled, and there was a large spike in the trading volume in VIX futures contracts at the end of day. A portion of the volume was attributable to the rebalancing demand of volatility-linked ETPs.

In the OIP, the Commission requested comment on the Fund's operation during periods with large percentage increases in volatility and whether the Sponsor's proposed limitation on the use of VIX Futures Contracts during its rebalance would sufficiently minimize the market impact of the Fund's daily rebalance.⁴⁶ Following the OIP, the Exchange amended its proposal to state that the Sponsor will seek to minimize the market impact of rebalances across all Funds on the price of VIX Futures Contracts by limiting the Funds' participation, on any given day, in VIX Futures Contracts to no more than ten percent of the VIX Futures Contracts traded on CFE during any Rebalance Period.⁴⁷

The Exchange's proposal regarding the rebalancing methodology of the Fund serves as an appropriate limit on the Fund's participation in the VIX futures market, and is reasonably designed to help mitigate the potential market impact on the Fund's daily rebalance demand during periods when there are large percentage increases in volatility.⁴⁸ In discussing the events

⁴⁶ See OIP, supra note 3, 85 FR at 82538. As originally proposed, the Sponsor would have sought to minimize the market impact of Fund rebalances on the price of VIX Futures Contracts by limiting the Fund's participation, on any given day, in VIX Futures Contracts to no more than one-quarter of the contracts traded on the CFE during any rebalance period (defined by the Index methodology as 3:45 p.m. to 4:00 p.m. ET.). See Notice, supra note 3, 85 FR 59836 at 59839.

⁴⁷ See Amendment No. 1, supra note 3, at 11.

⁴⁸ A commenter states that the Commission should not view individual product proposals in isolation. See Better Markets at 6. Although the Commission's findings in this order are based on the specific proposed rule change filed with the Commission, including how the proposed rule operates under the current market conditions discussed in this order, the

of “Volmageddon,” commenters describe several factors that may have contributed to the spike in futures prices: (1) growing assets under management (“AUM”) for VIX ETPs, which in turn required more rebalancing; (2) a large percentage increase in volatility; and (3) a market where multiple funds were attempting to rebalance simultaneously, and where the VIX futures TAS market was halted “limit up.”⁴⁹ The design of the rebalancing methodology helps to mitigate the first and third factors, even if there is a large percentage increase in volatility. Because the Funds’ must limit their participation in any Rebalance Period to 10%, the participation cap still serves as a limit on the Funds’ rebalancing demand during each Rebalance Period, regardless of AUM. Further, the Funds’ rebalance is spread over a longer time period and distributes trading away from a single point in time when other funds may be rebalancing,⁵⁰ and permits the Funds’ limited flexibility in order to reduce market impact, which may help reduce market crowding. In addition, the Commission observes that the VIX futures market has changed since the events of “Volmageddon:” (1) TAS has a wider permissible price range;⁵¹ and (2) VIX futures settle at 4:00 p.m. ET rather than 4:15 p.m. ET (i.e., after the close of U.S. equity market trading).⁵²

Commission recognizes that, over time, market conditions in VIX ETP markets, and the related VIX futures market, may change.

⁴⁹ See letter from Stuart Barton, Head of Investments, Sponsor, dated January 6, 2021, at n. 1.

⁵⁰ For example, two existing leveraged VIX ETPs target a 4 p.m. ET benchmark. See Securities Exchange Act Release No. 90691 (Dec. 16, 2020), 85 FR 83643 (Dec. 22, 2020) (SR-CboeBZX-2020-093).

⁵¹ See Cboe Product Update, “Price Parameter Change for TAS Transactions in VX Futures,” 2018, available at: https://cdn.cboe.com/resources/product_update/2018/VX-Trade-at-Settlement-VXT-Price-Parameter-Change.pdf.

⁵² See Cboe Futures Exchange, LLC Rule Certification, Submission Number CFE-2020-028 (September 23, 2020), available at: https://cdn.cboe.com/resources/regulation/rule_filings/pending/2020/20-028-Daily-Settlement-Determination-

In sum, the Commission considered the potential that VIX ETPs might have a destabilizing effect on markets during times of market stress. Based on the record, including commenters' descriptions of the events of February 2018, the Commission concludes that the Exchange's proposal is reasonably designed to help mitigate against the market impact concerns articulated in the OIP and by commenters opposed to the proposal. The rebalance design of the Funds may help distribute rebalancing volume. Further, the 10% participation cap strikes an appropriate balance between allowing the Funds to rebalance within a reasonably short period of time and managing the potential market impact of a large rebalance. Therefore, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act, including the protection of investors and the public interest.

B. Investor Protection

Commenters also raise concerns about the risks and complexity of leveraged and inverse VIX ETPs and their suitability for retail investors. One of the commenters asserts that: (1) recent market events and the public record with the VIX raise significant questions about the investor-protection risks posed by VIX-related investment products; (2) such questions must be adequately addressed by filings to list and trade more VIX-related products; and (3) the Exchange has not explained how explain how its proposed listing and trading of the Shares would be consistent with the Act, including the protection of investors.⁵³ Another commenter states that the absence of new sales practices protections for leveraged investment products

Time.pdf#:~:text=The%20Daily%20Settlement%20Time%20for%20VX%20futures%20is,for%20VX%20futures%20is%203%3A00%20p.m.%20Chicago%20time.

⁵³ See Healthy Markets at 6.

“leaves investors with extremely inadequate protections in this space.”⁵⁴ According to the commenter, shares of leveraged exchange-traded funds are unsuitable for retail investors because they provide markedly different returns -- and generally significantly underperform -- their underlying indices over the long-term.⁵⁵ That commenter also asserts that it would be inconsistent with the protection of investors to facilitate gambling-like market practices by approving additional products that enable leveraged bets on synthetic indexes.⁵⁶ More specifically, the commenter states that the Shares would not directly support economic activity and, in the commenter’s view, the assertion that any hedging achieved through the Shares would lead to a net gain in real capital formation is not supported.⁵⁷ Commenters also state that the products are inconsistent with the Act because there are “inherent dangers” for leveraged exchange-traded products that make them unsuitable for retail investors.⁵⁸ Finally, one commenter states that the Approval Order does not adequately address the risks to investors and to retail investors in particular.⁵⁹

Several commenters urge the Commission to approve the Fund and assert that it would meet an unmet need in the market for certain investors.⁶⁰ Commenters state that certain investors

⁵⁴ AFREF at 1-2.

⁵⁵ See AFREF at 2. Another commenter asserts that certain investors purchasing shares of the Long Fund may “be surprised to see that their losses would be amplified by a factor of 2 during periods of low volatility” and, in the view of this commenter, both products raise investor protection concerns because they are “complex and risky.” See Better Markets at 4-5.

⁵⁶ See AFREF at 2.

⁵⁷ See AFREF at 3.

⁵⁸ See Rutkowski, Healthy Markets at 2-3.

⁵⁹ See Better Markets at 4-5.

⁶⁰ See letters from Jay Soloff, Lead Options Analyst, Investors Alley, dated December 30, 2020 (“Soloff”); Russell Rhoads, Head of Research and Consulting, EQDerivatives,

replicate the inverse VIX strategy by shorting other VIX-related ETPs, which, according to commenters, may result in greater risks and higher costs for such investors.⁶¹ One commenter asserts that “the Fund provides a more predictable investment that has lower complexity and a better-defined risk profile.”⁶²

In response to commenters opposed to the proposal, the Sponsor states that commenters’ concerns related to leveraged and inverse exchange-traded products, and in particular the concern that such products underperform their benchmarks over time, have been raised previously. It states that such products are not designed to perform over long periods of time, and that courts have “affirmed the adequacy of the disclosure contained in the registration statement of these products.”⁶³ In addition, the Exchange states that the proposed products would provide “investors with new tools to implement investment strategies to which they might not otherwise have access.”⁶⁴ The Sponsor also cites the Commission’s recent amendments to Rule 6c-11 of the Investment Company Act of 1940, which would include certain leveraged and inverse exchange-traded funds within the scope of Rule 6c-11, as well as the Commission’s approvals of

dated January 14, 2021 (“Rhoads”); Invest in Vol, dated January 6, 2021 (“Invest in Vol”); Carroll; Harwood at 2.

⁶¹ See Carroll (stating investors may be “better served” with direct exposure rather than short sales); Harwood; Invest in Vol, at 2; and Soloff. See also Rhoads (stating the absence of a short VIX ETP excludes certain investors from opportunities afforded to hedge fund investors).

⁶² Harwood. However, a commenter on the Long Fund questions the profitability and utility of a 2x long product. See Long VIX Approval, *supra* note 21, at n.50, n. 53 and accompanying text.

⁶³ Volatility Shares 2 at 1-2.

⁶⁴ BZX Letter at 2. The Exchange states that the Funds would provide greater short and long exposure than ETPs currently trading on U.S. exchanges. See *id.*

leveraged and inverse exchange-traded products that are not registered investment companies.⁶⁵

The Sponsor asserts that this demonstrates that questions related to leveraged and inverse products have been therefore “asked and answered.”⁶⁶

The Commission acknowledges commenters’ concerns, but believes this proposed rule change is consistent with the protection of investors. Commenters assert that the Exchange has not met its burden to demonstrate the proposal is consistent with the protection of investors because leveraged and inverse exchange-traded products, in particular those linked to volatility, are complex and risky, and underperform their benchmarks over time. The Commission has recognized that certain complex products, such as inverse or leveraged exchange-traded products, “which may be useful for some sophisticated trading strategies, are highly complex financial instruments and are typically designed to achieve their stated objectives on a daily basis.”⁶⁷ However, there are existing rules and standards of conduct applicable to other complex products that would apply to listing and trading of the Shares. The best interest standard of conduct for broker-dealers required under Regulation Best Interest and the fiduciary obligations of investment advisers discussed in the Fiduciary Interpretation thereto apply to transactions in all exchange-traded products where the transaction is recommended by a broker-dealer or pursuant to the advice of an investment adviser.⁶⁸ In addition, the Financial Industry Regulatory

⁶⁵ See Volatility Shares 2 at 1-2.

⁶⁶ Volatility Shares 2 at 1-2.

⁶⁷ Regulation Best Interest Adopting Release, Exchange Act Rel. No. 86031 (Jun. 5, 2019), 84 FR 33318 (Jul. 12, 2019), at 33376.

⁶⁸ See Investment Company Act Rel. No. 34084, (Nov. 2, 2020), 85 FR 83217 (Dec. 21, 2020), at 83217-18 (discussing the best interest standard of conduct for broker-dealers and the fiduciary obligations of investment advisers in the context of all exchange-traded products).

Authority (“FINRA”) has implemented increased sales practice and customer margin requirements for FINRA members applicable to inverse, leveraged and inverse leveraged securities (which include the Shares), and has provided specific guidance regarding sales practice obligations for volatility-linked exchange-traded products.⁶⁹ Exchange members that carry customer accounts will be required to follow the FINRA guidance set forth in these notices. The Exchange also has rules relating to suitability, in particular BZX Rule 3.7.⁷⁰ Therefore, the Commission finds that this proposal is consistent with the Act, in particular the protection of investors and the public interest.⁷¹

C. Other Considerations

In addition, the Commission analyzed other aspects of the Exchange’s proposal and finds, as explained below, that the proposal is consistent with the Act because it is designed to prevent fraudulent and manipulative acts and practices and protect investors and the public interest. The Exchange has demonstrated there is an appropriate regulatory framework to support listing and trading of the Shares, including trading rules, surveillance, and listing standards.

⁶⁹ See FINRA Regulatory Notices 09-31 (Jun. 2009), 09-53 (Aug. 2009), 09-65 (Nov. 2009), 12-03 (Jan. 2012), and 17-32 (Oct. 2017).

⁷⁰ In particular, Rule 3.7 imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers and Interpretation and Policy .01 of BZX Rule 3.7 imposes a duty of due diligence on Exchange members to learn the essential facts relating to every customer prior to trading the Shares, and specifically provides that “[n]o Member shall recommend to a customer a transaction in any such product unless the Member has a reasonable basis for believing at the time of making the recommendation that the customer has such knowledge and experience in financial matters that he may reasonably be expected to be capable of evaluating the risks of the recommended transaction and is financially able to bear the risks of the recommended position.”

⁷¹ Although the Commission finds the proposal is consistent with the Exchange Act, the Commission is not expressing a view about whether the Shares are appropriate or suitable for all investors.

The proposal is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading in the Shares when a reasonable degree of certain pricing transparency cannot be assured. Specifically, the Exchange will obtain a representation from the Sponsor of the Shares that the NAV will be calculated daily and that the NAV and the Fund's holdings will be made available to all market participants at the same time. On each Business Day,⁷² before commencement of trading in Shares during Regular Trading Hours,⁷³ the Fund will disclose on its website the holdings that will form the basis for the Fund's calculation of NAV at the end of the Business Day. This website disclosure of the portfolio composition of the Fund will occur at the same time as the disclosure by the Fund of the portfolio composition to authorized participants, so that all market participants will be provided portfolio composition information at the same time, and the same portfolio information will be provided on the public website as in electronic files provided to authorized participants. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association. As required by BZX Rule 14.11(f)(4), an updated Intraday Indicative Value ("IIV") will be calculated and widely disseminated by one or more major market data vendors every 15 seconds throughout Regular Trading Hours. The IIV will be published on the Exchange's website and will be available through on-line information services such as Bloomberg and Reuters. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers'

⁷² A "Business Day" means any day other than a day when any of BZX, Cboe, CFE or other exchange material to the valuation or operation of the Fund, or the calculation of the VIX, options contracts underlying the VIX, VIX Futures Contracts or the Index is closed for regular trading.

⁷³ As defined in BZX Rule 1.5(w), the term "Regular Trading Hours" means the time between 9:30 a.m. and 4:00 p.m. ET.

computer screens and other electronic services. The Fund's website will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information. In addition, the level of the Index will be published at least every 15 seconds in real time from 9:30 a.m. to 4:00 p.m. ET and at the close of trading on each Business Day by Bloomberg and Reuters.

Quotation and last-sale information regarding VIX Futures Contracts and VIX Options Contracts will be available from the exchanges on which such instruments are traded. Quotation and last-sale information relating to VIX Options Contracts will also be available via the Options Price Reporting Authority. Quotation and last-sale information for VIX Swap Agreements will be available from nationally recognized data services providers, such as Reuters and Bloomberg, through subscription agreements or from a broker-dealer who makes markets in such instruments. Pricing information regarding Cash Equivalents in which the Fund may invest is generally available through nationally recognized data services providers, such as Reuters and Bloomberg, through subscription agreements. The closing prices and settlement prices of the Index Components (i.e., the first- and second-month VIX Futures Contracts) will be readily available from the websites of CFE (<http://www.cfe.cboe.com>), automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters. The CFE also provides delayed futures information on current and past trading sessions and market news free of charge on its website. Complete real-time data for component VIX Futures Contracts underlying the Index, including the specific contract specifications of Index Components (i.e., first-month and second-month VIX Futures Contracts), is available by subscription from Reuters and Bloomberg.

The Exchange's rules regarding trading halts further help to ensure the maintenance of fair and orderly markets for the Shares, which is consistent with the protection of investors and the public interest. Trading in the Shares may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the securities and/or the financial instruments composing the daily disclosed portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In addition, the Exchange will halt trading in the Shares under the conditions specified in BZX Rule 11.18 (Trading Halts Due to Extraordinary Market Volatility). BZX Rule 14.11(f)(4)(c)(ii) enumerates additional circumstances under which the Exchange will consider the suspension of trading in and will commence delisting proceedings for the Shares.

The Exchange's proposal is designed to safeguard material non-public information relating to the Fund's portfolio. Specifically, as the Exchange states, the Sponsor is not a broker-dealer or affiliated with a broker-dealer. In the event that (a) the Sponsor becomes a broker-dealer or newly affiliated with a broker-dealer, or (b) any new sponsor is a broker-dealer or becomes affiliated with a broker-dealer, it will implement and maintain a fire wall with respect to its relevant personnel or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition of and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the portfolio. Moreover, trading of the Shares will be subject to BZX Rule 14.11(f)(4)(D), which sets forth certain restrictions on Exchange members acting as registered

Market Makers⁷⁴ in Trust Issued Receipts to facilitate surveillance. In addition, the Exchange has a general policy prohibiting the distribution of material, non-public information by its employees.

Furthermore, the Exchange or FINRA, on behalf of the Exchange, or both, will communicate and may obtain information regarding trading in the Shares and the underlying listed instruments, including listed derivatives held by the Fund, with the Intermarket Surveillance Group (“ISG”), other markets or entities who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement. The trading of the Shares through the Exchange will be subject to the Exchange’s surveillance procedures for derivative products, and these procedures are adequate to properly monitor Exchange trading of the Shares during all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. In addition, all of the VIX Futures Contracts and VIX Options Contracts held by the Fund will trade on markets that are a member of ISG or affiliated with a member of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

Moreover, the trading of the Shares on the Exchange will be subject to the Exchange’s and other rules listed below. Specifically:

- (1) The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange’s existing rules governing the trading of equity securities;

⁷⁴ As defined in BZX Rule 1.5(l), the term “Market Maker” means an Exchange member that acts as a Market Maker pursuant to Chapter XI of the BZX Rules.

- (2) The Shares will conform to the initial and continued listing criteria under BZX Rule 14.11(f);
- (3) Pursuant to BZX Rule 14.11(a), all statements and representations made in the filing regarding the Index composition, description of the portfolio or reference assets, limitations on portfolio holdings or reference assets, dissemination and availability of the Index, reference assets, and IIV, or the applicability of Exchange listing rules specified in the filing shall constitute continued listing requirements for the Shares. The issuer will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will surveil for compliance with the continued listing requirements. If the Fund or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12.
- (4) The Exchange has the appropriate rules to facilitate transactions in the Shares during all trading sessions;
- (5) Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares;⁷⁵

⁷⁵ The Exchange states that the Information Circular will discuss the following: (a) the procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (b) BZX Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (c) Interpretation and Policy .01 of BZX Rule 3.7 which imposes a duty of due diligence on its members to learn the essential facts relating to every customer prior to trading the Shares, and specifically provides that “[n]o Member shall recommend to a customer a transaction in any such product unless the Member has a

- (6) FINRA has implemented increased sales practice and customer margin requirements for FINRA members applicable to inverse, leveraged and inverse leveraged securities (which include the Shares) and options on such securities, as described in FINRA Regulatory Notices 09-31 (June 2009), 09-53 (August 2009), and 09-65 (November 2009). Exchange members that carry customer accounts will be required to follow the FINRA guidance set forth in these notices;
- (7) For initial and continued listing, the Fund and the Trust must be in compliance with Rule 10A-3 under the Act;⁷⁶ and
- (8) A minimum of 100,000 Shares of the Fund will be outstanding at the commencement of trading on the Exchange.

D. Procedural Considerations

The Sponsor also asserts that the proposed rule change has been deemed approved pursuant to Exchange Act Section 19(b)(2)(D)(ii).⁷⁷ The Commission disagrees with the

reasonable basis for believing at the time of making the recommendation that the customer has such knowledge and experience in financial matters that he may reasonably be expected to be capable of evaluating the risks of the recommended transaction and is financially able to bear the risks of the recommended position;” (d) how information regarding the IIV and the Fund’s holdings is disseminated; (e) the risks involved in trading the Shares during the Pre-Opening and After Hours Trading Sessions (as such terms are defined in BZX Rules) when an updated IIV will not be calculated or publicly disseminated; (f) the requirement that Exchange members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (g) trading information.

⁷⁶ 17 CFR 240.10A-3.

⁷⁷ See Volatility Shares 1 at 4. Section 19(b) of the Exchange Act requires the Commission to “issue an order” approving or disapproving a proposed rule change within, at most, 240 days of the proposed rule change’s filing. See 15 U.S.C. 78s(b)(2)(B)(ii). If the Commission fails to issue an order within that period, the proposed rule change is deemed to have been approved. See 15 U.S.C. 78s(b)(2)(D).

Sponsor’s assertions that: (1) because the Approval Order is stayed, “the Commission did not effectively approve or disapprove [the Proposal] by the 240th day” and therefore the proposal has been deemed approved;⁷⁸ and (2) the Commission’s discretionary review of the order by delegated authority conflicts with the purpose and language of the statute.⁷⁹

The Commission complied with the requirements of the statute. Section 19(b)(2)(D) requires only that the Commission “issue an order” approving or disapproving the proposed rule change within 240 days. The Approval Order was issued within that period.

Although orders issued by delegated authority are issued by Commission staff, they are issued with the full authority of the Commission and are signed by the Secretary’s office on behalf of the Commission. Section 4A of the Exchange Act authorizes the Commission to delegate certain functions—including approval or disapproval of proposed rule changes under Section 19—to a “division of the Commission.”⁸⁰ And the Commission’s Rules of Practice make clear that “an action made pursuant to delegated authority shall have immediate effect and be deemed the action of the Commission.”⁸¹

⁷⁸ See Volatility Shares 1 at 4. The Sponsor asserts that, because the Commission did not act on SR-CboeBZX-2020-070 before May 21, 2021, the proposal has been deemed approved.

⁷⁹ See Volatility Shares 1 at 2.

⁸⁰ 15 U.S.C. 78d-1(a).

⁸¹ Commission Rule of Practice 431(e), 17 CFR 201.431(e). See also, e.g., Rule of Practice 430(c), 17 CFR 201.430(c) (referring to “a final order entered pursuant to [delegated authority]”); Rule of Practice 431(f), 17 CFR 201.431(f) (giving an order by delegated authority operative effect, even when review has been sought, until a person receives actual notice that it was been stayed, modified, or reversed on review). Moreover, as the Commission has previously explained, Congress was aware of the Commission’s ability to delegate authority to approve SRO rule filings when the time restrictions in Exchange Act Section 19(b)(2)(D) were enacted. And to construe Section 19(b)(2), as the Sponsor does, to require Commission review of an order by delegated authority to be completed within 240 days “would undermine both the specific deadlines set forth in the statute and

IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

IT IS THEREFORE ORDERED, pursuant to Rule 431 of the Commission's Rules of Practice, that the earlier action taken by delegated authority, Securities Exchange Act Release No. 91264 (March 5, 2021), 86 FR 13939 (March 11, 2021), is set aside and, pursuant to Section 19(b)(2) of the Act, the proposed rule change (SR-CboeBZX-2020-070), as modified by Amendment Nos. 1 and 3, hereby is approved.

By the Commission.

J. Matthew DeLesDernier
Assistant Secretary

the Commission's ability to delegate functions. Nor is such a construction necessary to fulfill Congress's purpose in enacting the deadlines to "streamline" the rule filing process. With rare exception, rule filings are decided, by delegated authority or otherwise, within 240 days. See Securities Exchange Act Release Nos. 88493 (Mar. 27, 2020), 85 FR 18617 (Apr. 2, 2020) (Order Affirming Action by Delegated Authority and Disapproving Proposed Rule Changes Related to Connectivity and Port Fee in the Matter BOX Exchange LLC) at 18626; and 82727 (Feb. 15, 2018), 83 FR 7793 (Feb. 22, 2017) (Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, Regarding the Acquisition of CHX Holdings, Inc. by North America Casin Holdings, Inc.) at 7799.