

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-91264; File No. SR-CboeBZX-2020-070)

March 5, 2021

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of Amendment Nos. 1 and 3 and Order Granting Accelerated Approval of 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. (“Exchange” or “BZX”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> 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) (Trust Issued Receipts). The proposed rule change was published for comment in the Federal Register on September 23, 2020.<sup>3</sup> On October 30, 2020, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>5</sup> On December 14,

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 89901 (Sept. 17, 2020), 85 FR 59836 (“Notice”). Comments on the proposed rule change can be found at: <https://www.sec.gov/comments/sr-cboebzx-2020-070/srcboebzx2020070.htm>.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 90292, 85 FR 70678 (Nov. 5, 2020). The Commission designated December 22, 2020, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

2020, the Commission instituted proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule change.<sup>7</sup> On January 28, 2021, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed.<sup>8</sup> On February 19, 2021, the Exchange filed partial Amendment No. 3 to the proposed rule change.<sup>9</sup> The Commission is publishing this

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<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>7</sup> See Securities Exchange Act Release No. 90659, 85 FR 82536 (December 18, 2020) (“OIP”).

<sup>8</sup> In Amendment No. 1, the Exchange: (i) updated the information regarding the Fund’s registration statement; (ii) clarified that the Index (defined below) seeks to reflect the returns that are potentially available from holding an unleveraged short position in first- and second- month VIX Futures Contracts (defined below) by measuring its daily performance from the weighted average price of VIX Futures Contracts; (iii) stated that the Sponsor (defined below) will seek to minimize the market impact of rebalances across all exchange traded products based on VIX Futures Contracts (“VIX ETPs”) that it sponsors (“Funds”) on the price of VIX Futures Contracts by limiting such Funds’ participation, on any given day, in VIX Futures Contracts to no more than ten percent (10%) of the contracts traded on Cboe Futures Exchange during any Rebalance Period (defined below); (iv) stated that, in the event the Funds expect to hit this 10% threshold during the primary Rebalance Period from 3:45 p.m. to 4:00 p.m. E.T., the Funds would extend their respective rebalances into additional Rebalance Periods and the Trade At Settlement (“TAS”) market; (v) stated that, to limit participation during periods of market illiquidity, the Sponsor may vary the manner and period over which all funds it sponsors are rebalanced, including the Fund, and that Funds will be allocated executions based on their percentage of notional transaction volume required; (vi) stated that the Index’s use of a weighted average price reference and the Sponsor’s commitment to cap participation in the VIX futures market during any Rebalance Period to no more than 10% for all Funds should, among other things, help reduce the market impact of all exposure to the VIX futures market; (vii) stated that, in reviewing VIX Futures Contracts trading back to March 26, 2004, the Fund expects that it would have participated in an Extended Rebalance Period (defined below) on one or more days only in February 2018 and March 2020; and (viii) made technical, clarifying, and conforming changes. Amendment No. 1 is available at: <https://www.sec.gov/comments/sr-cboebzx-2020-070/srcboebzx2020070-8308776-228419.pdf>.

<sup>9</sup> 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 to the proposed rule change. In Amendment No. 3, the Exchange added a representation that the Fund will notify both the Exchange and the Commission in the event that the Fund

notice to solicit comments on Amendment No. 1 from interested persons, and is approving the proposed rule change, as modified by Amendment Nos. 1 and 3, on an accelerated basis.

II. Description of the Proposed Rule Change, as Modified by Amendment Nos. 1 and 3<sup>10</sup>

The Exchange proposes to list and trade Shares of the Fund<sup>11</sup> under BZX Rule 14.11(f)(4), which governs the listing and trading of Trust Issued Receipts<sup>12</sup> on the Exchange. Volatility Shares LLC (“Sponsor”), a Delaware limited liability company and a commodity pool operator, serves as the Sponsor of the Trust.<sup>13</sup> Tidal ETF Services LLC serves as the administrator; U.S. Bank National Association serves as custodian of the Fund and the Shares; U.S. Bancorp Fund Services, LLC serves as the sub-administrator and transfer agent; and Wilmington Trust Company is the sole trustee of the Trust.

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participates in an Extended Rebalance Period as soon as practicable, but no later than 9:00 a.m. E.T. on the trading day following the event. Amendment No. 3 is available at: <https://www.sec.gov/comments/sr-cboebzx-2020-070/srcboebzx2020070-8393728-229403.pdf>.

<sup>10</sup> Additional information regarding the Fund, the Trust, and the Shares, including investment strategies, creation and redemption procedures, and portfolio holdings can be found in Amendment No. 1, *supra* note 8.

<sup>11</sup> The Fund has filed a registration statement on Form S-1 under the Securities Act of 1933, dated August 26, 2020 (File No. 333-248430) (“Registration Statement”). The Registration Statement for the Fund is not yet effective, and the Fund will not trade on the Exchange until such time that the Registration Statement is effective.

<sup>12</sup> 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.

<sup>13</sup> 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.

The Fund seeks to provide daily investment results (before fees and expenses) that correspond to the performance of the Short VIX Futures Index (SHORTVOL) (“Index”).<sup>14</sup> The Index measures the daily inverse performance of a theoretical portfolio of first- and second-month futures contracts on the Cboe Volatility Index (“VIX”).<sup>15</sup> The Index is comprised of VIX futures contracts (“VIX Futures Contracts”).<sup>16</sup> 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 constant weighted average maturity of approximately one month.<sup>17</sup> The Index seeks to reflect the returns that are potentially available from holding an

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<sup>14</sup> 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.

<sup>15</sup> 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. The VIX is calculated based on the prices of certain put and call options on the S&P 500. The VIX is reflective of the premium paid by investors for certain options linked to the level of the S&P 500.

<sup>16</sup> 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. 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).

<sup>17</sup> 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.

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.<sup>18</sup>

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.<sup>19</sup> 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 (“OTC”) swaps referencing the Index or referencing particular VIX Futures Contracts comprising the Index (“VIX Swap Agreements”)<sup>20</sup> or in listed VIX options contracts (“VIX Options Contracts,” and,

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<sup>18</sup> 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 different from the inverse of the VIX over all periods of time. 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. 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.

<sup>19</sup> The Exchange states the Fund’s NAV will be calculated at 4:00 p.m. E.T.

<sup>20</sup> The Exchange states the VIX Swap Agreements in which the Fund may invest may or may not be cleared. The Exchange states that the Fund will only enter into VIX Swap Agreements with counterparties that the Sponsor reasonably believes are capable of performing under the contract and will post collateral as required by the counterparty. The Exchange further states that the Fund will seek, where possible, to use counterparties, as applicable, whose financial status is such that the risk of default is reduced and that the Sponsor will evaluate the creditworthiness of counterparties on a regular basis. The Exchange states that, in addition to information provided by credit agencies, the Sponsor will review approved counterparties using various factors, which may include the counterparty’s reputation, the Sponsor’s past experience with the counterparty and the price/market actions of debt of the counterparty. According to the Exchange, the Fund may use various techniques to minimize OTC counterparty credit risk including entering into arrangements with counterparties whereby both sides exchange collateral on a mark-to-market basis. The Exchange states that collateral posted by the Fund to a counterparty in connection with uncleared VIX Swap

together with VIX Futures Contracts and VIX Swap Agreements, “VIX Derivative Products”). The Fund may also invest in Cash or Cash Equivalents<sup>21</sup> that may serve as collateral to the Fund’s investments in VIX Derivative Products.<sup>22</sup>

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.<sup>23</sup> 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

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Agreements is generally held for the benefit of the counterparty in a segregated tri-party account at the custodian to protect the counterparty against non-payment by the Fund.

<sup>21</sup> For purposes of the proposal, “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.

<sup>22</sup> According to the Exchange, the Fund will collateralize its obligations with Cash and Cash Equivalents consistent with the Investment Company Act of 1940 and interpretations thereunder.

<sup>23</sup> The Exchange states that the return of the Fund for a period longer than a single day is the result of its return for each day compounded over the period and usually would differ in amount and possibly even direction from either the inverse of the VIX or the inverse of a portfolio of short-term VIX Futures Contracts for the same period.

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 across all Funds<sup>24</sup> 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 (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.<sup>25</sup> 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,

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<sup>24</sup> For purposes of the filing, the Exchange states that the Funds include the Fund and the 2x Long VIX Futures ETF as proposed in SR-CboeBZX-2020-053, but may in the future include additional VIX ETPs sponsored by the Sponsor or its affiliates. See Securities Exchange Act Release No. 89234 (July 6, 2020), 85 FR 41644 (July 10, 2020).

<sup>25</sup> In the event that the Funds expect to hit the ten percent threshold during the primary Rebalance Period from 3:45 p.m. to 4:00 p.m. E.T., the Funds will extend their respective rebalances into additional Rebalance Periods and the 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 ten percent cap during any fifteen minute period of continuous market trading. The Funds will be allocated executions based on their percentage of notional transaction volume required.

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. E.T. on the trading day following the event.

### III. Discussion and Commission Findings

After careful review of the proposed rule change, as modified by Amendment Nos. 1 and 3, as well as comments received, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 3, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>26</sup> In particular, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 3, is consistent with Section 6(b)(5) of the Act,<sup>27</sup> which requires, among other things, that the Exchange's rules be designed 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.

#### A. Market Impact Considerations

In the OIP, the Commission sought additional comment to assess whether the proposal is consistent with the requirements in Section 6(b)(5) of the Act, and, specifically 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.<sup>28</sup> As

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<sup>26</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>27</sup> 15 U.S.C. 78f(b)(5).

<sup>28</sup> See OIP, supra note 7, 85 FR 82536 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



discussed below, the Commission finds that the Exchange’s proposal regarding the rebalancing methodology of the Fund, as amended, is designed to protect investors and the public interest.

An exchange-traded product (“ETP”) like the Fund would need to rebalance its holdings daily. For an ETP that tracks a benchmark index, like the Fund, the greater the movement in the reference index, the more demand would be associated with its daily rebalance. Because of the potential for large, sudden moves in VIX levels, there is a potential for large spikes in rebalancing demand for VIX ETPs. 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.<sup>29</sup>

In support of its amended proposal, 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.<sup>30</sup> 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

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any rebalance period (defined by the Index methodology as 3:45 p.m. to 4:00 p.m. E.T.).  
See Notice, supra note 3, 85 FR 59836 at 59839.

<sup>29</sup> See Amendment No. 1, supra note 8, at 11.

<sup>30</sup> See Amendment No. 1, supra note 8, at 12-13.

illiquidity.<sup>31</sup> The Exchange states that defining an explicit rebalancing methodology and limiting the Funds' participation in the VIX Futures Contracts should reduce the impact of the Fund's rebalancing on the price of VIX Futures Contracts. The Exchange further represents that in the event that the Fund participates in an Extended Rebalance Period, the Fund will notify the Exchange and the Commission of such participation as soon as practicable, but no later than 9:00 a.m. E.T. on the trading day following the event.<sup>32</sup>

In addition, the Exchange states that the Index's use of a weighted average price of VIX Futures Contracts to measure its daily performance, as described above, is expected to shift part of the present dependence of VIX ETPs on the TAS market, and reduce the potential impact of very short-term mispricing or manipulation on the daily price of the Funds.<sup>33</sup> The Exchange states that the weighted average price reference will also offer the Sponsor a larger window of time to rebalance the Fund, and the option to expand the Rebalance Period to limit market impact.<sup>34</sup>

The Commission received several comment letters in response to the OIP, including one from the Sponsor, all of which were supportive of the proposal.<sup>35</sup> Commenters wrote favorably

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<sup>31</sup> See Amendment No. 1, supra note 8, at 13.

<sup>32</sup> See Amendment No. 3, supra note 9.

<sup>33</sup> See Amendment No. 1, supra note 8, at 12.

<sup>34</sup> See id.

<sup>35</sup> See letters from Jay Soloff, Lead Options Analyst, Investors Alley, dated December 30, 2020 ("Soloff Letter"); Soeren Bundgaard Broegger, Copenhagen Business School, dated January 1, 2021 ("Broegger Letter"); Vance Harwood, President, Six Figure Investing, Advisory Board, Invest in Vol, dated January 4, 2021 ("Harwood Letter"); Stuart Barton, Head of Investments, Sponsor, dated January 6, 2021 ("Sponsor Letter"); Invest in Vol, dated January 6, 2021 ("Invest in Vol Letter"); Jim Carroll, dated January 7, 2021 ("Carroll Letter"); Peter Corrigan, dated January 7, 2021 ("Corrigan Letter"), and Russell Rhoads, Head of Research and Consulting, EQDerivatives, dated January 14, 2021 ("Rhoads Letter"). Several of these commenters stated that the Fund would fulfill a need

of the rebalancing design of the Fund.<sup>36</sup> One commenter stated 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 of concentrating the flows around the time of the daily settlement.”<sup>37</sup> One commenter stated, with respect to the rebalancing, that the “design of this ETF...will help insure the orderly rebalancing of this product, enhancing price discovery and liquidity of the VIX futures markets.”<sup>38</sup> Another commenter discussed the rebalance feature and capping trading volume during the rebalance period and stated that the architecture of the Fund substantially reduces the potential for fraudulent and manipulative acts and practices because it dilutes key information that encourages front running, liquidity withholding and other manipulative strategies.<sup>39</sup> Finally, a commenter affiliated with the Sponsor stated that “altering the valuation period, and hence the target period over which the Fund rebalances its portfolio ... will help reduce the dependency of VIX ETPs on the VIX settlement market” and this “dependence by previous and existing VIX ETPs...may have triggered a major market disruption on February 5, 2018.”<sup>40</sup>

The Commission believes that the Exchange’s proposal regarding the rebalancing methodology of the Fund, as amended, is reasonably designed to help mitigate the potential

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in the ETP space by permitting certain investors to obtain short volatility exposure in a more efficient manner than is currently available. See Sponsor Letter, at 2; Carroll Letter; Corrigan Letter; Harwood Letter, at 2; Invest in Vol Letter; Rhoads Letter; and Soloff Letter.

<sup>36</sup> See Sponsor Letter, at 1-2; Broegger Letter; Corrigan Letter; and Harwood Letter, at 1.

<sup>37</sup> See Broegger Letter.

<sup>38</sup> See Carroll Letter.

<sup>39</sup> See Harwood Letter, at 1.

<sup>40</sup> See Sponsor Letter.

market impact of the Fund's daily rebalance demand during periods when there are large percentage increases in volatility.<sup>41</sup> The Fund's proposed rebalancing process, including the Sponsor's commitment to cap participation in the VIX Futures Contracts market during any Rebalance Period to no more than 10% for all Funds, should help to temper the impact of the Funds' rebalances on the price of VIX Futures Contracts, particularly during periods of market volatility or illiquidity. The Commission believes 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 believes the Exchange's proposal is adequately designed to address the market impact concern articulated in the OIP. 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. Other Considerations

The Commission believes that 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 and, as such, finds that the proposal is designed to prevent fraudulent and manipulative acts and practices and protect investors and the public interest. 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.

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<sup>41</sup> 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 Commission recognizes that, over time, market conditions in VIX ETP markets, and the related VIX futures market, may change.

On each Business Day,<sup>42</sup> before commencement of trading in Shares during Regular Trading Hours,<sup>43</sup> 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' 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. E.T. and at the close of trading on each Business Day by Bloomberg and Reuters.

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<sup>42</sup> 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.

<sup>43</sup> 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. E.T.

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 Commission believes that 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 Commission finds that the Exchange's proposal regarding safeguarding material non-public information relating to the Fund's portfolio is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest. Specifically, the Exchange states that 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 Members<sup>44</sup> acting as registered Market Makers<sup>45</sup> 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.

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<sup>44</sup> As defined in BZX Rule 1.5(n), the term "Member" means any registered broker or dealer that has been admitted to membership in the Exchange.

<sup>45</sup> As defined in BZX Rule 1.5(l), the term "Market Maker" means a Member that acts as a Market Maker pursuant to Chapter XI of the BZX Rules.

Furthermore, the Commission finds that the Exchange’s proposal regarding surveillance of the Shares and the underlying investments is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest. The Exchange or the Financial Industry Regulatory Authority (“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 Exchange states that 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.

The Commission finds that the Exchange’s rules relating to trading of the Shares on the Exchange are designed 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. Specifically, the Exchange states that:

- (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;



- (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;<sup>46</sup>

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<sup>46</sup> 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 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 reasonable basis for

- (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). 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;<sup>47</sup> and
- (8) A minimum of 100,000 Shares of the Fund will be outstanding at the commencement of trading on the Exchange.

Accordingly, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 3, is consistent with Section 6(b)(5) of the Act<sup>48</sup> and the rules and regulations thereunder applicable to a national securities exchange.

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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 Members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (g) trading information.

<sup>47</sup> 17 CFR 240.10A-3.

<sup>48</sup> 15 U.S.C. 78f(b)(5).

#### IV. Solicitation of Comments on Amendment Nos. 1 and 3 to the Proposed Rule Change

Interested persons are invited to submit written views, data, and arguments concerning whether Amendment Nos. 1 and 3 are consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CboeBZX-2020-070 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CboeBZX-2020-070. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeBZX-2020-070 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of the Proposed Rule Change, as Modified by Amendment Nos. 1 and 3

The Commission finds good cause to approve the proposed rule change, as modified by Amendment Nos. 1 and 3, prior to the thirtieth day after the date of publication of notice of the filing of Amendment Nos. 1 and 3 in the Federal Register. In Amendment No. 1, among other things,<sup>49</sup> the Exchange represents that the Funds' participation, on any given day, in VIX Futures Contracts, will be limited to no more than ten percent of the VIX Futures Contracts traded on CFE during any Rebalance Period, and in the event that the Funds expect to hit the ten percent threshold during the primary Rebalance Period, the Funds would extend their respective rebalances into an Extended Rebalance Period. In Amendment No. 3, the Exchange represents that the Fund will notify both the Exchange and the Commission in the event that the Fund participates in an Extended Rebalance Period as soon as practicable, but no later than 9:00 a.m. E.T. on the trading day following the event. The changes to the proposal and additional information in Amendment Nos. 1 and 3 assist the Commission in evaluating the Exchange's proposal and in determining that it is consistent with the Act. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>50</sup> to approve the proposed rule change, as modified by Amendment Nos. 1 and 3, on an accelerated basis.

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<sup>49</sup> See supra note 8.

<sup>50</sup> 15 U.S.C. 78s(b)(2).

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>51</sup> that the proposed rule change (SR-CboeBZX-2020-070), as modified by Amendment Nos. 1 and 3, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>52</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>51</sup> Id.

<sup>52</sup> 17 CFR 200.30-3(a)(12).