

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-83120; File No. SR-NYSEArca-2018-04)

April 26, 2018

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Adopt New NYSE Arca Rule 8.900-E and to List and Trade Shares of the Royce Pennsylvania ETF; Royce Premier ETF; and Royce Total Return ETF under Proposed NYSE Arca Rule 8.900-E

On January 8, 2018, 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 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to: (1) adopt NYSE Arca Rule 8.900-E (Managed Portfolio Shares); and (2) list and trade shares (“Shares”) of the Royce Pennsylvania ETF, Royce Premier ETF, and Royce Total Return ETF under proposed NYSE Arca Rule 8.900-E. The proposed rule change was published for comment in the Federal Register on January 26, 2018.³ On March 7, 2018, pursuant to Section 19(b)(2) of the Exchange Act,⁴ 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.⁵ The Commission has received

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 82549 (January 19, 2018), 83 FR 3846 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 82824, 83 FR 10934 (March 13, 2018). The Commission designated April 26, 2018, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

five comments on the proposed rule change.⁶ This order institutes proceedings under Section 19(b)(2)(B) of the Exchange Act⁷ to determine whether to approve or disapprove the proposed rule change.

I. Summary of the Exchange’s Description of the Proposed Rule Change⁸

The Exchange proposes to adopt new NYSE Arca Rule 8.900-E, which would govern the listing and trading of Managed Portfolio Shares.⁹ The Exchange also proposes to list and trade the Shares of the Royce Pennsylvania ETF, Royce Premier ETF, and Royce Total Return ETF under proposed NYSE Arca Rule 8.900-E (each the “Fund,” and collectively the “Funds”).

⁶ See letters from: (1) Terence W. Norman, Founder, Blue Tractor Group, LLC, dated February 6, 2018 (“Blue Tractor Letter I”); (2) Simon P. Goulet, Co-Founder, Blue Tractor Group, LLC, dated February 13, 2018 (“Blue Tractor Letter II”); (3) Todd J. Broms, Chief Executive Officer, Broms & Company LLC, dated February 16, 2018 (“Broms Letter”); (4) Kevin S. Haerberle, Associate Professor of Law, William & Mary Law School, dated February 16, 2018 (“Haerberle Letter”); and (5) Gary L. Gastineau, President, ETF Consultants.com, Inc., dated March 6, 2018 (“Gastineau Letter”). The comment letters are available at <https://www.sec.gov/comments/sr-nysearca-2018-04/nysearca201804.htm>.

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ For a complete description of the Exchange’s proposal, including a description of the Precidian ETF Trust II (“Trust”), see the Notice, *supra* note 3.

⁹ Proposed NYSE Arca Rule 8.900-E(c)(1) defines the term “Managed Portfolio Share” as a security that (a) represents an interest in a registered investment company (“Investment Company”) organized as an open-end management 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; (b) is issued in a specified aggregate minimum number of shares equal to a Creation Unit (as defined in proposed Rule 8.900-E(c)(3)), or multiples thereof, in return for a designated portfolio of securities (and/or an amount of cash) with a value equal to the next determined net asset value (“NAV”); and (c) when aggregated in the same specified aggregate number of shares equal to a Redemption Unit (as defined in proposed Rule 8.900-E(c)(4)), or multiples thereof, may be redeemed at the request of an authorized participant, which authorized participant will be paid through a confidential account established for its benefit (“Confidential Account”) a portfolio of securities and/or cash with a value equal to the next determined NAV.

A. Description of the Funds

The portfolio for each Fund will consist of long and/or short positions in U.S.-listed securities and shares issued by other U.S.-listed exchange-traded funds (“ETFs”).¹⁰ All exchange-listed equity securities in which the Funds will invest will be listed and traded on U.S. national securities exchanges.

1. Royce Pennsylvania ETF

Under normal market conditions,¹¹ the Royce Pennsylvania ETF will invest at least 65% of its assets in U.S. exchange-listed equity securities of small-cap companies with market capitalizations up to \$3 billion that Royce & Associates, LP (“Royce”), the Fund’s investment sub-adviser, believes are trading below the sub-adviser’s estimate of their current worth. The Fund may invest in U.S. exchange-listed ETFs. The Fund may sell securities to, among other things, secure gains, limit losses, re-deploy assets into what Royce deems to be more promising opportunities, and/or manage cash levels in the Fund’s portfolio.

¹⁰ The Exchange represents that, for purposes of the filing, ETFs include Investment Company Units (as described in NYSE Arca Rule 5.2-E(j)(3)); Portfolio Depository Receipts (as described in NYSE Arca Rule 8.100-E); and Managed Fund Shares (as described in NYSE Arca Rule 8.600-E). The ETFs in which the Funds will invest all will be listed and traded on U.S. national securities exchanges. While the Funds may invest in inverse ETFs, the Funds will not invest in leveraged (e.g., 2X, -2X, 3X, or -3X) ETFs.

¹¹ Proposed Rule 8.900-E(c)(6) defines the term “normal market conditions” as including, but not limited to, the absence of trading halts in the applicable financial markets generally; operational issues (e.g., systems failure) causing dissemination of inaccurate market information; or force majeure type events such as natural or manmade disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance.

2. Royce Premier ETF

Under normal market conditions, the Royce Premier ETF will invest at least 80% of its net assets in a limited number of U.S. exchange-listed equity securities of primarily small-cap companies with market capitalizations from \$1 billion to \$3 billion at the time of investment. The Fund may invest in U.S. exchange-listed ETFs. The Fund may sell securities to, among other things, secure gains, limit losses, re-deploy assets into what Royce deems to be more promising opportunities, and/or manage cash levels in the Fund's portfolio.

3. Royce Total Return ETF

Under normal market conditions, the Royce Total Return ETF will invest at least 65% of its assets in dividend-paying U.S.-listed securities of small-cap companies with market capitalizations up to \$3 billion that Royce believes are trading below its estimate of their current worth. The Fund may invest in U.S. exchange-listed ETFs. The Fund may sell securities to, among other things, secure gains, limit losses, re-deploy assets into what Royce deems to be more promising opportunities, and/or manage cash levels in the Fund's portfolio.

4. Other Investments

While each Fund, under normal market conditions, will invest primarily in U.S.-listed equity securities, as described above, each Fund may invest its remaining assets in other securities and financial instruments as follows: (i) U.S. exchange-listed warrants, rights, and options (limited to 5% of total assets); (ii) cash or cash equivalents;¹² and (iii) the securities of other investment companies.

¹² The Exchange states that, for purposes of the filing, cash equivalents include short-term instruments (instruments with maturities of less than 3 months) of the following types: (i) U.S. Government securities, including bills, notes, and bonds differing as to maturity and rates of interest, which are either issued or guaranteed by the U.S. Treasury or by

5. Investment Restrictions

The Funds will not invest in futures, forwards, or swaps. Further, each Fund's investments will be consistent with its investment objective and will not be used to enhance leverage. While the Funds may invest in inverse ETFs, they will not invest in leveraged (e.g., 2X, -2X, 3X or -3X) ETFs. Finally, the equity securities (other than non-exchange-listed investment company securities) and options in which the Funds invest will be listed on a U.S. national securities exchange.

B. Key Features of Managed Portfolio Shares

According to the Exchange, while Investment Companies issuing Managed Portfolio Shares would be actively-managed, and in that respect would be similar to those issuing Managed Fund Shares,¹³ 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.¹⁴ By contrast, the portfolio for an issue of Managed Portfolio Shares would be disclosed only quarterly.

U.S. Government agencies or instrumentalities; (ii) certificates of deposit issued against funds deposited in a bank or savings and loan association; (iii) bankers' acceptances, which are short-term credit instruments used to finance commercial transactions; (iv) repurchase agreements and reverse repurchase agreements; (v) bank time deposits, which are monies kept on deposit with banks or savings and loan associations for a stated period of time at a fixed rate of interest; (vi) commercial paper, which are short-term unsecured promissory notes; and (vii) money market funds.

¹³ Managed Fund Shares are shares of actively-managed Investment Companies listed and traded under NYSE Arca Rule 8.600-E.

¹⁴ NYSE Arca Rule 8.600-E(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 NAV at the end of the business day. NYSE Arca Rule 8.600-E(d)(2)(B)(i) requires that, for Managed Fund

- Second, in connection with the creation of shares in “Creation Unit” size or the redemption of shares in “Redemption Unit” size, the delivery or receipt of any portfolio securities in kind would be effected through an agent (“AP Representative”) in a Confidential Account established for the benefit of the creating or 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 the Reporting Authority (as defined in proposed NYSE Arca Rule 8.900-E(c)(5)) and/or by one or more major market-data vendors every second during the Exchange’s Core Trading Session (normally, 9:30 a.m. to 4:00 p.m., Eastern Time (“E.T.”)).¹⁵ The Exchange states that the 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.¹⁶

Shares, the Disclosed Portfolio will be disseminated at least once daily and will be made available to all market participants at the same time.

¹⁵ Proposed NYSE Arca Rule 8.900-E(c)(2) defines the VIIV as the estimated indicative value of a Managed Portfolio Share based on all of the holdings of a series of Managed Portfolio Shares as of the close of business on the prior business day, and, for corporate actions, based on the applicable holdings as of the opening of business on the current business day, priced and disseminated in one second intervals during the Core Trading Session.

¹⁶ 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.

C. Arbitrage of Managed Portfolio Shares

The Exchange asserts that market makers will be able to make efficient and liquid markets in the Shares priced near the VIIV as long as the VIIV is disseminated every second and market makers employ market making techniques such as “statistical arbitrage,” including correlation hedging, beta hedging, and dispersion trading, which the Exchange represents is currently used throughout the financial services industry, to make efficient markets in exchange-traded products.¹⁷ According to the Exchange, if an authorized participant believes that the Shares 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 the Shares short and purchase securities that the authorized participant believes will track the movements of the Shares. When the spread narrows, the authorized participant would execute offsetting orders or enter an order with its AP Representative to create Shares. According to the Exchange, the authorized participant’s purchase of the portfolio securities into its Confidential Account, combined with the sale of the Shares, may create

¹⁷ According to the Exchange, statistical arbitrage enables a trader to construct an accurate proxy for another instrument, allowing it to hedge the other instrument or buy or sell the instrument when it is cheap or expensive in relation to the proxy. The Exchange states that statistical analysis permits traders to discover correlations, based purely on trading data without regard to other fundamental drivers. The Exchange also states that correlations are a function of differentials, over time, between one instrument or group of instruments and one or more other instruments, and that once the nature of these price deviations have been quantified, a universe of securities is searched in an effort to, in the case of a hedging strategy, minimize the differential. In addition, the Exchange also states that, once a suitable hedging proxy has been identified, a trader can minimize portfolio risk by executing the hedging basket. According to the Exchange, the trader then can monitor the performance of this hedge throughout the trade period, making correction where warranted. The Exchange states that, in the case of correlation hedging, the analysis seeks to find a proxy that matches the pricing behavior of the Fund, and that in the case of beta hedging, the analysis seeks to determine the relationship between the price movement over time of the Fund and that of another stock.

downward pressure on the price of the Shares and/or upward pressure on the price of the portfolio securities, bringing the market price of the Shares and the value of a Fund's portfolio securities closer together.

Similarly, according to the Exchange, an authorized participant could buy the Shares and instruct the AP Representative to redeem them and then sell the underlying portfolio securities from its Confidential Account in an attempt to profit when the Shares trade at a discount to the portfolio securities. According to the Exchange, the authorized participant's purchase of the Shares in the secondary market, combined with the sale of the portfolio securities from its Confidential Account, may create upward pressure on the price of the Shares and/or downward pressure on the price of portfolio securities, driving the market price of the Shares and the value of the Fund's portfolio securities closer together. The Exchange states that, according to Precidian Funds LLC, the investment adviser to the Trust ("Adviser"), this process is identical to how many authorized participants currently arbitrage existing, traditional ETFs, except for the use of the Confidential Account.

D. The Creation and Redemption Procedures

The Exchange states that, generally, the Shares will be purchased and redeemed on an in-kind basis, so that, except where the purchase or redemption would include cash under the circumstances described in the applicable Fund's registration statement, purchasers will be required to purchase "Creation Units" by making an in-kind deposit of specified instruments ("Deposit Instruments"), and authorized participants redeeming their Shares will receive an in-kind transfer of specified instruments ("Redemption Instruments") in their Confidential Account through an AP Representative. 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 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 order cut-off time established by the Fund. 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 AP Representative will in turn liquidate, hedge, or otherwise manage the securities based on instructions from the authorized participant.¹⁸ The AP Representative will pay the liquidation proceeds net of expenses, plus or minus any cash balancing amount, to the authorized participant through DTC.¹⁹ The redemption securities that the Confidential Account receives are expected to mirror the portfolio holdings of a Fund pro rata.

In the case of a creation, the authorized participant will enter into an irrevocable creation order with the Fund and then direct the AP Representative to purchase the necessary basket of portfolio securities. The AP Representative will then purchase the necessary securities in the

¹⁸ The Exchange represents that an authorized participant will issue execution instructions to the AP Representative 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.

¹⁹ 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 loss realized on the sale of those Shares will be taxable income to the authorized participant.

Confidential Account. Once the necessary basket of securities has been acquired, the purchased securities held in the Confidential Account will be contributed in-kind to the Fund.

The Exchange states that, in purchasing the necessary securities for creation purposes, and, conversely, in selling the portfolio securities for redemption purposes, the AP Representative will be required, by the terms of the Confidential Account agreement, to obfuscate the trades by use of tactics such as breaking the trades into multiple purchases or sales and transacting in multiple marketplaces.

E. 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-CSR 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.

In addition, the VIIV will be widely disseminated by the Reporting Authority and/or one or more major market-data vendors at least every second during the Exchange's Core Trading Session. According to the Exchange, the VIIV will include all accrued income and expenses of a Fund, and any extraordinary expenses booked during the day that would be taken into account in calculating the Fund's NAV will also be 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 mid-point pricing for purposes of VIIV calculation, stale prices are eliminated and a 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. The Exchange also believes that the use of quotations will dampen the impact of any momentary spikes in the price of a portfolio security.

According to the Exchange, each Fund will utilize two separate pricing feeds to provide two separate, 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 on a real time basis.²⁰ 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. Upon notification to the Exchange by the issuer of a series of Managed Portfolio Shares, or its agent, that the public VIIV and non-public, alternative intra-day indicative value differ by more than 25 basis points for 60 seconds, the Exchange will halt trading as soon as practicable in the Shares until the discrepancy is resolved.²¹

²⁰ The Exchange states that a Fund’s Custodian will provide, on a daily basis, the identities and quantities of portfolio securities that will form the basis for the Fund’s calculation of NAV at the end of the business day, plus any cash in the portfolio, to the Pricing Verification Agent for purposes of pricing.

²¹ According to the Exchange, for the period January 1, 2017, to October 31, 2017, the average bid/ask spread on actively managed equity ETFs (Managed Fund Shares) traded on NYSE Arca, as a percentage, was 38 basis points. For the same period, the spread on all exchange-traded products traded on NYSE Arca, as a percentage, was 54 basis points. A continuous deviation for sixty seconds could indicate an error in the feed or in a calculation engine used to calculate the two intraday indicative values. The Exchange

Each Fund’s board of directors 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.

F. Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by the Exchange, as well as cross-market 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. 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.²²

The Exchange represents that the Adviser will make available daily to FINRA and the Exchange the portfolio holdings of each Fund in order to facilitate the performance of the surveillances referred to above. In addition, the Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees.

states that the Trust reserves the right to change these thresholds to the extent deemed appropriate and approved by the Fund’s board of directors.

²² The Exchange states that these surveillances generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. The Exchange represents that the Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares, underlying common stocks, rights, warrants, ETFs, and exchange-listed options with other markets and other entities that are members of the Intermarket Surveillance Group (“ISG”), and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding such securities from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares, underlying common stocks, rights, warrants, ETFs and exchange-listed options from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

II. Summary of Comment Letters

The Commission has received five comment letters on the proposed rule change, each of which expresses opposition to the proposed rule change.²³ As of the date of this order instituting proceedings, the Exchange has not submitted a response to the comments.

A. Blue Tractor Letter I.²⁴ The commenter opposes the proposed rule change and raises the following concerns:²⁵

- Under the proposal, market participants will not be able to engage in bona fide arbitrage or efficient statistical arbitrage to keep the price of Shares close to a Fund's NAV;²⁶
- Funds can be reverse engineered to determine the composition of the portfolio securities, which will make the Funds susceptible to front-running;
- The proposed fund structure will result in asymmetric disclosure of confidential portfolio information to selected parties;

²³ See supra note 6.

²⁴ The Blue Tractor Letter I is available at <https://www.sec.gov/comments/sr-nysearca-2018-04/nysearca201804-3004003-161880.pdf>.

²⁵ Although the commenter purports to comment on the Notice, the comments are more directly related to the Trust's December 4, 2017, exemptive application. See Fifth Amended and Restated Application for an Order under Section 6(c) of the 1940 Act for exemptions from various provisions of the 1940 Act and rules thereunder (File No. 812-14405), dated December 4, 2017 ("Exemptive Application"). The commenter also references concerns that it raised in its comment letters to a similar, previous proposal filed by the Exchange to list and trade Managed Portfolio Shares, which the Exchange withdrew. See Securities Exchange Act Release No. 80553 (April 28, 2017), 82 FR 20932 (May 4, 2017) ("Prior Proposal").

²⁶ The commenter also notes that market makers will not be able to construct optimized tracking portfolios using the proposed fund structure and cites to a comment letter that it filed in response to the Prior Proposal. See Letter from Simon P. Goulet, Co-Founder, Blue Tractor Group, LLC, to Brent J. Fields, Secretary, Commission, dated November 22, 2017. This letter is available at <https://www.sec.gov/comments/sr-nysearca-2017-36/nysearca201736-2735961-161533.pdf>.

- Details regarding the VIIV generation process, as well as calculation engine verification procedures, are inadequate for market participants and market makers;
- One second dissemination of VIIVs in a high frequency trading environment is inadequate for authorized participants and market makers and not of value to retail investors; and
- Requiring AP Representatives to obfuscate trades for creation and redemption purposes in an effort to keep portfolio composition confidential will delay execution and increase costs for authorized participants.

B. Blue Tractor Letter II.²⁷ The commenter reiterates its concern that the Funds can be reverse engineered to determine their trading strategies and that “predatory traders” can use such information in order to front run the Funds.

C. Broms Letter.²⁸ The commenter opposes the proposed rule change and raises the following concerns:²⁹

²⁷ The Blue Tractor Letter II is available at <https://www.sec.gov/comments/sr-nysearca-2018-04/nysearca201804-3053961-161905.pdf>.

²⁸ The Broms Letter is available at <https://www.sec.gov/comments/sr-nysearca-2018-04/nysearca201804-3110868-161910.pdf>.

²⁹ The commenter also generally references concerns that it raised in its comment letters related to the Prior Proposal. See Letter from Todd J. Broms, Chief Executive Officer, Broms & Company LLC, to Brent J. Fields, Secretary, Commission, dated May 25, 2017, available at <https://www.sec.gov/comments/sr-nysearca-2017-36/nysearca201736.htm>. See also Letter from Todd J. Broms, Chief Executive Officer, Broms & Company LLC, to Brent J. Fields, Secretary, Commission, dated June 27, 2016, available at <https://www.sec.gov/comments/sr-nysearca-2016-08/nysearca201608-10.pdf>.

- Selective disclosure of confidential portfolio information to AP Representatives to trade on behalf of authorized participants violates federal securities policy and facilitates illegal insider trading;
- The portfolio holdings can be reverse engineered and result in harm to the Funds' shareholders; and
- Because authorized participants cannot engage in bona fide arbitrage, the Shares will not trade efficiently.

D. Haeberle Letter.³⁰ The commenter opposes the proposed rule change and raises the following concerns:³¹

- Selective disclosure of portfolio information to AP Representatives, and the use of such information by AP Representatives to engage in creations and redemptions, may violate Section 10(b) of the Exchange Act and Rule 10b-5thereunder;³²
- The proposal does not address how the Funds will ensure that AP Representatives comply with representations and contractual agreements to keep the Funds' portfolio securities confidential;
- Because AP Representatives will be required to obfuscate the sale and purchase of portfolio securities for creations and redemptions, they will be less likely to uphold their best execution obligations to authorized participants;

³⁰ The Haeberle Letter is available at <https://www.sec.gov/comments/sr-nysearca-2018-04/nysearca201804-3110867-161909.pdf>.

³¹ The commenter also summarizes the main points of its letter regarding the Prior Proposal. See Letter from Kevin S. Haeberle, Associate Professor of Law, William & Mary Law School, to Brent J. Fields, Secretary, Commission, dated December 15, 2017, available at <https://www.sec.gov/comments/sr-nysearca-2017-36/nysearca201736.htm>.

³² 15 U.S.C. 78j; 17 CFR 240.10b-5.

- Any failure of best execution will frustrate efficient market-making and arbitrage, leading to reduced liquidity in the Shares; and
- AP Representative services will likely be costly and, due to compliance constraints, few may offer such services, which will lead to higher expenses for the Funds and reduced liquidity for the Shares.

E. Gastineau Letter.³³ The commenter opposes the proposed rule change and raises the following concerns:

- The filing and other related documents are “riddled with demonstrably false statements of fact, unsubstantiated and misleading expressions of opinion, and omissions of critical analysis and disclosure....”,³⁴
- The portfolio holdings information can be uncovered by (1) time-series analysis of the VIIV or other publicly disseminated Fund information (reverse engineering), (2) observations of Confidential Account trading, (3) misuse or misappropriation of Fund holdings information communicated to AP Representatives, or (4) loss or theft of confidential Fund holdings information communicated to AP Representatives;
- By not assuring the protection of the Funds’ proprietary investment strategies, the proposal³⁵ fails to demonstrate a public purpose or to offer investors advantages over currently approved structures;

³³ The Gastineau Letter is available at <https://www.sec.gov/comments/sr-nysearca-2018-04/nysearca201804-3201927-162011.pdf>.

³⁴ See Gastineau Letter, *supra* note 6, at 7.

³⁵ In his comment letter, the commenter defines the “proposal” as the Notice, the Exemptive Application, the registration statement that the Trust filed on Form N-1A with respect to

- The proposal violates the requirements for selective disclosure in the 2004 adopting release to the N1-A Amendments and as well as the principles of Regulation FD;³⁶
- The proposed disclosure of the Funds’ portfolio holdings on a daily basis to AP Representatives, Fund service providers, and oversight authorities, and the lack of a surveillance or monitoring program to ensure that the Funds’ confidential information is protected and not misused, facilitate illegal insider trading in the Funds’ portfolio securities to the detriment of the Funds’ shareholders;
- The proposed Fund structure raises impediments to the successful arbitrage of, and market making in, the Shares, especially during volatile or stressed markets, because of: (1) the deficiencies of VIIVs as intraday price signals, (2) market makers’ forced reliance on statistical arbitrage and related correlation-based hedging techniques to manage their intraday exposures, and (3) the higher costs and loss of execution control over transactions in Creation Basket securities effected through the Confidential Accounts;

the Funds (Registration Statement on Form N-1A for the Trust, File Nos. 333-217142 and 811-23246, as filed on April 5, 2017), and certain comments on the Prior Proposal (see Letter from Mark Criscitello, Chairman, Precidian Funds LLC, to Brent J. Fields, Secretary, Commission, dated October 11, 2017; Letter from Daniel J. McCabe, Chief Executive, Precidian Investments, to Brent J. Fields, Secretary, Commission, dated October 12, 2017; and Letter from Joseph A. Sullivan, Chairman and Chief Executive Officer, Legg Mason, Inc., to Brent J. Fields, Secretary, Commission, dated October 12, 2017, which are available at <https://www.sec.gov/comments/sr-nysearca-2017-36/nysearca201736.htm>). Accordingly, the term “proposal” as used to describe the commenter’s comment letter refers to the same.

³⁶

17 CFR 243.100 et seq.

- The Shares will be more susceptible to trading halts because even a minimal level of quote disruption in the portfolio holdings will halt the Shares, which in turn will harm the Shares' liquidity and trading efficiency;
- Fund shareholders will incur significant new costs, liabilities, and risks in connection with the calculation and public dissemination of the VIIVs and the selective private disclosure of the Funds' confidential portfolio holdings information;
- The Shares will not trade efficiently because the Funds will invest in small-cap stocks, illiquid assets, and ETFs potentially holding foreign equities and/or less-liquid fixed income instruments;
- Information to investors is inadequate, and the Funds should provide publicly available, enhanced real-time VIIVs, daily closing market price and premium/discount based on the NAV, daily intraday estimated premiums/discounts, and daily purchase and redemption transaction fees; and
- (1) Widespread dissemination of the Funds' confidential portfolio holdings on a daily basis and "the absence of a discernible program" to protect the Funds' confidential information, and (2) the "high likelihood" that the Shares will trade at wider bid-ask spreads and more variable premiums/discounts than existing active ETFs, render the proposal inconsistent with the Section 6(b)(5) requirements that Exchange rules must be designed to prevent fraudulent and manipulative acts and

practices, protect investors and the public interest, and not to permit unfair discrimination among customers, issuers, brokers and dealers.³⁷

III. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2018-04 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act³⁸ 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. 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 Exchange Act,³⁹ 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 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, ...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."⁴⁰

³⁷ In addition, the commenter believes that the proposal fails to meet the statutory standards for exemptive relief pursuant to Section 6(c) of the 1940 Act and asserts that the normal tax benefits of ETF investing will likely not apply to the Funds.

³⁸ 15 U.S.C. 78s(b)(2)(B).

³⁹ Id.

⁴⁰ 15 U.S.C. 78f(b)(5).

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 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 Exchange 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.⁴¹

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,⁴² the issues raised by the commenters, and any other issues raised by the proposed rule change under the Exchange Act. In particular, the Commission seeks commenters' views regarding the concerns raised with respect to selective disclosure of confidential portfolio information, namely, whether such disclosure is

⁴¹ Section 19(b)(2) of the Exchange 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).

⁴² See supra note 3.

consistent with the requirement of Section 6(b)(5) that the rules of the exchange be designed to prevent fraudulent and manipulative acts and practices. The Commission also seeks commenters' views regarding the various concerns raised about how the Shares may trade in the secondary market, including the potential for frequent trading halts and poor trading performance during times of market volatility and stress. In this regard, the Commission specifically seeks commenters' views on whether the proposal is consistent with the maintenance of a fair and orderly market.

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. Please include File Number SR-NYSEArca-2018-04 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-2018-04. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2018-04 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.⁴³

Eduardo A. Aleman
Assistant Secretary

⁴³ 17 CFR 200.30-3(a)(57).