

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-83324; File No. SR-NYSEArca-2018-31)

May 24, 2018

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend NYSE Arca Rule 5.3-E to Exclude Certain Categories of Issuers from the Exchange's Annual Meeting Requirement

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act"),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on May 16, 2018, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend NYSE Arca Rule 5.3-E to exclude certain categories of issuers from the Exchange's annual meeting requirement. The proposed rule change is available on the Exchange's website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

NYSE Arca proposes to amend NYSE Arca Rule 5.3-E to exclude certain categories of issuers from the Exchange's annual meeting requirement.

NYSE Arca Rule 5.3-E(e) provides that a listed company is required to hold an annual meeting of shareholders to elect directors and to take action on other corporate matters in accordance with its charter, by-laws and applicable state or other laws. The preamble to Rule 5.3-E provides that preferred and debt listings, passive business organizations (such as royalty trusts), derivative and special purpose securities<sup>4</sup> are not required to comply with certain of the Corporate Governance and Disclosure Policies set forth in NYSE Arca Rule 5.3-E.<sup>5</sup> However, the preamble does not exclude the obligation to hold an annual meeting pursuant to NYSE Arca Rule 5.3-E(e) from those requirements with which such issuers must comply.

Holders of non-voting preferred and debt securities, securities of passive business organizations (such as royalty trusts) and derivative and special purpose securities either do not have the right to elect directors at annual meetings or have the right to elect directors only in very limited circumstances. For example, holders of non-voting preferred securities may have the right to temporarily elect directors if dividends on such securities have not been paid for a

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<sup>4</sup> Derivative and special purpose securities are securities listed pursuant to Rules 5.2-E(h), 5.2-E(j)(2)-(6) and Rule 8-E (8.100-E, 8.200-E, 8.201-E, 8.202-E, 8.203-E, 8.204-E, 8.300-E, 8.400-E, 8.600-E and 8.700-E), including Exchange Traded Funds ("ETFs") and similar products.

<sup>5</sup> See Securities Exchange Act Release No. 49810 (June 4, 2004), 69 FR 32647 (June 10, 2004).

specified period of time. Absent such special circumstances, in no event do holders of the securities listed above elect directors on an annual basis. Despite the fact that there is no matter with respect to which holders of these securities have an annual voting right under state law or their governing documents, NYSE Arca rules currently do not exclude the issuers of such securities from the requirement that they hold an annual meeting of shareholders.

NYSE Arca now proposes to change the preamble to Rule 5.3-E to provide that issuers of these securities would not need to satisfy the requirement to hold an annual meeting under Rule 5.3-E(e)(1). The Exchange also proposes to clarify that the exclusions for preferred stock set forth in that provision are specifically applicable only to non-voting preferred stock. Notwithstanding the exclusions noted above, if an issuer also lists common stock or voting preferred stock, or their equivalent, such issuer must still hold an annual meeting for the holders of that common stock or voting preferred stock, or their equivalent. The Exchange further proposes to clarify NYSE Arca Rule 5.3-E(e)(1) by specifying that the annual meeting requirement contained in such rule is applicable to issuers listing common stock or voting preferred stock, and their equivalents<sup>6</sup> and that such annual meeting requirement is inapplicable to preferred and debt listings, passive business organizations (such as royalty trusts), and certain categories of derivative and special purpose securities listed pursuant to Rules 5.2-E(h), 5.2-E(j)(2)-(6) and 8-E (8.100-E, 8.200-E, 8.201-E, 8.202-E, 8.203-E, 8.204-E, 8.300-E, 8.400-E, 8.600-E and 8.700-E).

The Exchange notes that the listing rules of the NASDAQ Stock Market LLC (“NASDAQ”), Cboe BZX Exchange, Inc. (“Cboe BZX”) and NYSE American LLC (“NYSE American”) all provide explicit exclusions for issuers of ETFs and other derivative securities

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<sup>6</sup> This language is identical to that used in the NASDAQ annual meeting rule. See NASDAQ Marketplace Rules IM-5620.

products from the annual meeting requirements in their rules.<sup>7</sup> The following are rules for derivative and special purpose securities listed on the Exchange and, in each case, a reference to a rule of either NYSE American or NASDAQ providing for the listing of similar securities on NYSE American or NASDAQ that are explicitly excluded from the annual meeting requirement on such exchange:<sup>8</sup>

- NYSE Arca Rule 5.2-E(h) (Unit Investment Trusts) and NYSE American Company Guide Section 118 (Investment Trusts);
- NYSE Arca Rule 5.2-E(j)(2) (Equity Linked Notes) and NYSE American Company Guide Section 107B (Equity Linked Term Notes);
- NYSE Arca Rule 5.2-E(j)(3) (Investment Company Units) and NYSE American Rule 1002A (Index Fund Shares);
- NYSE Arca Rule 5.2-E(j)(4) (Index Linked Exchangeable Notes) and NYSE American Company Guide Section 107C (Index Linked Exchangeable Notes);
- NYSE Arca Rule 5.2-E(j)(5) (Equity Gold Shares) and NASDAQ Marketplace Rule 5711(b) (Equity Gold Shares);
- NYSE Arca Rule 5.2-E(j)(6) (Index Linked Securities) and NYSE American Company Guide Sections 107D (Index-Linked Securities), 107E (Commodity-Linked Securities), 107F (Currency-Linked Securities), 107G (Fixed Income-Linked Securities), 107H (Futures-Linked Securities), and 107I (Combination-Linked Securities);

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<sup>7</sup> See NASDAQ Marketplace Rules IM-5620, Cboe BZX Rule 14.10, Interpretations and Policies 15; and NYSE American Company Guide Section 704, Commentary .01.

<sup>8</sup> The NYSE American and NASDAQ rule references are illustrative and are not intended as an indication that no other national securities exchange has a listing rule for the applicable security type with an explicit exclusion from its annual meeting requirement.

- NYSE Arca Rule 8.100-E (Portfolio Depository Receipts) and NYSE American Rule 1000A (Portfolio Depository Receipts);
- NYSE Arca Rule 8.200-E (Trust Issued Receipts) and NYSE American Rule 1202 (Trust Issued Receipts);
- NYSE Arca Rule 8.201-E (Commodity Based Trust Shares) and NYSE American Rule 1200A (Commodity Based Trust Shares);
- NYSE Arca Rule 8.202-E (Currency Trust Shares) and NYSE American Rule 1202B (Currency Trust Shares);
- NYSE Arca Rule 8.203-E (Commodity-Index Trust Shares) and NASDAQ Marketplace Rule 5711(f) (Commodity Index Shares);
- NYSE Arca Rule 8.204-E (Commodity Futures Trust Shares) and NASDAQ Marketplace Rule 5711(g)(Commodity Futures Trust Shares);
- NYSE Arca Rule 8.300-E (Partnership Units) and NYSE American Rule 1502 (Partnership Units);
- NYSE Arca Rule 8.400-E (Paired Trust Shares) and NYSE American Rule 1402 (Paired Trust Shares).

Shareholders of ETFs and derivative securities products listed on the Exchange receive regular disclosure documents describing the pricing mechanism for their securities and detailing how they can value their holdings. Moreover, the net asset value of the categories of ETFs and other derivative securities products listed above is determined by the market price of each fund's underlying securities or other reference asset. Because shareholders can value their investments on an ongoing basis, the Exchange believes that there is less need for shareholders to engage management at an annual meeting. In addition, while holders of such securities may have the

right to vote in certain limited circumstances, they do not have the right to vote on the annual election of a board of directors, further reducing the need for an annual meeting. Further, although the Exchange proposes to exclude issuers of such securities from holding an annual meeting, such issuers may still be required to hold special meetings as required by state law or their governing documents.

The Exchange proposes to include securities listed pursuant to NYSE Arca Rules 5.2-E(j)(4)-(6) in the types of derivative and special purpose securities that are excluded from certain corporate governance requirements.<sup>9</sup> The Exchange believes it is appropriate to exclude index-linked exchangeable notes listed pursuant to NYSE Arca Rule 5.2-E(j)(4) and exchange-traded notes listed pursuant to NYSE Arca Rule 5.2-E(j)(6) from the same corporate governance requirements that debt securities are currently excluded as each class of security is simply a different form of unsecured debt obligation of an issuer. Similarly, the Exchange believes it is appropriate to exclude Equity Gold Shares listed pursuant to NYSE Arca Rule 5.2-E(j)(5) from the same corporate governance requirements as it currently excludes other categories of commodity-based derivative and special purpose securities. Like such other classes of derivative and special purpose securities, Equity Gold Shares are passive investment vehicles that hold an interest in a specified commodity and continuously create and redeem shares at the trust's net asset value and their governing documents do not require that they hold an annual meeting. Further, NYSE Arca Rule 5.2-E(j)(5) specifically states that all NYSE Arca rules that reference

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<sup>9</sup> Such classes of securities are excluded from complying with the annual meeting requirements of other national securities exchanges. NYSE American Rule 704, for example, provides that its annual meeting requirement is not applicable to index-linked exchangeable notes, index-linked securities, currency-linked securities and commodity-linked securities. With respect to Equity Gold Shares, the Exchange believes that Nasdaq would exclude such securities from holding an annual meeting pursuant to Nasdaq Marketplace Rule 5711(b).

Investment Company Units shall include Equity Gold Shares. Therefore, the Exchange believes it is appropriate to provide the same corporate governance exclusions to Equity Gold Shares as NYSE Arca Rule 5.3-E currently provides to Investment Company Units.

The Exchange is proposing amendments to the rules for the following two categories of derivative and special purpose securities for which it has not identified explicit exclusions from the annual meeting requirement of any of the other listing exchanges:

- Managed Fund Shares (listed under NYSE Arca Rule 8.600-E), and
- Managed Trust Shares (listed under NYSE Arca Rule 8.700-E).

The Exchange believes it is appropriate to provide these exclusions for these categories of securities on the same basis as the other categories of listed derivative and special securities.

Managed Fund Shares and Managed Trust Shares share fundamental characteristics with Investment Company Units. Exchange rules require that they provide for the creation and redemption of the listed securities on a continuous basis in a manner similar to Investment Company Units. This mechanism is an important investor protection that helps to ensure that the trading price of the securities remains close to their net asset value and provides investors with an ability to readily dispose of their investment. In light of these protections and the fact that investors regularly receive disclosure documents, the Exchange believes that—like Investment Company Units—there is a reduced need for shareholders of Managed Fund Shares and Managed Trust Shares to engage directly with management at an annual meeting. Further, issuers of Managed Fund Shares and Managed Trust shares are subject to the requirements of state law and their governing documents as they relate to the requirement to hold shareholder meetings.

The Exchange proposes to remove securities listed pursuant to Rule 5.2-E(j)(1) (Other Securities), 8.3-E (Currency and Index Warrants) and 8.500-E (Trust Units) from those derivative and special purpose securities that are excluded from certain corporate governance requirements. The Exchange believes this amendment is appropriate because the attributes of such Other Securities that might be listed pursuant to Rule 5.2-E(j)(1) are presently unknown and therefore the Exchange cannot determine whether issuers of such securities should be excluded from complying with certain corporate governance requirements. Further, the Exchange does not presently list any security under the Other Securities, Currency and Index Warrants or Trust Units standards and has not done so in many years.<sup>10</sup>

The Exchange proposes to amend Rule 5.3-E to clarify that, with respect to requirements for independent directors and board committees, registered management investment companies (except for registered management investment companies that qualify as derivative and special purpose securities) are only exempt from complying with the corporate governance requirements in Rule 5.3-E(k)(2)-(4) and 5.3-E(k)(6). Such issuers are required to comply with all other provisions of Rule 5.3-E(k), including the preamble to such section.

The Exchange also proposes to make non-substantive formatting changes to Rule 5.3-E to improve readability. The Exchange also proposes to amend Rule 5.3-E(e) to divide it into subsections to make clear that issuers of preferred and debt listings, passive business organizations and certain derivative and special purpose securities are only excluded from the annual meeting requirement contained in such rule. The rule will further specify that regardless of whether an issuer is excluded from the annual meeting requirement, all issuers must comply

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<sup>10</sup> Should the Exchange list securities under the Other Securities, Currency and Index Warrants or Trust Units standards in the future, it may consider whether to amend its rules at that time to allow for certain corporate governance exclusions applicable to such classes of securities.

with the Exchange's advance notification requirement for all shareholders meetings, including special meetings.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>11</sup> in general, and furthers the objectives of Sections 6(b)(5)<sup>12</sup> of the Act, in particular, in that it is designed 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 mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed amendment is consistent with the protection of investors, as the holders of non-voting preferred stock, bonds, the listed shares of passive business organizations (such as royalty trusts), ETFs and certain other derivative and special purpose securities do not have voting rights with respect to the election of directors except in very limited circumstances as required by state law or their governing documents. In addition, the net asset value of the categories of ETFs and other derivative securities products that the Exchange proposes to exclude from its annual meeting requirement is determined by the market price of each fund's underlying securities or other reference asset. Shareholders of such ETFs and derivative securities products listed on the Exchange receive regular disclosure documents describing the pricing mechanism for their securities and detailing how they can value their holdings. Accordingly, holders of such securities can value their investment on an ongoing basis. Because of these factors, the Exchange believes there is a reduced need for shareholders to engage with management of issuers of these securities and thus

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<sup>11</sup> 15 U.S.C. 78f(b).

<sup>12</sup> 15 U.S.C. 78f(b)(5).

no need for the issuers of such securities to hold annual shareholder meetings absent the existence of other listed securities with director election voting rights. Further, although the Exchange proposes to exclude issuers of such securities from holding an annual meeting, such issuers may still be required to hold special meetings as required by state law or their governing documents.

The Exchange believes it is appropriate to include securities listed pursuant to NYSE Arca Rules 5.2-E(j)(4)-(6) in the definition of derivative and special purpose securities that are excluded from certain corporate governance requirements. With respect to the annual meeting requirement, the Exchange believes that such classes of securities are excluded from complying with the annual meeting requirements of other national securities exchanges.<sup>13</sup> The Exchange believes it is appropriate to exclude index-linked exchangeable notes listed pursuant to NYSE Arca Rule 5.2-E(j)(4) and exchange-traded notes listed pursuant to NYSE Arca Rule 5.2-E(j)(6) from the same corporate governance requirements that debt securities are currently excluded as each class of security is simply a different form of unsecured debt obligation of an issuer. Similarly, the Exchange believes it is appropriate to exclude Equity Gold Shares listed pursuant to NYSE Arca Rule 5.2-E(j)(5) from the same corporate governance requirements as it currently excludes other categories of commodity-based derivative and special purpose securities. Like such other classes of derivative and special purpose securities, Equity Gold Shares are passive investment vehicles that hold an interest in a specified commodity and continuously create and redeem shares at the trust's net asset value and their governing documents do not require that they hold an annual meeting. Further, NYSE Arca Rule 5.2-E(j)(5) specifically states that all NYSE Arca rules that reference Investment Company Units shall include Equity Gold Shares.

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<sup>13</sup> See Footnote 9, supra.

Therefore, the Exchange believes it is appropriate to provide the same corporate governance exclusions to Equity Gold Shares as NYSE Arca Rule 5.3-E currently provides to Investment Company Units. For the reasons stated above, the Exchange believes the proposal to exclude securities listed pursuant to NYSE Arca Rules 5.2-E(j)(4)-(6) from certain corporate governance requirements is consistent with the investor protection goals of Section 6(b)(5) of the Act.

The Exchange believes it is appropriate to remove securities listed pursuant to Rule 5.2-E(j)(1) (Other Securities), 8.3-E (Currency and Index Warrants) and 8.500-E (Trust Units) from those derivative and special purpose securities that are excluded from certain corporate governance requirements. With respect to Other Securities, the Exchange does not have enough information about such securities to determine whether any exclusion is appropriate and with respect to Currency and Index Warrants and Trust Units, the Exchange does not anticipate listing such securities in the near future.

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

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed amendments will not impose any burden on competition, as they simply conform NYSE Arca's rules to those of its competitors in the market for the listing of the specified types of securities. The additional categories of securities that the Exchange proposes to exclude (i.e., Managed Fund Shares and Managed Trust Shares) have similar characteristics to the categories of securities that are already excluded on other national securities exchanges. Therefore, the Exchange does not believe that it will impose any burden on competition to exclude them.

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

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

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>14</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>15</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2018-31 on the subject line.

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<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>15</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

Paper comments:

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

All submissions should refer to File Number SR-NYSEArca-2018-31. 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-NYSEArca-2018-31 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>16</sup> 17 CFR 200.30-3(a)(12).