

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-83289; File No. SR-NYSENAT-2018-02)

May 17, 2018

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Amended by Amendment No. 1, to Support the Re-launch of NYSE National, Inc. on the Pillar Trading Platform

I. Introduction

On February 21, 2018, NYSE National, Inc. (“NYSE National” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change in connection with the re-launch of the Exchange on the Pillar trading platform. The proposed rule change was published for comment in the Federal Register on March 13, 2018.³ The Commission received no comments on the proposed rule change. On April 25, 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 approve or disapprove the proposed rule change.⁵ On May 16, 2018, the Exchange filed Amendment No. 1 to the proposed rule change, which supersedes

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 82819 (March 7, 2018), 83 FR 11098 (March 13, 2018) (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No.83100 (April 25, 2018), 83 FR 19127 (May 1, 2018).

and replaces the original filing in its entirety.⁶ The Commission is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis, and is soliciting comments on Amendment No. 1.

II. Description of the Proposal

On February 1, 2017, the Exchange ceased trading operations.⁷ The Exchange proposes to re-launch trading operations on Pillar, which is an integrated trading technology platform designed to use a single specification for connecting to the equities and options markets operated by the Exchange and its affiliates, NYSE Arca, Inc. (“NYSE Arca”), NYSE American LLC (“NYSE American”), and New York Stock Exchange LLC (“NYSE”).

⁶ In Amendment No. 1, the Exchange proposes, among other things, to: (i) delete proposed Rule 8 and modify proposed Rule 5 to include only those rules that would support the trading on an unlisted trading privileges (“UTP”) basis of all NMS Stocks and the trading on a UTP basis of UTP Exchange Traded Products; (ii) revise the proposed definition of the term “UTP Exchange Traded Product”; (iii) propose a grace period of 30 calendar days for ETP Holders that are eligible for the expedited process for reinstatement under the proposal to register their Associated Persons with the Exchange; (iv) commit to working with Commission staff to update its membership rules and to file a separate filing relating to its membership rules within 90 days of any approval of the instant proposal; (v) identify which of the proposed Rules are based on the rules of NYSE American, as opposed to those based on the rules of NYSE Arca; (vi) add provisions, based on rules of other self-regulatory organizations (“SROs”), that were not included in the original filing; (vii) add a rule relating to the requirements for listed securities issued by Intercontinental Exchange, Inc. (“ICE”) or its affiliates; (viii) specifically incorporate by reference certain rules of the Financial Industry Regulatory Authority, Inc. (“FINRA”) that were only cited in the original version of the filing; (ix) add clarifying language to proposed rule text and the narrative describing the proposal; and (x) correct various technical errors. The proposed revisions of the proposal made in Amendment No. 1 are incorporated in the Description of the Proposal herein. Amendment No. 1 is available at: <https://www.sec.gov/comments/sr-nysenat-2018-02/nysenat201802-3653908-162416.pdf>.

⁷ See Securities Exchange Act Release No. 80018 (February 10, 2017), 82 FR 10947 (February 16, 2017) (SR-NSX-2017-04) (“Termination Filing”). On January 31, 2017, ICE, through its wholly-owned subsidiary, NYSE Group, acquired all of the outstanding capital stock of the Exchange (the “Acquisition”). See Securities Exchange Act Release No. 79902 (January 30, 2017), 82 FR 9258 (February 3, 2017) (SR-NSX-2016-16). Prior to the Acquisition, the Exchange was named “National Stock Exchange, Inc.” and was referred to as “NSX.”

Currently, NYSE Arca's cash equities market,⁸ NYSE American's cash equities market,⁹ and NYSE securities that trade on an unlisted trading privileges basis¹⁰ trade on Pillar. NYSE Arca, NYSE American, and NYSE have trading rules that are substantially similar and that are based on the rule numbering framework of NYSE Arca.¹¹

The Exchange proposes to re-launch trading on Pillar in all Tape A, Tape B, and Tape C securities on a UTP basis on a fully automated price-time priority allocation model. Unlike its affiliated exchanges, the Exchange does not propose to be a listing venue. Because the Exchange would trade securities on a UTP basis only, the Exchange proposes to operate in the same manner as its affiliated exchanges, NYSE Arca, NYSE American, and NYSE, with respect to securities that trade on a UTP basis on those exchanges. For example, the Exchange does not propose to operate any auctions and therefore does not propose rules to provide for auction functionality on the Exchange.¹² In addition, because the Exchange would not be a listing venue,

⁸ For a history of the implementation of Pillar on NYSE Arca, see Notice, supra note 3, at footnote 6.

⁹ For a history of the implementation of Pillar on NYSE American, see Notice, supra note 3, at footnote 7.

¹⁰ For a history of the implementation of Pillar on NYSE, see Notice, supra note 3, at footnote 8.

¹¹ According to the Exchange, NYSE American and NYSE proposed specific differences to certain trading rules with respect to NYSE Arca to differentiate their respective trading models, noting, for example, that NYSE American has a delay mechanism and does not offer specified order types. See id. The Exchange states that it does not propose to offer a trading model that is differentiated from NYSE Arca. It does propose, however, certain differences in some of the details of its rules, as further discussed below. In addition, in preparation for the re-launch of trading, the Exchange adopted the rule numbering framework of the NYSE Arca rules, which at that time were organized in 14 Rules. See Securities Exchange Act Release No. 81782 (September 29, 2017), 82 FR 81782 (October 5, 2017) (SR-NYSENat-2017-04) (Notice of Filing and Immediate Effectiveness).

¹² However, the Exchange would make available certain order types that currently exist on NYSE Arca, NYSE American, and NYSE for securities that trade on a UTP basis, which

the Exchange would not provide for either “lead” or “designated” market makers, which are available on NYSE Arca, NYSE, and NYSE American, respectively, for securities listed on those exchanges. As with NYSE Arca and NYSE American, the Exchange proposes rules that would provide that ETP Holders may register as market makers in securities that trade on a UTP basis on the Exchange. And, as with NYSE Arca and NYSE American, the Exchange proposes not to require that there be a market maker in a particular security on the Exchange for that security to trade on a UTP basis on the Exchange. Similar to NYSE American and to how NYSE trades securities on an unlisted trading privileges basis on Pillar, the Exchange also does not propose to operate a retail liquidity program.

While the Exchange proposes trading rules for the re-launch based on the rules of its affiliated exchanges, it also proposes to retain and renumber certain of its existing rules relating to membership and ETP Holder conduct. In certain cases, the Exchange proposes to replace an existing rule with a rule harmonized with conduct rules of other SROs.

Because the Exchange is not proposing new or different rules to qualify as a member of the Exchange for the re-launch, the Exchange proposes to reinstate ETP Holder status¹³ using the existing process described in Interpretation and Policies .01 to current Rule 2.5, which sets forth an expedited process for reinstatement as an ETP Holder and to register Associated Persons

provide for routing directly to the primary listing market. In addition, similar to NYSE Rule 7.31(c), the Exchange would offer “Auction-only Orders,” which are orders designated to participate in an auction on the primary listing market. The Exchange would route all such orders to the primary listing market. The proposed rules governing such order types on the Exchange are based on the recently-approved rules governing trading on Pillar on the NYSE. See Securities Exchange Act Release No. 82945 (March 26, 2018), 83 FR 13553 (March 29, 2018) (SR-NYSE-2017-36).

¹³ When the Exchange ceased operations, the Exchange terminated the ETP status of all ETP Holders as of the close of business on February 1, 2017. See Termination Filing, supra note 7.

established when the Exchange re-launched operations in 2015.¹⁴ In Amendment No. 1, the Exchange proposes new Commentary .01 to proposed Rule 2.5, which would provide those ETP Holders reinstated pursuant to the expedited process 30 calendar days in which to register their Associated Persons with the Exchange.¹⁵ Further, in Amendment No. 1, the Exchange represents that it understands that the rules set forth in Chapter II of the current rule book may not reflect certain harmonized standards for membership rules of other SROs. While the Exchange proposes to retain its existing membership rules, subject to the changes discussed below, for purposes of the re-launch, the Exchange represents that it commits to working with Commission staff to update its membership rules and will file a separate filing relating to its membership rules within 90 days of any approval of its proposed rule change.¹⁶

In addition, the Exchange proposes to amend Article V, Sections 5.1 and 5.8 of the Exchange's Bylaws by revising references to "Appeals Committee" to "Committee for Review." Because the existing NYSE National rulebook would be replaced with both new and renumbered rules under the new framework, the Exchange also proposes to delete Chapters I – XVI of the current rulebook and the rules contained therein.

The following is a brief overview of each rule section¹⁷ that would be included in the Exchange's rulebook, as proposed to be revised, and that would incorporate proposed changes to

¹⁴ See Securities Exchange Act Release No. 75098 (June 3, 2015), 80 FR 32644 (June 9, 2015) (Notice of filing and immediate effectiveness of proposed rule change to establish expedited process to reinstate ETP Holder status). Pursuant to that rule, approved ETP Holders that were in good standing as of the close of business on May 30, 2014, when the Exchange previously ceased trading operations, had their ETP Holder status reinstated and Associated Persons registered pursuant to an expedited process.

¹⁵ See Amendment No. 1, supra note 6.

¹⁶ Id.

¹⁷ Rules 4, 8, and 9 are proposed to be "Reserved."

individual sections, as reflected in Amendment No. 1.¹⁸

Rule 0 – Regulation of the Exchange and ETP Holders

Proposed Rule 0 would establish the framework for the regulation of the Exchange and its ETP Holders. Proposed Rule 0 acknowledges that the Exchange and FINRA are parties to a regulatory services agreement in which FINRA will perform certain functions on behalf of the Exchange, with the Exchange retaining ultimate legal responsibility for, and control of, such functions.

Rule 1 - Definitions

Proposed Rule 1 would contain definitions applicable to trading on the Exchange's Pillar platform.¹⁹ In Amendment No. 1, the Exchange proposes to modify Rule 1.1(m) from the initial filing to define the term "UTP Exchange Traded Product" to mean one of a list of specified classes of Exchange Traded Products that the Exchange intends to trade pursuant to unlisted trading privileges. The enumerated Exchange Traded Products that would be eligible to trade on the Exchange pursuant to unlisted trading privileges would include the following: Equity Linked Notes, Investment Company Units, Index-Linked Exchangeable Notes, Equity Gold Shares, Equity Index-Linked Securities, Commodity-Linked Securities, Currency-Linked Securities, Fixed-Income Index-Linked Securities, Futures-Linked Securities, Multifactor-Index-Linked Securities, Trust Certificates, Currency and Index Warrants, Portfolio Depository Receipts, Trust Issued Receipts, Commodity-Based Trust Shares, Currency Trust Shares, Commodity Index Trust Shares, Commodity Futures Trust Shares, Partnership Units, Paired Trust Shares, Trust Units, Managed Fund Shares and Managed Trust Shares.

¹⁸ See Amendment No. 1, supra note 6.

¹⁹ The proposed definitions are based on the rules of NYSE Arca, NYSE American, and NSX.

Rule 2 - Trading Permits

Proposed Rule 2 would set forth the membership rules for the Exchange, including the eligibility requirements,²⁰ continuing education requirements,²¹ and application requirements²² to become an ETP Holder. It also would set forth rules relating to revocation,²³ voluntary termination,²⁴ and transfer and sale²⁵ of an ETP.²⁶ Proposed Rule 2 would provide jurisdiction²⁷ to the Exchange to discipline ETP Holders²⁸ and Persons Associated with ETP Holders for violations of, among other things, the Act and the rules thereunder.²⁹ It also would provide the Exchange the ability to prescribe reasonable dues, assessments, and charges³⁰ and would include rules concerning the mandatory testing of the Exchange's business continuity and disaster recovery plans.³¹ In Amendment No. 1, the Exchange represents that there are no categories of persons on the Exchange that would fall outside of the membership categories and requirements set forth in proposed Rule 2.³²

The proposed rules are based on the Exchange's existing membership rules with the

²⁰ See proposed Rules 2.2, 2.3, and 2.4.

²¹ See proposed Rule 2.2.

²² See proposed Rule 2.5.

²³ See proposed Rule 2.6.

²⁴ See proposed Rule 2.7.

²⁵ See proposed Rule 2.8.

²⁶ See proposed Rule 1.1 (h) (defining "ETP").

²⁷ See proposed Rule 2.2(a).

²⁸ See proposed Rule 1.1 (i) (defining "ETP Holder").

²⁹ Rules 2.10, 2.11, and 2.12 are marked "Reserved."

³⁰ See proposed Rule 2.9.

³¹ See proposed Rule 2.13.

³² See Amendment No. 1, supra note 6.

following substantive differences: (1) the Exchange proposes to delete Rule 2.10, as proposed Rule 3.9 would cover the relationship between ETP Holders and Exchange affiliates; (2) Archipelago Securities LLC would replace NSX Securities LLC as the routing broker for the Exchange, so the Exchange proposes to delete current Rules 2.11 and 2.12,³³ and instead adopt proposed Rule 7.45,³⁴ which is based on NYSE Arca Rule 7.45-E, to cover the Exchange's routing function.

NYSE National also proposes an expedited process for reinstating ETP Holders. The ETP Holder would be able to submit a short form application to reinstate its status as an ETP Holder and to register Persons Associated with the ETP Holder if the ETP Holder was in good standing at the close of business on February 1, 2017, is a member of another SRO, and each proposed Person Associated with such ETP Holder holds an active and recognized securities industry registration and meets the requirements of proposed Rule 2.2(b).³⁵

In Amendment No. 1, the Exchange proposes a grace period of 30 calendar days from the effective date of proposed Rule 2.5 for ETP Holders that are eligible for the expedited process for reinstatement to register Persons Associated with the ETP Holder with the Exchange.³⁶ According to the Exchange, to be eligible for the expedited process and the temporary grace period, the ETP Holder already must have Persons Associated with the ETP Holder registered in the FINRA Central Registration Depository System ("CRD").³⁷ ETP Holders that take advantage of the proposed grace period would be able to begin trading on the Exchange before

³³ By its terms, NSX Rule 2.12 expired on September 30, 2008. See current Rule 2.12.

³⁴ See proposed Rule 7.45.

³⁵ See Commentary .01 to proposed Rule 2.5.

³⁶ See id.; see also Amendment No. 1, supra note 6.

³⁷ See Commentary .01 to proposed Rule 2.5; see also Amendment No. 1, supra note 6.

they complete registering their Persons Associated with the Exchange.

As noted above, the Exchange proposes to retain its existing rules relating to membership, which may not reflect certain harmonized standards for membership rules of other SROs. However, in Amendment No. 1, the Exchange commits to working with Commission staff to update its membership rules and to file a separate filing relating to its membership rules within 90 days of any approval of the Exchange's proposed rule change.³⁸

Proposed Rule 2.3, as a prerequisite to membership, would require an ETP Holder to be a member of a registered national securities association or of a registered national securities exchange. As a member of two or more SROs, an ETP Holder would be required to comply with whichever rules impose a higher standard.

Rule 3 - Organization and Administration

Proposed Rule 3 would include rules relating to: (1) the potential actions the Exchange may take for ETP Holder's failure to pay any assessments, dues or other charges to the Exchange within 45 days after they become payable; (2) a prohibition on an ETP Holder being affiliated with NYSE Group, Inc.; (3) prompt written notification to the Exchange whenever an ETP Holder is expelled or suspended from any SRO, encounters financial difficulty or operating inadequacies, fails to perform contracts or becomes insolvent; and (4) requirements for fingerprint-based background checks of Exchange employees and others. In Amendment No. 1, the Exchange proposes to add a rule relating to additional requirements to be undertaken by the Exchange if securities issued by ICE or its affiliates are traded on the Exchange.³⁹

³⁸ See Amendment No. 1, supra note 6.

³⁹ Id.

Rule 5 – Trading on an Unlisted Trading Privileges Basis

Proposed Rule 5 would provide for rules to trade all Tape A, Tape B, and Tape C securities, including Exchange Traded Products (also referred to herein as “ETPs”), on a UTP basis.⁴⁰ In Amendment No. 1, the Exchange states that it does not believe that it is necessary for an exchange that trades securities only on a UTP basis to have listing rules for ETPs.⁴¹ The Exchange further states that, as a non-listing venue, the Exchange would not have a relationship with any ETP issuers; thus, to the extent ETP listing rules include initial and continued listing standards, the Exchange would not be in a position to evaluate issuer compliance with such rules.⁴² Similarly, the Exchange states its belief that it should not be necessary for a non-listing venue to file with the Commission a Form 19b-4(e) if it begins trading an ETP on a UTP basis, because Rule 19b-4(e)(1) under the Act refers to the “listing and trading” of a “new derivative securities product.”⁴³ The Exchange therefore believes that the requirements of that rule refer to when an exchange lists and trades an ETP, and not when an exchange seeks only to trade such product on a UTP basis pursuant to Rule 12f-2 under the Act.⁴⁴ Accordingly, the proposal, as amended by Amendment No. 1, contains only those rules that would support the trading on a

⁴⁰ In the Notice, the Exchange proposed both Rules 5 and 8 to establish listing rules for Exchange Traded Products that are based on NYSE American Rules 5E and 8E and NYSE Rules 5P and 8P. See Notice, supra note 3. Because the Exchange would not be a listing venue, in Amendment No. 1, the Exchange proposes to modify its proposal to eliminate the listing rules contained in Rules 5 and 8. See Amendment No. 1, supra note 6. In particular, in Amendment No. 1, the Exchange proposes to delete proposed Rule 8 and modify proposed Rule 5 to include only those rules that would support the trading on a UTP basis of all NMS Stocks, and the trading on a UTP basis of UTP Exchange Traded Products.

⁴¹ See Amendment No. 1, supra note 6.

⁴² Id.

⁴³ 17 CFR 240.19b-4(e). See Amendment No. 1, supra note 6.

⁴⁴ 17 CFR 240.12f-2. See Amendment No. 1, supra note 6.

UTP basis of all NMS Stocks, and the trading on a UTP basis for UTP Exchange Trading Products, which are set forth in proposed Rule 5.1. Further, the Exchange does not propose rules other than Rule 5.1 or any of the provisions it previously had proposed in Rule 8, which would be designated as Reserved.⁴⁵

Proposed Rule 5.1 would establish the Exchange's authority to trade securities on a UTP basis. Proposed Rule 5.1(a)(1) would provide that the Exchange may extend UTP to any security that is an NMS Stock that is listed on another national securities exchange or with respect to which UTP may otherwise be extended in accordance with Section 12(f) of the Exchange Act.⁴⁶

Proposed Rule 5.1(a)(1) would further provide that any such security would be subject to all Exchange rules applicable to trading on the Exchange, unless otherwise noted. The Exchange notes that this proposed rule text is based in part on NYSE Arca Rule 5.1-E(a) and EDGA Rule 14.1, but with a proposed difference to refer generally to Exchange rules, and not limit such reference to Exchange trading rules. This would make clear that all Exchange rules would be applicable to the trading of securities on a UTP basis on the Exchange, including business conduct and sales practice rules set forth in proposed Rule 11.

Proposed Rule 5.1(a)(2) would establish additional rules for trading of UTP Exchange

⁴⁵ See note 40, *supra*. In Amendment No. 1, the Exchange states its belief that its proposed rule text in Rule 5, together with the proposed definition of UTP Exchange Traded Products in proposed Rule 1.1, which would enumerate the classes of Exchange Traded Products that the Exchange proposes to trade on a UTP basis, would satisfy the requirements of Rule 12f-5 under the Act, 17 CFR 240.12f-5, for a national securities exchange to have a rule or rules providing for transactions in a class or type of security to which the Exchange extends unlisted trading privileges. See Amendment No. 1, *supra* note 6.

⁴⁶ 15 U.S.C. 78l(f). See also 17 CFR 242.600. The term "NMS Stock" is defined in proposed Rule 1.1(u).

Traded Products, which are defined in Rule 1.1 (described above).⁴⁷ Specifically, the requirements in subparagraphs (A)-(E) of proposed Rule 5.1(a)(2) would apply to UTP Exchange Traded Products traded on the Exchange. Because the Exchange is not proposing that the Exchange would file with the Commission a Form 19b-4(e) with respect to each UTP Exchange Traded Product within five business days after commencement of trading, the Exchange does not propose rule text based on NYSE American Rule 5.1E(a)(2)(A) or NYSE Rule 5.1(a)(2)(A).

Proposed Rule 5.1(a)(2)(A) would provide that the Exchange would distribute an information circular prior to the commencement of trading in an Exchange Traded Product that generally would include the same information as the information circular provided by the listing exchange, including (a) the special risks of trading the Exchange Traded Product, (b) the Exchange's rules that will apply to the Exchange Traded Product and (c) information about the dissemination of value of the underlying assets or indices. Under proposed Rule 5.1(a)(2)(C), the Exchange would halt trading in a UTP Exchange Traded Product as provided for in proposed Rule 7.18.

Proposed Rule 5.1(a)(2)(E) would provide that the Exchange's surveillance procedures for Exchange Traded Products traded on the Exchange pursuant to UTP would be similar to the procedures used for equity securities traded on the Exchange and would incorporate and rely upon existing Exchange surveillance systems.

Proposed Rules 5.1(a)(2)(B) and (D) would establish the following requirements for ETP Holders that have customers that trade UTP Exchange Traded Products:

- Prospectus Delivery Requirements. Proposed Rule 5.1(a)(2)(B)(i) would remind

⁴⁷ See Proposed Rule 1.1(m).

ETP Holders that they are subject to the prospectus delivery requirements under the Securities Act of 1933, as amended (the “Securities Act”), unless the Exchange Traded Product is the subject of an order by the Commission exempting the product from certain prospectus delivery requirements under Section 24(d) of the Investment Company Act of 1940, as amended (the “1940 Act”), and the product is not otherwise subject to prospectus delivery requirements under the Securities Act. ETP Holders would also be required to provide a prospectus to a customer requesting a prospectus.⁴⁸

- Written Description of Terms and Conditions. Proposed Rule 5.1(a)(2)(B)(ii) would require ETP Holders to provide a written description of the terms and characteristics of UTP Exchange Traded Products to purchasers of such securities, not later than the time of confirmation of the first transaction, and with any sales materials relating to UTP Exchange Traded Products.
- Market Maker Restrictions. Proposed Rule 5.1(a)(2)(D) would establish certain restrictions for any ETP Holder registered as a market maker in an UTP Exchange Traded Product that derives its value from one or more currencies, commodities, or derivatives based on one or more currencies or commodities, or is based on a basket or index composed of currencies or commodities (collectively, “Reference Assets”). Specifically, such an ETP Holder must file with the Exchange and keep current a list identifying all accounts for trading the underlying physical asset or commodity, related futures or options on futures, or any other related derivatives (collectively with Reference Assets, “Related Instruments”), which the ETP

⁴⁸ Proposed Rule 5.1(a)(2)(B)(iii).

Holder acting as registered market maker may have or over which it may exercise investment discretion.⁴⁹ If an account in which an ETP Holder acting as a registered market maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, has not been reported to the Exchange as required by this Rule, an ETP Holder acting as registered market maker in the UTP Exchange Traded Product would not be permitted to trade in the underlying physical asset or commodity, related futures or options on futures, or any other related derivatives. Finally, a market maker could not use any material nonpublic information in connection with trading a Related Instrument. According to the Exchange, proposed Rule 5.1(a)(2)(D) is based in part on BZX Rule 14.11(j)(5).⁵⁰

Rule 6 – Consolidated Audit Trail and Order Audit Trail System

Proposed Rule 6 would incorporate the Exchange’s existing rules relating to the Consolidated Audit Trail National Market System Plan (“CAT NMS Plan”) without any substantive changes. Proposed Rule 6 would include 12 rules covering the following areas: (1) Definitions; (2) Clock Synchronization; (3) Industry Member Data Reporting; (4) Customer Information Reporting; (5) Industry Member Information Reporting; (6) Time Stamps; (7) Clock Synchronization Rule Violation; (8) Connectivity and Data Transmission; (9) Development and

⁴⁹ The proposed rule would also, more specifically, require a market maker to file with the Exchange and keep current a list identifying any accounts (“Related Instrument Trading Accounts”) for which related instruments are traded (1) in which the market maker holds an interest, (2) over which it has investment discretion, or (3) in which it shares in the profits and/or losses. In addition, a market maker would not be permitted to have an interest in, exercise investment discretion over, or share in the profits and/or losses of a Related Instrument Trading Account that has not been reported to the Exchange as required by the proposed rule.

⁵⁰ See Amendment No. 1, supra note 6.

Testing; (10) Recordkeeping; (11) Timely, Accurate and Complete Data; and (12) Compliance Dates. Proposed Rule 6.6900 would establish procedures for resolving potential disputes related to CAT Fees charged to Industry Members.

Proposed Rule 6.7400 would contain a series of rules that implement Order Audit Trail rules relating to definitions; applicability; synchronization of ETP Holder business clocks; recording of order information; order data transmission requirements; violation of order audit trail system rules; and exemption to the order recording and data transmission requirements.⁵¹

Rule 7 – Equities Trading

Rule 7 establishes the rules for trading on the Exchange. As noted above, the Exchange proposes to re-launch on the same trading platform as the cash equities trading platform of NYSE Arca. Thus, the provisions of proposed Rule 7 are, in large part, based on equivalent rules of NYSE Arca for this platform. In some instances, however, the proposed trading rules reflect a choice to adopt the version of a particular provision used by NYSE American and NYSE.⁵²

⁵¹ The Exchange notes that at the time that it ceased operations, it did not require its ETP Holders to maintain order information pursuant to an order tracking system and, therefore, did not have the proposed OATS rules or similar rules in its rulebook. According to the Exchange, requiring ETP Holders to comply with the proposed OATS requirements in connection with its re-launch of trading would not impose an undue burden on such ETP Holders or their associated persons because nearly all ETP Holders are expected to be members of another SRO that requires compliance with OATS requirements and because order information pursuant to the OATS rules need only be submitted upon request.

⁵² The Exchange has identified which of its proposed rules are based on the rules of NYSE American, as opposed to those based on the rules of NYSE Arca. See Amendment No. 1, supra note 6. The Exchange also has identified certain trading rules of NYSE Arca and NYSE American that it is not proposing to adopt. For example, the Exchange states that, because it would not be a listing venue, it is not proposing to adopt rules relating to lead or designated market makers. The Exchange also states that it would not operate auctions, and therefore is not proposing rules pertaining to auction procedures.

Proposed Rule 7 is divided into six sections. Section 1, “General Provisions,”⁵³ includes provisions relating to hours of business on the Exchange and holidays when it will not be open; responsibilities of ETP Holders and associated persons with respect to their roles in transactions and their charging of commissions; ex-dividend and ex-rights dates; units of trading; trading differentials; anonymity of bids and offers; settlement terms; binding prices; clearly erroneous executions; Exchange compliance with the Limit Up-Limit Down National Market System Plan; trading halts and suspensions; clearance and settlement; stock option transactions of market makers; short sales; and firmness of quotes.

Section 2 of proposed Rule 7, “Market Makers,”⁵⁴ includes provisions relating to registration of Market Makers. The section also includes proposed rules pertaining to access to quotations, private linkages, and compliance with Regulation NMS under the Act.

Section 3 of proposed Rule 7, “Exchange Trading,”⁵⁵ after setting forth provisions regarding authorized access to the Exchange, establishes rules relating to the kinds of order types available on the Exchange and how they are designed to trade. Section 3 of proposed Rule 7 also would set forth the rules of the Exchange relating to order entry; the codes by which the ETP Holder submitting an order must indicate whether it is acting in a principal, agency, or riskless principal capacity; and the three trading sessions for which the Exchange will be open (early, core, and late), including the securities that may be traded in each and the disclosures that ETP

⁵³ Section 1 comprises proposed Rules 7.1 through 7.18.

⁵⁴ Section 2 comprises proposed Rules 7.19 through 7.28.

⁵⁵ Section 3 comprises proposed Rules 7.29 through 7.41 (with Rules 7.42 through 7.44 reserved for future use).

Holder must make to non-ETP Holders that send orders to them for trading in the early or late session regarding, among other things, the risks that may apply to such orders.⁵⁶

Further, Section 3 of proposed Rule 7 would establish rules relating to the display and non-display of various order types, the ranking of orders in the Exchange book with respect to execution priority, and the role of price and time in determining such priority.⁵⁷ The section also includes proposed rules that pertain to routing of orders to away markets; the prohibition of trading through protected quotations and exceptions thereto; and compliance with other aspects of Regulation NMS under the Act.⁵⁸ It also lists the data feeds that the Exchange proposes to use for the handling, execution, and routing of orders, as well as regulatory compliance.⁵⁹ Additional proposed rules in Section 3 relate to odd lot and mixed lot trading on the Exchange; trade execution and reporting; and clearance and settlement of trades.⁶⁰

Section 4 of proposed Rule 7, “Operation of Routing Broker,” would define “routing broker” as “the broker-dealer affiliate of the Exchange and/or any other non-affiliate third-party broker-dealer that acts as a facility of the Exchange for routing orders entered into Exchange systems to other market centers for execution whenever such routing is required by Exchange rules or the federal securities laws,” and would set forth rules regarding the outbound routing function.⁶¹

⁵⁶ See proposed Rules 7.32 (Order Entry); 7.33 (Capacity Codes); and 7.34 (Trading Sessions).

⁵⁷ See proposed Rules 7.36 (Order Ranking and Display).

⁵⁸ See proposed Rules 7.37 (Order Execution and Routing).

⁵⁹ Id.

⁶⁰ See proposed Rules 7.38, 7.40, and 7.41, respectively. (Rule 7.39 is reserved for future use, as are Rules 7.42, 7.43, and 7.44.)

⁶¹ See proposed Rule 7.45, which comprises the whole of Section 4.

Section 4 also would provide that, for so long as the Exchange is affiliated with NYSE American, NYSE Arca, and NYSE, and Archipelago Securities LLC (“Arca Securities) in its capacity as a facility of those exchanges is utilized by those affiliated exchanges for the routing of any approved types of orders from those exchanges to NYSE National, Arca Securities may provide inbound routing services to NYSE National from those affiliated exchanges.⁶² This provision is contingent on the Exchange maintaining an agreement pursuant to Rule 17d-2 under the Act⁶³ with a non-affiliated SRO and establishing controls and procedures to prevent Arca Securities from benefitting from or acting on non-public information obtained as a result of the affiliation.⁶⁴

Section 5 of proposed Rule 7, “Plan to Implement a Tick Size Pilot Program”⁶⁵ would establish requirements relating to the Tick Size Pilot Program adopted as a joint industry plan under Regulation NMS under the Act, and is based on the similar rule of NYSE Arca.⁶⁶

Section 6 of proposed Rule 7, “Contracts in Securities,”⁶⁷ would provide that contracts in municipal securities be compared, settled, and cleared in accordance with regulations of the Municipal Securities Rulemaking Board; set forth requirements relating to ETP contracts of an ETP Holder with another ETP Holder; and establish requirements relating to the book entry

⁶² Proposed Rule 3.9 would provide that, unless approved by the Commission, neither NYSE Group, Inc., nor any of its affiliates (as such term is defined in Rule 12b-2 under the Act) shall hold, directly or indirectly, an ownership interest in any ETP Holder. Arca Securities would be covered by this provision.

⁶³ 17 CFR 240.17d-2.

⁶⁴ See id. Proposed Rule 7.45 also includes provisions regarding cancellation of orders and error accounts in connection with the arrangement of the Exchange with Arca Securities.

⁶⁵ Section 5 is comprised solely of proposed Rule 7.46.

⁶⁶ See NYSE Arca 7.46-E.

⁶⁷ Section 6 would include proposed Rules 7.60 through 7.62.

settlement of transactions.⁶⁸

Rule 10 – Disciplinary Proceedings, Other Hearings, and Appeals

Proposed Rule 10 consists of proposed Rule 10.8000, Investigations and Sanctions, and proposed Rule 10.9000, Code of Procedure, (“Rule 10.8000 and Rule 10.9000 Series”), which are based on NYSE American Rule 8000 and Rule 9000 Series of the Office Rules, with certain modifications.⁶⁹ Together, the rules would be the Exchange’s Disciplinary rules. Other than the differences specified in Amendment No. 1, the proposed Rule 10.8000 and 10.9000 Series are based on the individual counterpart NYSE American Rule 8000 and 9000 Series.⁷⁰ Given the different membership structures, lack of a physical trading floor,⁷¹ and differences in terminology throughout the rules, the proposed Rule 10.8000 and Rule 10.9000 Series would differ from the NYSE American rules as follows:

- the term “ETP Holder” is used rather than “member and member organization” or “member organization or ATP Holder”;
- the terms “Associated Person” and “Person Associated with an ETP Holder,” which are defined terms on the Exchange are used rather than the term “covered person”;

⁶⁸ See proposed Rules 7.61, 7.62, and 7.63, respectively.

⁶⁹ NYSE American Rule 8000 and Rule 9000 Series are substantially the same as the Rule 8000 and Rule 9000 Series of NYSE and of FINRA. See Securities Exchange Act Release No. 77241 (February 26, 2016), 81 FR 11311 (March 3, 2016) (SR-NYSEMKT-2016-30). See also Securities Exchange Act Release No. 78959 (September 28, 2016), 81 FR 68481 (October 4, 2016) (SR-NYSEMKT-2016-71). The NYSE American disciplinary rules were implemented on April 15, 2016. See NYSE American Information Memorandum 16-02 (March 14, 2016).

⁷⁰ See Amendment No. 1, *supra* note 6.

⁷¹ Because the Exchange would not have a floor, it would not have Floor-Based Panelists. See NYSE American Rules 9120(q), 9212(a)(2)(B), 9221(a)(3), 9231(b)(2) and (c)(2), and 9232(c).

- not adopt NYSE American Rules 8001 and 9001, which describe the effective date of the NYSE American rules;
- not retain the text of NYSE American’s legacy minor rules;
- add the following sentence, from NYSE Arca Rule 10.2(a), to Rule 10.8210(a): “No member of the Board of Directors or non-Regulatory Staff may interfere with or attempt to influence the process or resolution of any pending investigation or disciplinary proceeding”;
- exclude the definition of the following terms in Rule 10.9120: “Board of Directors,” “covered person,” “Exchange,” and “Floor-Based Panelist,” because they are defined elsewhere in the rules or are not applicable to the Exchange, and would mark those paragraphs as “Reserved”;
- add the following sentence to proposed Rule 10.9120(v)’s definition of “Panelist”: “Hearing Panel members will be drawn from the Exchange Business Conduct Committee (‘BCC’)”;
- merge the current Rule 8.15 and NYSE American Rule 9217 to create proposed Rule 10.9217, which sets forth the Exchange’s Minor Rule Violation Plan;⁷²
- replace the phrase “an ETP Holder that is an affiliate” from NYSE American Rule 9268(e)(2) with “an affiliate of the Exchange as such term is defined in Rule 12b-2 under the Exchange Act,” in proposed Rules 10.9268 and 10.9310(a)(1); and
- propose non-substantive grammatical differences in specified rules, as needed, and update internal cross references to the appropriate Exchange rule.

⁷² See Amendment No. 1, supra note 6. The Minor Rule Violation Plan provides an alternative method for the Exchange to address a violation of its rules. The Exchange is always free to pursue formal disciplinary action against a member that violates its rules.

Rule 11 – Business Conduct

The Exchange proposes to maintain certain current NYSE National rules regarding rules of fair practice, books and records, supervisions, extensions of credit, and trading practices and relocate these rules to proposed Rule 11. The Exchange also proposes to adopt conduct rules that are based on FINRA rules and to incorporate certain FINRA rules by reference.⁷³

Section 1 of proposed Rule 11 would be designated as Rules of Fair Practice and the preamble thereto would state that “References to the term ETP Holder in Section 1 to Rule 11 also mean Associated Persons of ETP Holders.” The rules in Section 1 to proposed Rule 11 relate to Business Conduct of ETP Holders,⁷⁴ Violations Prohibited,⁷⁵ Use of Fraudulent Devices,⁷⁶ False Statements,⁷⁷ Advertising Practices,⁷⁸ Fair Dealing with Customers,⁷⁹ The Prompt Receipt and Delivery of Securities,⁸⁰ Charges for Services Performed,⁸¹ Use of Information,⁸² Publication of Transactions and Quotations,⁸³ Offers at Stated Prices,⁸⁴ Payment

⁷³ See Amendment No. 1, supra note 6. In Amendment No. 1, the Exchange proposes to revise or relocate certain rules in Rule 11 that were included in the original proposed rule change.

⁷⁴ Proposed Rule 11.3.1.

⁷⁵ Proposed Rule 11.3.2.

⁷⁶ Proposed Rule 11.3.3.

⁷⁷ Proposed Rule 11.3.4.

⁷⁸ Proposed Rule 11.3.5.

⁷⁹ Proposed Rule 11.3.6.

⁸⁰ Proposed Rule 11.3.8.

⁸¹ Proposed Rule 11.3.9.

⁸² Proposed Rule 11.3.10.

⁸³ Proposed Rule 11.3.11.

⁸⁴ Proposed Rule 11.13.12.

Designed to Influence Market Prices, Other than Paid Advertising,⁸⁵ Disclosure of Control,⁸⁶ Discretionary Accounts,⁸⁷ Customer's Securities or Funds,⁸⁸ Prohibition Against Guarantees,⁸⁹ Sharing in Accounts; Extent Permissible,⁹⁰ and Telephone Solicitation.⁹¹

Section 2 of proposed Rule 11 would be designated as Books and Records and the rules thereunder would relate to Requirements,⁹² Furnishing of Records,⁹³ Record of Written Complaints,⁹⁴ and Disclosure of Financial Condition.⁹⁵

Section 3 of proposed Rule 11 would be designated as Supervision and the rules thereunder would relate to Written Procedures,⁹⁶ Responsibility of ETP Holders,⁹⁷ Records,⁹⁸ Review of Activities and Annual Inspection,⁹⁹ Prevention of the Misuse of Material, Nonpublic Information,¹⁰⁰ and Annual Certification of Compliance and Supervisory Processes.¹⁰¹

⁸⁵ Proposed Rule 11.13.13.

⁸⁶ Proposed Rule 11.13.15.

⁸⁷ Proposed Rule 11.13.16.

⁸⁸ Proposed Rule 11.13.17.

⁸⁹ Proposed Rule 11.13.18.

⁹⁰ Proposed Rule 11.13.19.

⁹¹ Proposed Rule 11.13.21.

⁹² Proposed Rule 11.4.1.

⁹³ Proposed Rule 11.4.2.

⁹⁴ Proposed Rule 11.4.3.

⁹⁵ Proposed Rule 11.4.4.

⁹⁶ Proposed Rule 11.5.1.

⁹⁷ Proposed Rule 11.5.2.

⁹⁸ Proposed Rule 11.5.3.

⁹⁹ Proposed Rule 11.5.4.

¹⁰⁰ Proposed Rule 11.5.5.

¹⁰¹ Proposed Rule 11.5.7.

Section 4 of proposed Rule 11 would be designated as Extensions of Credit and the rules thereunder would relate to Extensions of Credit – Prohibitions and Exemptions¹⁰² and Day Trading Margin.¹⁰³

Section 5 of proposed Rule 11 would be designated as Trading Practice Rules and the preamble thereto would state that “References to the term ETP Holder in Section 5 to Rule 11 also mean Associated Persons of ETP Holders.” The rules in Section 5 of proposed Rule 11 relate to Market Manipulation,¹⁰⁴ Fictitious Transactions,¹⁰⁵ Excessive Sales by an ETP Holder,¹⁰⁶ Manipulative Transactions,¹⁰⁷ Dissemination of False Information,¹⁰⁸ Joint Activity,¹⁰⁹ Influencing the Consolidated Tape,¹¹⁰ Options,¹¹¹ Best Execution,¹¹² and Prearranged Trades.¹¹³

The Exchange proposes to adopt new conduct rules in Section 6 of proposed Rule 11 (Harmonized Conduct Rules). The rules in Section 6 of proposed Rule 11 relate to Suitability,¹¹⁴

¹⁰² Proposed Rule 11.6.1.

¹⁰³ Proposed Rule 11.6.2.

¹⁰⁴ Proposed Rule 11.12.1.

¹⁰⁵ Proposed Rule 11.12.2.

¹⁰⁶ Proposed Rule 11.12.3.

¹⁰⁷ Proposed Rule 11.12.4.

¹⁰⁸ Proposed Rule 11.12.5.

¹⁰⁹ Proposed Rule 11.12.7.

¹¹⁰ Proposed Rule 11.12.8.

¹¹¹ Proposed Rule 11.12.9.

¹¹² Proposed Rule 11.12.10.

¹¹³ Proposed Rule 11.12.11.

¹¹⁴ Proposed Rule 11.2111.

Communications with the Public,¹¹⁵ Customer Confirmations,¹¹⁶ Anti-Money Laundering Compliance Program,¹¹⁷ Disruptive Quoting and Trading Activity Prohibited,¹¹⁸ and Prohibition Against Trading Ahead of Customer Orders.¹¹⁹ Other than proposed Rule 11.5220, relating to Disruptive Quoting and Trading Activity Prohibited, the Section 6 rules would incorporate by reference a specific FINRA rule or, in the case of proposed Rule 11.5320, would set forth the complete rule and also incorporate by reference the relevant FINRA rule.¹²⁰

Rule 12 – Arbitration

The Exchange proposes new Rule 12 (Arbitration) to replace rules set forth in Chapter IX relating to arbitration. Proposed Rule 12 would incorporate by reference the Rule 12000 Series and the Rules 13000 Series of the FINRA Manual (Code of Arbitration Procedures for Customer Disputes and Code of Arbitration for Industry Disputes) (the “FINRA Code of Arbitration”).¹²¹ Proposed Rule 12 would govern jurisdiction and the circumstances under which disputes may be arbitrated;¹²² pre-dispute arbitration agreements between ETP Holders and their customers, which would incorporate by reference FINRA Rule 2268;¹²³ arbitrators’ referrals to the

¹¹⁵ Proposed Rule 11.2210.

¹¹⁶ Proposed Rule 11.2232.

¹¹⁷ Proposed Rule 11.3310.

¹¹⁸ Proposed Rule 11.5220.

¹¹⁹ Proposed Rule 11.5320.

¹²⁰ In its proposed rule change, as amended, the Exchange states that it proposes to file a request that the Commission exercise its authority under Section 36 of the Act and Rule 0-12 thereunder, and grant the Exchange an exemption from the rule filing requirements of Section 19(b) of the Act for changes to Exchange rules that will be effected by a cross-reference to a FINRA rule, including FINRA rules designated as NASD rules.

¹²¹ See Amendment No. 1, supra note 6.

¹²² Proposed Rule 12(b).

¹²³ Proposed Rule 12(c).

Exchange;¹²⁴ any failures to honor an arbitrator's award;¹²⁵ and the effect of arbitration on the Exchange's rights as an SRO.¹²⁶

Rule 13 – Liability of Directors and Exchange

The Exchange proposes new Rule 13, which would set forth the rules governing the liability of its Directors and the Exchange. Proposed Rules 13.1 and 13.2 would set forth limitations on liability of the Directors and the Exchange, respectively.¹²⁷ Proposed Rule 13.3 would limit legal proceedings against any Directors, officer, employee, agent or other official of the Exchange or any subsidiary of the Exchange.¹²⁸ Proposed Rule 13.4 relates to responsibility for the Exchange's costs in defending a legal proceeding brought against the Exchange.¹²⁹

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and rules and regulations thereunder applicable to a national securities exchange.¹³⁰ In particular, the Commission finds that the amended proposed rule change is consistent with Section 6(b)(5) of the Act,¹³¹ which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the

¹²⁴ Proposed Rule 12(d).

¹²⁵ Proposed Rule 12(e).

¹²⁶ Proposed Rule 12(f).

¹²⁷ Proposed Rule 13.1 and 13.2.

¹²⁸ Proposed Rule 13.3.

¹²⁹ Proposed Rule 13.4.

¹³⁰ In approving the proposed rule changes, the Commission has considered their impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹³¹ 15 U.S.C. 78f(b)(5).

mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission further finds that the amended proposed rule change is consistent with Section 6(b)(7) of the Act,¹³² which requires, among other things, that the rules of a national securities exchange provide a fair procedure for the disciplining of members and persons associated with members.

1. Re-launch of the Exchange on the Pillar Trading Platform

The Exchange's proposal would re-launch the Exchange on the Pillar platform as a fully-automated cash equities trading market with a price-time priority allocation model. As discussed at length in Amendment No. 1, the re-launched Exchange would neither list securities nor operate an auction and instead, would trade securities solely on a UTP basis.

The Commission notes that the Exchange's amended proposal, in addition to retaining certain of the Exchange's existing rules, would establish new rules that are based on, and are substantially similar to, the rules of its affiliated exchanges and FINRA, which were filed and approved by the Commission (or which became immediately effective) pursuant to Section 19(b) of the Act.¹³³ Several of its affiliated exchanges currently operate using the Pillar trading platform, and a number of other national securities exchanges operate fully electronic markets. Accordingly, the Commission finds that the amended proposal raises no novel regulatory issues, that it is reasonably designed to protect investors and the public interest, and that it is consistent with the requirements of the Act. The Commission highlights below its views on certain of the more significant aspects of the Exchange's proposal.

¹³² 15 U.S.C. 78f(b)(7).

¹³³ See 78 U.S.C 78s(b).

Rule 2 – Trading Permits

As noted above, the Exchange proposes to retain its existing membership rules,¹³⁴ which may not reflect certain harmonized standards in the membership rules of other SROs. The Commission notes that the Exchange commits to working with Commission staff to update its membership rules and to file a separate filing relating to its membership rules within 90 days of any approval of the Exchange's proposed rule change.¹³⁵ Also, an ETP Holder, as a prerequisite to membership, would be required to be a member of a registered national securities association or of a registered national securities exchange.¹³⁶ As a member of two or more SROs, an ETP Holder would be required to comply with whichever rules impose a higher standard.

In Amendment No.1, the Exchange proposes a grace period of 30 calendar days for ETP Holders eligible for the expedited reinstatement process¹³⁷ to register Persons Associated with the ETP Holder with the Exchange. ETP Holders who take advantage of the grace period would be able to begin trading on the Exchange before completing the registration of Persons Associated with the Exchange. The Commission notes that, based on the requirements of the expedited process for reinstatement, such ETP Holders would be required to already have Persons Associated with the ETP Holder registered on CRD. The Commission believes that the grace period would remove impediments to and perfect the mechanism of a free and open market and a national market system by allowing ETP Holders to begin trading on the Exchange

¹³⁴ The Commission notes the Exchange represents that there are no categories of persons on the Exchange that would fall outside of the membership categories and requirements set forth in proposed Rule 2. See supra note 31.

¹³⁵ See supra note 37.

¹³⁶ See proposed Rule 2.3.

¹³⁷ See Commentary .01 to proposed Rule 2.5.

immediately, without completing the manual process of entering into CRD an additional registration for their Associated Persons, as of the Exchange's re-launch of trading.

Based on the fact that ETP Holders are currently subject to the registration requirements of the other exchange or association of which they are members, as well as on the Commission's expectation that the Exchange will file a proposal within 90 days to conform its membership rules to the membership rules of other SROs, the Commission finds that the Exchange's proposed membership rules are consistent with the requirements of the Act.

The Commission notes that proposed Rule 3.9 provides that, without prior Commission approval, no ETP Holder shall be affiliated with NYSE Group, Inc. or any of its affiliated entities.¹³⁸ The Commission finds that it is consistent with the Act to permit Arca Securities to become affiliated with the Exchange for the purposes of providing routing services for the Exchange, subject to conditions described in proposed Rule 7.45.

Rule 5 – Trading on an Unlisted Trading Privileges Basis

As discussed above, in Amendment No. 1 the Exchange states that it does not believe that it is necessary for an exchange that trades securities only on a UTP basis to have listing rules for ETPs.¹³⁹ Similarly, the Exchange states its belief that it should not be necessary for a non-listing venue to file a Form 19b-4(e) if it begins trading an ETP on a UTP basis, because Rule 19b-4(e)(1) under the Act refers to the "listing and trading" of a "new derivative securities product."¹⁴⁰ Accordingly, the Exchange proposes to adopt only those rules that would support the trading on a UTP basis of all NMS Stocks, and the trading on a UTP basis for UTP Exchange

¹³⁸ See proposed Rule 3.9(a). See also *supra* note 62.

¹³⁹ See Amendment No. 1, *supra* note 6.

¹⁴⁰ 17 CFR 240.19b-4(e). See Amendment No. 1, *supra* note 6.

Trading Products.¹⁴¹

Proposed Rule 5.1 would establish the Exchange's authority to trade securities on a UTP basis. Proposed Rule 5.1(a)(1) would provide that the Exchange may extend UTP to any security that is an NMS Stock that is listed on another national securities exchange or with respect to which UTP may otherwise be extended in accordance with Section 12(f) of the Act.¹⁴² Proposed Rule 5.1(a)(1) further would provide that any such security would be subject to all Exchange rules applicable to trading on the Exchange, unless otherwise noted.

Proposed Rule 5.1(a)(2) would establish additional rules for trading of UTP Exchange Traded Products, which are defined in Rule 1.1 (described above). Proposed Rule 5.1(a)(2)(A) would provide that the Exchange would distribute an information circular prior to the commencement of trading in an Exchange Traded Product that generally would include the same information as the information circular provided by the listing exchange, including (a) the special risks of trading the Exchange Traded Product, (b) the Exchange's rules that would apply to the Exchange Traded Product and (c) information about the dissemination of value of the underlying assets or indices. Proposed Rule 5.1(a)(2)(E) would provide that the Exchange's surveillance procedures for Exchange Traded Products traded on the Exchange pursuant to UTP would be similar to the procedures used for equity securities traded on the Exchange and would incorporate and rely upon existing Exchange surveillance systems. Proposed Rules 5.1(a)(2)(B) and (D) would establish certain requirements for ETP Holders that have customers that trade UTP Exchange Traded Products.¹⁴³

¹⁴¹ See supra note 40.

¹⁴² 15 U.S.C. 78l(f).

¹⁴³ Proposed Rule 5.1(a)(2)(B)(i) would remind ETP Holders that they are subject to the prospectus delivery requirements under the Securities Act, unless the Exchange Traded

The Commission finds that the Exchange’s proposed approach to the trading of securities on a UTP basis, as set forth in proposed Rule 5, as amended by Amendment No. 1, is consistent with Section 6(b)(5) of the Act.¹⁴⁴ The Commission notes that the provisions in proposed Rule 5 are based upon existing rules of other exchanges.¹⁴⁵ Proposed Rule 5.1 includes a provision that any security traded UTP on the Exchange “shall be subject to all Exchange rules applicable to trading on the Exchange, unless otherwise noted.” Importantly, the Exchange notes that this language is intended to make clear that all Exchange rules would be applicable to the trading of UTP on the Exchange, including business conduct and sales practice rules set forth in proposed Rule 11.¹⁴⁶ The Commission notes that, in Amendment No. 1, the Exchange would delete and reserve Rule 8, which it had previously proposed to include listing standards and related provisions for the trading of certain exchange derivatives on the Exchange.¹⁴⁷ The Commission believes that Rule 8, as previously proposed, is not necessary insofar as proposed Rules 5 and 11 would cover all categories of securities traded on the Exchange on a UTP basis.

Product is the subject of an order by the Commission exempting the product from certain prospectus delivery requirements under Section 24(d) of the 1940 Act, and the product is not otherwise subject to prospectus delivery requirements under the Securities Act. ETP Holders also would be required to provide a prospectus to a customer requesting a prospectus. Proposed Rule 5.1(a)(2)(B)(ii) would require ETP Holders to provide a written description of the terms and characteristics of UTP Exchange Traded Products to purchasers of such securities, not later than the time of confirmation of the first transaction, and with any sales materials relating to UTP Exchange Traded Products. Proposed Rule 5.1(a)(2)(D) also would establish certain requirements for any ETP Holder registered as a market maker in an UTP Exchange Traded Product that derives its value from one or more currencies, commodities, or derivatives based on one or more currencies or commodities, or is based on a basket or index composed of currencies or commodities.

¹⁴⁴ 15 U.S.C. 78f(b)(5).

¹⁴⁵ See discussion of proposed Rule 5 in Section II., supra.

¹⁴⁶ See Amendment No. 1, supra note 6.

¹⁴⁷ Id.

In sum, the Commission believes that the changes proposed by the Exchange in Amendment No. 1, including the proposed revisions to Rule 5 and the addition of the definitions of “Exchange Traded Product” and “UTP Exchange Traded Product” that enumerate the classes of Exchange Traded Products to be traded on a UTP basis,¹⁴⁸ as well as the proposed requirement to distribute an information circular prior to the commencement of trading, the business conduct and sales practice rules set forth in Rule 11 (which apply to all securities traded UTP on the Exchange), and the proposed deletion of Rule 8, taken together, establish an appropriate framework for the trading of Exchange Traded Products on a UTP basis on the Exchange.¹⁴⁹ Accordingly, for these reasons, the Commission finds that the proposed rules governing trading on a UTP basis on the Exchange are consistent with Section 6(b)(5) of the Act.

Rule 10 – Disciplinary Proceedings, Other Hearings and Appeals

The Exchange states that it is proposing to adopt the current disciplinary rules of NYSE American, which are substantially similar to those of NYSE and FINRA.¹⁵⁰ The Exchange indicates in Amendment No. 1, as discussed above, where proposed Rule 10 differs from the NYSE American disciplinary rules.¹⁵¹ The Exchange proposes disciplinary rules substantially

¹⁴⁸ See Amendment No. 1, supra note 6. As noted in the description of Rule 1 above, the Exchange proposes a definition of UTP Exchange Traded Products, which would enumerate in proposed Rule 1.1 the classes of Exchange Traded Products that the Exchange proposes to trade on a UTP basis. See Proposed Rule 1.1(m).

¹⁴⁹ In addition, the Commission believes that the filing of a Form 19b-4(e) is not required when an Exchange is trading a new derivative securities product on a UTP basis only.

¹⁵⁰ See Amendment No. 1, supra note 6. See also Securities Exchange Act Release Nos. 68678 (January 16, 2013), 78 FR 5213 (January 24, 2013) (SR-NYSE-2013-02) (NYSE disciplinary rule notice), 69045 (March 5, 2013), 78 FR 15394 (March 11, 2013) (NYSE-2013-02) (NYSE disciplinary rule approval order), 69963 (July 10, 2013), 78 FR 42573 (July 16, 2013) (SR-NYSE-2013-49), and 58643 (September 25, 2008), 73 FR 57174 (October 1, 2008) (order approving NASD disciplinary rules).

¹⁵¹ See Amendment No. 1, supra note 6.

similar to those of the NYSE American in order to harmonize the rules among the different NYSE Group exchanges and minimize any potential regulatory burden on members arising from differing processes. The Exchange represents that all but one of its ETP Holders are also members of FINRA, NYSE Arca, NYSE American, NYSE, or Nasdaq, and thus they would be familiar with the proposed rules.¹⁵² The Commission believes that the proposed Rule 10.8000 and Rule 10.9000 Series furthers the objectives of Section 6(b)(7) of the Act,¹⁵³ in that it provides fair procedures for the disciplining of ETP Holders and persons associated with an ETP Holder, the denial of membership to any person seeking membership therein, and the barring of any person from becoming a person associated with an ETP Holder. For the reasons discussed above, the Commission finds that the proposed changes are consistent with Section 6(b)(7) of the Act.

2. Section 11(a) of the Act

Section 11(a)(1) of the Act¹⁵⁴ prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises investment discretion (collectively, “covered accounts”) unless an exception applies. Rule 11a2-2(T) under the Act,¹⁵⁵ known as the “effect versus execute” rule, provides exchange members with an exemption from the Section

¹⁵² See Amendment No. 1, *supra* note 6, fn. 51. See also Securities Exchange Act Release No. 56204 (August 3, 2007), 72 FR 45288 (August 13, 2007) (NASDAQ-2007-070) (“To ensure that FINRA members did not incur significant regulatory burdens as a result of Nasdaq separating from FINRA and registering as a national securities exchange, Nasdaq based its rules governing regulatory standards and disciplinary processes on FINRA rules, to a significant extent.”).

¹⁵³ See 15 U.S.C. 78f(b)(7).

¹⁵⁴ 15 U.S.C. 78k(a)(1).

¹⁵⁵ 17 CFR 240.11a2-2(T).

11(a)(1) prohibition. Rule 11a2-2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute transactions on the exchange. To comply with Rule 11a2-2(T)'s conditions, a member: (i) must transmit the order from off the exchange floor; (ii) may not participate in the execution of the transaction once the order has been transmitted to the member performing the execution;¹⁵⁶ (iii) may not be affiliated with the executing member; and (iv) with respect to an account over which the member or an associated person has investment discretion, neither the member nor an associated person may retain any compensation in connection with effecting the transaction except as provided in the Rule. For the reasons set forth below, the Commission believes that ETP Holders entering orders into the Exchange's Pillar trading system would satisfy the requirements of Rule 11a2-2(T).

Rule 11a2-2(T)'s first requirement is that orders for covered accounts be transmitted from off the exchange floor. The Exchange represents that it will not have a physical trading floor when it re-launches trading and the Exchange's Pillar trading system will receive orders from members electronically through remote terminals or computer-to-computer interfaces.¹⁵⁷ In the context of other automated trading systems, the Commission has found that the off-floor transmission requirement is met if a covered account is transmitted from a remote location directly to an exchange's floor by electronic means.¹⁵⁸ Because the Pillar trading system

¹⁵⁶ This prohibition also applies to associated persons of the initiating member. The member may, however, participate in clearing and settling the transaction.

¹⁵⁷ See Amendment No. 1, supra note 6.

¹⁵⁸ In the context of other all-electronic systems, the Commission has similarly found that the off-floor transmission requirement is met if the system receives orders electronically through remote terminals or computer-to-computer interfaces. See, e.g., Securities Exchange Act Release Nos. 61419 (January 26, 2010), 75 FR 5157 (February 1, 2010) (SR-BATS-2009-031) (approving BATS options trading); 59154 (December 23, 2008),

receives orders electronically through remote terminals or computer-to-computer interfaces, the Commission believes that the Pillar trading system would satisfy this off-floor transmission requirement.

Second, Rule 11a2-2(T) requires that neither the initiating member nor an associated person of the initiating member participate in the execution of the transaction at any time after the order for the transaction has been transmitted. The Exchange represents that the Pillar trading system would at no time following the submission of an order allow an ETP Holder or an associated person of the ETP Holder to acquire control or influence over the result or timing of the order's execution.¹⁵⁹ According to the Exchange, the execution of an ETP Holder's order would be determined solely by the quotes and orders that are present in the system at the time the member submits the order and by the order priority under the Exchange rules.¹⁶⁰ Accordingly,

73 FR 80468 (December 31, 2008) (SR-BSE-2008-48) (approving equity securities listing and trading on BSE); 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080) (approving NOM options trading); 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10-131) (granting the application of The Nasdaq Stock Market LLC for registration as a national securities exchange); and 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (SR-PCX-00-25) (approving the establishment of the Archipelago Exchange as the equities trading facility of PCX Equities, Inc., a subsidiary of the Pacific Exchange, Inc.).

¹⁵⁹ See Amendment No. 1, supra note 6.

¹⁶⁰ See id. The Exchange notes that Rule 11a2-2(T) does not preclude a member from cancelling or modifying orders, or from modifying the instructions for executing orders, after they have been transmitted, provided that such cancellations or modifications are transmitted from off an exchange floor. See id. The Commission has stated that the non-participation requirement is satisfied under such circumstances so long as the modifications or cancellations are also transmitted from off the floor. See Securities Exchange Act Release No. 14563 (March 14, 1978), 43 FR 11542 (March 17, 1978) ("1978 Release") (stating that the "non-participation requirement does not prevent initiating members from canceling or modifying orders (or the instructions pursuant to which the initiating member wishes orders to be executed) after the orders have been transmitted to the executing member, provided that any such instructions are also transmitted from off the floor").

the Commission believes that an Exchange member and its associated persons would not participate in the execution of an order submitted to the Pillar trading system.

Third, Rule 11a2-2(T) requires that the order be executed by an exchange member that is not associated with the member initiating the order. The Commission has stated that this requirement is satisfied when automated exchange facilities are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange.¹⁶¹ The Exchange represents that the design of the Pillar trading system ensures that no ETP Holder has any special or unique trading advantage in the handling of its orders after transmitting its orders to the Exchange.¹⁶² Based on the Exchange's representation, the Commission believes that the Pillar trading system would satisfy this requirement.

Fourth, in the case of a transaction effected for an account with respect to which the initiating member or an associated person thereof exercises investment discretion, neither the initiating member nor any associated person may retain any compensation in connection with effecting the transaction, unless the person authorized to transact business for the account has expressly provided otherwise by written contract referring to Section 11(a) of the Act and Rule

¹⁶¹ In considering the operation of automated execution systems operated by an exchange, the Commission noted that, while there is not an independent executing exchange member, the execution of an order is automatic once it has been transmitted into the system. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2-2(T). See Securities Exchange Act Release No. 15533 (January 29, 1979), 44 FR 6084 (January 31, 1979).

¹⁶² See Amendment No. 1, supra note 6.

11a2-2(T) thereunder.¹⁶³ ETP Holders trading for covered accounts over which they exercise investment discretion must comply with this condition in order to rely on the rule's exemption.¹⁶⁴

IV. Solicitation of Comments on Amendment No. 1 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 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. Please include File Number SR-NYSENAT-2018-02 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.

¹⁶³ In addition, Rule 11a2-2(T)(d) requires that, if a member or associated person is authorized by written contract to retain compensation in connection with effecting transactions for covered accounts over which the member or associated person thereof exercises investment discretion, the member or associated person must furnish at least annually to the person authorized to transact business for the account a statement setting forth the total amount of compensation retained by the member or any associated person thereof in connection with effecting transactions for the account during the period covered by the statement. See 17 CFR 240.11a2-2(T)(d). See also 1978 Release, supra note 107 (“The contractual and disclosure requirements are designed to assure that accounts electing to permit transaction-related compensation do so only after deciding that such arrangements are suitable to their interests”).

¹⁶⁴ The Exchange represents that it will advise its membership through the issuance of a Regulatory Bulletin that those ETP Holders trading for covered accounts over which they exercise investment discretion must comply with this condition in order to rely on the exemption in Rule 11a2-2(T). See Amendment No. 1, supra note 6.

All submissions should refer to File Number SR-NYSENAT-2018-02. 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, 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-NYSENAT-2018-02 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of Proposed Rule Change, as Modified By Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 1 in the Federal Register. As discussed above, in Amendment No. 1, the Exchange proposes, among other things, to: (i) delete proposed Rule 8 and modify proposed Rule 5 to include only those rules that would support the trading on a UTP basis of all NMS

Stocks and the trading on a UTP basis of UTP Exchange Traded Products; (ii) revise the proposed definition of the term “UTP Exchange Traded Product”; (iii) propose a grace period of thirty days for ETP Holders that are eligible for the expedited process for reinstatement under the proposal to register their Associated Persons with the Exchange; (iv) commit to working with Commission staff to update its membership rules and to file a separate filing relating to its membership rules within 90 days of any approval of the instant proposal; (v) identify which of the proposed Rules are based on the rules of NYSE American, as opposed to those based on the rules of NYSE Arca; (vi) add provisions, based on rules of other SROs, that were not included in the original filing; (vii) add a rule relating to the requirements for listed securities issued by ICE or its affiliates; (viii) specifically incorporate by reference certain FINRA rules that were only cited in the original version of the filing; (ix) add clarifying language to proposed rule text and the narrative describing the proposal; and (x) correct various technical errors.

The Commission notes that the proposed changes in Amendment No. 1 provide clarifying details, harmonize certain proposed rules with rules of other exchanges, incorporate certain other SRO rules by reference, and otherwise streamline the Exchange’s proposed rulebook. The proposed changes do not introduce any rules that differ in any substantive manner from rules that previously have been approved by the Commission, or that have become immediately effective, pursuant to Section 19(b) of the Act. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,¹⁶⁵ to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis so that the Exchange can re-commence operating without unnecessary delay.

¹⁶⁵ 15 U.S.C. 78s(b)(2).

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁶⁶ that the proposed rule change (SR-NYSENAT-2018-02), as modified by Amendment No. 1, be and hereby is approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶⁷

Eduardo A. Aleman
Assistant Secretary

¹⁶⁶ Id.

¹⁶⁷ 17 CFR 200.30-3(a)(31).