Exchange to offer ETPs the ability to list on the Exchange without having to pay any annual fees. As such, the proposal is a competitive proposal that is intended to attract additional ETP listings, which will, in turn, benefit the Exchange and all other BATS-listed ETPs.

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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and paragraph (f) of Rule 19b–4 thereunder[13] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### IV. Solicitation of Comments

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

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BATS–2014–050 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–BATS–2014–050. 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 such filing also will be available for inspection and copying at the principal offices 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–BATS–2014–050, and should be submitted on or before November 19, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014–25668 Filed 10–28–14; 8:45 am]

**BILLING CODE 8011–01–P**

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f).

[14] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–73424; File No. SR–NYSEArca–2014–10]**

### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Disapproving a Proposed Rule Change To Adopt NYSE Arca Equities Rule 8.900, Which Permits the Listing and Trading of Managed Portfolio Shares, and To List and Trade Shares of the ActiveShares Large-Cap Fund, ActiveShares Mid-Cap Fund, and ActiveShares Multi-Cap Fund Pursuant to That Rule

October 24, 2014.

On February 7, 2014, NYSE Arca, Inc. (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt new NYSE Arca Equities Rule 8.900, which would govern the listing and trading of Managed Portfolio Shares, and to list and trade shares of the ActiveShares Large-Cap Fund, ActiveShares Mid-Cap Fund, and ActiveShares Multi-Cap Fund (each a ''Fund'' and, collectively, ''Funds'') under proposed NYSE Arca Equities Rule 8.900.[3] The proposed rule change was published for comment in the **Federal Register** on February 26, 2014.[4] The Commission received one comment letter on the proposed rule change during the initial comment period.[5]

On April 7, 2014, pursuant to Section 19(b)(2) of the Exchange Act,[6] 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 approve or disapprove the proposed rule change.[7] The Commission received two additional comment letters on the proposed rule change, including a letter from the Exchange in support of its proposal.[8] On May 27, 2014, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act [9] to determine whether to approve or disapprove the proposed rule change.[10] The Commission

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

[2] 17 CFR 240.19b–4.

[3] The Commission notes that Precidian ETFs Trust, which would be the issuer of the Funds, filed an Application for an Order under Section 6(c) of the 1940 Act for exemptions from various provisions of the 1940 Act and rules thereunder (File No. 812–14116), dated July 18, 2013 (''Exemptive Application''). The Commission published notice of this application (''Notice of Application for Exemptive Relief'') on October 21, 2014. *See* Investment Company Act Release No. 31300 (Oct. 21, 2014) (Precidian ETFs Trust, et al.; Notice of Application).

[4] *See* Securities Exchange Act Release No. 71588 (Feb. 20, 2014), 79 FR 10848 (''Notice''), *available at http://www.sec.gov/rules/sro/nysearca/2014/34-71588.pdf.*

[5] *See* Letter from Gary L. Gastineau, President, ETF Consultants.com, Inc., to Elizabeth M. Murphy, Secretary, Commission (Mar. 18, 2014) (''Gastineau Letter''). All comments on this proposal (*see also* notes 8 and 11, *infra*) are *available at http://www.sec.gov/comments/sr-nysearca-2014-10/nysearca201410.shtml.*

[6] 15 U.S.C. 78s(b)(2).

[7] *See* Securities Exchange Act Release No. 71895, 79 FR 20285 (Apr. 11, 2014). The Commission designated a longer period within which to take action on the proposed rule change and designated May 27, 2014, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

[8] *See* Letter from Dennis J. DeCore, Former Co-Head U.S. Index Arbitrage (1997–2007), Nomura Securities, to Elizabeth M. Murphy, Secretary, Commission (Apr. 8, 2014) (''DeCore Letter''); Letter from Martha Redding, Chief Counsel and Assistant Corporate Secretary, NYSE Euronext, to Secretary, Commission (May 14, 2014) (''Response Letter'').

[9] 15 U.S.C. 78s(b)(2)(B).

[10] *See* Securities Exchange Act Release No. 72255, 79 FR 31362 (June 2, 2014). Specifically, the

received a second letter from one of the commenters.[11] On August 22, 2014, the Commission designated a longer period for Commission action on the proposed rule change.[12] The Commission subsequently received an additional comment letter regarding the proposed rule change.[13]

This Order disapproves the proposed rule change.

**I. Description of the Proposal**

The Exchange proposes: (1) To adopt new NYSE Arca Equities Rule 8.900 to permit the listing and trading, or trading pursuant to unlisted trading privileges (''UTP''), of Managed Portfolio Shares, which are securities issued by an actively managed open-end investment management company; and (2) to list and trade shares (''Shares'') of the Funds under proposed NYSE Arca Equities Rule 8.900.[14] The discussion below summarizes the Exchange's proposal, details of which are described in the Notice.[15]

*A. Proposed Listing Rules*

The Exchange's proposal defines the term ''Managed Portfolio Share'' as a security that (a) is issued by a registered investment company (''Investment Company'') organized as an open-end management investment company or similar entity that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies; (b) is issued in any number of shares for a cash amount equal to the next determined net asset value (''NAV''); (c) may be redeemed for cash by any Retail Investor (as defined below) in any size less than a Redemption Unit (as defined below) for a cash amount equal to the next determined NAV; and (d) when aggregated in a number of shares equal to a Redemption Unit or multiples thereof, may be redeemed by or through an Authorized Participant,[16] with payment to be made, through a blind trust established for the Authorized Participant's benefit, in the form of securities, cash, or both with a value equal to the next determined NAV.

While funds issuing Managed Portfolio Shares would be actively managed and, to that extent, would be similar to Managed Fund Shares (which are actively managed funds listed and traded under NYSE Arca Equities Rule 8.600), Managed Portfolio Shares differ from Managed Fund Shares in the following significant respects.

- In contrast to Managed Fund Shares, for which a ''Disclosed Portfolio'' is required to be disseminated at least once daily,[17] the portfolio for an issue of Managed Portfolio Shares would be disclosed once quarterly in accordance with disclosure requirements otherwise applicable to open-end investment companies registered under the 1940 Act.[18]
- In connection with the redemption of shares in Redemption Unit[19] size, the in-kind delivery of any portfolio securities would generally be effected through a blind trust for the benefit of the redeeming Authorized Participant, and the blind trust would liquidate the portfolio securities pursuant to standing instructions from the Authorized Participant without disclosing the identity of those securities to the Authorized Participant.
- Investors, including ''Retail Investors,''[20] would be able to purchase shares either (a) in the secondary markets (e.g., the Exchange) at market prices or (b) for cash directly from a Fund in any amount on any day a fund determines its NAV, as described in more detail below.
- As with traditional open-end investment companies, Retail Investors would be able to redeem shares for cash directly from a fund on any day and in any size less than a Redemption Unit at the fund's NAV.[21]

For each series of Managed Portfolio Shares, an estimated value, defined in the proposed rules as the ''Portfolio Indicative Value'' (''PIV''), that reflects an estimated intraday value of a fund's portfolio, based on the last market price or last sale price, would be disseminated. The PIV would be based upon all of a Fund's holdings as of the close of the prior business day and would be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Core Trading Session (normally, 9:30 a.m. to 4:00 p.m., Eastern Time).

The Exchange's proposal provides that the Exchange would file separate proposals under Section 19(b) of the Exchange Act before listing and trading any additional series of Managed Portfolio Shares.

*B. Description of the Funds*

The portfolio for each Fund would consist primarily of stocks in the Russell 3000 Index (which consists of stocks included in the Russell 1000 Index and the Russell 2000 Index) and shares issued by other exchange-traded funds (''ETFs) that invest primarily in shares of issuers in the Russell 3000 Index. The

Commission instituted proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,'' and ''to protect investors and the public interest.'' *See id.,* 79 FR at 31368 (text accompanying n.86).

[11] *See* Letter from Gary L. Gastineau, President, ETF Consultants.com, Inc., to Elizabeth M. Murphy, Secretary, Commission (June 23, 2014) (''Second Gastineau Letter'').

[12] *See* Securities Exchange Act Release No. 72901, 79 FR 51380 (Aug. 28, 2014) (designating October 24, 2014 as the date by which the Commission must either approve or disapprove the proposed rule change).

[13] *See* Letter from Reginald M. Browne, Senior Managing Director—ETF Group, Cantor Fitzgerald & Co, to Mary Jo White, Chair, Commission (Oct. 20, 2014) (''Browne Letter'').

[14] The Exchange also proposes to amend NYSE Arca Equities Rule 7.34(a)(4)(A) (Trading Sessions) to include Managed Portfolio Shares in the trading halt provision for shares traded pursuant to UTP during the Exchange's Opening Session.

[15] *See* Notice, *supra* note 4. Additional information regarding the Precidian ETFs Trust and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions, and taxes is available in the registration statement filed by the Precidian ETFs Trust on January 22, 2014, on Form N–1A under the Securities Act of 1933 and under the Investment Company Act of 1940 (''1940 Act'') relating to the Funds (File Nos. 333–171987 and 811–22524) (''Registration Statement'').

[16] Certain large market participants, typically broker-dealers, can become ''Authorized Participants'' with respect to the Funds. Each Authorized Participant would enter into a contractual relationship with a Fund or Funds, allowing it to engage in redemptions of Shares directly with the issuer.

[17] NYSE Arca Equities Rule 8.600(c)(2) defines the term ''Disclosed Portfolio'' as the ''identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company's calculation of net asset value at the end of the business day.'' NYSE Arca Equities Rule 8.600(d)(2)(B)(i) requires that the Disclosed Portfolio be disseminated at least once daily and that it be made available to all market participants at the same time.

[18] A mutual fund is required to file with the Commission its complete portfolio schedules for the second and fourth fiscal quarters on Form N–SAR under the 1940 Act, and to file its complete portfolio schedules for the first and third fiscal quarters on Form N–Q under the 1940 Act, within 60 days of the end of the quarter. Form N–Q requires funds to file the same schedules of investments that are required in annual and semi-annual reports to shareholders. These forms are available to the public on the Commission's Web site at *http://www.sec.gov/.*

[19] A ''Redemption Unit'' is a specified number of Managed Portfolio Shares used for determining whether a retail investor may redeem for cash. According to the Notice, a Redemption Unit is currently 50,000 Shares.

[20] Under the proposal, a ''Retail Investor'' is defined as (i) a natural person; (ii) a trust established exclusively for the benefit of a natural person or a group of related family members; or (iii) a tax deferred retirement plan where investments are selected by a natural person purchasing for its own account.

[21] With respect to the three Funds that are the subject of the proposal, the Exchange has represented that fees for creations and redemptions by Retail Investors would not exceed two percent, in accordance with the requirements of Rule 22c–2 under the 1940 Act.

ActiveShares Large Cap Fund would invest primarily in securities included in the Russell 1000 Index and in ETFs that primarily invest in stocks in the Russell 1000 Index. The ActiveShares Mid-Cap Fund would invest primarily in securities that are included in the Russell 2000 Index and in ETFs that primarily invest in stocks in the Russell 2000 Index. And the ActiveShares Multi-Cap Fund would invest primarily in securities included in the Russell 3000 Index and in ETFs that primarily invest in stocks in the Russell 3000 Index. All exchange-listed equity securities in which the Funds would invest would be listed and traded on a U.S. national securities exchange.

Each Fund would target an overall net equity market exposure of between 70% and 130% of the Fund's assets. Each Fund would purchase securities that its portfolio managers believed to be undervalued and would sell short securities that the portfolio managers believed to be overvalued. Under normal market conditions,[22] each Fund's net long equity market exposure would not exceed 130%, and its net short equity market exposure would not exceed 30%, but the portfolio managers might at times exceed these percentages.

*Other Investments.* While each Fund, under normal market conditions, would invest primarily in stocks included in the Russell 3000 Index and ETFs, as described above, each Fund would be able to invest its remaining assets in repurchase agreements and reverse repurchase agreements, high-quality money market instruments, and the securities of other investment companies to the extent allowed by law.

## II. Summary of the Comments Received

As noted above, the Commission received two letters from the same commenter opposing the proposed rule change,[23] two letters from commenters supporting the proposal, and a letter from the Exchange responding to the opposing commenter's objections. Comments on the proposal raised two broad issues—(1) the effectiveness of arbitrage in the absence of daily portfolio disclosure, and (2) the benefits and drawbacks of the Funds' unique creation and redemption processes—as well as a number of other issues that are narrower in scope.

### *A. The Effectiveness of Arbitrage in the Absence of Daily Portfolio Disclosure*

The opposing commenter predicts that, compared to most existing ETFs, the Shares would probably trade with significantly wider bid-ask spreads, with more variable premiums and discounts, or with both, because of what the opposing commenter characterizes as the unreliability of the Funds' proposed method for ensuring secondary market trading efficiency.[24] The opposing commenter states that the Funds' market makers would have only indirect, and likely imperfect, information about Fund holdings.[25] As a result, according to the opposing commenter, effectively arbitraging the Funds would be significantly more difficult than the arbitrage for most existing foreign ETFs.[26]

The opposing commenter argues that there is no support for the Exchange's contention that existing ETFs holding portfolios of foreign securities, such as index-based ETFs holding Asian stocks, have demonstrated efficient pricing characteristics even though they do not provide opportunities for riskless arbitrage transactions during much of the trading day.[27] The opposing commenter also cites a draft academic working paper for the propositions that market trading efficiency varies significantly by type and size of ETF; that funds with high share trading volumes, liquid underlying holdings, and efficient arbitrage mechanisms trade with relatively tight bid-ask spreads and more stable premiums and discounts; and that funds lacking these characteristics generally trade with wider spreads and more variable premiums and discounts.[28]

Another commenter predicts that trading spreads in Managed Portfolio Shares would not be as ''tight'' as trading spreads in the SPY or QQQ (where futures, options, and equity portfolios can be used as a pure hedge), but that a frequent update of the intraday indicative value would allow market maker spreads to be reasonable.[29] A third commenter, who is a market maker in ETFs, states that, in his professional opinion and after significant analysis, ''given a clearly defined investment objective within a known universe of securities, efficient markets can and will be made in ETFs utilizing Precidian's Blind Trust Structure.''[30]

The Exchange responds to the opposing commenter that, as set forth in the Notice, market makers have indicated that the available information regarding the Shares would be sufficient for arbitrage and hedging purposes.[31] Additionally, the Exchange states that, based on discussions with market makers, it expects that market makers would agree to act as lead market makers (''LMMs'') in the Shares and believes that no market maker would accept an LMM assignment if it were not entirely comfortable in its ability to hedge its positions.[32] The Exchange argues that the opposing commenter offers no direct support for his doubts regarding efficient secondary market trading, and the Exchange asserts that these LMMs are uniquely suited to prospectively assess the effectiveness of arbitrage in the shares.[33]

Regarding the Exchange's assertion that market makers will be able to make efficient and liquid markets priced near the PIV as long as an accurate PIV is disseminated every 15 seconds and market makers have knowledge of a fund's means of achieving its investment objective, the opposing commenter states that, for a number of reasons, the dissemination of a PIV by the Funds is likely to prove ineffective in ensuring alignment of secondary market prices for the Shares with the values of the underlying portfolios.[34] The opposing commenter asserts that, during periods of rapid market movement, the use of last-sale prices to calculate a PIV, coupled with the

[22] The terms ''normally'' and ''under normal market conditions'' would include, but not be limited to, the absence of extreme volatility or trading halts in the equity markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure 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.

[23] This commenter notes that he has a retained economic interest in a product that may be competitive with Managed Portfolio Shares and states that his views on the Exchange's filing ''may be considered subject to a conflict of interest.'' Gastineau Letter, *supra* note 5, at 1, n.1. The Exchange asserts that the concerns of the opposing commenter are driven by competitive motives and that these concerns should not affect the Commission's decision to approve or disapprove the proposed rule change. *See* Response Letter, *supra* note 8, at 5. Instead, according to the Exchange, different proposals to list and trade actively managed EFTs without daily portfolio disclosure should be assessed on their individual merits and risks. *See id.* The opposing commenter asserts that the Commission should not ignore his comments just because they are raised by a competitor. *See* Second Gastineau Letter, *supra* note 11, at 7. The opposing commenter argues that the Commission should consider legitimate issues raised by any credible source, and he asserts that his comments are made in the public interest and, to the best of his ability, are not influenced by any conflict. *See id.*

[24] *See* Gastineau Letter, *supra* note 5, at 6.

[25] *See id.* at 8.

[26] *See id.*

[27] *See id.*

[28] *See id.* (citing Antti Petajisto, *Inefficiencies in the Pricing of Exchange-Traded Funds* (Working Paper Sept. 20, 2013 (''Petajisto Study'')).

[29] *See* DeCore Letter, *supra* note 8, at 1.

[30] *See* Browne Letter, *supra* note 13, at 2.

[31] *See* Response Letter, *supra* note 8, at 2.

[32] *See id.*

[33] *See id.*

[34] *See* Gastineau Letter, *supra* note 5, at 2–3.

dissemination of the PIV only every 15 seconds, would mean that the PIV would be a lagging indicator of actual portfolio values.[35] Additionally, the opposing commenter asserts that the PIV may reflect clearly erroneous values for securities that have not yet opened for trading on a particular business day or that are subject to an intraday interruption in trading.[36] The opposing commenter also criticizes the Exchange's representation that the adviser and calculation agent would use ''commercially reasonable efforts'' to calculate the PIV, arguing that this is a substantially lower standard of care than that applying to NAV calculations for ETFs and mutual funds.[37] The opposing commenter further asserts that the proposal does not provide that any entity would stand behind a Fund's PIV to ensure timeliness and accuracy.[38]

The opposing commenter predicts that frequent PIV errors would cause ''erroneous share trades'' to be executed.[39] The opposing commenter states that the proposal does not address whether PIV errors and related erroneous trades would be detected by the Exchange, whether such trades would be cancelled, or whether the Exchange would apply a materiality standard for cancellations.[40] The opposing commenter argues that, as a condition of approval, the Exchange should be required to monitor the timeliness and accuracy of PIV dissemination and to implement procedures to address trades when an erroneous PIV has been disseminated.[41]

The Exchange agrees with the opposing commenter that an accurate PIV would be essential for trading in the Shares, but asserts that the opposing commenter offers no support for the assertion that the PIV would be unreliable.[42] The Exchange reiterates that market makers have indicated that, after the first few days of trading, there would be sufficient data to run a statistical analysis that would lead to differences between the Share price of the ETF and the PIV being tightened substantially.[43] The Exchange states that it has no reason to believe that the PIV, which would be calculated using methodology substantially similar to that used in the calculation of all other ETF intraday indicative values, would be inherently unreliable.[44] The Exchange asserts that market participants would accept the PIV as a reliable, indicative real-time value because (a) the PIV would be calculated and disseminated based on a Fund's actual portfolio holdings; (b) the securities in which the Funds plan to invest are generally highly liquid and actively traded and therefore generally have accurate real-time pricing available; and (c) market participants would have a daily opportunity to evaluate whether the PIV at or near the close of trading was indeed predictive of the actual NAV.[45]

The Exchange states that, because it has no reason to believe that the PIVs would be inherently unreliable, it does not propose to institute any additional monitoring programs.[46] Instead, the Exchange states that it would rely on its existing surveillance systems to monitor trading in the Shares and that these procedures are adequate to properly deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.[47] The Exchange also states that its existing rule applicable to trade cancellations (NYSE Area Equities Rule 7.10) neither addresses trade cancellations in the event erroneous PIVs are disseminated nor provides the Exchange with the discretion to cancel trades.[48]

In his second comment letter,[49] which addresses the Exchange's Response Letter,[50] the opposing commenter states that he does not question the veracity of LMMs who have discussed with the Exchange their ability to make efficient and liquid markets in the Shares, but that he questions whether the important caveat—that accurate PIVs are available—would reliably be met.[51] He offers the following reasons why dissemination of PIVs at 15-second intervals throughout the Exchange's Core Trading Session would not provide a reliable and sufficient basis for ensuring that market trading prices of Shares maintain a close correspondence to each Share's underlying value: (a) PIVs may not be calculated in the same manner as NAV; (b) PIVs would be based on consolidated last sale information and may reflect clearly erroneous values for securities that have not opened for trading on a particular business day or that are subject to an intraday interruption in trading; (c) PIVs would be calculated based on a ''commercially reasonable'' standard of care, not the higher standards that apply to a Fund's daily NAV calculations; (d) there would be no time or scope for checking calculated PIV values before they are released in real time 1,560 times each trading day; and (e) the calculation of PIVs would require the coordinated actions of multiple parties, none of which would guarantee the accuracy of disseminated PIVs or assume liability for damages resulting from PIV errors.[52]

The opposing commenter asserts that disseminated PIVs for ETFs with transparent portfolios have essentially no relevance to secondary market trading efficiency and limited overall utility for investors.[53] In contrast, according to the opposing commenter, the officially disseminated PIVs would be the foundation supporting market trading of the Shares, because Fund holdings would not be disclosed, and market makers in the Shares would not be able to calculate their own independent estimates of intraday Fund values or to verify the accuracy of the Fund-disseminated PIVs.[54] The opposing commenter states that he is unaware of any studies that demonstrate the reliability of the intraday values disseminated for existing ETFs based on substantially the same calculation methodology and standards as proposed for the Shares.[55] He recommends that, if the Exchange is unwilling to undertake a surveillance program to detect erroneous PIVs and to establish procedures for cancelling trades based on erroneous trades, the Commission should condition any approval of the proposed rule change on a demonstration of the prospective reliability of Fund PIVs through a comprehensive study of the historical accuracy of the disseminated intraday values of existing ETFs with investment profiles similar to the Funds.[56]

The opposing commenter also questions whether the terms ''efficient and liquid markets'' and ''priced near the PIV'' (used by the cited LMMs) are properly defined or are suitable standards for open-end funds issuing redeemable securities.[57] The opposing commenter asserts that the Petajisto Study[58] demonstrates that the trading

[35] *See id.* at 10.

[36] *See id.*

[37] *See id.* at 10–11.

[38] *See id.* at 11.

[39] *See id.* at 13.

[40] *See id.*

[41] *See id.*

[42] *See* Response Letter, *supra* note 8, at 2.

[43] *See id.*

[44] *See id.*

[45] *See id.*

[46] *See id.*

[47] *See id.* at 3.

[48] *See id.*

[49] *See* Second Gastineau Letter, *supra* note 11.

[50] *See* Response Letter, *supra* note 8.

[51] *See* Second Gastineau Letter, *supra* note 11, at 3.

[52] *See id.*

[53] *See id.*

[54] *See id.* at 4–5.

[55] *See id.* at 5.

[56] *See id.*

[57] *See id.* at 3.

[58] *See supra* note 28.

efficiency of existing ETFs varies across a broad range and that many existing ETFs trade with wide bid-ask spreads and highly variable premiums/discounts,[59] and he posits that some of the LMMs supporting trading in those ETFs would nonetheless represent that they trade ''efficiently'' and ''near'' underlying value.[60]

The opposing commenter recommends that the Commission ask the Exchange to quantify the range of expected bid-ask spreads and premiums/discounts at which LMMs have indicated they expect the Shares to trade and to compare these expectations to accurate measures of benchmark index ETF trading performance.[61] Additionally, the opposing commenter argues that the Exchange's statement that it ''expects that a market maker will act as [LMM] in the Shares and believes no market maker would accept [an LMM] assignment if they were not entirely comfortable in their ability to hedge their positions'' does not support the Exchange's assertion that the Shares can be expected to trade at consistently tight bid-ask spreads and stable premiums/discounts.[62] He asserts that: (1) Every closed-end fund listed on the Exchange also has an LMM, including the many closed-end funds that routinely trade at double-digit discounts or premiums to NAV; and therefore (2) the mere presence of a market maker willing to serve as LMM is not evidence that a particular fund would trade with bid-ask spreads and premiums/discounts consistent with the marketplace's expectations for how ETFs should trade or the legal standard applicable to open-end investment companies issuing redeemable securities.[63]

*B. Creation and Redemption Process*

1. Redemptions by Authorized Participants

The opposing commenter raises a number of objections to the Funds' proposed use of a blind trust to effect redemption transactions by Authorized Participants. He predicts that the proposed redemption arrangements would introduce additional costs and uncertainties for Authorized Participants for the following reasons:

- The Funds' custodian would have a monopoly position as the sole eligible provider of trustee services for the blind trust;
- the Funds' adviser, rather than the Authorized Participant, would negotiate the fees paid to the trustee;
- in contrast to existing ETFs, no Authorized Participant would have the potential ability to use its market knowledge and market position to enhance arbitrage profits (or offset arbitrage costs) by managing sales of the distributed securities to minimize market impact or to realize prices above the market close; and
- the Funds' custodian, who acts for the Authorized Participant in the sale of distributed securities, would have no apparent incentive to sell distributed securities with low market impact or at prices above the close and would experience little or no downside from doing the opposite.[64]

The opposing commenter also asserts that redeeming Authorized Participants would be exposed to potential costs and risks associated with not being able to control disposition of significantly more concentrated redemption proceeds, and the opposing commenter argues that these extra costs and risks associated with the blind trust arrangement would be passed through to shareholders transacting in the secondary market, reflected as wider bid-ask spreads, more volatile premiums and discounts for the Shares, or both.[65]

In addition, the opposing commenter argues that the Commission should not grant the issuer's pending request for exemptive relief under the 1940 Act to maintain early Order Cut-Off Times for Fund redemptions, which are intended to facilitate the timely sale of distributed securities by the blind trusts that receive the proceeds of Authorized Participant redemptions and to facilitate the efficient processing of redemptions by retail investors through the Retail Redemption Facility.[66]

In response, the Exchange argues that the opposing commenter's arguments regarding cost considerations are irrelevant under the Exchange Act[67] and that limiting broker-dealer processing fees on direct purchases and redemptions of Shares would require Commission rulemaking.[68] The Exchange also argues that the opposing commenter's arguments regarding early Order Cut-Off Times for redemption is not relevant under the Exchange Act.[69]

The opposing commenter argues, in response, that mandatory early Order Cut-Off Times for direct purchases and redemptions of Shares, while raising issues under the 1940 Act, also raise Exchange Act issues due to the potential impact on secondary market trading. Specifically, the opposing commenter asks: (1) If Authorized Participants cannot enter orders to purchase and redeem Shares after a designated cut-off time, how would this affect market trading later in the session; and (2) if market makers cannot transact with the Fund to offload long and short positions in Shares accumulated after the cut off time, how could the Funds' proposed arbitrage mechanism function effectively?[70]

In connection with the unique redemption features of the Funds, the opposing commenter further asserts that there is a ''significant risk'' that the Internal Revenue Service (''IRS'') would deny the purported tax benefits of the Funds' distinctive in-kind redemption program.[71] Therefore, the opposing commenter recommends that approval of the proposal be conditioned on the issuer obtaining a favorable IRS determination of the tax treatment through a Private Letter Ruling.[72]

In response, the Exchange argues that the opposing commenter's arguments regarding the tax treatment of in-kind distributions through the blind trust are not relevant under the Exchange Act.[73]

The opposing commenter's second letter restates his belief that the tax treatment of the Funds' in-kind redemptions is relevant and again urges the Commission to condition any approval of the proposed rule change on the issuer receiving a Private Letter Ruling from the IRS affirming the claimed tax treatment of the Funds' in-kind redemptions.[74]

2. The Retail Redemption Facility

The opposing commenter posits that a principal purpose of including direct Share purchases and the Retail Redemption Facility in the proposal is to provide comfort to the Commission and market participants that investors

[59] *See* Second Gastineau Letter, *supra* note 11, at 3.

[60] *See id.*

[61] *See id.*

[62] *See id.* at 4.

[63] *See id.*

[64] *See* Gastineau Letter, *supra* note 5, at 12.

[65] *See id.*

[66] *See id.* at 16.

[67] *See* Response Letter, *supra* note 8, at 4–5.

[68] *See id.* at 4.

[69] *See id.* at 4–5.

[70] *See* Second Gastineau Letter, *supra* note 11, at 2.

[71] *See* Gastineau Letter, *supra* note 5, at 5.

[72] *See id.;* Second Gastineau Letter, *supra* note 11, at 2.

[73] *See* Response Letter, *supra* note 8, at 4–5.

[74] *See* Gastineau Letter, *supra* note 5, at 5. More generally, the opposing commenter asserts that none of the arguments he made are irrelevant because Section 6(b)(5) of the Exchange Act states, in relevant part, that the ''rules of the exchange must 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, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination'' among market participants. *See* Second Gastineau Letter, *supra* note 11, at 2 (omissions in original).

would be able to transact with the Fund at or near NAV whenever secondary market trading prices of shares vary significantly from NAV.[75] The opposing commenter argues that these provisions, as proposed, are inadequate for this purpose because: (a) The Retail Redemption Facility would be available only to a limited set of shareholders and would be restricted to redemptions of less than a Redemption Unit of shares; (b) the expected early Order Cut-Off Time for direct share purchases and the Retail Redemption Facility means that an investor's ability to directly purchase or redeem shares for cash would exist for only a portion of each business day; (c) investors who directly purchase and redeem shares would be subject to transaction fees imposed by the Fund of up to 2% and may also be subject to broker-dealer processing fees; (d) self-directed investors may not have adequate information about the available liquidity options to make intelligent choices about how best to buy and sell shares; (e) broker-dealers may not have adequate information to ensure that their customers consistently receive best execution on transactions in shares, given the two distinct liquidity pathways; and (f) broker-dealers may not have or may not develop the systems capabilities necessary to support customer transactions in Funds offering both secondary market trading in shares and direct share purchases and redemptions.[76]

The opposing commenter asserts that the Exchange's statements that ''investors may choose to purchase Shares directly from a Fund if they want to assure that they would not purchase Shares at a premium'' and that ''Retail Investors may decide to redeem their Shares for cash if they want to make sure they receive the NAV and do not want to risk selling their Shares in the secondary market at a discount'' are valid only to the extent that a Fund's direct purchase and redemption options apply to a particular investor, are available at the particular time of day when the investor seeks to buy or sell Shares, are not negated by disproportionate fees, and are backed by investor information and broker-dealer systems adequate to support informed decision-making and effective execution of direct transactions in Shares.[77] The opposing commenter expresses concern that, because of the challenges to broker-dealer trade management and order processing systems introduced by the Funds' unique dual-liquidity features, broker-dealers (if left unregulated) would charge significantly higher fees on direct purchases and redemptions than the commissions they charge on comparably sized secondary market trades in Shares.[78] He argues that, if broker-dealer fees on direct transactions in Shares are too high, then shareholders would, in a practical sense, lose access to the Funds' intended mechanism for ensuring continued access to liquidity at or near NAV during periods when market trading prices of Shares vary significantly from NAV.[79] To the extent that the Commission values the Funds' direct purchase and redemption facilities, he recommends that the Commission place appropriate limits on associated broker-dealer fees and Fund Transactions Fees.[80] The opposing commenter also repeats his views that the Funds' proposed direct purchase and redemptions options should apply equally to all investors and should be available throughout each business day's Regular Trading Session, arguing that disparate redemption rights for different groups of shareholders are inherently discriminatory and inconsistent with the Requirements of Section 6(b)(5) of the Exchange Act.[81]

The opposing commenter recommends that the Funds should be required to extend eligibility for the Retail Redemption Facility to all shareholders and that the Order Cut-Off Times for direct purchases of shares and redemptions under the Retail Redemption Facility be established as of the close of the Exchange's regular trading session.[82] The opposing commenter recommends that the Exchange be required to limit trading in shares to broker-dealers that have represented to the Exchange that they have systems in place (a) to accommodate direct purchases and redemptions of Shares on terms no less favorable than secondary market transactions and (b) to ensure best execution of transactions in shares, considering both secondary market trading and direct purchase and redemption options.[83] The opposing commenter also recommends that the broker-dealers trading shares on the Exchange should not be permitted to charge their customers processing fees on direct purchases and redemptions of shares that exceed what they charge the same customers for secondary market trades.[84] Further, the opposing commenter recommends that the Funds should not be permitted to charge transaction fees on direct purchases and redemptions of shares that exceed the associated Fund expenses incurred, taking into account the size of a specific transaction.[85]

In response, the Exchange does not address the individual objections raised by the opposing commenter, but instead asserts that the process proposed in the Notice is consistent with the applicable provisions of the Exchange Act.[86]

*C. Other Issues*

1. Disclosures

The opposing commenter alleges that the prospectus contains a number of material misstatements and omissions relating to in-kind redemptions and direct purchases and redemptions.[87] In response, the Exchange argues that the opposing commenter's arguments regarding prospectus disclosures are irrelevant under the Exchange Act.[88] The opposing commenter, in his second comment letter, argues that adequacy of Fund disclosures is critically important to evaluation of the proposal under both the 1940 Act and the Exchange Act because efficient, informed, and non-discriminatory trading in the Shares requires market participants to have access to timely and accurate information regarding the Funds, including risks and special considerations in buying and selling Shares.[89]

With respect to improved disclosures and availability of information, the opposing commenter states that, given the importance of the PIV to the decision-making process of current and prospective Fund investors, all Fund investors should have ongoing access to current PIV values.[90] The opposing commenter suggests that each Fund's current PIV be provided at no charge on a public Web site and made available to the public no later than it is made available to any other market participant.[91] The opposing commenter also suggests that the following be published on the Funds' Web site: Real-time PIVs and historical PIV information; statistics regarding closing-price premiums and discounts, statistics

[75] *See* Gastineau Letter, *supra* note 5, at 17.

[76] *See id.* at 17–18.

[77] *See* Second Gastineau Letter, *supra* note 11, at 6.

[78] *See id.*

[79] *See id.*

[80] *See id.*

[81] *See id.*

[82] *See* Gastineau Letter, *supra* note 5, at 20.

[83] *See id.*

[84] *See id.*

[85] *See id.* at 20–21.

[86] *See* Response Letter, *supra* note 8, at 4.

[87] *See* Gastineau Letter, *supra* note 5, at 27–28.

[88] *See* Response Letter, *supra* note 8, at 4–5.

[89] *See* Second Gastineau Letter, *supra* note 11, at 3.

[90] *See* Gastineau Letter, *supra* note 5, at 25.

[91] *See id.*

regarding intraday estimated premiums and discounts; statistics regarding bid-ask spreads; statistics regarding long or short equity market exposure and the amount of investment leverage employed; and statistics regarding transaction fees applicable to direct purchases of shares, redemptions through the Retail Redemption Facility, and Redemption Unit redemptions by Authorized Participants.[92]

Further, the opposing commenter asserts that, given the fundamental differences in how the Shares may be bought or sold, compared to other ETFs, it is not appropriate for the Funds to be advertised or marketed as ETFs.[93] Therefore, the opposing commenter recommends that the Commission take appropriate steps to ensure that the Exchange, broker-dealers, and market data providers do not describe the Funds as ETFs.[94]

In response, the Exchange states that such real-time Web site disclosure of an indicative value is not required of other ETFs.[95] The Exchange states that the PIV is designed to provide guidance regarding variances between the prior day's closing prices and intraday changes in the value of the underlying portfolio.[96] The pricing of the Shares themselves would be disseminated in real time through the Consolidated Quotation System, according to the Exchange.[97]

Responding to the Exchange's assertion that the Funds should not be required to provide investors with free public access to real-time PIVs and other Fund trading information because these requirements do not apply to existing ETFs, the opposing commenter asserts that the Funds would differ from all existing ETFs in three respects for which the suggested requirements for additional PIV and other Fund trading information disclosures are highly relevant: (a) The Funds would offer shareholders two distinct pathways for buying and selling Shares (i.e., direct transactions and secondary market trades) and therefore should be obligated to give investors sufficient information about Share trading conditions to help them determine how best to buy and sell Shares; (b) the arbitrage mechanism intended to support efficient secondary market trading in Shares is untested and is likely to be less reliable than the mechanism supporting efficient trading in existing ETFs, meaning that investors in the Funds should appropriately pay more attention to Share trading costs and must have access to enhanced trading information to make that possible; and (c) the arbitrage mechanism underlying trading in Shares is uniquely reliant upon PIVs, with the result that a level playing field among market participants can only be achieved if all Fund investors have equal access to this critical Fund data.[98]

2. Proposed Limits on Fund Holdings

The opposing commenter asserts that the Funds should: (a) Be required to limit their equity investments to U.S.-exchange-listed stocks with market caps of $5 billion or greater (consistent with the general understanding of large- and medium-cap stocks, a universe of about 700 stocks currently); (b) not be permitted to invest in illiquid assets or debt instruments of non-U.S. issuers; and (c) not be permitted to employ investment leverage or hold short positions.[99]

In response, the Exchange argues that the opposing commenter's recommendation to curtail the permitted investments of the Funds is not relevant under the Exchange Act.[100]

In his second letter, the opposing commenter argues that the nature of the Funds' holdings is highly relevant because the reliability of a Fund's PIVs would depend on the availability, timeliness, and accuracy of intraday valuations for the Fund's underlying holdings, which in turn would vary significantly by holdings type.[101] He asserts that, if intraday valuation information for a Fund's holdings does not support the dissemination of timely and accurate PIVs throughout the Regular Trading Session, the Fund cannot be expected to trade efficiently.[102]

3. Trading Hours

The opposing commenter notes that the Exchange would permit trading in the Shares between 4:00 a.m. and 8:00 p.m., but that the PIV would only be disseminated during the Core Trading Session of 9:30 a.m. to 4:00 p.m.[103] The opposing commenter asserts that the proposal does not adequately address the significant risk that the prices of shares bought or sold in the Opening Session (4:00 a.m. to 9:30 a.m.) and Late Trading Session (4:00 p.m. to 8:00 p.m.) would vary widely from underlying portfolio values because an updated PIVs would not be available.[104] Therefore, the opposing commenter suggests that trading in shares should be limited to the Exchange's Core Trading Session.[105]

In response, the Exchange states that: (a) Its surveillance procedures are operative during all trading sessions and are adequate to monitor trading in the Shares; (b) that it has no reason to discount the assertions of market makers regarding their ability to make efficient markets during all trading sessions; and (c) it would ensure that the information bulletin required by the Exchange's listing standards would adequately address the special characteristics and risks associated with trading in the Shares.[106]

In response, the opposing commenter questions: (a) How a market maker would have any idea whether Shares were trading at a premium or a discount during the Opening and Late Trading Sessions, if PIVs are not being disseminated; and (b) how a market maker would have a basis to construct hedge positions against Share inventory accumulated during these sessions.[107] He asserts again that the Shares should not trade during periods when neither the contents nor any estimates of current values of Fund holdings are known in the marketplace.[108]

4. Potential Informational Advantages for Certain Market Participants

The opposing commenter argues that the lack of portfolio transparency would favor market makers and other professional traders over other market participants, such as investors, and the opposing commenter concludes that this disparate treatment is contrary to the principle that all participants should be on an equal footing with respect to knowledge of a fund's holdings.[109] Notwithstanding the public dissemination of the PIV, the opposing commenter argues that market makers and other professional traders would have a significant indirect informational advantage over other participants because of their ability to glean information about a Fund's holdings through sophisticated data analysis of changes in the PIV.[110] In particular, the

[92] *See id.* at 26–27.

[93] *See id.* at 28.

[94] *See id.*

[95] *See* Response Letter, *supra* note 8, at 4.

[96] *See id.*

[97] *See id.*

[98] *See* Second Gastineau Letter, *supra* note 11, at 7.

[99] *See* Gastineau Letter, *supra* note 5, at 24.

[100] *See* Response Letter, *supra* note 8, at 4.

[101] *See* Second Gastineau Letter, *supra* note 11, at 3.

[102] *See* Second Gastineau Letter, *supra* note 11, at 3.

[103] *See* Gastineau Letter, *supra* note 5, at 24.

[104] *See id.*

[105] *See id.*

[106] *See* Response Letter, *supra* note 8, at 3.

[107] *See* Second Gastineau Letter, *supra* note 11, at 7.

[108] *See id.*

[109] *See* Gastineau Letter, *supra* note 5, at 14–15.

[110] *See id.* at 14.

opposing commenter asserts that market makers and professional traders could uncover a Fund's holdings and trading activity and front-run the Fund.[111] The opposing commenter asserts that, prior to approval, the proposal should be amended to include: (1) A discussion of the steps to be taken to minimize reverse-engineering risk; (2) a discussion of how the Funds propose to resolve the conflict between providing market makers with adequate information to support efficient Share trading and protecting against reverse engineering; and (3) representations that the Funds would adequately disclose reverse-engineering risk and the conflicts the Funds face in seeking to provide for efficient market trading and protection against reverse engineering.[112]

The Exchange states that the following information would be publicly available to market professionals and retail investors alike: a PIV, disseminated every 15 seconds; an NAV, disseminated daily after the close; and the national best bid and offer and last trade for the Shares, disseminated in real-time through the Consolidated Quotation System and the Consolidated Tape.[113] The Exchange also states that, as with other ETFs, any independent view that market participants might have about the composition of the fund holdings and the value of those holdings would be included in the prices at which those participants would be willing to trade the product.[114]

The opposing commenter counters that all investors would not have equal access to Share trading information unless, as he recommends, the Commission conditions approval of the proposal on the Funds providing free access to PIVs on a public Web site and PIVs being available to the general public as soon as they are available to any party.[115] Otherwise, the opposing commenter argues, market makers would be able to generate an informational advantage regarding a Fund's holdings through sophisticated time-series analysis of intraday changes in the Fund's PIVs.[116] He asserts that the dissemination of market information in a manner that facilitates unfair discrimination among market participants is inconsistent with equitable principles of trade and, therefore, with the requirements of Section 6(b)(5) of the Exchange Act.[117]

5. Potential Benefits

One commenter supports the proposed rule change, asserting that investors would have access for the first time to many different types of active management strategies.[118] This commenter also asserts that Managed Portfolio Shares would have the benefit of intraday trading and of creation and redemption at closing NAV and that they would, unlike other ETFs, offer the additional advantage of allowing investors to create or redeem directly for cash in amounts less than a creation unit.[119] Another commenter states that the Funds would permit investors to ''avail themselves of the alpha-generating capabilities of professional managers and potentially greater returns, while enjoying greater access and information than a mutual fund can provide.'' [120] This commenter also notes that money managers, too, would enjoy benefits in the form of ''lower infrastructure costs, greater efficiency and the associated flexibility to make portfolio changes, and the ability to maintain portfolio confidentiality while avoiding professional front running.'' [121]

The Exchange asserts that, assuming investor protection concerns are adequately addressed, investors and the marketplace can only benefit from listing and trading of a variety of products with different structures, positing that competitive forces would ultimately decide the success or failure of such initiatives.[122]

## III. Discussion and Commission Findings

Under Section 19(b)(2)(C) of the Exchange Act, the Commission shall approve a proposed rule change of a self-regulatory organization if the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to that organization.[123] The Commission shall disapprove a proposed rule change if it does not make such a finding.[124] Commission Rule of Practice 700(d)(3) provides that, when the Commission has instituted proceedings to determine whether to approve or disapprove a rule filing, the Commission shall makes its determination on the basis of the record, which ''shall consist of the proposed rule change filed on Form 19b-4 by the self-regulatory organization, including all attachments and exhibits thereto, and all written materials received from any interested parties on the proposed rule change, including the self-regulatory organization that filed the proposed rule change . . . as well as any written materials that reflect communications between the Commission and any interested parties.'' [125]

After careful consideration, the Commission does not find that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission does not find that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act, which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, 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 to protect investors and the public interest.[126]

Before an ETF can list and trade on a national securities exchange, the ETF must have exemptive relief under the 1940 Act, and a national securities exchange must have effective rules in place to list and trade the ETF.[127] As noted above, the Precidian ETFs Trust has filed an Exemptive Application under the 1940 Act.[128] As stated in the

[111] *See id.* at 15.

[112] *See id.*

[113] *See* Response Letter, *supra* note 8, at 3.

[114] *See id.*

[115] *See* Second Gastineau Letter, *supra* note 11, at 6.

[116] *See id.*

[117] *See id.*

[118] *See* DeCore Letter, *supra* note 8, at 1.

[119] *See id.* at 1–2.

[120] *See* Browne Letter, *supra* note 13, at 1.

[121] *See* Browne Letter, *supra* note 13, at 2.

[122] *See* Response Letter, *supra* note 8, at 5.

[123] 15 U.S.C 78s(b)(2)(C)(i).

[124] 15 U.S.C. 78s(b)(2)(C)(i); *see also* 17 CFR 201.700(b)(3).

[125] 17 CFR 201.700(d)(3). The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. *See id.* Any failure of a self-regulatory organization to provide the information solicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization. *Id.*

[126] 15 U.S.C. 78f(b)(5). In disapproving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[127] Neither an ETF that has obtained 1940 Act exemptive relief but does not fall within Commission-approved exchange listing standards, nor an ETF that falls within Commission-approved listing standards but has been denied 1940 Act exemptive relief, can legally be listed and traded on a national securities exchange.

[128] *See* note 3, *supra.* The Precidian ETFs Trust submitted an application for an order under section

Continued

Notice of an Application for Exemptive Relief, however, ''the Commission preliminarily believes that [Precidian's] proposed ETFs do not meet the standard for exemptive relief under section 6(c) of the [1940] Act,'' [129] and accordingly, ''absent a request for a hearing that is granted by the Commission, the Commission intends to deny [Precidian's] request for an exemption under section 6(c) of the [1940] Act as not necessary or appropriate in the public interest and as not consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the [1940] Act.'' [130]

The purpose of the Exchange's proposed rule change is to allow the listing and trading of the proposed Funds and future Funds of the same type. The Commission does not believe that approving this proposed rule change would be consistent with the requirement under the Exchange Act that an exchange's rules be consistent with the protection of investors and the public interest, because the Commission has stated its intention to deny the Funds exemptive relief under the 1940 Act and because denying this exemptive relief would mean that the Funds could not legally operate.[131]

## IV. Conclusion

For the reasons set forth above, the Commission does not find that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) of the Exchange Act.[132]

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change (SR–NYSEArca–2014–10) be, and it hereby is, disapproved.

By the Commission.

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014–25714 Filed 10–28–14; 8:45 am]

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6(c) of the 1940 Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the 1940 Act and rule 22c–1 under the 1940 Act; under sections 6(c) and 17(b) of the 1940 Act for an exemption from sections 17(a)(1) and 17(a)(2) of the 1940 Act; and under section 12(d)(1)(J) of the 1940 Act for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the 1940 Act.

[129] Notice of Application for Exemptive Relief, *supra* note 3, at 3.

[130] *Id.* at 29.

[131] The Commission's determinations under Section 6(c) of the 1940 Act with respect to the Funds are preliminary and could change if a hearing were requested, the Commission were to grant the request, and persuasive new information were presented. Under Section 19(b)(2) of the Exchange Act, however, the last date on which the Commission can take final action to approve or disapprove the Exchange's proposed rule change is no later than 240 days after notice of the proposed rule change was published in the **Federal Register**. As a result, the Commission must either approve or disapprove the proposed rule change by October 24, 2014, and it must do so on the basis of the facts as they currently exist, irrespective of any information that might be presented to or considered by the Commission at a later date in the context of its final determination under Section 6(c) of the 1940 Act.

[132] Having found for the reasons explained above that the Exchange's proposed rule change is not consistent with the requirements of the Exchange Act, the Commission does not believe it is necessary to address each of the particular objections raised by the commenter who opposes the proposed rule change.

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–73416; File No. SR–NASDAQ–2014–034]**

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change Relating to Proposed Changes To Remove From the Exchange Rules Fee Provisions Regarding Re-Transmission of ''Third-Party Data''

October 23, 2014.

On April 7, 2014, The NASDAQ Stock Market LLC (''Nasdaq'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to remove, from the Exchange rules, fee provisions with respect to third-party data feeds that Nasdaq receives from multiple sources and then re-transmits to clients in connection with the Exchange's co-location services. The proposed rule change was published for comment in the **Federal Register** on April 28, 2014.[3] On June 5, 2014, the Commission extended the time to act on the proposal until July 25, 2014.[4] On July 22, 2014, the Commission instituted proceedings to determine whether to disapprove the proposed rule change in an order published in the **Federal Register**.[5] The Commission received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act [6] provides that, after initiating disapproval proceedings, the Commission shall issue an order approving or disapproving the proposed rule change not later than 180 days after the date of publication of notice of the filing of the proposed rule change. The Commission may extend the period for issuing an order approving or disapproving the proposed rule change, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination. The proposed rule change was published for notice and comment in the **Federal Register** on April 28, 2014. October 25, 2014 is 180 days from that date, and December 24, 2014 is an additional 60 days from that date.

The Commission finds that it is 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 issues raised in connection with the proposed rule change. Specifically, as the Commission noted in the Order Instituting Proceedings, the proposed rule change raises issues such as whether the proposed rule change is consistent with the statutory definition of the term ''facility'' and the statutory requirements applicable to national securities exchanges.[7]

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[8] designates December 24, 2014, as the date by which the Commission should either approve or disapprove the proposed rule change.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014–25672 Filed 10–28–14; 8:45 am]

**BILLING CODE 8011–01–P**

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 71990 (April 22, 2014), 79 FR 23389 (''Notice'').

[4] *See* Securities Exchange Act Release No. 72328, 79 FR 33605 (June 11, 2014).

[5] *See* Securities Exchange Act Release No. 72654, 79 FR 43808 (July 28, 2014) (''Order Instituting Proceedings'').

[6] 15 U.S.C. 78s(b)(2).

[7] *See* Order Instituting Proceedings, *supra* note 5.

[8] 15 U.S.C. 78s(b)(2).

[9] 17 CFR 200.30–3(a)(31).