8011-01p
SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-88726; File No. SR-CboeBZX-2020-003]
Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of Amendment No. 2 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of the -1x Short VIX Futures ETF Under BZX Rule 14.11(f)(4), Trust Issued Receipts

April 22, 2020.

I. Introduction

On January 3, 2020, 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 list and trade shares ("Shares") of the -1x Short VIX Futures ETF ("Fund"), a series of VS Trust ("Trust"), under BZX Rule 14.11(f)(4) (Trust Issued Receipts). The proposed rule change was published for comment in the Federal Register on January 23, 2020.[3] On February 25, 2020, 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 March 24, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 87992 (January 16, 2020), 85 FR 4023.

4 15 U.S.C. 78s(b)(2).

5 See Securities Exchange Act Release No. 88276, 85 FR 12353 (March 2, 2020). The Commission designated April 22, 2020 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

superseded the proposed rule change as originally filed.[6] On April 13, 2020, the Exchange filed Amendment No. 2 to the proposed rule change, which replaced and superseded the proposed rule change, as modified by Amendment No. 1.[7] The Commission has received no comments on the proposed rule change. The Commission is publishing this notice and order to solicit comments on the proposed rule change, as modified by Amendment No. 2, from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act[8] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 2.

---

6 Amendment No. 1 is available at: https://www.sec.gov/comments/sr-cboebzx-2020-003/srcboebzx2020003-6993242-214730.pdf.

7 In Amendment No. 2, the Exchange: (i) clarified that the primary investments of the Fund will be VIX Futures Contracts (as defined herein) based on components of the Index (as defined herein); (ii) clarified that the Fund will collateralize its obligations with Cash and Cash Equivalents (as defined herein) consistent with the 1940 Act and interpretations thereunder; (iii) stated that the Index and the Fund should be expected to perform significantly different from the inverse of the VIX (as defined herein); (iv) clarified where pricing information for the Shares and the underlying investments of the Fund will be publicly available; (v) represented that all statements and representations made in the filing regarding the Index composition, description of the portfolio or reference assets, limitations on portfolio holdings or reference assets, dissemination and availability of the Index, reference asset, and IIV (as defined herein), and the applicability of Exchange rules specified in the filing shall constitute continued listing requirements for the Fund; (vi) represented that the Exchange has a general policy prohibiting the distribution of material, non-public information by its employees; (vii) added additional information regarding the Information Circular to be distributed prior to the commencement of trading, including a discussion of suitability obligations by Members; (viii) discussed increased sales practice and customer margin requirements for FINRA members applicable to the Shares; (ix) represented that the Fund does not seek to achieve its primary investment objective over a period of time greater than a single day; and (x) made technical, clarifying, and conforming changes. Amendment No. 2 is available on the Commission's website at: https://www.sec.gov/comments/sr-cboebzx-2020-003/srcboebzx2020003-7098109-215773.pdf.

8 15 U.S.C. 78s(b)(2)(B).

II. Description of the Proposal, as Modified by Amendment No. 2[9]

A. Description of the Fund

The Exchange proposes to list and trade Shares of the Fund[10] under BZX Rule 14.11(f)(4), which governs the listing and trading of Trust Issued Receipts[11] on the Exchange. Volatility Shares LLC ("Sponsor"), a Delaware limited liability company and a commodity pool operator, serves as the Sponsor of the Trust.[12] Tidal ETF Services LLC serves as the administrator; U.S. Bank National Association serves as custodian of the Fund and the Shares; U.S. Bancorp Fund Services, LLC serves as the sub-administrator and transfer agent; and Wilmington Trust Company is the sole trustee of the Trust.

The Exchange states that the Fund seeks to provide daily investment results (before fees and expenses) that correspond to the performance of the Short VIX Futures Index (SHORTVOL)

---

9 Additional information regarding the Fund, the Trust, and the Shares, including investment strategies, creation and redemption procedures, and portfolio holdings can be found in Amendment No. 2, supra note 7.

10 The Exchange states that the Fund has filed a draft registration statement on Form S-1 under the Securities Act of 1933, dated December 6, 2019 (File No. 377-02945) ("Draft Registration Statement"). The Exchange represents that the Fund will not trade on the Exchange until there is an effective registration statement for the Fund.

11 Rule 14.11(f)(4) applies to Trust Issued Receipts that invest in "Financial Instruments." The term "Financial Instruments," as defined in Rule 14.11(f)(4)(A)(iv), means any combination of investments, including cash; securities; options on securities and indices; futures contracts; options on futures contracts; forward contracts; equity caps, collars and floors; and swap agreements.

12 The Exchange states that the Sponsor is not a broker-dealer or affiliated with a broker-dealer. The Exchange further states that in the event that (a) the Sponsor becomes a broker-dealer or newly affiliated with a broker-dealer, or (b) any new sponsor is a broker-dealer or becomes affiliated with a broker-dealer, it will implement and maintain a fire wall with respect to its relevant personnel or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the portfolio.

("Index").[13] The Index seeks to offer short exposure to market volatility through publicly traded futures markets and measures the daily inverse performance of a theoretical portfolio of first- and second-month futures contracts on the Cboe Volatility Index ("VIX").[14] The Fund does not seek to achieve its primary investment objective over a period of time greater than a single day. The return of the Fund for a period longer than a single day is the result of its return for each day compounded over the period and usually will differ in amount and possibly even direction from either the inverse of the VIX or the inverse of a portfolio of short-term VIX Futures Contracts for the same period. These differences can be significant.

The Fund will primarily invest in VIX futures contracts traded on the Cboe Futures Exchange, Inc. ("CFE") ("VIX Futures Contracts") based on components of the Index to pursue its investment objective. In the event accountability rules, price limits, position limits, margin limits or other exposure limits are reached with respect to VIX Futures Contracts, the Sponsor may cause the Fund to obtain exposure to the Index through over-the-counter ("OTC") swaps referencing the Index or referencing particular VIX Futures Contracts comprising the Index ("VIX Swap Agreements").

The Fund may also invest in VIX Swap Agreements if the market for a specific VIX Futures Contract experiences emergencies (e.g., natural disaster, terrorist attack or an act of God)

---

13 The Index is sponsored by Cboe Global Indexes ("Index Sponsor"). The Index Sponsor is not a registered broker-dealer, but is affiliated with a broker-dealer. The Exchange represents that the Index Sponsor has implemented and will maintain a fire wall with respect to the broker-dealer affiliate regarding access to information concerning the composition of and/or changes to the Index. In addition, the Exchange represents that the Index Sponsor has implemented and will maintain procedures that are designed to prevent the use and dissemination of material, non-public information regarding the Index.

14 The Exchange states that the VIX is designed to measure the implied volatility of the S&P 500 over 30 days in the future and is calculated based on the prices of certain put and call options on the S&P 500. The Exchange states that the VIX is reflective of the premium paid by investors for certain options linked to the level of the S&P 500.

or disruptions (e.g., a trading halt or a flash crash) or in situations where the Sponsor deems it impractical or inadvisable to buy or sell VIX Futures Contracts (such as during periods of market volatility or illiquidity). The VIX Swap Agreements in which the Fund may invest may or may not be cleared.[15] The Fund will collateralize its obligations with Cash and Cash Equivalents[16] consistent with the 1940 Act and interpretations thereunder.

In addition to VIX Swap Agreements, if the Fund is unable to meet its investment objective through investments in VIX Futures Contracts, the Fund may also obtain exposure to the Index through listed VIX options contracts traded on the Cboe Exchange, Inc. ("Cboe") ("VIX Options Contracts").

The Fund may also invest in Cash and Cash Equivalents that may serve as collateral in the VIX Futures Contracts, VIX Swap Agreements, and VIX Options Contracts (collectively, "VIX Derivative Products").

If the Fund is successful in meeting its objective, its value (before fees and expenses) on a given day should gain approximately as much on a percentage basis as the level of the Index

---

15 The Exchange represents that the Fund will only enter into VIX Swap Agreements with counterparties that the Sponsor reasonably believes are capable of performing under the contract and will post collateral as required by the counterparty. The Fund will seek, where possible, to use counterparties, as applicable, whose financial status is such that the risk of default is reduced; however, the risk of losses resulting from default is still possible. The Sponsor will evaluate the creditworthiness of counterparties on a regular basis. In addition to information provided by credit agencies, the Sponsor will review approved counterparties using various factors, which may include the counterparty's reputation, the Sponsor's past experience with the counterparty and the price/market actions of debt of the counterparty. The Fund may use various techniques to minimize OTC counterparty credit risk including entering into arrangements with counterparties whereby both sides exchange collateral on a mark-to-market basis. Collateral posted by the Fund to a counterparty in connection with uncleared VIX Swap Agreements is generally held for the benefit of the counterparty in a segregated tri-party account at the custodian to protect the counterparty against non-payment by the Fund.

16 For purposes of the proposal, "Cash and Cash Equivalents" has the meaning set forth in BZX Rule 14.11(i)(4)(C)(iii) applicable to Managed Fund Shares.

when it rises. Conversely, its value (before fees and expenses) should lose approximately as much on a percentage basis as the level of the Index when it declines. The Fund primarily acquires short exposure to the VIX through VIX Futures Contracts, such that the Fund has exposure intended to approximate the Index at the time of the net asset value ("NAV") calculation of the Fund.[17] However, as discussed above, in the event that the Fund is unable to meet its investment objective solely through the investment of VIX Futures Contracts, it may invest in VIX Swap Agreements or VIX Options Contracts. The Fund may also invest in Cash or Cash Equivalents that may serve as collateral to the Fund's investments in VIX Derivative Products.

The Fund is not actively managed but rather seeks to remain fully invested in VIX Derivative Products (and Cash and Cash Equivalents as collateral) that provide exposure to the Index consistent with its investment objective without regard to market conditions, trends or direction. In seeking to achieve the Fund's investment objective, the Sponsor uses a mathematical approach to determine the type, quantity and mix of investment positions that the Sponsor believes in combination should produce daily returns consistent with the Fund's objective. The Sponsor relies upon a pre-determined model to generate orders that result in repositioning the Fund's investments in accordance with its investment objective.

B. VIX Futures Contracts

The Index is comprised of, and the value of the Fund will be based on, VIX Futures Contracts. VIX Futures Contracts are measures of the market's expectation of the level of VIX at certain points in the future, and as such, will behave differently than current, or spot, VIX. According to the Exchange, while the VIX represents a measure of the current expected

17 The Exchange states the Fund's NAV will be calculated at 4:00 p.m. ET.

volatility of the S&P 500 over the next 30 days, the prices of VIX Futures Contracts are based on the current expectation of what the expected 30-day volatility will be at a particular time in the future (on the expiration date). As a result, the Index and the Fund should be expected to perform very differently from the inverse of the VIX over all periods of time.

C. Description of the Index

The Index is designed to express the daily inverse performance of a theoretical portfolio of first- and second-month VIX Futures Contracts ("Index Components"), with the price of each VIX Futures Contract reflecting the market's expectation of future volatility. The Index seeks to reflect the returns that are potentially available from holding an unleveraged short position in first- and second- month VIX Futures Contracts. While the Index does not correspond to the inverse of the VIX, as it seeks short exposure to VIX, the value of the Index, and by extension the Fund, will generally rise as the VIX falls and fall as the VIX rises. However, as noted above, because VIX Futures Contracts correlate to future volatility readings of VIX, while the VIX itself correlates to current volatility, the Index and the Fund should be expected to perform significantly different from the inverse of the VIX. Further, unlike the Index, the VIX, which is not a benchmark for the Fund, is calculated based on the prices of certain put and call options on the S&P 500.[18]

The Index employs rules for selecting the Index Components and a formula to calculate a level for the Index from the prices of these components. Specifically, the Index Components represent the prices of the two near-term VIX Futures Contracts, replicating a position that rolls the nearest month VIX Futures Contract to the next month VIX Futures Contract on a daily basis in equal fractional amounts. This results in a constant weighted average maturity of

---

[18] See supra note 14.

approximately one month. The roll period usually begins on the Wednesday falling 30 calendar days before the S&P 500 option expiration for the following month ("Cboe VIX Monthly Futures Settlement Date") and runs to the Tuesday prior to the subsequent month's Cboe VIX Monthly Futures Settlement Date.

III. Proceedings to Determine Whether to Approve or Disapprove SR-CboeBZX-2020-003, as Modified by Amendment No. 2, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[19] to determine whether the proposed rule change, as modified by Amendment No. 2, should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[20] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposal's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade," and "to protect investors and the public interest."[21]

IV. Procedure: Request for Written Comments

---

19 15 U.S.C. 78s(b)(2)(B).

20 Id.

21 15 U.S.C. 78f(b)(5).

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.[22]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change, as modified by Amendment No. 2, should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in Amendment No. 2,[23] in addition to any other comments they may wish to submit about the proposed rule change. In this regard, the Commission seeks commenters' views regarding whether the Exchange's proposal to list and trade Shares of the Fund, which seeks to provide daily investment results that correspond to the

---

22 Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

23 See supra note 7.

performance of an index that measures the daily inverse performance of a theoretical portfolio of first- and second-month VIX Futures Contracts, is adequately designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest, and is consistent with the maintenance of a fair and orderly market under the Exchange Act. In particular, the Commission seeks commenters' views regarding whether the Exchange has adequately described the potential impact of sudden fluctuations in market volatility on the Index and on the Fund's operation and performance for the Commission to make a determination under Section 6(b)(5) of the Act.

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-CboeBZX-2020-003 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-2020-003. 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-2020-003 and should be submitted by [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

J. Matthew DeLesDernier,
Assistant Secretary.

[24] 17 CFR 200.30-3(a)(12); 17 CFR 200.30-3(a)(57).

[FR Doc. 2020-08937 Filed: 4/27/2020 8:45 am; Publication Date: 4/28/2020]