

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77086; File No. SR-BATS-2016-03]

### Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To List and Trade the Shares of the Elkhorn Dow Jones RAFI Commodity ETF of Elkhorn ETF Trust

February 9, 2016.

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 February 1, 2016, BATS Exchange, Inc. (the "Exchange" or "BATS") 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. On February 3, 2016, the Exchange filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1 thereto, from interested persons.

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

The Exchange is proposing a rule change to list and trade the shares of the Elkhorn Dow Jones RAFI Commodity ETF (the "Fund") of Elkhorn ETF Trust (the "Trust") under BATS Rule 14.11(i) ("Managed Fund Shares"). The shares of the Fund are collectively referred to herein as the "Shares."

The text of the proposed rule change is available at the Exchange's Web site at [www.batstrading.com](http://www.batstrading.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

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

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

##### 1. Purpose

The Exchange proposes to list and trade the Shares under BATS Rule 14.11(i), which governs the listing and trading of Managed Fund Shares on the Exchange.<sup>3</sup> The Fund will be an actively managed fund. The Shares will be offered by the Trust, which was established as a Massachusetts business trust on December 12, 2013.<sup>4</sup> The Trust is registered with the Commission as an open-end investment company and has filed a registration statement on behalf of the Fund on Form N-1A ("Registration Statement") with the Commission.<sup>5</sup> The Fund will be a series of the Trust. The Fund will invest in, among other things, exchange-traded commodity futures contracts and exchange-traded commodity-linked instruments held indirectly through a wholly-owned subsidiary controlled by the Fund and organized under the laws of the Cayman Islands (referred to herein as the "Subsidiary").

##### Description of the Shares and the Fund

Elkhorn Investments, LLC will be the investment adviser (the "Adviser") to the Fund and will monitor the Fund's investment portfolio. It is currently anticipated that day-to-day portfolio management for the Fund will be provided by the Adviser. However, the Fund and the Adviser may contract with an investment sub-adviser (a "Sub-Adviser") to provide day-to-day portfolio management for the Fund. ALPS Distributors, Inc. (the "Distributor") will be the principal underwriter and distributor of the Fund's Shares. The Fund will contract with unaffiliated third parties to provide

<sup>3</sup> The Commission approved BATS Rule 14.11(i) in Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR-BATS-2011-018).

<sup>4</sup> The Trust has obtained from the Commission an order granting certain exemptive relief to the Trust under the 1940 Act (File No. 812-14262). In compliance with BATS Rule 14.11(i)(2)(E), which applies to Managed Fund Shares based on an international or global portfolio, the Trust's application for exemptive relief under the 1940 Act states that the Fund will comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933 (15 U.S.C. 77a).

<sup>5</sup> See Registration Statement on Form N-1A for the Trust, dated November 10, 2015 (File Nos. 333-201473 and 811-22926). The descriptions of the Fund and the Shares contained herein are based, in part, on information in the Registration Statement.

administrative, custodial and transfer agency services to the Fund.

Rule 14.11(i)(7) provides that, if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a "fire wall" between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio.<sup>6</sup> In addition, Rule 14.11(i)(7) further requires that personnel who make decisions on the investment company's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the applicable investment company portfolio. Rule 14.11(i)(7) is similar to BATS Rule 14.11(b)(5)(A)(i), however, Rule 14.11(i)(7) in connection with the establishment of a "fire wall" between the investment adviser and the broker-dealer reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with index-based funds. The Adviser is not a broker-dealer, although it is affiliated with a broker-dealer. The Adviser has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the Fund's portfolio. In addition, personnel who make decisions regarding the Fund's portfolio composition will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Fund's portfolio. In the event that (a) the Adviser or a Sub-

<sup>6</sup> An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the "Advisers Act"). As a result, the Adviser and any 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>1</sup> 15 U.S.C. 78s(b)(1).

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

Adviser becomes, or becomes newly affiliated with, a broker-dealer or registers as a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it will implement a fire wall with respect to its relevant personnel and/or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the portfolio and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

#### Elkhorn Dow Jones RAFI Commodity ETF

According to the Registration Statement, the Fund's investment objective will be to provide total return which exceeds that of the Dow Jones RAFI Commodity Index (the "Benchmark")<sup>7</sup> consistent with prudent investment management. The Fund will seek excess return above the Benchmark through the active management of a short duration portfolio of highly liquid, high quality bonds.

The Fund will be an actively managed fund that seeks to achieve its investment objective by, under normal market conditions,<sup>8</sup> investing in exchange-traded commodity futures contracts, centrally cleared and non-centrally cleared swaps,<sup>9</sup> exchange-traded options on futures contracts and exchange-traded commodity-linked instruments<sup>10</sup> (collectively,

<sup>7</sup> The Benchmark is developed, maintained and sponsored by S&P Dow Jones Indices LLC ("S&P Indices").

<sup>8</sup> The term "under normal market conditions" includes, but is not limited to, the absence of extreme volatility or trading halts in the fixed income markets, futures 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>9</sup> Investments in non-centrally cleared swaps (through the Subsidiary) will not represent more than 20% of the Fund's net assets. When investing in non-centrally cleared swaps, the Subsidiary will seek, where possible, to use counterparties, as applicable, whose financial status is such that the risk of default is reduced; however, the risk of losses resulting from default is still possible. The Adviser and/or a Sub-Adviser will evaluate the creditworthiness of counterparties on an ongoing basis. In addition to information provided by credit agencies, the Adviser's and/or a Sub-Adviser's analysis will evaluate each approved counterparty using various methods of analysis and may consider such factors as the counterparty's liquidity, its reputation, the Adviser's and/or a Sub-Adviser's past experience with the counterparty, its known disciplinary history and its share of market participation.

<sup>10</sup> Exchange-traded commodity-linked instruments include only the following: (1) funds

("Commodities") through the Subsidiary, thereby obtaining exposure to the commodities markets.

The Fund's Commodities investments, in part, will be comprised of exchange-traded futures contracts on commodities that comprise the Benchmark. Although the Fund, through the Subsidiary, will generally hold many of the futures contracts included in the Benchmark, the Fund and the Subsidiary will be actively managed and will not be obligated to invest in all of (or to limit investments solely to) such futures contracts. In addition, with respect to investments in exchange-traded futures contracts, the Fund and the Subsidiary will not be obligated to invest in the same amount or proportion as the Benchmark, or be obligated to track the performance of the Benchmark. There can be no assurance that the Fund's performance will exceed the performance of the Benchmark at any time. In addition to exchange-traded futures contracts, the Fund's Commodities investments will also be comprised of the following: centrally cleared and non-centrally cleared swaps on commodities, exchange-traded options on futures contracts that provide exposure to the investment returns of the commodities markets, and exchange-traded commodity-linked instruments, without investing directly in physical commodities.

The Fund will invest in Commodities through investments in the Subsidiary and will not invest directly in physical commodities. The Fund's investment in the Subsidiary may not exceed 25% of the Fund's total assets. In addition to Commodities, the Fund's assets will be invested in: (1) Short-term investment grade fixed income securities including only the following instruments: U.S. government and agency securities,<sup>11</sup> corporate debt obligations<sup>12</sup> and

that provide exposure to commodities as would be listed under Rules 14.11(b), (c), and (i); and (2) pooled investment vehicles that invest primarily in commodities and commodity-linked instruments as would be listed under Rules 14.11(d) and 14.11(e)(2), (4), (6), (7), (8), (9) and (10). Such pooled investment vehicles are commonly referred to as "exchange-traded funds" but they are not registered as investment companies because of the nature of their underlying investments.

<sup>11</sup> Such securities are securities that are issued or guaranteed by the U.S. Treasury, by various agencies of the U.S. government, or by various instrumentalities, which have been established or sponsored by the U.S. government. U.S. Treasury obligations are backed by the "full faith and credit" of the U.S. government. Securities issued or guaranteed by federal agencies and U.S. government-sponsored instrumentalities may or may not be backed by the full faith and credit of the U.S. government.

<sup>12</sup> At least 75% of corporate debt obligations will have a minimum principal amount outstanding of \$100 million or more.

repurchase agreements;<sup>13</sup> (2) money market instruments;<sup>14</sup> (3) investment companies (other than those that are commodity-linked instruments),<sup>15</sup> including both exchange traded and non-exchange-traded investment companies, that provide exposure to commodities, equity securities and fixed income securities to the extent permitted under the 1940 Act and any applicable exemptive relief;<sup>16</sup> (4) certain bank instruments<sup>17</sup>; and (5) cash and other cash equivalents (collectively, "Other Investments"). The Fund will use the Other Investments as

<sup>13</sup> The Fund intends to enter into repurchase agreements only with financial institutions and dealers believed by the Adviser and/or a Sub-Adviser to present minimal credit risks in accordance with criteria approved by the Trust's Board of Trustees (the "Board"). The Adviser and/or a Sub-Adviser will review and monitor the creditworthiness of such institutions. The Adviser and/or a Sub-Adviser will monitor the value of the collateral at the time the transaction is entered into and at all times during the term of the repurchase agreement.

<sup>14</sup> For the Fund's purposes, money market instruments will include only the following instruments: short-term, high-quality securities issued or guaranteed by non-U.S. governments, agencies and instrumentalities; non-convertible corporate debt securities with remaining maturities of not more than 397 days that satisfy ratings requirements under Rule 2a-7 under the 1940 Act; money market mutual funds; and deposits and other obligations of U.S. and non-U.S. banks and financial institutions. In addition, the Fund may invest in commercial paper, which are short-term unsecured promissory notes. The Fund may additionally invest in commercial paper only if it has received the highest rating from at least one nationally recognized statistical rating organization or, if unrated, has been judged by the Adviser and/or a Sub-Adviser to be of comparable quality.

<sup>15</sup> The Fund may invest in the securities of certain other investment companies in excess of the limits imposed under the 1940 Act pursuant to an exemptive order obtained by the Trust and the Adviser from the Commission. See Investment Company Act Release No. 31401 (December 29, 2014) (File No. 812-14264). The exchange-traded investment companies in which the Fund may invest include Index Fund Shares (as described in Rule 14.11(c)), Portfolio Depository Receipts (as described in Rule 14.11(b)), and Managed Fund Shares (as described in Rule 14.11(i)). The non-exchange-traded investment companies in which the Fund may invest include all non-exchange-traded investment companies that are not money market mutual funds, as described above. While the Fund and the Subsidiary may invest in inverse commodity-linked instruments and securities of investment companies, the Fund and the Subsidiary will not invest in leveraged or inverse leveraged (e.g., 2X or -3X) commodity-linked instruments or securities of investment companies.

<sup>16</sup> The exchange-traded investment companies and commodity-linked instruments in which the Fund invests will be listed and traded in the U.S. on registered exchanges.

<sup>17</sup> The term "certain bank instruments" includes only the following instruments: certificates of deposit issued against funds deposited in a bank or savings and loan association; bankers' acceptances, which are short-term credit instruments used to finance commercial transactions; and bank time deposits, which are monies kept on deposit with banks or savings and loan associations for a stated period of time at a fixed rate of interest.

investments, to provide liquidity and to collateralize the Subsidiary's commodity exposure on a day-to-day basis.

The Fund's investment in the Subsidiary will be designed to help the Fund achieve exposure to commodity returns in a manner consistent with the federal tax requirements applicable to the Fund and other regulated investment companies.

The Fund intends to qualify for and to elect to be treated as a separate regulated investment company under Subchapter M of the Internal Revenue Code.<sup>18</sup>

#### Subsidiary's Investments

The Subsidiary will generally seek to make investments in Commodities and its portfolio will be managed by the Adviser or a Sub-Adviser.<sup>19</sup> The Adviser or a Sub-Adviser will use its discretion to determine the percentage of the Fund's assets allocated to the Commodities held by the Subsidiary that will be invested in exchange-traded commodity futures contracts, centrally cleared and non-centrally cleared swaps, exchange-traded options on futures contracts and exchange-traded commodity-linked instruments. In this regard, under normal market conditions,

the Subsidiary is expected, as a general matter, to invest in futures contracts in proportional weights and allocations that are similar to the Benchmark, as well as in the other Commodities. Additionally, the Subsidiary, like the Fund, may invest in Other Investments (e.g., as investments or to serve as margin or collateral or otherwise support the Subsidiary's positions in Commodities).

The Fund's investment in the Subsidiary is intended to provide the Fund with exposure to commodity markets within the limits of current federal income tax laws applicable to investment companies such as the Fund, which limit the ability of investment companies to invest directly in the derivative instruments. The Subsidiary will have the same investment objective as the Fund, but unlike the Fund, it may invest without limitation in Commodities. The Subsidiary's investments will provide the Fund with exposure to domestic and international markets.

The Benchmark is designed to offer an alternative beta using signals to generate alpha, but with typical indexing merits such as liquidity, transparency and a low fee structure. The Benchmark uses

momentum and roll yield to over or underweight the liquidity weighted commodities within the equally weighted sectors of the Dow Jones Commodity Index. Furthermore, the Benchmark utilizes a modified dynamic roll methodology based on liquidity and implied roll yield, includes only contracts expiring out to 24 months and requires that each eligible contract must have open interest of at least 5% of the total open interest in the nearby most liquid contracts. The roll occurs on the first through fifth (1st–5th) business days with the monthly rebalancing. The Benchmark includes only those commodities that are included in the Dow Jones Commodity Index. Currently, the Benchmark contains 24 commodities across three major sectors including energy, agriculture and livestock, and metals. The following table describes each of the commodities underlying the futures contracts included in the Benchmark as of October 31, 2015. The table also provides each instrument's trading hours, exchange and ticker symbol. The table is subject to change (and the Subsidiary will not in all cases invest in the futures contracts included in the Benchmark).

Commodity	Exchange code	Exchange name <sup>20</sup>	Trading hours electronic (E.T.)	Contract symbol(s)
WTI Crude Oil .....	NYM	New York Mercantile Exchange ....	18:00–17:15 .....	CL.
NY Harbor ULSD .....	NYM	New York Mercantile Exchange ....	18:00–17:15 .....	HO.
Brent Crude Oil .....	ICE	ICE Futures Europe .....	20:00–18:00 .....	B.
RBOB Gasoline .....	NYM	New York Mercantile Exchange ....	18:00–17:15 .....	RB.
Gasoil .....	ICE	ICE Futures Europe .....	20:00–18:00 .....	G.
Natural Gas .....	NYM	New York Mercantile Exchange ....	18:00–17:15 .....	NG.
SRW Wheat .....	CBT	Chicago Board of Trade .....	Sun-F 20:00–08:45; M–F 09:30–14:15.	W; ZW.
HRW Wheat .....	CBT	Chicago Board of Trade .....	Sun-F 20:00–08:45; M–F 9:30–14:15.	KW; KE.
Corn .....	CBT	Chicago Board of Trade .....	Sun-F 20:00–08:45; M–F 09:30–14:15.	C; ZC.
Soybeans .....	CBT	Chicago Board of Trade .....	Sun-F 20:00–08:45; M–F 09:30–14:15.	S; ZS.
Coffee "C" Arabica .....	NYB	ICE Futures US .....	04:15–13:30 .....	KC.
Sugar #11 .....	NYB	ICE Futures US .....	03:30–13:00 .....	SB.
Cocoa .....	NYB	ICE Futures US .....	04:45–13:30 .....	CC.
Cotton .....	NYB	ICE Futures US .....	21:00–14:20 .....	CT.
Live Cattle .....	CME	Chicago Mercantile Exchange .....	M 10:05–F 14:55; (Halts 17:00–18:00).	LC; LE.
Feeder Cattle .....	CME	Chicago Mercantile Exchange .....	M 10:05–F 14:55; (Halts 17:00–18:00).	FC; GF.
Lean Hogs .....	CME	Chicago Mercantile Exchange .....	M 10:05–F 14:55; (Halts 17:00–18:00).	LH; HE.
Aluminium primary .....	LME	London Metal Exchange .....	20:00–14:00 .....	AH.
Copper grade A .....	LME	London Metal Exchange .....	20:00–14:00 .....	CA.
Lead standard .....	LME	London Metal Exchange .....	20:00–14:00 .....	PB.
Nickel primary .....	LME	London Metal Exchange .....	20:00–14:00 .....	NI.

<sup>18</sup> 26 U.S.C. 851.

<sup>19</sup> The Subsidiary will not be registered under the 1940 Act and will not be directly subject to its investor protections, except as noted in the Registration Statement. However, the Subsidiary will be wholly-owned and controlled by the Fund.

Therefore, the Fund's ownership and control of the Subsidiary will prevent the Subsidiary from taking action contrary to the interests of the Fund or its shareholders. The Board will have oversight responsibility for the investment activities of the Fund, including its expected investment in the Subsidiary, and the Fund's role as the sole

shareholder of the Subsidiary. The Subsidiary will also enter into separate contracts for the provision of custody, transfer agency, and accounting agent services with the same or with affiliates of the same service providers that provide those services to the Fund.

Commodity	Exchange code	Exchange name <sup>20</sup>	Trading hours electronic (E.T.)	Contract symbol(s)
Zinc high grade .....	LME	London Metal Exchange .....	20:00–14:00 .....	ZS.
Silver .....	CMX	COMEX .....	18:00–17:15 .....	SI.
Gold .....	CMX	COMEX .....	18:00–17:15 .....	GC.

<sup>20</sup> All of the exchanges are Intermarket Surveillance Group (“ISG”) members except for the London Metal Exchange (“LME”), ICE Futures Europe, and Commodity Exchange (“COMEX”). The LME falls under the jurisdiction of the Financial Conduct Authority (“FCA”). The FCA is responsible for ensuring the financial stability of the exchange members’ businesses, whereas the LME is largely responsible for the oversight of day-to-day exchange activity, including conducting the arbitration proceedings under the LME arbitration regulations. With respect to the futures contracts and exchange-traded options on futures contracts in which the Subsidiary invests, not more than 10% of the weight (to be calculated as the value of the contract divided by the total absolute notional value of the Subsidiary’s futures and options contracts) of the futures and options contracts held by the Subsidiary in the aggregate shall consist of instruments whose principal trading market is a market from which the Exchange may not obtain information regarding trading in the futures contracts and exchange-traded options on futures contracts by virtue of: (a) its membership in ISG; or (b) a comprehensive surveillance sharing agreement.

As the U.S. and foreign exchanges noted above list additional contracts, as currently listed contracts on those exchanges gain sufficient liquidity, or as other exchanges list sufficiently liquid contracts, the Adviser and/or any Sub-Adviser will include those contracts in the list of possible investments of the Subsidiary. The list of commodities futures and commodities markets considered for investment can and will change over time.

#### Commodities Regulation

The Commodity Futures Trading Commission (“CFTC”) has adopted substantial amendments to CFTC Rule 4.5 relating to the permissible exemptions and conditions for reliance on exemptions from registration as a commodity pool operator. As a result of the instruments that will be indirectly held by the Fund, the Adviser will register as a commodity pool operator<sup>21</sup> and will also be a member of the National Futures Association (“NFA”). Any Sub-Adviser will register as a commodity pool operator or commodity trading adviser, as required by CFTC regulations. The Fund and the Subsidiary will be subject to regulation by the CFTC and NFA and additional disclosure, reporting and recordkeeping rules imposed upon commodity pools.

#### Investment Restrictions

While the Fund will be permitted to borrow as permitted under the 1940 Act, the Fund’s investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.*, 2X and –3X) of the Benchmark.

The Fund may not invest more than 25% of the value of its total assets in securities of issuers in any one industry or group of industries. This restriction will not apply to obligations issued or guaranteed by the U.S. government, its agencies or instrumentalities, or

securities of other investment companies.<sup>22</sup>

The Subsidiary’s shares will be offered only to the Fund and the Fund will not sell shares of the Subsidiary to other investors. The Fund and the Subsidiary will not invest in any non-U.S. equity securities (other than shares of the Subsidiary). The Fund will not purchase securities of open-end or closed-end investment companies except in compliance with the 1940 Act or any applicable exemptive relief.<sup>23</sup>

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 securities deemed illiquid by the Adviser.<sup>24</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 securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.<sup>25</sup>

<sup>22</sup> See Form N–1A, Item 9. The Commission has taken the position that a fund is concentrated if it invests more than 25% of the value of its total assets in any one industry. *See, e.g.*, Investment Company Act Release No. 9011 (October 30, 1975), 40 FR 54241 (November 21, 1975).

<sup>23</sup> See *supra* note 15.

<sup>24</sup> In reaching liquidity decisions, the Adviser may consider the following factors: the frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace trades (*e.g.*, the time needed to dispose of the security, the method of soliciting offers, and the mechanics of transfer).

<sup>25</sup> The Commission has stated that long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008), footnote

#### Net Asset Value

The Fund’s net asset value (“NAV”) will be determined as of the close of trading (normally 4:00 p.m., Eastern Time (“E.T.”)) on each day the New York Stock Exchange (“NYSE”) is open for business. The NAV of the Fund will be calculated by dividing the value of the net assets of such Fund (*i.e.*, the value of its total assets, less total liabilities) by the total number of outstanding Shares, generally rounded to the nearest cent.

The Fund’s and the Subsidiary’s investments will be generally valued using market valuations. A market valuation generally means a valuation (i) obtained from an exchange, a pricing service, or a major market maker (or dealer), (ii) based on a price quotation or other equivalent indication of value supplied by an exchange, a pricing service, or a major market maker (or dealer), or (iii) based on amortized cost. The Fund and the Subsidiary may use various pricing services or discontinue the use of any pricing service. A price obtained from a pricing service based on such pricing service’s valuation matrix may be considered a market valuation.

If available, debt securities and money market instruments with maturities of more than 60 days will typically be priced based on valuations provided by independent, third-party pricing agents. Such values will generally reflect the last reported sales price if the security is actively traded. The third-party pricing agents may also value debt

34. *See also* Investment Company Act Release No. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding “Restricted Securities”); Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N–1A). A fund’s portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the fund. *See* Investment Company Act Release No. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a–7 under the 1940 Act); Investment Company Act Release No. 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the Securities Act of 1933).

<sup>21</sup> As defined in Section 1a(11) of the Commodity Exchange Act.

securities at an evaluated bid price by employing methodologies that utilize actual market transactions, broker-supplied valuations, or other methodologies designed to identify the market value for such securities. Debt obligations with remaining maturities of 60 days or less may be valued on the basis of amortized cost, which approximates market value. If such prices are not available, the security will be valued based on values supplied by independent brokers or by fair value pricing, as described below.

Futures contracts will be valued at the settlement price established each day by the board or exchange on which they are traded.

Exchange-traded options will be valued at the closing price in the market where such contracts are principally traded.

Swaps will be valued based on valuations provided by independent, third-party pricing agents.

Securities of non-exchange-traded investment companies will be valued at NAV. Equity securities listed on a securities exchange (including exchange-traded commodity-linked instruments and exchange-traded investment companies), market or automated quotation system for which quotations are readily available (except for securities traded on The NASDAQ Stock Market LLC ("NASDAQ") and the London Stock Exchange Alternative Investment Market ("LSE AIM")) will be valued at the last reported sale price on the primary exchange or market on which they are traded on the valuation date (or at approximately 4:00 p.m., E.T. if a security's primary exchange is normally open at that time). For a security that trades on multiple exchanges, the primary exchange will generally be considered to be the exchange on which the security generally has the highest volume of trading activity. If it is not possible to determine the last reported sale price on the relevant exchange or market on the valuation date, the value of the security will be taken to be the most recent mean between the bid and asked prices on such exchange or market on the valuation date. Absent both bid and asked prices on such exchange, the bid price may be used. For securities traded on NASDAQ or LSE AIM, the official closing price will be used. If such prices are not available, the security will be valued based on values supplied by independent brokers or by fair value pricing, as described below.

The prices for foreign instruments will be reported in local currency and converted to U.S. dollars using currency exchange rates. Exchange rates will be

provided daily by recognized independent pricing agents.

In the event that current market valuations are not readily available or such valuations do not reflect current market values, the affected investments will be valued using fair value pricing pursuant to the pricing policy and procedures approved by the Board in accordance with the 1940 Act. Fair value pricing may require subjective determinations about the value of an asset and may result in prices that differ from the value that would be realized if the asset was sold.

#### Creation and Redemption of Shares

The Fund will issue and redeem Shares on a continuous basis at NAV<sup>26</sup> only in large blocks of Shares ("Creation Units") in transactions with authorized participants, generally including broker-dealers and large institutional investors ("Authorized Participants"). Creation Units are not expected to consist of less than 25,000 Shares. The Fund will issue and redeem Creation Units in exchange for an in-kind portfolio of instruments and/or cash in lieu of such instruments (the "Creation Basket").<sup>27</sup> In addition, if there is a difference between the NAV attributable to a Creation Unit and the market value of the Creation Basket exchanged for the Creation Unit, the party conveying instruments with the lower value will pay to the other an amount in cash equal to the difference (referred to as the "Cash Component").

Creations and redemptions must be made by or through an Authorized Participant that has executed an agreement that has been agreed to by the Distributor with respect to creations and redemptions of Creation Units. All standard orders to create Creation Units must be received by the Distributor no later than the closing time of the regular trading session on the NYSE (ordinarily 4:00 p.m., E.T.) (the "Closing Time") in each case on the date such order is placed in order for the creation of Creation Units to be effected based on the NAV of Shares as next determined on such date after receipt of the order in proper form. Shares may be redeemed only in Creation Units at their NAV next determined after receipt not later than the Closing Time of a redemption

<sup>26</sup> The NAV of the Fund's Shares generally will be calculated once daily Monday through Friday as of the close of regular trading on the NYSE, generally 4:00 p.m., E.T. (the "NAV Calculation Time"). NAV per Share will be calculated by dividing the Fund's net assets by the number of Fund Shares outstanding.

<sup>27</sup> The Adviser represents that, to the extent that the Trust permits or requires a "cash in lieu" amount, such transactions will be effected in the same or equitable manner for all Authorized Participants.

request in proper form by the Fund through the Distributor and only on a business day.

On each business day, prior to the opening of business of the Exchange, the Fund will cause to be published through the National Securities Clearing Corporation the list of the names and quantities of the instruments comprising the Creation Basket, as well as the estimated Cash Component (if any), for that day. The published Creation Basket will apply until a new Creation Basket is announced on the following business day.

#### Availability of Information

The Fund's Web site ([www.elkhorn.com](http://www.elkhorn.com)), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Fund that may be downloaded. The Web site will include the Shares' ticker, CUSIP and exchange information along with additional quantitative information updated on a daily basis, including, for the Fund: (1) daily trading volume, the prior business day's reported NAV and closing price, mid-point of the bid/ask spread at the time of calculation of such NAV (the "Bid/Ask Price")<sup>28</sup> and a calculation of the premium and discount of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. Daily trading volume information for the Fund will also be available in the financial section of newspapers, through subscription services such as Bloomberg, Thomson Reuters, and International Data Corporation, which can be accessed by Authorized Participants and other investors, as well as through other electronic services, including major public Web sites. On each business day, before commencement of trading in Shares during Regular Trading Hours<sup>29</sup> on the Exchange, the Fund will disclose on its Web site the identities and quantities of the portfolio of securities, Commodities and other assets (the "Disclosed Portfolio" as defined in Rule 14.11(i)(3)(B)) held by the Fund and the Subsidiary that will form the basis for the Fund's calculation of NAV at the

<sup>28</sup> The Bid/Ask Price of the Fund will be determined using the mid-point of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

<sup>29</sup> Regular Trading Hours are 9:30 a.m. to 4:00 p.m. Eastern Time.

end of the business day.<sup>30</sup> The Fund's disclosure of derivative positions in the Disclosed Portfolio will include information that market participants can use to value these positions intraday. On a daily basis, the Disclosed Portfolio displayed on the Fund's Web site the following information regarding each portfolio holding, as applicable to the type of holding: ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding such as the type of swap), the identity of the security, commodity 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 percentage weighting of the holding in the Fund's portfolio. The Web site and information will be publicly available at no charge.

In addition, for the Fund, an estimated value, defined in BATS Rule 14.11(i)(3)(C) as the "Intraday Indicative Value," that reflects an estimated intraday value of the Fund's portfolio (including the Subsidiary's portfolio), will be disseminated. Moreover, the Intraday Indicative Value will be based upon the current value for the components of the Disclosed Portfolio and will be updated and widely disseminated by one or more major market data vendors and broadly displayed at least every 15 seconds during the Exchange's Regular Trading Hours.<sup>31</sup>

The dissemination of the Intraday Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and will provide a close estimate of that value throughout the trading day.

Intra-day executable price quotations on the securities and other assets held by the Fund and the Subsidiary will be available from major broker-dealer firms or on the exchange on which they are traded, as applicable. Intra-day price information on the securities and other assets held by the Fund and the

Subsidiary will also be available through subscription services, such as Bloomberg and Thomson Reuters, which can be accessed by Authorized Participants and other investors. More specifically, pricing information for exchange-traded commodity futures contracts, exchange-traded options on futures contracts, exchange-traded commodity-linked instruments, exchange-traded investment companies other than exchange-traded commodity-linked instruments will be available on the exchanges on which they are traded and through subscription services. Pricing information for securities of non-exchange-traded investment companies will be available through the applicable fund's Web site or major market data vendors. Pricing information for swaps, fixed income securities and money market instruments will be available through subscription services and/or broker-dealer firms and/or pricing services. Additionally, the Trade Reporting and Compliance Engine ("TRACE") of the Financial Industry Regulatory Authority ("FINRA") will be a source of price information for certain fixed income securities held by the Fund.

Investors will also be able to obtain the Fund's Statement of Additional Information ("SAI"), the Fund's annual and semi-annual reports (together, "Shareholder Reports"), and its Form N-CSR and Form N-SAR, filed twice a year. The Fund's SAI and Shareholder Reports will be available free upon request from the Fund, and those documents and the Form N-CSR and Form N-SAR may be viewed on-screen or downloaded from the Commission's Web site at [www.sec.gov](http://www.sec.gov). 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. The previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares will be available on the facilities of the CTA.

Information relating to the Benchmark, including its constituents, weightings and changes to its constituents, will be available on the Web site of S&P Indices.

#### Initial and Continued Listing

The Shares will be subject to BATS Rule 14.11(i), which sets forth the initial and continued listing criteria applicable to Managed Fund Shares. The Exchange represents that, for initial and/or continued listing, the Fund and the Subsidiary must be in compliance with

Rule 10A-3 under the Act.<sup>32</sup> A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

#### Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. The Exchange will halt trading in the Shares under the conditions specified in BATS Rule 11.18. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities, Commodities and other assets constituting the Disclosed Portfolio of the Fund and the Subsidiary; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 14.11(i)(4)(B)(iv), which sets forth circumstances under which Shares of the Fund may be halted.

#### Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. BATS will allow trading in the Shares from 8:00 a.m. until 5:00 p.m. Eastern Time. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in BATS Rule 11.11(a), the minimum price variation for quoting and entry of orders in Managed Fund Shares traded on the Exchange is \$0.01, with the exception of securities that are priced less than \$1.00, for which the minimum price variation for order entry is \$0.0001.

#### Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the

<sup>30</sup> Under accounting procedures to be followed by the Fund, trades made on the prior business day ("T") will be booked and reflected in NAV on the current business day ("T+1"). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

<sup>31</sup> Currently, it is the Exchange's understanding that several major market data vendors display and/or make widely available Intraday Indicative Values published via the Consolidated Tape Association ("CTA") or other data feeds.

<sup>32</sup> See 17 CFR 240.10A-3.

Exchange's surveillance procedures for derivative products, including Managed Fund Shares. The Exchange may obtain information regarding trading in the Shares and the underlying shares in exchange-traded investment companies, commodity-linked instruments, futures, and options on futures via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, the Exchange is able to access, as needed, trade information for certain fixed income instruments reported to TRACE. With respect to the futures contracts and exchange-traded options on futures contracts in which the Subsidiary invests, not more than 10% of the weight (to be calculated as the value of the contract divided by the total absolute notional value of the Subsidiary's futures and options contracts) of the futures and options contracts held by the Subsidiary in the aggregate shall consist of instruments whose principal trading market is a market from which the Exchange may not obtain information regarding trading in the futures contracts and exchange-traded options on futures contracts by virtue of: (a) Its membership in ISG; or (b) a comprehensive surveillance sharing agreement. Investments in non-centrally cleared swaps (through the Subsidiary) will not represent more than 20% of the Fund's net assets.

In addition, the Exchange prohibits the distribution of material, non-public information by its employees.

#### Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (2) BATS Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (3) how information regarding the Intraday Indicative Value and the Disclosed Portfolio is disseminated; (4) the risks involved in trading the Shares during the Pre-Opening<sup>33</sup> and After Hours Trading Sessions<sup>34</sup> when an updated

Intraday Indicative Value will not be calculated or publicly disseminated; (5) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Information Circular will advise members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Fund. Members purchasing Shares from the Fund for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

Additionally, the Information Circular will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Information Circular will also disclose the trading hours of the Shares of the Fund and the applicable NAV Calculation Time for the Shares. The Information Circular will disclose that information about the Shares of the Fund will be publicly available on the Fund's Web site. In addition, the Information Circular will reference that the Trust is subject to various fees and expenses described in the Fund's Registration Statement.

#### 2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act<sup>35</sup> in general and Section 6(b)(5) of the Act<sup>36</sup> in particular in that it is 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 Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in BATS Rule 14.11(i). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the

applicable federal securities laws. If the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser to the investment company shall erect a "fire wall" between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio. The Adviser is not registered as a broker-dealer, although it is affiliated with a broker-dealer, and is therefore required to implement a "fire wall" with respect to such broker-dealer affiliate regarding access to information concerning the composition and/or changes to the Fund's portfolio. In addition, Rule 14.11(i)(7) further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Fund's portfolio. The Exchange may obtain information regarding trading in the Shares and the underlying shares in investment companies, futures, and options on futures via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement. The Exchange represents that trading in the Shares will be subject to the existing trading surveillances which are designed to detect violations of Exchange rules and applicable federal securities laws.

The Exchange will communicate as needed regarding trading in the Shares and in the exchange-traded Commodities and exchange-traded investment companies not included within the definition of Commodities (together, "Exchange-Traded Instruments") held by the Fund and the Subsidiary with other markets and other entities that are members of the ISG and may obtain trading information regarding trading in the Shares and in the Exchange-Traded Instruments held by the Fund and the Subsidiary from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and in the Exchange-Traded Instruments held by the Fund and the Subsidiary from markets and other entities that are members of ISG, which includes securities and futures exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement. The Exchange will be able to access, as needed, trade information for certain

<sup>33</sup> The Pre-Opening Session is from 8:00 a.m. to 9:30 a.m. Eastern Time.

<sup>34</sup> The After Hours Trading Session is from 4:00 p.m. to 5:00 p.m. Eastern Time.

<sup>35</sup> 15 U.S.C. 78f.

<sup>36</sup> 15 U.S.C. 78f(b)(5).

fixed income securities held by the Fund reported to FINRA's TRACE.

With respect to the futures contracts and exchange-traded options on futures contracts in which the Subsidiary invests, not more than 10% of the weight (to be calculated as the value of the contract divided by the total absolute notional value of the Subsidiary's futures and options contracts) of the futures and options contracts held by the Subsidiary in the aggregate shall consist of instruments whose principal trading market is a market from which the Exchange may not obtain information regarding trading in the futures contracts and exchange-traded options on futures contracts by virtue of: (a) Its membership in ISG; or (b) a comprehensive surveillance sharing agreement. Investments in non-centrally cleared swaps (through the Subsidiary) will not represent more than 20% of the Fund's net assets.

The Fund's investment objective will be to provide total return which exceeds that of the Benchmark, consistent with prudent investment management. The Fund will invest in Commodities through investments in the Subsidiary and will not invest directly in physical commodities. The Fund's investment in the Subsidiary may not exceed 25% of the Fund's total assets. While the Fund will be permitted to borrow as permitted under the 1940 Act, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.*, 2X and -3X) of the Benchmark. 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 securities deemed illiquid by the Adviser. The Fund and the Subsidiary will not invest in any non-U.S. equity securities (other than shares of the Subsidiary).

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. In addition, a large amount of information will be publicly available regarding the Fund and the Shares, thereby promoting market transparency. Moreover, the Intraday Indicative Value will be widely disseminated by one or more major market data vendors and broadly displayed at least every 15 seconds during Regular Trading Hours. On each business day, before commencement of trading in Shares during Regular

Trading Hours, the Fund will disclose on its Web site the Disclosed Portfolio of the Fund and the Subsidiary that will form the basis for the Fund's calculation of NAV at the end of the business day. Pricing information will be available on the Fund's Web site including: (1) The prior business day's reported NAV, the Bid/Ask Price of the Fund, and a calculation of the premium and discount of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters.

Additionally, 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, and quotation and last sale information for the Shares will be available on the facilities of the CTA.

Intra-day executable price quotations on the securities and other assets held by the Fund and the Subsidiary will be available from major broker-dealer firms or on the exchange on which they are traded, as applicable. Intra-day price information on the securities and other assets held by the Fund and the Subsidiary will also be available through subscription services, such as Bloomberg and Thomson Reuters, which can be accessed by Authorized Participants and other investors. More specifically, pricing information for exchange-traded commodity futures contracts, exchange-traded options on futures contracts, exchange-traded commodity-linked instruments, and exchange-traded investment companies other than exchange-traded commodity-linked instruments will be available on the exchanges on which they are traded and through subscription services. Pricing information for non-exchange-traded investment companies will be available through the applicable fund's Web site or major market data vendors. Pricing information for swaps, fixed income securities and money market instruments will be available through subscription services and/or broker-dealer firms and/or pricing services. Additionally, FINRA's TRACE will be a source of price information for certain fixed income securities held by the Fund.

The Fund's Web site will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information. Trading in Shares of the Fund will be halted under the conditions specified in BATS Rule 11.18. Trading may also be halted

because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Finally, trading in the Shares will be subject to BATS Rule 14.11(i)(4)(B)(iv), which sets forth circumstances under which Shares of the Fund may be halted. In addition, the Exchange is able to access, as needed, trade information for certain fixed income instruments reported to FINRA's TRACE. As noted above, investors will also have ready access to information regarding the Fund's holdings, the Intraday Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and in the Exchange-Traded Instruments held by the Fund and the Subsidiary with other markets and other entities that are members of the ISG and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Intraday Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of an additional actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace.



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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as modified by Amendment No. 1 thereto, 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-BATS-2016-03 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-BATS-2016-03. 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 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-BATS-2016-03, and should be submitted on or before March 8, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>37</sup>

**Brent J. Fields,**  
*Secretary.*

[FR Doc. 2016-02981 Filed 2-12-16; 8:45 am]

**BILLING CODE 8011-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-77098; File No. SR-FINRA-2015-059]

**Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change To Amend the Derivatives and Other Off-Balance Sheet Items Schedule Pursuant to FINRA Rule 4524 (Supplemental FOCUS Information)**

February 9, 2016.

**I. Introduction**

On December 23, 2015, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "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 amend the instructions to the Derivatives and Other Off-Balance Sheet Items Schedule ("OBS") pursuant to FINRA Rule 4524 (Supplemental FOCUS Information) to expand the application of the OBS to certain non-carrying/non-clearing firms that have a certain amount of off-balance sheet obligations. The proposed rule change was published for comment in the

**Federal Register** on January 7, 2016.<sup>3</sup> The Commission did not receive written comments in response to the proposed rule change. This order approves the proposed rule change.

**II. Description of Proposed Rule Change**

FINRA Rule 4524 requires each firm, as FINRA shall designate, to file such additional financial or operational schedules or reports as FINRA may deem necessary or appropriate for the protection of investors or in the public interest as a supplement to the FOCUS Report.<sup>4</sup> In February 2013, the SEC approved FINRA's adoption, pursuant to FINRA Rule 4524, of the OBS as a supplement to the FOCUS report.<sup>5</sup> The OBS captures important information that is not otherwise reported on firms' balance sheets and requires all firms that carry customer accounts or self-clear or clear transactions for others (referred to, collectively, as "carrying or clearing firms") to file with FINRA the OBS within 22 business days of the end of each calendar quarter, unless a carrying or clearing firm meets the de minimis exception set forth in the instructions to the OBS.<sup>6</sup>

Pursuant to FINRA Rule 4524, FINRA proposed to amend the instructions to the OBS to expand its application beyond carrying or clearing firms to include firms that neither carry customer accounts nor clear transactions (referred to, collectively, as "non-clearing firms") that have,

<sup>3</sup> See Exchange Act Release No. 76813 (Dec. 31, 2015), 81 FR 844 (Jan. 7, 2016).

<sup>4</sup> See Securities Exchange Act Release No. 66364 (Feb. 9, 2012), 77 FR 8938 (Feb. 15, 2012) (Order Approving File No. SR-FINRA-2011-064). FINRA Rule 4524 also provides that FINRA will specify the content of additional schedules or reports, their format, and the timing and the frequency of such supplemental filings in a *Regulatory Notice* (or similar communication), the content of which FINRA will file with the Commission pursuant to Section 19(b) of the Exchange Act.

<sup>5</sup> See Securities Exchange Act Release No. 68832 (Feb. 5, 2013), 78 FR 9754 (Feb. 11, 2013) (Order Approving File No. SR-FINRA-2012-050). Carrying or clearing firms were required to file with FINRA their initial OBS on or before July 31, 2013, to disclose off-balance sheet information as of June 30, 2013. See *Regulatory Notice* 13-10 (March 2013) (Supplemental FOCUS Information).

<sup>6</sup> The de minimis exception relieves a carrying or clearing firm from filing the OBS for the reporting period if the aggregate of all gross amounts of off-balance sheet items is less than 10 percent of the firm's excess net capital on the last day of the reporting period. For purposes of the OBS, as well as the proposed amendments to the OBS, the term "excess net capital" means net capital reduced by the greater of the minimum dollar net capital requirement or two percent of combined aggregate debit items as shown in the Formula for Reserve Requirements pursuant to Exchange Act Rule 15c3-3. See Securities Exchange Act Release No. 68832 (Feb. 5, 2013), 78 FR 9754, 9755 (Feb. 11, 2013) (Order Approving File No. SR-FINRA-2012-050).

<sup>37</sup> 17 CFR 200.30-3(a)(12).

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

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