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April 15, 2020

Vanessa Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090

RE: Use of Derivatives by Registered Investment Companies and Business Development Companies; Required Due Diligence by Broker-Dealers and Registered Investment Advisers Regarding Retail Customers' Transactions in Certain Leveraged/Inverse Investment Vehicles; File Number S7-24-15

Dear Ms. Countryman:

NYSE Arca, Inc. ("NYSE Arca") appreciates the opportunity to comment on the SEC's proposed amendments to the rules under the Investment Company Act of 1940, as amended (the "1940 Act") regarding the use of derivatives and other transactions by registered investment companies and business development companies (the "Proposal").<sup>1</sup>

Our U.S. public markets provide unparalleled access to capital, liquidity and trusted regulation and are the destination of choice for investors and issuers. A key component of our public markets today is the exchange traded fund ("ETF") industry, which provides global investors with many important benefits including ease of access, intraday liquidity, low fees and increased tax efficiency. NYSE Arca is the premier global listing and trading venue for ETFs, representing the largest single pool of liquidity for investor access to ETFs, with trading volume in exchange-traded products more than twice that of the next largest exchange. NYSE Arca has over 1,500 ETF listings, representing approximately \$2.75 trillion of ETF assets under management in the United States.

NYSE Arca supports balanced regulation to ensure the protection of investors and to support a healthy pipeline of ETF issuers that seek to access the public markets. This in turn benefits investors via savings vehicles of all kinds, job growth opportunities for Main Street, and contributes to the growth of the entire U.S. economy. In general, we support the Commission's efforts in the Proposal to update the regulatory regime applicable to registered funds to reflect

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<sup>1</sup> Use of Derivatives by Registered Investment Companies and Business Development Companies; Required Due Diligence by Broker-Dealers and Registered Investment Advisers Regarding Retail Customers' Transactions in Certain Leveraged/Inverse Investment Vehicles, Release No. 34-87607; IA-5413; RIN 3235-AL60 (January 24, 2020) (the "Release"), *available at* <https://www.sec.gov/rules/proposed/2019/34-87607.pdf>.



today's U.S. marketplace. In considering changes to the regulatory regime for the use of derivatives by registered funds, including ETFs, it is important for the Commission to preserve the ability for all investors to be able to maintain access to the many benefits that exchange-traded products can provide, such as portfolio diversity, liquidity, hedging of long-term holdings, and interest rate risk management. It is also important for the Commission to acknowledge the enhanced safeguards that come with providing access to derivatives through the public markets, rather than the private or over-the-counter markets. NYSE Arca's comments on the Proposal are provided from such a perspective.

### **The Proposal Should Preserve Investor Access and Choice**

The Proposal includes new sales practice rules—Rule 15l-2 under the Securities Exchange Act of 1934 and Rule 211(h)-1 under the Investment Advisers Act of 1940—that would place new restrictions on an investor's ability to invest in leveraged or inverse funds and exchange-listed commodity or currency pools ("leveraged investment vehicles"). Perhaps most notably, the proposed sales practice rules would require that clients seeking to invest in a leveraged investment vehicle be subject to a new account approval process whereby an agent could only approve the account if it has a reasonable basis to believe that the client is capable of evaluating the risks associated with leveraged investment vehicle products. Such an account approval sales practice requirement reflects a sizeable shift beyond what is required for investments in leveraged investment vehicles today.

NYSE Arca is not providing comment here on the potential burdens that the proposed sales practice requirements may place on the broker-dealers or investment advisers who are required to implement the account approval processes. As an exchange, our role is to provide investors access to the broadest possible range of investable choices, provided those investments meet our listing standards. To that end, we point out that the proposed sales practice requirements in the Proposal would limit the ability to invest in products, namely leveraged investment vehicles, that have been approved by the SEC, part of the public marketplace, and listed and trading on NYSE Arca since 2006.

We encourage the Commission to carefully balance the additional burdens for accessing an entire section of the ETF industry against the perceived investor protections to be gained. Investor choice and investment access are hallmarks of the U.S. capital markets. When armed with proper disclosure as to the nature of an investment, it should be up to investors -- not the government -- to decide how to allocate their capital as they see fit. It is our view that the investor, or their agent working in their best interest, is most equipped to make informed decisions on how to deploy capital in an investment portfolio, how and when to use leverage, and to ultimately make their own informed investment decision based on the investor's portfolio and risk tolerances.<sup>2</sup>

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<sup>2</sup> The Commission's recently adopted Regulation Best Interest (effective in September 2019) requires that broker-dealers have a reasonable basis to believe that a recommendation is in the best interest of a particular retail customer based on that retail customer's investment profile and the potential risks, rewards, and costs associated with the recommendation and does not place the financial or other interest of the broker, dealer, or such natural person ahead of the



## The Proposal Should Acknowledge the Safeguards of the Public Markets

The Proposal's sales practice requirements to *limit* access to publicly traded leveraged investment vehicles also appear to be at odds with the approach taken by the Commission in other areas of its regulatory agenda to *expand* access to the private markets, which are inherently riskier for investors. In a recent string of regulatory proposals, the Commission has contemplated greater expansion of access to the private markets for a larger segment of investors than is permitted today, notwithstanding the dramatically less robust regulatory protections in the private market space.<sup>3</sup>

The public markets are highly-regulated and trusted, deriving from the robust disclosure and transparency that underpin which products are brought to market and available to be traded. The regulatory regime for the U.S. public markets works because it puts decision-making power in the hands of investors through access to information, while providing the Commission with the tools to require issuers to provide such information. Briefly put, "[i]nvestors expect, and rely on, full and accurate disclosure to make investment decisions and take risks; the Commission, in turn, is charged to act sharply to stop fraud and prevent unfair and dishonest practices, including misleading disclosures."<sup>4</sup>

In the private markets, by comparison, neither investors nor the Commission have the same quality of information available to them as is required by the registration process for products traded on the public markets. Investors who invest in the private markets are provided significantly less information than is required by, for example, an ETF registered under the 1940 Act or a corporate issuer registered under the Securities Act of 1933. The Proposal's sales practice requirements for leveraged investment vehicles would benefit from considering the robust regulatory regime for disclosure already in place for these public market products today.

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interest of the retail customer. We encourage the Commission account for the ongoing implementation of Regulation Best Interest as it considers the final elements of the Proposal's sales practice requirements for leveraged investment vehicles.

<sup>3</sup> See, *Amending the "Accredited Investor" Definition*, Sec. and Exch. Comm'n, Rel. Nos. 33-10734; 34-87784, Jan. 15, 2020, available at <https://www.govinfo.gov/content/pkg/FR-2020-01-15/pdf/2019-28304.pdf>; *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets* Sec. and Exch. Comm'n, Rel. Nos. 33-10763 and 34-88321, Mar. 4, 2020, available at <https://www.sec.gov/rules/proposed/2020/33-10763.pdf>.

<sup>4</sup> Chair Mary Jo White, *The SEC after the Financial Crisis: Protecting Investors, Preserving Markets*, January 17, 2017, at <https://www.sec.gov/news/speech/the-sec-after-the-financial-crisis.html>. See also Commissioner Tory A. Paredes, *Remarks at the SEC Speaks in 2013*, February 22, 2013, at <https://www.sec.gov/news/speech/2013-spch022213taphtm> ("investors, when armed with information, are well-positioned to evaluate their investment opportunities and to allocate their capital as they see fit").



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We encourage the Commission to consider the Proposal in light of the Commission's broader rulemaking agenda and to strike a balance between limiting investor access to investment opportunities in the public markets and continuing to prioritize strong investor protection measures.

Sincerely,

*Douglas M. Yones*

Douglas M. Yones  
Head of Exchange Traded Products, NYSE Group

cc: The Honorable Chairman Clayton  
The Honorable Hester Peirce  
The Honorable Elad Roisman  
The Honorable Allison Lee  
Dalia Blass, Director, Division of Investment Management