

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-89608; File No. SR-NYSEArca-2019-77)

August 19, 2020

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Shares of the AdvisorShares Pure US Cannabis ETF under NYSE Arca Rule 8.600-E

I. Introduction

On December 13, 2019, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares (“Shares”) of the AdvisorShares Pure US Cannabis ETF (“Fund”) under NYSE Arca Rule 8.600-E (“Managed Fund Shares”). The proposed rule change was published for comment in the Federal Register on December 26, 2019.<sup>3</sup> On January 28, 2020, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.<sup>5</sup> On March 13, 2020, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act<sup>6</sup> to determine

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

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

<sup>3</sup> See Securities Exchange Act Release No. 87791 (December 18, 2019), 84 FR 71057.

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

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

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

whether to approve or disapprove the proposed rule change.<sup>7</sup> On June 12, 2020, pursuant to Section 19(b)(2) of the Act,<sup>8</sup> the Commission designated a longer period within which to issue an order approving or disapproving the proposed rule change.<sup>9</sup> On July 7, 2020, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>10</sup> The Commission has received no comment letters on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change, as Modified by Amendment No. 1<sup>11</sup>

The Exchange proposes to list and trade Shares of the Fund under Commentary .01 to NYSE Arca Rule 8.600-E, which governs the listing and trading of Managed Fund Shares on the Exchange. AdvisorShares Investments, LLC (“Adviser”) is the investment adviser for the

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<sup>7</sup> See Securities Exchange Act Release No. 88378, 85 FR 15834 (March 19, 2020).

<sup>8</sup> 15 U.S.C. 78s(b)(2).

<sup>9</sup> See Securities Exchange Act Release No. 89057, 85 FR 36910 (June 18, 2020). The Commission designated August 22, 2020, as the date by which the Commission shall either approve or disapprove the proposed rule change.

<sup>10</sup> In Amendment No. 1, the Exchange (i) represented that the Fund has obtained an opinion of counsel that provides that (a) the Fund and its shareholders will not violate the Controlled Substances Act, 21 U.S.C. § 801, et seq., (“Controlled Substances Act”) or the Money Laundering Control Act, 18 U.S.C. § 1956, et seq., for the Fund’s purchase of securities issued by Cannabis Companies (as defined herein) which participate in the cannabis industry in full compliance with state law and (b) the Fund’s execution of a cash-settled total return swap, under certain circumstances, would not subject the Fund and its shareholders to regulatory liability should a court hold that the total return swap violates the Act or the Controlled Substances Act; and (ii) made other conforming technical changes. Because Amendment No. 1 to the proposed rule change does not materially alter the substance of the proposed rule change and makes conforming and technical changes, Amendment No. 1 is not subject to notice and comment. Amendment No. 1 is available on the Commission’s website at: <https://www.sec.gov/comments/sr-nysearca-2019-77/srnysearca201977-7394645-218996.pdf>.

<sup>11</sup> Additional information regarding the Shares and the Fund can be found in Amendment No. 1, supra note 10, and the Registration Statement, infra note 13.

Fund.<sup>12</sup> AdvisorShares Trust (“Trust”) and the Adviser manage the Fund’s investments, subject to the oversight and supervision by the Board of Trustees of the Trust.<sup>13</sup> Foreside Fund Services, LLC, a registered broker-dealer, will act as the distributor for the Fund’s Shares. The Bank of New York Mellon will serve as the administrator, custodian, and transfer agent for the Fund.

A. Principal Investments of the Fund

According to the Exchange, the investment objective of the Fund is to seek long-term capital appreciation. The Fund will seek to achieve its investment objective by investing, under normal market conditions,<sup>14</sup> at least 80% of its net assets in securities of companies that derive at least 50% of their net revenue from the marijuana and hemp business in the United States (“Cannabis Companies”) and in derivatives that have economic characteristics similar to such securities.<sup>15</sup>

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<sup>12</sup> The Exchange represents that the Adviser is not registered as a broker-dealer, and the Adviser is not affiliated with any broker-dealers. In the event (a) the Adviser becomes registered as a broker-dealer or newly affiliated with a broker-dealer, or (b) any new adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it will implement and maintain a “fire wall” with respect to its relevant personnel or broker-dealer affiliate regarding access to information concerning the composition of, and/or changes to, the portfolio, and will be subject to procedures, each designed to prevent the use and dissemination of material non-public information regarding the portfolio.

<sup>13</sup> The Trust is registered under the 1940 Act. On August 19, 2019, the Trust filed with the Commission Post-Effective Amendment No. 145 to the Trust’s registration statement on Form N-1A under the Securities Act of 1933 (15 U.S.C. 77a) and under the 1940 Act relating to the Fund (File Nos. 333-157876 and 811-22110) (“Registration Statement”). In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. See Investment Company Act Release No. 29291 (May 28, 2010) (File No. 812-13677).

<sup>14</sup> The term “normal market conditions” is defined in NYSE Arca Rule 8.600-E(c)(5).

<sup>15</sup> The Fund’s investments in derivatives will include investments in both listed derivatives and over-the-counter (“OTC”) derivatives, as those terms are defined in Commentary .01(d) and (e) to NYSE Arca Rule 8.600-E.

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

According to the Exchange, all of the Fund's investments, including derivatives instruments, would be made in accordance with all applicable laws, including U.S. federal and state laws.<sup>16</sup> The Fund will concentrate at least 25% of its investments in the pharmaceuticals, biotechnology and life sciences industry group within the health care sector.

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

The Fund may invest in the following types of U.S. and foreign exchange-listed equity securities: common stock; preferred stock; warrants; Real Estate Investment Trusts (REITs); and rights. The Fund may also invest in U.S. exchange-listed exchange-traded funds ("ETFs")<sup>17</sup> and in U.S. exchange-listed closed-end funds.

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<sup>16</sup> The Fund filed an opinion of counsel on July 1, 2020 as an exhibit to the Registration Statement. See supra notes 10 and 13.

<sup>17</sup> For purposes of this filing, the term "ETFs" includes Investment Company Units (as described in NYSE Arca Rule 5.2-E(j)(3)); Portfolio Depositary Receipts (as described in NYSE Arca Rule 8.100-E); and Managed Fund Shares (as described in NYSE Arca Rule 8.600-E). All ETFs will be listed and traded in the U.S. on a national securities exchange. While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged (e.g., 2X, -2X, 3X or -3X) ETFs.

The Fund may hold cash and cash equivalents.<sup>18</sup>

The Fund may hold OTC total return swaps on U.S. and foreign exchange-listed equity securities.

B. Other Investments of the Fund

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

C. Investment Restrictions

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

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

D. Application of Generic Listing Requirements

The Exchange is submitting the proposed rule change because the portfolio for the Fund will not meet all of the "generic" listing requirements of Commentary .01 to NYSE Arca Rule 8.600-E applicable to the listing of Managed Fund Shares. The Fund's portfolio will meet all such requirements except for those set forth in Commentary .01(e).<sup>19</sup> Specifically, the Exchange

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<sup>18</sup> For purposes of this filing, "cash equivalents" are the short-term instruments enumerated in Commentary .01(c) to NYSE Arca Rule 8.600-E.

<sup>19</sup> Commentary .01(e) to NYSE Arca Rule 8.600-E provides that a portfolio may hold OTC derivatives, including forwards, options and swaps on commodities, currencies and financial instruments (e.g., stocks, fixed income, interest rates, and volatility) or a basket or index of any of the foregoing; however, on both an initial and continuing basis, no more than 20% of the assets in the portfolio may be invested in OTC derivatives. For

proposes that the Fund's investments in OTC total return swaps on U.S. and foreign exchange-listed equity securities may exceed the 20% limit on investments in OTC derivatives set forth in Commentary .01(e). The Exchange proposes that up to 60% of the Fund's assets (calculated as the aggregate gross notional value) may be invested in OTC total return swaps on U.S. and foreign exchange-listed equity securities.<sup>20</sup> The only OTC derivatives that the Fund may invest in are OTC total return swaps on U.S. and foreign exchange-listed equity securities. Price information relating to OTC swaps will be available from major market data vendors. Other than Commentary .01(e), the Shares of the Fund will conform to the initial and continued listing criteria under NYSE Arca Rule 8.600-E and will meet all other requirements of NYSE Arca Rule 8.600-E and Commentary .01 thereto.

### III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>21</sup> In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act,<sup>22</sup> 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

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purposes of calculating this limitation, a portfolio's investment in OTC derivatives will be calculated as the aggregate gross notional value of the OTC derivatives.

<sup>20</sup> The Exchange represents that the Adviser monitors counterparty credit risk exposure (including for OTC derivatives) and evaluates counterparty credit quality on a continuous basis.

<sup>21</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>22</sup> 15 U.S.C. 78f(b)(5).

impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

As discussed above, the Exchange proposes that the Fund may invest up to 60% of its assets (calculated as the aggregate gross notional value) in OTC derivatives. The only OTC derivatives that the Fund may invest in are OTC total return swaps on U.S. and foreign exchange-listed equity securities, so the underlying securities are trading on transparent and regulated markets. In addition, the Fund will disclose on its website information regarding the Disclosed Portfolio required under NYSE Arca Rule 8.600-E(c)(2) to the extent applicable and such website information will be publicly available at no charge.<sup>23</sup> Other than Commentary .01(e), the Shares of the Fund will conform to the initial and continued listing criteria under NYSE Arca Rule 8.600-E and will meet all other requirements of NYSE Arca Rule 8.600-E and Commentary .01 thereto. All Fund investments, including derivative instruments (i.e., OTC total return swaps on U.S. and foreign exchange-listed equity securities), will be made in accordance with all applicable laws, including U.S. federal and state laws.

In evaluating these aspects of the proposal, the Commission believes that the proposal is reasonably designed to mitigate the Shares' susceptibility to manipulation because (i) the investments of the Fund will be transparent in that they are required to be disclosed daily and specifically will include information regarding the Fund's investments in OTC derivatives; (ii) the instruments underlying the Fund's OTC derivative investments will be traded on transparent and regulated markets, as the only OTC derivatives that the Fund may invest in are total return swaps on U.S. and foreign exchange-listed equity securities; and (iii) the Fund's investments otherwise are consistent with the Exchange's generic listing standards. In addition, the

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<sup>23</sup> See Amendment No. 1, supra note 10, at 12.

Commission believes that the proposal is consistent with the listing of other series of Managed Fund Shares that have been approved by the Commission.<sup>24</sup>

Pursuant to Commentary .01 to NYSE Arca Rule 8.600-E, all statements or representations made in the filing regarding (a) the description of the portfolio or reference asset, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange listing rules specified in the filing shall constitute continued listing requirements for listing the Shares on the Exchange. In addition, the issuer must notify the Exchange of any failure by the Fund to comply with the continued listing requirements. Pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor<sup>25</sup> for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5-E(m).

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<sup>24</sup> See, e.g., Securities Exchange Act Release No. 82080 (November 15, 2017), 82 FR 55449 (November 21, 2017) (NYSEArca-2017-86) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, To List and Trade Shares of the JPMorgan Managed Futures ETF Under NYSE Arca Rule 8.600-E); Securities Exchange Act Release No. 82492 (January 12, 2018), 83 FR 2850 (January 19, 2018) (SR-NYSEArca-2017-87) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 6, To List and Trade Shares of the JPMorgan Long/Short ETF Under NYSE Arca Rule 8.600-E).

<sup>25</sup> The Commission notes that certain proposals for the listing and trading of exchange-traded products include a representation that the exchange will “surveil” for compliance with the continued listing requirements. See, e.g., Securities Exchange Act Release No. 77499 (April 1, 2016), 81 FR 20428, 20432 (April 7, 2016) (SR-BATS-2016-04). In the context of this representation, it is the Commission’s view that “monitor” and “surveil” both mean ongoing oversight of compliance with the continued listing requirements. Therefore, the Commission does not view “monitor” as a more or less stringent obligation than “surveil” with respect to the continued listing requirements.



Accordingly, for the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act<sup>26</sup> and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>27</sup> that the proposed rule change (SR-NYSEArca-2019-77), as modified by Amendment No. 1, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>28</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>26</sup> 15 U.S.C. 78f(b)(5).

<sup>27</sup> Id.

<sup>28</sup> 17 CFR 200.30-3(a)(12).