(File No. AN–OCC–2012–04), whichever is later.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68440; File No. SR–NYSEArca–2012–28]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change as Modified by Amendment No. 1 To List and Trade Shares of the JPM XF Physical Copper Trust Pursuant to NYSE Arca Equities Rule 8.201

December 14, 2012.

I. Introduction

On April 2, 2012, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of JPM XF Physical Copper Trust (''Trust'') pursuant to NYSE Arca Equities Rule 8.201. J.P. Morgan Commodity ETF Services LLC is the sponsor of the Trust (''Sponsor''). The proposed rule change was published for comment in the **Federal Register** on April 20, 2012.[3]

The Commission initially received one comment letter, which opposed the proposed rule change.[4] On May 30, 2012, the Commission extended the time period for Commission action to July 19, 2012.[5] On June 19, 2012, NYSE Arca submitted a letter in support of its proposal.[6] On July 13, 2012, V&F submitted a second comment letter opposing the proposed rule change.[7] On July 16, 2012, United States Senator Carl Levin submitted a comment letter opposing the proposed rule change.[8] Additionally, on July 19, 2012, the Commission received a comment letter from another party opposing the proposed rule change.[9]

On July 19, 2012, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change.[10] The initial comments for the proceeding were due on August 24, 2012, and the Commission received four comment letters (another letter from V&F, another letter from the Exchange, a letter on behalf of the Sponsor, and a letter from several copper fabricators).[11] Rebuttal comments to submissions made during the initial comment period were due on September 10, 2012. The Commission received three more comment letters (another letter from V&F and two more on behalf of the Sponsor).[12] On October 2, 2012, the Commission issued a notice of designation of longer period for Commission action on proceedings to determine whether to approve or disapprove the proposed rule change.[13] The Commission subsequently received six more comment letters (two more letters from V&F, two letters from Americans for Financial Reform, and two letters from Robert E. Rutkowski).[14] On November 30, 2012, the Exchange filed Amendment No. 1 to the proposed rule change.[15] On December 7, 2012, the

[13] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

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

[4] *See* letter from Vandenberg & Feliu, LLP (''V&F''), received May 9, 2012 (''V&F May 9 Letter''). Comment letters are available at *http://www.sec.gov/comments/sr-nysearca-2012-28/nysearca201228.shtml.*

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

[6] *See* letter from Janet McGinness, General Counsel, NYSE Markets, NYSE Euronext, to Elizabeth M. Murphy, Secretary, Commission, dated June 19, 2012 (''Arca June 19 Letter'').

[7] *See* letter from Robert B. Bernstein, V&F, to Elizabeth M. Murphy, Secretary, Commission, dated July 13, 2012 (''V&F July 13 Letter'').

[8] *See* letter from U.S. Senator Carl Levin, to Elizabeth M. Murphy, Secretary, Commission, dated July 16, 2012 (''Levin Letter'').

[9] *See* Web comment from Suzanne H. Shatto (''Shatto Letter'').

[10] *See* Securities Exchange Act Release No. 67470, 77 FR 43620 (July 25, 2012) (''Order Instituting Proceedings'').

[11] *See* letters from Janet McGinness, General Counsel, NYSE Markets, NYSE Euronext, to Elizabeth M. Murphy, Secretary, Commission, dated August 23, 2012 (''Arca August 23 Letter''); Joe Williamson, Senior Vice President, Strategic Sourcing, Southwire Company; Janet Sander, Vice President, Director of Purchasing, Encore Wire Corporation; Ron Beal, Executive Vice President, Tubes Division, Luvata; and Mark Woehnklar, President, Amrod Corp., to Elizabeth M. Murphy, Secretary, Commission, dated August 23, 2012 (''Copper Fabricators Letter''); Robert B. Bernstein, V&F, to Elizabeth M. Murphy, Secretary, Commission, dated August 24, 2012 (''V&F August 24 Letter''); and John G. Crowley, Davis Polk & Wardwell LLP (''DP''), on behalf of the Sponsor, to Elizabeth M. Murphy, Secretary, Commission, dated August 24, 2012 (''DP August 24 Letter''). In its August 24 Letter, V&F requested to make an oral presentation in the proceeding. *See* V&F August 24 Letter at 1. The Commission denied V&F's request. *See* letter from Kevin M. O'Neill, Deputy Secretary, Commission, to Robert B. Bernstein, Eaton & Van Winkle LLP (''EVW''), dated December 5, 2012, *available at http://www.sec.gov/comments/sr-nysearca-2012-28/nysearca201228.shtml.* By letter dated November 29, 2012, Mr. Bernstein informed the Commission that he had left V&F and would continue to represent Southwire Company, Encore Wire Corporation, Luvata, and Amrod Corp. (collectively, the ''Copper Fabricators'') and RK Capital LLC in this proceeding.

[12] *See* letters from Robert B. Bernstein, V&F, to Elizabeth M. Murphy, Secretary, Commission, dated September 10, 2012 (''V&F September 10 Letter''); John G. Crowley, DP, on behalf of the Sponsor, to Elizabeth M. Murphy, Secretary, Commission, dated September 10, 2012 (''DP September 10 Letter''); and John G. Crowley, DP, on behalf of the Sponsor, to Elizabeth M. Murphy, Secretary, Commission, dated September 12, 2012 (''DP September 12 Letter'').

[13] *See* Securities Exchange Act Release No. 67965, 77 FR 61457 (October 9, 2012).

[14] *See* letters from Robert B. Bernstein, V&F, to Elizabeth M. Murphy, Secretary, Commission, dated October 23, 2012 (''V&F October 23 Letter''); Americans for Financial Reform (''AFR''), to Elizabeth M. Murray [sic], Secretary, Commission, dated October 23, 2012 (''AFR October 23 Letter''); email from Robert E. Rutkowski, to Mary Schapiro, Chair, Commission, dated October 24, 2012 (''Rutkowski October 24 Letter''); Robert B. Bernstein, V&F, to Elizabeth M. Murphy, Secretary, Commission, dated November 16, 2012 (''V&F November 16 Letter''); AFR, to Elizabeth M. Murray [sic], Secretary, Commission, dated November 16, 2012 (''AFR November 16 Letter''); and email from Robert E. Rutkowski, to Mary Schapiro, Chair, Commission, dated November 17, 2012 (''Rutkowski November 17 Letter'').

[15] In Amendment No. 1, the Exchange represented that: (1) It has obtained a representation from the Sponsor that the Sponsor is affiliated with one or more broker-dealers and other entities, and the Sponsor will implement a firewall with respect to such affiliate(s) regarding access to material non-public information of the Trust concerning the Trust and the Shares, and will be subject to procedures designed to prevent the use and dissemination of material non-public information of the Trust regarding the Trust and the Shares; (2) it will obtain a representation from the Trust prior to commencement of trading of the Shares that the net asset value (''NAV'') of the Trust and the NAV per Share will be calculated daily and made available to all market participants at the same time; (3) if the First-Out IIV or the Liquidation IIV (terms defined *infra* in note 42) is not being disseminated as required, the Exchange may halt trading during the day in which the disruption occurs; if the interruption persists past the day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption; (4) its comprehensive surveillance sharing agreement with the London Metal Exchange (''LME'') applies to trading in copper derivatives (as well as copper); (5) it will require that a minimum of 100,000 Shares be outstanding at the start of trading of the Shares; and (6) it can obtain information regarding the activities of the Sponsor and its affiliates under the Exchange's listing rules. Additionally, the Exchange supplemented its description of surveillance applicable to the Shares contained in the proposed rule change as originally filed. Specifically, the Exchange represents that trading in the Shares would be subject to the existing trading surveillances, administered by the Financial Industry Regulatory Authority (''FINRA'') on behalf of the Exchange, and that, in addition, FINRA would augment those existing surveillances with a review specific to the Shares that is designed to identify potential manipulative trading activity through use of the creation and redemption process. The Exchange represented that all those procedures would be operational at the commencement of trading in the Shares on the Exchange and that, on an ongoing basis, NYSE Regulation, Inc. (on behalf of the Exchange) and FINRA would regularly monitor the continued operation of those

Commission received another comment letter opposing the proposed rule change.[16] The Commission is publishing this notice to solicit comments on Amendment No. 1 to the proposed rule change from interested persons, and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.[17]

II. Description of the Proposal

The Exchange proposes to list and trade the Shares under NYSE Arca Equities Rule 8.201, which governs the listing and trading of ''Commodity-Based Trust Shares.'' [18] The Trust's investment objective is for the value of the Shares to reflect, at any given time, the value of its copper, less the Trust's expenses and liabilities. The Trust will invest in Grade A copper [19] in physical form from a source refinery that has had its brand registered with the LME (an ''Acceptable Delivery Brand'').[20] The Exchange states that, although the Shares are not the exact equivalent of an investment in copper, they are designed to provide investors with an alternative that allows a participation in the copper market through the securities market.[21]

A. Description of the Copper Market [22]

The following is a summary of the description of the copper market that the Exchange included in its filing. The market participants in the copper market include primary and secondary producers; fabricators, manufacturers, and end-use consumers; physical traders and merchants, who generally facilitate the domestic and international trade of copper supplies along the value chain and support the distribution of supplies to consumers; and the banking sector. Copper supply generally comes from the extraction and processing of ore (''primary production'') and the recovery of copper from existing stock (''secondary production''). Primary production accounts for the majority of new global copper supply.

Copper's physical, chemical, and aesthetic properties make it a material of choice in a wide range of electrical, electronics and communication, construction, transportation, industrial machinery and equipment, and general consumer applications. From copper derived from primary and secondary production, fabricators produce semi-fabricated products, such as copper wire, copper alloys, tube products, rods, bars, section, plate, sheets and strips, for various applications. The location of copper relative to consumption demand is important given the bulk and cost of transportation. The source of copper also is important to fabricators and consumers and affects buying behavior. Copper end-users will pay an additional locational premium to obtain copper of a specific brand that is stored in a specific location.[23]

The global market in copper consists of: (i) Trading within the physical copper market; and (ii) financial trading, through either (a) the exchange-traded futures and options market or (b) the over-the-counter (''OTC'') market. Each of these is described below in further detail.

1. Physical Copper Market

The physical copper market is comprised of sales directly by producers and refiners to end-users, and by sales transacted by merchants, dealers, and trading banks. A major portion of annual copper production and use is effected through transactions in the physical copper market, often through renewable annual supply contracts.

2. Futures Exchanges

A majority of copper derivatives trading occurs on three exchanges: The LME, the Commodity Exchange, Inc. (''COMEX'') (a division of CME Group, Inc.), and the Shanghai Futures Exchange (''SHFE''). LME members are regulated by the Financial Services Authority (''FSA''), the regulator of the financial services industry in the United Kingdom. COMEX is regulated by the U.S. Commodity Futures Trading Commission (''CFTC'') under the Commodity Exchange Act (''CEA''). The SHFE is regulated by the Chinese Securities Regulatory Commission (''CSRC''). At present, Chinese regulations stipulate that only companies or organizations organized and registered in China or Chinese citizens are allowed to participate in trading on the SHFE.

Futures exchanges provide for the trading of futures and options on futures contracts, which producers and consumers use to fix a price in the future as a hedge against price variations. Producers and consumers take long or short positions to manage price risk, which activity is facilitated by investors who buy the price risk.

Only eligible organizations or members are able to participate directly in trading on the LME. The LME publishes prices discovered as a result of daily trading of exchange contracts on the LME. The LME Settlement Price [24] and forward prices serve as the global benchmark prices of Grade A copper.[25] The copper industry uses these prices as the basis of price negotiations for the physical purchase and sale of copper. All contracts registered with the LME are executed on the basis of physical settlement: LME members deliver base metal against LME futures contracts in the form of LME warrants.[26] The seller

procedures. In addition, the Exchange has represented that it will communicate as needed regarding trading in the Shares with other markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[16] *See* letter from Robert B. Bernstein, EVW, to Elizabeth M. Murphy, Secretary, Commission, dated December 7, 2012 (''EVW December 7 Letter'').

[17] Similar to other exchange traded products that hold physical metals, the Sponsor, the Trust, and persons or entities engaging in transactions in Shares need to seek exemptions from, or interpretative or no-action advice regarding, Rules 101 and 102 of Regulation M under the Act to create or redeem Shares. *See, e.g.,* letters from James A. Brigagliano, Assistant Director, Division of Market Regulation, (i) to Kathleen Moriarty, Esq., Carter Ledyard & Milburn, dated November 17, 2004, with respect to the trading of StreetTRACKS Gold Trust, (ii) to David Yeres, dated January 27, 2005, with respect to the trading of the iShares COMEX Gold Trust, and (iii) to David Yeres, dated April 27, 2006, with respect to the trading of iShares Silver Trust. The Sponsor, on behalf of itself, the Trust, and persons or entities engaging in transactions in Shares, submitted a request to the Commission requesting that the Commission grant exemptions from, or interpretative or no-action guidance regarding, Rules 101 and 102 of Regulation M. Simultaneous with the approval of the proposed rule change, the Commission, by separate order, is granting the Trust, based on the representations and facts presented in its letter and subject to the conditions contained in that order, an exemption from the requirements of Rules 101 and 102 of Regulation M under the Act with respect to the Trust. *See* Securities Exchange Act Release No. 68439 (December 14, 2012).

[18] Commodity-Based Trust Shares are securities issued by a trust that represent investors' discrete identifiable and undivided interest in and ownership of the net assets of the trust.

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

[20] Currently, there are 79 brands that are Acceptable Delivery Brands. The LME may deregister brands from time to time. According to the Exchange, generally, copper that is not of an Acceptable Delivery Brand is worth less than copper that is of an Acceptable Delivery Brand because of the perceived lower liquidity associated with that brand of copper. *See* Notice, *supra* note 3, 77 FR at 23777–78.

[21] *See id.*

[22] See Notice, *supra* note 3, for a more detailed description of the copper market.

[23] *See infra* note 35.

[24] *See infra* note 34 and accompanying text.

[25] *See infra* note 34.

[26] An ''LME warrant'' is a bearer document evidencing the right of the holder to possession of a specified lot of metal at a specified LME warehouse location. LME warrants are traded in the

Continued

has the right to select the LME warrant delivered to the buyer. Pertinent information about LME warrants is recorded in the LMEsword system. The LME publishes the number of LME warrants and associated tonnage (including canceled LME warrants for which copper has yet to be delivered out of the relevant LME warehouse).

3. OTC Market

Physical traders, merchants, and banks participate in OTC spot, forward, option, and other derivative transactions for copper.[27] The terms of OTC contracts are not standardized and market participants have the flexibility to negotiate all terms of the transaction, including delivery specifications and settlement terms. The OTC market facilitates long-term transactions, such as life-of-mine off-take arrangements,[28] which otherwise could be constrained by contract terms on a futures exchange. Participants in OTC transactions are subject to counter-party risk, including credit risk and contractual obligations to perform. The OTC derivative market for copper remains largely unregulated with respect to public disclosure of information by the parties, thus providing confidentiality among principals.

4. Copper Market Regulation

The CFTC is authorized under the CEA to monitor, investigate, and take actions with respect to activities that may have a material impact on the markets for physical commodities, commodity futures, commodity options, and swaps in the United States. Specifically, the CFTC has jurisdiction over manipulation and attempted manipulation of the cash commodity markets.[29] The CFTC also has broad authority over commodity derivatives markets and participants in those markets, including the COMEX.[30] Commodity futures and options traded on the COMEX also are subject to regulation by its parent, CME Group's Market Regulation Oversight Committee (''MROC''), under CFTC rules. The MROC is a self-regulatory body created in 2004 to ensure competitive and financially sound trading activity on the Chicago Mercantile Exchange, Inc. and its subsidiary exchanges.

The FSA is responsible for supervising the LME and regulating the financial soundness and conduct of the business conducted by LME members. The LME, a Recognised Investment Exchange by the FSA, is required by statute to ensure that business on its markets is conducted in an orderly and transparent manner, providing proper protection to investors and persons looking to manage risk. Regulation of the market is largely carried out by the LME. In addition to FSA oversight, the LME and its members also are subject to regulatory controls and input from various U.K. government bodies and offices, as well as directives from the European Union Commission. In international trading, rules applied by overseas regulatory bodies, such as the CFTC, are also taken into account.

The SHFE is a self-regulatory body under the supervision and governance of the CSRC. The SHFE is a day-to-day overseer of exchange activity, and is expected to carry out regulation as per the laws established by the CSRC. The CSRC serves as the final authority on exchange regulation and policy development, and ultimately determines the effectiveness of the SHFE as a regulatory entity. The CSRC has the right to overturn or revoke the SHFE's regulatory privileges at any time.

B. Description of the Proposed Rule Change and the Trust[31]

The Exchange proposes to list and trade the Shares under NYSE Arca Equities Rule 8.201. J.P. Morgan Treasury Securities Services, a division of JPMorgan Chase Bank, National Association, is the administrative agent of the Trust (''Administrative Agent''). Wilmington Trust Company is the trustee of the Trust (''Trustee''). The Henry Bath Group is the warehouse-keeper of the Trust (''Warehouse-keeper'').[32] Metal Bulletin Ltd., which is not affiliated with the Sponsor, is the valuation agent of the Trust (''Valuation Agent'').

As mentioned above, the Trust will hold Grade A copper in physical form, and the Trust's investment objective is for the value of the Shares to reflect, at any given time, the value of the copper owned by the Trust at that time, less the Trust's expenses and liabilities at that time. The Trust will hold only copper and will not trade in copper futures. The Trust will not be actively managed and will not engage in any activities designed to obtain a profit from, or to prevent losses caused by, changes in the price of copper.

The Administrative Agent will calculate the NAV of the Trust as promptly as practicable after 4:00 p.m. EST on each Business Day.[33] As part of this calculation, the Administrative Agent will determine the value of the trust's copper using the LME Settlement Price[34] and locational premia/discount information provided by the Valuation Agent.[35]

OTC market. The holder of an LME warrant is responsible for rental payments for storage of the underlying copper in an LME-approved warehouse as well as any changes to the price of the underlying copper and locational premium.

[27] OTC contracts are principal-to-principal agreements traded and negotiated privately between two principal parties, without going through an exchange or other intermediary.

[28] A life-of-mine off-take arrangement is an agreement between a producer and a buyer to purchase/sell portions of the producer's future production over the life of the operation. These agreements are commonly negotiated prior to the construction of a project as they can assist in obtaining financing by showing future revenue streams.

[29] Section 9(a)(2) of the CEA, 7 U.S.C. 13(a)(2), provides that it is a felony punishable by up to ten years' imprisonment or up to a $1 million fine for ''[a]ny person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, * * * or to corner or attempt to corner any such commodity.'' Section 6(c) of the CEA, 7 U.S.C. 9, authorizes the CFTC to assess treble damage penalties for manipulation or attempted manipulation of the price of any commodity in interstate commerce and to adopt rules to prevent manipulative practices. CFTC Rule 180.1 prohibits fraud and fraud-based manipulations, including any such attempts; CFTC Rule 180.2 addresses the elements of price-based manipulation and attempted manipulation.

[30] For example, 17 CFR 18.05 requires all traders that hold or control a reportable futures or options positions to: (1) ''Keep books and records showing all details concerning all positions and transactions in the commodity'' on all reporting markets, OTC transactions, exempt boards of trade, and foreign boards of trade; (2) ''keep books and records showing all details concerning all positions and transactions in the cash commodity, its products and byproducts, and all commercial activities that the trader hedges in the futures or option contract in which the trader is reportable''; and (3) provide to the CFTC upon request ''pertinent information concerning such positions, transactions, or activities.''

[31] *See* Notice, *supra* note 3, for a more detailed description. Additional details regarding the Trust also are set forth in the registration statement for the Trust, most recently amended on July 12, 2011 (No. 333–170085) (''Registration Statement'').

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

[33] A Business Day is a day that the Exchange is open for regular trading and that is not a holiday in London, England. *See id.* at 23775 n.18.

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

[35] The value of copper depends in part on its location, *i.e.,* copper stored in a location that is low in supply and high in demand carries a higher

The Trust will store its copper in both LME-approved warehouses and non-LME-approved warehouses that are maintained by the Warehouse-keeper, but none of the copper held by the Trust will be on LME warrant, and therefore will not be subject to regulation by the LME.[36] Initially, the permitted warehouse locations will be in the Netherlands (Rotterdam), Singapore (Singapore), South Korea (Busan and Gwangyang), China (Shanghai), and the United States (Baltimore, Chicago, and New Orleans). Although the Trust may hold copper in warehouses in any of these locations (or other locations that may be determined by the Sponsor from time to time), the locations at which copper actually is held will depend on the warehouse locations at which authorized participants have actually delivered copper to the Trust and the warehouse locations from which copper is or has been delivered pursuant to the Trust's redemption procedures.

Shares will be created when an authorized participant transfers Grade A Copper of an Acceptable Delivery Brand and having a weight equal to the Creation Unit Weight [37] to one or more acceptable warehouse locations of the Trust and the Trust, in return for the copper, delivers a Creation Unit of Shares [38] to the authorized participant. In creating Shares, if the aggregate weight of the whole lots transferred by the authorized participant falls short of or exceeds the aggregate Creation Unit Weight, the Administrative Agent will instruct the Warehouse-keeper to transfer ownership of copper between the authorized participant's book-entry account (''Reserve Account'') and the Warehouse-keeper's book-entry account (''Trust Account'') to cover any such amount.

Shares will be redeemed when an authorized participant transfers a Creation Unit of Shares to the Trust and the Trust, in return for such Shares, delivers copper having a weight equal to the Creation Unit Weight to the authorized participant, in accordance with the Selection Protocol.[39] Following the transfer of whole lots of copper, the Administrative Agent will instruct the Warehouse-keeper to adjust for any redemption underweight by transferring ownership of copper from the Trust Account to the relevant authorized participant's Reserve Account.[40] Because the copper held by the Trust in different locations may vary in value based on the applicable locational premium, the value of the copper actually received by the authorized participant will depend on the location of the specific whole lot(s) and fractional lots, if any, of the copper transferred to the authorized participant.

Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association. The Exchange also will make available via the Consolidated Tape trading volume, closing prices, and NAV for the Shares from the previous day.[41] In addition, NYSE Arca will calculate and disseminate, approximately every 15 seconds during the Exchange's Core Trading Session, two different IIVs for the Shares: The First-Out IIV and the Liquidation IIV.[42]

On each Business Day, as promptly as practicable after 4:00 p.m. E.T., the Trust will publish the following on its Web site: (1) The number of outstanding Shares as of the beginning of the Business Day; (2) the NAV of the Trust; (3) the NAV per Share; (4) the locational premium for each warehouse location, as calculated by the Valuation Agent at 5:00 p.m. London time, quoted both in U.S. dollars and as a percentage premium relative to the LME settlement price; (5) the price per metric ton of copper in each warehouse location where the Trust is permitted to hold copper; (6) the aggregate weight in metric tons of all copper owned by the Trust; (7) the aggregate weight in metric tons of the copper owned by the Trust in each warehouse location; (8) the gross value in U.S. dollars of the copper owned by the Trust in each warehouse location; (9) the Creation Unit Ratio; and (10) the Creation Unit Weight.[43] The Exchange will obtain a representation from the Trust prior to the commencement of trading of the Shares that the NAV will be calculated daily and made available to all market participants at the same time.[44]

Additionally, as promptly as practicable after 4:00 p.m. E.T. on each Business Day, the Trust will make available on its Web site a downloadable file containing the following information relating to each lot of copper owned by the Trust: (1) The unique identification number of the lot; (2) the warehouse location in which the lot is held; (3) the brand of the lot and, if such brand of copper is not an Acceptable Delivery Brand, an indication that the lot consists of a brand of copper that has been de-registered; (4) the weight in metric tons of the lot; and (5) the date upon which the lot was delivered to the Trust.[45]

The Exchange states that investors may obtain, almost on a 24-hour basis, copper pricing information based on the spot price of copper from various financial information service providers,

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

[36] *See id.* at 23778.

[37] The Creation Unit Weight for a particular day will be equal to 25.0 metric tons multiplied by the Creation Unit Ratio in effect for such day. The Creation Unit Ratio will initially be equal to 1.0, but will decline gradually over time to reflect the payment of expenses by the Trust. As a result, the Creation Unit Weight will decline gradually over time as well. The Creation Unit Weight and the Creation Unit Ratio in effect on any Business Day will have been calculated on the prior Business Day, after the calculation of the Trust's NAV on such Business Day. For a discussion of how the Administrative Agent will calculate the Creation Unit Ratio and the Creation Unit Weight, *See id.* at 23784.

[38] A Creation Unit of Shares is a block of 2,500 Shares. *See id.* at 23781.

[39] According to NYSE Arca, the Selection Protocol is intended to provide a consistent and transparent method of selecting lots, by requiring the Administrative Agent to select lots in the following manner: (1) Lots will be selected first from the warehouse where it holds available copper that has the lowest locational premium at a particular time (*i.e.,* the ''cheapest-to-deliver location''), and then from other warehouse locations successively based on a ranking of their respective locational premia from lowest to highest; (2) if there are multiple lots in the same warehouse location specified by the first step, lots in such warehouse location will be selected based on the date such lots were first delivered to the relevant account, with the earliest delivered lot being selected first; and (3) if there are multiple lots in the same warehouse location that were first delivered to the relevant account on the same date, lots will be selected based on the actual weight of the lot, with the lot having the lowest actual weight being selected first. *See id.* at 23781–82.

[40] According to NYSE Arca, when copper is redeemed in this manner, the amount of copper received by the authorized participant will equal a pro rata share of the copper held by the Trust based on the weight of the Trust's aggregate copper holdings immediately prior to the processing of redemptions. *See id.* at 23782.

[41] *See id.* at 23786.

[42] The ''First-Out IIV'' is designed to facilitate arbitrage activity by authorized participants by indicating whether the Shares are trading at a discount or premium during the trading day. *See id.* at 23785. It represents, as of the time of such calculation, the hypothetical U.S. dollar value per Share of the copper that would need to be transferred to or from the Trust to create or redeem one Share included in a Creation Unit, assuming that copper in the cheapest-to-deliver location was used for such creation or redemption. *See id.* at 23783. The ''Liquidation IIV'' is an intraday indicative value that represents, as of the time of the calculation, the hypothetical U.S. dollar value per Share of all of the copper owned by the Trust divided by the number of Shares then outstanding. *See id.* For a description of how the Exchange will calculate the First-Out IIV and the Liquidation IIV, *See id.* at 23784–86.

[43] *See id.* at 23783.

[44] *See* Amendment No. 1, *supra* note 15.

[45] *See* Notice, *supra* note 3, 77 FR at 23783.

such as Reuters and Bloomberg.[46] Reuters and Bloomberg provide at no charge on their Web sites delayed information regarding the spot price of copper and last-sale prices of copper futures, as well as information and news about developments in the copper market.[47] Reuters and Bloomberg also offer a professional service to subscribers for a fee that provides information on copper prices directly from market participants.[48] There are a variety of public Web sites providing information on copper, ranging from those specializing in precious metals to sites maintained by major newspapers, such as *The Wall Street Journal*.[49] The Trust's Web site will provide ongoing pricing information for copper spot prices and the Shares.[50] The Exchange will provide on its Web site (*www.nyx.com*) a link to the Trust's Web site.[51]

NYSE Arca will require that a minimum of 100,000 Shares be outstanding at the start of trading,[52] which represents 1,000 metric tons of copper. The Trust seeks to initially register 6,180,000 Shares.[53] NYSE Arca represents that the Shares satisfy the requirements of NYSE Arca Equities Rule 8.201, which governs the listing and trading of Commodity-Based Trust Shares, and thereby qualify for listing and trading on the Exchange.[54]

Under NYSE Arca Equities Rule 7.34(a)(5), if the Exchange becomes aware that the NAV is not being disseminated to all market participants at the same time, it must halt trading on the Exchange until such time as the NAV is available to all market participants at the same time. If the First-Out IIV or the Liquidation IIV is not being disseminated as required, the Exchange may halt trading during the day in which the disruption occurs; if the interruption persists past the day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.[55] Further, the Exchange will consider suspension of trading pursuant to NYSE Arca Rule 8.201(e)(2) if, after the initial 12-month period following commencement of trading: (1) The value of copper is no longer calculated or available on at least a 15-second delayed basis from a source unaffiliated with the Sponsor, Trust, or Custodian, or the Exchange stops providing a hyperlink on its Web site to any such unaffiliated source providing that value; or (2) if the Liquidation IIV is no longer made available on at least a 15-second delayed basis. More generally, with respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading on the Exchange in the Shares 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 conditions in the underlying copper market have caused disruptions and/or lack of trading; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Additionally, trading in the Shares will be subject to trading halts caused by extraordinary market volatility pursuant to the Exchange's circuit breaker rule.[56]

NYSE Arca represents that its surveillance procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of NYSE Arca rules and applicable federal securities laws.[57] To support this, the Exchange states that, pursuant to NYSE Arca Equities Rule 8.201(g), it is able to obtain information regarding trading in the Shares, physical copper, copper futures contracts, options on copper futures, or any other copper derivative from ETP Holders acting as registered market makers, in connection with their proprietary or customer trades. More generally, NYSE Arca states that it has regulatory jurisdiction over its ETP Holders and their associated persons, which include any person or entity controlling an ETP Holder, as well as a subsidiary or affiliate of an ETP Holder that is in the securities business.[58] With respect to a subsidiary or affiliate of an ETP Holder that does business only in commodities or futures contracts, the Exchange states that it can obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.[59] Further, NYSE Arca states that it may obtain trading information via the Intermarket Surveillance Group (''ISG'') from other exchanges that are members of the ISG, including the COMEX,[60] and that it has entered into a comprehensive surveillance sharing agreement with the LME that applies with respect to trading in copper and copper derivatives.[61]

Prior to the commencement of trading, the Exchange represents that it will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (a) The procedures for purchases and redemptions of Shares in the Creation Unit (including noting that Shares are not individually redeemable); (b) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) how information regarding the IIV is disseminated; (d) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; (e) the possibility that trading spreads and the resulting premium or discount on the Shares may widen as a result of reduced liquidity of physical copper trading during the Core and Late Trading Sessions after the close of the major world copper markets; and (f) trading information.

The Notice and the Registration Statement include additional information about: The Trust; the Shares; the Trust's investment objectives, strategies, policies, and restrictions; fees and expenses; creation and redemption of Shares; the physical copper market; availability of information; trading rules and halts; and surveillance procedures.[62]

III. Discussion and Commission Findings

After careful review and for the reasons discussed below, the Commission finds that the proposed rule change is consistent with the requirements of the Act, including Section 6 of the Act,[63] and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission finds that the proposed rule change is consistent

[46] *See id.* at 23786.

[47] *See id.*

[48] *See id.*

[49] *See id.*

[50] *See id.*

[51] *See id.*

[52] *See* Amendment No. 1, *supra* note 15.

[53] *See* Registration Statement, *supra* note 31.

[54] With respect to application of Rule 10A–3 (17 CFR 240.10A–3) under the Act (15 U.S.C. 78a), the Trust relies on the exemption contained in Rule 10A–3(c)(7). *See* Notice, *supra* note 3, at 23773 n.12.

[55] *See* Amendment No. 1, *supra* note 15. NYSE Arca Equities Rule 8.201(e)(2) also provides that the Exchange may seek to delist the Shares in the event the underlying commodity or the IIV is no longer calculated or available as required.

[56] *See* NYSE Arca Equities Rule 7.12.

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

[58] *See* Amendment No. 1, *supra* note 15.

[59] *See id.*

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

[61] *See* Amendment No. 1, *supra* note 15.

[62] *See* Notice and the Registration Statement, *supra* notes 3 and 31, respectively.

[63] 15 U.S.C. 78f.

with Section 6(b)(5) of the Act,[64] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and 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. In addition, the Commission finds that the proposed rule change is consistent with Section 6(b)(8) of the Act,[65] which requires that the rules of a national securities exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Commission also finds that the proposed rule change is consistent with Section 11A(a)(1)(C)(iii) of the Act,[66] which sets forth Congress's finding that it is in the public interest and appropriate for the protection of investors to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Further, pursuant to Section 3(f) of the Act, the Commission has considered whether the proposed rule change will promote efficiency, competition, and capital formation.

Six commenters submitted fourteen comment letters to explain their opposition to the proposed rule change.[67] Generally, the opposing commenters assert that the proposed rule change is inconsistent with Section 6(b)(5) of the Act.[68] V&F (and EVW), the Copper Fabricators, Senator Levin, and AFR (collectively, ''Opposing Commenters'') assert that the issuance by the Trust of all of the Shares covered by the Registration Statement within a short period of time would result in a substantial reduction in the supply of global copper available for immediate delivery.[69] The Opposing Commenters assert that this reduction in short-term supply would increase both the price of copper and volatility in the copper market, which would in turn significantly harm the U.S. economy.[70] They further state that the predicted decrease in copper available for immediate delivery would make the physical copper market more susceptible to manipulation.[71]

In response, the Exchange and the Sponsor generally state that the Trust would serve as a transparent and accessible alternative by which participants in the copper market can access or offload physical copper inventory and associated price risk.[72] The Sponsor believes that the Trust would move copper from one type of liquid stock to another type of liquid stock, rather than removing inventory from the market, and would track, rather than drive, copper prices.[73] The Exchange and the Sponsor believe the structure of the Trust and the regulatory regime for the Shares and copper derivatives (including non-securities) suggest approval of the proposed rule change would not render the copper market more susceptible to manipulation.[74]

Given the concerns expressed by the commenters that the Trust would remove a substantial amount of the supply of copper available for immediate delivery over a short period of time, which would render the physical copper market more susceptible to manipulation, and that the Trust therefore would provide market participants an effective means to manipulate the price of copper and thereby the price of the Shares,[75] the Commission analyzes the comments to examine, among other things, the extent to which the listing and trading of the Shares may (1) impact the supply of copper available for immediate delivery and the ability of market participants to manipulate the price of copper, and (2) be susceptible to manipulation. The sections below summarize and respond to the comments received.

A. The Trust's Impact on the Supply of Copper Available for Immediate Delivery

The Opposing Commenters believe that the issuance by the Trust of all of the Shares covered by the Registration Statement within a short period of time would result in the withdrawal of substantial quantities of copper from LME and COMEX warehouses, thus negatively impacting the supply of copper available for immediate delivery.[76] As discussed below, this belief assumes that: (1) Copper held by the Trust would not be available for immediate delivery; (2) the global supply of copper available for immediate delivery that could be used to create Shares consists almost exclusively of copper already under LME or COMEX warrant, and therefore the Shares would be created primarily using copper already under LME or COMEX warrant; and (3) the Trust would acquire a substantial amount of copper within a short period of time, such that copper suppliers would not be able to adjust production to replace the copper removed from the market by the

[64] 15 U.S.C. 78f(b)(5).

[65] 15 U.S.C. 78f(b)(8).

[66] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[67] *See* V&F May 9 Letter, *supra* note 4; V&F July 13 Letter, *supra* note 7; Levin Letter, *supra* note 8; Shatto Letter, *supra* note 9; Copper Fabricators Letter, *supra* note 11; V&F August 24 Letter, *supra* note 11; V&F September 10 Letter, *supra* note 12; V&F October 23 Letter, *supra* note 14; AFR October 23 Letter, *supra* note 14; Rutkowski October 24 Letter, *supra* note 14; V&F November 16 Letter, *supra* note 14; AFR November 16 Letter, *supra* note 14; Rutkowski November 17 Letter, *supra* note 14; and EVW December 7 Letter, *supra* note 16. V&F, and subsequently EVW, identified themselves as law firms that represent RK Capital LLC, an international copper merchant, and the Copper Fabricators. *See* V&F July 13 Letter, *supra* note 7, at 1; and EVW December 7 Letter, *supra* note 16, at 1. *See also supra* note 16 (explaining the change in representation). The Copper Fabricators state that they collectively comprise about 50% of the copper fabricating capacity of the United States. *See* Copper Fabricators Letter, *supra* note 11, at 1. AFR identifies itself as a coalition of over 250 groups who advocate for reform of the financial industry. *See* AFR October 23 Letter, *supra* note 14, at 1.

[68] Ms. Shatto does not tie her objections to any particular provision of the Act. First, she believes that ''jp morgan'' does not need another derivative product. This principle is not relevant to consideration of the proposed rule change under the Act. Second, she questions whether ''jp morgan,'' which she says ''already trades a lot in the commodities market,'' may be able to ''manipulate the market,'' a concern shared by other commenters. She asserts that ''jp morgan gets inside information by using their warehouses to buy and sell copper which maximizes profits to the detriment of commercial interests who have to buy copper.'' Concerns regarding the potential for manipulation are addressed in Section III.D and III.E. Third, she asserts that derivatives often allow short selling, which affects many equities at one time, making the equities market extremely volatile. Ms. Shatto does not provide further information to explain why this concern is relevant to the proposed rule change. Concerns regarding the potential for increased volatility in the copper market are addressed in Section III.C. Fourth, she states: ''banks should be banks, not business conglomerations.'' This principle is not relevant to consideration of the proposed rule change under the Act. Finally, she recommends that the Commission not enable short sellers or options traders. The proposed rule change does not address short selling or approve the listing and trading of options on the Shares. Mr. Rutkowski requests that the Commission deny the proposed rule change for the reasons articulated by AFR.

[69] *See* V&F May 9 Letter, *supra* note 4, at 3, 6; Levin Letter, *supra* note 8, at 1, 4; Copper Fabricators Letter, *supra* note 11, at 3; and AFR October 23 Letter, *supra* note 14, at 2.

[70] *See* V&F May 9 Letter, *supra* note 4, at 5–7; Levin Letter, *supra* note 8, at 1, 7; Copper Fabricators Letter, *supra* note 11, at 4–5; and AFR October 23 Letter, *supra* note 14, at 2.

[71] *See* V&F May 9 Letter, *supra* note 4, at 1, 10; Levin Letter, *supra* note 8, at 7; AFR October 23 Letter, *supra* note 14, at 4–5; Copper Fabricators Letter, *supra* note 11, at 5–6; and AFR October 23 Letter, *supra* note 14, at 4–5.

[72] *See* DP August 24 Letter, *supra* note 11, at 7; and Arca June 19 Letter, *supra* note 6, at 5.

[73] *See* DP August 24 Letter, *supra* note 11, at 11, 13.

[74] *See id.* at 4–5; and Arca June 19 Letter, *supra* note 6, at 5–6.

[75] *See* V&F May 9 Letter, *supra* note 4, at 1, 10.

[76] *See id.* at 3–4; Levin Letter, *supra* note 8, at 4–5; Copper Fabricators Letter, *supra* note 11, at 5; and AFR October 23 Letter, *supra* note 14, at 3.

Trust. The Commission believes that the record does not support each of the contentions, and thus, for the reasons discussed below, the Commission does not believe that the listing and trading of the Shares is likely to disrupt the supply of copper available for immediate delivery.

1. Availability of the Trust's Copper

Opposing Commenters assert that copper held by the Trust would not be available for immediate delivery, and therefore copper deposited into the Trust would be removed from the market and would be unavailable to end-users.[77] In response, the Sponsor asserts that the Trust would not remove immediately available copper inventory from the market.[78] The Sponsor points out that a report cited by one of the commenters defines inventories held in exchange-traded funds as ''liquid stocks.'' [79] The Sponsor asserts that, in effect, the Trust would move copper from one type of liquid stock (warrants) to another type of liquid stock (Shares).[80]

The Commission agrees with the Sponsor that copper held by the Trust will remain available to consumers and other participants in the physical copper market because: (1) The Trust will not consume copper; [81] (2) Shares are redeemable (in size) for copper on every Business Day; [82] and (3) redeeming authorized participants will receive the right to obtain their copper within three business days.[83] Additionally, as the Sponsor explains, the copper received in exchange for redeemed Shares could be: (1) Sold in the OTC market for cash; (2) swapped in the OTC market for copper in a different location or for a different brand; and/or (3) removed from the warehouse and consumed.[84] The Sponsor states that these three types of transactions are commonplace in the copper market.[85] Further, copper delivered from the Trust (in exchange for Shares) could be placed under LME warrant if required by LME market participants.[86] Given the structure of the Trust, the Commission believes that the amount of copper accessible to industrial users will not meaningfully change as a result of the listing and trading of the Shares. Accordingly, the Commission believes that the proposed rule change will not burden capital formation for users who acquire copper for industrial and other purposes.

The Commission recognizes that one group of end users state that they would not acquire Shares for the purpose of redeeming them to acquire copper because the copper they would receive in exchange for Shares might be in a location far from their plants or might be of brands that are not acceptable to their plants.[87] Regardless of the preferences of these consumers, authorized participants may redeem Shares for copper and the record does not contain any evidence that these or any other consumers of copper could not use the Shares to obtain copper through an authorized participant. Further, the record supports that the same logistical issues exist and are regularly addressed by end-users of copper holding LME warrants. Currently, a purchaser of an LME warrant does not know the location or brand of the underlying copper, and therefore warrant holders sometimes need to swap the warrants to acquire copper of a preferred brand in a convenient location.[88] The end user commenters explain that, because not all available brands of copper held at LME and COMEX warehouses are acceptable for the efficient operation of their fabricating plants, they currently rely on copper merchants to obtain their desired brands of copper by aggregating the lots from copper on warrant at LME and COMEX warehouses.[89] Nothing in the record indicates that copper merchants will not be able to perform the same function in connection with copper delivered in connection with Share redemptions. As discussed above,[90] on a daily basis, the Trust will publish information on the location and brand of copper that will be delivered to the next redeeming authorized participant, and this may assist end

[77] *See* V&F May 9 Letter, *supra* note 4, at 1; Levin Letter, *supra* note 8, at 7; Copper Fabricators Letter, *supra* note 11, at 3, and AFR October 23 Letter *supra* note 14, at 3.

[78] *See, e.g.,* DP August 24 Letter, *supra* note 11, at 13.

[79] *See* DP August 24 Letter, *supra* note 11, at 13; and DP September 10 Letter, *supra* note 12, at 5 n.11.

[80] *See* DP August 24 Letter, *supra* note 11, at 13.

[81] *See id.* at 22.

[82] *See* Notice, *supra* note 3, 77 FR at 23782.

[83] *See* DP August 24 Letter, *supra* note 11, at 7. The record is unclear whether authorized participants that are redeeming the Shares will be able to physically remove copper from the warehouse in which it is stored within three business days, or whether this reference is to three business days in addition to the existing time it takes to remove copper from the warehouses. The Registration Statement provides: ''Redemption orders will be settled by delivery of copper on the third Trading Day following the redemption order date, *provided* that, by 3:00 p.m. New York City time on the date such settlement is to take place, the Administrative Agent confirms in writing to the Warehouse-keeper that (x) the Administrative Agent's DTC account has been credited with the Creation Units to be redeemed and (ii) the Authorized Participant has paid the Administrative Agent the applicable transaction fee for such redemption order.'' Registration Statement, *supra* note 31 (emphasis in original). One of the Opposing Commenters acknowledged, however, that taking copper off LME warrant, which the commenter considers to be copper available for immediate delivery, takes time; according to that commenter: (1) The amount of time it takes to take copper off LME warrant depends ''on the length of the loading out queue'' at the LME warehouse; and (2) queues ''are currently ranging from 275 working days Vlissingen, Netherlands, 91 working days (4.5 months) in New Orleans, 51 working days (2.5 months) in Johor, Malaysia to under one month in Korea and Rotterdam, Netherlands.'' V&F August 24 Letter, *supra* note 11, at 14.

This commenter expresses further concern in its latest comment letter about an increasing length of time that it takes to withdraw metal, including copper, from LME warehouses. The commenter argues that this ''troubling new development'' may, together with the proposed listing and trading of the Shares, jeopardize the ability of United States copper consumers to obtain the physical copper they need in a timely manner. *See generally* EVW December 7 Letter, *supra* note 16. By its December 7 submission, the commenter appears to be updating information previously provided about the length of queues, but does not assert any new reason for disapproving the listing and trading of the Shares that is distinct from its original assertion, responded to in the text above, that listing and trading of the Shares will reduce the supply of copper available for immediate delivery.

For purposes of analyzing this proposed rule change, the Commission assumes that copper will be transferred to an authorized participant's book-entry account within three days, and that an authorized participant taking delivery of copper from an LME warehouse will then have to wait in the queues described by this Opposing Commenter, just like other owners withdrawing metal from that warehouse. The Commission believes that waiting up to an extra three business days beyond the time required to take copper off of LME warrant is not a significant enough delay to consider the copper delivered from the Trust unavailable for immediate delivery. In this regard, the Commission notes that the commenter, who acknowledges that taking copper off of LME warrant takes time, considers copper on LME warrant to be available for immediate delivery. *See, e.g.,* V&F July 13 Letter, *supra* note 7, at 1 (stating its view that there are no substantial sources of copper available for immediate delivery available to the Trust other than warranted copper in LME warehouses). Further, as noted above, the Trust's copper may be held in both LME-approved warehouses and non-LME-approved warehouses, and there is nothing in the record concerning the existence of unloading queues in non-LME warehouses. The Commission also notes that the LME appears to be attempting to address the unloading queue issue, see London Metal Exchange, *Consultation on Changes to LME Policy for Approval of Warehouses in Relation to Delivery Out Rates,* Notice 12/296: A295: W152 (November 15, 2012), *available at http://www.lme.com/downloads/notices/12_296_A295_W152_Consultation_on_Changes_to_LME_Policy_for_Approval_of_Warehouses_in_Relation_to_Delivery_Out_Rates.pdf,* which applies to LME warehoused aluminum and zinc, not just copper. *See also* EVW December 7 Letter, *supra* note 16, at 3.

[84] *See* DP August 24 Letter, *supra* note 11, at 7.

[85] *See id.* at 8.

[86] *See id.*

[87] *See* Copper Fabricators Letter, *supra* note 11, at 7. *See also* V&F September 10 Letter, *supra* note 12, at 4; and V&F July 13 Letter, *supra* note 7, at 7.

[88] *See* DP August 24 Letter, *supra* note 11, at 8.

[89] *See* Copper Fabricators Letter, *supra* note 11, at 3.

[90] *See supra* text accompanying note 45.

users of copper and copper merchants to locate suitable copper.

One of the Opposing Commenters also expresses concern that investors who hold the Shares would not sell them, and therefore Shares would not be readily available for redemption.[91] This claim is unsupported. There is no evidence in the record to suggest that investors holding the Shares will be unwilling to sell them, particularly in response to market movements or changes in investor needs.

The Commission believes that the listing and trading of the Shares, as proposed, could provide another way for market participants and investors to trade in copper, and could enhance competition among trading venues. Further, the Commission believes that the listing and trading of the Shares will provide investors another investment alternative, which could enhance a well-diversified portfolio. By broadening the securities investment alternatives available to investors, the Commission believes that trading in the Shares could increase competition among financial products and the efficiency of financial investment.

2. Source of Copper Used To Create Shares

The Opposing Commenters believe that the global supply of copper available for immediate delivery, and eligible to be used to create Shares, consists almost exclusively of copper already under LME or COMEX warrant, and therefore they believe that Shares would be created primarily using copper already under LME or COMEX warrant.[92] One of the Opposing Commenters states that the size of the market for copper available for immediate delivery is small relative to the size it expects the Trust to attain, asserting that there is only 230,000 metric tons available on the LME, with an additional 60,000 metric tons available on the COMEX, and projects that the Trust would remove as much as 61,800 metric tons from the market, which would be about 21.3% of the copper available for immediate delivery.[93] The Opposing Commenters also assert that the Trust would be funded with copper under warrant in the United States, which would result in a shortage of copper in the United States.[94] These Opposing Commenters urge the Commission to consider collectively the supply impacts of the Trust and the iShares Copper Trust,[95] the shares of which the Exchange also is proposing to list and trade.[96]

In contrast, the Sponsor believes that there are very substantial copper inventories available outside of the LME and COMEX that are deliverable on a short-term basis that could be used to fund the Trust. Specifically, the Sponsor states that, even according to the data provided by one of the Opposing Commenters, there are substantial sources of liquid copper stock inventory outside of the LME and other exchanges, and that most liquid copper stock inventory is non-LME or exchange inventory.[97] The Sponsor provided data that it says shows that liquid global copper inventories that are considered LME-branded are estimated at approximately 1.4 million metric tons as of July 31, 2012, and that approximately 70% of these inventories are not under warrant with the LME, COMEX, or any other exchange.[98] Additionally, the Sponsor asserts that authorized participants would not deposit into the Trust copper exclusively or disproportionately from the U.S.; according to the Sponsor, five of the initial permitted warehouses are located outside of the U.S. and, based on current conditions, the Sponsor states that Shanghai, South Korea, and Singapore are the most likely locations at which copper would be delivered to the Trust.[99]

The Commission believes that there is significant uncertainty about the locations from which copper will be purchased to create Shares. Based on the description of the Trust in the proposed rule change, authorized participants and their customers will choose what eligible copper to deposit with the Trust. Further, the Commission understands, based on information submitted by the Sponsor, that premia in different locations have fluctuated historically relative to one another and will continue to change over time, and that a region with the highest locational premia at a given time may have the lowest locational premia at a later date.[100]

The Commission also believes that the record supports the view that there are sufficient copper stockpiles such that up

[91] *See* V&F September 10 Letter, *supra* note 12, at 3.

[92] *See* Levin Letter, *supra* note 8, at 4–5; Copper Fabricators Letter, *supra* note 11, at 3 (''The market for copper available for immediate delivery consists of copper on warrant in LME and Comex warehouses. If there is any other copper available for us to purchase and be delivered within a week or two, we are generally not aware of it.''); V&F July 13 Letter, *supra* note 7, at 2–4; and AFR October 23 Letter, *supra* note 14, at 2.

[93] *See* V&F July 13 Letter, *supra* note 7, at 8. How opposing commenters measure the projected size of the Trust is discussed *infra* in Section III.A.3. Another Opposing Commenter states that, in 2011, total global copper stocks were 3.515 million metric tons, of which it believes only 808,000 metric tons were considered to be ''liquid.'' Levin Letter, *supra* note 8, at 4. The commenter then goes on to assert that: (1) Of those liquid stocks, most actually are unavailable for purchase; (2) most of that liquid copper that is available for immediate delivery is under LME or COMEX warrant; and (3) as of August 2011, the LME and COMEX had only 537,500 metric tons under warrant. *See id.* at 4–5. That commenter estimates that the Trust, which he expects would hold up to 61,800 metric tons of copper, and the iShares Copper Trust (*see infra* note 95), which would hold up to 121,200 metric tons of copper, collectively would hold approximately 34% of the copper available for immediate delivery. *See* Levin Letter, *supra* note 8, at 5. The Commission is not addressing the iShares Copper Trust proposed rule change in this order.

[94] *See* Levin Letter, *supra* note 8, at 6; V&F May 9 Letter, *supra* note 4, at 4; V&F July 13 Letter, *supra* note 7, at 9; Copper Fabricators Letter, *supra* note 11, at 4–5; and AFR October 23 Letter, *supra* note 14, at 2.

[95] *See* Securities Exchange Act Release No. 67237 (June 22, 2012), 77 FR 38351 (June 27, 2012) (SR–NYSEArca–2012–66) (notice of proposal to list and trade shares of the iShares Copper Trust).

[96] *See* Levin Letter, *supra* note 8, at 5, 6; Copper Fabricators Letter, *supra* note 11, at 3–4; and V&F May 9 Letter, *supra* note 4, at 6. 10.

[97] *See* DP August 24 Letter, *supra* note 11, at 13.

[98] *See* DP September 10 Letter, *supra* note 12, at 2. The Sponsor cites a report by Metal Bulletin Research indicating there are 4.09 million metric tonnes of refined copper stocks worldwide, 1.78 million metric tonnes of which can be considered to be liquid. *See* DP August 24 Letter, *supra* note 11, at Annex C–5 at 7, 10 (citing Metal Bulletin Research, ''Independent Assessment of Global Copper Stocks,'' August 22, 2012). According to the Sponsor, Metal Bulletin Research is the research arm of Metal Bulletin Ltd., the Trust's Valuation Agent. *See id.* at 15 n.44. Metal Bulletin Research estimates that 1.36 million metric tonnes of the 1.78 million metric tonnes considered to be liquid are in the form of LME brands. *See id.* at Annex C–5 at 7. Metal Bulletin Research further estimates that 249,000 metric tonnes are on LME warrant and 136,000 metric tonnes are LME-branded but located on other exchanges, leaving approximately 70% (or 975,000 metric tonnes) of liquid copper stocks that are eligible to be placed on LME warrant. *See id.* at Annex C–5 at 10.

[99] *See* DP September 10 Letter, *supra* note 12, at 8 n.32; and DP August 24 Letter, *supra* note 11, at 26.

[100] The Sponsor provided the following information provided by the Valuation Agent regarding locational premia: (1) In the United States, the average locational premium as a percentage of average physical price was 1.4217% for the year ended December 31, 2010; 1.1377% between January 1 and March 31, 2011, and 1.1590% between April 1 and June 15, 2011; (2) in Europe, the average locational premium as a percentage of average physical price was .9426% for the year ended December 31, 2010; .7035% between January 1 and March 31, 2011, and .7327% between April 1 and June 15, 2011; (3) in Shanghai, China, the average locational premium as a percentage of average physical price was 1.3500% for the year ended December 31, 2010; .3982% between January 1 and March 31, 2011, and .4640% between April 1 and June 15, 2011; and in Singapore, the average locational premium as a percentage of average physical price was 1.1259% for the year ended December 31, 2010; .7117% between January 1 and March 31, 2011, and .4964% between April 1 and June 15, 2011. *See* DP August 24 Letter, *supra* note 11, at C–3. The Sponsor states that this data provided in Annex C–3 demonstrates that locational premia vary over time and, as a result, ''a region with the highest premia in one interval of time may have the lowest premia at a later date, and vice versa.'' *See id.* at 32.

to 61,800 metric tons of copper could be deposited into the Trust without authorized participants taking copper off of either LME or COMEX warrant. For example, the Valuation Agent [101] estimates liquid global copper inventories that are considered LME-branded to be approximately 1.4 million metric tons as of July 31, 2012, and approximately 70% of these inventories are not under warrant with the LME, COMEX, or any other exchange.[102] One of the Opposing Commenters argues that this supply of non-warranted copper belongs to producers, consumers, and/or merchants and traders and is not otherwise in the supply pipeline, and that the only copper available for immediate delivery is in LME and COMEX warehouses.[103] The Commission believes, however, that it is more plausible that a sufficient portion of the estimated 1.4 million metric tons of copper inventories cited by commenters currently is available for authorized participants to use to create Shares.

For example, an Opposing Commenter states that there is estimated to be between 500,000 and 600,000 metric tons of bonded copper inventory in Shanghai and Guangzhou, China, and that up to 10% of this stockpile is not deliverable because it has not been kept under cover.[104] In the Commission's view, this leaves between 450,000 and 540,000 tons of copper that may be deliverable to the Trust. The Sponsor says that ''Metal Bulletin'' estimates that 80% of these bonded stocks are LME acceptable metal given the imported status of such metal and arbitrage activity between the LME and SHFE.[105] One of the Opposing Commenters argues that the Commission should not include copper located in China as inventory available for immediate delivery, noting that China is one of the largest copper-consuming countries in the world, leading the commenter to conclude that China would not export copper.[106] That commenter does not provide any empirical support for this view. That commenter also suggests that copper in China is unavailable because ''a substantial percentage of the inventory in bonded warehouses in China is being held in financing structures,'' [107] but the commenter admits that it does not know either how much of the copper is so encumbered under financing arrangements or how long such copper would be restricted.[108] Further, even if the commenter is correct that, as a practical matter, such copper may be unavailable to U.S. copper consumers, that does not preclude copper in Shanghai from being deposited into the Trust (if it is otherwise eligible), as one of the Trust's initial permitted warehouse locations is Shanghai.

Even assuming that authorized participants will need to remove copper from LME warrant to deposit the copper into the Trust, as discussed above, the Commission believes that the Trust's copper will remain available for immediate delivery to consumers and participants in the physical markets.[109] Accordingly, the Commission does not believe that the listing and trading of the Shares is likely to disrupt the supply of copper available for immediate delivery.

3. Growth of the Trust

One of the Opposing Commenters believes it is reasonable to expect that the Trust would sell all of the Shares covered by the Registration Statement in the three months after the registration becomes effective because of: (1) ''the stated desire to have the Trust remove enough copper from the market each month to move prices upward to cover the costs of storage''; (2) the very limited quantity of copper available for immediate delivery to accomplish the Trust's objective; and (3) the increase in copper prices in the three months following October 2010, when the Trust, iShares Copper Trust, and ETFS Physical Copper were announced.[110] That commenter also asserts that the copper supply is inelastic and that supply, therefore, is unlikely to increase fast enough to account for the increased demand that the commenter believes would be unleashed by the creation and growth of the Trust.[111] Opposing commenters state that the Trust would hold approximately 61,800 metric tons of copper if the Sponsor sells all of the 6,180,000 Shares covered by its Registration Statement.[112]

The Sponsor states that it does not expect to sell all registered Shares within three months after the Registration Statement becomes effective, and states: ''[l]ike all other physical metal ETVs, the Trust would register significantly more Shares than it initially intends to sell so that it is able to meet any such demand.'' [113] The Sponsor predicts that, in connection with the initial offering of Shares, the Trust would hold 9,893 metric tons of copper.[114]

As a preliminary matter, the Opposing Commenters appear to conflate the amount of copper held by the Trust with the number of Shares issued. When Commodity-Based Trusts redeem shares, those redeemed shares do not get put ''back on the shelf''; once securities are redeemed, the issuer cannot resell securities of the same amount unless there is either sufficient capacity left on the registration statement (*i.e.,* enough registered securities to cover the new issuance of shares by the issuer) or unless a new registration statement is filed to register the offer and sale of the securities.[115] Accordingly, 6,180,000 issued Shares will correspond with 61,800 metric tons of copper held by the Trust only if authorized participants do not redeem any Shares. Based on the existence of the arbitrage mechanism of the Trust,[116] which is common to many exchange-traded vehicles, the Commission believes it is very unlikely that no Shares will be redeemed.

The Commission believes that the amount of copper held by the Trust will

[101] The Exchange states that the Valuation Agent is an independent, third-party valuation agent that is not affiliated with the Sponsor. *See* Notice, *supra* note 3, 77 FR at 23773.

[102] *See* DP September 10 Letter, *supra* note 12, at 2.

[103] *See* V&F September 10 Letter, *supra* note 12, at 2.

[104] *See* V&F August 24 Letter, *supra* note 11, at 9–10. In contrast, the Sponsor states that there is estimated to be 550,000 metric tons of copper in bonded warehouses in Shanghai alone. *See* DP August 24 Letter, *supra* note 11, at 33.

[105] *See* DP August 24 Letter, *supra* note 11, at 30.

[106] *See* V&F September 10 Letter, *supra* note 12, at 5.

[107] V&F August 24 Letter, *supra* note 11, at 9.

[108] *See id.*

[109] *See supra* Section III.A.1.

[110] *See* V&F August 24 Letter, *supra* note 11, at 20. ETFS Physical Copper is a trust that holds copper under LME warrant and its shares are traded on the London Stock Exchange and Deutsche Börse. *See http://www.etfsecurities.com/en/updates/document_pdfs/ETFS_Physical_Industrial_Copper_Fact_Sheet.pdf.* A discussion of the effect of ETFS Physical Copper on the price of copper is included below. *See infra* Section III.B.

[111] *See* V&F May 9 Letter, *supra* note 4, at 5. That commenter states that, in the longer term, copper miners are likely to respond to price signals and increase production. *See* V&F August 24 Letter, *supra* note 11, at 28. Another Opposing Commenter generally asserted that the Trust actually would change ''supply and demand relationships.'' AFR October 23 Letter, *supra* note 14, at 4. That commenter offered neither an explanation for nor quantitative data to support its belief. As discussed below, the Commission believes that the Opposing Commenters have not supported their prediction that the assets of the Trust will grow so quickly, and that copper supply is sufficiently inelastic, such that copper prices would be impacted. *See infra* text following note 118.

[112] *See* V&F May 9 Letter, *supra* note 4, at 3; Levin Letter, *supra* note 8, at 5.

[113] DP August 24 Letter, *supra* note 11, at 41.

[114] *See id.*

[115] *See* Sections 5 and 6 of the Securities Act, 15 U.S.C. 77e and 15 U.S.C. 77f, respectively.

[116] The Trust's arbitrage mechanism allows authorized participants to create and redeem Shares, and is designed to align the secondary market price per Share to the NAV per Share. *See* Notice, *supra* note 3, 77 FR at 23780.

depend on investor demand for the Shares and the extent to which authorized participants fulfill such demand by buying Creation Units and not redeeming issued Shares. Investor demand for the Shares is currently unknown. The Commission notes that ETFS Physical Copper, shares of which are listed and traded on the London Stock Exchange and Deutsche Börse, has not grown to a substantial size since its inception.[117]

As discussed above, the Commission believes that copper held by the Trust will be available for immediate delivery.[118] However, even assuming that the Trust's copper will be unavailable for immediate delivery, the Commission believes that the Opposing Commenters have not supported their prediction that the Trust would grow so quickly that it would significantly disrupt the supply of copper available for immediate delivery.

4. Other Physical Commodity Trusts

Opposing commenters admit that the introduction of Commodity-Based Trusts that hold other metals had virtually no impact on the available supply, but they assert that these other metals—gold, silver, platinum, and palladium—are fundamentally different because they have traditionally been held for investment purposes, currently are used as currency, and that, as a result, there were ample stored sources available to fund Commodity-Based Trusts overlying those metals.[119] They assert that copper, in contrast, generally is not held as an investment, but rather is used exclusively for industrial purposes, with the annual demand generally exceeding the available supply, and they therefore believe that the introduction of the Trust would impact supply.[120]

In response, the Sponsor states that the majority of the market for silver, platinum, and palladium is industrial in nature.[121] The Sponsor has provided statistics from Thomson Reuters GFMS, a provider of information about the international metals industries, showing that in 2011, industrial use accounted for 84% of global palladium demand, 66% of global platinum demand, and 53% of global silver demand.[122] The Sponsor also states its belief that any holding of physical copper inventories, or of a financial replicating position, is implicitly an investment in copper.[123]

Given the industrial usage of silver, platinum, and palladium as compared to copper,[124] the Commission believes that it is reasonable to project that any impact of the listing and trading of the Shares will not be meaningfully different than that of the listing and trading of shares of these other Commodity-Based Trusts due solely to the nature of the underlying commodity markets. In any event, the Commission's analyses above in Sections III.A.1–3 are the primary bases for our belief that the listing and trading of the Shares is not likely to disrupt the supply of copper available for immediate delivery. The non-impact of those other trusts on the supplies in the underlying precious metals markets is consistent with this view, but it is not a significant factor underlying it.

B. The Trust's Impact on the Price of Copper

The Opposing Commenters assert that, due to the rapid growth of the Trust, which they believe would occur and would remove a substantial portion of the supply of immediately available LME-warranted copper,[125] the price of copper would be driven up.[126] As noted above, one of the Opposing Commenters estimates that the Trust, which would hold up to 61,800 metric tons of copper, and the iShares Copper Trust,[127] which would hold up to 121,200 metric tons of copper, collectively would hold approximately 34% of the copper available for immediate delivery.[128] That commenter concludes that, ''[i]f the supply of copper available for immediate delivery drops by about 34%, it naturally follows that the price of copper will rise.'' [129] Another of the Opposing Commenters states: ''[t]he LME settlement price is axiomatically affected by the quantity of copper on warrant * * * because the quantity on warrant defines how much copper is eligible to be delivered against a cash contract, *i.e.,* it is the total supply that is available when setting the settlement price.'' [130] That commenter also asserts that the launch of the UK-listed ETFS Physical Copper security and announcements about the proposed copper trusts in the United States were part of the cause of a copper price run up,[131] and predicts that the price increases for copper would be especially dramatic in the U.S., where copper currently is relatively inexpensive.[132] Another Opposing Commenter asserts that the value of copper is based on ''consumption rather than intrinsic value,'' and the creation of the Trust would introduce a financial element to copper pricing.[133]

In contrast, the Sponsor asserts that copper cash prices are not determined only by changes in on-warrant LME copper stocks.[134] The Sponsor believes

[117] According to one Opposing Commenter, on December 17, 2010 (one week after the product was launched), ETFS Physical Copper held 1,445.4 metric tons of copper, and on August 3, 2012, it held 1,763.7 metric tons of copper, although there have been periods where ETFS Physical Copper has held greater quantities of copper, reaching as high as 7,072.9 metric tons of copper in March and April of 2012. *See* V&F August 24 Letter, *supra* note 11, at 15.

[118] *See supra* Section III.A.1.

[119] *See* V&F May 9 Letter, *supra* note 4, at 2; and Levin Letter, *supra* note 8, at 6.

[120] *See* V&F May 9 Letter, *supra* note 4, at 2–3; and Levin Letter, *supra* note 8, at 7. Senator Levin states that because copper is very expensive to store and difficult to transport, relative to precious metals, copper is not currently held for investment purposes, and predicts that holding copper for investment purposes will have a significantly greater impact on the copper market than the precious metals Commodity-Based Trusts had on their markets and the broader economy. *See* Levin Letter, *supra* note 8, at 7.

[121] *See* DP August 24 Letter, *supra* note 11, at 39. Similarly, the Exchange states that the Trust would not be the first Commodity-Based Trust to hold a metal that is used primarily for industrial purposes. *See* Arca June 19 Letter, *supra* note 6, at 6.

[122] *See* DP August 24 Letter, *supra* note 11, at 39. No other commenter provided comparable statistics regarding the industrial use of palladium, platinum, or silver.

[123] *See id.* at 17, 19. The Sponsor believes copper held for investment purposes would include copper inventories on the LME, SHFE, and COMEX (453,464 metric tons as of July 31, 2012); copper inventories held through exchange-traded vehicles (2,356 metric tons as of July 31, 2012); and non-exchange-registered copper stocks (3.6 million metric tons as of July 31, 2012, 100,000 metric tons of which were held by hedge funds and private investors in private warehousing arrangements). *See id.* at 17–18.

[124] As mentioned above, the Sponsor provided statistics showing that in 2011, industrial use accounted for 84% of global palladium demand, 66% of global platinum demand, and 53% of global silver demand. *See supra* text accompanying note 122.

[125] *See supra* Section III.A.1.

[126] *See* V&F May 9 Letter, *supra* note 4, at 5; Copper Fabricators Letter, *supra* note 11, at 4–5; Levin Letter, *supra* note 8, at 5; and AFR October 23 Letter, *supra* note 14, at 2, 3.

[127] *See* Levin Letter, *supra* note 8, at 5. The Commission is not addressing the iShares Copper Trust proposed rule change in this order.

[128] *See id.*

[129] *See id.* Similarly, the Copper Fabricators state that the removal of 183,000 metric tons of copper from LME warehouses, which they believe is virtually all of the copper available for immediate delivery worldwide, would result in prices moving up very sharply. *See* Copper Fabricators Letter, *supra* note 11, at 5.

[130] *See* V&F August 24 Letter, *supra* note 11, at 7.

[131] *See id.* at 16.

[132] *See* V&F May 9 Letter, *supra* note 4, at 4–5.

[133] AFR October 23 Letter *supra* note 14, at 2. This commenter does not fully explain why the ''financialization'' of copper would result in higher copper prices. The commenter appears to make the same argument as other commenters: Namely, that the Trust will drive up the price of copper by removing it from the market, an activity that the commenter characterizes as ''hoarding.'' *See id.* at 3. Indeed, the commenter incorporates by reference the Levin Letter. *See id.* at 2.

[134] *See* DP August 24 Letter, *supra* note 11, at 11.

that supply and demand fundamentals, independent of the Trust, drive the price of copper.[135] According to the Sponsor, the main determinants of price in the copper market are production and demand fundamentals such as: Demand expectations; mine and refinery capacity; marginal costs of production (in particular, the change in marginal costs of production at different production levels); global and regional industrial growth patterns; cost of financing; and inventory levels.[136] The Sponsor states that: (1) Prices have reached the highest level and been among the lowest levels both in a ''normal'' regime and a low-stocks environment; and (2) copper inventories and prices do not always have an inverse relationship.[137] In response to questions posed by the Commission about the impact of LME inventories on the LME Settlement Price, the Sponsor states that 5-day changes in the supply of LME inventories of 10,000 metric tons or more are not that uncommon, and that inventory builds or withdrawals equivalent to the amount of copper required for the initial creation unit of Shares currently occur at the LME at least one quarter of the time.[138] The Sponsor and the Exchange also state that, due to the Trust's creation/redemption mechanism and the related ability of authorized participants to exchange Shares for physical copper, Shares—like shares of other physical commodity backed trusts—would track rather than drive the price of the commodity it holds.[139]

As discussed above,[140] the Commission does not believe that the listing and trading of the Shares is likely to disrupt the supply of copper available for immediate delivery, which is what the Opposing Commenters predict would increase the price of copper. However, even if the supply of copper under LME warrant would decrease because previously warranted copper were transferred to the Trust, for the reasons discussed below, the Commission does not believe that lower LME inventory level by itself will increase the LME Settlement Price (or any other price of copper).

To analyze the potential impact of changes in the LME inventory level on changes in the LME Settlement Price, Commission staff performed two regression analyses.[141] The first analysis was a linear regression of daily copper price changes, using five years of daily data from 2007–2012, against the following explanatory variables: The change in LME copper inventory from the previous day (*i.e.,* the lagged change in LME copper inventory), and the changes in spot prices of nickel, tin, gold, silver, platinum, and palladium, and the S&P 500, VIX index, and the China A-Shares index returns. The results indicate that LME copper inventories do not appear to have any independent statistical effect on prices.[142]

Commission staff also performed a similar regression analysis using monthly data from January 2000 until June 2012 obtained from the International Copper Study Group (''ICSG'') to determine whether a relation between copper prices and LME inventories exists over a longer time horizon.[143] The second analysis was a linear regression of monthly copper price changes against the following explanatory variables: The previous month's change in LME copper inventory, total exchange copper inventory (*i.e.,* combined inventory from LME, COMEX, and SHFE), non-exchange copper inventory (*i.e.,* inventory from merchants, producers, and consumers), and spot price changes for nickel, tin, and platinum. This analysis again indicates that LME inventories specifically do not appear to have any independent statistical effect on prices.[144]

Based on these analyses, even if the listing and trading of Shares of the Trust were to result in the removal of copper on warrant from LME inventories, the Commission does not believe that such a supply reduction will by itself directly impact the LME Settlement Price (or any other price of copper). Although total exchange inventories, in contrast to LME inventories, appear to have some effect on monthly copper prices in this linear regression analysis, the coefficient estimate associated with total exchange inventories indicates that copper prices should decrease when copper is taken off-exchange.[145]

Commission staff also performed Granger causality analyses[146] to test the causal effect the holdings of other Commodity-Based Trusts historically have had on the prices of their underlying commodities. Specifically, to evaluate whether the introduction of the SPDR Gold Trust, iShares Silver Trust, ETFS Platinum Trust, ETFS Physical Palladium Shares, and ETFS Physical Copper trust had an impact on the return of the metals underlying those trusts, using monthly data from their inceptions until September 2012, Commission staff examined flows into these funds and subsequent changes in underlying prices over time.[147] This analysis revealed no observable relation between the flow of assets and subsequent price changes of the underlying metal prices.[148] Commission staff repeated this analysis on a daily frequency for iShares Silver Trust, ETFS Platinum Trust, ETFS Physical Palladium Shares, and ETFS Physical Copper.[149] Again, Commission staff found no evidence that fund flows were statistically related to subsequent changes in the underlying metals prices. Given the industrial usage of silver, platinum, and palladium as compared to copper,[150] the Commission believes that it is reasonable to project that any impact of the listing and trading of the Shares will not be meaningfully different than that of the listing and trading of shares of other Commodity-Based Trusts due solely to the nature of the underlying commodity markets.

[135] *See id.* at 10. *See also* AFR November 16 Letter, *supra* note 14, at 6–7 (''It is true that if all other factors were equal, the removal of supply from the market through hoarding would increase prices, leading to a positive correlation between inventory and prices. But other supply and demand factors will frequently introduce exactly the opposite relationship between inventory and price.'' (footnote omitted)).

[136] *See* DP August 24 Letter, *supra* note 11, at 10.

[137] *See id.* at 24.

[138] *Id.*

[139] *See id.* at 25; and Arca June 19 Letter, *supra* note 6, at 4.

[140] *See supra* Section III.A.

[141] *See* Memorandum to File, dated November 6, 2012, from the Division of Risk, Strategy, and Financial Innovation (''RF Analysis''). The RF Analysis was designed to look for evidence of price impact related to changes in copper inventory levels and fund flows.

[142] *See id.* at 10.

[143] The Sponsor suggests that some of the inventory data published by the ICSG may be incomplete, but the Sponsor did not question the ICSG LME copper inventory data that was used in the Staff's analysis. *See* DP August 24 Letter, *supra* note 11, at 19.

[144] *See* RF Analysis, *supra* note 141, at 11.

[145] *See id.*

[146] Granger causality is a statistical concept of causality that is based on prediction. If a signal X ''Granger-causes'' a signal Y, past values of X should contain information that helps predict Y above and beyond the information contained in past values of Y alone. *See id.* at 3, n.9.

[147] *See id.* at 2–9. Because ETFS Physical Copper is small relative to the potential size of the Trust—holding only approximately 2,000 metric tons of copper as of August 2012—Commission staff augmented its analysis by comparing asset growth of SPDR Gold Trust, iShares Silver Trust, ETFS Platinum Trust, and ETFS Physical Palladium Shares with changes in spot prices for the underlying metals.

[148] *See id.* at 4.

[149] Daily asset data was not available for the SPDR Gold Trust within the Commission's existing data sources.

[150] As mentioned above, the Sponsor provided statistics showing that in 2011, industrial use accounted for 84% of global palladium demand, 66% of global platinum demand, and 53% of global silver demand. *See supra* note 122 and accompanying text.

The Commission received three comment letters regarding the Commission staff's analysis.[151] These letters include comments on both the substantive conclusions reached as well as the methodology used.[152] As described further below, the Commission believes the staff's analysis reasonably evaluates whether historical price impacts are associated with changes in copper supply, one of the Opposing Commenters' contentions.

One of the Opposing Commenters states that the results in Table 4 in the RF Analysis appear to contradict the staff's conclusion that there is no statistically significant relationship between copper inventories and copper prices as the results show a strong positive relationship between total exchange inventories and copper prices.[153] The Commission believes that the aforementioned linear regression analysis conducted by staff indicates that LME copper inventories do not appear to have any independent statistical effect on copper prices. Further, we recognize that the linear regression analysis summarized in Table 4 also indicates that total exchange inventory has a positive relation to copper prices. Specifically, this linear regression analysis indicates that removal of copper from exchanges would lead to a decrease in the price of copper, thus benefiting market participants who use copper as an input.[154]

This Opposing Commenter also states that the Commission staff's decision to use the inventory of LME-warranted copper, total exchange copper inventory, and total non-exchange inventory as independent variables makes it difficult to interpret any single coefficient.[155] The commenter states that because LME copper inventory makes up a significant portion of total exchange inventory, the two variables are obviously highly correlated, creating the problem of collinearity between regressors.[156] As a response to these comments, the Commission notes that its staff conducted a separate analysis, in which COMEX and SHFE copper inventory were substituted for total exchange copper inventory (*i.e.,* the inventory of LME-warranted copper was removed from total exchange copper inventory). Consistent with the findings in the RF Analysis, this separate analysis shows that, even when replacing total exchange inventories with non-LME exchange inventories, LME inventories specifically do not appear to have any independent statistical effect on copper prices.[157]

Further, this Opposing Commenter states: ''There are growing doubts about the utility of not just LME inventories but any established exchange inventories in representing the true global inventory stocks of copper.'' [158] The commenter asserts that, if there are large global inventories of copper that are not being measured, the utility of any of the models in the Commission staff's analysis is highly doubtful.[159] As discussed above, the Commission believes that there are sufficient copper stockpiles such that up to 61,800 metric tons of copper could be deposited into the Trust without authorized participants taking copper off of either LME or COMEX warrant.[160] This may, as the commenter suggests, limit the utility of the RF Analysis regarding the relation between LME inventories and prices. However, other Opposing Commenters have argued that the price of copper will increase precisely because authorized participants will create Shares by taking copper off of LME and/or COMEX warrant, and the RF Analysis addresses this concern.[161] Moreover, the Commission believes that if there are large global inventories of copper that are not being measured, it is less likely that the listing and trading of the Shares will by itself increase the price of copper compared with the scenario suggested by other commenters who assert that LME inventories drive prices.

This Opposing Commenter also argues that the Commission staff's analysis ignores key ''institutional factors'' in the copper market.[162] The commenter asserts that price determination in any market is highly dependent on the rules that govern that market, and that for an industrial commodity, factors concerning the practical use of the commodity are important.[163] According to the commenter, the most important institutional factor is the LME's requirement ''that any holder of 50 percent or more of LME warrants in any metal must lend its inventory on demand at rates designed to prevent any

[151] *See* AFR November 16 Letter, *supra* note 14; V&F November 16 Letter, *supra* note 14; and Rutkowski November 17 Letter, *supra* note 14. Mr. Rutkowski urges that the Commission afford the AFR November 16 Letter the attention Mr. Rutkowski believes it deserves. *See* Rutkowski November 17 Letter, *supra* note 14. The Commission discusses both the AFR November 16 Letter and the V&F November 16 Letter below.

[152] AFR states that ''[t]he detailed regression data, models (including computer code), and full results used in [the RF Analysis] should be released to the public.'' *See* AFR November 16 Letter, *supra* note 14, at 3. The Commission does not believe it is necessary to release this information because the RF Analysis includes sufficient data and information to permit commenters to evaluate the staff's analyses.

[153] *See id.* at 2. The commenter's concern appears to be based on its belief that supply changes ''on the margin'' influence price and that, if supply hoarding increases prices, the key determinant of price levels will be inventories for the source of supply for the marginal unit of copper. The commenter sets forth reasons why it believes the LME inventory no longer represents the marginal unit of copper, and its belief that total exchange inventory (or potentially off-exchange inventory) is the type of inventory most likely to include the marginal unit of copper inventory on the world market. AFR states that in recent years, inventories have been moving from the LME toward other exchanges, and that since 2008, most inventory flow has been to non-LME exchanges. AFR also argues that LME lending rules would make it illogical to use LME-warranted copper to influence market prices. In addition, AFR asserts that total exchange inventories may be a better guide to price impact since the Trust would hold copper that is not on LME warrant. *See id.* at 4.

AFR also states that because the Commission staff's analysis ''does not properly report the units in which these regression variables are measured in, and does not provide standardized coefficients, it is not possible to fully assess the economic (as opposed to statistical) significance of'' total exchange inventories and compare it to other coefficients. *See id.* at 4 n.4. While the Commission acknowledges this comment, the RF Analysis does not rely on the magnitude of coefficient estimates, but rather on the statistical significance of those estimates.

[154] In contrast, the Opposing Commenters argue that the removal from the market of a substantial portion of copper available for immediate delivery would drive up the price of copper. *See supra* notes 125–132 and accompanying text.

[155] *See* AFR November 16 Letter, *supra* note 14, at 4. Another commenter asserts that Commission staff ''included likely heteroskedastic variables of other LME and LBMA metals prices in the regression, which may in the least, have undermined the cogency of the coefficient pertaining to LME copper inventory levels.'' *See* V&F November 16 Letter, *supra* note 14, at 1–2. There is no evidence in the record of the existence of heteroskedasticity in these variables that would affect the results of the RF Analysis.

[156] *See* AFR November 16 Letter, *supra* note 14, at 4. This commenter did not identify which independent variables Commission staff should have used and did not provide its own regression analysis for Commission to consider.

[157] In this alternative regression specification, the coefficient for non-LME exchange inventories is estimated to be positive and statistically significant, like the coefficient for total exchange inventory in Table 4 of the RF Analysis. This result again implies that taking inventory off these exchanges may result in a decrease in copper prices, as opposed to an increase in prices as predicted by the Opposing Commenters.

[158] *See* AFR November 16 Letter, *supra* note 14, at 8. AFR states: ''Table 4 does include a variable for the off-exchange inventory. The coefficient is large but not statistically significant. It is difficult to assess this finding given the collinearity issue and the lack of detail on how the off-exchange inventory variable is calculated.'' *See id.* at 4 n.8. The Commission does not believe that the magnitude of the coefficient for off-exchange inventory in Table 4 of the RF Analysis is relevant as the p-value is statistically insignificant.

[159] *See id.* at 9.

[160] *See supra* Section III.A.2.

[161] *See supra* notes 125–132 and accompanying text.

[162] *See* AFR November 16 Letter, *supra* note 14, at 8.

[163] *See id.*

profit from the dominant position.'' [164] The commenter asserts that the findings in the RF Analysis are based on analyses of exchange-traded funds backed by LME warrants, and asserts that the findings of that analysis likely do not accurately reflect the likely price impact of the Trust as the assets of the Trust would not be backed by LME warrants.[165] As discussed above,[166] however, Commission staff evaluated whether the introduction of the SPDR Gold Trust, iShares Silver Trust, ETFS Platinum Trust, ETFS Physical Palladium Shares, and ETFS Physical Copper had an impact on the return of the metals underlying those trusts. Only ETFS Physical Copper holds LME warrants; the SPDR Gold Trust, iShares Silver Trust, ETFS Platinum Trust, and ETFS Physical Palladium Shares all hold physical gold, silver, platinum, and palladium, respectively, not warrants on those metals. Accordingly, the Commission believes the staff's analysis considers the institutional factor cited by the commenter.

Further, one of the Opposing Commenters asserts that the Commission staff's analysis ignores endogeneity problems.[167] The commenter argues that the Commission staff's Granger causality analyses [168] are inappropriate because they look for a statistical relationship between variables that are simultaneously determined—specifically, asset flows into Commodity-Based Trusts and metals prices.[169] In addition, this commenter argues that the Commission staff's regression analyses, performed to determine whether a relationship exists between copper prices and LME inventories,[170] are subject to endogeneity bias.[171] The commenter asserts that the Commission staff's analysis ''attempts to retrieve the causal impact of supply hoarding on prices through regressing price on quantity in the market generally.'' [172] According to the commenter, although, ''if all other factors were equal, the removal of supply from the market through hoarding would increase prices, leading to a positive correlation between inventory and prices,'' other supply and demand factors, such as an inventory buildup in connection with a decline in prices caused by decreased market demand, can lead to a negative correlation between inventory level and prices.[173] Thus, according to the commenter, a correlation between inventory levels and price will not isolate the effect of supply hoarding.[174]

The Commission does not believe that endogeneity biases are problematic with regard to the linear regression analyses and the Granger causality analyses Commission staff conducted because the analyses examine the relation between lagged inventory changes (in case of the regression analyses) or lagged flows (in the case of the Granger causality analyses) and subsequent price changes. For this reason, the inventory and flow variables are determined prior to the price variables being determined, and are not determined simultaneously with prices.[175]

Another of the Opposing Commenters states that the Granger causality analyses appear on their face to be incongruous.[176] This commenter states its belief that Commission staff appears to be comparing assets under management to the respective price of the commodity held by the trust, and provides a chart that the commenter purports to show that there is a 92% correlation between the rolling monthly change in NAV of the iShares Silver Trust and the silver price.[177] The Granger causality analysis from Tables 1 and 2 of the RF Analysis examines the relation between dollar flows into the funds and subsequent changes in the prices of the underlying metals. It does not examine the relation between changes in assets under management, which are driven by both flows and returns of the underlying, and the concurrent change in the prices of the underlying metals. Therefore, the Commission believes that the relation between the change in NAV for these funds and the concurrent change in the prices of the underlying metal is irrelevant for the purposes of the cited analysis.

Two of the Opposing Commenters question the time periods used in the Commission staff's analysis. One of these Opposing Commenters states that Commission staff failed to account for the term structure of prices (*e.g.,* whether, and the extent to which, the market is in contango or backwardation).[178] This commenter states: ''[t]he correct lag period to test for price impacts on copper consumers depends upon the delivery times and production lead times, which also affect the price impacts of deep backwardation on consumer access to supplies.'' [179] While this commenter suggests that the Commission staff did not use the correct lag period in its analysis, the commenter did not provide any specific time intervals that should be used from the many possible alternatives, nor did it explain what time intervals would have been more appropriate than those used by Commission staff. The Commission believes the daily periods used in the RF Analysis were reasonable and appropriate because evidence of the relationship between inventories and prices would likely be seen at daily intervals.[180]

Another of the Opposing Commenters suggests that Commission staff should have examined the cash to three month time spread and provides its own analysis, which the commenter concludes demonstrates a strong relationship between LME inventory changes and the cash to three month time spread.[181] This commenter states that if the Trust and the iShares Copper Trust were to sell all of the shares registered through their respective registration statements, the cash to three month time spread ''would blow out to a massive backwardation, potentially approaching record levels, making it impossible for copper consumers to finance their inventory.'' [182] The

[164] *See id.*

[165] *See id. See also supra* text accompanying note 147.

[166] *See supra* note 147 and accompanying text.

[167] *See* AFR November 16 Letter, *supra* note 14, at 5. AFR states that endogeneity refers to the simultaneous determination of quantity and price in supply-demand systems and ''involves a causal loop between the dependent and independent variable such that the causal impact of the independent variable cannot be isolated.'' *See id.*

[168] *See supra* notes 146–150 and accompanying text.

[169] *See* AFR November 16 Letter, *supra* note 14, at 5.

[170] *See supra* notes 141–144 and accompanying text.

[171] *See* AFR November 16 Letter, *supra* note 14, at 6.

[172] *See id.*

[173] *See id.* at 6–7.

[174] *See id.* at 7.

[175] The commenter asserts: ''The most preferred method [to address endogeneity issues] is to use an instrumental variables approach that isolates factors that affect market supply but are unrelated to other causal factors.'' *Id.* This commenter, however, did not submit for Commission consideration the analysis it asserts is necessary, nor did the commenter provide any examples of instrumental variables it asserted would rectify the analysis.

[176] *See* V&F November 16 Letter, *supra* note 14, at 6.

[177] *See id.* at 6–7.

[178] *See* AFR November 16 Letter, *supra* note 14, at 9.

[179] *See id.*

[180] In particular, LME inventory data for the previous day is released on the morning of each trading day so that prices are able to react over the course of that day. Moreover, the use of the monthly lag period confirmed the results of the daily analysis and allowed for the examination of the effect of non-exchange copper inventories for which only monthly data were available within the Commission's existing data sources.

[181] *See* V&F November 16 Letter, *supra* note 14, at 3.

[182] *See id.* The commenter further states that the mechanics of unit creation for Commodity-Based Trusts backed by precious metals are fundamentally different than those for Commodity-Based Trusts backed by industrial metals, citing the lack of copper in unallocated accounts that could be used

analysis provided by this commenter, however, does not provide the significance level of any test statistics associated with these findings, which would provide an assessment of the likelihood that relations were observed in the data by statistical chance. Without an assessment of statistical significance, it is difficult to conclude whether observed relations in the commenter's data are systematic or anecdotal. In addition, this commenter's analyses appear to analyze inventory changes against concurrent price changes. The Commission does not believe that such a concurrent analysis can isolate the effect of inventory changes on prices because such an analysis cannot distinguish whether price changes lead inventory changes or vice versa.

Further, as discussed above, the Commission does not believe that the listing and trading of the Shares is likely to disrupt the supply of copper available for immediate delivery,[183] and believes that the Opposing Commenters have not supported their prediction that the Trust would grow so quickly that it would significantly disrupt the supply of copper available for immediate delivery.[184]

This Opposing Commenter also asserts that Commission staff erred by using lagged daily LME stock data. This commenter asserts that because there are ''many consecutive and non-consecutive days that LME stock levels and LME traded metals do not change while LME prices do * * *, running a daily LME stock series through a regression analysis will yield statistically weak results in most cases.'' [185] The commenter states that LME inventory data for the prior day is released at 9:00 a.m. in the London trading day, thereby giving the market a full trading day to digest the data.[186] The lagged daily LME inventory change used in the RF Analysis in fact was regressed against the change in copper prices for the day on which this information was released at 9:00 a.m.[187]

In addition, this Opposing Commenter asserts that there is not a strong statistical relationship between lagged copper inventories and contemporaneous copper prices because the LME represents the copper market's ''warehouse of last resort.'' [188] According to this commenter, when LME stocks are drawn down or added to, market participants ''should have already fully discounted the fundamental information contained within that particular stock move.'' [189] This assertion seems consistent with a hypothesis that price changes precede inventory changes, which is contrary to Opposing Commenters' assertions that inventory changes precede price changes.[190] The Commission believes that this argument provides further weight to the Commission staff's finding that the LME copper inventory changes do not appear to precede price changes.

This Opposing Commenter suggests that, instead of looking at lagged daily LME stock data, the Commission staff should have looked at the 30 largest quarter-to-quarter LME inventory declines against changes in the LME cash price over the same time periods. The commenter asserts that such analysis, which the commenter submitted, shows that for the 30 largest observations, the median stock decline was 28.6%, and that the LME cash price rose in 25 out of 30 observations, for a median increase of 10.5%.[191] The commenter states that these findings suggest that if LME and COMEX inventories were to decline by more than 50%, which the commenter asserts could happen if the Trust and the iShares Copper Trust were to sell all of the shares registered through their respective registration statements, prices could increase 20–60% in the quarter that the LME and COMEX inventory decline occurs.[192]

The analysis provided by this commenter, however, does not provide the significance level of any test statistics associated with these findings.[193] In addition, this commenter's analysis appears to analyze inventory changes against concurrent price changes. The Commission does not believe that such a concurrent analysis can isolate the effect of inventory changes on prices.[194] Further, as discussed above, the Commission does not believe that the listing and trading of the Shares is likely to disrupt the supply of copper available for immediate delivery,[195] and believes that the Opposing Commenters have not supported their prediction that the Trust would grow so quickly that it would significantly disrupt the supply of copper available for immediate delivery.[196]

One of the Opposing Commenters states that Commission staff should have considered the impact on locational premia.[197] This commenter asserts that the relationship between COMEX inventory and locational premia in the U.S. is strong, and provides data that the commenter suggests shows that when COMEX inventories are at anemic levels, locational premia can be very high (above $200 per metric ton).[198] Thus, the commenter argues that if the Trust results in the removal of inventory from LME and COMEX warehouses, the associated market impact will be much higher locational premia.[199] The analysis provided by this commenter, however, does not provide the significance level of any test statistics associated with these findings.[200] In addition, this commenter's analysis appears to analyze inventory changes against concurrent price changes. The Commission does not believe that such

in creating Shares. According to the commenter, neither producers nor consumers are carrying meaningful inventories of copper, which would require authorized participants to acquire copper from LME and COMEX inventories to create Shares. The commenter asserts that a backwardation would be necessary to trigger the movement of copper to authorized participants, and that consumers would have to compete for this metal or lend to authorized participants. *See id.* at 4. As discussed above, the Commission believes that the record supports the view that there are sufficient copper stockpiles such that up to 61,800 metric tons of copper could be deposited into the Trust without authorized participants taking copper off of either LME or COMEX warrant. *See supra* Section II.A.2.

[183] *See supra* Section III.A.

[184] *See supra* Section III.A.3.

[185] *See* V&F November 16 Letter, *supra* note 14, at 2.

[186] *See id.* at 5–6.

[187] To confirm this, Commission staff reconciled a sample of historical LME stock data from the LME Web site (*http://www.lme.com/dataprices.asp*) and the Bloomberg LME stock data used in the RF Analysis. Additional reconciliation was done against historical LME copper warehouse stock data found at *http://www.metalprices.com/historical/database/copper/lme-copper-warehouse-stocks.*

[188] *See* V&F November 16 Letter, *supra* note 14, at 6.

[189] *See id.* at 6 (stating that LME stocks are drawn down by consumers because neither producers nor traders have material to sell to consumers and consumers are willing to go through the logistical hassle of being long LME warrants, swapping the warrants for their preferred brands, and transporting the copper to their individual plant, and that ''[i]t is nonsensical to assume that the trading community has not already discounted this information into the LME price''). *But see id.* at 2 (''Intuitively it doesn't make sense to argue that in a physically settled exchange system that fungible stock levels don't exert some statistically robust influence on metals prices.'').

[190] *See supra* note 154 and accompanying text.

[191] *See* V&F November 16 Letter, *supra* note 14, at 2.

[192] *See id.* at 2.

[193] *See supra* text following note 182.

[194] *See supra* text following note 182.

[195] *See supra* Section III.A.

[196] *See supra* Section III.A.3.

[197] *See* V&F November 16 Letter, *supra* note 14, at 3, 5. This commenter refers to ''physical'' premia in describing the manner in which the Trust will value its copper holdings: ''Another market price that the SEC could have done well to look into is the physical premia, especially in light of the [Trust's] implied objective to value metal * * * on an in-situ basis, taking into account regional physical price variations.'' *See id.* at 5. Consistent with this description, the Commission refers to locational premia rather than physical premia.

[198] *See id.*

[199] *See id.*

[200] *See supra* text following note 182.

a concurrent analysis can isolate the effect of inventory changes on prices, as discussed previously.[201] In addition, according to data provided by commenters, locational premia typically appear to be no greater than 2%. Therefore, the Commission believes the degree to which such premia can be influenced is limited. Further, even assuming that copper was taken off LME warrant to be deposited into the Trust, the Commission believes that the Trust's copper will remain available for immediate delivery to consumers and participants in the physical markets,[202] which will limit the possible effect on locational premia.

Finally, this Opposing Commenter asserts that the listing and trading of the Shares could change the fundamental structure of the copper market, and that Commission staff should ''ponder'' such a structural change in the copper market.[203] This commenter states that the ex-post implications for copper outright prices in a market that involves listing and trading of the Shares cannot be accurately inferred from what this commenter characterizes as ''an overly-simplistic ex-ante statistical analysis of LME/global inventories and LME settlement prices.'' [204] According to this commenter, never before has it been possible for financial players to ''lock up'' significant amounts of LME and COMEX inventory in a short period of time and remove that copper from the market.[205] Further, while this commenter indicates that ''[o]verall *historically* the level of LME inventories has been generally indicative of the trading environment, not a driver of the metal price per se,'' creation of the Trust could change the role of LME inventories from being a function of the fundamentals to being a fundamental, and ''arguably THE fundamental, as has become the case in precious metals.'' [206]

The Commission believes that such assertions are speculative and unsupported by the record. As discussed in detail throughout this order, the Commission does not believe that the listing and trading of the Shares is likely to alter the supply and demand fundamentals of the copper market. Further, as discussed above, the Commission does not believe that the listing and trading of the Shares is likely to disrupt the supply of copper available for immediate delivery [207] and, even assuming that copper was taken off LME warrant to be deposited into the Trust, the Commission believes that the Trust's copper will remain available for immediate delivery to consumers and participants in the physical markets.[208]

Lastly, one of the Opposing Commenters cites a study that ''examines the hedging activity of sponsors using futures as hedges for the total return swaps'' entered into as part of commodity index funds.[209] According to the commenter, the sponsor of a commodity index fund must replace expiring futures contracts with later-maturing futures on a continuous basis (referred to as the ''roll'').[210] The commenter states that the Frenk & Turbeville Study ''found an extremely strong and significant correlation'' over a multi-year period between the five-day roll period for hedges of the Goldman Sachs Commodity Futures Index in each month with a movement in the forward price curve toward higher prices in the future.[211] The commenter believes that suppliers hold onto more of the underlying commodity to take advantage of the rising prices signaled by the movement in the forward price curve (although no fundamental market forces have signaled such higher prices), which in turn increases spot prices to attract supply that otherwise could be hoarded.[212] The commenter believes that the proposed trust will have a more direct effect on the copper market as withdrawal of supply in rising-price markets (and flooding of supply in decreasing-price markets) constitutes an actual change in supply and demand relationships.[213]

The Commission is not persuaded that the conclusions of a study on correlations between the roll periods of futures indexes and commodities prices should be extrapolated to predict the impact of the Trust, which will hold physical copper (not copper derivatives), on the price of copper. As discussed above, the Commission believes that copper delivered into and held by the Trust will remain available for immediate delivery and, even if it is ''removed from the market'' as commenters have suggested, the supply of copper available for immediate delivery is sufficient such that the creation and quick growth of the Trust alone is not expected to impact the price of copper.[214]

Because the Commission does not believe that the listing and trading of the Shares, by itself, will increase the price of copper, the Commission also believes that approval of the proposed rule change will not have an adverse effect on the efficiency of copper allocation for industrial uses and will also not have an adverse effect on capital formation for industrial uses of copper.

C. The Trust's Impact on Copper Price Volatility

The Opposing Commenters assert that the successful creation and growth of the Trust would make the price of copper, which one of those commenters states already is volatile,[215] even more volatile. Specifically, they assert that the successful creation and growth of the Trust, which would in their view substantially restrict supply and increase copper prices, would create a boom and bust cycle in copper prices.[216] For example, the Copper Fabricators predict that: (1) The Trust would remove copper from the market, and thus would drive the price of copper higher, which in turn would

[201] *See supra* text following note 182.

[202] *See supra* text accompanying note 109.

[203] *See* V&F November 16 Letter, *supra* note 14, at 3–4.

[204] *See id.* at 4.

[205] *See id.* at 3–4, 8.

[206] *See id.* at 6 (emphasis in original). The commenter states that exchange-traded vehicles backed by silver, platinum, and palladium have become the largest single holder of those metals in a remarkably short period of time (less than eight years) and that exchange-traded vehicles backed by gold are eclipsed at a national level only by the U.S. and Germany. According to the commenter, while the cumulative impact of exchange-traded vehicles on prices has dissipated as these products have matured, ''the reality is that they have become a key fundamental in terms of analyzing the precious metals markets,'' and have become the main asset class. The commenter asserts that it is not certain, and that it should not be assumed, that potential investors in the Trust will ''be as sticky as they have been in gold and silver, and to a lesser degree in platinum and palladium.'' *Id.* at 7. The commenters ''stickiness'' argument has been addressed above. *See supra* Section III.A.1.

[207] *See supra* Section III.A. Even assuming that the Trust's copper will be unavailable for immediate delivery, the Commission believes that the Opposing Commenters have not supported their prediction that the Trust would grow so quickly that it would significantly disrupt the supply of copper available for immediate delivery. *See supra* Section III.A.3.

[208] *See supra* text accompanying note 109.

[209] AFR October 23 Letter, *supra* note 14, at 4 (citing David Frenk & Wallace Turbeville, Commodity Index Traders and the Boom/Bust Cycle in Commodities Prices (October 2011), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1945570* (''Frenk & Turbeville Study'')). The commenter states that these total return swaps do not reference a single commodity, but rather are valued based on indices comprised of a basket of commodity futures. *See id.* at 3.

[210] *See id.* at 4.

[211] *See id.*

[212] *See id.*

[213] *Id.*

[214] *See supra* Sections III.A.1 and A.3.

[215] *See* V&F May 9 Letter, *supra* note 4, at 5.

[216] *See id.* at 5; Levin Letter, *supra* note 8, at 5; Copper Fabricators Letter, *supra* note 11, at 5–6; and AFR October 23 Letter, *supra* note 14, at 2. *But see* V&F November 16 Letter, *supra* note 14, at 8 (stating that if Commission staff were to analyze whether the discrete flow of ounces in and out of exchange-traded vehicles drives underlying metals price, it would likely show that volatility in precious metals is not solely a function of net metal flow in and out of the exchange-traded vehicles).

drive the price of the Shares higher; (2) at some point, the anticipated incremental increase in price would either be insufficient to cover the increasing costs of storage or would not be enough to generate a profit; and (3) that when that expected outcome occurs, Share holders would sell their Shares and authorized participants would redeem them, returning the copper held in the Trust to the physical market.[217] The Opposing Commenters predict that this ultimate sell-off would be quick, and predict that the expected ''dumping'' of thousands of metric tons of copper back onto the market would depress the price of copper and negatively impact the world economy at large.[218]

In contrast, NYSE Arca and the Sponsor assert that the Trust would not increase copper price volatility in this manner and in fact may reduce it. The Exchange states that, because of the arbitrage mechanism common to all exchange-traded vehicles, share prices of physical commodity-backed exchange-traded vehicles generally follow rather than drive the price of the underlying assets.[219] The Sponsor asserts that volatility in prices results when there is a major change in prevailing expectations about fundamental market parameters, and the Trust would not affect any of the fundamental parameters that drive supply and demand.[220] Further, the Sponsor states that the Trust may reduce copper price volatility because, if holders of the Shares act according to their incentives—namely, to sell into rallies and buy on price dips—their actions may tend to reduce peaks and valleys in pricing, and help to reduce volatility.[221]

The Opposing Commenters' prediction that the listing and trading of the Shares would cause a boom and bust is premised upon both the supply and price impacts they predict. As discussed above, the Commission does not believe that the listing and trading of the Shares is likely to disrupt the supply of copper available for immediate delivery[222] or increase the price of copper.[223] In addition, this boom and bust prediction is unsupported by any empirical evidence. As a result, the Commission does not believe that the proposed listing and trading of the Shares will impact copper volatility in the manner that Opposing Commenters suggest. Further, the Commission does not believe that approval of the proposed rule change will impede the use of copper because the listing and trading of the Shares is not expected to, as discussed above, result in heightened volatility. Therefore, the Commission does not believe that the listing and trading of the Shares will have an adverse effect on the efficiency of copper allocation and capital formation.

D. The Trust's Impact on the Potential To Manipulate the Price of Copper

The Opposing Commenters set forth a number of arguments about why the Trust would increase the potential for manipulation of the copper market. One of the Opposing Commenters asserts that the Trust, in effect, would introduce so much transparency into the copper market that it would allow the Trust to manipulate, or alternatively provide market participants an effective means to manipulate, the price of copper and thereby the price of the Shares. According to that commenter, investors in the Trust would be able to measure how much impact their collective removal of copper from the supply available for immediate delivery would have on copper prices each day, and could adjust their purchasing strategies accordingly.[224] Therefore, that commenter believes that the increased market transparency, which the Exchange asserts would result from the formation and operation of the Trust, would not be in the public interest.[225] Instead, the commenter believes the transparency of the Trust's holdings would provide market participants with critical information about ''how much copper needs to be removed on any given day in order to artificially inflate [copper] prices and thus the price of the Trust's shares.'' [226]

Due to their view of the Trust's impact on the supply of copper available for immediate delivery, Opposing Commenters predict that the Trust would make the copper market more susceptible to squeezes and corners.[227] According to an Opposing Commenter, after a substantial portion of the copper market is deposited in one or more physical copper trusts, the costs of acquiring the remaining inventory would be relatively inexpensive, thus reducing a hurdle to engineering a corner or squeeze.[228] According to another commenter, such manipulative activities could go undetected by the LME because trusts that hold physical commodities are not subject to any form of commodity regulations; by holding physical copper rather than LME warrants, the Trust would be able to control more of the available supply of copper without triggering LME reporting or rules.[229]

In response, the Exchange states that the Trust instead may reduce the potential for fraud or manipulation in the physical copper market because: (1) The Trust may hold copper in multiple global locations, which is intended to provide a larger, more liquid supply of copper than would be available if creations and redemptions were only permitted using copper held in a single location; (2) the Trust and transactions in the Shares would be transparent, publishing information about its holdings and operations through its Web site; (3) the Trust would utilize a consistent, transparent, non-discretionary, rules-based, and fully disclosed selection protocol for redemptions; and (4) the Trust's copper would be valued by a recognized, independent valuation agent.[230]

The Sponsor also claims that the Trust may reduce the potential for fraud or manipulation in the physical copper market,[231] which would have an impact on any potential manipulation of the

[217] *See* Copper Fabricators Letter, *supra* note 11, at 5–6.

[218] *See, e.g.,* Levin Letter, *supra* note 8, at 6. More specifically, V&F states that, because of this predicted boom and bust, mines will go bust and resources will be needlessly misallocated. *See* V&F August 24 Letter, *supra* note 11, at 28.

[219] *See* Arca June 19 Letter, *supra* at 6, at 4.

[220] *See* DP August 24 Letter, *supra* note 11, at 11. The Sponsor also states: (1) Changes in realized volatility of physical copper prices and prices of copper derivatives based on changes in global copper supply are not constants; (2) LME prices and price volatility do not increase or decrease based solely on LME copper stocks or on-warrant LME copper stocks; and (3) in general, realized volatility of copper prices tends to be higher in a lower stocks environment, as strong physical demand draws production and distribution systems to full capacity utilization. *See id.* at 24–25.

[221] *See id.* at 11.

[222] *See supra* Section III.A.

[223] *See supra* Section III.B.

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

[225] *See id.* at 10.

[226] V&F July 13 Letter, *supra* note 7, at 10.

[227] *See* V&F May 9 Letter, *supra* note 4, at 1, 10; Levin Letter, *supra* note 8, at 7; and AFR October 23 Letter, *supra* note 14, at 4–5. One of the Opposing Commenters describes a squeeze on the copper market as occurring ''when a lack of supply and excess demand forces the price upward, and a corner is when one party acquires enough copper to be able to manipulate its price.'' Levin Letter, *supra* note 8, at 7.

[228] *See* V&F September 10 Letter, *supra* note 12, at 7. Senator Levin asserts that the Trust will make the copper market more susceptible to squeezes because it could be used by market participants to remove copper from the available supply in order to artificially inflate the price. *See* Levin Letter, *supra* note 8, at 7.

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

[230] *See* Arca June 19 Letter, *supra* note 6, at 5–6.

[231] *See* DP August 24 Letter, *supra* note 11, at 4. The Sponsor also states that neither it nor the Trust could deliberately influence copper prices even if it sought to because the Trust is not managed—it does not take positions or buy and sell copper, and it cannot place large orders that could affect the market. *See id.* at 12.

Shares as well. Specifically, the Sponsor asserts that the Trust already has introduced greater transparency into the copper market.[232] According to the Sponsor, prior to July 16, 2011, locational premia (*i.e.,* prices) for physical copper were reported infrequently, available only by subscription, and available only for certain broad regions.[233] Since then, in anticipation of the Trust's potential launch, the Valuation Agent has calculated the locational premium for physical copper in each of the Trust's approved warehouses on a daily basis, and published the locational premia on a *weekly* basis.[234] The Sponsor expects that transparency would increase through the listing of the Shares because when trading of the Shares commences: (1) The Trust would post on its Web site these locational premia on a *daily* basis; (2) the Exchange would continuously disseminate pricing information as part of its required intraday indicative value (''IIV'') reporting; (3) the Sponsor believes that Shares would be created using previously unreported non-exchange-registered stocks, and thus copper market participants would have more information about supply; and (4) the Trust would furnish complete visibility into creation and redemption activity by certain authorized participants.[235]

The Sponsor also argues that the underlying copper market is subject to extensive and explicit regulatory authority, and the increased transparency furnished by the Trust would enhance regulators' ability to oversee the copper market and enforce applicable laws and rules. Specifically, the Sponsor states: (1) The CFTC has explicit anti-fraud and anti-manipulation authority under the CEA that extends over the U.S. physical commodity markets; (2) the Department of Justice has the ability to pursue antitrust violations, such as concerted buying and selling involving commodities, under the federal antitrust laws; and (3) the LME has broad rights to obtain information relating to the activities of LME members and their affiliates if the LME has cause to suspect undesirable or improper trading that affects the copper markets, including the markets for both LME-warranted and non-warranted copper, and therefore the LME can obtain information about both LME and non-LME metal trading activities from J.P. Morgan Securities plc, an affiliate of the Sponsor that is a ring-dealing member of the LME, as well as from the Sponsor.[236] The Sponsor also asserts that there has been no increased manipulative behavior due to the reduction of copper available for immediate delivery that resulted from the prior years' deficits in copper production versus copper consumption, and that the creation of commodity backed trusts holding gold, silver, platinum, and/or palladium has not led to manipulation of the markets for those precious metals.[237]

The Commission does not believe that the listing and trading of the Shares is likely to increase the likelihood of manipulation of the copper market and, correspondingly, of the price of the Shares. Generally, the Commission believes that increased transparency helps mitigate risks of manipulation. For example, in approving the listing and trading of shares of the iShares Silver Trust, the Commission stated that the dissemination of information about the silver shares would ''facilitate transparency with respect to the Silver Shares and diminish the risk of manipulation or unfair informational advantage.'' [238] In this case, the Commission believes the transparency that the Trust will provide with respect to its holdings, the locational premium for and price per metric ton of the copper in each warehouse location of the Trust, and creation and redemption activity, including the locations of creations and redemptions, as well as the dissemination of quotations for and last-sale prices of transactions in the Shares and the IIV and NAV of the Trust,[239] all are expected to help reduce the ability of market participants to manipulate the physical copper market or the price of Shares.[240] Also, the Commission believes that the listing and trading of the Shares on the Exchange (and any other national securities exchange that trades the Shares pursuant to unlisted trading privileges) [241] may serve to make the overall copper market more transparent if OTC trading of unreported warehouse receipts shifts to trading Shares on exchanges.[242] In particular, additional information regarding the supply of copper will be disseminated, which will enable users of copper to make better-informed decisions. Over the long term, this additional transparency could enhance efficiency in the market for copper and capital formation for participants in this market. In addition, the Commission believes that the listing and delisting criteria for the Shares are expected to help to maintain a minimum level of liquidity and therefore minimize the potential for manipulation of the Shares.[243]

The Opposing Commenters assert serious disruptions in the supply of copper would make corners and squeezes more likely.[244] As discussed above, the Commission does not believe that the listing and trading of the Shares is likely to disrupt the supply of copper available for immediate delivery.[245] Depending on the size of the Trust though, it is possible that copper holdings may be dispersed across an additional market—*i.e.,* less copper may be held under LME and/or COMEX

[232] *See id.* at 4–5.

[233] *See id.*

[234] *See id.*

[235] *See id.*

[236] *See id.* at 5.

[237] *See id.* at 45, 46.

[238] *See* Securities Exchange Act Release No. 53521 (March 20, 2006), 71 FR 14967, 14975 (March 24, 2006).

[239] *See* DP August 24 Letter, *supra* note 11, at 43–45, and *supra* text accompanying notes 43 and 45.

[240] Further, the Trust is a passive vehicle, and therefore V&F's concerns about manipulation by the Trust itself are misplaced.

[241] When a national securities exchange extends ''unlisted trading privileges'' to a security, it allows the trading of a security that is not listed and registered on that exchange. *See* Securities Exchange Act Release No. 35323 (February 2, 1995), 60 FR 7718, 7718 (February 9, 1995) (proposing rules to reduce the period that exchanges have to wait before extending unlisted trading privileges to any listed initial public offering security). A number of national securities exchanges have rules that allow the extension of unlisted trading privileges to issues such as the Shares. *See, e.g.,* Securities Exchange Act Release No. 57806 (May 9, 2008), 73 FR 28541 (May 16, 2008) (SR–Phlx–2008–34); Securities Exchange Act Release No. 58623 (September 23, 2008), 73 FR 57169 (October 1, 2008) (SR–BATS–2008–004).

[242] Market participants that acquire a large percentage of the Shares must identify themselves to the Commission by filing Schedules 13D or 13G. *See* 17 CFR 240.13d–1. Specifically, Section 13(d) of the Act, 15 U.S.C. 78m(d), and the rules thereunder require that a person file with the Commission, within ten days after acquiring, directly or indirectly, beneficial ownership of more than five percent of a class of equity securities, a disclosure statement on Schedule 13D, subject to certain exceptions. *See* 17 CFR 240.13d–1. Section 13(g) and the rules thereunder enable certain persons who are the beneficial owners of more than five percent of a class of certain equity securities to instead file a short form Schedule 13G, assuming certain conditions have been met. Beneficial owners are also required to report changes in the information filed.

In addition, Section 13(f)(1) of the Act and Rule 13f–1 thereunder require every ''institutional investment manager,'' as defined in Section 13(f)(5)(A) of the Act, that exercises investment discretion with respect to ''section 13(f) securities,'' as defined in Rule 13f–1, having an aggregate fair market value of at least $100 million (''Reportable Securities''), to file with the Commission quarterly reports on Form 13F setting forth each Reportable Security's name, CUSIP number, the number of shares held, and the market value of the position.

[243] For example, under NYSE Arca Equities Rule 8.201(e)(2)(ii), the Exchange will consider suspending trading in the Shares or delisting the Shares if, following the initial 12-month period following commencement of trading, there are fewer than 50,000 Shares issued and outstanding.

[244] *See supra* notes 227–229 and accompanying text.

[245] *See supra* Section III.A.

warrant and more copper may be held by the Trust. However, the availability of inter-market arbitrage is expected to help mitigate any potential increase in the ability of market participants to engage in corners or squeezes as a result of any dispersion of copper holdings across markets (as distinguished from a reduction in the copper supply). For example, if the Trust grows large relative to the market for warrants on the LME, LME market participants faced with a potential corner or squeeze may acquire Shares, redeem them (through an authorized participant) for LME warrantable copper, put the copper on LME warrant, and deliver the warrants.[246] Further, although the Exchange currently provides for the listing and trading of shares of Commodity-Based Trusts backed by physical gold, silver, platinum, and palladium, none of the commenters has identified any evidence that the trading of shares of these Commodity-Based Trusts has led to manipulation of the gold, silver, platinum, or palladium markets.

For the reasons discussed above, the Commission does not believe that the proposed listing and trading of the Shares is likely to render the copper market or the price of Shares more susceptible to manipulation. Correspondingly, the Commission does not believe that approval of the proposed rule change will impose any burden on competition between participants in the market for copper as it will not provide market participants a greater opportunity to achieve an unfair competitive advantage.

E. Surveillance

One of the Opposing Commenters questions whether NYSE Arca's surveillance procedures are adequate to prevent fraudulent and manipulative trading in the Shares. According to that commenter, NYSE Arca's surveillance procedures are not adequate because they are the kind of garden-variety measures that are always in place to prevent collusion and other forms of manipulation by traders.[247] Two other Opposing Commenters assert that the Sponsor would be in a privileged informational position and could improperly trade on that non-public information.[248] One of those commenters asserts that the Sponsor participates in other, non-security copper derivatives markets (namely futures and swaps), and states that the Sponsor has an extensive commodities trading operation and ''owns copper warehousing capacity in the United States giving it access to physical supply.'' [249] The commenter also expresses concern that, if the Sponsor ''knows information regarding ETF inflows and outflows and understands the volatility consequences of changes in the holdings of the ETF,'' it can take advantage of that asymmetrical information and could ''be a potential source of disruption to the markets.'' [250]

NYSE Arca asserts that the statements about its surveillance are unsubstantiated,[251] and states that its surveillance procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.[252] In particular, the Exchange represents the following:

- Pursuant to NYSE Arca Equities Rule 8.201(g), an ETP Holder acting as a registered Market Maker in Commodity-Based Trust Shares must file with the Exchange and keep current a list identifying all accounts for trading in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the Market Maker may have or over which it may exercise investment discretion. No Market Maker shall trade in an underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, in an account in which a Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by NYSE Arca Equities Rule 8.201.
- In addition, pursuant to NYSE Arca Equities Rule 8.201(g), the Exchange is able to obtain information regarding trading in the Shares, physical copper, copper futures contracts, options on copper futures, or any other copper derivative from ETP Holders acting as registered market makers, in connection with their proprietary or customer trades.[253]
- NYSE Arca has regulatory jurisdiction over its ETP Holders and their associated persons, which include any person or entity controlling an ETP Holder, as well as a subsidiary or affiliate of an ETP Holder that is in the securities business.[254]
- With respect to a subsidiary or affiliate of an ETP Holder that does business only in commodities or futures contracts, the Exchange can obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a member.[255]
- Commentary .04 of NYSE Arca Equities Rule 6.3 requires an ETP Holder acting as a registered Market Maker in the Shares, and its affiliates, to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of any material nonpublic information with respect to such products, any components of the related products, any physical asset or commodity underlying the product, applicable currencies, underlying indexes, related futures or options on futures, and any related derivative instruments (including the Shares).[256]
- NYSE Arca may obtain trading information via ISG from other exchanges that are members of the ISG, including the COMEX.[257] The Exchange also states that it has entered into a comprehensive surveillance sharing agreement with LME that applies to trading in copper and copper derivatives.[258]

Further, in the context of preventing fraudulent and manipulative acts, the Exchange discusses its authority to halt trading in the Shares in the interest of promoting a fair and orderly market and protecting the interests of investors.[259]

According to the Exchange, the Valuation Agent will exclude any information provided by any JPMorgan-

[246] *See supra* note 85.

[247] *See* V&F May 9 Letter, *supra* note 4, at 10.

[248] *See* Shatto Letter, *supra* note 9; and AFR October 23 Letter, *supra* note 14, at 2.

[249] *See* AFR October 23 Letter *supra* note 14, at 4.

[250] *Id.* Similarly, another opposing commenter asserts that ''jp morgan gets inside information by using their warehouses to buy and sell copper which maximizes profits to the detriment of commercial interests who have to buy copper.'' Shatto Letter, *supra* note 9.

[251] *See* Arca August 23 Letter, *supra* note 11, at 1.

[252] *See* Notice, *supra* note 3, 77 FR at 23787. The Exchange also states that its existing surveillances will be augmented with a product-specific review designed to identify potential manipulative trading activity through the use of the creation and redemption process. *See* Amendment No. 1, *supra* note 15.

[253] *See* Notice, *supra* note 3, 77 FR at 23787. *See also* Arca August 23 Letter, *supra* note 11, at 2–3.

[254] *See* Amendment No. 1, *supra* note 15.

[255] *See id. See also infra* text accompanying notes 257–258.

[256] *See* Notice, *supra* note 3, 77 FR at 23786. *See also* Arca August 23 Letter, *supra* note 11, at 3.

[257] *See* Notice, *supra* note 3, 77 FR at 23787. *See also* Arca August 23 Letter, *supra* note 11, at 3.

[258] *See* Amendment No. 1, *supra note 15.*

[259] *See* Arca August 23 Letter, *supra* note 11, at 3 (''As stated in the Notice, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares, and trading on the Exchange in the Shares may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.'').

affiliated entity when calculating the locational premium of copper in any permitted warehouse location.[260] In addition, NYSE Arca has obtained a representation from the Sponsor that it will (i) implement a firewall with respect to its affiliates regarding access to material non-public information of the Trust concerning the Trust and the Shares, and (ii) will be subject to procedures designed to prevent the use and dissemination of material non-public information of the Trust regarding the Trust and the Shares.[261] The Commission believes the firewall that the Exchange will require the Sponsor to erect is a reasonable measure to help prevent the flow of non-public information to the Sponsor's affiliates.[262]

More generally, based on the Exchange's representations, the Commission believes that the Exchange's surveillance procedures appear to be reasonably designed to permit the Exchange to monitor for, detect, and deter violations of Exchange rules and applicable federal securities laws and rules.[263] In addition to all of the same surveillance procedures employed with respect to the trading of all other Commodity-Based Trust Shares, NYSE Arca states that a new product specific review will be employed to monitor trading in the Shares to identify potential manipulative trading activity through the use of the creation and redemption process.[264] The commenters have not identified any specific deficiency in the proposed procedures or provided any evidence that the Exchange's surveillance program has been ineffective with respect to trading in other Commodity-Based Trust Shares.

F. Dissemination of Information About the Shares and Copper

The Commission believes the proposal is reasonably designed to promote sufficient disclosure of information that may be necessary to price the Shares appropriately. Specifically, the Commission believes that dissemination of the NAV, IIV, and copper holdings information, as discussed above, will facilitate transparency with respect to the Shares and diminish the risk of manipulation or unfair informational advantage.[265] Further, as noted above, quotation and last-sale information for the Shares will be available via the Consolidated Tape Association, and the Exchange will make available via the Consolidated Tape trading volume, closing prices, and NAV for the Shares from the previous day.[266] Additionally, as discussed above, the Exchange has identified numerous sources of copper price information unconnected with the Exchange that are readily available to investors.[267] The Commission therefore believes that sufficient venues for obtaining reliable copper pricing information exist to allow investors in the Shares to adequately monitor the price of copper and compare it to the NAV of the Shares.

G. Listing and Trading of the Shares

The Commission believes that the Exchange's proposed rules and procedures for the listing and trading of the Shares are consistent with the Act. For example, the Commission believes that the proposal is reasonably designed to prevent trading when a reasonable degree of transparency cannot be assured. As detailed above, NYSE Arca Equities Rules 7.34(a)(5) and 8.201(e)(2) respectively provide that: (1) If the Exchange becomes aware that the NAV is not being disseminated to all market participants at the same time, it must halt trading on the NYSE Marketplace until such time as the NAV is available to all market participants; and (2) the Exchange will consider suspension of trading if, after the initial 12-month period following commencement of trading: (a) The value of copper is no longer calculated or available on at least a 15-second delayed basis from a source unaffiliated with the Sponsor, Trust, or Custodian, or the Exchange stops providing a hyperlink on its Web site to any such unaffiliated source providing that value; or (b) if the Liquidation IIV is no longer made available on at least a 15-second delayed basis.[268] In addition, the Exchange's general authority to halt trading because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable, also will advance this objective. Further, trading in the Shares will be subject to NYSE Arca Equities Rule 7.12, the Exchange's circuit breaker rule, which governs trading halts caused by extraordinary market volatility.

Further, the Shares will be subject to Exchange rules governing the responsibilities of market makers and customer suitability requirements. In addition, the Shares will be subject to Exchange Rule 8.201 for initial and continued listing of Shares.[269] As discussed above,[270] the Commission believes that the listing and delisting criteria for the Shares are expected to maintain a minimum level of liquidity and therefore minimize the potential for manipulation of the Shares. The Commission also believes that the Information Bulletin will adequately inform members and member organizations about the terms, characteristics, and risks of trading the Shares.

H. Commission Findings

After careful review, and for the reasons discussed in Sections III.A–G above, the Commission finds that the proposed rule change is consistent with the requirements of the Act, including Section 6 of the Act,[271] and the rules and regulations thereunder applicable to a national securities exchange.[272] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[273] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and 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; with Section 6(b)(8) of the Act,[274] which requires that the rules of a national securities exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act; and with Section 11A(a)(1)(C)(iii) of the Act,[275] which sets forth Congress's finding that it is in the public interest and appropriate for

[260] Notice, *supra* note 3, 77 FR at 23783.

[261] *See* Amendment No. 1, *supra* note 15.

[262] Further, NYSE Arca represents that it can obtain information about the activities of the Sponsor and its affiliates under the Exchange's listing rules.

[263] The Commission has discussed above in Section III.D other reasons why it believes that the listing and trading of the Shares as proposed is unlikely increase the likelihood of manipulation of the copper market and, correspondingly, of the price of the Shares.

[264] *See* Amendment No. 1, *supra* note 15.

[265] *See supra* notes 238–242, and accompanying text.

[266] *See supra* text accompanying note 41.

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

[268] Additionally, if the First-Out IIV or the Liquidation IIV is not being disseminated as required, the Exchange may halt trading during the day in which the disruption occurs; if the interruption persists past the day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. *See* Amendment No. 1, *supra* note 15.

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

[270] *See supra* text accompanying note 243.

[271] 15 U.S.C. 78f.

[272] This approval order is based on all of the Exchange's representations.

[273] 15 U.S.C. 78f(b)(5).

[274] 15 U.S.C. 78f(b)(8).

[275] 15 U.S.C. 78k–1(a)(1)(C)(iii).

the protection of investors to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities.[276]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No.1 to 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*. Please include File Number SR–NYSEArca–2012–28 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSEArca–2012–28. 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 submissions, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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 the filings also will be available for inspection and copying at the principal offices of the Exchanges. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2012–28 and should be submitted on or before January 10, 2013.

V. Accelerated Approval of Proposed Rule Change As Modified by Amendment No. 1

As discussed above, the Exchange submitted Amendment No. 1 to make additional representations regarding trading in the Shares, availability of information, and the Exchange's surveillance program.[277] The Commission believes these additional representations are useful to, among other things, help: (1) Assure adequate liquidity in the Shares; (2) assure adequate availability of information to investors to support the arbitrage mechanism; (3) assure adequate information available to the Exchange to support its monitoring of Exchange trading of the Shares in all trading sessions; and (4) the Exchange deter and detect violations of NYSE Arca rules and applicable federal securities laws. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[278] for approving the proposed rule change, as modified by Amendment No. 1, prior to the 30th day after the date of publication of notice in the **Federal Register**.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[279] that the proposed rule change (SR–NYSEArca–2012–28), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

By the Commission.

Kevin M. O'Neill,

Deputy Secretary.

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[276] As noted above (see *supra* Section II.B), quotation and last-sale information for the Shares will be available via the Consolidated Tape Association, and the Exchange will make available via the Consolidated Tape trading volume, closing prices, and NAV for the Shares from the previous day. *See supra* text accompanying note 41.

[277] *See supra* note 15.

[278] 15 U.S.C. 78s(b)(2).

[279] 15 U.S.C. 78s(b)(2).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68438; File No. AN–OCC–2012–04]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of No Objection to Advance Notice Filing To Revise the Method for Determining the Minimum Clearing Fund Size To Include Consideration of the Amount Necessary To Draw on Secured Credit Facilities

December 14, 2012.

I. Introduction

On October 18, 2012, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') an advance notice concerning a proposed rule change AN–OCC–2012–04 pursuant to Section 806(e) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''),[1] entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Title VIII'' or ''Clearing Supervision Act'') and Rule 19b–4 under the Securities Exchange Act of 1934 (''Exchange Act'').[2] The advance notice was published in the **Federal Register** on November 20, 2012.[3] The Commission did not receive comments on the advance notice publication. This publication serves as a notice of no objection to the proposed rule change discussed in the advance notice.

II. Description of Proposed Rule Change

A. Background

On September 23, 2011, the Commission approved a proposed rule change by OCC to establish the size of OCC's clearing fund as the amount that is required, within a confidence level selected by OCC, to sustain the maximum anticipated loss under a defined set of scenarios as determined by OCC, subject to a minimum clearing fund size of $1 billion.[4] OCC implemented this change in May 2012. Until that time, the size of OCC's

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 68225 (November 14, 2012), 77 FR 69668 (November 20, 2012). OCC also filed a proposed rule change under Section 19(b)(1) of the Exchange Act relating to these changes. *See* Securities Exchange Act Release No. 68130 (November 1, 2012), 77 FR 66900 (November 7, 2012) (Proposing Release). The Commission did not receive comments on the proposed rule change.

[4] Securities Exchange Act Release No. 65386 (September 23, 2011), 76 FR 60572 (September 29, 2011) (SR–OCC–2011–10).