

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-89197; File No. SR-NYSEArca-2020-56)

June 30, 2020

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change to Amend NYSE Arca Rules 5.2-E(j)(3), 5.2-E(j)(8), 5.5-E(g)(2), 8.600-E and 8.900-E

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on June 18, 2020, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) a proposed rule change described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Arca Rules 5.2-E(j)(3) (Investment Company Units), 5.2-E(j)(8) (Exchange-Traded Fund Shares), 5.5-E(g)(2), 8.600-E (Managed Fund Shares) and 8.900-E (Managed Portfolio Shares) to (1) remove the listing requirement that, following the initial twelve-month period after commencement of trading of a series of Investment Company Units, Exchange-Traded Fund Shares, Managed Fund Shares, and Managed Portfolio Shares, respectively, on the Exchange that the applicable fund has at least 50 beneficial holders, and (2) require that a series of Investment Company Units, Exchange-Traded Fund Shares, Managed Fund Shares, and Managed Portfolio Shares, respectively, have at least one creation unit outstanding on an initial and continued listing basis. The proposed change is

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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 to amend NYSE Arca Rules 5.2-E(j)(3) (Investment Company Units), 5.5 E(g)(2), 5.2-E(j)(8) (Exchange-Traded Fund Shares)<sup>4</sup>, 8.600-E (Managed Fund Shares) and 8.900-E (Managed Portfolio Shares) (collectively, “Fund Shares”) to (1) remove the listing requirement that, following the initial twelve-month period after commencement of trading of a series of Investment Company Units, Exchange-Traded Fund Shares, Managed Fund Shares or Managed Portfolio Shares, respectively, on the Exchange, such series have at least 50 beneficial holders, and (2) require that a series of Fund Shares have at least one creation unit outstanding on an initial and continued listing basis.<sup>5</sup>

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<sup>4</sup> A series of Exchange-Traded Fund Shares listed pursuant to NYSE Arca Rule 5.2-E (j)(8) is required to be eligible to operate in reliance on Rule 6c-11 under the Investment Company Act of 1940, as amended (“1940 Act”). See NYSE Arca Rule 5.2-E (j)(8)(e)(1).

<sup>5</sup> The term creation unit would have the same meaning as defined in Rule 6c-11(a)(1) (i.e., a specified number of exchange-traded fund shares that the exchange-traded fund will

The Exchange believes that the requirement that a series of Fund Shares listed on the Exchange must have at least 50 beneficial shareholders is no longer necessary. Exchange-Traded Fund Shares are currently subject to the conditions of Rule 6c-11 under 1940 Act<sup>6</sup> and Investment Company Units and Managed Fund Shares will be required to operate in compliance with Rule 6c-11 by December 23, 2020.<sup>7</sup> The Exchange believes that the requirements of Rule 6c-11 and, in particular, the website disclosure requirements of Rule 6c-11(c), together with the existing creation and redemption process, serve to mitigate the risks of manipulation and lack of liquidity that the shareholder requirement was intended to address. The Exchange believes that requiring at least one creation unit to be outstanding at all times, together with the enhanced disclosure requirements of Rule 6c-11, will facilitate an effective arbitrage mechanism that, for Investment Company Units, Managed Fund Shares and Exchange-Traded Fund Shares, will provide investors with sufficient transparency into the holdings of the underlying portfolio and help ensure that the trading price in the secondary market remains in line with the value per share of a fund's portfolio.

For example, Rule 6c-11(c)(1)(vi), which requires additional disclosure if the premium or discount is in excess of 2% for more than seven consecutive days, as well as the related website disclosure and discussion requirements,<sup>8</sup> provides additional transparency to investors in the event

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issue to (or redeem from) an authorized participant in exchange for the deposit (or delivery) of a basket and a cash balancing amount if any).

<sup>6</sup> See Release No. 33-10695; IC-33646; File No. S7-15-18 (Exchange-Traded Funds) (September 25, 2019), 84 FR 57162 (October 24, 2019) (“ETF Adopting Release”).

<sup>7</sup> As of December 23, 2020, the Commission is rescinding those portions of prior Commission ETF exemptive orders that grant relief related to the formation and operation of an ETF. See ETF Adopting Release, note 39 and accompanying text.

<sup>8</sup> Rule 6c-11(c)(1)(vi) provides that “[i]f the exchange-traded fund’s premium or discount is greater than 2% for more than seven consecutive trading days, a statement that the exchange-traded fund’s premium or discount, as applicable, was greater than 2% and a

that the trading value and the underlying portfolio deviate for an extended period of time, which could indicate an inefficient arbitrage mechanism.<sup>9</sup>

With respect to Managed Portfolio Shares, while these securities do not publicly disclose their portfolio holdings daily and are not eligible to rely on Rule 6c-11, the Commission, in approving exchange rules accommodating listing and trading of Managed Portfolio Shares, stated that the Verified Intraday Indicative Value (“VIIV”) and other information required to be disseminated in connection with such trading ensures transparency of key values and information for such securities.<sup>10</sup> The Exchange believes that such information is sufficient to support an effective arbitrage process, independent of any minimum shareholder requirement.

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discussion of the factors that are reasonably believed to have materially contributed to the premium or discount, which must be maintained on the website for at least one year thereafter.”

<sup>9</sup> The Commission discussed the importance of an effective and efficient arbitrage mechanism in the ETF Adopting Release at 84 FR 57165 and 57209-57211 (“Secondary Market Trading, Arbitrage and ETF Liquidity”).

<sup>10</sup> See Securities Exchange Act Release No. 87759 (December 16, 2019) 84 FR 70223 (December 20, 2019) (SR-CboeBZX-2019-047) (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). In that order, the Commission stated: “Although the portfolio holdings of the Managed Portfolio Shares are not publicly disclosed on a daily basis, the Commission believes that the proposed continued listing standards and trading rules under proposed BZX Rule 14.11(k) are adequate to ensure transparency of key values and information regarding the securities. The Commission notes that, for continued listing of each series of Managed Portfolio Shares, the VIIV will be widely disseminated by the Reporting Authority and/or one or more major market data vendors in one second intervals during Regular Trading Hours, and will be disseminated to all market participants at the same time. Further, transactions in Managed Portfolio Shares would be permitted only during Regular Trading Hours, when one second VIIVs would be available. In addition, like all other registered management investment companies, each series of Managed Portfolio Shares would be required to publicly disclose its portfolio holdings information on a quarterly basis, within at least 60 days following the end of every fiscal quarter.” [footnotes omitted]. See also, 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 NYSE Arca Rule 8.900-E).

The Exchange notes that, as of June 9, 2020, the median creation unit size for a series of Fund Shares listed on the Exchange is 50,000 shares and the mean creation unit size is approximately 58,012 shares. As of June 9, 2020, of the approximately 1,368 series of Fund Shares listed on the Exchange, the median number of creation units outstanding is approximately 71, approximately 214 series have fewer than 10 creation units outstanding, and approximately 13 series have one creation unit outstanding.<sup>11</sup>

The arbitrage mechanism relies on the fact that Fund Shares can be created and redeemed and that Fund Shares are able to flow into the market when the price of a series of Fund Shares is lower than the net asset value per share of the portfolio. The resulting buying and selling of Fund Shares, as well as the underlying portfolio components, generally causes the market price and the net asset value per share to align. The functioning of the arbitrage mechanism helps to ensure that the trading price in the secondary market is at fair value.

The existence of the creation and redemption process, as well as the proposed requirement that at least one creation unit is always outstanding, would ensure that market participants are able to redeem Fund Shares and, thereby, allow the arbitrage mechanism to function properly. The Exchange believes, therefore, that such arbitrage mechanism would obviate the need for a minimum shareholder requirement to support a fair and orderly market in Fund Shares. In addition, the Exchange's surveillance procedures for Fund Shares and its ability to halt trading in Fund Shares in specified circumstances provide for additional investor protections by further mitigating any abnormal trading that would affect the Fund Shares' prices.<sup>12</sup>

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<sup>11</sup> NYSE Arca internal data as of June 9, 2020.

<sup>12</sup> See, e.g., NYSE Arca Rule 7.18-E(d)(2); NYSE Arca Rule 8.900-E(d)(2).

## 2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act<sup>13</sup> in general and Section 6(b)(5) of the Act<sup>14</sup> in particular in that 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 a national market system, and, in general, to protect investors and the public interest.

Exchange-Traded Fund Shares are currently subject to the conditions of Rule 6c-11 under 1940 Act<sup>15</sup> and Investment Company Units and Managed Fund Shares will be required to operate in compliance with Rule 6c-11 by December 23, 2020.<sup>16</sup> The Exchange believes that the requirements of Rule 6c-11 and in particular the website disclosure requirements of Rule 6c-11(c), together with the existing creation and redemption process and proposed requirement that at least one creation unit is always outstanding, would serve to mitigate the risks of manipulation and the lack of liquidity that the shareholder requirement was intended to address. More specifically, the Exchange believes that requiring at least one creation unit to be outstanding at all times, together with the enhanced disclosure requirements of Rule 6c-11, would facilitate an effective arbitrage mechanism that, for Investment Company Units, Managed Fund Shares and Exchange-Traded Fund Shares, would provide investors with sufficient transparency into the holdings of the underlying portfolio and help ensure that the trading price in the secondary market remains in line with the value per share of a fund's portfolio.

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<sup>13</sup> 15 U.S.C. 78f.

<sup>14</sup> 15 U.S.C. 78f(b)(5).

<sup>15</sup> See note 6, supra.

<sup>16</sup> See note 7, supra.

With respect to Managed Portfolio Shares, the Commission, in approving exchange rules accommodating listing and trading of Managed Portfolio Shares, stated that the VIIV and other information required to be disseminated in connection with such trading ensures transparency of key values and information for such securities.<sup>17</sup> The Exchange believes that such information is sufficient to support an effective arbitrage process, independent of any minimum shareholder requirement.

Reliance on the conditions of Rule 6c-11 (for Investment Company Units, Exchange-Traded Fund Shares and Managed Fund Shares) or the VIIV and other requirements applicable to Managed Portfolio Shares, together with the existing creation and redemption process, as well as the presence of at least one creation unit, would serve to work together to mitigate the risks of manipulation and the lack of liquidity that the shareholder requirement was intended to address. By further aligning the listing requirements with the operational relationship between investors, market participants and ETF issuers, the proposal facilitates greater transparency for investors and issuers resulting in a more efficient market and increased investor protections.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

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

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 purpose of the Act. The Exchange believes that the proposed rule change will facilitate growth in development of new issues of Fund Shares, to the benefit of investors and the marketplace.

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<sup>17</sup> See note 10, supra.

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. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2020-56 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-2020-56. 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 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, D.C. 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-2020-56 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>18</sup> 17 CFR 200.30-3(a)(12).