



8011-01

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88625; File No. SR-NYSEArca-2019-81]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to Adopt NYSE Arca Rule 5.2-E(j)(8) Governing the Listing and Trading of Exchange-Traded Fund Shares

April 13, 2020.

On November 1, 2019, NYSE Arca, Inc. (“Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to, among other things, adopt new NYSE Arca Rule 5.2-E(j)(8) to permit the generic listing and trading of Exchange-Traded Fund Shares. The proposed rule change was published for comment in the Federal Register on November 20, 2019.³

On December 17, 2019, 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 disapprove the proposed rule change.⁵ On February 12, 2020, the Exchange filed Amendment No. 1 to the proposed rule

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 87542 (November 14, 2019), 84 FR 64170.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 87775, 84 FR 70590 (December 23, 2019).

change, which amended and replaced the proposed rule change in its entirety.⁶ On February 13, 2020, the Commission published the proposed rule change, as modified by Amendment No. 1, for notice and comment and instituted proceedings to determine whether to approve or disapprove the proposed change, as modified by Amendment No. 1.⁷ On April 7, 2020, the Exchange filed Amendment No. 2 to the proposed rule change, which replaced and superseded the proposed rule change, as modified by Amendment No. 1.⁸ The Commission has received no comments on the proposed rule change.

The Commission is publishing this notice to solicit comments on Amendment No. 2 to the proposed rule change from interested persons, and is approving the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

I. The Exchange's Description of the Proposal, as Modified by Amendment No. 2

The Exchange proposes new Rule 5.2-E(j)(8) to establish generic listing standards for Exchange-Traded Fund Shares, which are Derivative Securities Products that are permitted to operate in reliance on Rule 6c-11 under the Investment Company Act of 1940. In addition, the Exchange proposes to discontinue the quarterly reports currently required with respect to Managed Fund Shares listed on the Exchange pursuant to Commentary .01 to NYSE Arca Rule 8.600-E. This Amendment No. 2 to SR-NYSEArca-2019-81 replaces SR-NYSEArca-2019-81 as originally filed and Amendment 1 thereto, and supersedes such filings in their entirety. The proposed change is available on the Exchange's website at www.nyse.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

⁶ See infra at note 8.

⁷ See Securities Exchange Act Release No. 88204, 85 FR 9892 (February 20, 2020).

⁸ Amendments No. 1 and 2 to the proposed rule change is available on the Commission's website at: <https://www.sec.gov/comments/sr-nysearca-2019-81/srnysearca201981.htm>.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes new Rule 5.2-E(j)(8) to establish “generic” listing standards for Exchange-Traded Fund Shares, which are Derivative Securities Products⁹ that are permitted to operate in reliance on Rule 6c-11 (“Rule 6c-11”) under the Investment Company Act of 1940 (“1940 Act”).¹⁰ In addition, the Exchange proposes to discontinue the quarterly reports currently required with respect to Managed Fund Shares listed on the Exchange pursuant to Commentary .01 to Rule 8.600-E.

The Exchange currently lists and trades shares of exchange-traded funds (“ETFs”) under the generic listing criteria of NYSE Arca Rule 5.2-E(j)(3) for Investment Company Units or Commentary .01 to NYSE Arca Rule 8.600-E for Managed Fund Shares, or pursuant to a

⁹ The term “Derivative Securities Product” is defined in Rule 1.1(k) to mean a security that meets the definition of “derivative securities product” in Rule 19b-4(e) under the Exchange Act. 17 CFR 240.19b-4(e). As provided under Rule 19b-4(e), the term “new derivative securities product” means any type of option, warrant, hybrid securities product or any other security, other than a single equity option or a security futures product, whose value is based, in whole or in part, upon the performance of, or interest in, an underlying instrument. The term “Exchange Act” is defined in Rule 1.1(q) to mean the Securities Exchange Act of 1934, as amended.

¹⁰ 15 U.S.C. 80a-1.

Securities and Exchange Commission (“Commission”) approval order or notice of effectiveness under Section 19(b)(2) or Section 19(b)(3)(A), respectively, of the Act. Issuers of Investment Company Units and Managed Fund Shares have heretofore been required to submit an application for exemptive relief from certain provisions under the 1940 Act and to receive such relief pursuant to an exemptive order by the Commission. The Commission recently adopted Rule 6c-11 to permit ETFs that satisfy certain conditions to operate without obtaining an exemptive order from the Commission under the 1940 Act.¹¹ The regulatory framework provided in Rule 6c-11, therefore, will streamline current procedures and reduce the costs and time frames associated with bringing ETFs to market, thereby enhancing competition among ETF issuers and reducing costs for investors.¹²

Rule 19b-4(e)(1) provides that the listing and trading of a new derivative securities product by a self-regulatory organization (“SRO”) is not deemed a proposed rule change, pursuant to paragraph (c)(1) of Rule 19b-4,¹³ if the Commission has approved, pursuant to

¹¹ See Release Nos. 33-10695; IC-33646; File No. S7-15-18 (Exchange-Traded Funds) (September 25, 2019), 84 FR 57162 (October 24, 2019) (the “Rule 6c-11 Release”).

¹² In approving the rule, the Commission stated that the “rule will modernize the regulatory framework for ETFs to reflect our more than two decades of experience with these investment products. The rule is designed to further important Commission objectives, including establishing a consistent, transparent, and efficient regulatory framework for ETFs and facilitating greater competition and innovation among ETFs.” Rule 6c-11 Release, at 57163. The Commission also stated the following regarding the rule’s impact: “We believe rule 6c-11 will establish a regulatory framework that: (1) Reduces the expense and delay currently associated with forming and operating certain ETFs unable to rely on existing orders; and (2) creates a level playing field for ETFs that can rely on the rule. As such, the rule will enable increased product competition among certain ETF providers, which can lead to lower fees for investors, encourage financial innovation, and increase investor choice in the ETF market.” Rule 6c-11 Release, at 57204.

¹³ 17 CFR 240.19b-4(c)(1). As provided under SEC Rule 19b-4(c)(1), a stated policy, practice, or interpretation of the SRO shall be deemed to be a proposed rule change unless it is reasonably and fairly implied by an existing rule of the SRO.

Section 19(b) of the Act, the SRO's trading rules, procedures and listing standards for the product class that would include the new derivative securities product and the SRO has a surveillance program for the product class.¹⁴ As contemplated by this Rule, the Exchange proposes new Rule 5.2-E(j)(8) to establish generic listing standards for ETFs that are permitted to operate in reliance on Rule 6c-11. An ETF listed under proposed Rule 5.2-E(j)(8) would therefore not need a separate proposed rule change pursuant to Rule 19b-4 before it can be listed and traded on the Exchange.¹⁵

The Exchange believes that the proposed generic listing rules for Exchange-Traded Fund Shares, described below, would facilitate efficient procedures for ETFs that are permitted to operate in reliance on Rule 6c-11. The Exchange further believes that the proposed rule is fully consistent with, and will further, the Commission's goals in adopting Rule 6c-11. As with Investment Company Units and Managed Fund Shares listed under the generic listing standards

¹⁴ Currently, "passive" ETFs (Investment Company Units) based on an underlying index as well as actively-managed ETFs (Managed Fund Shares) are listed on the Exchange pursuant to NYSE Arca Rules 5.2-E(j)(3) and 8.600-E, respectively, and such securities are eligible for Exchange listing pursuant to Rule 19b-4(e) if they satisfy the "generic" listing criteria specified in those Exchange rules. The Exchange may file with the Commission a proposed rule change pursuant to Rule 19(b) of the Act to permit listing of Investment Company Units and Managed Fund Shares that do not meet the applicable generic listing criteria. Such securities may be listed and traded on the Exchange following Commission approval or notice of effectiveness of the applicable proposed rule change.

¹⁵ With respect to ETFs that seek Exchange listing and that are not permitted to operate in reliance on Rule 6c-11 – for example, leveraged ETFs – such ETFs could be listed on the Exchange pursuant to the generic listing criteria in NYSE Arca Rule 5.2-E(j)(3) or 8.600-E, or pursuant to an Exchange Rule 19b-4 filing to permit listing under NYSE Arca Rule 5.2-E(j)(3) or 8.600-E, as applicable. The Exchange represents that all statements and representations made in any such filing regarding (a) the description of the portfolio or reference assets, (b) limitations on portfolio holdings or reference assets, and (c) the applicability of Exchange listing rules specified in the applicable rule filing shall constitute continued listing requirements for listing the applicable series of Exchange-Traded Fund Shares.

in NYSE Arca Rules 5.2-E(j)(3) and 8.600-E, respectively, series of Exchange-Traded Fund Shares that are permitted to operate in reliance on Rule 6c-11 would be permitted to be listed and traded on the Exchange without a prior Commission approval order or notice of effectiveness pursuant to Section 19(b) of the Act. This will significantly reduce the time frame and costs associated with bringing these securities to market, thereby promoting market competition among issuers of Exchange-Traded Fund Shares, to the benefit of the investing public.

Proposed Rule 5.2-E(j)(8)--Exchange-Traded Fund Shares

The Exchange is proposing standards that would pertain to Exchange-Traded Fund Shares to qualify for listing and trading pursuant to Rule 19b-4(e), as follows.¹⁶

Proposed Rule 5.2-E(j)(8)(a) would provide that the Exchange would consider for trading, whether by listing or pursuant to unlisted trading privileges (“UTP”), Exchange-Traded Fund Shares that meet the criteria of proposed Rule 5.2-E(j)(8).

Proposed Rule 5.2-E(j)(8)(b) would specify applicability of proposed Rule 5.2-E(j)(8) and would provide that it is applicable only to Exchange-Traded Fund Shares. Proposed Rule 5.2-E(j)(8) (b) would further provide that, except to the extent inconsistent with proposed Rule 5.2-E(j)(8), or unless the context otherwise requires, Exchange rules would be applicable to the trading on the Exchange of such securities and that Exchange-Traded Fund Shares would be included within the definition of NMS Stock as defined in Rule 1.1.

Proposed Rule 5.2-E(j)(8)(c) would set forth the definitions that would be used for purposes of the proposed rule as follows:

¹⁶ Rule 6c-11 became effective on December 23, 2019. Subject to approval of this proposed rule change, Exchange-Traded Fund Shares that are permitted to operate in reliance on Rule 6c-11 would be eligible for listing and trading on the Exchange under proposed Rule 5.2-E(j)(8) after that date.

- Proposed Rule 5.2-E(j)(8)(c)(1) would define the term “1940 Act” to mean the Investment Company Act of 1940, as amended.
- Proposed Rule 5.2-E(j)(8)(c)(2) would define the term “Exchange-Traded Fund” as having the same meaning as the term “exchange-traded fund” as defined in Rule 6c-11(a)(1) under the 1940 Act.¹⁷
- Proposed Rule 5.2-E(j)(8)(c)(3) would define the term “Exchange-Traded Fund Share” to mean a share of stock issued by an Exchange-Traded Fund.¹⁸

Proposed Rule 5.2-E(j)(8)(c)(4) would define the term “Reporting Authority” to mean, in respect of a particular series of Exchange-Traded Fund Shares, the Exchange, an institution, or a reporting service designated by the Exchange or by the exchange that lists a particular series of Exchange-Traded Fund Shares (if the Exchange is trading such series pursuant to unlisted trading privileges) as the official source for calculating and reporting information relating to such series, including, but not limited to, any current index or portfolio value, the current value of the portfolio of any securities required to be deposited in connection with issuance of Exchange-Traded Fund Shares, the amount of any dividend equivalent payment or cash distribution to holders of Exchange-Traded Fund Shares, net asset value, or other information relating to the

¹⁷ Rule 6c-11(a)(1) defines “exchange-traded fund” as a registered open-end management company: (i) That issues (and redeems) creation units to (and from) authorized participants in exchange for a basket and a cash balancing amount if any; and (ii) Whose shares are listed on a national securities exchange and traded at market-determined prices. The terms “authorized participant,” “basket” and “creation unit” are defined in Rule 6c-11(a).

¹⁸ The definition of Exchange-Traded Fund Shares is the same as the definition of “exchange-traded fund shares” in Rule 6c-11(a) under the 1940 Act.

issuance, redemption or trading of Exchange-Traded Fund Shares. A series of Exchange-Traded Fund Shares may have more than one Reporting Authority, each having different functions.¹⁹

Proposed Rule 5.2-E(j)(8)(d) would specify the limitations on Exchange liability and relates to limitation of the Exchange, the Reporting Authority, or any agent of the Exchange as a result of specified events and conditions. Specifying such limitations of liability is standard in the Exchange's rules governing the listing of Derivative Securities Products and the proposed rule text is substantively identical to Rules 5.2-E(j)(3)(D), 8.100-E(f), 8.201-E(f), 8.200-E(f), 8.202-E(f), 8.203-E(f), 8.204-E(g), 8.300-E(f), 8.400-E(f), 8.500-E(e), 8.600-E(e), and 8.700-E(g).

Proposed Rule 5.2-E(j)(8)(e) would provide that Exchange may approve Exchange-Traded Fund Shares for listing and/or trading (including pursuant to UTP) pursuant to Rule 19b-4(e) under the Exchange Act provided that each series of Exchange-Traded Fund Shares must be eligible to operate in reliance on Rule 6c-11 under the 1940 Act and,) must satisfy the requirements of proposed Rule 5.2-E(j)(8)(as described below) upon initial listing and, except for subparagraph (1)(A) of Rule 5.2-E(j)(8), on a continuing basis. As further proposed, an issuer of such securities must notify the Exchange of any failure to comply with such requirements.

Proposed Rule 5.2-E(j)(8)(e)(1) sets forth the initial and continued listing standards for Exchange-Traded Fund Shares to be listed on the Exchange and would provide that Exchange-Traded Fund Shares will be listed and traded on the Exchange subject to the requirement that the investment company issuing a series of Exchange-Traded Fund Shares is eligible to operate in reliance on the requirements of Rule 6c-11(c) on an initial and continued listing basis.

¹⁹ Proposed Rule 5.2-E(j)(8)(c)(4) is based, for example, on Rules 8.100-E(a)(2) for Portfolio Depositary Receipts); 8.600-E(c)(4) (for Managed Fund Shares) and 8.700-E(c)(4) (for Managed Trust Securities).

Proposed Rule 5.2-E(j)(8)(e)(1)(A) provides that, for each series of Exchange-Traded Fund Shares, the Exchange will establish a minimum number of Exchange-Traded Fund Shares required to be outstanding at the time of commencement of trading on the Exchange.

Proposed Rule 5.2-E(j)(8)(e)(2) would set forth the standards for suspension of trading or removal of Exchange-Traded Fund Shares from listing on the Exchange and would provide that the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 5.5-E(m) of, a series of Exchange-Traded Fund Shares under any of the following circumstances:

- (i) if the Exchange becomes aware that the investment company is no longer eligible to operate in reliance on Rule 6c-11; (see proposed Rule 5.2-E(j)(8)(e)(2)(A));
- (ii) if the investment company no longer complies with the requirements set forth in Rule 5.2-E(j)(8) (see proposed Rule 5.2-E(j)(8)(e)(2)(B));
- (iii) if, following the initial twelve-month period after commencement of trading on the Exchange of a series of Exchange-Traded Fund Shares, there are fewer than 50 beneficial holders of such series of Exchange-Traded Fund Shares (see proposed Rule 5.2-E(j)(8)(e)(2)(C)); or
- (iv) if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable (see proposed Rule 5.2-E(j)(8)(e)(2)(D)). This proposed rule text is based, for example, on Rules 5.2-E(j)(6)(B)(2)(c)(3)(for Index-Linked Securities); 8.600-E(d)(2)(C)(vi)(for Managed Fund Shares); and 8.700-E(d)(2)(c)(vi)(for Managed Trust Securities).

Proposed Rule 5.2-E(j)(8)(f) would provide that transactions in Exchange-Traded Fund Shares would occur during the trading hours specified in Rule 7.34-E(a). As with other

Derivative Securities Products listed on the Exchange, Exchange-Traded Fund Shares would trade during the Early, Core, and Late Trading Sessions, as defined in Rule 7.34-E(a). ETP Holders accepting orders in Exchange-Traded Fund Shares in the Early or Late Trading Session would be subject to the customer disclosure requirements specified in Rule 7.34-E(d).²⁰

Proposed Rule 5.2-E(j)(8)(g) would provide that the Exchange would implement and maintain written surveillance procedures for Exchange-Traded Fund Shares. This proposed rule is based, for example, on Commentary .01(f) to Rule 5.2-E(j)(3) (for Investment Company Units); Commentary .03 to Rule 8.600-E (for Managed Fund Shares); and Commentary .04 to Rule 8.700-E (for Managed Trust Securities).

Proposed Rule 5.2-E(j)(8)(h) would provide that, upon termination of an investment company issuing Exchange-Traded Fund Shares, the Exchange requires that Exchange-Traded Fund Shares issued in connection with such entity be removed from Exchange listing.²¹

Proposed Commentary .01 to Rule 5.2-E(j)(8) would provide that a security that has previously been approved for listing on the Exchange pursuant to the generic listing requirements specified in Rule 5.2-E(j)(3) or Commentary .01 to Rule 8.600-E, or pursuant to a proposed rule change approved or subject to a notice of effectiveness by the Commission, may be considered approved for listing solely under Rule 5.2-E(j)(8) if such security is eligible to operate in reliance on Rule 6c-11 under the 1940 Act. Once so approved for listing, the

²⁰ NYSE Arca Rule 1.1-E(o) states that the term “ETP Holder” shall refer to a sole proprietorship, partnership, corporation, limited liability company or other organization in good standing that has been issued an Equity Trading Permit (“ETP”). An ETP Holder must be a registered broker or dealer pursuant to Section 15 of the Act. An ETP Holder shall agree to be bound by the Certificate of Incorporation, Bylaws and Rules of the Exchange, and by all applicable rules and regulations of the Commission.

²¹ The Exchange will propose applicable NYSE Arca listing fees for Exchange-Traded Fund Shares in the NYSE Arca Equities Schedule of Fees and Charges in a separate proposed rule change.

continued listing requirements applicable to such previously-listed security will be those specified in paragraph (e) of Rule 5.2-E(j)(8). Any requirements for listing as specified in Rule 5.2-E(j)(3) or Commentary .01 to Rule 8.600-E, or an approval order or notice of effectiveness of a separate proposed rule change that differ from the requirements of Rule 5.2-E(j)(8) will no longer be applicable to such security.²²

The Exchange believes that proposed Commentary .01 harmonizes the Exchange's listing standards for all Exchange-Traded Funds that will be listed on the Exchange, even if they were previously listed pursuant to different continued listing requirements. Specifically, as noted in the Rule 6c-11 Release, one year following the effective date of Rule 6c-11, the Commission will be rescinding those portions of its prior ETF exemptive orders under the 1940 Act that grant relief related to the formation and operation of certain ETFs. The Exchange believes that once this occurs, all Exchange-Traded Funds will be subject to the same requirements under Rule 6c-11 and will no longer be subject to any differing requirements that may have been set forth in the exemptive orders issued before the effective date of Rule 6c-11. To maintain consistent standards for all Exchange-Traded Fund Shares on the Exchange, the Exchange further believes that such

²² With respect to (1) new issues of Exchange-Traded Fund Shares listed under 5.2-E(j)(8), and (2) ETFs previously listed on the Exchange pursuant to Rule 5.2-E(j)(3) or 8.600-E and that are eligible to operate under Rule 6c-11, the Exchange will file a Form 19b-4(e) pursuant to Rule 19b-4(e) under the Act. Item 3 to Form 19b-4(e) (Class of New Derivative Securities Product) would specify that the ETF is listed as an issue of Exchange-Traded Fund Shares under NYSE Arca Rule 5.2-E(j)(8). The Exchange will require Exchange-listed series of Investment Company Units or Managed Fund Shares that wish to transition to listing as Exchange-Traded Fund Shares under Rule 5.2-E(j)(8) to provide written notification to the Exchange of eligibility to rely on Rule 6c-11. After such transition, an issuer of any such security, prior to the Commission's rescission of the issuer's exemptive relief under the 1940 Act and following notice to the Exchange, could thereafter revert to reliance on the generic listing criteria in Rule 5.2-E(j)(3) or Commentary .01 to Rule 8.600-E, or any proposed rule change approved or subject to a notice of effectiveness by the Commission in connection with the listing of such security.

previously-listed products should no longer be required to comply with the previously-applicable continued listing requirements for such Exchange-Traded Funds.

Proposed Commentary .02 to Rule 5.2-E(j)(8) would provide that the following requirements shall be met by series of Exchange-Traded Fund Shares on an initial and continued listing basis. With respect to series of Exchange-Traded Fund Shares that are based on an index: (1) If the underlying index is maintained by a broker-dealer or fund adviser, the broker-dealer or fund adviser will erect and maintain a “fire wall” around the personnel who have access to information concerning changes and adjustments to the index and the index will be calculated by a third party who is not a broker-dealer or fund adviser, and (2) Any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on the index composition, methodology and related matters, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index. See proposed Commentary .02 (a) to Rule 5.2-E(j)(8)). Proposed Commentary .02(a) is based on Commentary .01(b)(1) to Rule 5.2-E(j)(3) and Commentary .02(b)(1) and (b)(3) to Rule 5.2-E(j)(3).

In addition, with respect to series of Exchange-Traded Fund Shares that are actively managed, if the investment adviser to the investment company issuing Exchange-Traded Fund Shares is affiliated with a broker-dealer, such investment adviser will erect and maintain a “fire wall” between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such Exchange-Traded Fund’s portfolio. Personnel who make decisions on the Exchange-Traded Fund’s portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Exchange-Traded Fund portfolio. The Reporting Authority

that provides information relating to the portfolio of a series of Exchange-Traded Fund Shares 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 such portfolio. (See proposed Commentary .02(b) to Rule 5.2-E(j)(8)). Proposed Commentary .02(b) is based in part on Commentary .06 to Rule 8.600-E.

The Exchange also proposes non-substantive amendments to include Exchange-Traded Fund Shares in other Exchange rules. Specifically, the Exchange proposes to amend Rule 5.3-E, concerning Corporate Governance and Disclosure Policies, and Rule 5.3-E(e), concerning Shareholder/Annual Meetings, to add Exchange-Traded Fund Shares to the enumerated derivative and special purpose securities that are subject to the respective Rules. Thus, Exchange-Traded Fund Shares would be subject to corporate governance, disclosure and shareholder/annual meeting requirements that are consistent with other derivative and special purpose securities enumerated in those Rules.

The Exchange notes that Exchange-Traded Fund Shares will be subject to all Exchange rules applicable to equities trading. With respect to Exchange-Traded Fund Shares, all of the Exchange member obligations relating to product description and prospectus delivery requirements will continue to apply in accordance with Exchange rules and federal securities laws, and the Exchange and the Financial Industry Regulatory Authority, Inc. (“FINRA”) will continue to monitor Exchange members for compliance with such requirements, which are not changing as a result of Rule 6c-11 under the 1940 Act.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in a series of Exchange-Traded Fund Shares.²³ Trading in Exchange-Traded Fund 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 Exchange-Traded Fund Shares inadvisable.

These may include: (1) the extent to which certain information about the Exchange-Traded Fund Shares that is required to be disclosed under Rule 6c-11(c) of the 1940 Act is not being made available; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

NYSE Arca Rule 7.18-E(d)(2) provides that, with respect to Derivative Securities Products (which would include Exchange-Traded Fund Shares) listed on the Exchange for which a Net Asset Value (“NAV”) is disseminated, if the Exchange becomes aware that the NAV is not being disseminated to all market participants at the same time, it will halt trading in the affected Derivative Securities Product on the NYSE Arca Marketplace until such time as the NAV is available to all market participants. In addition, the Exchange may halt trading in Exchange Traded Fund Shares if there is an interruption or disruption in the dissemination of an underlying index value, if applicable, if there are major interruptions in securities trading in U.S. or global markets, or in the presence of other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market.

²³ See NYSE Arca Rule 7.12-E.

The Exchange will obtain a representation from the issuer of a series of Exchange-Traded Fund Shares that the NAV per share of such series will be calculated daily and will be made available to all market participants at the same time.

Minimum Price Variation

As provided in NYSE Arca Rule 7.6-E, the minimum price variation (“MPV”) for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is \$0.01, with the exception of securities that are priced less than \$1.00 for which the MPV for order entry is \$0.0001.

Surveillance

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Exchange-Traded Fund Shares in all trading sessions and to deter and detect violations of Exchange rules. Specifically, the Exchange intends to utilize its existing surveillance procedures applicable to derivative products, which are currently applicable to Investment Company Units and Managed Fund Shares, among other product types, to monitor trading in Exchange-Traded Fund Shares. The Exchange or FINRA, on behalf of the Exchange, will communicate as needed regarding trading in Exchange-Traded Fund Shares and certain of their applicable underlying components with other markets that are members of the Intermarket Surveillance Group (“ISG”) or with which the Exchange has in place a comprehensive surveillance sharing agreement. In addition, the Exchange may obtain information regarding trading in Exchange-Traded Fund Shares and certain of their applicable underlying components from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. Additionally, FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities that

may be held by a series of Exchange-Traded Fund Shares reported to FINRA's TRACE. FINRA also can access data obtained from the Municipal Securities Rulemaking Board's Electronic Municipal Market Access ("EMMA") system relating to municipal bond trading activity for surveillance purposes in connection with trading in a series of Exchange-Traded Fund Shares, to the extent that a series of Exchange-Traded Fund Shares holds municipal securities. As noted above, the issuer of a series of Exchange-Traded Fund Shares will be required to comply with Rule 10A-3 under the Act for the initial and continued listing of Exchange-Traded Fund Shares, as provided under Rule 5.3-E.

Pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. As provided for under proposed Rule 5.2-E(j)(8)(e)(2), if the investment company or series of Exchange-Traded Fund Shares is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Rule 5.5-E(m).

The Exchange will utilize its existing procedures to monitor issuer compliance with the requirements of proposed Rule 5.2-E(j)(8). For example, the Exchange will continue to use intraday alerts that will notify Exchange personnel of trading activity throughout the day that may indicate that certain disclosures are not being made accurately or that other unusual conditions or circumstances are present that could be detrimental to the maintenance of a fair and orderly market. The Exchange will require periodic certification from the issuer of a series of Exchange-Traded Fund Shares that it is in compliance with Rule 6c-11 and the requirements of Rule 5.2-E(j)(8). Proposed Rule 5.2-E(j)(8)(e)(2)(i) provides that the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 5.5-E(m) of, a series of Exchange-Traded Fund Shares if the Exchange becomes aware that the investment

company is no longer eligible to operate in reliance on Rule 6c-11. The Exchange’s awareness for purposes of determining whether to suspend trading or delist a series of Exchange-Traded Fund Shares may result from notification by the investment company or by the Exchange learning, through its own efforts, of non-compliance with Rule 5.2-E(j)(8).²⁴ In addition, the Exchange will periodically review issuer websites to monitor whether disclosures are being made for a series of Exchange-Traded Fund Shares as required by Rule 6c-11(c)(1). The Exchange also notes that proposed Rule 5.2-E(j)(8)(e) would require an issuer of Exchange-Traded Fund Shares to notify the Exchange that it is no longer eligible to operate in reliance on Rule 6c-11 or that it does not comply with the requirements of proposed Rule 5.2-E(j)(8). The Exchange will rely on the foregoing procedures to become aware of any non-compliance with the requirements of Rule 5.2-E(j)(8).

Firewalls

Commentary .01(b)(1) and Commentary .02(b) to NYSE Arca Rule 5.2-E (j)(3) (applicable to Investment Company Units) and Commentary .06 to NYSE Arca Rule 8.600-E (applicable to Managed Fund Shares) require the establishment and maintenance of a “firewall” around personnel who have access to information concerning changes to an index or the composition and/or changes to a fund’s portfolio; and that specified persons or entities be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index or portfolio.

In the Rule 6c-11 Release, the Commission, in the context of index-based ETFs with affiliated index providers (“self-indexed ETFs”), noted the federal securities law provisions that

²⁴ As proposed Rule 5.2-E(j)(8) does not impose index dissemination requirements, the Exchange does not plan to conduct a specific index dissemination surveillance for securities listed pursuant to such rule.

currently relate to implementation by funds of appropriate measures to deal with misuse of non-public information.²⁵ The Exchange notes that these federal securities laws requirements will continue to apply to issues of index and actively-managed ETFs and the proposed generic listing rules for Exchange-Traded Fund Shares are consistent with such requirements. The Exchange notes that proposed Commentary .02(a) to Rule 5.2-E(j)(8) provides that, with respect to series of Exchange-Traded Fund Shares that are based on an index, if the underlying index is maintained by a broker-dealer or fund adviser, the broker-dealer or fund adviser will erect and maintain a “fire wall” around the personnel who have access to information concerning changes and adjustments to the index and the index shall be calculated by a third party who is not a broker-dealer or fund advisor. In addition, proposed Commentary .02(b) provides that, with respect to series of Exchange-Traded Fund Shares that are actively managed, if the investment adviser to the Exchange-Traded Fund issuing Exchange-Traded Fund Shares is affiliated with a broker-dealer, such investment adviser will erect and maintain a “fire wall” between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such Exchange-Traded Fund portfolio. Personnel who make

²⁵ See Rule 6c-11 Release at 57168-57169. See also 17 CFR 270.38a-1 (rule 38a-1 under the 1940 Act) (requiring funds to adopt policies and procedures reasonably designed to prevent violation of federal securities laws); 17 CFR 270.17j-1(c)(1) (rule 17j-1(c)(1) under the Investment Company Act) (requiring funds to adopt a code of ethics containing provisions designed to prevent certain fund personnel (“access persons”) from misusing information regarding fund transactions); section 204A of the Investment Advisers Act of 1940 (“Advisers Act”) (15 U.S.C. 80b-204A) (requiring an adviser to adopt policies and procedures that are reasonably designed, taking into account the nature of its business, to prevent the misuse of material, non-public information by the adviser or any associated person, in violation of the Advisers Act or the Exchange Act, or the rules or regulations thereunder); section 15(g) of the Exchange Act (15 U.S.C. 78o(f)) (requiring a registered broker or dealer to adopt policies and procedures reasonably designed, taking into account the nature of the broker’s or dealer’s business, to prevent the misuse of material, nonpublic information by the broker or dealer or any person associated with the broker or dealer, in violation of the Exchange Act or the rules or regulations thereunder).

decisions on the applicable Exchange Traded Fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Exchange Traded Fund portfolio.

In support of this proposal, the Exchange represents that:

- (1) the Exchange-Traded Fund Shares will conform to the initial and continued listing criteria under Rule 5.2-E(j)(8);
- (2) the Exchange's surveillance procedures are adequate to properly monitor the trading of the Exchange-Traded Fund Shares in all trading sessions and to deter and detect violations of Exchange rules. Specifically, the Exchange intends to utilize its existing surveillance procedures applicable to derivative products, which will include Exchange-Traded Fund Shares, to monitor trading in the Exchange-Traded Fund Shares;
- (3) the issuer of a series of Exchange-Traded Fund Shares will be required to comply with Rule 10A-3 under the Act for the initial and continued listing of Exchange-Traded Fund Shares, as provided under Rule 5.3-E; and
- (4) Exchange-Traded Fund Shares will be subject to all Exchange rules applicable to equities trading.

Proposed Discontinuance of Quarterly Reporting Obligation for Managed Fund Shares

In its order approving the Exchange's proposal to adopt generic listing standards for Managed Fund Shares,²⁶ the Commission noted that the Exchange has represented that it would "provide the Commission staff with a report each calendar quarter that includes the following

²⁶ See Securities Exchange Act Release No. 78397 (July 22, 2016), 81 FR 49320 (the "Managed Fund Shares Approval Order").

information for issues of Managed Fund Shares listed during such calendar quarter under Commentary .01 to NYSE Arca Rule 8.600-E: (1) trading symbol and date of listing on the Exchange; (2) the number of active authorized participants and a description of any failure of an issue of Managed Fund Shares listed pursuant to Commentary .01 to Rule 8.600-E or of an authorized participant to deliver shares, cash, or cash and financial instruments in connection with creation or redemption orders; and (3) a description of any failure of an issue of Managed Fund Shares to comply with Rule 8.600-E.”²⁷ The Exchange has provided such information to the Commission on a quarterly basis for two years. The requirement to provide such quarterly reports for Managed Fund Shares is not separately specified in Rule 8.600-E, and Investment Company Units listed under Rule 5.2-E(j)(3) have not been subject to a similar requirement.

The generic listing criteria in proposed Rule 5.2-E(j)(8) will now apply equally both to Exchange-Traded Fund Shares that are Investment Company Units previously listed under Rule 5.2-E(j)(3) and those that are Managed Fund Shares previously listed under Commentary .01 to Rule 8.600-E. All types of Exchange-Traded Fund Shares, whether index-based or actively managed, must be eligible to operate in reliance on Rule 6c-11.²⁸ The Exchange believes no

²⁷ See Managed Fund Shares Approval Order at footnote 18.

²⁸ The Exchange notes that Rule 6c-11(d) sets forth recordkeeping requirements applicable to exchange-traded funds, and provides that that the exchange-traded fund must maintain and preserve for a period of not less than five years, the first two years in an easily accessible place: (1) All written agreements (or copies thereof) between an authorized participant and the exchange-traded fund or one of its service providers that allows the authorized participant to place orders for the purchase or redemption of creation units; (2) For each basket exchanged with an authorized participant, records setting forth: (i) The ticker symbol, CUSIP or other identifier, description of holding, quantity of each holding, and percentage weight of each holding composing the basket exchanged for creation units; (ii) If applicable, identification of the basket as a custom basket and a record stating that the custom basket complies with policies and procedures that the exchange-traded fund adopted pursuant to paragraph (c)(3) of Rule 6c-11; (iii) Cash balancing amount (if

purpose would be served by continuing to require quarterly reports for one class of ETFs and not another when both would be subject to the same Exchange generic listing rules. In addition, Managed Fund Shares have been trading on the Exchange since 2008 and there are currently 192 issues of Managed Fund Shares listed on the Exchange. The market for actively-managed ETFs has expanded and matured significantly over the last twelve years and market participants, including national securities exchanges, have become more experienced with issues related to the operation and regulatory oversight of such securities. The Exchange, therefore, proposes to discontinue quarterly reporting going forward.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,²⁹ in general, and furthers the objectives of Section 6(b)(5) of the Act,³⁰ in particular, because it is 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, in general, to protect investors and the public interest.

By facilitating efficient procedures for listing ETFs that are permitted to operate in reliance on Rule 6c-11, the generic listing rules in proposed Rule 5.2-E(j)(8) described above are consistent with, and will further, the Commission's goals in adopting Rule 6c-11. In addition, by allowing Exchange-Traded Fund Shares to be listed and traded on the Exchange without a prior Commission approval order or notice of effectiveness pursuant to Section 19(b) of the Act, proposed Rule 5.2-E(j)(8) will significantly reduce the time frame and costs associated with

any); and (iv) Identity of authorized participant transacting with the exchange-traded fund.

²⁹ 15 U.S.C. 78f(b).

³⁰ 15 U.S.C. 78f(b)(5).

bringing these securities to market, thereby promoting market competition among issuers of Exchange-Traded Fund Shares, to the benefit of the investing public.

In addition, the proposed rule change would fulfill the intended objective of Rule 19b-4(e) under the Act by permitting Exchange-Traded Fund Shares that satisfy the proposed listing standards to be listed and traded without separate Commission approval.

Proposed Rule 5.2-E(j)(8)(d) would specify the limitations on Exchange liability and relates to limitation of the Exchange, the Reporting Authority, or any agent of the Exchange as a result of specified events and conditions.

As provided in proposed Rule 5.2-E(j)(8)(e), the Exchange may approve Exchange-Traded Fund Shares for listing and trading on the Exchange subject to the requirement that the investment company issuing a series of Exchange-Traded Fund Shares is eligible to operate in reliance on Rule 6c-11³¹ under the 1940 Act and must satisfy the requirements of Rule 5.2-E(j)(8) on an initial listing and, except for subparagraph (1)(A) of Rule 5.2-E(j)(8)(e), a continuing basis. An issuer of such securities must notify the Exchange of any failure to comply with such requirements. These requirements will ensure that Exchange-listed Exchange-Traded Fund Shares continue to operate in a manner that fully complies with the portfolio transparency requirements of Rule 6c-11(c).

As provided in proposed Rule 5.2-E(j)(8)(e)(1), Exchange-Traded Fund Shares will be listed and traded on the Exchange subject to the requirement that the investment company issuing a series of Exchange-Traded Fund Shares is eligible to operate in reliance on the requirements of Rule 6c-11(c) under the 1940 Act on an initial and continued listing basis.

³¹ Rule 6c-11(c) sets forth certain conditions applicable to exchange-traded funds, including information required to be disclosed on the fund's website.

As provided in proposed Rule 5.2-E(j)(8)(e)(2) (Suspension of trading or removal), the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 5.5-E(m) of, a series of Exchange-Traded Fund Shares if the Exchange becomes aware that it is no longer eligible to operate in reliance on Rule 6c-11 or does not comply with the requirements set forth in Rule 5.2-E(j)(8); if, following the initial twelve-month period after commencement of trading on the Exchange of a series of Exchange-Traded Fund Shares, there are fewer than 50 beneficial holders of such series of Exchange-Traded Fund Shares; or if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable.

As provided in proposed Rule 5.2-E(j)(8)(g), the Exchange will implement and maintain written surveillance procedures for Exchange-Traded Fund Shares. The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Exchange-Traded Fund Shares in all trading sessions and to deter and detect violations of Exchange rules. Specifically, the Exchange intends to utilize its existing surveillance procedures applicable to derivative products, which will include Exchange-Traded Fund Shares, to monitor trading in the Exchange-Traded Fund Shares.

Proposed Rule 5.2-E(j)(8)(h) provides that, upon termination of an investment company issuing Exchange-Traded Fund Shares, the Exchange requires that Exchange-Traded Fund Shares issued in connection with such entity be removed from Exchange listing.

Proposed Commentary .01 to Rule 5.2-E(j)(8) provides that a security that has previously been approved for listing on the Exchange pursuant to the generic listing requirements specified in Rule 5.2-E(j)(3) or Commentary .01 to Rule 8.600-E, or pursuant to a proposed rule change approved or subject to a notice of effectiveness by the Commission, may be considered

approved for listing solely under Rule 5.2-E(j)(8) if such security is eligible to operate in reliance on Rule 6c-11 under the 1940 Act. Once so approved for listing, the continued listing requirements applicable to such previously-listed security will be those specified in paragraph (e) of Rule 5.2-E(j)(8). Any requirements for listing as specified in Rule 5.2-E(j)(3) or Commentary .01 to Rule 8.600-E, or an approval order or notice of effectiveness of a separate proposed rule change that differ from the requirements of Rule 5.2-E(j)(8) will no longer be applicable to such security. The Exchange believes proposed Commentary .01 will streamline the listing process for such securities, consistent with the regulatory framework adopted in Rule 6c-11 under the 1940 Act.

Proposed Commentary .02 to Rule 5.2-E(j)(8) would provide requirements to be met on an initial and continued listing basis by series of Exchange-Traded Fund Shares that are based on an index or are actively managed regarding the erection and maintenance of a “fire wall” as well as implementation and maintenance of procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index or portfolio. The Exchange believes the provisions of Commentary .02 will address possible concerns regarding misuse of material non-public information regarding an index underlying a series of Exchange-Traded Fund Shares or the portfolio for a series of Exchange-Traded Fund Shares, as applicable.

The proposed addition of Exchange-Traded Fund Shares to the enumerated derivative and special purpose securities that are subject to the provisions of Rule 5.3-E (Corporate Governance and Disclosure Policies) and Rule 5.3-E (e) (Shareholder/Annual Meetings) would subject Exchange-Traded Fund Shares to the same requirements currently applicable to other 1940 Act-registered investment company securities (i.e., Investment Company Units, Managed Fund Shares and Portfolio Depositary Receipts).

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Exchange-Traded Fund Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

FINRA, on behalf of the Exchange, or the regulatory staff of the Exchange, will communicate as needed regarding trading in Exchange-Traded Fund Shares with other markets that are members of ISG, including all U.S. securities exchanges on which the components are traded. In addition, the Exchange may obtain information regarding trading in Exchange-Traded Fund Shares from other markets that are members of the ISG, including all U.S. securities exchanges on which the components are traded, or with which the Exchange has in place a comprehensive surveillance sharing agreement. The Exchange intends to utilize its existing surveillance procedures applicable to derivative products, which are currently applicable to Investment Company Units and Managed Fund Shares, among other product types, to monitor trading in Exchange-Traded Fund Shares. FINRA, on behalf of the Exchange, will communicate as needed regarding trading in Exchange-Traded Fund Shares and certain of their applicable underlying components with other markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. In addition, the Exchange may obtain information regarding trading in Exchange-Traded Fund Shares and certain of their applicable underlying components from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. Additionally, FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities that may be held by a series of Exchange-Traded Fund Shares reported to FINRA's TRACE. FINRA also can access data obtained from the Municipal Securities Rulemaking Board's EMMA system

relating to municipal bond trading activity for surveillance purposes in connection with trading in a series of Exchange-Traded Fund Shares, to the extent that a series of Exchange-Traded Fund Shares holds municipal securities. As noted above, the issuer of a series of Exchange-Traded Fund Shares will be required to comply with Rule 10A-3 under the Act for the initial and continued listing of Exchange-Traded Fund Shares, as provided under Rule 5.3-E.

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in a series of Exchange-Traded Fund Shares.³² Trading in Exchange-Traded Fund 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 Exchange-Traded Fund Shares inadvisable. NYSE Arca Rule 7.18-E(d)(2) provides that, with respect to Derivative Securities Products (which would include Exchange-Traded Fund Shares) listed on the Exchange for which an NAV is disseminated, if the Exchange becomes aware that the NAV is not being disseminated to all market participants at the same time, it will halt trading in the affected Derivative Securities Product on the NYSE Arca Marketplace until such time as the NAV is available to all market participants. The Exchange will obtain a representation from the issuer of a series of Exchange-Traded Fund Shares that the NAV per share of such series will be calculated daily and will be made available to all market participants at the same time.

The Exchange will monitor for compliance with the continued listing requirements. If the Exchange-Traded Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Rule 5.5-E(m).

³² See NYSE Arca Rule 7.12-E.

The Exchange will utilize its existing procedures to monitor issuer compliance with the requirements of proposed Rule 5.2-E(j)(8). For example, the Exchange will continue to use intraday alerts that will notify Exchange personnel of trading activity throughout the day that may indicate that certain disclosures are not being made accurately or that other unusual conditions or circumstances are present that could be detrimental to the maintenance of a fair and orderly market. The Exchange will require periodic certification from the issuer of a series of Exchange-Traded Fund Shares that it is in compliance with Rule 6c-11 and the requirements of Rule 5.2-E(j)(8). In addition, the Exchange, on a periodic basis will review issues of Exchange-Traded Fund Shares listed on the Exchange for compliance with the requirements of Rule 6c-11(c)(1). Proposed Rule 5.2-E(j)(8)(e) would require an issuer of Exchange-Traded Fund Shares to notify the Exchange if it is no longer eligible to operate in reliance on Rule 6c-11 or that it does not comply with the requirements of proposed Rule 5.2-E(j)(8) (except for subparagraph (1)(A) of Rule 5.2-E(j)(8)(e)).

With respect to the proposed discontinuance of quarterly reports currently required for Managed Fund Shares, the Exchange believes such quarterly reports are no longer necessary in view of the requirements of Rule 6c-11(d). The generic listing criteria in proposed Rule 5.2-E(j)(8) will now apply equally both to Exchange-Traded Fund Shares that are Investment Company Units previously listed under Rule 5.2-E(j)(3) and those that are Managed Fund Shares previously listed under Commentary .01 to Rule 8.600-E. All types of Exchange-Traded Fund Shares, whether index-based or actively managed, must be eligible to operate in reliance on Rule 6c-11.³³ The Exchange believes no purpose would be served by continuing to require quarterly reports for one class of ETFs and not another when both would be subject to the same Exchange

³³ See note 25, *supra*.

generic listing rules. As noted above, the market for actively-managed ETFs has expanded and matured significantly over the last twelve years and market participants, including national securities exchanges, have become more experienced with issues related to the operation and regulatory oversight of such securities. The Exchange, therefore, proposes to discontinue quarterly reporting going forward.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,³⁴ the Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, the Exchange believes that the proposed rule change would facilitate the listing and trading of Exchange-Traded Fund Shares and result in an efficient process surrounding the listing and trading of Exchange-Traded Fund Shares, which will enhance competition among market participants, to the benefit of investors and the marketplace. The Exchange believes that this will reduce the time frame for bringing Exchange-Traded Fund Shares to market, thereby reducing the burdens on issuers and other market participants and promoting competition. In turn, the Exchange believes that the proposed change would make the process for listing Exchange-Traded Fund Shares more competitive by applying uniform listing standards with respect to Exchange-Traded Fund Shares.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Discussion and Commission Findings

³⁴ 15 U.S.C. 78f(b)(8).

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the Act and rules and regulations thereunder applicable to a national securities exchange.³⁵ In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Act,³⁶ 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.

A. Proposed NYSE Arca Rule 5.2-E(j)(8)

As an initial matter, the Commission notes that the Exchange currently has generic listing standards for Investment Company Units, Managed Fund Shares, and Portfolio Depositary Receipts,³⁷ and therefore proposed NYSE Arca Rule 5.2-E(j)(8) would not permit the Exchange to generically list any novel product types. The Commission also notes that a number of the provisions of proposed NYSE Arca Rule 5.2-E(j)(8) are substantively similar to provisions of other NYSE Arca listing rules.³⁸

The Commission believes that proposed NYSE Arca Rule 5.2-E(j)(8) is reasonably designed to help prevent fraudulent and manipulative acts and practices. A central qualification for listing under the proposed rule is ongoing compliance with Rule 6c-11 under the 1940 Act, which requires, among other things, ETFs to prominently disclose the portfolio holdings that will

³⁵ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³⁶ 15 U.S.C. 78f(b)(5).

³⁷ See NYSE Arca Rules.

³⁸ See Amendment No. 2, supra note 8, at 7-11.

form the basis for each calculation of net asset value per share.³⁹ Because initial and ongoing compliance with Rule 6c-11 under the 1940 Act is a condition for listing and trading on the Exchange, the proposed rule would permit NYSE Arca to list and trade shares of an investment company with a fully transparent portfolio,⁴⁰ and the Commission believes that portfolio transparency should help prevent manipulation of the price of Exchange-Traded Fund Shares.⁴¹ Additionally, proposed NYSE Arca Rule 5.2-E(j)(8) includes requirements relating to fire walls and procedures to prevent the use and dissemination of material, non-public information regarding the applicable ETF index and portfolio,⁴² all such requirements of which are designed

³⁹ See Rule 6c-11 Release, supra note 11, at 57180-81.

⁴⁰ See supra note 31 and accompanying text. The Commission also noted that, with respect to ETF portfolio transparency, the disclosures are designed to promote an effective arbitrage mechanism and inform investors about the risks of deviation between market price and net asset value when deciding whether to invest in ETFs generally or in a particular ETF. See Rule 6c-11 Release, supra note 11, at 57166.

⁴¹ See id. at 57169 (concluding that portfolio transparency combined with existing requirements should be sufficient to protect against certain abuses).

⁴² For example, proposed Commentary .02(a) to NYSE Arca Rule 5.2-E(j)(8) provides that, with respect to a series of Exchange-Traded Fund Shares that are based on an index, if the underlying index is maintained by a broker-dealer or fund adviser, the broker-dealer or fund adviser will erect and maintain a “fire wall” around the personnel who have access to information concerning changes and adjustments to the index, and the index will be calculated by a third party who is not a broker-dealer or fund adviser. In addition, any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on the index composition, methodology and related matters, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index. Proposed Commentary .02(b) to NYSE Arca Rule 5.2-E(j)(8) further states that, with respect to series of Exchange-Traded Fund Shares that are actively managed, if the investment adviser to the investment company issuing Exchange-Traded Fund Shares is affiliated with a broker-dealer, such investment adviser will erect and maintain a “fire wall” between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such Exchange-Traded Fund’s portfolio. Additionally, personnel who make decisions on the Exchange-Traded Fund’s portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Exchange-

to prevent fraudulent and manipulative acts and practices.⁴³ The Commission specifically notes that certain of these requirements relating to such fire walls and procedures, which are substantively identical to NYSE Arca’s rules governing the listing and trading of index-based and actively managed ETFs, apply in addition to what is already required under the Act and the 1940 Act and respective rules and regulations thereunder, and the Commission believes that such requirements collectively provide additional protections against the potential misuse of material, non-public information. Therefore, the Commission concludes that the proposed requirements relating to such fire walls and procedures, combined with ETF portfolio transparency and the existing requirements under the Act and 1940 Act, should help to protect against fraudulent and manipulative acts and practices under Section 6(b)(5) of the Act.

Proposed NYSE Arca Rule 5.2-E(j)(8)(g) requires that the Exchange implement and maintain written surveillance procedures for Exchange-Traded Fund Shares. The Exchange intends to utilize its existing surveillance procedures applicable to derivative products, which are currently applicable to Investment Company Units and Managed Fund Shares (among other product types), to monitor trading in Exchange-Traded Fund Shares, and represents that its surveillance procedures are adequate to (a) properly monitor the trading of such securities during all trading sessions and (b) deter and detect violations of Exchange rules and the applicable federal securities laws. Consistent with Section 6(b)(1) of the Act, the Exchange represents that,

Traded Fund portfolio. Moreover, the Reporting Authority that provides information relating to the portfolio of a series of Exchange-Traded Fund Shares 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 such portfolio.

⁴³ In adopting Rule 6c-11, the Commission determined that the safeguards in the existing regulatory regime adequately address “special concerns that self-indexed ETFs present, including the potential ability of an affiliated index provider to manipulate an underlying index to the benefit or detriment of a self-indexed ETF.” Rule 6c-11 Release, supra note 11, 84 FR at 57168.

pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements, and that, as provided under proposed NYSE Arca Rule 5.2-E(j)(8)(e)(2), if the investment company or series of Exchange-Traded Fund Shares is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5-E(m).⁴⁴ Further, the Exchange represents that it, or FINRA on behalf of the Exchange, will communicate as needed regarding trading in Exchange-Traded Fund Shares and certain of their applicable underlying components with other markets that are members of the ISG or with which NYSE Arca has in place a comprehensive surveillance sharing agreement.

The Exchange represents that it will utilize its existing procedures to monitor issuer compliance with the requirements of proposed NYSE Arca Rule 5.2-E(j)(8). For example, the Exchange will continue to use intraday alerts that will notify Exchange personnel of trading activity throughout the day that may indicate that certain disclosures are not being made accurately or that other unusual conditions or circumstances are present that could be detrimental to the maintenance of a fair and orderly market.⁴⁵ The Exchange will require periodic certification from the issuer of a series of Exchange-Traded Fund Shares that it is in compliance with Rule 6c-11 under the 1940 Act and the requirements of NYSE Arca Rule 5.2-E(j)(8).⁴⁶ Proposed NYSE Arca Rule 5.2-E(j)(8)(e)(2)(i) provides that the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 5.5-E(m) of, a

⁴⁴ The Commission also finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(1) of the Act (15 U.S.C. 78f(b)(1)), which requires (among other things) that a national securities exchange be organized and have the capacity to comply with its own rules.

⁴⁵ See Amendment No. 2, supra note 8, at 13.

⁴⁶ See id.

series of Exchange-Traded Fund Shares if the Exchange becomes aware that the investment company is no longer eligible to operate in reliance on Rule 6c-11 under the 1940 Act.⁴⁷ In addition, the Exchange states that it will periodically review issuer websites to monitor whether disclosures are being made for a series of Exchange-Traded Fund Shares as required by Rule 6c-11(c)(1) under the 1940 Act.⁴⁸ The Exchange also notes that proposed NYSE Arca Rule 5.2-E(j)(8)(e) would require an issuer of Exchange-Traded Fund Shares to notify the Exchange that it is no longer eligible to operate in reliance on Rule 6c-11 under the 1940 Act or that it does not comply with the requirements of proposed NYSE Arca Rule 5.2-E(j)(8).⁴⁹ Finally, proposed NYSE Arca Rule 5.2-E(j)(8)(e)(2)(C) requires that the Exchange commence delisting proceedings for a series of Exchange-Traded Fund Shares if, following the initial 12-month period after commencement of trading on the Exchange, there are fewer than 50 beneficial holders of such series of Exchange-Traded Fund Shares.

Consistent with the requirement of Section 6(b)(5) of the Act⁵⁰ that the Exchange's rules be designed to remove impediments to and perfect the mechanism of a free and open market, the Exchange's rules regarding trading halts will help to ensure the maintenance of fair and orderly markets for Exchange-Traded Fund Shares. Specifically, as discussed above, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in a series of

⁴⁷ The Exchange represents that its awareness for purposes of determining whether to suspend trading or delist a series of Exchange-Traded Fund Shares may result from notification by the investment company or by the Exchange learning, through its own efforts, of non-compliance with NYSE Arca Rule 5.2-E(j)(8). See id.

⁴⁸ See id.

⁴⁹ See Amendment No. 2, supra note 8, at 13-14.

⁵⁰ 15 U.S.C. 78f(b)(5).

Exchange-Traded Fund Shares.⁵¹ NYSE Arca states that trading in Exchange-Traded Fund Shares will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12-E have been reached.⁵² Additionally, NYSE Arca Rule 7.18-E(d)(2) provides that, with respect to Derivative Securities Products (which would include Exchange-Traded Fund Shares) listed on the Exchange for which an NAV is disseminated, if the Exchange becomes aware that the NAV is not being disseminated to all market participants at the same time, it will halt trading in the affected Derivative Securities Product until such time as the NAV is available to all market participants.⁵³ Additionally, trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in Exchange-Traded Fund Shares inadvisable. As NYSE Arca represents in the proposal, examples of such market conditions or reasons may be: (1) the extent to which certain information about the Exchange-Traded Fund Shares that is required to be disclosed under Rule 6c-11 of the 1940 Act is not being made available;⁵⁴ (2) if there is an interruption or disruption in the dissemination of an underlying index value, if applicable; (3) if there are major interruptions in securities trading in U.S. or global markets; or (4) in the presence of other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market.⁵⁵

B. Discontinuance of Quarterly Reports of Generically Listed Managed Fund Shares

In support of its proposal to adopt generic listing standards for Managed Fund Shares, the Exchange proposed to submit quarterly reports to the Commission disclosing certain

⁵¹ See Amendment No. 2, supra note 8, at 20.

⁵² See id.

⁵³ See id.

⁵⁴ See Amendment No. 2, supra note 8, at 12.

⁵⁵ See id.

information. These reports were designed to identify problems associated with generically listed Managed Fund Shares. In adopting Rule 6c-11 under the 1940 Act, the Commission largely eliminated prior distinctions between actively managed and index-based ETFs, and NYSE Arca does not submit quarterly reports regarding the shares of index-based ETFs that it generically lists. In addition, the Commission recognizes that, since the adoption of the Managed Fund Shares generic listing standards, the marketplace for ETFs has matured and developed, an increased number of actively managed ETFs have been listed and are trading on national securities exchanges, and market participants have become more familiar with such securities. Further, proposed NYSE Arca Rule 5.2-E(j)(8)(g) requires that the Exchange implement and maintain written surveillance procedures for Exchange-Traded Fund Shares.⁵⁶ The Exchange represents that it intends to utilize its existing surveillance procedures applicable to derivative products, which will include Exchange-Traded Fund Shares, to monitor trading in the Exchange-Traded Fund Shares, and will perform ongoing surveillance of Exchange-Traded Fund Shares listed on the Exchange to ensure compliance with Rule 6c-11 and the 1940 Act on an ongoing basis. The Commission notes that manipulation concerns are mitigated by a combination of the Exchange's surveillance procedures, NYSE Arca's ability to halt trading under proposed NYSE Arca Rule 5.2-E(j)(8),⁵⁷ and the Exchange's ability to commence delisting proceedings under

⁵⁶ Moreover, NYSE Arca Rule 8.600-E(d)(2)(C) requires that the Exchange implement and maintain written surveillance procedures for Managed Fund Shares.

⁵⁷ The Exchange states that it may consider all relevant factors in exercising its discretion to halt or suspend trading in a series of Exchange-Traded Fund Shares, and that it may halt trading due to market conditions that make trading in the Exchange-Traded Fund Shares inadvisable, including the following circumstances: (1) if the circuit breaker parameters in NYSE Arca Rule 7.12-E have been reached; (2) if there is an interruption or disruption in the dissemination of an underlying index value, if applicable, (3) if there are major interruptions in securities trading in U.S. or global markets; or (4) in the presence of other

proposed NYSE Arca Rule 5.2-E(j)(8)(e)(2). In light of these reasons, as well as the Commission's experience with the quarterly reports, the Commission believes that this proposal is consistent with Section 6(b)(5) of the Act, and it therefore finds that it is no longer necessary for NYSE Arca to continue to submit such quarterly reports.

C. Other Related Rule Changes

The Exchange also proposes non-substantive amendments to include Exchange-Traded Fund Shares in other Exchange rules. Specifically, the Exchange proposes to amend NYSE Arca Rule 5.3-E, concerning Corporate Governance and Disclosure Policies, and NYSE Arca Rule 5.3-E(e), concerning Shareholder/Annual Meetings, to add Exchange-Traded Fund Shares to the enumerated derivative and special purpose securities that are subject to the respective rules.⁵⁸ The Exchange states that the proposed addition of Exchange-Traded Fund Shares to the enumerated derivative and special purpose securities that are subject to the provisions of NYSE Arca Rule 5.3-E (Corporate Governance and Disclosure Policies) and NYSE Arca Rule 5.3-E(e) (Shareholder/Annual Meetings) would subject Exchange-Traded Fund Shares to the same requirements currently applicable to other 1940 Act-registered investment company securities (i.e., Investment Company Units, Managed Fund Shares, and Portfolio Depositary Receipts).⁵⁹ The Commission believes that these proposed changes simply incorporate proposed NYSE Arca Rule 5.2-E(j)(8) into the existing framework of the Exchange's rules, and therefore finds that such changes are consistent with Section 6(b)(5) of the Act.

unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market.

⁵⁸ Under the current version of these rules, Investment Company Units, Portfolio Depositary Receipts and Managed Fund Shares are exempted from the specified corporate governance requirements.

⁵⁹ See Amendment No. 2, supra note 8, at 19.

D. Exchange Representations

In support of this proposal, the Exchange has made the following representations:

- (1) Exchange-Traded Fund Shares will conform to the initial and continued listing criteria under proposed NYSE Arca Rule 5.2-E(j)(8) and will be subject to all Exchange rules applicable to equity trading.⁶⁰ With respect to Exchange-Traded Fund Shares, all of the Exchange member obligations relating to product description and prospectus delivery requirements will continue to apply in accordance with Exchange rules and federal securities laws, and the Exchange and FINRA will continue to monitor Exchange members for compliance with such requirements, which are not changing as a result of Rule 6c-11 under the 1940 Act.⁶¹
- (2) NYSE Arca will (a) monitor for compliance with the continued listing standards; (b) review the website of series of Exchange-Traded Fund Shares to ensure that the requirements of Rule 6c-11 are being met; and (c) employ intraday alerts that will notify Exchange personnel of unusual trading activity throughout the day that could be indicative of unusual conditions or circumstances that could be detrimental to the maintenance of a fair and orderly market.⁶²

⁶⁰ See id. at 11.

⁶¹ See id.

⁶² See id. at 13. NYSE Arca Rule 5.2-E(j)(8)(e) would require an issuer of Exchange-Traded Fund Shares to notify the Exchange that it is no longer eligible to operate in reliance on Rule 6c-11 or that it does not comply with the requirements of proposed NYSE Arca Rule 5.2-E(j)(8).

- (3) NYSE Arca will obtain a representation from the issuer of a series of Exchange-Traded Fund Shares that the NAV per share of such series will be calculated daily and will be made available to all market participants at the same time.⁶³
- (4) NYSE Arca's surveillance procedures are adequate to properly monitor the trading of the Exchange-Traded Fund Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.⁶⁴
- (5) The Exchange, or FINRA on behalf of the Exchange, will communicate as needed regarding trading in Exchange-Traded Fund Shares and certain of their applicable underlying components with other markets that are members of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. Additionally, FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities that may be held by a series of Exchange-Traded Fund Shares reported to TRACE. FINRA also can access data obtained from the EMMA system relating to municipal bond trading activity for surveillance purposes in connection with trading in a series of Exchange-Traded Fund Shares, to the extent that a series of Exchange-Traded Fund Shares holds municipal securities.⁶⁵

⁶³ See id. at 12.

⁶⁴ See id. at 19.

⁶⁵ See id. at 12-13.

- (6) The issuer of a series of Exchange-Traded Fund Shares will be required to comply with Rule 10A-3 under the Act for the initial and continued listing of Exchange-Traded Fund Shares, as provided under NYSE Arca Rule 5.3-E.⁶⁶

This approval order is based on all of the Exchange's representations, including those set forth above and in Amendment No. 2 to the proposed rule change. For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Sections 6(b)(1) and 6(b)(5) of the Act⁶⁷ and the rules and regulations thereunder applicable to a national securities exchange.

IV. Solicitation of Comments to the Proposed Rule Change, as Modified by Amendment No. 2

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 2 to the proposed rule change is consistent with the Exchange Act.

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. Please include File Number SR-NYSEArca-2019-81 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-2019-81. This file number should be included on the subject line if e-mail is used. To help the Commission process and review

⁶⁶ See *id.* at 13.

⁶⁷ 15 U.S.C. 78f(b)(1) and 15 U.S.C. 78f(b)(5), respectively.

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-2019-81, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 2, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 2 in the Federal Register. In Amendment No. 2, the Exchange (among other things): (1) expanded the circumstances in which it may halt trading in a series of Exchange-Traded Fund Shares; (2) clarified its undertakings with respect to ensuring compliance with the proposed generic listing standard; (3) specified that Exchange-Traded Fund Shares would be subject to rules governing Exchange member disclosure obligations; and (4) clarified the applicability of certain current listing rules in light of proposed NYSE Arca Rule 5.2-E(j)(8). These changes assisted the Commission in finding that the proposal is consistent with the Act.

Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,⁶⁸ to approve the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁶⁹ that the proposed rule change (SR-NYSEArca-2019-81), as modified by Amendment No. 2, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷⁰

J. Matthew DeLesDernier,

Assistant Secretary.

⁶⁸ 15 U.S.C. 78s(b)(2).

⁶⁹ Id.

⁷⁰ 17 CFR 200.30-3(a)(12).

