



8011-01P

SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-86112; File No. SR-NYSEArca-2019-28]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 3, to List and Trade Shares of the Virtus WMC Risk-Managed Alternative Equity ETF under NYSE Arca Rule 8.600-E

June 14, 2019.

I. Introduction

On April 15, 2019, 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 Virtus WMC Risk-Managed Alternative Equity ETF (“Fund”) under NYSE Arca Rule 8.600-E. The proposed rule change was published for comment in the Federal Register on May 3, 2019.³ On May 14, 2019, the Exchange filed Amendment No. 1 to the proposed rule change. On May 16, 2019, the Exchange filed Amendment No. 2 to the proposed rule change, which amended and replaced the proposed rule change as modified by Amendment No. 1. On June 10, 2019, the Exchange filed Amendment No. 3 to the proposed rule change, which amended and replaced the proposed rule change as modified by Amendment No. 2.⁴ The Commission has received no comments on the proposed rule change. This order approves the proposed rule change, as modified by Amendment No. 3.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 85751 (April 30, 2019), 84 FR 19141.

⁴ In Amendment No. 3, the Exchange: (a) clarified the permitted investments of the Fund; (b) clarified that the only OTC derivatives that the Fund may invest in are forward foreign currency contracts and OTC options on U.S. and foreign exchange-listed equity securities, U.S. and foreign exchange-listed equity securities indices, and interest rates;

II. Description of the Proposal, as Modified by Amendment No. 3⁵

The Exchange proposes to list and trade Shares of the Fund under NYSE Arca Rule 8.600-E, which governs the listing and trading of Managed Fund Shares on the Exchange. The Fund is a series of ETFs Series I (“Trust”).⁶ Virtus ETF Advisors LLC (“Adviser”) is the investment adviser for the Fund. Wellington Management Company LLP is the sub-adviser to the Fund (“Sub-Adviser”).⁷ ETF Distributors LLC, a registered broker-dealer, will act as the distributor for the Fund’s Shares and the Bank of New York Mellon will serve as the custodian, administrator, and transfer agent for the Fund.

(c) stated that price information relating to currency forwards will be available from major market data vendors; and (d) made other clarifying, technical, and conforming changes. Amendment No. 3 is not subject to notice and comment because it does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues. Amendment No. 3 is available at: <https://www.sec.gov/comments/sr-nysearca-2019-28/srnysearca201928-5656834-185771.pdf>.

⁵ For a complete description of the Exchange’s proposal, see Amendment No. 3, supra note 4.

⁶ According to the Exchange, on February 28, 2019, the Trust filed with the Commission a Post-Effective Amendment to the Trust’s registration statement on Form N-1A under the Securities Act of 1933 and the 1940 Act relating to the Fund (File Nos. 333-187668 and 811-22819) (“Registration Statement”). The Exchange represents that the Trust will file an amendment to the Registration Statement as necessary to conform to the representations in this filing. In addition, 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. 30607 (July 23, 2013) (File No. 812-14080).

⁷ The Exchange states that the Adviser and the Sub-Adviser are not registered as broker-dealers but that each is affiliated with one or more broker-dealers and has implemented and will maintain a “fire wall” with respect to each such broker-dealer affiliate regarding access to information concerning the composition of and/or changes to the Fund’s portfolio. In addition, in the event (a) the Adviser or the Sub-Adviser becomes registered as a broker-dealer or newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, such entity will implement and maintain a “fire wall” with respect to its relevant personnel or broker-dealer affiliate 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 such portfolio.

A. Principal Investments of the Fund

According to the Exchange, the investment objective of the Fund is to seek to provide superior risk-adjusted total returns over the long term. The Fund will seek to achieve its investment objective, under normal market conditions,⁸ by (i) investing in a broadly diversified portfolio of global equity securities in both developed and emerging markets, and (ii) implementing a beta management strategy by shorting futures contracts and purchasing and selling options, as further described below. Under normal market conditions, the Fund will invest at least 80% of its net assets (plus any borrowings for investment purposes) in equity securities, listed derivatives and over-the-counter (“OTC”) derivatives, cash and cash equivalents, each as further described below.

The Fund will invest in the following U.S. and foreign exchange-listed equity securities of U.S. and foreign issuers: common stock, preferred stock, convertible preferred stock, rights, warrants, American Depositary Receipts, Global Depositary Receipts, and real estate investment trusts.

The Fund may hold cash and cash equivalents.⁹

The Fund may hold U.S. and foreign exchange-traded futures and U.S. and foreign exchange-traded or OTC options on U.S. and foreign exchange-listed equity securities, U.S. and foreign exchange-listed equity securities indices, and interest rates.

The Fund may invest in forward foreign currency contracts and U.S. and foreign exchange-traded foreign currency futures contracts.

The Fund may enter into short sales of any securities and financial instruments in which the Fund may invest.

⁸ The term “normal market conditions” is defined in NYSE Arca Rule 8.600-E(c)(5).

⁹ The term “cash equivalents” is defined in NYSE Arca Rule 8.600-E, Commentary .01(c).

The Fund may use derivative instruments described above as a substitute for investing directly in an underlying security or other financial instrument, to seek to enhance returns, to seek to manage or reduce exposure/risk, or to seek to manage foreign currency risk.

B. Other Investments

While the Fund, under normal market conditions, will invest at least 80% in the securities and financial instruments described above, the Fund may invest its remaining assets in the following securities and financial instruments: exchange-traded funds (“ETFs”);¹⁰ convertible bonds; and U.S. government securities (that are not cash equivalents as defined in NYSE Arca Rule 8.600-E, Commentary .01(c)).¹¹

C. Investment Restrictions

The Fund will not invest in securities or other financial instruments that have not been described in the proposed rule change.

The Fund’s investments, including derivatives, will be consistent with the Fund’s investment objective and will not be used to enhance leverage (although certain derivatives and other investments may result in leverage). That is, the Fund’s investments will not be used to seek performance that is the multiple or inverse multiple (e.g., 2X or -3X) of the Fund’s primary broad-based securities benchmark index (as defined in Form N-1A).¹²

¹⁰ For purposes of this filing, the term “ETFs” includes Investment Company Units (as described in NYSE Arca Rule 5.2-E(j)(3)); Portfolio Depositary Receipts (as described in NYSE Arca Rule 8.100-E); and Managed Fund Shares (as described in NYSE Arca Rule 8.600-E). All ETFs will be listed and traded in the U.S. on a national securities exchange. While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged (e.g., 2X, -2X, 3X or -3X) ETFs.

¹¹ These are obligations guaranteed by the U.S. government and include U.S. Treasury notes, U.S. Treasury bonds, and U.S. Treasury bills.

¹² The Fund’s broad-based securities benchmark index will be identified in a future amendment to the Registration Statement following the Fund’s first full calendar year of performance.

D. Use of Derivatives by the Fund

The Exchange represents that the Fund's investments in derivative instruments will be made in accordance with the 1940 Act and consistent with the Fund's investment objective and policies. To limit the potential risk associated with such transactions, the Fund will enter into offsetting transactions or segregate or " earmark " assets determined to be liquid by the Adviser in accordance with procedures established by the Trust's Board of Trustees and in accordance with the 1940 Act or as permitted by applicable Commission guidance. According to the Exchange, these procedures have been adopted consistent with Section 18 of the 1940 Act and related Commission guidance. In addition, the Exchange states that the Fund has included appropriate risk disclosure in its offering documents, including leveraging risk.

The Exchange states that the Adviser and Sub-Adviser will monitor counterparty credit risk exposure (including for OTC derivatives) and evaluate counterparty credit quality on a continuous basis.

The Exchange states that the Adviser and the Sub-Adviser believe that there will be minimal, if any, impact to the arbitrage mechanism as a result of the Fund's use of derivatives. According to the Exchange, the Adviser and the Sub-Adviser understand that market makers and participants should be able to value derivatives as long as the positions are disclosed with relevant information. The Adviser and the Sub-Adviser believe that the price at which Shares of the Fund trade will continue to be disciplined by arbitrage opportunities created by the ability to purchase or redeem Shares of the Fund at their net asset value ("NAV"), which should ensure that Shares of the Fund will not trade at a material discount or premium in relation to their NAV.

E. Application of Generic Listing Requirements

The Exchange states that the portfolio for the Fund will not meet all of the generic listing

requirements set forth in Commentary .01 to NYSE Arca Rule 8.600-E applicable to the listing of Managed Fund Shares. The Exchange represents that the Fund's portfolio will meet all such requirements except for those set forth in Commentary .01(e) with respect to the Fund's investments in OTC derivatives.¹³

Specifically, the Exchange states that the aggregate gross notional value of the Fund's investments in OTC derivatives may exceed 20% of Fund assets, calculated as the aggregate gross notional value of such OTC derivatives. The Exchange proposes that up to 50% of the Fund's assets (calculated as the aggregate gross notional value) may be invested in OTC derivatives that are used to reduce currency, interest rate, or credit risk arising from the Fund's investments (i.e., for hedging purposes). The Exchange states that the Fund's investments in OTC derivatives, other than OTC derivatives used to hedge the Fund's portfolio against currency, interest rate, or credit risk, will be limited to 20% of the assets in the Fund's portfolio, calculated as the aggregate gross notional value of such OTC derivatives. As discussed above, the only OTC derivatives that the Fund may invest in are forward foreign currency contracts and OTC options on U.S. and foreign exchange-listed equity securities, U.S. and foreign exchange-listed equity securities indices, and interest rates.

The Exchange states that the Adviser and Sub-Adviser represent that the proposed exception from the generics described above is consistent with the Fund's investment objective and will further assist the Adviser and Sub-Adviser to achieve such investment objective. The Exchange states that, other than Commentary .01(e), the Shares of the Fund will conform to the

¹³ Commentary .01(e) to Rule 8.600-E provides that a portfolio may hold OTC derivatives, including forwards, options and swaps on commodities, currencies and financial instruments (e.g., stocks, fixed income, interest rates, and volatility) or a basket or index of any of the foregoing; however, on both an initial and continuing basis, no more than 20% of the assets in the portfolio may be invested in OTC derivatives (calculated as the aggregate gross notional value of the OTC derivatives).

initial and continued listing criteria under NYSE Arca Rule 8.600-E and will meet all other requirements of NYSE Arca Rule 8.600-E.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 3, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁴ In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 3, is consistent with Section 6(b)(5) of the Act,¹⁵ 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.

As noted above, the aggregate gross notional value of the Fund's investments in OTC derivatives may exceed the 20% limit in Commentary .01(e) to NYSE Arca Rule 8.600-E. Specifically, the Exchange proposes that up to 50% of the Fund's assets may be invested in OTC derivatives that are used to hedge the Fund's portfolio, and that up to 20% of the Fund's assets may be invest in other OTC derivatives (in each case, calculated as the aggregate gross notional value of such OTC derivatives).

According to the Exchange, if the Fund were limited to investing up to 20% of its assets in OTC derivatives, the Fund would have to exclude or underweight its strategies utilizing OTC derivatives and the Fund would be less diversified, concentrating risk in the other strategies it

¹⁴ 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).

¹⁵ 15 U.S.C. 78f(b)(5).

plans to utilize.¹⁶ In addition, the Exchange states that the inability of the Fund to adequately hedge its holdings could expose the Fund's shareholders to additional investment risk.¹⁷ Furthermore, the Exchange states that OTC derivatives can provide the Fund with more flexibility to manage risk and may frequently be a more efficient hedging vehicle than listed derivatives.¹⁸ The Exchange states that OTC derivatives can be customized to a greater degree than listed derivatives and can provide the Fund with more flexibility to negotiate the exact exposure the Fund requires, thereby providing a better hedge on Fund assets than listed derivatives.¹⁹ In addition, the Exchange states that the use of OTC derivatives can mitigate trading costs because they allow for more control over the duration of a hedge and are not subject to costs of rolling that are associated with listed derivatives.²⁰

On a daily basis, the Fund will disclose on its website the information regarding the Disclosed Portfolio required under NYSE Arca Rule 8.600-E(c)(2) to the extent applicable.²¹ The website information will be publicly available at no charge.²²

¹⁶ See Amendment No. 3, supra note 4, at 11-12. The Exchange states that the Adviser represents that it is not possible to implement its strategies efficiently using listed derivatives because the foreign exchange forward market is OTC. The Exchange also states that use of OTC options on U.S. and foreign exchange-listed equity securities and U.S. and foreign exchange-listed equity securities indices may be an important means to reduce risk in the Fund's equity investments or to enhance returns of such investments. See id. at 11.

¹⁷ See id. at 18.

¹⁸ See id.

¹⁹ See id. at 10.

²⁰ See id.

²¹ NYSE Arca Rule 8.600-E(c)(2) requires that the website for each series of Managed Fund Shares disclose the following information regarding the Disclosed Portfolio, to the extent applicable: (A) ticker symbol; (B) CUSIP or other identifier; (C) description of the holding; (D) with respect to holdings in derivatives, the identity of the security, commodity, index or other asset upon which the derivative is based; (E) the strike price for any options; (F) the quantity of each security or other asset held as measured by

The Commission notes that, other than Commentary .01(e), the Fund will meet all the requirements of NYSE Arca Rule 8.600-E.

The Commission also finds that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Act,²³ which sets forth Congress’s 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 will be available via the Consolidated Tape Association (“CTA”) high-speed line. The Portfolio Indicative Value (“PIV”) for the Fund, as defined in NYSE Arca Rule 8.600-E(c)(3), will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange’s Core Trading Session. 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. 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.

Quotation and last sale information for ETFs and other U.S. exchange-traded equity securities will be available via the CTA high-speed line. Quotation and last sale information for options cleared via the Options Clearing Corporation are available via the Options Price Reporting Authority. Intra-day and closing price information regarding U.S and foreign exchange-traded options and futures will be available from the exchange on which such instruments are traded. Price information relating to OTC options and currency forwards will be

(i) par value, (ii) notional value, (iii) number of shares, (iv) number of contracts, and (v) number of units; (G) maturity date; (H) coupon rate; (I) effective date; (J) market value; and (K) percentage weighting of the holding in the portfolio.

²² See Amendment No. 3, supra note 4, at 13.

²³ 15 U.S.C. 78k-1(a)(1)(C)(iii).

available from major market data vendors. Intra-day price information for U.S. and foreign exchange-traded options on futures will be available from the applicable exchange and from major market data vendors. For U.S. and foreign exchange-listed equity securities, intraday price quotations will generally be available from broker-dealers and trading platforms (as applicable). Price information for cash equivalents and convertible bonds will be available from major market data vendors. Price information regarding U.S. government securities generally may be obtained from brokers and dealers who make markets in such securities or through nationally recognized pricing services through subscription agreements. 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 to the extent transactions in such securities are reported to TRACE.²⁴

The Commission also believes that the proposal 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 Exchange has obtained 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. Trading in the Shares will be halted if the circuit-breaker parameters in NYSE Arca Rule 7.12-E have been reached. 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.

²⁴ Broker-dealers that are FINRA member firms have an obligation to report transactions in specified debt securities to TRACE to the extent required under applicable FINRA rules. Generally, such debt securities will have at issuance a maturity that exceeds one calendar year. For fixed income securities that are not reported to TRACE, (i) intraday price quotations will generally be available from broker-dealers and trading platforms (as applicable) and (ii) price information will be available from feeds from market data vendors, published or other public sources, or online information services, as described above. See Amendment No. 3, supra note 4, at 13, n. 14.

Moreover, trading in the Shares will be subject to NYSE Arca Rule 8.600-E(d)(2)(D), which sets forth circumstances under which Shares may be halted.

The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. The Exchange states that neither the Adviser nor the Sub-Adviser are registered as a broker-dealer but each is affiliated with one or more broker-dealers and each has implemented and will maintain a “fire wall” with respect to such broker-dealer affiliate regarding access to information concerning the composition of and/or changes to the Fund’s portfolio. 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.²⁵

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. In support of this proposal, the Exchange represents that:

- (1) Other than Commentary .01(e), as specifically described herein, the Fund will meet all other requirements of NYSE Arca Rule 8.600-E.
- (2) A minimum of 100,000 Shares of the Fund will be outstanding at the commencement of trading on the Exchange.
- (3) Trading in the Shares will be subject to the 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

²⁵ See NYSE Arca Rule 8.600-E(d)(2)(B)(ii).

deter and detect violations of Exchange rules and applicable federal securities laws.

- (4) The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed, and may obtain information, regarding trading in the Shares, certain exchange-traded equity securities (including ETFs), certain exchange-traded options, and certain futures with other markets and other entities that are members of the Intermarket Surveillance Group (“ISG”). In addition, the Exchange may obtain information regarding trading in the Shares, certain exchange-traded equity securities (including ETFs), certain exchange-traded options and certain futures from markets and other entities with which the Exchange has in place a comprehensive surveillance sharing agreement. FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA’s TRACE.
- (5) Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss: (a) the procedures for purchases and redemptions of Shares in creation units (and that Shares are not individually redeemable); (b) NYSE Arca Rule 9.2-E(a), which imposes a duty of due diligence on its Equity Trading Permit 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 Early and Late Trading Sessions when an updated PIV will not be calculated or publicly disseminated; (d) how information regarding the PIV and the Disclosed Portfolio

is disseminated; (e) the requirement that Equity Trading Permit Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

- (6) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.
- (7) For initial and continued listing, the Fund will be in compliance with Rule 10A-3 under the Act.²⁶
- (8) The Fund's investments, including derivatives, will be consistent with the Fund's investment objective and will not be used to enhance leverage (although certain derivatives and other investments may result in leverage). That is, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (e.g., 2X or -3X) of the Fund's primary broad-based securities benchmark index (as defined in Form N-1A).
- (9) The only OTC derivatives that the Fund may invest in are forward foreign currency contracts and OTC options on U.S. and foreign exchange-listed equity securities, U.S. and foreign exchange-listed equity securities indices, and interest rates.

The Exchange represents that all statements and representations made in this filing regarding (a) the description of the portfolio or reference asset, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange listing rules specified in the rule filing 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

²⁶ See 17 CFR 240.10A-3.

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 monitor²⁷ 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).

This approval order is based on all of the Exchange's statements and representations, including those set forth above and in Amendment No. 3.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 3, is consistent with Section 6(b)(5) of the Act²⁸ and Section 11A(a)(1)(C)(iii) of the Act²⁹ and the rules and regulations thereunder applicable to a national securities exchange.

²⁷ The Commission notes that 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.

²⁸ 15 U.S.C. 78f(b)(5).

²⁹ 15 U.S.C. 78k-1(a)(1)(C)(iii).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³⁰ that the proposed rule change (SR-NYSEArca -2019-28), as modified by Amendment No. 3, be, and it hereby is, approved.

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

Vanessa A. Countryman,
Acting Secretary.

³⁰ 15 U.S.C. 78s(b)(2).

³¹ 17 CFR 200.30-3(a)(12).

[FR Doc. 2019-13073 Filed: 6/19/2019 8:45 am; Publication Date: 6/20/2019]