

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-EDGA-2014-006, and should be submitted on or before April 22, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

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

[FR Doc. 2014-07191 Filed 3-31-14; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71804; File No. SR-NYSEArca-2013-141]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, To Adopt New NYSE Arca Equities Rule 7.25 To Create a Crowd Participant Program on a Pilot Basis To Incent Competitive Quoting and Trading Volume in Exchange-Traded Products by Market Makers Qualified With the Exchange as CPs

March 26, 2014.

On December 6, 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")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to adopt the Crowd Participant Program ("CP Program" or "Program"), a one-year pilot program, to incentivize competitive quoting and trading volume in exchange-traded products ("ETPs") by Market Makers qualified with the Exchange as Crowd Participants ("CPs"). The proposed rule change was published for comment in the **Federal Register** on December 26, 2013.<sup>3</sup> The Commission received no comment letters on the proposal. On February 5, 2014, pursuant to Section 19(b)(2) of the Act,<sup>4</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>5</sup> On March 19, 2014, the Exchange submitted Amendment No. 2 to the proposed rule change.<sup>6</sup> The Commission is publishing this notice to solicit comments on Amendment No. 2 from interested persons, and is approving the proposed rule change, as modified by Amendment No. 2 thereto, on an accelerated basis.<sup>7</sup>

#### I. Description of the Amended Proposal

As set forth in more detail in the Notice,<sup>8</sup> the Exchange is proposing to adopt new NYSE Arca Equities Rule 7.25 and to amend its fee schedules to set forth the requirements for the CP Program, which will be a voluntary one-year pilot program for issuers of certain ETPs listed on the Exchange. The Exchange states that the CP Program is designed to incentivize Market Makers<sup>9</sup> qualified with the Exchange as CPs<sup>10</sup> to quote and trade in certain low-volume ETPs by offering issuers an alternative

<sup>5</sup> Securities Exchange Act Release No. 71479 (Feb. 5, 2014), 79 FR 8225 (Feb. 11, 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 March 26, 2014 as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

<sup>6</sup> Amendment No. 1 was filed by the Exchange on March 18, 2014 and withdrawn by the Exchange on March 19, 2014 due to a technical error. In Amendment No. 2, the Exchange proposes to: (i) Change, from two-million shares to one-million shares, the consolidated average daily volume ("CADV") threshold applicable to participation eligibility in the proposed CP Program; (ii) change the CP Program Fee (as described below) from a fixed amount of \$50,000 to a range of \$50,000 to \$100,000, as determined exclusively by the issuer; and (iii) clarify that the CP Program Fee cannot be refunded to an issuer.

<sup>7</sup> Today the Commission also is granting exemptive relief from Rule 102 under Regulation M concerning the CP Program. See Securities Exchange Act Release No. 71805 (Mar. 26, 2014) (Order Granting a Limited Exemption from Rule 102 of Regulation M Concerning the NYSE Arca, Inc.'s Crowd Participant Program Pilot).

<sup>8</sup> See Notice, *supra* note 3.

<sup>9</sup> A Market Maker is an Equity Trading Permit Holder that acts as a Market Maker pursuant to NYSE Arca Equities Rule 7. See NYSE Arca Equities Rule 1.1(v). An Equity Trading Permit Holder is a sole proprietorship, partnership, corporation, limited liability company, or other organization in good standing that has been issued an Equity Trading Permit. See NYSE Arca Equities Rule 1.1(n).

<sup>10</sup> A "Crowd Participant" is defined as an Equity Trading Permit Holder that: (1) Is qualified as a Market Maker, and in good standing, on the Exchange; (2) electronically enters quotes and orders into the systems and facilities of the Exchange; and (3) is obligated to maintain a displayed bid or offer at the National Best Bid ("NBB") or the National Best Offer ("NBO"), respectively, in each assigned ETP consistent with paragraph (g) of the proposed rule. See proposed NYSE Arca Equities Rule 7.25(a).

fee program funded by participating issuers and credited to CPs from the Exchange's general revenues.<sup>11</sup> In addition, the Exchange states that the Program is designed to add competition among existing qualified Market Makers on the Exchange.<sup>12</sup> The Exchange states that the CP Program will offer an alternative to the existing Lead Market Maker program on the Exchange and the ETP Incentive Program (under NYSE Arca Equities Rule 8.800)<sup>13</sup> for issuers to consider when determining where to list their securities.<sup>14</sup> The Exchange states that under the voluntary CP Program, multiple CPs would compete for daily rebates, which would be funded from the Exchange's general revenues and offset by charging issuers a non-refundable "CP Program Fee," which would be credited to the Exchange's general revenues.<sup>15</sup>

#### A. Eligible Products; Issuer and CP Application Process

An ETP will be eligible to participate in the CP Program if (i) it is listed on the Exchange as of the commencement of the pilot period or becomes listed during the pilot period; (ii) the listing is under NYSE Arca Equities Rules 5.2(j)(3) (Investment Company Units), 5.2(j)(5) (Equity Gold Shares), 8.100 (Portfolio Depositary Receipts), 8.200 (Trust Issued Receipts), 8.201 (Commodity-Based Trust Shares), 8.202 (Currency Trust Shares), 8.203 (Commodity Index Trust Shares), 8.204 (Commodity Futures Trust Shares), 8.300 (Partnership Units), 8.600 (Managed Fund Shares), or 8.700 (Managed Trust Securities); (iii) it is neither participating in the ETP Incentive Program under Rule 8.800 nor has a Lead Market Maker assigned to it; (iv) with respect to an ETP that was listed on the Exchange before the commencement of the CP Program, the ETP has a CADV of one million shares or less for at least the preceding three months; and (v) if the ETP is added to the CP Program after listing on the Exchange, it is compliant with continuing listing standards.<sup>16</sup>

An issuer that wishes to have an ETP participate in the CP Program and pay the Exchange a non-refundable CP Program Fee will be required to submit a written application in a form prescribed by the Exchange for each

<sup>11</sup> See Notice, *supra* note 3, at 78427.

<sup>12</sup> *Id.*

<sup>13</sup> See Securities Exchange Act Release No. 69706 (June 6, 2013), 78 FR 35340 (June 12, 2013) (SR-NYSEArca-2013-34).

<sup>14</sup> See Notice, *supra* note 3, at 78427.

<sup>15</sup> *Id.*

<sup>16</sup> See proposed NYSE Arca Equities Rule 7.25(b). See also Amendment No. 2, *supra* note 6.

<sup>15</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> See Securities Exchange Act Release No. 71146 (Dec. 19, 2013), 78 FR 78426 ("Notice").

<sup>4</sup> 15 U.S.C. 78s(b)(2).

ETP.<sup>17</sup> An issuer may apply to have its ETP participate at the time of listing or thereafter at the beginning of each quarter during the pilot period.<sup>18</sup> The Exchange may, on a CP Program-wide basis, limit the number of ETPs that any one issuer may have in the CP Program.<sup>19</sup> In addition, in order for its ETP to be eligible to participate in the CP Program, an issuer must be current in all payments due to the Exchange.<sup>20</sup>

The Exchange will communicate the ETP(s) proposed for inclusion in the CP Program on a written solicitation that will be sent to all qualified CPs along with the CP Program Fee the issuer will pay the Exchange for each ETP, which will be determined by the issuer based on the range of fees set forth in the Exchange's Schedule of Fees and Charges for Exchange Listing Services ("Listing Fee Schedule").<sup>21</sup>

To qualify as a CP, an Exchange Trading Permit Holder must (i) be qualified as a Market Maker, and in good standing, on the Exchange; and (ii) have adequate information barriers between the business unit of the Exchange Trading Permit Holder acting as a CP in a proprietary capacity and the Exchange Trading Permit Holder's customer, research and investment banking business, if any.<sup>22</sup> To become a CP, an Exchange Trading Permit Holder must submit a CP application form with all supporting documentation to the Exchange.<sup>23</sup> Exchange staff will determine whether an applicant is qualified to become a CP based on the qualifications described in the proposed rule and shall notify the applicant of its decision.<sup>24</sup> If an applicant is approved by the Exchange to receive CP status, such applicant will be required to have connectivity with relevant Exchange systems before it will be permitted to quote and trade as a CP on the Exchange.<sup>25</sup> If approved to receive CP status, a CP shall be assigned to participating ETPs in the same manner that Market Makers are currently assigned to securities listed on the

Exchange.<sup>26</sup> If an applicant is disapproved by the Exchange, the applicant may seek review under NYSE Arca Equities Rule 10.13<sup>27</sup> and/or reapply for CP status at least three calendar months following the month in which the applicant received the disapproval notice from the Exchange.<sup>28</sup>

#### *B. Disclosure Relating to the CP Program*

Pursuant to proposed NYSE Arca Equities Rule 7.25(c)(4), the Exchange will provide notification on a dedicated page on its Web site regarding: (i) The ETPs participating in the CP Program; (ii) the date a particular ETP begins participating and ceases participating in the CP Program; (iii) the date the Exchange receives written notice of an issuer's intent to withdraw its ETP from the CP Program, or a CP's intent to withdraw from its ETP assignment(s) in the CP Program, and, in each case, the intended withdrawal date, if provided; (iv) the CPs assigned to each ETP participating in the CP Program; and (v) the amount of the CP Program Fee for each ETP. This page will also include a fair and balanced description of the CP Program, including: (i) A description of the CP Program's operation as a pilot, including the effective date thereof; (ii) the potential benefits that may be realized by an ETP's participation in the CP Program; (iii) the potential risks that may be attendant with an ETP's participation in the CP Program; (iv) the potential impact resulting from an ETP's entry into and exit from the CP Program; and (v) how interested parties can request additional information regarding the CP Program and/or the ETPs participating therein.<sup>29</sup>

Under proposed NYSE Arca Equities Rule 7.25(c)(5), an issuer of an ETP that is approved to participate in the CP Program will be required to issue a press release to the public when an ETP commences or ceases participation in the CP Program. The press release will be in a form and manner prescribed by the Exchange, and if practicable, will be issued at least two days before the ETP commences or ceases participation in the CP Program.<sup>30</sup> The issuer also will

be required to dedicate space on its Web site, or, if it does not have a Web site, on the Web site of the adviser or sponsor of the ETP, to (i) include any such press releases and (ii) provide a hyperlink to the dedicated page on the Exchange's Web site that describes the CP Program.<sup>31</sup>

#### *C. CP Program Fee*

An issuer (or sponsor on behalf of the issuer) of an ETP that is participating in the CP Program will be required to pay the Exchange a non-refundable "CP Program Fee" in accordance with the Exchange's Listing Fee Schedule, which fee will be credited to the Exchange's general revenues.<sup>32</sup> The Exchange proposes to amend its Listing Fee Schedule to provide that the CP Program Fee under NYSE Arca Rule 7.25 will be determined by the issuer within a range of \$50,000–\$100,000.<sup>33</sup> The CP Program Fee for each ETP will be paid by the issuer to the Exchange in quarterly installments at the beginning of each quarter and prorated if the issuer commences participation for an ETP in the CP Program after the beginning of a quarter.<sup>34</sup> If the ETP has a sponsor, the sponsor may pay the CP Program Fee to the Exchange.<sup>35</sup> The CP Program Fee paid by an issuer will be credited to the Exchange's general revenues.<sup>36</sup> The issuer will not receive a credit from the Exchange, even if the assigned CPs did not satisfy their daily or monthly quoting requirements in any given month in such quarter for the ETP.<sup>37</sup> The precise amount of the CP Program

while the impact of participation in or exit from the CP Program, which is optional, cannot be fully understood until objective observations can be made in the context of the CP Program, potential impacts on the market quality of the issuer's ETP may result, including with respect to the average spread and average quoted size for the ETP. *See* Notice, *supra* note 3, at 78429, n.13.

<sup>31</sup> *See* proposed NYSE Arca Equities Rule 7.25(c)(5). The disclosure requirements set forth in the proposal would be in addition to, and would not supersede, the prospectus disclosure requirements under the Securities Act of 1933 or the Investment Company Act of 1940. *See* Notice, *supra* note 3, at 78429, n.14.

<sup>32</sup> *See* proposed NYSE Arca Equities Rule 7.25(e). *See also* Amendment No. 2, *supra* note 6. An ETP shall not be permitted to begin participation in the CP Program, and therefore will not be charged the CP Program Fee, unless there are eligible CPs assigned to such ETP. *See* Amendment No. 2, *supra* note 6.

<sup>33</sup> *See* proposed Listing Fee Schedule; *see also* Amendment No. 2, *supra* note 6. An issuer participating in the CP Program will still be required to pay applicable listing and annual fees. *See* Notice, *supra* note 3, at 78429, n.20.

<sup>34</sup> *See* proposed Listing Fee Schedule.

<sup>35</sup> *Id.* The term "sponsor" means the registered investment adviser that provides investment management services to an ETP or any of such investment adviser's parents or subsidiaries. *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* *See also* Amendment No. 2, *supra* note 6.

<sup>17</sup> *See* proposed NYSE Arca Equities Rule 7.25(c)(2). *See also* Amendment No. 2, *supra* note 6.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *See* proposed NYSE Arca Equities Rule 7.25(c)(1).

<sup>21</sup> *See* proposed NYSE Arca Equities Rule 7.25(c)(3).

<sup>22</sup> *See* proposed NYSE Arca Equities Rule 7.25(d)(1).

<sup>23</sup> *See* proposed NYSE Arca Equities Rule 7.25(d)(2).

<sup>24</sup> *See* proposed NYSE Arca Equities Rule 7.25(d)(3)–(4).

<sup>25</sup> *See* proposed NYSE Arca Equities Rule 7.25(d)(5).

<sup>26</sup> *Id.* The Exchange does not anticipate placing a limit on the number of CPs assigned to a particular ETP or on the number of ETPs to which a particular CP would be assigned. *See* Notice, *supra* note 3, at 78429.

<sup>27</sup> NYSE Arca Equities Rule 10.13 provides the procedure for persons aggrieved by certain actions taken by the Exchange to apply for an opportunity to be heard and to have the action reviewed.

<sup>28</sup> *See* proposed NYSE Arca Equities Rule 7.25(d)(6).

<sup>29</sup> *See* proposed NYSE Arca Equities Rule 7.25(c)(4).

<sup>30</sup> The issuer's press release will be required to include language describing, for example, that

Fee to be paid for an ETP in the CP Program will be determined by the issuer.<sup>38</sup>

#### D. CP Performance Measurement

The Exchange will measure the performance of a CP in an assigned ETP by calculating Size Event Tests (“SETs”) during Core Trading Hours<sup>39</sup> on every day on which the Exchange is open for business.<sup>40</sup> The Exchange will measure the quoted displayed size at the NBB (NBO) of each CP at least once per second to determine bid (offer) SETs (a “Bid (Offer) SET”).<sup>41</sup> A CP will be considered to have a winning Bid (Offer) SET (a “Winning Bid (Offer) SET”) for a particular ETP if, at the time of the SET, the CP: (i) Is quoting at least 500 shares of the ETP at the NBB (NBO); (ii) has the greatest aggregate displayed size at the NBB (NBO); and (iii) is quoting an offer (bid) of at least 100 shares at a price at or within 1.2% of the CP’s best bid (offer).<sup>42</sup>

#### E. CP Quoting Requirements

Each CP that is assigned to one or more ETPs in the CP Program will be required to maintain continuous, two-sided displayed quotes or orders in accordance with existing NYSE Arca Equities Rule 7.23(a)(1) for each such ETP.<sup>43</sup> In addition, CPs have additional daily and monthly quoting requirements under the proposal. First, a CP must have Winning Bid (Offer) SETs equal to at least 10% of the total Bid (Offer) SETs on any trading day in order to meet its daily quoting requirement and be eligible for the daily CP Payments for an ETP (described in the Exchange’s Schedule of Fees and Charges for Exchange Services (“Trading Fee Schedule”).<sup>44</sup> Furthermore, a CP must have displayed quotes or orders of at least 100 shares at the NBB (NBO) at least 10% of the time that the Exchange calculates Bid (Offer) SETs to meet its monthly quoting requirement.<sup>45</sup> For purposes of meeting these daily and monthly quoting requirements, CP quotes may be for the account of the CP in either a proprietary capacity or a principal capacity on behalf of an

affiliated or unaffiliated person.<sup>46</sup> For purposes of measuring CP quoting, the Exchange will include all Market Maker quotes and orders in assigned ETPs of an Equity Trading Permit Holder that is a CP.<sup>47</sup>

#### F. CP Payment

Proposed NYSE Arca Equities Rule 7.25(h) provides that the Exchange will credit a CP for a “CP Payment” from its general revenues in accordance with the Exchange’s Trading Fee Schedule.

The Exchange proposes to amend its Trading Fee Schedule to specify the amount of the total daily rebate, which would be an amount not to exceed the CP Program Fee paid to the Exchange by an issuer under Rule 7.25, less a 5% Exchange administration fee, divided by the number of trading days in the calendar year.<sup>48</sup> Half of this amount will be allocated to bid SETs and half will be allocated to offer SETs.<sup>49</sup>

Furthermore, 70% of the bid (offer) SET amount will be credited to the CP with the highest number of Winning Bid (Offer) SETs and 30% of the bid (offer) SET amount will be credited to the CP with the second-highest number of Winning Bid (Offer) SETs.<sup>50</sup> If only one CP is eligible for the bid (offer) SET amount, 100% of such rebate will be provided to such CP.<sup>51</sup> If more than two CPs have an equal number of Winning Bid (Offer) SETs, the CP with the higher executed volume in the ETP on the Exchange on the particular trading day will be awarded the applicable daily CP Payment.<sup>52</sup> A rebate will not be provided if no eligible CPs exist (e.g., if CPs are assigned to the ETP but do not satisfy the requirements to have a Winning Bid or Winning Offer).<sup>53</sup>

The Exchange will credit a CP for the CP Payment at the end of each month.<sup>54</sup> If the ETP is withdrawn from the CP Program pursuant to proposed Rule 7.25(i) (as described below) during the month, then the CP will not be eligible for a CP Payment after the date of such withdrawal.<sup>55</sup> Furthermore, if an issuer does not pay its quarterly installments to the Exchange on time and the ETP

continues to be included in the CP Program, the Exchange will continue to credit CPs in accordance with the Exchange’s Trading Fee Schedule.<sup>56</sup>

#### G. Withdrawal

The Exchange will withdraw an ETP from the CP Program upon request from the issuer.<sup>57</sup> If an ETP liquidates or suspends the redemption of shares, it will be automatically withdrawn from the CP Program as of the ETP liquidation or suspension date.<sup>58</sup> An ETP will be automatically removed from the CP Program if the issuer is not current in all payments due to the Exchange after two consecutive quarters.<sup>59</sup> Finally, if an ETP maintains a CADV of one million shares or more for three consecutive months, it will be automatically withdrawn from the CP Program within one month thereafter.<sup>60</sup>

A CP that does not satisfy the monthly quoting requirement for three consecutive months will be subject to the potential withdrawal of its CP status.<sup>61</sup> Any such withdrawal determinations would be for a specific ETP.<sup>62</sup> A CP can also initiate withdrawal from an ETP assignment in the CP Program by giving notice to the Exchange.<sup>63</sup> The Exchange will effect such withdrawal as soon as practicable, but no later than 30 days after the date the notice is received by the Exchange.<sup>64</sup> Such withdrawal can be for a specific ETP or for all ETPs to which the CP is assigned.<sup>65</sup>

<sup>56</sup> *Id.*

<sup>57</sup> See proposed NYSE Arca Equities Rule 7.25(i)(2).

<sup>58</sup> See proposed NYSE Arca Equities Rule 7.25(i)(1).

<sup>59</sup> See proposed NYSE Arca Equities Rule 7.25(i)(3). Only the ETP for which an issuer is not current in payments would be subject to withdrawal. For example, if an issuer listed two ETPs on the Exchange that participated in the CP Program and was current in payments for one but not for the other, only the latter ETP would be subject to withdrawal from the CP Program. See Notice, *supra* note 3, at 78430, n.32.

<sup>60</sup> See proposed NYSE Arca Equities Rule 7.25(i)(4); see also Amendment No. 2, *supra* note 6. If after such automatic withdrawal the ETP fails to maintain a CADV of one million shares or more for three consecutive months, the issuer of the ETP may reapply for the CP Program one month thereafter. See proposed NYSE Arca Equities Rule 7.25(i)(4).

<sup>61</sup> See proposed NYSE Arca Equities Rule 7.25(j)(1).

<sup>62</sup> *Id.* For example, if a CP satisfied its monthly quoting requirement for one ETP but not for another ETP that it was assigned to, the CP would be subject to withdrawal for the latter ETP but not the former. See Notice, *supra* note 3, at 78431, n.35.

<sup>63</sup> See proposed NYSE Arca Equities Rule 7.25(j)(2).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>38</sup> See proposed Listing Fee Schedule; see also Amendment No. 2, *supra* note 6.

<sup>39</sup> See NYSE Arca Equities Rule 1.1(f).

<sup>40</sup> See proposed NYSE Arca Equities Rule 7.25(f)(1).

<sup>41</sup> See proposed NYSE Arca Equities Rule 7.25(f)(2).

<sup>42</sup> See proposed NYSE Arca Equities Rule 7.25(f)(3).

<sup>43</sup> See proposed NYSE Arca Equities Rule 7.25(g)(1).

<sup>44</sup> See proposed NYSE Arca Equities Rule 7.25(g)(2).

<sup>45</sup> See proposed NYSE Arca Equities Rule 7.25(g)(3).

<sup>46</sup> See proposed NYSE Arca Equities Rule 7.25(g)(4). A CP’s quotes in a principal capacity could include quotes submitted to the Exchange on behalf of customers or other unaffiliated or affiliated persons. See Notice, *supra* note 3, at 78430, n.26.

<sup>47</sup> See proposed NYSE Arca Equities Rule 7.25(g)(4).

<sup>48</sup> See proposed Trading Fee Schedule.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

### H. Implementation of Pilot

The CP Program will be offered to issuers from the date of implementation, which will occur no later than 90 days after Commission approval of the filing, until one calendar year after implementation.<sup>66</sup> During the pilot period, the Exchange will assess the CP Program and may expand the criteria for ETPs that are eligible to participate.<sup>67</sup> At the end of the pilot period, the Exchange will determine whether to continue or discontinue the CP Program or make it permanent.<sup>68</sup>

During the pilot period, the Exchange will provide the Commission with certain market quality reports each month, which will also be posted on the Exchange's Web site.<sup>69</sup> Such reports will include the Exchange's analysis regarding the CP Program and whether it is achieving its goals,<sup>70</sup> as well as market quality data such as, for all ETPs listed as of the date of implementation of the CP Program and listed during the pilot period (for comparative purposes, including comparable ETPs that are listed on the Exchange but not participating in the CP Program): volume (CADV and NYSE Arca average daily volume); NBBO bid/ask spread differentials; CP participation rates; NYSE Arca market share; CP time spent at the inside; CP time spent within \$0.03 of the inside; percent of time NYSE Arca had the best price with the best size; CP quoted spread; CP quoted depth; and Rule 605 statistics (one-month delay).<sup>71</sup> These reports will also compare, to the extent practicable, ETPs before and after they are in the CP Program, and will further provide data and analysis about the market quality of ETPs that exceed the one million share CADV threshold and "graduate," or are otherwise withdrawn or terminated from, the CP Program.<sup>72</sup> These reports will also compare, to the extent practicable, the CP Program against the ETP Incentive Program, including with

respect to the potential impact that one program may have on the other and how the analysis described above with respect to the CP Program compares to the Exchange's similar analysis with respect to the ETP Incentive Program.<sup>73</sup> In connection with the proposal, the Exchange will provide other data and information related to the CP Program as may be periodically requested by the Commission.<sup>74</sup> In addition, the Exchange states that issuers may utilize ArcaVision to analyze and replicate data on their own.<sup>75</sup>

### I. Surveillance

The Exchange represents that its surveillance procedures will be adequate to properly monitor the trading of ETPs participating in the CP Program on the Exchange during all trading sessions and to detect and deter violations of Exchange rules and applicable federal securities laws.<sup>76</sup> The Exchange states that trading of the ETPs through the Exchange will be subject to the Financial Industry Regulatory Authority's ("FINRA") surveillance procedures for derivative products including ETFs,<sup>77</sup> and that the Exchange may obtain information via the Intermarket Surveillance Group ("ISG") from other exchanges that are members or affiliates of the ISG; and from issuers and public and non-public data sources such as, for example, Bloomberg.<sup>78</sup>

### II. Discussion and Commission Findings

The Commission has carefully considered the proposed rule change, as modified by Amendment No. 2 thereto, and finds that the proposed rule change,

as modified by Amendment No. 2 thereto, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to national securities exchanges. In particular, as discussed below, the Commission finds that the proposed rule change, as modified by Amendment No. 2 thereto, is consistent with Section 6(b)(4) of the Act,<sup>79</sup> which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities, and with Section 6(b)(5) of the Act,<sup>80</sup> which requires, among other things, that the rules of a national securities exchange 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, and that the rules not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Further, as required by Section 3(f) of the Act, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation.<sup>81</sup>

The CP Program, as proposed to be implemented on a pilot basis, is designed to enhance the market quality for certain lower volume ETPs participating in the program by incentivizing Market Makers to take CP assignments in such ETPs by offering an alternative fee structure for such CPs. As proposed by the Exchange, each CP must comply with a monthly quoting requirement in order to remain a CP, and must comply with a daily quoting requirement in order to be eligible for the daily CP Payments, which are higher than the standard quoting requirements applicable to Market Makers on the Exchange. Specifically, in addition to satisfying the requirements of NYSE Arca Equities Rule 7.23, with respect to the daily quoting requirement, the CP with the greatest aggregate size at the NBB or NBO at each SET will be considered to have the Winning Bid (Offer) SET, provided the CP is quoting at least 500 shares of the ETP at the NBB (NBO) and is quoting at least 100 shares on the other side of the market at a price at or within 1.2% of the CP's best bid (offer). The CPs with the highest and second highest number of Winning Bid (Offer) SETs each day will receive a portion of the daily rebate, provided

<sup>66</sup> See Notice, *supra* note 3, at 78431.

<sup>67</sup> *Id.* The Commission notes that any modifications to the terms of the proposal would require a rule filing with the Commission pursuant to Section 19(b) of the Exchange Act and Rule 19b-4 thereunder.

<sup>68</sup> The Commission notes that any proposed continuance of the CP Program or proposal to make the CP Program permanent would require a rule filing with the Commission pursuant to Section 19(b) of the Exchange Act and Rule 19b-4 thereunder.

<sup>69</sup> See Notice, *supra* note 3, at 78431.

<sup>70</sup> The Exchange believes that an initial indicator of the success of the CP Program will be the extent to which issuers elect to have their ETPs participate therein, as well as the number of Market Makers that choose to act as CPs. See Notice, *supra* note 3, at 78431, n. 36.

<sup>71</sup> See Notice, *supra* note 3, at 78431.

<sup>72</sup> *Id.* See also Amendment No. 2, *supra* note 6.

<sup>73</sup> See Notice, *supra* note 3, at 78431.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* NYSE Arca provides ArcaVision free of charge to the public via the Web site [www.ArcaVision.com](http://www.ArcaVision.com). According to the Exchange, ArcaVision offers a significant amount of trading data and market quality statistics for every Regulation NMS equity security traded in the United States, including all ETPs. Publicly available reports within ArcaVision, which include relevant comparative data, are the Symbol Summary, Symbol Analytics, Volume Comparison and Quotation Comparison reports, among others. In addition, users can create the reports on a per-symbol basis over a flexible time frame and can also take advantage of predefined symbol sets based on type of ETP or issuer. Users can also create their own symbol lists. The Exchange states that ArcaVision allows an ETP issuer to see additional information specific to its CPs and other Market Makers in each ETP via the "ArcaVision Market Maker Summary" reporting mechanism. *Id.* at 78431, n.37.

<sup>76</sup> See Notice, *supra* note 3, at 78433.

<sup>77</sup> FINRA surveils trading on the Exchange, including ETP trading, pursuant to a Regulatory Services Agreement ("RSA"). The Exchange is responsible for FINRA's performance under this RSA. *Id.* at 78432, n.39.

<sup>78</sup> *Id.* at 78433.

<sup>79</sup> 15 U.S.C. 78f(b)(4).

<sup>80</sup> 15 U.S.C. 78f(b)(5).

<sup>81</sup> See 15 U.S.C. 78c(f).

that such CPs have Winning Bid (Offer) SETs equal to at least 10% of the total Winning Bid (Offer) SETs on any trading day. With respect to the monthly quoting requirement, a CP must be quoting at least 100 shares at the NBB or NBO at least 10% of the time that the Exchange is calculating Bid (Offer) SETs. Thus, the proposal is designed to incentivize both quoting frequency at the NBBO and quoted size at the NBBO, by conditioning eligibility for CP status, eligibility for the daily CP Payment, and allocation of the daily CP Payment on whether a CP meets or exceeds various quoting requirements. In addition, the Program is separately designed to incentivize CPs to compete with each other to receive the CP Payments, as only the eligible CPs with the highest and second highest numbers of Winning Bid (Offer) SETs will receive a portion of the daily CP Payment, and if more than two CPs have an equal number of Winning Bid (Offer) SETs, the CP with the higher executed volume in the ETP on the Exchange on the particular trading day will be awarded the applicable portion of the daily CP Payment. As a result, the proposal has the potential to improve the market quality of the ETPs that participate in the CP Program by encouraging CPs to provide liquidity in such ETPs consistent with the performance standards. This potential improved market quality, were it to occur, could benefit investors in the form of enhanced liquidity, narrowed spreads, and reduced transaction costs.

In addition, because the quoted bid-ask spread in a security represents one of the main drivers of transaction costs for investors, and because high price volatility should generally deter investors from trading low-liquidity ETPs, the CP Program, were the potential benefits of the program to occur, should facilitate a more-efficient and less-uncertain trading environment for investors.<sup>82</sup> Furthermore, were the

potential benefits of the CP Program to occur, improving the liquidity of certain low-volume ETPs may lead to both an overall increase in ETP trading volume and a redistribution of trading volume toward lower-volume ETPs that would not otherwise attract sufficient liquidity to successfully participate in the market.

While the Commission believes that the CP Program has the potential to improve market quality of the ETPs participating in the Program, the Commission is concerned about unintended consequences of the CP Program. For example, the CP Program could have the potential to distort market forces because the CP Program may act to artificially influence trading in ETPs that otherwise would not be traded. Similarly, the Commission recognizes concerns about the potential negative impact on an ETP participating in the Program, such as reduced liquidity and wider spreads, when an ETP is withdrawn or terminated from the CP Program. While the Commission is mindful of these concerns, the Commission believes, for the reasons described below, that certain aspects of the CP Program could help mitigate these concerns.

First, the proposal contains disclosure provisions that will help to alert and educate potential and existing investors in the ETPs participating in the Program about the Program. Specifically, the Exchange will disclose on its Web site the following information: (i) The ETPs participating in the CP Program and the CPs assigned to each participating ETP; (ii) the date a particular ETP begins participating or ceases participating in the CP Program; (iii) the date the Exchange receives written notice of an issuer's intent to withdraw its ETP from the CP Program, or a CP's intent to withdraw from its ETP assignment(s) in the CP Program, and, in each case, the intended withdrawal date, if provided; and (iii) the amount of the CP Program Fee for each ETP. The Exchange also will include on its Web site a fair and balanced description of the CP Program, including a description of the potential benefits and risks that may be attendant with an ETP's participation in the Program. Furthermore, an issuer of an ETP that is approved to participate in the CP Program will be required to issue a press release to the public when an ETP commences or ceases participation in the CP Program, to post such press release on its Web site, and to provide on its Web site a hyperlink to the Exchange's Web page describing the CP Program. This disclosure will help to inform investors and other market participants which ETPs are participating in the CP Program, which

CPs are assigned to each ETP, the amount of CP Program Fee an issuer will incur as a result of participating in the CP Program, the amount of the daily CP Payments that CPs may be eligible to receive from the Exchange under the CP Program, and the potential benefits and risks of the Program. A wide variety of ETPs are currently listed and trading today, and the Commission believes that such disclosure could be helpful for investors and other market participants to discern which ETPs listed on the Exchange are and are not subject to the CP Program and to make informed investment decisions with respect to ETPs.<sup>83</sup>

Second, the CP Program is targeted at a subset of ETPs, namely those ETPs that are generally less liquid and which the Exchange believes might benefit most from the CP Program. Specifically, as proposed, ETPs that are otherwise eligible for the CP Program will not be eligible if they have a CADV of more than 1,000,000 shares for three consecutive months. Likewise, the CP Program will terminate with respect to a particular ETP if the ETP sustains a CADV of 1,000,000 shares or more for three consecutive months.

Finally, as proposed by the Exchange, the CP Program will be limited to a one-year pilot. The Commission believes that it is important to implement the CP Program as a pilot. Operating the CP Program as a pilot will allow assessment of whether the Program is in fact achieving its goal of improving the market quality of ETPs by increasing the supply of Market Makers seeking to take on CP assignments in ETPs, prior to any proposal or determination to make the program permanent.<sup>84</sup> In addition, approval on a pilot basis will allow the assessment, prior to any proposal or determination to make the Program permanent, of whether the Program has any unintended impact on the participating ETPs, securities not participating in the Program, or the market or market participants generally.

The Exchange has represented that during the pilot it will submit monthly reports to the Commission about market quality in respect of the CP Program and

<sup>82</sup> Transaction costs are generally defined as the penalty that an investor pays for transacting. Transaction costs have four components: Commissions; bid/ask spread; market impact; and opportunity cost. See Grinold, Kahn. *Active Portfolio Management*, Second Edition, Chapter 16. An increase in bid-ask spreads will inevitably increase the transaction costs of an investor. In addition, transactions in low-liquidity securities have a higher market impact when compared to other more liquid securities. See Albert Kyle's (1985) measure of market impact (Kyle's Lambda), defining an inverse relationship between volume and price impact. Therefore, the lower the volume of the ETP or stock, the higher the market impact of any transaction in that stock. This last effect acts as a disincentive to trading that security. Therefore, an environment where an ETP trades more often and with a larger number of shares will reduce transaction costs both through the narrowing of spreads and lower market impact.

<sup>83</sup> The concurrent exemptive relief the Commission is issuing today from Rule 102 under Regulation M concerning the CP Program also contains additional disclosure requirements. See Securities Exchange Act Release No. 71805 (Mar. 26, 2014), *supra* note 7.

<sup>84</sup> The Exchange would be required to file with the Commission any proposal to extend the CP Program beyond the pilot period or to make the program permanent pursuant to Section 19(b) of the Exchange Act and the rules and regulations thereunder. Such a filing would be published for comment in the *Federal Register* pursuant to Section 19(b) and Rule 19b-4.

that these reports will be posted on the Exchange's public Web site. The Exchange has represented that such reports will include the Exchange's analysis regarding the CP Program and whether it is achieving its goals, as well as market quality data for all ETPs listed as of the date of implementation of the CP Program and listed during the pilot period (for comparative purposes, including comparable ETPs that are listed on the Exchange but not participating in the CP Program) such as volume (CADV and NYSE Arca average daily volume), NBBO bid/ask spread differentials, CP participation rates, NYSE Arca market share, CP time spent at the inside, CP time spent within \$0.03 of the inside, percent of time NYSE Arca had the best price with the best size, CP quoted spread, CP quoted depth, and Rule 605 statistics (one-month delay). In addition, the Exchange has represented that it will provide in the monthly public report to the Commission data and analysis on the market quality of ETPs after they exceed the one million CADV threshold and "graduate" from the Program or are otherwise withdrawn or terminated from the Program. The Exchange has also represented that the monthly public reports to the Commission will also compare the CP Program against the ETP Incentive Program, including with respect to the potential impact that one program may have on the other and how the analysis described above with respect to the CP Program compares to the Exchange's similar analysis with respect to the ETP Incentive Program. The Exchange also has represented that it will provide to the Commission any other data and information related to the CP Program as may be periodically requested by the Commission in connection with the proposal. Furthermore, the Exchange has represented that issuers may utilize ArcaVision to analyze and replicate data on their own.<sup>85</sup> This information will help the Commission, the Exchange, and other interested persons to evaluate whether the CP Program has resulted in the intended benefits it is designed to achieve, any unintended consequences resulting from the CP Program, and the extent to which the CP Program alleviates or aggravates the concerns the Commission has noted, including previously-stated Commission concerns relating to issuer payments to market makers.<sup>86</sup>

For example, the Exchange and the Commission will look to assess what impact, if any, there is on the market

quality of ETPs that withdraw or are otherwise terminated from the CP Program. One way for an ETP to be terminated from the CP Program is if it exceeds the 1,000,000 CADV threshold included within the rules. The Commission recognizes that the CP Program may not, in the one-year pilot period, produce sufficient data (*i.e.*, a large number of ETPs that enter and exit the Program) to allow a full assessment of whether termination (or withdrawal) of an ETP from the Program has resulted in any unintended consequences on the market quality of the ETP or otherwise. However, the Commission believes that the proposal strikes a reasonable balance between (i) setting the threshold for "graduation" from the CP Program high enough to encourage participation in the Program and (ii) setting the threshold low enough to have a sufficient number of ETPs graduate from the CP Program within the pilot period so that the Exchange, the Commission, and other interested persons can assess the impact, if any, of the CP Program, including "graduation" of ETPs from the Program.

Furthermore, the pilot structure of the CP Program will provide information to help determine whether any provisions of the CP Program should be modified. For example, based on data from the pilot, the Exchange may determine that the 1,000,000 CADV termination threshold is not an appropriate threshold on which to base eligibility for the Program or that the Program should be time-limited.

The Commission believes that the design of the CP Program and the public disclosure requirements, coupled with implementation of the proposal on a pilot basis, should help mitigate potential concerns the Commission has noted above relating to any unintended or negative effects of the CP Program on the ETP market and investors.

The Commission has previously expressed concerns relating to payments by issuers to market makers. FINRA Rule 5250 (formerly NASD Rule 2460) prohibits FINRA members and their associated persons from directly or indirectly accepting any payment from an issuer for acting as a market maker.<sup>87</sup> FINRA Rule 5250 was implemented, in part, to address concerns about issuers paying market makers, directly or

indirectly, to improperly influence the price of an issuer's stock and because of conflict of interest concerns between issuers and market makers.<sup>88</sup> FINRA Rule 5250 was designed to preserve "the integrity of the marketplace by ensuring that quotations accurately reflect a broker-dealer's interest in buying or selling a security."<sup>89</sup> Specifically, in the NASD Rule 2460 Approval Order, the Commission found that the

decision by a firm to make a market in a given security and the question of price generally are dependent on a number of factors, including, among others, supply and demand, the firm's expectations toward the market, its current inventory position, and exposure to risk and competition. This decision should not be influenced by payments to the member from issuers or promoters. Public investors expect broker-dealers' quotations to be based on the factors described above. If payments to broker-dealers by promoters and issuers were permitted, investors would not be able to ascertain which quotations in the marketplace are based on actual interest and which quotations are supported by issuers or promoters. This structure would harm investor confidence in the overall integrity of the marketplace.<sup>90</sup>

The Commission also added that "such payments may be viewed as a conflict of interest since they may influence the member's decision as to whether to quote or make a market in a security and, thereafter, the prices that the member would quote."<sup>91</sup>

The Commission believes that a number of aspects of the CP Program mitigate the concerns that FINRA Rule 5250 was designed to address. First, the Commission believes that the terms of the CP Program are generally objective, clear, and transparent. The standards for the CP Program are set forth in proposed NYSE Arca Equities Rule 7.25 and the Exchange's Listing Fee Schedule and Trading Fee Schedule (further described above)<sup>92</sup> and describe the ETP eligibility criteria, application process, fee and payment structure, CP performance standards, CP Payment allocation, and withdrawal standards. These requirements apply to all ETPs, issuers, and CPs participating in the CP Program.<sup>93</sup>

<sup>88</sup> See Securities Exchange Act Release No. 38812 (July 3, 1997), 62 FR 37105 (July 10, 1997) (SR-NASD-97-29) ("NASD Rule 2460 Approval Order"), at 37107.

<sup>89</sup> See *id.* at 37107.

<sup>90</sup> See *id.*

<sup>91</sup> See *id.* at 37106.

<sup>92</sup> See *supra* Section I.

<sup>93</sup> While the Exchange will have some amount of discretion pursuant to the proposed rules to limit the number of ETPs that any one issuer may have in the CP Program, the Commission believes such limit would not be unfairly discriminatory, as it would be imposed on a Program-wide basis.

<sup>85</sup> See *supra* note 75 and accompanying text.

<sup>86</sup> See *infra* notes 88–91 and accompanying text.

<sup>87</sup> FINRA has amended Rule 5250 to create an exception for payments to members that are expressly provided for under the rules of a national securities exchange that are effective after being filed with, or filed with and approved by, the Commission pursuant to the requirements of the Act. See Securities Exchange Act Release No. 69398 (Apr. 18, 2013), 78 FR 24261 (Apr. 24, 2013). This amendment to FINRA Rule 5250 became effective May 15, 2013.

Second, the Exchange also will provide notification on its public Web site regarding the various aspects of the CP Program. As discussed above, this disclosure will include: (i) The ETPs participating in the CP Program and the CPs assigned to each participating ETP; (ii) the date a particular ETP begins participating or ceases participating in the CP Program; (iii) the date the Exchange receives written notice of an issuer's intent to withdraw its ETP from the CP Program, or a CP's intent to withdraw from its ETP assignment(s) in the CP Program, and, in each case, the intended withdrawal date, if provided; (iv) the amount of the CP Program Fee for each ETP; and (v) a fair and balanced description of the CP Program, including the potential benefits and risks that may be attendant with an ETP's participation in the Program. In addition, an issuer of an ETP participating in the CP Program will be required to issue a press release when an ETP commences or ceases participation in the CP Program, to post such press release on its Web site, and to provide on its Web site a hyperlink to the Exchange's Web page describing the CP Program.

And third, ETPs participating in the CP Program will be traded on the Exchange, which is a regulated market, pursuant to the current trading and reporting rules of the Exchange, and pursuant to the Exchange's established market surveillance and trade monitoring procedures. The Exchange will administer the application and acceptance of the ETPs and CPs into the CP Program, as well as the continuation in and withdrawal from the Program. The Exchange will collect the CP Program Fees from issuers and credit them to the Exchange's general revenues. A CP will be eligible to receive a CP Payment from the Exchange's general revenues only after it meets the proposed CP quoting requirements, as determined by the Exchange. Furthermore, the CP Program Fees will be paid into the Exchange's general revenues, and the CP Payments will be paid out of the Exchange's general revenues. If no eligible CP exists for particular ETP on a particular day, no CP Payment will be provided on that day. If the assigned CPs in a particular ETP do not satisfy their daily or monthly quoting requirements in any given day or month in a quarter, the issuer will not receive any credit from the Exchange following the end of the quarter. If an issuer does not pay its quarterly installment of the CP Program Fee for a particular ETP to the Exchange on time and the ETP continues to be

included in the CP Program, the Exchange will continue to credit CPs in accordance with the Trading Fee Schedule. The Commission believes that these factors, taken together, should help to mitigate the conflict of interest and other concerns that the Commission has previously identified<sup>94</sup> relating to issuers paying for market making.

The Commission believes that it is reasonable and consistent with the Act for the Exchange to limit the CP Program to certain types of securities to allow the Exchange, through a pilot, to assess whether the Program will have the desired effect of improving the market quality of these securities before implementing the Program on a permanent basis. The Commission believes that it is reasonable and consistent with the Act for the Exchange to limit the CP Program to products under the 1,000,000 CADV threshold, to support the Exchange's stated purpose to "incentivize Market Makers on the Exchange to quote and trade in certain low-volume ETPs."<sup>95</sup>

The Commission believes that the CP Program Fees are an equitable allocation of reasonable fees. First, participation in the CP Program is voluntary. An entity is free to determine whether it would be economically desirable to pay the CP Program Fee, given the permitted range of the fee, the trading characteristics of the ETP, and the anticipated benefit. If an issuer chooses to participate in the CP Program with respect to an ETP, it will have the discretion to determine the amount of the CP Program Fee it will pay, between \$50,000 and \$100,000. The CP Program Fee will be paid for by either the issuer that has an ETP participating in the CP Program or the sponsor associated with such issuer. Thus, the CP Program Fee will be incurred and paid for by an entity that has chosen to participate in, and that may potentially benefit from, the CP Program.<sup>96</sup> An entity that chooses not to

<sup>94</sup> See NASD Rule 2460 Approval Order, *supra* note 88, and *supra* notes 88–91. See also Securities Act Release No. 6334 (Aug. 6, 1981), 46 FR 42001 (Aug. 18, 1981), at Section IV.B (Treatment as Statutory Underwriter).

<sup>95</sup> See Notice, *supra* note 3, at 78427.

<sup>96</sup> Issuers of exchange-traded funds registered under the 1940 Act are prohibited from paying directly or indirectly for distribution of their shares (*i.e.*, directly or indirectly financing any activity that is primarily intended to result in the sale of shares), unless such payments are made pursuant to a plan that meets the requirements of Rule 12b–1 under the 1940 Act. Although the services at issue could be primarily intended to result in the sale of fund shares, the Commission has stated that such a determination will depend on the surrounding circumstances. See *Payment of Asset-Based Sales Loads by Registered Open-End Management Investment Companies*, Investment Company Act Release No. 16431 (June 13, 1988) ("1988 12b–1 Release"). As the Commission has noted previously,

participate will not be required to pay any additional fee beyond the standard listing and annual fees. Further, the permitted range of CP Program Fees will be the same for any issuer wishing to participate in the Program. The Commission also believes that allowing the issuer some discretion when determining the amount of the CP Program Fee amount is consistent with the Act. Not all ETPs are alike, and trading in certain products may be riskier or more costly than trading in others. The Commission believes that it is reasonable to allow each issuer to choose to participate in the Program and to determine the amount, subject to a permitted range, at which it is desirable to incentivize CPs through the CP Program Fee to improve the market quality of ETPs participating in the Program. Finally, as discussed above, the payment of the CP Program Fee will be transparent to the marketplace, as this information will be disclosed on the Exchange's Web site.

#### *Section 11(d)(1) of the Exchange Act*

Section 11(d)(1) of the Exchange Act<sup>97</sup> generally prohibits a broker-dealer from extending or maintaining credit, or arranging for the extension or maintenance of credit, on shares of new issue securities, if the broker-dealer participated in the distribution of the new issue securities within the preceding 30 days. The Commission's view is that shares of open-end investment companies and unit investment trusts registered under the 1940 Act, such as ETP shares, are distributed in a continuous manner, and broker-dealers that sell such securities are therefore participating in the "distribution" of a new issue for purposes of Section 11(d)(1).<sup>98</sup>

The Division of Trading and Markets, acting under delegated authority, granted an exemption from Section 11(d)(1) and Rule 11d1–2 thereunder for broker-dealers that have entered into an agreement with an exchange-traded fund's distributor to place orders with

if a fund makes payments that are ostensibly for a non-distribution purpose, and the recipient of those payments finances distribution, the question arises whether the fund's assets are being used indirectly for distribution. The Commission has stated that there can be no precise definition of what types of expenditures constitute indirect use of fund assets, and this determination is based on the facts and circumstances of each individual case. In addition, fund directors, particularly independent directors bear substantial responsibility for making that judgment. See *Bearing of Distribution Expenses by Mutual Funds*, Investment Company Act Release No. 11414 (October 28, 1980).

<sup>97</sup> 15 U.S.C. 78k(d)(1)

<sup>98</sup> See, *e.g.*, Exchange Act Release Nos. 6726 (Feb. 8, 1962), 27 FR 1415 (Feb. 15, 1962) and 21577 (Dec. 18, 1984), 49 FR 50174 (Dec. 27, 1984).



the distributor to purchase or redeem the exchange-traded fund's shares ("Broker-Dealer APs").<sup>99</sup> The SIA Exemption allows a Broker-Dealer AP to extend or maintain credit, or arrange for the extension or maintenance of credit, to or for customers on the shares of qualifying exchange-traded funds subject to the condition that neither the Broker-Dealer AP, nor any natural person associated with the Broker-Dealer AP, directly or indirectly (including through any affiliate of the Broker-Dealer AP), receives from the fund complex any payment, compensation, or other economic incentive to promote or sell the shares of the exchange-traded fund to persons outside the fund complex, other than non-cash compensation permitted under NASD Rule 2830(l)(5)(A), (B), or (C). This condition is intended to eliminate special incentives that Broker-Dealer APs and their associated persons might otherwise have to "push" exchange-traded fund shares.<sup>100</sup>

The CP Program will permit certain ETPs to voluntarily incur increased listing fees payable to the Exchange. In turn, the Exchange will use the fees to make CP Payments to market makers that improve the liquidity of participating issuers' securities, and thus enhance the market quality for the participating issuers. CP Payments will be accrued for, among other things, maintaining continuous, two-sided displayed quotes or orders. Receipt of the CP Payments by certain broker-dealers will implicate the conditions of the SIA Exemption<sup>101</sup> from the new issue lending restriction in Section 11(d)(1) of the Exchange Act discussed above. The Commission's view is that the CP Payments market makers will receive under the proposal are indirect payments from the fund complex to the

market maker and that those payments are compensation to promote the shares of the ETP. Therefore, a market maker that is also a broker-dealer receiving the incentives will not be able to rely on the SIA Exemption from Section 11(d)(1).<sup>102</sup> This does not mean that broker-dealers cannot participate in the CP Program; it merely means they cannot rely on the SIA Exemption<sup>103</sup> while doing so. Thus, broker-dealers that participate in the CP Program will need to comply with Section 11(d)(1) unless there is another applicable exemption.

### III. Solicitation of Comments on Amendment No. 2

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 2 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2013-141 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.
- All submissions should refer to File Number SR-NYSEArca-2013-141. 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-NYSEArca-2013-141 and should be submitted on or before April 22, 2014.

### IV. Accelerated Approval of Proposed Rule Change as Modified by Amendment No. 2

As discussed above, the Exchange submitted Amendment No. 2 to (i) change, from two-million shares to one-million shares, the CADV threshold applicable to participation eligibility in the proposed CP Program; (ii) change the CP Program Fee from a fixed amount of \$50,000 to a range of \$50,000 to \$100,000, as determined exclusively by the issuer; and (iii) clarify that the CP Program Fee cannot be refunded to an issuer. The Commission believes that the modification to the CADV threshold and the clarification regarding the CP Program Fee in Amendment No. 2 cause the proposed CP Program to more closely mirror the respective features of the Exchange's existing pilot ETP Incentive Program under NYSE Arca Equities Rule 8.800. In addition, the modification in Amendment No. 2 to the CP Program Fee causes it to be similar to the fee imposed by another exchange in a similar program.<sup>104</sup> Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>105</sup> for approving the proposed rule change, as modified by Amendment No. 2, prior to the 30th day after the date of publication of notice in the **Federal Register**.

### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>106</sup> that the proposed rule change (SR-NYSEArca-2013-141), as modified by Amendment No. 2 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>107</sup>

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

[FR Doc. 2014-07187 Filed 3-31-14; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>99</sup> See Letter from Catherine McGuire, Chief Counsel, Division of Trading and Markets, Securities and Exchange Commission to Securities Industry Association (Nov. 21, 2005) ("SIA Exemption").

<sup>100</sup> Trading and markets staff provided no-action relief from Section 11(d)(1) for broker-dealers engaging in secondary market proprietary or customer transactions in securities of Commodity-based Exchange-Traded Trusts ("CBETs") similar to the Commission's SIA Exemption. This relief is conditioned on the broker-dealer and any natural person associated with the broker-dealer not receiving from the Fund complex, directly or indirectly, any payment, compensation or other economic incentive to promote or sell Shares to persons outside of the Fund complex, other than non-cash compensation permitted under NASD Rule 2830(1)(5)(A), (B), or (C). See No-Action Letter re: DB Commodity Index Tracking Fund and DB Commodity Services LLC (Jan. 19, 2006); No-Action Letter re: Rydex Specialized Products LLC (Dec. 5, 2005); No-Action Letter re: streetTRACKS Gold Trust (Dec. 12, 2005); and No-Action Letter re: iShares COMEX Gold Trust (Dec. 12, 2005).

<sup>101</sup> See also note 100, *supra*.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> See Nasdaq Rule 5950(b)(2).

<sup>105</sup> 15 U.S.C. 78s(b)(2).

<sup>106</sup> 15 U.S.C. 78s(b)(2).

<sup>107</sup> 17 CFR 200.30-3(a)(12).