

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>39</sup>

**Kevin M. O'Neill,**  
*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-73081; File No. SR-NYSEArca-2014-20]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change, as Modified by Amendment Nos. 3 and 5, Relating to the Listing and Trading of Shares of Reality Shares DIVS ETF under NYSE Arca Equities Rule 8.600

September 11, 2014.

#### I. Introduction

On February 25, 2014, NYSE Arca, Inc. ("Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares ("Shares") of Reality Shares DIVS ETF ("Fund") under NYSE Arca Equities Rule 8.600. On March 7, 2014, the Exchange filed Amendment No. 2 to the proposed rule change, which amended and replaced the proposed rule change in its entirety.<sup>3</sup> The proposed rule change, as modified by Amendment No. 2, was published for comment in the **Federal Register** on March 17, 2014.<sup>4</sup> The Commission received no comments on the proposal. On April 23, 2014, pursuant to Section 19(b)(2) of the Act,<sup>5</sup> the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>6</sup>

On May 27, 2014, the Exchange submitted Amendment No. 3 to the proposed rule change.<sup>7</sup> On June 5, 2014, the Exchange filed Amendment No. 5 to the proposed rule change.<sup>8</sup> On June 9, 2014, the Commission published notice of Amendment Nos. 3 and 5 and instituted proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment Nos. 3 and 5.<sup>9</sup> The Commission received no comments on the proposal, as modified by Amendment Nos. 3 and 5. This order grants approval of the proposed rule change, as modified by Amendment Nos. 3 and 5.

#### II. Description of the Proposed Rule Change

The Exchange has made the following representations and statements in describing the Fund and its investment strategies, including other portfolio holdings and investment restrictions.<sup>10</sup>

##### General

The Fund will be an actively-managed exchange-traded fund ("ETF"). The Shares of the Fund will be offered by the Reality Shares ETF Trust (formerly, the ERNY Financial ETF Trust) ("Trust"). The Trust will be registered with the Commission as an open-end management investment company.<sup>11</sup>

<sup>7</sup> Amendment No. 3 replaced SR-NYSEArca-2014-20, as previously amended by Amendment No. 2, and superseded such filing in its entirety.

<sup>8</sup> Amendment No. 5 was technical in nature and changed the name of the Fund, and all related references in the filing, from "Reality Shares Isolated Dividend Growth ETF" to "Reality Shares DIVS ETF." Amendment No. 4 was filed by the Exchange on June 4, 2014 and withdrawn on June 5, 2014.

<sup>9</sup> See Securities Exchange Act Release No. 72347, 79 FR 33964 (June 13, 2014) ("Notice and Order").

<sup>10</sup> The Commission notes that additional information regarding the Trust, the Fund, and the Shares, including investment strategies, risks, net asset value ("NAV") calculation, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions, and taxes, among other information, is included in the Notice and the Registration Statement, as applicable. See Notice and Order and Registration Statement, *supra* note 9 and *infra* note 11, respectively.

<sup>11</sup> The Trust will be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1) ("1940 Act"). According to the Exchange, on November 12, 2013, the Trust filed a registration statement on Form N-1A under the Securities Act of 1933 ("1933 Act") (15 U.S.C. 77a), and under the 1940 Act relating to the Fund, as amended by Pre-Effective Amendment Number 1, filed with the Commission on February 6, 2014 (File Nos. 333-192288 and 811-22911) and Pre-Effective Amendment Number 2, filed with the Commission on May 1, 2014 (File Nos. 333-192288 and 811-22911) ("Registration Statement"). According to the Exchange, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. Investment Company Act Release No. 30552 (June 10, 2013) ("Exemptive Order"). According to the Exchange, the Trust filed an

Reality Shares Advisors, LLC (formerly, ERNY Financial Advisors, LLC) will serve as the investment adviser to the Fund ("Adviser").<sup>12</sup> ALPS Distributors, Inc. will be the principal underwriter and distributor of the Fund's Shares. The Bank of New York Mellon will serve as administrator, custodian, and transfer agent for the Fund.

##### Investment Strategies

The Fund is actively managed by the Adviser and seeks long-term capital appreciation by using proprietary trading strategies designed to isolate and capture the growth in the level of dividends expected to be paid on a portfolio of large-capitalization equity securities listed for trading in the U.S., Europe, and Japan,<sup>13</sup> while attempting to minimize the Fund's exposure to the price fluctuations associated with such securities.<sup>14</sup> The Adviser believes that, over time, the level of expected dividends reflected in the Fund's portfolio will be highly correlated to the level of actual dividends paid on such large capitalization securities.

Under normal market conditions,<sup>15</sup> and as further described below, the

Application for an Order under Section 6(c) of the 1940 Act for exemptions from various provisions of the 1940 Act and rules thereunder (File No. 812-14146), on April 5, 2013, as amended on May 10, 2013 ("Exemptive Application"). The Exchange represents that investments made by the Fund will comply with the conditions set forth in the Exemptive Application and the Exemptive Order.

<sup>12</sup> The Exchange states that the Adviser is not registered as a broker-dealer and is not affiliated with any broker-dealers. In addition, the Exchange states that in the event (a) the Adviser or any sub-adviser becomes registered as a broker-dealer or newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, such adviser or sub-adviser will implement a fire wall with respect to its relevant personnel or broker-dealer affiliate regarding access to information concerning the composition and changes to the portfolio, and such adviser or sub-adviser will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the portfolio.

<sup>13</sup> The Exchange states that the Adviser considers U.S. large capitalization companies to be those with market capitalizations within the range of market capitalizations of the companies included in the S&P 500 Index. The Adviser considers European large capitalization companies to be those with market capitalizations within the range of market capitalizations of the companies included in the Euro Stoxx 50 Index. The Adviser considers Japanese large capitalization companies to be those with market capitalizations within the range of market capitalizations of the companies included in the Nikkei 225 Index.

<sup>14</sup> The Exchange states that there is no guarantee that either the level of overall dividends paid by such companies will grow over time, or that the Fund's investment strategies will capture such growth. The Exchange represents that the Fund will include appropriate risk disclosure in its offering documents disclosing both of these risks.

<sup>15</sup> The term "under normal market conditions" includes, but is not limited to, the absence of

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<sup>39</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> Amendment No. 1 was filed on March 6, 2014 and withdrawn on March 7, 2014.

<sup>4</sup> See Securities Exchange Act Release No. 71686 (March 11, 2014), 79 FR 14761.

<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>6</sup> Securities Exchange Act Release No. 72000 (April 23, 2014), 79 FR 24032 (April 29, 2014). The Commission determined that it was appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission designated June 13, 2014 as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

Fund will invest substantially all of its assets in (i) a combination of exchange-listed options contracts on large capitalization equity indexes and exchange-listed options contracts on exchange traded funds (“ETFs”)<sup>16</sup> designed to track the performance of large capitalization equity securities listed for trading in the U.S., Europe, or Japan, as well as (ii) derivatives, including swaps, exchange-listed futures contracts, and forward contracts, designed to capture the growth of the level of dividends expected to be paid on large capitalization equity securities listed for trading in the U.S., Europe, and Japan. In addition to the investments described above, the Fund may also buy and sell over-the-counter (“OTC”) options on indexes of large-capitalization U.S., European, and Japanese equity securities listed for trading in the U.S., Europe, and Japan, such as the S&P 500 Index, the Euro Stoxx 50 Index, and the Nikkei 225 Index, and listed and OTC options on the securities, or any group of securities, issued by large capitalization U.S., European, and Japanese companies.<sup>17</sup>

The Fund will buy (*i.e.*, hold a “long” position in) and sell (*i.e.*, hold a “short” position in) put and call options.<sup>18</sup> The Fund will invest in a combination of put and call options designed to allow the Fund to isolate its exposure to the growth of the level of dividends expected to be paid on a portfolio of securities issued by large capitalization companies listed for trading in the United States, Europe, and Japan, while minimizing the Fund’s exposure to changes in the trading price of such

extreme volatility or trading halts in the equity markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance.

<sup>16</sup> For purposes of this proposed rule change, ETFs include Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)), Portfolio Depositary Receipts as described in NYSE Arca Equities Rule 8.100, and Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600). The ETFs all will be listed and traded in the U.S. on registered exchanges. While the Fund may invest in inverse ETFs, it may not invest in leveraged or inverse leveraged (*e.g.*, 2X, -2X, 3X or -3X) ETFs.

<sup>17</sup> The Fund will transact only with OTC options dealers that have in place an International Swaps and Derivatives Association (“ISDA”) agreement with the Fund.

<sup>18</sup> A put option gives the purchaser of the option the right to sell, and the issuer of the option the obligation to buy, the underlying security or instrument on a specified date or during a specified period of time. A call option on a security gives the purchaser of the option the right to buy, and the writer of the option the obligation to sell, the underlying security or instrument on a specified date or during a specified period of time.

securities. The Fund may invest up to 80% of its assets through options transactions.

The prices of index and ETF options reflect the market trading prices of the securities included in the applicable index or securities held by the applicable ETF, as well as market expectations regarding the level of dividends to be paid on such indexes or ETFs during the term of the option. A significant portion of the Fund’s portfolio holdings will consist of multiple corresponding near-term and long-term put and call option combinations on the same reference assets (*e.g.*, options on the S&P 500 Index or options on S&P 500 ETFs) with the same strike price. Because option prices reflect both stock price and dividend expectations, they can be used in combination to isolate either price exposure or dividend expectations. The use of near-term and long-term put and call option combinations on the same reference asset with the same strike price, but with different maturities, is designed to gain exposure to the level of dividends expected to be paid on a portfolio of large-capitalization equity securities listed for trading in the U.S., Europe, and Japan, while attempting to minimize the Fund’s exposure to the price fluctuations associated with these securities.

Once established, this portfolio construction of option combinations will accomplish two goals. First, the use of corresponding buy or sell positions on near and long-term options at the same strike price is designed to neutralize underlying stock price movements. In other words, the corresponding “buy” and “sell” positions on the same reference asset are designed to net against each other and eliminate the impact that changes to the stock price of the reference asset would otherwise have on the value of the Fund Shares. Second, by minimizing the impact of price fluctuations through the construct of the near- and long-term contract combinations, the strategy is designed to isolate market expectations for dividends implied between expiration dates of the near-term and long-term option contracts.

The Fund may invest in exchange-listed futures contracts and forward contracts based on indexes of large-capitalization U.S., European, and Japanese equity securities listed for trading in the U.S., Europe, or Japan, such as the S&P 500 Index, the Euro Stoxx 50 Index, and the Nikkei 225 Index, and the securities, or any group of securities, issued by large capitalization U.S., European, and

Japanese companies.<sup>19</sup> The Fund’s use of listed futures contracts and forward contracts will be designed to allow the Fund to isolate its exposure to the growth of the level of the dividends expected to be paid on a portfolio of securities of large capitalization U.S., European, and Japanese companies, while minimizing the Fund’s exposure to changes in the trading price of such securities. As with option contracts, the prices of equity index futures contracts and forward contracts reflect the market trading prices of the securities included in the applicable index, as well as market expectations regarding the level of dividends to be paid on such indexes during the term of such futures or forward contract. Therefore, as with option contracts, long and short positions in near-dated and far-dated futures and forward contracts can be used in combination to isolate either price exposure or dividend expectations. For example, as with option contracts, the use of long and short positions in near-dated and far-dated futures and forward contracts can be used to gain exposure to the level of dividends expected to be paid on a portfolio of securities, while attempting to minimize the Fund’s exposure to the price fluctuations associated with such securities. In addition, the Fund may invest in listed dividend futures contracts. Listed dividend futures contracts are available for certain indices (such as EURO STOXX 50 Index Dividend Futures and Nikkei 225 Dividend Index Futures). These futures contracts provide direct exposure to the level of implied dividends in the designated index, without exposure to the price of the securities included in the index. The Fund also may invest in Eurodollar futures contracts to manage or hedge exposure to interest rate fluctuations. The Fund may invest up to 80% of its assets through futures contracts and forward transactions.

The Fund may enter into dividend and total return swap transactions (including equity swap transactions) based on indexes of large-capitalization U.S., European, and Japanese equity securities listed for trading in the U.S., Europe, and Japan, such as the S & P 500 Index, the Euro Stoxx 50 Index, and the Nikkei 225 Index, and securities, or any group of securities, issued by large

<sup>19</sup> A listed futures contract is a standardized contract traded on a recognized exchange in which two parties agree to exchange either a specified financial asset or the cash equivalent of said asset at a specified future date and price. A forward contract involves the obligation to purchase or sell either a specified financial asset or the cash equivalent of said asset at a future date at a price set at the time of the contract.

capitalization U.S., European, and Japanese companies.<sup>20</sup> In a typical swap transaction, one party agrees to make periodic payments to another party (“counterparty”) based on the change in market value or level of a specified rate, index, or asset. In return, the counterparty agrees to make periodic payments to the first party based on the return of a different specified rate, index, or asset. Swap transactions are usually done on a net basis, the Fund receiving or paying only the net amount of the two payments. In a typical dividend swap transaction, the Fund would pay the swap counterparty a premium and would be entitled to receive the value of the actual dividends paid on the subject index during the term of the swap contract. In a typical total return swap, the Fund might exchange long or short exposures to the return of the underlying securities or an underlying index to isolate the value of the dividends paid on the underlying securities or index constituents. The Fund also may engage in interest rate swap transactions. In a typical interest rate swap transaction one stream of future interest payments is exchanged for another. Such transactions often take the form of an exchange of a fixed payment for a variable payment based on a future interest rate. The Fund intends to use interest rate swap transactions to manage or hedge exposure to interest rate fluctuations. The Fund may invest up to 80% of its assets through swap transactions.<sup>21</sup>

The Fund will attempt to limit counterparty risk by entering into non-cleared swap, forward, and option contracts only with counterparties the Adviser believes are creditworthy and by limiting the Fund’s exposure to each counterparty. The Adviser will monitor the creditworthiness of each counterparty and the Fund’s exposure to each counterparty on an ongoing basis.<sup>22</sup>

<sup>20</sup> The Fund will transact only with swap dealers that have in place an ISDA agreement with the Fund.

<sup>21</sup> Where practicable, the Fund intends to invest in swaps cleared through a central clearing house (“Cleared Swaps”). Currently, only certain of the interest rate swaps in which the Fund intends to invest are Cleared Swaps, while the dividend and total return swaps (including equity swaps) in which the Fund may invest are currently not Cleared Swaps.

<sup>22</sup> The Fund will seek, where possible, to use counterparties, as applicable, whose financial status is such that the risk of default is reduced; however, the risk of losses resulting from default is still possible. The Adviser will evaluate the creditworthiness of counterparties on an ongoing basis. In addition to information provided by credit agencies, the Adviser will evaluate each approved counterparty using various methods of analysis, such as, for example, the counterparty’s liquidity in the event of default, the counterparty’s reputation,

The Fund’s investments in swaps, futures contracts, forward contracts, and options will be consistent with the Fund’s investment objective and with the requirements of the 1940 Act.<sup>23</sup>

#### *Other Investments and Investment Restrictions*

In addition to the investments described above, the Fund may invest up to 20% of its net assets in high-quality, short-term debt securities and money market instruments.<sup>24</sup> Debt securities and money market instruments include shares of fixed income or money market mutual funds, commercial paper, certificates of deposit, bankers’ acceptances, U.S. Government securities (including securities issued or guaranteed by the U.S. government or its authorities, agencies, or instrumentalities), repurchase agreements<sup>25</sup> and bonds that are rated BBB or higher.

The Fund will not purchase the securities of issuers conducting their principal business activity in the same industry if, immediately after the purchase and as a result thereof, the value of the Fund’s investments in that industry would equal or exceed 25% of the current value of the Fund’s total assets, provided that this restriction does not limit the Fund’s: (i) Investments in securities of other investment companies, (ii) investments in securities issued or guaranteed by the U.S. government, its agencies or

the Adviser’s past experience with the counterparty, and the counterparty’s share of market participation.

<sup>23</sup> To limit the potential risk associated with such transactions, the Fund will segregate or “ earmark ” assets determined to be liquid by the Adviser in accordance with procedures established by the Trust’s Board of Trustees and in accordance with the 1940 Act (or, as permitted by applicable regulation, enter into certain offsetting positions) to cover its obligations arising from such transactions. These procedures have been adopted consistent with Section 18 of the 1940 Act and related Commission guidance. In addition, the Fund will include appropriate risk disclosure in its offering documents, including leveraging risk. Leveraging risk is the risk that certain transactions of the Fund, including the Fund’s use of derivatives, may give rise to leverage, causing the Fund to be more volatile than if it had not been leveraged. To mitigate leveraging risk, the Adviser will segregate or “ earmark ” liquid assets or otherwise cover the transactions that may give rise to such risk.

<sup>24</sup> The Fund may invest in shares of money market mutual funds to the extent permitted by the 1940 Act.

<sup>25</sup> The Fund may enter into repurchase agreements with banks and broker-dealers. A repurchase agreement is an agreement under which securities are acquired by a fund from a securities dealer or bank subject to resale at an agreed upon price on a later date. The acquiring fund bears a risk of loss in the event that the other party to a repurchase agreement defaults on its obligations and the fund is delayed or prevented from exercising its rights to dispose of the collateral securities.

instrumentalities, or (iii) investments in repurchase agreements collateralized by U.S. Government securities.

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser, consistent with Commission guidance.<sup>26</sup> The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund’s net assets are held in illiquid assets. Illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

The Fund may buy and sell individual large-capitalization equity securities listed for trading in the U.S., Europe, and Japan.

The Fund may invest in the securities of other investment companies (including money market funds) to the extent permitted under the 1940 Act.

The Fund’s investments will be consistent with its investment objective and will not be used to provide multiple returns of a benchmark or to produce leveraged returns. The Fund’s investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.*, 2Xs and 3Xs) of the Fund’s primary broad-based securities benchmark index (as defined in Form N–1A).<sup>27</sup>

The Trust’s Exemptive Order does not place any limit on the amount of derivatives in which the Fund can invest (other than adherence to the requirements of the 1940 Act and the rules thereunder).

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

After careful review, the Commission finds that the proposed rule change, as modified by Amendment Nos. 3 and 5,

<sup>26</sup> In reaching liquidity decisions, the Adviser may consider the following factors: The frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace in which it trades (*e.g.*, the time needed to dispose of the security, the method of soliciting offers, and the mechanics of transfer).

<sup>27</sup> The Fund’s broad-based securities benchmark index will be identified in a future amendment to the Registration Statement following the Fund’s first full calendar year of performance.

is consistent with the requirements of Section 6 of the Act<sup>28</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>29</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>30</sup> which requires, among other things, that the Exchange's rules be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission notes that the Fund and the Shares must comply with the initial and continued listing requirements of NYSE Arca Equities Rule 8.600 to be listed and traded on the Exchange.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,<sup>31</sup> which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Quotation and last sale information for the Shares will be available via the Consolidated Tape Association ("CTA") high-speed line. In addition, the Portfolio Indicative Value ("PIV"), as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated at least every 15 seconds during the Core Trading Session by one or more major market data vendors.<sup>32</sup> On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio (as such term is defined in NYSE Arca Equities Rule 8.600(c)(2)) that will form the basis for the Fund's calculation of NAV at the end of the business day.<sup>33</sup> In addition,

<sup>28</sup> 15 U.S.C. 78f.

<sup>29</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>30</sup> 15 U.S.C. 78f(b)(5).

<sup>31</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

<sup>32</sup> According to the Exchange, several major market data vendors display or make widely available Portfolio Indicative Values published on CTA or other data feeds.

<sup>33</sup> On a daily basis, the Fund will disclose on the Fund's Web site the following information regarding each portfolio holding, as applicable to the type of holding: Ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding, such as the type of swap); the identity of the security, commodity, index or other asset or instrument underlying the holding, if any; for options, the option strike price; quantity held (as measured by,

a portfolio composition file, which includes the security names and share quantities required to be delivered in exchange for a Creation Unit of the Fund, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the New York Stock Exchange, LLC ("NYSE") via the National Securities Clearing Corporation. The NAV of the Fund will be calculated once each business day as of the regularly scheduled close of trading on the NYSE (normally, 4:00 p.m., Eastern Time).<sup>34</sup> Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.

Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. The intra-day, closing, and settlement prices of the portfolio

for example, par value, notional value or number of shares, contracts or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and the percentage weighting of the holding in the Fund's portfolio. The Web site information will be publicly available at no charge.

<sup>34</sup> The Fund will calculate its NAV by: (i) Taking the current market value of its total assets; (ii) subtracting any liabilities; and (iii) dividing that amount by the total number of Shares outstanding. According to the Exchange, the Trust will generally value exchange-listed equity securities (which include common stocks and ETFs) and exchange-listed options on such securities at market closing prices. Market closing price is generally determined on the basis of last reported sales prices, or if no sales are reported, based on the midpoint between the last reported bid and ask. The Trust will generally value listed futures at the settlement price determined by the applicable exchange. Non-exchange-traded derivatives, such as forwards, OTC options, and swap transactions, will normally be valued on the basis of quotations or equivalent indication of value supplied by an independent pricing service or major market makers or dealers. Investment company securities (other than ETFs) will be valued at NAV. Debt securities and money market instruments generally will be valued based on prices provided by independent pricing services, which may use valuation models or matrix pricing to determine current value. The Trust generally will use amortized cost to value debt securities and money market instruments that have a remaining maturity of 60 days or less. In the event that current market valuations are not readily available or the Trust or Adviser believes such valuations do not reflect current market value, the Trust's procedures require that a security's fair value be determined. In determining such value the Trust or the Adviser may consider, among other things, (i) price comparisons among multiple sources, (ii) a review of corporate actions and news events, and (iii) a review of relevant financial indicators (e.g., movement in interest rates, market indices, and prices from the Fund's index providers). In these cases, the Fund's NAV may reflect certain portfolio securities' fair values rather than their market prices. Fair value pricing involves subjective judgments and it is possible that the fair value determination for a security is materially different than the value that could be realized upon the sale of the security.

securities and other Fund investments, including ETFs, futures, and exchange-traded equities and options, will be readily available from the national securities exchanges trading such securities, automated quotation systems, published or other public sources, and, with respect to OTC options, swaps, and forwards, from third party pricing sources, or on-line information services such as Bloomberg or Reuters. Price information regarding investment company securities other than ETFs will be available from on-line information services and from the Web site for the applicable investment company security. The intra-day, closing, and settlement prices of debt securities and money market instruments will be readily available from published and other public sources or on-line information services. The Fund's Web site will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. Trading in Shares of a Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable,<sup>35</sup> and trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth additional circumstances under which trading in the Shares of a Fund may be halted. The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. Consistent with NYSE Arca Equities Rule 8.600(d)(2)(B)(ii), the Reporting Authority must implement and maintain, or be subject to, procedures

<sup>35</sup> These reasons may include: (1) The extent to which trading is not occurring in the securities and/or the financial instruments composing the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.

designed to prevent the use and dissemination of material, non-public information regarding the actual components of the Fund's portfolio. In addition, the Exchange states that the Adviser is not registered as a broker-dealer and is not affiliated with a broker-dealer.<sup>36</sup> The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by the Financial Industry Regulatory Authority ("FINRA") on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.<sup>37</sup> The Exchange further represents that these procedures are adequate to properly monitor Exchange-trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange. Moreover, prior to the commencement of trading, the Exchange states that it will inform its Equity Trading Permit Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares.

The Exchange represents that the Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including the following:

(1) The Shares will conform to the initial and continued listing criteria

<sup>36</sup> See *supra* note 12. The Exchange states that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 ("Advisers Act"). As a result, the Adviser and its related personnel are subject to the provisions of Rule 204A-1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A-1 under the Advisers Act. In addition, Rule 206(4)-7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

<sup>37</sup> The Exchange states that FINRA surveils trading on the Exchange pursuant to a regulatory services agreement and that the Exchange is responsible for FINRA's performance under this regulatory services agreement.

under NYSE Arca Equities Rule 8.600, which governs Managed Fund Shares.

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

(3) FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares, exchange-listed equity securities, ETFs, futures contracts, and exchange-traded options contracts with other markets and other entities that are members of the Intermarket Surveillance Group ("ISG"), and FINRA, on behalf of the Exchange, may obtain trading information regarding trading in the Shares, exchange-listed equity securities, ETFs, futures contracts, and exchange-traded options contracts from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares, exchange-listed equity securities, ETFs, futures contracts, and exchange-traded options contracts from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. FINRA, on behalf of the Exchange, will be able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's Trade Reporting and Compliance Engine ("TRACE").

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

(5) For initial and continued listing, the Fund will be in compliance with Rule 10A-3 under the Act,<sup>38</sup> as

provided by NYSE Arca Equities Rule 5.3.

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

(7) Not more than 10% of the assets of the Fund in the aggregate invested in exchange-traded equity securities shall consist of equity securities whose principal market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement. In addition, not more than 10% of the net assets of the Fund in the aggregate invested in futures contracts or exchange-traded options shall consist of futures contracts or options whose principal market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

(8) Where practicable, the Fund intends to invest in Cleared Swaps.

(9) The Fund will attempt to limit counterparty risk by entering into non-cleared swap, forward, and option contracts only with counterparties the Adviser believes are creditworthy and by limiting the Fund's exposure to each counterparty. The Adviser will monitor the creditworthiness of each counterparty and the Fund's exposure to each counterparty on an ongoing basis. The Fund will seek, where possible, to use counterparties, as applicable, whose financial status is such that the risk of default is reduced; however, the risk of losses resulting from default is still possible. The Adviser will evaluate the creditworthiness of counterparties on an ongoing basis. In addition to information provided by credit agencies, the Adviser will evaluate each approved counterparty using various methods of analysis, such as, for example, the counterparty's liquidity in the event of default, the counterparty's reputation, the Adviser's past experience with the counterparty, and the counterparty's share of market participation.

(10) The Fund's investments in swaps, futures contracts, forward contracts, and options will be consistent with the Fund's investment objective

<sup>38</sup> 17 CFR 240.10A-3.

and with the requirements of the 1940 Act. To limit the potential risk associated with such transactions, the Fund will segregate or “earmark” assets determined to be liquid by the Adviser in accordance with procedures established by the Trust’s Board of Trustees and in accordance with the 1940 Act (or, as permitted by applicable regulation, enter into certain offsetting positions) to cover its obligations arising from such transactions. These procedures have been adopted consistent with Section 18 of the 1940 Act and related Commission guidance. In addition, the Fund will include appropriate risk disclosure in its offering documents, including leveraging risk. Leveraging risk is the risk that certain transactions of the Fund, including the Fund’s use of derivatives, may give rise to leverage, causing the Fund to be more volatile than if it had not been leveraged. To mitigate leveraging risk, the Adviser will segregate or “earmark” liquid assets or otherwise cover the transactions that may give rise to such risk.

(11) The Fund’s investments will be consistent with its investment objective and will not be used to provide multiple returns of a benchmark or to produce leveraged returns. The Fund’s investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.*, 2Xs and 3Xs) of the Fund’s primary broad-based securities benchmark index (as defined in Form N-1A).

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

This approval order is based on all of the Exchange’s representations, including those set forth above and in the Notice and Order, and the Exchange’s description of the Fund.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment Nos. 3 and 5, is consistent with Section 6(b)(5) of the Act<sup>39</sup> and the rules and regulations thereunder applicable to a national securities exchange.

#### IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>40</sup> that the proposed rule change (SR-NYSEArca-2014-20), as modified by Amendment Nos. 3 and 5, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>41</sup>

**Kevin M. O’Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-73080; File No. SR-BATS-2014-039]

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

September 11, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 28, 2014, BATS Exchange, Inc. (the “Exchange” or “BATS”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

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

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

<sup>41</sup> 17 CFR 200.30-3(a)(12).

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

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

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

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

<sup>5</sup> A Member is defined as “any registered broker or dealer that has been admitted to membership in the Exchange.” See Exchange Rule 1.5(n).

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

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

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

###### 1. Purpose

The Exchange proposes to modify its fee schedule applicable to use of the Exchange’s equities trading platform (“BATS Equities”) in order to: (i) Add two additional “Cross-Asset Step-Up Tiers” for purposes of tiered pricing applicable to BATS Equities; and (ii) modify fees applicable to orders routed to and executed at the New York Stock Exchange LLC (“NYSE”).

###### Additional Step-Up Tiers

Currently, with respect to BATS Equities, the Exchange determines the liquidity adding rebate that it will provide to Members using the Exchange’s tiered pricing structure, which is based on the Member meeting certain volume tiers based on their ADAV<sup>6</sup> as a percentage of TCV<sup>7</sup> or ADV<sup>8</sup> as a percentage of TCV. Under

<sup>6</sup> As provided in the fee schedule, for purposes of BATS Equities pricing, “ADAV” means average daily added volume calculated as the number of shares added per day on a monthly basis; the Exchange excludes from the ADAV calculation routed shares as well as shares added on any day that the Exchange’s system experiences a disruption that lasts for more than 60 minutes during regular trading hours (“Exchange System Disruption”), on any day with a scheduled early market close and on the last Friday in June (the “Russell Reconstitution Day”).

<sup>7</sup> As provided in the fee schedule, for purposes of BATS Equities pricing, “TCV” means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply, excluding volume on any day that the Exchange experiences an Exchange System Disruption, on any with a scheduled early market close and the Russell Reconstitution Day.

<sup>8</sup> As provided in the fee schedule, for purposes of BATS Equities pricing, “ADV” means average daily volume calculated as the number of shares added or removed, combined, per day on a monthly basis; the Exchange excludes from the ADV calculation routed shares, and shares added on any day that the Exchange’s system experiences an Exchange System

<sup>39</sup> 15 U.S.C. 78f(b)(5).

<sup>40</sup> 15 U.S.C. 78s(b)(2).