

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94053; File No. SR-NYSE-2022-04)

January 25, 2022

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Amend Rules 5P, 5.2(j)(8)(e), 8P, and 98

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on January 14, 2022, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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 Rules 5P, 5.2(j)(8)(e), 8P, and 98 to permit the listing and trading of certain Exchange Traded Products that have a component NMS Stock listed on the Exchange or that are based on, or represent an interest in, an underlying index or reference asset that includes an NMS Stock listed on the Exchange. The proposed rule change is available on the Exchange’s website at 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

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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 Rules 5P, 8P, 5.2(j)(8)(e) and 98 to permit the listing of certain Exchange Traded Products (“ETPs”)⁴ that have a component NMS Stock listed on the Exchange or that are based on, or represent an interest in, an underlying index or reference asset that includes an NMS Stock listed on the Exchange (an “NYSE Component Security” or, collectively, “NYSE Component Securities”). The amendments would also permit the trading of those ETPs on the NYSE Trading Floor (“Trading Floor” or “Floor”).⁵

Currently, Exchange rules do not permit the listing of an ETP that has underlying NYSE Component Securities. The proposed changes would permit the listing of ETPs that satisfy the composition and concentration requirements for equity-based products set forth in the listing criteria of (1) current Rules 5.2(j)(3) (Investment Company Units), 5.2(j)(6) (Equity Index-Linked Securities), 8.100 (Portfolio Depositary Receipts), 8.600 (Managed Fund Shares), and (2)

⁴ Rule 1.1(l) defines “Exchange Traded Product” as a security that meets the definition of “derivative securities product” in Rule 19b-4(e) under the Act. ETPs include, for example, securities listed and traded on the Exchange pursuant to the following Exchange rules: Rule 5.2(j)(3) (Investment Company Units); Rule 5.2(j)(5) (Equity Gold Shares); Rule 5.2(j)(6) (Equity Index-Linked Securities); Rule 8.100 (Portfolio Depositary Receipts); Rule 8.200 (Trust Issued Receipts) (“TIR”); Rule 8.201 (Commodity-Based Trust Shares); Rule 8.202 (Currency Trust Shares); Rule 8.203 (Commodity Index Trust Shares); Rule 8.204 (Commodity Futures Trust Shares); Rule 8.600 (Managed Fund Shares); and Rule 8.700 (Managed Trust Securities).

⁵ The term “Trading Floor” is defined in Rule 6A to mean the restricted-access physical areas designated by the Exchange for the trading of securities, commonly known as the “Main Room” and the “Buttonwood Room.”

Rule 5.2(j)(8) as proposed to be amended to include requirements to ensure diversification, non-concentration, liquidity and capitalization.

Accordingly, these ETPs would not be covered by the restrictions associated with the listing of ETPs that have an NYSE Component Security.

Background

Current Listing Rules

Currently, the Exchange trades securities, including ETPs, on its Pillar trading platform on an unlisted trading privileges (“UTP”) basis, subject to Pillar Platform Rules 1P - 13P.⁶ ETPs traded on a UTP basis on the Exchange are not assigned to a Designated Market Maker (“DMM”) and are available for Floor brokers to trade in Floor-based crossing transactions.⁷ The Exchange does not have any restrictions on which ETPs may trade on a UTP basis on the Exchange.

The Exchange’s rules permit it to list ETPs under Rules 5P and 8P. Specifically, Rules 5P (Securities Traded) and 8P (Trading of Certain Exchange Traded Products) provide for the listing of certain ETPs on the Exchange that (1) meet the applicable requirements set forth in those rules, and (2) do not hold NYSE Component Securities.⁸ ETPs listed under Rules 5P and

⁶ “UTP Security” is defined as a security that is listed on a national securities exchange other than the Exchange and that trades on the Exchange pursuant to unlisted trading privileges. See Rule 1.1.

⁷ See Securities Exchange Act Release No. 82945 (March 26, 2018), 83 FR 13553, 13568 (March 29, 2018) (SR-NYSE-2017-36) (approving Exchange rules to trade securities on a UTP basis on the Pillar trading platform).

⁸ ETPs listed under NYSE Rules 8.601 (Active Proxy Portfolio Shares) and 8.900 (Managed Portfolio Shares) are not subject to the prohibition in the preamble to Rule 8P. See Securities Exchange Act Release No. 90091 (October 5, 2020), 85 FR 64194, 64211 (October 9, 2020) (SR-NYSE-2020-77) (Notice); Securities Exchange Act Release No. 90526 (November 27, 2020), 85 FR 78157 (December 3, 2020) (SR-NYSE-2020-77) (Notice of Deemed Approval).

8P are “Tape A” listings and are traded pursuant to the rules applicable to NYSE-listed securities. Accordingly, once an ETP is listed, it is assigned to a DMM pursuant to Rule 103B and the assigned DMM has obligations vis-à-vis such securities as specified in Rule 104, including facilitating the opening, reopening, and closing of, and trading in, such securities.⁹

The Exchange recently adopted a new Rule 5.2(j)(8)¹⁰ establishing generic listing standards allowing the Exchange to list and trade Exchange-Traded Fund Shares.¹¹

Relevant Commission Precedent

While the trading of an equity security and its related derivative product at the same physical location (“side-by-side trading”)¹² and the practice of the same person or firm making markets in an equity security and its related option (“integrated market making”¹³) has generally not been permitted, the Commission has approved integrated market making and side-by-side

⁹ See Securities Exchange Act Release No. 87056 (September 23, 2019), 84 FR 51205 (September 27, 2019) (SR-NYSE-2019-34) (order approving amendments to Rule 104 to specify DMM requirements for ETPs listed on the Exchange pursuant to Rules 5P and 8P).

¹⁰ See Securities Exchange Act Release No. 91029 (February 1, 2021), 86 FR 8420 (February 5, 2021) (SR-NYSE-2020-86) (approval order).

¹¹ See Release Nos. 33-10695; IC-33646; File No. S7-15-18 (ETFs) (September 25, 2019), 84 FR 57162 (October 24, 2019) (the “Rule 6c-11 Release”).

¹² “Side-by-side trading” refers to the trading of an equity security and its related derivative product at the same physical location, though “not necessarily by the same specialist or specialist firm.” See Securities Exchange Act Release No. 46213 (July 16, 2002), 67 FR 48232, 48233 (July 23, 2002) (SR-Amex-2002-21) (“Release No. 46213”) (order approving side-by-side trading and integrated market making of broad index-based ETFs and related options); see also Securities Exchange Act Release No. 45454 (February 15, 2002), 67 FR 8567, 8568 n. 7 (February 25, 2002) (SR-NYSE-2001-43) (“Release No. 45454”) (order approving approved person of a specialist to act as a specialist or primary market maker with respect to an option on a stock in which the NYSE specialist is registered on the Exchange).

¹³ “Integrated market making” refers to the practice of the same person or firm making markets in an equity security and its related option. See Release No. 45454, 67 FR at 8568 n. 7.

trading for “broad-based” exchange traded funds (“ETF”) and Trust-Issued Receipts (“TIR”) and related options.¹⁴ The test for whether a product is “broad-based,” and therefore not readily susceptible to manipulation, is whether the individual components of the ETP are sufficiently liquid and well-capitalized and the product is not over-concentrated.¹⁵ When these criteria are met, and the product can therefore be considered “broad-based,” the Commission has explicitly permitted integrated market making and side-by-side trading in both the ETP and related options, with no additional requirement for information barriers or physical or organizational separation.

In making a determination of whether an ETP is broad-based, the Commission has relied on an exchange’s listing standards. For instance, in permitting integrated market making and side-by-side trading for two types of ETPs and their related options, the Commission looked to

¹⁴ See Release No. 46213, 67 FR at 48232 (approving side-by-side trading and integrated market making for certain ETFs and TIRs and related options); see also Securities Exchange Act Release No. 62479 (July 9, 2010), 75 FR 41264 (July 15, 2010) (SR-Amex-2010-31) (“Release No. 62479”) (order approving side-by-side trading and integrated market making in the QQQ ETF and certain of its component securities where the QQQs met the composition and concentration measures to be classified as a broad-based ETF).

¹⁵ See Release No. 62479, 75 FR at 41272. The Commission has expressed its belief “that, when the securities underlying an ETF consist of a number of liquid and well-capitalized stocks, the likelihood that a market participant will be able to manipulate the price of the ETF is reduced.” See *id.* See generally Securities Exchange Act Release Nos. 56633 (October 9, 2007), 72 FR 58696 (October 16, 2007) (SR-ISE-2007-60) (order approving generic listing standards for ETFs based on both U.S. and international indices, noting they are “sufficiently broad-based in scope to minimize potential manipulation.”); 55621 (April 12, 2007), 72 FR 19571 (April 18, 2007) (SR-NYSEArca-2006-86) (same); 54739 (November 9, 2006), 71 FR 66993 (November 17, 2006) (SR-Amex-2006-78) (same); 57365 (February 21, 2008), 73 FR 10839 (February 28, 2008) (SR-CBOE-2007-109) (order approving generic listing standards for ETFs based on international indices, noting they are “sufficiently broad-based in scope to minimize potential manipulation.”); 56049 (July 11, 2007), 72 FR 39121 (July 17, 2007) (SR-Phlx-2007-20) (same); 55113 (January 17, 2007), 72 FR 3179 (January 24, 2007) (SR-NYSE-2006-101) (same); and 55269 (February 9, 2007), 72 FR 7490 (February 15, 2007) (SR-Nasdaq-2006-50) (same).

the then-American Stock Exchange LLC's listing standards that, as described below, are very similar to the Exchange's current listing standards.¹⁶

In particular, the Commission observed that the ETPs at issue, an ETF and a TIR, were securities based on "groups of stocks" whose prices were based on the prices of their component securities. As such, the Commission was of the view that a market participant's ability to manipulate the price of the ETPs or the related options would be "limited."¹⁷ Moreover, the Commission noted that the listing standards required (1) each product to have a minimum of 13 securities in the underlying portfolio, (2) that the most heavily weighted component securities could not exceed 25% of the weight of the portfolio, and (3) that the five most heavily weighted component securities could not exceed 65% of the weight of the portfolio. As the Commission concluded,

[b]y limiting the proposal to broad-based ETFs and TIRs, concerns regarding informational advantages about individual securities are lessened.¹⁸

Finally, the Commission noted that the capitalization and liquidity requirements imposed by the listing standards -- for example, the component securities that in the aggregate account for at least 90% of the weight of the portfolio must have a minimum market value of at least \$75 million and the component securities representing 90% of the weight of the portfolio each must have a minimum trading volume during each of the last six month of at least 250,000 shares -- "should reduce the likelihood that any market participant has an unfair information advantage

¹⁶ The American Stock Exchange LLC is now NYSE American, LLC.

¹⁷ Release No. 46213, 67 FR at 48235.

¹⁸ Id.

about the ETF, TIR, its related options, or its component securities, or that a market participant would not be able to manipulate the prices of the ETFs, TIRs, or their related options.”¹⁹

Proposed Rule Change

The Exchange proposes to list and trade certain ETPs that include one or more underlying NYSE Component Securities. Because listed securities are assigned to DMMs, trading is on the Floor of the Exchange and thus a listed ETP with an underlying NYSE Component Security could be assigned to a DMM that is also assigned one or more NYSE Component Securities forming part of the underlying ETP index or portfolio. The Exchange believes that it would be consistent with the Exchange Act and with prior Commission actions with respect to both integrated market making and side-by-side trading for the Exchange to list an ETP that also includes NYSE Component Securities based on the broad-based listing criteria contained in the relevant listing rules.

Current Generic Listing Standards

The Exchange believes that certain of its existing listing rules, together with proposed additional criteria for ETPs that meet the criteria for listing under Rule 5.2(j)(8), incorporate salient composition and concentration criteria designed to ensure that listed ETPs with an NYSE Component Security would be sufficiently broad-based to address potential manipulation concerns. Specifically, the Exchange believes that ETPs with underlying NYSE Component Securities that would qualify for listing under the current criteria in Rules 5.2(j)(3), Supplementary Material .01(a); 5.2(j)(6)(B)(I); 8.100, Supplementary Material .01(a)(A); and 8.600, Supplementary Material .01(a), would satisfy the type of broad-based listing criteria previously identified by the Commission to address potential manipulation concerns. The

¹⁹ Id.

Exchange believes that such ETPs could accordingly list and trade on the Exchange with no additional requirement for information barriers or physical or organizational separation based on the broad-based nature of the current listing criteria.

The current listing standards for these Rules incorporate composition and concentration criteria that includes market cap, volume, weighting and minimum number of components requirements. For instance, the generic listing requirements for Equity Index-Linked Securities Listing Standards (“ETN”) under Rule 5.2(j)(6)(B)(I) require that, among other things,

- each underlying index have at least ten (10) component securities;²⁰ that each component security (excluding Derivative Securities Products and Index-Linked Securities) have a minimum market value of at least \$75 million;²¹
- component stocks (excluding Derivative Securities Products and Index-Linked Securities) that in the aggregate account for at least 90% of the weight of the index (excluding Derivative Securities Products and Index-Linked Securities) each have a minimum global monthly trading volume of 1,000,000 shares, or minimum global notional volume traded per month of \$25,000,000, averaged over the last six months;²² and

²⁰ See NYSE Rule 5.2(j)(6)(B)(I)(1)(a). The rule provides that there shall be no minimum of component securities if one or more issues of Derivative Securities Products (i.e., Investment Company Units (as described in Rule 5.2(j)(3)) and securities described in Section 2 of Rule 8P) or Index-Linked Securities (as described in Rule 5.2(j)(6)), constitute, at least in part, component securities underlying an issue of Equity Index-Linked Securities.

²¹ See NYSE Rule 5.2(j)(6)(B)(I)(1)(b)(i). For each of the lowest dollar weighted component securities in the index that in the aggregate account for no more than 10% of the dollar weight of the index (excluding Derivative Securities Products and Index-Linked Securities), the rule provides that the market value can be at least \$50 million.

²² See NYSE Rule 5.2(j)(6)(B)(I)(1)(b)(ii).

- no underlying component security (excluding Derivative Securities Products and Index-Linked Securities) represent more than 25% of the dollar weight of the index, and, to the extent applicable, the five highest dollar weighted component securities in the index (excluding Derivative Securities Products and Index-Linked Securities) do not in the aggregate account for more than 50% of the dollar weight of the index (60% for an index consisting of fewer than 25 component securities).²³

The generic listing standards for equities-based Investment Company Units under Rule 5.2(j)(3), equities-based Portfolio Depositary Receipts under Rule 8.600, and equities-based Managed Fund Shares under Rule 8.601 contain comparable requirements.²⁴

By virtue of the composition and concentration requirements in the Exchange's generic listing standards for equities-based products relating to market cap, trading volume, and diversity requirements, among others, that the underlying components must meet to list on the Exchange, the generic listing standards are, among other things,

intended to reduce the potential for manipulation by assuring that the ETP is sufficiently broad-based, and that the components of an index or portfolio underlying an ETP are adequately capitalized, sufficiently liquid, and that no one stock dominates the index.²⁵

²³ See NYSE Rule 5.2(j)(6)(B)(I)(1)(b)(iii).

²⁴ See Rule 5.2(j)(3), Supp. Material .01(a)(A); Rule 8.100, Supp. Material .01(a)(A)(1)-(3) & Rule 8.600, Supp. Material .01 (a)(1)(A)-(C).

²⁵ See Securities Exchange Act Release No. 80189 (March 9, 2017), 82 FR 13889, 13892 (March 15, 2017) (SR-NYSEArca-2017-01) (order approving amendment of NYSE Arca Rule 5 and 8 Series to add specific continued listing standards for ETPs and to specify the delisting procedures for these products). See generally id. n. 28 & authorities cited therein.

The Exchange believes that ETPs meeting these existing listing criteria would be sufficiently broad-based to allow integrated market making and side-by-side trading in both the ETP and the NYSE Component Securities without more, and therefore should be excluded from the preambles to Rules 5P and 8P.

Proposed Broad-Based Generic Listing Standards for Exchange Traded Fund Shares

The Exchange further believes that Exchange Traded Fund Shares eligible to list under Rule 5.2(j)(8) that have underlying NYSE Component Securities should be eligible to list and trade on the Exchange if such Exchange Traded Fund Shares meet similar broad-based requirements as those specified in Rules 5.2(j)(3), 5.2(j)(6), 8.100, and 8.600 described above. To allow for listing of Exchange Traded Fund Shares with NYSE Component Securities, the Exchange proposes to add a new subsection e.1.B. to Rule 5.2(j)(8) to provide for additional listing requirements for such Exchange Traded Fund Shares. As with the ETPs discussed above, Exchange-Traded Fund Shares with NYSE Component Securities meeting the proposed composition and concentration measures proposed in Rule 5.2(j)(8)(e)(1)(B) would be permitted to list with no additional requirement for information barriers or physical or organizational separation, and would be excluded from the preamble to Rule 5P.

As proposed, Rule 5.2(j)(8)(e)(1)(B) would provide that if a portfolio of a series of Exchange-Traded Fund Shares has NYSE Component Securities, the component securities of the equity portion of such portfolio or index must satisfy specified requirements upon initial listing and on a continuing basis that would be designed to ensure that broad-based Exchange Traded Fund Shares with underlying NYSE Component Securities would be listed and traded on the Exchange.

First, proposed Rule 5.2(j)(8)(e)(1)(B)(1) would provide that the portfolio or index must

include a minimum of 13 equity component securities. This proposed requirement is substantively the same as listing rules for ETPs that similarly require a minimum of 13 equity component securities. For example, as set forth in Supplementary Material .01 of Rule 5.2(j)(3), the index components for investment company units (“Units”) consisting solely of US Component Stocks²⁶ or US Component Stocks and cash -- i.e., where the equity portion of the portfolio does not include Non-US Component Stocks²⁷ -- must include a minimum of 13 component stocks.²⁸ In addition, actively managed funds under Rule 8.600 and Rule 8.100 (Portfolio Depositary Receipts) also require a minimum of 13 component securities if the equity portion of the portfolio does not include Non-U.S. Component Stocks.²⁹ The Exchange believes that the proposed 13 equity component requirement for a series of Exchange Traded Fund Shares with an NYSE Component Securities would similarly ensure significant portfolio breadth such that the potential for manipulation or coordinated trading is significantly attenuated.

Second, proposed Rule 5.2(j)(8)(e)(1)(B)(2) provides that no one single component security may exceed 30% of the equity weight of the portfolio or index. Third, proposed Rule

²⁶ The term “US Component Stock” means an equity security that is registered under Sections 12(b) or 12(g) of the Securities Exchange Act of 1934 or an American Depositary Receipt, the underlying equity security of which is registered under Sections 12(b) or 12(g) of the Securities Exchange Act of 1934. See Rule 5.2(j)(3).

²⁷ The term “Non-US Component Stock” means an equity security that is not registered under Sections 12(b) or 12(g) of the Securities Exchange Act of 1934 and that is issued by an entity that (a) is not organized, domiciled or incorporated in the United States, and (b) is an operating company (including Real Estate Investment Trusts (REITS) and income trusts, but excluding investment trusts, unit trusts, mutual funds, and derivatives). See Rule 5.2(j)(3).

²⁸ See Rule 5.2(j)(3), Supp. Material .01(a)(A)(4). There is no minimum number of component stocks if (a) one or more series of Units or Portfolio Depositary Receipts (as defined in Section 2 of Rule 8P) constitute, at least in part, components underlying a series of Managed Fund Units, or (b) one or more series of such ETPs account for 100% of the US Component Stocks portion of the weight of the index or portfolio. See id.

²⁹ See Rule 8.100, Supp. Material .01(a)(A)(4) & Rule 8.600, Supp. Material .01(a)(1)(D).

5.2(j)(8)(e)(1)(B)(3) would provide that the five most heavily weighted component securities may not exceed 65% of the equity weight of the portfolio or index. Both of these proposed requirements are substantively identical to current generic listing requirements for Investment Company Units under Supplementary Material .01 of Rule 5.2(j)(3), which provides that the most heavily weighted component stock (excluding Investment Company Units and securities defined in Section 2 of Rule 8P) cannot exceed 30% of the equity weight of the portfolio, and, to the extent applicable, the five most heavily weighted component stocks (excluding Units and securities defined in Section 2 of Rule 8P) cannot exceed 65% of the equity weight of the portfolio.³⁰ Portfolio Depositary Receipts and Managed Fund Shares have similar requirements.³¹

Fourth, proposed Rule 5.2(j)(8)(e)(1)(B)(4) provides that component securities that in the aggregate account for at least 90% of the equity weight of the portfolio or index each must have a minimum market value of at least \$75 million. The proposed requirements are substantively identical to the current generic listing requirements for Units under Supplementary Material .01 of Rule 5.2(j)(3), which provides that component stocks in the aggregate account for at least 90% of the weight of the US Component Stocks portion of the index or portfolio (excluding Derivative Securities Products) each shall have a minimum market value of at least \$75 million.³²

Finally, proposed Rule 5.2(j)(8)(e)(1)(B)(5) would provide that component securities that in the aggregate account for at least 70% of the equity weight of the index or portfolio each must

³⁰ See Rule 8.100, (a)(A)(3).

³¹ See Rule 8.100, Supp. Material .01(a)(A)(1)-(3) & Rule 8.600, Supp. Material .01(a)(1)(A)-(C).

³² See Rule 5.2(j)(3), Supp. Material .01(a)(A)(1).

have a minimum monthly trading volume of 250,000 shares, or minimum notional volume traded per month of \$25,000,000, averaged over the last six months. The proposed requirement is also substantively identical to Supplementary Material .01 of Rule 5.2(j)(3), which provides that component stocks (excluding Derivative Securities Products) that in the aggregate account for at least 70% of the US Component Stocks portion of the weight of the index or portfolio (excluding Derivative Securities Products) each shall have a minimum monthly trading volume of 250,000 shares, or minimum notional volume traded per month of \$25,000,000, averaged over the last six months.³³

The Exchange believes that these proposed additional initial and continued listed requirements for a series of Exchange Traded Fund Shares with one or more NYSE Component Securities mirror existing generic listing standards for equities-based products and are consistent with the listing requirements described above that the Commission determined were sufficiently broad-based to address potential manipulation concerns. Accordingly, the Exchange believes that the proposed requirements would ensure that a portfolio of a series of Exchange Traded Fund Shares listed under Rule 5.2(j)(8) with one or more NYSE Component Securities would not be unduly concentrated.

The Exchange believes that requiring Exchange Traded Fund Shares with underlying NYSE Component Securities to meet enhanced criteria is designed to ensure that the Exchange Traded Fund Shares listed on the Exchange would be broad-based and would mitigate potential issues raised by the trading of Exchange Traded Fund Shares on the same physical trading floor as one or more component securities.

³³ See Rule 5.2(j)(3), Supp. Material .01(a)(A)(2).

Proposed Changes to Rules 5P and 8P

To effect the above-described changes, the Exchange proposes to amend the preambles following both Rule 5P and Rule 8P.

For Rule 5P, the Exchange proposes to add “Listed and” before “Traded” in the heading. The Exchange also proposes to add the defined term “NYSE Component Securities,” which would mean the existing Rule 5P definition of “any component NMS Stock that is listed on the Exchange or that is based on, or represents an interest in, an underlying index or reference asset that includes an NMS Stock on the Exchange.” The Exchange further proposes to amend Rule 5P to exclude from the listing prohibition an Exchange Traded Product listed under NYSE Rules 5.2(j)(3), Supplementary Material .01(a); 5.2(j)(6)(B)(I); or 5.2(j)(8) (e)(1)(B). Finally, for the avoidance of doubt, the Exchange proposes to add text to the heading of Rule 5P providing that the Exchange may submit a rule filing pursuant to Section 19(b) of the Securities Exchange Act of 1934 to permit the listing and trading of an ETP that does not otherwise meet the above standards.

The Exchange similarly proposes to amend the heading of Rule 8P to add “Listing and” before “Trading.” The Exchange also proposes to replace the text “component NMS Stock that is listed on the Exchange or that is based on, or represents an interest in, an underlying index or reference asset that includes an NMS Stock listed on the Exchange” with the proposed newly defined term of “NYSE Component Securities.” Use of this new defined term would not make any substantive changes to the Rule and is designed to streamline the rule text. Finally, the Exchange would amend Rule 8P to add language similar to that proposed for Rule 5P that would exclude from the listing prohibition an Exchange Traded Product listed under Rules 8.100, Supplementary Material .01(a)(A) or 8.600, Supplementary Material .01(a).

Proposed Changes to Rule 98

Rule 98 governs the operation of DMM units and imposes certain restrictions on DMM trading. With respect to integrated market making, the Commission has approved changes to Rule 98 that permit a DMM unit to engage in integrated market making with off-Floor market making units in related products.³⁴ Rule 98(c)(6) prohibits DMM units from operating as a specialist or market maker on the Exchange in related products, unless specifically permitted in Exchange rules. Rule 98(b)(7) defines “related products” as “any derivative instrument that is related to a DMM security.”³⁵ Accordingly, consistent with the proposal, the Exchange proposes to amend Rule 98(b)(7) to specifically exclude from the definition of “related products” the ETPs that are excluded from the listing prohibition set forth in the preamble to Rule 5P or to Rule 8P.

With the proposed changes above, the Exchange would be able to list ETPs that include NYSE Component Securities and are listed under Rules 5.2(j)(3), Supplementary Material .01(a); 5.2(j)(6)(B)(I); 5.2(j)(8)(e)(1)(B); 8.100, Supplementary Material .01(a)(A); or 8.600 Supplementary Material .01(a). The proposed change would also provide that ETPs listed under these rules would be excluded from the Rule 98 definition of “related products.” In addition, this proposed change would clarify that ETPs listed under Rules 8.601 (Active Proxy Portfolio Shares) and 8.900 (Managed Portfolio Shares), which are currently excluded from the preamble

³⁴ See Securities Exchange Act Release No. 58328 (August 7, 2008), 73 FR 48260 (August 18, 2008) (SR-NYSE-2008-45) (order approving amendments to Rule 98 that permit specialist firms to integrate with off-Trading Floor trading desks that trade in “related products,” as that term is defined in Rule 98).

³⁵ Under Rule 98(b)(7), derivative instruments include options, warrants, hybrid securities, single-stock futures, security-based swap agreement, a forward contract, or “any other instrument that is exercisable into or whose price is based upon or derived from a security traded at the Exchange.”

to Rule 8P, would also be excluded from the Rule 98 definition of “related products.”³⁶

As discussed above, for each of the ETPs proposed to be excluded from the definition of “related security,” integrated market making and side-by-side trading in both the ETP and any underlying NYSE Component Securities would be appropriate with no additional requirement for information barriers or physical or organizational separation.

In addition to the reasons why specific products present a reduced risk of manipulation, the Exchange believes that there are significant safeguards in place to prohibit the misuse of material nonpublic information by a member organization that operates a DMM unit. Specifically, Rule 98 contains narrowly tailored restrictions to address that DMMs while on the Floor may have access to certain Floor-based non-public information and requires DMM units to maintain procedures and controls to prevent the misuse of material, non-public information that are effective and appropriate for that member organization.

Specifically, under Rule 98(c)(2), a member organization seeking approval to operate a DMM unit pursuant to Rule 98 must maintain and enforce written policies and procedures reasonably designed, taking into consideration the nature of such member organization’s business, (1) to prevent the misuse of material, non-public information by such member organizations or persons associated with such member organization, and (2) to ensure compliance with applicable federal laws and regulations and with Exchange rules.³⁷ Further,

³⁶ See note 7, *supra*.

³⁷ Rule 98(c)(2) provides examples of conduct that would constitute the misuse of material, non-public information, including, but not limited to: (1) trading in any securities issued by a corporation, or in any related product, while in possession of material-non-public information concerning the issuer; or (2) trading in a security or related product, while in possession of material non-public information concerning imminent transactions in the security or related product; or (3) disclosing to another person or entity any material, non-public information involving a corporation whose shares are publicly traded or an imminent transaction in an underlying security or related product for the purpose of

Rule 98(c)(3)(A) provides that a member organization shall protect against the misuse of Floor-based non-public order information and that only the Trading Floor-based employees of the DMM unit and individuals responsible for the direct supervision of the DMM unit's Floor-based operations may have access (as permitted pursuant to Rule 104) to Floor-based non-public order information. Rule 98(c)(3)(B) specifies the restrictions applicable to employees of the DMM unit while on the Trading Floor.

Rule 98(c)(3)(C) also provides that a Floor-based employee of a DMM unit who moves to a location off the trading floor of the Exchange, or any person who provides risk management oversight or supervision of the Floor-based operations of the DMM unit and becomes aware of Floor-based non-public order information, shall not (1) make such information available to customers, (2) make such information available to individuals or systems responsible for making trading decisions in DMM securities in away markets or related products, or (3) use any such information in connection with making trading decisions in DMM securities in away markets or related products. The rule covers an individual that leaves the Floor, as well as a manager providing oversight or supervision of the Floor-based operations of the DMM unit. Submission and approval of a DMM unit's written policies and procedures addressing the requirements of Rule 98 is a prerequisite to operating a DMM unit on the Floor. The Exchange notes that all member organizations currently operating DMM units already have in place written policies and procedures to comply with Rule 98.

The significant safeguards must be viewed in the context of the evolution of equities markets away from manual executions toward an electronic market that automates executions

facilitating the possible misuse of such material, non-public information. See Rule 98(c)(2)(A)-(C).

and in many cases hard codes the rule requirements into the execution logic. Over the years the Exchange has enhanced the transparency of its marketplace and significantly reduced the amount of material, non-public information available to DMMs. For instance, the Exchange disseminates Closing Auction Imbalance Information beginning 10 minutes before the scheduled end of Core Trading Hours, which provides updated imbalance information and indicative closing prices. Moreover, the Commission recently approved a rule filing to make permanent a rule change that Floor brokers would no longer be permitted to represent verbal interest intended for the Closing Auction, as defined in Rule 7.35, and require all Floor brokers to enter orders for the Closing Auction electronically during Core Trading Hours.³⁸ This proposed change permanently eliminated one of the few remaining pieces of information available only to Floor-based DMMs. Moreover, since Floor broker verbal interest had to be entered manually by the DMM, this rule change also eliminated one of the only significant remaining manual trading opportunities for DMMs. DMMs continue to have benefits in connection with their unique role. For example, at the point of sale, DMMs have access to aggregated buying and selling interest that is eligible to participate in the Closing Auction.³⁹ However, pursuant to current Rule 104(h)(ii), a DMM may not use any information provided by Exchange systems in a manner that would violate Exchange rules or federal securities laws or regulations. In addition, pursuant to current Rule 104(h)(iii), Floor brokers may request that a DMM provide them with the information that is available to the DMM at the post, including such aggregated buying and

³⁸ See Securities Exchange Act Release No. 92480 (July 23, 2021), 86 FR 40885 (July 29, 2021) (SR-NYSE-2020-95) (Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2, To Make Permanent Commentaries to Rule 7.35A and Commentaries to Rule 7.35B and To Make Related Changes to Rules 7.32, 7.35C, 46B, and 47).

³⁹ DMM unit algorithms, however, are not provided aggregated buying and selling interest for the Closing Auction until after the end of Core Trading Hours.

selling interest for the Closing Auction.

Finally, trading on the Exchange is subject to a comprehensive regulatory program that includes a suite of surveillances that review trading by DMMs and other market participants on the Floor, including surveillances designed to monitor for trading ahead and manipulative activity. To assist Exchange surveillance of DMM trading activity, a member organization operating a DMM unit must daily provide the Exchange with net position information in DMM securities by the DMM unit and any independent trading unit of which it is part for such times and in the manner prescribed by the Exchange pursuant to Rule 98(c)(5). In addition, routine examinations are conducted consistent with the current exam-based regulatory program associated with Rule 98 that reviews member organizations operating DMM units for compliance with the above-described policies and procedures to protect against the misuse of material nonpublic information. Based on the foregoing, and because the Exchange believes that DMM market-making activity is not materially different from market-making on other exchanges, the Exchange believes that these existing programs are reasonably designed to address any concerns that may be raised by the trading of the specified listed ETPs that have underlying NYSE Component Securities.

For all of the reasons stated above, the proposal is therefore consistent with the requirements of the Act.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,⁴⁰ in general, and furthers the objectives of Sections 6(b)(5) of the Act,⁴¹ in particular, because it is

⁴⁰ 15 U.S.C. 78f(b).

⁴¹ 15 U.S.C. 78f(b)(5).

designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Specifically, the Exchange believes that listing and trading ETPs that have underlying NYSE Component Securities and that also meet the composition and concentration requirements set forth in the listing criteria of Rules 5.2(j)(3), Supplementary Material .01(a); 5.2(j)(6)(B)(I); 8.100, Supplementary Material .01(a)(A); and 8.600, Supplementary Material .01(a) as well as those proposed under Rule 5.2(j)(8)(e)(1)(B), would remove impediments to and perfect the mechanism of a free and open market and a national market system by facilitating the of listing and trading a broader range of ETPs consistent with the Exchange's current structure to trade listed securities. The Exchange believes that permitting the ETPs with underlying NYSE Component Securities that meet the criteria of the specified listing rules (including as amended) would meet the type of listing criteria previously identified by the Commission as sufficiently broad-based and well-diversified to protect against potential manipulation. The Exchange believes that these safeguards would continue to serve to prevent fraudulent and manipulative acts and practices, as well as to protect investors and the public interest from concerns that may be associated with integrated market making and any possible misuse of non-public information. Accordingly, the Exchange believes that integrated market making and side-by-side trading in both the listed ETP and underlying listed NMS stock components is appropriate with no additional requirement for information barriers or physical or organizational separation.

The Exchange believes that the proposed changes to Rule 98 to exclude any ETPs listed on the Exchange from the definition of “related products” would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would facilitate the assignment of listed ETPs, which would include ETPs with underlying NYSE Component Securities that meet the specified listing rules in Rules 5P and 8P, to DMMs and permit DMMs to trade such listed ETPs consistent with existing Rules governing DMM trading, including, for example, Rule 104.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

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

In accordance with Section 6(b)(8) of the Act,⁴² the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, the Exchange believes that the proposed rule change would facilitate the listing of additional ETPs on the Exchange by allowing such securities to trade no differently than other securities listed on the Exchange, including assigning such securities to a DMM, which would enable the Exchange to further compete with unaffiliated exchange competitors that also list and trade ETPs. The proposed rule changes would also provide issuers with greater choice in potential listing venues for their ETP products to include an exchange model that includes a DMM assigned to their security and related benefits to an issuer as a result of the Exchange’s high-touch trading model. The Exchange accordingly believes that the proposed change would promote competition by facilitating the listing and trading of a broader range of ETPs on the Exchange.

⁴² 15 U.S.C. 78f(b)(8).

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 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. Please include File Number SR-NYSE-2022-04 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-NYSE-2022-04. 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-NYSE-2022-04 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.⁴³

J. Matthew DeLesDernier
Assistant Secretary

⁴³ 17 CFR 200.30-3(a)(12).