

open market and a national market system, and, in general, to protect investors and the public interest. Clarifying the manner in which the Marketing Fee exemption for strategy transactions can be accomplished will eliminate any confusion and provide a clear procedure for applicants to get such an exemption for their strategy transactions, thereby removing impediments to and perfecting the mechanism of a free and open market.

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

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed change does not change to whom the Marketing Fee exemption for strategy executions applies; it merely states the manner for those executing such transactions to receive the exemption. The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed change because only applies to trading on CBOE and does not amend any fees, or to whom such fees apply. To the extent that the more clear explanation of the manner by which a market participant executing a strategy transaction may apply for such transaction's exemption from the Marketing Fee may be attractive to market participants on other exchanges, such market participants may elect to become market participants on CBOE.

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

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

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>6</sup> and paragraph (f) of Rule 19b-4<sup>7</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may

temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

#### **IV. Solicitation of Comments**

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

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2013-051 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-CBOE-2013-051. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from

submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2013-051 and should be submitted on or before June 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>8</sup>

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

[FR Doc. 2013-12164 Filed 5-21-13; 8:45 am]

**BILLING CODE 8011-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-69591; File No. SR-NYSEArca-2013-33]**

### **Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To List and Trade the International Bear ETF Under NYSE Arca Equities Rule 8.600**

May 16, 2013.

#### **I. Introduction**

On March 21, 2013, 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" or "Exchange Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares ("Shares") of the International Bear ETF ("Fund") under NYSE Arca Equities Rule 8.600. On April 3, 2013, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The proposed rule change, as modified by Amendment No. 1 thereto, was published for comment in the **Federal Register** on April 10, 2013.<sup>4</sup> The Commission received no comments on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1 thereto.

#### **II. Description of the Proposal**

The Exchange proposes to list and trade Shares of the Fund under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares. The Shares will be offered by AdvisorShares Trust ("Trust"), a statutory trust organized under the laws of the State of Delaware and registered

<sup>6</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> In Amendment No. 1, the Exchange made certain technical changes to the proposed rule change.

<sup>4</sup> See Securities Exchange Act Release No. 69303 (April 4, 2013), 78 FR 21475 ("Notice").

<sup>6</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>7</sup> 17 CFR 240.19b-4(f).

with the Commission as an open-end management investment company.<sup>5</sup> The investment adviser to the Fund is AdvisorShares Investments, LLC ("Adviser"). The Fund will have a sub-adviser ("Sub-Adviser") that provides day-to-day portfolio management of the Fund. Foreside Fund Services, LLC will be the principal underwriter and distributor of the Fund's Shares. The Bank of New York Mellon will serve as the administrator, custodian, transfer agent, and accounting agent for the Fund. According to the Exchange, the Adviser is not affiliated with a broker-dealer.<sup>6</sup>

#### *Principle Investments*

The Sub-Adviser will seek to achieve the Fund's investment objective by short selling a portfolio of foreign equity securities, U.S. exchange-listed and traded equity securities of non-U.S. organizations, and American Depositary Receipts ("ADRs"). The Fund may invest in such equity securities of any capitalization range and in any market sector at any time as necessary to seek to achieve the Fund's investment objective. Under normal circumstances,<sup>7</sup> at least 80% of the Fund's net assets will be such equity securities, which the Fund will short sell.

The Fund will be actively managed and thus will not seek to replicate the performance of a specified passive index of securities. Instead, it will use an active investment strategy to seek to meet its investment objective. The Sub-Adviser, subject to the oversight of the

Adviser and the Board of Trustees, will have discretion on a daily basis to manage the Fund's portfolio in accordance with the Fund's investment objective and investment policies. The Sub-Adviser will utilize various fundamental and technical research techniques in security selection. In selecting short positions, the Sub-Adviser will seek to identify securities that may be overvalued and due for capital depreciation. Once a position is included in the Fund's portfolio, it will be subject to regular fundamental and technical risk management review.

The equity securities in which the Fund may invest consist of common stocks, preferred stocks, warrants to acquire common stock, securities convertible into common stock, investments in master limited partnerships, rights, and REITs. The Fund may transact in equity securities traded in the U.S. on registered exchanges or, in the case of ADRs, the over-the-counter market. The Fund may short sell up to 10% of its total assets in unsponsored ADRs. The Fund may invest in the equity securities of foreign issuers, including the securities of foreign issuers in emerging market countries.<sup>8</sup>

The Fund may invest in issuers located outside the United States directly, or in financial instruments that are indirectly linked to the performance of foreign issuers. Examples of such financial instruments include ADRs, Global Depositary Receipts ("GDRs"), European Depositary Receipts ("EDRs"), International Depositary Receipts ("IDRs"), "ordinary shares," and "New York shares."<sup>9</sup> Except for up to 10% of

ADRs, which may be unsponsored, such financial instruments will all be listed and traded on registered exchanges in the U.S. or markets that are members of the ISG or are parties to a comprehensive surveillance sharing agreement with the Exchange.

The Fund may engage regularly in short sales transactions in which the Fund sells a security it does not own. To complete such a transaction, the Fund must borrow or otherwise obtain the security to make delivery to the buyer. The Fund then is obligated to replace the security borrowed by purchasing the security at the market price at the time of replacement. The price at such time may be more or less than the price at which the security was sold by the Fund. Until the security is replaced, the Fund will be required to pay to the lender amounts equal to any dividends or interest, which accrue during the period of the loan. To borrow the security, the Fund also may be required to pay a premium, which would increase the cost of the security sold. The Fund may also use repurchase agreements to satisfy delivery obligations in short sales transactions. The proceeds of the short sale will be retained by the broker, to the extent necessary to meet the margin requirements, until the short position is closed out.

Until the Fund closes its short position or replaces the borrowed security, the Fund will: (a) Maintain a segregated account containing cash or liquid securities at such a level that (i) the amount deposited in the account plus the amount deposited with the broker as collateral will equal the current value of the security sold short and (ii) the amount deposited in the segregated account plus the amount deposited with the broker as collateral will not be less than the market value of the security at the time the security was sold short; or (b) otherwise cover the Fund's short position. The Fund may use up to 100% of its portfolio to engage in short sales transactions and collateralize its open short positions.

#### *Other Investments*

While the Fund will invest at least 80% of its assets as described above, the Fund may invest in certain other investments, as described below. The

markets outside the U.S. EDRs, for example, are designed for use in European securities markets, while GDRs are designed for use throughout the world. Ordinary shares are shares of foreign issuers that are traded abroad and on a U.S. exchange. New York shares are shares that a foreign issuer has allocated for trading in the U.S. ADRs, ordinary shares, and New York shares all may be purchased with and sold for U.S. dollars.

<sup>5</sup> The Trust is registered under the Investment Company Act of 1940 ("1940 Act"). On October 19, 2012, the Trust filed with the Commission an amendment to its registration statement on Form N-1A under the Securities Act of 1933 and the 1940 Act relating to the Fund (File Nos. 333-157876 and 811-22110) ("Registration Statement"). In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. See Investment Company Act Release No. 29291 (May 28, 2010) (File No. 812-13677).

<sup>6</sup> See NYSE Arca Equities Rule 8.600, Commentary .06. In the event (a) the Adviser becomes newly affiliated with a broker-dealer, (b) the Sub-Adviser is affiliated with a broker-dealer, or (c) any new adviser or sub-adviser becomes affiliated with a broker-dealer, it will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding such portfolio.

<sup>7</sup> The term "under normal circumstances" includes, but is not limited to, the absence of adverse market, economic, political or other conditions, including extreme volatility or trading halts in the equity markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance.

<sup>8</sup> Emerging or developing markets exist in countries that are considered to be in the initial stages of industrialization. The Fund will invest only in foreign equity securities that trade in markets that are members of the Intermarket Surveillance Group ("ISG") or are parties to a comprehensive surveillance sharing agreement with the Exchange.

<sup>9</sup> ADRs are U.S. dollar denominated receipts typically issued by U.S. banks and trust companies that evidence ownership of underlying securities issued by a foreign issuer. The underlying securities may not necessarily be denominated in the same currency as the securities into which they may be converted. The underlying securities are held in trust by a custodian bank or similar financial institution in the issuer's home country. The depositary bank may not have physical custody of the underlying securities at all times and may charge fees for various services, including forwarding dividends and interest and corporate actions. Generally, ADRs in registered form are designed for use in domestic securities markets and are traded on exchanges or over-the-counter in the U.S. GDRs, EDRs, and IDRs are similar to ADRs in that they are certificates evidencing ownership of shares of a foreign issuer, however, GDRs, EDRs, and IDRs may be issued in bearer form and denominated in other currencies, and are generally designed for use in specific or multiple securities

Fund may invest in exchange-traded funds ("ETFs") registered pursuant to the 1940 Act, exchange-traded notes ("ETNs"),<sup>10</sup> and other exchange-traded products (together with ETFs and ETNs, collectively, "ETPs").<sup>11</sup> The Fund will invest only in ETPs that trade in markets that are members of the ISG or are parties to a comprehensive surveillance sharing agreement with the Exchange.

The Fund may invest in several different types of investment companies from time to time, including mutual funds and business development companies ("BDCs"),<sup>12</sup> when the Adviser or the Sub-Adviser believes such an investment is in the best interests of the Fund and its shareholders. For example, the Fund may elect to invest in another investment company when such an investment presents a more efficient investment option than buying securities individually. The Fund also may invest in investment companies that are included as components of an index, such as BDCs, to seek to track the performance of that index. The Fund will invest only in BDCs that trade in markets that are members of the ISG or

are parties to a comprehensive surveillance sharing agreement with the Exchange.

The Fund may invest, under normal circumstances, up to 10% of its net assets in debt securities. Debt securities include a variety of fixed income obligations, including, but not limited to, corporate debt securities, government securities, municipal securities, convertible securities, and mortgage-backed securities. Debt securities include investment-grade securities, non-investment-grade securities, and unrated securities. The Fund may invest in non-investment-grade securities.<sup>13</sup> The Fund may invest in variable and floating rate securities. On a day-to-day basis, the Fund may hold U.S. government securities,<sup>14</sup> short-term high quality fixed income securities, money market instruments, overnight and fixed-term repurchase agreements, cash, and cash equivalents with maturities of one year or less for investment purposes and to cover its short positions.

The Fund may enter into repurchase agreements with financial institutions, which may be deemed to be loans.<sup>15</sup> The Fund may enter into reverse repurchase agreements without limit as part of the Fund's investment strategy.<sup>16</sup>

<sup>10</sup> ETNs are senior, unsecured unsubordinated debt securities issued by an underwriting bank that are designed to provide returns that are linked to a particular benchmark less investor fees. ETNs have a maturity date and, generally, are backed only by the creditworthiness of the issuer. It is expected that the issuer's credit rating will be investment grade at the time of investment.

<sup>11</sup> ETPs may include Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)); Index-Linked Securities (as described in NYSE Arca Equities Rule 5.2(j)(6)); Portfolio Depositary Receipts (as described in NYSE Arca Equities Rule 8.100); Trust Issued Receipts (as described in NYSE Arca Equities Rule 8.200); Commodity-Based Trust Shares (as described in NYSE Arca Equities Rule 8.201); Currency Trust Shares (as described in NYSE Arca Equities Rule 8.202); Commodity Index Trust Shares (as described in NYSE Arca Equities Rule 8.203); Trust Units (as described in NYSE Arca Equities Rule 8.500); Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600); and closed-end funds. The ETPs all will be listed and traded in the U.S. on registered exchanges. The Fund may invest in the securities of ETPs registered under the 1940 Act consistent with the requirements of Section 12(d)(1) of the 1940 Act, or any rule, regulation or order of the Commission or interpretation thereof. The Fund will only make such investments in conformity with the requirements of Section 817 of the Internal Revenue Code of 1986. The Fund may invest in ETPs that are pooled investment vehicles not registered pursuant to the 1940 Act. Closed-end funds are pooled investment vehicles that are registered under the 1940 Act and whose shares are listed and traded on U.S. national securities exchanges.

<sup>12</sup> According to the Exchange, a BDC is a less common type of closed-end investment company that more closely resembles an operating company than a typical investment company. BDCs generally focus on investing in, and providing managerial assistance to, small, developing, financially troubled, private companies or other companies that may have value that can be realized over time and with management assistance.

<sup>13</sup> Non-investment-grade securities, also referred to as "high-yield securities" or "junk bonds," are debt securities that are rated lower than the four highest rating categories by a nationally recognized statistical rating organization (for example, lower than Baa3 by Moody's Investors Service, Inc. or lower than BBB- by Standard & Poor's, a division of The McGraw-Hill Companies, Inc.) or are determined to be of comparable quality by the Adviser or the Sub-Adviser.

<sup>14</sup> The Fund may invest in U.S. government securities and U.S. Treasury zero-coupon bonds. Securities issued or guaranteed by the U.S. government or its agencies or instrumentalities include U.S. Treasury securities, which are backed by the full faith and credit of the U.S. Treasury and which differ only in their interest rates, maturities, and times of issuance; U.S. Treasury bills, which have initial maturities of one-year or less; U.S. Treasury notes, which have initial maturities of one to ten years; and U.S. Treasury bonds, which generally have initial maturities of greater than ten years.

<sup>15</sup> The Fund follows certain procedures designed to minimize the risks inherent in such agreements. These procedures include effecting repurchase transactions only with large, well-capitalized and well-established financial institutions whose condition will be continually monitored by the Sub-Adviser. In addition, the value of the collateral underlying the repurchase agreement will always be at least equal to the repurchase price, including any accrued interest earned on the repurchase agreement. It is the current policy of the Fund not to invest in repurchase agreements that do not mature within seven days if any such investment, together with any other illiquid assets held by the Fund, amounts to more than 15% of the Fund's net assets.

<sup>16</sup> Reverse repurchase agreements involve sales by the Fund of portfolio assets concurrently with an agreement by the Fund to repurchase the same assets at a later date at a fixed price. The Fund will

However, the Fund does not expect to engage, under normal circumstances, in reverse repurchase agreements with respect to more than 33⅓% of its assets. The Fund also may invest directly and indirectly in foreign currencies.

The Fund, in the ordinary course of business, may purchase securities on a when-issued or delayed-delivery basis (*i.e.*, delivery and payment can take place between a month and 120 days after the date of the transaction). These securities are subject to market fluctuation and no interest accrues to the purchaser during this period. At the time the Fund makes the commitment to purchase securities on a when-issued or delayed-delivery basis, the Fund will record the transaction and thereafter reflect the value of the securities, each day, in determining the Fund's net asset value ("NAV"). The Fund will not purchase securities on a when-issued or delayed-delivery basis if, as a result, more than 15% of the Fund's net assets would be so invested.

To respond to adverse market, economic, political or other conditions, the Fund may refrain from short selling and increase its investment in U.S. government securities, short-term high quality fixed income securities, money market instruments, overnight and fixed-term repurchase agreements, cash and cash equivalents with maturities of one year or less. The Fund may hold little or no short positions for extended periods, depending on the Sub-Adviser's assessment of market conditions.

The Fund may not (i) with respect to 75% of its total assets, purchase securities of any issuer (except securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities or shares of investment companies) if, as a result, more than 5% of its total assets would be invested in the securities of such issuer; or (ii) acquire more than 10% of the outstanding voting securities of any one issuer. In addition, the Fund may not invest 25% or more of its total assets in the securities of one or more issuers conducting their principal business activities in the same industry or group of industries. The Fund will not invest 25% or more of its total assets in any investment company that so concentrates. This limitation does not apply to investments in securities issued or guaranteed by the U.S.

establish a segregated account with the Trust's custodian bank in which the Fund will maintain cash, cash equivalents, or other portfolio securities equal in value to the Fund's obligations in respect of reverse repurchase agreements. Such reverse repurchase agreements could be deemed to be a borrowing, but are not senior securities.

Government, its agencies or instrumentalities, or shares of investment companies.

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities. 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 securities. Illiquid securities 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 will seek to qualify for treatment as a Regulated Investment Company under the Internal Revenue Code. The Fund will not invest in options contracts, futures contracts, or swap agreements. The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage.

Additional information regarding the Fund; Shares; investment objective, strategies, methodology, and restrictions; risks; fees and expenses; creations and redemptions of Shares; availability of information; trading rules and halts; and surveillance procedures, among other things, can be found in the Registration Statement and in the Notice, as applicable.<sup>17</sup>

### III. Discussion and Commission's Findings

After careful review, the Commission finds that the Exchange's proposal to list and trade the Shares is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>18</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,<sup>19</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 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 Exchange Act,<sup>20</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, and for the underlying securities, from the securities exchanges on which they are listed. Information regarding the equity securities, debt securities, fixed income instruments, and other investments held by the Fund will be available from the U.S. and non-U.S. securities exchanges trading such securities, automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters. The Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated at least every 15 seconds during the Core Trading Session through one or more major market data vendors.<sup>21</sup> On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund's Web site will disclose the Disclosed Portfolio, as defined in NYSE Arca Equities Rule 8.600(c)(2), that will form the basis for the Fund's calculation of NAV at the end of the business day.<sup>22</sup> The Fund will calculate NAV once each business day as of the regularly scheduled close of trading on the New York Stock Exchange, LLC (normally 4:00 p.m. Eastern Time). The Web site for the Fund will include a form of the prospectus for the Fund and additional data relating to NAV and other

applicable quantitative information. 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,<sup>23</sup> and 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.<sup>24</sup>

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.<sup>25</sup> Trading in Shares of the 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>26</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 Shares of the Fund may be halted.<sup>27</sup> 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 Adviser, as the Reporting Authority, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the Fund's portfolio.<sup>28</sup> The Exchange states that the Adviser is not affiliated with a broker-dealer.<sup>29</sup>

<sup>23</sup> See Notice, *supra* note 4, 78 FR at 21479.

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

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

<sup>26</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.

<sup>27</sup> See NYSE Arca Equities Rule 8.600(d)(2)(D).

<sup>28</sup> See NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

<sup>29</sup> An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 ("Advisers Act"). As a result, the Adviser and Sub-Adviser and their related personnel are subject to the provisions of Rule 204A-1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary

Continued

<sup>20</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

<sup>21</sup> See Notice, *supra* note 4, 78 FR at 21479. According to the Exchange, several major market data vendors display and/or make widely available Portfolio Indicative Values taken from CTA or other data feeds.

<sup>22</sup> On a daily basis, the Fund's Web site will disclose for each portfolio security and other financial instrument of the Fund the following information: ticker symbol (if applicable); name of security and financial instrument; number of shares and dollar value of securities and financial instruments held in the portfolio; and percentage weighting of the security and financial instrument in the portfolio. The Web site information will be publicly available at no charge.

<sup>17</sup> See Notice and Registration Statement, *supra* notes 4 and 5, respectively.

<sup>18</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>19</sup> 15 U.S.C. 78f(b)(5).

Moreover, prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. The Commission notes that the Financial Industry Regulatory Authority ("FINRA"), on behalf of the Exchange,<sup>30</sup> will communicate as needed regarding trading in the Shares with other markets that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

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:

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

(2) The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws and that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

(3) Except for up to 10% of ADRs, which may be unsponsored, the Fund will invest only in equity securities (including financial instruments that are linked to the performance of foreign issuers),<sup>31</sup> ETPs, and BDCs that trade in

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>30</sup> The Exchange states that, while FINRA surveils trading on the Exchange pursuant to a regulatory services agreement, the Exchange is responsible for FINRA's performance under this regulatory services agreement.

<sup>31</sup> See notes 8 and 9, *supra*, and accompanying text.

markets that are members of the ISG or are parties to a comprehensive surveillance sharing agreement with the Exchange.

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

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

(6) For initial and continued listing, the Fund will be in compliance with Rule 10A-3 under the Exchange Act,<sup>32</sup> as provided by NYSE Arca Equities Rule 5.3.<sup>33</sup>

(7) The Fund will not invest in options contracts, futures contracts, or swap agreements.

(8) The Fund's investments will be consistent with its respective investment objective and will not be used to enhance leverage.

(9) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities.

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

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

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1 thereto, is consistent with Section

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

<sup>33</sup> See Notice, *supra* note 4, 78 FR at 21478.

6(b)(5) of the Act<sup>34</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 Exchange Act,<sup>35</sup> that the proposed rule change (SR-NYSEArca-2013-33), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>36</sup>

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

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-69589; File No. SR-BYX-2013-014]

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

May 16, 2013.

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 May 3, 2013, BATS Y-Exchange, Inc. (the "Exchange" or "BYX") 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 proposes to amend the fee schedule applicable to Members<sup>5</sup>

<sup>34</sup> 15 U.S.C. 78f(b)(5).

<sup>35</sup> 15 U.S.C. 78s(b)(2).

<sup>36</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 any registered broker or dealer that has been admitted to membership in the Exchange.