

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69251; File No. SR–NYSEArca–2013–14]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to Listing and Trading of Shares of the Cambria Shareholder Yield ETF Pursuant to NYSE Arca Equities Rule 8.600

March 28, 2013.

I. Introduction

On January 31, 2013, NYSE Arca, Inc. (“Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Exchange Act”)² and Rule 19b–4 thereunder,³ a proposed rule change to list and trade shares (“Shares”) of the Cambria Shareholder Yield ETF (“Fund”) under NYSE Arca Equities Rule 8.600. On February 13, 2013, the Exchange filed Amendment No. 1 to the proposed rule change.⁴ The proposed rule change was published for comment in the **Federal Register** on February 21, 2013.⁵ The Commission received no comments on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change

The Exchange proposes to list and trade Shares of the Fund under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares⁶ on the Exchange. The Shares of

the Fund will be offered by Cambria ETF Trust (“Trust”). The Trust will be registered with the Commission under the 1940 Act as an open-end management investment company.⁷ Cambria Investment Management, L.P. will serve as the investment adviser to the Fund (“Adviser”).⁸ SEI Investments Distribution Co. (“Distributor”) will be the principal underwriter and distributor of the Fund’s Shares. SEI Investments Global Funds Services (“Administrator”) will serve as administrator for the Fund. Brown Brothers Harriman & Co. will serve as the custodian and transfer agent for the Fund (“Custodian” and “Transfer Agent,” respectively). The Exchange represents that the Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600 and that the Fund will be in compliance with Rule 10A–3 under the Exchange Act,⁹ as provided by NYSE Arca Equities Rule 5.3.

The Fund seeks income and capital appreciation with an emphasis on income from investments in the U.S. equity market. The Fund will seek to achieve its investment objective by investing primarily in equity securities, including the common stock of U.S. companies, that exhibit strong cash flows, as reflected by their payment of dividends to shareholders and their return of capital to shareholders in other forms, such as through net stock buybacks, net debt payoff, mergers, acquisitions, and other forms of reinvestment in the business. The Fund may obtain a limited amount of foreign

and emerging markets exposure through investments in depositary receipts, including American Depositary Receipts (“ADRs”) and Global Depositary Receipts (“GDRs”). The Fund will not invest in non-U.S. equity securities other than through ADRs and GDRs. The Fund will not invest in options, futures, or swaps. The Fund’s investments will be consistent with its respective investment objective and will not be used to enhance leverage.

Cambria will utilize a quantitative model to identify which securities the Fund might purchase and sell and opportune times for purchases and sales. While the Fund will invest in approximately 100 of the top equity securities as determined by their shareholder yield, the quantity of holdings in the Fund will be based on a number of factors, including the asset size of the Fund and the number of companies that satisfy the Adviser’s quantitative measurements at any one time. The Fund’s portfolio will be rebalanced to the Adviser’s internal target allocations, developed pursuant to the Adviser’s strategy described above, at least quarterly.

Additional information regarding the Fund; the Shares; the Fund’s investment objective, strategies, methodology, and restrictions; the Adviser; the distributor; the administrator; the custodian; the transfer agent; risks; fees and expenses; creations and redemptions of Shares; availability of information; trading rules and halts; and surveillance procedures, among other things, can be found in the Registration Statement and in the Notice, as applicable.¹⁰

III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange’s proposal to list and trade the Shares is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.¹¹ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,¹² which requires, among other things, that the Exchange’s rules be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b–4.

⁴ In Amendment No. 1, the Exchange: (1) made technical changes to the proposed rule change to clarify how the net asset value of the Cambria Shareholder Yield ETF would be calculated; and (2) stated that quotation and last-sale information for many securities held by the Cambria Shareholder Yield ETF would be available via the Consolidated Tape Association high speed line.

⁵ See Securities Exchange Act Release No. 68930 (February 14, 2013), 78 FR 12110 (“Notice”).

⁶ A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (“1940 Act”) organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index, or combination thereof.

⁷ On July 6, 2012, the Trust filed an amendment to the Trust’s registration statement on Form N–1A under the Securities Act of 1933 (“1933 Act”) (15 U.S.C. 77a), and under the 1940 Act relating to the Fund (File Nos. 333–180879 and 811–22704) (“Registration Statement”). The Trust also filed an 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. 812–13959), dated November 13, 2012 (“Exemptive Application”). The Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. See Investment Company Act Release No. 30340 (January 4, 2013) (“Exemptive Order”). The Exchange states that investments made by the Fund will comply with the conditions set forth in the Exemptive Application and the Exemptive Order. See Notice, *supra* note 5, 78 FR at 12110 n.7.

⁸ The Exchange states that the Advisor is not affiliated with any broker-dealer and, in the event that (a) the Adviser or any sub-adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes affiliated with a broker-dealer, it will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition of and/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. See Notice, *supra* note 5, 78 FR at 12111.

⁹ 17 CFR 240.10A–3.

¹⁰ See *supra* notes 5 and 7.

¹¹ 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).

¹² 15 U.S.C. 78f(b)(5).

general, to protect investors and the public interest.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Exchange Act, which sets forth Congress' finding 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 and many securities held by the Fund will be available via the Consolidated Tape Association high-speed line, and the Exchange will disseminate the Portfolio Indicative Value ("PIV") at least every 15 seconds during the Core Trading Session through one or more major market data vendors.¹³ The Fund's Web site will include additional quantitative information updated on a daily basis, including, for the Fund, (1) the prior business day's reported closing price, NAV, and mid-point of the bid/ask spread at the time of calculation of such NAV ("Bid/Ask Price"),¹⁴ and a calculation of the premium and discount of the Bid/Ask Price against the NAV, and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters.¹⁵ Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.¹⁶ NYSE Arca expects that information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers.¹⁷

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 Fund will make available on its Web

site on each business day before commencement of the Core Trading Session the Disclosed Portfolio that will form the basis for the Fund's calculation of NAV at the end of the business day.¹⁸ The Commission notes that the Exchange will obtain a representation from the Fund 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.¹⁹ In addition, the basket composition file will be publicly disseminated daily prior to the opening of the NYSE via NSCC. Further, if the PIV is not being disseminated as required, the Exchange may halt trading during the day in which the interruption occurs; if the interruption persists past the day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.²⁰ 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.²¹ Finally, the Exchange states that, on its behalf, the Financial Industry Regulatory Authority will communicate as needed regarding trading in the Shares with other markets that are members of the Intermarket Surveillance Group or with which the Exchange has in place a comprehensive surveillance sharing agreement.²²

The Exchange has represented that the Shares are equity securities subject to the Exchange's rules governing the trading of equity securities.²³ In support of this proposal, the Exchange has made representations, including:

(1) The Shares will conform to the initial and continuing listing criteria under NYSE Arca Equities Rule 8.600.

(2) The Exchange's surveillance 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 applicable federal securities laws.

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

(4) Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders ("ETP Holders") in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (a) The procedures for purchases and redemptions of Shares and that Shares are not individually redeemable; (b) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated PIV will not be calculated or publicly disseminated; (d) how information regarding the PIV is disseminated; (e) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(5) For initial and continued listing, the Fund will be in compliance with Rule 10A-3 under the Exchange Act,²⁴ as provided by NYSE Arca Equities Rule 5.3.²⁵

(6) The Fund will not invest in non-U.S. equity securities other than through ADRs and GDRs.

(7) The Fund will not invest in options, futures or swaps.

(8) The Fund's investments will be consistent with its respective investment objective and will not be used to enhance leverage.

(9) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities.

(10) The Fund will not loan its securities 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).

(11) A minimum of 100,000 Shares for the Fund will be outstanding at the

¹³ See Notice, *supra* note 5, 78 FR at 12114.

¹⁴ The Bid/Ask Price of the Fund will be determined using the mid-point of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

¹⁵ See Notice, *supra* note 5, 78 FR at 12114.

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.* Under accounting procedures to be followed by the Fund, trades made on the prior business day ("T") will be booked and reflected in NAV on the current business day ("T+1"). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day. See *id.*

¹⁹ See *id.* at 12112.

²⁰ See NYSE Arca Equities Rule 8.600(d)(2)(D). Trading in the Shares may also be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the securities composing the Disclosed Portfolio and/or the financial instruments of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. See Notice, *supra* note 5, 78 FR at 12114.

²¹ See NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

²² See Notice, *supra* note 5, 78 FR at 12115.

²³ See *id.* at 12114.

²⁴ 17 CFR 240.10A-3.

²⁵ See Notice, *supra* note 5, 78 FR at 12112.

commencement of trading on the Exchange.

This order is based on the Exchange's representations.

For the forgoing reasons, the Commission believes the Exchange's proposal to list and trade the Shares is consistent with the Exchange Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,²⁶ that the proposed rule change (SR–NYSEArca–2013–14), as modified by Amendment No. 1, be, and it hereby is, approved.

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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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69256; File No. SR–NYSEArca–2012–28]

Self-Regulatory Organizations; NYSE Arca, Inc.; Response to Comments Submitted After the Issuance on December 14, 2012, of a Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change as Modified by Amendment No. 1 To List and Trade Shares of the JPM XF Physical Copper Trust Pursuant to NYSE Arca Equities Rule 8.201

March 28, 2013.

I. Introduction

On April 2, 2012, NYSE Arca, Inc. (“Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) ¹ and Rule 19b–4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the JPM XF Physical Copper Trust (“Trust”) pursuant to NYSE Arca Equities Rule 8.201. The proposed rule change was published for comment in the **Federal Register** on April 20, 2012.³

On December 14, 2012, the Commission approved the proposed

rule change,⁴ finding that it was consistent with the requirements of the Act. In its Approval Order, the Commission invited interested persons to submit written data, views, and arguments concerning the Approval Order, including whether Amendment No. 1 to the proposed rule change is consistent with the Act.⁵

In response to the solicitation of comments, the Commission received two comment letters.⁶ Both letters opposed the approval of the proposed rule change, and one commenter specifically requested that the Commission reconsider and reverse its decision, and disapprove the proposed rule change.⁷ This Response addresses those comments.

⁴ See Securities Exchange Act Release No. 68440, 77 FR 75468 (December 20, 2012) (“Approval Order”). Prior to approving the proposed rule change, the Commission: (1) Extended the time period for Commission action to July 19, 2012, *see* Securities Exchange Act Release No. 67075 (May 30, 2012), 77 FR 33258 (June 5, 2012); (2) instituted proceedings to determine whether to approve or disapprove the proposed rule change, *see* Securities Exchange Act Release No. 67470 (July 19, 2012), 77 FR 43620 (July 25, 2012); and (3) issued a notice of designation of longer period for Commission action on proceedings to determine whether to approve or disapprove the proposed rule change, *see* Securities Exchange Act Release No. 67965 (October 2, 2012), 77 FR 61457 (October 9, 2012).

⁵ See Approval Order, *supra* note 4, 77 FR 75487.

⁶ See letter from Robert B. Bernstein, Partner, Eaton & Van Winkle LLP (“EVW”), to Elizabeth M. Murphy, Secretary, Commission, dated January 9, 2013 (“EVW January 9 Letter”); and email from Janet Klein, dated January 7, 2013 (“Klein Email”). Comment letters are available at <http://www.sec.gov/comments/sr-nysearca-2012-28/nysearca201228.shtml>. Ms. Klein asserted that approval of the proposed rule change would: (1) Be “contrary to rational oversight of wise practice,” without explaining the basis for her judgment; (2) not contribute to the economy; and (3) promote “speculative swings of a commodity price not related to supply/demand,” again without explaining the basis for her conclusion. *See* Klein Email, *supra*. The Commission discussed the likelihood of any impact of the proposed rule change on the price of copper in the Approval Order. *See* Approval Order, *supra* note 4, 77 FR 75477–82.

⁷ *See* EVW January 9 Letter, *supra* note 6. This commenter submitted seven comment letters opposing the proposed rule change prior to the Commission's issuance of the Approval Order. *See* letters from Vandenberg & Feliu, LLP (“V&F”), received May 9, 2012 (“V&F May 9 Letter”); Robert B. Bernstein, V&F, to Elizabeth M. Murphy, Secretary, Commission, dated July 13, 2012; Robert B. Bernstein, V&F, to Elizabeth M. Murphy, Secretary, Commission, dated August 24, 2012 (“V&F August 24 Letter”); Robert B. Bernstein, V&F, to Elizabeth M. Murphy, Secretary, Commission, dated September 10, 2012 (“V&F September 10 Letter”); Robert B. Bernstein, V&F, to Elizabeth M. Murphy, Secretary, Commission, dated October 23, 2012; Robert B. Bernstein, V&F, to Elizabeth M. Murphy, Secretary, Commission, dated November 16, 2012; and Robert B. Bernstein, EVW, to Elizabeth M. Murphy, Secretary, Commission, dated December 7, 2012 (“EVW December 7 Letter”).

II. Response to Comments

One commenter (referred to herein as “the commenter”) repeated many concerns that had been previously raised, considered by the Commission, and expressly addressed in the Approval Order. This commenter, however, expanded upon and clarified some of his prior arguments.⁸ Accordingly, the Commission responds below to certain comments made by the commenter after the Commission approved the proposed rule change.⁹

A. Direct Participation in Trading on the London Metal Exchange (“LME”)

The commenter asserts that the Approval Order contained an incorrect statement of fact regarding who may trade directly on the LME. The commenter asserts that the Commission was incorrect in stating that “[o]nly eligible organizations or members are able to participate directly in trading on the LME,” and asserts that only “open outcry” trading on the LME is limited to eligible organizations or members, and that most trading on the LME takes place in inter-office trading that is open to anyone who has a telephone and a computer screen.¹⁰ The commenter further states that the Commission relied on this conclusion in reaching its decision.¹¹

The Commission believes that the description in the Approval Order regarding trading on the LME is correct.¹² The Commission understands that trading on the LME can occur in a number of ways, all of which must occur through a member.¹³ Trading can occur in the LME's open-outcry trading floor (the “Ring”), but such trading is limited to ring-dealing members.¹⁴ Electronic trading can occur through LMEselect; although clients can access LMEselect, such access is available only via member systems or member-

⁸ *See supra* note 7.

⁹ The other comment is addressed *supra* at note 6.

¹⁰ *See* EVW January 9 Letter, *supra* note 6, at 4–5 (quoting Approval Order, *supra* note 4, 77 FR 75469).

¹¹ *See* EVW January 9 Letter, *supra* note 6, at 5.

¹² The Approval Order expressly states that this description comes from the description of the copper market that the Exchange included in its filing. *See* Approval Order, *supra* note 4, 77 FR 75469. In the notice of the proposed rule change, the Exchange stated: “The LME is a principal-to-principal market where only eligible organizations or ‘members’ are able to participate directly in trading.” Notice, *supra* note 3, 77 FR 23776. The commenter did not raise any concerns about the Exchange's description of the LME in any of the comment letters he previously submitted.

¹³ *See* Approval Order, *supra* note 4, 77 FR 75469.

¹⁴ *See* LME, Trading, Venues and Systems, The Ring, <http://lme.com/trading/venues-and-systems/ring/>.

²⁶ 15 U.S.C. 78s(b)(2).

²⁷ 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ Securities Exchange Act Release No. 66816 (April 16, 2012), 77 FR 23772 (“Notice”).