

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-79384; File No. SR-NYSEArca-2016-70)

November 23, 2016

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Proposed Rule Change, as Modified by Amendment Nos. 1 and 2 Thereto, Regarding Use of Rule 144A Securities By the Fidelity Corporate Bond ETF, Fidelity Investment Grade Bond ETF, Fidelity Limited Term Bond ETF, and Fidelity Total Bond ETF

I. Introduction

On May 11, 2016, NYSE Arca, Inc. (“Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to permit the Fidelity Corporate Bond ETF, Fidelity Investment Grade Bond ETF, Fidelity Limited Term Bond ETF, and Fidelity Total Bond ETF (individually, “Fund,” and collectively, “Funds”) to consider securities issued pursuant to Rule 144A under the Securities Act of 1933 (“Securities Act”) as debt securities eligible for principal investment. The proposed rule change was published for comment in the Federal Register on May 31, 2016.<sup>3</sup> On June 30, 2016, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to 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> On July 26, 2016, the Exchange

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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. 77891 (May 24, 2016), 81 FR 34388 (“Notice”).

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

<sup>5</sup> See Securities Exchange Act Release No. 78207, 81 FR 44338 (Jul. 7, 2016). The Commission designated August 29, 2016 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

filed Amendment No. 1 to the proposed rule change.<sup>6</sup> On August 29, 2016, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act<sup>7</sup> to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1 thereto.<sup>8</sup> In the Order Instituting Proceedings, the Commission solicited comments to specified matters related to the proposal.<sup>9</sup> On November 22, 2016, the Exchange filed Amendment No. 2 to the proposed rule change.<sup>10</sup> The Commission has received no comments on the proposed rule change. This order grants approval of the proposed rule change, as modified by Amendment Nos. 1 and 2 thereto.

## II. Exchange's Description of the Proposal

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<sup>6</sup> In Amendment No. 1, which amended and replaced the proposed rule change in its entirety, the Exchange: (a) corrected certain aspects of the the investment descriptions for each Fund in accordance with the Prior Corporate Bond Releases and Prior Total Bond Releases (as defined herein); (b) confirmed that all of the Rule 144A securities in which a Fund invests will be corporate debt securities for which transactions are reported to TRACE (as defined herein); and (c) confirmed that FINRA (as defined herein), on behalf of the Exchange, is able to access, as needed, trade information for the Rule 144A securities as well as certain other fixed income securities held by the Funds reported to TRACE. Amendment No. 1 is available at: <https://www.sec.gov/comments/sr-nysearca-2016-70/nysearca201670-1.pdf>. Because Amendment No. 1 to the proposed rule change does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 1 is not subject to notice and comment.

<sup>7</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>8</sup> See Securities Exchange Act Release No. 78712, 81 FR 60759 (Sept. 2, 2016) (“Order Instituting Proceedings”). Specifically, the Commission instituted 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.” See id., 81 FR at 60764.

<sup>9</sup> See id.

<sup>10</sup> In Amendment No. 2, which amended and replaced the proposed rule change in its entirety, the Exchange clarified that no more than 35% of a Fund’s assets may be invested in Rule 144A securities. Amendment No. 2 is available at: <https://www.sec.gov/comments/sr-nysearca-2016-70/nysearca201670-2.pdf>. Because Amendment No. 2 to the proposed rule change does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 2 is not subject to notice and comment.

The Commission approved the listing and trading of shares (“Shares”) of the Funds under NYSE Arca Equities Rule 8.600,<sup>11</sup> which governs the listing and trading of Managed Fund Shares. The Exchange proposes to amend the representation in the Prior Corporate Bond Notice and Prior Total Bond Notice to provide that each Fund may include Rule 144A securities within a Fund’s principal investments in debt securities (i.e., debt securities in which at least 80% of a Fund’s assets are invested), provided that no more than 35% of a Fund’s assets may be invested in Rule 144A securities.

A. Exchange’s Description of the Funds

Fidelity Investments Money Management, Inc. (“FIMM”), an affiliate of Fidelity Management & Research Company (“FMR”), is the manager (“Manager”) of each Fund. FMR Co., Inc. (“FMRC”) serves as a sub-adviser for the Fidelity Total Bond ETF. FMRC has day-to-day responsibility for choosing certain types of investments of foreign and domestic issuers for Fidelity Total Bond ETF. Other investment advisers, which also are affiliates of FMR, serve as sub-advisers to the Funds and assist FIMM with foreign investments, including Fidelity

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<sup>11</sup> See Securities Exchange Act Release Nos. 72068 (May 1, 2014), 79 FR 25923 (May 6, 2014) (SR-NYSEArca-2014-47) (notice of filing of proposed rule change relating to listing and trading of Shares of Fidelity Corporate Bond ETF Managed Shares under NYSE Arca Equities Rule 8.600) (“Prior Corporate Bond Notice”); 72439 (Jun. 20, 2014), 79 FR 36361 (Jun. 26, 2014) (SR-NYSEArca-2014-47) (order approving proposed rule change relating to listing and trading of Shares of Fidelity Corporate Bond ETF Managed Shares under NYSE Arca Equities Rule 8.600) (“Prior Corporate Bond Order” and, together with the Prior Corporate Bond Notice, “Prior Corporate Bond Releases”); 72064 (May 1, 2014), 79 FR 25908 (May 6, 2014) (SR-NYSEArca-2014-46) (notice of filing of proposed rule change relating to listing and trading of Shares of Fidelity Investment Grade Bond ETF; Fidelity Limited Term Bond ETF; and Fidelity Total Bond ETF under NYSE Arca Equities Rule 8.600) (“Prior Total Bond Notice”); 72748 (Aug. 4, 2014), 79 FR 46484 (Aug. 8, 2014) (SR-NYSEArca-2014-46) (order approving proposed rule change relating to listing and trading of Shares of the Fidelity Investment Grade Bond ETF, Fidelity Limited Term Bond ETF, and Fidelity Total Bond ETF under NYSE Arca Equities Rule 8.600) (“Prior Total Bond ETF Order” and, together with the Prior Total Bond Notice, “Prior Total Bond Releases”).

Management & Research (U.K.) Inc., Fidelity Management & Research (Hong Kong) Limited, and Fidelity Management & Research (Japan) Inc. (individually, “Sub-Adviser,” and together with FMRC, collectively “Sub-Advisers”). Fidelity Distributors Corporation is the distributor for the Funds’ Shares.

The Funds are funds of Fidelity Merrimack Street Trust (“Trust”), a Massachusetts business trust.<sup>12</sup> The Exchange represents that the Shares of the Fidelity Corporate Bond ETF, Fidelity Limited Term Bond ETF, and Fidelity Total Bond ETF are currently trading on the Exchange.

1. Fidelity Corporate Bond ETF

As described in the Prior Corporate Bond Notice, the Fidelity Corporate Bond ETF seeks a high level of current income. The Manager normally invests at least 80% of Fidelity Corporate Bond ETF assets in investment-grade corporate bonds and other corporate debt securities.<sup>13</sup> Corporate debt securities are bonds and other debt securities issued by corporations and other business structures, as described in the Prior Corporate Bond Notice.

The Fidelity Corporate Bond ETF may hold uninvested cash or may invest it in cash equivalents such as money market securities, or shares of short-term bond exchanged-traded

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<sup>12</sup> The Trust is registered under the Investment Company Act of 1940 (“1940 Act”). According to the Exchange, on December 29, 2015, the Trust filed with the Commission an amendment to its registration statement on Form N-1A under the Securities Act and the 1940 Act relating to the Funds (File Nos. 333-186372 and 811-22796) (“Registration Statement”). In addition, the Exchange states that the Trust has obtained certain exemptive relief under the 1940 Act. See Investment Company Act Release No. 30513 (May 10, 2013) (File No. 812-14104).

<sup>13</sup> According to the Exchange, investment-grade debt securities include all types of debt instruments, including corporate debt securities that are of medium and high-quality. An investment-grade rating means the security or issuer is rated investment-grade by a credit rating agency registered as a nationally recognized statistical rating organization with the Commission (for example, Moody’s Investors Service, Inc.), or is unrated but considered to be of equivalent quality by the Fidelity Corporate Bond ETF’s Manager or Sub-Advisers.

funds registered under the 1940 Act (“ETFs”), or mutual funds or money market funds, including Fidelity central funds (special types of investment vehicles created by Fidelity for use by the Fidelity funds and other advisory clients). The Manager uses the Barclays U.S. Credit Bond Index as a guide in structuring the Fund and selecting its investments. FIMM manages the Fund to have similar overall interest rate risk to the Barclays U.S. Credit Bond Index.

As stated in the Prior Corporate Bond Releases, in buying and selling securities for the Fund, the Manager analyzes the credit quality of the issuer, security-specific features, current valuation relative to alternatives in the market, short-term trading opportunities resulting from market inefficiencies, and potential future valuation. In managing the Fund’s exposure to various risks, including interest rate risk, the Manager considers, among other things, the market’s overall risk characteristics, the market’s current pricing of those risks, information on the Fund’s competitive universe and internal views of potential future market conditions.

While the Manager normally invests at least 80% of assets of the Fund in investment grade corporate bonds and other corporate debt securities, as described above, the Manager may invest up to 20% of the Fund’s assets in other securities and financial instruments, as summarized below.

In addition to corporate debt securities, the debt securities in which the Fund may invest are U.S. Government securities; repurchase agreements and reverse repurchase agreements; mortgage- and other asset-backed securities; loans; loan participations, loan assignments, and other evidences of indebtedness, including letters of credit, revolving credit facilities, and other standby financing commitments; structured securities; stripped securities; municipal securities; sovereign debt obligations; obligations of international agencies or supranational entities; and other securities believed to have debt-like characteristics, including hybrid securities, which may

offer characteristics similar to those of a bond security such as stated maturity and preference over equity in bankruptcy.

The Fund may invest in restricted securities, which are subject to legal restrictions on their sale. Restricted securities generally can be sold in privately negotiated transactions, pursuant to an exemption from registration under the Securities Act, or in a registered public offering.

## 2. Fidelity Investment Grade Bond ETF

As described in the Prior Total Bond Notice, the Fidelity Investment Grade Bond ETF (which has not yet commenced operation) will seek a high level of current income. The Manager normally will invest at least 80% of the Fund's assets in investment-grade debt securities (those of medium and high quality). The debt securities in which the Fund may invest are corporate debt securities; U.S. Government securities; repurchase agreements and reverse repurchase agreements; money market securities; mortgage- and other asset-backed securities; senior loans; loan participations and loan assignments and other evidences of indebtedness, including letters of credit, revolving credit facilities and other standby financing commitments; stripped securities; municipal securities; sovereign debt obligations; and obligations of international agencies or supranational entities (collectively, "Debt Securities").

As described in the Prior Total Bond Notice, the Fidelity Investment Grade Bond ETF may hold uninvested cash or may invest it in cash equivalents such as repurchase agreements, shares of short term bond ETFs, mutual funds, or money market funds, including Fidelity central funds (special types of investment vehicles created by Fidelity for use by the Fidelity funds and other advisory clients). The Manager will use the Barclays U.S. Aggregate Bond Index

(“Aggregate Index”) as a guide in structuring the Fund and selecting its investments, and will manage the Fund to have similar overall interest rate risk to the Aggregate Index.

As described in the Prior Total Bond Notice, the Manager will consider other factors when selecting the Fidelity Investment Grade Bond ETF’s investments, including the credit quality of the issuer, security-specific features, current valuation relative to alternatives in the market, short-term trading opportunities resulting from market inefficiencies, and potential future valuation. In managing the Fidelity Investment Grade Bond ETF’s exposure to various risks, including interest rate risk, the Manager will consider, among other things, the market’s overall risk characteristics, the market’s current pricing of those risks, information on the Fidelity Investment Grade Bond ETF’s competitive universe, and internal views of potential future market conditions.

### 3. Fidelity Limited Term Bond ETF

As described in the Prior Total Bond Notice, the Fidelity Limited Term Bond ETF seeks to provide a high rate of income. The Manager normally invests at least 80% of the Fidelity Limited Term Bond ETF’s assets in investment-grade Debt Securities (those of medium and high quality).

The Fidelity Limited Term Bond ETF may hold uninvested cash or may invest it in cash equivalents such as repurchase agreements, shares of short term bond ETFs, mutual funds, or money market funds, including Fidelity central funds (special types of investment vehicles created by Fidelity for use by the Fidelity funds and other advisory clients). The Manager uses the Fidelity Limited Term Composite Index (“Composite Index”) as a guide in structuring the Fund and selecting its investments. The Manager manages the Fidelity Limited Term Bond ETF to have similar overall interest rate risk to the Composite Index.

The Manager considers other factors when selecting the Fidelity Limited Term Bond ETF's investments, including the credit quality of the issuer, security-specific features, current valuation relative to alternatives in the market, short-term trading opportunities resulting from market inefficiencies, and potential future valuation. In managing the Fidelity Limited Term Bond ETF's exposure to various risks, including interest rate risk, the Manager considers, among other things, the market's overall risk characteristics, the market's current pricing of those risks, information on the Fund's competitive universe, and internal views of potential future market conditions.

#### 4. Fidelity Total Bond ETF

As described in the Prior Total Bond Notice, the Fidelity Total Bond ETF seeks a high level of current income. The Manager normally invests at least 80% of the Fidelity Total Bond ETF's assets in Debt Securities. The Manager allocates the Fidelity Total Bond ETF's assets across investment-grade, high yield, and emerging market Debt Securities. The Manager may invest up to 20% of the Fund's assets in lower-quality Debt Securities.

The Fidelity Total Bond ETF may hold uninvested cash or may invest it in cash equivalents such as repurchase agreements, shares of short term bond ETFs, mutual funds, or money market funds, including Fidelity central funds (special types of investment vehicles created by Fidelity for use by the Fidelity funds and other advisory clients).

The Manager uses the Barclays U.S. Universal Bond Index ("Universal Index") as a guide in structuring and selecting the investments of the Fidelity Total Bond ETF and selecting its investments, and in allocating the Fidelity Total Bond ETF's assets across the investment-grade, high yield, and emerging market asset classes. The Manager manages the Fidelity Total Bond ETF to have similar overall interest rate risk to the Universal Index. The Manager



considers other factors when selecting the Fund's investments, including the credit quality of the issuer, security-specific features, current valuation relative to alternatives in the market, short-term trading opportunities resulting from market inefficiencies, and potential future valuation. In managing the Fund's exposure to various risks, including interest rate risk, the Manager considers, among other things, the market's overall risk characteristics, the market's current pricing of those risks, information on the Fund's competitive universe, and internal views of potential future market conditions.

As described in the Prior Total Bond Notice, the Manager may invest the Fidelity Total Bond ETF's assets in Debt Securities of foreign issuers in addition to securities of domestic issuers.

#### 5. Other Investments of the Funds

While, as described above, the Manager normally invests at least 80% of assets of Fidelity Limited Term Bond ETF in investment-grade Debt Securities (and will normally invest at least 80% of assets of the Fidelity Investment Grade Bond ETF in investment-grade Debt Securities), and the Manager normally invests at least 80% of assets of the Fidelity Total Bond ETF in Debt Securities, the Manager may invest up to 20% of a Fund's assets in other securities and financial instruments ("Other Investments," as described in the Prior Total Bond Notice). As described in the Prior Corporate Bond Notice and Prior Total Bond Notice, as part of a Fund's Other Investments, (i.e., up to 20% of a Fund's assets), each Fund may invest in restricted securities, which are subject to legal restrictions on their sale.<sup>14</sup>

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<sup>14</sup> Restricted securities are subject to legal restrictions on their sale. Restricted securities generally can be sold in privately negotiated transactions, pursuant to an exemption from registration under the Securities Act, or in a registered public offering. Rule 144A securities are securities which, while privately placed, are eligible for purchase and resale pursuant to Rule 144A. Rule 144A permits certain qualified institutional buyers, such as

B. Exchange's Description of the Proposed Change to the Principal Investments of the Funds

The Exchange proposes that each Fund may include Rule 144A securities within a Fund's principal investments in debt securities (i.e., debt securities in which at least 80% of a Fund's assets are invested), provided that no more than 35% of a Fund's assets may be invested in Rule 144A securities. As discussed below, the Exchange believes it is appropriate for Rule 144A securities to be included as principal investments of a Fund, subject to the 35% limitation referenced above, in view of (1) the high level of liquidity in the market for such securities compared to other debt securities asset classes, and (2) the high level of transparency in the market for Rule 144A securities, particularly in light of reporting of transaction data in such securities through the Trade Reporting and Compliance Engine ("TRACE") operated by the Financial Industry Regulatory Authority ("FINRA"). All of the Rule 144A securities in which a Fund invests will be corporate debt securities for which transactions are reported in TRACE.

FMR has represented to the Exchange that Rule 144A securities account for approximately 20% of daily trading volume in U.S. corporate bonds. Dealers trade and report transactions in Rule 144A securities in the same manner as registered corporate bonds. While the average number of daily trades and U.S. dollar volume in registered corporate bonds is much higher than in Rule 144A securities, the average lot size is higher for Rule 144A securities.<sup>15</sup> Specifically, the average lot size for 144A securities for the period January 1, 2015 through

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a Fund, to trade in privately placed securities even though such securities are not registered under the Securities Act.

<sup>15</sup> Source: MarketAxess Trace Data. For example, for the period January 1, 2015 through August 31, 2015, for registered bonds and Rule 144A securities with \$1 billion to \$1.999 billion the average daily dollar volume outstanding was approximately \$6.8 billion and \$1.7 billion, respectively, and the average lot size was \$666,647 and \$2,398,292, respectively.

August 31, 2015 was approximately \$2.2 million, compared to an average lot size for the same period of approximately \$500,000 for registered corporate bonds.

The Exchange notes that, in 2013, the Commission approved FINRA rules relating to dissemination of information regarding transactions in Rule 144A securities in TRACE.<sup>16</sup> Transactions executed by FINRA members became subject to dissemination through FINRA's TRACE on June 30, 2014, thus providing a level of transparency to the Rule 144A market comparable to that of registered bonds.<sup>17</sup>

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<sup>16</sup> See Securities Exchange Act Release Nos. 70009 (Jul. 19, 2013), 78 FR 44997 (Jul. 25, 2103) (SR-FINRA-2013-029) (notice of filing of a proposed rule change relating to the dissemination of transactions in TRACE-Eligible securities effected pursuant to Rule 144A); 70345 (Sept. 6, 2013), 78 FR 56251 (Sept. 12, 2013) (SR-FINRA-2013-029) (order approving proposed rule change relating to the dissemination of transactions in TRACE-Eligible securities effected pursuant to Rule 144A). In the proposed rule change, FINRA proposed to amend FINRA Rule 6750 to provide for the dissemination of Rule 144A transactions, provided the asset type (e.g., corporate bonds) currently is subject to dissemination under FINRA Rule 6750; to amend the dissemination protocols to extend the dissemination caps currently applicable to the non-Rule 144A transactions in such asset type (e.g., non-Rule 144A corporate bond transactions) to Rule 144A transactions in such securities; to amend FINRA Rule 7730 to establish a data set for real-time Rule 144A transaction data and a second data set for historic Rule 144A transaction data; to amend the definition of "Historic TRACE Data" to reference the three data sets currently included therein and the proposed fourth data set; and to make other clarifying and technical amendments. FINRA Rule 6730(a) requires any transaction in a TRACE-Eligible security to be reported to TRACE as soon as practicable, but no later than within 15 minutes of the transaction, subject to specified exceptions. FINRA Rule 6730(c) requires the trade report to contain information on size, price, time of execution, amount of commission, the date of settlement, and other information.

<sup>17</sup> The Exchange notes that in a June 30, 2014 press release "FINRA Brings 144A Corporate Debt Transactions Into the Light," FINRA stated: "144A transactions—resales of restricted corporate debt securities to large institutions called qualified institutional buyers (QIBs) - account for a significant portion of the volume in corporate debt securities. In the first quarter of 2014, 144A transactions comprised nearly 13 percent of the average daily volume in investment-grade corporate debt, and nearly 30 percent of the average daily volume in high-yield corporate debt. 144A transactions comprised nearly 20 percent of the average daily volume in the corporate debt market as a whole. Through the Trade Reporting and Compliance Engine (TRACE), FINRA will disseminate 144A transactions subject to the same dissemination caps that are currently in effect for non-144A transactions. The same dissemination cap for investment-grade corporate bonds (\$5

The Exchange further notes that, while the proposed rule change would categorize Rule 144A securities within a Fund’s principal investments in debt securities (subject to a limitation of investments in Rule 144A securities to 35% of a Fund’s assets), any investments in Rule 144A securities, of course, would be required to comply with restrictions under the 1940 Act and rules thereunder relating to investment in illiquid assets. As stated in the Prior Corporate Bond Notice and Prior Total Bond Notice, each Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Manager or Sub-Advisers. Each Fund monitors its portfolio liquidity 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 a Fund’s net assets are held in illiquid assets. Illiquid assets include assets subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.<sup>18</sup>

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million) applies to both 144A and non-144A corporate bond transactions, and the \$1 million dissemination cap for high-yield corporate bonds similarly applies to both 144A and non-144A transactions. 144A transactions are also subject to the same 15-minute reporting requirement as non-144A corporate debt transactions.” See also FINRA Regulatory Notice 13-35 October 2013.

<sup>18</sup> The Exchange notes that in a recent rulemaking proposal relating to open-end fund liquidity risk management programs, the Commission stated that “[s]ecurities offered pursuant to rule 144A under the Securities Act may be considered liquid depending on certain factors.” The Commission, citing to the “Statement Regarding ‘Restricted Securities’” noted: “The Commission stated [in the “Statement Regarding ‘Restricted Securities’”] that ‘determination of the liquidity of Rule 144A securities in the portfolio of an investment company issuing redeemable securities is a question of fact for the board of directors to determine, based upon the trading markets for the specific security’ and noted that the board should consider the unregistered nature of a rule 144A security as one of the factors it evaluates in determining its liquidity.” See Release Nos. 33-9922; IC-31835; File Nos. S7-16-15; S7-08-15 (Sept. 22, 2015).

Moreover, as stated in the Prior Corporate Bond Notice and Prior Total Bond Notice, each Fund does not currently intend to purchase any asset if, as a result, more than 10% of its net assets would be invested in assets that are deemed to be illiquid because they are subject to legal or contractual restrictions on resale or because they cannot be sold or disposed of in the ordinary course of business at approximately the prices at which they are valued. For purposes of a Fund's illiquid assets limitation discussed above, if through a change in values, net assets, or other circumstances, a Fund were in a position where more than 10% of its net assets were invested in illiquid assets, it would consider appropriate steps to protect liquidity.

The Prior Corporate Bond Notice and Prior Total Bond Notice stated that various factors may be considered in determining the liquidity of a Fund's investments, including: (1) the frequency of trades and quotes for the asset; (2) the number of dealers wishing to purchase or sell the asset and the number of other potential purchasers; (3) dealer undertakings to make a market in the asset; and (4) the nature of the asset and the nature of the marketplace in which it trades (including any demand, put or tender features, the mechanics and other requirements for transfer, any letters of credit or other credit enhancement features, any ratings, the number of holders, the method of soliciting offers, the time required to dispose of the security, and the ability to assign or offset the rights and obligations of the asset).

The Exchange believes that the size of the Rule 144A market (approximately 20% of daily trading volume in U.S. corporate bonds), the active participation of multiple dealers utilizing trading protocols that are similar to those in the corporate bond market, and the transparency of the 144A market resulting from reporting of Rule 144A transactions in TRACE will deter manipulation in trading the Shares. The Exchange notes that all of the Rule 144A

securities in which a Fund invests will be corporate debt securities for which transactions are reported in TRACE.

The Exchange represents that, except for the change described above, all other representations made in the Prior Corporate Bond Releases and the Prior Total Bond Releases remain unchanged. The Funds will continue to comply with all initial and continued listing requirements under NYSE Arca Equities Rule 8.600.

The Exchange further represents that the trading in the Shares will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by FINRA, on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.<sup>19</sup> The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange. The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and underlying exchange-traded options, futures, exchange-traded equity securities (including ADRs, EDRs, and GDRs), and other exchange-traded instruments with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and underlying exchange-traded options, futures, exchange-traded equity securities (including ADRs, EDRs, and GDRs), and other exchange-traded instruments from such markets and other entities. The Exchange may obtain information regarding trading in the Shares and underlying exchange-traded options, futures, exchange-

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<sup>19</sup> FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

traded equity securities (including ADRs, EDRs, and GDRs), and other exchange-traded instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.<sup>20</sup> FINRA, on behalf of the Exchange, is able to access, as needed, trade information for the Rule 144A securities as well as certain other fixed income securities held by the Funds reported to TRACE. In addition, as stated in the Prior Corporate Bond Releases and the Prior Total Bond Releases, investors have ready access to information regarding the Funds' holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last-sale information for the Shares.

The Exchange also represents that all statements and representations made in this filing and the Prior Corporate Bond Releases and Prior Total Bond Releases regarding (a) the description of the Funds' respective portfolios, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares of the Funds on the Exchange. The Adviser has represented to the Exchange that it will advise the Exchange of any failure by a Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If a Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Equities Rule 5.5(m).

### III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal, as modified by Amendment Nos. 1 and 2 thereto, is consistent with the Exchange Act and the rules and

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<sup>20</sup> For a list of the current members of ISG, see [www.isgportal.org](http://www.isgportal.org). The Exchange notes that not all of the components of the portfolio for a Fund may trade on exchanges that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

regulations thereunder applicable to a national securities exchange.<sup>21</sup> In particular, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 2 thereto, is consistent with Section 6(b)(5) of the Exchange Act,<sup>22</sup> which requires, among other things, that the Exchange's rules be designed 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.

The Commission notes that transaction information relating to Rule 144A securities is available via TRACE. According to the Exchange, all of the Rule 144A securities in which a Fund invests will be corporate debt securities for which transactions are reported in TRACE. The Commission believes that limiting Rule 144A securities in which a Fund invests as principal investments to corporate debt securities for which transactions are reported to TRACE would help to promote market transparency and provide an appropriate limit on the use of 144A securities as debt securities eligible for principal investment, provided that no more than 35% of a Fund's assets may be invested in Rule 144A securities.

The Commission notes that, while the proposal would allow a Fund to consider Rule 144A securities as debt securities eligible for principal investment, subject to the 35% limitation referenced above, any investments in such securities would be required to comply with the restrictions under the 1940 Act and rules thereunder relating to investments in illiquid assets. As stated in the Prior Corporate Bond Notice and Prior Total Bond Notice, each Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Manager or Sub-Advisers.

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<sup>21</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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



The Manager or Sub-Advisers, who are responsible for the day-to-day decisions regarding the liquidity of securities, may consider various factors in determining the liquidity of a Fund's investments, including: (1) the frequency of trades and quotes for the asset; (2) the number of dealers wishing to purchase or sell the asset and the number of other potential purchasers; (3) dealer undertakings to make a market in the asset; and (4) the nature of the asset and the nature of the marketplace in which it trades (including any demand, put or tender features, the mechanics and other requirements for transfer, any letters of credit or other credit enhancement features, any ratings, the number of holders, the method of soliciting offers, the time required to dispose of the security, and the ability to assign or offset the rights and obligations of the asset). Ultimately, however, a Fund's Board of Directors has responsibility for determining the liquidity of securities (including Rule 144A securities) held by a Fund.

The Commission further notes that pursuant to the 1940 Act and rules thereunder, Funds are required to monitor their respective portfolio's liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and to 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 a Fund's net assets are held in illiquid assets. Moreover, the Exchange represents that each Fund does not currently intend to purchase any asset if, as a result, more than 10% of its net assets would be invested in assets that are deemed to be illiquid because they are subject to legal or contractual restrictions on resale or because they cannot be sold or disposed of in the ordinary course of business at approximately the prices at which they are valued.

Importantly, the Commission notes that the Funds will continue to be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule

8.600. The Exchange represents that, except for the change described above, all other representations made in the Prior Corporate Bond Releases and the Prior Total Bond Releases remain unchanged. The Commission finds that providing the Manager or Sub-Advisers of each Fund additional flexibility to consider Rule 144A securities as debt securities eligible for principal investment, given the protections discussed above, is consistent with the Act.

In support of this proposal, the Exchange represented that:

- (1) The Funds will continue to comply with all initial and continued listing requirements under NYSE Arca Equities Rule 8.600.
- (2) Each Fund may include Rule 144A securities within a Fund's principal investments in debt securities (i.e., debt securities in which at least 80% of a Fund's assets are invested), provided that no more than 35% of a Fund's assets may be invested in Rule 144A securities.
- (3) All of the Rule 144A securities in which a Fund invests will be corporate debt securities for which transactions are reported in TRACE.
- (4) Trading in the Shares will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by FINRA, on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws. These procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.
- (5) The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and underlying exchange-traded

options, futures, exchange-traded equity securities (including ADRs, EDRs, and GDRs), and other exchange-traded instruments with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and underlying exchange-traded options, futures, exchange-traded equity securities (including ADRs, EDRs, and GDRs), and other exchange-traded instruments from such markets and other entities. The Exchange may obtain information regarding trading in the Shares and underlying exchange-traded options, futures, exchange-traded equity securities (including ADRs, EDRs, and GDRs), and other exchange-traded instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

- (6) FINRA, on behalf of the Exchange, is able to access, as needed, trade information for the Rule 144A securities as well as certain other fixed income securities held by the Funds reported to TRACE. In addition, as stated in the Prior Corporate Bond Releases and the Prior Total Bond Releases, investors have ready access to information regarding the Funds' holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last-sale information for the Shares.
- (7) Trading in Shares of a Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable, and trading in the Shares will be subject to NYSE Arca

Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of a Fund may be halted.

- (8) The Exchange represents that the Manager and the Sub-Advisers are not broker-dealers but are affiliated with one or more broker-dealers and have each implemented a fire wall with respect to such broker-dealers regarding access to information concerning the composition and/or changes to the portfolios, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the portfolios.
- (9) The Exchange will obtain a representation from the issuer of the Shares that the net asset value (“NAV”) per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.
- (10) The Portfolio Indicative Value with respect to Shares of each Fund will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange’s Core Trading Session.
- (11) On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, each Fund will disclose on the Trust’s website the Disclosed Portfolio that will form the basis for a Fund’s calculation of NAV at the end of the business day.
- (12) The Trust’s website will include a form of the prospectus for the Funds and additional data relating to NAV and other applicable quantitative information.

The Exchange also represents that all statements and representations made in this filing and the Prior Corporate Bond Releases and Prior Total Bond Releases regarding (a) the

description of the Funds' respective portfolios, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares of the Funds on the Exchange. In addition, the Adviser has represented to the Exchange that it will advise the Exchange of any failure by a Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements.<sup>23</sup> If a Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Equities Rule 5.5(m).

This approval order is based on all of the Exchange's representations, including those set forth above and in the Notice, as modified by Amendment Nos. 1 and 2 to the proposed rule change. The Commission notes that the Funds must comply with the requirements of NYSE Arca Equities Rule 8.600 to be listed and traded on the Exchange on an initial and continuing basis.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 2 thereto, is consistent with Section 6(b)(5) of the Act<sup>24</sup> and the rules and regulations thereunder applicable to a national securities exchange.

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<sup>23</sup> The Commission notes that certain other proposals for the listing and trading of Managed Fund Shares include a representation that the exchange will "surveil" for compliance with the continued listing requirements. See, e.g., Securities Exchange Act Release No. 77499 (Apr. 1, 2016), 81 FR 20428 (Apr. 7, 2016) (Notice of Filing of Amendment No. 2, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of the SPDR DoubleLine Short Duration Total Return Tactical ETF of the SSgA Active Trust), available at: <http://www.sec.gov/rules/sro/bats/2016/34-77499.pdf>. In the context of this representation, it is the Commission's view that "monitor" and "surveil" both mean ongoing oversight of the Fund's compliance with the continued listing requirements. Therefore, the Commission does not view "monitor" as a more or less stringent obligation than "surveil" with respect to the continued listing requirements.

<sup>24</sup> 15 U.S.C. 78f(b)(5).

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,<sup>25</sup> that the proposed rule change (SR-NYSEArca-2016-70), as modified by Amendment Nos. 1 and 2 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

Robert W. Errett  
Deputy Secretary

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<sup>25</sup> 15 U.S.C. 78s(b)(2).

<sup>26</sup> 17 CFR 200.30-3(a)(12).