

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90683; File No. SR-NYSEArca-2020-94]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendments No. 1 and No. 2, To List and Trade Shares of the AdvisorShares Q Portfolio Blended Allocation ETF and AdvisorShares Q Dynamic Growth ETF Under NYSE Arca Rule 8.900-E

December 16, 2020.

I. Introduction

On October 20, 2020, NYSE Arca, Inc. (“Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the following funds under NYSE Arca Rule 8.900-E (Managed Portfolio Shares): AdvisorShares Q Portfolio Blended Allocation ETF and AdvisorShares Q Dynamic Growth ETF (each a “Fund” and, collectively, the “Funds”). The proposed rule change was published for comment in the *Federal Register* on November 9, 2020.³ On December 9, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed, and on December 10, 2020, the Exchange filed Amendment No. 2 to the proposed rule change.⁴ The Commission has received no comment letters on the proposal. This order approves the proposed rule change, as modified by Amendments No. 1 and No. 2.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ See Securities Exchange Act Release No. 90323 (November 3, 2020), 85 FR 71366.

⁵ In Amendment No. 1, the Exchange: (1) Updated the status of the application for exemptive relief filed by the Trust (defined below); (2) modified its representation regarding the use of the Funds’ investments; (3) supplemented its description of the Funds’ NAVs; (4) disclosed the minimum number of shares that would be outstanding at the commencement of trading on the Exchange; and (5) made technical changes. In Amendment No. 2, the Exchange clarified its representation regarding the minimum number of Shares outstanding at the commencement of trading on the Exchange. Because Amendments No. 1 and No. 2 do not materially alter the substance of the proposed rule change, Amendment No. 2 is not subject to notice and comment. Both amendments are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nysearca-2020-94/srnysearca202094.htm>.

II. Description of the Proposal⁶

NYSE Arca Rule 8.900-E(b)(1) requires the Exchange to file separate proposals under Section 19(b) of the Act before listing and trading any series of Managed Portfolio Shares on the Exchange; thus, the Exchange submitted this proposal to list and trade the Shares. The Shares will be issued by the AdvisorShares Trust (“Trust”), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.⁷ The investment adviser to each Fund will be AdvisorShares Investments, LLC (“Adviser”). The investment sub-advisor to each Fund will be ThinkBetter, LLC. Foreside Fund Services, LLC (“Distributor”) will serve as the distributor of the Shares.

Each Fund’s holdings will conform to the permissible investments as set forth in the Exemptive Application and Exemptive Order. Pursuant to the Exemptive Order, the only permissible investments for the Funds are the following, all of which trade on a U.S. exchange contemporaneously with the Shares: Exchange-traded funds (“ETFs”), exchange-traded notes, exchange-listed common stocks, exchange-traded American Depositary Receipts, exchange-traded real estate investment trusts, exchange-traded commodity pools, exchange-traded metals trusts, exchange-traded currency trusts and exchange-traded futures, as well as cash and cash equivalents (short-term U.S. Treasury securities, government money market funds, and repurchase agreements).⁸

The AdvisorShares Q Portfolio Blended Allocation ETF is an actively managed ETF that is primarily a “fund of funds.” Its investment objective is to seek to maximize total return over the long-term. The Fund will invest in ETFs representing all asset classes, including, but not limited to, treasury bonds, municipal bonds, investment grade corporate bonds, high-yield U.S.

corporate bonds, U.S. and foreign equities, and commodities.

The AdvisorShares Q Dynamic Growth ETF is an actively managed ETF that is primarily a “fund of funds.” It will seek to achieve long-term growth by investing in ETFs representing all asset classes, including, but not limited to, treasury bonds, municipal bonds, investment grade corporate bonds, high-yield U.S. corporate bonds, U.S. and foreign equities, commodities, and volatility products.

Each Fund’s investments, including derivatives, will be consistent with its investment objective and will not be used to enhance leverage (although certain derivatives and other investments may result in leverage). Each Fund’s investments will not be used to seek performance that is the multiple or inverse multiple (*e.g.*, 2X or -3X) of the Fund’s benchmark.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendments No. 1 and No. 2, to list and trade the Shares is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.⁹ In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act,¹⁰ which requires, among other things, that the Exchange’s rules 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.

The Adviser is not registered as a broker-dealer but is affiliated with a broker-dealer.¹¹ The Adviser has implemented and will maintain a “fire wall” with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to a Fund’s portfolio and Creation Basket.¹² Any person related to the Adviser or the Trust who makes decisions pertaining to a Fund’s portfolio composition or that has access to information regarding a Fund’s portfolio or changes thereto or the

⁹ In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ See Amendment No. 1, *supra* note 5, at 5.

¹² See *id.* See also NYSE Arca Rule 8.900-E(c)(5) (defining “Creation Basket”).

⁶ Additional information regarding the Fund, the Trust (defined *infra*), and the Shares can be found in Amendments No. 1 and No. 2, *supra* note 5, and the Registration Statement, *infra* note 7.

⁷ The Trust is registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1) (“1940 Act”). On September 11, 2020, the Trust filed a registration statement on Form N-1A under the Securities Act of 1933 and the 1940 Act for the Funds (File Nos. 333-157876 and 811-22110) (“Registration Statement”). The Commission issued an order granting exemptive relief to the Trust (“Exemptive Order”) under the 1940 Act on December 8, 2020 (Investment Company Act Release No. 31431). The Exemptive Order was granted in response to the Trust’s application for exemptive relief (“Exemptive Application”) (File No. 812-15146).

⁸ See Amendment No. 1, *supra* note 5, at 6, n.7.

Creation Basket will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio or changes thereto and the Creation Basket.¹³ Further, any person or entity, including an AP Representative,¹⁴ custodian, Reporting Authority, distributor, or administrator, who has access to information regarding the Fund's portfolio composition or changes thereto or its Creation Basket, must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Fund portfolio or changes thereto or the Creation Basket.¹⁵ Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity must erect and maintain a "fire wall" between the person or entity and the broker-dealer with respect to access to information concerning the composition of and/or changes to such Fund's portfolio or Creation Basket.¹⁶

The Exchange states that trading in the Shares will be subject to the Exchange's surveillance procedures for derivative products, and that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws.¹⁷ NYSE Arca Rule 8.900–E(b)(3) requires each Fund's investment adviser to, upon request by the Exchange, or the Financial Industry Regulatory Authority ("FINRA") on behalf of the Exchange, to make available the daily portfolio holdings of each series of Managed Portfolio Shares. The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees.¹⁸ Similarly, FINRA Rule 9910(d) generally prohibits FINRA employees from

disseminating or disclosing, for a purpose unnecessary to the performance of FINRA job responsibilities any nonpublic information obtained in the course of his or her employment.

The Commission also finds that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Act,¹⁹ which sets forth Congress's finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. For the reasons discussed below, the Commission believes that the proposal is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading in the Shares when a reasonable degree of certain pricing transparency cannot be assured and, as such, the Commission believes the proposal is reasonably designed to maintain a fair and orderly market for trading the Shares. Specifically, as required by NYSE Arca Rule 8.900–E(d)(1)(B), the Exchange will obtain a representation from the issuer that the net asset value ("NAV") per Share of each Fund will be calculated daily and will be made available to all market participants at the same time.²⁰ Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services.²¹ Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association high-speed line.²² In addition, the Verified Intraday Indicative Value ("VIIV"), as defined in NYSE Arca Rule 8.900–E(c)(2),²³ will be

widely disseminated by the Reporting Authority and/or one or more major market data vendors in one second intervals during the Exchange's Core Trading Session and will be disseminated to all market participants at the same time.²⁴ Moreover, the Funds' website, www.advisorshares.com, will include a form of the prospectus for each Fund that may be downloaded. The Funds' website will include additional quantitative information updated on a daily basis, including, for each Fund, the prior Business Day's NAV, market closing price or mid-point of the bid/ask spread at the time of calculation of such NAV ("Bid/Ask Price"),²⁵ and a calculation of the premium and discount of the market closing price or Bid/Ask Price against the NAV. The website and information will be publicly available at no charge.²⁶

Additionally, the Exchange's rules regarding trading halts should help ensure the maintenance of fair and orderly markets for the Shares. Trading in the Shares will be subject to NYSE Arca Rule 8.900–E(d)(2)(C), which sets forth circumstances under which trading in the Shares will be halted. NYSE Arca Rule 8.900–E(d)(2)(C)(i) provides that the Exchange may consider all relevant factors in exercising its discretion to halt trading in a series of Managed Portfolio Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the series of Managed Portfolio Shares inadvisable. These may include: (a) The extent to which trading is not occurring in the securities and/or the financial instruments composing the portfolio; or (b) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.²⁷ Further, NYSE

issuance, redemption, or trading of Managed Portfolio Shares. A series of Managed Portfolio Shares may have more than one Reporting Authority, each having different functions.

²⁴ See Amendment No. 1, *supra* note 5, at 11–12.

²⁵ The Bid/Ask Price of the Shares will be the mid-point between the current national best bid and offer at the time of calculation of a Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Funds or their service providers. See Amendment No. 1, *supra* note 5, at 11, n.15.

²⁶ See *id.* at 11.

²⁷ The Exemptive Application provides that the Investment Company or their agent will request that the Exchange halt trading in the applicable series of Managed Portfolio Shares where: (i) The intraday indicative values calculated by the calculation engines differ by more than 25 basis points for 60 seconds in connection with pricing of the VIIV; or (ii) holdings representing 10% or more of a series of Managed Portfolio Shares' portfolio have become subject to a trading halt or otherwise do not have readily available market quotations. Any such requests will be one of many factors considered in

¹³ See Amendment No. 1, *supra* note 5, at 5.

Furthermore, the Exchange represents that in the event that (a) the Adviser or any sub-adviser becomes registered as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, the Adviser will implement and maintain a fire wall with respect to personnel of the broker-dealer or broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio and/or Creation Basket. See *id.*

¹⁴ See NYSE Arca Rule 8.900–E(c)(5) (defining "AP Representative").

¹⁵ See Amendment No. 1, *supra* note 5, at 5–6. See also NYSE Arca Rule 8.900–E(b)(5).

¹⁶ See Amendment No. 1, *supra* note 5, at 6. See also NYSE Arca Rule 8.900–E(b)(5).

¹⁷ See Amendment No. 1, *supra* note 5, at 14.

¹⁸ See *id.*

¹⁹ 15 U.S.C. 78k–1(a)(1)(C)(iii).

²⁰ See Amendment No. 1, *supra* note 5, at 14.

²¹ See *id.* at 11.

²² See *id.*

²³ NYSE Arca Rule 8.900–E(c)(2) defines the term "Verified Intraday Indicative Value" as the indicative value of a Managed Portfolio Share based on all of the holdings of a series of Managed Portfolio Shares as of the close of business on the prior business day and, for corporate actions, based on the applicable holdings as of the opening of business on the current business day, priced and disseminated in one second intervals during the Core Trading Session by the Reporting Authority. NYSE Arca Rule 8.900–E(c)(8) defines the term "Reporting Authority" with respect to a particular series of Managed Portfolio Shares as the Exchange, an institution, or a reporting service designated by the Exchange or by the exchange that lists a particular series of Managed Portfolio Shares (if the Exchange is trading such series pursuant to unlisted trading privileges), as the official source for calculating and reporting information relating to such series, including, but not limited to, the NAV, the VIIV, or other information relating to the

Arca Rule 8.900–E(d)(2)(C)(ii) provides that, if the Exchange becomes aware that: (i) The VIIV of a series of Managed Portfolio Shares is not being calculated or disseminated in one second intervals, as required; (ii) the NAV with respect to a series of Managed Portfolio Shares is not disseminated to all market participants at the same time; (iii) the holdings of a series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act; or (iv) such holdings are not made available to all market participants at the same time (except as otherwise permitted under the applicable Exemptive Order or no-action relief granted by the Commission or Commission staff to the Investment Company with respect to the series of Managed Portfolio Shares), it will halt trading in such series until such time as the VIIV, the NAV, or the holdings are available, as required.

In support of this proposal, the Exchange has also made the following representations:

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Rule 8.900–E, as well as all terms in the Exemptive Order.²⁸

(2) The Exchange states that a minimum of 100,000 Shares of each Fund will be outstanding at the commencement of trading on the Exchange.²⁹

(3) The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities.³⁰

(4) Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders ("ETP Holders") in an Information Bulletin ("Bulletin") of the special characteristics and risks associated with trading the Shares.³¹

order to determine whether to halt trading in a series of Managed Portfolio Shares, and the Exchange retains sole discretion in determining whether trading should be halted. As provided in the Exemptive Application, each series of Managed Portfolio Shares would employ a pricing verification agent to continuously compare two intraday indicative values during regular trading hours in order to ensure the accuracy of the VIIV. *See id.* at 13, n.19.

²⁸ *See id.* at 14.

²⁹ *See* Amendment No. 2, *supra* note 5, at 3.

³⁰ *See* Amendment No. 1, *supra* note 5, at 13.

³¹ The Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares; (2) NYSE Arca Rule 9.2–E(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) how information regarding the VIIV is disseminated; (4) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; (5) trading

(5) FINRA, on behalf of the Exchange, or the regulatory staff of the Exchange, or both, will communicate as needed regarding trading in the Shares and certain exchange-traded instruments with other markets and other entities that are members of the Intermarket Surveillance Group ("ISG"), and FINRA, on behalf of the Exchange, or the regulatory staff of the Exchange, or both, may obtain trading information regarding trading such securities from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and certain exchange-traded instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.³²

(6) The Exchange represents that, for initial and/or continued listing, each Fund will be in compliance with Rule 10A–3 under the Act.³³

This approval order is based on all of the Exchange's statements and representations set forth above and in Amendments No. 1 and No. 2.

Additionally, the Exchange states that all statements and representations made in its proposal regarding (a) the description of the portfolio or reference assets, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules shall constitute continued listing requirements for listing the Shares on the Exchange, as provided under NYSE Arca Rule 8.900–E(b)(1). The issuer of the Shares will be required to represent to the Exchange that it will advise the Exchange of any failure by a Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will surveil for compliance with the continued listing requirements. If a Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).³⁴

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendments No. 1 and No. 2, is consistent with Section 6(b)(5) of the Act³⁵ and Section 11A(a)(1)(C)(iii) of the Act³⁶ and the rules and regulations

information; and (6) that the portfolio holdings of the Shares are not disclosed on a daily basis. *See id.* at 14–15.

³² *See id.* at 14.

³³ *See id.* at 6, n.6.

³⁴ *See id.* at 14.

³⁵ 15 U.S.C. 78f(b)(5).

³⁶ 15 U.S.C. 78k–1(a)(1)(C)(iii).

thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,³⁷ that the proposed rule change (SR–NYSEArca–2020–94), as modified by Amendments No. 1 and No. 2, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁸

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90689]

Order Granting Temporary Exemptive Relief, Pursuant to Section 36 of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 608(e) of Regulation NMS Under the Exchange Act, From Section 8.1.1 and Section 8.1.2 of Appendix D of the National Market System Plan Governing the Consolidated Audit Trail

December 16, 2020.

I. Introduction

By letter dated December 1, 2020 ("Participant Letter"), BOX Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc. ("FINRA"), Investors Exchange LLC, Long-Term Stock Exchange, Inc., MEMX LLC, Miami International Securities Exchange LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, NASDAQ BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (collectively, the "Participants") request that the Securities and Exchange Commission (the "Commission"), pursuant to the Commission's authority under Section 36 of the Exchange Act¹ and Rule 608(e) of Regulation NMS under the Exchange Act,² grant exemptive relief from the national market system plan governing the

³⁷ 15 U.S.C. 78s(b)(2).

³⁸ 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78mm.

² 17 CFR 242.608(e).