are satisfied. The Commission believes that the Exchange's view is not unreasonable. In approving the proposed rule change, the Commission notes that in any instance in which a listed company relies on the Exception, the company's board would continue to be required under the proposal to affirmatively determine that the director does not have any relationship which, in the opinion of the board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.[22]

The Commission further notes that a listed company is permitted to use the Exception only if its board, under exceptional and limited circumstances, determines that membership on the committee by the individual is required by the best interests of the company and its shareholders. Moreover, the Commission notes that any time an issuer relies on the Exception, it is required to make the public disclosures indicated above.

Finally, the Commission believes that replacing the undefined term ''officer'' with the defined term ''Executive Officer,'' in keeping with the Exchange's longstanding interpretation of its listing rules, clarifies the applicability of the listing rules.

For the reasons discussed above, the Commission finds that the rule change is consistent with the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[23] that the proposed rule change (SR–NASDAQ–2012–062), be, and it hereby is, approved.

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

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–18106 Filed 7–24–12; 8:45 am]

BILLING CODE 8011–01–P

[22] *See* Nasdaq Rule 5605(a)(2).

[23] 15 U.S.C. 78s(b)(2).

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67471; File No. SR–FINRA–2012–26]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change Relating to the Handling of Stop and Stop Limit Orders

July 19, 2012.

On May 24, 2012, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend FINRA's rules relating to the handling of stop and stop limit orders. The proposed rule change was published for comment in the **Federal Register** on June 6, 2012.[3] The Commission received four comment letters regarding the proposal.[4]

Section 19(b)(2) of the Act [5] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day from the publication of notice of filing of this proposed rule change is July 21, 2012. The Commission is extending the 45-day time period.

The Commission finds that it is appropriate to designate a longer period within which to take action on this proposed rule change. In particular, extension of time will ensure the Commission has sufficient time to consider the Exchange's proposal in light of, among other things, the comments received on the proposal. The extension of time also will allow the Commission sufficient time to consider any responses to the comments.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[6] designates September 4, 2012, as the date by which the Commission should either approve or disapprove, or institute proceedings to determine whether to disapprove, this proposed rule change.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–18108 Filed 7–24–12; 8:45 am]

BILLING CODE 8011–01–P

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 67085 (May 31, 2012), 77 FR 33537.

[4] *See* Letters to Elizabeth M. Murphy, Secretary, Commission, from Ann L. Vlcek, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated June 26, 2012; Gary J. Sjostedt, Director, Order Routing and Sales, TD Ameritrade, Inc., dated June 27, 2012; Virgil F. Liptak, dated July 3, 2012; and Christopher Nagy, President, KOR Trading LLC, dated July 9, 2012. The comment letters received by the Commission are available at *http://www.sec.gov/comments/sr-finra-2012-026/finra2012026.shtml.*

[5] 15 U.S.C. 78s(b)(2).

[6] 15 U.S.C. 78s(b)(2).

[7] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67470; File No. SR–NYSEArca–2012–28]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether To Approve or Disapprove a Proposed Rule Change to List and Trade Shares of the JPM XF Physical Copper Trust Pursuant to NYSE Arca Equities Rule 8.201

July 19, 2012.

I. Introduction

On April 2, 2012, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of JPM XF Physical Copper Trust (''Trust'') pursuant to NYSE Arca Equities Rule 8.201. The proposed rule change was published for comment in the **Federal Register** on April 20, 2012.[3] The Commission initially received one comment letter on the proposed rule change.[4] On May 30, 2012, the

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

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 66816 (April 16, 2012), 77 FR 23772 (''Notice'').

[4] *See* letter from Vandenberg & Feliu, LLP (''V&F''), received May 9, 2012 (''V&F Letter''). The V&F Letter is available at *http://www.sec.gov/comments/sr-nysearca-2012-28/nysearca201228.shtml.* In a second comment letter, V&F identified itself as a U.S. law firm that represents RK Capital LLC, an international copper merchant, and four end-users of copper: Southwire Company, Encore Wire Corporation, Luvata, and

Commission extended the time period for Commission action to July 19, 2012.[5] On June 19, 2012, NYSE Arca submitted a response to the V&F Letter.[6] On July 13, 2012, V&F submitted a second comment letter.[7] Additionally, on July 16, 2012, United States Senator Carl Levin submitted a comment letter on the proposed rule change.[8]

This order institutes proceedings under Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove the proposed rule change. The institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved, nor does it mean that the Commission will ultimately disapprove the proposed rule change. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

II. Description of the Proposal

The Exchange proposes to list and trade the Shares under NYSE Arca Equities Rule 8.201, which governs the listing and trading of commodity-based trust shares. J.P. Morgan Commodity ETF Services LLC is the sponsor of the Trust (''Sponsor'').[9] J.P. Morgan Treasury Securities Services, a division of JPMorgan Chase Bank, National Association, is the administrative agent of the Trust (''Administrative Agent''). Wilmington Trust Company is the trustee of the Trust (''Trustee''). The Henry Bath Group is the warehouse-keeper of the Trust (''Warehouse-keeper'').[10] Metal Bulletin Ltd., an independent, third-party valuation agent that is not affiliated with the Sponsor, is the valuation agent of the Trust (''Valuation Agent'').

The Trust's investment objective is for the value of the Shares to reflect, at any given time, the value of the copper owned by the Trust at that time, less the Trust's expenses and liabilities at that time. The Trust would not be actively managed and would not engage in any activities designed to obtain a profit from, or to prevent losses caused by, changes in the price of copper.

The Trust would invest in Grade A copper [11] in physical form from a source refinery that has had its brand registered with the London Metal Exchange (''LME'') (an ''Acceptable Delivery Brand'').[12] The Trust would hold only copper and would not trade in copper futures. While the Trust would store its copper in both LME-approved warehouses and non-LME-approved warehouses that are maintained by the Warehouse-keeper, none of the copper held by the Trust would be on LME warrant, and therefore would not be subject to regulation by the LME.[13] Initially, the permitted warehouse locations would be in the Netherlands (Rotterdam), Singapore (Singapore), South Korea (Busan and Gwangyang), China (Shanghai), and the United States (Baltimore, Chicago, and New Orleans). Although the Trust may hold copper in warehouses in any of these locations (or other locations that may be determined by the Sponsor from time to time), the locations at which copper actually is held would depend on (i) the warehouse locations at which authorized participants have actually delivered copper to the Trust and (ii) the warehouse locations from which copper is or has been delivered pursuant to the Trust's redemption procedures.[14]

The Administrative Agent will calculate the net asset value (''NAV'') of the Trust as promptly as practicable after 4:00 p.m. EST on each Business Day.[15] As part of this calculation, the Administrative Agent will determine the value of the trust's copper using the LME Settlement Price [16] and information provided by the Valuation Agent.[17]

NYSE Arca anticipates requiring that a minimum of 100,000 Shares be outstanding at the start of trading,[18] which represents 1,000 metric tons of copper. The Trust seeks to register

AmRod. V&F states that these companies collectively comprise about 50% of the copper fabricating capacity of the United States. *See* V&F Letter II, *infra* note 7, at 1.

[5] *See* Securities Exchange Act Release No. 67075, 77 FR 33258 (June 5, 2012).

[6] *See* letter from Janet McGinness, General Counsel, NYSE Markets, to Elizabeth Murphy, Secretary, Commission, dated June 19, 2012 (''Arca's Response''). Arca's Response is available at *http://www.sec.gov/comments/sr-nysearca-2012-28/nysearca201228.shtml.*

[7] *See* letter from Robert B. Bernstein, V&F, to Elizabeth M. Murphy, Secretary, Commission, dated July 13, 2012 (''V&F Letter II''). This letter is available at *http://www.sec.gov/comments/sr-nysearca-2012-28/nysearca201228-5.pdf.*

[8] *See* letter from U.S. Senator Carl Levin to Elizabeth M. Murphy, Secretary, Commission, dated July 16, 2012 (''Sen. Levin Letter''). The Sen. Levin Letter is available at *http://www.sec.gov/comments/sr-nysearca-2012-28/nysearca201228-6.pdf.*

[9] Additional details regarding the Trust are set forth in the Registration Statement for the Trust on Amendment No. 5 to Form S–1, filed with the Commission on July 12, 2011 (No. 333–170085) (''Registration Statement'').

[10] Each of Henry Bath & Son Limited, Henry Bath LLC, Henry Bath Singapore Pte Limited, Henry Bath Italia Sr1, and Henry Bath BV is a member of the Henry Bath Group of companies and a wholly owned subsidiary of J.P. Morgan Ventures Energy Corporation, and is an affiliate of the Sponsor. *See* Notice, *supra* note 3, 77 FR at 23773 n.10

[11] According to the Exchange, the LME trades, promotes, and maintains the standards of quality, shape, and weight of Grade A Copper, a commonly accepted standardized form of copper cathode. Grade A Copper currently must conform to the standard BS EN 1978:1998 (Cu-CATH–1), which specifies the allowed source, shape, and chemical composition of the cathode. Most copper cathodes are 99.95% to 99.99% pure copper. The chemical composition, and impurities, in the cathode depend largely on the source of the copper and whether the metal has been processed from copper sulfide ore or copper oxide ore. Copper oxide ore has a smaller number of residual chemical elements in the cathode. *See* Notice, *supra* note 3, 77 FR at 23777.

[12] Currently, there are 79 brands that are Acceptable Delivery Brands. Some refineries have more than one smelting and refining process, so a refinery may register more than one brand, reflecting, among other factors, the different chemical composition, size, origins, and bundling of the copper cathodes. The LME has the authority to deregister brands from the LME from time to time. Generally, copper that is not of an Acceptable Delivery Brand is worth less than copper that is of an Acceptable Delivery Brand because of the perceived lower liquidity associated with that brand of metal. *See* Notice, *supra* note 3, 77 FR at 23777–78.

[13] *See* Notice, *supra* note 3, 77 FR at 23778.

[14] Similar to other exchange traded products that hold physical metals, the Sponsor, the Trust, and persons or entities engaging in transactions in Shares would need to seek exemptions from, or interpretative or no-action advice, regarding Rules 101 and 102 of Regulation M under the Securities Exchange Act of 1934 in order to create or redeem Shares. *See, e.g.,* letters from James A. Brigagliano, Assistant Director, Division of Market Regulation, (i) to Kathleen Moriarty, Esq., Carter Ledyard & Milburn, dated November 17, 2004, with respect to the trading of StreetTRACKS Gold Trust, (ii) to David Yeres, dated January 27, 2005, with respect to the trading of the iShares COMEX Gold Trust, and (iii) to David Yeres, dated April 27, 2006, with respect to the trading of iShares Silver Trust.

[15] A Business Day is a day that the Exchange is open for regular trading and that is not a holiday in London, England. *See* Notice, *supra* note 3, 77 FR at 23775, n.18.

[16] The ''LME Settlement Price'' is, with respect to any Business Day, the official cash sellers price per metric ton of Grade A Copper on the LME, stated in U.S. dollars, as determined by the LME at the end of the morning's second ring session (12:35 p.m. London time) for copper on each day that the LME is open for trading. The LME Settlement Price is made publicly available in real-time through third-party vendors such as Bloomberg and Reuters (on Bloomberg, it is currently displayed on Bloomberg page ''LOCADY <comdty>''). It is also made publicly available on a delayed basis on the LME's Web site at approximately 10:00 p.m. London time. *See* Notice, *supra* note 3, 77 FR at 23775 n.17.

[17] The value of copper depends in part on its location, *i.e.,* copper stored in a location that is low in supply and high in demand carries a higher premium than copper that is stored in a location where supply is high and demand is low. To assist in valuing the Trust's copper, by 9:00 a.m. EST, the Valuation Agent will provide the Administrative Agent the locational premia for the locations at which the trust is permitted to hold copper. The locational premium for a warehouse location for a Business Day will be calculated as an amount expressed in U.S. dollars that is equal to the average value of copper per metric ton in such location minus the LME Settlement Price of copper on such Business Day. *See* Notice, *supra* note 3, 77 FR at 23779.

[18] *See* Notice, *supra* note 3, 77 FR at 23786.

6,180,000 Shares,[19] which represents 61,800 metric tons of copper.

The Exchange states that it intends to utilize its existing surveillance procedures applicable to derivative products (including commodity-based trust shares) to monitor trading in the Shares, and represents that such 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.[20] In discussing its ability to obtain information relevant to trading of the Shares on its facilities, the Exchange states that it is able to obtain information: (1) regarding trading in physical copper, the Shares, and other copper derivatives by ETP Holders registered as Exchange market makers, pursuant to NYSE Arca Equities Rule 8.201(g); (2) from the LME, with which the Exchange has a comprehensive surveillance sharing agreement; and (3) via the Intermarket Surveillance Group (''ISG'') from other exchanges who are members of the ISG, such as Commodity Exchange, Inc. (''COMEX'').

The Notice and in the Registration Statement include additional information about: the Trust; the Shares; the Trust's investment objectives, strategies, policies, and restrictions; fees and expenses; creation and redemption of Shares; the physical copper market; availability of information; trading rules and halts; and surveillance procedures.[21]

III. Summary of the Comments Received and the Exchange's Response

The two commenters on the proposal (collectively, ''Commenters'') oppose the proposed rule change.[22] According to the Commenters, the issuance by the Trust of all of the Shares covered by the Registration Statement within a short period of time would result in a material reduction in the immediately available supply of global copper.[23] They also assert that this reduction in short-term supply would increase both volatility in the copper market and the price of copper, which would in turn significantly harm the U.S. economy.[24] The Commenters further state that the decrease in copper available for immediate delivery would make the physical copper market more susceptible to manipulation.[25]

In its response letter, NYSE Arca states that V&F's arguments either are based on incorrect information or are unsubstantiated.[26] The Exchange's response, as discussed in further detail below, addresses in particular V&F's conclusions about the impact of the Trust on the price of physical copper.[27] In its second letter, V&F responds to the Exchange's arguments by reiterating some of its positions and providing additional information.

A. Adverse Copper Market Impact

1. Impact on Supply of Copper Available for Immediate Delivery

V&F states that almost all of the copper produced worldwide is delivered pursuant to long-term contracts to copper fabricators, and that at any given time, there is only a limited supply of copper available for immediately delivery.[28] V&F further states that this copper, which generally is stored in LME warehouses, usually is deposited by producers with excess supply or by copper merchants looking for purchasers and is sold to traders seeking to close out short positions or to fabricators in sudden need of additional supply.[29]

V&F states that the only ''visible'' copper available to satisfy the Trust's requirements for copper to be delivered to the Trust to create shares is copper stored in LME warehouses.[30] V&F estimates that, if the Trust sells all of the 6,180,000 Shares it seeks to register, creation of the Trust could result in as much as 61,800 metric tons of copper being removed from LME warehouses, which is more than 30% of the 200,000 metric tons currently available for immediate delivery.[31]

V&F believes the Trust is likely to acquire copper from locations with the lowest premiums.[32] According to V&F, based on the present level of demand, locational premiums for copper in the U.S. are at least ten times lower than they are in Europe and Asia.[33] Accordingly, V&F predicts that much of the copper used to fund the Trust will come from the immediately available supply in the U.S.[34]

In response to these concerns raised by V&F, the Exchange points out that the Trust will hold only copper that is not under LME warrant.[35] NYSE Arca states that the Sponsor of the Trust does not believe that ''huge quantities'' of LME warranted copper will be removed from the LME system, as V&F predicts, because of: (1) The cost and time that would be required to take copper off warrant; and (2) the availability of large supplies of non-warranted physical copper to create Shares.[36] NYSE Arca provides data from the Sponsor of the Trust indicating that the amount of non-warranted copper is approximately ten times larger than the amount of LME warranted copper.[37]

NYSE Arca further states that the Trust will not immediately remove from the market as much as 61,800 metric tons of copper.[38] According to the Exchange, the Trust seeks to register 6,180,000 Shares but, like the other physical metal exchange-traded products, the Trust seeks to register significantly more Shares than it intends to sell initially.[39] NYSE Arca notes that the number of Shares that will be issued will depend on investor demand for the Shares and the extent to which authorized participants seek to fulfill such demand by ordering additional creation units from the Trust.[40]

In its second letter, V&F reiterates its view that ''the only substantial source of copper available to meet the Trust's requirements * * * is warranted copper in LME warehouses.'' [41] V&F states that

[19] *See* Registration Statement, *supra* note 9.

[20] *See* Notice, *supra* note 3, 77 FR at 23787.

[21] *See* Notice and the Registration Statement, *supra* notes 3 and 9, respectively.

[22] *See supra* notes 4, 7, and 8. One of the Commenters, V&F, identified itself as a U.S. law firm that represents an international copper merchant and four U.S. copper fabricators. *See supra* note 4.

[23] *See* V&F Letter, *supra* note 4, at 3, 6 and Sen. Levin Letter, *supra* note 8, at 1, 4.

[24] *See* V&F Letter, *supra* note 4, at 5–7 and Sen. Levin Letter, *supra* note 8, at 1, 7.

[25] *See* V&F Letter, *supra* note 4, at 1, 10 and Sen. Levin Letter, *supra* note 8, at 7.

[26] *See* Arca's Response, *supra* note 6, at 1.

[27] *See id.* at 4–5.

[28] *See* V&F Letter, *supra* note 4, at 3.

[29] *See id.*

[30] *See id.*

[31] *See id.* at 1, 3.

[32] *See id.* at 4.

[33] *See id.*

[34] V&F states that the total amount of copper available in New Orleans and Chicago (two of the three U.S. warehouses proposed to be used by the Trust) is 45,000 and 25,000 metric tons respectively and, as mentioned above, the Trust may acquire as much as 61,800 tons of copper in connection with the initial offering of Shares. V&F predicts that the removal of large quantities of copper from LME warehouses in the U.S. also will result in the emptying out of substantial quantities of copper from COMEX warehouses. V&F believes that this copper either would be delivered to LME warehouses, where the demand is greatest, or it would be shipped to fabricators in other parts of the U.S. that are no longer able to get copper for immediate delivery from the LME. *See id.*

[35] *See* Arca's Response, *supra* note 6, at 1–2.

[36] *See id.* at 3. The Exchange states that the Sponsor expects that the initial Shares will be created using 10,185 metric tons of copper, none of which will be taken off LME warrant for the creation. *See id.* at 4.

[37] *See id.* at 3.

[38] *See id.* at 4.

[39] The Exchange states that currently the Sponsor expects that the value of the initial creation units will not exceed $75 million, which corresponds to approximately 10,185 metric tons, or approximately 407 lots of copper in the current cheapest-to-deliver location for the Trust as of June 6, 2012. *See id.*

[40] *See id.*

[41] *See* V&F Letter II, *supra* note 7, at 1.

the fact that the Trust will hold only copper that is not warranted does not mean, as NYSE Arca concludes, that copper will not be taken off LME warrant and held by the Trust.[42] V&F also challenges the Exchange's assertion about the availability of a large supply of off-warrant copper that may be used to create Shares, and argues that the copper not on LME warrant actually is largely unavailable for Share creation.[43] For example, V&F states that the overall physical copper stocks include copper that is subject to long-term contracts, and is generally held in the normal course by producers and consumers as buffer stocks to ensure smooth running of their logistics and to meet contingencies.[44] V&F further states that there is no evidence that any of the non-registered copper stocks would be available for the Trust to purchase, and concludes that the only copper available to create Shares would be the copper in the LME and COMEX warehouses.[45] In addition, V&F states its view that the potential size of the Trust is large relative to the size of market for copper available for immediate delivery.[46] Specifically, V&F asserts that the Trust could remove as much as 21.3% of copper available for immediate delivery on the LME and COMEX markets combined.[47] Senator Levin also comments that there is ample evidence that the proposed commodity-based exchange traded product (''CB–ETP'') will disrupt the supply of copper by removing from the market a substantial percentage of the copper available for immediate delivery.[48]

With respect to the number of shares registered by the Trust and the size of the Trust, V&F states that there is no assurance that the Exchange-required minimum will have any bearing on the ultimate size of the offering.[49] V&F points to the Trust's registration statement, which contains an estimate that the number of shares under the registration statement is roughly equivalent to the holding of approximately 61,800 metric tons of copper by the Trust.[50] V&F also notes that the Trust Agreement places no limit on the amount of copper the Trust may hold; thus the Trust may issue an unlimited number of shares, subject to registration requirements, and may, in theory, acquire an unlimited amount of copper.[51]

In response to NYSE Arca's statement that the sponsor of the Trust believes that LME warranted copper will not be removed from the LME system because of the cost and time that would be required to take copper off warrant, V&F states its view that, although an authorized participant can obtain LME grade copper available for immediate delivery from owners of LME grade copper in LME warehouses by purchasing long positions on the LME and taking delivery, the authorized participant would have no guarantee of the location of its copper, creating a risk that the authorized participant's copper is at a location (or locations) that might be too expensive to transfer to a Trust warehouse.[52] V&F further states that, in comparison, an authorized participant can create Shares at little or not cost by purchasing LME warrants for copper in LME warehouses with the lowest location cost premiums.[53]

V&F believes that investors' ability to redeem Shares for the Trust's physical copper would not limit the impact of removing substantial quantities of copper from the market.[54] According to V&F, most investors in a copper-backed CB–ETP would not have any real economic incentive to redeem their Shares for physical delivery as investors would benefit from a rise in the price of copper and can do so through sale of the Shares on the Exchange without having to assume any risk of delivery.[55] In its response, NYSE Arca points out that Share creations may be offset by Share redemptions, which result in copper being released from the Trust and becoming available to the physical markets.[56] V&F reiterates in its second letter its views expressed in its first comment letter on the Exchange's assertion that copper may return to the market through redemptions.[57]

Additionally, both Commenters reference another proposed CB–ETP, the iShares Copper Trust. In a separate proposed rule change, NYSE Arca proposes to list and trade shares of the iShares Copper Trust, which would also hold physical copper.[58] V&F states that this CB–ETP:

> would remove as much as 120,000 metric tons of copper from the market. And like JPM, BlackRock also intends to acquire LME-grade copper from the LME warehouses where the location premiums being charged are the lowest. Thus, approval of this rulemaking could lead to the removal of all or nearly all of the LME and Comex supply of copper available for immediate delivery.[59]

V&F further states that the collective effect of the Trust and the iShares Copper Trust (collectively, ''Copper

[42] *See id.* at 2. V&F further states that the Trust would have to take the copper off-warrant because otherwise the holding of such warranted copper in an LME warehouse would subject the Trust to the LME's lending obligations and the draft registration statement makes clear that, consistent with its intent to take the Trust's copper off-market, the Trust does not intend to be subject to any of the LME's rules, including rules that would require the Trust to lend any of its copper. *See id.*

[43] *See id.* at 2–4.

[44] *See id.* at 3. V&F further states that ''[o]ther such stocks consist of stock [sic] in bonded warehouses outside China* * *which are destined for the Chinese market,'' none of which is available for purchase by authorized participants to create Shares. *See id.* V&F also states that they have heard it is usual for both producers and consumers to have a considerable holding of copper stock, but at present this is not the case because consumers, in particular, have drawn down inventories to the bare minimum in order to reduce working capital requirements at a time of high copper prices. *See id.* at 4.

[45] *See id.* at 2–4. V&F states that the Exchange compounds misinformation about the availability of copper stocks by including a table it obtained from the Sponsor of the Trust purporting to break down registered and non-registered market stocks as of May 2012. *See id.* at 3. V&F states that the use of the term ''market'' by the Exchange in reference to total non-registered stocks suggests that such tonnage is actually available for purchase at market, but V&F believes that there is no evidence that any of the non-registered stocks would be available for the Trust to purchase. *See id.* To support its statements about the tightness of the supply of immediately available copper, V&F submitted portions of a report prepared by Bloomsbury Minerals Economics Ltd. for RK Capital Management LLP. *See id.* Exhibit A.

[46] *See id.* at 8.

[47] *See id.* at 8–9. V&F states that the size of the market for copper available for immediate delivery is relatively small in that there is only 230,000 metric tons available on the LME, with an additional 60,000 metric tons available on the COMEX. *See id.* at 8. V&F further states that therefore, the Trust proposes to remove as much as 61,800 metric tons, or about 21.3% of the copper available for immediate delivery. *See id.*

[48] *See* Sen. Levin Letter, *supra* note 8, at 1. For example, Senator Levin notes that ''it appears that most of the remaining copper stocks available for immediate delivery are on the LME and [COMEX].'' *See id.* at 5.

[49] *See* V&F Letter II, *supra* note 7, at 7.

[50] *See id.* at 8.

[51] *See id.*

[52] *See id.* at 6.

[53] *See id.*

[54] *See* V&F Letter, *supra* note 4, at 5.

[55] *See id.*

[56] *See* Arca's Response, *supra* note 6, at 3.

[57] *See* V&F Letter II, *supra* note 7, at 7. V&F states that while fabricators may purchase Shares and redeem them whenever they need supply, doing so: (1) Would add cost and risk to fabricators who otherwise would simply purchase available stocks from LME warehouses; (2) may not have any appreciable effect on price or supply in a rising market with tight supply; and (3) would be an inefficient and perhaps impracticable way of obtaining copper because the copper delivered by the Trust may be warehoused in an unhelpful location (*e.g.,* a fabricator in Alabama may need copper in New Orleans, not Shanghai) or of an unacceptable brand or quality. *See* V&F Letter, *supra* note 4, at 5–6.

[58] *See* Securities Exchange Act Release No. 67237 (June 22, 2012), 77 FR 38351 (June 27, 2012) (SR–NYSEArca–2012–66) (''iShares Notice''). BlackRock Asset Management International Inc. is the sponsor of this trust. See the iShares Notice and Pre-Effective Amendment No. 4 to Form S–1 for iShares Copper Trust, filed with the Commission on September 2, 2011 (No. 333–170131) for a detailed description of the iShares Copper Trust and the Exchange's proposal to list and trade the iShares Copper Trust.

[59] *See* V&F Letter, *supra* note 4, at 6.

Trusts'') would be ''far-reaching and potentially devastating to the U.S. and world economies,'' including ''shortages of copper, higher prices to consumers, and increased volatility.'' [60] Senator Levin also states that, if the Commission approves the listing and trading of the Shares and shares of the iShares Copper Trust, the trusts would hold approximately 34% of the copper stocks available for immediate delivery and would remove from the U.S. market over 55% of the available copper.[61]

2. Impact on Copper Prices

According to V&F, removing large amounts of copper from LME warehouses would disrupt the supply of copper available for immediate delivery and thereby cause a substantial rise in near-term copper prices.[62] V&F argues that this also would cause an immediate spike in the cash-to-three-month spread price of copper, as near-term prices for delivery accelerate compared to prices for delivery later in time.[63] V&F is concerned that manufacturers and fabricators that rely on the supply of copper available in LME warehouses would be forced to pay substantially higher prices in the short term, and, in turn, manufacturers and fabricators would pass these price increases on to their customers.[64] V&F predicts that the price increases both for copper and copper products will be especially dramatic in the U.S., where copper currently is relatively inexpensive.[65] Additionally, V&F asserts that the supply of copper generally is inelastic and that supply, therefore, will not increase fast enough to account for the increased demand unleashed by the creation and growth of the Trust.[66]

V&F characterizes the physical copper market as currently volatile, and believes that the successful creation and growth of the Trust would create a bubble, and the bursting of the bubble would result in increased price volatility in the physical copper market.[67] V&F states that, with

> the risk of an ETF removing indefinitely all or substantially all of the copper available for immediate delivery, the risk of price volatility becomes enormous. This is because the greater amount of copper artificially kept off-the-market, the greater the chance that investors will eventually no longer keep propping up the price with further purchases, and the greater the likelihood that the bubble will burst, thus flooding the market with surplus copper, and severely depressing the price.[68]

V&F further states that investors in a copper CB–ETP would benefit immediately from any increase in the price of copper because the more copper removed from the market to satisfy the demand for the copper CB–ETP, the higher the price not only of copper, but of the copper CB–ETP itself.[69] V&F notes that, like all bubbles, as investor demand for this product wanes, the bubble will burst, leaving in its wake a glut of physical copper that the Trust will be forced to dump on the market, causing prices to plummet, and leaving in its wake unsuspecting investors who will have lost the value of their investment.[70] Senator Levin also makes statements about the potential effect of the Shares, stating that the ''supply disruption is likely to affect the cash and futures market for copper, increasing volatility and driving up [the Share] price to create a bubble and burst cycle.'' [71]

V&F further believes that investors in the Trust would be able to measure how much impact their collective removal of copper from the supply available for immediate delivery would have on copper prices each day, and could adjust their purchasing strategies accordingly.[72] V&F questions, therefore, whether the increased market transparency that the Exchange asserts will result from the formation and operation of the Trust will be in the public interest.[73]

The Exchange, in its response letter, states that V&F's concerns about price volatility are speculative and misplaced.[74] NYSE Arca asserts that, because of the arbitrage mechanism common to all types of CB–ETPs, CB–ETP share prices generally follow the price of the underlying asset(s), rather than drive the price as V&F predicts.[75] The Exchange agrees that, in theory, if extremely high demand for shares of a CB–ETP caused it to grow very rapidly relative to the size of the market for the underlying asset, such demand could place upward pressure on the price of the underlying asset.[76] The Exchange states that Share redemptions would be able to drive down the price of copper only if the size of the redemptions is extremely large relative to the size of the physical copper markets and those redemptions occurred over a very short period of time.[77] The Exchange acknowledges that this is a theoretical possibility, but states that V&F has not provided any evidence to support its prediction.[78] According to NYSE Arca, given the anticipated size of the Trust relative to the size and depth of the physical copper markets, the Sponsor of the Trust has informed the Exchange that it does not expect the Trust to cause a spike in copper prices.[79]

In response to the Exchange, V&F reiterates its concern that the Trust, if launched, could trigger an increase in the price of copper.[80] Senator Levin also voices a concern that the Trust, if launched, would have an impact on the price of copper.[81] V&F and Senator Levin refer to language in the Trust's Registration Statement in which the issuer discusses the potential for the growth of the Trust to impact the price of copper and the Shares. Specifically, the Commenters reference statements from the Registration Statement that: (1) because there is no limit on the amount of copper that the Trust may acquire, the Trust, as it grows, may have an impact on the supply and demand for copper that ultimately may affect the price of the Shares in a manner unrelated to other factors affecting the global markets for copper; and (2) if the amount of copper acquired by the Trust were large enough in relation to global copper supply and demand, in-kind creations and redemptions of Shares could have an impact on the supply and demand for copper unrelated to other factors affecting the global markets for copper, which in turn could affect the price at which Shares are traded on the Exchange.[82] V&F also states that because the potential size of the Trust is large relative to the size of the market for copper available for immediate delivery, even modest investor demand for the Shares could place upward pressure on the price of copper.[83]

[60] *See id.* at 10.

[61] *See* Sen. Levin Letter, *supra* note 8, at 5–6.

[62] *See* V&F Letter, *supra* note 4, at 5.

[63] *See id.*

[64] *See id.*

[65] *See id.* at 4–5.

[66] *See id.* at 5. According to V&F, it is difficult for copper producers to increase supply, sometimes taking 15 years or longer to open a new mine, and even in areas where copper is considered plentiful, political instability can keep a mine from producing. *See id.* Moreover, V&F states that U.S. producers do not have surplus product to deliver. *See id.* Therefore, V&F asserts that once copper stored in warehouses disappears, it likely will not be replenished any time soon. *See id.* Senator Levin concurs that the copper market is inelastic. *See* Sen. Levin Letter, *supra* note 8, at 3.

[67] *See* V&F Letter, *supra* note 4, at 2, 9.

[68] *See id.* at 5.

[69] *See id.*

[70] *See id.* at 2.

[71] *See* Sen. Levin Letter, *supra* note 9, at 1.

[72] *See* V&F Letter, *supra* note 4, at 9.

[73] *See id.* at 10.

[74] *See* Arca's Response, *supra* note 6, at 4.

[75] *See id.*

[76] *See id.* at 5.

[77] *See id.*

[78] *See id.*

[79] *See id.*

[80] *See* V&F Letter II, *supra* note 7, at 8.

[81] *See* Sen. Levin Letter, *supra* note 8, at 5.

[82] *See* V&F Letter II, *supra* note 7, at 8 and Sen. Levin Letter, *supra* note 8, at 5–6.

[83] *See* V&F Letter II, *supra* note 7, at 8–9.

3. Increased Likelihood of Copper Market Manipulation

V&F asserts generally that the tightened supply of copper it believes would be caused by fully funding the Trust would render the physical copper market more susceptible to manipulation.[84] V&F compares the possible effect of funding the Trust to the conspiracy (described in the V&F Letter) between Sumitomo Corporation and a U.S. trader to squeeze the price of copper on the LME in the U.S. by, among other things, removing 100% of the copper from the LME warehouse in Long Beach, California.[85]

NYSE Arca, in its response letter, highlights several structural features of the Trust and the Shares that are intended to prevent fraudulent and manipulative practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market, and in general, protect investors and the public interest, including that:

- The Trust may hold copper in multiple global locations, which is intended to provide a larger, more liquid supply of copper than would be available if creations and redemptions were only permitted using copper held in a single location; [86]
- The Trust would be transparent, publishing information about its holdings and operations through its Web site; [87]
- The Trust would utilize a consistent, transparent, non-discretionary, rules-based, and fully disclosed selection protocol for redemptions; [88] and
- The Trust's copper would be valued by a recognized, independent valuation agent.[89]

In response, V&F states that, although the Trust may hold its copper in various locations worldwide, the Trust makes clear that it intends to acquire copper from locations where the premiums are the lowest, and that is in the United States.[90] Senator Levin also states that it is likely that the Trust's copper will come from LME warehouses in the United States since the Trust will likely acquire its initial copper holdings from the location with the lowest locational premia, and the United States currently is the country with the lowest locational premia.[91]

V&F further responds to Arca's statements about the structure of the Trust by stating that the transparency of the Trust's holdings will provide market participants with critical information about ''how much copper needs to be removed on any given day in order to artificially inflate [copper] prices and thus the price of the Trust's shares.'' [92]

Senator Levin states that approval of the proposed rule change would make the copper market more susceptible to squeezes and corners by speculators.[93] According to Senator Levin, market participants could use the Shares to remove copper from the available supply with the intent to artificially inflate the price of copper, and this activity would go undetected by the LME because CB–ETPs currently are not subject to any form of commodity regulations.[94] Senator Levin states that, by holding physical copper rather than LME warrants, the Trust can control more of the available supply of copper without triggering LME reporting or rules.[95] Senator Levin further states the view that creating this market condition would be inconsistent with the requirements in Section 6(b)(5) of the Act that exchange rules be designed to prevent manipulative acts and protect investors and the public interest.[96]

Finally, V&F questions whether NYSE Arca's surveillance procedures are adequate to prevent fraudulent and manipulative trading in the Shares.[97] According to V&F, NYSE Arca's surveillance procedures are not adequate because they are the kind of garden-variety measures that are always in place to prevent collusion and other forms of manipulation by traders.[98]

In response, NYSE Arca asserts that it will be able to obtain information regarding trading in the Shares and the underlying copper, copper futures contracts, options on copper futures, or any other copper derivative.[99] NYSE Arca further states that it can obtain trading information via the ISG from other exchanges that are members of the ISG, including the New York Mercantile Exchange, of which COMEX is a division.[100] The Exchange also notes that it has entered into a comprehensive surveillance sharing agreement with the LME that applies with respect to trading in copper.[101]

B. Comparison to Other Commodity-Based Trusts

V&F distinguishes the Trust from prior commodity-based trusts whose shares have been approved for listing and trading by the Commission.[102] According to V&F, gold, silver, platinum, and palladium are all precious metals that have traditionally been held for investment purposes and are currently used as currency.[103] As a result, there are ample stored sources available to back physical CB–ETPs holding precious metals, and the introduction of such CB–ETPs had virtually no impact on the available supply.[104] In contrast, V&F states that copper generally is not held as an investment, but rather is used exclusively for industrial purposes, with the annual demand generally exceeding the available supply.[105]

NYSE Arca states that: (1) The Trust will not be the first CB–ETP to hold a metal that is used primarily for industrial purposes; (2) NYSE Arca is unaware of empirical evidence demonstrating that the launches of CB–ETPs that hold a metal that is used primarily for industrial purposes (*e.g.,* platinum and palladium) have disrupted the markets for the underlying physical commodities or caused those commodity prices to increase; and (3) V&F has not provided any evidence that a copper-based CB–ETP would have such effects.[106]

In its second letter, V&F states in response that platinum and palladium are used for both industrial and investment purposes and that, unlike copper, there is enough of a supply of platinum and palladium available in storage and being produced that the introduction of CB–ETPs backed by these metals did not cause the kind of disruption to the market that a copper-backed CB–ETPs would cause.[107] Specifically, V&F states that: (1) In recent years, there has been a surplus in palladium due to the Russian

[84] *See* V&F Letter, *supra* note 4, at 1, 10.

[85] *See id.* at 6, 10 (describing the conspiracy).

[86] *See* Arca's Response, *supra* note 6, at 5.

[87] *See id.*

[88] *See id.*

[89] *See id.* at 6.

[90] *See* V&F Letter II, *supra* note 7, at 9. V&F states its view that the most cost-efficient manner to create Shares would be to acquire warrants for copper held in the New Orleans warehouse where the Trust's copper may be stored and take that copper off warrant; by doing so, an authorized participant would avoid transportation costs and pay the lowest premium for the copper. *See id.* at 6.

[91] *See* Sen. Levin Letter, *supra* note 8, at 6.

[92] *See* V&F Letter II, *supra* note 7, at 10.

[93] *See* Sen. Levin Letter, *supra* note 8, at 7.

[94] *See id.*

[95] *See id.*

[96] *See id.* at 1, 7.

[97] *See* V&F Letter, *supra* note 4, at 10.

[98] *See id.*

[99] *See* Arca's Response, *supra* note 6, at 6.

[100] *See id.*

[101] *See id.*

[102] *See* V&F Letter, *supra* note 4, at 2–3.

[103] *See id.* at 2.

[104] *See id.*

[105] *See id.* at 2–3. V&F states that the consensus among experts is that copper is in deficit, has been in deficit for the past three years, and is expected to remain in deficit for at least the next couple of years. *See id.* at 3.

[106] *See* Arca's Response, *supra* note 6, at 6.

[107] *See* V&F Letter II, *supra* note 7, at 11.

government's sell-off of its stockpile; (2) there is about a year's supply of platinum reserves above ground; and (3) there is only a 1–2 week supply of copper available on the LME.[108] Senator Levin states that gold, silver, platinum, and palladium are substantially different than copper because these four metals are the only precious metals that are currently treated as world currencies and commonly held for investment purposes, and as a result there are substantial existing supplies of these metals that could be acquired to back an CB–ETPs without affecting the world market price in these metals.[109] Senator Levin observes that copper is not currently held for investment purposes because it is very expensive to store and difficult to transport, and there is not the same existing supply of copper for the Trust to acquire to back its CB–ETP, and concludes that holding copper for investment purposes will have a significantly greater impact on the copper market than CB–ETPs holding platinum, palladium, silver, or gold had on their respective markets and the broader economy.[110]

IV. Proceedings To Determine Whether to Approve or Disapprove SR–NYSEArca–2012–28 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[111] to determine whether this proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. As noted above, the institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B),[112] the Commission is providing notice of the grounds for disapproval under consideration. The Commission believes that questions remain about whether the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act,[113] which requires that the rules of an exchange be designed, among other things, 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.

As discussed above, the Commission received comment letters from two parties opposing the proposed rule change. The Commenters assert that the successful creation of the Trust would materially reduce the supply of copper available for immediate delivery, which would increase the price of copper and volatility in the copper market, and, in turn, would harm the U.S. economy.[114] In addition, the Commenters argue that, by decreasing the amount of copper available for immediate delivery, the Trust will make the copper market more susceptible to manipulation.[115] V&F also believes the Exchange's surveillance procedures are inadequate to prevent fraudulent and manipulative trading in the Shares.[116]

In response, the Exchange believes V&F's arguments either are based on incorrect information or are unsubstantiated,[117] and disputes V&F's conclusions regarding the Trust's impact on the copper market.[118] NYSE Arca states different expectations regarding the source and amount of copper that would be used to create Shares of the Trust, as well as the potential impact on the price of copper.[119]

In light of the comments received and the Exchange's response, the Commission is soliciting further comments on the proposed rule change, including comments regarding the issues already commented upon.

V. Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the concerns identified above, as well as any others they may have regarding the proposed rule change. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. The Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[120]

Interested persons are invited to submit written data, views and arguments regarding whether the proposed rule change should be disapproved by August 24, 2012. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by September 10, 2012.

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposed rule change and the comments received, in addition to any other comments they may wish to submit about the proposed rule change. The Commission requests that commenters support their responses to the questions below with empirical data sufficient to inform the Commission's decision making. In particular, the Commission seeks comment on the following:

1. In light of the comments received, the Commission is soliciting further comments regarding copper usage and supply trends. For example:

◦ What was the world mine production capacity in each of the past 10 years? What data is available regarding projected world mine production over the next 3 to 5 years? What factors impact the ability to increase or decrease mine production?

◦ What was the refined production in each of the past 10 years? How much of the refined production was from primary and secondary sources? What was the world refinery capacity in each of the past 10 years? What data is available regarding projected refined production over the next 3 to 5 years? What factors impact the ability to increase or decrease refinery production?

◦ What was the world refined usage in each of the past 10 years? What data is available regarding projected usage over the next 3 to 5 years?

[108] *See id.*

[109] *See* Sen. Levin Letter, *supra* note 8, at 6–7.

[110] *See id.* at 7.

[111] 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *Id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding. *Id.*

[112] *Id.*

[113] 15 U.S.C. 78f(b)(5).

[114] *See* V&F Letter, *supra* note 4, at 5–7 and Sen. Levin Letter, *supra* note 8, at 1, 7.

[115] *See* V&F Letter, *supra* note 4, at 1, 10 and Sen. Levin Letter, *supra* note 8, at 7.

[116] *See* V&F Letter, *supra* note 4, at 10.

[117] *See* Arca's Response, *supra* note 6, at 1.

[118] *See id.* at 4.

[119] *See id.* at 2–4.

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

○ How much copper has been held for investment purposes over the past 10 years? How much of this copper was taken off LME warrant? How much of this copper has been eligible to be placed on LME warrant?

2. According to the International Copper Study Group (''ICSG'), world refined usage of copper exceeded world refined production by approximately 417,000 tons in 2010 and 231,000 tons in 2011, and world refined stocks decreased by 161,000 tons in 2010 and increased by 13,000 tons in 2011.[121] What factors account for refined stocks decreasing less than the deficit amount (or even increasing) in 2010 and 2011? Are there any factors with respect to the supply of copper available for immediate delivery that the Commission should consider in evaluating the market's ability to meet demand for copper? When a deficit occurs, are copper fabricators and other end users able to access copper to meet excess demand? If so, what are the sources of that copper? How much copper is available for immediate delivery that is not on LME warrant?

3. The Commenters state that a material reduction in the supply of copper available for immediate delivery will increase the price of copper and volatility in the copper market, and, in turn, would harm the U.S. economy.[122] The Commission requests comment on whether commenters agree or disagree with these concerns, and why or why not. For example:

○ Do commenters believe creation of the Trust will have an impact on the supply of copper? If so, what will that impact be? If not, why not?

○ How does a change in the supply of copper impact the price of copper? To what extent do copper stocks need to be reduced or increased to impact the price of copper?

○ To what extent is the LME Settlement Price affected by the amount of copper on LME warrant? To what extent must copper on LME warrant be reduced to impact the LME Settlement Price? To what extent, if at all, is the LME Settlement Price affected by the supply of copper ineligible to be placed on LME warrant?

○ How does a change in the supply of copper impact volatility in the physical copper and copper derivatives markets?

○ Is there empirical evidence that creation of the Trust will impact copper prices and volatility? What impact, if any, will creation of the Trust have on the US economy?

4. V&F and Senator Levin state that the Trust and the proposed iShares Copper Trust,[123] collectively, will remove from the market a substantial percentage of the copper available for immediate delivery, with Senator Levin stating that the Copper Trusts would hold approximately 34% of the copper stocks available for immediate delivery and would remove from the U.S. market over 55% of the available copper.[124] V&F further states that the collective effect of the Trust and the iShares Copper Trust would be ''far-reaching and potentially devastating to the U.S. and world economies,'' including ''shortages of copper, higher prices to consumers, and increased volatility.''[125] Do commenters agree or disagree with these statements? If so, why or why not?

5. V&F states that the only ''visible'' copper available to satisfy the Trust's requirements is copper stored in LME warehouses.[126] NYSE Arca represents that it has been informed by the Sponsor that overall physical copper stocks, including stocks that are immediately available for sale, are substantially larger than V&F would suggest.[127] V&F responded, arguing that the copper stocks identified in Arca's Response mainly consist of metal in the supply chain, which would not be generally available for creation of Shares.[128] The Commission is soliciting further comments regarding physical copper stocks. For example:

○ How much copper is currently held in LME warehouses? How much of the copper currently held in LME warehouses is on warrant? How much copper in LME warehouses is available for investment purposes?

○ How much copper is held in COMEX, Shanghai Futures Exchange (''SHFE''), and Multi Commodity Exchange of India (''MCX'') warehouses? How much copper held in COMEX, SHFE, and MCX warehouses is eligible to be placed on LME warrant (*i.e.,* is of a brand registered with the LME)? How much of this LME warrant-eligible copper is available for investment purposes? Where is this copper located?

○ What quantity of copper stock, if any, is held in other locations that would be eligible to be placed on LME warrant (if it were located at an LME warehouse)?

○ How accessible are stocks of copper eligible to be placed on warrant that are not held in LME warehouses?

○ Are commenters aware of any activities involving the stockpiling of copper? If so, how much copper has been stockpiled? Where is such copper located? How accessible is such copper? How much of this stock was taken off LME warrant? How much of this copper is eligible to be placed on LME warrant?

6. The Trust will store copper in warehouses that are maintained by the Warehouse-keeper. Initially, the permitted warehouse locations are in the Netherlands (Rotterdam), Singapore (Singapore), South Korea (Busan and Gwangyang), China (Shanghai), and the United States (Baltimore, Chicago, and New Orleans) (each an ''Approved Warehouse'' and, collectively, the ''Approved Warehouses'').[129] What is the locational premium at each of the Approved Warehouses? What impact would changes in locational premia have on supply and demand for copper at each of the Approved Warehouses? How much copper is held at each of the Approved Warehouses? How much of the copper held at each of the Approved Warehouses is on LME warrant? How much is eligible to be placed on LME warrant? How much copper eligible for LME warrant is available for investment purposes? How much is not eligible to be placed on LME warrant?

7. V&F states that Shares will be created by acquiring LME-warranted copper and taking it off warrant to be deposited in the Trust.[130] NYSE Arca represents that it has been informed by the Sponsor that the economics do not support this suggestion, given the large supply of non-warranted physical copper and the cost and time that would be required in order to take LME warranted copper off warrant solely for the purposes of creating Shares.[131] V&F responded, arguing that taking copper off LME warrant would involve little or no cost if LME warrants are purchased for copper that is already stored at the Approved Warehouses.[132] The Commission requests comment on these opposing views. Specifically:

○ What costs are involved in taking copper off LME warrant? What costs are involved in putting copper on LME warrant?

○ How long does it take to take copper off LME warrant? How long does it take to put copper on LME warrant?

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[121] Press Release, ICSG, Copper: Preliminary Data for February 2012 (June 20, 2012), *available at http://www.icsg.org/index.php?option=com_content&task=view&id=63&Itemid=64.*

[122] *See* V&F Letter, *supra* note 4, at 5–7 and Sen. Levin Letter, *supra* note 8, at 1.

[123] *See* iShares Notice, *supra* note 58 (describing the iShares Copper Trust).

[124] *See* V&F Letter, supra note 4, at 6 and Sen. Levin Letter, supra note 8, at 5–6.

[125] *See* V&F Letter, supra note 4, at 10.

[126] *See id.* at 3.

[127] *See* Arca's Response, *supra* note 6, at 3.

[128] *See* V&F Letter II, *supra* note 7, at 5.

[129] *See* Notice, *supra* note 3, at 23779.

[130] *See* V&F Letter, *supra* note 4, at 3.

[131] *See* Arca's Response, *supra* note 6, at 3.

[132] *See* V&F Letter II, *supra* note 7, at 6.

○ How does the cost and time required to take copper off warrant compare to the cost and time to ship copper to an Approved Warehouse?

8. The Commission understands that ETFS Physical Copper securities currently trade on the London Stock Exchange. How much copper did ETFS Physical Copper hold following the initial creation? How much copper does ETFS Physical Copper currently hold? What change, if any, was there in the price of copper following creation of ETFS Physical Copper? Did the creation of ETFS Physical Copper result in an observable impact on the copper market? Has ETFS Physical Copper engaged in the lending of copper?

9. The Commission has previously approved listing on the Exchange under NYSE Arca Equities Rule 8.201 of other issues of CB–ETPs backed by gold, silver, platinum, and palladium (collectively ''precious metals''). While these precious metals are often held for investment purposes, the Commission understands they are also used for various industrial purposes. V&F asserts that copper is used exclusively for industrial purposes and is not generally held for investment.[133] The Commission requests information regarding the production and use of precious metals. How much gold, silver, platinum, and palladium has been produced in each of the last 10 years? How much gold, silver, platinum, and palladium has been used for investment purposes in each of the last 10 years? How much gold, silver, platinum, and palladium has been used for industrial purposes in each of the last 10 years? Are there any other uses of gold, silver, platinum, and palladium relevant to understanding utilization of these precious metals? What are the current and historic stocks of gold, silver, platinum, and palladium? Is there any empirical evidence that the listing of CB–ETPs backed by gold, silver, platinum, or palladium impacted prices in these markets?

10. V&F estimates that creation of the Trust could result in the immediate removal of up to 61,800 metric tons of copper from LME warehouses.[134] NYSE Arca states its understanding that the Sponsor currently expects that the value of the initial creation units to be issued by the Trust would not exceed 10,185 metric tons.[135] Further, while the Trust is seeking to register 6,180,000 Shares, the Exchange states that like the other CB–ETPs, the Trust is seeking to register significantly more Shares than it intends to sell initially.[136] What is the likelihood that the Trust will sell all registered Shares initially? What is the likelihood that the Trust will sell all registered Shares in the three months after the registration goes effective? How quickly did the CB–ETPs backed by gold, silver, platinum, and palladium sell the shares registered in the first registration statement?

11. V&F argues that, by decreasing the amount of copper available for immediate delivery, the Trust will make the copper market more susceptible to manipulation.[137] Specifically, V&F states that ''the drawing down of stocks in LME and Comex warehouses'' resulting from the listing and trading of the Shares ''will make it much easier and cheaper for [copper market] speculators to engage in temporary market squeezes and corners.'' [138] Senator Levin also argues that approval of the proposed rule change would make the copper market more susceptible to squeezes and corners by speculators.[139] The Commission requests comment on these concerns, as well as whether commenters agree or disagree with the comments and why or why not. For example:

○ Will creation of the Trust impact the ability to manipulate the physical copper or copper derivatives markets? If so, how? If not, why not?

○ Has there been any increased manipulative behavior due to the reduction of copper available for immediate delivery that resulted from the prior years' deficits in copper production versus copper consumption?

○ Are there any structural aspects of the copper market that render it more or less susceptible to manipulation?

○ Is there empirical evidence that the creation of CB–ETPs backed by gold, silver, platinum, and palladium has led to manipulation of the physical markets for those precious metals? If so, please describe.

12. Both Commenters discuss concerns about the potential impact of the Trust on the copper market, and how that potential impact could, in turn, affect the Shares. V&F states that, with

> the risk of an ETF removing indefinitely all or substantially all of the copper available for immediate delivery, the risk of price volatility becomes enormous. This is because the greater amount of copper artificially kept off-the-market, the greater the chance that investors will eventually no longer keep propping up the price with further purchases, and the greater the likelihood that the bubble will burst, thus flooding the market with surplus copper, and severely depressing the price.[140]

V&F further states that investors in a copper CB–ETP would benefit immediately from any increase in the price of copper because the more copper removed from the market to satisfy the demand for the copper CB–ETP, the higher the price not only of copper, but of the copper CB–ETP itself.[141] V&F notes that, like all bubbles, as investor demand for this product wanes, the bubble will burst, leaving in its wake a glut of physical copper that the Trust will be forced to dump on the market, causing prices to plummet, and leaving in its wake unsuspecting investors who will have lost the value of their investment.[142] Senator Levin also makes statements about the potential effect on the Shares, stating that the ''supply disruption is likely to affect the cash and futures market for copper, increasing volatility and driving up…[the Share] price to create a bubble and burst cycle.'' [143]

Do commenters agree or disagree with these comments? If so, why or why not? 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–NYSEArca–2012–28 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–2012–28. These file numbers 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

[133] *See* V&F Letter, *supra* note 4, at 2–3.

[134] *See id.* at 1, 3.

[135] *See* Arca's Response, *supra* note 6, at 4.

[136] *See id.*

[137] *See* V&F Letter, *supra* note 4, at 1, 10.

[138] *See id.* at 9.

[139] *See* Sen. Levin Letter, *supra* note 8, at 7.

[140] *See* V&F Letter, *supra* note 4, at 5.

[141] *See id.*

[142] *See id.* at 2.

[143] *See* Sen. Levin Letter, *supra* note 9, at 1.

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 such filings also will be available for inspection and copying at the principal office of the Exchanges. 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–NYSEArca–2012–28 and should be submitted on or before August 24, 2012. Rebuttal comments should be submitted by September 10, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[144]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–18107 Filed 7–24–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67466; File No. SR–Phlx–2012–93]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish Managed Data Solution for PHLX Top of Options

July 19, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder [2] notice is hereby given that on July 6, 2012, NASDAQ OMX PHLX LLC (''Phlx'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a 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

Phlx proposes to establish a program for Managed Data Solutions for PHLX Top of Options data offered by Distributors externally distributing data to clients and/or client organizations that are using the TOPO information internally. The text of the proposed rule change is available at *http://nasdaqomxphlx.cchwallstreet.com,* at Phlx's principal office, 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 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 III 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

PHLX is proposing to create a new data distribution model (a Managed Data Solution) to further the distribution of the Top of PHLX Options datafeed (''TOPO''). The Managed Data Solution offers a new delivery method to firms seeking simplified market data administration. The Managed Data Solution may be offered by Distributors externally distributing data to clients and/or client organizations that are using the TOPO information internally. This new pricing and administrative option is in response to industry demand, as well as due to changes in the technology used to distribute market data. Distributors offering Managed Data Solutions continue to be fee liable for the applicable distributor fees for the receipt and distribution of TOPO data.

A Managed Data Solution is a delivery option that will assess a new, innovative fee schedule to Distributors of TOPO that provide datafeed solutions such as an Application Programming Interface (API) or similar automated delivery solutions to recipients with only limited entitlement controls (*e.g.,* usernames and/or passwords) (''Managed Data Recipients''). However, the Distributor must first agree to reformat, redisplay and/or alter the TOPO data prior to retransmission, but not to affect the integrity of TOPO data and not to render it inaccurate, unfair, uninformative, fictitious, misleading, or discriminatory. A Managed Data Solution is any retransmission data product containing PHLX TOPO offered by a Distributor where the Distributor manages and monitors, but does not control, the information. However, the Distributor does maintain contracts with the Managed Data Recipients and is liable for any unauthorized use by the Managed Data Recipients under a Managed Data Solution. The Recipient of a Managed Data Solution may use the information for internal purposes only and may not distribute the information outside of their organization.

Currently, the Exchange does not distinguish between Managed Data Recipients and a recipient of an uncontrolled data product. Some Distributors believe that the Managed Data Solution is a viable alternative to an uncontrolled data product. Some Distributors have even held-off on deploying new PHLX TOPO offerings, pending the initiation of Managed Data Solutions. Thus, offering a Managed Data Solution fee schedule would not only result in PHLX offering lower fees for existing Managed Data Recipients utilizing a Managed Data Solution, but will allow new Distributors to deliver Managed Data Solutions to new clients, thereby increasing transparency of the market. PHLX proposes to establish two fees for Distributors that adopt the Managed Data Solution to Distributors, a monthly Managed Data Solution Administration fee of $1,500 and a monthly Subscriber fee of $250. The proposed monthly License fee would be in addition to the monthly Distributor fee of $2,500 (for external usage) currently set forth in Section IX of the PHLX Fee Schedule, and the $250 monthly Subscriber fee would be assessed for each Subscriber of a Managed Data Solution.

2. Statutory Basis

PHLX believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[3] in general, and with Section 6(b)(4) of the Act,[4] in particular, in that it provides an equitable allocation of reasonable fees among Subscribers and Recipients of PHLX data. In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique

[144] 17 CFR 200.30–3(a)(57).

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

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78f.

[4] 15 U.S.C. 78f(b)(4).