

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-82842; File No. SR-CboeBZX-2017-005)

March 9, 2018

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to List and Trade Shares of a Series of the Cboe Vest S&P 500 Buffer Protect Strategy ETF Under the ETF Series Solutions Trust Under Rule 14.11(c)(3), Index Fund Shares

I. Introduction

On November 21, 2017, 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, under BZX Rule 14.11(c)(3), shares (“Shares”) of a series of the Cboe Vest S&P 500<sup>®</sup> Buffer Protect Strategy ETF (individually, “Fund,” and, collectively, “Funds”) under the ETF Series Solutions Trust (“Trust”). The proposed rule change was published for comment in the Federal Register on December 11, 2017.<sup>3</sup> On January 22, 2018, the Commission extended the time period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to March 11, 2018.<sup>4</sup> The Commission has received no comment letters on the proposed rule change. This order institutes proceedings under Section 19(b)(2)(B) of the Act<sup>5</sup> to determine whether to disapprove the proposed rule change.

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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. 82217 (December 5, 2017), 82 FR 58243 (“Notice”).

<sup>4</sup> See Securities Exchange Act Release No. 82558, 83 FR 3820 (January 26, 2018).

<sup>5</sup> 15 U.S.C. 78s(b)(2)(B).

## II. Exchange's Description of the Proposed Rule Change<sup>6</sup>

The Exchange proposes to list and trade the Shares of the Funds under BZX Rule 14.11(c)(3), which governs the listing and trading of Index Fund Shares. In total, the Exchange is proposing to list and trade Shares of twelve monthly series of the Cboe Vest S&P 500<sup>®</sup> Buffer Protect Strategy ETF. Each Fund will be an index-based exchange traded fund ("ETF"). The Funds will include the following: Cboe Vest S&P 500<sup>®</sup> Buffer Protect Strategy (January) ETF; Cboe Vest S&P 500<sup>®</sup> Buffer Protect Strategy (February) ETF; Cboe Vest S&P 500<sup>®</sup> Buffer Protect Strategy (March) ETF; Cboe Vest S&P 500<sup>®</sup> Buffer Protect Strategy (April) ETF; Cboe Vest S&P 500<sup>®</sup> Buffer Protect Strategy (May) ETF; Cboe Vest S&P 500<sup>®</sup> Buffer Protect Strategy (June) ETF; Cboe Vest S&P 500<sup>®</sup> Buffer Protect Strategy (July) ETF; Cboe Vest S&P 500<sup>®</sup> Buffer Protect Strategy (August) ETF; Cboe Vest S&P 500<sup>®</sup> Buffer Protect Strategy (September) ETF; Cboe Vest S&P 500<sup>®</sup> Buffer Protect Strategy (October) ETF; Cboe Vest S&P 500<sup>®</sup> Buffer Protect Strategy (November) ETF; and Cboe Vest S&P 500<sup>®</sup> Buffer Protect Strategy (December) ETF. Each Fund will be based on the Cboe S&P 500 Buffer Protect Index (Month) Series, where "Month" is the corresponding month associated with the roll date of the applicable Fund (individually, "Index," and, collectively, "Indexes").

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 Funds on Form N-1A

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<sup>6</sup> A more detailed description of the Trust, the Funds, and the Shares, as well as the availability of price information and other information regarding the Indexes (as defined herein) and the Funds' portfolio holdings, are included in the Notice and Registration Statement (as defined herein). See Notice, supra note 3; Registration Statement, infra note 7 and accompanying text.

(“Registration Statement”) with the Commission.<sup>7</sup> The Funds’ adviser will be Cboe Vest Financial, LLC (“Adviser”), and the index provider will be Cboe Exchange, Inc. (“Cboe Options” or “Index Provider”).

Each Fund’s investment objective is to track, before fees and expenses, the performance of its respective Index. The value of each Index is calculated daily by Cboe Options utilizing an option valuation model. The Exchange is submitting this proposed rule change because the Indexes for the Funds do not meet the listing requirements of BZX Rule 14.11(c)(3) applicable to an index that consists of equity securities. Specifically, the Indexes for the Funds do not meet the listing requirements of BZX Rule 14.11(c)(3) because the Indexes consist of options based on an index of U.S. Component Stocks.<sup>8</sup>

#### Cboe Vest S&P 500<sup>®</sup> Buffer Protect Indexes

Each Index is a rules-based options index that consists exclusively of FLEXible EXchange Options on the S&P 500 Index (“FLEX Options”) listed on Cboe Options.<sup>9</sup> The Indexes are designed to provide exposure to the large capitalization U.S. equity market with lower volatility and downside risks than traditional equity indices, except in environments of rapid appreciation in the U.S. equity market over the course of one year. On a specified day of the applicable month

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<sup>7</sup> See Registration Statement on Form N-1A for the Trust, dated October 24, 2017 (File Nos. 333-179562 and 811-22668). According to the Exchange, the Commission has not yet issued an order granting exemptive relief to the Trust under the Investment Company Act of 1940 applicable to the activities of the Funds, but the Funds will not be listed on the Exchange until such an order is issued and any conditions contained therein are satisfied.

<sup>8</sup> As defined in Rule 14.11(c)(1)(D), the term “U.S. Component Stock” means 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.

<sup>9</sup> Additional information about the Indexes and methodology is available on the Index Provider’s website at [www.cboe.com](http://www.cboe.com).

for each Index (“Roll Date”),<sup>10</sup> the applicable Index implements a portfolio of put and call FLEX Options with expirations on the next Roll Date that, if held to such Roll Date, seeks to “buffer protect” against the first 10% decline in the value of the S&P 500 Index, while providing participation up to a maximum capped gain in the value of the S&P 500 Index (“Capped Level”). The Capped Level is calculated as of each Roll Date based on the prices of the applicable FLEX Options, such that the value of the portfolio of FLEX Options that comprises each Index is equivalent to the value of a portfolio comprised of the S&P 500 Index constituents. As of the 2017 Roll Date, the Capped Level for the January Index was 11%, meaning that the January Index is designed to provide participation up to a maximum 11% gain in the value of the S&P 500 Index from the 2017 Roll Date to the 2018 Roll Date, but to not provide any participation for gains in the S&P 500 Index in excess of 11%.

Each Index is designed to provide the following outcomes between Roll Dates:

- If the S&P 500 declines more than 10%: the Index declines 10% less than the S&P 500 Index (e.g., if the S&P 500 Index returns -35%, the Index is designed to return -25%);
- If the S&P 500 declines between 0% and 10%: the Index provides a total return of zero (0%);
- If the S&P 500 appreciates between 0% and the Capped Level: the Index appreciates the same amount as the S&P 500 Index; and

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<sup>10</sup> Each of the twelve Indexes is designed to provide returns over a defined year long period and, thus, there is an Index associated with each month. As such, the Roll Date for a specific Index is dependent on the monthly series for which the Index is associated. For example, the Roll Date for the Cboe® S&P 500® Buffer Protect Index January Series is in January, and the Roll date for the Cboe® S&P 500® Buffer Protect Index February Series is in February, a pattern which continues through the rest of the calendar year.

- If the S&P 500 appreciates more than the Capped Level: the Index appreciates by the amount of the Capped Level.

Each Index includes a mix of purchased and written (sold) put and call FLEX Options structured to achieve the results described above. Such results are only applicable for each full 12-month period from one Roll Date to the next Roll Date, and the Index may not return such results for shorter or longer periods. The value of each Index is calculated daily by Cboe Options utilizing a rules-based options valuation model.

#### Holdings of the Funds

Under Normal Market Conditions,<sup>11</sup> each Fund will seek to track the total return performance, before fees and expenses, of its respective Index. Under Normal Market Conditions, each Fund will invest all, or substantially all, of its assets in the FLEX Options that make up each respective underlying Index, standardized U.S. exchange-listed options contracts based on the S&P 500 (“S&P 500 Index Options”), U.S. exchange-listed options based on one or more ETFs<sup>12</sup> that track the performance of the S&P 500 Index and have the same economic characteristics as the FLEX Options that make up each Index (“Comparable ETF Options”),<sup>13</sup> as

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<sup>11</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>12</sup> For purposes of this proposal, the term ETF means Portfolio Depositary Receipts and Index Fund Shares as defined in BZX Rules 14.11(b) and 14.11(c), respectively, and their equivalents on other national securities exchanges.

<sup>13</sup> The term “Comparable ETF Options” will at any time include only the five ETFs based on the S&P 500 Index with the greatest options consolidated average daily exchange trading volume for the previous quarter.

well as cash and cash equivalents.<sup>14</sup> Under Normal Market Conditions, at least 80% of each Fund's total assets (exclusive of any collateral held from securities lending) will be invested in the FLEX Options that make up the Index. The Funds will hold only FLEX Options, S&P 500 Index Options, Comparable ETF Options, and cash and cash equivalents. The FLEX Options owned by each Fund will have the same terms (i.e., same strike price and expiration) for all investors of that Fund within an outcome period. The Capped Level is determined with respect to the applicable Index on the inception date of the applicable Fund and at the beginning of each outcome period.

III. Proceedings to Determine Whether to Disapprove SR-CboeBZX-2017-005 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>15</sup> 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 proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

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<sup>14</sup> For purposes of this filing, cash equivalents are short-term instruments with maturities of less than three months, including: (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>15</sup> 15 U.S.C. 78s(b)(2)(B).

Pursuant to Section 19(b)(2)(B) of the Act,<sup>16</sup> the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposal's consistency with Section 6(b)(5) of the Act,<sup>17</sup> 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, and to protect investors and the public interest.

Under the proposal, each Fund's investment objective is to track, before fees and expenses, the performance of its respective Index, each of which consists of a hypothetical portfolio of purchased and written (sold) put and call FLEX Options structured to participate in market gains and losses of the S&P 500 Index within pre-determined ranges that are only applicable for a full 12-month period from one Roll Date to the next Roll Date. Specifically, on each Roll Date, the applicable Index implements a portfolio of put and call FLEX Options with expirations on the next Roll Date that, if held to such Roll Date, seeks to buffer protect against the first 10% decline in the value of the S&P 500 Index, and to provide participation up to a maximum capped gain in the value of the S&P 500 Index. Because of these Index characteristics, the Index outcomes that each Fund seeks to track are best realized if the Shares are bought at the initial Roll Date and sold at the expiration of the next Roll Date. The Commission notes, however, that market participants may buy or sell Shares of the Funds at any time, not only at the initial or expiration of a Roll Date. Consequently, with respect to the pricing of the Shares at any time other than the commencement or expiration of a Roll Date, the Commission seeks commenters' views on the sufficiency of the information provided in the proposed rule change to support a determination that the listing and trading of the Shares would be consistent with

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<sup>16</sup> Id.

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

Section 6(b)(5) of the Act.

#### IV. Procedure: Request for Written Comments

Interested persons are invited to submit written views, data, and arguments concerning the foregoing, including whether the proposed rule change 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 under the Act, any request for an opportunity to make an oral presentation.<sup>18</sup>

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 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].

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-2017-005 on the subject line.

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<sup>18</sup> Section 19(b)(2) of the Exchange Act, as amended by the Securities Acts 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 Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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-2017-005. 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-2017-005 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>19</sup> 17 CFR 200.30-3(a)(57).