

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-78415; File No. SR-BatsBZX-2016-09)

July 26, 2016

Self-Regulatory Organizations; Bats BZX Exchange, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Shares of the Pointbreak Agriculture Commodity Strategy Fund of the Pointbreak ETF Trust under BZX Rule 14.11(i), Managed Fund Shares

I. Introduction

On April 15, 2016, Bats 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 (“Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares (“Shares”) of the Pointbreak Agriculture Commodity Strategy Fund (“Fund”) of the Pointbreak ETF Trust (“Trust”) under BZX Rule 14.11(i). The proposed rule change was published for comment in the Federal Register on May 3, 2016.<sup>3</sup>

On June 15, 2016, 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 July 19, 2016, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>6</sup>

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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. 77723 (April 27, 2016), 81 FR 26600 (“Notice”).

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

<sup>5</sup> See Securities Exchange Act Release No. 78079, 81 FR 40381 (June 21, 2016). The Commission designated August 1, 2016 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

<sup>6</sup> In Amendment No. 1, which replaced the original filing in its entirety, the Exchange: (1) clarified where price information can be obtained for certain investments of the Fund;

The Commission received no comments on the proposed rule change. This order grants approval of the proposed rule change, as modified by Amendment No. 1.

II. The Exchange's Description of the Proposal

The Exchange proposes to list and trade the Shares under BZX Rule 14.11(i), which governs the listing and trading of Managed Fund Shares on the Exchange. The Shares will be offered by the Trust. According to the Exchange, the Trust is registered with the Commission as an open-end investment company.<sup>7</sup> Pointbreak Advisers LLC will be the investment adviser (“Adviser”)<sup>8</sup> to the Fund.<sup>9</sup> Brown Brothers Harriman & Co. will be the administrator, custodian,

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(2) provided additional information regarding the creation and redemption process; and  
(3) made other technical amendments. Amendment No. 1 is available at <https://www.sec.gov/comments/sr-batsbx-2016-09/batsbx201609-1.pdf>. Because Amendment No. 1 does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 1 is not subject to notice and comment.

<sup>7</sup> The Exchange states that the Trust has filed a registration statement on behalf of the Fund with the Commission. See Registration Statement on Form N-1A for the Trust, dated March 8, 2016 (File Nos. 333-205324 and 811-23068) (“Registration Statement”). The Exchange states that the Commission has issued an order granting certain exemptive relief to the Trust under the Investment Company Act of 1940 (“1940 Act”). See Investment Company Act Release No. 32064 (April 4, 2016) (File No. 812-14577).

<sup>8</sup> The Exchange states that, prior to listing on the Exchange, the Adviser will be registered as a Commodity Pool Operator and will become a member of the National Futures Association (“NFA”). The Exchange also states that the Fund and its Subsidiary (as defined below) will be subject to regulation by the Commodity Futures Trading Commission and NFA, as well as to additional disclosure, reporting, and recordkeeping rules imposed upon commodity pools.

<sup>9</sup> The Exchange states that the Adviser is not a registered broker-dealer and is not affiliated with a broker-dealer. In the event that (a) the Adviser becomes a broker-dealer or newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a broker-dealer or becomes affiliated with a broker-dealer, that adviser or sub-adviser will implement a fire wall with respect to its relevant personnel or its broker-dealer affiliate, as applicable, regarding access to information concerning the composition of 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.

and transfer agent for the Trust and ALPS Distributors, Inc. will serve as the distributor for the Trust.<sup>10</sup>

A. The Fund's Investments

According to the Exchange, the Fund is an actively managed exchange-traded fund (“ETF”) that seeks to provide total return that exceeds that of the Solactive Agriculture Commodity Index (“Benchmark”) over time. The Fund is not an index-tracking ETF and is not required to invest in the specific components of the Benchmark. However, the Exchange represents that the Fund will generally seek to maintain a portfolio of instruments similar to those included in the Benchmark and will seek exposure to commodities included in the Benchmark.<sup>11</sup>

The Benchmark is a rules-based index composed of futures contracts on 11 heavily traded agriculture commodities including cocoa, coffee, corn, cotton, feeder cattle, hard red winter wheat, lean hogs, live cattle, soybeans, sugar, and soft red winter wheat. The Exchange states that the Benchmark will seek to increase the weightings of those commodities whose futures markets display the most backwardation, or the least contango, among the 11 commodities. In addition, the Exchange represents that the Benchmark will seek to select the contract month for each specific commodity among the next 13 months that display the most

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<sup>10</sup> Additional information regarding the Trust, the Fund, and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings, disclosure policies, calculation of the NAV, distributions, and taxes, among other things, can be found in Amendment No. 1 and the Registration Statement, as applicable. See Amendment No. 1, supra note 6; Registration Statement, supra note 7.

<sup>11</sup> The Fund will generally obtain its exposure to commodity markets via investments in a wholly owned subsidiary organized under the laws of the Cayman Islands (“Subsidiary”). References to the investments of the Fund include investments of the Subsidiary to which the Fund gains indirect exposure.

backwardation or the least contango, and will not attempt to always own those contracts that are closest to expiration.

Although the Fund, through the Subsidiary (as further described below), will generally invest in Agriculture Commodities Futures (as defined below) that are components of the Benchmark, the Fund and the Subsidiary will be actively managed and will not be required to invest in all of, or limit their investments solely to, the Agriculture Commodities Futures. In this regard, the Fund, through the Subsidiary, may hold the same Agriculture Commodities Futures in approximately, but not exactly, the same weights as the Benchmark. The Fund, through the Subsidiary, will generally hold the Agriculture Commodities Futures with the same maturity as the Benchmark, but may select a different month of maturity in seeking to achieve better performance than the Benchmark.

According to the Exchange, under normal circumstances,<sup>12</sup> the Fund will invest in Agriculture Commodities Futures through the Subsidiary and Cash Instruments (as defined below) both directly through the Fund and through the Subsidiary. “Agriculture Commodities Futures” include only exchange-traded futures on commodities and exchange-traded futures contracts on commodity indices. “Cash Instruments” include only: (i) short-term obligations issued by the U.S. Government; (ii) cash and cash-like instruments;<sup>13</sup> (iii) money market mutual

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<sup>12</sup> According to the Exchange, the term “under normal circumstances” includes, but is not limited to, the absence of extreme volatility or trading halts in the futures markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance.

<sup>13</sup> Cash-like instruments include only the following: short-term negotiable obligations of commercial banks, fixed-time deposits, bankers acceptances of U.S. banks and similar institutions, and commercial paper rated at the date of purchase “Prime-1” by Moody’s Investors Service, Inc. or “A-1+” or “A-1” by Standard & Poor’s or, if unrated, of comparable quality, as the Adviser determines.

funds; and (iv) repurchase agreements.<sup>14</sup> Cash Instruments would provide liquidity, serve as margin, or collateralize the Subsidiary’s investments in Agriculture Commodities Futures. The Fund will not invest in Cash Instruments that are below investment-grade.

The Exchange states that the Fund generally will not invest directly in Agriculture Commodities Futures and expects to gain exposure to Agriculture Commodities Futures by investing a portion of its assets in the Subsidiary.<sup>15</sup> The Fund’s investment in the Subsidiary is intended to provide the Fund with exposure to commodity markets in accordance with applicable rules and regulations. The Subsidiary has the same investment objective and investment restrictions as the Fund. The Fund will generally invest up to 25% of its total assets in the Subsidiary.

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<sup>14</sup> According to the Exchange, the Fund follows certain procedures designed to minimize the risks inherent in repurchase agreements. These procedures include effecting repurchase transactions only with large, well-capitalized, and well-established financial institutions whose condition will be continually monitored by the Adviser. The Exchange represents that it is the current policy of the Fund not to invest in repurchase agreements that do not mature within seven days if any such investment, together with any other illiquid assets held by the Fund, amount to more than 15% of the Fund’s net assets. The Exchange states that the investments of the Fund in repurchase agreements, at times, may be substantial when, in the view of the Adviser, liquidity or other considerations so warrant.

<sup>15</sup> The Exchange states that the Subsidiary is not registered under the 1940 Act and is not directly subject to its investor protections, except as noted in the Registration Statement. However, according to the Exchange, the Subsidiary is wholly-owned and controlled by the Fund and is advised by the Adviser. Therefore, the Exchange asserts, because of the Fund’s ownership and control of the Subsidiary, the Subsidiary would not take action contrary to the interests of the Fund or its shareholders. The Fund’s Board of Trustees has oversight responsibility for the investment activities of the Fund, including its expected investment in the Subsidiary, and the Fund’s role as the sole shareholder of the Subsidiary. The Adviser receives no additional compensation for managing the assets of the Subsidiary. The Exchange states that the Subsidiary will also enter into separate contracts for the provision of custody, transfer agency, and accounting agent services with the same or with affiliates of the same service providers that provide those services to the Fund.

The Exchange represents that, during times of adverse market, economic, political, or other conditions, the Fund may depart temporarily from its principal investment strategies (such as by maintaining a significant uninvested cash position) for defensive purposes. The Exchange states that doing so could help the Fund avoid losses, but may mean lost investment opportunities, and that during these periods, the Fund may not achieve its investment objective.

The Fund intends to qualify each year as a regulated investment company under the Internal Revenue Code.

#### **B. The Fund's Investment Restrictions**

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment) deemed illiquid by the Adviser<sup>16</sup> under the 1940 Act. The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets. Illiquid assets include assets subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

Aside from the Fund's investments in the Subsidiary, neither the Fund nor the Subsidiary will invest in non-U.S. equity securities. Neither the Fund nor the Subsidiary will invest in derivatives other than Agriculture Commodities Futures.

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<sup>16</sup> The Exchange states that, in reaching liquidity decisions, the Adviser may consider the following factors: the frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace in which it trades (e.g., the time needed to dispose of the security, the method of soliciting offers, and the mechanics of transfer).

The Fund’s investments will be consistent with the Fund’s investment objective and will not be used to achieve leveraged or inverse leveraged returns.

### III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange’s proposal to list and trade the Shares is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>17</sup> In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Exchange Act,<sup>18</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.

The Commission also finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Exchange Act,<sup>19</sup> which sets forth Congress’s finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities.

According to the Exchange, quotation and last sale information for the Shares will be available on the facilities of the Consolidated Tape Association (“CTA”), and the previous day’s closing price and trading volume information for the Shares will be generally available daily in the print and online financial press. Also, daily trading volume information for the Fund will be

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<sup>17</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>18</sup> 15 U.S.C. 78f(b)(5).

<sup>19</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

available in the financial section of newspapers, through subscription services such as Bloomberg, Thomson Reuters, and International Data Corporation, which can be accessed by authorized participants and other investors, as well as through other electronic services, including major public websites. Additionally, 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.

In addition, the Intraday Indicative Value<sup>20</sup> (as defined in BZX Rule 14.11(i)(3)(C)) will be updated and widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Regular Trading Hours.<sup>21</sup> On each business day, before commencement of trading in the Shares during Regular Trading Hours on the Exchange, the Fund will disclose on its website the Disclosed Portfolio (as defined in BZX Rule 14.11(i)(3)(B))<sup>22</sup> that will form the basis for the Fund's calculation of NAV at the end of the

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<sup>20</sup> According to the Exchange, the Intraday Indicative Value will be based upon the current value for the components of the Disclosed Portfolio (as defined below). The Exchange states that quotations of certain of the Fund's holdings may not be updated for purposes of calculating Intraday Indicative Value during U.S. trading hours where the market on which the underlying asset is traded settles prior to the end of the Exchange's Regular Trading Hours. The Exchange's Regular Trading Hours are 9:30 a.m. to 4:00 p.m. Eastern Time.

<sup>21</sup> The Exchange notes that several major market data vendors display or make widely available Intraday Indicative Values published via the CTA or other data feeds.

<sup>22</sup> The Disclosed Portfolio will include for each portfolio holding of the Fund and the Subsidiary, as applicable: ticker symbol or other identifier, a description of the holding, identity of the asset upon which the derivative is based, the quantity of each security or other asset held as measured by select metrics, maturity date, coupon rate, effective date, market value, and percentage weight of the holding in the portfolio. The website and information will be publicly available at no charge.

business day.<sup>23</sup> The website for the Fund will also include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

Intraday price quotations on Cash Instruments of the type held by the Fund, with the exception of money market mutual funds, are available from major broker-dealer firms and from third parties, which may provide prices free with a time delay or “live” with a paid fee. For Agriculture Commodities Futures, intraday pricing information is available directly from the applicable listing exchange. Price information for money market mutual funds will be available from the applicable investment company’s website.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Exchange will obtain a representation from the issuer of the Shares that the NAV

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<sup>23</sup> The NAV of the Fund will generally be determined at 4:00 p.m. Eastern Time each business day when the Exchange is open for trading. The Fund intends to require all creation and redemption requests to be received no later than 10:30 a.m. Eastern Time (“cutoff time”) in order to create or redeem Shares based on that day’s NAV. In support of this early cutoff time, the Exchange represents that the early cutoff time will provide the Fund with certainty as to whether to buy or sell certain Agriculture Commodity Futures in advance of their settlement times, which should help to minimize the difference between the price used to calculate the NAV and the price at which the Fund is able to buy or sell the Agriculture Commodity Futures. The Exchange also represents that the early cutoff time will provide authorized participants and market makers with certainty regarding the prices that will be used for calculating the NAV and that they will be able to transact at those prices, which should assist authorized participants and market makers to efficiently hedge their positions. Moreover, the Exchange represents that the early cutoff time should not significantly interfere with the arbitrage mechanism because authorized participants and market makers will continue to be able to hedge their positions in the Fund by investing directly in Agriculture Commodity Futures as trading in these Agriculture Commodity Futures continues after the settlement time. Finally, the Exchange represents that although the authorized participants and market makers that accumulate positions after the cutoff time may take on risk or additional costs to the extent they have to hold part or all of their positions overnight, the risk or additional costs do not generally interfere with the arbitrage mechanism. See Amendment No. 1, supra note 6.

will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. Further, trading in the Shares will be subject to BZX Rules 11.18 and 14.11(i)(4)(B)(iv), which set forth circumstances under which trading in Shares of the Fund may be halted. Trading 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 Agriculture Commodities Futures and other assets composing the 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.

The Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio.<sup>24</sup> The Exchange represents that it prohibits the distribution of material, non-public information by its employees. The Exchange states that the Adviser is not a registered broker-dealer and is not affiliated with a broker-dealer, and that, in the event that (a) the Adviser becomes a broker-dealer or newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a broker-dealer or becomes affiliated with a broker-dealer, that adviser or sub-adviser will implement a fire wall with respect to its relevant personnel or its broker-dealer affiliate, as applicable, regarding access to information concerning the composition of 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.<sup>25</sup>

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<sup>24</sup> See BZX Rule 14.11(i)(4)(B)(ii)(b).

<sup>25</sup> The Exchange represents that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940.

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. The Exchange represents that trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Managed Fund Shares, and that these 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 represents that it 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. In support of this proposal, the Exchange has made the following representations:

- (1) The Shares will be subject to BZX Rule 14.11(i), which sets forth the initial and continued listing criteria applicable to Managed Fund Shares.
- (2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.
- (3) The Exchange may obtain information regarding trading in the Shares and the underlying futures, including futures contracts held by the Subsidiary, via the Intermarket Surveillance Group ("ISG") from other exchanges who are members or affiliate members of the ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, the Exchange is able to access, as needed, trade information for certain fixed income instruments reported to FINRA's Trade Reporting and Compliance Engine.

- (4) All of the futures contracts in the Disclosed Portfolio for the Fund (including those held by the Subsidiary) will trade on markets that are a member or affiliate member of ISG or on markets with which the Exchange has in place a comprehensive surveillance sharing agreement.
- (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. Specifically, 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) how information regarding the Intraday Indicative Value and Disclosed Portfolio is disseminated; (d) the risks involved in trading the Shares during the Pre-Opening and After Hours Trading Sessions (as defined in the Exchange's rules), when an updated Intraday Indicative Value will not be calculated or publicly disseminated; (e) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.
- (6) For initial and continued listing, the Fund must be in compliance with Rule 10A-3 under the Exchange Act.<sup>26</sup>
- (7) Aside from the Fund's investments in the Subsidiary, neither the Fund nor the Subsidiary will invest in non-U.S. equity securities.

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<sup>26</sup> See 17 CFR 240.10A-3.

- (8) Neither the Fund nor the Subsidiary will invest in derivatives other than Agriculture Commodities Futures.
- (9) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment) deemed illiquid by the Adviser under the 1940 Act. The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets.
- (10) The Fund's investments will be consistent with the Fund's investment objective and will not be used to achieve leveraged or inverse leveraged returns.
- (11) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.

The Exchange represents that all statements and representations made in the filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures constitute continued listing requirements for listing the Shares on the Exchange. In addition, the issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and that, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under BZX Rule 14.12.

This approval order is based on all of the Exchange's representations, including those set forth above and in Amendment No. 1. The Commission notes that the Fund and the Shares must comply with the requirements of BZX Rule 14.11(i) to be initially and continuously listed and traded on the Exchange.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Exchange Act<sup>27</sup> and Section 11A(a)(1)(C)(iii) of the Exchange Act<sup>28</sup> and the rules and regulations thereunder applicable to a national securities exchange.

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

<sup>28</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,<sup>29</sup> that the proposed rule change (SR-BatsBZX-2016-09), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>30</sup>

Robert W. Errett  
Deputy Secretary

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<sup>29</sup> 15 U.S.C. 78s(b)(2).

<sup>30</sup> 17 CFR 200.30-3(a)(12).