

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-57149; File No. SR-NYSEArca-2007-122)

January 15, 2008

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to Certain Modifications to the Initial Listing Standards for Index-Linked Securities

I. Introduction

On November 28, 2007, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”), through its wholly owned subsidiary, NYSE Arca Equities, Inc. (“NYSE Arca Equities”), filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposal to modify certain initial listing standards for Index-Linked Securities. The proposed rule change was published for comment in the Federal Register on December 12, 2007.<sup>3</sup> The Commission received no comments on the proposal. On January 8, 2008, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> This order approves the proposed rule change, as amended.

II. Description of the Proposal

The Exchange proposes to amend one of the requirements of NYSE Arca Equities Rule 5.2(j)(6)(A), which sets forth the listing requirements applicable to all types of Index-Linked Securities to be listed and traded on the Exchange, to provide for greater flexibility in the listing

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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. 56907 (December 5, 2007), 72 FR 70640 (“Notice”).

<sup>4</sup> In Amendment No. 1, the Exchange clarified that certain suitability standards, including those under NYSE Arca Equities Rule 9.2(a) (Diligence as to Accounts), would apply to Index-Linked Securities, as described herein, and that such standards would be disclosed in an Information Bulletin. Because Amendment No. 1 is technical in nature, the Commission is not publishing it for public comment.

criteria for such securities. Currently, NYSE Arca Equities Rule 5.2(j)(6)(A)(d) provides that the payment at maturity of a cash amount for Index-Linked Securities may or may not provide for a multiple of the positive performance of an underlying Reference Asset, and in no event will payment at maturity be based on a multiple of the negative performance of an underlying Reference Asset.

The Exchange proposes to amend NYSE Arca Equities Rule 5.2(j)(6)(A)(d) to: (1) allow the Exchange to consider for listing and trading Index-Linked Securities that provide for payment at maturity based on a multiple of the direct or inverse performance of an underlying Reference Asset; and (2) provide that in no event will a loss or negative payment at maturity be accelerated by a multiple that exceeds twice the performance of an underlying Reference Asset. The Exchange proposes these changes in order to permit the listing and trading of Index-Linked Securities that employ investment strategies similar or analogous to certain exchange-traded funds like the Short Funds and UltraShort Funds of the ProShares Trust and the Inverse Funds and Leveraged Inverse Funds of the Rydex ETF Trust, each of which trade on the Exchange pursuant to unlisted trading privileges (“UTP”) under NYSE Arca Equities Rule 5.2(j)(3).<sup>5</sup> The Short Funds and Inverse Funds seek daily investment results, before fees and expenses, that correspond to the inverse or opposite of the daily performance (-100%) of the respective underlying indexes, and the Ultra Short Funds and Leveraged Inverse Funds seek daily

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<sup>5</sup> See, e.g., Securities Exchange Act Release Nos. 56763 (November 7, 2007), 72 FR 64103 (November 14, 2007) (SR-NYSEArca-2007-81) (approving the trading of shares of funds of the Rydex ETF Trust pursuant to UTP); 56601 (October 2, 2007), 72 FR 57625 (October 10, 2007) (SR-NYSEArca-2007-79) (approving the trading shares of eight funds of the ProShares Trust based on international equity indexes pursuant to UTP); 55125 (January 18, 2007), 72 FR 3462 (January 25, 2007) (SR-NYSEArca-2006-87) (approving the trading of shares of 81 funds of the ProShares Trust pursuant to UTP); and 54026 (June 21, 2006), 71 FR 36850 (June 28, 2006) (SR-PCX-2005-115) (approving the trading of shares of certain other funds of the ProShares Trust pursuant to UTP).

investment results, before fees and expenses, that correspond to twice the inverse or opposite of the daily performance (-200%) of the respective underlying indexes.

NYSE Arca Equities Rule 9.2(a) provides that an ETP Holder, before recommending a transaction in Index-Linked Securities, must have reasonable grounds to believe that the recommendation is suitable for their customer based on any facts disclosed by the customer as to its other security holdings and as to its financial situation and needs. Further, the rule provides, with a limited exception, that prior to the execution of a transaction recommended to a non-institutional customer, the ETP Holder shall make reasonable efforts to obtain information concerning the customer's financial status, tax status, investment objectives, and any other information that such ETP Holder believes would be useful to make a recommendation. Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of this suitability requirement. Specifically, the Information Bulletin will remind ETP Holders that, in recommending transactions in these securities, they must have a reasonable basis to believe that the customer can evaluate the special characteristics, and is able to bear the financial risks, of such investment.

### III. Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>6</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act<sup>7</sup> in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating,

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<sup>6</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

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 Commission believes that the Exchange's proposal is consistent with the Act, and, in particular, reasonably balances the removal of impediments to a free and open market with the protection of investors and the public interest, two principles set forth in Section 6(b)(5) of the Act. The Commission notes that a variety of exchange-traded funds seeking to provide (a) investment results that correspond to or exceed twice (200%) the direct performance of a specified stock index, or (b) investment results that correspond to twice (-200%) the inverse or opposite of the index's performance, are currently traded on the Exchange.<sup>8</sup> In addition, the Commission further believes that heightened suitability standards are appropriate for derivative securities products, including Index-Linked Securities, which seek to provide investment results that correspond to the direct or inverse performance of an underlying reference asset by a specified multiple and allow for a loss or negative payment at maturity to be accelerated by a specified multiple. Before recommending transactions in these types of leveraged products, ETP Holders must have a reasonable basis to believe that the customer can evaluate the special characteristics, and is able to bear the financial risks, of such investment. The Commission expects the Exchange to continue to monitor the application of these suitability requirements, including those under NYSE Arca Equities Rule 9.2(a).

#### IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>9</sup> that the

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<sup>8</sup> See supra note 5 and accompanying text.

<sup>9</sup> 15 U.S.C. 78s(b)(2).

proposed rule change (SR-NYSEArca-2007-122), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>10</sup> 17 CFR 200.30-3(a)(12).