

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-90835; File No. SR-NYSEArca-2020-84)

December 31, 2020

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, to Amend NYSE Arca Rule 8.900-E to Adopt Generic Listing Standards for Managed Portfolio Shares

I. Introduction

On September 22, 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” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend NYSE Arca Rule 8.900-E to adopt generic listing standards for Managed Portfolio Shares. On October 2, 2020, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on October 13, 2020.³ On November 13, 2020, 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 comments on the proposed rule change. The Commission is publishing this

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 90104 (October 7, 2020), 85 FR 64598 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 90418, 85 FR 73812 (November 19, 2020). The Commission designated January 11, 2021, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

order to solicit comments on the proposed rule change from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change

The Exchange adopted listing standards for Managed Portfolio Shares as set forth in NYSE Arca Rule 8.900-E.⁷ A Managed Portfolio Share is a security that (a) represents an interest in an investment company (“Investment Company”), registered under the Investment Company Act of 1940 (“1940 Act”) organized as an open-end management investment company, that invests in a portfolio of securities selected by the Investment Company’s investment adviser consistent with the Investment Company’s investment objectives and policies; (b) is issued in a Creation Unit,⁸ or multiples thereof, in return for a designated portfolio of instruments (and/or an amount of cash) with a value equal to the next determined net asset value and delivered to the Authorized Participant (as defined in the Investment Company’s Form N-1A filed with the Commission) through a Confidential Account;⁹ (c) when aggregated into a

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 88648 (April 15, 2020), 85 FR 22200 (April 21, 2020) (SR-NYSEArca-2020-32) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt a New NYSE Arca Rule 8.900-E).

⁸ NYSE Arca Rule 8.900-E(c)(6) defines the term “Creation Unit” as a specified minimum number of Managed Portfolio Shares issued by an Investment Company at the request of an Authorized Participant in return for a designated portfolio of instruments and/or cash.

⁹ NYSE Arca Rule 8.900-E(c)(4) defines the term “Confidential Account” as “an account owned by an Authorized Participant and held with an AP Representative on behalf of the Authorized Participant. The account will be established and governed by contractual agreement between the AP Representative and the Authorized Participant solely for the purposes of creation and redemption, while keeping confidential the Creation Basket constituents of each series of Managed Portfolio Shares, including from the Authorized Participant. The books and records of the Confidential Account will be maintained by the AP Representative on behalf of the Authorized Participant.” NYSE Arca Rule 8.900-E(c)(3) defines the term “AP Representative” as “an unaffiliated broker-dealer, with

Redemption Unit,¹⁰ or multiples thereof, may be redeemed for a designated portfolio of instruments (and/or an amount of cash) with a value equal to the next determined net asset value delivered to the Confidential Account for the benefit of the Authorized Participant; and (d) the portfolio holdings for which are disclosed within at least 60 days following the end of every fiscal quarter.¹¹ Further, each series of Managed Portfolio Shares widely disseminates a Verified Intraday Indicative Value or “VIIV”¹² in one second intervals during the Core Trading Session.¹³

NYSE Arca Rule 8.900-E(b)(1) currently requires that the Exchange submit a proposed rule change with the Commission to list and trade each new series of Managed Portfolio Shares.¹⁴ The Exchange proposes to amend NYSE Arca Rule 8.900-E to adopt “generic” listing

which an Authorized Participant has signed an agreement to establish a Confidential Account for the benefit of such Authorized Participant, that will deliver or receive, on behalf of the Authorized Participant, all consideration to or from the Investment Company in a creation or redemption. An AP Representative will not be permitted to disclose the Creation Basket to any person, including the Authorized Participants.”

¹⁰ NYSE Arca Rule 8.900-E(c)(7) defines the term “Redemption Unit” as a specified minimum number of Managed Portfolio Shares that may be redeemed to an Investment Company at the request of an Authorized Participant in return for a portfolio of instruments and/or cash.

¹¹ See NYSE Arca Rule 8.900-E(c)(1).

¹² NYSE Arca Rule 8.900-E(c)(2) defines the term “Verified Intraday Indicative Value” (“VIIV”) 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.

¹³ NYSE Arca Rule 8.900-E(d)(2)(A) requires for continued listing that the VIIV for a series of Managed Portfolio Shares be widely disseminated by the Reporting Authority and/or by one or more major market data vendors in one second intervals during the Core Trading Session, and be disseminated to all market participants at the same time.

¹⁴ The Exchange notes that the Commission has approved listing and trading of series of Managed Portfolio Shares on the Exchange under NYSE Arca Rule 8.900-E and on another national securities exchange under substantially equivalent listing rules. See Securities Exchange Act Release Nos. 89633 (August 25, 2020), 85 FR 53868 (August 31, 2020) (SR-NYSEArca-2020-48) (Order Approving a Proposed Rule Change, as

standards that would allow the Exchange to approve the listing and trading (including pursuant to unlisted trading privileges) of series of Managed Portfolio Shares that satisfy those generic listing standards pursuant to Rule 19b-4(e) under the Act.¹⁵

A. Proposed Amendments to Rule 8.900-E

The Exchange proposes to amend Rule 8.900-E(b)(1) to state that the Exchange may approve Managed Portfolio Shares for listing and/or trading (including pursuant to unlisted trading privileges) pursuant to Rule 19b-4(e) under the Act. The Exchange would also specify within proposed Rule 8.900-E(b)(1) that components of a series of Managed Portfolio Shares listed pursuant to Rule 19b-4(e) shall satisfy the criteria set forth in Rule 8.900-E and

Modified by Amendment No. 1, to List and Trade Shares of Gabelli ETFs under Rule 8.900-E (“Gabelli Approval Order”); 88247 (February 20, 2020), 85 FR 11137 (February 26, 2020) (SR-CboeBZX-2019-102) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3 Thereto, to List and Trade Shares of the ClearBridge Focus Value ETF under BZX Rule 14.11(k)) (“ClearBridge Approval Order”); 88175 (February 12, 2020), 85 FR 9494 (February 19, 2020) (SR-CboeBZX-2019-057) (Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2 Thereto, to List and Trade Shares of the American Century Focused Dynamic Growth ETF and American Century Focused Large Cap Value ETF under BZX Rule 14.11(k)) (“American Century Approval Order” and, together with the Gabelli Approval Order and the ClearBridge Approval Order, “Approval Orders”).

¹⁵ 17 CFR 240.19b-4(e). Rule 19b-4(e)(1) under the Act 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, if the Commission has approved, pursuant to 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. See 17 CFR 240.19b-4(e)(1). 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. See 17 CFR 240.19b-4(e). Under 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. 17 CFR 240.19b-4(c)(1). 17 CFR 240.19b-4(c)(1).

Commentary .01 thereto upon initial listing and on a continual basis. In addition, the Exchange would specify that it will file separate proposals under Section 19(b) of the Act before the listing and trading of a series of Managed Portfolio Shares with components that do not satisfy the criteria set forth in proposed Commentary .01 or components other than those specified in proposed Commentary .01.¹⁶

Proposed Commentary .01(a) to Rule 8.900-E would provide that the portfolio holdings for a series of Managed Portfolio Shares shall include only the following components:

- (1) U.S. exchange-traded securities that are common stocks; preferred stocks; American Depositary Receipts; and real estate investment trusts;
- (2) U.S. exchange-traded funds that are listed under the following NYSE Arca rules: Investment Company Units (Rule 5.2-E(j)(3)); Exchange-Traded Fund Shares (Rule 5.2-E(j)(8)); Portfolio Depositary Receipts (Rule 8.100-E); Managed Fund Shares (Rule 8.600-E); Active Proxy Portfolio Shares (Rule 8.601-E); and Managed Portfolio Shares (Rule 8.900-E);
- (3) Equity Gold Shares (listed under NYSE Arca Rule 5.2-E(j)(5))
- (4) Index-Linked Securities (listed under NYSE Arca Rule 5.2-E(j)(6));
- (5) Commodity-Based Trust Shares (listed under NYSE Arca Rule 8.201-E);
- (6) Currency Trust Shares (listed under NYSE Arca Rule 8.202-E);
- (7) The following securities, which are required to be organized as commodity pools:
Commodity Index Trust Shares (listed under NYSE Arca Rule 8.203-E); Commodity

¹⁶ For example, according to the Exchange, if the components of a series of Managed Portfolio Shares included a security or asset that is not specified in proposed Commentary .01, the Exchange would file a separate proposed rule change with the Commission to list the series of Managed Portfolio Shares.

Futures Trust Shares (listed under NYSE Arca Rule 8.204-E); Trust Units (listed under NYSE Arca Rule 8.500-E); and Managed Trust Securities (listed under NYSE Arca Rule 8.700-E);

(8) The following securities if organized as commodity pools: Trust Issued Receipts (listed under NYSE Arca Rule 8.200-E) and Partnership Units (listed under NYSE Arca Rule 8.300-E);

(9) U.S. exchange-traded futures that trade contemporaneously with shares of a series of Managed Portfolio Shares in the Exchange's Core Trading Session; and

(11) Cash and cash equivalents, which cash equivalents would be limited to short-term U.S. Treasury securities, government money market funds, and repurchase agreements.

Proposed Commentary .01(b) to Rule 8.900-E would provide that a series of Managed Portfolio Shares will not hold short positions in securities and other financial instruments referenced in the list of permitted investments in proposed Commentary .01(a). Proposed Commentary .01(c) would provide that the securities referenced in proposed Commentary .01(a)(2)-(8) would also include securities listed on another national securities exchange pursuant to substantially equivalent listing rules.

The Exchange states that the securities and financial instruments enumerated in proposed Commentary .01(a) to Rule 8.900-E are consistent with, and limited to, the "permissible investments" for series of Managed Portfolio Shares previously approved by the Commission for Exchange listing and trading, as described in the Approval Orders¹⁷ and as permitted by their respective exemptive relief under the 1940 Act.

¹⁷ See supra note 14.

The Exchange also states that the regulatory staff of the Exchange, or the Financial Industry Regulatory Authority, Inc. (“FINRA”), on behalf of the Exchange, will communicate as needed regarding trading in Managed Portfolio Shares, other exchange-traded equity securities and futures contracts with other markets that are members of the Intermarket Surveillance Group (“ISG”), including U.S. exchanges on which the components are traded. In addition, the Exchange may obtain information regarding trading in Managed Portfolio Shares from other markets that are members of the ISG, including all U.S. securities exchanges and futures exchanges on which the equity securities and futures contracts are traded. The Exchange represents that its surveillance procedures are adequate to continue to properly monitor the trading of Managed Portfolio 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 Managed Portfolio Shares, to monitor trading in the Managed Portfolio Shares.

The Exchange states that the Managed Portfolio Shares will conform to the initial and continued listing criteria under Rule 8.900-E. All Managed Portfolio Shares listed and/or traded pursuant to Rule 8.900-E (including pursuant to unlisted trading privileges) are subject to all Exchange rules and procedures that currently govern the trading of equity securities on the Exchange. The issuer of a series of Managed Portfolio Shares will be required to comply with Rule 10A-3 under the Act for the initial and continued listing of Managed Portfolio Shares, as provided under NYSE Arca Rule 5.3-E.

Further, according to the Exchange, prior to listing pursuant to proposed amended Rule 8.900-E and proposed Commentary .01 thereto, an issuer would be required to represent to the Exchange that it will advise the Exchange of any failure by a series of Managed Portfolio Shares

to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If a series of Managed Portfolio Shares is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5-E(m).

III. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2020-84, as Modified by Amendment No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁸ 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 additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,¹⁹ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in

¹⁸ 15 U.S.C. 78s(b)(2)(B).

¹⁹ Id.

securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.²⁰

The Exchange proposes to adopt generic listing standards for Managed Portfolio Shares, which would allow the Exchange to list and trade Managed Portfolio Shares that meet the requirements of NYSE Arca Rule 8.900-E and Commentary .01 without filing a proposed rule change with the Commission. As noted above, however, the Exchange only recently adopted Rule 8.900-E to permit the listing and trading of Managed Portfolio Shares on the Exchange.²¹ Further, the Exchange states that only three series of Managed Portfolio Shares are currently listed and traded on BZX and does not indicate whether any series are currently listed and traded on the Exchange.²² Accordingly, the Commission and the Exchange, as well as the marketplace, more generally, have limited experience with respect to this type of new derivative securities

²⁰ 15 U.S.C. 78f(b)(5).

²¹ See supra note 7 and accompanying text. The Commission notes that it also recently approved a substantively similar rule for the listing and trading of Managed Portfolio Shares on Cboe BZX Exchange, Inc. (“BZX”). See Securities Exchange Act Release No. 87759 (December 16, 2019), 84 FR 70223 (December 20, 2019) (Notice of Filing of Amendment Nos. 4 and 5, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 4 and 5, to Adopt BZX Rule 14.11(k) to Permit the Listing and Trading of Managed Portfolio Shares).

²² See Notice, supra note 3, at 64600. See also Approval Orders, supra note 14. The Commission notes that, since the initial filing of the Exchange’s proposal, additional Managed Portfolio Shares have been approved, or filed pursuant to (b)(3)(A) under Section 19 of the Exchange Act, for listing on a national securities exchange. See Securities Exchange Act Release Nos. 90528 (November 30, 2020), 85 FR 78389 (December 4, 2020) (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); 90683 (December 16, 2020), 85 FR 83665 (December 22, 2020) (Order Approving a Proposed Rule Change, as Modified by Amendments No. 1 and No. 2, to List and Trade Shares of the AdvisorShares Q Portfolio Blended Allocation ETF and AdvisorShares Q Dynamic Growth ETF Under NYSE Arca Rule 8.900-E).

product.²³ In the past, a new derivative securities product typically had a significant history of being listed and traded on an exchange before the Commission approved its generic listing standards. For example, the Commission approved the Exchange’s listing standards for Managed Fund Shares in 2008, but did not approve the generic listing standards for the same until 2016.²⁴ Given the relatively short amount of time the Commission has had to oversee and observe Managed Portfolio Shares and other similarly structured exchange traded products, the Commission is concerned that there is insufficient experience to determine that the proposal to permit generic listing and trading of Managed Portfolio Shares is consistent with Section 6(b)(5) of the Act, including whether the proposal is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”²⁵ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission

²³ See supra note 15.

²⁴ See Securities Exchange Act Release No. 78397 (July 22, 2016), 81 FR 49320 (July 27, 2016) (SR-NYSEArca-2015-110) (Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 7 Thereto, Amending NYSE Arca Equities Rule 8.600 to Adopt Generic Listing Standards for Managed Fund Shares) and Securities Exchange Act Release No. 57619 (April 4, 2008), 73 FR 19544 (April 10, 2008) (Notice of Filing of Amendment No. 1 to Proposed Rule Change and Order Granting Accelerated Approval of Such Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to Rules Permitting the Listing and Trading of Managed Fund Shares, Trading Hours and Halts, Listing Fees Applicable to Managed Fund Shares, and the Listing and Trading of Shares of the PowerShares Active AlphaQ Fund, PowerShares Active Alpha Multi-Cap Fund, PowerShares Active Mega-Cap Portfolio, and the PowerShares Active Low Duration Portfolio).

²⁵ 17 CFR 201.700(b)(3).

finding,²⁶ and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.²⁷ The Commission notes that the Exchange has provided no data or analysis to support the determination that, in the absence of significant market or regulatory experience, its proposal to permit the listing and trading of Managed Portfolio Shares pursuant to a generic listing standards raises no new or novel concerns.

Accordingly, the Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including whether the proposal is consistent with the Act.

IV. 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)²⁸ of the Act 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 under the Act,²⁹ any request for an opportunity to make an oral presentation.³⁰

²⁶ See id.

²⁷ See id.

²⁸ 15 U.S.C. 78f(b)(5).

²⁹ 17 CFR 240.19b-4.

³⁰ 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

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,³¹ 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-2020-84 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-2020-84. This file number should be included on the subject line if e-mail is used. To help the Commission process and review 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

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).

³¹ See Notice, supra note 3.

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-2020-84 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.³²

J. Matthew DeLesDernier
Assistant Secretary

³² 17 CFR 200.30-3(a)(57).