

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-90775; File No. SR-NYSE-2020-86)

December 22, 2020

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change for a New Rule 5.2(j)(8)

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on December 18, 2020, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “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 (1) a new Rule 5.2(j)(8) establishing “generic” listing standards for Exchange-Traded Products that are permitted to operate in reliance on Rule 6c-11 under the Investment Company Act of 1940, and (2) a new Rule 7.18(d)(2) that would govern trading halts for listed Exchange-Traded Products. 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.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes a new Rule 5.2(j)(8) establishing “generic” listing standards for Exchange-Traded Products (“ETPs”)⁴ that are permitted to operate in reliance on Rule 6c-11 under the Investment Company Act of 1940 (the “1940 Act”). The Exchange also proposes a new Rule 7.18(d)(2) that would govern trading halts for listed ETPs.

Background

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.⁵ ETPs

⁴ Rule 1.1(k) 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)(Index- Linked Securities); Rule 8.100 (Portfolio Depositary Receipts); Rule 8.200 (Trust Issued Receipts); 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 “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.

traded on a UTP basis on the Exchange are not assigned to a Designated Market Maker (“DMM”) but are available for Floor brokers to trade in Floor-based crossing transactions.⁶

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 have any component NMS Stock that is listed on the Exchange or is based on, or represents an interest in, an underlying index or reference asset that includes an NMS Stock listed on the Exchange. ETPs listed under Rules 5P and 8P would be “Tape A” listings and traded pursuant to the rules applicable to NYSE-listed securities. Accordingly, once an ETP is listed, it would be assigned to a DMM pursuant to Rule 103B and the assigned DMM would have obligations vis-à-vis such securities as specified in Rule 104, including facilitating the opening, reopening, and closing of such securities.⁷

The Commission recently adopted Rule 6c-11 under the 1940 Act to permit ETPs that are exchange traded funds (“ETF”) shares (“Exchange-Traded Fund Shares”) and that satisfy certain conditions to operate without obtaining an exemptive order from the Commission under the 1940 Act.⁸ The regulatory framework provided in Rule 6c-11 streamlines procedures and reduces the

⁶ 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).

⁷ 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).

⁸ 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”).

costs and time frames associated with bringing ETFs to market, thereby enhancing competition among ETF issuers and reducing costs for investors.⁹

The Exchange proposes new Rule 5.2(j)(8) to establish generic listing standards allowing the Exchange to list and trade Exchange-Traded Fund Shares in a manner consistent with Rule 6c-11. Proposed Rule 5.2(j)(8) is based on NYSE Arca, Inc. (“NYSE Arca”) Rule 5.2-E(j)(8).¹⁰ In addition, the Exchange proposes a new Rule 7.18(d)(2) based on NYSE Arca Rule 7.18-E(d)(2) that would govern trading halts for listed ETPs.

Proposed Rule Change

The Exchange proposes standards that would pertain to Exchange-Traded Fund Shares to qualify for listing and trading pursuant to Rule 19b-4(e), as follows.

Proposed Rule 5.2(j)(8)(a) would provide that the Exchange would consider for trading, whether by listing or on a UTP basis, Exchange-Traded Fund Shares that meet the criteria of proposed Rule 5.2(j)(8). Proposed Rule 5.2(j)(8)(a) is based on NYSE Arca Rule 5.2-E(j)(8)(a) without any differences.

⁹ The Commission observed that the “rule will modernize the regulatory framework for ETFs to reflect our more than two decades of experience with these investment products. The rule is designed to further important Commission objectives, including establishing a consistent, transparent, and efficient regulatory framework for ETFs and facilitating greater competition and innovation among ETFs.” See Rule 6c-11 Release, at 57163. The Commission also stated the following regarding the rule’s impact: “We believe rule 6c-11 will establish a regulatory framework that: (1) reduces the expense and delay currently associated with forming and operating certain ETFs unable to rely on existing orders; and (2) creates a level playing field for ETFs that can rely on the rule. As such, the rule will enable increased product competition among certain ETF providers, which can lead to lower fees for investors, encourage financial innovation, and increase investor choice in the ETF market.” *Id.* at 57204.

¹⁰ See Securities Exchange Act Release No. 88625 (April 13, 2020), 85 FR 21479 (April 17, 2020) (SR-NYSEArca-2019-81) (Notice of filing of Amendment No. 2 and Order granting accelerated approval of proposed rule change, as modified by Amendment No. 2, to adopt NYSE Arca Rule 5.2-E(j)(8) establishing generic listing standards for Exchange-Traded Fund Shares).

Proposed Rule 5.2(j)(8)(b) would specify applicability of proposed Rule 5.2(j)(8) and would provide that it is applicable only to Exchange-Traded Fund Shares. Proposed Rule 5.2(j)(8)(b) would further provide that, except to the extent inconsistent with proposed Rule 5.2(j)(8) or unless the context otherwise requires, Exchange rules would be applicable to the trading on the Exchange of such securities and that Exchange-Traded Fund Shares would be included within the definition of NMS Stock as defined in Rule 1.1. Proposed Rule 5.2(j)(8)(b) is based on NYSE Arca Rule 5.2-E(j)(8)(b) without any differences.

Proposed Rule 5.2(j)(8)(c) would set forth the proposed rule's applicable definitions, which are based on NYSE Arca Rule 5.2-E(j)(8)(c) without any differences, as follows:

- Proposed Rule 5.2(j)(8)(c)(1) would define the term “1940 Act” to mean the Investment Company Act of 1940, as amended.
- Proposed Rule 5.2(j)(8)(c)(2) would define the term “Exchange-Traded Fund” as having the same meaning as the term “exchange-traded fund” as defined in Rule 6c-11(a)(1) under the 1940 Act.¹¹
- Proposed Rule 5.2(j)(8)(c)(3) would define the term “Exchange-Traded Fund Share” to mean a share of stock issued by an Exchange-Traded Fund.¹²
- Proposed Rule 5.2(j)(8)(c)(4) would define the term “Reporting Authority” to mean with respect to a particular series of Exchange-Traded Fund Shares, the

¹¹ Rule 6c-11(a)(1) defines “exchange-traded fund” as a registered open-end management company: (i) That issues (and redeems) creation units to (and from) authorized participants in exchange for a basket and a cash balancing amount if any; and (ii) Whose shares are listed on a national securities exchange and traded at market-determined prices. The terms “authorized participant,” “basket” and “creation unit” are defined in Rule 6c-11(a).

¹² The definition of Exchange-Traded Fund Shares is the same as the definition of “exchange-traded fund shares” in Rule 6c-11(a) under the 1940 Act.

Exchange, an institution, or a reporting service designated by the Exchange or by the exchange that lists a particular series of Exchange-Traded Fund 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, any current index or portfolio value, the current value of the portfolio of any securities required to be deposited in connection with issuance of Exchange-Traded Fund Shares, the amount of any dividend equivalent payment or cash distribution to holders of Exchange-Traded Fund Shares, net asset value, or other information relating to the issuance, redemption or trading of Exchange-Traded Fund Shares. A series of Exchange-Traded Fund Shares may have more than one Reporting Authority, each having different functions.

Proposed Rule 5.2(j)(8)(d) would specify the limitations on Exchange liability and relates to limitations of the Exchange, the Reporting Authority, or any agent of the Exchange as a result of specified events and conditions. Specifying such limitations of liability is standard in the Exchange's rules governing the listing of Exchange-Traded Products and the proposed rule text is substantively identical to Rules 5.2(j)(3)(D), 8.100(f), 8.201(f), 8.200(f), 8.202(f), 8.203(f), 8.204(g), 8.300(f), 8.400(f), 8.500(e), 8.600(e), and 8.700(g). Proposed Rule 5.2(j)(8)(d) is based on NYSE Arca Rule 5.2-E(j)(8)(d) without any differences.

Proposed Rule 5.2(j)(8)(e) would provide that the Exchange may approve Exchange-Traded Fund Shares for listing and/or trading (including on a UTP basis) pursuant to Rule 19b-4(e) under the Exchange Act provided that each series of Exchange-Traded Fund Shares must be eligible to operate in reliance on Rule 6c-11 under the 1940 Act and must satisfy the requirements of proposed Rule 5.2(j)(8)(as described below) upon initial listing and, except for

subparagraph (1)(A) of proposed Rule 5.2(j)(8)(e), on a continuing basis. As further proposed, an issuer of such securities must notify the Exchange of any failure to comply with such requirements. Proposed Rule 5.2(j)(8)(e) is based on NYSE Arca Rule 5.2-E(j)(8)(e) without any differences.

Proposed Rule 5.2(j)(8)(e)(1) sets forth the initial and continued listing standards for Exchange-Traded Fund Shares to be listed on the NYSE and would provide that Exchange-Traded Fund Shares will be listed and traded on the Exchange subject to the requirement that the investment company issuing a series of Exchange-Traded Fund Shares is eligible to operate in reliance on the requirements of Rule 6c-11(c) on an initial and continued listing basis. Proposed Rule 5.2(j)(8)(e)(1) is based on NYSE Arca Rule 5.2-E(j)(8)(e)(1) without any differences.

Proposed Rule 5.2(j)(8)(e)(1)(A) provides that, for each series of Exchange-Traded Fund Shares, the Exchange will establish a minimum number of Exchange-Traded Fund Shares required to be outstanding at the time of commencement of trading on the Exchange. Proposed Rule 5.2(j)(8)(e)(1)(A) is based on NYSE Arca Rule 5.2-E(j)(8)(e)(1)(A) without any differences.

Proposed Rule 5.2(j)(8)(e)(2) would set forth the standards for suspension of trading or removal of Exchange-Traded Fund Shares from listing on the Exchange and would provide that the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 5.5(m) of, a series of Exchange-Traded Fund Shares under any of the following circumstances:

- (A) if the Exchange becomes aware that the investment company is no longer eligible to operate in reliance on Rule 6c-11;

(B) if the investment company no longer complies with the requirements set forth in Rule 5.2(j)(8);

(C) if, following the initial twelve-month period after commencement of trading on the Exchange of a series of Exchange-Traded Fund Shares, there are fewer than 50 beneficial holders of such series of Exchange-Traded Fund Shares; or

(D) if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable (see proposed Rule 5.2(j)(8)(e)(2)(D)).

Proposed Rule 5.2(j)(8)(e)(2) is based on NYSE Arca Rule 5.2-E(j)(8)(e)(2) without any differences.

Proposed Rule 5.2(j)(8)(f) would provide that transactions in Exchange-Traded Fund Shares would occur during the trading hours specified in Rule 7.34(a) for Exchange-listed securities. Proposed Rule 5.2(j)(8)(f) is based on NYSE Arca Rule 5.2-E(j)(8)(f) with a difference to cross reference the Exchange's rule governing the hours of trading. In addition, unlike NYSE Arca, Exchange-listed securities trade on the Exchange only during Core Trading Hours.

Proposed Rule 5.2(j)(8)(g) would provide that the Exchange would implement and maintain written surveillance procedures for Exchange-Traded Fund Shares. This proposed rule is based, for example, on Commentary .01(f) to Rule 5.2(j)(3) (for Investment Company Units); Commentary .03 to Rule 8.600 (for Managed Fund Shares); and Commentary .04 to Rule 8.700 (for Managed Trust Securities). Proposed Rule 5.2(j)(8)(g) is based on NYSE Arca Rule 5.2-E(j)(8)(g) without any differences.

Proposed Rule 5.2(j)(8)(h) would provide that, upon termination of an investment company issuing Exchange-Traded Fund Shares, the Exchange would require that Exchange-Traded Fund Shares issued in connection with such entity be removed from Exchange listing. Proposed Rule 5.2(j)(8)(h) is based on NYSE Arca Rule 5.2-E(j)(8)(h) without any differences.

Proposed Commentary .01 to Rule 5.2(j)(8) would provide that a security that has previously been approved for listing on the Exchange pursuant to the generic listing requirements specified in Rule 5.2(j)(3) or Commentary .01 to Rule 8.600, or pursuant to a proposed rule change approved or subject to a notice of effectiveness by the Commission, may be considered approved for listing solely under Rule 5.2(j)(8) if such security is eligible to operate in reliance on Rule 6c-11 under the 1940 Act. Once so approved for listing, the continued listing requirements applicable to such previously-listed security will be those specified in paragraph (e) of Rule 5.2(j)(8). Any requirements for listing as specified in Rule 5.2(j)(3) or Commentary .01 to Rule 8.600, or an approval order or notice of effectiveness of a separate proposed rule change that differ from the requirements of Rule 5.2(j)(8) will no longer be applicable to such security. Commentary .01 to proposed Rule 5.2(j)(8) is based on Commentary .01 to NYSE Arca Rule 5.2-E(j)(8) without any differences.¹³

The Exchange believes that proposed Commentary .01 to Rule 5.2(j)(8) harmonizes the Exchange's listing standards for all ETFs that will be listed on the Exchange, even if they were previously listed pursuant to different continued listing requirements. Specifically, as noted in the Rule 6c-11 Release, one year following the effective date of Rule 6c-11, the Commission will be rescinding those portions of its prior ETF exemptive orders under the 1940 Act that grant

¹³ There are currently no securities listed on the Exchange that would be eligible for approval under proposed Commentary .01 to Rule 5.2(j)(8).

relief related to the formation and operation of certain ETFs. The Exchange believes that once this occurs, all ETFs will be subject to the same requirements under Rule 6c-11 and will no longer be subject to any differing requirements that may have been set forth in the exemptive orders issued before the effective date of Rule 6c-11.

Proposed Commentary .02 to Rule 5.2(j)(8) is based on Commentary .02 to NYSE Arca Rule 5.2-E(j)(8)(a) without any differences, and would establish the following requirements that each series of Exchange-Traded Fund Shares based on an index would be required to meet on an initial and continued listing basis:

(1) If the underlying index is maintained by a broker-dealer or fund adviser, the broker-dealer or fund adviser will erect and maintain a “fire wall” around the personnel who have access to information concerning changes and adjustments to the index and the index will be calculated by a third party who is not a broker-dealer or fund adviser, and

(2) Any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on the index composition, methodology and related matters, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index.¹⁴

In addition, with respect to series of Exchange-Traded Fund Shares that are actively managed, if the investment adviser to the investment company issuing Exchange-Traded Fund Shares is affiliated with a broker-dealer, such investment adviser will erect and maintain a “fire wall” between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such portfolio. Personnel who make decisions on

¹⁴ See proposed Commentary .02(a) to Rule 5.2(j)(8)). Proposed Commentary .02(a) is based on Commentary .01(b)(1) to Rule 5.2(j)(3) and Commentary .02(b)(1) and (b)(3) to Rule 5.2(j)(3).

the portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable portfolio. The Reporting Authority that provides information relating to the portfolio of a series of Exchange-Traded Fund Shares must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of such portfolio.¹⁵

The Exchange notes that Exchange-Traded Fund Shares will be subject to all Exchange rules applicable to equities trading. With respect to Exchange-Traded Fund Shares, all obligations relating to product description and prospectus delivery requirements will continue to apply in accordance with Exchange rules and federal securities laws, and the Exchange and the Financial Industry Regulatory Authority, Inc. (“FINRA”) will continue to monitor Exchange members for compliance with such requirements, which are not changing as a result of Rule 6c-11 under the 1940 Act.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in a series of Exchange-Traded Fund Shares.¹⁶ Trading in Exchange-Traded Fund Shares will be halted if the circuit breaker parameters in Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in Exchange-Traded Fund Shares inadvisable. These may include: (1) the extent to which certain information about the Exchange-Traded Fund Shares that is required to be disclosed under Rule 6c11(c) of the 1940 Act is not being made available, or (2)

¹⁵ See proposed Commentary .02(b) to Rule 5.2(j)(8)). Proposed Commentary .02(b) is based in part on Commentary .06 to Rule 8.600.

¹⁶ See NYSE Rule 7.12.

whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

The Exchange proposes a new Rule 7.18(d)(2) modeled on NYSE Arca Rule 7.18-E(d)(2) that would govern trading halts for listed ETPs (which would include Exchange-Traded Fund Shares). Proposed Rule 7.18(d)(2) would provide that, with respect to an ETP listed on the Exchange for which a Net Asset Value (“NAV”) (and in the case of Managed Fund Shares under NYSE Rule 8.600 and Managed Trust Securities under NYSE Rule 8.700, a Disclosed Portfolio) is disseminated, if the Exchange becomes aware that the NAV (or in the case of Managed Fund Shares or Managed Trust Securities, the Disclosed Portfolio) is not being disseminated to all market participants at the same time, it will halt trading in the affected Exchange Traded Product on the NYSE until such time as the NAV (or in the case of Managed Fund Shares or Managed Trust Securities, the Disclosed Portfolio, as applicable) is available to all market participants.

In addition, the Exchange may halt trading in ETPs if there is an interruption or disruption in the dissemination of an underlying index value, if applicable, if there are major interruptions in securities trading in U.S. or global markets, or in the presence of other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market.

Minimum Price Variation

As provided in NYSE Rule 7.6, the minimum price variation (“MPV”) for quoting and entry of orders in equity securities traded on the NYSE is \$0.01, with the exception of securities that are priced less than \$1.00 for which the MPV for order entry is \$0.0001.

Surveillance

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Exchange-Traded Fund Shares in all trading sessions and to deter and

detect violations of Exchange rules. Specifically, the Exchange will implement and maintain written surveillance procedures to monitor trading in Exchange-Traded Fund Shares on the NYSE.¹⁷ The Exchange or FINRA, on behalf of the Exchange, will communicate as needed regarding trading in Exchange-Traded Fund Shares and certain of their applicable underlying components with other markets that are members of the Intermarket Surveillance Group (“ISG”) or with which the Exchange has in place a comprehensive surveillance sharing agreement. In addition, the Exchange may obtain information regarding trading in Exchange-Traded Fund Shares and certain of their applicable underlying components from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. Additionally, FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities that may be held by a series of Exchange-Traded Fund Shares reported to FINRA’s TRACE. FINRA also can access data obtained from the Municipal Securities Rulemaking Board’s Electronic Municipal Market Access (“EMMA”) system relating to municipal bond trading activity for surveillance purposes in connection with trading in a series of Exchange-Traded Fund Shares, to the extent that a series of Exchange-Traded Fund Shares holds municipal securities. As noted below, the issuer of a series of Exchange-Traded Fund Shares will be required to comply with Rule 10A-3 under the Act for the initial and continued listing of Exchange-Traded Fund Shares, as provided under Rule 5.2.

Pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. As provided for under proposed Rule

¹⁷ The Exchange notes that the surveillance procedures applicable to Exchange-Traded Fund Shares on the NYSE would be substantially similar to those in place for Investment Company Units, Exchange-Traded Fund Shares, and Managed Fund Shares, among other product types, on NYSE Arca.

5.2(j)(8)(e)(2), if the investment company or series of Exchange-Traded Fund Shares is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Rule 5.5(m).

The Exchange will implement and maintain written surveillance procedures to monitor issuer compliance with the requirements of proposed Rule 5.2(j)(8) for Exchange-Traded Funds on the NYSE. For example, the Exchange will use intraday alerts that will notify Exchange personnel of trading activity throughout the day that may indicate that certain disclosures are not being made accurately or that other unusual conditions or circumstances are present that could be detrimental to the maintenance of a fair and orderly market. The Exchange will require periodic certification from the issuer of a series of Exchange-Traded Fund Shares that it is in compliance with Rule 6c-11 and the requirements of Rule 5.2(j)(8).

Proposed Rule 5.2(j)(8)(e)(2)(i) provides that the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 5.5(m) of, a series of Exchange-Traded Fund Shares if the Exchange becomes aware that the investment company is no longer eligible to operate in reliance on Rule 6c-11. The Exchange's awareness for purposes of determining whether to suspend trading or delist a series of Exchange-Traded Fund Shares may result from notification by the investment company or by the Exchange learning, through its own efforts, of non-compliance with Rule 5.2(j)(8).¹⁸ In addition, the Exchange will periodically review issuer websites to monitor whether disclosures are being made for a series of Exchange-Traded Fund Shares as required by Rule 6c-11(c)(1). The Exchange also notes that proposed Rule 5.2(j)(8)(e) would require an issuer of Exchange-Traded Fund Shares to notify the

¹⁸ As proposed, Rule 5.2(j)(8) does not impose index dissemination requirements, the Exchange does not plan to conduct a specific index dissemination surveillance for securities listed pursuant to such rule.

Exchange that it is no longer eligible to operate in reliance on Rule 6c-11 or that it does not comply with the requirements of proposed Rule 5.2(j)(8). The Exchange will rely on the foregoing procedures to become aware of any non-compliance with the requirements of Rule 5.2(j)(8). Proposed Rule 5.2(j)(8)(e)(2)(i) is based on NYSE Arca Rule 5.2-E(j)(8)(e)(2)(i) without any differences.

Firewalls

Commentary .01(b)(1) and Commentary .02(b) to NYSE Rule 5.2(j)(3) (applicable to Investment Company Units) and Commentary .06 to NYSE Rule 8.600 (applicable to Managed Fund Shares) require the establishment and maintenance of a “firewall” around personnel who have access to information concerning changes to an index or the composition and/or changes to a fund’s portfolio; and that specified persons or entities be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index or portfolio.

In the Rule 6c-11 Release, the Commission, in the context of index-based ETFs with affiliated index providers (“self-indexed ETFs”), noted the federal securities law provisions that currently relate to implementation by funds of appropriate measures to deal with misuse of non-public information.¹⁹ The Exchange notes that these federal securities law requirements will

¹⁹ See Rule 6c-11 Release at 57168-57169. See also 17 CFR 270.38a-1 (Rule 38a-1 under the 1940 Act) (requiring funds to adopt policies and procedures reasonably designed to prevent violation of federal securities laws); 17 CFR 270.17j-1(c)(1) (Rule 17j-1(c)(1) under the Investment Company Act) (requiring funds to adopt a code of ethics containing provisions designed to prevent certain fund personnel (“access persons”) from misusing information regarding fund transactions); section 204A of the Investment Advisers Act of 1940 (“Advisers Act”) (15 U.S.C. 80b-204A) (requiring an adviser to adopt policies and procedures that are reasonably designed, taking into account the nature of its business, to prevent the misuse of material, non-public information by the adviser or any associated person, in violation of the Advisers Act or the Exchange Act, or the rules or regulations thereunder); section 15(g) of the Exchange Act (15 U.S.C. 78o(f)) (requiring a registered

continue to apply to issues of index and actively-managed ETFs and the proposed generic listing rules for Exchange-Traded Fund Shares are consistent with such requirements.

The Exchange notes that proposed Commentary .02(a) to Rule 5.2(j)(8) provides that, with respect to series of Exchange-Traded Fund Shares that are based on an index, if the underlying index is maintained by a broker-dealer or fund adviser, the broker-dealer or fund adviser will erect and maintain a “fire wall” around the personnel who have access to information concerning changes and adjustments to the index and the index shall be calculated by a third party who is not a broker-dealer or fund advisor. In addition, proposed Commentary .02(b) to Rule 5.2(j)(8) provides that, with respect to series of Exchange-Traded Fund Shares that are actively managed if, the investment adviser to the Exchange-Traded Fund issuing Exchange-Traded Fund Shares is affiliated with a broker-dealer, such investment adviser will erect and maintain a “fire wall” between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such Exchange-Traded Fund portfolio. Personnel who make decisions on the applicable Exchange-Traded Fund’s portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Exchange-Traded Fund portfolio. Proposed Commentary .02(a) to Rule 5.2(j)(8)(k) is based on Commentary .02(a) to NYSE Arca Rule 5.2-E(j)(8) without any differences.

As noted, proposed Rule is based on recently adopted NYSE Arca Rule 5.2-E(j)(8).²⁰ The Exchange believes that adopting the same generic standards for Exchange-Traded Fund Shares

broker or dealer to adopt policies and procedures reasonably designed, taking into account the nature of the broker’s or dealer’s business, to prevent the misuse of material, nonpublic information by the broker or dealer or any person associated with the broker or dealer, in violation of the Exchange Act or the rules or regulations thereunder).

²⁰ See note 10, *supra*.

would facilitate efficient procedures for ETFs that are permitted to operate in reliance on Rule 6c-11. The Exchange further believes that the proposed rule is, like its NYSE Arca counterpart, fully consistent with, and will further, the Commission's goals in adopting Rule 6c-11.

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,²¹ in general, and furthers the objectives of Sections 6(b)(5) of the Act,²² in particular, because it is 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.

By facilitating efficient procedures for listing Exchange-Traded Fund Shares that are permitted to operate in reliance on Rule 6c-11, the generic listing rules in proposed Rule 5.2(j)(8) described above based on NYSE Arca Rule 5.2-E(j)(8) recently approved by the Commission are consistent with, and will further, the Commission's goals in adopting Rule 6c-11. In addition, by allowing Exchange-Traded Fund Shares to be listed and traded on the Exchange without a prior Commission approval order or notice of effectiveness pursuant to Section 19(b) of the Act, proposed Rule 5.2(j)(8) will significantly reduce the time frame and costs associated with

²¹ 15 U.S.C. 78f(b).

²² 15 U.S.C. 78f(b)(5).

bringing these securities to market, thereby promoting market competition among issuers of Exchange-Traded Fund Shares, to the benefit of the investing public. In addition, the proposed rule change would fulfill the intended objective of Rule 19b-4(e) under the Act by permitting Exchange-Traded Fund Shares that satisfy the proposed listing standards to be listed and traded without separate Commission approval.

Proposed Rule 5.2(j)(8)(d) would specify the limitations on Exchange liability and relates to limitation of the Exchange, the Reporting Authority, or any agent of the Exchange as a result of specified events and conditions. As provided in proposed Rule 5.2(j)(8)(e), the Exchange may approve Exchange-Traded Fund Shares for listing and trading on the Exchange subject to the requirement that the investment company issuing a series of Exchange-Traded Fund Shares is eligible to operate in reliance on Rule 6c-11²³ under the 1940 Act and must satisfy the requirements of Rule 5.2(j)(8) on an initial listing and, except for subparagraph (1)(A) of Rule 5.2(j)(8)(e), a continuing basis. An issuer of such securities must notify the Exchange of any failure to comply with such requirements. These requirements will ensure that Exchange-listed Exchange-Traded Fund Shares continue to operate in a manner that fully complies with the portfolio transparency requirements of Rule 6c-11(c). As provided in proposed Rule 5.2(j)(8)(e)(1), Exchange-Traded Fund Shares will be listed and traded on the Exchange subject to the requirement that the investment company issuing a series of Exchange-Traded Fund Shares is eligible to operate in reliance on the requirements of Rule 6c-11(c) under the 1940 Act on an initial and continued listing basis. As provided in proposed Rule 5.2(j)(8)(e)(2) (Suspension of trading or removal), the Exchange will consider the suspension of trading in, and

²³ Rule 6c-11(c) sets forth certain conditions applicable to exchange-traded funds, including information required to be disclosed on the fund's website.

will commence delisting proceedings under Rule 5.5(m) of, a series of Exchange-Traded Fund Shares if the Exchange becomes aware that it is no longer eligible to operate in reliance on Rule 6c-11 or does not comply with the requirements set forth in Rule 5.2(j)(8); if, following the initial twelve-month period after commencement of trading on the Exchange of a series of Exchange-Traded Fund Shares, there are fewer than 50 beneficial holders of such series of Exchange-Traded Fund Shares; or if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable.

As provided in proposed Rule 5.2(j)(8)(g), the Exchange will implement and maintain written surveillance procedures for Exchange-Traded Fund Shares on the NYSE. The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Exchange-Traded Fund Shares in all trading sessions and to deter and detect violations of Exchange rules. Proposed Rule 5.2(j)(8)(h) provides that, upon termination of an investment company issuing Exchange-Traded Fund Shares, the Exchange requires that Exchange-Traded Fund Shares issued in connection with such entity be removed from Exchange listing.

Proposed Commentary .01 to Rule 5.2(j)(8) provides that a security that has previously been approved for listing on the Exchange pursuant to the generic listing requirements specified in Rule 5.2(j)(3) or Commentary .01 to Rule 8.600, or pursuant to a proposed rule change approved or subject to a notice of effectiveness by the Commission, may be considered approved for listing solely under Rule 5.2(j)(8) if such security is eligible to operate in reliance on Rule 6c-11 under the 1940 Act. Once so approved for listing, the continued listing requirements applicable to such previously-listed security will be those specified in paragraph (e) of Rule 5.2(j)(8). Any requirements for listing as specified in Rule 5.2(j)(3) or Commentary .01 to Rule 8.600, or an approval order or notice of effectiveness of a separate proposed rule change that

differ from the requirements of Rule 5.2(j)(8) will no longer be applicable to such security. The Exchange believes proposed Commentary .01 to Rule 5.2(j)(8) will streamline the listing process for such securities, consistent with the regulatory framework adopted in Rule 6c-11 under the 1940 Act.

Proposed Commentary .02 to Rule 5.2(j)(8) would provide requirements to be met on an initial and continued listing basis by series of Exchange-Traded Fund Shares that are based on an index or are actively managed regarding the erection and maintenance of a “fire wall” as well as implementation and maintenance of procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index or portfolio. The Exchange believes the provisions of the proposed rule will address possible concerns regarding misuse of material non-public information regarding an index underlying a series of Exchange-Traded Fund Shares or the portfolio for a series of Exchange-Traded Fund Shares, as applicable.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and is consistent with the protection of investors and the public interest because the Exchange will have in place surveillance procedures that are adequate to properly monitor trading in the Exchange-Traded Fund Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. FINRA, on behalf of the Exchange, will communicate as needed regarding trading in Exchange-Traded Fund Shares and certain of their applicable underlying components with other markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. In addition, the Exchange may obtain information regarding trading in Exchange-Traded Fund Shares and certain of their applicable underlying components from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive

surveillance sharing agreement. Additionally, FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities that may be held by a series of Exchange-Traded Fund Shares reported to FINRA's TRACE. FINRA also can access data obtained from the Municipal Securities Rulemaking Board's EMMA system relating to municipal bond trading activity for surveillance purposes in connection with trading in a series of Exchange-Traded Fund Shares, to the extent that a series of Exchange-Traded Fund Shares holds municipal securities. As noted above, the issuer of a series of Exchange-Traded Fund Shares will be required to comply with Rule 10A-3 under the Act for the initial and continued listing of Exchange-Traded Fund Shares, as provided under Rule 5.2.

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in a series of Exchange-Traded Fund Shares.²⁴ Trading in Exchange-Traded Fund Shares will be halted if the circuit breaker parameters in NYSE Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in Exchange-Traded Fund Shares inadvisable. Proposed NYSE Rule 7.18(d)(2), which is based on NYSE Arca Rule 7.18-E(d)(2) without any differences, would permit the Exchange to halt trading in listed ETPs (which would include Exchange-Traded Fund Shares) for which an NAV (and in the case of Managed Fund Shares under NYSE Rule 8.600 and Managed Trust Securities under NYSE Rule 8.700, a Disclosed Portfolio) is disseminated when the Exchange becomes aware that the NAV (or in the case of Managed Fund Shares or Managed Trust Securities, the Disclosed Portfolio) is not being disseminated to all market participants at the same time until such time as the NAV (or in the

²⁴ See NYSE Rule 7.12.

case of Managed Fund Shares or Managed Trust Securities, the Disclosed Portfolio, as applicable) is available to all market participants.

The Exchange will obtain a representation from the issuer of a series of Exchange-Traded Fund Shares that the NAV per share of such series will be calculated daily and will be made available to all market participants at the same time. The Exchange will monitor for compliance with the continued listing requirements. If the Exchange-Traded Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Rule 5.5(m). The Exchange will utilize existing procedures to monitor issuer compliance with the requirements of proposed Rule 5.2(j)(8). For example, the Exchange will continue to use intraday alerts that will notify Exchange personnel of trading activity throughout the day that may indicate that certain disclosures are not being made accurately or that other unusual conditions or circumstances are present that could be detrimental to the maintenance of a fair and orderly market. The Exchange will require periodic certification from the issuer of a series of Exchange-Traded Fund Shares that it is in compliance with Rule 6c-11 and the requirements of Rule 5.2(j)(8). In addition, the Exchange, on a periodic basis will review issues of Exchange-Traded Fund Shares listed on the Exchange for compliance with the requirements of Rule 6c-11(c)(1). Proposed Rule 5.2(j)(8)(e) would require an issuer of Exchange-Traded Fund Shares to notify the Exchange if it is no longer eligible to operate in reliance on Rule 6c-11 or that it does not comply with the requirements of proposed Rule 5.2(j)(8) (except for subparagraph (1)(A) of Rule 5.2(j)(8)(e)).

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,²⁵ 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 and trading of Exchange-Traded Fund Shares and result in an efficient process surrounding the listing and trading of Exchange-Traded Fund Shares, which will enhance competition among market participants, to the benefit of investors and the marketplace. The Exchange also believes that the proposed change will reduce the time frame for bringing Exchange-Traded Fund Shares to market, thereby reducing the burdens on issuers and other market participants and promoting competition. In turn, the Exchange believes that the proposed change would make the process for listing Exchange-Traded Fund Shares more competitive by applying uniform listing standards to Exchange-Traded Fund Shares.

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

²⁵ 15 U.S.C. 78f(b)(8).

- (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-2020-86 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-2020-86. 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-2020-86, 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.²⁶

Eduardo A. Aleman
Deputy Secretary

²⁶ 17 CFR 200.30-3(a)(12).