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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-84275; File No. SR-NYSEArca-2018-40]

### **Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Regarding Investments of the REX BKCM ETF**

September 24, 2018

On June 26, 2018, 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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change seeking to modify certain investments of the REX BKCM ETF (“Fund”), a series of the Exchange Listed Funds Trust (“Trust”), the shares (“Shares”) of which are currently listed and traded on the Exchange under NYSE Arca Rule 8.600-E, Managed Fund Shares. The proposed rule change was published for comment in the Federal Register on July 3, 2018.<sup>3</sup>

On August 14, 2018, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>5</sup> The Commission has received no comment letters on the proposed rule change.

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

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

<sup>3</sup> See Securities Exchange Act Release No. 83546 (June 28, 2018), 83 FR 31214 (July 3, 2018) (“Notice”).

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 83844 (Aug. 14, 2018), 83 FR 42178 (Aug. 20, 2018). The Commission designated October 1, 2018, as the date by which it should

This order institutes proceedings under Section 19(b)(2)(B) of the Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule change.

I. Summary of the Proposal<sup>7</sup>

The Trust is registered under the Investment Company Act of 1940 (“1940 Act”).<sup>8</sup> The Shares are listed and traded on the Exchange under Commentary .01 to NYSE Arca Rule 8.600-E,<sup>9</sup> which sets forth the generic criteria applicable to the listing and trading of Managed Fund Shares on the Exchange.<sup>10</sup> According to the Exchange, the investment objective of the Fund is to seek total return. The Fund will seek to achieve its investment objective, under normal

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approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>7</sup> The Commission notes that additional information regarding, among other things, the Shares, Fund, investment objective, permitted investments, investment strategies and methodology, investment restrictions, investment adviser and subadviser, creation and redemption procedures, availability of information, trading rules and halts, and surveillance procedures, can be found in the Notice (see supra note 3) and the Registration Statement (see infra note 8), as applicable.

<sup>8</sup> On May 7, 2018, the Trust filed with the Commission an amendment to its registration statement on Form N-1A under the Securities Act of 1933 and the 1940 Act relating to the Fund (File Nos. 333-180871 and 811-22700) (“Registration Statement”). The Exchange states that the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. See Investment Company Act Release No. 30445 (Apr. 2, 2013) (File No. 812-13969).

<sup>9</sup> The Shares commenced trading on the Exchange on May 16, 2018. See Notice, supra note 3, 83 FR at 31215.

<sup>10</sup> See NYSE Arca Rule 8.600-E (permitting the listing and trading of “Managed Fund Shares,” defined as a security that (a) represents an interest in a registered investment company (“Investment Company”) organized as an open-ended management investment company or similar entity, that invests in a portfolio of securities selected by the Investment Company’s investment adviser consistent with the Investment Company’s investment objectives and policies; (b) is issued in a specified aggregate minimum number in return for a deposit of a specified portfolio of securities and/or a cash amount with a value equal to the next determined net asset value; and (c) when aggregated in the same specified minimum number, may be redeemed at a holder’s request, which holder will be paid a specified portfolio of securities and/or cash with a value equal to the next determined net asset value).

market conditions, by obtaining investment exposure to an actively managed portfolio consisting of equity securities of cryptocurrency-related and other blockchain technology-related companies.<sup>11</sup>

The Fund intends to change its investment strategy such that the Shares would no longer qualify for generic listing on the Exchange. Specifically, the Fund's portfolio would continue to satisfy all of the generic listing requirements except that:

- the Fund, through its Subsidiary,<sup>12</sup> would be able to invest up to 15% of its total assets in shares of the Bitcoin Investment Trust ("GBTC"), an over-the-counter ("OTC") equity security, which investments would not meet the requirements of Commentary .01(a)(1)(E) to Rule 8.600-E; and
- the Fund and the Subsidiary would be able to invest in the securities of non-exchange-traded open-end investment companies (i.e., mutual funds), which investments would not meet the requirements of Commentary .01(a)(1)(A)–(E) to Rule 8.600-E.<sup>13</sup>

According to the Exchange, GBTC is a private, open-ended trust available to accredited investors that derives its value from the price of bitcoin.<sup>14</sup> The Subsidiary's investment in GBTC will be reflected in the net asset value of the Fund's Shares based on the closing price of GBTC

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<sup>11</sup> See Notice, supra note 3, 83 FR at 31215.

<sup>12</sup> According to the Exchange, the Fund expects to obtain exposure to certain investments by investing up to 25% of its total assets, as measured at the end of every quarter of the Fund's taxable year, in a wholly-owned and controlled Cayman Islands subsidiary ("Subsidiary"). See id. at 31216.

<sup>13</sup> See id. at 31216, 31218. The Exchange represents that the Fund will not hold listed or OTC derivatives based on bitcoin or other cryptocurrencies. See id. at 31216 nn.10–11.

<sup>14</sup> See id. at 31216 n.9. The Exchange states that GBTC's investment objective is for the net asset value per share to reflect the performance of the market price of bitcoin, less GBTC's expenses. See id. at 31218.

on OTC Markets Group, Inc.’s (“OTC Markets”) OTCQX Best Marketplace.<sup>15</sup> According to the Exchange, GBTC has demonstrated significant liquidity and the liquid market in the shares of GBTC alleviates valuation concerns. In addition, the Exchange represents that substantial and sustained trading volume in shares of GBTC, as well as the limitation of such investment to 15% of the Fund’s assets, would help to limit any adverse effect on the Fund’s arbitrage mechanism.<sup>16</sup>

The Exchange represents that the investments in securities of non-exchange-traded open-end investment companies will not be principal investments of the Fund. These investments, which may include mutual funds that invest, for example, principally in fixed income securities, would be utilized to help the Fund meet its investment objective and to equitize cash in the short term. According to the Exchange, such securities have a net asset value based on the value of securities and financial assets the investment company holds.<sup>17</sup>

## II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2018-40 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>18</sup> to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the

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<sup>15</sup> See id. at 31216.

<sup>16</sup> See id. at 31218. According to the Exchange, shares of GBTC have a minimum monthly trading volume of 250,000 shares, or a minimum notional volume traded per month of \$25 million, averaged over the last six months, and a market value in excess of the required \$75 million. Shares of GBTC have been quoted on OTC Markets’ OTCQX Best Marketplace under the symbol “GBTC” since March 26, 2015. The Exchange represents that, as of May 7, 2018, approximately 187,572,000 shares of GBTC were outstanding, with a market capitalization of \$2,807,852,840 based on the last traded price. Average trading volume for the 6 months ended May 7, 2018, was 7,107,650 shares per day, and total trading volume for 2017 was 1,576,551,613 shares. See id.

<sup>17</sup> See id. at 31218–19.

<sup>18</sup> 15 U.S.C. 78s(b)(2)(B).

proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>19</sup> the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade," and "to protect investors and the public interest."<sup>20</sup>

According to the Exchange, the Fund, through its Subsidiary, may invest up to 15% of its total assets in OTC shares of GBTC. In addition, the Exchange represents that the liquid market in the shares of GBTC alleviates valuation concerns, and that the substantial and sustained trading volume in shares of GBTC would help to limit any adverse effect on the Fund's arbitrage mechanism. What are commenters' views on the Exchange's assertions that the liquid market in the shares of GBTC alleviates valuation and arbitrage concerns? What are commenters' views on whether any premium or discount in the market price of GBTC compared to the value of its portfolio assets would affect valuation and arbitrage concerns? What are commenters' views, generally, on whether exposure to spot bitcoin markets through investment in GBTC would render the Shares of the Fund susceptible to manipulation?

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<sup>19</sup> Id.

<sup>20</sup> 15 U.S.C. 78f(b)(5).

### III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>21</sup>

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice,<sup>22</sup> in addition to any other comments they may wish to submit about the proposed rule change.

Comments may be submitted by any of the following methods:

#### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

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<sup>21</sup> Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

<sup>22</sup> See Notice, supra note 3.

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEArca-2018-40 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2018-40. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All

submissions should refer to File Number SR-NYSEArca-2018-40 and should be submitted by [INSERT DATE 21 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**Eduardo A. Aleman,**

*Assistant Secretary.*

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<sup>23</sup> 17 CFR 200.30-3(a)(57).

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