

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-90528; File No. SR-NYSEArca-2020-80)

November 30, 2020

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of Alger Mid Cap 40 ETF and Alger 25 ETF under Rule 8.900-E

I. Introduction

On September 1, 2020, 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 Alger Mid Cap 40 ETF and Alger 25 ETF (individually, “Fund,” and collectively, “Funds”) under NYSE Arca Rule 8.900-E (Managed Portfolio Shares). The proposed rule change was published for comment in the Federal Register on September 21, 2020.<sup>3</sup>

On October 7, 2020, NYSE Arca filed Amendment No. 1 to the proposed rule change.<sup>4</sup> On October 29, 2020, pursuant to Section 19(b)(2) of the Act,<sup>5</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 disapprove the proposed rule change.<sup>6</sup>

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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. 89869 (September 15, 2020), 85 FR 59354.

<sup>4</sup> Amendment No. 1, which amended and replaced the proposed rule change in its entirety, is available on the Commission’s website at: <https://www.sec.gov/comments/sr-nysearca-2020-80/srnysearca202080.htm>.

<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>6</sup> See Securities Exchange Act Release No. 90286, 85 FR 70216 (November 4, 2020).

On November 5, 2020, NYSE Arca filed Amendment No. 2 to the proposed rule change.<sup>7</sup> The Commission has received no comments on the proposal. This order grants approval of the proposed rule change, as modified by Amendment No. 2.

II. The Exchange’s Description of the Proposal, as Modified by Amendment No. 2<sup>8</sup>

NYSE Arca Rule 8.900-E(b)(1) requires the Exchange to file separate proposals under Section 19(b) of the Act before listing and trading any series of Managed Portfolio Shares on the Exchange. Accordingly, the Exchange has submitted this proposal to list and trade the Shares of the Funds. The Shares will be issued by The Alger ETF Trust (“Trust”), a business trust organized under the laws of the state of Massachusetts and registered with the Commission as an open-end management investment company.<sup>9</sup> The investment adviser to each Fund will be Fred Alger Management, LLC (“Adviser”), and Fred Alger & Company, LLC will serve as the distributor of each of the Fund’s Shares.

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<sup>7</sup> Amendment No. 2, which amended and replaced the proposed rule change, as modified by Amendment No. 1, in its entirety, is available on the Commission’s website at: <https://www.sec.gov/comments/sr-nysearca-2020-80/srnysearca202080.htm>.

<sup>8</sup> Additional information regarding the Funds, the Trust (defined *infra*), and the Shares can be found in Amendment No. 2, *id.*, and the Registration Statement, *infra* note 9.

<sup>9</sup> The Trust is registered under the Investment Company Act of 1940 (“1940 Act”). On August 17, 2020, the Trust filed a registration statement on Form N-1A under the Securities Act of 1933 and the 1940 Act for the Funds (File No. 811-23603) (“Registration Statement”). The Commission issued an order granting exemptive relief to the Trust (“Exemptive Order”) under the 1940 Act on May 19, 2020 (Investment Company Act Release No. 33869) in response to the Trust’s application (“Exemptive Application”) for exemptive relief (File No. 812-15117).

A. Description of the Funds

Each Fund's holdings will conform to the permissible investments as set forth in the Exemptive Application and Exemptive Order and the holdings will be consistent with all requirements in the Exemptive Application and Exemptive Order.<sup>10</sup>

Alger Mid Cap 40 ETF

The Fund's primary objective is to seek long-term capital appreciation. The Fund will primarily invest in equity securities listed on U.S. exchanges, including common or preferred stocks, of mid-cap growth companies. The Fund will generally own approximately 40 holdings.

Alger 25 ETF

The Fund's primary objective is to seek long-term capital appreciation. The Fund will primarily invest in equity securities of growth companies of any market capitalization listed on U.S. exchanges, including common or preferred stocks. The Fund will generally own approximately 25 holdings.

B. The Funds' Investment Restrictions

Each Fund's investments, including derivatives, will be consistent with its investment objective and will not be used to enhance leverage (although certain derivatives and other investments may result in leverage). That is, for each Fund, the Fund's investments will not be

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<sup>10</sup> Pursuant to the Exemptive Order, the only permissible investments for a Fund are the following that trade on a U.S. exchange contemporaneously with Shares of a Fund: exchange-traded funds ("ETFs"), exchange-traded notes, exchange-listed common stocks, exchange-traded American Depositary Receipts, exchange-traded real estate investment trusts, exchange-traded commodity pools, exchange-traded metals trusts, exchange-traded currency trusts and exchange-traded futures, as well as cash and cash equivalents (short-term U.S. Treasury securities, government money market funds, and repurchase agreements).

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).<sup>11</sup>

### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 2, to list and trade the Shares is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>12</sup> 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,<sup>13</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 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.

For each series, the Exchange will establish a minimum number of Shares required to be outstanding at the time of commencement of trading on the Exchange.<sup>14</sup>

The Adviser is not registered as a broker-dealer but is affiliated with a broker-dealer.<sup>15</sup> The Adviser has implemented and will maintain a "fire wall" with respect to its broker-dealer affiliate regarding access to information concerning the composition of, and changes to, a Fund's

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<sup>11</sup> Each Fund's broad-based securities benchmark index will be identified in a future amendment to the Registration Statement following that Fund's first full calendar year of performance.

<sup>12</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>13</sup> 15 U.S.C. 78f(b)(5).

<sup>14</sup> See NYSE Arca Rule 8.900-E(d)(1)(A).

<sup>15</sup> See Amendment No. 2, supra note 7, at 6.

portfolio and Creation Basket.<sup>16</sup> Any person related to the Adviser or the Trust who makes decisions pertaining to a Fund’s portfolio composition or that has access to information regarding a Fund’s portfolio or changes thereto or the Creation Basket will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding such portfolio or changes thereto and the Creation Basket.<sup>17</sup> Further, any person or entity, including an AP Representative,<sup>18</sup> custodian, Reporting Authority, distributor, or administrator, who has access to information regarding the Fund’s portfolio composition or changes thereto or its Creation Basket, must be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the applicable Fund portfolio or changes thereto or the Creation Basket.<sup>19</sup> Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity must erect and maintain a “fire wall” between the person or entity and the broker-dealer with respect to access to information concerning the composition of and/or changes to such Fund’s portfolio or Creation Basket.<sup>20</sup>

The Exchange states that trading in the Shares will be subject to the Exchange’s surveillance procedures for derivative products, and that its surveillance procedures are adequate

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<sup>16</sup> See id. See also NYSE Arca Rule 8.900-E(c)(5) (defining “Creation Basket”).

<sup>17</sup> See Amendment No. 2, supra note 7, at 6. Furthermore, the Exchange represents that in the event that (a) the Adviser becomes registered as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, the Adviser will implement and maintain a fire wall with respect to personnel of the broker-dealer or broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio and/or Creation Basket. See id. at 6.

<sup>18</sup> See NYSE Arca Rule 8.900-E(c)(5) (defining “AP Representative”).

<sup>19</sup> See NYSE Arca Rule 8.900-E(b)(5).

<sup>20</sup> See id.

to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws.<sup>21</sup> NYSE Arca Rule 8.900-E(b)(3) requires each Fund’s investment adviser to, upon request by the Exchange, or the Financial Industry Regulatory Authority (“FINRA”) on behalf of the Exchange, to make available to the daily portfolio holdings of each series of Managed Portfolio Shares. The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees.<sup>22</sup> The Commission notes that, similarly, FINRA Rule 9910(d) generally prohibits FINRA employees from disseminating or disclosing, for a purpose unnecessary to the performance of FINRA job responsibilities any nonpublic information obtained in the course of his or her employment.

The Commission also finds that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Act,<sup>23</sup> which sets forth Congress’s finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. The Commission believes that the proposal is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading in the Shares when a reasonable degree of certain pricing transparency cannot be assured. As such, the Commission believes the proposal is reasonably designed to maintain a fair and orderly market for trading the Shares.

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<sup>21</sup> See Amendment No. 2, *supra* note 7, at 15.

<sup>22</sup> See *id.*

<sup>23</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

Specifically, as required by NYSE Arca Rule 8.900-E(d)(1)(B), the Exchange will obtain a representation from the issuer that the net asset value (“NAV”) per Share of each Fund will be calculated daily and will be made available to all market participants at the same time.<sup>24</sup> Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers’ computer screens and other electronic services.<sup>25</sup> Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association high-speed line.<sup>26</sup> In addition, the Verified Intraday Indicative Value (“VIIV”), as defined in NYSE Arca Rule 8.900-E(c)(2),<sup>27</sup> will be widely disseminated by the Reporting Authority and/or one or more major market data vendors in one second intervals during the Exchange’s Core Trading Session.<sup>28</sup> Moreover, the Funds’ website will include a form of the prospectus for each Fund that may be downloaded. The Funds’ website will include additional quantitative information updated on a daily basis, including, for each Fund, the prior

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<sup>24</sup> See Amendment No. 2, supra note 7, at 19.

<sup>25</sup> See id. at 12.

<sup>26</sup> See id.

<sup>27</sup> NYSE Arca Rule 8.900-E(c)(2) defines the term “Verified Intraday Indicative Value” as the indicative value of a Managed Portfolio Share based on all of the holdings of a series of Managed Portfolio Shares as of the close of business on the prior business day and, for corporate actions, based on the applicable holdings as of the opening of business on the current business day, priced and disseminated in one second intervals during the Core Trading Session by the Reporting Authority. NYSE Arca Rule 8.900-E(c)(8) defines the term “Reporting Authority” with respect to a particular series of Managed Portfolio Shares as the Exchange, an institution, or a reporting service designated by the Exchange or by the exchange that lists a particular series of Managed Portfolio 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, the NAV, the VIIV, or other information relating to the issuance, redemption, or trading of Managed Portfolio Shares. A series of Managed Portfolio Shares may have more than one Reporting Authority, each having different functions.

<sup>28</sup> See NYSE Arca Rule 8.900-E(d)(2)(A). See Amendment No. 2, supra note 7, at 12.

Business Day's NAV, market closing price or mid-point of the bid/ask spread at the time of calculation of such NAV ("Bid/Ask Price"),<sup>29</sup> and a calculation of the premium and discount of the market closing price or Bid/Ask Price against the NAV. The website and information will be publicly available at no charge.<sup>30</sup>

The Commission also notes that the Exchange's rules regarding trading halts help to ensure the maintenance of fair and orderly markets for the Shares. Specifically, the Exchange may consider all relevant factors in exercising its discretion to halt trading in the Shares, and will halt trading in the Shares under the conditions specified in NYSE Arca Rule 7.12-E. Trading in the Shares will be subject to NYSE Arca Rule 8.900-E(d)(2)(C), which sets forth circumstances under which trading in the Shares will be halted. Specifically, NYSE Arca Rule 8.900-E(d)(2)(C)(i) provides that the Exchange may consider all relevant factors in exercising its discretion to halt trading in a series of Managed Portfolio Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the series of Managed Portfolio Shares inadvisable. These may include: (a) the extent to which trading is not occurring in the securities and/or the financial instruments composing the portfolio; or (b) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.<sup>31</sup> NYSE Arca Rule 8.900-E(d)(2)(C)(ii) provides that, if the

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<sup>29</sup> The Bid/Ask Price of a Fund's Shares will be the mid-point between the current national best bid and offer at the time of calculation of such Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Funds or their service providers. See Amendment No. 2, supra note 7, at 12, n. 7.

<sup>30</sup> See id.

<sup>31</sup> The Exemptive Application provides that the Investment Company or their agent will request that the Exchange halt trading in the applicable series of Managed Portfolio Shares where: (i) the intraday indicative values calculated by the calculation engines differ by more than 25 basis points for 60 seconds in connection with pricing of the VIIV; or (ii) holdings representing 10% or more of a series of Managed Portfolio Shares' portfolio have become subject to a trading halt or otherwise do not have readily available



Exchange becomes aware that: (i) the VIIV of a series of Managed Portfolio Shares is not being calculated or disseminated in one second intervals, as required; (ii) the NAV with respect to a series of Managed Portfolio Shares is not disseminated to all market participants at the same time; (iii) the holdings of a series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act; or (iv) such holdings are not made available to all market participants at the same time (except as otherwise permitted under the applicable Exemptive Order or no-action relief granted by the Commission or Commission staff to the Investment Company with respect to the series of Managed Portfolio Shares), it will halt trading in such series until such time as the VIIV, the NAV, or the holdings are available, as required.

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

- (1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Rule 8.900-E.
- (2) The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities.<sup>32</sup>

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market quotations. Any such requests will be one of many factors considered in order to determine whether to halt trading in a series of Managed Portfolio Shares, and the Exchange retains sole discretion in determining whether trading should be halted. As provided in the Exemptive Application, each series of Managed Portfolio Shares would employ a pricing verification agent to continuously compare two intraday indicative values during regular trading hours in order to ensure the accuracy of the VIIV. See id. at 14, n. 21.

<sup>32</sup> See Amendment No. 2, supra note 7, at 14.

- (3) Prior to the commencement of trading, the Exchange will inform its members in an Information Bulletin (“Bulletin”) of the special characteristics and risks associated with trading the Shares.<sup>33</sup>
- (4) FINRA, on behalf of the Exchange, or the regulatory staff of the Exchange, or both, will communicate as needed regarding trading in the Shares and certain exchange-traded instruments with other markets and other entities that are members of the Intermarket Surveillance Group (“ISG”), and FINRA, on behalf of the Exchange, or the regulatory staff of the Exchange, or both, may obtain trading information regarding trading such securities from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and certain exchange-traded instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.
- (5) The Exchange represents that, for initial and/or continued listing, each Fund will be in compliance with Rule 10A-3 under the Act.<sup>34</sup>

This approval order is based on all of the Exchange’s statements and representations set forth above and in Amendment No. 2 to the proposed rule change. Additionally, the Exchange states that all statements and representations made in its proposal regarding (a) the description of the

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<sup>33</sup> The Bulletin will discuss the following: (1) the procedures for purchases and redemptions of Shares; (2) NYSE Arca Rule 9.2-E(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) how information regarding the VIIV is disseminated; (4) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; (5) trading information; and (6) that the portfolio holdings of the Shares are not disclosed on a daily basis. See id. at 15.

<sup>34</sup> See id. at 7, n. 7.

portfolio or reference assets, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules shall constitute continued listing requirements for listing the Shares on the Exchange, as provided under NYSE Arca Rule 8.900-E(b)(1). The issuer of the Shares will be required to represent to the Exchange that it will advise the Exchange of any failure by a Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will surveil for compliance with the continued listing requirements. If a Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5-E(m).<sup>35</sup>

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Act<sup>36</sup> and Section 11A(a)(1)(C)(iii) of the Act<sup>37</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>38</sup> that the

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<sup>35</sup> See id. at 15.

<sup>36</sup> 15 U.S.C. 78f(b)(5).

<sup>37</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

<sup>38</sup> 15 U.S.C. 78s(b)(2).

proposed rule change (SR-NYSEArca-2020-80), as modified by Amendment No. 2, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>39</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>39</sup> 17 CFR 200.30-3(a)(12).