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SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-72714; File No. SR-NYSEArca-2014-41]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change, as Modified by Amendment Nos. 1 and 4 Thereto, Relating to Listing and Trading of Shares of the Reality Shares DIVS Index ETF under NYSE Arca Equities Rule 5.2(j)(3)
July 29, 2014.

On April 11, 2014, 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")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to list and trade shares ("Shares") of the Reality Shares DIVS Index ETF ("Fund") (formerly, Reality Shares Isolated Dividend Growth Index ETF) under NYSE Arca Equities Rule 5.2(j)(3). The proposed rule change was published for comment in the Federal Register on April 30, 2014.[3] On May 6, 2014, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the proposed rule change in its entirety.[4] On June 6, 2014, the Exchange filed Amendment No. 4 to the proposed rule change.[5] On June 13, 2014, pursuant to Section 19(b)(2) of the Act,[6] the

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 72015 (Apr. 24, 2014), 79 FR 24475 ("Notice").

4 In Amendment No. 1, the Exchange clarified the valuation of investments for purposes of calculating net asset value, provided additional details regarding the dissemination of the Disclosed Portfolio, and made other minor technical edits to the proposed rule change. Amendment No. 1 provided clarification to the proposed rule change, and because it does not materially affect the substance of the proposed rule change or raise novel or unique regulatory issues, Amendment No. 1 is not subject to notice and comment.

5 The Exchange filed Amendment No. 2 on June 4, 2014 and withdrew it on June 5, 2014, and filed Amendment No. 3 on June 5, 2014 and withdrew it on June 6, 2014.

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.[7] The Commission received no comment letters on the proposed rule change. This Order institutes proceedings under Section 19(b)(2)(B) of the Act[8] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment Nos. 1 and 4 thereto.

I. <u>Description of the Proposal</u>

A. <u>In General</u>

The Exchange proposes to list and trade Shares of the Fund under NYSE Arca Equities Rule 5.2(j)(3), which governs the listing and trading of Investment Company Units on the Exchange.[9] The Shares of the Fund will be offered by the Reality Shares ETF Trust (formerly,

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Amendment No. 4 supersedes both Amendment Nos. 2 and 3. In Amendment No. 4, the Exchange amended the proposal to reflect a name change to the Fund and the underlying index. Specifically, the Exchange replaced each reference to "Reality Shares Isolated Dividend Growth Index ETF" in the proposal with "Reality Shares DIVS Index ETF" and replaced each reference to "Reality Shares Isolated Dividend Growth Index" in the proposal with "Reality Shares DIVS Index." Amendment No. 4 is a technical amendment and is not subject to notice and comment as it does not materially affect the substance of the filing.

6 15 U.S.C. 78s(b)(2).

7 <u>See</u> Securities Exchange Act Release No. 72385, 79 FR 35205 (Jun. 19, 2014). The Commission designated a longer period within which to take action on the proposed rule change and designated July 29, 2014, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

8 15 U.S.C. 78s(b)(2)(B).

9 NYSE Arca Equities Rule 5.2(j)(3)(A) provides that an Investment Company Unit is a security that represents an interest in a registered investment company that holds securities comprising, or otherwise based on or representing an interest in, an index or portfolio of securities (or holds securities in another registered investment company that holds securities comprising, or otherwise based on or representing an interest in, an index or portfolio of securities).

the ERNY Financial ETF Trust) ("Trust"). The Trust will be registered with the Commission as an open-end management investment company.[10] Reality Shares Advisors, LLC (formerly, ERNY Financial Advisors, LLC) will serve as the investment adviser to the Fund ("Adviser"). ALPS Distributors, Inc. will be the principal underwriter and distributor of the Fund's Shares. The Bank of New York Mellon will serve as administrator, custodian and transfer agent for the Fund.

B. The Exchange's Description of the Fund

The Exchange has made the following representations concerning the Fund.

The Fund will seek long-term capital appreciation by tracking the performance of the Reality Shares DIVS Index ("Index"). The Index was developed and is maintained by Reality Shares, Inc. ("Index Provider").[11] The Adviser is a wholly-owned subsidiary of the Index Provider. The Index Provider is not registered as an investment adviser or broker-dealer and is

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10 According to the Exchange, the Trust will be registered under the Investment Company Act of 1940 ("1940 Act"). On November 12, 2013, the Trust filed a registration statement on Form N-1A under the Securities Act of 1933 ("1933 Act") and under the 1940 Act relating to the Fund, as amended by Pre-Effective Amendment Number 1, filed with the Commission on February 6, 2014 (File Nos. 333-192288 and 811-22911) (the "Registration Statement"). The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement. In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. Investment Company Act Release No. 30678 (Aug. 27, 2013) ("Exemptive Order"). The Exchange states that investments made by the Fund will comply with the conditions set forth in the Exemptive Order.

11 The Index will be calculated by International Data Corporation, which is not affiliated with the Adviser or the Index Provider, and which is not a broker-dealer or fund advisor. Commentary .01(b)(1) to NYSE Arca Equities Rule 5.2(j)(3) provides that, if the applicable index is maintained by a fund advisor or a broker-dealer, the fund advisor or broker-dealer shall erect a "fire wall" around the personnel who have access to information concerning changes and adjustments to the index, and the index shall be calculated by a third party who is not a broker-dealer or fund advisor.

not affiliated with any broker-dealer. The Adviser is not registered as a broker-dealer and is not affiliated with any broker-dealer.[12]

1. Index Methodology

The Index will be calculated using a proprietary, rules-based methodology designed to track market expectations for dividend growth conveyed in real-time using the mid-point of the bid-ask spread on S&P 500 Index options and options on exchange-traded funds ("ETFs")[13] designed to track the S&P 500 Index.[14] All options included in the Index will be listed and traded on a U.S. national securities exchange. The Index will consist of a minimum of 20 components.

The prices of index and ETF options reflect the market trading prices of the securities included in the applicable underlying index or ETF, as well as market expectations regarding the level of dividends to be paid on those indexes or ETFs during the term of the option. The Index

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12 The Adviser and the Index Provider have represented that a fire wall exists around the respective personnel who have access to information concerning changes and adjustments to the Index. The Exchange notes that, in the event (a) the Adviser, any sub-adviser, or the Index Provider becomes registered as a broker-dealer or newly affiliated with a broker-dealer, or (b) any new adviser, sub-adviser, or Index Provider is a registered broker-dealer or becomes affiliated with a broker-dealer, that entity will implement a fire wall with respect to their relevant personnel or broker-dealer affiliate, as applicable, regarding access to information concerning the composition of or changes to the portfolio and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the portfolio.

13 For purposes of this proposed rule change, such ETFs include Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)) and Portfolio Depositary Receipts (as described in NYSE Arca Equities Rule 8.100). The ETFs all will be listed and traded in the U.S. on registered exchanges. The Fund may not invest in leveraged or inverse leveraged (e.g., 2X, -2X, 3X, or -3X) ETFs or options on such ETFs.

14 The Index will not directly measure or track actual dividend payments or the actual growth in dividend payments, but will instead track market expectations of dividend growth as implied by the options that make up the Index.

constituents, and, therefore, most of the Fund's portfolio holdings, will consist of multiple corresponding near-term and long-term put and call option combinations on the same reference assets (i.e., options on the S&P 500 Index or options on S&P 500 ETFs) with the same strike price. Because option prices reflect both stock price and dividend expectations, they can be used in combination to isolate either price exposure or dividend expectations. The use of near-term and long-term put and call options combinations on the same reference asset with the same strike price, but with different maturities, is designed to gain exposure to the expected dividends reflected in options on the S&P 500 Index and options on ETFs tracking the S&P 500 Index while neutralizing the impact of stock price movements. According to the Exchange, over time, the Index will increase or decrease in value as the dividend spread between the near-term and long-term option combinations increases or decreases as a result of changing market expectations for dividend growth.

2. Principal Investments of the Fund

The Fund will seek long-term capital appreciation and will seek investment results that, before fees and expenses, generally correspond to the performance of the Index. At least 80% of the Fund's total assets (exclusive of collateral held from securities lending, if any) will be invested in the component securities of the Index. The Fund will seek a correlation of 0.95 or better between its performance and the performance of its Index. A figure of 1.00 would represent perfect correlation. The Fund generally will use a representative sampling investment strategy.

The Fund will buy (i.e., hold a "long" position in) and sell (i.e., hold a "short" position in) put and call options. The strategy of taking both a long position in a security through its ex-dividend date (the last date an investor can own the security and receive dividends paid on the security) and a corresponding short position in the same security immediately thereafter is designed to allow the Fund to isolate its exposure to the growth of the level of dividends expected to be paid on a security while minimizing its exposure to changes in the trading price of that security.

The Fund will buy and sell U.S. exchange-listed options on the S&P 500 Index and U.S. exchange-listed options on ETFs designed to track the S&P 500 Index. A put option gives the purchaser of the option the right to sell, and the issuer of the option the obligation to buy, the underlying security or instrument on a specified date or during a specified period of time. A call option on a security gives the purchaser of the option the right to buy, and the writer of the option the obligation to sell, the underlying security or instrument on a specified date or during a specified period of time. The Fund will invest in a combination of put and call options designed to allow the Fund to isolate its exposure to the growth of the level of expected dividends reflected in options on the S&P 500 Index and options on ETFs tracking the S&P 500 Index, while minimizing the Fund's exposure to changes in the trading price of such securities.

3. Other Investments of the Fund

While, as described above, at least 80% of the Fund's total assets (exclusive of collateral held from securities lending, if any) will be invested in the component securities of the Index, the Fund may invest up to 20% of the Fund's total assets in other securities and financial instruments, as described below.

The Fund may invest in U.S. exchange-listed futures contracts based on the S&P 500 Index and ETFs designed to track the S&P 500 Index, and forward contracts based on the S&P 500 Index and ETFs designed to track the S&P 500 Index. The Fund's use of exchange-listed futures contracts and forward contracts is designed to allow the Fund to isolate its exposure to the growth of the level of expected dividends reflected in options on the S&P 500 Index and options on ETFs tracking the S&P 500 Index, while minimizing the Fund's exposure to changes in the trading price of such securities. The Fund may also buy and sell OTC options on the S&P 500 Index and on ETFs designed to track the S&P 500 Index.

The Fund may enter into dividend and total return swap transactions (including equity swap transactions) based on the S&P 500 Index and ETFs designed to track the S&P 500 Index.[15] In a typical swap transaction, one party agrees to make periodic payments to another party ("counterparty") based on the change in market value or level of a specified rate, index, or asset. In return, the counterparty agrees to make periodic payments to the first party based on the return of a different specified rate, index, or asset. Swap transactions are usually done on a net basis, with the Fund receiving or paying only the net amount of the two payments. In a typical dividend swap transaction, the Fund would pay the swap counterparty a premium and would be entitled to receive the value of the actual dividends paid on the subject index during the term of the swap contract. In a typical total return swap, the Fund might exchange long or short exposures to the return of the underlying securities or index to isolate the value of the dividends paid on the underlying securities or index constituents. The Fund also may engage in interest rate swap transactions. In a typical interest rate swap transaction one stream of future interest payments is exchanged for another. Such transactions often take the form of an exchange of a fixed payment for a variable payment based on a future interest rate. The Fund intends to use interest rate swap transactions to manage or hedge exposure to interest rate fluctuations.

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15 The Fund will transact only with swap dealers that have in place an ISDA agreement with the Fund.

The Fund may invest up to 20% of its assets (exclusive of collateral held from securities lending, if any) in exchange-listed equity securities and derivative instruments (specifically, futures contracts, forward contracts, and swap transactions)[16] relating to the Index and its component securities that the Adviser believes will help the Fund track the Index. For example, the Fund may buy and sell ETFs and, to a limited extent, individual large-capitalization equity securities listed and traded on a U.S. national securities exchange.

The Fund may invest in the securities of other investment companies (including money market funds) to the extent permitted under the 1940 Act.

The Fund's short positions and its investments in swaps, futures contracts, forward contracts, and options based on the S&P 500 Index and ETFs designed to track the S&P 500 Index will be backed by investments in cash, high-quality short-term debt securities, and money-market instruments in an amount equal to the Fund's maximum liability under the applicable position or contract, or will otherwise be offset in accordance with Section 18 of the 1940 Act. Short-term debt securities and money market instruments include shares of fixed income or money market mutual funds, commercial paper, certificates of deposit, bankers' acceptances, U.S. Government Securities (including securities issued or guaranteed by the U.S. government or its authorities, agencies, or instrumentalities), repurchase agreements,[17] and bonds that are rated BBB or higher.

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16 Where practicable, the Fund intends to invest in swaps cleared through a central clearing house ("Cleared Swaps"). Currently, only certain of the interest rate swaps in which the Fund intends to invest are Cleared Swaps, while the dividend and total return swaps (including equity swaps) in which the Fund may invest are currently not Cleared Swaps.

17 The Fund may enter into repurchase agreements with banks and broker-dealers. A repurchase agreement is an agreement under which securities are acquired by a fund from a securities dealer or bank subject to resale at an agreed-upon price on a later date. The

In addition to the investments described above, and in a manner consistent with its investment objective, the Fund may invest a limited portion of its net assets in high-quality, short-term debt securities and money market instruments for cash management purposes.[18]

The Fund will attempt to limit counterparty risk in non-cleared swap, forward, and OTC option contracts by entering into such contracts only with counterparties the Adviser believes are creditworthy and by limiting the Fund's exposure to each counterparty. The Adviser will monitor the creditworthiness of each counterparty and the Fund's exposure to each counterparty on an ongoing basis.[19]

The Exchange represents that the Fund's investments in swaps, futures contracts, forward contracts, and options will be consistent with the Fund's investment objective and with the requirements of the 1940 Act.[20]

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acquiring fund bears a risk of loss in the event that the other party to a repurchase agreement defaults on its obligations and the fund is delayed or prevented from exercising its rights to dispose of the collateral securities.

18 The Fund may invest in shares of money market mutual funds to the extent permitted by the 1940 Act.

19 The Fund will seek, where possible, to use counterparties, as applicable, whose financial status is such that the risk of default is reduced; however, the risk of losses resulting from default is still possible. The Adviser will evaluate the creditworthiness of counterparties on an ongoing basis. In addition to information provided by credit agencies, the Adviser will evaluate each approved counterparty using various methods of analysis, such as, for example, the counterparty's liquidity in the event of default, the counterparty's reputation, the Adviser's past experience with the counterparty, and the counterparty's share of market participation.

20 To limit the potential risk associated with such transactions, the Fund will segregate or "earmark" assets determined to be liquid by the Adviser in accordance with procedures established by the Trust's Board of Trustees and in accordance with the 1940 Act (or, as permitted by applicable regulation, will enter into certain offsetting positions) to cover its obligations arising from such transactions. These procedures have been adopted consistent with Section 18 of the 1940 Act and related Commission guidance. In addition, the Fund will include appropriate risk disclosure in its offering documents,

4. Investment Restrictions of the Fund

To the extent the Index concentrates (i.e., holds 25% or more of its total assets) in the securities of a particular industry or group of industries, the Fund will concentrate its investments to approximately the same extent as the Index.

The Fund may hold up to an aggregate amount of 15% of its net assets in assets (calculated at the time of investment) deemed illiquid by the Adviser, consistent with Commission guidance.[21] The Fund will monitor 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 the Fund's net assets are held in illiquid assets. Illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

The Fund may make secured loans of its portfolio securities; however, securities loans will not be made if, as a result, the aggregate amount of all outstanding securities loans by the Fund exceeds 33 1/3% of its total assets (including the market value of collateral received). To

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including leveraging risk. Leveraging risk is the risk that certain transactions of the Fund, including the Fund's use of derivatives, may give rise to leverage, causing the Fund to be more volatile than if it had not been leveraged. To mitigate leveraging risk, the Adviser will segregate or "earmark" liquid assets or otherwise cover the transactions that may give rise to such risk.

21 In reaching liquidity decisions, the Adviser may consider the following factors: the frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace in which it trades (e.g., the time needed to dispose of the security, the method of soliciting offers, and the mechanics of transfer).

the extent the Fund engages in securities lending, securities loans will be made to broker-dealers that the Adviser believes to be of relatively high credit standing pursuant to agreements requiring that the loans continuously be collateralized by cash, liquid securities, or shares of other investment companies with a value at least equal to the market value of the loaned securities.

The Fund will be classified as a "non-diversified" investment company under the 1940 Act and intends to qualify for, and to elect treatment as, a separate regulated investment company under Subchapter M of the Internal Revenue Code. The Exchange represents that the Fund's investments will be consistent with its investment objective and will not be used to provide multiple returns of a benchmark or to produce leveraged returns.

II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2014-41 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[22] 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 Act,[23] 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

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22 15 U.S.C. 78s(b)(2)(B).

23 Id.

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."[24]

III. 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.[25]

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].

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[24] 15 U.S.C. 78f(b)(5).

[25] 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).

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,[26] as modified by Amendment Nos. 1 and 4 to the proposed rule change, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following:

1. Because the Index is designed to reflect changes in market expectations of future dividend growth, rather than to track actual dividend growth, is the Fund's investment strategy fundamentally based on an assumption that the options markets systemically underprice dividend growth? What are commenters' views regarding whether investors would be able to understand the strategy, risks, potential rewards, assumptions, and expected performance of the Fund's strategy?
2. With respect to the trading of the Shares on the Exchange, do commenters believe that the Exchange's rules governing sales practices are adequately designed to ensure the suitability of recommendations regarding the Shares? Why or why not? If not, should the Exchange's rules governing sales practices be enhanced? If so, in what ways?
3. How closely do commenters think the market price of the Shares will track the Fund's intraday indicative value ("IIV") or the intraday value of the Index? Are certain of these values likely to be more volatile than others? If so, how would this affect trading in the Shares? Are the Shares likely to trade with a significant premium or discount to IIV? What are commenters' views of how effectively the

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[26] See supra note 3.

IIV of the Fund would represent the Fund's portfolio? What are commenters' views of how the Shares' market price, the Fund's IIV, and the intraday value of the Index will relate to one another during times of market stress?

4. Does the liquidity of the long-dated options in which the Fund will invest differ materially from that of the short-dated options in which the Fund will invest? If so, how would that affect the ability of market makers to engage in arbitrage or to hedge their positions while making a market in the Shares? Would the liquidity characteristics of the Index components or of the options in the Fund's portfolio affect the calculation of the Index value, the calculation of the Fund's IIV, the calculation of the Fund's NAV, or the ability of market makers or other market participants to value the Shares? If so, how?

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-2014-41 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-2014-41. 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-2014-41 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.[27]

Kevin M. O'Neill,
Deputy Secretary.

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[27] 17 CFR 200.30-3(a)(57).