

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-66507; File No. SR-NYSEArca-2011-81]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 3 Thereto, Relating to the Listing and Trading of the Guggenheim Enhanced Short Duration High Yield Bond ETF Under NYSE Arca Equities Rule 8.600

March 2, 2012.

#### I. Introduction

On November 14, 2011, NYSE Arca, Inc. ("Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares ("Shares") of the Guggenheim Enhanced Short Duration High Yield Bond ETF ("Fund") under NYSE Arca Equities Rule 8.600. The proposed rule change was published for comment in the **Federal Register** on December 5, 2011.<sup>3</sup> On January 17, 2012, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> On January 18, 2012, the Exchange filed Amendment No. 2 to the proposed rule change.<sup>5</sup> On February 7, 2012, the Exchange extended the time period for Commission action to March 4, 2012. On February 29, 2012, the Exchange filed Amendment No. 3 to the proposed rule change.<sup>6</sup> The Commission received

no comments on the proposal. This order grants approval of the proposed rule change, as modified by Amendment No. 3 thereto.

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

The Exchange proposes to list and trade Shares of the Fund pursuant to NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares on the Exchange. The Shares will be offered by the Claymore Exchange-Traded Fund Trust ("Trust"),<sup>7</sup> a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company. The investment adviser for the Fund is Guggenheim Funds Investment Advisors, LLC ("Adviser"). The Bank of New York Mellon is the custodian and transfer agent for the Fund. Guggenheim Funds Distributors, Inc. is the distributor for the Fund. The Adviser is affiliated with a broker-dealer and has represented that it has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio.<sup>8</sup>

"Generally, the Fund considers participation interests to be illiquid and therefore subject to the Fund's percentage limitations for investments in illiquid securities." The amended sentence reads: "Generally, the Fund considers participation interests to be illiquid and therefore subject to the Fund's percentage limitations for holdings of illiquid securities." For each of the amendments discussed above, the Exchange also made corresponding amendments to Exhibit 1 of the filing. The purpose of Amendment No. 3 was to make the proposed rule change more consistent with the Investment Company Act of 1940 ("1940 Act") requirements relating to restrictions on holdings of illiquid securities by registered open-end management investment companies. Because Amendment No. 3 seeks to maintain consistency with the 1940 Act and rules and regulations thereunder, and does not materially alter the substance of the proposed rule change or raise any novel regulatory issues, the amendment is not subject to notice and comment.

<sup>7</sup> The Trust is registered under the 1940 Act. On December 8, 2010, the Trust filed with the Commission Form N-1A under the Securities Act of 1933 (15 U.S.C. 77a) and under the 1940 Act relating to the Fund (File Nos. 333-134551 and 811-21906) ("Registration Statement"). In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. See Investment Company Act Release No. 29271 (May 18, 2010) (File No. 812-13534) ("Exemptive Order").

<sup>8</sup> See NYSE Arca Equities Rule 8.600, Commentary .06. In the event (a) the Adviser or any sub-adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes affiliated with a broker-dealer, it will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

### Guggenheim Enhanced Short Duration High Yield Bond ETF

The investment objective of the Fund is to seek to maximize total return, through monthly income and capital appreciation, consistent with capital preservation. The Fund will use an actively managed strategy that seeks to maximize total return, comprised of income and capital appreciation, and risk-adjusted returns in excess of the 3-month LIBOR, while maintaining a low-risk profile relative to below investment grade rated, longer-term, fixed income investments. The Fund will primarily invest in below investment grade rated bonds while opportunistically allocating to investment grade bonds and other select securities. The Fund's portfolio will maintain an effective duration of one year or less.

#### Primary Investments

As a principal investment strategy, under normal market circumstances,<sup>9</sup> the Fund will invest at least 80% of its net assets in debt securities which are below investment grade ("high yield" bonds or "junk bonds").<sup>10</sup> Bonds are considered to be below investment grade if they have a Standard & Poor's or Fitch credit rating of "BB+" or lower or a Moody's credit rating of "Ba1" or lower or bonds that are unrated and deemed to be of below investment grade quality as determined by the Adviser.<sup>11</sup> The Fund's primary investments also may include floating rate or adjustable rate bonds,<sup>12</sup> callable bonds with, as

<sup>9</sup> The term "under normal market circumstances" includes, but is not limited to, the absence of extreme volatility or trading halts in the fixed income 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>10</sup> As of August 30, 2011, the Adviser represents that there were approximately 1,100 high yield bond issues that mature on or before December 2016, representing \$420 billion or approximately 40% of the total amount of high yield bonds outstanding. (Source: Barclays Capital). As of August 1, 2011, floating rate bank loans outstanding were \$637 billion. (Source regarding floating rate bank loans: Credit Suisse Leveraged Finance Strategy Update, August 1, 2011).

<sup>11</sup> The Fund's investments will be subject to credit risk. Credit risk is the risk that issuers or guarantors of debt instruments or the counterparty to a derivatives contract, repurchase agreement or loan of portfolio securities is unable or unwilling to make timely interest and/or principal payments or otherwise honor its obligations. Debt instruments are subject to varying degrees of credit risk, which may be reflected in credit ratings. Credit rating downgrades and defaults (failure to make interest or principal payment) may potentially reduce the Fund's income and Share price.

<sup>12</sup> The Fund may invest in debt securities that have variable or floating interest rates which are readjusted on set dates (such as the last day of the

<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. 65847 (November 29, 2011), 76 FR 75926 ("Notice").

<sup>4</sup> The Exchange withdrew Amendment No. 1 on January 18, 2012 and extended the time period for Commission action to January 25, 2012. On January 23, 2012, the Exchange extended the time period for Commission action to February 8, 2012.

<sup>5</sup> The Exchange withdrew Amendment No. 2 on February 29, 2012.

<sup>6</sup> Amendment No. 3 amended the sentence: "The Fund may invest in the aggregate up to 15% of its net assets (taken at the time of investment) in: (1) Illiquid securities<sup>13</sup> and (2) Rule 144A securities." The amended sentence reads: "The Fund may hold in the aggregate up to 15% of its net assets in (1) illiquid securities,<sup>13</sup> and (2) Rule 144A securities." Amendment No. 3 also amended the sentences: "Master notes are generally illiquid and therefore subject to the Fund's percentage limitations for investments in illiquid securities. The Fund may invest up to 15% of its net assets in bank loans, which include participation interests (as described below)." The amended sentences read: "Master notes are generally illiquid and therefore subject to the Fund's percentage limitations for holdings of illiquid securities. The Fund may hold up to 15% of its net assets in bank loans, which include participation interests (as described below)." Lastly, Amendment No. 3 amended the sentence:

determined by the Adviser, a high probability of being redeemed prior to maturity,<sup>13</sup> “putable” bonds (bonds that give the holder the right to sell the bond to the issuer prior to the bond’s maturity) when the put date is within a 24 month period, “busted” convertible securities (a convertible security that is trading well below its conversion value minimizing the likelihood that it will ever reach its convertible price prior to maturity), and other types of securities, all of which may be rated at or below investment grade. The Fund will not invest in securities in default at the time of investment. The management process is intended to be highly flexible and responsive to market opportunities. For example, when interest rates are low and credit markets are healthy, the Fund may be overweight in callable bonds, which generally have a lower yield-to-call than yield-to-maturity, as well as bonds that are subject to company repurchases and tender offers. In weaker credit markets, the Fund may be overweight in bonds that are at maturity or have putable features. The Adviser anticipates that under normal market circumstances the Fund will invest approximately 20% of its assets in securities that will be called, tendered, or mature within 60 to 90 days.

The Adviser will commence the investment review process with a top-down, macroeconomic outlook to determine both investment themes and relative value within each market sector and industry. Within these parameters, the Adviser will then apply detailed bottom-up security selection to select individual portfolio securities that the Adviser believes can add value from income and/or the potential for capital appreciation. Credit research may include an assessment of an issuer’s profitability, its competitive positioning and management strength, as well as industry characteristics, liquidity, growth, and other factors. The Adviser may sell a portfolio security due to changes in credit characteristics or outlook, as well as changes in portfolio strategy or cash flow needs. A portfolio

month or calendar quarter) in the case of variable rates or whenever a specified interest rate change occurs in the case of a floating rate instrument. Variable or floating interest rates generally reduce changes in the market price of securities from their original purchase price because, upon readjustment, such rates approximate market rates. Accordingly, as interest rates decrease or increase, the potential for capital appreciation or depreciation is less for variable or floating rate securities than for fixed rate obligations.

<sup>13</sup> During periods of falling interest rates, an issuer of a callable bond may exercise its right to pay principal on an obligation earlier than expected, which may result in the Fund reinvesting proceeds at lower interest rates, resulting in a decline in the Fund’s income.

security may also be sold and replaced with one that presents a better value or risk/reward profile. Except during periods of temporary defensive positioning, the Adviser generally expects to be fully-invested.

The Adviser aims to manage the Fund so as to provide investors with a higher degree of principal stability than is typically available in a portfolio of lower-rated longer-term, fixed income investments. The Adviser intends to invest the Fund’s assets in the securities of issuers in many different industries and intends to invest a maximum of 2–3% of the Fund’s assets in the securities of any one issuer, though the Fund is not restricted from maintaining positions of greater weight based upon the outlook for an issuer or during periods of relatively small asset levels of the Fund.

The Fund may invest a portion of its assets in various types of U.S. government obligations. The Fund also may invest in convertible securities, including bonds, debentures, notes, preferred stocks, and other securities that may be converted into a prescribed amount of common stocks or other equity securities at a specified price and time. The Fund may invest in municipal securities and certificates of deposit.

While the Adviser anticipates that the Fund will invest primarily in the debt securities of U.S.-registered companies, it may also invest in those of foreign companies in developed countries.<sup>14</sup> The Fund may invest in U.S.-registered, dollar-denominated bonds of foreign corporations, governments, agencies, and supra-national agencies.<sup>15</sup>

The Fund will be managed in accordance with the principal investment strategies stated above, subject to the following investment restrictions: The Fund will not employ any leverage in order to meet its investment objective, and, consistent

<sup>14</sup> The Adviser considers developed countries to include Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, Ireland, Israel, Italy, Japan, Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, the United Kingdom, and the United States.

<sup>15</sup> Such bonds have different risks than investing in U.S. companies. These include differences in accounting, auditing, and financial reporting standards, the possibility of expropriation or confiscatory taxation, adverse changes in investment or exchange control regulations, political instability, which could affect U.S. investments in foreign countries, and potential restrictions of the flow of international capital. Foreign companies may be subject to less governmental regulation than U.S. issuers. Moreover, individual foreign economies may differ favorably or unfavorably from the U.S. economy in such respects as growth of gross domestic product, rate of inflation, capital investment, resource self-sufficiency, and balance of payment options.

with the Exemptive Order, the Fund will not invest in derivatives, including options, swaps, or futures.

#### Other Investments

As non-principal investment strategies, the Fund may invest its remaining assets in money market instruments (including other funds which invest exclusively in money market instruments), preferred securities, insurance-linked securities, and structured notes (notes on which the amount of principal repayment and interest payments are based on the movement of one or more specified factors, such as the movement of a particular security or security index). The Fund may, from time to time, invest in money market instruments or other cash equivalents as part of a temporary defensive strategy to protect against temporary market declines. When the Fund takes a temporary defensive position that is inconsistent with its principal investment strategies, the Fund may not achieve its investment objective. The Fund may also invest, to a limited extent, in other pooled investment vehicles which are not registered investment companies under the 1940 Act; however, the Fund will not invest in hedge funds or commodity pools.

The Fund may invest in commercial interests, including commercial paper and other short-term corporate instruments. Commercial paper consists of short-term promissory notes issued by corporations and may be traded in the secondary market after its issuance.

The Fund may invest in zero-coupon or pay-in-kind securities. These securities are debt securities that do not make regular cash interest payments. Zero-coupon securities are sold at a deep discount to their face value. Pay-in-kind securities pay interest through the issuance of additional securities. Because zero-coupon and pay-in-kind securities do not pay current cash income, the price of these securities can be volatile when interest rates fluctuate.

The Fund may invest up to 10% of its net assets in asset-backed securities issued or guaranteed by private issuers.

The Fund may hold in the aggregate up to 15% of its net assets in: (1) Illiquid securities<sup>16</sup> and (2) Rule 144A

<sup>16</sup> The Fund may invest in master notes, which are demand notes that permit the investment of fluctuating amounts of money at varying rates of interest pursuant to arrangements with issuers who meet the quality criteria of the Fund. The interest rate on a master note may fluctuate based upon changes in specified interest rates, be reset periodically according to a prescribed formula or be a set rate. Although there is no secondary market in master demand notes, if such notes have a

securities.<sup>17</sup> Illiquid securities include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets. Rule 144A securities are securities which, while privately placed, are eligible for purchase and resale pursuant to Rule 144A under the Securities Act of 1933. Rule 144A permits certain qualified institutional buyers, such as the Fund, to trade in privately placed securities even though such securities are not registered under the Securities Act of 1933.

The Fund may invest in the securities of other investment companies (including money market funds). Under Section 12(d) of the 1940 Act, or as otherwise permitted by the Commission, the Fund's investment in investment companies is limited to, subject to certain exceptions, (i) 3% of the total outstanding voting stock of any one investment company, (ii) 5% of the Fund's total assets with respect to any one investment company and (iii) 10% of the Fund's total assets in investment companies in the aggregate.<sup>18</sup>

The Fund may enter into repurchase<sup>19</sup> and reverse repurchase

demand future, the payee may demand payment of the principal amount of the note upon relatively short notice. Master notes are generally illiquid and therefore subject to the Fund's percentage limitations for holdings of illiquid securities. See *supra* note 6. The Fund may hold up to 15% of its net assets in bank loans, which include participation interests (as described below). See *id.* Any bank loans will be broadly syndicated and may be first or second liens; the Fund will not invest in third lien or mezzanine loans. The interest rate on bank loans and other adjustable rate securities typically resets every 90 days based upon then current interest rates. The Fund may purchase participations in corporate loans. Participation interests generally will be acquired from a commercial bank or other financial institution ("Lender") or from other holders of a participation interest ("Participant"). The purchase of a participation interest either from a Lender or a Participant will not result in any direct contractual relationship with the borrowing company ("Borrower"). The Fund generally will have no right directly to enforce compliance by the Borrower with the terms of the credit agreement. Instead, the Fund will be required to rely on the Lender or the Participant that sold the participation interest, both for the enforcement of the Fund's rights against the Borrower and for the receipt and processing of payments due to the Fund under the loans. Under the terms of a participation interest, the Fund may be regarded as a member of the Participant, and thus the Fund is subject to the credit risk of both the Borrower and a Participant. Participation interests are generally subject to restrictions on resale. Generally, the Fund considers participation interests to be illiquid and therefore subject to the Fund's percentage limitations for holdings of illiquid securities. See *id.*

<sup>17</sup> See *supra* note 6.

<sup>18</sup> 15 U.S.C. 80a–12(d).

<sup>19</sup> Repurchase agreements are agreements pursuant to which securities are acquired by the Fund from a third party with the understanding that they will be repurchased by the seller at a fixed price on an agreed date. These agreements may be

agreements.<sup>20</sup> The Fund also may invest in the securities of real estate investment trusts to the extent allowed by law, which pool investors' funds for investments primarily in commercial real estate properties.

The Fund may not invest 25% or more of the value of its total assets in securities of issuers in any one industry or group of industries. This restriction does not apply to obligations issued or guaranteed by the U.S. government, its agencies, or instrumentalities.

The Fund's portfolio holdings will be disclosed on its Web site ([www.guggenheimfunds.com](http://www.guggenheimfunds.com)) daily after the close of trading on the Exchange and prior to the opening of trading on the Exchange the following day.

The Fund intends to maintain the level of diversification necessary to qualify as a regulated investment company under Subchapter M of the Internal Revenue Code of 1986, as amended.<sup>21</sup> The Fund represents that the portfolio will include a minimum of 13 non-affiliated issuers. The Fund will only purchase performing securities, not distressed debt. Distressed debt is debt that is currently in default and is not expected to pay the current coupon.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600. The Exchange represents that, for initial and/or continued listing, the Fund will be in compliance with Rule 10A–3 under the Exchange Act,<sup>22</sup> as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares of the Fund will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the net asset value ("NAV") per Share will be calculated daily and

made with respect to any of the portfolio securities in which the Fund is authorized to invest. Repurchase agreements may be characterized as loans secured by the underlying securities. The Fund may enter into repurchase agreements with (i) member banks of the Federal Reserve System having total assets in excess of \$500 million and (ii) securities dealers ("Qualified Institutions"). The Adviser will monitor the continued creditworthiness of Qualified Institutions.

<sup>20</sup> Reverse repurchase agreements involve the sale of securities with an agreement to repurchase the securities at an agreed-upon price, date and interest payment and have the characteristics of borrowing. The securities purchased with the funds obtained from the agreement and securities collateralizing the agreement will have maturity dates no later than the repayment date. Generally the effect of such transactions is that the Fund can recover all or most of the cash invested in the portfolio securities involved during the term of the reverse repurchase agreement, while in many cases the Fund is able to keep some of the interest income associated with those securities.

<sup>21</sup> 26 U.S.C. 851.

<sup>22</sup> 17 CFR 240.10A–3.

that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. In addition, the Fund will not invest in non-U.S.-registered equity securities.

Additional information regarding the Trust, Fund, Shares, Fund's investment strategies, risks, creation and redemption procedures, fees, portfolio holdings and disclosure policies, distributions and taxes, availability of information, trading rules and halts, and surveillance procedures, among other things, can be found in the Notice and the Registration Statement, as applicable.<sup>23</sup>

### III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act<sup>24</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>25</sup> In particular, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act,<sup>26</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 notes that the Fund and the Shares must comply with the requirements of NYSE Arca Equities Rule 8.600 to be listed and traded on the Exchange.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,<sup>27</sup> which sets forth Congress's finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association ("CTA") high-speed

<sup>23</sup> See Notice and Registration Statement, *supra* notes 3 and 7, respectively.

<sup>24</sup> 15 U.S.C. 78f.

<sup>25</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>26</sup> 15 U.S.C. 78f(b)(5).

<sup>27</sup> 15 U.S.C. 78k–1(a)(1)(C)(iii).

line. In addition, the Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session.<sup>28</sup> On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio, as defined in NYSE Arca Equities Rule 8.600(c)(2), that will form the basis for the Fund's calculation of NAV at the end of the business day.<sup>29</sup> The NAV per Share of the Fund will be determined once daily as of the close of the New York Stock Exchange ("NYSE"), usually 4 p.m. Eastern Time, each day the NYSE is open for trading, provided that any assets or liabilities denominated in currencies other than the U.S. dollar shall be translated into U.S. dollars at the prevailing market rates on the date of valuation as quoted by one or more major banks or dealers that makes a two-way market in such currencies (or a data service provider based on quotations received from such banks or dealers); and U.S. fixed income instruments may be valued as of the announced closing time for trading in fixed income instruments on any day that the Securities Industry and Financial Markets Association announces an early closing time. Information regarding market price and trading volume for the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. In addition, price information for the debt securities held by the Fund will be available through major market data vendors. The Web site for the Fund will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

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>30</sup> In addition, the Exchange will halt trading in the Shares under the specific circumstances set forth in NYSE Arca Equities Rule 8.600(d)(2)(D) and may halt trading in the Shares if trading is not occurring in the securities and/or the financial instruments comprising the Disclosed Portfolio of the Fund, or if other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.<sup>31</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>32</sup> The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. The Exchange also states that the Adviser is affiliated with a broker-dealer, and the Adviser has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio.<sup>33</sup>

<sup>30</sup> See NYSE Arca Equities Rule 8.600(d)(1)(B).

<sup>31</sup> See NYSE Arca Equities Rule 8.600(d)(2)(C). With respect to trading halts, the Exchange may consider other relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. 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>32</sup> See NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

<sup>33</sup> See *supra* note 8. The Commission notes that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 ("Advisers Act"). As a result, the Adviser and its related personnel are subject to the provisions of Rule 204A-1 under the Advisers Act relating to codes of ethics. This rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A-1 under the Advisers Act. In addition, Rule 206(4)-7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures

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

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

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

(3) The Exchange's surveillance procedures applicable to derivative products, which include Managed Fund Shares, are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

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

(5) For initial and/or continued listing, the Fund will be in compliance with Rule 10A-3 under the Exchange Act,<sup>34</sup> as provided by NYSE Arca Equities Rule 5.3.

(6) The Fund will not: (a) Invest in non-U.S.-registered equity securities; (b) employ any leverage in order to meet its

reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

<sup>34</sup> 17 CFR 240.10A-3.

<sup>28</sup> According to the Exchange, several major market data vendors display and/or make widely available Portfolio Indicative Values published on CTA or other data feeds.

<sup>29</sup> On a daily basis, the Adviser will disclose on the Fund's Web site for each portfolio security or other financial instrument of the Fund the following information: Ticker symbol (if applicable), name of security or financial instrument, number of shares or dollar value of financial instruments held in the portfolio, and percentage weighting of the security or financial instrument in the portfolio. The Web site information will be publicly available at no charge.

investment objective; and (c) consistent with the Exemptive Order, invest in derivatives, including options, swaps, or futures.

(7) The Fund may hold in the aggregate up to 15% of its net assets in: (a) Illiquid securities; and (b) Rule 144A securities.<sup>35</sup>

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

This approval order is based on the Exchange's representations.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act<sup>36</sup> and the rules and regulations thereunder applicable to a national securities exchange.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>37</sup> that the proposed rule change (SR-NYSEArca-2011-81), as modified by Amendment No. 3 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>38</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012-5610 Filed 3-7-12; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-66508; File No. SR-FINRA-2012-018]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Amend NASD Rules 1012 (General Provisions) and 1017 (Application for Approval of Change in Ownership, Control, or Business Operations) To Adopt New Standardized Electronic Form CMA

March 2, 2012.

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> notice is hereby given that on February 28, 2012, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission

("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

FINRA is proposing to amend NASD Rules 1012 (General Provisions) and 1017 (Application for Approval of Change in Ownership, Control, or Business Operations) to adopt new standardized electronic Form CMA.

The text of the proposed rule change is available on FINRA's Web site at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

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

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

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

###### 1. Purpose

NASD Rule 1017 (Application for Approval of Change in Ownership, Control, or Business Operations) provides parameters for certain changes in a member's ownership, control, or business operations that would require a continuing membership application. Among other things, those changes include a merger of a member with another member, a direct or indirect acquisition by a member of another member, a change in equity ownership or partnership capital of the member that results in one person or entity directly or indirectly owning or controlling 25 percent or more of the equity or partnership capital, or a material change in business operations as defined in NASD Rule 1011(k) ("material change in business operations").<sup>3</sup> Currently, NASD Rule

1017 does not require an applicant seeking approval of a change of ownership, control, or business operations ("continuing membership applicant" or "applicant") to submit a standardized form as part of its continuing membership application and provides little detail regarding an application's required contents. Instead, each applicant is responsible for determining the contents of its continuing membership application. This often results in information deficiencies, which in turn, creates unnecessary delays in efficiently processing the applications. NASD Rule 1017 also generally requires a continuing membership application to be filed in the district office in which an applicant's principal place of business is located. Additionally, NASD Rule 1012 (General Provisions) provides that, unless otherwise prescribed by FINRA, applicants may submit continuing membership applications via first-class mail, overnight courier, or hand-delivery (or facsimile upon agreement by FINRA and the applicant).

This manner of submitting a continuing membership application reduces the overall efficiency of the process and also creates unnecessary delays in properly forwarding information within FINRA, such as in conveying information to and from the centralized Membership Application Program Group formed in January 2011. To address these deficiencies, the proposed rule change amends NASD Rule 1012 to require continuing membership applicants to file an application in the manner prescribed in Rule 1017. In addition, the proposed rule change amends NASD Rule 1017(b) to require continuing membership applicants to file an application in the manner prescribed by FINRA with the Department of Member Regulation ("the Department") and to include the completed Form CMA as part of the contents of a continuing membership application.

New Form CMA will provide continuing membership applicants with the benefits of a streamlined application process that new member applicants currently experience via the standardized online Form NMA and is intended to significantly reducing administrative delays that exists in today's manual application processes.

New Form CMA is structured similarly to revisions proposed for Form NMA with adjustments in the content of

membership agreement restriction; (2) market making, underwriting, or acting as a dealer for the first time; and (3) adding business activities that require a higher minimum net capital under SEA Rule 15c3-1.

<sup>35</sup> See *supra* note 6.

<sup>36</sup> 15 U.S.C. 78f(b)(5).

<sup>37</sup> 15 U.S.C. 78s(b)(2).

<sup>38</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> NASD Rule 1011(k) defines a "material change in business operations" as including, but not limited to: (1) Removing or modifying a