

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82906; File No. SR-CboeBZX-2017-012)

March 20, 2018

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 2, 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

I. Introduction

On December 7, 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 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade the shares (“Shares”) of the LHA Market State® Tactical U.S. Equity ETF (“Fund”), a Series of the ETF Series Solutions (“Trust”). The proposed rule change was published for comment in the Federal Register on December 28, 2017.³ On January 31, 2018, the Exchange filed Amendment No. 1 to the proposed rule change.⁴ On February 6, 2018, pursuant to Section 19(b)(2) of the Exchange Act,⁵ 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.⁶ On February 13,

¹ 15 U.S.C.78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 82379 (Dec. 21, 2017), 82 FR 61608.

⁴ Amendment No. 1, which amended and replaced the proposed rule change in its entirety, is available on the Commission’s website at: <https://www.sec.gov/comments/sr-cboebzx-2017-012/cboebzx2017012-3002921-161895.pdf>.

⁵ 15 U.S.C. 78s(b)(2).

⁶ See Securities Exchange Act Release No. 82643, 83 FR 6071 (Feb. 12, 2018). The Commission designated March 28, 2018, as the date by which the Commission shall

2018, the Exchange filed Amendment No. 2 to the proposed rule change.⁷ The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change, as modified by Amendment No. 2.

II. Exchange's Description of the Proposal, as Modified by Amendment No. 2

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 Exchange represents that 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 has submitted this proposal in order to allow the Fund to hold listed derivatives, in particular S&P 500 futures, in a manner that would exceed the limitations of BZX Rule 14.11(i)(4)(C)(iv)(b), which prevents, among other things, a series of Managed Fund Shares from holding listed derivatives based on any single underlying reference asset in excess of 30 percent of the weight of its portfolio (including gross notional exposures)

either approve, disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

⁷ In Amendment No. 2, which amended and replaced the proposed rule change, as modified by Amendment No. 1, in its entirety, the Exchange: (a) supplemented the description of the Fund's relative exposures to the U.S. equity and S&P 500 futures markets; (b) made conforming informational and rule reference corrections to maintain internal consistency; (c) updated the status of the registration statement for the Fund; (d) clarified the use of certain defined terms; and (e) made other technical and non-substantive changes. Because Amendment No. 2 does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, it is not subject to notice and comment. Amendment No. 2 is available on the Commission's website at: <https://www.sec.gov/comments/sr-cboebzx-2017-012/cboebzx2017012-3033817-161904.pdf>.

(“30% Limitation”).⁸ Otherwise, the Fund will comply with all other listing requirements of BZX Rule 14.11(i), including BZX Rule 14.11(i)(4)(C), on an initial and continued listing basis.

The Shares will be offered by the Trust, which is registered with the Commission as an open-end investment company.⁹ The Fund’s adviser, Little Harbor Advisors, LLC (“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 of, or changes to, the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material, nonpublic information regarding such portfolio.

⁸ BZX Rule 14.11(i)(4)(C)(iv)(b) requires that the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets to 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 to not exceed 30% of the weight of the portfolio (including gross notional exposures). The Exchange states that the proposal is to allow the Fund to exceed the specific requirement of BZX 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). According to the Exchange, the Fund will meet the other requirement of BZX Rule 14.11(i)(4)(C)(iv)(b).

⁹ The Exchange represents that the Trust has filed a post-effective amendment to its registration statement (“Registration Statement”) on December 18, 2017. See Registration Statement on Form N-1A for the Trust (File Nos. 333-179562 and 811-22668). 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 Fund, but the Exchange further represents that the Fund Shares will not be listed on the Exchange until such an order is issued and any conditions contained therein are satisfied.

In order to achieve its investment objective, under Normal Market Conditions,¹⁰ the Fund will invest approximately 80% of its net assets at the time of investment in U.S. exchange-listed exchange-traded funds that principally invest in U.S. equity securities (“U.S. ETFs”)¹¹ or the constituent stock holdings of a U.S. ETF (together with U.S. ETFs, collectively, “U.S. Equities”). The Fund generally will invest in U.S. Equities in order to gain exposure to large cap U.S. equity securities.

As noted above, BZX Rule 14.11(i)(4)(C)(iv)(b) imposes a 30% Limitation. 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”). The Fund will utilize short or long S&P 500 Futures to the extent needed to reduce or augment, respectively, the Fund’s exposure relative to the exposure resulting from investments in the U.S. Equities in order to achieve the desired net exposure. The Exchange represents that S&P 500 Futures are an efficient means of reducing or augmenting exposure to U.S. Equities, as described above. According to the Exchange, allowing the Fund to hold a greater portion of its portfolio in S&P 500 Futures would mitigate the Fund’s dependency on holding over-the-counter (“OTC”) instruments, which would reduce the Fund’s operational burden by allowing the Fund to primarily use listed futures contracts to achieve its

¹⁰ As defined in BZX Rule 14.11(i)(3)(E), 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.

¹¹ The Exchange states that, for purposes of the proposal, the term “U.S. ETFs” means Portfolio Depositary Receipts, Index Fund Shares, and Managed Fund Shares as defined in BZX Rules 14.11(b), 14.11(c), and 14.11(i), respectively, and their equivalents on other national securities exchanges.

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 cash and cash equivalents in compliance with BZX Rules 14.11(i)(4)(C)(ii) and (iii) in order to collateralize its S&P 500 Futures 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 BZX 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, cash equivalents, and the cash value of futures positions¹² 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, is calculated using gross notional exposures gained through the S&P 500 Futures in both the numerator and denominator, and which is consistent with the derivatives exposure calculation under BZX Rule 14.11(i)(4)(C)(iv). The Exchange represents that, except for the 30% Limitation, 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 BZX Rule 14.11(i).

¹² The Exchange states that cash value of futures positions is based on the value of the Fund's daily margin account with the applicable futures exchange(s).

III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal to list and trade the Shares, as modified by Amendment No. 2, is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.¹³ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,¹⁴ 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, according to the Exchange, the Shares will meet each of the initial and continued listing criteria in BZX Rule 14.11(i), including BZX Rule 14.11(i)(4)(C), with the exception of the 30% Limitation. According to the Exchange, the liquidity in the S&P 500 Futures markets mitigates the concerns that BZX 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.¹⁵

¹³ 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).

¹⁴ 15 U.S.C. 78f(b)(5).

¹⁵ According to the Exchange, 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. The Exchange represents that 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. Moreover, the Exchange represents that the diversity, liquidity, and market capitalization 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 as it relates to the S&P 500 Futures holdings.

In addition, the Exchange represents 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 further represents that all of the futures contracts and U.S. ETFs held by the Fund will trade on markets that are members of the Intermarket Surveillance Group (“ISG”) or affiliated with a member of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. Moreover, the Exchange represents that it may obtain information regarding trading in the Shares and the underlying futures contracts and U.S. ETFs held by the Fund via the ISG from other exchanges who are members of the ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement.¹⁶ The Commission also notes that, according to the Exchange, the Fund’s investment in U.S. ETFs or the constituent stocks of a U.S. ETF will meet the requirements for U.S. Component Stocks in BZX Rule 14.11(i)(4)(C)(i)(a). BZX Rule 14.11(i)(4)(C)(i)(a) provides that equity securities in the portfolio shall be listed on a national securities exchange, except that no more than 10% of the equity weight of the portfolio may be non-exchange traded ADRs. As all national securities exchanges are ISG members, the Commission notes that no less than 90% of constituent stocks of a U.S. ETF that the Fund will hold will be traded on markets that are members of ISG. In addition, the Exchange also represents that the Shares of the Fund will comply with all requirements applicable to Managed Fund Shares, including, but not limited to, requirements relating to the

¹⁶ As stated above, S&P 500 Futures are traded on the Chicago Mercantile Exchange. The Commission notes that the Chicago Mercantile Exchange represents a significant market in S&P 500 Futures, is a regulated futures and options market, and is a member of ISG. See supra note 15. For a list of the current members and affiliate members of ISG, see 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.

dissemination of key information such as the Disclosed Portfolio,¹⁷ net asset value,¹⁸ and the Intraday Indicative Value,¹⁹ suspension of trading or removal,²⁰ trading halts,²¹ surveillance,²² minimum price variation for quoting and order entry,²³ the information circular,²⁴ and firewalls²⁵ as set forth in Exchange rules applicable to Managed Fund Shares. Likewise, the Exchange represents that all statements and representations made in this filing regarding (a) the description of the portfolio or reference assets, (b) limitations on portfolio holdings or reference assets, (c) dissemination and availability of reference asset and intraday indicative values, (d) or the applicability of Exchange listing rules specified in this filing shall constitute continued listing requirements for listing the Shares on the Exchange. Moreover, according to 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 Exchange Act, the Exchange will surveil for compliance with the continued listing requirements.²⁶ If the Fund or the Shares are not in compliance with the

¹⁷ See BZX Rules 14.11(i)(4)(A)(ii) and 14.11(i)(4)(B)(ii).

¹⁸ See BZX Rule 14.11(i)(4)(A)(ii).

¹⁹ See BZX Rule 14.11(i)(4)(B)(i).

²⁰ See BZX Rule 14.11(i)(4)(B)(iii).

²¹ See BZX Rule 14.11(i)(4)(B)(iv).

²² See BZX Rule 14.11(i)(2)(C).

²³ See BZX Rule 14.11(i)(2)(B).

²⁴ See BZX Rule 14.11(i)(6).

²⁵ See BZX Rule 14.11(i)(7).

²⁶ The Exchange represents that FINRA conducts certain cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange further represents that it is responsible for FINRA's performance under this regulatory services agreement.

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 and description of the Fund, including those set forth above and in Amendment No. 2 to the proposed rule change.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Exchange Act²⁷ and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,²⁸ that the proposed rule change (SR-CboeBZX-2017-012), as modified by Amendment No. 2, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁹

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²⁷ 15 U.S.C. 78f(b)(5).

²⁸ 15 U.S.C. 78s(b)(2).

²⁹ 17 CFR 200.30-3(a)(12).