

Gary Gastineau  
ETF Consultants.com, Inc.  
4731 Bonita Bay Boulevard, Unit 401  
Bonita Springs, FL 34134

December 18, 2017

Brent J. Fields  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: Notice of Designation of Longer Period for Commission Action on Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Adopt NYSE Arca Equities Rule 8.900 to Permit Listing and Trading of Managed Portfolio Shares and to List and Trade Shares of the Royce Pennsylvania ETF, Royce Premier ETF, and Royce Total Return ETF under Proposed NYSE Arca Equities Rule 8.900 (Release No. 34-80553; File No. SR-NYSEArca-2017-36) ("Notice")<sup>1</sup>

Dear Mr. Fields:

I write to provide public comment on the Notice and the NYSE Arca, Inc. (Exchange) rule change request referenced therein (Rule Change Request)<sup>2</sup> to permit the listing and trading of Managed Portfolio Shares and to list and trade Managed Portfolio Shares of three series (Funds) of the Precidian ETF Trust II (Trust).<sup>3</sup> The Filing relates to a request<sup>4</sup> by the Trust and other parties for exemptive relief from various provisions of the Investment Company Act of 1940, as amended (Exemptive Application),

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<sup>1</sup>See Securities Exchange Act Release No. 34-81977 (October 30, 2017).

<sup>2</sup>See Securities Exchange Act Release No. 80553 (April 28, 2017), 82 FR 20932.

<sup>3</sup>As background, I am the author of The Exchange-Traded Funds Manual (Second Edition, Wiley, 2010) and numerous other publications on exchange-traded products. Since 2003, I have been the principal of a consulting business now operating as ETF Consultants.com, inc. I maintain a free website at [www.etfconsultants.com](http://www.etfconsultants.com) for anyone interested in ETFs. I was previously Managing Director for ETF Product Development at Nuveen Investments and Senior Vice President for New Product Development at the American Stock Exchange. In 2005, Managed ETFs™ LLC (Managed ETFs), of which I am a principal, filed an application for exemptive relief to permit the offering of certain actively managed exchange-traded funds (File No. 812-13228 (May 29, 2005); no longer active). The intellectual property developed by Managed ETFs was subsequently sold to an affiliate of Eaton Vance Corp. (Eaton Vance) and forms much of the basis for NextShares™ exchange-traded managed funds (NextShares), for which the Commission granted exemptive relief in December 2014 and Eaton Vance launched the initial funds in the first quarter of 2016. Because NextShares may be competitive with Managed Portfolio Shares if approved and because I have a retained economic interest, my views may be considered subject to a conflict of interest. My comments are made in the public interest and, to the best of my ability, are not influenced by any conflict.

<sup>4</sup>See File No. 812-14405 (May 2, 2017). The third amended and restated Exemptive Application filed on May 2, 2017 has since been replaced by the fourth amended and restated Exemptive Application dated September 29, 2017 and the fifth amended and restated Exemptive Application dated December 4, 2017.

and a registration statement filed<sup>5</sup> by the Trust on Form N-1A under the Securities Act of 1933, as amended (Registration Statement). In this letter, the Requested Rule Change, Exemptive Application and Registration Statement are treated as elements of a single proposal (Proposal) and the various filing parties and their affiliates are referred to as the "Applicants."<sup>6</sup> My comments here support and amplify my earlier commentary on the Proposal provided in a letter to you dated May 24, 2017 (May Letter).<sup>7</sup>

As set forth in the Notice, the SEC has designated December 30, 2017 as the date by which it should either approve or disapprove the Rule Change Request. In the Notice, the SEC cites as rationale for designating a longer period to consider approving or disapproving the Rule Change Request the need for "sufficient time to consider the proposed rule change and the issues raised in comment letters that have been submitted in connection therewith."<sup>8</sup>

Since the Notice was issued in October, the Proposal has attracted additional public comments and SEC staff analysis<sup>9</sup> with major implications for whether the Requested Rule Change should be approved:

- In a series of five comment letters submitted in October, November and December, Terence Norman and Simon Goulet of Blue Tractor Group LLC (Blue Tractor) demonstrated that the Proposal's central claim that the Funds' proposed method of operation will "eliminate the potential for "free riding" or "front-running"" of the Funds' portfolio trades"<sup>10</sup> is, in fact, false. Additional evidence that the Funds may be subject to substantial reverse engineering risk was provided in a study published by the SEC's Division of Economic and Risk Analysis (DERA) on November 4, 2017.
- In his comment letter dated December 15<sup>th</sup>, Professor Kevin Haeberle described in detail how the Proposal's intended selective disclosure of confidential Fund holdings information on a daily basis to AP Representatives (formerly Trusted Agents) for trading on behalf of Authorized Participants would violate federal securities laws against insider trading and selection disclosure, and state law and FINRA requirements relating to best execution. As noted by Professor Haeberle, the SEC has no exemptive authority with respect to securities law prohibitions against insider trading and selective disclosure.

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<sup>5</sup>See File Nos. 333-217142 and 811-23246 (April 4, 2017).

<sup>6</sup>Unless otherwise noted, the capitalized terms used herein have the same meanings as in the Rule Change Request, Exemptive Application and Registration Statement. When those documents use different terminology or conflict, the Rule Change Request is followed.

<sup>7</sup>Available at <https://www.sec.gov/comments/sr-nysearca-2017-36/nysearca201736.htm>.

<sup>8</sup>See Notice at page 3.

<sup>9</sup>Available at <https://www.sec.gov/comments/sr-nysearca-2017-36/nysearca201736.htm>.

<sup>10</sup>See Rule Change Request at page 46.

- In her comment letter dated December 5<sup>th</sup>, Martha Redding of the New York Stock Exchange replaced the Rule Change Request subject to the Notice with an amended version of the same (Amended Rule Change Request) that substantially modifies the Proposal and dramatically weakens the Applicants' case for why approval would be in the public interest. As revised, the Proposal would no longer permit Authorized Participants to engage in Bona Fide Arbitrage through their AP Representatives, removing one of the two foundational elements — together with dissemination of VIIVs at one-second intervals — of the Applicants' prior proposed approach to seeking to ensure the secondary market trading efficiency of Fund shares. And, bowing to the growing evidence that the Funds may be susceptible to reverse engineering based on analysis of patterns of intraday VIIV changes, the Amended Rule Change Request now asserts that the Proposal could only "reduce," rather than "eliminate," front-running and free-rider risks. Moreover, the Amended Rule Change Request and associated Exemptive Application amendment provide for other important changes to the Proposal including, among others, the method of VIIV calculation, the operation of Confidential Accounts, Fund Board responsibilities and the anticipated initial price range of Fund shares.

Given the extensive reworking of the Proposal, the Amended Rule Change Request sensibly provides for an additional public comment period, which would extend for 21 days after the Amended Rule Change Request is published in the Federal Register. Although nothing has appeared in the Federal Register as yet, the new comment deadline would likely fall sometime in January 2018.

In considering the December 30, 2017 date by which the Notice provides that the SEC should either approve or disapprove the (original) Rule Change Request, it is abundantly clear to this commenter that the Commission has no choice but to disapprove, both on procedural grounds and considering the Proposal's many fatal deficiencies.

Procedurally, approving the Rule Change Request in the December timeframe would mean taking action before the end of the public comment period set forth in the Amended Rule Change Request. Doing so would deprive the SEC of the insights that future commenters may provide and deny commenters the right to have their views and opinions heard. Since the Proposal as reflected in the (original) Rule Change Request is now null and void, the December 30<sup>th</sup> deadline for the SEC to take action should be thrown out as well. The governing timeframe for SEC consideration of the (revised) Proposal should properly begin anew on the date of publication of the Amended Rule Change Request in the Federal Register, and should continue thereafter for so long as the Commission needs to fully consider the views of commenters yet to be heard from, and to conclude the Commission's own investigations and deliberations on the Proposal as newly constituted.

In substance, the Proposal as most recently modified continues to fall far short of meeting the statutory standard that approval is necessary or appropriate in the public interest and consistent with

the protection of investors. Substantially all of the deficiencies that I and other commenters identified prior to the Notice remain unaddressed, and recent commentary from Blue Tractor and Professor Haerberle and the DERA study expose additional critical failings of the Proposal.

To reiterate the conclusions of the May Letter, I continue to believe that the Proposal is deeply, fundamentally and fatally flawed and should not be approved. This determination is based principally upon:

- the proposed selective disclosure of confidential Fund holdings information to Trusted Agents/AP Representatives for trading on behalf of Confidential Account holders in violation of federal securities laws (*as described on pages 4-6 of the May Letter and further detailed in the Haerberle comment letter*);
- the unreliability of the Funds' proposed method for ensuring secondary market trading efficiency and the likelihood that Fund shares will trade at significantly wider bid-ask spreads and/or more variable premiums/discounts than existing ETFs that themselves demonstrate trading deficiencies (*as described on pages 6-19 of the May Letter and made even more unreliable by the elimination of Bona Fide Arbitrage*);
- the likelihood that the Funds' trading performance will be especially poor during periods of market stress and volatility (*especially with no Bona Fide Arbitrage*);
- concerns that the security of confidential Fund information widely disseminated to Trusted Agents/AP Representatives and other Confidential Account service providers cannot be assured (*see pages 19-21 of the May Letter and the Haerberle comment letter*);
- the potentially significant added Fund costs and risks in connection with the calculation, verification and dissemination of VIIVs and associated Fund warranties (*see pages 21-23 of the May Letter*);
- the potential for frequent trading halts in Fund shares (*see page 23 of the May Letter*);
- the likely incidence of erroneous Fund share trades and the absence of an Exchange program to detect and appropriately remediate erroneous trades (*see page 24 of the May Letter*);
- the potential for reverse engineering of a Fund's portfolio holdings through analysis of VIIVs and other Fund information (*see pages 24-26 of the May Letter, the Blue Tractor comment letters and the DERA study*);

- the significant risk that the IRS will deny the purported tax benefits of the Funds' distinctive in-kind redemption program (*as described on pages 26-29 of the May Letter and further exacerbated by recent modifications to the Proposal*); and
- the costs, risks and uncertainties of broker-dealers serving as Authorized Participants and Non-Authorized Participant Market Makers meeting their compliance obligations with respect to securities traded on their behalf through Confidential Accounts (*see pages 29-32 of the May Letter*).

Over many years now, the Applicants have doggedly pursued approval of the Proposal in its many iterations. While their persistence may be commendable, these efforts have come at a considerable cost of public and private resources. The promise of imminent approval long touted by the Proposal's principal sponsors has also stymied the advance of true innovation in exchange-traded products. The time for SEC action may now be at hand. As the Commission acts, it is my hope that you will not only reject the Proposal, but will do so with sufficient clarity and vehemence to put this bad idea to rest once and for all.

In closing, I wish to thank the Commissioners and staff of the SEC for consideration of the views expressed in this letter.

Sincerely,



Gary L. Gastineau  
President, ETF Consultants.com, Inc.