

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-95378; File No. SR-NYSE-2022-04)

July 27, 2022

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 1, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Amend Rules 5P, 5.2(j)(8)(e), 8P, and 98

I. Introduction

On January 14, 2022, 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 (“Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to permit the listing and trading of certain exchange-traded products (“ETPs”) that overlie one or more stocks listed on the Exchange. The proposed rule change was published for comment in the Federal Register on January 31, 2022.<sup>3</sup>

On March 9, 2022, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>5</sup>

On April 28, 2022, the Commission instituted proceedings under Section 19(b)(2)(B) of the

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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. 94053 (Jan. 25, 2022), 87 FR 4982 (“Notice”). The Commission has received one comment letter, which does not relate to the substance of the proposed rule change. The comment letter is available at <https://www.sec.gov/comments/sr-nyse-2022-04/srnyse202204-288838.htm>.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 94392, 87 FR 14592 (Mar. 15, 2022). The Commission designated May 1, 2022 as the date by which it should approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

Exchange Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule change.<sup>7</sup> On June 30, 2022, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and superseded the proposed rule change as originally filed.<sup>8</sup> The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. The Exchange’s Description of the Proposed Rule Change, as Modified by Amendment No. 1

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 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”)<sup>9</sup> that have a component NMS Stock listed on the

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<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>7</sup> See Securities Exchange Act Release No. 94814, 87 FR 26378 (May 4, 2022).

<sup>8</sup> Amendment No. 1 can be found on the Commission’s website at: <https://www.sec.gov/comments/sr-nyse-2022-04/srnyse202204-20133423-303642.pdf>.

<sup>9</sup> 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 Securities and Exchange Act of 1934 (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

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”).<sup>10</sup>

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) 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

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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).

<sup>10</sup> 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.”

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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> ETPs listed under Rules 5P and 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.<sup>14</sup>

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<sup>11</sup> “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.

<sup>12</sup> 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).

<sup>13</sup> 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).

<sup>14</sup> 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

The Exchange recently adopted a new Rule 5.2(j)(8)<sup>15</sup> establishing generic listing standards allowing the Exchange to list and trade Exchange-Traded Fund Shares.<sup>16</sup>

#### Relevant Commission Precedent

While the trading of an equity security and its related derivative product at the same physical location (“side-by-side trading”)<sup>17</sup> and the practice of the same person or firm making markets in an equity security and its related option (“integrated market making”<sup>18</sup>) has generally not been permitted, the Commission has approved integrated market making and side-by-side trading for “broad-based” exchange traded funds (“ETF”) and Trust-Issued Receipts (“TIR”) and related options.<sup>19</sup> The test for whether a product is “broad-based,” and therefore not readily

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specify DMM requirements for ETPs listed on the Exchange pursuant to Rules 5P and 8P).

<sup>15</sup> See Securities Exchange Act Release No. 91029 (February 1, 2021), 86 FR 8420 (February 5, 2021) (SR-NYSE-2020-86) (approval order).

<sup>16</sup> 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”).

<sup>17</sup> “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).

<sup>18</sup> “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.

<sup>19</sup> 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

susceptible to manipulation, is whether the individual components of the ETP are sufficiently liquid and well-capitalized and the product is not over-concentrated.<sup>20</sup> 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 these determinations, the Commission balanced the potential improvements in the quality of the markets for the securities and their related options against the competitive, regulatory, and surveillance concerns.<sup>21</sup>

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the QQQs met the composition and concentration measures to be classified as a broad-based ETF).

<sup>20</sup> 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). Although the relevant Commission precedents involved 1940 Act investment products, the underlying rationale applies with equal force to non-1940 Act products. Whether a product is sufficiently broad-based such that the product is not readily susceptible to manipulation should follow from an assessment of whether the listing criteria are designed to ensure the underlying individual components are sufficiently liquid and well-capitalized and not over-concentrated. Whether or not a product is issued by an investment company as defined by the 1940 Act is not relevant to this analysis.

<sup>21</sup> See Release No. 46213, 67 FR at 48234. In this regard, the Commission noted that it must consider whether a side-by-side trading or integrated market making proposal would permit market participants to possess “undetected, material non-public market

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 the then-American Stock Exchange LLC's listing standards that, as described below, are very similar to the Exchange's current listing standards.<sup>22</sup>

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."<sup>23</sup> 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.<sup>24</sup>

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

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information" that could give certain market participants a trading advantage over other market participants. See id.

<sup>22</sup> The American Stock Exchange LLC is now NYSE American, LLC.

<sup>23</sup> Release No. 46213, 67 FR at 48235.

<sup>24</sup> Id.

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 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.”<sup>25</sup>

#### Proposed Rule Change

Because listed securities are assigned to DMMs, trading is on the Floor of the Exchange and thus a listed ETP with one or more underlying NYSE Component Securities 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 Act and with prior Commission actions with respect to both integrated market making and side-by-side trading for the Exchange to list certain ETPs that include NYSE Component Securities based on the broad-based listing criteria contained in the relevant listing rules.

Specifically, the Exchange proposes to permit the listing and trading of five types of ETPs that include one or more underlying NYSE Component Securities as long as the ETP independently satisfies the quantitative generic listing criteria set forth in the listing rules for those products. As discussed more fully below, four of the proposed ETPs would rely on existing listing criteria. For ETPs that have underlying NYSE Component Securities and that otherwise meet the criteria for listing of Rule 5.2(j)(8), the Exchange proposes additional broad-based listing criteria that must be satisfied in order for the ETP to be listed and traded on the Exchange. To accomplish this change, the Exchange proposes to specifically exclude these five

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Id.



types of ETPs from the current prohibition on listing products with underlying NYSE Component Securities in the preambles to Rules 5P and Rule 8P, respectively. The Exchange would also amend Rule 5P to provide that the Exchange may submit a rule filing pursuant to Section 19(b) of the Act to permit the listing and trading of an ETP that does not otherwise meet the specified listing standards. Finally, the Exchange proposes to amend Rule 98(b)(7) to exclude from the definition of “related products” the five types of ETPs that are excluded from the listing prohibition set forth in the preamble to Rule 5P or to Rule 8P.

#### Current Generic Listing Standards

The Exchange believes that four 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 that have an NYSE Component Security would be sufficiently broad-based to address potential manipulation concerns. Specifically, the Exchange believes that ETPs that have underlying NYSE Component Securities and that would otherwise qualify for listing under the current criteria in Rule 5.2(j)(3), Supplementary Material .01(a), Rule 5.2(j)(6)(B)(I), Rule 8.100, Supplementary Material .01(a)(A), and Rule 8.600, Supplementary Material .01(a), could, by virtue of meeting the listing criteria, 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.

As discussed more fully below, the current listing standards for each product incorporate composition and concentration criteria that includes market cap, volume, weighting and minimum number of components requirements, as follows.

#### Rule 5.2(j)(3), Supplementary Material .01(a) -- Investment Company Units (“Units”)

Units listed under Rule 5.2(j)(3), Supplementary Material .01(a)(A) based on an index or portfolio of only US Component Stocks<sup>26</sup> or US Component Stocks and cash underlying a series of listed Units must meet the following criteria on an initial and continued listing basis:

- The index or portfolio include a minimum of 13 component stocks;<sup>27</sup>
- Component stocks (excluding Units and securities defined in Section 2 of Rule 8P) that in the aggregate account for at least 90% of the weight of the US Component Stocks portion of the index or portfolio (excluding such Units and securities defined in Section 2 of Rule 8P) each will have a minimum market value of at least \$75 million;<sup>28</sup>
- Component stocks (excluding Units and securities defined in Section 2 of Rule 8P) that in the aggregate account for at least 70% of the US Component Stocks portion of the weight of the index or portfolio (excluding such Exchange Traded Products) each will 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;<sup>29</sup> and

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<sup>26</sup> For purposes of Rule 5.2(j)(3), “US Component Stock” means an equity security that is registered under Sections 12(b) or 12(g) of the Act or an American Depositary Receipt (“ADR”), the underlying equity security of which is registered under Sections 12(b) or 12(g) of the Act. See NYSE Rule 5.2(j)(3).

<sup>27</sup> See Rule 5.2(j)(3).01(a)(A)(4). The rule provides that there shall be 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 Units, or (b) one or more series of ETPs account for 100% of the US Component Stocks portion of the weight of the index or portfolio.

<sup>28</sup> See Rule 5.2(j)(3).01(a)(A)(1).

<sup>29</sup> See Rule 5.2(j)(3).01(a)(A)(2).

- The most heavily weighted component stock component (excluding Units and securities defined in Section 2 of Rule 8P) will not exceed 30% of the US Component Stocks portion of the weight of the index or portfolio, and, to the extent applicable, the five most heavily weighted component stocks (excluding Exchange Traded Products) will not exceed 65% of the US Component Stocks portion of the weight of the index or portfolio.<sup>30</sup>

Similarly, Units listed under Rule 5.2(j)(3), Supplementary Material .01(a)(B) based on an index or portfolio of both US Component Stocks and Non-US Component Stocks<sup>31</sup> or US Component Stocks, Non-US Component Stocks and cash, must meet the following criteria on an initial and continued listing basis:

- The index or portfolio include a minimum of 20 component stocks;<sup>32</sup>
- Component stocks (similarly excluding Units and securities defined in Section 2 of Rule 8P) that in the aggregate account for at least 90% of the weight of the combined US and Non-US Component Stocks portions of the index or portfolio

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<sup>30</sup> See Rule 5.2(j)(3).01(a)(A)(3).

<sup>31</sup> The term “Non-U.S. Component Stock” means an equity security that is not registered under Sections 12(b) or 12(g) of the Act 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).

<sup>32</sup> See Rule 5.2(j)(3).01(a)(B)(4). The rule provides that there shall be no minimum number of component stocks if (a) one or more series of Units or Portfolio Depositary Receipts constitute, at least in part, components underlying a series of Units, or (b) one or more series of Exchange Traded Products account for 100% of the weight of the combined US and Non-US Component Stocks portions of the index or portfolio.

(excluding such Units and securities defined in Section 2 of Rule 8P) each will have a minimum market value of at least \$100 million;<sup>33</sup>

- Component stocks (excluding Units and securities defined in Section 2 of Rule 8P) that in the aggregate account for at least 70% of the combined US and Non-US Component Stocks portions of the weight of the index or portfolio (excluding such Exchange Traded Products) each will have a minimum global monthly trading volume of 250,000 shares, or minimum global notional volume traded per month of \$25,000,000, averaged over the last six months;<sup>34</sup> and
- The most heavily weighted component stock component (excluding Units and securities defined in Section 2 of Rule 8P) will not exceed 25% of the combined US and Non-US Component Stocks portions of the weight of the index or portfolio, and, to the extent applicable, the five most heavily weighted component stocks (excluding Exchange Traded Products) will not exceed 60% of the combined US and Non-US Component Stocks portions of the weight of the index or portfolio.<sup>35</sup>

These listing requirements for Units are generally comparable to the listing requirements described above in the relevant precedents for assessing whether a product is sufficiently broad-based to address potential manipulation concerns.

First, the index or portfolio underlying Units must have the same minimum number (13) of component stocks. For an index or portfolio underlying Units listed under Rule 5.2(j)(3),

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<sup>33</sup> See Rule 5.2(j)(3).01(a)(B)(1).

<sup>34</sup> See Rule 5.2(j)(3).01(a)(B)(2).

<sup>35</sup> See Rule 5.2(j)(3).01(a)(B)(3).

Supplementary Material .01(a)(B), based on an index or portfolio of both US Component Stocks and Non-US Component Stocks or US Component Stocks, Non-US Component Stocks and cash, the minimum component requirement is even stricter (20 component stocks).<sup>36</sup>

Second, the component stocks in an index or portfolio underlying Units must meet comparable capitalization and liquidity requirements, *i.e.*, at least 90% of the weight of the US Component Stocks portion of the index or portfolio each must have a minimum market value of at least \$75 million. For an index or portfolio underlying Units listed under Rule 5.2(j)(3), Supplementary Material .01(a)(B), the minimum market value requirement is \$100 million.

Third, the component stocks in an index or portfolio underlying Units must also meet comparable minimum trading volume requirements, *i.e.*, component stocks in an index or portfolio accounting for at least 70% of the US Component Stocks portion of the weight of the index or portfolio each must 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. Although the Exchange's listing standard does not require 90% of the of the weight of the index or portfolio to each have the same minimum monthly trading volume of 250,000 shares, the Exchange believes that the 70% requirement is still significant enough to reduce the likelihood that any market participant would be able to engage in price manipulation. The Exchange notes that in approving the current listing requirements, the Commission was satisfied that the these standards met the statutory requirements of the Act and were designed, among other things, to prevent manipulation. Moreover, the Exchange believes that the current requirements, coupled with the Exchange's rigorous regulation and surveillance of trading activity by DMMs and other

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<sup>36</sup> See Rule 5.2(j)(3).01(a)(B)(4).

Floor-based market participants discussed below, are also sufficient to prevent potential manipulation.

Finally, the concentration requirements for Units are also generally comparable. Indeed, for Units based on an index or portfolio of only US Component Stocks or US Component Stocks and cash, the requirement that the most heavily weighted component stock not exceed 30% of the US Component Stocks portion of the weight of the index or portfolio is arguably stricter.

In the case of Units based on an index or portfolio of both US Component Stocks and Non-US Component Stocks or US Component Stocks, Non-US Component Stocks and cash, the requirement that the most heavily weighted component stock not exceed 25% of the combined US and Non-US Component Stocks portion of the weight of the index or portfolio is also arguably comparable. The Exchange believes that the difference between this requirement and the 30% standard set forth in the relevant precedents is not sufficiently material to warrant the conclusion that the Exchange's current standard would be insufficient to deter potential manipulation, especially when considered in combination with the other current requirements for Units, some of which are arguably stricter. The requirement that the five most heavily weighted component stocks (excluding Units and securities defined in Section 2 of Rule 8P) not exceed 60% of the combined US and Non-US Component Stocks portions of the weight of the index or portfolio is slightly less than the relevant precedent, the Exchange believes the difference would not be material given that the index or portfolio could also contain non-Exchange listed US Component Stocks as well as Non-US Component Stocks. As noted, in approving the current listing requirements, the Commission was satisfied that these standards met the statutory requirements of the Act and were designed, among other things, to prevent manipulation. Moreover, the Exchange believes that the current requirements, coupled with the Exchange's

rigorous regulation and surveillance of trading activity by DMMs and other Floor-based market participants discussed below, are also sufficient to prevent potential manipulation.

Based on the foregoing, the Exchange believes Units with an NYSE Component Security listing under the existing listing criteria would be sufficiently broad-based to address potential manipulation concerns and could thus list without additional requirements for information barriers or physical or organizational separation.

Rule 5.2(j)(6)(B)(I) -- Equity Index-Linked Securities

Equity Index-Linked Securities (“ETN”) based on an index or indexes of, among other things, equity securities listed under Rule 5.2(j)(6)(B)(I) must meet the following initial listing criteria:

- Each underlying index has at least ten (10) component securities;<sup>37</sup>
- Each component security (excluding Derivative Securities Products and Index-Linked Securities) has a minimum market value of at least \$75 million;<sup>38</sup>
- 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)

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<sup>37</sup> See 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.

<sup>38</sup> See 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.

each must 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;<sup>39</sup>

- No underlying component security (excluding Derivative Securities Products and Index-Linked Securities) will 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) will 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);<sup>40</sup> and
- 90% of the index's numerical value (excluding Derivative Securities Products and Index-Linked Securities) and at least 80% of the total number of component securities (excluding Derivative Securities Products and Index-Linked Securities) will meet the then current criteria for standardized option trading set forth in NYSE Arca Rule 5.3-O.<sup>41</sup>

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<sup>39</sup> See Rule 5.2(j)(6)(B)(I)(1)(b)(ii).

<sup>40</sup> See Rule 5.2(j)(6)(B)(I)(1)(b)(iii).

<sup>41</sup> See Rule 5.2(j)(6)(B)(I)(1)(b)(iv). The ETN listing requirements also contain two requirements that did not figure in the SEC's analysis of the hallmarks of a broad-based ETP. First, 90% of the index's numerical value (excluding Derivative Securities Products and Index-Linked Securities) and at least 80% of the total number of component securities (excluding Derivative Securities Products and Index-Linked Securities) will meet the then current criteria for standardized option trading set forth in NYSE Arca Rule 5.3-O. See Rule 5.2(j)(6)(B)(I)(1)(b)(iv). An index will not be subject to this requirement if (a) no underlying component security represents more than 10% of the dollar weight of the index (excluding Derivative Securities Products and Index-Linked Securities) and (b) the index has a minimum of 20 components (excluding Derivative Securities Products and Index-Linked Securities). See id. In addition, all component



These listing requirements for ETNs are comparable to the requirements described above in the relevant precedents for assessing whether a product is sufficiently broad-based to address potential manipulation concerns.

First, indexes underlying ETNs must have a minimum of 10 component securities. Although the precedents discussed above cited a minimum of 13 components, the Exchange does not believe the small difference translates into less meaningful diversification to obviate potential manipulation concerns, especially when considered in light of the heightened market value and volume requirements for listed ETNs, discussed below.

Second, each component security of the ETN's underlying index must have a minimum market value of at least \$75 million, which is stricter than the requirement that only component securities that in the aggregate account for at least 90% of the weight of the portfolio have such a minimum market value.

Third, ETN component stocks that in the aggregate account for at least 90% of the weight of the index must 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, far in excess of the 250,000 shares noted in the Commission precedents.

Fourth, no underlying component security can represent more than 25% of the dollar weight of the index, which is comparable, although the five highest dollar weighted component securities in the index cannot 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), which is less than

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securities must be, among others, securities (other than foreign country securities and ADRs) that are issued by a reporting company under the Act or by an investment company registered under the 1940 Act, which in each case is listed on a national securities exchange, and an "NMS stock" (as defined in Rule 600 of Regulation NMS). See Rule 5.2(j)(6)(B)(I)(1)(b)(v).

the 65% of the weight of the portfolio noted in the Commission precedents. The Exchange believes that the lower weighting for the five highest dollar weighted component securities does not significantly dilute the requirement since the weighting still comprises half of an index with 25 or more component securities and 60% for an index composed of 25 or few securities. As with the minimum component requirement, the Exchange believes that the stricter market capitalization and volume requirements for listed ETNs along with the other current requirements would mean that the securities underlying the index would be larger and more liquid, and therefore generally more difficult to manipulate.

Based on the foregoing, the Exchange believes ETNs that have an NYSE Component Security and that list under the existing listing criteria would be sufficiently broad-based to address potential manipulation concerns and could thus list without additional requirements for information barriers or physical or organizational separation.

#### 8.100, Supplementary Material .01(a)(A) -- Portfolio Depositary Receipts

Rule 8.100, Supplementary Material 01(a)(A) provides that the components of an index or portfolio of only US Component Stocks<sup>42</sup> underlying a series of Portfolio Depositary Receipts must meet the following criteria on an initial and continued listing basis:

- Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each will have a minimum market value of at least \$75 million;

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<sup>42</sup> For purposes of Rule 8.100, the term “US Component Stock” means an equity security that is registered under Sections 12(b) or 12(g) of the Act or an ADR, the underlying equity security of which is registered under Sections 12(b) or 12(g) of the Act. See Rule 8.100(a)(3).

- Component stocks that in the aggregate account for at least 90% of the weight of the index or portfolio each will have a minimum monthly trading volume during each of the last six months of at least 250,000 shares;
- The most heavily weighted component stock will not exceed 25% of the weight of the index or portfolio, and the five most heavily weighted component stocks will not exceed 65% of the weight of the index or portfolio;
- The index or portfolio will include a minimum of 13 component stocks; and
- All securities in the index or portfolio will be US Component Stocks listed on a national securities exchange and will be NMS Stocks as defined in Rule 600 of Regulation NMS under the Act.

These listing requirements for Portfolio Depositary Receipts are the same as the listing requirements described above in the relevant precedents for assessing whether a product is sufficiently broad-based to address potential manipulation concerns.

First, the index or portfolio for Portfolio Depositary Receipts must have the same minimum number (13) of component stocks.

Second, the component stocks of Portfolio Depositary Receipts must have the same capitalization and liquidity requirements, i.e., at least 90% of the weight of the US Component Stocks portion of the index or portfolio each will have a minimum market value of at least \$75 million.

Third, component stocks of Portfolio Depositary Receipts must also have the same minimum trading volume, i.e., must in the aggregate account for at least 90% of the US Component Stocks portion of the weight of the index or portfolio each will have a minimum monthly trading volume of 250,000 shares, during the last six months.

Finally, the concentration requirements are also comparable, requiring heavily weighted component stocks to not exceed 25% of the US Component Stocks portion of the weight of the index or portfolio, and, to the extent applicable, the five most heavily weighted component stocks not to exceed 65%.

Based on the foregoing, the Exchange believes Portfolio Depositary Receipts that have an NYSE Component Security and that list under the existing listing criteria would be sufficiently broad-based to address potential manipulation concerns and could thus list without additional requirements for information barriers or physical or organizational separation.

Rule 8.600, Supplementary Material .01(a) -- Managed Fund Shares

Supplementary Material .01(a) of Rule 8.600 provides that the component stocks of the equity portion of a portfolio of Managed Fund Shares that are U.S. Component Stocks<sup>43</sup> shall meet the following criteria initially and on a continuing basis:

- Component stocks (excluding Derivative Securities Products and Index-Linked Securities) that in the aggregate account for at least 90% of the equity weight of the portfolio (excluding such Derivative Securities Products and Index-Linked Securities) each shall have a minimum market value of at least \$75 million;
- Component stocks (excluding Derivative Securities Products and Index-Linked Securities) that in the aggregate account for at least 70% of the equity weight of the portfolio (excluding such Derivative Securities Products and Index-Linked Securities) each shall have a minimum monthly trading volume of 250,000 shares,

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<sup>43</sup> Rule 8.600, Supp. Material.01(a) notes that “U.S. Component Stocks” are the same as described in Rule 5.2(j)(3). See note 20 [sic], supra.

or minimum notional volume traded per month of \$25,000,000, averaged over the last six months;

- The most heavily weighted component stock (excluding Derivative Securities Products and Index-Linked Securities) shall not exceed 30% of the equity weight of the portfolio, and, to the extent applicable, the five most heavily weighted component stocks (excluding Derivative Securities Products and Index-Linked Securities) shall not exceed 65% of the equity weight of the portfolio;
- Where the equity portion of the portfolio does not include Non-U.S. Component Stocks,<sup>44</sup> the equity portion of the portfolio shall include a minimum of 13 component stocks;<sup>45</sup>
- Except as provided in the Rule, equity securities in the portfolio shall be U.S. Component Stocks listed on a national securities exchange and shall be NMS Stocks as defined in Rule 600 of Regulation NMS under the Act; and
- ADRs in a portfolio may be exchange-traded or non-exchange-traded. However, no more than 10% of the equity weight of a portfolio shall consist of non-exchange-traded ADRs.

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<sup>44</sup> See note 26, *supra*.

<sup>45</sup> See Rule 8.600, Supp. Material.01(a)(1)(D). The rule provides that there shall be no minimum number of component stocks if (1) one or more series of Exchange Traded Products or Index-Linked Securities constitute, at least in part, components underlying a series of Managed Fund Shares, or (2) one or more series of Derivative Securities Products or Index-Linked Securities account for 100% of the equity weight of the portfolio of a series of Managed Fund Shares.

These listing requirements for Managed Fund Shares are either the same as or generally comparable to the listing requirements described above in the relevant precedents for assessing whether a product is sufficiently broad-based to address potential manipulation concerns.

First, the portfolio for Managed Fund Shares where the equity portion of the portfolio does not include Non-U.S. Component Stocks must include the same minimum number (13) of component stocks. Where the equity portion of a portfolio of Managed Fund Shares includes Non-U.S. Component Stocks, the equity portion of the portfolio must include a minimum of 20 component stocks, which is a stricter requirement.

Second, the component stocks of Managed Fund Shares must meet the same capitalization and liquidity requirements, i.e., at least 90% of the weight of the US Component Stocks portion of the index or portfolio each must have a minimum market value of at least \$75 million.

Third, component stocks of Managed Fund Shares must also meet comparable minimum trading volume requirements, i.e., must in the aggregate account for at least 70% of the US Component Stocks portion of the weight of the index or portfolio each will have a minimum monthly trading volume of 250,000 shares, during the last six months. Once again, although the Exchange's listing standard does not require 90% of the weight of the index or portfolio to each have the same minimum monthly trading volume of 250,000 shares, the Exchange believes that the 70% requirement is significant enough to meaningfully reduce the likelihood that any market participant would be able to engage in price manipulation. The Exchange notes that in approving the current listing requirements, the Commission was satisfied that these standards met the statutory requirements of the Act and were designed, among other things, to prevent manipulation. Moreover, the Exchange believes that the 70% requirement, coupled with the

Exchange's rigorous regulation and surveillance of trading activity by DMMs and other Floor-based market participants discussed below, is also sufficient to prevent potential manipulation.

Finally, the concentration requirements are somewhat stricter, requiring heavily weighted component stocks to not exceed 30% (not 25%) of the US Component Stocks portion of the weight of the index or portfolio, and, to the extent applicable, the five most heavily weighted component stocks must not exceed 65%.

Based on the foregoing, the Exchange believes Managed Fund Shares that have an NYSE Component Security and that list under the existing listing criteria would be sufficiently broad-based to address potential manipulation concerns and could thus list without additional requirements for information barriers or physical or organizational separation.

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As the foregoing discussion demonstrates, 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.<sup>46</sup>

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<sup>46</sup> 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.

Accordingly, 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 an actively managed series of Exchange-Traded Fund Shares or the index underlying a series of index-based 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) and discussed above, the index components underlying Units consisting solely of US Component Stocks<sup>47</sup> or US Component Stocks and cash -- i.e., where the equity portion of the portfolio does not include Non-US Component Stocks -- must include a minimum of 13 component stocks.<sup>48</sup> In addition, Portfolio Depositary Receipts and Rule 8.100 and Managed Fund Shares under Rule 8.600 also require a minimum of 13 component securities if the equity portion of the portfolio does not include Non-U.S. Component Stocks.<sup>49</sup> 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 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

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<sup>47</sup> See Rule 5.2(j)(3) & note 19, infra.

<sup>48</sup> See Rule 5.2(j)(3), Supp. Material .01(a)(A)(4). As previously noted, 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.

<sup>49</sup> See Rule 8.100, Supp. Material .01(a)(A)(4) & Rule 8.600, Supp. Material .01(a)(1)(D).

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.<sup>50</sup> Portfolio Depositary Receipts and Managed Fund Shares have similar requirements.<sup>51</sup>

Third, 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 similar 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 Units and securities defined in Section 2 of Rule 8P) each shall have a minimum market value of at least \$75 million.<sup>52</sup>

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 have a minimum monthly trading volume of 250,000 shares, or minimum notional volume traded

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<sup>50</sup> See Rule 8.100, Supp. Material .01(a)(A)(3).

<sup>51</sup> See Rule 8.100, Supp. Material .01(a)(A)(1)-(3) & Rule 8.600, Supp. Material .01(a)(1)(A)-(C).

<sup>52</sup> See Rule 5.2(j)(3), Supp. Material .01(a)(A)(1). As proposed, Rule 5.2(j)(8)(e)(1)(B) would not, unlike Rule 5.3(j)(3), Supp. Material .01(a)(A)(1)-(3), exclude Units and securities defined in Section 2 of Rule 8P when calculating the weight of the portfolio, thereby ensuring a stricter percentage requirement for indices or portfolios containing NYSE Component Securities.

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 Units and securities defined in Section 2 of Rule 8P) 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.<sup>53</sup> Although the Exchange's proposed listing standard does not require 90% of the of the weight of the index or portfolio to each have the same minimum monthly trading volume of 250,000 shares, the Exchange believes that the 70% requirement is still significant enough to reduce the likelihood that any market participant would be able to engage in price manipulation. The Exchange believes that the current requirements, coupled with the Exchange's rigorous regulation and surveillance of trading activity by DMMs and other Floor-based market participants discussed below, are also sufficient to prevent potential manipulation. Moreover, the Exchange notes that the alternative minimum notional volume traded per month of \$25,000,000, averaged over the last six months, is the same as that in current Exchange listing standards that also incorporate a 70% and not a 90% weight requirement, such as that for Units, and that the Commission was satisfied that the Exchange's current listing standards met the statutory requirements of the Act and were designed, among other things, to prevent manipulation.

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

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<sup>53</sup> See Rule 5.2(j)(3), Supp. Material .01(a)(A)(2).

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.

#### 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 listed 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.<sup>54</sup> 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.”<sup>55</sup> Accordingly, consistent with the proposal, the Exchange proposes

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<sup>54</sup> 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).

<sup>55</sup> 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

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 to Rule 8P, would also be excluded from the Rule 98 definition of “related products.”<sup>56</sup>

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.

#### Safeguards Against Informational Advantages

In addition to the reasons why specific products present a reduced risk of manipulation, the Exchange believes that there are significant structural and regulatory safeguards in place that both minimize the amount of material nonpublic information available to DMMs and prevent the potential misuse of that information by DMMs to give themselves a competitive or trading advantage over other market participants.<sup>57</sup> As discussed below, the evolution of NYSE trading

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instrument that is exercisable into or whose price is based upon or derived from a security traded at the Exchange.”

<sup>56</sup> See note 8, *supra*.

<sup>57</sup> See, e.g., Release No. 46213, 67 FR at 48234.

away from Floor-based manual executions toward an electronic market has made trading on the Exchange more transparent. In addition, the increasingly automated logic for executions -- including for interest entered by both Floor brokers and DMMs -- has severely circumscribed the amount of non-public information that is only available to DMMs. Moreover, Rule 98 requires and enforces procedures that are designed to restrict trading by DMMs when in possession of material non-public information, thereby minimizing the potential for manipulative and improper trading conduct by DMMs when trading the proposed specific products with underlying NYSE Component Securities.<sup>58</sup>

#### *Market Structure Evolution*

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.

One of the most significant evolutions has been in the technology and the manner in which DMMs close securities. Since 2014, DMMs have had the ability to close securities manually or electronically.<sup>59</sup> When this functionality was introduced, to close a security electronically, a DMM needed to be physically present on the Trading Floor. With the transition to the Pillar trading platform, a DMM can now close a security electronically even when not present on the Trading Floor. Further, since 2015, the Exchange has had the ability to facilitate the close of trading for one or more securities when the DMM is unable to do so.<sup>60</sup> As a result,

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<sup>58</sup> See *id.*, 67 FR at 48235.

<sup>59</sup> See Securities Exchange Act Release No. 71086 (December 16, 2013), 78 FR 77186 (December 20, 2013) (SR-NYSE-2013-79) (Notice of filing and immediate effectiveness of proposed rule change amending Rules 104 and 123C to specify that closings may be effectuated manually or electronically).

<sup>60</sup> See Securities Exchange Act Release No. 74006 (January 6, 2015), 80 FR 1567 (January 12, 2015) (SR-NYSE-2014-73) (Notice of filing and immediate effectiveness of proposed

DMMs can efficiently and effectively algorithmically close their assigned securities without being physically present on the Floor.

In addition, the Exchange has significantly enhanced the transparency of its marketplace. 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. In 2019, in connection with the transition to the Pillar trading platform, the Exchange amended its rules to provide that Floor Broker Interest (i.e., interest verbalized in the trading crowd by a Floor Broker) would be included in Closing Auction Imbalance Information. Further, beginning in 2020, the Exchange temporarily suspended the availability of Floor Broker Interest to be eligible to participate in the Closing Auction, as defined in Rule 7.35. In 2021, the Exchange permanently excluded Floor Broker Interest from the Closing Auction and requires all Floor brokers to enter orders for the Closing Auction electronically during Core Trading Hours.<sup>61</sup> Because of the absence of Floor Broker Interest in the Closing Auction, any remaining information advantage that DMMs might have had with respect to orders from Floor brokers -- even after such interest was included in the Closing Auction Imbalance Information -- was eliminated.

Given their unique role to facilitate the close of trading, DMMs at the point of sale continue to have display-only access to aggregated buying and selling interest that is eligible to

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rule change amending Rule 123C to specify that Exchange systems may close one or more securities electronically).

<sup>61</sup> 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).



participate in the Closing Auction at each price point.<sup>62</sup> DMM unit algorithms, however, are not provided access to such non-public information until after the end of Core Trading Hours, and only in connection with messaging for the DMM to electronically facilitate the close of trading. Moreover, pursuant to 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 selling interest for the Closing Auction. Moreover, 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.

The Exchange believes that as a result of the cumulative effect of these changes, the non-public interest available to Floor participants has been meaningfully and materially reduced such that no market participant on the Trading Floor has an unfair competitive advantage over any other market participant on the Trading Floor.

#### *Rule 98 Restrictions*

In addition to the prohibitions contained in Rule 104(h), Rule 98 contains narrowly tailored restrictions to address the fact 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

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<sup>62</sup> See Rules 104(a)(3) and 104(b)(3). The information available at each price point is not available in the Auction Imbalance Information. However, such information is used to calculate the Continuous Book Clearing Price, which is disseminated via Auction Imbalance Information.

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.<sup>63</sup> Further, 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, 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

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<sup>63</sup> 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 facilitating the possible misuse of such material, non-public information. See Rule 98(c)(2)(A)-(C).

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.

*Regulation and Surveillance of Floor Trading*

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). Moreover, DMM units and individual DMMs must produce trading and other records relating to ETP trading (including books and records with respect to which such DMM unit or DMM has access and control) to the Exchange on demand and can be subject to disciplinary action for failing to do so.<sup>64</sup> 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. On a day-to-day basis, the physical activity at DMM posts is also under visual surveillance by Floor-based regulatory staff.

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<sup>64</sup> See, e.g., Rule 8210 & 476(a)(11).

In today's marketplace, the Exchange believes that primarily electronic DMM market-making activity is not materially different from market-making on other exchanges. DMMs, who have not been agents for the Exchange's limit order book for many years and whose trading activity on the Exchange is limited to proprietary trading, do not have a unique ability to direct or influence trading or control intra-day prices. In addition, no single exchange has more than 20% of the market, and the Exchange's share of executed volume of equity trades in Tapes A, B and C securities is less than 12%.<sup>65</sup> Based on the foregoing, the Exchange believes that DMMs have no unique opportunities to engage in improper conduct trading ETPs with underlying NYSE Component Securities that would create unfair advantages for DMMs and would be "hard, if not impossible" for the Exchange to surveil.<sup>66</sup> The Exchange accordingly believes that its existing programs are reasonably designed to address any regulatory issues that may be raised by the trading of the specified listed ETPs.

Finally, the Exchange believes that the proposal would provide benefits to the marketplace.<sup>67</sup> Like other securities traded on the Exchange, ETPs with underlying NYSE Component Securities would benefit from a market model featuring an assigned DMM that has unique responsibilities to actively make markets (i.e., quote bids and offers) throughout the trading day, both at inside market prices and throughout the order book, that adds significantly to the quality of markets made in those assigned securities. Because DMMs are also responsible for executing the NYSE opening and closing auctions and are obligated to ensure all marketable auction orders receive an execution, obligations that other markets do not apply to market makers, the Exchange believes that the

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<sup>65</sup> See Cboe Global Markets U.S. Equities Market Volume Summary, available at [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/).

<sup>66</sup> See, e.g., Release No. 45454, 67 FR at 8568. See also note 16, supra.

<sup>67</sup> See id., 67 FR at 8569.

quality of auctions in these products would also be enhanced, to the benefit of all market participants. Given reduced potential for manipulation and improper trading conduct for the reasons described above, the Exchange believes that the potential improvements to liquidity and quality of the markets outweigh the potential regulatory concerns.<sup>68</sup>

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,<sup>69</sup> in general, and furthers the objectives of Sections 6(b)(5) of the Act,<sup>70</sup> 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.

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

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<sup>68</sup> See, e.g., *id.*, 67 FR at 8569.

<sup>69</sup> 15 U.S.C. 78f(b).

<sup>70</sup> 15 U.S.C. 78f(b)(5).

mechanism of a free and open market and a national market system by facilitating the listing and trading of a broader range of ETPs consistent with the Exchange's current structure to trade listed securities. The Exchange believes that permitting [sic] the ETPs that have underlying NYSE Component Securities and 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. In addition to the reasons why these specific products present a reduced risk of manipulation, the Exchange believes that there are significant structural and regulatory safeguards in place that both minimize the amount of material nonpublic information available to DMMs and prevent the potential misuse of that information by DMMs to give themselves a competitive or trading advantage over other market participants. Taken together, the Exchange believes these factors sufficiently minimize the risk of potential manipulation and improper trading conduct. Moreover, as also discussed above, the Exchange believes there would be potential improvements in the quality of the markets for the ETPs with underlying NYSE Component Securities traded on the Exchange. The Exchange accordingly believes that these benefits outweigh the reduced regulatory risks and 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 that have underlying NYSE Component Securities and 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,<sup>71</sup> 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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

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<sup>71</sup> 15 U.S.C. 78f(b)(8).

No written comments were solicited or received with respect to the proposed rule change.

### III. Discussion and Commission Findings

After careful review of the proposal, the Commission finds that the Exchange's proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,<sup>72</sup> 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, 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.

#### A. Background

Currently, NYSE Rules 5P and 8P generally prohibit the Exchange from listing shares of an ETP that has 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 listed on the Exchange.<sup>73</sup> Additionally, current NYSE 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. NYSE assigns each of securities it lists to a DMM, and

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<sup>72</sup> 15 U.S.C. 78f(b)(5).

<sup>73</sup> A NMS Stock is defined in Rule 600 of Regulation NMS, 17 CFR 242.600(b)(48), as "any NMS security other than an option." A "NMS Security" is any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options." 17 CFR 242.600(b)(47). "NMS Security" refers to "exchange-listed equity securities and standardized options, but does not include exchange-listed debt securities, securities futures, or open-end mutual funds, which are not currently reported pursuant to an effective transaction reporting plan." See Question 1.1 in the "Responses to Frequently Asked Questions Concerning Large Trader Reporting," available at: <https://www.sec.gov/divisions/marketreg/large-trader-faqs.htm>.



trading is on the floor of the Exchange. Integrated market making could be implicated if NYSE starts listing ETPs with an underlying NYSE Component Security because each ETP would be assigned to a DMM and that DMM may be assigned one or more NYSE Component Securities that underlie the ETP's underlying index or portfolio.

Previously, the Commission explained that the concerns raised by side-by-side trading and integrated market making are that such practices could result in the unfair use of non-public market information by and an unfair competitive advantage for market participants that engage in such practices because of their access to and ability to use non-public market information.<sup>74</sup> More recently however, finding that informational advantage concerns about individual securities are lessened for “broad based” ETFs and TIRs,<sup>75</sup> the Commission approved integrated market making and side-by-side trading for “broad-based” ETFs and TIRs and related options.<sup>76</sup> In determining whether a product is broad based, the Commission analyzed the listing criteria for each product. Specifically, the Commission considered the diversification, capitalization, and liquidity requirements in evaluating the likelihood that a market participant would be able to manipulate the prices of the ETFs, TIRs, or their related options. In approving these practices, the Commission also stated that the listing exchange's surveillance procedures should be adequate “to ensure that market participants do not engage in manipulative or improper trading practices.”<sup>77</sup>

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<sup>74</sup> Release No. 46213, supra note 17, 67 FR at 48234. As an example, the Commission explained how “in a side-by-side trading environment or integrated market making environment on a single exchange floor, floor members, by virtue of their positions on the floor of an exchange, are able to react instantaneously to market information by executing orders before the information is publicly disseminated.” Id.

<sup>75</sup> Id. at 48235.

<sup>76</sup> See id. at 48236; see also Release No. 62479, supra note 19.

<sup>77</sup> Release No. 46213, supra note 17, 67 FR at 48235.

B. Discussion of the Proposal

The Exchange proposes to amend its rules regarding side-by-side trading. Specifically, the Exchange proposes to exclude from its listing prohibitions in NYSE Rules 5P and 8P shares of an ETP that independently satisfies the quantitative generic listing criteria set forth in NYSE Rules 5.2(j)(3), Supplementary Material .01(a), NYSE Rule 5.2(j)(6)(B)(I); or proposed Rule 5.2(j)(8)(e)(1)(B), as well as shares of an ETP that independently satisfies the generic listing criteria set forth in NYSE Rules 8.100, Supplementary Material .01(a)(A) or 8.600, Supplementary Material .01(a) (collectively, “Specified ETP Listing Rules”).<sup>78</sup> The Exchange seeks to list and trade shares of these types of ETPs with no additional requirement for information barriers or physical or organizational separation because the current listing criteria provide that they overlie a sufficiently broad-based underlying portfolio or reference asset (as applicable).

The Exchange also proposes to amend its rule regarding integrated market making. The Exchange proposes to narrow the definition of “related products” to exclude derivative instruments that overlie ETPs listed under NYSE Rule 8.900, which governs the listing and trading of Managed Portfolio Shares on the Exchange,<sup>79</sup> or that satisfy the generic listing criteria of one of the Specified ETP Listing Rules.

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<sup>78</sup> Shares of Active Proxy Portfolio Shares and Managed Portfolio Shares, which are issued by funds whose portfolios are not fully transparent, already are exempted from the general prohibition. See NYSE Rule 8P.

<sup>79</sup> A defining characteristic of Managed Portfolio Shares is that their portfolio holdings are disclosed within at least 60 days following the end of every fiscal quarter. See NYSE Rule 8.900(c)(1). Instead of disclosing its portfolio on a daily basis, each issue of Managed Portfolio Shares disseminates to all market participants at the same time a Verified Intraday Indicative Value in one-second intervals during the Core Trading Session. See NYSE Rule 8.900(d)(2)(A). Unlike DMMs for transparent ETPs, a DMM for an issue of Managed Portfolio Shares does not know whether any component NMS

1. The Listing Criteria for the ETPs

The Exchange proposes to exclude from its listing prohibitions in NYSE Rules 5P and 8P shares of an ETP that independently satisfies the quantitative generic listing criteria set forth in the Specified ETP Listing Rules.

The Commission believes that the proposed rule change permitting side-by-side trading and integrated market making of shares of the specified types of ETPs and their related options is consistent with section 6(b)(5) of the Exchange Act because the quantitative generic listing criteria set forth in the Specified ETP Listing Rules reduce the susceptibility to manipulation of such shares and correspondingly their related options. The Commission previously, has found the quantitative generic listing criteria included in the Specified ETP Listing Rules to be consistent with section 6(b)(5) of the Exchange Act and to be designed to prevent manipulation of the price of the ETP shares.<sup>80</sup> Additionally, the quantitative generic listing criteria included in the Specified ETP Listing Rules are generally consistent with the Amex listing requirements that the

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Stock that is listed on the Exchange is a component of the fund's portfolio. Therefore, the concern underlying the historical prohibitions against side-by-side trading and integrated market making is not implicated with respect to DMMs for Managed Portfolio Shares (i.e., they do not have any informational advantage).

<sup>80</sup> The Commission approved NYSE's adoption of the Specified ETP Listing Rules, which are substantively identical to the rules of other exchanges, as consistent with Section 6(b)(5) of the Exchange Act. See Securities Exchange Act Release Nos. 80214 (March 10, 2017), 82 FR 14050, 14052-53 (March 16, 2017) (SR-NYSE-2016-44) and 91029, supra note 15, 86 FR at 8423-24. In approving the substantively identical rules of other exchanges, the Commission found that the generic listing criteria, including the quantitative requirements that must be satisfied to permit side-by-side trading and integrated market, are designed to prevent manipulation. See, e.g., Securities Exchange Act Release No. 78397 (July 22, 2016), 81 FR 49320, 49327 (July 27, 2016) (finding that the generic listing criteria for Managed Fund Shares should promote the listing only of Managed Fund Shares that are not susceptible to manipulation).

Commission found to be broad-based.<sup>81</sup> Although the minimum trading volume criterion for Portfolio Depositary Receipts is lower than the threshold in Amex's rules, the Commission has found that the generic listing criteria for Portfolio Depositary Receipts are consistent with Section 6(b)(5) of the Exchange Act and are designed to prevent the manipulation of generically listed Portfolio Depositary Receipts.<sup>82</sup> Coupled with the Exchange's surveillance procedures and the requirements applicable to DMMs described below, the Commission believes that the quantitative generic listing criteria applicable to Portfolio Depositary Receipts are adequate to prevent manipulation in the context of side-by-side trading and integrated market making by DMMs on the Exchange.

## 2. DMMs and the Exchange's Surveillance Procedures

The primary risk posed by integrated market making and side-by-side trading is that a DMM might improperly utilize its informational advantage. The DMMs' historical informational advantage over other market participants has been decreased through a series of rule changes by the Exchange. For example, the evolution of the Exchange's trading floor from a floor-based model to a primarily electronic market has increased the transparency of trading on the Exchange, automated logic for executions has circumscribed the amount of non-public information available to DMMs, and DMM units have been required to implement policies and procedures to prevent the misuse of material non-public information.

To ensure that DMMs do not improperly use any remaining informational advantage, the Exchange utilizes a regulatory program that reviews trading by DMMs and other market participants on the Floor, including surveillances designed to monitor for trading ahead and

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<sup>81</sup> See Release No. 46213, supra note 17.

<sup>82</sup> See Securities Exchange Act Release No. 54739, supra note 20.

manipulative activity. Additionally, 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). The Exchange also requires DMM units and individual DMMs to produce trading and other records relating to ETP trading (including books and records with respect to which such DMM unit or DMM has access and control) to the Exchange on demand, and DMM units and individuals can be subject to disciplinary action for failing to do so.<sup>83</sup> In addition, the Exchange conducts routine examinations, consistent with the current exam-based regulatory program associated with Rule 98, to review member organizations operating DMM units for compliance with the above-described policies and procedures to protect against the misuse of material nonpublic information. Lastly, the Exchange states that Floor-based regulatory staff visually monitor DMM physical activity daily. The Commission believes that the Exchange's regulation and surveillance of DMM trading activity, and its examination procedures regarding DMMs, adequately mitigate the risk that DMMs might engage in manipulative or improper trading practices in connection with side-by-side trading and integrated market making for ETPs under the Specified ETP Listing Rules.

### 3. Conclusion

For the reasons discussed above, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the Exchange Act<sup>84</sup> and the rules and regulations thereunder applicable to a national securities exchange.

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<sup>83</sup> See, e.g., Exchange Rules 8210 & 476(a)(11).

<sup>84</sup> 15 U.S.C. 78f(b)(5).

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

Interested persons are invited to submit written views, data, and arguments concerning whether Amendment No. 1 is consistent with the Exchange 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](mailto: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].

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

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 1 in the Federal Register. In Amendment No. 1, the Exchange (among other things) clarified its proposed rule text and supplemented its discussion of why its proposal is consistent with the Exchange Act. Specifically, the Exchange analyzed the requirements of the Specified ETP Listing Rules that address the potential for manipulation and its DMM surveillance regime. This additional information in Amendment No. 1 assisted the Commission in evaluating the Exchange's proposal and in determining that it is consistent with the Exchange Act. Amendment No. 1 does not raise any novel legal issue. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,<sup>85</sup> to approve the proposed rule change, as modified by Amendment No. 1 on an accelerated basis.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,<sup>86</sup> that

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<sup>85</sup> 15 U.S.C. 78s(b)(2).

<sup>86</sup> Id.

the proposed rule change (SR-NYSE-2022-04), as modified by Amendment No. 1, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>87</sup>

J. Matthew DeLesDernier

Deputy Secretary

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<sup>87</sup> 17 CFR 200.30-3(a)(12).