

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-81947; File No. SR-BatsBZX-2017-46)

October 25, 2017

Self-Regulatory Organizations; Bats BZX Exchange, Inc.; Notice of Filing of Amendments No. 2 and No. 3, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendments No. 2 and No. 3, to List and Trade Shares of the Aptus Fortified Value ETF, a Series of ETF Series Solutions, under Rule 14.11(c)

I. Introduction

On July 10, 2017, Bats BZX Exchange, Inc. (“Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the Aptus Fortified Value ETF (“Fund”), a series of ETF Series Solutions (“Trust”), under Rule 14.11(c). The proposed rule change was published for comment in the Federal Register on July 28, 2017.³ On August 31, 2017, the Exchange filed Amendment No. 1 to the proposed rule change. On September 8, 2017, 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 On October 6, 2017, the Exchange filed Amendment No. 2 to the proposed rule change, which replaced the proposed rule change, as modified by Amendment No. 1, in its entirety.⁶ On October 24, 2017, the Exchange filed Amendment No. 3 to the proposed

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 81191 (July 24, 2017), 82 FR 35256.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 81558, 82 FR 43278 (September 14, 2017).

⁶ In Amendment No. 2, the Exchange: (1) provided additional information regarding the Adviser (as defined below), the Index Provider (as defined below), and the index

rule change.⁷ The Commission received no comments on the proposal. The Commission is publishing this notice to solicit comments on Amendments No. 2 and No. 3 from interested persons, and is approving the proposed rule change, as modified by Amendments No. 2 and No. 3, on an accelerated basis.

II. Description of the Proposed Rule Change, as Modified by Amendments No. 2 and No. 3

The Exchange proposes to list and trade the Shares under Rule 14.11(c)(3), which governs the listing and trading of Index Fund Shares on the Exchange. The Shares will be offered by the Trust, which was established as a Delaware statutory trust on February 9, 2012. The Trust is registered with the Commission as an open-end investment company and has filed a registration statement on behalf of the Fund on Form N-1A (“Registration Statement”) with the Commission.⁸ Aptus Capital Advisors, LLC (“Adviser” or “Index Provider”) serves as investment adviser and index provider to the Fund. The Index Provider is not a broker-dealer and is not affiliated with a broker-dealer. The Index Provider will implement and maintain a “fire wall” around the personnel who have access to information concerning changes and

calculation agent; (2) amended and provided additional discussions regarding constituents of the Aptus Fortified Value Index (“Index”) and permitted holdings of the Fund; (3) clarified the types of statements and representations made in the proposal that will constitute continued listing requirements; and (4) made other technical, non-substantive, and conforming changes. Amendment No. 2 is available at: <https://www.sec.gov/comments/sr-batsbzx-2017-46/batsbzx201746-2630920-161197.pdf>.

⁷ In Amendment No. 3, the Exchange: (1) clarified that all securities included in the Index – rather than held by the Fund – are listed on U.S. securities exchanges that are members of the Intermarket Surveillance Group (“ISG”); and (2) clarified the Fund’s compliance with various applicable requirements. Amendment No. 3 is available at: <https://www.sec.gov/comments/sr-batsbzx-2017-46/batsbzx201746-2651203-161342.pdf>.

⁸ See Registration Statement on Form N-1A for the Trust, dated June 8, 2017 (File Nos. 333-179562 and 811-22668). According to the Exchange, the Commission has issued an order, upon which the Trust may rely, granting certain exemptive relief under the Investment Company Act of 1940. See Investment Company Act Release No. 32110 (May 10, 2016) (File No. 812-14604).

adjustments to the Index. The Index is calculated by an unaffiliated third party who is not a broker-dealer or fund advisor. In addition, any advisory committee, supervisory board, or similar entity that advises the Index Provider or that makes decisions on the Index or portfolio composition, methodology and related matters, will implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the Index.

The Fund will seek to track the performance, before fees and expenses, of the Aptus Fortified Value Index. According to the Exchange, the Index does not meet all of the generic listing requirements of Rule 14.11(c)(3)(A)(i). Specifically, Rule 14.11(c)(3)(A)(i) sets forth the requirements for components of an index or portfolio of U.S. Component Stocks, but the Index may include put options, which are not included in the definition of U.S. Component Stocks.⁹ The Index will otherwise conform to the initial and continued listing criteria under Rule 14.11(c).

According to the Exchange, the Index is a rules-based, equal-weighted index that is designed to gain exposure to 50 of the most undervalued U.S.-listed common stocks and real estate investment trusts (“REITs”), while hedging against significant U.S. equity market declines when the market is overvalued. More specifically, the Index is composed of an equity component of 50 common stocks and REITs¹⁰ and, when the Index determines that the U.S. equity market is overvalued, a “tail hedge” component of long put options on a large, highly liquid ETF¹¹ listed on a national securities exchange that tracks the performance of the large-cap

⁹ A “U.S. Component Stock” is an equity security that is registered under Sections 12(b) or 12(g) of the Act, or an American Depositary Receipt, the underlying equity security of which is registered under Sections 12(b) or 12(g) of the Act. See Rule 14.11(c)(1)(D).

¹⁰ The equity component of the Index will meet the requirements of Rule 14.11(c)(3)(A)(i).

¹¹ ETF includes Portfolio Depositary Receipts and Index Fund Shares, as defined in Rules 14.11(b) and 14.11(c), respectively, or their equivalents on other national securities exchanges.

U.S. equity market (“Underlying ETF”).¹² All of the securities included in the Index are and will be listed on U.S. exchanges, and all such exchanges are members of the ISG.

When the tail hedge is not in effect, the Index will be composed 100% of the equity component. At the time the tail hedge is implemented, the Index will be composed 99.5% of the equity component and 0.50% the tail hedge (based on the theoretical dollar value of the Index at the time that the options are added to the Index). Any tail hedge implementation will occur on the last business day of the applicable month.¹³ At the time the tail hedge is implemented, the put options on the Underlying ETF will have an expiration date of approximately three months from the date the tail hedge is implemented, and the strike price will be approximately 30% less than the most recent closing price of the Underlying ETF.

According to the Exchange, the Fund may hold: (1) securities that are possible constituents of the Index; (2) cash and cash equivalents;¹⁴ (3) U.S. Government securities, including bills, notes, and bonds differing as to maturity and rates of interest, which are either

¹² The large-cap U.S. equity market tracking ETF with the highest average daily options volume (as determined annually by the Index rules) will be the Underlying ETF.

¹³ On the last business day of each month, any options held by the Index are removed. If the tail hedge will not be in effect for the following month, the weight of such options, if any, will be reallocated pro rata to the securities in the Index’s equity component. If the tail hedge will continue in effect for the following month, the Index is rebalanced such that the tail hedge (with new options purchased) has a weight of 0.50% and the equity component securities are adjusted up or down pro rata to have a weight of 99.5%.

¹⁴ Cash equivalents include short-term instruments (instruments with maturities of less than 3 months) of the following types: (1) 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; (2) certificates of deposit issued against funds deposited in a bank or savings and loan association; (3) bankers’ acceptances, which are short-term credit instruments used to finance commercial transactions; (4) repurchase agreements and reverse repurchase agreements; (5) 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; (6) commercial paper, which are short-term unsecured promissory notes; and (7) money market funds.

issued or guaranteed by the U.S. Treasury or by U.S. Government agencies or instrumentalities; and (4) other ETFs.¹⁵

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendments No. 2 and No. 3, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁶ In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,¹⁷ 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.

The Commission notes that, except for the options position that may be included in the Index (the aggregate market value of which is capped at 0.50% of the theoretical dollar value of the Index at the time that the options are added to the Index),¹⁸ the Index will satisfy, on an initial and continued listing basis, all of the generic listing standards under Rule 14.11(c)(3)(A)(i). All of the securities included in the Index are and will be listed on U.S. securities exchanges, and all such exchanges are members of the ISG. Moreover, the Fund may hold only the following:

¹⁵ These ETFs include Portfolio Depository Receipts (as described in Rule 14.11(b)), Index Fund Shares (as described in Rule 14.11(c)), and Managed Fund Shares (as described in Rule 14.11(i)). The ETFs in which the Fund may invest all will be listed and traded in the U.S. on national securities exchanges. The Fund may invest in inverse ETFs, but will not invest in leveraged (e.g., 2X, -2X, 3X, or -3X) ETFs.

¹⁶ 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).

¹⁷ 15 U.S.C. 78f(b)(5).

¹⁸ As noted above, the options will overlie a large, highly liquid ETF listed on a national securities exchange that tracks the performance of the large-cap U.S. equity market.

securities that are possible constituents of the Index (all of which will be listed on U.S. securities exchanges); cash; cash equivalents; U.S. Government securities; and other ETFs (all of which will be listed on U.S. securities exchanges).

The Exchange states that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. The Exchange also states that it may obtain information regarding trading in the Shares and the underlying equities and options contracts held by the Fund and included in the Index via the ISG from other exchanges who are members or affiliates of the ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

The Fund will meet and be subject to the requirements of Rule 14.11(c), and other applicable requirements for Index Fund Shares based on a U.S. equity index or portfolio, including, but not limited to, requirements relating to the dissemination of key information such as the Net Asset Value, the Intraday Indicative Value, rules governing the trading of equity securities, trading hours, trading halts, surveillance, and the information circular, as set forth in Exchange rules applicable to Index Fund Shares and the orders approving such rules. In addition, for initial and/or continued listing, the Fund must be in compliance with Rule 10A-3 under the Act.¹⁹

The Exchange represents that all statements and representations regarding the index composition, the description of the portfolio or reference assets, limitations on portfolio holdings or reference assets, dissemination and availability of index, reference assets, and intraday indicative values, and the applicability of Exchange listing rules specified in the filing constitute

¹⁹ 17 CFR 240.10A-3.

continued listing requirements for the Fund. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund or the Shares to comply with the continued listing requirements. 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 Rule 14.12. This approval order is based on all of the Exchange's statements and representations, including those set forth above and in Amendments No. 2 and No. 3.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendments No. 2 and No. 3, is consistent with Section 6(b)(5) of the Act²⁰ and the rules and regulations thereunder applicable to a national securities exchange.

IV. Solicitation of Comments on Amendments No. 2 and No. 3 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendments No. 2 and No. 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. Please include File Number SR-BatsBZX-2017-46 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.

²⁰ 15 U.S.C. 78f(b)(5).

All submissions should refer to File Number SR-BatsBZX-2017-46. 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-BatsBZX-2017-46, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendments No. 2 and No. 3

The Commission finds good cause to approve the proposed rule change, as modified by Amendments No. 2 and No. 3, prior to the thirtieth day after the date of publication of notice of the filing of Amendments No. 2 and No. 3 in the Federal Register. The Commission believes that Amendments No. 2 and No. 3 supplement the proposed rule change by providing

clarification and additional information regarding the Index and the Fund.²¹ The changes and additional information helped the Commission to evaluate the Shares' susceptibility to manipulation, and whether the listing and trading of the Shares would be consistent with the protection of investors and the public interest. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,²² to approve the proposed rule change, as modified by Amendments No. 2 and No. 3, on an accelerated basis.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²³ that the proposed rule change (SR-BatsBZX-2017-46), as modified by Amendments No. 2 and No. 3 be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Eduardo A. Aleman
Assistant Secretary

²¹ See supra notes 6 and 7.

²² 15 U.S.C. 78s(b)(2).

²³ Id.

²⁴ 17 CFR 200.30-3(a)(12).