

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-84863; File No. SR-NYSEArca-2018-67)

December 19, 2018

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend NYSE Arca Rule 5.2-E(j)(6) Relating to Equity Index-Linked Securities Listing Standards Set Forth in NYSE Arca Rule 5.2-E(j)(6)(B)(I)

On September 10, 2018, 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 amend listing standards set forth in NYSE Arca Rule 5.2-E(j)(6)(B)(I) relating to criteria applicable to components of an index underlying an issue of Equity Index-Linked Securities. The proposed rule change was published for comment in the Federal Register on October 1, 2018.³

On November 13, 2018, 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 The Commission has received no comment letters on the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 84279 (Sept. 25, 2018), 83 FR 49437 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 84576, 83 FR 58315 (Nov. 19, 2018). The Commission designated December 30, 2018, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

This order institutes proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.

I. Summary of the Proposal⁷

NYSE Arca Rule 5.2-E(j)(6)(B)(I) sets forth the listing standards applicable to Equity Index-Linked Securities.⁸ The Exchange proposes to amend NYSE Arca Rule 5.2-E(j)(6)(B)(I) relating to criteria applicable to components of an index underlying an issue of Equity Index-Linked Securities, as described below.⁹

Proposed Amendments to NYSE Arca Rule 5.2-E(j)(6)(B)(I)(1)(b)(v)

The Exchange proposes to amend NYSE Arca Rule 5.2-E(j)(6)(B)(I)(1)(b)(v) to provide that all component securities of an index underlying an issue of Equity Index-Linked Securities

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ The Commission notes that additional aspects and information regarding the proposal can be found in the Notice. See Notice, supra note 3.

⁸ Equity Index-Linked Securities are securities that provide for the payment at maturity based on the performance of an underlying index or indexes of equity securities, securities of closed-end management investment companies registered under the Investment Company Act of 1940 (“1940 Act”), and/or Investment Company Units (as described in NYSE Arca Rule 5.2-E(j)(3)). In the proposal, the Exchange also refers to these securities as “Exchange-Traded Notes” or “ETNs.”

⁹ NYSE Arca Rule 5.2-E(j)(6)(B)(I)(1)(b)(v) provides that all component securities shall be either: (A) Securities (other than foreign country securities and American Depositary Receipts (“ADRs”)) that are (x) issued by a 1934 Act reporting company or by an investment company registered under the 1940 Act, which in each case is listed on a national securities exchange, and (y) an “NMS stock” (as defined in Rule 600 of SEC Regulation NMS); or (B) Foreign country securities or ADRs, provided that foreign country securities or foreign country securities underlying ADRs having their primary trading market outside the United States on foreign trading markets that are not members of the Intermarket Surveillance Group (“ISG”) or parties to comprehensive surveillance sharing agreements with the Exchange will not in the aggregate represent more than 50% of the dollar weight of the index, and provided further that: (i) the securities of any one such market do not represent more than 20% of the dollar weight of the index; and (ii) the securities of any two such markets do not represent more than 33% of the dollar weight of the index.

shall be either (1) U.S. Component Stocks (as described in NYSE Arca Rule 5.2-E(j)(3))¹⁰ that are listed on a national securities exchange and are NMS Stocks as defined in Rule 600 of Regulation NMS under the Exchange Act; or (2) Non-U.S. Component Stocks (as described in NYSE Arca Rule 5.2-E(j)(3))¹¹ that are listed and traded on an exchange that has last-sale reporting.¹² The proposed amendment, therefore, would delete from Rule 5.2-E(j)(6)(B)(I)(1)(b)(v) the requirement that foreign country securities or foreign country securities underlying ADRs in an index satisfy requirements that a specified percentage of the dollar weight of the index have primary trading markets that are members of ISG or primary trading markets that are parties to comprehensive surveillance sharing agreements with the Exchange.

According to the Exchange, the proposed amendment would eliminate a requirement for Equity Index-Linked Securities that is not applicable to Investment Company Units and Managed Fund Shares with respect to Non-U.S. Component Stock index components or holdings of Non-U.S. Component Stocks. The Exchange states that the amendment, therefore, would afford greater flexibility to ETN issuers to list securities that include foreign stocks and to better

¹⁰ NYSE Arca Rule 5.2-E(j)(3) provides that the term “US Component Stock” shall mean an equity security that is registered under Sections 12(b) or 12(g) of the Securities Exchange Act of 1934 or an American Depositary Receipt, the underlying equity security of which is registered under Sections 12(b) or 12(g) of the Securities Exchange Act of 1934.

¹¹ NYSE Arca Rule 5.2-E(j)(3) provides that the term “Non-US Component Stock” shall mean an equity security that is not registered under Sections 12(b) or 12(g) of the Securities Exchange Act of 1934 and that is issued by an entity that (a) is not organized, domiciled or incorporated in the United States, and (b) is an operating company (including Real Estate Investment Trusts (REITS) and income trusts, but excluding investment trusts, unit trusts, mutual funds, and derivatives).

¹² The text of proposed NYSE Arca Rule 5.2-E(j)(6)(B)(I)(1)(b)(v)(1) is comparable to the requirement for US Component Stocks in Commentary .01(a)(A)(5) to NYSE Arca Rule 5.2-E(j)(3). The text of proposed NYSE Arca Rule 5.2-E(j)(6)(B)(I)(1)(b)(v)(2) is comparable to the requirement for Non-US Component Stocks in Commentary .01(a)(B)(5) to NYSE Arca Rule 5.2-E(j)(3).

compete with issuers of Investment Company Units and Managed Fund Shares, which are not subject to this requirement.

Proposed Amendments to NYSE Arca Rule 5.2-E(j)(6)(B)(I)(1)(a)

The Exchange also proposes to amend NYSE Arca Rule 5.2-E(j)(6)(B)(I)(1)(a) by increasing the required minimum number of components in an index underlying Equity Index-Linked Securities that includes Non-U.S. Component Stocks.¹³ The Exchange proposes that an underlying index consisting only of U.S. Component Stocks (as described in Rule 5.2-E(j)(3)) that are listed on a national securities exchange and are NMS Stocks as defined in Rule 600 of Regulation NMS under the Exchange Act would be required to have at least ten (10) component securities; and an underlying index consisting of (a) only Non-U.S. Component Stocks (as described in Rule 5.2-E(j)(3)), or (b) both U.S. Component Stocks and Non-U.S. Component Stocks, would be required to have at least twenty (20) component securities. According to the Exchange, an increase in the required minimum number of components in an index that includes Non-U.S. Component Stocks would be comparable to the requirement applicable to equity indexes underlying series of Investment Company Units listed under Commentary .01 to NYSE Arca Rule 5.2-E(j)(3), and would provide for greater diversification among index components.¹⁴

¹³ NYSE Arca Rule 5.2-E(j)(6)(B)(I)(1)(a) provides that each underlying index is required to have at least ten (10) component securities; provided, however, that there shall be no minimum number of component securities if one or more issues of Derivative Securities Products (i.e., Investment Company Units (as described in Rule 5.2-E(j)(3)) and securities described in Section 2 of Rule 8) or Index-Linked Securities (as described in Rule 5.2-E(j)(6)), constitute, at least in part, component securities underlying an issue of Equity Index-Linked Securities.

¹⁴ See Commentary .01(a)(B)(4) to NYSE Arca Rule 5.2-E(j)(3). See also Commentary .01(a)(2)(D) to NYSE Arca Rule 8.600-E, which provides that, where the equity portion of the portfolio includes Non-U.S. Component Stocks, the equity portion of the portfolio shall include a minimum of 20 component stocks; provided, however, that there shall be no minimum number of component stocks if (i) one or more series of Derivative Securities Products or Index-Linked Securities constitute, at least in part, components

The Exchange reasons that the proposed amendments to the generic listing rules for Equity Index-Linked Securities should help ensure that index components of the applicable reference asset are adequately capitalized, sufficiently liquid, and diversified, and that these proposed requirements should significantly minimize the potential for manipulation. The Exchange believes the amendments are appropriate and in the public interest in that Equity Index-Linked Securities would continue to be subject to numerical criteria for index components underlying Equity Index-Linked Securities that are comparable in significant respects to the criteria for U.S. Component Stocks and Non-U.S. Component Stocks in Commentary .01 to NYSE Arca Rule 5.2-E(j)(3) for Investment Company Units and Commentary .01(a) to NYSE Arca Rule 8.600-E for Managed Fund Shares.¹⁵

II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2018-67 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁶ 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.

underlying a series of Managed Fund Shares, or (ii) one or more series of Derivative Securities Products or Index-Linked Securities account for 100% of the equity weight of the portfolio of a series of Managed Fund Shares.

¹⁵ Commentary .01 to NYSE Arca Rule 5.2-E(j)(3) and Commentary .01(a) to NYSE Arca Rule 8.600-E provide generic initial and continued listing criteria applicable to an equity index or portfolio underlying Investment Company Units and Managed Fund Shares, respectively.

¹⁶ 15 U.S.C. 78s(b)(2)(B).

Pursuant to Section 19(b)(2)(B) of the Act,¹⁷ the Commission is providing notice of the grounds for disapproval under consideration, as discussed below. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade," and "to protect investors and the public interest."¹⁸

Under the proposal, the Exchange would eliminate from NYSE Arca Rule 5.2-E (j)(6)(B)(I)(1)(b)(v) the requirement that foreign country securities or foreign country securities underlying ADRs in an index satisfy requirements that a specified percentage of the dollar weight of the index have primary trading markets that are members of ISG or primary trading markets that are parties to comprehensive surveillance sharing agreements with the Exchange. According to the Exchange, the proposed amendment would eliminate a requirement for Equity Index-Linked Securities that is not applicable to Investment Company Units and Managed Fund Shares with respect to Non-U.S. Component Stock index components or holdings of Non-U.S. Component Stocks. The Exchange asserts that the amendment to NYSE Arca Rule 5.2-E (j)(6)(B)(I)(1)(b)(v) would afford greater flexibility to ETN issuers to list securities that include foreign stocks and to better compete with issuers of Investment Company Units and Managed Fund Shares, which are not subject to this requirement. In making this assertion, the Exchange compares the listing standards of Equity Index-Linked Securities to the standards of Investment Company Units and Managed Fund Shares. Based on the differences between ETNs and Investment Company Units and Managed Fund Shares, what are commenters' views on the

¹⁷ Id.

¹⁸ 15 U.S.C. 78f(b)(5).

applicability of the Exchange's comparisons in justifying the proposed amendments? Based on the unique structure of ETNs, which, unlike Investment Company Units and Managed Fund Shares, are not governed by the requirements of the 1940 Act and the rules thereunder, what are commenters' views on the Exchange's proposal to eliminate the requirement that a minimum percentage of component foreign country securities or foreign country securities underlying ADRs in an index be traded primarily on markets that are members of ISG or on markets that are parties to comprehensive surveillance sharing agreements with the Exchange? In light of the proposed amendment to NYSE Arca Rule 5.2-E (j)(6)(B)(I)(1)(b)(v) that would eliminate the requirement that a minimum percentage of component foreign country securities or foreign country securities underlying ADRs in an index be traded primarily on markets that are members of ISG or on markets that are parties to comprehensive surveillance sharing agreements with the Exchange, what are commenters' views about whether the Exchange has met its burden in demonstrating that the proposal is consistent with Section 6(b)(5) of the Act, which requires the rules of the Exchange be designed to, among other things, prevent fraudulent and manipulative acts and practices? The Commission requests any comment, data, or analysis that commenters think may be relevant to the Commission's consideration of the Exchange's proposal.

III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral

presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.¹⁹

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice,²⁰ 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. Please include File Number SR-NYSEArca-2018-67 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NYSEArca-2018-67. This file number should be included on the subject line if e-mail is used. To help the Commission process and review

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

²⁰ See Notice, supra note 3.

your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2018-67 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.²¹

Brent J. Fields
Secretary

²¹ 17 CFR 200.30-3(a)(57).