

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-71606; File No. SR-NYSEArca-2013-122)

February 24, 2014

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change Relating to the Use of Derivative Instruments by PIMCO Total Return Exchange Traded Fund

I. Introduction

On November 6, 2013, 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 relating to the use of derivative instruments by the PIMCO Total Return Exchange Traded Fund (“Fund”). The proposed rule change was published for comment in the Federal Register on November 26, 2013.<sup>3</sup> The Commission received no comment letters on the proposed rule change. On January 9, 2014, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>5</sup> This order institutes proceedings under Section 19(b)(2)(B) of the

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

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

<sup>3</sup> See Securities Exchange Act Release No. 70905 (November 20, 2013), 78 FR 70610 (“Notice”).

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

<sup>5</sup> Securities Exchange Act Release No. 71271 (January 9, 2014), 79 FR 2736 (January 15, 2014). The Commission determined that it was 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 proposed rule change. Accordingly, the Commission designated February 24, 2014 as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule change.

## II. Description of the Proposal

The Commission approved the listing and trading on the Exchange of shares (“Shares”) of the Fund<sup>7</sup> under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares. The Shares are offered by PIMCO ETF Trust (“Trust”), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.<sup>8</sup> The investment manager to the Fund is Pacific Investment Management Company LLC (“PIMCO” or “Adviser”). The Exchange proposes to change the description of the Fund’s use of derivative instruments, as described below.

On December 6, 2012, the staff of the Commission’s Division of Investment Management issued a no-action letter (“No-Action Letter”) relating to the use of derivatives by actively-managed exchange traded funds (“ETFs”).<sup>9</sup> The No-Action Letter noted that, in March of 2010, the Commission announced in a press release that the staff was conducting a review to evaluate the use of derivatives by mutual funds, ETFs, and other investment companies and that,

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<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>7</sup> See Securities Exchange Act Release No. 66321 (February 3, 2012), 77 FR 6850 (February 9, 2012) (SR-NYSEArca-2011-95) (“Prior Order”). See also Securities Exchange Act Release No. 65988 (December 16, 2011), 76 FR 79741 (December 22, 2011) (SR-NYSEArca-2011-95) (“Prior Notice,” and together with the Prior Order, collectively, “Prior Release”).

<sup>8</sup> The Trust is registered under the Investment Company Act of 1940 (“1940 Act”). The Exchange states that on October 29, 2012 the Trust filed with the Commission the most recent post-effective amendment to its registration statement under the Securities Act of 1933 (“1933 Act”) and under the 1940 Act relating to the Fund (File Nos. 333-155395 and 811-22250) (“Registration Statement”). The Exchange further states that the Trust has obtained an order granting certain exemptive relief under the 1940 Act. See Investment Company Act Release No. 28993 (November 10, 2009) (File No. 812-13571) (“Exemptive Order”).

<sup>9</sup> See No-Action Letter dated December 6, 2012 from Elizabeth G. Osterman, Associate Director, Office of Exemptive Applications, Division of Investment Management, Commission.

pending completion of this review, the staff would defer consideration of exemptive requests under the 1940 Act relating to, among others, actively-managed ETFs that would make significant investments in derivatives.

The No-Action Letter stated that Division of Investment Management staff will no longer defer consideration of exemptive requests under the 1940 Act relating to actively-managed ETFs that make use of derivatives provided that they include representations to address some of the concerns expressed in the Commission's March 2010 press release. These representations are: (i) that the ETF's board periodically will review and approve the ETF's use of derivatives and how the ETF's investment adviser assesses and manages risk with respect to the ETF's use of derivatives; and (ii) that the ETF's disclosure of its use of derivatives in its offering documents and periodic reports is consistent with relevant Commission and staff guidance. The No-Action Letter stated that the Division of Investment Management would not recommend enforcement action to the Commission under sections 2(a)(32), 5(a)(1), 17(a), 22(d), and 22(e) of the 1940 Act, or rule 22c-1 under the 1940 Act if actively-managed ETFs operating in reliance on specified orders (which include the Trust's Exemptive Order)<sup>10</sup> invest in options contracts, futures contracts, or swap agreements provided that they comply with the representations stated in the No-Action Letter, as noted above.

In the Prior Release, the Exchange stated that, consistent with the Trust's Exemptive Order, the Fund would not invest in options contracts, futures contracts, or swap agreements. In view of the No-Action Letter, the Exchange is proposing to change this representation to permit the Fund to use derivative instruments, as described below.<sup>11</sup>

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<sup>10</sup> See supra note 8.

<sup>11</sup> The Adviser represents that the Fund, in connection with its use of derivative instruments, will comply with the representations stated in the No-Action Letter, as noted

The Prior Release stated that the Fund will invest under normal market circumstances at least 65% of its total assets in a diversified portfolio of Fixed Income Instruments of varying maturities.<sup>12</sup> “Fixed Income Instruments” include bonds, debt securities, and other similar instruments issued by various U.S. and non-U.S. public- or private-sector entities.<sup>13</sup> The Exchange proposes to revise this statement to provide that the Fund will invest under normal market circumstances at least 65% of its total assets in a diversified portfolio of Fixed Income Instruments of varying maturities, which may be represented by derivatives related to Fixed Income Instruments (“65% policy”).

The Prior Release stated that the Fund’s investment would not be used to enhance leverage. In view of the Exchange’s proposal to permit the Fund to use derivative instruments,

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above.

<sup>12</sup> As stated in the Prior Release, 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>13</sup> As noted in the Prior Release, “Fixed Income Instruments,” as such term is used generally in the Registration Statement, include: debt securities issued or guaranteed by the U.S. Government, its agencies or government-sponsored enterprises; corporate debt securities of U.S. and non-U.S. issuers, including convertible securities and corporate commercial paper; mortgage-backed and other asset-backed securities; inflation-indexed bonds issued both by governments and corporations; structured notes, including hybrid or “indexed” securities and event-linked bonds; bank capital and trust preferred securities; loan participations and assignments; delayed funding loans and revolving credit facilities; bank certificates of deposit, fixed time deposits, and bankers’ acceptances; repurchase agreements on Fixed Income Instruments and reverse repurchase agreements on Fixed Income Instruments; debt securities issued by states or local governments and their agencies, authorities, and other government-sponsored enterprises; obligations of non-U.S. governments or their subdivisions, agencies, and government-sponsored enterprises; and obligations of international agencies or supranational entities. Securities issued by U.S. Government agencies or government-sponsored enterprises may not be guaranteed by the U.S. Treasury.

as described below, the Fund's investments in derivative instruments may be used to enhance leverage. However, as noted in the Prior Release, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (e.g., 2x or 3x) of the Fund's broad-based securities market index.

#### The Fund's Use of Derivatives

According to the Exchange, with respect to the Fund, derivative instruments primarily will include forwards, exchange-traded and over-the-counter ("OTC") options contracts, exchange-traded futures contracts, options on futures contracts, and swap agreements.

Generally, derivatives are financial contracts whose value depends upon, or is derived from, the value of an underlying asset, reference rate, or index, and may relate to stocks, bonds, interest rates, currencies or currency exchange rates, commodities, and related indexes. The Exchange states that the Fund may, but is not required to, use derivative instruments for risk management purposes or as part of its investment strategies.<sup>14</sup>

The Exchange represents that the Fund's investments in derivative instruments will be made in accordance with the 1940 Act and consistent with the Fund's investment objective and policies. The Exchange states that the Fund will typically use derivative instruments as a substitute for taking a position in the underlying asset and/or as part of a strategy designed to reduce exposure to other risks, such as interest rate or currency risk. The Fund may also use

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<sup>14</sup> The Fund will seek, where possible, to use counterparties whose financial status is such that the risk of default is reduced; however, the risk of losses resulting from default is still possible. PIMCO's Counterparty Risk Committee evaluates the creditworthiness of counterparties on an ongoing basis. In addition to information provided by credit agencies, PIMCO credit analysts evaluate each approved counterparty using various methods of analysis, including company visits, earnings updates, the broker-dealer's reputation, PIMCO's past experience with the broker-dealer, market levels for the counterparty's debt and equity, the counterparty's liquidity, and its share of market participation.

derivative instruments to enhance returns. According to the Exchange, to limit the potential risk associated with such transactions, the Fund will segregate or “ earmark ” assets determined to be liquid by PIMCO in accordance with procedures established by the Trust’s Board of Trustees and in accordance with the 1940 Act (or, as permitted by applicable regulation, enter into certain offsetting positions) to cover its obligations under derivative instruments. These procedures have been adopted consistent with Section 18 of the 1940 Act and related Commission guidance. In addition, the Exchange states that the Fund will include appropriate risk disclosure in its offering documents, including leveraging risk. Leveraging risk is the risk that certain transactions of the Fund, including the Fund’s use of derivatives, may give rise to leverage, causing the Fund to be more volatile than if it had not been leveraged.<sup>15</sup> Because the markets for certain securities, or the securities themselves, may be unavailable or cost prohibitive as compared to derivative instruments, suitable derivative transactions may be an efficient alternative for the Fund to obtain the desired asset exposure.

The Adviser believes that derivatives can be an economically attractive substitute for an underlying physical security that the Fund would otherwise purchase. For example, the Fund could purchase Treasury futures contracts instead of physical Treasuries or could sell credit default protection on a corporate bond instead of buying a physical bond. Economic benefits include potentially lower transaction costs or attractive relative valuation of a derivative versus a physical bond (e.g., differences in yields).

The Adviser further believes that derivatives can be used as a more liquid means of adjusting portfolio duration as well as targeting specific areas of yield curve exposure, with potentially lower transaction costs than the underlying securities (e.g., interest rate swaps may

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<sup>15</sup> To mitigate leveraging risk, the Adviser will segregate or “ earmark ” liquid assets or otherwise cover the transactions that may give rise to such risk.

have lower transaction costs than physical bonds). Similarly, money market futures can be used to gain exposure to short-term interest rates in order to express views on anticipated changes in central bank policy rates. In addition, derivatives can be used to protect client assets through selectively hedging downside (or “tail risks”) in the Fund.

According to the Exchange, the Fund also can use derivatives to increase or decrease credit exposure. Index credit default swaps (CDX) can be used to gain exposure to a basket of credit risk by “selling protection” against default or other credit events, or to hedge broad market credit risk by “buying protection.” Single name credit default swaps (CDS) can be used to allow the Fund to increase or decrease exposure to specific issuers, saving investor capital through lower trading costs. The Fund can use total return swap contracts to obtain the total return of a reference asset or index in exchange for paying a financing cost. A total return swap may be much more efficient than buying underlying securities of an index, potentially lowering transaction costs.

The Adviser believes that the use of derivatives will allow the Fund to selectively add diversifying sources of return from selling options. Option purchases and sales can also be used to hedge specific exposures in the portfolio, and can provide access to return streams available to long-term investors such as the persistent difference between implied and realized volatility. Option strategies can generate income or improve execution prices (i.e., covered calls).

#### Other Investments

In addition to the Fund’s use of derivatives in connection with the 65% policy, under the proposal the Fund would seek to invest in derivative instruments not based on Fixed Income Instruments, consistent with the Fund’s investment restrictions relating to exposure to those asset classes.

The Prior Release also stated that the Fund may invest in debt securities and instruments that are economically tied to foreign (non-U.S.) countries. The Prior Release stated further that PIMCO generally considers an instrument to be economically tied to a non-U.S. country if the issuer is a foreign government (or any political subdivision, agency, authority, or instrumentality of such government), or if the issuer is organized under the laws of a non-U.S. country. In the case of applicable money market instruments, such instruments will be considered economically tied to a non-U.S. country if either the issuer or the guarantor of such money market instrument is organized under the laws of a non-U.S. country.

The Exchange proposes to add to this representation that, with respect to derivative instruments, as proposed to be used, PIMCO generally will consider such instruments to be economically tied to non-U.S. countries if the underlying assets are foreign currencies (or baskets or indexes of such currencies), or instruments or securities that are issued by foreign governments (or any political subdivision, agency, authority, or instrumentality of such governments) or issuers organized under the laws of a non-U.S. country (or if the underlying assets are money market instruments, as applicable, if either the issuer or the guarantor of such money market instruments is organized under the laws of a non-U.S. country).

The Fund's investments, including investments in derivative instruments, are subject to all of the restrictions under the 1940 Act, including restrictions with respect to illiquid securities. The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser,<sup>16</sup> consistent with Commission guidance. The Fund will monitor its portfolio liquidity

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<sup>16</sup> In reaching liquidity decisions with respect to Rule 144A securities, the Adviser may consider the following factors: the frequency of trades and quotes for the security; the number of dealers willing to purchase or sell the security and the number of other

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

The Exchange states that the changes described herein will be effective upon (i) the effectiveness of an amendment to the Trust's Registration Statement disclosing the Fund's intended use of derivative instruments, and (ii) when this proposed rule change has become operative. The Adviser represents that it has managed and will continue to manage the Fund in the manner described in the Prior Release, and will not implement the changes described herein until this proposed rule change is operative.

The Adviser represents that there is no change to the Fund's investment objective and that the Fund will continue to comply with all initial and continued listing requirements under NYSE Arca Equities Rule 8.600. Except for the changes noted above, all other facts presented and representations made in the Prior Release remain unchanged.

#### Derivatives Valuation Methodology for Purposes of Determining Net Asset Value

The Exchange states that the net asset value ("NAV") of the Fund's Shares is determined by dividing the total value of the Fund's portfolio investments and other assets, less any liabilities, by the total number of Shares outstanding. Fund Shares are valued as of the close of regular trading (normally 4:00 p.m., Eastern time ("E.T.)) ("NYSE Close") on each day NYSE

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potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace trades (e.g., the time needed to dispose of the security, the method of soliciting offers, and the mechanics of transfer).

Arca is open (“Business Day”). Information that becomes known to the Fund or its agents after the NAV has been calculated on a particular day will not generally be used to retroactively adjust the price of a portfolio asset or the NAV determined earlier that day. The Fund reserves the right to change the time its NAV is calculated if the Fund closes earlier, or as permitted by the Commission.

According to the Exchange, for purposes of calculating NAV, portfolio securities and other assets for which market quotes are readily available are valued at market value. Market value is generally determined on the basis of last reported sales prices, or if no sales are reported, based on quotes obtained from a quotation reporting system, established market makers, or pricing services. Domestic and foreign fixed income securities and non-exchange-traded derivatives will normally be valued on the basis of quotes obtained from brokers and dealers or pricing services using data reflecting the earlier closing of the principal markets for those assets. Prices obtained from independent pricing services use information provided by market makers or estimates of market values obtained from yield data relating to investments or securities with similar characteristics. Exchange-traded options, futures, and options on futures will generally be valued at the settlement price determined by the applicable exchange.

Derivatives for which market quotes are readily available will be valued at market value. Local closing prices will be used for all instrument valuation purposes.

For the Fund’s 4:00 p.m. E.T. futures holdings, estimated prices from Reuters will be used if any cumulative futures margin impact is greater than \$0.005 to the NAV due to futures movement after the fixed income futures market closes (3:00 p.m. E.T.) and up to the NYSE Close (generally 4:00 p.m. E.T.). Swaps traded on exchanges such as the Chicago Mercantile

Exchange or the Intercontinental Exchange will use the applicable exchange closing price where available.

Derivatives Valuation Methodology for Purposes of Determining Intra-day Indicative Value

According to the Exchange, on each Business Day, before commencement of trading in Fund Shares on NYSE Arca, the Fund discloses on its website the identities and quantities of the portfolio instruments and other assets held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the Business Day. In order to provide additional information regarding the intra-day value of Shares of the Fund, NYSE Arca or a market data vendor disseminates every 15 seconds through the facilities of the Consolidated Tape Association or other widely disseminated means an updated Intra-day Indicative Value ("IIV") for the Fund as calculated by an information provider or market data vendor.

The Exchange states that a third party market data provider is currently calculating the IIV for the Fund. For the purposes of determining the IIV, the third party market data provider's valuation of derivatives is expected to be similar to their valuation of all securities. The third party market data provider may use market quotes if available or may fair value securities against proxies (such as swap or yield curves).

According to the Exchange, with respect to specific derivatives:

- Foreign currency derivatives may be valued intraday using market quotes, or another proxy as determined to be appropriate by the third party market data provider.
- Futures may be valued intraday using the relevant futures exchange data, or another proxy as determined to be appropriate by the third party market data provider.

- Interest rate swaps may be mapped to a swap curve and valued intraday based on changes of the swap curve, or another proxy as determined to be appropriate by the third party market data provider.
- CDX/CDS may be valued using intraday data from market vendors, or based on underlying asset price, or another proxy as determined to be appropriate by the third party market data provider.
- Total return swaps may be valued intraday using the underlying asset price, or another proxy as determined to be appropriate by the third party market data provider.
- Exchange listed options may be valued intraday using the relevant exchange data, or another proxy as determined to be appropriate by the third party market data provider.
- OTC options may be valued intraday through option valuation models (e.g., Black-Scholes) or using exchange traded options as a proxy, or another proxy as determined to be appropriate by the third party market data provider.

#### Disclosed Portfolio

The Exchange states that the Fund's disclosure of derivative positions in the Disclosed Portfolio will include information that market participants can use to value these positions intraday. This information will vary by line item, and may include tickers or other identifiers which would identify the listing or clearing exchange for exchange-traded and cleared derivatives, strike price(s), underlying asset, swap or index, coupon, effective date, maturity, and quantities or exposure. For example, a Treasury future would require only a ticker/identifier and quantity. An OTC option may require underlying asset or swap details, strike price, quantity,

and expiration date. For the avoidance of doubt, exchange-traded and cleared derivatives will be identified by ticker or other identifiers which would identify the listing or clearing exchange for those instruments.

#### Impact on Arbitrage Mechanism

The Adviser believes there will be minimal, if any, impact to the arbitrage mechanism as a result of the use of derivatives. Market makers and participants should be able to value derivatives as long as the positions are disclosed with relevant information. The Adviser believes that the price at which Shares trade will continue to be disciplined by arbitrage opportunities created by the ability to purchase or redeem creation Shares at their NAV, which should ensure that Shares will not trade at a material discount or premium in relation to their NAV.

The Adviser does not believe there will be any significant impacts to the settlement or operational aspects of the Fund's arbitrage mechanism due to the use of derivatives. Because derivatives generally are not eligible for in-kind transfer, they will typically be substituted with a "cash in lieu" amount when the Fund processes purchases or redemptions of creation units in-kind.

#### Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by the Financial Industry Regulatory Authority ("FINRA") on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.<sup>17</sup> The Exchange represents that these procedures are adequate to properly

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<sup>17</sup> FINRA surveils trading on the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares, exchange traded options, futures, and options on futures with other markets or other entities that are members of the Intermarket Surveillance Group (“ISG”), and FINRA may obtain trading information regarding trading in the Shares, exchange traded options, futures, and options on futures from such markets or entities. In addition, the Exchange may obtain information regarding trading in the Shares, exchange traded options, futures, and options on futures from markets or other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.<sup>18</sup> In addition, FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA’s Trade Reporting and Compliance Engine. In addition, the Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees.

Additional information regarding the Trust, the Fund, and the Shares, including

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<sup>18</sup> For a list of the current members of ISG, see [www.isgportal.org](http://www.isgportal.org). The Exchange notes that not all components of the Disclosed Portfolio for the Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions, and taxes, among other things, is included in the Notice and Registration Statement, as applicable.<sup>19</sup>

III. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2013-122 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>20</sup> to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>21</sup> the Commission is providing notice of the grounds for disapproval under consideration. In particular, Section 6(b)(5) of the Act<sup>22</sup> 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, 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; and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As discussed above, under the proposal, the Fund would seek to invest, under normal market circumstances, at least 65% of its total assets in a diversified portfolio of Fixed Income

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<sup>19</sup> See Notice and Registration Statement, supra notes 3 and 8, respectively.

<sup>20</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>21</sup> Id.

<sup>22</sup> 15 U.S.C. 78f(b)(5).

Instruments of varying maturities, which may be represented by derivative instruments based on Fixed Income Instruments.<sup>23</sup> With respect to the Fund, derivative instruments primarily will include forwards, exchange-traded and OTC options contracts, exchange-traded futures contracts and options on futures contracts, and swap agreements. In addition to the Fund's use of derivative instruments in connection with the 65% policy, under the proposal, the Fund would seek to invest in derivative instruments that are not based on Fixed Income Instruments, consistent with the Fund's investment restrictions relating to exposure to those asset classes.<sup>24</sup> In the Notice, the Exchange included a description of the information that would be made available about the derivative positions in the Disclosed Portfolio. Also in the Notice, the Exchange discussed the impact of the proposal on the arbitrage mechanism and its surveillance of the listing and trading of the Shares on the Exchange.

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<sup>23</sup> See supra note 13.

<sup>24</sup> In the Prior Release, the Exchange described the Fund's permitted investments in Fixed Income Instruments and assets other than Fixed Income Instruments and noted that the Fund would be subject to certain investment restrictions (in addition to the diversification requirements and restrictions relating to illiquid securities, among others, under the 1940 Act). Such investment restrictions include the following: (a) the Fund may invest up to 15% of its total assets in securities and instruments that are economically tied to emerging market countries; (b) the Fund will normally limit its foreign currency exposure (from non-U.S. dollar-denominated securities or currencies) to 20% of its total assets; (c) the Fund may invest up to 10% of its total assets in preferred stock, convertible securities and other equity related securities; and (d) the Fund will not invest in any non-U.S registered equity securities, except if such securities are traded on exchanges that are members of ISG. See Prior Release, supra note 7. In addition, the Commission notes that specifically with respect to the Fund's investments in Fixed Income Instruments, the Exchange represented in the Prior Release that the Fund would be subject to the following investment restrictions: (i) the Fund will invest primarily (under normal market circumstances, at least 65% of its total assets) in investment-grade Fixed Income Instruments, but may invest up to 10% of its total assets in high yield Fixed Income Instruments; and (ii) while corporate debt securities and debt securities economically tied to an emerging market country generally must have \$200 million or more par amount outstanding and significant par value traded to be considered as an eligible investment for the Fund, at least 80% of issues of such securities held by the Fund must have \$200 million or more par amount outstanding. See id.

The Commission solicits comment on whether the proposal is consistent with the Exchange Act and whether the Exchange has sufficiently met its burden in presenting a statutory analysis of how its proposal is consistent with the Exchange Act. In particular, the grounds for disapproval under consideration include whether the Exchange’s proposal is consistent 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.”<sup>25</sup> The Commission continues to evaluate the sufficiency of the information that would be available regarding the pricing of the OTC derivative instruments included in the Disclosed Portfolio, and the impact on the ability of investors and other market participants to value the Fund’s holdings, and to engage in arbitrage and hedging activities.

#### IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the concerns identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>26</sup>

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<sup>25</sup> 15 U.S.C. 78f(b)(5).

<sup>26</sup> Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding - either oral or notice and opportunity for written comments - is appropriate for consideration of a particular proposal by a self-regulatory organization. See

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following:

1. The Exchange states, in the proposed rule change, that the Fund's disclosure of derivative positions in the Disclosed Portfolio will include information that market participants can use to value the derivatives positions intraday, and that this information will vary by line item, and may include tickers or other identifiers which would identify the listing or clearing exchange for exchange-traded and cleared derivatives, strike price(s), underlying asset, swap or index, coupon, effective date, maturity, and quantities or exposure. The Exchange further states that market makers and participants should be able to value derivatives as long as the positions are disclosed with relevant information. Do commenters agree? Why or why not? What type of information is necessary to be included in the information to be made available about the Disclosed Portfolio for market participants to be able to value the derivatives positions intraday?

2. The Exchange states that the Adviser believes there will be minimal, if any, impact to the arbitrage mechanism as a result of the use of derivatives. Do commenters agree? Why or why not?

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Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR- NYSEArca-2013-122 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Numbers SR-NYSEArca-2013-122. This file number should be included on the subject line if e-mail 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 website (<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 website 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 filings also will be available for inspection and copying at the principal office of the Exchanges. 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-NYSEArca-2013-122 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>27</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>27</sup> 17 CFR 200.30-3(a)(57).