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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-89663; File No. SR-NYSEArca-2020-48]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Shares of Gabelli ETFs under Rule 8.900-E, Managed Portfolio Shares

August 25, 2020.

I. Introduction

On May 15, 2020, NYSE Arca, Inc. (“Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> a proposed rule change to list and trade shares (“Shares”) of the following funds under Rule 8.900-E (Managed Portfolio Shares): Gabelli Growth Innovators ETF, Gabelli Financial Services ETF, Gabelli Small Cap Growth ETF, Gabelli Small & Mid Cap ETF, Gabelli Micro Cap ETF, Gabelli ESG ETF, Gabelli Asset ETF, Gabelli Equity Income ETF, and Gabelli Green Energy ETF (each a “Fund” and, collectively, the “Funds”). The proposed rule change was published for comment in the Federal Register on June 3, 2020.<sup>4</sup> On July 9, 2020, the Commission extended the time period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to September 1, 2020.<sup>5</sup> On August 6, 2020, the Exchange filed Amendment No. 1 to the proposed

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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.

<sup>4</sup> See Securities Exchange Act Release No. 88970 (May 28, 2020), 85 FR 34262.

<sup>5</sup> See Securities Exchange Act Release No. 89279, 85 FR 42925 (July 15, 2020).

rule change, which replaced and superseded the proposed rule change as originally filed.<sup>6</sup> The Commission has received no comment letters on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

## II. The Exchange's Description of the Proposal<sup>7</sup>

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 Managed Portfolio Shares of the Funds. The Shares will be issued by the Gabelli ETFs 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.<sup>8</sup> The investment adviser to each Fund will be Gabelli Funds, LLC ("Adviser"). G.distributors, LLC will serve as the distributor of each of the Funds' Shares.

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<sup>6</sup> Because Amendment No. 1 does not materially alter the substance of the proposed rule change, Amendment No. 1 is not subject to notice and comment. Amendment No. 1 is available on the Commission's website at: <https://www.sec.gov/comments/sr-nysearca-2020-48/srnysearca202048-7529145-222118.pdf>.

<sup>7</sup> Additional information regarding the Fund, the Trust (defined *infra*), and the Shares can be found in Amendment No. 1, *supra* note 6, and the Registration Statement, *infra* note 8.

<sup>8</sup> The Trust is registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1) ("1940 Act"). On May 8, 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 No. 812-15036) ("Registration Statement"). The Commission issued an order granting exemptive relief to the Trust ("Exemptive Order") under the 1940 Act on December 3, 2019 (Investment Company Act Release No. 33708). The Exemptive Order was granted in response to the Trust's application for exemptive relief ("Exemptive Application") (File No. 812-15036).

A. Description of the Funds

Each Fund's holdings will conform to the permissible investments as set forth in the Exemptive Application and Exemptive Order, and the holdings will be consistent with all requirements in the Exemptive Application and Exemptive Order.<sup>9</sup>

Gabelli Growth Innovators ETF. The Fund's primary objective is to seek to provide capital appreciation. The Fund will primarily invest in common stocks of companies that the Adviser believes are relevant to the Fund's investment theme of innovation, with assets invested primarily in a broad range of readily marketable equity securities consisting of U.S. exchange-listed common stock and preferred stock.

Gabelli Financial Services ETF. The Fund seeks to provide capital appreciation. The Fund intends to invest in the securities, including U.S. exchange-listed common stock and preferred stock, of companies principally engaged in the group of industries comprising the financial services sector.

Gabelli Small Cap Growth ETF. The Fund seeks to provide a high level of capital appreciation. The Fund intends to invest primarily in the U.S. exchange-listed common stocks of companies which the Adviser believes are likely to have rapid growth in revenues and above average rates of earnings growth.

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<sup>9</sup> Pursuant to the Exemptive Order, the only permissible investments for a Fund are the following that trade on a U.S. exchange contemporaneously with the Funds' 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).

Gabelli Small & Mid Cap ETF. The Fund seeks long term capital growth. The Fund intends to invest primarily in equity securities (such as U.S. exchange-listed common stock and preferred stock) of companies with small or medium sized market capitalizations.

Gabelli Micro Cap ETF. The Fund primarily seeks to provide investors with long term capital appreciation. The Fund intends to invest primarily in equity securities of micro-cap companies (as defined by the Fund). The Fund seeks to invest in equity securities including U.S. exchange-listed common stocks (including indirect holdings of common stock through American Depositary Receipts) and preferred stocks.

Gabelli ESG ETF. The Fund's investment objective is capital appreciation. The Fund seeks to invest primarily in companies that the Adviser believes meet the Fund's guidelines for social responsibility. The Fund intends to invest in common and preferred stocks that are listed on a national securities exchange.

Gabelli Asset ETF. The Fund primarily seeks to provide growth of capital. The Fund intends to invest primarily in U.S. exchange-listed common stocks and preferred stocks and may also invest in foreign securities by investing in American Depositary Receipts.

Gabelli Equity Income ETF. The Fund seeks a high level of total return on its assets with an emphasis on income. The Fund intends to invest in income producing equity securities including U.S. exchange-listed common stock and preferred stock.

Gabelli Green Energy ETF. The Fund seeks total return through current income and capital appreciation. The Fund intends to invest primarily in U.S. equity securities and American Depositary Receipts issued by clean energy companies.

B. The Funds' Investment Restrictions

Each Fund's holdings will be consistent with all requirements described in the Exemptive Application and Exemptive Order.<sup>10</sup> 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). That is, for each Fund, the 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 primary broad-based securities benchmark index (as defined in Form N-1A).<sup>11</sup>

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, to list and trade the Shares is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>12</sup> 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,<sup>13</sup> 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.

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<sup>10</sup> See id. and supra note 8.

<sup>11</sup> Each Fund's broad-based securities benchmark index will be identified in a future amendment to the Registration Statement following that Fund's first full calendar year of performance.

<sup>12</sup> 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).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

For each series, the Exchange will establish a minimum number of shares required to be outstanding at the time of commencement of trading on the Exchange.<sup>14</sup>

The Adviser is not registered as a broker-dealer but is affiliated with a broker-dealer.<sup>15</sup> 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.<sup>16</sup> 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 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.<sup>17</sup> Further, any person or entity, including an AP Representative,<sup>18</sup> 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.<sup>19</sup> Moreover, if any such person or entity is registered as

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<sup>14</sup> See NYSE Arca Rule 8.900-E(d)(1)(A).

<sup>15</sup> See Amendment No. 1, supra note 6, at 6.

<sup>16</sup> See id. See also NYSE Arca Rule 8.900-E(c)(5) (defining “Creation Basket”).

<sup>17</sup> See Amendment No. 1, supra note 6, at 6. Furthermore, the Exchange represents that in the event that (a) the 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. at 18.

<sup>18</sup> See NYSE Arca Rule 8.900-E(c)(5) (defining “AP Representative”).

<sup>19</sup> See NYSE Arca Rule 8.900-E(b)(5).

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.<sup>20</sup>

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.<sup>21</sup> 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 to 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.<sup>22</sup> The Commission notes that, 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,<sup>23</sup> 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

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<sup>20</sup> See id.

<sup>21</sup> See Amendment No. 1, supra note 6, at 16.

<sup>22</sup> See id.

<sup>23</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

transactions in, securities. 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. 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.<sup>24</sup> 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.<sup>25</sup> Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association high-speed line.<sup>26</sup> In addition, the Verified Intraday Indicative Value (“VIIV”), as defined in Rule 8.900-E(c)(2),<sup>27</sup> will be widely disseminated by the

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<sup>24</sup> See Amendment No. 1, *supra* note 6, at 15-16.

<sup>25</sup> See *id.* at 13.

<sup>26</sup> See *id.*

<sup>27</sup> 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 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.

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.<sup>28</sup> Moreover, the Funds' website, [www.Gabelli.com](http://www.Gabelli.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"),<sup>29</sup> 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.<sup>30</sup>

The Commission also notes that the Exchange's rules regarding trading halts help to ensure the maintenance of fair and orderly markets for the Shares. Specifically, the Exchange may consider all relevant factors in exercising its discretion to halt trading in the Shares, and will halt trading in the Shares under the conditions specified in NYSE Arca Rule 7.12-E. Trading in the Shares will be subject to Rule 8.900-E(d)(2)(C), which sets forth circumstances under which trading in the Shares will be halted. Specifically, 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

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<sup>28</sup> See NYSE Arca Rule 8.900-E(d)(2)(A). See Amendment No. 1, *supra* note 6, at 13.

<sup>29</sup> The Bid/Ask Price of a Fund's Shares will be the mid-point between the current national best bid and offer at the time of calculation of such 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 6, at 13.

<sup>30</sup> See *id.*

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.<sup>31</sup> 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.

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<sup>31</sup> 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 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 15, n.21.

- (2) 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.<sup>32</sup>
- (3) Prior to the commencement of trading, the Exchange will inform its members in an Information Bulletin (“Bulletin”) of the special characteristics and risks associated with trading the Shares.<sup>33</sup>
- (4) 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.

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<sup>32</sup> See id. at 15.

<sup>33</sup> The Bulletin will discuss the following: (1) the procedures for purchases and redemptions of Shares; (2) 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 information; and (6) that the portfolio holdings of the Shares are not disclosed on a daily basis. See id. at 16-17.

- (5) The Exchange represents that, for initial and/or continued listing, each Fund will be in compliance with Rule 10A-3 under the Act.<sup>34</sup>

This approval order is based on all of the Exchange's statements and representations set forth above and in Amendment No. 1. 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 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 Exchange Rule 5.5-E(m).<sup>35</sup>

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act<sup>36</sup> and Section 11A(a)(1)(C)(iii) of the Act<sup>37</sup> and the rules and regulations thereunder applicable to a national securities exchange.

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<sup>34</sup> See id. at 7.

<sup>35</sup> See id. at 16.

<sup>36</sup> 15 U.S.C. 78f(b)(5).

<sup>37</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>38</sup> that the proposed rule change (SR-NYSEArca-2020-48), as modified by Amendment No. 1, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>39</sup>

Jill M. Peterson,  
Assistant Secretary.

[FR Doc. 2020-19051 Filed: 8/28/2020 8:45 am; Publication Date: 8/31/2020]

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<sup>38</sup> 15 U.S.C. 78s(b)(2).

<sup>39</sup> 17 CFR 200.30-3(a)(12).