

preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings once an investment by a Fund of Funds in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board's determinations were made.

9. Before investing in a Fund in excess of the limit in section 12(d)(1)(A), a Fund of Funds and the Trust will execute a FOF Participation Agreement stating without limitation that their respective boards of directors or trustees and their investment advisers, or trustee and Sponsor, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in Shares of a Fund in excess of the limit in section 12(d)(1)(A)(i), a Fund of Funds will notify the Fund of the investment. At such time, the Fund of Funds will also transmit to the Fund a list of the names of each Fund of Funds Affiliate and Underwriting Affiliate. The Fund of Funds will notify the Fund of any changes to the list of the names as soon as reasonably practicable after a change occurs. The Fund and the Fund of Funds will maintain and preserve a copy of the order, the FOF Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

10. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Investing Management Company including a majority of the disinterested directors or trustees, will find that the advisory fees charged under such contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund, or its respective Master Fund, in which the Investing Management Company may invest. These findings and their basis will be fully recorded in the minute books of the appropriate Investing Management Company.

11. Any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

12. No Fund, or its respective Master Fund, will acquire securities of any other investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent (i) the Fund, or its respective Master Fund, acquires securities of another investment company pursuant to exemptive relief from the Commission permitting the Fund, or its respective Master Fund, to acquire securities of one or more investment companies for short-term cash management purposes, (ii) the Fund acquires securities of the Master Fund pursuant to the Master-Feeder Relief or (iii) the Fund invests in a Wholly-Owned Subsidiary that is a wholly-owned and controlled subsidiary of the Fund (or its respective Master Fund) as described in the Application. Further, no Wholly-Owned Subsidiary will acquire securities of any other investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act other than money market funds that comply with rule 2a-7 for short-term cash management purposes.

For the Commission, by the Division of Investment Management, under delegated authority.

**Robert W. Errett,**  
*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77480; File No. SR-BATS-2016-03]

### Self-Regulatory Organizations; BATS Exchange, Inc.; Order Granting Approval of Proposed Rule Change, as Modified by Amendment Nos. 1 and 3 Thereto, To List and Trade Shares of the Elkhorn Dow Jones RAFI Commodity ETF of Elkhorn ETF Trust

March 30, 2016.

#### I. Introduction

On February 1, 2016, BATS Exchange, Inc. ("Exchange" or "BATS") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares ("Shares") of the Elkhorn Dow Jones RAFI Commodity ETF ("Fund"). On February 3, 2016, the Exchange filed Amendment No. 1 to the proposed rule

change. The proposed rule change, as modified by Amendment No. 1 thereto, was published for comment in the **Federal Register** on February 16, 2016.<sup>3</sup> On March 22, 2016, the Exchange filed and subsequently withdrew Amendment No. 2 to the proposed rule change and filed Amendment No. 3 to the proposed rule change.<sup>4</sup> The Commission received no comments on the proposal. This order grants approval of the proposed rule change, as modified by Amendment Nos. 1 and 3 thereto.

#### II. Exchange's Description of the Proposed Rule Change

The Exchange proposes to list and trade the Shares of the Fund pursuant to BATS Rule 14.11(i), which governs the listing and trading of Managed Fund Shares on the Exchange.<sup>5</sup> The Shares will be offered by the Elkhorn ETF Trust ("Trust"), which was established as a Massachusetts business trust on December 12, 2013.<sup>6</sup> Elkhorn Investments, LLC will be the investment adviser ("Adviser") to the Fund. It is currently anticipated that day-to-day portfolio management for the Fund will be provided by the Adviser. However, the Fund and the Adviser may contract with an investment sub-adviser ("Sub-Adviser") to provide day-to-day portfolio management for the Fund. ALPS Distributors, Inc. will be the principal underwriter and distributor of

<sup>3</sup> See Securities Exchange Act Release No. 77086 (Feb. 9, 2016), 81 FR 7857 ("Notice").

<sup>4</sup> In Amendment No. 3 to the proposed rule change, the Exchange clarified that: (a) All statements and representations made in the proposal shall constitute continued listing requirements for listing the Shares on the Exchange; (b) the issuer will advise the Exchange of any failure by the Fund to comply with the continued listing requirements; (c) pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will surveil for compliance with the continued listing requirements; and (d) if the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. Because Amendment No. 3 does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 3 is not subject to notice and comment (Amendment No. 3 to the proposed rule change is available at: <http://www.sec.gov/comments/sr-bats-2016-03/bats201603-1.pdf>).

<sup>5</sup> All statements and representations made in this filing regarding (a) the description of the portfolio, (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 on the Exchange.

<sup>6</sup> The Exchange represents that the Trust is registered under the Investment Company Act of 1940 ("1940 Act"). See Registration Statement on Form N-1A for the Trust, dated November 10, 2015 (File Nos. 333-201473 and 811-22926) ("Registration Statement"). The Exchange further states that the Trust has obtained certain exemptive relief under the 1940 Act.

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

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

the Fund's Shares. The Fund will contract with unaffiliated third parties to provide administrative, custodial and transfer agency services to the Fund. The Exchange represents the Adviser is not a broker-dealer, but is affiliated with a broker-dealer, and it has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition of, or changes to, the Fund's portfolio.<sup>7</sup>

#### A. Exchange's Description of the Fund's Investments<sup>8</sup>

According to the Exchange, the Fund's investment objective will be to provide total return which exceeds that of the Dow Jones RAFI Commodity Index ("Benchmark")<sup>9</sup> consistent with prudent investment management.<sup>10</sup> The Fund will seek excess return above the Benchmark through the active management of a short duration portfolio of highly liquid, high quality bonds.

The Fund will be an actively managed fund that seeks to achieve its investment objective by investing, under normal market conditions,<sup>11</sup> in exchange-traded

<sup>7</sup> See BATS Rule 14.11(i)(7). The Exchange further represents that, in the event that (a) the Adviser or a Sub-Adviser becomes, or becomes newly affiliated with, a broker-dealer or registers as a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it will implement a fire wall with respect to its relevant personnel or such 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 such portfolio.

<sup>8</sup> The Commission notes that additional information regarding the Fund, the Trust, the Subsidiary (as defined herein), and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, calculation of net asset value ("NAV"), distributions, and taxes, among other things, can be found in the Notice and the Registration Statement, as applicable. See Notice and Registration Statement, *supra* notes 3 and 5, respectively.

<sup>9</sup> The Benchmark is developed, maintained, and sponsored by S&P Dow Jones Indices LLC ("S&P Indices").

<sup>10</sup> According to the Exchange, the Benchmark currently contains 24 commodities across three major sectors including energy, agriculture and livestock, and metals. See Notice, *supra* note 3 (providing additional information regarding the Benchmark and its components, including a table describing each of the commodities underlying the futures contracts included in the Benchmark as of October 31, 2015, and each instrument's trading hours, exchange, and ticker symbol).

<sup>11</sup> The term "under normal market conditions" includes, but is not limited to, the absence of extreme volatility or trading halts in the fixed income markets, futures markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance.

commodity futures contracts, centrally cleared and non-centrally cleared swaps,<sup>12</sup> exchange-traded options on futures contracts, and exchange-traded commodity-linked instruments<sup>13</sup> (collectively, "Commodities") through a wholly-owned subsidiary controlled by the Fund and organized under the laws of the Cayman Islands ("Subsidiary"), thereby obtaining exposure to the commodities markets.

The Fund's Commodities investments, in part, will be comprised of exchange-traded futures contracts on commodities that comprise the Benchmark. Although the Fund, through the Subsidiary, will generally hold many of the futures contracts included in the Benchmark, the Fund and the Subsidiary will be actively managed and will not be obligated to invest in all of (or to limit investments solely to) such futures contracts. In addition, with respect to investments in exchange-traded futures contracts, the Fund and the Subsidiary will not be obligated to invest in the same amount or proportion as the Benchmark, or be obligated to track the performance of the Benchmark. In addition to exchange-traded futures contracts, the Fund's Commodities investments will also be comprised of the following: Centrally cleared and non-centrally cleared swaps on commodities; exchange-traded options on futures contracts that provide exposure to the investment returns of the commodities markets; and exchange-traded commodity-linked instruments, without investing directly in physical commodities.

The Fund will invest in Commodities through investments in the Subsidiary and will not invest directly in physical commodities. The Fund's investment in

<sup>12</sup> Investments in non-centrally cleared swaps (through the Subsidiary) will not represent more than 20% of the Fund's net assets. When investing in non-centrally cleared swaps, the Subsidiary 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 and/or a Sub-Adviser will evaluate the creditworthiness of counterparties on an ongoing basis. In addition to information provided by credit agencies, the Adviser's and/or a Sub-Adviser's analysis will evaluate each approved counterparty using various methods of analysis and may consider such factors as the counterparty's liquidity, its reputation, the Adviser's and/or a Sub-Adviser's past experience with the counterparty, its known disciplinary history and its share of market participation.

<sup>13</sup> Exchange-traded commodity-linked instruments include only the following: (1) Funds that provide exposure to commodities as would be listed under Exchange Rules 14.11(b), (c), and (i); and (2) pooled investment vehicles that invest primarily in commodities and commodity-linked instruments as would be listed under Exchange Rules 14.11(d) and 14.11(e)(2), (4), (6), (7), (8), (9), and (10).

the Subsidiary may not exceed 25% of the Fund's total assets. In addition to Commodities, the Fund's assets will be invested in: (1) Short-term, investment grade fixed income securities, including only the following instruments: U.S. government and agency securities,<sup>14</sup> corporate debt obligations,<sup>15</sup> and repurchase agreements;<sup>16</sup> (2) money market instruments;<sup>17</sup> (3) investment companies (other than those that are commodity-linked instruments),<sup>18</sup> including both exchange traded and non-exchange-traded investment companies, that provide exposure to commodities, equity securities, and

<sup>14</sup> Such securities are securities that are issued or guaranteed by the U.S. Treasury, by various agencies of the U.S. government, or by various instrumentalities, which have been established or sponsored by the U.S. government. U.S. Treasury obligations are backed by the "full faith and credit" of the U.S. government. Securities issued or guaranteed by federal agencies and U.S. government-sponsored instrumentalities may or may not be backed by the full faith and credit of the U.S. government.

<sup>15</sup> At least 75% of corporate debt obligations will have a minimum principal amount outstanding of \$100 million or more.

<sup>16</sup> The Fund intends to enter into repurchase agreements only with financial institutions and dealers believed by the Adviser and/or a Sub-Adviser to present minimal credit risks in accordance with criteria approved by the Trust's Board of Trustees ("Board"). The Adviser and/or a Sub-Adviser will review and monitor the creditworthiness of such institutions. The Adviser and/or a Sub-Adviser will monitor the value of the collateral at the time the transaction is entered into and at all times during the term of the repurchase agreement.

<sup>17</sup> For the Fund's purposes, money market instruments will include only the following instruments: Short-term, high-quality securities issued or guaranteed by non-U.S. governments, agencies and instrumentalities; non-convertible corporate debt securities with remaining maturities of not more than 397 days that satisfy ratings requirements under Rule 2a-7 under the 1940 Act; money market mutual funds; and deposits and other obligations of U.S. and non-U.S. banks and financial institutions. In addition, the Fund may invest in commercial paper (short-term unsecured promissory notes), but only if the commercial paper has received the highest rating from at least one nationally recognized statistical rating organization or, if unrated, has been judged by the Adviser and/or a Sub-Adviser to be of comparable quality.

<sup>18</sup> According to the Exchange, the Fund may invest in the securities of certain other investment companies in excess of the limits imposed under the 1940 Act pursuant to an exemptive order obtained by the Trust and the Adviser from the Commission. The exchange-traded investment companies in which the Fund may invest include Index Fund Shares (as described in Rule 14.11(c)), Portfolio Depository Receipts (as described in Rule 14.11(b)), and Managed Fund Shares (as described in Rule 14.11(i)). The non-exchange-traded investment companies in which the Fund may invest include all non-exchange-traded investment companies that are not money market mutual funds, as described above. While the Fund and the Subsidiary may invest in inverse commodity-linked instruments and securities of investment companies, the Fund and the Subsidiary will not invest in leveraged or inverse leveraged (e.g., 2X or -3X) commodity-linked instruments or securities of investment companies.

fixed income securities to the extent permitted under the 1940 Act and any applicable exemptive relief;<sup>19</sup> (4) certain bank instruments;<sup>20</sup> and (5) cash and other cash equivalents (collectively, "Other Investments"). The Fund will use the Other Investments as investments, to provide liquidity, and to collateralize the Subsidiary's commodity exposure on a day-to-day basis.

The Fund's investment in the Subsidiary will be designed to help the Fund achieve exposure to commodity returns in a manner consistent with the federal tax requirements applicable to the Fund and other regulated investment companies. The Fund intends to qualify for, and to elect to be treated as, a separate regulated investment company under Subchapter M of the Internal Revenue Code.

#### *B. Exchange's Description of the Subsidiary's Investments*

The Subsidiary will generally seek to make investments in Commodities, and its portfolio will be managed by the Adviser or a Sub-Adviser.<sup>21</sup> The Adviser or a Sub-Adviser will use its discretion to determine the percentage of the Fund's assets allocated to the Commodities held by the Subsidiary that will be invested in exchange-traded commodity futures contracts, centrally cleared and non-centrally cleared swaps, exchange-traded options on futures contracts, and exchange-traded commodity-linked instruments. In this regard, under normal market conditions, the Subsidiary is expected, as a general matter, to invest in futures contracts in proportional weights and allocations

<sup>19</sup> The exchange-traded investment companies and commodity-linked instruments in which the Fund invests will be listed and traded in the U.S. on registered exchanges.

<sup>20</sup> The term "certain bank instruments" includes only the following instruments: Certificates of deposit issued against funds deposited in a bank or savings and loan association; bankers' acceptances, which are short-term credit instruments used to finance commercial transactions; and 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.

<sup>21</sup> The Exchange states that the Subsidiary will not be registered under the 1940 Act and will not be directly subject to its investor protections, except as noted in the Registration Statement. However, the Subsidiary will be wholly-owned and controlled by the Fund. Therefore, the Fund's ownership and control of the Subsidiary will prevent the Subsidiary from taking action contrary to the interests of the Fund or its shareholders. The Board will have oversight responsibility for the investment activities of the Fund, including its expected investment in the Subsidiary, and the Fund's role as the sole shareholder of the Subsidiary. The Subsidiary will also enter into separate contracts for the provision of custody, transfer agency, and accounting agent services with the same or with affiliates of the same service providers that provide those services to the Fund.

that are similar to the Benchmark, as well as in the other Commodities. Additionally, the Subsidiary, like the Fund, may invest in Other Investments (e.g., as investments, to serve as margin or collateral, or to otherwise support the Subsidiary's positions in Commodities).

The Fund's investment in the Subsidiary is intended to provide the Fund with exposure to commodity markets within the limits of current federal income tax laws applicable to investment companies such as the Fund, which limit the ability of investment companies to invest directly in the derivative instruments. The Subsidiary will have the same investment objective as the Fund, but unlike the Fund, it may invest without limitation in Commodities. The Subsidiary's investments will provide the Fund with exposure to domestic and international markets.

#### *C. Exchange's Description of Commodities Regulation*

The Commodity Futures Trading Commission ("CFTC") has adopted substantial amendments to CFTC Rule 4.5 relating to the permissible exemptions and conditions for reliance on exemptions from registration as a commodity pool operator. As a result of the instruments that will be indirectly held by the Fund, the Adviser will register as a commodity pool operator and will also become a member of the National Futures Association ("NFA"). Any Sub-Adviser will register as a commodity pool operator or commodity trading adviser, as required by CFTC regulations. The Fund and the Subsidiary will be subject to regulation by the CFTC and NFA and additional disclosure, reporting, and recordkeeping rules imposed upon commodity pools.

#### *D. Exchange's Description of the Fund's Investment Restrictions*

While the Fund will be permitted to borrow as permitted under the 1940 Act, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (i.e., 2X and -3X) of the Benchmark. In addition, the Fund may not invest more than 25% of the value of its total assets in securities of issuers in any one industry or group of industries. This restriction will not apply to obligations issued or guaranteed by the U.S. government, its agencies or instrumentalities, or securities of other investment companies.

The Subsidiary's shares will be offered only to the Fund, and the Fund will not sell shares of the Subsidiary to other investors. The Fund and the Subsidiary will not invest in any non-

U.S. equity securities (other than shares of the Subsidiary). The Fund will not purchase securities of open-end or closed-end investment companies, except in compliance with the 1940 Act or any applicable exemptive relief. In addition, the Exchange represents that, with respect to the futures contracts and exchange-traded options on futures contracts in which the Subsidiary invests, not more than 10% of the weight (to be calculated as the value of the contract divided by the total absolute notional value of the Subsidiary's futures and options contracts) of the futures and options contracts held by the Subsidiary, in the aggregate, shall consist of instruments whose principal trading market is a market from which the Exchange may not obtain information regarding trading in the futures contracts and exchange-traded options on futures contracts by virtue of: (a) Its membership in the Intermarket Surveillance Group ("ISG"); or (b) a comprehensive surveillance sharing agreement.

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including securities deemed illiquid by the Adviser.<sup>22</sup> 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.

### **III. Discussion and Commission's Findings**

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act<sup>23</sup> and the rules and regulations thereunder applicable to a national

<sup>22</sup> 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 trades (e.g., the time needed to dispose of the security, the method of soliciting offers, and the mechanics of transfer).

<sup>23</sup> 15 U.S.C. 78f.

securities exchange.<sup>24</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>25</sup> which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, 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 also finds that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Act,<sup>26</sup> which sets forth the finding of Congress that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Quotation and last-sale information for the Shares will be available on the facilities of the Consolidated Tape Association ("CTA"). An estimated value, defined in BATS Rule 14.11(i)(3)(C) as the Intraday Indicative Value ("IIV"), that reflects an estimated intraday value of the Fund's portfolio (including the Subsidiary's portfolio), will be disseminated. The IIV will be based upon the current value for the components of the Disclosed Portfolio (as defined below) and will be updated and widely disseminated by one or more major market data vendors and broadly displayed at least every 15 seconds during the Exchange's Regular Trading Hours.<sup>27</sup> On each business day, before commencement of trading in Shares during Regular Trading Hours,<sup>28</sup> the Fund will disclose on its Web site the identities and quantities of the portfolio of securities, Commodities, and other assets ("Disclosed Portfolio" as defined in Rule 14.11(i)(3)(B)) held by the Fund and the Subsidiary that will form the basis for the Fund's calculation of NAV at the end of the business day.<sup>29</sup>

The NAV of the Fund's Shares generally will be calculated once daily Monday through Friday as of the close of regular trading on the New York Stock Exchange, generally 4:00 p.m. Eastern Time.<sup>30</sup> Additionally, information

intraday. On a daily basis, the Disclosed Portfolio displayed on the Fund's Web site will include the following information regarding each portfolio holding, as applicable to the type of holding: Ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding, such as the type of swap), the identity of the security, commodity, or other asset or instrument underlying the holding, if any; for options, the option strike price; quantity held (as measured by, for example, par value, notional value, or number of shares, contracts, or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and percentage weighting of the holding in the Fund's portfolio. The Web site and information will be publicly available at no charge.

<sup>30</sup> In determining the value of the assets held by the Fund and the Subsidiary, the Fund's and the Subsidiary's investments will be generally valued using market valuations. A market valuation generally means a valuation (i) obtained from an exchange, a pricing service, or a major market maker (or dealer), (ii) based on a price quotation or other equivalent indication of value supplied by an exchange, a pricing service, or a major market maker (or dealer), or (iii) based on amortized cost. The Fund and the Subsidiary may use various pricing services or discontinue the use of any pricing service. A price obtained from a pricing service based on such pricing service's valuation matrix may be considered a market valuation. If available, debt securities and money market instruments with maturities of more than 60 days will typically be priced based on valuations provided by independent, third party pricing agents. Such values will generally reflect the last reported sales price if the security is actively traded. The third party pricing agents may also value debt securities at an evaluated bid price by employing methodologies that utilize actual market transactions, broker supplied valuations, or other methodologies designed to identify the market value for such securities. Debt obligations with remaining maturities of 60 days or less may be valued on the basis of amortized cost, which approximates market value. If such prices are not available, the security will be valued based on values supplied by independent brokers or by fair value pricing, as described below. Futures contracts will be valued at the settlement price established each day by the board or exchange on which they are traded. Exchange-traded options will be valued at the closing price in the market where such contracts are principally traded. Swaps will be valued based on valuations provided by independent, third-party pricing agents. Securities of non-exchange-traded investment companies will be valued at NAV. Equity securities listed on a securities exchange (including exchange-traded commodity linked instruments and exchange-traded investment companies), market or automated quotation system for which quotations are readily available (except for securities traded on The NASDAQ Stock Market LLC ("NASDAQ") and the London Stock Exchange Alternative Investment Market ("LSE AIM")) will be valued at the last reported sale price on the primary exchange or market on which they are traded on the valuation date (or at approximately 4:00 p.m. Eastern Time if a security's primary exchange is normally open at that time). For a security that trades on multiple exchanges, the primary exchange will generally be considered to be the exchange on which the security generally has the highest volume of trading activity. If it is not possible to determine the last reported sale price on the relevant exchange or

regarding market price and volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. The previous day's closing price and trading volume information for the Shares will also be published daily in the financial section of newspapers. Intra-day executable price quotations on the securities and other assets held by the Fund and the Subsidiary will be available from major broker-dealer firms or on the exchange on which they are traded, as applicable. Intra-day price information on the securities and other assets held by the Fund and the Subsidiary will also be available through subscription services, such as Bloomberg and Thomson Reuters, which can be accessed by authorized participants and other investors.<sup>31</sup> Daily trading volume information for the Fund will also be available in the financial section of newspapers, through subscription services such as Bloomberg, Thomson Reuters, and International Data Corporation, which can be accessed by authorized participants and other investors, as well as through other electronic services, including major

market on the valuation date, the value of the security will be taken to be the most recent mean between the bid and asked prices on such exchange or market on the valuation date. Absent both bid and asked prices on such exchange, the bid price may be used. For securities traded on NASDAQ or LSE AIM, the official closing price will be used. If such prices are not available, the security will be valued based on values supplied by independent brokers or by fair value pricing, as described below. The prices for foreign instruments will be reported in local currency and converted to U.S. dollars using currency exchange rates. Exchange rates will be provided daily by recognized independent pricing agents. In the event that current market valuations are not readily available or such valuations do not reflect current market values, the affected investments will be valued using fair value pricing pursuant to the pricing policy and procedures approved by the Board in accordance with the 1940 Act. Fair value pricing may require subjective determinations about the value of an asset and may result in prices that differ from the value that would be realized if the asset was sold.

<sup>31</sup> More specifically, the Exchange represents that pricing information for exchange-traded commodity futures contracts, exchange-traded options on futures contracts, exchange-traded commodity-linked instruments, exchange-traded investment companies other than exchange-traded commodity-linked instruments will be available on the exchanges on which they are traded and through subscription services. Pricing information for securities of non-exchange-traded investment companies will be available through the applicable fund's Web site or major market data vendors. Pricing information for swaps, fixed income securities, and money market instruments will be available through subscription services, broker-dealer firms, and/or pricing services. Additionally, the Trade Reporting and Compliance Engine ("TRACE") of the Financial Industry Regulatory Authority ("FINRA") will be a source of price information for certain fixed income securities held by the Fund.

<sup>24</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>25</sup> 15 U.S.C. 78f(b)(5).

<sup>26</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

<sup>27</sup> According to the Exchange, several major market data vendors display and/or make widely available Intraday Indicative Values published via the CTA or other data feeds.

<sup>28</sup> Regular Trading Hours are 9:30 a.m. to 4:00 p.m. Eastern Time.

<sup>29</sup> According to the Exchange, the Fund's disclosure of derivative positions in the Disclosed Portfolio will include information that market participants can use to value these positions

public Web sites. The Fund's Web site will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information. Information relating to the Benchmark, including its constituents, weightings, and changes to its constituents, will be available on the Web site of S&P Indices.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes that the Exchange will obtain a representation from the issuer of the Shares that the 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.<sup>32</sup> Trading in the Shares also will be subject to BATS Rule 14.11(i)(4)(B)(iv), which sets forth circumstances under which Shares of the Fund may be halted.<sup>33</sup> The Exchange may halt trading in the Shares if trading is not occurring in the securities, Commodities, or other assets constituting the Disclosed Portfolio of the Fund and the Subsidiary, or if other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.<sup>34</sup> Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio.<sup>35</sup> The Exchange states that it prohibits the distribution of material, non-public information by its employees. The Exchange also represents that the Adviser is affiliated with a broker-dealer, and the Adviser has implemented a fire wall with respect to that broker-dealer affiliate regarding access to information concerning the composition of, or changes to, the

Fund's portfolio.<sup>36</sup> Moreover, the Exchange represents that it may obtain information regarding trading in the Shares and the underlying shares in exchange-traded investment companies, commodity-linked instruments, futures, and options on futures via ISG, from other exchanges who are members or affiliates of ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

The Exchange further represents that the Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including:

(1) The Shares will be subject to BATS Rule 14.11(i), which sets forth the initial and continued listing criteria applicable to Managed Fund Shares.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Managed Fund Shares.

(4) The Exchange will communicate as needed regarding trading in the Shares and in the exchange-traded Commodities and exchange-traded

investment companies not included within the definition of Commodities (together, "Exchange Traded Instruments") held by the Fund and the Subsidiary with other markets and other entities that are members of ISG and may obtain trading information regarding trading in the Shares and in the Exchange Traded Instruments held by the Fund and the Subsidiary from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and in the Exchange Traded Instruments held by the Fund and the Subsidiary from markets and other entities that are members of ISG, which includes securities and futures exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement. The Exchange also will be able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's TRACE.

(5) With respect to the futures contracts and exchange-traded options on futures contracts in which the Subsidiary invests, not more than 10% of the weight (to be calculated as the value of the contract divided by the total absolute notional value of the Subsidiary's futures and options contracts) of the futures and options contracts held by the Subsidiary, in the aggregate, shall consist of instruments whose principal trading market is a market from which the Exchange may not obtain information regarding trading in the futures contracts and exchange-traded options on futures contracts by virtue of: (a) Its membership in ISG; or (b) a comprehensive surveillance sharing agreement.

(6) Prior to the commencement of trading, the Exchange will inform its members in an Information Circular ("Circular") of the special characteristics and risks associated with trading the Shares. Specifically, the Circular will discuss the following: (a) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (b) BATS Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (c) how information regarding the IIV and the Disclosed Portfolio is disseminated; (d) the risks involved in trading the Shares during the Pre-Opening<sup>37</sup> and After Hours Trading Sessions<sup>38</sup> when an

<sup>36</sup> See *supra* note 7 and accompanying text. An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 ("Advisers Act"). As a result, the Adviser and any Sub-Adviser and their related personnel are subject to the provisions of Rule 204A-1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A-1 under the Advisers Act. In addition, Rule 206(4)-7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

<sup>32</sup> See BATS Rule 14.11(i)(4)(A)(ii).

<sup>33</sup> See BATS Rule 14.11(i)(4)(B)(iv).

<sup>34</sup> See BATS Rule 14.11(i)(4)(B)(iii) (providing additional considerations for the suspension of trading in or removal from listing of Managed Fund Shares on the Exchange). With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. The Exchange will halt trading in the Shares under the conditions specified in BATS Rule 11.18. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

<sup>35</sup> See BATS Rule 14.11(i)(4)(B)(ii)(B).

<sup>37</sup> The Pre-Opening Session is from 8:00 a.m. to 9:30 a.m. Eastern Time.

<sup>38</sup> The After Hours Trading Session is from 4:00 p.m. to 5:00 p.m. Eastern Time.

updated IIV will not be calculated or publicly disseminated; (e) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(7) For initial and continued listing, the Fund and the Subsidiary must be in compliance with Rule 10A-3 under the Act.<sup>39</sup>

(8) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including securities deemed illiquid by the Adviser under the 1940 Act.

(9) The Fund will invest in Commodities through investments in the Subsidiary and will not invest directly in physical commodities. The Fund's investment in the Subsidiary may not exceed 25% of the Fund's total assets. The Fund and the Subsidiary will not invest in any non-U.S. equity securities (other than shares of the Subsidiary).

(10) Investments in non-centrally cleared swaps (through the Subsidiary) will not represent more than 20% of the Fund's net assets.

(11) At least 75% of corporate debt obligations will have a minimum principal amount outstanding of \$100 million or more. In addition, the exchange-traded investment companies and commodity-linked instruments in which the Fund invests will be listed and traded in the U.S. on registered exchanges.

(12) While the Fund will be permitted to borrow as permitted under the 1940 Act, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.*, 2X and -3X) of the Benchmark.

(13) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.

The Exchange represents that all statements and representations made in the filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures constitute continued listing requirements for listing the Shares on the Exchange. In addition, the issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will surveil for compliance with the continued listing

requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 14.12. This approval order is based on all of the Exchange's representations and description of the Fund, including those set forth above and in the Notice. The Commission notes that the Fund and the Shares must comply with the requirements of BATS Rule 14.11(i), including those set forth in this proposed rule change, 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 3 thereto, is consistent with Section 6(b)(5) of the Act<sup>40</sup> and the rules and regulations thereunder applicable to a national securities exchange.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>41</sup> that the proposed rule change (SR-BATS-2016-03), as modified by Amendment Nos. 1 and 3 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>42</sup>

**Robert W. Errett,**  
*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77474; File No. TP 16-7]

#### Order Granting Limited Exemptions From Exchange Act Rule 10b-17 and Rules 101 and 102 of Regulation M to J.P. Morgan Exchange-Traded Fund Trust, JPMorgan Diversified Return International Currency Hedged ETF, and JPMorgan Diversified Return Europe Currency Hedged ETF Pursuant to Exchange Act Rule 10b-17(b)(2) and Rules 101(d) and 102(e) of Regulation M

March 30, 2016.

By letter dated March 30, 2016 (the "Letter"), as supplemented by conversations with the staff of the Division of Trading and Markets, counsel for J.P. Morgan Exchange-Traded Fund Trust (the "Trust"), on behalf of the Trust, the JPMorgan Diversified Return International

Currency Hedged ETF and the JPMorgan Diversified Return Europe Currency Hedged ETF (each, a "Fund" and collectively the "Funds"), any national securities exchange on or through which shares issued by the Funds ("Shares") may subsequently trade, SEI Investments Distribution Co. (the "Distributor"), and persons or entities engaging in transactions in Shares (collectively, the "Requestors"), requested exemptions, or interpretive or no-action relief, from Rule 10b-17 of the Securities Exchange Act of 1934, as amended ("Exchange Act"), and Rules 101 and 102 of Regulation M, in connection with secondary market transactions in Shares and the creation or redemption of aggregations of Shares of at least 50,000 shares ("Creation Units").

The Trust is registered with the Securities and Exchange Commission ("Commission") under the Investment Company Act of 1940, as amended ("1940 Act"), as an open-end management investment company. The JPMorgan Diversified Return International Currency Hedged ETF will seek to provide investment results that closely correspond, before fees and expenses, to the performance of the FTSE Developed ex North America Diversified Factor 100% Hedged to USD Index (the "JPIH Index"), which consists of (a) the equity securities included in the FTSE Developed ex North America Diversified Factor Index (the "JPIH Underlying Index"), and (b) a currency hedging component (reflecting the effect of selling the applicable non-U.S. currency forward each month), which is intended solely to mitigate exposure to fluctuations between the currencies of the securities included in the JPIH Index and the U.S. dollar. The Fund intends to track the JPIH Index by (a) holding shares of the JPMorgan Diversified Return International Equity ETF (the "JPIH Underlying ETF"), an ETF whose investment objective is to seek investment results that correspond generally to the performance, before fees and expenses, of the JPIH Underlying Index, instead of the Fund investing directly in the shares of issuers of the individual securities of the JPIH Underlying Index<sup>1</sup> and (b) entering into foreign currency forward contracts.

<sup>1</sup> Each Fund may, in very rare instances, invest directly in the shares of issuers of the individual securities of the applicable Underlying Index instead of holding shares of the applicable Underlying ETF if holding those individual securities would provide greater liquidity or other efficiencies to the Fund or if the Underlying ETF is no longer accepting purchases. In such event, the

Continued

<sup>39</sup> See 17 CFR 240.10A-3.

<sup>40</sup> 15 U.S.C. 78f(b)(5).

<sup>41</sup> 15 U.S.C. 78s(b)(2).

<sup>42</sup> 17 CFR 200.30-3(a)(12).