



8011-01p  
SECURITIES AND EXCHANGE COMMISSION  
[Release No. 34-88378; File No. SR-NYSEArca-2019-77]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to List and Trade Shares of the AdvisorShares Pure US Cannabis ETF under NYSE Arca Rule 8.600-E

March 13, 2020

On December 13, 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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares (“Shares”) of the AdvisorShares Pure US Cannabis ETF (“Fund”) under NYSE Arca Rule 8.600-E. The proposed rule change was published for comment in the Federal Register on December 26, 2019.<sup>3</sup> On January 28, 2020, 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 approve or disapprove the proposed rule change.<sup>5</sup> The Commission has received no comment letters on the

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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. 87791 (December 18, 2019), 84 FR 71057 (“Notice”).

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

<sup>5</sup> See Securities Exchange Act Release No. 88066, 85 FR 6009 (February 3, 2020). The Commission designated March 25, 2020, as the date by which it should approve, disapprove, or institute proceedings to determine whether to approve or disapprove the proposed rule change.

proposal. The Commission is publishing this order to institute 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. Exchange's Description of the Proposal<sup>7</sup>

The Exchange proposes to list and trade Shares of the Fund under Commentary .01 to NYSE Arca Rule 8.600-E, which governs the listing and trading of Managed Fund Shares<sup>8</sup> on the Exchange.

AdvisorShares Investments, LLC ("Adviser") is the investment adviser for the Fund.<sup>9</sup> AdvisorShares Trust ("Trust") and the Adviser manage the Fund's investments, subject to the oversight and supervision by the Board of Trustees of the Trust.<sup>10</sup> Foreside Fund Services, LLC,

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<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, creation and redemption procedures, availability of information, trading rules and halts, and surveillance procedures, can be found in the Notice (see supra note **Error! Bookmark not defined.**) and the Registration Statement (see infra note 9), as applicable.

<sup>8</sup> A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 ("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.

<sup>9</sup> The Exchange represents that the Adviser is not registered as a broker-dealer, and the Adviser is not affiliated with any broker-dealers. In the event (a) the Adviser becomes registered as a broker-dealer or newly affiliated with a broker-dealer, or (b) any new adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it 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, each designed to prevent the use and dissemination of material non-public information regarding the portfolio.

<sup>10</sup> The Exchange represents that the Trust is registered under the 1940 Act. On August 19, 2019, the Trust filed with the Commission Post-Effective Amendment No. 145 to the Trust's registration statement on Form N-1A under the Securities Act of 1933 (15 U.S.C. 77a) and under the 1940 Act relating to the Fund (File Nos. 333-157876 and 811-22110) ("Registration Statement"). In addition, the Exchange represents that the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. See

a registered broker-dealer, will act as the distributor for the Fund's Shares. The Bank of New York Mellon will serve as the administrator, custodian, and transfer agent for the Fund.

A. Principal Investments of the Fund

According to the Exchange, the investment objective of the Fund is to seek long-term capital appreciation. The Fund will seek to achieve its investment objective by investing, under normal market conditions,<sup>11</sup> at least 80% of its net assets in securities of companies that derive at least 50% of their net revenue from the marijuana and hemp business in the United States and in derivatives that have economic characteristics similar to such securities.<sup>12</sup>

In addition to its investment in securities of companies that derive a significant portion of their revenue from the marijuana and hemp business, and in derivatives providing exposure to such securities, the Fund may invest in securities of companies that, in the opinion of the Advisor, may have current or future revenues from cannabis-related business or that are registered with the United States Drug Enforcement Agency (DEA) specifically for the purpose of handling marijuana for lawful research and development of cannabis or cannabinoid-related products.

According to the Exchange, the Fund will not invest directly in or hold ownership in any companies that engage in cannabis-related business unless permitted by national and local laws of the relevant jurisdiction, including U.S. federal and state laws. The Fund has represented that this restriction does not apply to the Fund's investment in derivatives instruments. All of the

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Investment Company Act Release No. 29291 (May 28, 2010) (File No. 812-13677).

<sup>11</sup> The term "normal market conditions" is defined in NYSE Arca Rule 8.600-E(c)(5).

<sup>12</sup> The Fund's investments in derivatives will include investments in both listed derivatives and over-the-counter ("OTC") derivatives, as those terms are defined in Commentary .01(d) and (e) to NYSE Arca Rule 8.600-E.

Fund's investments, including derivatives instruments, would be made in accordance with all applicable laws, including U.S. federal and state laws. The Fund will concentrate at least 25% of its investments in the pharmaceuticals, biotechnology and life sciences industry group within the health care sector.

The Fund primarily may invest in U.S. and foreign exchange-listed equity securities and in derivative instruments, as further described in this section, intended to provide exposure to such securities.

The Fund may invest in the following types of U.S. and foreign exchange-listed equity securities: common stock; preferred stock; warrants; Real Estate Investment Trusts (REITs); and rights. The Fund may also invest in U.S. exchange-listed exchange-traded funds ("ETFs")<sup>13</sup> and in U.S. exchange-listed closed-end funds.

The Fund may hold over-the-counter ("OTC") total return swaps on U.S. and foreign exchange-listed equity securities.

The Fund may hold cash and cash equivalents.<sup>14</sup>

**B. Other Investments of the Fund**

In addition to the Fund's principal investments described above, the Fund may invest in U.S. exchange-listed equity options and equity index options and in Rule 144A securities.

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<sup>13</sup> 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.

<sup>14</sup> For purposes of this filing, "cash equivalents" are the short-term instruments enumerated in Commentary .01(c) to NYSE Arca Rule 8.600-E.

C. Investment Restrictions

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).

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

D. Application of Generic Listing Requirements

The Exchange represents that it is submitting this proposed rule change because the portfolio for the Fund will not meet all of the "generic" listing requirements of 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 would meet all such requirements except for those set forth in Commentary .01(e),<sup>15</sup> as described below.

The Exchange proposes that the Fund's investments in OTC total return swaps on U.S. and foreign exchange-listed equity securities may exceed the 20% limit on investments in OTC derivatives set forth in in Commentary .01(e). Alternatively, the Exchange proposes that up to 60% of the Fund's assets (calculated as the aggregate gross notional value) may be invested in

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<sup>15</sup> Commentary .01(e) to NYSE Arca 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. For purposes of calculating this limitation, a portfolio's investment in OTC derivatives will be calculated as the aggregate gross notional value of the OTC derivatives.

OTC total return swaps on U.S. and foreign exchange-listed equity securities.<sup>16</sup> The only OTC derivatives that the Fund may invest in are OTC total return swaps on U.S. and foreign exchange-listed equity securities. The Exchange represents that, other than Commentary .01(e), the Shares of the Fund will conform to the 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 and Commentary .01 thereto.

II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2019-77 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>17</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 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>18</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

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<sup>16</sup> The Exchange represents that the Adviser monitors counterparty credit risk exposure (including for OTC derivatives) and evaluates counterparty credit quality on a continuous basis.

<sup>17</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>18</sup> Id.

“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>19</sup>

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>20</sup> in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks commenters’ views regarding whether the Exchange has adequately described and provided clear information about the Fund’s proposed portfolio, including the Fund’s proposed investments in securities of companies that derive a significant portion of their revenue from the marijuana and hemp business, in derivatives providing exposure to such securities, and in securities of companies that, in the opinion of the Advisor, may have current or future revenues from cannabis-related business or that are registered with the DEA specifically for the purpose of handling marijuana for lawful research and development of cannabis or cannabinoid-related products, for the Commission to make a determination under Section 6(b)(5) of the Act.

### 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

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<sup>19</sup> 15 U.S.C. 78f(b)(5).

<sup>20</sup> See Notice, supra note 3.

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, 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
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2019-77 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-2019-77. This file number should be included on the subject line if e-mail is used. To help the Commission process and review

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<sup>21</sup> Section 19(b)(2) of the Act, as amended by the Securities Acts 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 Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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-2019-77 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>22</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>22</sup> 17 CFR 200.30-3(a)(57).

