

D. Other Comments

Comment letters also addressed the following topics:

- The desire of investors to gain access to bitcoin through an ETP;¹⁰⁷
 - investor understanding about bitcoin;¹⁰⁸
 - the valuation of bitcoin and price differentials across bitcoin trading venues;¹⁰⁹
 - the intrinsic value of bitcoin;¹¹⁰
 - the reliability of bitcoin as a store of value;¹¹¹
 - the volatility of bitcoin prices;¹¹²
 - the regulation of bitcoin spot markets;¹¹³
 - the operation and valuation of the proposed ETPs;¹¹⁴
 - arbitrage between the price of the Shares and the underlying portfolio instruments;¹¹⁵
 - the ability of the Funds to meet redemption orders;¹¹⁶
 - the custody of the assets of the Funds;¹¹⁷
 - the effect on the Funds of a fork in the bitcoin blockchain;¹¹⁸
 - the potential impact of Commission approval of the proposed ETP on the price of bitcoin and on the U.S. economy;¹¹⁹
 - the leadership role that the United States might play in the cryptocurrency space if the Commission were to approve the proposed ETP;¹²⁰
 - the utility of a bitcoin ETP as a global tool for wealth distribution;¹²¹ and
 - the legitimacy that Commission approval of the proposed ETP might confer upon bitcoin as a digital asset.¹²²
- Ultimately, however, additional discussion of these tangential topics is

¹⁰⁷ See Kaleda Letter, *supra* note 12; Santos Letter, *supra* note 12; Netto Letter, *supra* note 12.

¹⁰⁸ See Desai Letter, *supra* note 12, at 1; Kumar Letter, *supra* note 12.

¹⁰⁹ See Kumar Letter, *supra* note 12; Malkin Letter, *supra* note 12; Bhat Letter, *supra* note 12; GraniteShares Letter, *supra* note 12, at 6–7, 10–11.

¹¹⁰ See Ahn Letter, *supra* note 12.

¹¹¹ See Otenyi Letter, *supra* note 12; Desai Letter, *supra* note 12, at 1.

¹¹² See Desai Letter, *supra* note 12, at 1; Malkin Letter, *supra* note 12, at 1; Bhat Letter, *supra* note 12.

¹¹³ See Barnwell Letter, *supra* note 12, at 2; Desai Letter, *supra* note 12, at 1; Fitzgerald Letter, *supra* note 12, at 1; Kumar Letter, *supra* note 12; Malkin Letter, *supra* note 12, at 1.

¹¹⁴ See NERA Letter, *supra* note 12, at 1–3, 5; GraniteShares Letter, *supra* note 12, at 3, 5–6.

¹¹⁵ See GraniteShares Letter, *supra* note 12, at 8.

¹¹⁶ See *id.* at 7.

¹¹⁷ See *id.* at 3.

¹¹⁸ See *id.* at 6.

¹¹⁹ See Krohn Letter, *supra* note 12; Hales Letter, *supra* note 12; Santos Letter, *supra* note 12.

¹²⁰ See Hales Letter, *supra* note 12.

¹²¹ See Otenyi Letter, *supra* note 12.

¹²² See Desai Letter, *supra* note 12, at 1, 2; Kumar Letter, *supra* note 12; Santos Letter, *supra* note 12.

unnecessary, as they do not bear on the basis for the Commission's decision to disapprove the proposal.

E. The Exchange's Untimely Amendments to the Proposal

As noted above, the deadline for rebuttal comments in response to the Order Instituting Proceedings was May 15, 2018.¹²³ On August 21, 2018, however, the Exchange filed Amendment No. 1 with the Commission, stating that the amendment "amends and replaces in its entirety the proposal as originally submitted on January 5, 2018." Then, on August 22, 2018, the Exchange filed Amendment No. 2 with the Commission, stating that the amendment "amends and replaces in its entirety Amendment No. 1 as submitted on August 21, 2018, which amended and replaced in its entirety the proposal as originally submitted on January 5, 2018." Because these amendments were filed months after the deadline for comments on the proposed rule change, the Commission deems Amendment No. 1 and Amendment No. 2 to have been untimely filed.

Even if these amendments had been timely filed, however, the Commission would still conclude that the Exchange had not met its burden to demonstrate that its proposal is consistent with Exchange Act Section 6(b)(5). The change that the amendments made to the proposal was to limit the investments of the Funds to Bitcoin Futures Contracts, which trade on CFE and CME, eliminating the Funds' ability to invest in listed or unlisted swaps on bitcoin or on the Benchmark Futures Contracts.¹²⁴ Although CFE and CME are "regulated markets," the record, as discussed above, does not provide a basis for the Commission to conclude that CFE and CME are regulated markets "of significant size" in Bitcoin Futures Contracts.¹²⁵ Therefore, even if the Exchange's amendments were timely filed, the Commission would be unable to find, based on the record, that the Exchange had entered into a surveillance-sharing agreement with a regulated market of significant size related to bitcoin.¹²⁶

¹²³ See *supra* note 10 and accompanying text.

¹²⁴ The Sponsor also represents in its August 20, 2018, comment letter that the Funds would invest only in Bitcoin Futures Contracts. See GraniteShares Letter, *supra* note 12, at 5.

¹²⁵ See *supra* notes 78–91 and accompanying text.

¹²⁶ Additionally, even though the Exchange's amendments would have removed the representation in the Notice that the Exchange expects significant liquidity to exist in the market for Bitcoin Futures Contracts, based on numerous conversations with market participants, issuers, and discussions with personnel of CFE, see *supra* notes

F. Basis for Disapproval

The record before the Commission does not provide a basis for the Commission to conclude that the Exchange has met its burden under the Exchange Act and the Commission's Rules of Practice to demonstrate that its proposed rule change is consistent with Exchange Act Section 6(b)(5).¹²⁷

IV. Conclusion

For the reasons set forth above, the Commission does not find, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) of the Exchange Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act, that proposed rule change SR–CboeBZX–2018–001 is disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²⁸

Brent J. Fields,

Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–83908; File No. SR–CboeBZX–2018–064]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Certain Representations Relating to the Listing and Trading of Shares of the Innovator S&P 500 Buffer ETFs

August 22, 2018.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b–4 thereunder,² notice is hereby given that on August 16, 2018, Cboe BZX Exchange, Inc. (the "Exchange" or "BZX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II

23 & 82 and accompanying text, the elimination of this representation would not alter the Commission's conclusion that the Exchange has not met its burden to demonstrate that CFE and CME are markets "of significant size."

¹²⁷ In disapproving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹²⁸ 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend certain representations made in a proposed rule change previously filed with the Commission pursuant to Rule 19b-4 relating to the Innovator S&P 500 Buffer ETFs (the "Buffer Funds").

The text of the proposed rule change is available at the Exchange's website at www.markets.cboe.com, at the principal office of the Exchange, 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 IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The shares of the Buffer Funds (the "Shares") were approved to be listed and traded on the Exchange under Rule 14.11(i),³ which governs the listing and trading of Managed Fund Shares, but have not yet begun trading. The Buffer Funds are each a series of the Innovator ETFs Trust (the "Trust"), which is organized as a Delaware statutory trust and is registered with the Commission as an open-end management investment company.⁴

In this proposed rule change, the Exchange proposes to amend several representations made in the Prior

Approval related to the investment strategy, as described below.⁵ Throughout the description of the Buffer Funds' investment strategy in the Prior Approval, there are representations such as "(each Buffer Fund will) seek to provide investment returns during the outcome period that match the gains of the S&P 500 Index up to the Buffer Cap Level, while shielding investors from S&P 500 Index losses of up to 10%." The Exchange is proposing to amend all such representations related to the Buffer Funds such that the Buffer Funds will provide investment returns during the outcome period that match the gains of the S&P 500 Index up to the Buffer Cap Level, while shielding investors from S&P 500 Index losses of up to 9% instead of the previously stated 10%.

The Exchange does not believe that this proposed change raises any substantive issues for the Commission because it represents only a small change to the investment strategy and all other statements and representations made in the Prior Approval regarding the description of the portfolio or reference assets, limitations on portfolio holdings or reference assets, dissemination and availability of reference assets and intraday indicative values, and the applicability of Exchange listing rules specified in the Prior Approval remain true and shall continue to constitute continued listing requirements for the Buffer Funds. Additionally, the change proposed above will constitute a continued listing requirement for the Buffer Funds.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act⁶ in general and Section 6(b)(5) of the Act⁷ 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, in general, to protect investors and the public interest. Specifically, the Exchange believes that the proposal 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, in general, to protect investors and the public interest.

As described above, all of the representations from the Prior Approval which formed the basis for the Prior Approval remain true and will continue to constitute continued listing requirements for the Buffer Funds with the exception of the one point (changing the downside protection from 10% to 9%) that the Exchange is proposing to amend. This proposed change will not make any changes to the types of instruments that the Buffer Funds can hold, but will only make a small change to the investment strategy. As such, the Exchange believes that the proposal does not raise any substantive issues that were not previously addressed in the Prior Approval.

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. The Exchange believes that the proposal to allow the Buffer Funds to amend their investment strategy will enhance competition among both market participants and listing venues by allowing additional series of Managed Fund Shares to come to list on the Exchange, to the benefit of investors and the marketplace.

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. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act⁸ and subparagraph (f)(6) of Rule 19b-4 thereunder.⁹

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the

⁸ 15 U.S.C. 78s(b)(3)(A).

⁹ 17 CFR 240.19b-4(f)(6). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

³ See Securities Exchange Act Release No. 83679 (July 20, 2018), 83 FR 35505 (July 26, 2018) (SR-BatsBZX-2017-72) (the "Prior Approval").

⁴ See Registration Statement on Form N-1A for the Trust, dated August 8, 2018 (File Nos. 333-146827 and 811-22135) (the "Registration Statement"). The Commission has issued an order granting certain exemptive relief to the Trust under the Investment Company Act of 1940 (15 U.S.C. 80a-1) ("1940 Act") (the "Exemptive Order"). See Investment Company Act Release No. 32854 (October 6, 2017) (File No. 812-14781).

⁵ The Exchange notes that while a change was made to the principal investment strategy, there were no changes to the Buffer Funds' investment objective, the method or methods used to select the Buffer Funds' portfolio investments, or the Buffer Funds' fees and expenses.

⁶ 15 U.S.C. 78f.

⁷ 15 U.S.C. 78f(b)(5).

Act¹⁰ normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)¹¹ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The Exchange states that waiver of the 30-day operative delay would allow the Buffer Funds to immediately begin listing and trading on the Exchange and employ its amended investment strategy. The Commission does not believe that any new or novel issues are raised by the proposal. Moreover, as noted above, apart from modifying the downside protection from 10% to 9%, all other statements and representations made in the Prior Approval would remain true and will apply on a continuous basis. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.¹²

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether 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

- Send an email to rule-comments@sec.gov. Please include File Number SR-CboeBZX-2018-064 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-2018-064. 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 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-2018-064, and should be submitted on or before September 18, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Eduardo A. Aleman,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-83904; File No. SR-NYSEArca-2017-139]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Disapproving a Proposed Rule Change To List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF

August 22, 2018.

I. Introduction

On December 4, 2017, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade the shares ("Shares") of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF (each a "Fund" and, collectively, the "Funds") issued by the ProShares Trust II ("Trust") under NYSE Arca Rule 8.200-E, Commentary .02. The proposed rule change was published for comment in the **Federal Register** on December 26, 2017.³ The comment period for the Notice of Proposed Rule Change closed on January 16, 2018.

On January 30, 2018, pursuant to Section 19(b)(2) of the Exchange 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 approve or disapprove the proposed rule change.⁵ On March 23, 2018, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act⁶ to determine whether to approve or disapprove the proposed rule change.⁷ The comment period and rebuttal comment period for the Order Instituting Proceedings closed on April 19, 2018, and May 3, 2018, respectively. Finally, on June 15, 2018, the Commission extended the period for consideration of the proposed rule change to August 23, 2018.⁸ As of

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 82350 (Dec. 19, 2017), 82 FR 61100 (Dec. 26, 2017) ("Notice").

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 82602 (Jan. 30, 2018), 83 FR 4941 (Feb. 2, 2018).

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 82939 (Mar. 23, 2018), 83 FR 13537 (Mar. 29, 2018) ("Order Instituting Proceedings").

⁸ See Securities Exchange Act Release No. 83452 (June 15, 2018), 83 FR 28894 (June 21, 2018).

¹⁰ 17 CFR 240.19b-4(f)(6).

¹¹ 17 CFR 240.19b-4(f)(6)(iii).

¹² For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹³ 17 CFR 200.30-3(a)(12).