

subparagraph (f)(2) of Rule 19b-4<sup>9</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>10</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

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

##### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2014-131 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-NYSEArca-2014-131. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public

Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices 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-NYSEArca-2014-131, and should be submitted on or before December 5, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

Kevin M. O'Neill,

Deputy Secretary.

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-73559; File No. SR-BATS-2014-018]

#### Self-Regulatory Organizations; BATS Exchange, Inc.; Order Disapproving a Proposed Rule Change To Adopt Rule 14.11(k) to List Managed Portfolio Shares and to List and Trade Shares of Certain Funds of the Spruce ETF Trust

November 7, 2014

On August 4, 2014, BATS Exchange, Inc. ("Exchange" or "BATS") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to adopt new BATS Rule 14.11(k), which would permit the Exchange to list Managed Portfolio Shares, which are shares of actively managed exchange-traded funds ("ETFs") for which the portfolio is disclosed quarterly, and to list and trade shares of certain funds of the Spruce ETF Trust ("Trust")<sup>3</sup> under proposed BATS Rule 14.11(k). The

proposed rule change was published for comment in the **Federal Register** on August 13, 2014.<sup>4</sup> The Commission received one comment letter on the proposal.<sup>5</sup> On September 24, 2014, pursuant to Section 19(b)(2) of the Exchange Act,<sup>6</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>7</sup>

This Order disapproves the proposed rule change.

#### I. Description of the Proposal

The Exchange proposes to: (1) Add new BATS Rule 14.11(k) which would permit the listing of Managed Portfolio Shares; and (2) list and trade shares ("Shares") of the following funds (each a "Fund" and, collectively, the "Funds") under the proposed rule: Large Cap Fund, Large Cap Value Fund, Large Cap Growth Fund, Large/Mid Cap Fund, Large/Mid Cap Value Fund, Large/Mid Cap Growth Fund, Large Cap Long-Short Fund, Large Cap Value Long-Short Fund, Large Cap Growth Long-Short Fund, Large/Mid Cap Long-Short Fund, and Large/Mid Cap Value Long-Short Fund, Large/Mid Cap Growth Long-Short Fund, and Large Cap Growth Active Insights Fund. The discussion below summarizes the Exchange's proposal, details of which are described in the Notice.<sup>8</sup>

##### A. Proposed Listing Rules

The Exchange's proposal would define the term "Managed Portfolio Share" as a security that (a) is issued by an investment company ("Investment Company") organized as an open-end management investment company or similar entity, that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies; (b) is issued in a predetermined Creation Unit<sup>9</sup> size in

<sup>4</sup> See Securities Exchange Act Release No. 72787 (Aug. 7, 2014), 79 FR 47488 ("Notice").

<sup>5</sup> See Letter from Gary L. Gastineau, President, ETF Consultants.com, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated Aug. 30, 2014 ("Comment Letter").

<sup>6</sup> 15 U.S.C. 78s(b)(2).

<sup>7</sup> See Securities Exchange Act Release No. 73199, 79 FR 58844 (September 30, 2014). The Commission designated November 11, 2014 as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

<sup>8</sup> See Notice, *supra* note 4.

<sup>9</sup> Under the proposal, a "Creation Unit" is a specified minimum number of Managed Portfolio

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<sup>9</sup> 17 CFR 240.19b-4(f)(2).

<sup>10</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>11</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> The Commission notes that the Trust, which would be the issuer of the funds, filed an Application for an Order under Section 6(c) of the Investment Company Act of 1940 ("1940 Act") and rules thereunder (File No. 812-13953), dated September 1, 2011 ("Exemptive Application"). The Commission published notice of this application ("Notice of an Application for Exemptive Relief") on October 21, 2014. See Investment Company Act Release No. 31301 (Oct. 21, 2014), 79 FR 63964 (Oct. 27, 2014).

exchange for a cash amount equal to the next determined Net Asset Value (“NAV”),<sup>10</sup> (c) pursuant to the “Small Allotment Redemption Option,” may be redeemed for cash by any Beneficial Owner<sup>11</sup> in any size less than a Redemption Unit<sup>12</sup> for a cash amount equal to the next determined NAV for at least 15 calendar days, in the event that for 10 consecutive Business Days, or such shorter period as determined by the issuer, the midpoint of the national best bid and offer at the time of the calculation of the NAV (the “Bid/Ask Price”),<sup>13</sup> for the security has a discount of 5% or greater from the NAV; and (d) when aggregated in a number of shares equal to a Redemption Unit, or multiples thereof, may be redeemed at an Authorized Participant’s<sup>14</sup> request, which each Authorized Participant would be paid through a blind trust established for its benefit a portfolio of securities and/or cash with a value equal to the next determined NAV.

Funds issuing Managed Portfolio Shares would be actively-managed, and in that respect would be similar to Managed Fund Shares, which are actively-managed funds listed and traded under BATS Rule 14.11(i). Managed Portfolio Shares, however, would differ from Managed Fund Shares in the following important respects. First, in contrast to Managed Fund Shares, for which a “Disclosed Portfolio” is required to be disseminated at least once daily,<sup>15</sup> the portfolio for an

Shares that an Authorized Participant may purchase from the issuer for the current net asset value.

<sup>10</sup> Depending on the context, the term “NAV” may refer to the NAV per Share, the NAV per Creation Unit, or the NAV of a fund.

<sup>11</sup> Under the proposal, a “Beneficial Owner” is defined as: (1) A natural person; (2) a trust established for the benefit of a natural person or a group of related family members; or (3) a tax deferred retirement plan where investments are selected by a natural person purchasing for its own account.

<sup>12</sup> Under the proposal, a “Redemption Unit” is a specified number of Managed Portfolio Shares that an Authorized Participant may sell to the issuer for the current NAV and which is also used for determining whether a Beneficial Owner may redeem for cash. See *infra* note 14.

<sup>13</sup> The records relating to Bid/Ask Prices would be retained by the Funds and its service providers.

<sup>14</sup> Certain large market participants, typically broker-dealers, can become “Authorized Participants” with respect to the Funds. Each Authorized Participant would enter into a contractual relationship with a Fund or Funds, allowing it to engage in redemptions of Shares directly with the issuer.

<sup>15</sup> BATS Rule 14.11(i)(3)(B) defines the term “Disclosed Portfolio” as the identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company’s calculation of NAV at the end of the business day. BATS Rule 14.11(i)(4)(B)(ii)(a) requires that the Disclosed Portfolio be disseminated at least once daily and that it be made available to all market participants at the same time.

issue of Managed Portfolio Shares would be disclosed at least quarterly in accordance with normal disclosure requirements otherwise applicable to open-end investment companies registered under the 1940 Act.<sup>16</sup> Second, creations of Managed Portfolio Shares would generally be effected through a delivery of only cash, whereas creations of Managed Fund Shares are generally effected through an in-kind delivery of securities and cash. Third, in connection with the redemption of shares in Redemption Unit size, the in-kind delivery of any portfolio securities would generally be effected through a blind trust for the benefit of the redeeming Authorized Participant, and the blind trust would liquidate the portfolio securities pursuant to instructions from the Authorized Participant without disclosing the identity of those securities to the Authorized Participant. Fourth, pursuant to the Small Allotment Redemption Option, Beneficial Owners would be able to redeem shares for cash directly from a fund in any size less than a Redemption Unit at the fund’s NAV in limited circumstances.

For each series of Managed Portfolio Shares, an estimated value, defined in the proposed rule as the “Intraday Indicative Value” (“IIV”), that reflects an estimated intraday value of a fund’s portfolio would be disseminated. The IIV would be based upon all of a fund’s holdings as of the close of the prior business day and would be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange’s Regular Trading Hours (normally, 9:30 a.m. to 4:00 p.m., Eastern Time).

The Exchange’s proposal provides that the Exchange would file separate proposals under Section 19(b) of the Exchange Act before listing and trading any series of Managed Portfolio Shares.

### B. Description of the Funds

BlackRock Fund Advisors would be the investment adviser (“Adviser”) to the Funds.<sup>17</sup> State Street Bank and Trust Company would be the administrator, custodian, and transfer agent for the

<sup>16</sup> A mutual fund is required to file with the Commission its complete portfolio schedules for the second and fourth fiscal quarters on Form N-SAR under the 1940 Act, and is required to file its complete portfolio schedules for the first and third fiscal quarters on Form N-Q under the 1940 Act, within 60 days of the end of the quarter. Form N-Q requires funds to file the same schedules of investments that are required in annual and semi-annual reports to shareholders. These forms are available to the public on the Commission’s Web site at [www.sec.gov](http://www.sec.gov).

<sup>17</sup> BlackRock Fund Advisors is an indirect wholly owned subsidiary of BlackRock, Inc.

Trust (“Custodian” or “Transfer Agent”). BlackRock Investments, LLC (“Distributor”) would serve as the distributor for the Trust.

Under normal circumstances,<sup>18</sup> each Fund would invest at least 80% of its net assets in a portfolio of long positions (or engage in borrowings for the purpose of establishing short positions for the Long-Short Funds) in U.S. equity securities.<sup>19</sup> The Funds may in some instances also invest in non-U.S. equity securities with similar market capitalization, liquidity, and risk-return profiles to the U.S. equity securities eligible for investment. Each Fund would hold equity securities of at least 13 non-affiliated issuers, primarily from the 1,200 largest U.S. stocks by market capitalization as determined by The Frank Russell Company annually. Generally, the Large/Mid Cap Funds would select securities from a universe of approximately the 1,200 largest equity securities traded on U.S. exchanges and the Large Cap Funds would select securities from a universe of approximately the 1,000 largest equity securities traded on U.S. exchanges.

A Fund may, to a limited extent (under normal circumstances, less than 20% of the Fund’s net assets), engage in transactions in futures contracts, forward contracts, options, and swaps.<sup>20</sup> A Fund may also invest a portion of its assets in high-quality money market instruments.

## II. Summary of the Comment Letter

The Commission received one letter opposing the proposed rule change, which raises several concerns.<sup>21</sup> First,

<sup>18</sup> The term “under normal circumstances” includes, but is not limited to, the absence of adverse market, economic, political, or other conditions, including 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.

<sup>19</sup> Equity securities would include common stock, preferred stock, securities convertible into common stock and securities or other instruments whose price is linked to the value of common stock, which includes, but is not limited to, shares of other investment companies.

<sup>20</sup> Derivatives would include the following: treasury futures, equity index futures, currency futures, currency forwards, interest rate swaps, credit default swaps, total return swaps, equity index options, and single stock equity options. The derivatives, excluding currency forwards, would be exchange traded and/or centrally cleared. Each Fund’s use of derivatives may be used to enhance leverage, but such leverage would never exceed 1/3 of a Fund’s total assets.

<sup>21</sup> See *supra* note 5. The commenter notes that he has a retained economic interest in a product that may be competitive with Managed Portfolio Shares,

the commenter asserts that there is a “significant risk” that the Internal Revenue Service (“IRS”) would deny the purported tax benefits of the Funds’ distinctive in-kind redemption program.<sup>22</sup> Therefore, the commenter recommends that approval of the proposal be conditioned on the issuer obtaining a favorable IRS determination of the tax treatment through a Private Letter Ruling.<sup>23</sup>

In addition, the commenter predicts that, compared to most existing ETFs, the Shares would probably trade with significantly wider bid-ask spreads, with more variable premiums and discounts, or with both, because of what the commenter characterizes as the unreliability of the Funds’ proposed method for ensuring secondary market trading efficiency. The commenter states that the Funds’ market makers would have only indirect, and likely imperfect, information about Fund holdings.<sup>24</sup> The commenter argues that effectively arbitraging the Funds would be significantly more difficult than the arbitrage for most existing foreign ETFs.<sup>25</sup> The commenter also argues that there is no support for the Exchange’s contention that existing ETFs holding portfolios of foreign securities, such as index-based ETFs holding Asian stocks, have demonstrated efficient pricing characteristics even though, because foreign stocks do not trade during the same hours as U.S. ETFs, the ETFs holding foreign stocks do not provide opportunities for riskless arbitrage transactions during much of the trading day.<sup>26</sup> The commenter also cites a draft academic working paper<sup>27</sup> for the propositions that market trading efficiency varies significantly by type and size of ETF; that funds with high share trading volumes, liquid underlying holdings, and efficient arbitrage mechanisms trade with relatively tight bid-ask spreads and more stable premiums and discounts; and that funds lacking these characteristics generally traded with wider spreads and more variable premiums and discounts.<sup>28</sup>

and states that his views on the Exchange’s filing “may be considered subject to a conflict of interest.” Comment Letter, *supra* note 5, at 1, n.1. He states that his comments are made in the public interest and to the best of his ability are not influenced by any conflict. *See id.*

<sup>22</sup> *See id.* at 4.

<sup>23</sup> *See id.*

<sup>24</sup> *See id.* at 7.

<sup>25</sup> *See id.*

<sup>26</sup> *See id.* at 9.

<sup>27</sup> “Inefficiencies in the Pricing of Exchange-Traded Funds,” Antti Petajisto, September 20, 2013, available at <http://www.petajisto.net/>.

<sup>28</sup> *See* Comment Letter, *supra* note 5, at 8.

The commenter also states its view that, for a number of reasons, the dissemination of an IIV by the Funds would likely prove ineffective in ensuring alignment of secondary market prices for the Shares with the values of the underlying portfolios. The commenter asserts that, during periods of rapid market movement, the use of last-sale prices to calculate an IIV, coupled with the dissemination of the IIV only every 15 seconds, would mean that the IIV would be a lagging indicator of actual portfolio values.<sup>29</sup> Additionally, the commenter asserts that the IIV may reflect clearly erroneous values for securities that have not yet opened for trading on a particular business day or that are subject to an intraday interruption in trading.<sup>30</sup> The commenter also states that no one would stand behind a Fund’s IIV to ensure timeliness and accuracy.<sup>31</sup> The commenter predicts that, without a reliable IIV, the Shares cannot and would not trade acceptably in the secondary market.<sup>32</sup>

The commenter predicts that frequent IIV errors would in turn cause “erroneous share trades” to be executed.<sup>33</sup> The commenter states that the proposal does not address the treatment of erroneous share trades resulting from a faulty IIV—namely, whether IIV errors and related erroneous trades would be detected by the Exchange, whether such trades would be cancelled, and whether the Exchange would apply a materiality standard for cancellations.<sup>34</sup> The commenter argues that, as a condition of approval, the Exchange should be required to monitor the timeliness and accuracy of IIV dissemination and to implement procedures to address trades when an erroneous IIV has been disseminated.<sup>35</sup>

The commenter also predicts that the following elements of the proposed redemption arrangements would introduce additional costs and uncertainties for Authorized Participants:

- The Custodian would have a monopoly position as the sole eligible provider of trustee services for the blind trust;
- The Adviser, rather than the Authorized Participant, would negotiate the fees paid to the trustee;
- In contrast to existing ETFs, no Authorized Participant would have the

potential ability to use its market knowledge and market position to enhance arbitrage profits (or offset arbitrage costs) by managing sales of the distributed securities to minimize market impact or to realize prices above the market close; and

- The Custodian, who stands in for the Authorized Participant in the sale of distributed securities, would have no apparent incentive to sell distributed securities with low market impact or at prices above the close and would experience little or no downside from doing the opposite.<sup>36</sup>

The commenter also asserts that redeeming Authorized Participants would be exposed to potential costs and risks associated with not being able to control disposition of significantly more concentrated redemption proceeds, and the commenter argues that these extra costs and risks associated with the blind trust arrangement would be passed through to shareholders transacting in the secondary market, reflected as wider bid-ask spreads, more volatile premiums and discounts for the Shares, or both.<sup>37</sup>

The commenter posits that the lack of portfolio transparency would favor market makers and other professional traders over other market participants, such as investors.<sup>38</sup> Notwithstanding the public dissemination of the IIV, the commenter argues that market makers and other professional traders would have a significant indirect information advantage over other participants because of their ability to glean information about a Fund’s holdings through sophisticated data analysis of changes in the IIV.<sup>39</sup> In particular, the commenter asserts that IIV disclosures might enable market makers and professional traders to uncover a Fund’s holdings and trading activity, rendering the Fund susceptible to the dilutive effects of front running.<sup>40</sup> The commenter asserts that, prior to approval, the proposal should be amended to include: (1) A discussion of the steps to be taken to minimize reverse engineering risk; (2) a discussion of how the Funds propose to resolve the conflict between providing market makers with adequate information to support efficient Share trading and protecting against reverse engineering; and (3) representations that the Funds would adequately disclose reverse-engineering risk and the conflicts the

<sup>36</sup> *See id.* at 11.

<sup>37</sup> *See id.*

<sup>38</sup> *See id.* at 13.

<sup>39</sup> *See id.* at 13–14.

<sup>40</sup> *See id.* The commenter discusses certain factors determining a fund’s susceptibility to reverse engineering using intraday valuations disseminated at 15 second intervals. *See id.* at 14.

<sup>29</sup> *See id.* at 9.

<sup>30</sup> *See id.* at 9–10.

<sup>31</sup> *See id.* at 10.

<sup>32</sup> *See id.*

<sup>33</sup> *See id.* at 12.

<sup>34</sup> *See id.*

<sup>35</sup> *See id.*

Funds face in seeking to provide for efficient market trading and protection against reverse engineering.<sup>41</sup>

The commenter argues that the Commission should not grant the issuer's pending request for exemptive relief under the 1940 Act to maintain early Order Cut-Off Times for Fund redemptions, which are intended to facilitate the timely sale of distributed securities by the blind trusts that receive the proceeds of Authorized Participant redemptions and the efficient processing of redemptions by retail investors through the Small Allotment Redemption Option.<sup>42</sup> The commenter questions how the early Order Cut-Off Times would impact secondary market trading and the Funds' proposed arbitrage mechanism.<sup>43</sup>

The commenter posits that a principal purpose of including the Small Allotment Redemption Option in the proposal is to provide comfort to the Commission and market participants that investors would be able to redeem Shares with the Fund at or near NAV whenever secondary market trading prices are at a significant discount to NAV.<sup>44</sup> The commenter argues that these provisions, as proposed, are inadequate for this purpose because: (1) Shares could trade at persistently wide discounts to NAV and still rarely, if ever, cause the Small Allotment Redemption Option to be invoked due to the triggering events thresholds; (2) the Small Allotment Redemption Option would be available only to a limited set of shareholders and would be restricted to redemptions of less than a Redemption Unit; (3) the expected early Order Cut-Off Time for redemptions under the Small Allotment Redemption Option means that an investor's ability to directly redeem Shares for cash would exist for only a portion of each business day; and (4) investors who redeem Shares would be subject to transaction fees imposed by the Fund of up to 2% and may also be subject to broker-dealer processing fees.<sup>45</sup> The commenter recommends that the Commission impose the following conditions for approval: (1) Modification of the triggering events;<sup>46</sup> (2) extension of eligibility for the Small Allotment Redemption Option to all shareholders and establishment (and disclosure) of a reasonable upper limit on the value of Shares that are eligible; (3) establishing the close of the

Exchange's Regular Trading Hours as the Order Cut-off Time for redemptions under the Small Allotment Redemption Option; and (4) establishment of a cap on transaction fees that the Funds may charge on direct redemptions of Shares.<sup>47</sup>

The commenter believes that the Funds would be permitted to hold investments that are not well-suited to the continuous dissemination of timely and accurate IIVs throughout the trading day.<sup>48</sup> The commenter asserts that the Funds should: (1) Be required to limit their non-cash investments to U.S.-exchange-listed stocks with market caps of \$5 billion or greater (consistent with the general understanding of large- and medium-cap stocks; a universe of about 700 stocks currently); (2) not be permitted to invest in illiquid assets; and (3) not be permitted to employ investment leverage or hold short positions.<sup>49</sup>

The commenter notes that the Exchange would permit trading in the Shares between 8:00 a.m. and 5:00 p.m., but that the IIV would only be disseminated during the Exchange's Regular Trading Hours, which are between 9:30 a.m. and 4:00 p.m. The commenter asserts that the proposal does not adequately address the significant risk that the prices of Shares bought or sold in the Pre-Opening Session (8:00 a.m. to 9:30 a.m.) and After Hours Session (4:00 p.m. to 5:00 p.m.) would vary widely from underlying portfolio values because an updated IIVs would not be available.<sup>50</sup> Therefore, the commenter suggests that trading in Shares should be limited to the Exchange's Regular Trading Hours.<sup>51</sup>

The commenter states that, given the importance of the IIV to the decision-making process of current and prospective Fund investors, all Fund investors should have ongoing access to current IIV values.<sup>52</sup> The commenter suggests that each Fund's current IIV be provided at no charge on a public Web site and made available to the public no later than it is made available to any other market participant.<sup>53</sup> The commenter also suggests that the following information be published on the Funds' Web site: real time IIVs and historical IIV information; statistics regarding closing price premiums and discounts; statistics regarding intraday

estimated premiums and discounts; statistics regarding bid-ask spreads; statistics regarding long or short equity market exposure and the amount of investment leverage employed; and statistics regarding transaction fees applicable to purchases of Shares, redemptions through the Small Allotment Redemption Option and Redemption Unit redemptions by Authorized Participants.<sup>54</sup>

### III. Discussion and Commission Findings

Under Section 19(b)(2)(C) of the Exchange Act, the Commission shall approve a proposed rule change of a self-regulatory organization if the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to that organization.<sup>55</sup> The Commission shall disapprove a proposed rule change if it does not make such a finding.<sup>56</sup>

After careful consideration, the Commission does not find that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission does not find that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act, which requires that the rules of a national securities 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 to protect investors and the public interest.<sup>57</sup>

Before an ETF can list and trade on a national securities exchange, the ETF must have exemptive relief under the 1940 Act, and a national securities exchange must have effective rules in place to list and trade the ETF.<sup>58</sup> As noted above, the Trust has filed an Exemptive Application under the 1940

<sup>54</sup> See *id.* at 22–23.

<sup>55</sup> 15 U.S.C. 78s(b)(2)(C)(i).

<sup>56</sup> 15 U.S.C. 78s(b)(2)(C)(ii).

<sup>57</sup> 15 U.S.C. 78f(b)(5). In disapproving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>58</sup> Neither an ETF that has obtained 1940 Act exemptive relief but does not fall within Commission-approved exchange listing standards, nor an ETF that falls within Commission-approved listing standards but has been denied 1940 Act exemptive relief, can legally be listed and traded on a national securities exchange.

<sup>41</sup> See *id.* at 14.

<sup>42</sup> See *id.* at 15.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* at 15–16.

<sup>45</sup> See *id.* at 16.

<sup>46</sup> See *id.* at 17.

<sup>47</sup> See *id.* at 20.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.* at 21.

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See *id.* at 21–22.

Act.<sup>59</sup> As stated in the Notice of an Application for Exemptive Relief, however, “the Commission preliminarily believes that [the Trust’s] proposed ETFs do not meet the standard for exemptive relief under section 6(c) of the [1940] Act,”<sup>60</sup> and accordingly, “absent a request for a hearing that is granted by the Commission, the Commission intends to deny [the Trust’s] request for an exemption under section 6(c) of the [1940] Act as not necessary or appropriate in the public interest and as not consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the [1940] Act.”<sup>61</sup>

The purpose of the Exchange’s proposed rule change is to allow the listing and trading of the proposed Funds and future funds of the same type. The Commission does not believe that approving this proposed rule change would be consistent with the requirement under the Exchange Act that an exchange’s rules be consistent with the protection of investors and the public interest, because the Commission has stated its intention to deny the Trust’s request for exemptive relief under the 1940 Act and because denying this exemptive relief would mean that the Funds could not legally operate.<sup>62</sup>

#### IV. Conclusion

For the reasons set forth above, the Commission does not find that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular,

<sup>59</sup> See note 3 and accompanying text, *supra*. The Trust, the Advisor, and the Distributor submitted an application for an order under section 6(c) of the 1940 Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the 1940 Act and rule 22c-1 under the 1940 Act; under sections 6(c) and 17(b) of the 1940 Act for an exemption from sections 17(a)(1) and 17(a)(2) of the 1940 Act; and under section 12(d)(1)(j) of the 1940 Act for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the 1940 Act.

<sup>60</sup> Notice of Application for Exemptive Relief, *supra* note 3, at 3.

<sup>61</sup> *Id.* at 31.

<sup>62</sup> The Commission’s determinations under Section 6(c) of the 1940 Act with respect to the Funds are preliminary and could change if a hearing were requested, the Commission were to grant the request, and persuasive new information were presented. Under Section 19(b)(2) of the Exchange Act, however, the Commission must approve, disapprove, or institute proceedings to disapprove this proposed rule change by November 11, 2014, and it must do so on the basis of the facts as they currently exist, irrespective of any information that might be presented to or considered by the Commission at a later date in the context of its final determination under Section 6(c) of the 1940 Act.

with Section 6(b)(5) of the Exchange Act.<sup>63</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change (SR-BATS-2014-018) be, and it hereby is, disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>64</sup>

**Kevin M. O’Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-73564; File No. SR-EDGA-2014-26]

### Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for Use of EDGA Exchange, Inc.

November 7, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 31, 2014, EDGA Exchange, Inc. (the “Exchange” or “EDGA”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19-4(f)(2) thereunder,<sup>4</sup> which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange filed a proposal to amend the fee schedule applicable to

<sup>63</sup> Having found for the reasons explained above that the Exchange’s proposed rule change is not consistent with the requirements of the Exchange Act, the Commission does not believe it is necessary to address each of the particular objections raised by the commenter who opposes the proposed rule change.

<sup>64</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> 15 U.S.C. 78s(b)(3)(A)(ii).

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

Members<sup>5</sup> and non-members of the Exchange pursuant to EDGA Rules 15.1(a) and (c). Changes to the fee schedule pursuant to this proposal are effective upon filing.

The text of the proposed rule change is available at the Exchange’s Web site at <http://www.directedge.com>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

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

###### 1. Purpose

The Exchange proposes to amend its Fee Schedule to decrease the fee for orders yielding Flag K, which routes to PSX using ROUC or ROUE routing strategies. In securities priced at or above \$1.00, the Exchange currently assesses a fee of \$0.0026 per share for Members’ orders that yield Flag K. The Exchange proposes to amend its Fee Schedule to decrease this fee to \$0.0024 per share from \$0.0026 per share. The proposed change represents a pass through of the rate that Direct Edge ECN LLC (d/b/a DE Route) (“DE Route”), the Exchange’s affiliated routing broker-dealer, is charged for routing orders to PSX when it does not qualify for a volume tiered reduced fee. The proposed change is in response to PSX’s November 2014 fee change where PSX decreased the fee to remove liquidity via routable order types it charges its customers, from a fee of \$0.0026 per share to a fee of \$0.0024 per share.<sup>6</sup>

<sup>5</sup> The term “Member” is defined as “any registered broker or dealer, or any person associated with a registered broker or dealer, that has been admitted to membership in the Exchange. A Member will have the status of a “member” of the Exchange as that term is defined in Section 3(a)(3) of the Act.” See Exchange Rule 1.5(n).

<sup>6</sup> See PSX, Equity Trader Alert 2014-95, Updates to PSX and BX Pricing for November 2014, dated October 27, 2014, available at <http://>