

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-79085; File No. SR-NYSE-2016-44)

October 12, 2016

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendments No. 1 and 2, Allowing the Exchange to Trade Pursuant to Unlisted Trading Privileges Any NMS Stock Listed on Another National Securities Exchange; Establishing Listing and Trading Requirements for Exchange Traded Products; and Adopting New Equity Trading Rules Relating to Trading Halts of Securities Traded Pursuant to UTP on the Pillar Platform

On June 30, 2016, New York Stock Exchange LLC (“Exchange” or “NYSE”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to (1) allow the Exchange to trade pursuant to unlisted trading privileges (“UTP”) any NMS Stock listed on another national securities exchange; (2) establish listing and trading requirements for exchange-traded products (“ETPs” or “Exchange Traded Products”); and (3) adopt new equity trading rules relating to trading halts of securities traded pursuant to UTP on the Exchange’s Pillar trading platform. The proposed rule change was published for comment in the Federal Register on July 14, 2016.<sup>3</sup>

On July 26, 2016, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> On August 23, 2016, pursuant to Section 19(b)(2) of the Act,<sup>5</sup> the Commission designated a longer

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 78263 (Jul. 8, 2016), 81 FR 45580 (“Notice”).

<sup>4</sup> In Amendment No. 1, the Exchange: (1) added a bullet point stating that “[b]ecause the Exchange’s rules regarding the production of books and records are described in Rule 440, the Exchange is proposing to refer to Rule 440 in its proposed rules wherever NYSE Arca Equities Rule 4.4 is referenced in the rules of NYSE Arca Equities proposed in this filing;” (2) deleted the sentence stating, “If an exchange has approved trading rules, procedures and listing standards in place that have been approved by the Commission for

period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>6</sup> On August 26, 2016, the Exchange filed Amendment No. 2 to the proposed rule change.<sup>7</sup> The Commission has received no comments on the proposed rule change.

This order institutes proceedings under Section 19(b)(2)(B) of the Act<sup>8</sup> to determine whether to approve or disapprove the proposed rule change, as modified by Amendments No. 1 and 2.

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the product class that would include a new derivative securities product, the listing and trading of such ‘new derivative securities product,’ does not require a proposed rule change under Section 19b-4 of the Act” and made conforming changes to the rest of that paragraph; (3) deleted the bullet point that stated, “Correction of a typographical error in NYSE Arca Equities Rule 8.400(a) so that proposed Rule 8.400(a) reads ‘as such terms are used in Rule 5.1(b)’ in the last sentence, rather than ‘as such terms are used in the Rule 5.1(b)’ as is currently drafted in NYSE Arca Equities Rule 8.400(a)”;

(4) noted that “for new ETPs to be traded pursuant to UTP, which are listed and traded on another exchange pursuant to Rule 19b-4(e), the Exchange would be required to file Form 19b-4(e) with the Commission in accordance with the requirements therein.” Amendment No. 1 is available at: <https://www.sec.gov/comments/sr-nyse-2016-44/nyse201644-1.pdf>. Because Amendment No. 1 to the proposed rule change does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 1 is not subject to notice and comment.

<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>6</sup> See Securities Exchange Act Release No. 78641, 81 FR 59259 (Aug. 29, 2016). The Commission designated October 12, 2016, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

<sup>7</sup> In Amendment No. 2, the Exchange: (1) added the clause “pursuant to UTP” at the end of the sentence that states, “The Exchange would have to file a Form 19b-4(e) with the Commission to trade these ETPs;” (2) in the first footnote that follows that sentence, deleted the clause “pursuant to Rule 19b-4(e);” and (3) at the end of that same footnote, added the reference, “See proposed Rule 5.1(a)(2); supra note 19 and accompanying text.” Amendment No. 2 is available at: <https://www.sec.gov/comments/sr-nyse-2016-44/nyse201644-2.pdf>. Because Amendment No. 2 to the proposed rule change does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 2 is not subject to notice and comment.

<sup>8</sup> 15 U.S.C. 78s(b)(2)(B).

I. Summary of the Proposed Rule Change<sup>9</sup>

The Exchange states that it does not currently trade any securities on a UTP basis. The Exchange proposes new rules to trade all Tape B and Tape C symbols, on a UTP basis, on its new trading platform, Pillar.<sup>10</sup> In addition, the Exchange proposes to adopt rules for the listing and trading of the following types of Exchange Traded Products:<sup>11</sup> 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 Depositary 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 Securities.<sup>12</sup>

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<sup>9</sup> The Commission notes that additional statements and information describing the specific proposed changes to the Exchange's rules, among other things, can be found in the Notice and Amendments No. 1 and 2 to the proposed rule change. See Notice and Amendments No. 1 and 2 to the proposed rule change, supra notes 3, 4, and 7, respectively.

<sup>10</sup> According to the Exchange, on January 29, 2015, the Exchange announced the implementation of 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") and NYSE MKT LLC. See Trader Update dated January 29, 2015, available at: [http://www1.nyse.com/pdfs/Pillar\\_Trader\\_Update\\_Jan\\_2015.pdf](http://www1.nyse.com/pdfs/Pillar_Trader_Update_Jan_2015.pdf).

<sup>11</sup> The Exchange is proposing to define the term "Exchange Traded Product" to mean a security that meets the definition of "derivative securities product" in Rule 19b-4(e) under the Exchange Act. This proposed definition is identical to the definition of "Derivatives Securities Product" in NYSE Arca Equities Rule 1.1(bbb).

<sup>12</sup> See Notice, supra note 3.

The Exchange represents that the proposed rules for these ETPs are substantially identical (other than with respect to certain non-substantive and technical amendments) to the rules of the NYSE Arca Equities exchange for the qualification, listing, and trading of these ETPs.<sup>13</sup>

According to the Exchange, it will trade securities pursuant to UTP only on its Pillar platform, not on its current trading platform. Further, at this time, the Exchange states that it does not intend to list ETPs pursuant to the proposed rules. The Exchange does not proposing to change any of the current rules of the Exchange pertaining to the listing and trading of ETPs in the NYSE Listed Company Manual or in its other rules.

II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSE-2016-44 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>14</sup> to determine whether the proposed rule change, as modified by Amendments No. 1 and 2, should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as modified by Amendments No. 1 and 2. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change, as modified by Amendments No. 1 and 2.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>15</sup> the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act,

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<sup>13</sup> See Notice, *supra* note 3, at 45580-45581, n.7 (citing NYSE Equities Rules 5 (Listings) and 8 (Trading of Certain Equities Derivatives)).

<sup>14</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>15</sup> Id.

which requires, among other things, that the rules of a national securities exchange be “designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,” and “to protect investors and the public interest.”<sup>16</sup>

### III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>17</sup>

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person’s submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. The Commission asks that commenters address the sufficiency of the Exchange’s statements in support of the proposal, which are set forth in the Notice,<sup>18</sup> in addition to any other

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<sup>16</sup> 15 U.S.C. 78f(b)(5).

<sup>17</sup> Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

<sup>18</sup> See Notice, supra note **Error! Bookmark not defined.**

comments they may wish to submit about the proposed rule change, as modified by Amendments No. 1 and 2.<sup>19</sup>

In particular, the Commission seeks comment on whether the proposed rules regarding ETPs, which would not expressly apply on a continuing basis, are consistent with the Act.<sup>20</sup> The Commission notes that, while the Exchange represents that it “does not intend to list ETPs on its Pillar platform,”<sup>21</sup> the proposed rule text contains no such limitation, and the Exchange’s Form 19b-4 filing also describes the standards being proposed as governing the “*listing and trading*” of ETPs.<sup>22</sup>

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

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<sup>19</sup> See Amendments No. 1 and 2 to the proposed rule change, *supra* notes 4 and 7, respectively.

<sup>20</sup> The Commission’s orders approving the generic listing and trading of actively managed ETFs relied upon the listing exchange’s representation that the listing criteria would apply on a continuing basis. See, e.g., Securities Exchange Act Releases No. 78396 (July 22, 2016), 81 FR 49698, 49701 (July 28, 2016) (File No. SR-BATS-2015-100); No. 78397 (July 22, 2016), 81 FR 49320, 49324 (July 27, 2016) (File No. SR-NYSEArca-2015-110); and No. 78918 (Sept. 23, 2016), 81 FR 67033, 67035 (Sept. 29, 2016) (File No. SR-NASDAQ-2016-104). Recent Commission orders approving the listing and trading of individual ETPs have similarly relied upon representations by the listing exchange that all statements and representations made regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of exchange rules and surveillance procedures shall constitute continued listing requirements. See, e.g., Securities Exchange Act Release No. 77920 (May 25, 2016), 81 FR 35086, 35090 (June 1, 2016) (SR-NYSEArca-2016-46; approving listing and trading of shares of the AdvisorShares Cornerstone Small Cap ETF); No. 78847 (Sept. 15, 2016), 81 FR 64560, 64562 (Sept. 20, 2016) (File No. SR-BATS-2016-34; approving listing and trading of shares of the ProShares Crude Oil Strategy ETF).

<sup>21</sup> See Notice, *supra* note 3, at 45581.

<sup>22</sup> See, e.g., Notice, *supra* note 3, at 45580, 45583 (emphasis added).

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2016-44 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 Numbers SR-NYSE-2016-44. 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 these filings also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that

you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2016-44 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

Robert W. Errett  
Deputy Secretary

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<sup>23</sup> 17 CFR 200.30-3(a)(57).