

proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) (iii) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>13</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>14</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay to ensure that NASDAQ OMX is able to implement the rule changes.

The Commission finds that waiver of the operative delay is consistent with the protection of investors and the public interest. The Commission notes in waiving the 30-day operative delay that the Commission published for comment in the **Federal Register** the initial filing to amend NASDAQ OMX's By-Laws, did not receive any comments,<sup>15</sup> and subsequently approved the proposed rule change.<sup>16</sup> Further, the Commission notes that the Exchange's proposal is identical to the proposed rule change previously approved by the Commission.<sup>17</sup> Accordingly, the Commission finds that it is consistent with investor protection and the public interest to waive the 30-day operative delay in accordance with 19b-4(f)(6)(iii) so that NASDAQ OMX's By-Laws can be effective without undue delay, and therefore designates the proposal operative upon filing.<sup>18</sup>

At any time within 60 days of the filing of such 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.

#### IV. Solicitation of Comments

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

<sup>13</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission 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 filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

<sup>14</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>15</sup> See *supra* note 6.

<sup>16</sup> See *supra* note 3.

<sup>17</sup> *Id.*

<sup>18</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BX-2011-022 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-BX-2011-022. 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 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 a.m. and 3 p.m. Copies of such 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 No. SR-BX-2011-022 and should be submitted on or before May 24, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

**Cathy H. Ahn,**

*Deputy Secretary.*

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<sup>19</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64357; File No. SR-NYSEArca-2011-18]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To List and Trade the Meidell Tactical Advantage ETF

April 28, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 15, 2011, NYSE Arca, Inc. ("Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II 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 proposes to list and trade the following under NYSE Arca Equities Rule 8.600 ("Managed Fund Shares"): The Meidell Tactical Advantage ETF. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and <http://www.nyse.com>.

#### 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 self-regulatory organization 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 those 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 Exchange proposes to list and trade the following Managed Fund Shares<sup>3</sup> ("Shares") under NYSE Arca

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> A Managed Fund Share is a security that represents an interest in an investment company

Equities Rule 8.600: The Meidell Tactical Advantage ETF (“Fund”).<sup>4</sup> The Shares will be offered by AdvisorShares Trust (“Trust”), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.<sup>5</sup> The investment adviser to the Fund is AdvisorShares Investments, LLC (“Adviser”). American Wealth Management is the Fund’s sub-adviser (“Sub-Adviser”) and provides day-to-day portfolio management of the Fund. Foreside Fund Services, LLC (“Distributor”) is the principal underwriter and distributor of the Fund’s Shares.

Commentary .06 to Rule 8.600 provides that, if the investment adviser to the Investment Company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect 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 investment

registered under the Investment Company Act of 1940 (15 U.S.C. 80a) (“1940 Act”) organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index, or combination thereof.

<sup>4</sup> The Commission approved NYSE Arca Equities Rule 8.600 and the listing and trading of certain funds of the PowerShares Actively Managed Exchange-Traded Funds Trust on the Exchange pursuant to Rule 8.600 in Securities Exchange Act Release No. 57619 (April 4, 2008) 73 FR 19544 (April 10, 2008) (SR-NYSEArca-2008-25). The Commission also has approved listing and trading on the Exchange of a number of actively managed funds under Rule 8.600. *See, e.g.*, Securities Exchange Act Release Nos. 57801 (May 8, 2008), 73 FR 27878 (May 14, 2008) (SR-NYSEArca-2008-31) (order approving Exchange listing and trading of twelve actively-managed funds of the WisdomTree Trust); 60460 (August 7, 2009), 74 FR 41468 (August 17, 2009) (SR-NYSEArca-2009-55) (order approving listing of Dent Tactical ETF); 63076 (October 12, 2010), 75 FR 63874 (October 18, 2010) (SR-NYSEArca-2010-79) (order approving Exchange listing and trading of Cambria Global Tactical ETF); 63802 (January 31, 2011), 76 FR 6503 (February 4, 2011) (SR-NYSEArca-2010-118) (order approving Exchange listing and trading of the SiM Dynamic Allocation Diversified Income ETF and SiM Dynamic Allocation Growth Income ETF).

<sup>5</sup> The Trust is registered under the 1940 Act. On March 15, 2011, the Trust filed with the Commission Post-Effective Amendment No. 20 to Form N-1A under the Securities Act of 1933 (15 U.S.C. 77a) and under the 1940 Act relating to the Fund (File Nos. 333-157876 and 811-22110) (“Registration Statement”). The description of the operation of the Trust and the Fund herein is based on the Registration Statement.

Company portfolio.<sup>6</sup> In addition, Commentary .06 further requires that personnel who make decisions on the open-end fund’s portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the open-end fund’s portfolio. Commentary .06 to Rule 8.600 is similar to Commentary .03(a)(i) and (iii) to NYSE Arca Equities Rule 5.2(j)(3); however, Commentary .06 in connection with the establishment of a “fire wall” between the investment adviser and the broker-dealer reflects the applicable open-end fund’s portfolio, not an underlying benchmark index, as is the case with index-based funds. Neither the Adviser nor the Sub-Adviser is affiliated with a broker-dealer. In the event (a) the Adviser or the Sub-Adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes affiliated with a broker-dealer, they will be required to implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to a portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

#### Description of the Fund

According to the Registration Statement, the Fund’s investment objective is to seek to provide long-term capital appreciation with a secondary emphasis on capital preservation. The Fund is an actively managed exchange-traded fund (“ETF”) and thus does not seek to replicate the performance of a specified index. The Fund is considered

<sup>6</sup> An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (“Advisers Act”). As a result, the Adviser and Sub-Adviser and their related personnel are subject to the provisions of Rule 204A-1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A-1 under the Advisers Act. In addition, Rule 206(4)-7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

a “fund-of-funds” that seeks to achieve its investment objective by primarily investing in other ETFs that offer diversified exposure to global regions, countries, styles (market capitalization, value, growth, etc.) or sectors, and other exchange-traded products (“ETPs,” and, together with ETFs, “Underlying ETPs”),<sup>7</sup> including but not limited to exchange-traded notes (“ETNs”),<sup>8</sup> exchange-traded currency trusts, and closed-end funds.<sup>9</sup> The Fund will primarily invest in U.S.-listed domestic and foreign equity-based, fixed income-based, currency-based, and commodity-based Underlying ETPs.

The Sub-Adviser will seek to achieve the Fund’s investment objective by managing a tactical strategy that has the ability to dynamically rebalance the Fund’s portfolio from as much as 100% equity-based assets to 100% fixed income-based assets or cash and cash equivalents depending on market trends. This is a long-only tactical strategy that seeks to minimize portfolio losses by rotating out of higher volatility assets and into lower volatility assets when the Sub-Adviser believes there are significant risks in the equity markets. Risk management is an integral part of the Sub-Adviser’s investment strategy. The Fund will not invest in leveraged, inverse, or inverse leveraged Underlying ETPs.

The Sub-Adviser uses a quantitative tactical methodology to identify the Underlying ETPs believed to be participating in long-term “durable trends” within the market. This model enables the Sub-Adviser to evaluate, rank, and select the appropriate mix of investments in Underlying ETPs given market conditions.

The Sub-Adviser’s investment philosophy emphasizes investments in broad market indexes and market sector indexes. In general, the Fund will

<sup>7</sup> Underlying ETPs include Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)); Index-Linked Securities (as described in NYSE Arca Equities Rule 5.2(j)(6)); Portfolio Depositary Receipts (as described in NYSE Arca Equities Rule 8.100); Trust Issued Receipts (as described in NYSE Arca Equities Rule 8.200); Commodity-Based Trust Shares (as described in NYSE Arca Equities Rule 8.201); Currency Trust Shares (as described in NYSE Arca Equities Rule 8.202); Commodity Index Trust Shares (as described in NYSE Arca Equities Rule 8.203); Trust Units (as described in NYSE Arca Equities Rule 8.500); Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600); and closed-end funds.

<sup>8</sup> ETNs are debt obligations of investment banks that are traded on exchanges and the returns of which are linked to the performance of market indexes.

<sup>9</sup> The Fund, through its investment in Underlying ETPs, may invest in closed-end funds, pooled investment vehicles that are registered under the 1940 Act and whose shares are listed and traded on U.S. national securities exchanges.

purchase or increase its exposure to Underlying ETPs that track equity markets or market sectors when the Sub-Adviser's quantitative tactical asset allocation model and risk analysis indicates that the applicable market or sector is at low risk of losing value or presents opportunity for growth and appreciation. The Fund will generally sell interests in, or reduce investment exposure to, Underlying ETPs tracking equity markets or market sectors in favor of fixed income-based Underlying ETPs or cash positions when the Sub-Adviser's quantitative tactical asset allocation model and risk analysis indicates that such markets have become, or are becoming, risky.

The Sub-Adviser uses a quantitative metric to rank and select the appropriate mix of investments given prevailing market conditions. The Sub-Adviser's quantitative tactical asset allocation model determines asset allocation between bonds and stocks, equity selection, sector concentration, as well as limiting portfolio drawdown. The general guidelines for the Fund's portfolio are as follows:

**ASSETS HELD BY UNDERLYING ETPS**

Equity-Based .....	0%–100%
Fixed Income-Based/Cash .....	0%–100%

Depending on the economic and market climate, the portfolio may increase or decrease portfolio concentrations within the ranges shown below.

Foreign Equity .....	0%–50%
Large Cap Equity .....	0%–50%
Mid Cap Equity .....	0%–30%
Small Cap Equity .....	0%–30%
Commodities .....	0%–20%
Currencies .....	0%–10%

The Fund's portfolio may temporarily exceed these percentage ranges for short periods without notice, and the Sub-Adviser may alter the percentage ranges when it deems appropriate.

Additional quantitative tools are used to evaluate the probability of investment success within the equity market. These tools allow the Sub-Adviser to get into or out of equity positions, and include but are not limited to:

- Interest rate spreads.
- Options activity.
- Market breadth.
- Equity index trends.

The Fund intends to invest primarily in the securities of Underlying ETPs consistent with the requirements of Section 12(d)(1) of the 1940 Act, or any rule, regulation, or order of the Commission or interpretation thereof.

The Fund will only make such investments in conformity with the requirements of Section 817 of the Internal Revenue Code of 1986, as amended ("Code").<sup>10</sup>

The Fund, through its investment in Underlying ETPs, may invest in equity securities. Equity securities represent ownership interests in a company or partnership and consist of common stocks, preferred stocks, warrants to acquire common stock, securities convertible into common stock, investments in master limited partnerships securities traded in the U.S. on registered exchanges or the over-the-counter market, rights, and Depositary Receipts.<sup>11</sup>

The Fund, through its investments in Underlying ETPs, may invest in the equity securities of foreign issuers, including the securities of foreign issuers in emerging market countries. Emerging or developing markets exist in countries that are considered to be in the initial stages of industrialization.

The Fund, through its investment in Underlying ETPs, may invest in debt securities. A debt security is a security consisting of a certificate or other evidence of a debt (secured or unsecured) on which the issuing company or governmental body promises to pay the holder thereof a fixed, variable, or floating rate of interest for a specified length of time, and to repay the debt on the specified maturity date. Some debt securities, such as zero coupon bonds, do not make regular interest payments, but are issued at a discount to their principal or maturity value. Debt securities include a variety of fixed income obligations, including, but not limited to, corporate debt securities, government securities, municipal securities, convertible securities, and mortgage-backed securities. Debt securities include investment-grade securities, non-investment-grade securities, and unrated securities. Debt securities are subject to a variety of risks, such as interest rate risk, income risk, call/prepayment risk, inflation risk, credit risk, and currency risk.

<sup>10</sup> 26 CFR 1.817-5.

<sup>11</sup> American Depositary Receipts ("ADRs"), as well as Global Depositary Receipts ("GDRs"), are certificates evidencing ownership of shares of a foreign issuer. Depositary Receipts may be sponsored or unsponsored. These certificates are issued by depositary banks and generally trade on an established market in the United States or elsewhere. The underlying shares are held in trust by a custodian bank or similar financial institution in the issuer's home country. The depositary bank may not have physical custody of the underlying securities at all times and may charge fees for various services, including forwarding dividends and interest and corporate actions.

The Fund, or the Underlying ETPs in which it invests, may invest in U.S. government securities, U.S. Treasury zero-coupon bonds, and real estate investment trusts.

**Other Investments**

To respond to adverse market, economic, political, or other conditions, the Fund may invest 100% of its total assets, without limitation, in high-quality debt securities and money market instruments either directly or through Underlying ETPs. The Fund may be invested in these instruments for extended periods, depending on the Sub-Adviser's assessment of market conditions. These debt securities and money market instruments include shares of other mutual funds, commercial paper, certificates of deposit, bankers' acceptances, U.S. Government securities, repurchase and reverse repurchase agreements,<sup>12</sup> and bonds that are BBB or higher.

The Fund may not (i) with respect to 75% of its total assets, purchase securities of any issuer (except securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities, or shares of investment companies) if, as a result, more than 5% of its total assets would be invested in the securities of such issuer, or (ii) acquire more than 10% of the outstanding voting securities of any one issuer. For purposes of this policy, the issuer of the underlying security will be deemed to be the issuer of any respective Depositary Receipt.<sup>13</sup>

The Fund may not invest 25% or more of its total assets in the securities of one or more issuers conducting their principal business activities in the same industry or group of industries. This limitation does not apply to investments in securities issued or guaranteed by the U.S. Government, its agencies or

<sup>12</sup> The Fund may enter into repurchase agreements with financial institutions, which may be deemed to be loans. The Fund follows certain procedures designed to minimize the risks inherent in such agreements. These procedures include effecting repurchase transactions only with large, well-capitalized and well-established financial institutions whose condition will be continually monitored by the Sub-Adviser. In addition, the value of the collateral underlying the repurchase agreement will always be at least equal to the repurchase price, including any accrued interest earned on the repurchase agreement. In the event of a default or bankruptcy by a selling financial institution, the Fund will seek to liquidate such collateral. In addition, the Fund may enter into reverse repurchase agreements without limit as part of the Fund's investment strategy. Reverse repurchase agreements involve sales by the Fund of portfolio assets concurrently with an agreement by the Fund to repurchase the same assets at a later date at a fixed price.

<sup>13</sup> The diversification standard is set forth in Section 5(b)(1) of the 1940 Act.

instrumentalities, or shares of investment companies. The Fund will not invest 25% or more of its total assets in any investment company that so concentrates. For purposes of this policy, the issuer of the underlying security will be deemed to be the issuer of any respective ADRs or GDRs.<sup>14</sup>

The Fund may not purchase illiquid securities.<sup>15</sup>

Except for Underlying ETPs that may hold non-U.S. issues, the Fund will not otherwise invest in non-U.S. issues.

According to the Registration Statement, the Fund will seek to qualify for treatment as a Regulated Investment Company ("RIC") pursuant to Subchapter M under the Code.<sup>16</sup>

The Fund calculates net asset value ("NAV") by: (i) Taking the current market value of its total assets; (ii) subtracting any liabilities; and (iii) dividing that amount by the total

number of Shares owned by shareholders. The NAV of the Fund will normally be determined as of the close of the regular trading session on the New York Stock Exchange ("NYSE") (ordinarily 4:00 p.m. Eastern Time) on each business day. In calculating NAV, the Fund generally values investment portfolios at market price. If market prices are unavailable or are unreliable, or when the value of a security has been materially affected by events occurring after the relevant market closes, the Fund will price those securities at fair value as determined in good faith using methods approved by the Fund's Board of Trustees.

Creations and redemptions of Shares occur in large specified blocks of Shares, referred to as "Creation Units." According to the Registration Statement, the Shares of the Fund are "created" at their NAV by Authorized Participants only in block-size Creation Units of 25,000 Shares or more. An Authorized Participant enters into an agreement ("Participant Agreement") with the Fund's Distributor or a Depository Trust Company participant that has executed a Participant Agreement with the Distributor, and deposits into the Fund a portfolio of securities closely approximating the holdings of the Fund and a specified amount of cash, together totaling the NAV of the Creation Unit(s), in exchange for 25,000 Shares of the Fund (or multiples thereof). Similarly, Shares can only be redeemed in Creation Units, generally 25,000 Shares or more, principally in-kind for a portfolio of securities held by the Fund and a specified amount of cash together totaling the NAV of the Creation Unit(s). Shares are not redeemable from the Fund except when aggregated in Creation Units. The prices at which creations and redemptions occur are based on the next calculation of NAV after an order is received in a form prescribed in the Participant Agreement.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600. The Exchange represents that, for initial and/or continued listing, the Fund will be in compliance with Rule 10A-3 under the Exchange Act,<sup>17</sup> as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio

will be made available to all market participants at the same time.

#### Availability of Information

The Fund's Web site (<http://www.advisorshares.com>), which will be publicly available prior to the public offering of Shares, will include a form of the Prospectus for the Fund that may be downloaded. The Fund's Web site will include additional quantitative information updated on a daily basis, including, for the Fund, (1) daily trading volume, the prior business day's reported closing price, NAV and midpoint of the bid/ask spread at the time of calculation of such NAV ("Bid/Ask Price"),<sup>18</sup> and a calculation of the premium and discount of the Bid/Ask Price against the NAV, and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio, as defined in NYSE Arca Equities Rule 8.600(c)(2), that will form the basis for the Fund's calculation of NAV at the end of the business day.<sup>19</sup>

On a daily basis, the Adviser will disclose for each portfolio security or other financial instrument of the Fund the following information: Ticker symbol (if applicable); name of security or financial instrument; number of Shares or dollar value of financial instruments held in the portfolio; and percentage weighting of the security or financial instrument in the portfolio. The Web site information will be publicly available at no charge.

In addition, a basket composition file, which includes the security names and share quantities required to be delivered in exchange for Fund Shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the NYSE via the National Securities Clearing Corporation. The basket represents one Creation Unit of the Fund.

<sup>18</sup> The Bid/Ask Price of the Fund is determined using the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

<sup>19</sup> Under accounting procedures followed by the Fund, trades made on the prior business day ("T") will be booked and reflected in NAV on the current business day ("T+1"). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

<sup>14</sup> See Form N-1A, Item 9. The Commission has taken the position that a fund is concentrated if it invests more than 25% of the value of its total assets in any one industry. See, e.g., Investment Company Act Release No. 9011 (October 30, 1975), 40 FR 54241 (November 21, 1975).

<sup>15</sup> The Commission has stated that long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. See Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14617 (March 18, 2008), footnote 34. See also, Investment Company Act Release No. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding "Restricted Securities"); Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N-1A). A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the ETF. See Investment Company Act Release No. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a-7 under the 1940 Act); Investment Company Act Release No. 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the Securities Act of 1933).

<sup>16</sup> 26 U.S.C. 851. One of several requirements for RIC qualification is that the Fund must receive at least 90% of the Fund's gross income each year from dividends, interest, payments with respect to securities loans, gains from the sale or other disposition of stock, securities or foreign currencies, or other income derived with respect to the Fund's investments in stock, securities, foreign currencies and net income from an interest in a qualified publicly traded partnership ("90% Test"). A second requirement for qualification as a RIC is that the Fund must diversify its holdings so that, at the end of each fiscal quarter of the Fund's taxable year: (a) At least 50% of the market value of the Fund's total assets is represented by cash and cash items, U.S. Government securities, securities of other RICs, and other securities, with these other securities limited, in respect to any one issuer, to an amount not greater than 5% of the value of the Fund's total assets or 10% of the outstanding voting securities of such issuer; and (b) not more than 25% of the value of its total assets are invested in the securities (other than U.S. Government securities or securities of other RICs) of any one issuer or two or more issuers which the Fund controls and which are engaged in the same, similar, or related trades or businesses, or the securities of one or more qualified publicly traded partnership ("Asset Test").

<sup>17</sup> 17 CFR 240.10A-3.

Investors can also obtain the Trust's Statement of Additional Information ("SAI"), the Fund's Shareholder Reports, and its Form N-CSR and Form N-SAR, filed twice a year. The Trust's SAI and Shareholder Reports are available free upon request from the Trust, and those documents and the Form N-CSR and Form N-SAR may be viewed on-screen or downloaded from the Commission's Web site at <http://www.sec.gov>.

Information regarding market price and trading volume of the Shares is and will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association ("CTA") high-speed line, and, for the Underlying ETPs, will be available from the national securities exchange on which they are listed. In addition, the Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be disseminated by the Exchange at least every 15 seconds during the Core Trading Session by one or more major market data vendors. The dissemination of the Portfolio Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and will provide a close estimate of that value throughout the trading day.

Additional information regarding the Trust and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions, and taxes is included in the Registration Statement. All terms relating to the Fund that are referred to, but not defined in, this proposed rule change are defined in the Registration Statement.

#### Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.<sup>20</sup> Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of 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 trading

is not occurring in the securities and/or the financial instruments comprising the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted.

#### Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. Eastern Time in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Equities Rule 7.6, Commentary .03, the minimum price variation ("MPV") for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is \$0.01, with the exception of securities that are priced less than \$1.00 for which the MPV for order entry is \$0.0001.

#### Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which include Managed Fund Shares) to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable Federal securities laws.

The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange may obtain information via the Intermarket Surveillance Group ("ISG") from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement.<sup>21</sup> In addition, the Exchange

could obtain information from the U.S. exchanges on which the Underlying ETPs are listed and traded.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

#### Information Bulletin

Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit ("ETP") Holders in an Information Bulletin ("Bulletin") of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (4) how information regarding the Portfolio Indicative Value is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Exchange Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m. Eastern Time each trading day.

#### 2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(5)<sup>22</sup> that an exchange have rules that are 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.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will

Underlying ETPs are listed on national securities exchanges, all of which are members of ISG.

<sup>22</sup> 15 U.S.C. 78f(b)(5).

<sup>20</sup> See NYSE Arca Equities Rule 7.12, Commentary .04.

<sup>21</sup> For a list of the current members of ISG, see <http://www.isgportal.org>. The Exchange notes that not all components of the Disclosed Portfolio for the Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. All

be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 8.600. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable Federal securities laws. The Exchange may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. All Underlying ETPs will be listed on national securities exchanges, all of which are members of ISG, and the listing and trading of such securities is subject to rules of the exchanges on which they are listed and traded, as approved by the Commission. The Fund will not invest in leveraged, inverse, or inverse leveraged Underlying ETPs. The Fund may not purchase illiquid securities. Except for Underlying ETPs that may hold non-U.S. issues, the Fund will not otherwise invest in non-U.S. issues.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. In addition, a large amount of information is publicly available regarding the Fund and the Shares, thereby promoting market transparency. Quotation and last-sale information for the Shares will be available via the CTA high-speed line and, for the Underlying ETPs, will be available from the national securities exchange on which they are listed. In addition, the Portfolio Indicative Value will be disseminated by the Exchange at least every 15 seconds during the Core Trading Session. The Fund's Web site will include a form of the Prospectus for the Fund that may be downloaded, as well as additional quantitative information updated on a daily basis. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio that will form the basis for the Fund's calculation of NAV at the end of the business day. On a daily basis, the Adviser will disclose for each portfolio security or other financial instrument of the Fund the following information: Ticker symbol (if applicable); name of security or financial instrument; number

of Shares or dollar value of financial instruments held in the portfolio; and percentage weighting of the security or financial instrument in the portfolio. The Web site for the Fund will include a form of the Prospectus for the Fund and additional data relating to NAV and other applicable quantitative information. Moreover, prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last-sale information for the Shares.

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 additional types of actively-managed exchange-traded products that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last-sale information for the Shares.

#### *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 purposes of the Act.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission shall:

(A) By order approve or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be 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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2011-18 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2011-18. 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 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 a.m. and 3 p.m. Copies of the filing will also 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 No. SR-NYSEArca-2011-18 and should be submitted on or before May 24, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011-10717 Filed 5-2-11; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64353; File No. SR-FINRA-2011-020]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to FINRA's Trading Activity Fee Rate for Transactions in Covered Equity Securities

April 27, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 26, 2011, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. 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

FINRA is proposing to amend Section 1 of Schedule A to the FINRA By-Laws

to adjust the rate of FINRA's Trading Activity Fee ("TAF") for transactions in covered equity securities.

The text of the proposed rule change is available on FINRA's Web site at <http://www.finra.org>, at the principal office of FINRA, 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, FINRA 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. FINRA 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 Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

FINRA's primary member regulatory pricing structure consists of the following fees: The Personnel Assessment (PA); the Gross Income Assessment (GIA); and the Trading Activity Fee (TAF). These fees are used to fund FINRA's regulatory activities, including examinations; financial monitoring; and FINRA's policymaking, rulemaking, and enforcement activities.<sup>3</sup> Because the proceeds from these fees are used to fund FINRA's regulatory mandate, Section 1 of Schedule A to FINRA's By-Laws notes that "FINRA shall periodically review these revenues in conjunction with costs to determine the applicable rate."<sup>4</sup>

FINRA initially adopted the TAF in 2002 as a replacement for an earlier regulatory fee based on trades reported to Nasdaq's Automated Confirmation Transaction system then in place.<sup>5</sup> Currently, the TAF is generally assessed on the sale of all exchange registered securities wherever executed (except debt securities that are not TRACE-Eligible Securities), over-the-counter equity securities, security futures, TRACE-Eligible Securities (provided that the transaction is a Reportable TRACE Transaction), and all municipal securities subject to Municipal Securities Rulemaking Board ("MSRB") reporting requirements. The rules

governing the TAF also include a list of transactions exempt from the TAF.<sup>6</sup>

The current TAF rates are \$0.000075 per share for each sale of a covered equity security, with a maximum charge of \$3.75 per trade; \$0.002 per contract for each sale of an option; \$0.04 per contract for each round turn transaction of a security future; and \$0.00075 per bond for each sale of a covered TRACE-Eligible Security and/or municipal security, with a maximum charge of \$0.75 per trade. In addition, if the execution price for a covered security is less than the TAF rate on a per share, per contract, or round turn transaction basis, then no TAF is assessed.

The current TAF rate for covered equity securities of \$0.000075 per share has been in place for over six years.<sup>7</sup> Over that time period, FINRA has proposed the restructuring of both the GIA and the PA. For example, effective January 1, 2010, the GIA and PA were restructured to stabilize cash flows by shifting a greater portion of the regulatory fees from the GIA, which is based on industry revenue, to the PA, which is based on the more constant figure of registered persons, while seeking to remain revenue neutral to FINRA.<sup>8</sup>

As FINRA noted when it restructured the GIA and the PA, because the GIA is assessed based on a member's annual gross revenue for the preceding calendar year, FINRA's revenues derived from the GIA are subject to the year-to-year volatility of members' revenues. A similar unpredictability of revenue flows exists with the TAF. The TAF generally is assessed on sales of securities by members and is collected from clearing firms on a monthly basis. Although the TAF is generally charged on transactions in equity securities, TRACE-reportable securities, options, and futures, over 95% of TAF revenue is generated by transactions in covered equity securities. Thus, FINRA's revenue from the TAF is substantially affected by changes in trading volume in the equities markets. Because of the substantial decrease in average daily share volumes (ADSV) since 2009, FINRA has seen a commensurate substantial decline in revenue from the TAF.

To stabilize revenue flows necessary to support FINRA's regulatory mission, FINRA is proposing an increase to the

<sup>6</sup> See FINRA By-Laws, Schedule A, § 1(b)(2).

<sup>7</sup> See Securities Exchange Act Release No. 50485 (October 1, 2004), 69 FR 60445 (October 8, 2004); NASD Notice to Members 04-84 (November 2004).

<sup>8</sup> See Securities Exchange Act Release No. 61042 (November 20, 2009), 74 FR 62616 (November 30, 2009); see also Regulatory Notice 09-68 (November 2009).

<sup>23</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See FINRA By-Laws, Schedule A, § 1(a).

<sup>4</sup> *Id.*

<sup>5</sup> See Securities Exchange Act Release No. 46416 (August 23, 2002), 67 FR 55901 (August 30, 2002).