

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-77845; File No. SR-NYSEArca-2016-08)

May 17, 2016

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to Adopt NYSE Arca Equities Rule 8.900 to Permit Listing and Trading of Managed Portfolio Shares and to Permit Listing and Trading of Shares of Fifteen Issues of the Precidian ETFs Trust

On January 27, 2016, 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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to: (1) adopt NYSE Arca Equities Rule 8.900; and (2) approve the listing and trading of shares (“Shares”) of fifteen issues of the Precidian ETFs Trust (“Trust”). The proposed rule change was published for comment in the Federal Register on February 18, 2016.<sup>3</sup> On March 9, 2016, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> The Commission has received four comments on the proposed rule change.<sup>5</sup> This order institutes proceedings under Section

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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. 76944 (Feb. 11, 2016), 81 FR 8269 (“Notice”).

<sup>4</sup> In Amendment No. 1 to the proposed rule change, the Exchange corrected the citations to the Trust’s Form N-1A and Exemptive Application, which were misstated in the proposal. Because Amendment No. 1 is technical in nature and does not materially alter the substance of the proposed rule change or raise any novel regulatory issues, it is not subject to notice and comment. Amendment No. 1 to the proposed rule change is available on the Commission’s website at: <http://www.sec.gov/comments/sr-nysearca-2016-08/nysearca201608-1.pdf>.

<sup>5</sup> See Letter from Gary L. Gastineau, President, ETF Consultants.com, Inc., to Brent J. Fields, Secretary, Commission, dated Mar. 10, 2016 (“Gastineau Letter”); Letter from David Nadig (Mar. 31, 2016) (“Nadig Letter”); Letter from Andrew M. Gross, Jr. (Apr. 5, 2016) (“Gross Letter”); Letter from Andrew M. Gross, Jr. (Apr. 5, 2016) (“Gross Letter”); Letter from Joseph A. Sullivan, Chairman and Chief Executive Officer, Legg Mason Global Asset Management, to Mary Jo White, Chair, Commission (Apr. 15, 2016)

19(b)(2)(B) of the Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1 thereto.

I. Summary of the Exchange’s Description of the Proposed Rule Change

The Exchange proposes to adopt new NYSE Arca Equities Rule 8.900, which would govern the listing and trading of “Managed Portfolio Shares.”<sup>7</sup> The Exchange also proposes to list and trade the Shares of the following funds under proposed NYSE Arca Equities Rule 8.900: (1) Precidian U.S. Managed Volatility Fund; (2) Precidian Strategic Value; (3) Precidian Large Cap Value; (4) Precidian Focused Dividend Strategy; (5) Precidian U.S. Large Cap Growth; (6) Precidian U.S. Core Equity; (7) Precidian U.S. Mid Cap Growth; (8) Precidian Total Return; (9) Precidian High Dividend Yield; (10) Precidian Small Cap Dividend Value; (11) Precidian Multi-factor Small Cap Core; (12) Precidian Multi-factor Small Cap Growth; (13) Precidian Large Cap Core Plus 130/30; (14) Precidian Mid Cap Core Plus 130/30; and (15) Precidian Small Cap Core Plus 130/30 (each a “Fund,” and collectively the “Funds”). In addition, the Exchange proposes to amend NYSE Arca Equities Rule 7.34 (Trading Sessions), which relates

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(“Sullivan Letter”). The comment letters are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nysearca-2016-08/nysearca201608.shtml>.

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

<sup>7</sup> Proposed NYSE Arca Equities Rule 8.900(c)(1) defines the term “Managed Portfolio Share” as a security that (a) is issued by a registered investment company organized as an open-end management investment company (“Investment Company”) or similar entity, that invests in a portfolio of securities selected by the Investment Company’s investment adviser consistent with the Investment Company’s investment objectives and policies; and (b) when aggregated in a number of shares equal to a Redemption Unit (as defined herein) or multiples thereof, may be redeemed at the request of an authorized participant (as defined in the Investment Company’s Form N-1A filed with the Commission), which authorized participant will be paid through a confidential account established for its benefit a portfolio of securities and/or cash with a value equal to the next determined net asset value (“NAV”).

to securities traded on the Exchange during the Core Trading Session, to add a reference to proposed NYSE Arca Equities Rule 8.900.

A. Key Features of Managed Portfolio Shares

While Investment Companies issuing Managed Portfolio Shares would be actively-managed, and in that respect would be similar to those issuing Managed Fund Shares,<sup>8</sup> Managed Portfolio Shares would differ from Managed Fund Shares in the following respects.

- First, issues of Managed Fund Shares are required to disseminate their “Disclosed Portfolio” at least once daily.<sup>9</sup> By contrast, the portfolio for an issue of Managed Portfolio Shares would be disclosed only quarterly.
- Second, in connection with the redemption of shares in “Redemption Unit” size (as described below), the delivery of any portfolio securities in kind would only be effected through a “Confidential Account” (as described below) for the benefit of the redeeming authorized participant without disclosing the identity of the securities to the authorized participant.
- Third, for each series of Managed Portfolio Shares, a Verified Intraday Indicative Value (“VIIV”) would be disseminated by one or more major market-data vendors every second during the Exchange’s Core Trading Session (normally,

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<sup>8</sup> Managed Fund Shares are shares of actively-managed Investment Companies listed and traded under NYSE Arca Equities Rule 8.600.

<sup>9</sup> NYSE Arca Equities Rule 8.600(c)(2) defines the term “Disclosed Portfolio” as the identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company’s calculation of net asset value at the end of the business day. NYSE Arca Equities Rule 8.600(d)(2)(B)(i) requires that, for Managed Fund Shares, the Disclosed Portfolio will be disseminated at least once daily and will be made available to all market participants at the same time.

9:30 a.m. to 4:00 p.m., Eastern Time (“E.T.”)).<sup>10</sup> The Exchange states that dissemination of the VIIV will allow investors to determine the estimated intra-day value of the underlying portfolio of a series of Managed Portfolio Shares and will provide a close estimate of that value throughout the trading day.<sup>11</sup>

B. Arbitrage of Managed Portfolio Shares

The Exchange asserts that market makers will be able to make efficient and liquid markets priced near the VIIV even without daily disclosure of a Fund’s underlying portfolio, as long as a VIIV is disseminated every second and market makers have knowledge of a Fund’s means of achieving its investment objective. According to the Exchange, market makers would have knowledge of a Fund’s means of achieving its investment objective by employing risk-management techniques such as “statistical arbitrage.”<sup>12</sup> The Exchange also states that market

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<sup>10</sup> Proposed NYSE Arca Equities Rule 8.900(c)(2) defines the VIIV as the estimated indicative value of a Managed Portfolio Share based on all of the issuer’s holdings as of the close of business on the prior business day, priced and disseminated in one second intervals, and subject to validation by a pricing verification agent of the Investment Company that is responsible for comparing multiple independent pricing sources to establish the accuracy of the VIIV. The specific methodology for calculating the VIIV will be disclosed on each Fund’s website.

<sup>11</sup> According to the Exchange, the VIIV should not be viewed as a “real-time” update of the NAV per Share of each Fund, because the VIIV may not be calculated in the same manner as the NAV, which will be computed once a day, generally at the end of the business day.

<sup>12</sup> According to the Exchange, statistical arbitrage enables a trader to construct an accurate proxy for another instrument, allowing the trader to hedge the other instrument or buy or sell the instrument when it is cheap or expensive in relation to the proxy. Statistical analysis permits traders to discover correlations based purely on trading data without regard to other fundamental drivers. These correlations are a function of differentials, over time, between one instrument or group of instruments and one or more other instruments. Once the nature of these price deviations has been quantified, a universe of securities is searched in an effort to, in the case of a hedging strategy, minimize the differential. Once a suitable hedging proxy has been identified, a trader can minimize portfolio risk by executing the hedging basket. The trader then can monitor the

makers will make efficient markets in Managed Portfolio Shares by establishing a Confidential Account (as defined herein), monitoring the VIIV for arbitrage opportunities, and effecting transactions in the Shares and the Fund's (unknown) portfolio securities, as described below.

According to the Exchange, if an authorized participant believes that Shares of a Fund are trading at a price that is higher than the value of the underlying portfolio – for example, if the market price for the Shares is higher than the VIIV – then the authorized participant may sell Shares of the Fund short and instruct its “Trusted Agent”<sup>13</sup> to buy portfolio securities for its Confidential Account. When the market price of the Shares falls in line with the value of the portfolio, the authorized participant can then close out its positions in both the Shares and the portfolio securities. According to the Exchange, the authorized participant's purchase of the portfolio securities into its Confidential Account, combined with the sale of Shares, may also create downward pressure on the price of Shares and/or upward pressure on the price of the portfolio securities, bringing the market price of Shares and the value of a Fund's portfolio securities closer together.

Similarly, according to the Exchange, an authorized participant could buy Shares and instruct the Trusted Agent to sell the underlying portfolio securities from its Confidential Account in an attempt to profit when a Fund's Shares are trading at a discount to its portfolio.

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performance of this hedge throughout the trade period making correction where warranted.

<sup>13</sup> Proposed Commentary .04 to NYSE Arca Equities Rule 8.900 requires that authorized participants and non-authorized participant market makers redeeming Managed Portfolio Shares sign an agreement with an agent (“Trusted Agent”) to establish a confidential account (“Confidential Account”), for the benefit of such authorized participant or non-authorized participant market maker, that will receive all consideration from the issuer in a redemption. A Trusted Agent may not disclose the consideration received in a redemption except as required by law or as provided in the Investment Company's Form N-1A, as applicable.

According to the Exchange, the authorized participant's purchase of a Fund's Shares in the secondary market, combined with the sale of the portfolio securities from its Confidential Account, may also create upward pressure on the price of Shares and/or downward pressure on the price of portfolio securities, driving the market price of Shares and the value of a Fund's portfolio securities closer together. The Exchange states that, Precidian Funds LLC ("Adviser"), the investment adviser to the Trust, avers that this process is identical to how many authorized participants currently arbitrage existing traditional ETFs, except for the use of the Confidential Account.

According to the Exchange, a market maker that is not an authorized participant would also be able to establish a Confidential Account and could engage in arbitrage activity without using the creation or redemption processes described above. If such a market maker believes that a Fund is overvalued relative to its underlying assets, the Exchange states, that market maker could sell Shares short and instruct its Trusted Agent to buy portfolio securities in its Confidential Account and then wait for the trading prices to move toward parity and close out the positions in both the Shares and the portfolio securities to realize a profit from the relative movement of their trading prices. Similarly, according to the Exchange, this market maker could buy Shares and instruct the Trusted Agent to sell the underlying portfolio securities in an attempt to profit when a Fund's Shares are trading at a discount to a Fund's underlying or reference assets.

### C. The Creation and Redemption Procedures

The Exchange states that, generally, Shares will be purchased and redeemed on an in-kind basis, so that, except where the purchase or redemption will include cash under the limited circumstances described in the Registration Statement, purchasers will be required to purchase

Creation Units by making an in-kind deposit of specified instruments (“Deposit Instruments”), and shareholders redeeming their Shares will receive an in-kind transfer of specified instruments (“Redemption Instruments”). On any given Business Day, the names and quantities of the instruments that constitute the Deposit Instruments and the names and quantities of the instruments that constitute the Redemption Instruments will be identical, and these instruments may be referred to, in the case of either a purchase or a redemption, as the “Creation Basket.”

In the case of a redemption, a Fund’s custodian (“Custodian”) will typically deliver securities to the Confidential Account on a pro rata basis with a value approximately equal to the value of the Shares tendered for redemption at the Cut-Off time. The Custodian will make delivery of the securities by appropriate entries on its books and records transferring ownership of the securities to the authorized participant’s Confidential Account, subject to delivery of the Shares redeemed. The Trusted Agent of the Confidential Account will in turn liquidate, hedge, or otherwise manage the securities based on instructions from the authorized participant.<sup>14</sup>

If the Trusted Agent is instructed to sell all securities received at the close on the redemption date, the Trusted Agent will pay the liquidation proceeds net of expenses, plus or minus any cash balancing amount, to the authorized participant through DTC.<sup>15</sup> The redemption

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<sup>14</sup> An authorized participant will issue execution instructions to the Trusted Agent and be responsible for all associated profit or losses. Like a traditional ETF, the authorized participant has the ability to sell the basket securities at any point during normal trading hours.

<sup>15</sup> According to the Exchange, under applicable provisions of the Internal Revenue Code, the authorized participant is expected to be deemed a “substantial owner” of the Confidential Account because it receives distributions from the Confidential Account. As a result, the Exchange states, all income, gain, or loss realized by the Confidential Account will be directly attributed to the authorized participant. The Exchange also states that, in a redemption, the authorized participant will have a basis in the distributed securities equal to the fair market value at the time of the distribution, and any gain or

securities that the Confidential Account receives is expected to mirror the portfolio holdings of a Fund pro rata.

F. Availability of Information

Each Fund will be required to file with the Commission its complete portfolio schedules for the second and fourth fiscal quarters on Form N-SAR under the 1940 Act, and to file its complete portfolio schedules for the first and third fiscal quarters on Form N-Q under the 1940 Act, within 60 days of the end of the quarter. Form N-Q requires funds to file the same schedules of investments that are required in annual and semi-annual reports to shareholders. The Trust's SAI and each Fund's shareholder reports will be available free upon request from the Trust. These documents and forms may be viewed on-screen or downloaded from the Commission's website at [www.sec.gov](http://www.sec.gov).

In addition, the VIIV, as defined in proposed NYSE Arca Equities Rule 8.900 (c)(3), will be widely disseminated by one or more major market-data vendors at least every second during the Exchange's Core Trading Session. The VIIV, which is approximate value of each Fund's investments on a per Share basis, will be disseminated every second during the Exchange's Core Trading Session through the facilities of the CTA. According to the Exchange, the VIIV will include all accrued income and expenses of a Fund and will assure that any extraordinary expenses, booked during the day, that would be taken into account in calculating a Fund's NAV for that day are also taken into account in calculating the VIIV. For purposes of the VIIV, securities held by a Fund will be valued throughout the day based on the mid-point between the disseminated current national best bid and offer. According to the Exchange, by utilizing the

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loss realized on the sale of those Shares will be taxable income to the authorized participant.

mid-point pricing for purposes of VIIV calculation, stale prices are eliminated and more accurate representation of the real-time value of the underlying securities is provided to the market. Specifically, according to the Exchange, quotations based on the mid-point of bid/ask spreads more accurately reflect current market sentiment by providing real time information on where market participants are willing to buy or sell securities at that point in time. Using quotations rather than last-sale information addresses concerns regarding the staleness of pricing information of less actively traded securities. The Exchange represents that, because quotations are updated more frequently than last-sale information especially for inactive securities, the VIIV will be based on more current and accurate information. The Exchange also represents that the use of quotations will also dampen the impact of any momentary spikes in the price of a portfolio security.

Each Fund will utilize two independent pricing sources to provide two independent sources of pricing information. Each Fund will also utilize a “Pricing Verification Agent” and establish a computer-based protocol that will permit the Pricing Verification Agent to continuously compare the two data streams from the independent pricing agents sources on a real time basis.<sup>16</sup> A single VIIV will be disseminated publicly for each Fund; however, the Pricing Verification Agent will continuously compare the public VIIV against a non-public alternative intra-day indicative value to which the Pricing Verification Agent has access. If it becomes apparent that there is a material discrepancy between the two data streams, the Exchange will be notified and have the ability to halt trading in a Fund until the discrepancy is resolved.<sup>17</sup> Each

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<sup>16</sup> A Fund’s Custodian will provide, on a daily basis, the constituent basket file comprised of all securities plus any cash to the independent pricing agent(s) for purposes of pricing.

<sup>17</sup> Proposed Rule 8.900(d)(2)(C) provides that, upon notification to the Corporation by the Investment Company or its agent that (i) the prices from the multiple independent pricing

Fund's Board will review the procedures used to calculate the VIIV and maintain its accuracy as appropriate, but not less than annually. The specific methodology for calculating the VIIV will be disclosed on each Fund's website.

### III. Summary of Comment Letters

The Commission has received four comment letters on the proposed rule change.<sup>18</sup>

A. Gastineau Letter.<sup>19</sup> The commenter opposes approval of the proposed rule change and recommends imposition of a number of requirements in the event the proposed rule change and the Exemptive Application are approved. Preliminarily, the commenter offers an opinion regarding the standard of review that should be applied, stating that, because this would be a new and potentially ground breaking less-transparent ETF structure, the Commission should apply a meaningfully higher standard until the Commission is completely comfortable with the state of the ETF market.

Generally, the commenter asserts that market makers will face significant impediments to successfully arbitraging the Shares, and he predicts that this will lead to the Shares trading at wider

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sources to be validated by the Investment Company's pricing verification agent differ by more than 25 basis points for 60 seconds in connection with pricing of the VIIV, or (ii) that the VIIV of a series of Managed Portfolio Shares is not being priced and disseminated in one-second intervals, as required, the Corporation will halt trading in the Managed Portfolio Shares as soon as practicable. The halt in trading would continue until the Investment Company or its agent notifies the Corporation that the prices from the independent pricing sources no longer differ by more than 25 basis points for 60 seconds or that the VIIV is being priced and disseminated as required. The Investment Company or its agent would be responsible for monitoring that the VIIV is being priced and disseminated as required and whether the prices to be validated from multiple independent pricing sources differ by more than 25 basis points for 60 seconds.

<sup>18</sup> See supra note 5.

<sup>19</sup> The Gastineau Letter is available at: <http://www.sec.gov/comments/sr-nysearca-2016-08/nysearca201608-2.pdf>

bid-ask spreads and more variable premiums/discounts than actively-managed ETFs available today.

In evaluating the Exchange's statements regarding VIIVs, the commenter asserts that their utility should be compared not to the IIVs of existing ETFs but rather to the independently derived, real-time estimates of underlying fund value that ETF market makers use to identify arbitrage opportunities and manage the risk of holding ETF positions today ("MM IIVs"). The commenter asserts that, because existing actively managed ETFs (and most index ETFs) provide full daily disclosure of their current portfolio, their market makers have access to far better information about the current value of Fund holdings than the proposed VIIVs would provide and, correspondingly, VIIVs will be significantly less precise than MM IIVs. The commenter also asserts that MM IIVs include significant information that would not be reflected in VIIVs, noting:

- In calculating VIIVs, Fund securities would be valued based on the midpoint between the current national best bid and offer quotations. The commenter characterizes the bid-ask midpoint as a "fairly crude valuation metric" that does not capture important trading information incorporated into MM IIVs, such as the current bid-ask spread, the depth of the current order book on the bid and offer side of the market, and the predominance of current trading between bid-side and offer-side transactions.
- VIIVs would be calculated and disseminated every second and, while this interval may seem sufficient, MM IIVs are updated in fractions of a second (milliseconds or microseconds).
- The VIIV verification process would leave significant room for dissemination of erroneous values. For example, a Fund's Pricing Verification Agent would take no

action to address observed discrepancies in VIIV input prices until the calculated Fund values differ by at least 25 bps for 60 seconds. The commenter characterizes that disparity as “huge,” asserting that it would be wider than the customary bid-ask spread of most domestic equity ETFs.

- The VIIV process would not address all potential intraday valuation errors. The commenter describes that corporate actions must be accurately reflected in the VIIV, which can be challenging, and market makers would not be able to verify that corporate actions are appropriately reflected in a Fund’s VIIVs because of the non-transparent portfolio.
- The process for adjusting VIIVs in the event of trading halts in portfolio securities is cumbersome and likely to result in errors in disseminated VIIVs. Throughout a halt, which may be protracted, the Fund would continue to disseminate VIIVs that do not reflect fair values of the halted security, and therefore may vary significantly from the Fund’s true underlying value at that time. The commenter asserts that MM IIVs would almost certainly arrive at a fair estimate of a Fund’s current underlying value far faster than the VIIV specified process.

The commenter asserts that reliance on faulty VIIVs may expose market makers to unrecoverable losses, noting that: (1) neither the Exchange nor its agents nor the Reporting Authority would be liable for disseminating erroneous VIIVs; and (2) the circumstances under which the Independent Pricing Agents and the Pricing Verification Agent are legally liable for such errors are limited.

According to the commenter, market makers’ forced reliance on VIIVs to determine intraday Fund valuations is a source of significant incremental risk for them versus making markets

in existing ETFs, and he predicts that this will result in the Shares trading at wider bid-ask spreads and more variable premiums and discounts to NAV than similar existing ETFs.

The commenter also criticizes the Confidential Accounts structure. He asserts that, compared to the usual manner in which market makers in existing ETFs engage in arbitrage and buy and sell Creation Basket instruments, the Confidential Accounts arrangement exposes market makers to significant additional costs, risks and lost opportunities, including:

- Less control over trade execution and trade order management when implementing portfolio hedging and Creation Unit transactions, which will result in more cost and risk, and less profit opportunity.
- No ability for market makers to use their market knowledge and market positions to enhance arbitrage profits and minimize costs.
- Reduced incentive for third-party service providers to trade expeditiously and with low market impact.
- Little or no ability for market makers to monitor trading in Confidential Accounts to ensure best execution or to evaluate trading performance.
- Forced pro rata hedging, which, the commenter states, is very often not the best hedge. Sub-optimal hedging results in less efficient arbitrage.
- Given the more-involved routing of trade instructions and trade orders that the Confidential Account structure would necessitate, the commenter states that hedging and Creation Unit instrument transactions through Confidential Accounts will almost certainly take longer, on average, for a market maker to execute than similar transactions that the market maker executes internally. According to the commenter, slower executions may translate into less efficient arbitrage.

- Potentially significant explicit costs to establish and maintain Confidential Accounts.

Additionally, the commenter discusses the efficiency of statistical arbitrage. While market makers may be able to gain some useful information about a Fund's current composition by knowing the Fund's investment objective and tracking performance correlations over time versus a known index, the commenter states that the amount of portfolio information that can be gleaned using this approach is limited. As a result, any portfolio hedge constructed using this information would be subject to meaningful basis risk.

The commenter also expresses concern regarding portfolio information security in light of the dissemination of this data across a network of Trusted Agents, affiliated broker-dealers and other Confidential Account service providers, and their use of the provided information to implement trades on behalf of Confidential Account holders.

The commenter also raises concerns with the possibility that market participants could use the VIIV to reverse-engineer the Funds' portfolio holdings, subjecting the Funds to the dilutive effects of front-running. The commenter asserts that "it is far from a settled question that the Funds would not ever be susceptible to reverse engineering."

B. Nadig Letter.<sup>20</sup> This commenter states his support of the proposal, noting that, after having been through multiple variations, the proposal now has the correct VIIV structure.

C. Gross Letter.<sup>21</sup> This commenter first notes the advantages that ETFs offer to retail investors, and supports the idea of investing in actively managed funds, stating that live, intra-day

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<sup>20</sup> The Nadig Letter is available at: <http://www.sec.gov/comments/sr-nysearca-2016-08/nysearca201608-3.htm>.

<sup>21</sup> The Gross Letter is available at: <http://www.sec.gov/comments/sr-nysearca-2016-08/nysearca201608-4.htm>.

pricing of the underlying portfolio enables the commenter to see how the portfolio value is performing at all times (as opposed to mutual funds), enables market participants to provide liquidity for the product (with the ability to arbitrage price discrepancies by creating and redeeming shares in the portfolio, as with existing ETFs), and allows for purchases and sales of shares at any time. With wider intra-day trading ranges recently, the ability to put in limit buy orders below the market (or limit sell orders above the market) is critical to the commenter.

In addition, the commenter notes that actively managed ETFs provide benefits to the fund manager and to fund performance. The commenter states that actively managed ETFs allow fund managers to make investment decisions they believe in, without being distorted by tax consequences. In addition, the commenter believes that the proposed Funds have come up with a way to provide retail and professional investors with a level playing field in terms of intra-day price feeds on the value of the underlying portfolio, and through a trusted agent to allow market makers to create and redeem (and hold) the portfolio of the actively managed fund without being able to see the individual share holdings. The commenter finds this proposal to be an “elegant solution” and to be an effective way to both use the well-understood arbitrage mechanism that has made ETFs liquid and reliable products and allow market makers to control execution of their fund portfolios while protecting the confidentiality of the fund manager.

D. Sullivan Letter.<sup>22</sup> The commenter expresses support for the proposed rule change. He states that the Precidian structure would permit his firm’s portfolio managers to manage active ETFs using their proprietary strategies without being susceptible to front running by other managers or investors and while still offering the following benefits of active ETFs to clients,

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<sup>22</sup> The Sullivan Letter is available at: <http://www.sec.gov/comments/sr-nysearca-2016-08/nysearca201608-5.pdf>.

which would positively impact yields and net investor returns: (1) the ability to trade shares throughout the day at known prices; (2) lower fund operating expenses, primarily in the form of lower transfer agency costs and overall portfolio transaction costs; and (3) improved tax efficiency. According to the commenter, his firm's clients realize only a modest benefit from daily transparency. The commenter also mentioned that his firm is a shareholder in Precidian.

IV. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2016-08 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>23</sup> to determine whether the proposed rule change, as modified by Amendment No. 1 thereto, 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. 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 comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>24</sup> the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the 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>

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<sup>23</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>24</sup> Id.

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

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues 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 that 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>

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 of the Exchange's statements in support of the proposal, which are set forth in the Notice<sup>27</sup> and in Amendment No. 1 to the proposed rule change,<sup>28</sup> in addition to any other comments they may wish to submit about the proposed rule change. Specifically, the Commission seeks comment on the statements of the Exchange contained in the Notice, as modified by Amendment No. 1 thereto, and any

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

<sup>27</sup> See supra note 3.

<sup>28</sup> See supra note 4.

other issues raised by the proposed rule change. In particular, the Commission seeks comment on the following:

1. Do commenters believe that market makers will be able to engage in effective and efficient arbitrage in the Shares without knowledge of the contents of the Funds' portfolios? Do commenters believe that market makers will be able to engage in effective and efficient arbitrage in the Shares while delegating trading in the portfolio securities to an intermediary, rather than trading in those securities directly? Do commenters believe that the Shares of a Fund will trade at secondary market prices that are closely aligned with the value of the Fund's portfolio?

2. Do commenters believe that the trading characteristics – such as bid/ask spread and premium or discount to NAV – of a Fund will be comparable to the trading characteristics of a fully transparent ETF with similar assets and a similar strategy?

3. What are commenters' views concerning the proposed use of a VIIV as opposed to the IIV commonly used by other ETFs? Do commenters believe that the VIIV will provide sufficient information to market participants to ensure that the Funds are appropriately priced in secondary trading? Do commenters believe that the VIIV will provide sufficient information to market participants in periods of market volatility, including periods in which securities underlying a Fund's portfolio encounter trading halts or pauses? Do commenters believe that the proposed parameters that apply to the accuracy of the VIIV – i.e., the requirement that the two independent calculations not disagree by more than 25 basis points for 60 seconds or more – are appropriate?

4. What are commenters' views regarding whether market participants will be able to use the VIIV – by itself or in conjunction with other public data – to reverse engineer a Fund's portfolio holdings? What factors might affect the susceptibility of a Fund to such reverse

engineering? If such reverse engineering were possible, what effect would it have on the Fund?  
What effect would reverse engineering have on shareholders in the Fund?

5. What are commenters views about the selective disclosure of portfolio holdings to the Trusted Agents, as described above?

6. In light of the non-transparency of the basket of securities underlying the proposed Funds, the Commission seeks comment on how a broker-dealer authorized participant engaging in creation and redemption activity might fulfill its obligation to maintain a minimum level of net capital in compliance with Rule 15c3-1 under the Act and how such an authorized participant would comply with the books and records requirements of Rules 17a-3 and 17a-4 under the Act. For example, how would an authorized participant that is a broker-dealer apply an appropriate haircut to positions included in the Creation Basket when the authorized participant is unaware of the securities included in the basket? In addition, how would the authorized participant determine an appropriate price for such securities? Moreover, how would such an authorized participant make and keep current the records required under Rule 17a-3, including the daily blotter and daily stock record required under paragraphs (a)(1) and (a)(5), respectively, of that rule?

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-2016-08 on the subject line.

Paper comments:

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

All submissions should refer to File Numbers SR-NYSEArca-2016-08. 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 these filings also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that

you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2016-08 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>29</sup>

Robert W. Errett  
Deputy Secretary

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<sup>29</sup> 17 CFR 200.30-3(a)(12).