

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-82379; File No. SR-CboeBZX-2017-012)

December 21, 2017

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change to List and Trade Shares of the LHA Market State® Tactical U.S. Equity ETF, a Series of the ETF Series Solutions, under Rule 14.11(i), Managed Fund Shares

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 7, 2017, Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposed rule change to list and trade shares of the LHA Market State® Tactical U.S. Equity ETF (the “Fund”), a series of the ETF Series Solutions (the “Trust”), under Rule 14.11(i) (“Managed Fund Shares”). The shares of the Fund are referred to herein as the “Shares.”

The text of the proposed rule change is available at the Exchange’s website at [www.markets.cboe.com](http://www.markets.cboe.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

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

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade the Shares under Rule 14.11(i), which governs the listing and trading of Managed Fund Shares on the Exchange.<sup>3</sup> The Fund will be an actively managed exchange-traded fund that seeks to provide investment results that exceed the total return performance of the broader U.S. equity market on a risk-adjusted basis. The Exchange submits this proposal in order to allow the Fund to hold listed derivatives, in particular S&P 500 futures, in a manner that does not comply with Rule 14.11(i)(4)(C)(iv)(b).<sup>4</sup> Otherwise, the Fund

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<sup>3</sup> The Commission originally approved BZX Rule 14.11(i) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR-BATS-2011-018) and subsequently approved generic listing standards for Managed Fund Shares under Rule 14.11(i) in Securities Exchange Act Release No. 78396 (July 22, 2016), 81 FR 49698 (July 28, 2016) (SR-BATS-2015-100).

<sup>4</sup> Rule 14.11(i)(4)(C)(iv)(b) provides that “the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets shall not exceed 65% of the weight of the portfolio (including gross notional exposures), and the aggregate gross notional value of listed derivatives based on any single underlying reference asset shall not exceed 30% of the weight of the portfolio (including gross notional exposures).” The Exchange is proposing that the Fund be exempt only from the requirement of Rule 14.11(i)(4)(C)(iv)(b) that prevents the aggregate gross notional value of listed derivatives based on any single underlying reference asset from exceeding 30% of the weight of the portfolio (including gross notional exposures). The Fund will meet the requirement that

will comply with all other listing requirements on an initial and continued listing basis under Rule 14.11(i).<sup>5</sup>

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 is expected to file a registration statement on behalf of the Fund on Form N-1A (“Registration Statement”) with the Commission.<sup>6</sup> The Fund’s adviser, Little Harbor Advisors, LLC (the “Adviser”), is not registered as a broker-dealer and is not affiliated with a broker-dealer. Adviser personnel who make decisions regarding the Fund’s portfolio are subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the Fund’s portfolio. In the event that (a) the Adviser becomes registered as a broker-dealer or newly affiliated with a broker-dealer; or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer; it will implement a fire wall with respect to its relevant personnel or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the portfolio, and will be

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the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets shall not exceed 65% of the weight of the portfolio (including gross notional exposures).

<sup>5</sup> The Exchange notes that this proposal is very similar to a previously approved proposal to list and trade a series of Managed Fund Shares on the Exchange with similar exposures to a single underlying reference asset and U.S. exchange-listed equity securities. See Securities Exchange Act Release No. 80529 (April 26, 2017), 82 FR 20506 (May 2, 2017) (SR-BatsBZX-2017-14).

<sup>6</sup> The Trust expects to file a post-effective amendment to the Registration Statement on or about December 15, 2017. See Registration Statement on Form N-1A for the Trust (File Nos. 333-179562 and 811-22668). The descriptions of the Fund and the Shares contained herein are based, in part, on information expected to be included in the Registration Statement. The Commission has not yet issued an order granting exemptive relief to the Trust under the Investment Company Act of 1940 (15 U.S.C. 80a-1) applicable to the activities of the Fund, but the Fund will not be listed on the Exchange until such an order is issued and any conditions contained therein are satisfied.

subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

The Fund intends to qualify each year as a regulated investment company under Subchapter M of the Internal Revenue Code of 1986, as amended.

LHA Market State Tactical U.S. Equity ETF

In order to achieve its investment objective, under Normal Market Conditions,<sup>7</sup> the Fund will invest approximately 80% of its net assets at the time of investment in U.S. exchange-listed ETFs<sup>8</sup> that principally invest in U.S. equity securities (“U.S. ETFs”) or the constituent stocks of a U.S. ETF. As noted above, Rule 14.11(i)(4)(C)(iv)(b) prevents the Fund from holding listed derivatives based on any single underlying reference asset in excess of 30% of the weight of its portfolio (including gross notional exposures). The Exchange is proposing to allow the Fund to hold up to 60% of the weight of its portfolio at the time of investment (including gross notional exposures) in S&P 500 futures contracts traded on the Chicago Mercantile Exchange (“S&P 500 Futures”). Allowing the Fund to hold a greater portion of its portfolio in S&P 500 Futures would mitigate the Fund’s dependency on holding OTC instruments, which would reduce the Fund’s operational burden by allowing the Fund to primarily use listed futures contracts to achieve its investment objective and would further reduce counter-party risk associated with holding OTC instruments. The Exchange notes that the Fund may also hold certain fixed income securities and

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<sup>7</sup> The term “Normal Market Conditions” includes, but is not limited to, the absence of trading halts in the applicable financial markets generally; operational issues causing dissemination of inaccurate market information or system failures; or force majeure type events such as natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance.

<sup>8</sup> For purposes of this proposal, the term ETF means Portfolio Depositary Receipts and Index Fund Shares as defined in Rule 14.11(b) and 14.11(c), respectively, and their equivalents on other national securities exchanges.

cash and cash equivalents in compliance with Rules 14.11(i)(4)(C)(ii) and (iii) in order to collateralize its derivatives positions.

As noted above, the Fund's investment in U.S. ETFs or the constituent stocks of a U.S. ETF will constitute approximately 80% of the Fund's net assets at the time of investment and under Normal Market Conditions, and such holdings will meet the requirements for U.S. Component Stocks in Rule 14.11(i)(4)(C)(i)(a). The Fund may hold approximately 20% of its net assets at the time of investment in fixed income securities, cash, and the cash value of futures positions<sup>9</sup> under Normal Market Conditions. The combination of U.S. ETFs, constituent stocks of U.S. ETFs, fixed income securities, cash, cash equivalents, and the cash value of futures positions will constitute the entirety of the Fund's holdings and the cash value of these holdings will be used to form the basis for these calculations. The Exchange notes that this is different than the calculation used to measure the Fund's holdings in S&P 500 Futures as it relates to the Fund holding up to 60% of the weight of its portfolio, which, as noted above, includes gross notional exposures gained through the S&P 500 Futures in both the numerator and denominator, which is consistent with the derivatives exposure calculation under Rule 14.11(i)(4)(C)(iv). The Exchange represents that, except for the 30% limitation in Rule 14.11(i)(4)(C)(iv)(b), the Fund's proposed investments will satisfy, on an initial and continued listing basis, all of the generic listing standards under BZX Rule 14.11(i)(4)(C) and all other applicable requirements for Managed Fund Shares under Rule 14.11(i).

The Trust is required to comply with Rule 10A-3 under the Act for the initial and continued listing of the Shares of the Fund. In addition, the Exchange represents that the Shares

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<sup>9</sup> The cash value of futures positions is based on the value of the Fund's daily margin account with the applicable futures exchange(s).

of the Fund will comply with all other requirements applicable to Managed Fund Shares, which includes the dissemination of key information such as the Disclosed Portfolio,<sup>10</sup> Net Asset Value,<sup>11</sup> and the Intraday Indicative Value,<sup>12</sup> suspension of trading or removal,<sup>13</sup> trading halts,<sup>14</sup> surveillance,<sup>15</sup> minimum price variation for quoting and order entry,<sup>16</sup> the information circular,<sup>17</sup> and firewalls<sup>18</sup> as set forth in Exchange rules applicable to Managed Fund Shares. Moreover, all of the futures contracts and U.S. ETFs held by the Fund will trade on markets that are a member of Intermarket Surveillance Group (“ISG”) or affiliated with a member of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.<sup>19</sup> All statements and representations made in this filing regarding (a) the description of the portfolio, reference assets, and indices, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules shall constitute continued listing requirements for listing the Shares on the Exchange. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund or Shares 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

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<sup>10</sup> See Rule 14.11(i)(4)(A)(ii) and 14.11(i)(4)(B)(ii).

<sup>11</sup> See Rule 14.11(i)(4)(A)(ii).

<sup>12</sup> See Rule 14.11(i)(4)(B)(i).

<sup>13</sup> See Rule 14.11(i)(4)(B)(iii).

<sup>14</sup> See Rule 14.11(i)(4)(B)(iv).

<sup>15</sup> See Rule 14.11(i)(2)(C).

<sup>16</sup> See Rule 14.11(i)(2)(B).

<sup>17</sup> See Rule 14.11(i)(6).

<sup>18</sup> See Rule 14.11(i)(7).

<sup>19</sup> For a list of the current members and affiliate members of ISG, see [www.isgportal.com](http://www.isgportal.com). The Exchange notes that not all components of the Disclosed Portfolio for the Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

the continued listing requirements. If the Fund or Shares are not in compliance with the applicable listing requirements, then, with respect to such Fund or Shares, the Exchange will commence delisting procedures under Exchange Rule 14.12. FINRA conducts certain cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures with respect to such Fund under Exchange R7ule [sic] 14.12.

## 2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act<sup>20</sup> in general and Section 6(b)(5) of the Act<sup>21</sup> in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, 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 in that the Shares will meet each of the initial and continued listing criteria in BZX Rule 14.11(i) with the exception Rule 14.11(i)(4)(C)(iv)(b), which requires that the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets shall not exceed 65% of the weight of the portfolio (including gross notional exposures), and the aggregate gross notional value of listed derivatives based on any single underlying reference asset shall not exceed 30% of the weight of the portfolio (including gross notional exposures).<sup>22</sup> The Exchange believes that

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<sup>20</sup> 15 U.S.C. 78f.

<sup>21</sup> 15 U.S.C. 78f(b)(5).

<sup>22</sup> As noted above, the Exchange is proposing that the Fund be exempt only from the requirement of Rule 14.11(i)(4)(C)(iv)(b) that prevents the aggregate gross notional value

the liquidity in the S&P 500 Futures markets mitigates the concerns that Rule 14.11(i)(4)(C)(iv)(b) is intended to address and that such liquidity would prevent the Shares from being susceptible to manipulation.<sup>23</sup> The Exchange also believes that the concerns that Rule 14.11(c)(3)(A)(i) are intended to address are mitigated by the diversity, liquidity, and market cap of the securities underlying the S&P 500® Index.<sup>24</sup> Further, allowing the Fund to hold a greater portion of its portfolio in S&P 500 Futures would mitigate the Fund's dependency on holding OTC instruments, which would reduce the Fund's operational burden by allowing the Fund to primarily use listed futures contracts to achieve its investment objective and would further reduce counter-party risk associated with holding OTC instruments. The Exchange further believes that the diversity, liquidity, and market cap of the securities underlying the S&P 500 Index are sufficient to protect against market manipulation of both the Fund's holdings and the Shares.

The Exchange believes 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. All of the futures contracts held by the Fund will trade on markets that are a member of ISG or affiliated with a

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of listed derivatives based on any single underlying reference asset from exceeding 30% of the weight of the portfolio (including gross notional exposures). The Fund will continue to meet the requirement that the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets shall not exceed 65% of the weight of the portfolio (including gross notional exposures).

<sup>23</sup> As of December 7, 2017, the average daily notional volume for S&P 500 Futures was more than \$180 billion over the previous thirty trading days.

<sup>24</sup> The Exchange notes that the diversity, liquidity, and market cap of the components of the S&P 500 Index are such that the S&P 500 Index would without question meet the generic listing standards applicable to an index composed of U.S. Component Stocks in Rule 14.11(c)(3)(A)(i).

member of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. The Exchange may obtain information regarding trading in the Shares and the underlying futures contracts held by the Fund 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.<sup>25</sup> The Exchange further notes that the Fund will meet and be subject to all other requirements of the Generic Listing Rules and other applicable continued listing requirements for Managed Fund Shares under Rule 14.11(i), including those requirements regarding the dissemination of key information such as the Disclosed Portfolio,<sup>26</sup> Net Asset Value,<sup>27</sup> and the Intraday Indicative Value,<sup>28</sup> suspension of trading or removal,<sup>29</sup> trading halts,<sup>30</sup> surveillance,<sup>31</sup> minimum price variation for quoting and order entry,<sup>32</sup> the information circular,<sup>33</sup> and firewalls<sup>34</sup> as set forth in Exchange rules applicable to Managed Fund Shares

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

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<sup>25</sup> See note 19, supra.

<sup>26</sup> See note 10, supra.

<sup>27</sup> See note 11, supra.

<sup>28</sup> See note 12, supra.

<sup>29</sup> See note 13, supra.

<sup>30</sup> See note 14, supra.

<sup>31</sup> See note 15, supra.

<sup>32</sup> See note 16, supra.

<sup>33</sup> See note 17, supra.

<sup>34</sup> See note 18, supra.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change, rather will facilitate the listing and trading of an additional actively-managed exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is 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 No. SR-CboeBZX-2017-012 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 No. SR-CboeBZX-2017-012. 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 am and 3:00 pm. Copies of such filing will also 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 No. SR-CboeBZX-2017-012 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>35</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>35</sup> 17 CFR 200.30-3(a)(12).