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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88566; File No. SR-CboeBZX-2019-097]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to Adopt BZX Rule 14.11(l) Governing the Listing and Trading of Exchange-Traded Fund Shares

April 6, 2020.

On November 15, 2019, 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”)¹ and Rule 19b-4 thereunder,² a proposed rule change to, among other things, adopt new BZX Rule 14.11(l) to list and trade Exchange-Traded Fund Shares. The proposed rule change was published for comment in the Federal Register on November 22, 2019.³

On December 17, 2019, 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 February 12, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the proposed rule change in its entirety.⁶ On February 20, 2020, the Commission published the proposed rule change, as modified by Amendment No. 1, for notice and comment and instituted proceedings to determine whether to approve or

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 87560 (November 18, 2019), 84 FR 64607.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 87777, 84 FR 70598 (December 23, 2019).

⁶ See infra note 8.

disapprove the proposed change, as modified by Amendment No. 1.⁷ On March 20, 2020, the Exchange filed Amendment No. 2 to the proposed rule change, which amended and replaced the proposed rule change, as modified by Amendment No. 1.⁸ The Commission has received no comments on the proposed rule change.

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

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

The Exchange proposes a rule change to adopt BZX Rule 14.11(l) to permit the listing and trading of Exchange-Traded Fund Shares that are permitted to operate in reliance on Rule 6c-11 under the Investment Company Act of 1940. The Exchange is also proposing to discontinue the quarterly reports required with respect to Managed Fund Shares listed on the Exchange pursuant to the generic listing standards under Rule 14.11(i).

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

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

⁷ See Securities Exchange Act Release No. 88208 (February 13, 2020), 85 FR 9834.

⁸ Amendments No. 1 and 2 to the proposed rule change is available on the Commission's website at: <https://www.sec.gov/comments/sr-cboebzx-2019-097/srcboebzx2019097.htm>.

IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

This Amendment No. 2 to SR-CboeBZX-2019-097 amends and replaces in its entirety the proposal as amended by Amendment No. 1, which was submitted on February 12, 2020, and amended and replaced in its entirety the proposal as originally submitted on November 15, 2019. The Exchange submits this Amendment No. 1 in order to clarify certain points and add additional details to the proposal.

The Exchange proposes to add new Rule 14.11(l)⁹ for the purpose of permitting the generic listing and trading, or trading pursuant to unlisted trading privileges, of Exchange-Traded Fund Shares¹⁰ that are permitted to operate in reliance on Rule 6c-11 (“Rule 6c-11”) under the Investment Company Act of 1940 (the “1940 Act”).¹¹ The Exchange is also proposing to make conforming changes to the Exchange’s corporate governance requirements under Rule 14.10(e) in order to accommodate the proposed listing of Exchange-Traded Fund Shares. Finally, the

⁹ The Exchange notes that it is proposing new Rule 14.11(l) because it has also proposed a new Rule 14.11(k) as part of another proposal. See Securities Exchange Act Release No. 87062 (September 23, 2019), 84 FR 51193 (September 27, 2019) (SR-CboeBZX-2019-047).

¹⁰ As provided below, proposed Rule 14.11(l)(3)(A) provides that the term “ETF Shares” shall mean the shares issued by a registered open-end management investment company that: (i) is eligible to operate in reliance on Rule 6c-11 under the Investment Company Act of 1940; (ii) issues (and redeems) creation units to (and from) authorized participants in exchange for a basket and a cash balancing amount (if any); and (iii) issues shares that it intends to list or are listed on a national securities exchange and traded at market-determined prices.

¹¹ 15 U.S.C. 80a-1.

Exchange is proposing to discontinue the quarterly reports required with respect to Managed Fund Shares listed on the Exchange pursuant to the generic listing standards under Rule 14.11(i). The Exchange notes that it plans to submit a separate filing related to fees applicable to ETF Shares listed on the Exchange.

The Commission recently adopted Rule 6c-11 to permit exchange-traded funds (“ETFs”) that satisfy certain conditions to operate without obtaining an exemptive order from the Commission under the 1940 Act.¹² Since the first ETF was approved by the Commission in 1992, the Commission has routinely granted exemptive orders permitting ETFs to operate under the 1940 Act because there was no ETF specific rule in place and they have characteristics that distinguish them from the types of structures contemplated and included in the 1940 Act. After such an extended period operating without a specific rule set and only under exemptive relief, Rule 6c-11 is designed to provide a consistent, transparent, and efficient regulatory framework for ETFs.¹³ Exchange listing standards applicable to ETFs have been similarly adopted and tweaked over the years and the Exchange believes that, just as the Commission has undertaken a review of the 1940 Act as it is applicable to ETFs, it is appropriate to perform a similar holistic

¹² See Release Nos. 33-10695; IC-33646; File No. S7-15-18 (Exchange-Traded Funds) (September 25, 2019), 84 FR 57162 (October 24, 2019) (the “Rule 6c-11 Release”).

¹³ In approving the rule, the Commission stated that the “rule will modernize the regulatory framework for ETFs to reflect our more than two decades of experience with these investment products. The rule is designed to further important Commission objectives, including establishing a consistent, transparent, and efficient regulatory framework for ETFs and facilitating greater competition and innovation among ETFs.” Rule 6c-11 Release, at 57163. The Commission also stated the following regarding the rule’s impact: “We believe rule 6c-11 will establish a regulatory framework that: (1) Reduces the expense and delay currently associated with forming and operating certain ETFs unable to rely on existing orders; and (2) creates a level playing field for ETFs that can rely on the rule. As such, the rule will enable increased product competition among certain ETF providers, which can lead to lower fees for investors, encourage financial innovation, and increase investor choice in the ETF market.” Rule 6c-11 Release, at 57204

review and overhaul of Exchange listing rules. With this in mind, the Exchange submits this proposal to add new Rule 14.11(l) and certain corresponding rule changes because it believes that this proposal similarly promotes consistency, transparency, and efficiency surrounding the exchange listing process for ETF Shares in a manner that is consistent with the Act, as further described below.¹⁴ Except as otherwise provided, the Exchange would continue to enforce all governance, disclosure, and trading rules for ETF Shares, as defined below, listed on the Exchange.

Consistent with Index Fund Shares and Managed Fund Shares listed under the generic listing standards in Rules 14.11(c) and 14.11(i), respectively, series of Exchange-Traded Fund Shares that are permitted to operate in reliance on Rule 6c-11 would be permitted to be listed and traded on the Exchange without a prior Commission approval order or notice of effectiveness pursuant to Section 19(b) of the Act.¹⁵

¹⁴ The Exchange deems ETF Shares to be equity securities, thus rendering trading in any series of ETF Shares subject to the Exchange's existing rules governing the trading of equity securities. With respect to trading in ETF Shares, all of the BZX Member obligations relating to product description and prospectus delivery requirements will continue to apply in accordance with Exchange rules and federal securities laws, and the Exchange will continue to monitor its Members for compliance with such requirements, which are not changing as a result of Rule 6c-11 under the 1940 Act.

¹⁵ Rule 19b-4(e)(1) provides that the listing and trading of a new derivative securities product by a self-regulatory organization ("SRO") is not deemed a proposed rule change, pursuant to paragraph (c)(1) of Rule 19b-4, if the Commission has approved, pursuant to Section 19(b) of the Act, the SRO's trading rules, procedures and listing standards for the product class that would include the new derivative securities product and the SRO has a surveillance program for the product class. As contemplated by this Rule 14.11(l), the Exchange proposes new Rule 14.11(l) to establish generic listing standards for ETFs that are permitted to operate in reliance on Rule 6c-11. An ETF listed under proposed Rule 14.11(l) would therefore not need a separate proposed rule change pursuant to Rule 19b-4 before it can be listed and traded on the Exchange.

Proposed Listing Rules

Proposed Rule 14.11(l)(1) provides that the Exchange will consider for trading, whether by listing or pursuant to unlisted trading privileges, the shares of Exchange-Traded Funds (“ETF Shares”) that meet the criteria of this Rule 14.11(l).¹⁶

Proposed Rule 14.11(l)(2) provides that the proposed rule would be applicable only to ETF Shares. Except to the extent inconsistent with this Rule 14.11(l), or unless the context otherwise requires, the rules and procedures of the Board of Directors shall be applicable to the trading on the Exchange of such securities. ETF Shares are included within the definition of “security” or “securities” as such terms are used in the Rules of the Exchange.

Proposed Rule 14.11(l)(2) further provides that: (A) transactions in ETF Shares will occur throughout the Exchange’s trading hours; (B) the minimum price variation for quoting and entry of orders in ETF Shares is \$0.01;¹⁷ and (C) the Exchange will implement and maintain written surveillance procedures for ETF Shares.

¹⁶ To the extent that a series of ETF Shares does not satisfy one or more of the criteria in proposed Rule 14.11(l), the Exchange may file a separate proposal under Section 19(b) of the Act in order to list such series on the Exchange. Consistent with Rule 14.11(a), any of the statements or representations in that proposal 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 asset, and intraday indicative values (as applicable), or the applicability of Exchange listing rules specified in any filing to list such series of ETF Shares shall constitute continued listing requirements for the series of ETF Shares. Further, in the event that a series of ETF Shares becomes listed under proposed Rule 14.11(l) and subsequently can no longer rely on Rule 6c-11, so long as the series of ETF Shares may otherwise rely on exemptive relief issued by the Commission, such series of ETF Shares may be listed as a series of Index Fund Shares under Rule 14.11(c) or Managed Fund Shares under Rule 14.11(i), as applicable, as long as the series of ETF Shares meets all listing requirements applicable under the applicable rule.

¹⁷ Consistent with Exchange Rules 11.11(a)(1) and 14.11(i)(2)(B), the Exchange notes that the proposed minimum price variation is identical to the minimum price variation for Index Fund Shares and Managed Fund Shares.

Proposed Rule 14.11(l)(3)(A) provides that the term “ETF Shares” shall mean shares of stock issued by an Exchange-Traded Fund.

Proposed Rule 14.11(l)(3)(B) provides that the term “Exchange-Traded Fund” has the same meaning as the term “exchange-traded fund” as defined in Rule 6c-11 under the Investment Company Act of 1940.

Proposed Rule 14.11(l)(3)(C) provides that the term “Reporting Authority” in respect of a particular series of ETF Shares means the Exchange, an institution, or a reporting service designated by the Exchange or by the exchange that lists a particular series of ETF Shares (if the Exchange is trading such series pursuant to unlisted trading privileges) as the official source for calculating and reporting information relating to such series, including, but not limited to, the amount of any dividend equivalent payment or cash distribution to holders of ETF Shares, net asset value, index or portfolio value, the current value of the portfolio of securities required in connection with issuance of ETF Shares, or other information relating to the issuance, redemption or trading of ETF Shares. A series of ETF Shares may have more than one Reporting Authority, each having different functions.¹⁸

Proposed Rule 14.11(l)(4) provides that the Exchange may approve a series of ETF Shares for listing and/or trading (including pursuant to unlisted trading privileges) on the Exchange pursuant to Rule 19b-4(e) under the Act, provided such series of ETF Shares is eligible to operate in reliance on Rule 6c-11 under the Investment Company Act of 1940 and must satisfy the requirements of this Rule 14.11(l) on an initial and continued listing basis.

¹⁸ The Exchange notes that the definition of Reporting Authority is based on the definitions provided under Rule 14.11(c)(1)(C) and 14.11(i)(3)(D) related to Index Fund Shares and Managed Fund Shares, respectively.

Proposed Rule 14.11(l)(4)(A) provides that the requirements of Rule 6c-11 must be satisfied by a series of ETF Shares on an initial and continued listing basis. Such securities must also satisfy the following criteria on an initial and, except for paragraph (i) below, continued, listing basis. Further, proposed Rule 14.11(l)(4)(A) provides that: (i) for each series, the Exchange will establish a minimum number of ETF Shares required to be outstanding at the time of commencement of trading on the Exchange; (ii) if an index underlying a series of ETF Shares is maintained by a broker-dealer or fund adviser, the broker-dealer or fund adviser shall erect and maintain a “fire wall” around the personnel who have access to information concerning changes and adjustments to the index and the index shall be calculated by a third party who is not a broker-dealer or fund adviser. If the investment adviser to the investment company issuing an actively managed series of ETF Shares is affiliated with a broker-dealer, such investment adviser shall erect and maintain a “fire wall” between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such Exchange-Traded Fund’s portfolio; and (iii) any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on the composition, methodology, and related matters of an index underlying a series of ETF Shares, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index. For actively managed Exchange-Traded Funds, personnel who make decisions on the portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable portfolio.¹⁹

¹⁹ The proposed requirements under proposed Rule 14.11(l)(4)(A) are substantively identical to the equivalent provisions for Index Fund Shares and Managed Fund Shares

Proposed Rule 14.11(l)(4)(B) provides that each series of ETF Shares will be listed and traded on the Exchange subject to application of Proposed Rule 14.11(l)(4)(B)(i) and (ii). Proposed Rule 14.11(l)(4)(B)(i) provides that the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 14.12 for, a series of ETF Shares under any of the following circumstances: (a) if the Exchange becomes aware that the issuer of the ETF Shares is no longer eligible to operate in reliance on Rule 6c-11 under the Investment Company Act of 1940; (b) if any of the other listing requirements set forth in this Rule 14.11(l) are not continuously maintained; (c) if, following the initial twelve month period after commencement of trading on the Exchange of a series of ETF Shares, there are fewer than 50 beneficial holders of the series of ETF Shares for 30 or more consecutive trading days; or (d) if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable. Proposed Rule 14.11(l)(4)(B)(ii) provides that upon termination of an investment company, the Exchange requires that ETF Shares issued in connection with such entity be removed from Exchange listing.

Proposed Rule 14.11(l)(5) provides that neither the Exchange, the Reporting Authority, nor any agent of the Exchange shall have any liability for damages, claims, losses or expenses caused by any errors, omissions, or delays in calculating or disseminating any current index or portfolio value; the current value of the portfolio of securities required to be deposited in connection with issuance of ETF Shares; the amount of any dividend equivalent payment or cash distribution to holders of ETF Shares; net asset value; or other information relating to the purchase, redemption, or trading of ETF Shares, resulting from any negligent act or omission by

under Rules 14.11(c)(3)(B)(i) and (iii), 14.11(c)(4)(C)(i) and (iii), 14.11(c)(5)(A)(i) and (iii), and 14.11(i)(7).

the Exchange, the Reporting Authority, or any agent of the Exchange, or any act, condition, or cause beyond the reasonable control of the Exchange, its agent, or the Reporting Authority, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission, or delay in the reports of transactions in one or more underlying securities.²⁰

Proposed Rule 14.11(l)(6) provides that a security that has previously been approved for listing on the Exchange pursuant to the generic listing requirements specified in Rule 14.11(c) or Rule 14.11(i), or pursuant to the approval of a proposed rule change or subject to a notice of effectiveness by the Commission, may be considered for listing solely under this Rule 14.11(l) if such security is eligible to operate in reliance on Rule 6c-11 under the 1940 Act. At the time of listing of such security under this Rule 14.11(l), the continued listing requirements applicable to such previously-listed security will be those specified in paragraph (b) of this Rule 14.11(l). Any requirements for listing as specified in Rule 14.11(c) or Rule 14.11(i), or an approval order or notice of effectiveness of a separate proposed rule change, that differ from the requirements of this Rule 14.11(l) will no longer be applicable to such security.

The Exchange is also proposing to make two corresponding amendments to include ETF Shares in other Exchange rules. Specifically, the Exchange is also proposing: (i) to amend Rule 14.10(e)(1)(E) and Interpretation and Policy .13 to Rule 14.10 in order to add ETF Shares to a list of product types listed on the Exchange, including Index Fund Shares, Managed Fund Shares, and Managed Portfolio Shares, that are exempted from the Audit Committee

²⁰ The Exchange notes that proposed Rule 14.11(l)(5) is substantively identical to the equivalent Rules for Index Fund Shares and Managed Fund Shares under Rule 14.11(c)(10) and 14.11(i)(5).

requirements set forth in Rule 14.10(c)(3), except for the applicable requirements of SEC Rule 10A-3;²¹ and (ii) to amend Rule 14.11(c)(3)(A)(i)(a) in order to include ETF Shares in the definition of Derivative Securities Products.

Discussion

Proposed Rule 14.11(l) is based in large part on Rules 14.11(c) and (i) related to the listing and trading of Index Fund Shares and Managed Fund Shares on the Exchange, respectively, both of which are issued under the 1940 Act and would qualify as ETF Shares after Rule 6c-11 is effective. Rule 14.11(c) and 14.11(i) are very similar, their primary difference being that Index Fund Shares are designed to track an underlying index and Managed Fund Shares are based on an actively managed portfolio that is not designed to track an index. As such, the Exchange believes that using Rules 14.11(c) and (i) (collectively, the “Current ETF Standards”) as the basis for proposed Rule 14.11(l) is appropriate because they are generally designed to address the issues associated with ETF Shares. The only substantial differences between proposed Rule 14.11(l) and the Current ETF Standards that are not otherwise required under Rule 6c-11 are as follows: (i) proposed Rule 14.11(l) does not include the quantitative standards applicable to a fund or an index that are included in the Current ETF Standards; and (ii) proposed Rule 14.11(l) does not include any requirements related to the dissemination of a fund’s Intraday Indicative Value.²² These differences are discussed below.

²¹ The Exchange notes that these proposed changes would subject ETF Shares to the same corporate governance requirements as other open-end management investment companies listed on the Exchange.

²² For purposes of this filing, the term “Intraday Indicative Value” or “IIV” shall mean an intraday estimate of the value of a share of each series of either Index Fund Shares or Managed Fund Shares.

Quantitative Standards

The Exchange believes that the proposal is designed to prevent fraudulent and manipulative acts and practices because the Exchange will perform ongoing surveillance of ETF Shares listed on the Exchange in order to ensure compliance with Rule 6c-11 and the 1940 Act on an ongoing basis. While proposed Rule 14.11(l) does not include the quantitative requirements applicable to an ETF or an ETF's holdings or underlying index that are included in Rules 14.(c) and 14.11(i),²³ the Exchange believes that the manipulation concerns that such standards are intended to address are otherwise mitigated by a combination of the Exchange's surveillance procedures, the Exchange's ability to halt trading under the proposed Rule 14.11(l)(4)(B)(ii), and the Exchange's ability to suspend trading and commence delisting proceedings under proposed Rule 14.11(l)(4)(B)(i). The Exchange will also halt trading in ETF Shares under the conditions specified in Rule 11.18, "Trading Halts Due to Extraordinary Market Volatility." The Exchange also believes that such concerns are further mitigated by enhancements to the arbitrage mechanism that will come from Rule 6c-11, specifically the additional flexibility provided to issuers of ETF Shares through the use of custom baskets for creations and redemptions and the additional information made available to the public through the additional daily website disclosure obligations applicable under Rule 6c-11.²⁴ The Exchange

²³ The Exchange notes that Rules 14.11(c) and (i) include certain quantitative standards related to the size, trading volume, concentration, and diversity of the holdings of a series of Index Fund Shares or Managed Fund Shares (the "Holdings Standards") as well as related to the minimum number of beneficial holders of a fund (the "Distribution Standards"). The Exchange believes that to the extent that manipulation concerns are mitigated based on the factors described herein, such concerns are mitigated both as it relates to the Holdings Standards and the Distribution Standards.

²⁴ The Exchange notes that the Commission came to a similar conclusion in several places in the Rule 6c-11 Release. See Rule 6c-11 Release at 15-18; 60-61; 69-70; 78-79; 82-84; and 95-96.

believes that the combination of these factors will act to keep ETF Shares trading near the value of their underlying holdings and further mitigate concerns around manipulation of ETF Shares on the Exchange without the inclusion of quantitative standards.²⁵ The Exchange will monitor for compliance with Rule 6c-11 in order to ensure that the continued listing standards are being met.²⁶ Specifically, the Exchange will review the website of each series of ETF Shares listed on the Exchange in order to ensure that the requirements of Rule 6c-11 are being met. The Exchange will also employ numerous intraday alerts that will notify Exchange personnel of trading activity throughout the day that is potentially indicative of certain disclosures not being made accurately or the presence of other unusual conditions or circumstances that could be detrimental to the maintenance of a fair and orderly market. As a backstop to the surveillances described above, the Exchange also notes that Rule 14.11(a) would require an issuer of ETF Shares to notify the Exchange of any failure to comply with Rule 6c-11 or the 1940 Act.

The Exchange may suspend trading in and commence delisting proceedings for a series of ETF Shares where such series is not in compliance with the applicable listing standards or where the Exchange believes that further dealings on the Exchange are inadvisable.²⁷ The

²⁵ The Exchange believes that this applies to all quantitative standards, whether applicable to the portfolio holdings of a series of ETF Shares or the distribution of the ETF Shares.

²⁶ As noted throughout, proposed Rule 14.11(l), unlike Rule 14.11(c) and 14.11(i), does not include Holdings Standards and, as such, there will be no quantitative standards applicable by the Exchange to the portfolio holdings of a series of ETF Shares on an initial or continued listing basis.

²⁷ Specifically, proposed Rule 14.11(l)(4)(B) provides that each series of ETF Shares will be listed and traded on the Exchange subject to application of Proposed Rule 14.11(l)(4)(B)(i) and (ii). Proposed Rule 14.11(l)(4)(B)(i) provides that the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 14.12 for, a series of ETF Shares under any of the following circumstances: (a) if the Exchange becomes aware that the issuer of the ETF Shares is no longer eligible to operate in reliance on Rule 6c-11 under the Investment Company Act of 1940; (b) if any of the other listing requirements set forth in this Rule 14.11(l) are not continuously

Exchange also notes that Rule 14.11(a) requires any issuer to provide the Exchange with prompt notification after it becomes aware of any non-compliance with proposed Rule 14.11(l), which would include any failure of the issuer to comply with Rule 6c-11 or the 1940 Act.²⁸

Further, the Exchange also represents that its surveillance procedures are adequate to properly monitor the trading of the ETF Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. Specifically, the Exchange intends to utilize its existing surveillance procedures applicable to derivative products, which are currently applicable to Index Fund Shares and Managed Fund Shares, among other product types, to monitor trading in ETF Shares. The Exchange or the Financial Industry Regulatory Authority, Inc. (“FINRA”), on behalf of the Exchange, will communicate as needed regarding trading in ETF Shares and certain of their applicable underlying components with other markets that are members of the Intermarket Surveillance Group (“ISG”) or with which the Exchange has in place a comprehensive surveillance sharing agreement. In addition, the Exchange may obtain information regarding trading in ETF Shares and certain of their applicable underlying components from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. Additionally, FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed

maintained; (c) if, following the initial twelve month period after commencement of trading on the Exchange of a series of ETF Shares, there are fewer than 50 beneficial holders of the series of ETF Shares for 30 or more consecutive trading days; or (d) if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable. Proposed Rule 14.11(l)(4)(B)(ii) provides that upon termination of an investment company, the Exchange requires that ETF Shares issued in connection with such entity be removed from Exchange listing.

²⁸ The Exchange notes that failure by an issuer to notify the Exchange of non-compliance pursuant to Rule 14.11(a) would itself be considered non-compliance with the requirements of Rule 14.11 and would subject the series of ETF Shares to potential trading halts and the delisting process under Rule 14.12.

income securities that may be held by a series of ETF Shares reported to FINRA’s Trade Reporting and Compliance Engine (“TRACE”). FINRA also can access data obtained from the Municipal Securities Rulemaking Board’s (“MSRB”) Electronic Municipal Market Access (“EMMA”) system relating to municipal bond trading activity for surveillance purposes in connection with trading in a series of ETF Shares, to the extent that a series of ETF Shares holds municipal securities. Finally, as noted above, the issuer of a series of ETF Shares will be required to comply with Rule 10A-3 under the Act for the initial and continued listing of Exchange-Traded Fund Shares, as provided under Rule 14.10(e)(1)(E) and Interpretation and Policy .13 to Rule 14.10.²⁹

The Exchange notes that it may consider all relevant factors in exercising its discretion to halt or suspend trading in a series of ETF Shares. Trading may be halted if the circuit breaker parameters in Rule 11.18 have been reached, because of other 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 certain information about the ETF Shares that is required to be disclosed under Rule 6c-11 of the Investment Company Act of 1940 is not being made available, including specifically where the Exchange becomes aware that the net asset value with respect to a series of ETF Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the net asset value is available to all market participants;³⁰ (2) if an interruption to the dissemination to the value of the index or reference asset on which a series

²⁹ The Exchange notes that these proposed changes would subject ETF Shares to the same corporate governance requirements as other open-end management investment companies listed on the Exchange.

³⁰ The Exchange will obtain a representation from the issuer of ETF Shares that the net asset value per share for the series will be calculated daily and made available to all market participants at the same time.

of ETF Shares is based persists past the trading day in which it occurred or is no longer calculated or available; (3) trading in the securities comprising the underlying index or portfolio has been halted in the primary market(s); or (4) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

Intraday Indicative Value

As described above, proposed Rule 14.11(l) does not include any requirements related to the dissemination of an Intraday Indicative Value. Both Rule 14.11(c) and Rule 14.11(i) include the requirement that a series of Index Fund Shares and Managed Fund Shares, respectively, disseminate and update an Intraday Indicative Value at least every 15 seconds.³¹ The Exchange believes that it is consistent with the Act to not require the calculation and dissemination of the Intraday Indicative Value for the same reasons enumerated in the Rule 6c-11 Release, which specifically discusses and describes why Rule 6c-11 does not require ETFs to publicly calculate and disseminate the Intraday Indicative Value,³² and a separate Exchange proposal to eliminate the requirement to calculate and disseminate the Intraday Indicative Value for certain series of Index Fund Shares and Managed Fund Shares.³³

As such, the Exchange believes that it is appropriate and consistent with the Act to not include a requirement for the dissemination of an IIV for a series of ETF Shares to be listed on the Exchange.

Discontinuing Quarterly Reporting for Managed Fund Shares

³¹ See Rules 14.11(c)(3)(C), 14.11(c)(6)(A), and 14.11(c)(9)(B)(e) related to Index Fund Shares and Rules 14.11(i)(3)(C), 14.11(i)(4)(B)(i), 14.11(i)(4)(B)(iii)(b), and 14.11(i)(4)(B)(iv) related to Managed Fund Shares.

³² See Rule 6c-11 Release at 61-66.

³³ See Securities Exchange Act Release No. 88259 (February 21, 2020), 85 FR 11419 (February 27, 2020) (SR-CboeBZX-2020-007).

Finally, the Exchange is proposing to eliminate certain quarterly reporting obligations related to the listing and trading of Managed Fund Shares on the Exchange. In the order approving the Exchange's proposal to adopt generic listing standards for Managed Fund Shares,³⁴ the Commission noted that the Exchange had represented that "on a quarterly basis, the Exchange will provide a report to the Commission staff that contains, for each ETF whose shares are generically listed and traded under BATS Rule 14.11(i): (a) Symbol and date of listing; (b) the number of active authorized participants ("APs") and a description of any failure by either a fund or an AP to deliver promised baskets of shares, cash, or cash and instruments in connection with creation or redemption orders; and (c) a description of any failure by an ETF to comply with BATS Rule 14.11(i)."³⁵ This reporting requirement is not specifically enumerated in Rule 14.11(i).

The Exchange has provided such information to the Commission on a quarterly basis since the MFS Approval Order was issued in 2016. The type of information provided in the reports was created to provide a window into the creation and redemption process for Managed Fund Shares in order to ensure that the arbitrage mechanism would work as expected for products that were listed pursuant to the newly approved generic listing standards. The approval of the Rule 6c-11 collapses the distinction between index funds and active funds, which the Exchange believes represents that the Commission is generally comfortable with actively managed funds, rendering the reports unnecessary. Further, because the same general types of information provided in those reports will be made available under Rule 6c-11 directly from the

³⁴ See Securities Exchange Act Release No. 78396 (July 22, 2016), 81 FR 49698 (July 28, 2016) (SR-BATS-2015-100) (the "MFS Approval Order").

³⁵ See MFS Approval Order at footnote 14.

issuers of such securities the Exchange also believes that it is consistent with the Act to remove this reporting obligation because it will be duplicative and no longer necessary.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act³⁶ in general and Section 6(b)(5) of the Act³⁷ in particular in that it is 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 Exchange believes that proposed Rule 14.11(l) is designed to prevent fraudulent and manipulative acts and practices in that the proposed rules relating to listing and trading ETF Shares on the Exchange provide specific initial and continued listing criteria required to be met by such securities. Proposed Rule 14.11(l)(4) sets forth initial and continued listing criteria applicable to ETF Shares, specifically providing that the Exchange may approve a series of ETF Shares for listing and/or trading (including pursuant to unlisted trading privileges) on the Exchange pursuant to Rule 19b-4(e) under the Act, provided such series of ETF Shares is eligible to operate in reliance on Rule 6c-11 under the Investment Company Act of 1940 and must satisfy the requirements of this Rule 14.11(l) on an initial and continued listing basis.³⁸ The

³⁶ 15 U.S.C. 78f.

³⁷ 15 U.S.C. 78f(b)(5).

³⁸ The Exchange notes that eligibility to operate in reliance on Rule 6c-11 does not necessarily mean that an investment company would be listed on the Exchange pursuant to proposed Rule 14.11(l). To this point, an investment company that operates in reliance on 6c-11 could also be listed as a series of Index Fund Shares or Managed Fund Shares pursuant to Rule 14.11(c) or 14.11(i), respectively, and would be subject to all requirements under each of those rules. Further to this point, in the event that a series of ETF Shares listed on the Exchange preferred to be listed as a series of Index Fund Shares or Managed Fund Shares (as applicable), nothing would preclude such a series from

Exchange will submit a Form 19b-4(e) for all series of ETF Shares upon being listed pursuant to Rule 14.11(l), including those series of ETF Shares that are listed under Rule 14.11(l) pursuant to proposed Rule 14.11(l)(6) and such Form 19b-4(e) will specifically note that such series of ETF Shares are being listed on the Exchange pursuant to Rule 14.11(l).

Proposed Rule 14.11(l)(4)(B) provides that each series of ETF Shares will be listed and traded on the Exchange subject to application of Proposed Rule 14.11(l)(4)(B)(i) and (ii). Proposed Rule 14.11(l)(4)(B)(i) provides that the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 14.12 for, a series of ETF Shares under any of the following circumstances: (a) if the Exchange becomes aware that the issuer of the ETF Shares is no longer eligible to operate in reliance on Rule 6c-11 under the Investment Company Act of 1940; (b) if any of the other listing requirements set forth in this Rule 14.11(l) are not continuously maintained; (c) if, following the initial twelve month period after commencement of trading on the Exchange of a series of ETF Shares, there are fewer than 50 beneficial holders of the series of ETF Shares for 30 or more consecutive trading days; or (d) if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable. The Exchange notes that it may become aware that the issuer is no longer eligible to operate in reliance on Rule 6c-11, as described in proposed Rule 14.11(l)(4)(B)(i)(a), as a result of either the Exchange identifying non-compliance through its own monitoring process or through notification by the issuer. Proposed Rule 14.11(l)(4)(B)(ii) provides that upon termination of an investment company, the Exchange requires that ETF Shares issued in connection with such entity be removed from Exchange listing. The Exchange

changing to be listed as a series of Index Fund Shares or Managed Fund Shares (as applicable), as long as the series met each of the initial and continued listing obligations under the applicable rules.

also notes that it will obtain a representation from the issuer of each series of ETF Shares stating that the requirements of Rule 6c-11 will be continuously satisfied and that the issuer will notify the Exchange of any failure to do so.

The Exchange further believes that proposed Rule 14.11(l) is designed to prevent fraudulent and manipulative acts and practices because of the robust surveillances in place on the Exchange as required under proposed Rule 14.11(l)(2)(C) along with the similarities of proposed Rule 14.11(l) to the rules related to other securities that are already listed and traded on the Exchange and which would qualify as ETF Shares. Proposed Rule 14.11(l) is based in large part on Rules 14.11(c) and (i) related to the listing and trading of Index Fund Shares and Managed Fund Shares on the Exchange, respectively, both of which are issued under the 1940 Act and would qualify as ETF Shares after Rule 6c-11 is effective. Rule 14.11(c) and 14.11(i) are very similar, their primary difference being that Index Fund Shares are designed to track an underlying index and Managed Fund Shares are based on an actively managed portfolio that is not designed to track an index. As such, the Exchange believes that using the Current ETF Standards as the basis for proposed Rule 14.11(l) is appropriate because they are generally designed to address the issues associated with ETF Shares. The only substantial differences between proposed Rule 14.11(l) and the Current ETF Standards that are not otherwise required under Rule 6c-11 are as follows: (i) proposed Rule 14.11(l) does not include the quantitative standards applicable to a fund or an index that are included in the Current ETF Standards; and (ii) proposed Rule 14.11(l) does not include any requirements related to the dissemination of a fund's Intraday Indicative Value.

Quantitative Standards

The Exchange believes that the proposal is consistent with Section 6(b)(1) of the Act³⁹ in that, in addition to being designed to prevent fraudulent and manipulative acts and practices, the Exchange has the capacity to enforce proposed Rule 14.11(l) by performing ongoing surveillance of ETF Shares listed on the Exchange in order to ensure compliance with Rule 6c-11 and the 1940 Act on an ongoing basis. While proposed Rule 14.11(l) does not include the quantitative requirements applicable to a fund and a fund's holdings or underlying index that are included in Rules 14.(c) and 14.11(i),⁴⁰ the Exchange believes that the manipulation concerns that such standards are intended to address are otherwise mitigated by a combination of the Exchange's surveillance procedures, the Exchange's ability to halt trading under the proposed Rule 14.11(l)(4)(B)(ii), and the Exchange's ability to suspend trading and commence delisting proceedings under proposed Rule 14.11(l)(4)(B)(i). The Exchange also believes that such concerns are further mitigated by enhancements to the arbitrage mechanism that will come from compliance with Rule 6c-11, specifically the additional flexibility provided to issuers of ETF Shares through the use of custom baskets for creations and redemptions and the additional information made available to the public through the additional daily website disclosure obligations applicable under Rule 6c-11.⁴¹ The Exchange believes that the combination of these factors will act to keep ETF Shares trading near the value of their underlying holdings and

³⁹ 15 U.S.C. 78f(b)(1).

⁴⁰ The Exchange notes that Rules 14.11(c) and (i) include certain Holdings Standards and Distribution Standards. The Exchange believes that to the extent that manipulation concerns are mitigated based on the factors described herein, such concerns are mitigated both as it relates to the Holdings Standards and the Distribution Standards.

⁴¹ The Exchange notes that the Commission came to a similar conclusion in several places in the Rule 6c-11 Release. See Rule 6c-11 Release at 15-18; 60-61; 69-70; 78-79; 82-84; and 95-96.

further mitigate concerns around manipulation of ETF Shares on the Exchange without the inclusion of quantitative standards.⁴² The Exchange will monitor for compliance with Rule 6c-11 in order to ensure that the continued listing standards are being met. Specifically, the Exchange plans to review the website of series of ETF Shares in order to ensure that the requirements of Rule 6c-11 are being met. The Exchange will also employ numerous intraday alerts that will notify Exchange personnel of trading activity throughout the day that is potentially indicative of certain disclosures not being made accurately or the presence of other unusual conditions or circumstances that could be detrimental to the maintenance of a fair and orderly market. As a backstop to the surveillances described above, the Exchange also notes that Rule 14.11(a) would require an issuer of ETF Shares to notify the Exchange of any failure to comply with Rule 6c-11 or the 1940 Act.

To the extent that any of the requirements under Rule 6c-11 or the 1940 Act are not being met, the Exchange may halt trading in a series of ETF Shares as provided in proposed Rule 14.11(l)(4)(B)(ii). Further, the Exchange may also suspend trading in and commence delisting proceedings for a series of ETF Shares where such series is not in compliance with the applicable listing standards or where the Exchange believes that further dealings on the Exchange are inadvisable.⁴³ The Exchange also notes that Rule 14.11(a) requires any issuer to provide the

⁴² The Exchange believes that this applies to all quantitative standards, whether applicable to the portfolio holdings of a series of ETF Shares or the distribution of the ETF Shares.

⁴³ Specifically, proposed Rule 14.11(l)(4)(B) provides that each series of ETF Shares will be listed and traded on the Exchange subject to application of Proposed Rule 14.11(l)(4)(B)(i) and (ii). Proposed Rule 14.11(l)(4)(B)(i) provides that the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 14.12 for, a series of ETF Shares under any of the following circumstances: (a) if the Exchange becomes aware that the issuer of the ETF Shares is no longer eligible to operate in reliance on Rule 6c-11 under the Investment Company Act of 1940; (b) if any of the other listing requirements set forth in this Rule 14.11(l) are not continuously

Exchange with prompt notification after it becomes aware of any non-compliance with proposed Rule 14.11(l), which would include any failure of the issuer to comply with Rule 6c-11 or the 1940 Act.⁴⁴

Further, the Exchange also represents that its surveillance procedures are adequate to properly monitor the trading of the ETF Shares in all trading sessions and to deter and detect violations of Exchange rules. Specifically, the Exchange intends to utilize its existing surveillance procedures applicable to derivative products, which are currently applicable to Index Fund Shares and Managed Fund Shares, among other product types, to monitor trading in ETF Shares. The Exchange or FINRA, on behalf of the Exchange, will communicate as needed regarding trading in ETF Shares and certain of their applicable underlying components with other markets that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. In addition, the Exchange may obtain information regarding trading in ETF Shares and certain of their applicable underlying components from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. Additionally, FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities that may be held by a series of ETF Shares reported to FINRA's TRACE.

maintained; (c) if, following the initial twelve month period after commencement of trading on the Exchange of a series of ETF Shares, there are fewer than 50 beneficial holders of the series of ETF Shares for 30 or more consecutive trading days; or (d) if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable. Proposed Rule 14.11(l)(4)(B)(ii) provides that upon termination of an investment company, the Exchange requires that ETF Shares issued in connection with such entity be removed from Exchange listing.

⁴⁴ The Exchange notes that failure by an issuer to notify the Exchange of non-compliance pursuant to Rule 14.11(a) would itself be considered non-compliance with the requirements of Rule 14.11 and would subject the series of ETF Shares to potential trading halts and the delisting process under Rule 14.12.

FINRA also can access data obtained from the MSRB's EMMA system relating to municipal bond trading activity for surveillance purposes in connection with trading in a series of ETF Shares, to the extent that a series of ETF Shares holds municipal securities. Finally, as noted above, the issuer of a series of ETF Shares will be required to comply with Rule 10A-3 under the Act for the initial and continued listing of Exchange-Traded Fund Shares, as provided under Rule 14.10(e)(1)(E) and Interpretation and Policy .13 to Rule 14.10.⁴⁵

Intraday Indicative Value

As described above, proposed Rule 14.11(l) does not include any requirements related to the dissemination of an Intraday Indicative Value. Both Rule 14.11(c) and Rule 14.11(i) include the requirement that a series of Index Fund Shares and Managed Fund Shares, respectively, disseminate and update an Intraday Indicative Value at least every 15 seconds.⁴⁶ The Exchange believes that it is consistent with the Act to not require the calculation and dissemination of the Intraday Indicative Value for the same reasons enumerated in the Rule 6c-11 Release, which specifically discusses and describes why Rule 6c-11 does not require ETFs to publicly calculate and disseminate the Intraday Indicative Value,⁴⁷ and a separate Exchange proposal to eliminate the requirement to calculate and disseminate the Intraday Indicative Value for certain series of Index Fund Shares and Managed Fund Shares.⁴⁸

⁴⁵ The Exchange notes that these proposed changes would subject ETF Shares to the same corporate governance requirements as other open-end management investment companies listed on the Exchange.

⁴⁶ See Rules 14.11(c)(3)(C), 14.11(c)(6)(A), and 14.11(c)(9)(B)(e) related to Index Fund Shares and Rules 14.11(i)(3)(C), 14.11(i)(4)(B)(i), 14.11(i)(4)(B)(iii)(b), and 14.11(i)(4)(B)(iv) related to Managed Fund Shares.

⁴⁷ See Rule 6c-11 Release at 61-66.

⁴⁸ See Securities Exchange Act Release No. 88259 (February 21, 2020), 85 FR 11419 (February 27, 2020) (SR-CboeBZX-2020-007).

As such, the Exchange believes that it is appropriate and consistent with the Act to not include a requirement for the dissemination of an IIV for a series of ETF Shares to be listed on the Exchange.

The Exchange also believes that the proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that a large amount of information will be publicly available regarding the Funds and the Shares, thereby promoting market transparency. Quotation and last sale information for ETF Shares will be available via the CTA high-speed line. The website for each series of ETF Shares will include a form of the prospectus for the Fund that may be downloaded, and additional data relating to NAV and other applicable quantitative information, updated on a daily basis. Moreover, prior to the commencement of trading, the Exchange will inform its members in a circular of the special characteristics and risks associated with trading in the series of ETF Shares. As noted above, series of ETF Shares will not be required to publicly disseminate an IIV. The Exchange continues to believe that this proposal is consistent with the Act and is designed to promote just and equitable principles of trade and to protect investors and the public interest because the transparency that comes from daily portfolio holdings disclosure as required under Rule 6c-11 provides market participants with sufficient information to facilitate the intraday valuation of ETF Shares, rendering the dissemination of the IIV unnecessary.

The Exchange notes that it is not proposing to prohibit the dissemination of an IIV for a series of ETF Shares and believes that there could be certain instances in which the dissemination of an IIV could provide valuable information to the investing public. The Exchange proposes to leave that decision to an issuer of ETF Shares and is simply not proposing to require the dissemination of an IIV.

Based on the foregoing discussion regarding proposed Rule 14.11(l) and its similarities to and differences between the Current ETF Standards, the Exchange believes that the proposal is consistent with the Act and is designed to prevent fraudulent and manipulative transactions and that the manipulation concerns that the quantitative standards and the IIV requirements are designed to address are otherwise mitigated by the proposal and the new daily website disclosure obligations and flexibility under Rule 6c-11.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of ETF Shares in a manner that will enhance competition among market participants, to the benefit of investors and the marketplace. The Exchange believes that approval of this proposal will streamline current procedures, reduce the costs and timeline associated with bringing ETFs to market, and provide significantly greater regulatory certainty to potential issuers considering bringing ETF Shares to market, thereby enhancing competition among ETF issuers and reducing costs for investors.⁴⁹

The Exchange also believes that the corresponding change to amend Rule 14.10(e)(1)(E) and Interpretation and Policy .13 to Rule 14.10 in order to add ETF Shares to a list of product

⁴⁹ In approving the rule, the Commission stated that the “rule will modernize the regulatory framework for ETFs to reflect our more than two decades of experience with these investment products. The rule is designed to further important Commission objectives, including establishing a consistent, transparent, and efficient regulatory framework for ETFs and facilitating greater competition and innovation among ETFs.” Rule 6c-11 Release, at 57163. The Commission also stated the following regarding the rule’s impact: “We believe rule 6c-11 will establish a regulatory framework that: (1) Reduces the expense and delay currently associated with forming and operating certain ETFs unable to rely on existing orders; and (2) creates a level playing field for ETFs that can rely on the rule. As such, the rule will enable increased product competition among certain ETF providers, which can lead to lower fees for investors, encourage financial innovation, and increase investor choice in the ETF market.” Rule 6c-11 Release, at 57204.

types listed on the Exchange, including Index Fund Shares, Managed Fund Shares, and Managed Portfolio Shares, that are exempted from the Audit Committee requirements set forth in Rule 14.10(c)(3), except for the applicable requirements of SEC Rule 10A-3 because it is a non-substantive change meant only to subject ETF Shares to the same corporate governance requirements currently applicable to Index Fund Shares and Managed Fund Shares. All other corporate governance requirements that ETF Shares are not specifically exempted from will otherwise apply. The Exchange also believes that the non-substantive change to amend Rule 14.11(c)(3)(A)(i)(a) in order to include ETF Shares in the definition of Derivative Securities Products is also a non-substantive change because it is just intended to add ETF Shares to a definition that includes Index Fund Shares and Managed Fund Shares in order to make sure that ETF Shares are treated consistently with Index Fund Shares and Managed Fund Shares throughout the Exchange's rules.

Finally, the Exchange believes that eliminating the quarterly reporting requirement for Managed Fund Shares is designed to prevent fraudulent and manipulative acts and practices and, in general, to protect investors and the public interest because the report no longer serves the purpose for which it was originally intended. The type of information provided in the reports was created to provide a window into the creation and redemption process for Managed Fund Shares in order to ensure that the arbitrage mechanism would work as expected for products that were listed pursuant to the newly approved generic listing standards. The Exchange and Commission have had several years of this reporting process and no significant issues have arisen. The Exchange believes that this speaks further to the maturity of the marketplace for ETFs and, further, Rule 6c-11 collapsing the difference between Index Fund Shares and Managed Fund Shares indicates a general comfort with Managed Fund Shares that further justifies eliminating

this reporting obligation. In the Rule 6c-11 Release, the Commission concluded that “the arbitrage mechanism for existing actively managed ETFs has worked effectively with small deviations between market price and NAV per share.”⁵⁰ The Exchange generally agrees with this conclusion and, while such quarterly reports were useful when Managed Fund Shares were first able to be listed pursuant to generic listing standards, the Exchange believes that such a window into the creation and redemption process for Managed Fund Shares no longer provides useful information related to the prevention of manipulation or protection of investors which it was originally designed to provide. Further, because the same general types of information provided in those reports will be made available under Rule 6c-11 directly from the issuers of such securities the Exchange also believes that it is consistent with the Act to remove this reporting obligation because it will be duplicative and no longer necessary.

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.

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. To the contrary, the Exchange believes that the proposed rule change would enhance competition by streamlining current procedures, reducing the costs and timeline associated with bringing ETFs to market, and providing significantly greater regulatory certainty to potential issuers considering bringing ETF Shares to market, all of which the Exchange believes would enhance competition among ETF issuers and reduce costs for investors. The Exchange also believes that the proposed

⁵⁰ See Rule 6c-11 Release at 23.

change would enhance competition among ETF Shares by ensuring the application of uniform listing standards.

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. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the Act and rules and regulations thereunder applicable to a national securities exchange.⁵¹ In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Act,⁵² 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.

A. Proposed BZX Rule 14.11(l)

As an initial matter, the Commission notes that the Exchange currently has generic listing standards for Index Fund Shares, Managed Fund Shares, and Portfolio Depositary Receipts,⁵³ and therefore proposed Rule 14.11(l) would not permit the Exchange to generically list any novel

⁵¹ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁵² 15 U.S.C. 78f(b)(5).

⁵³ See BZX Rules.

product types. The Commission also notes that a number of the provisions of proposed Rule 14.11(l) are substantively identical to provisions of other BZX listing rules.⁵⁴

The Commission believes that proposed BZX Rule 14.11(l) is reasonably designed to help prevent fraudulent and manipulative acts and practices. A central qualification for listing under the proposed rule is ongoing compliance with Rule 6c-11 under the 1940 Act, which requires, among other things, ETFs to prominently disclose the portfolio holdings that will form the basis for each calculation of net asset value per share.⁵⁵ Because initial and ongoing compliance with Rule 6c-11 of the 1940 Act is a condition for listing and trading on the Exchange, the proposed rule would permit Nasdaq to list and trade shares of an investment company with a fully transparent portfolio,⁵⁶ and the Commission believes that portfolio transparency should help prevent manipulation of the price of ETF Shares.⁵⁷ Additionally, proposed BZX Rule 14.11(l) includes requirements relating to fire walls and procedures to prevent the use and dissemination of material, non-public information regarding the applicable ETF index and portfolio,⁵⁸ all such requirements of which are designed to prevent fraudulent and

⁵⁴ See supra notes 17, 19, and 20 and accompanying text, respectively. Additionally, the proposed definition of “Reporting Authority” is based on the definitions in BZX Rules 14.11(c)(1)(C) and 14.11(i)(3)(D). See supra note 18.

⁵⁵ See Rule 6c-11 Release, supra note 12, at 57180-81.

⁵⁶ See supra note 9. The Commission also noted that, with respect to ETF portfolio transparency, the disclosures are designed to promote an effective arbitrage mechanism and inform investors about the risks of deviation between market price and net asset value when deciding whether to invest in ETFs generally or in a particular ETF. See Rule 6c-11 Release, supra note 12, at 57166.

⁵⁷ See id. at 57169 (concluding that portfolio transparency combined with existing requirements should be sufficient to protect against certain abuses).

⁵⁸ For example, proposed BZX Rule 14.11(l)(4)(A)(ii) provides that if the index underlying a series of ETF Shares is maintained by a broker-dealer or fund adviser, the broker-dealer or fund adviser shall erect and maintain a “fire wall” around the personnel who have access to information concerning changes and adjustments to the index and the index will

manipulative acts and practices.⁵⁹ The Commission specifically notes that certain of these requirements relating to such fire walls and procedures, which are substantively identical to BZX's rules governing the listing and trading of index-based and actively managed ETFs, apply in addition to what is already required under the Act and the 1940 Act and respective rules and regulations thereunder, and the Commission believes that such requirements collectively provide additional protections against the potential misuse of material, non-public information. Therefore, the Commission concludes that the proposed requirements relating to such fire walls and procedures, combined with ETF portfolio transparency and the existing requirements under the Act and 1940 Act, should help to protect against fraudulent and manipulative acts and practices under Section 6(b)(5) of the Act.

Proposed BZX Rule 14.11(l)(2)(C) requires that the Exchange implement and maintain written surveillance procedures for ETF Shares. The Exchange will employ its existing surveillance procedures applicable to derivative products, which are currently applicable to Index

be calculated by a third party who is not a broker-dealer or fund adviser. Proposed BZX Rule 14.11(l)(4)(A)(ii) further states that if the investment adviser to an ETF is affiliated with a broker-dealer, such investment adviser will erect and maintain a "fire wall" between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to the underlying portfolio. Proposed BZX Rule 14.11(l)(4)(A)(iii) requires that any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on the composition, methodology and related matters, of an index underlying a series of ETF Shares must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index. In addition, for actively managed ETFs, personnel who make decisions on the portfolio composition must be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the applicable portfolio. See generally proposed BZX Rule 14.11(l)(4)(A).

⁵⁹ In adopting Rule 6c-11, the Commission determined that the safeguards in the existing regulatory regime adequately address "special concerns that self-indexed ETFs present, including the potential ability of an affiliated index provider to manipulate an underlying index to the benefit or detriment of a self-indexed ETF." Rule 6c-11 Release, supra note 12, 84 FR at 57168.

Fund Shares and Managed Fund Shares, to trading in ETF Shares, and represents that its surveillance procedures are adequate to (a) properly monitor the trading of such securities during all trading sessions and (b) deter and detect violations of Exchange rules and the applicable federal securities laws. The Exchange represents that, consistent with Section 6(b)(1) of the Act, it has the capacity to enforce proposed BZX Rule 14.11(l) by performing ongoing surveillance of ETF Shares listed on the Exchange in order to ensure compliance with Rule 6c-11 and the 1940 Act on an ongoing basis.⁶⁰ Further, the Exchange represents that it, or FINRA on behalf of the Exchange, will communicate as needed regarding trading in ETF Shares and certain of their applicable underlying components with other markets that are members of the ISG or with which BZX has in place a comprehensive surveillance sharing agreement. The Exchange represents that it will perform ongoing surveillance of ETF Shares listed on the Exchange in order to ensure compliance with Rule 6c-11 under the 1940 Act on an ongoing basis. The Exchange also notes that BZX Rule 14.11(a) requires any issuer to provide the Exchange with prompt notification after it becomes aware of any non-compliance with proposed Rule 14.11(l), which would include any failure of the issuer to comply with Rule 6c-11 or the 1940 Act.⁶¹ Additionally, BZX plans

⁶⁰ The Commission also finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(1) of the Act (15 U.S.C. 78f(b)(1)), which requires (among other things) that a national securities exchange be organized and have the capacity to comply with its own rules. The Exchange represents that it will: (1) monitor for compliance with Rule 6c-11 under the 1940 Act to ensure that the continued listing standards are being met; (2) review the website of series of ETF Shares to ensure that the requirements of Rule 6c-11 under the 1940 Act are being met; and (3) obtain a representation from the issuer of each series of ETF Shares that the requirements of proposed BZX Rule 14.11(l) will be satisfied and that the issuer will notify the Exchange of any failure to do so.

⁶¹ The Exchange further represents that failure by an issuer to notify the Exchange of non-compliance pursuant to Rule 14.11(a) would itself be considered non-compliance with the requirements of BZX Rule 14.11 and would subject the series of ETF Shares to potential trading halts and the delisting process under BZX Rule 14.12.

to review the website of series of ETF Shares in order to ensure that the requirements of Rule 6c-11 are being met. Finally, proposed BZX Rule 14.11(l)(4)(B)(i)(c) requires that the Exchange commence delisting proceedings for a series of ETF Shares if, following the initial 12-month period after commencement of trading on the Exchange, there are fewer than 50 beneficial holders of such series of ETF Shares for 30 or more consecutive trading days.

Consistent with the requirement of Section 6(b)(5) of the Act⁶² that the Exchange's rules be designed to remove impediments to and perfect the mechanism of a free and open market, the Exchange's rules regarding trading halts will help to ensure the maintenance of fair and orderly markets for ETF Shares. Specifically, as discussed above, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in a series of ETF Shares. BZX states that trading in ETF Shares will be halted if the circuit breaker parameters in BZX Rule 11.18 have been reached or when the Exchange becomes aware that the net asset value for a series of ETF Shares is not being disseminated to all market participants at the same time.⁶³ Additionally, trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in ETF Shares inadvisable. As BZX represents in the proposal, examples of such market conditions or reasons may be: (1) the extent to which certain information about the ETF Shares that is required to be disclosed under Rule 6c-11 of the 1940 Act is not being made available; (2) if an interruption to the dissemination to the value of the index or reference asset on which a series of ETF Shares is based persists past the trading day in which it occurred or is no longer calculated or available; (3) trading in the securities comprising the underlying index or portfolio has been halted in the primary market(s); or (4) in the presence

⁶² 15 U.S.C. 78f(b)(5).

⁶³ See supra note 30 and accompanying text.

of other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market. Further, BZX will employ numerous intraday alerts that will notify Exchange personnel of trading activity throughout the day that is potentially indicative of certain disclosures not being made accurately or the presence of other unusual conditions or circumstances that could be detrimental to the maintenance of a fair and orderly market.⁶⁴ The Exchange also may suspend trading in and commence delisting proceedings for a series of ETF Shares where such series is not in compliance with the applicable listing standards or where the Exchange believes that further dealings on the Exchange are inadvisable.

B. Discontinuance of Quarterly Reports of Generically Listed Managed Fund Shares

In support of its proposal to adopt generic listing standards for Managed Fund Shares, the Exchange proposed to submit quarterly reports to the Commission disclosing certain information.⁶⁵ These reports were designed to identify problems associated with generically listed Managed Fund Shares. In adopting Rule 6c-11 under the 1940 Act, the Commission largely eliminated prior distinctions between actively managed and index-based ETFs, and BZX does not submit quarterly reports regarding the shares of index-based ETFs that it generically lists. In addition, the Commission recognizes that, since the adoption of the Managed Fund Shares generic listing standards, the marketplace for ETFs has matured and developed, an increased number of actively managed ETFs have been listed and are trading on national securities exchanges, and market participants have become more familiar with such securities. Moreover, proposed BZX Rule 14.11(l)(2)(C) requires that the Exchange implement and

⁶⁴ See Amendment No. 2, supra note 8, at 15.

⁶⁵ The information included in these reports is summarized above. See supra note 35 and accompanying text.

maintain written surveillance procedures for ETF Shares.⁶⁶ The Exchange represents that it intends to utilize its existing surveillance procedures applicable to derivative products, which will include ETF Shares, to monitor trading in the ETF Shares, and will perform ongoing surveillance of ETF Shares listed on the Exchange to ensure compliance with Rule 6c-11 and the 1940 Act on an ongoing basis. The Commission notes that manipulation concerns are mitigated by a combination of the Exchange’s surveillance procedures, BZX’s ability to halt trading under proposed BZX Rule 14.11(l),⁶⁷ and the Exchange’s ability to commence delisting proceedings under proposed BZX Rule 14.11(l)(4)(i). In light of these reasons, as well as the Commission’s experience with the quarterly reports, the Commission believes that this proposal is consistent with Section 6(b)(5) of the Act, and it therefore finds that it is no longer necessary for BZX to continue to submit such quarterly reports.

C. Other Related Rule Changes

The Exchange proposes to: (1) expand the definition of “Derivative Securities Products” in BZX Rule 14.11(c)(3)(A)(i)(a) to include ETF Shares; and (2) exempt ETF Shares from certain corporate governance requirements by including ETF Shares among the product types enumerated in BZX Rules 14.10(e)(1)(E) and Interpretations and Policies .13 to BZX Rule

⁶⁶ Moreover, BZX Rule 14.11(i)(2)(C) requires that the Exchange implement and maintain written surveillance procedures for Managed Fund Shares.

⁶⁷ The Exchange states that it may consider all relevant factors in exercising its discretion to halt or suspend trading in a series of ETF Shares, and that it may halt trading due to market conditions that make trading in the ETF Shares inadvisable, including the following circumstances: (1) where the Exchange becomes aware that the net asset value with respect to a series of ETF Shares is not disseminated to all market participants at the same time; and (2) if an interruption to the dissemination to the value of the index or reference asset on which a series of ETF Shares is based persists past the trading day in which it occurred or is no longer calculated or available.

14.10.⁶⁸ The Exchange states that these changes will subject ETF Shares to the same corporate governance requirements currently applicable to Index Fund Shares and Managed Fund Shares. The Commission believes that these proposed changes simply incorporate proposed BZX Rule 14.11(l) into the existing framework of BZX's rules, and therefore finds that such changes are consistent with Section 6(b)(5) of the Act.

D. Exchange Representations

In support of this proposal, the Exchange has made the following representations:

- (1) BZX deems ETF Shares to be equity securities, thus rendering trading in ETF Shares subject to the Exchange's existing rules governing the trading of equity securities.⁶⁹ The Exchange notes that ETF Shares will be subject to rules governing Exchange member disclosure obligations in connection with equities trading, and that Rule 6c-11 does not change the applicability of these Exchange rules with respect to these securities.⁷⁰
- (2) BZX will (a) monitor for compliance with Rule 6c-11 to ensure that the continued listing standards are being met; (b) review the website of series of ETF Shares to ensure that the requirements of Rule 6c-11 are being met; and (c) employ numerous intraday alerts that will notify Exchange personnel of unusual trading activity throughout the day that could be indicative of unusual conditions or

⁶⁸ Under the current version of these rules, Index Fund Shares and Managed Fund Shares are exempted from the specified corporate governance requirements.

⁶⁹ See supra note 14.

⁷⁰ With respect to trading in ETF Shares, the Exchange represents that all of the BZX member obligations relating to product description and prospectus delivery requirements will continue to apply in accordance with the Exchange rules and federal securities laws, and BZX will continue to monitor its members for compliance with such requirements, which are not changing as a result of Rule 6c-11 under the 1940 Act. See supra note 14.

circumstances that could be detrimental to the maintenance of a fair and orderly market.⁷¹

- (3) BZX will obtain a representation from the issuer of ETF Shares that the net asset value for the series will be calculated daily and will be made available to all market participants at the same time.⁷² BZX will also obtain a representation from the issuer of each series of ETF Shares that the requirements of Rule 6c-11 will be continuously satisfied and that the issuer will notify the Exchange of any failure to do so.⁷³
- (4) BZX's surveillance procedures are adequate to properly monitor the trading of the ETF Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.⁷⁴
- (5) The Exchange, or FINRA on behalf of the Exchange, will communicate as needed regarding trading in ETF Shares and certain of their applicable underlying components with other markets that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

Additionally, FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities that may be held by a series

⁷¹ See Amendment No. 2, supra note 8, at 15. The Exchange also notes that BZX Rule 14.11(a) would require an issuer of ETF Shares to notify BZX of any failure to comply with Rule 6c-11 or the 1940 Act. See id. The Exchange notes that failure by an issuer to notify the Exchange of non-compliance pursuant to Rule 14.11(a) would itself be considered non-compliance with the requirements of Rule 14.11 and would subject the series of ETF Shares to potential trading halts and the delisting process under Rule 14.12. See id. at 16, n.22.

⁷² See id. at 18, n.24.

⁷³ See id. at 22.

⁷⁴ See id. at 16.

of ETF Shares reported to TRACE. FINRA also can access data obtained from the EMMA system relating to municipal bond trading activity for surveillance purposes in connection with trading in a series of ETF Shares, to the extent that a series of ETF Shares holds municipal securities.⁷⁵

- (6) The issuer of a series of ETF Shares will be required to comply with Rule 10A-3 under the Act for the initial and continued listing of ETF Shares, as provided under BZX Rule 14.10(e)(1)(E) and Interpretation and Policy .13 to BZX Rule 14.10.⁷⁶

This approval order is based on all of the Exchange's representations, including those set forth above and in Amendment No. 2. For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Sections 6(b)(1) and 6(b)(5) of the Act⁷⁷ and the rules and regulations thereunder applicable to a national securities exchange.

IV. Solicitation of Comments to the Proposed Rule Change, as Modified by Amendment No. 2

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 2 to the proposed rule change 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

⁷⁵ See *id.* at 16-17.

⁷⁶ The Exchange also notes that these proposed changes would subject ETF Shares to the same corporate governance requirements as other open-end management investment companies listed on the Exchange. See *id.* at 17.

⁷⁷ 15 U.S.C. 78f(b)(1) and 15 U.S.C. 78f(b)(5), respectively.

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-CboeBZX-2019-097 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 Number SR-CboeBZX-2019-097. 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-2019-097, 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 Amendment No. 2

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 2, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 2 in the Federal Register. In Amendment No. 2, the Exchange (among other things): (1) modified the circumstances in which it will consider suspending trading in a series of ETF Shares; (2) broadened its undertakings with respect to ensuring compliance with the proposed generic listing standard; (3) clarified that ETF Shares would be subject to all Exchange rules applicable to equities trading, including rules governing Exchange member disclosure obligations; and (4) clarified the applicability of certain current listing rules in light of proposed BZX Rule 14.11(l). Amendment No. 2 also provides other clarifications and additional information in support of the proposed rule change. These changes, as well as additional information in Amendment No. 2, assisted the Commission in finding that the proposal is consistent with the Act. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,⁷⁸ to approve the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act⁷⁹ that the proposed rule change (SR-CboeBZX-2019-097), as modified by Amendment No. 2, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸⁰

⁷⁸ 15 U.S.C. 78s(b)(2).

⁷⁹ Id.

⁸⁰ 17 CFR 200.30-3(a)(12).

J. Matthew DeLesDernier,
Assistant Secretary.

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