

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-92595; File No. SR-NYSEArca-2021-64)

August 6, 2021

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change to Amend Rule 8.601-E (Active Proxy Portfolio Shares) to Provide for the Use of Custom Baskets

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 July 28, 2021, NYSE Arca, Inc. (“NYSE Arca” 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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend Rule 8.601-E (Active Proxy Portfolio Shares) to provide for the use of “Custom Baskets” consistent with the exemptive relief issued pursuant to the Investment Company Act of 1940 applicable to a series of Active Proxy Portfolio Shares. 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 Rule 8.601-E (Active Proxy Portfolio Shares)⁴ to provide for the use of “Custom Baskets” consistent with the exemptive relief issued pursuant to the Investment Company Act of 1940⁵ applicable to a series of Active Proxy Portfolio Shares.

To effectuate this change, the Exchange proposes the following amendments to Rule 8.601-E.

First, a new section 4 would be added to Rule 8.601-E(c) (Definitions) defining “Custom Basket” to mean a portfolio of securities that is different from the Proxy Portfolio (as defined in Rule 8.601-E(c)(3)) and is otherwise consistent with the exemptive relief issued pursuant to the Investment Company Act of 1940 applicable to a series of Active Proxy Portfolio Shares.

⁴ NYSE Arca Rule 8.601-E(c)(1) defines the term “Active Proxy Portfolio Share” as a security that (a) is issued by an “Investment Company” registered under the Investment Company Act of 1940 (“1940 Act”) (15 U.S.C. 80a) organized as an open-end management investment company that invests in a portfolio of securities selected by the Investment Company’s investment adviser consistent with the Investment Company’s investment objectives and policies; (b) is issued in a specified minimum number of shares, or multiples thereof, in return for a deposit by the purchaser of the Proxy Portfolio and/or cash with a value equal to the next determined net asset value (“NAV”); (c) when aggregated in the same specified minimum number of Active Proxy Portfolio Shares, or multiples thereof, may be redeemed at a holder’s request in return for the Proxy Portfolio and/or cash to the holder by the issuer with a value equal to the next determined NAV; and (d) the portfolio holdings for which are disclosed within at least 60 days following the end of every fiscal quarter.

⁵ 15 U.S.C. 80a et seq.

Current sections (4) and (5) of Rule 8.601-E(c) would be renumbered (5) and (6), respectively. The definition of “Active Proxy Portfolio Share” in NYSE Arca Rule 8.601-E(c)(1) would be amended to provide for creations of shares in return for a deposit by the purchaser of, and redemptions of shares at a holder’s request in return for, a Custom Basket rather than a Proxy Portfolio to the extent permitted by a fund’s exemptive relief. In addition, the definition of “Reporting Authority” in respect of a particular series of Active Proxy Portfolio Shares in current section 4 (proposed section 5) of Rule 8.601E(c) would be amended to provide for Custom Baskets to the extent permitted by a fund’s exemptive relief. Currently, “Reporting Authority” in respect of a particular series of Active Proxy Portfolio Shares means the Exchange, an institution, or a reporting service designated by the Exchange or by the exchange that lists a particular series of Active Proxy Portfolio Shares (if the Exchange is trading such series pursuant to unlisted trading privileges) as the official source for calculating and reporting information relating to such series, including, but not limited to, NAV, the Actual Portfolio, Proxy Portfolio or other information relating to the issuance, redemption or trading of Active Proxy Portfolio Shares. The rule further provides that a series of Active Proxy Portfolio Shares may have more than one Reporting Authority, each having different functions. The Exchange would add “Custom Basket” to the non-exclusive list of information relating to Active Proxy Portfolio Shares that a Reporting Authority calculates and reports, i.e., including, but not limited to, NAV, the Actual Portfolio, Proxy Portfolio, Custom Basket, or other information relating to the issuance, redemption or trading of Active Proxy Portfolio Shares.

Second, Rule 8.601-E(d) (Initial and Continued Listing), which currently provides criteria that Active Proxy Portfolio Shares must satisfy for initial and continued listing on the Exchange, would be amended to incorporate specific initial and continued listing criteria for

Custom Baskets. Specifically, current Rule 8.601-E(d)(1)(B) provides that the Exchange shall obtain a representation from the issuer of each series of Active Proxy Portfolio Shares that the NAV per share for the series shall be calculated daily and that the NAV, the Proxy Portfolio, and the Actual Portfolio shall be made publicly available to all market participants at the same time. These requirements would become proposed Rule 8.601-E(d)(1)(B)(i) & (ii). The Exchange proposes a third romanette providing that the Exchange shall also obtain a representation from the issuer of each series of Active Proxy Portfolio Shares that the issuer and any person acting on behalf of the series of Active Proxy Portfolio Shares will comply with Regulation Fair Disclosure under the Securities Exchange Act of 1934, including with respect to any Custom Basket.

Third, a new section (d)(2)(B)(ii) would be added to Rule 8.601-E providing that, with respect to each Custom Basket utilized by a series of Active Proxy Portfolio Shares, each business day, before the opening of trading in the Core Trading Session (as defined in Rule 7.34-E (a)), the investment company shall make publicly available on its website the composition of any Custom Basket transacted on the previous business day, except a Custom Basket that differs from the applicable Proxy Portfolio only with respect to cash. Rule 8.601-E(d)(2)(B), which is currently titled “Proxy Portfolio,” would be amended to read “Proxy Portfolio and Custom Basket.”

Finally, the Exchange would make conforming amendments to Commentary .04 and Commentary .05 of Rule 8.601-E, as follows.

First, Commentary .04 to NYSE Arca Rule 8.601-E provides that, if the investment adviser to the Investment Company issuing Active Proxy Portfolio Shares is registered as a broker-dealer or is affiliated with a broker-dealer, such investment adviser will erect and

maintain a “fire wall” between the investment adviser and personnel of the broker-dealer or broker-dealer affiliate, as applicable, with respect to access to information concerning the composition and/or changes to such Investment Company’s Actual Portfolio and/or Proxy Portfolio. Commentary .04 further provides that any person related to the investment adviser or Investment Company who makes decisions pertaining to the Investment Company’s Actual Portfolio and/or Proxy Portfolio, or has access to non-public information regarding the Investment Company’s Actual Portfolio and/or the Proxy Portfolio, or changes thereto must be subject to procedures reasonably designed to prevent the use and dissemination of material non-public information regarding the Actual Portfolio and/or the Proxy Portfolio, or changes thereto.

Commentary .04 would be amended to provide for Custom Baskets to the extent permitted by a fund’s exemptive relief. As proposed, Commentary .04 would provide that if the investment adviser to the Investment Company issuing Active Proxy Portfolio Shares is registered as a broker-dealer or is affiliated with a broker-dealer, such investment adviser will erect and maintain a “fire wall” between the investment adviser and personnel of the broker-dealer or broker-dealer affiliate, as applicable, with respect to access to information concerning the composition and/or changes to such Investment Company’s Actual Portfolio, Proxy Portfolio, and/or Custom Basket, as applicable. In addition, Commentary .04 would provide that any person related to the investment adviser or Investment Company who makes decisions pertaining to the Investment Company’s Actual Portfolio, Proxy Portfolio, and/or Custom Basket, as applicable, or has access to non-public information regarding the Investment Company’s Actual Portfolio, the Proxy Portfolio, and/or the Custom Basket, as applicable, or changes thereto must be subject to procedures reasonably designed to prevent the use and

dissemination of material non-public information regarding the Actual Portfolio, the Proxy Portfolio, and/or the Custom Basket, as applicable, or changes thereto.

Second, Commentary .05 to Rule 8.601-E provides that any person or entity, including a custodian, Reporting Authority, distributor, or administrator, who has access to nonpublic information regarding the Investment Company's Actual Portfolio or the Proxy Portfolio or changes thereto, must be subject to procedures reasonably designed to prevent the use and dissemination of material non-public information regarding the applicable Investment Company Actual Portfolio or the Proxy Portfolio or changes thereto. Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity will erect and maintain a "fire wall" between the person or entity and the broker-dealer with respect to access to information concerning the composition and/or changes to such Investment Company Actual Portfolio or Proxy Portfolio.

Commentary .05 would similarly be amended to provide for Custom Baskets to the extent permitted by a fund's exemptive relief. As proposed, Commentary .05 would be amended to provide that any person or entity, including a custodian, Reporting Authority, distributor, or administrator, who has access to non-public information regarding the Investment Company's Actual Portfolio, or the Proxy Portfolio, or the Custom Basket, as applicable, or changes thereto, must be subject to procedures reasonably designed to prevent the use and dissemination of material non-public information regarding the applicable Investment Company Actual Portfolio, the Proxy Portfolio, or the Custom Basket, as applicable, or changes thereto. Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity will erect and maintain a "fire wall" between the person or entity and the broker-

dealer with respect to access to information concerning the composition and/or changes to such Investment Company Actual Portfolio, Proxy Portfolio, or Custom Basket, as applicable.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁷ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange believes that amending Rule 8.601-E to incorporate specific initial and continued listing criteria required to be met by Active Proxy Portfolio Shares that utilize Custom Baskets is designed to prevent fraudulent and manipulative acts and practices. The Exchange believes that the daily dissemination of the composition of any Custom Basket transacted on the previous day, except a Custom Basket that differs from the applicable Proxy Portfolio only with respect to cash, together with the right of Authorized Participants to create and redeem each day at the NAV, will enable market participants to value and trade shares in a manner that will not lead to significant deviations between the Bid/Ask Price and NAV of shares of a series of Active Proxy Portfolio Shares. Further, including Custom Baskets in the requirements of Commentaries .04 and .05 would act as a safeguard against any misuse and improper dissemination of nonpublic information related to a fund's Custom Basket or changes thereto. The requirement that any person or entity implement procedures reasonably designed to prevent the use and

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f (b)(5).

dissemination of material non-public information regarding a Custom Basket will act to prevent any individual or entity from sharing such information externally and the internal “fire wall” requirements applicable where an entity is a registered broker-dealer or affiliated with a broker-dealer will act to make sure that no entity will be able to misuse the data for their own purposes.

As such, the Exchange believes that the proposed amendment of Rule 8.601-E is designed to prevent fraudulent and manipulative acts and practices.

The proposed rule change is also designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will permit use of Custom Baskets consistent with an issuer’s exemptive relief in a manner that will benefit investors by increasing efficiencies in the creation/redemption process. The Exchange believes this will enhance competition among market participants, to the benefit of investors and the marketplace. Similarly, the Exchange believes that the proposed initial and continued listing standards are designed to promote disclosure and transparency with respect to the use of Custom Baskets consistent with an issuer’s exemptive relief. Specifically, the Exchange believes that requiring as an initial listing condition that an issuer and any person acting on behalf of the series of Active Proxy Portfolio Shares comply with Regulation Fair Disclosure under the Securities Exchange Act of 1934, including with respect to any Custom Basket, would further the full and fair disclosure objectives of Regulation Fair Disclosure to the benefit of the investing public and all market participants. Further, the Exchange believes that requiring as a continued listing condition that, with respect to each Custom Basket utilized by a series of Active Proxy Portfolio Shares, each business day, before the opening of trading in the Core Trading Session (as defined in Rule 7.34-E (a)), an investment company make publicly available on its website the composition of any Custom Basket transacted on the previous business day, except a Custom

Basket that differs from the applicable Proxy Portfolio only with respect to cash, also furthers the goals of transparency and full and fair disclosure, to the benefit of investors and the public interest.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the proposed rule change, by permitting use of Custom Baskets consistent with an issuer's exemptive relief, would introduce additional competition among various ETF products to the benefit of investors.

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-NYSEArca-2021-64 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2021-64. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to

make available publicly. All submissions should refer to File Number SR-NYSEArca-2021-64, 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.⁸

J. Matthew DeLesDernier
Assistant Secretary

⁸ 17 CFR 200.30-3(a)(12).