

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-91845; File No. SR-CboeBZX-2021-014)

May 11, 2021

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Allow Invesco Focused Discovery Growth ETF and Invesco Select Growth ETF to Strike and Publish Multiple Intraday Net Asset Values

On January 22, 2021, 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” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to allow Invesco Focused Discovery Growth ETF and Invesco Select Growth ETF (each a “Fund” and together “the Funds”) to strike and publish multiple intraday net asset values. The proposed rule change was published for comment in the Federal Register on February 10, 2021.³

On March 24, 2021, pursuant to Section 19(b)(2) of the Act,⁴ 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.⁵ No comments on the proposed rule change have been received. The Commission is issuing this

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 91064 (February 4, 2021), 86 FR 8935 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 91398, 86 FR 16650 (March 30, 2021). The Commission designated May 11, 2021, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

order to institute proceedings pursuant to Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.

I. Description of the Proposal

The Commission approved a rule governing the listing and trading of shares (“Shares”) of the Funds,⁷ which are Tracking Fund Shares.⁸ The Shares are listed and are trading on the Exchange. The current rule governing the listing and trading of the Shares contemplates that each Fund would calculate and disseminate one net asset value (“NAV”) per day.⁹ Each Fund’s NAV represents the value of the Fund’s assets minus its liabilities divided by the number of shares outstanding.

The Exchange proposes to amend the rule applicable to the listing and trading of the Shares to allow each Fund to calculate and disseminate multiple intraday NAVs. The Exchange states that NAVs, which are used to value exchange-traded products (“ETPs”) such as Tracking

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 90684 (December 16, 2020) 85 FR 83637 (December 22, 2020) (SR-CboeBZX-2020-091) (“Prior Order”). See also BZX Rule 14.11(m)(2)(A) (requiring the Exchange to file proposals under Section 19(b) of the Act before listing and trading a series of Tracking Fund Shares).

⁸ A “Tracking Fund Share” is a security that: (1) represents an interest in an investment company registered under the Investment Company Act of 1940 (“Investment Company”) organized as an open-end management investment company, that invests in a portfolio of securities selected by the Investment Company’s investment adviser consistent with the Investment Company’s investment objectives and policies; (2) is issued in a specified aggregate minimum number in return for a deposit of a specified Tracking Basket and/or a cash amount with a value equal to the next determined net asset value; (3) when aggregated in the same specified minimum number, may be redeemed at a holder’s request, which holder will be paid a specified Tracking Basket and/or a cash amount with a value equal to the next determined net asset value; and (4) the portfolio holdings for which are disclosed within at least 60 days following the end of every fiscal quarter. See BZX Rule 14.11(m)(3)(A).

⁹ See Prior Order, supra note 7, 85 FR at 83638.

Fund Shares,¹⁰ are central to the arbitrage process for many ETPs,¹¹ and that arbitrage is important because it provides a means to maintain a close tie between market price and NAV per share of the ETP.¹²

In support of its proposal, the Exchange states that allowing the Funds to strike and publish multiple intraday NAVs would provide the marketplace with additional information related to each Fund's underlying holdings on an intraday basis, which the Exchange believes will allow market participants to better assess their risk and provide additional certainty around intraday price and hedging.¹³ The Exchange also provides that its proposal would reduce the risk that market participants face intraday related to the possible divergence between the Tracking Basket and the value of each Fund's underlying holdings by permitting market participants to "lock in" their creation and redemption at both intraday NAV and at the end-of day-NAV. The Exchange states that its proposal, by reducing the risk that market participants face intraday, would encourage tighter spreads and deeper liquidity in the Shares, to the benefit of investors.¹⁴

II. Proceedings to Determine Whether to Approve or Disapprove SR-CboeBZX-2021-014 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁵ to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the

¹⁰ See Notice, *supra* note 3, 86 FR at 8935.

¹¹ See *id.* at 8935-8936.

¹² See *id.* at 8936.

¹³ See *id.* at 8936-8937.

¹⁴ See *id.* at 8937.

¹⁵ 15 U.S.C. 78s(b)(2)(B).

proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved.

Pursuant to Section 19(b)(2)(B) of the Act,¹⁶ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of and input concerning the proposed rule change's consistency with the Act and, in particular, Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers."¹⁷

The Commission has not previously approved a proposed rule change under Rule 19b-4 of the Act to permit the listing and trading of any ETP that calculates and disseminates multiple intraday NAVs.¹⁸ The Exchange's proposal, therefore, raises novel questions and concerns regarding the proposal's impact on how the Shares would trade and whether the proposal is consistent with the requirements of Section 6(b)(5) of the Act, including the requirement that the rules of a national securities exchange be "designed to... remove impediments to and perfect the mechanism of a free and open market and a national market system," and promote "the

¹⁶ Id.

¹⁷ 15 U.S.C. 78f(b)(5).

¹⁸ The Exchange notes that its proposal is similar to a functionality offered by Invesco Treasury Collateral ETF. According to the Exchange, that ETF calculates its NAV at 12 p.m. and 4 p.m. ET every day the New York Stock Exchange ("NYSE") is open. See Notice, supra note 3, 86 FR at 8936, n.8. The Commission notes, however, that Invesco Treasury Collateral ETF was not filed with the Commission pursuant to Section 19 of the Act. Accordingly, as it relates the Commission's review under the Rule 19b-4 process, the Exchange's proposal herein is a case of first impression.

maintenance of fair and orderly markets” consistent with Section 11(A) of the Act. Accordingly, the Commission seeks comments on the novel aspects of the proposal, including the following:

1. As proposed, each Fund would be able to strike and disseminate multiple intraday NAVs. Do commenters have views regarding whether the calculation and dissemination of multiple intraday NAVs would be helpful or confusing to market participants, particularly in light of the other information, including intraday indicative value, which is disseminated regarding the Shares?
2. What effects, if any, would intraday creations and redemptions have on secondary trading and price discovery?
3. The Shares are listed and traded on the Exchange as Tracking Fund Shares. Accordingly, the Funds do not disclose on a daily basis the Funds’ full portfolio holdings. Given the lack of full portfolio transparency on a daily basis, what issues, if any, do multiple, intraday NAVs pose? What, if any, benefits do they confer?
4. The proposal does not stipulate the number of intraday NAVs each Fund will strike and does not stipulate when such intraday NAVs would be struck. Do commenters have concerns regarding the lack of fixed number and times of proposed intraday NAVs? If so, what are those concerns?

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder...is on the self-regulatory organization [‘SRO’] that proposed the rule change.”¹⁹ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of

¹⁹ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding, and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.²⁰

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether the proposal should be approved or disapproved.

IV. Commission's Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.²¹

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication

²⁰ See id.

²¹ Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice, in addition to any other comments they may wish to submit about the proposed rule change.

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. Please include File Number SR-CboeBZX-2021-014 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-2021-014. 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-2021-014 and should be submitted by [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

J. Matthew DeLesDernier
Assistant Secretary

²² 17 CFR 200.30-3(a)(57).