

Dated: January 24, 2022.

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-94024; File No. SR-NYSEArca-2021-28]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of ConvexityShares Daily 1.5x SPIKES Futures ETF Under NYSE Arca Rule 8.200-E (Trust Issued Receipts)

January 21, 2022.

I. Introduction

On May 13, 2021, NYSE Arca, Inc. ("NYSE Arca" or "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 ConvexityShares Daily 1.5x SPIKES Futures ETF ("Fund"), a series of the ConvexityShares Trust ("Trust"), under NYSE Arca Rule 8.200-E, Commentary .02 ("Trust Issued Receipts"). The proposed rule change was published for comment in the *Federal Register* on May 26, 2021.³ On July 2, 2021, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.⁵ On July 26, 2021, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed.⁶ On August 12, 2021, the Commission published notice of Amendment No. 1 and instituted proceedings under Section 19(b)(2)(B) of the Act⁷ to determine whether to approve or disapprove the proposed

rule change.⁸ On November 15, 2021, pursuant to Section 19(b)(2) of the Act,⁹ the Commission designated a longer period within which to issue an order approving or disapproving the proposed rule change.¹⁰ The Commission has received no comment letters on the proposed rule change. The Commission is approving the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change, as Modified by Amendment No. 1¹¹

The Exchange proposes to list and trade Shares of the Fund¹² under NYSE Arca Rule 8.200-E, Commentary .02 which governs the listing and trading of Trust Issued Receipts¹³ on the Exchange. The Fund will be managed and controlled by ConvexityShares, LLC ("Sponsor"), a commodity pool operator.¹⁴ Teucrium Trading, LLC, a commodity trading adviser registered with the Commodity Futures Trading Commission, will be the Sub-Adviser for the Fund ("Sub-Adviser") and will manage the Fund's commodity futures investment strategy.¹⁵ U.S. Bank will

provide custody and fund accounting to the Trust and the Fund; U.S. Bancorp Fund Services will be the transfer agent for the Shares and administrator for the Fund; and Foreside will serve as the distributor for the Fund.

The Fund will seek daily investment results, before fees and expenses, that correspond to one-and-a-half times (1.5x) the performance of its benchmark index for a single day. The Fund is benchmarked to the T3 SPIKE Front 2 Futures Index ("Index"), an investable index of SPIKES futures contracts.¹⁶ The Index is intended to reflect the returns that are potentially available through an unleveraged investment in a theoretical portfolio of first- and second-month futures contracts on the SPIKES Volatility Index ("SPIKES Index").¹⁷

The Index is comprised solely of SPIKES futures contracts.¹⁸ The Index

dealer, or (b) any new Sub-Adviser becomes registered as a broker-dealer or becomes newly affiliated with a broker-dealer, it will implement and maintain a fire wall with respect to its relevant personnel of the broker-dealer or broker-dealer affiliate, as applicable, regarding access to information concerning the composition 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.

¹⁶ The Index is sponsored by Triple Three Partners Pty Ltd, which licenses the use of the Index to its affiliated company, T3i Pty Ltd (Triple Three Partners Pty Ltd and T3i Pty Ltd. are collectively referred to herein as "T3 Index" or "Index Sponsor"). The Index Sponsor is affiliated with the Sponsor. The Index Sponsor has implemented and will maintain a fire wall regarding access to information concerning the composition of and/or changes to the Index. In addition, the Index Sponsor has implemented and will maintain procedures that are designed to prevent the use and dissemination of material, non-public information regarding the Index. The Index Sponsor is not registered as an investment adviser or broker-dealer and is not affiliated with any broker-dealers. The Index is calculated and published by Solactive AG, which is not affiliated with T3 Index.

¹⁷ The Exchange states that the SPIKES Index is a non-investable index that measures the implied volatility of the SPDR S&P 500 ETF Trust ("SPY") over 30 days in the future. SPY is a unit investment trust that holds a portfolio of common stocks that closely tracks the price performance and dividend yield of the S&P 500 Composite Price Index ("S&P 500"). The SPIKES Index does not represent the actual or the realized volatility of SPY. The SPIKES Index is calculated based on the prices of a constantly changing portfolio of SPY put and call options. The SPIKES Index is reflective of the premium paid by investors for certain options linked to the level of the S&P 500. The SPIKES Index is a theoretical calculation and cannot be traded on a spot basis. T3 Index is the owner, creator and licensor of the SPIKES Index. The SPIKES Index is calculated, maintained and published by Miami International Securities Exchange, LLC via the Options Price Reporting Authority.

¹⁸ According to the Exchange, SPIKES futures contracts were launched for trading by the Minneapolis Grain Exchange, LLC ("MGEX") on December 14, 2020. While the SPIKES Index represents a measure of the expected 30-day

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 91949 (May 20, 2021), 86 FR 28420.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 92320, 86 FR 36309 (July 9, 2021).

⁶ Amendment No. 1 is available at: <https://www.sec.gov/comments/sr-nysearca-2021-28/srnysearca202128-9090695-246773.pdf>.

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ See Securities Exchange Act Release No. 92651, 86 FR 46292 (August 18, 2021).

⁹ 15 U.S.C. 78s(b)(2).

¹⁰ See Securities Exchange Act Release No. 93575, 86 FR 64978 (November 19, 2021). The Commission designated January 21, 2022, as the date by which the Commission shall either approve or disapprove the proposed rule change.

¹¹ Additional information regarding the Fund, the Trust, and the Shares, including investment strategies, creation and redemption procedures, and portfolio holdings can be found in Amendment No. 1, *supra* note 6.

¹² The Fund has filed a registration statement on Form S-1 under the Securities Act of 1933, dated May 25, 2021 ("Registration Statement"). The Registration Statement for the Fund is not yet effective and the Exchange will not commence trading in Shares of the Fund until the Registration Statement becomes effective.

¹³ Commentary .02 to NYSE Arca Rule 8.200-E applies to Trust Issued Receipts that invest in "Financial Instruments." The term "Financial Instruments," as defined in Commentary .02(b)(4) to NYSE Arca Rule 8.200-E, means any combination of investments, including cash; securities; options on securities and indices; futures contracts; options on futures contracts; forward contracts; equity caps, collars, and floors; and swap agreements.

¹⁴ The Sponsor is not registered as a broker-dealer or affiliated with a broker-dealer. In the event (a) the Sponsor becomes registered as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new sponsor becomes registered as a broker-dealer or becomes newly affiliated with a broker-dealer, it will implement and maintain a fire wall with respect to its relevant personnel of the broker-dealer or broker-dealer affiliate, as applicable, regarding access to information concerning the composition 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.

¹⁵ The Sub-Adviser is not registered as a broker-dealer or affiliated with a broker-dealer. In the event (a) the Sub-Adviser becomes registered as a broker-dealer or becomes newly affiliated with a broker-

employs rules for selecting the SPIKES futures contracts comprising the Index and a formula to calculate a level for the Index from the prices of these SPIKES futures contracts. Currently, the SPIKES futures contracts comprising the Index represent the prices of two near-term SPIKES futures contracts, replicating a position that rolls the nearest month SPIKES futures contracts to the next month SPIKES futures contracts at or close to the daily settlement price via a Trade-At-Settlement¹⁹ program towards the end of each business day in equal fractional amounts. This results in a constant weighted average maturity of one month.

The Fund will invest primarily in SPIKES futures contracts to gain the appropriate exposure to the Index. Under certain circumstances (described below), the Fund may also invest in futures contracts and swap contracts ("VIX Related Positions") on the Cboe Volatility Index ("VIX").²⁰ The Exchange states that the VIX is an index that tracks volatility and would be expected to perform in a substantially similar manner as the SPIKES Index.

The Fund seeks to achieve its investment objective through the appropriate amount of exposure to the SPIKES futures contracts included in the Index. The Sponsor or Sub-Adviser determines the type, quantity and mix of investments that the Sponsor or Sub-Adviser believes, in combination, should provide daily leveraged exposure to the Index to seek investment results equal to one-and-a-half times the performance of the Index. In the event accountability rules, price limits, position limits, margin limits or other exposure limits are reached with respect to SPIKES futures contracts, or if the market for a specific futures contract experiences emergencies (e.g., natural disaster, terrorist attack or an act

of God) or disruptions (e.g., a trading halt or a flash crash), or in situations where the Sponsor or Sub-Adviser deems it impractical or inadvisable to buy or sell SPIKES futures contracts (such as during periods of market volatility or illiquidity, or when trading in SPY is halted), the Sponsor or Sub-Adviser may cause the Fund to invest in VIX Related Positions. The Sponsor expects the Fund's positions in VIX Related Positions to consist primarily of VIX futures contracts, which are traded on the Cboe Futures Exchange. However, in the event accountability rules, price limits, position limits, margin limits or other exposure limits are reached with respect to VIX futures contracts, or if the market for a specific VIX futures contract experiences emergencies or disruptions or in situations where the Sponsor or Sub-Adviser deems it impractical or inadvisable to buy or sell VIX futures contracts, the Fund would hold VIX swap agreements.²¹ The Fund will also hold cash or cash equivalents such as U.S. Treasury securities or other high credit quality, short-term fixed-income or similar securities (such as shares of money market funds) as collateral for investments and pending investments.

III. Discussion and Commission Findings

After careful review of the proposed rule change, as modified by Amendment No. 1, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.²² In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act,²³ 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 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 proposal is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading in the Shares when a reasonable degree of certain pricing transparency cannot be assured. Specifically, the Exchange will obtain a representation from the issuer of the Shares that the net asset value ("NAV") per Share will be calculated and disseminated daily and will be made available to all market participants at the same time. Each day before 9:30 a.m., E.T., the daily holdings of the Fund will be available on the Fund's website, www.convexityshares.com, which will be publicly accessible at no charge.²⁴ This website disclosure of the Fund's daily holdings will occur at approximately the same time as the disclosure by the Trust of the daily holdings to authorized participants, so that all market participants will be provided daily holdings information at approximately the same time, and the same holdings information will be provided on the public website as in electronic files provided to authorized participants. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association. As required by NYSE Arca Rule 8.200-E, Commentary .02, an updated Intraday Fund Value ("IFV") will be calculated and widely disseminated by one or more major market data vendors every 15 seconds during the Exchange's Core Trading Session (9:30 a.m., E.T., to 4:00 p.m., E.T.). The IFV will be readily available from the Fund's website, automated quotation systems, published or other public sources, or major market data vendors' website or on-line information services. 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. The Fund's website will include a form of the prospectus for the Fund and additional data relating to NAV and

volatility of SPY, the prices of SPIKES futures contracts are based on the current expectation of the expected 30-day volatility of SPY on the expiration date of the futures contract.

¹⁹ According to the Exchange, a Trade at Settlement ("TAS") transaction is a transaction at a price equal to the daily settlement price, or at a specified differential above or below the daily settlement price. The TAS transaction price will be determined following execution and based upon the daily settlement price of the respective SPIKES futures contracts month. The permissible price range for permitted TAS transactions is from 0.50 index points below the daily settlement price to 0.50 index points above the daily settlement price. The permissible minimum increment for a TAS transaction is 0.01 index points. See MGEX Rule 83.15 at <http://www.mgex.com/documents/20210318-Rulebook.pdf>.

²⁰ According to the Exchange, the VIX is a measure of estimated near-term future volatility based upon the weighted average of the implied volatilities of near-term put and call options on the S&P 500.

²¹ The Fund will attempt to limit counterparty risk in uncleared swap agreements by entering into such agreements only with counterparties the Sponsor and Sub-Adviser believe are creditworthy and by limiting the Fund's exposure to each counterparty. The Exchange represents that the Sponsor and Sub-Adviser will monitor the creditworthiness of each counterparty and the Fund's exposure to each counterparty on an ongoing basis.

²² 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).

²³ 15 U.S.C. 78f(b)(5).

²⁴ The daily website disclosure of portfolio holdings will include, as applicable, (i) the composite value of the total portfolio, (ii) the quantity and type of each holding (including the ticker symbol, maturity date or other identifier, if any) and other descriptive information including, in the case of a swap, the type of swap, its notional value and the underlying instrument, index or asset on which the swap is based, (iii) the market value of each investment held by the Fund, (iv) the type (including maturity, ticker symbol, or other identifier) and value of each Treasury security and cash equivalent, and (v) the amount of cash held in the Fund's portfolio.

other applicable quantitative information. The level of the Index will be published at least every 15 seconds, both in real time from 9:30 a.m. to 4 p.m., E.T., and at the close of trading on each business day by Bloomberg and Reuters. The Fund's website will also provide information regarding the SPIKES futures contracts constituting the Index and the Index methodology. In addition, the level of the SPIKES Index and the VIX is available from Bloomberg and Reuters.

Complete real-time data for SPIKES futures contracts, which trade on MGEX, is available by subscription through on-line information services. MGEX also provides delayed futures information on current and past trading sessions and market news free of charge on its website. Price information regarding cleared VIX swap contracts is available from major market data vendors and price information for non-exchange-traded VIX swap contracts may be obtained from brokers and dealers who make markets in such instruments. Price information regarding VIX futures is available from the Cboe Futures Exchange and from major market data vendors. Price information for cash equivalents is available from major market data vendors.

The Exchange's rules regarding trading halts further help to ensure the maintenance of fair and orderly markets for the Shares, which is consistent with the protection of investors and the public interest. Trading in the Shares may 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 and/or the financial instruments composing the daily disclosed portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12-E (Trading Halts Due to Extraordinary Market Volatility) have been reached. The Exchange may halt trading during the day in which an interruption to the dissemination of the IFV or the value of the Index occurs. If the interruption to the dissemination of the IFV or the value of the Index persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the NAV with respect to the Shares or disclosure of the Fund's daily

holdings is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV and the Fund's daily holdings is available to all market participants. NYSE Arca Rule 8.200-E, Commentary .02, enumerates additional circumstances under which the Exchange will consider the suspension of trading in and will commence delisting proceedings for the Shares.

The Exchange's proposal is designed to safeguard material non-public information relating to the Fund's portfolio. Specifically, as the Exchange states, neither the Sponsor nor the Sub-Adviser is registered as a broker-dealer or affiliated with a broker-dealer. In the event that (a) either the Sponsor or the Sub-Adviser becomes registered as a broker-dealer or newly affiliated with a broker-dealer, or (b) any new sponsor or sub-adviser is registered as a broker-dealer or becomes affiliated with a broker-dealer, it will implement and maintain a fire wall with respect to its relevant personnel or personnel of the broker-dealer affiliate, as applicable, 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. Moreover, trading of the Shares will be subject to NYSE Arca Rule 8.200-E, Commentary .02(e), which sets forth certain restrictions on Equity Trading Permit Holders ("ETP Holders") acting as registered Market Makers²⁵ in Trust Issued Receipts to facilitate surveillance. In addition, the Exchange has a general policy prohibiting the distribution of material, non-public information by its employees.

Furthermore, the Exchange or the Financial Industry Regulatory Authority ("FINRA"), on behalf of the Exchange, or both, will communicate as needed, and may obtain information, regarding trading in the Shares, SPIKES futures, VIX futures and other underlying exchange-listed instruments with other markets and entities that are members of the Intermarket Surveillance Group ("ISG"). In addition, the Exchange may obtain information regarding trading in the Shares, SPIKES futures, VIX futures and other underlying exchange-listed instruments from markets and other entities with which the Exchange has in place a comprehensive surveillance sharing agreement ("CSSA"). All futures contracts in which the Fund invests

shall consist of futures contracts whose principal market is a member of the ISG or is a market with which the Exchange has a CSSA. The Exchange states that trading in the Shares will be subject to existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by FINRA on behalf of the Exchange, and these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The Exchange has demonstrated there is an appropriate regulatory framework to support listing and trading of the Shares, including trading rules, surveillance, and listing standards. Moreover, the trading of the Shares on the Exchange will be subject to the Exchange's and other rules listed below. Specifically:

(1) The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities;

(2) The Shares will conform to the initial and continued listing criteria under NYSE Arca Rule 8.200-E;

(3) Pursuant to NYSE Arca Rule 8.200-E(a), all statements and representations made in the filing regarding (a) the description of the Index, portfolio, or reference asset, (b) limitations on Index or portfolio holdings or reference assets, or (c) the applicability of Exchange listing rules specified in the filing will constitute continued listing requirements for the Shares. The issuer 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 monitor²⁶ 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 NYSE Arca Rule 5.5-E(m).

²⁶ Certain proposals for the listing and trading of exchange-traded products include a representation that the exchange will "surveil" for compliance with the continued listing requirements. *See, e.g.*, Securities Exchange Act Release No. 77499 (April 1, 2016), 81 FR 20428, 20432 (April 7, 2016) (SR-BATS-2016-04). In the context of this representation, it is the Commission's view that "monitor" and "surveil" both mean ongoing oversight of compliance with the continued listing requirements. Therefore, the Commission does not view "monitor" as a more or less stringent obligation than "surveil" with respect to the continued listing requirements.

²⁵ As defined in NYSE Arca Rule 1.1(z) the term "Market Maker" means an ETP Holder that acts as a Market Maker pursuant to NYSE Arca Rule 7-E.

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

(5) Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares;²⁷

(6) FINRA has implemented increased sales practice and customer margin requirements for FINRA members applicable to inverse, leveraged and inverse leveraged securities (which include the Shares) and options on such securities, as described in FINRA Regulatory Notices 09–31 (June 2009), 09–53 (August 2009), and 09–65 (November 2009). ETP Holders that carry customer accounts will be required to follow the FINRA guidance set forth in these notices;

(7) For initial and continued listing, the Fund will be in compliance with Rule 10A–3 under the Act;²⁸ and

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

Accordingly, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act²⁹ and the rules and regulations thereunder applicable to a national securities exchange.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,³⁰ that the proposed rule change (SR–NYSEArca–2021–28), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³¹

J. Matthew DeLesDernier,
Assistant Secretary.

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²⁷ The Exchange states that the Information Bulletin will discuss the following: (1) The risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated IFV will not be calculated or publicly disseminated; (2) the procedures for purchases and redemptions of Shares in Creation Units and Redemption Units (and that Shares are not individually redeemable); (3) NYSE Arca Rule 9.2–E(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; (4) how information regarding the IFV is disseminated; (5) how information regarding portfolio holdings is disseminated; (6) 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 (7) trading information.

²⁸ 17 CFR 240.10A–3.

²⁹ 15 U.S.C. 78f(b)(5).

³⁰ *Id.*

³¹ 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–401, OMB Control No. 3235–0459]

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:

Rule 3a–4

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (the “Commission”) has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Rule 3a–4 (17 CFR 270.3a–4) under the Investment Company Act of 1940 (15 U.S.C. 80a) (“Investment Company Act” or “Act”) provides a nonexclusive safe harbor from the definition of investment company under the Act for certain investment advisory programs. These programs, which include “wrap fee” programs, generally are designed to provide professional portfolio management services on a discretionary basis to clients who are investing less than the minimum investments for individual accounts usually required by the investment adviser but more than the minimum account size of most mutual funds. Under wrap fee and similar programs, a client’s account is typically managed on a discretionary basis according to pre-selected investment objectives. Clients with similar investment objectives often receive the same investment advice and may hold the same or substantially similar securities in their accounts. Because of this similarity of management, some of these investment advisory programs may meet the definition of investment company under the Act.

In 1997, the Commission adopted rule 3a–4, which clarifies that programs organized and operated in accordance with the rule are not required to register under the Investment Company Act or comply with the Act’s requirements.¹ These programs differ from investment

¹ Status of Investment Advisory Programs Under the Investment Company Act of 1940, Investment Company Act Rel. No. 22579 (Mar. 24, 1997) [62 FR 15098 (Mar. 31, 1997)] (“Adopting Release”). In addition, there are no registration requirements under section 5 of the Securities Act of 1933 for programs that meet the requirements of rule 3a–4. See 17 CFR 270.3a–4, introductory note.

companies because, among other things, they provide individualized investment advice to the client. The rule’s provisions have the effect of ensuring that clients in a program relying on the rule receive advice tailored to the client’s needs.

For a program to be eligible for the rule’s safe harbor, each client’s account must be managed on the basis of the client’s financial situation and investment objectives and in accordance with any reasonable restrictions the client imposes on managing the account. When an account is opened, the sponsor² (or its designee) must obtain information from each client regarding the client’s financial situation and investment objectives, and must allow the client an opportunity to impose reasonable restrictions on managing the account.³ In addition, the sponsor (or its designee) must contact the client annually to determine whether the client’s financial situation or investment objectives have changed and whether the client wishes to impose any reasonable restrictions on the management of the account or reasonably modify existing restrictions. The sponsor (or its designee) must also notify the client quarterly, in writing, to contact the sponsor (or its designee) regarding changes to the client’s financial situation, investment objectives, or restrictions on the account’s management.

Additionally, the sponsor (or its designee) must provide each client with a quarterly statement describing all activity in the client’s account during the previous quarter. The sponsor and personnel of the client’s account manager who know about the client’s account and its management must be reasonably available to consult with the client. Each client also must retain certain indicia of ownership of all securities and funds in the account.

The Commission staff estimates that 27,979,460 clients participate each year in investment advisory programs relying on rule 3a–4.⁴ Of that number, the staff

² For purposes of rule 3a–4, the term “sponsor” refers to any person who receives compensation for sponsoring, organizing or administering the program, or for selecting, or providing advice to clients regarding the selection of, persons responsible for managing the client’s account in the program.

³ Clients specifically must be allowed to designate securities that should not be purchased for the account or that should be sold if held in the account. The rule does not require that a client be able to require particular securities be purchased for the account.

⁴ These estimates are based on an analysis of the number of individual clients from Form ADV Item 5D(a)(1) and (b)(1) of advisers that report they provide portfolio management to wrap programs as

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