SECURITIES AND EXCHANGE COMMISSION


Self-Regulatory Organizations; Bats BZX Exchange, Inc.; Notice of Filing of Amendment Nos. 1 and 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, Relating to BZX Rule 14.11, Other Securities, and BZX Rule 14.12, Failure To Meet Listing Standards

March 7, 2017

I. Introduction

On November 18, 2016, Bats 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”) and Rule 19b–4 thereunder, a proposed rule change amending BZX Rule “Rule” 14.11 to add specific continued listing standards for exchange-traded products (“ETPs”) and to amend Rule 14.12 to specify the delisting procedures for these products. The proposed rule change was published for comment in the Federal Register on December 7, 2016. On January 18, 2017, 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 approve or disapprove the proposed rule change. On March 1, 2017, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the original proposal. On March 3, 2017, the Exchange filed Amendment No. 2 to the proposed rule change. The Commission received nine comment letters on the proposed rule change. The Commission is publishing this notice to solicit comments on Amendment Nos. 1 and 2 from interested persons, and is approving the proposed rule change, as modified by Amendment Nos. 1 and 2, on an accelerated basis.

II. Description of the Proposed Rule Change, as Modified by Amendment Nos. 1 and 2

The Exchange proposes to amend Rule 14.11 to specify continued listing requirements for products listed under that rule, which include products listed pursuant to Rule 19b–4(e) under the Act (“generically-listed products”) and products listed pursuant to proposed rule changes filed with the Commission (“non-generically-listed products”).

The Exchange also proposes to amend Rule 14.11(a) to specify issuer notification requirements related to failures to comply with continued listing requirements. Specifically, the Exchange proposes to amend Rule 14.11(a) to require a company with securities listed under Rule 14.11 to promptly notify the Exchange after the company becomes aware of any non-compliance by the company with the requirements of the rule. As proposed, the Exchange would initiate delisting proceedings for a product listed under Rule 14.11 if any of its continued listing requirements (including those set forth in an Exchange Rule and those set forth in an applicable proposed rule change) is not continuously maintained.

The Exchange also proposes to amend Rule 14.12 to specify the delisting procedures for products listed under Rule 14.11. Under proposed Rule 14.12(f)(2)(A), unless the company is currently under review by an Adjudicatory Body for a Staff Delisting Determination, the Listing Qualifications Department may accept and review a plan to regain compliance when the company fails to meet a continued listing requirement contained in Rule 14.11. Under the proposed rule, the company would be required to submit its compliance plan within 45 calendar days of the Exchange staff’s notification of deficiencies.

Finally, the Exchange proposes to make conforming and technical changes throughout Rule 14.11 to maintain consistency in its rules. For example, the Exchange proposes to consistently use the language “initiate delisting proceedings pursuant to Rule 14.12” when describing the delisting procedures for a product that fails to meet continued listing requirements; consistently state that, if the index that underlies a series of Portfolio Depository Receipts or Index Fund Shares is maintained by a broker-dealer or fund advisor, the index shall be calculated by a third party who is not

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1 See infra notes 33–35 and accompanying text.

2 Unlike failures to comply with other continued listing requirements, if there is an exception to the dissemination of the reference asset, index, or intraday indicative values for a listed product, the Exchange would initiate delisting proceedings under Rule 14.12 only if the interruption persists past the trading day in which it occurred. See, e.g., proposed changes to Rules 14.11(b)(9)(B)(i) and (e), and 14.11(c)(4)(B)(i) and (e).

3 See, e.g., proposed changes to Rules 14.11(b)(9)(B)(i) and 14.11(c)(9)(B)(ii).
III. Discussion and Commission Findings

The Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission finds that the proposed rule change is consistent 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, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Commission received nine comment letters that express concerns regarding the proposal. First, commenters question how an ETF, especially one that uses indexes established and maintained by unaffiliated third parties, would comply with the proposed rules, and how the Exchange would enforce them. Commenters assert that it would be unrealistic to anticipate that an ETF could ensure that an unaffiliated index complies with the initial listing standards on an ongoing basis, and express concern that an equity-index ETF, through no action of its own, could see certain of the constituent securities of the unaffiliated index fall below the listing requirements. One commenter believes that even if a third party index provider was amenable to changes to an underlying index that would allow an ETF to regain compliance with the continued listing standards, it is unlikely that the ETF would be able to formulate a compliance plan within 45 calendar days of the Exchange staff’s notification. Second, commenters argue that the proposal would provide for unfair discrimination because the proposed rules would result in differential treatment of ETFs as compared to other securities (e.g., common stock). Commenters believe that the continued listing standards for equity securities generally differ from the initial listing standards, whereas the proposed ETF continued listing standards would be the same as the initial listing standards. Third, commenters assert that the proposal provides no explanation or evidence regarding the potential manipulation of ETFs under the current rules, or how the proposal would reduce the potential for manipulation. One commenter also believes that significant compliance enhancements could be required to ensure proper and continuous testing of securities held in an index, and questions how this type of testing would enhance investor protection.

The Commission believes that the proposal is consistent with the Act. As the Commission previously stated, the development, implementation, and enforcement of standards governing the initial and continued listing of securities on an exchange are activities of critical importance to financial markets and the investing public.

Once a security has been approved for initial listing, continued listing criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange’s standards for market depth and liquidity so that fair and orderly markets can be maintained.

With respect to commenters’ concerns regarding the inability of certain ETFs to approach the thresholds set forth in the continued listing standards, the Commission believes that a variety of means are available to ETF (including ETF) issuers to monitor for a product’s compliance with the continued listing standards. For example, information regarding the composition of a third party index may be publicly available, or may be obtained from the index provider pursuant to provisions in the index licensing agreement, so that the ETF issuer can monitor its compliance on an ongoing basis. If an index approaches the thresholds set forth in the continued listing standards, the issuer may decide to engage in discussions with the index provider regarding potential modifications to the index so that the ETF can continue to be listed on the Exchange. If an index provider is unwilling to modify the index in order to comply with the Exchange’s listing requirements, the Exchange may submit a rule proposal to continue to list the product based on the index. Moreover, as noted below, the listing standards that address the index composition with respect to certain index-based ETFs already apply equally on an initial and ongoing basis, so some ETF issuers should have experience complying with these requirements. With respect to commenters’ questions regarding the Exchange’s enforcement of the proposed continued listing requirements, the Commission notes that the Exchange is proposing to apply its existing delisting procedures, which allow for the time to...
regain compliance to be extended to as long as 180 days,\textsuperscript{27} to products listed under Rule 14.11, rather than adopting new delisting procedures for these products.

With respect to commenters’ concerns that the proposed listing standards would treat ETPs fundamentally differently than other types of listed equity securities, the Commission notes that ETPs and other types of equity securities each have certain listing standards that are higher on an initial basis and lower on a continuing basis.\textsuperscript{28} Similarly, ETPs and other types of equity securities each have certain listing standards that are the same on an initial and continuing basis.\textsuperscript{29} In fact, the listing standards that address the index composition with respect to certain index-based ETPs already apply equally on an initial and ongoing basis.\textsuperscript{30}

Finally, with respect to commenters’ questions regarding the purpose of the proposal and its impact on the potential for manipulation and investor protection, the Commission notes that, in approving a wide variety of ETP listing standards, including standards that apply to underlying indexes or portfolios, the Commission has consistently explained that these standards, among other things,\textsuperscript{31} are intended to reduce the potential for manipulation by assuring that the ETP is sufficiently broad-based, and that the components of an index or portfolio underlying an ETP are adequately capitalized, sufficiently liquid, and that no one stock dominates the index.\textsuperscript{32} For exchange listing standards to effectively achieve their goals, including to effectively address the potential for manipulation of a listed ETF, their application cannot be linked to only a single point in time (i.e., the time of initial listing). Instead, they must be applied on an ongoing basis. The Commission notes that, currently, certain provisions within Rule 14.11 impose specific listing requirements on an initial basis, without imposing ongoing listing requirements that are intended to achieve the same goals as those listed requirements.\textsuperscript{33} To fill this gap, the proposal would specify that certain listing requirements in Rule 14.11 apply both on an initial and ongoing basis, rather than only at the time of initial listing.\textsuperscript{34} Also, with substantial market capitalization and trading volume account for a substantial portion of any underlying index or portfolio when applied in conjunction with the other applicable listing requirements, will permit the listing only of ETPs that are sufficiently broad-based in scope to minimize potential manipulation.\textsuperscript{53} 19, 2006), 71 FR 4180, 4186 (January 25, 2006) (SR–NASD–2006–001) (approving generic listing standards for Index-LINKed Securities and stating that the listing standards for Index-LINKed Securities, including minimum market capitalization, monthly trading volume, and relative weight requirements, are designed to ensure that the trading markets for ETPs that are underly index Securities are adequately capitalized and sufficiently liquid, and that no one stock dominates the index. The Commission believes that these requirements should significantly minimize the potential for [ ] manipulation.”). 78396 (July 22, 2016), 81 FR 49698, 49702 (July 28, 2016) (SR–BATS–2015–100) (approving generic listing standards for Managed Fund Shares, noting the Exchange’s statement that the proposed requirements for Managed Fund Shares are based in large part on the listing criteria currently applicable to Index Fund Shares and stating that “the Commission believes that this is an appropriate approach with respect to underlying asset classes covered by existing generic standards, because the mere addition of active management to an ETF portfolio that would qualify for generic listing as an index-based ETF should not affect the portfolio’s susceptibility to manipulation”).

\textsuperscript{33} Moreover, certain of the listing requirements do not explicitly state that they apply on an ongoing, as well as initial, basis. In these cases, the proposal would make explicit that the requirements apply both on an initial and ongoing basis. See, e.g., proposed changes to Rule 14.11(b)(3)(B)–(C) (making explicit that, for Portfolio Depositary Receipts, requirements related to exchange methodology and index value dissemination, as well as intra-day indicative value dissemination, apply on an initial and ongoing basis); proposed changes to Rule 14.11(e)(3), Interpretations and Policies .03 (making explicit that, for Trust Certificates, requirements related to tangible net worth and earnings apply on an initial and ongoing basis); and the existing requirements of Rule 14.11(e)(3), Interpretations and Policies .03 (making explicit that, for Trust Certificates, requirements related to the qualifications of a trustee and changes to a trustee apply on an initial and ongoing basis).
respect to non-generically listed products, the Exchange proposes to amend Rule 14.11(a) to state that any of the statements or representations in the proposed rule change regarding the index composition, the description of the portfolio or reference asset, 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 the proposed rule change constitute continued listing requirements. 35

Because the proposal specifies continued listing requirements for products listed pursuant to Rule 14.11, the Commission believes the proposal is designed to achieve on a continuing basis the goals of the listing requirements, including ensuring that the Exchange lists products that are not susceptible to manipulation and maintaining fair and orderly markets for the listed products. In particular, the Commission believes that the proposal is designed to ensure that stocks with substantial market capitalization and trading volume account for a substantial portion of the weight of an index or portfolio underlying a listed product, provide transparency regarding the composition of an index or portfolio underlying a listed product; 36 ensure that there is adequate liquidity in the listed product itself; 39 and provide timely and fair disclosure of useful information that may be necessary to price the listed product. 40 Moreover, the Commission believes that the proposal to require an issuer to notify the Exchange of its failures to comply with continued listing requirements would supplement the Exchange’s own surveillance of the listed products. 41

As noted above, the proposal specifies the delisting procedures for products listed pursuant to Rule 14.11. The Commission believes that the proposed amendments to Rule 14.12 would provide transparency regarding the process that the Exchange will follow if a listed product fails to meet its continued listing requirements. 42 Thus, as noted above, the process surrounding compliance plans already exists in Rule 14.12. As a result, the proposed delisting procedures are not novel.

Finally, the Commission believes that the conforming and technical proposed changes do not raise novel issues, are designed to further the goals of the listing standards, and provide clarity and consistency in the Exchange’s rules. For the reasons discussed above, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with the Act.

IV. Accelerated Approval of Amendment Nos. 1 and 2

As noted above, in Amendment No. 1, the Exchange: (i) Further amended Rule 14.11(a) to require a Company with securities listed under Rule 14.11 to provide the Exchange with prompt notification if the Company (rather than an Executive Officer of the Company) becomes aware of its non-compliance with the requirements of Rule 14.11; (ii)

Further amended Rule 14.11 to reflect that certain listing requirements apply on an initial and ongoing basis; (iii) further amended Rule 14.11 to consistently state that the Exchange will initiate delisting proceedings if continued listing requirements are not maintained; (iv) further amended Rule 14.11 to provide that the Exchange would initiate delisting proceedings due to an interruption to the dissemination of index, reference asset, or intraday indicative values (as applicable to the product) only if the interruption persists past the trading day in which it occurred; (v) further amended Rule 14.11 to consistently state that the Exchange will implement and maintain surveillance procedures for the applicable product; and (vi) made other technical, clarifying, and conforming changes throughout Rule 14.11. The Commission believes that Amendment No. 1 furthers the goals of the proposed rule change as discussed above, and enhances consistency between the Exchange’s proposal and a recently approved proposal from another exchange. 42 In Amendment No. 2, the Exchange specified the implementation date for the proposed rule change and made clarifying and technical changes. The Commission believes that Amendment No. 2 provides clarity and does not alter the substance of the proposed rule change. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act, to approve the proposed rule change, as modified by Amendment Nos. 1 and 2, on an accelerated basis.

V. Solicitation of Comments on Amendment Nos. 1 and 2

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment Nos. 1 and 2 are consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission’s Internet rule-comment form (http://www.sec.gov/rules/sro.shtml); or

• Send an email to rule-comments@sec.gov. Please include File Number SR–BatsBZX–2016–80 on the subject line.

Paper Comments

• Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.


For example, the Exchange proposes to amend Rule 14.11(e)(12)(B) to explicitly state that listing requirements for SEEDS apply both on an initial and ongoing basis, including, for example, the minimum public distribution and the minimum market value of an issue of SEEDS.

For example, the proposed changes to Rule 14.11(b)(3)(C) would make explicit that the requirements related to the dissemination of the value of the index underlying Portfolio Depository Receipts and the intraday indicative value for Portfolio Depository Receipts apply on an initial and ongoing basis.

The Commission notes that it has approved proposed rule changes for the listing and trading of ETPs that included similar representations. See, e.g., Securities Exchange Act Release No. 77548 (April 6, 2016), 81 FR 21626, 21630 (April 12, 2016) (SR–NASDAQ–2015–161). The Commission also notes that similar types of requirements exist in Rule 14.11(e)(12)(B) to explicitly state that listing requirements related to the dissemination of the value of the index underlying Portfolio Depository Receipts apply on an initial and ongoing basis, including whether Amendment Nos. 1 and 2, is consistent with the Act.

The Commission notes that the concept of issuer notification is not novel. For example, in connection with its proposal to adopt generic listing standards for Managed Fund Shares, the Exchange stated that, prior to listing pursuant to the generic listing standards, an issuer would be required to represent to the Exchange that it will advise the Exchange of any failure by a series of Managed Fund Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(b)(1) of the Act, the Exchange will surveil for compliance with the continued listing requirements. See Securities Exchange Act Release No. 763096 (July 22, 2016), 81 FR 49698, 49702 (July 28, 2016) (SR–BATS–2015–100).

For example, the proposal to require that components of the index or portfolio underlying Portfolio Depository Receipts be exchange-listed and NMS stocks, would apply both on an initial and ongoing basis.

For example, as proposed, the requirements under Rule 14.11(b)(3)(A), including minimum market value and minimum monthly trading volume requirements for components of the index or portfolio underlying Portfolio Depository Receipts, would apply both on an initial and ongoing basis. Also, for non-generically listed products, the proposal would provide that statements or representations made in the proposed rule change regarding the index composition and the description of the portfolio, among other things, constitute continued listing requirements. See proposed changes to Rule 14.11(a).

For example, as proposed, the requirements under Rule 14.11(b)(3)(A), including the requirement that components of the index or portfolio underlying Portfolio Depository Receipts be exchange-listed and NMS stocks, would apply both on an initial and ongoing basis.
All submissions should refer to File Number SR–BatsBZX–2016–80. This file number should be included on the subject line if email 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 Web site (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 Web site 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BatsBZX–2016–80 and should be submitted on or before April 3, 2017.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, \(^{44}\) that the proposed rule change (SR–BatsBZX–2016–80), as modified by Amendment Nos. 1 and 2, be, and hereby is, approved on an accelerated basis. \(^{45}\)

Eduardo A. Aleman, Assistant Secretary.

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DEPARTMENT OF STATE

[Public Notice 9915]


The Office of the Assistant Legal Adviser for Private International Law, Department of State, gives notice of a public meeting to discuss possible work by the United Nations Commission on International Trade Law (UNCITRAL) in the area of cloud computing. The public meeting will take place on Monday, April 10, 2017 from 10 a.m. until 12:30 p.m. EDT. This is not a meeting of the full Advisory Committee.

At its 2016 annual meeting, the Commission decided that UNCITRAL’s Working Group IV could take up work on the topics of identity management and cloud computing. The Commission asked the UNCITRAL Secretariat and Working Group IV to conduct preparatory work on both topics so that the Commission might make an informed decision about future work on these topics. In this regard, the UNCITRAL Secretariat has drafted a note on contractual aspects of cloud computing, A/CN.9/WG.IV/WP.142, which is available at http://www.unictral.org/pdf/english/workinggroups/wg_4/WP.142-e.pdf. In its note, the Secretariat requests guidance from Working Group IV on the scope of any work in the area of cloud computing, possible methodology, and priority to be allocated to any work.

The purpose of the public meeting is to obtain the views of concerned stakeholders on the issues presented in the Secretariat’s note as well as the need for an UNCITRAL instrument on this topic. Participants in the public meeting should read the Secretariat’s note in advance of the meeting and should be prepared to discuss the issues presented within the note as well as the sample text included as an annex to the note. Those who cannot attend but wish to comment are welcome to do so by email to Michael Coffee at coffeems@state.gov.

Time and Place: The meeting will take place on April 10, 2017, from 10 a.m. until 12:30 p.m. EDT in Room 356, South Building, State Department Annex 4A, Washington, DC 20037. Participants should plan to arrive at the Navy Hill gate on the west side of 23rd Street NW., at the intersection of 23rd Street NW. and D Street NW. by 9:30 a.m. for visitor screening. If you are unable to attend the public meeting and would like to participate from a remote location, teleconferencing will be available.

Public Participation: This meeting is open to the public, subject to the capacity of the meeting room. Access to the building is strictly controlled. For pre-clearance purposes, those planning to attend should email pilgr@state.gov providing full name, address, date of birth, citizenship, driver’s license or passport number, and email address. This information will greatly facilitate entry into the building. A member of the public needing reasonable accommodation should email pilgr@state.gov not later than April 3, 2017. Requests made after that date will be considered, but might not be able to be fulfilled. If you would like to participate by telephone, please email pilgr@state.gov to obtain the call-in number and other information.

Data from the public is requested pursuant to Public Law 99–399 (Omnibus Diplomatic Security and Anti-Terrorism Act of 1986), as amended; Public Law 107–56 (USA PATRIOT Act); and Executive Order 13356. The purpose of the collection is to validate the identity of individuals who enter Department facilities.

The data will be entered into the Visitor Access Control System (VACS–D) database. Please see the Security Records System of Records Notice (State-36) at https://foia.state.gov/docs/SORN/State-36.pdf for additional information.

Michael S. Coffee, Attorney-Adviser, Office of Private International Law, Office of the Legal Adviser, Department of State.

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DEPARTMENT OF STATE

[Public Notice 9916]

Notice of Determinations; Culturally Significant Objects Imported for Exhibition Determinations: “Terracotta Warriors of the First Emperor” Exhibition