

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-77487; File No. SR-BATS-2015-105)

March 31, 2016

Self-Regulatory Organizations; BATS Exchange, Inc.; Order Granting Approval of Proposed Rule Change, as Modified by Amendment Nos. 1, 2, and 3 Thereto, to List and Trade Shares of the Elkhorn S&P GSCI Dynamic Roll Commodity ETF of Elkhorn ETF Trust

I. Introduction

On December 18, 2015, BATS Exchange, Inc. (“Exchange” or “BATS”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares (“Shares”) of the Elkhorn S&P GSCI Dynamic Roll Commodity ETF (“Fund”) of Elkhorn ETF Trust (“Trust”) under BATS Rule 14.11(i). The proposed rule change was published for comment in the Federal Register on January 4, 2016.<sup>3</sup> On February 17, 2016, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to 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 February 18, 2016, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>6</sup> On February 24, 2016,

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<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. 76776 (Dec. 28, 2015), 81 FR 120 (“Notice”).

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

<sup>5</sup> See Securities Exchange Act Release No. 77159, 81 FR 9041 (Feb. 23, 2016). The Commission designated April 1, 2016 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change. See id.

<sup>6</sup> In Amendment No. 1, which amended and replaced the proposed rule change in its entirety, the Exchange clarified the scope of the non-exchange-traded investment companies, futures, and exchange-traded options on futures to be held by the Fund and the Subsidiary. Because Amendment No. 1 to the proposed rule change does not

the Exchange filed Amendment No. 2 to the proposed rule change.<sup>7</sup> On March 22, 2016, the Exchange filed Amendment No. 3 to the proposed rule change.<sup>8</sup> The Commission received no comments on the proposal. This order grants approval of the proposed rule change, as modified by Amendment Nos. 1, 2, and 3 thereto.

## II. Exchange's Description of the Proposed Rule Change

The Exchange proposes to list and trade the Shares of the Fund pursuant to BATS Rule 14.11(i), which governs the listing and trading of Managed Fund Shares on the Exchange. The Shares will be offered by the Trust, which was established as a Massachusetts business trust on

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materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 1 is not subject to notice and comment (Amendment No. 1 to the proposed rule change is available at: <https://www.sec.gov/comments/sr-bats-2015-105/bats2015105-2.pdf>).

<sup>7</sup> In Amendment No. 2, which amended and replaced the proposed rule change, as modified by Amendment No. 1 thereto, in its entirety, the Exchange clarified: (a) that the Fund and the Subsidiary would not invest in leveraged or inverse leveraged securities of investment companies; (b) that the commodity-linked instruments in which the Fund invests will be listed and traded in the U.S. on registered exchanges; (c) that, for surveillance, the Exchange would be able to obtain information regarding trading in the underlying commodity-linked instruments; and (d) the scope of exchange-traded options on futures contracts to be held by the Fund and Subsidiary. Because Amendment No. 2 to the proposed rule change does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 2 is not subject to notice and comment (Amendment No. 2 to the proposed rule change is available at: <https://www.sec.gov/comments/sr-bats-2015-105/bats2015105-1.pdf>).

<sup>8</sup> In Amendment No. 3 to the proposed rule change, the Exchange clarified that: (a) all statements and representations made in the proposal shall constitute continued listing requirements for listing the Shares on the Exchange; (b) the issuer will advise the Exchange of any failure by the Fund to comply with the continued listing requirements; (c) pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will surveil for compliance with the continued listing requirements; and (d) if the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. Because Amendment No. 3 does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 3 is not subject to notice and comment (Amendment No. 3 to the proposed rule change is available at: <https://www.sec.gov/comments/sr-bats-2015-105/bats2015105-3.pdf>).

December 12, 2013.<sup>9</sup> Elkhorn Investments, LLC will be the investment adviser (“Adviser”) to the Fund. It is currently anticipated that day-to-day portfolio management for the Fund will be provided by the Adviser. However, the Fund and the Adviser may contract with an investment sub-adviser (“Sub-Adviser”) to provide day-to-day portfolio management for the Fund. ALPS Distributors, Inc. will be the principal underwriter and distributor of the Fund’s Shares. The Fund will contract with unaffiliated third parties to provide administrative, custodial and transfer agency services to the Fund. The Exchange represents the Adviser is not a broker-dealer, but is affiliated with a broker-dealer, and it has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition of, or changes to, the Fund’s portfolio.<sup>10</sup>

A. Exchange’s Description of the Fund’s Investments<sup>11</sup>

According to the Exchange, the Fund’s investment objective will be to provide total return which exceeds that of the S&P GSCI Dynamic Roll Index (“Benchmark”)<sup>12</sup> consistent

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<sup>9</sup> The Exchange represents that the Trust is registered under the Investment Company Act of 1940 (“1940 Act”). See Registration Statement on Form N-1A for the Trust, dated November 10, 2015 (File Nos. 333-201473 and 811-22926) (“Registration Statement”). The Exchange further states that the Trust has obtained certain exemptive relief under the 1940 Act.

<sup>10</sup> See BATS Rule 14.11(i)(7). The Exchange further represents that, in the event that (a) the Adviser or a Sub-Adviser becomes, or becomes newly affiliated with, a broker-dealer or registers as a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it will implement a fire wall with respect to its relevant personnel or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition of, 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>11</sup> The Commission notes that additional information regarding the Fund, the Trust, the Subsidiary (as defined herein), and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, calculation of net asset value (“NAV”), distributions, and taxes, among other things, can be found in the Notice and the Registration Statement, as applicable. See Notice and Registration Statement, supra notes 3 and 9, respectively.

with prudent investment management.<sup>13</sup> The Fund will seek excess return above the Benchmark through the active management of a short duration portfolio of highly liquid, high quality bonds.

The Fund will be an actively managed fund that seeks to achieve its investment objective by investing, under normal market conditions,<sup>14</sup> in exchange-traded commodity futures contracts, centrally cleared and non-centrally cleared swaps,<sup>15</sup> exchange-traded options on futures contracts, and exchange-traded commodity-linked instruments<sup>16</sup> (collectively, “Commodities”) through a wholly-owned subsidiary controlled by the Fund and organized under

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<sup>12</sup> The Benchmark is developed, maintained, and sponsored by S&P Dow Jones Indices LLC (“S&P Indices”).

<sup>13</sup> According to the Exchange, the Benchmark currently contains 24 commodity futures on physical commodities across five sectors: energy, agriculture; livestock; industrial metals; and precious metals. See Notice, *supra* note 3 (providing additional information regarding the Benchmark and its components, including a table describing each of the commodities underlying the futures contracts included in the Benchmark as of October 31, 2015, and each instrument’s trading hours, exchange, and ticker symbol).

<sup>14</sup> The term “under normal market conditions” includes, but is not limited to, the absence of extreme volatility or trading halts in the fixed income markets, futures markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance.

<sup>15</sup> Investments in non-centrally cleared swaps (through the Subsidiary) will not represent more than 20% of the Fund’s net assets. When investing in non-centrally cleared swaps, the Subsidiary will seek, where possible, to use counterparties, as applicable, whose financial status is such that the risk of default is reduced; however, the risk of losses resulting from default is still possible. The Adviser and/or a Sub-Adviser will evaluate the creditworthiness of counterparties on an ongoing basis. In addition to information provided by credit agencies, the Adviser’s and/or a Sub-Adviser’s analysis will evaluate each approved counterparty using various methods of analysis and may consider such factors as the counterparty’s liquidity, its reputation, the Adviser’s and/or a Sub-Adviser’s past experience with the counterparty, its known disciplinary history and its share of market participation.

<sup>16</sup> Exchange-traded commodity-linked instruments include only the following: (1) funds that provide exposure to commodities as would be listed under Exchange Rules 14.11(b), (c), and (i); and (2) pooled investment vehicles that invest primarily in commodities and commodity-linked instruments as would be listed under Exchange Rules 14.11(d) and 14.11(e)(2), (4), (6), (7), (8), (9), and (10).

the laws of the Cayman Islands (“Subsidiary”), thereby obtaining exposure to the commodities markets.

The Fund’s Commodities investments, in part, will be comprised of exchange-traded futures contracts on commodities that comprise the Benchmark. Although the Fund, through the Subsidiary, will generally hold many of the futures contracts included in the Benchmark, the Fund and the Subsidiary will be actively managed and will not be obligated to invest in all of (or to limit investments solely to) such futures contracts. In addition, with respect to investments in exchange-traded futures contracts, the Fund and the Subsidiary will not be obligated to invest in the same amount or proportion as the Benchmark, or be obligated to track the performance of the Benchmark. In addition to exchange-traded futures contracts, the Fund’s Commodities investments will also be comprised of the following: centrally cleared and non-centrally cleared swaps on commodities; exchange-traded options on futures contracts that provide exposure to the investment returns of the commodities markets; and exchange-traded commodity-linked instruments, without investing directly in physical commodities.

The Fund will invest in Commodities through investments in the Subsidiary and will not invest directly in physical commodities. The Fund’s investment in the Subsidiary may not exceed 25% of the Fund’s total assets. In addition to Commodities, the Fund’s assets will be invested in: (1) short-term, investment grade fixed income securities, including only the following instruments: U.S. government and agency securities,<sup>17</sup> corporate debt obligations,<sup>18</sup> and

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<sup>17</sup> Such securities are securities that are issued or guaranteed by the U.S. Treasury, by various agencies of the U.S. government, or by various instrumentalities, which have been established or sponsored by the U.S. government. U.S. Treasury obligations are backed by the “full faith and credit” of the U.S. government. Securities issued or guaranteed by federal agencies and U.S. government-sponsored instrumentalities may or may not be backed by the full faith and credit of the U.S. government.

<sup>18</sup> At least 75% of corporate debt obligations will have a minimum principal amount

repurchase agreements;<sup>19</sup> (2) money market instruments;<sup>20</sup> (3) investment companies (other than those that are commodity-linked instruments),<sup>21</sup> including both exchange traded and non-exchange-traded investment companies, that provide exposure to commodities, equity securities, and fixed income securities to the extent permitted under the 1940 Act and any applicable exemptive relief;<sup>22</sup> (4) certain bank instruments;<sup>23</sup> and (5) cash and other cash equivalents

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outstanding of \$100 million or more.

<sup>19</sup> The Fund intends to enter into repurchase agreements only with financial institutions and dealers believed by the Adviser and/or a Sub-Adviser to present minimal credit risks in accordance with criteria approved by the Trust's Board of Trustees ("Board"). The Adviser and/or a Sub-Adviser will review and monitor the creditworthiness of such institutions. The Adviser and/or a Sub-Adviser will monitor the value of the collateral at the time the transaction is entered into and at all times during the term of the repurchase agreement.

<sup>20</sup> For the Fund's purposes, money market instruments will include only the following instruments: short-term, high-quality securities issued or guaranteed by non-U.S. governments, agencies and instrumentalities; non-convertible corporate debt securities with remaining maturities of not more than 397 days that satisfy ratings requirements under Rule 2a-7 under the 1940 Act; money market mutual funds; and deposits and other obligations of U.S. and non-U.S. banks and financial institutions. In addition, the Fund may invest in commercial paper (short-term unsecured promissory notes), but only if the commercial paper has received the highest rating from at least one nationally recognized statistical rating organization or, if unrated, has been judged by the Adviser and/or a Sub-Adviser to be of comparable quality.

<sup>21</sup> According to the Exchange, the Fund may invest in the securities of certain other investment companies in excess of the limits imposed under the 1940 Act pursuant to an exemptive order obtained by the Trust and the Adviser from the Commission. The exchange-traded investment companies in which the Fund may invest include Index Fund Shares (as described in Rule 14.11(c)), Portfolio Depository Receipts (as described in Rule 14.11(b)), and Managed Fund Shares (as described in Rule 14.11(i)). The non-exchange-traded investment companies in which the Fund may invest include all non-exchange-traded investment companies that are not money market mutual funds, as described above. While the Fund and the Subsidiary may invest in inverse commodity-linked instruments and securities of investment companies, the Fund and the Subsidiary will not invest in leveraged or inverse leveraged (e.g., 2X or -3X) commodity-linked instruments or securities of investment companies.

<sup>22</sup> The exchange-traded investment companies and commodity-linked instruments in which the Fund invests will be listed and traded in the U.S. on registered exchanges.

<sup>23</sup> The term "certain bank instruments" includes only the following instruments: certificates

(collectively, “Other Investments”). The Fund will use the Other Investments as investments, to provide liquidity, and to collateralize the Subsidiary’s commodity exposure on a day-to-day basis.

The Fund’s investment in the Subsidiary will be designed to help the Fund achieve exposure to commodity returns in a manner consistent with the federal tax requirements applicable to the Fund and other regulated investment companies. The Fund intends to qualify for, and to elect to be treated as, a separate regulated investment company under Subchapter M of the Internal Revenue Code.

**B. Exchange’s Description of the Subsidiary’s Investments**

The Subsidiary will generally seek to make investments in Commodities, and its portfolio will be managed by the Adviser or a Sub-Adviser.<sup>24</sup> The Adviser or a Sub-Adviser will use its discretion to determine the percentage of the Fund’s assets allocated to the Commodities held by the Subsidiary that will be invested in exchange-traded commodity futures contracts, centrally cleared and non-centrally cleared swaps, exchange-traded options on futures contracts, and exchange-traded commodity-linked instruments. In this regard, under normal market conditions,

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of deposit issued against funds deposited in a bank or savings and loan association; bankers’ acceptances, which are short-term credit instruments used to finance commercial transactions; and bank time deposits, which are monies kept on deposit with banks or savings and loan associations for a stated period of time at a fixed rate of interest.

<sup>24</sup> The Exchange states that the Subsidiary will not be registered under the 1940 Act and will not be directly subject to its investor protections, except as noted in the Registration Statement. However, the Subsidiary will be wholly-owned and controlled by the Fund. Therefore, the Fund’s ownership and control of the Subsidiary will prevent the Subsidiary from taking action contrary to the interests of the Fund or its shareholders. The Board will have oversight responsibility for the investment activities of the Fund, including its expected investment in the Subsidiary, and the Fund’s role as the sole shareholder of the Subsidiary. The Subsidiary will also enter into separate contracts for the provision of custody, transfer agency, and accounting agent services with the same or with affiliates of the same service providers that provide those services to the Fund.

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

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

C. Exchange's Description of Commodities Regulation

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

D. Exchange's Description of the Fund's Investment Restrictions

While the Fund will be permitted to borrow as permitted under the 1940 Act, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (i.e., 2X



and -3X) of the Benchmark. In addition, the Fund may not invest more than 25% of the value of its total assets in securities of issuers in any one industry or group of industries. This restriction will not apply to obligations issued or guaranteed by the U.S. government, its agencies or instrumentalities, or securities of other investment companies.

The Subsidiary's shares will be offered only to the Fund, and the Fund will not sell shares of the Subsidiary to other investors. The Fund and the Subsidiary will not invest in any non-U.S. equity securities (other than shares of the Subsidiary). The Fund will not purchase securities of open-end or closed-end investment companies, except in compliance with the 1940 Act or any applicable exemptive relief. In addition, the Exchange represents that, with respect to the futures contracts and exchange-traded options on futures contracts in which the Subsidiary invests, not more than 10% of the weight (to be calculated as the value of the contract divided by the total absolute notional value of the Subsidiary's futures and options contracts) of the futures and options contracts held by the Subsidiary, in the aggregate, shall consist of instruments whose principal trading market is a market from which the Exchange may not obtain information regarding trading in the futures contracts and exchange-traded options on futures contracts by virtue of: (a) its membership in the Intermarket Surveillance Group ("ISG"); or (b) a comprehensive surveillance sharing agreement.

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including securities deemed illiquid by the Adviser.<sup>25</sup> The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of

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<sup>25</sup> In reaching liquidity decisions, the Adviser may consider the following factors: the frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace trades (e.g., the time needed to dispose of the security, the method of soliciting offers, and the mechanics of transfer).

current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets. Illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets, as determined in accordance with Commission staff guidance.

### III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act<sup>26</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>27</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>28</sup> which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, 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 also finds that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Act,<sup>29</sup> which sets forth the finding of Congress 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

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<sup>26</sup> 15 U.S.C. 78f.

<sup>27</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>28</sup> 15 U.S.C. 78f(b)(5).

<sup>29</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

transactions in, securities. Quotation and last-sale information for the Shares will be available on the facilities of the Consolidated Tape Association (“CTA”). An estimated value, defined in BATS Rule 14.11(i)(3)(C) as the Intraday Indicative Value (“IIV”), that reflects an estimated intraday value of the Fund’s portfolio (including the Subsidiary’s portfolio), will be disseminated. The IIV will be based upon the current value for the components of the Disclosed Portfolio (as defined below) and will be updated and widely disseminated by one or more major market data vendors and broadly displayed at least every 15 seconds during the Exchange’s Regular Trading Hours.<sup>30</sup> On each business day, before commencement of trading in Shares during Regular Trading Hours,<sup>31</sup> the Fund will disclose on its website the identities and quantities of the portfolio of securities, Commodities, and other assets (“Disclosed Portfolio” as defined in Rule 14.11(i)(3)(B)) held by the Fund and the Subsidiary that will form the basis for the Fund’s calculation of NAV at the end of the business day.<sup>32</sup> The NAV of the Fund’s Shares generally will be calculated once daily Monday through Friday as of the close of regular trading on the New York Stock Exchange, generally 4:00 p.m. Eastern Time.<sup>33</sup> Additionally,

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<sup>30</sup> According to the Exchange, several major market data vendors display and/or make widely available Intraday Indicative Values published via the CTA or other data feeds.

<sup>31</sup> Regular Trading Hours are 9:30 a.m. to 4:00 p.m. Eastern Time.

<sup>32</sup> According to the Exchange, the Fund’s disclosure of derivative positions in the Disclosed Portfolio will include information that market participants can use to value these positions intraday. On a daily basis, the Disclosed Portfolio displayed on the Fund’s website will include the following information regarding each portfolio holding, as applicable to the type of holding: ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding, such as the type of swap), the identity of the security, commodity, or other asset or instrument underlying the holding, if any; for options, the option strike price; quantity held (as measured by, for example, par value, notional value, or number of shares, contracts, or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and percentage weighting of the holding in the Fund’s portfolio. The website and information will be publicly available at no charge.

<sup>33</sup> In determining the value of the assets held by the Fund and the Subsidiary, the Fund’s

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and the Subsidiary's investments will be generally valued using market valuations. A market valuation generally means a valuation (i) obtained from an exchange, a pricing service, or a major market maker (or dealer), (ii) based on a price quotation or other equivalent indication of value supplied by an exchange, a pricing service, or a major market maker (or dealer), or (iii) based on amortized cost. The Fund and the Subsidiary may use various pricing services or discontinue the use of any pricing service. A price obtained from a pricing service based on such pricing service's valuation matrix may be considered a market valuation. If available, debt securities and money market instruments with maturities of more than 60 days will typically be priced based on valuations provided by independent, third party pricing agents. Such values will generally reflect the last reported sales price if the security is actively traded. The third party pricing agents may also value debt securities at an evaluated bid price by employing methodologies that utilize actual market transactions, broker supplied valuations, or other methodologies designed to identify the market value for such securities. Debt obligations with remaining maturities of 60 days or less may be valued on the basis of amortized cost, which approximates market value. If such prices are not available, the security will be valued based on values supplied by independent brokers or by fair value pricing, as described below. Futures contracts will be valued at the settlement price established each day by the board or exchange on which they are traded. Exchange-traded options will be valued at the closing price in the market where such contracts are principally traded. Swaps will be valued based on valuations provided by independent, third-party pricing agents. Securities of non-exchange-traded investment companies will be valued at NAV. Equity securities listed on a securities exchange (including exchange-traded commodity linked instruments and exchange-traded investment companies), market or automated quotation system for which quotations are readily available (except for securities traded on The NASDAQ Stock Market LLC ("NASDAQ") and the London Stock Exchange Alternative Investment Market ("LSE AIM")) will be valued at the last reported sale price on the primary exchange or market on which they are traded on the valuation date (or at approximately 4:00 p.m. Eastern Time if a security's primary exchange is normally open at that time). For a security that trades on multiple exchanges, the primary exchange will generally be considered to be the exchange on which the security generally has the highest volume of trading activity. If it is not possible to determine the last reported sale price on the relevant exchange or market on the valuation date, the value of the security will be taken to be the most recent mean between the bid and asked prices on such exchange or market on the valuation date. Absent both bid and asked prices on such exchange, the bid price may be used. For securities traded on NASDAQ or LSE AIM, the official closing price will be used. If such prices are not available, the security will be valued based on values supplied by independent brokers or by fair value pricing, as described below. The prices for foreign instruments will be reported in local currency and converted to U.S. dollars using currency exchange rates. Exchange rates will be provided daily by recognized independent pricing agents. In the event that current market valuations are not readily available or such valuations do not reflect current market values, the affected investments will be valued using fair value pricing pursuant to the pricing policy and procedures approved by the Board in accordance with the 1940 Act. Fair value pricing may require subjective determinations about the value of an asset and

information regarding market price and volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. The previous day's closing price and trading volume information for the Shares will also be published daily in the financial section of newspapers. Intra-day executable price quotations on the securities and other assets held by the Fund and the Subsidiary will be available from major broker-dealer firms or on the exchange on which they are traded, as applicable. Intra-day price information on the securities and other assets held by the Fund and the Subsidiary will also be available through subscription services, such as Bloomberg and Thomson Reuters, which can be accessed by authorized participants and other investors.<sup>34</sup> Daily trading volume information for the Fund will also be available in the financial section of newspapers, through subscription services such as Bloomberg, Thomson Reuters, and International Data Corporation, which can be accessed by authorized participants and other investors, as well as through other electronic services, including major public websites. The Fund's website will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information. Information relating to the Benchmark, including its constituents, weightings, and changes to its constituents, will be available on the website of S&P Indices.

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may result in prices that differ from the value that would be realized if the asset was sold.

<sup>34</sup> More specifically, the Exchange represents that pricing information for exchange-traded commodity futures contracts, exchange-traded options on futures contracts, exchange-traded commodity-linked instruments, exchange-traded investment companies other than exchange-traded commodity-linked instruments will be available on the exchanges on which they are traded and through subscription services. Pricing information for securities of non-exchange-traded investment companies will be available through the applicable fund's website or major market data vendors. Pricing information for swaps, fixed income securities, and money market instruments will be available through subscription services, broker-dealer firms, and/or pricing services. Additionally, the Trade Reporting and Compliance Engine ("TRACE") of the Financial Industry Regulatory Authority ("FINRA") will be a source of price information for certain fixed income securities held by the Fund.

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 Commission notes that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily, and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.<sup>35</sup> Trading in the Shares also will be subject to BATS Rule 14.11(i)(4)(B)(iv), which sets forth circumstances under which Shares of the Fund may be halted.<sup>36</sup> The Exchange may halt trading in the Shares if trading is not occurring in the securities, Commodities, or other assets constituting the Disclosed Portfolio of the Fund and the Subsidiary, or if other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.<sup>37</sup> Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio 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 portfolio.<sup>38</sup> The Exchange states that it prohibits the distribution of material, non-public information by its employees. The Exchange also represents that the Adviser is affiliated with a broker-dealer, and the Adviser has implemented a fire wall with respect to that broker-dealer affiliate regarding access to

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<sup>35</sup> See BATS Rule 14.11(i)(4)(A)(ii).

<sup>36</sup> See BATS Rule 14.11(i)(4)(B)(iv).

<sup>37</sup> See BATS Rule 14.11(i)(4)(B)(iii) (providing additional considerations for the suspension of trading in or removal from listing of Managed Fund Shares on the Exchange). With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. The Exchange will halt trading in the Shares under the conditions specified in BATS Rule 11.18. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

<sup>38</sup> See BATS Rule 14.11(i)(4)(B)(ii)(B).

information concerning the composition of, or changes to, the Fund's portfolio.<sup>39</sup> Moreover, the Exchange represents that it may obtain information regarding trading in the Shares and the underlying shares in exchange-traded investment companies, commodity-linked instruments, futures, and options on futures via ISG, from other exchanges who are members or affiliates of ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

The Exchange further 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 be subject to BATS Rule 14.11(i), which sets forth the initial and continued listing criteria applicable to Managed Fund Shares.
- (2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

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<sup>39</sup> See supra note 10 and accompanying text. 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 any Sub-Adviser and their related personnel are subject to the provisions of Rule 204A-1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A-1 under the Advisers Act. In addition, Rule 206(4)-7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

- (3) The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Managed Fund Shares.
- (4) The Exchange will communicate as needed regarding trading in the Shares and in the exchange-traded Commodities and exchange-traded investment companies not included within the definition of Commodities (together, "Exchange Traded Instruments") held by the Fund and the Subsidiary with other markets and other entities that are members of ISG and may obtain trading information regarding trading in the Shares and in the Exchange Traded Instruments held by the Fund and the Subsidiary from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and in the Exchange Traded Instruments held by the Fund and the Subsidiary from markets and other entities that are members of ISG, which includes securities and futures exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement. The Exchange also will be able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's TRACE.
- (5) With respect to the futures contracts and exchange-traded options on futures contracts in which the Subsidiary invests, not more than 10% of the weight (to be calculated as the value of the contract divided by the total absolute notional value



of the Subsidiary's futures and options contracts) of the futures and options contracts held by the Subsidiary, in the aggregate, shall consist of instruments whose principal trading market is a market from which the Exchange may not obtain information regarding trading in the futures contracts and exchange-traded options on futures contracts by virtue of: (a) its membership in ISG; or (b) a comprehensive surveillance sharing agreement.

- (6) Prior to the commencement of trading, the Exchange will inform its members in an Information Circular (“Circular”) of the special characteristics and risks associated with trading the Shares. Specifically, the Circular will discuss the following: (a) the procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (b) BATS Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (c) how information regarding the IIV and the Disclosed Portfolio is disseminated; (d) the risks involved in trading the Shares during the Pre-Opening<sup>40</sup> and After Hours Trading Sessions<sup>41</sup> when an updated IIV will not be calculated or publicly disseminated; (e) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.
- (7) For initial and continued listing, the Fund and the Subsidiary must be in compliance with Rule 10A-3 under the Act.<sup>42</sup>

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<sup>40</sup> The Pre-Opening Session is from 8:00 a.m. to 9:30 a.m. Eastern Time.

<sup>41</sup> The After Hours Trading Session is from 4:00 p.m. to 5:00 p.m. Eastern Time.

<sup>42</sup> See 17 CFR 240.10A-3.

- (8) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including securities deemed illiquid by the Adviser under the 1940 Act.
- (9) The Fund will invest in Commodities through investments in the Subsidiary and will not invest directly in physical commodities. The Fund's investment in the Subsidiary may not exceed 25% of the Fund's total assets. The Fund and the Subsidiary will not invest in any non-U.S. equity securities (other than shares of the Subsidiary).
- (10) Investments in non-centrally cleared swaps (through the Subsidiary) will not represent more than 20% of the Fund's net assets.
- (11) At least 75% of corporate debt obligations will have a minimum principal amount outstanding of \$100 million or more. In addition, the exchange-traded investment companies and commodity-linked instruments in which the Fund invests will be listed and traded in the U.S. on registered exchanges.
- (12) While the Fund will be permitted to borrow as permitted under the 1940 Act, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (i.e., 2X and -3X) of the Benchmark.
- (13) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.

The Exchange represents that all statements and representations made in the filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures constitute continued listing requirements for listing the Shares on the Exchange. In addition, the issuer has represented to the

Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will surveil for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. This approval order is based on all of the Exchange's representations and description of the Fund, including those set forth above and in the Notice. The Commission notes that the Fund and the Shares must comply with the requirements of BATS Rule 14.11(i), including those set forth in this proposed rule change, to be listed and traded on the Exchange on an initial and continuing basis.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1, 2, and 3 thereto, is consistent with Section 6(b)(5) of the Act<sup>43</sup> and the rules and regulations thereunder applicable to a national securities exchange.

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<sup>43</sup> 15 U.S.C. 78f(b)(5).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>44</sup> that the proposed rule change (SR-BATS-2015-105), as modified by Amendment Nos. 1, 2, and 3 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>45</sup>

Robert W. Errett  
Deputy Secretary

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<sup>44</sup> 15 U.S.C. 78s(b)(2).

<sup>45</sup> 17 CFR 200.30-3(a)(12).