

### 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 not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the proposal will provide market participants with additional protection from anomalous executions. Thus, the Exchange does not believe the proposal creates any significant burden on competition.

### 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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>7</sup> and Rule 19b-4(f)(6) thereunder.<sup>8</sup> Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it is filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder.<sup>9</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>10</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>11</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. In support of its request, the Exchange states that the protections offered by this proposal are designed to contribute to a fair and orderly market and enhance the protection of investors by offering a level of price protection to

pre-open limit orders that is not presently available. The Exchange states that waiving the 30-day delayed operative date will enable all market participants to benefit from the price protection offered by this proposal without delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.<sup>12</sup>

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

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2014-76 on the subject line.

#### Paper Comments

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

All submissions should refer to File Number SR-NYSEMKT-2014-76. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the

Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room at 100 F Street NE., Washington, DC 20549-1090 on official business days between the hours of 10:00 a.m. and 3:00 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 Number SR-NYSEMKT-2014-76, and should be submitted on or before October 6, 2014.

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

Kevin M. O'Neill,  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-73022; File No. SR-NYSEArca-2014-79]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change, as Modified by Amendments No. 1 and No. 2, To List and Trade Shares of InfraCap MLP ETF Under NYSE Arca Equities Rule 8.600

September 9, 2014.

#### I. Introduction

On July 9, 2014, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares ("Shares") of InfraCap MLP ETF ("Fund") under NYSE Arca Equities Rule 8.600. The proposed rule change was published for comment in the **Federal Register** on July 28, 2014.<sup>3</sup> On July 25, 2014, NYSE Arca filed

<sup>13</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 Securities Exchange Act Release No. 72651 (July 22, 2014), 79 FR 43801 ("Notice").

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>8</sup> 17 CFR 240.19b-4(f)(6).

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

<sup>10</sup> 17 CFR 240.19b-4(f)(6).

<sup>11</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>12</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).

Amendment No. 1 to the proposal.<sup>4</sup> On August 8, 2014, NYSE Arca filed Amendment No. 2 to the proposal.<sup>5</sup> The Commission received no comments on the proposal. This order grants approval of the proposed rule change, as modified by Amendments No. 1 and No. 2.

## II. Description of the Proposed Rule Change

The Exchange proposes to list and trade the Shares under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares on the Exchange. The Shares will be offered by ETFis Series Trust I (“Trust”). The Trust is registered with the Commission as an investment company.<sup>6</sup>

<sup>4</sup> Amendment No. 1 replaced and superseded the original filing in its entirety. In Amendment No. 1, the Exchange amended the proposed rule change to: (a) Clarify the type of investment company securities that the Fund may invest in as part of its principal investment strategy; (b) clarify that the real estate investment trust interests that the Fund may invest in as part of its non-principal investment strategy will be exchange-traded; (c) state that not more than 10% of the assets of the Fund will be invested in equity securities that are traded on an exchange that is not a member of the Intermarket Surveillance Group (“ISG”) or with which the Exchange does not have in place a comprehensive surveillance sharing agreement; (d) describe how the over-the-counter (“OTC”) securities in which the Fund invests will be valued for purposes of calculating the Fund’s Net Asset Value (“NAV”) of the Fund, and specify where pricing information for such securities may be obtained; and (e) state, for surveillance purposes, that the Financial Industry Regulatory Authority (“FINRA”), on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA’s Trade Reporting and Compliance Engine (“TRACE”). See Amendment No. 1, available at: <http://www.sec.gov/comments/sr-nysearca-2014-79/nysearca201479-1.pdf>. Amendment No. 1 provided clarification to the proposed rule change, and because it does not materially affect the substance of the proposed rule change or raise novel or unique regulatory issues, Amendment No. 1 is not subject to notice and comment.

<sup>5</sup> Amendment No. 2 amended the filing, as modified by Amendment No. 1, to: (a) Reflect a name change to the Fund from “InfraCap Active MLP ETF” to “InfraCap MLP ETF;” and (b) clarify that all of the principal investments of the Fund, including the other open-end and closed-end investment companies that the Fund may invest in as part of its principal investment strategy, will be exchange-traded. Amendment No. 2 provided clarification to the proposed rule change, and because it does not materially affect the substance of the proposed rule change or raise novel or unique regulatory issues, Amendment No. 2 is not subject to notice and comment.

<sup>6</sup> The Trust is registered under the Investment Company Act of 1940 (“1940 Act”). The Exchange states that on February 26, 2014, the Trust filed with the Commission a post-effective amendment to its registration statement on Form N-1A under the Securities Act of 1933 and under the 1940 Act relating to the Fund (File Nos. 333-187668 and 811-22819) (“Registration Statement”). In addition, the Exchange states that the Trust filed an Amended and Restated Application for an Order under Section 6(c) of the 1940 Act for exemptions from

ETFis Capital LLC (“Adviser”) will serve as the investment adviser to the Fund and Infrastructure Capital Advisors, LLC (“Sub-Adviser”) will serve as sub-adviser for the Fund. The Exchange states that neither the Adviser nor the Sub-Adviser is registered as a broker-dealer. The Exchange states that the Adviser (but not the Sub-Adviser) is affiliated with a broker-dealer; that the Adviser has implemented a fire wall with respect to such broker-dealer affiliate regarding access to information concerning the composition of, or changes to, the portfolio; and that the Adviser will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the portfolio.<sup>7</sup>

ETF Distributors LLC will be the principal distributor of the Fund’s Shares. The Bank of New York Mellon will serve as the administrator, accountant, custodian, and transfer agent for the Fund.

The Exchange has made the following representations and statements in describing the Fund and its investment strategies, including portfolio holdings and investment restrictions.<sup>8</sup>

### Principal Fund Investments

According to the Exchange, the Fund seeks total return primarily through investments in equity securities of publicly-traded master limited partnerships and limited liability companies taxed as partnerships (“MLPs”).<sup>9</sup> The Fund will seek to

various provisions of the 1940 Act and rules thereunder (File No. 812-14080), dated June 19, 2013, and that the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. See Investment Company Act Release No. 30607 (July 23, 2013) (File No. 812-14080).

<sup>7</sup> See Commentary .06 to NYSE Arca Equities Rule 8.600. The Exchange states that, in the event (a) the Adviser or any sub-adviser registers as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, the adviser or sub-adviser will implement a fire wall with respect to its relevant personnel or broker-dealer affiliate, as applicable, regarding access to information concerning the composition of, or changes to, the portfolio, and that adviser or sub-adviser will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

<sup>8</sup> The Commission notes that additional information regarding the Trust, the Fund, and the Shares, investment strategies, risks, NAV calculation, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions, and taxes, among other information, is included in the Notice, Amendment Nos. 1 and 2, and the Registration Statement, as applicable. See Notice, Amendment Nos. 1 and 2, and Registration Statement, *supra* notes 3, 4, 5, and 6 respectively.

<sup>9</sup> According to the Exchange, the Fund may invest in MLP units, securities of companies holding primarily general partner or managing member interests in MLPs, and securities that themselves

achieve its investment objective by normally<sup>10</sup> investing up to 100% (but not less than 80%) of its total assets in exchange-traded securities of MLPs in the energy infrastructure sector. The Fund will focus on investing in MLPs selected by the Sub-Adviser that trade on the New York Stock Exchange (“NYSE”) or the NASDAQ Stock Market (“Nasdaq”) and that, as their principal business, operate assets used in the gathering, transporting, processing, storing, refining, distributing, mining, or marketing of natural gas, natural gas liquids, crude oil, refined petroleum products, or coal.

According to the Exchange, the Fund will typically focus on “midstream” MLPs which are MLPs that collect, gather, process, transport, and store natural resources and their byproducts (primarily crude oil, natural gas, and refined petroleum products), generally without taking ownership of the energy products.<sup>11</sup>

The Fund expects to typically invest in a portfolio of between 25 and 50 MLPs, but there is no limit on the number of MLPs in which the Fund will invest.<sup>12</sup> The Sub-Adviser’s investment decisions will be based on a variety of quantitative, qualitative, and relative

own interests in MLPs (*e.g.*, exchange-traded funds (“ETFs”), exchange-traded notes (“ETNs”), and other exchange-traded open-end and closed-end investment companies that invest in MLPs). The Exchange states that, for purposes of this filing, ETFs include the following: Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)); Portfolio Depositary Receipts (as described in NYSE Arca Equities Rule 8.100); and Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600). The Exchange further states that, for purposes of this filing, ETNs include securities listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(6) (Index-Linked Securities).

<sup>10</sup> The term “normally” includes, but is not limited to, the absence of extreme volatility or trading halts in the equity markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance. According to the Registration Statement, the Fund may, from time to time, take temporary defensive positions that are inconsistent with its principal investment strategies in an attempt to respond to adverse market, economic, political, or other conditions. In such circumstances, the Fund may also hold up to 100% of its portfolio in cash and cash equivalent positions. According to the Registration Statement, when the Fund takes a temporary defensive position, it may not be able to achieve its investment objective.

<sup>11</sup> According to the Exchange, Midstream MLPs may also operate ancillary businesses, including the marketing of energy products and logistical services related thereto, but are typically not engaged in the mining, production, or distribution of energy products.

<sup>12</sup> Under normal circumstances, the Fund will not invest more than 15% of its total assets in any one issuer.

valuation factors. The Sub-Adviser will typically evaluate potential investments with respect to certain key variables that the Sub-Adviser believes make a business successful over time, including, without limitation, a company's competitive position, its perceived ability to earn a high return on capital, the historical and projected stability and reliability of its earnings and cash flow, its anticipated ability to generate cash in excess of its growth needs, and its access to additional capital. The Sub-Adviser also expects to utilize its personnel's experience in evaluating energy infrastructure investments and long-term relationships with energy industry participants to help identify investment opportunities.

#### *Other Fund Investments*

According to the Exchange, although the Fund will normally invest not less than 80% of its total assets as described above, the Fund has flexibility to invest the remaining 20% of its assets in other types of securities, including exchange-traded equity securities of large, medium, and small capitalization companies; money market mutual funds; ETFs; and other open-end or closed-end investment companies unrelated to the energy infrastructure sector, when the Sub-Adviser believes they offer more attractive opportunities or to meet liquidity, redemption, or short-term investing needs.

According to the Exchange, the Fund may invest up to 20% of its total assets in securities convertible into common stock. Convertible securities eligible for purchase by the Fund will be exchange-traded and include convertible bonds, convertible preferred stocks, and warrants. The Fund will not invest directly in real estate, but may invest in exchange-traded readily marketable securities issued by companies that invest in real estate or interests therein. The Fund may also invest in readily marketable interests in exchange-traded real estate investment trusts.

According to the Exchange, the Fund may invest in money market instruments and foreign debt traded on U.S. exchanges or in OTC markets, and the Fund may invest in equity securities (including equity securities in the form of American Depositary Receipts) traded on U.S. exchanges or in the OTC markets.

The Fund may also invest, or establish short positions, in ETFs, exchange-traded options, or futures contracts in an effort to hedge against market, interest rate, or commodity risks in the Fund's portfolio.

#### *Investment Restrictions*

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed to be illiquid by the Sub-Adviser.<sup>13</sup> The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets. Illiquid assets include assets subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

The Fund may lend portfolio securities in an amount equal to up to 33% of its total assets to broker-dealers, major banks, or other recognized domestic institutional borrowers of securities that the Sub-Adviser has determined are creditworthy under guidelines established by the Board of Trustees. The Fund may not lend securities to any company affiliated with the Sub-Adviser. Each loan of securities will be collateralized by cash, securities, or letters of credit. The Fund might experience a loss if the borrower defaults on the loan.

The Fund will not invest in swaps. The Fund's investments will be consistent with its investment objective.

The Fund will not invest in un-sponsored ADRs. The Fund will invest only in ADRs, futures, and options that are traded on an exchange that is a member of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. Not more than 10% of the assets of the Fund will be invested in equity securities that are traded on an exchange that is not a member of the ISG or with which the Exchange does not have in place a comprehensive surveillance sharing agreement.

The Fund may use leverage (including margin borrowing) to the extent permitted by the 1940 Act. However, the Fund's investments will not be used to

<sup>13</sup> In determining the liquidity of the Fund's investments, the Sub-Adviser may consider various factors including: (i) The frequency of trades and quotations; (ii) the number of dealers and prospective purchasers in the marketplace; (iii) dealer undertakings to make a market; (iv) the nature of the security (including any demand or tender features); and (v) the nature of the marketplace for trades (including the ability to assign or offset the Fund's rights and obligations relating to the investment).

seek performance that is the multiple or inverse multiple (*i.e.*, 2Xs and 3Xs) of an index.

#### **III. Discussion and Commission Findings**

After careful review, the Commission finds that the proposed rule change, as modified by Amendments No. 1 and No. 2, is consistent with the requirements of Section 6 of the Act<sup>14</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>15</sup> In particular, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act,<sup>16</sup> which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission notes that the Fund and the Shares must comply with the requirements of NYSE Arca Equities Rule 8.600 for the Shares to be listed and traded on the Exchange.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,<sup>17</sup> which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association ("CTA") high-speed line. In addition, the Indicative Optimized Portfolio Value ("IOPV"),<sup>18</sup>

<sup>14</sup> 15 U.S.C. 78f.

<sup>15</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>16</sup> 15 U.S.C. 78f(b)(5).

<sup>17</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

<sup>18</sup> According to the Exchange, the IOPV calculations will be estimates of the value of the Fund's NAV per Share using market data converted into U.S. dollars at the current currency rates. The IOPV will be calculated by an independent third party calculator and will be calculated based on the same portfolio holdings disclosed on the Fund's Web site. The IOPV price will be based on quotes and closing prices from the securities' local market and may not reflect events that occur subsequent to the local market's close. The quotations of certain Fund holdings may not be updated during U.S. trading hours if such holdings do not trade in the United States. Premiums and discounts between the

which is the Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated at least every 15 seconds during the Core Trading Session by one or more major market data vendors.<sup>19</sup> 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>20</sup> The NAV of the Fund will be determined as of the close of the regular trading session on the Exchange (ordinarily 4:00 p.m. Eastern Time) on each day that the Exchange is open.<sup>21</sup> A

IOPV and the market price may occur. The Exchange states that the IOPV should not be viewed as a "real-time" update of the NAV per Share of the Fund, which will be calculated only once a day.

<sup>19</sup> According to the Exchange, several major market data vendors currently display or make widely available IOPVs taken from the CTA or other data feeds.

<sup>20</sup> On a daily basis, the Adviser will disclose for each portfolio security or other financial instrument of the Fund the following information on the Fund's Web site: ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding); the identity of the security, commodity, index, or other asset or instrument underlying the holding, if any; for options, the option strike price; quantity held (as measured by, for example, par value, notional value, or number of shares, contracts, or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and the percentage weighting of the holding in the Fund's portfolio. The Web site information will be publicly available at no charge.

<sup>21</sup> The NAV per Share for the Fund will be computed by dividing the value of the net assets of the Fund (*i.e.*, the value of its total assets less total liabilities) by the total number of Shares outstanding, rounded to the nearest cent. Expenses and fees, including the management fee, will be accrued daily and taken into account for purposes of determining NAV. The Exchange represents that for purposes of calculating NAV, exchange-traded securities will be valued at market closing price or, if no sale has occurred, at the last quoted bid price on the primary exchange on which they are traded. Price information for exchange-traded securities—including equity securities of MLPs and large, medium, and small capitalization companies, ETFs, ETNs, ADRs, convertible securities, and options—will be taken from the exchange where the security is primarily traded. Futures will be valued at the settlement price determined by the applicable exchange. Foreign debt securities, domestic debt securities, and equity securities, in each case that trade in the OTC market, will be valued based on price quotations obtained from a broker-dealer who makes markets in such securities or on other equivalent indications of value provided by a third-party pricing service. Any such third-party pricing service may use a variety of methodologies to value some or all such securities to determine the market price. The Fund's foreign and domestic debt securities that trade in the OTC market will generally be valued at bid prices. Investment company securities, including money market mutual funds and open-end and closed-end investment companies, will be valued at NAV, utilizing pricing services. In computing the Fund's NAV, the value of the Fund's portfolio holdings is

basket composition file, which includes the security names and share quantities required to be delivered in exchange for the Fund's 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. Information regarding market price and trading volume of the Shares 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. The intra-day, closing, and settlement prices of the portfolio securities and other Fund investments will be readily available from the national securities exchanges trading those securities, automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters. Quotation and last sale information for underlying securities that are exchange-listed—including equity securities of MLPs and large, medium, and small capitalization companies, ETFs, ETNs, ADRs, and convertible securities—will be available via the CTA high-speed line. Information relating to futures will be available from the exchange on which such futures are traded. Information relating to exchange-traded options will be available via the Options Price Reporting Authority. Information for investment companies, including money market mutual funds and open-end and closed-end investment companies, will be available from publicly available pricing sources, including Bloomberg, IDC, and Reuters. Quotation information for foreign debt securities, domestic debt securities, and equity securities that trade in OTC

based on the holdings' closing price on local markets when available. When a portfolio holding's market price is not readily available or does not otherwise accurately reflect the fair value of such security, the Fund will use that holding's fair value as determined in good faith in accordance with the Fund's fair value pricing procedures, which will be approved by the Board of Trustees. In addition, the Fund may fair value foreign equity portfolio holdings each day the Fund calculates its NAV. Accordingly, the Fund's NAV may reflect certain portfolio holdings' fair values rather than their market prices. In valuing non-exchange traded securities, the Fund will first use publicly available pricing sources, including Bloomberg, IDC, and Reuters. Non-exchange traded securities will only be fair valued if their market prices are not readily available. To the extent the assets of the Fund are invested in other open-end investment companies that are registered under the 1940 Act, the Fund's NAV is calculated based upon the NAVs reported by those registered open-end investment companies.

markets may be obtained from brokers and dealers who make markets in those securities or through nationally recognized pricing services through subscription agreements. The Fund's Web site ([www.infracapmlp.com](http://www.infracapmlp.com)), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes 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.<sup>22</sup> The Exchange may halt trading in the Shares if trading is not occurring in the securities or the financial instruments constituting the Disclosed Portfolio of the Fund, or if other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.<sup>23</sup> In addition, trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth additional circumstances under which Shares of the Fund may be halted. The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio of the Fund must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the Fund's portfolio.<sup>24</sup> In addition, the Exchange states that, while neither the Adviser nor the Sub-Adviser is registered as a broker-dealer, the

<sup>22</sup> See NYSE Arca Equities Rule 8.600(d)(1)(B).

<sup>23</sup> See NYSE Arca Equities Rule 8.600(d)(2)(C) (providing additional considerations for the suspension of trading in or removal from listing of Managed Fund Shares on the Exchange). 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. 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.

<sup>24</sup> See NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

Adviser (but not the Sub-Adviser) is affiliated with a broker-dealer and has implemented a fire wall with respect to that broker-dealer regarding access to information concerning the composition of, or changes to, the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the portfolio.<sup>25</sup> The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.<sup>26</sup> The Exchange further 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 represents that the Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. In support of this proposal, the Exchange has made the following representations:

(1) The Shares will conform to the initial and continuing listing criteria under NYSE Arca Equities Rule 8.600.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) FINRA, on behalf of the Exchange, will communicate as needed regarding

trading in the Shares and exchange-traded assets held by the Fund with other markets that are members of ISG, and FINRA, on behalf of the Exchange, may obtain trading information regarding trading in the Shares and exchange-traded assets held by the Fund from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and exchange-traded assets held by the Fund from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. In addition, FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's TRACE.

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

(5) For initial and continued listing, the Fund will be in compliance with Rule 10A-3 under the Act,<sup>27</sup> as provided by NYSE Arca Equities Rule 5.3.

(6) The Fund will normally invest up to 100% (but not less than 80%) of its total assets in exchange-traded securities of MLPs in the energy infrastructure sector.

(7) The Fund will not invest in swaps.

(8) The Fund will not invest in unsponsored ADRs. The Fund will invest only in ADRs, futures, and options that are traded on an exchange that is a member of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

(9) Not more than 10% of the assets of the Fund will be invested in equity securities that are traded on an exchange that is not a member of the ISG or with which the Exchange does not have in place a comprehensive surveillance sharing agreement.

(10) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed to be illiquid by the Sub-Adviser. The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets.

(11) The Fund's investments will be consistent with its investment objective. The Fund may use leverage (including margin borrowing) to the extent permitted by the 1940 Act. However, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.*, 2Xs and 3Xs) of an index.

(12) A minimum of 100,000 Shares for the Fund will be outstanding at the commencement of trading on the Exchange.

This approval order is based on all of the Exchange's representations and description of the Fund, including those set forth above and in the Notice and Amendments No. 1 and No. 2.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendments No. 1 and No. 2, is consistent with Section 6(b)(5) of the Act<sup>28</sup> and the rules and regulations thereunder applicable to a national securities exchange.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>29</sup> that the proposed rule change (SR-NYSEArca-2014-79), as modified by Amendments No. 1 and No. 2, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>30</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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<sup>25</sup> See *supra* note 7 and accompanying text. 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.

<sup>26</sup> The Exchange states that FINRA surveils trading on the Exchange pursuant to a regulatory services agreement and that the Exchange is responsible for FINRA's performance under this regulatory services agreement.

<sup>27</sup> 17 CFR 240.10A-3.

<sup>28</sup> 15 U.S.C. 78f(b)(5).

<sup>29</sup> 15 U.S.C. 78s(b)(2).

<sup>30</sup> 17 CFR 200.30-3(a)(12).