

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58825; File No. SR-NYSEArca-2008-89)

October 21, 2008

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change Amending NYSE Arca Equities Rule 5.2(j)(3) in Connection with Generic Listing Standards for Multiple Fund Shares and Inverse Fund Shares

I. Introduction

On August 25, 2008, NYSE Arca, Inc. (“Exchange” or “NYSE Arca”), 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 proposed rule change to amend NYSE Arca Equities Rule 5.2(j)(3) in connection with generic listing standards for Multiple Fund Shares and Inverse Fund Shares. The proposed rule change was published for comment in the Federal Register on September 16, 2008.<sup>3</sup> The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to amend Commentaries .01, .02, and .03 and to adopt new Commentary .04, to NYSE Arca Equities Rule 5.2(j)(3), the Exchange’s initial listing standards for Investment Company Units (“ICUs”), to permit the listing and trading of ICUs issued by an open-end management investment company that seek to provide investment results, before fees and expenses, that either correspond to a specified multiple of the percentage performance on a given day of a particular benchmark domestic equity index, international equity index, Fixed

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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. 58484 (September 8, 2008), 73 FR 53472.

Income Securities<sup>4</sup> index, or a combination thereof (“Multiple Fund Shares”) or that correspond inversely up to minus or negative 300 percent (-300%) of the percentage performance on a given day of a particular domestic equity index, international equity index, Fixed Income Securities index, or a combination thereof (“Inverse Fund Shares,” and together with Multiple Fund Shares, collectively, “Fund Shares”), in each case, pursuant to Rule 19b-4(e) under the Act.<sup>5</sup>

Specifically, the Exchange proposes to remove the current limitation to listing Multiple Fund Shares and Inverse Fund Shares<sup>6</sup> and to amend Commentaries .01, .02, and .03 to NYSE Arca Equities Rule 5.2(j)(3) to permit the Exchange to approve the listing and trading of Multiple Fund Shares and Inverse Fund Shares pursuant to Rule 19b-4(e) under the Act, provided that each of the applicable conditions and requirements set forth in Commentaries .01, .02, or .03 to NYSE Arca Equities Rule 5.2(j)(3), as proposed to be amended, and proposed Commentary .04 to NYSE Arca Equities Rule 5.2(j)(3) are satisfied.

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<sup>4</sup> Fixed Income Securities are debt securities that are notes, bonds, debentures, or evidence of indebtedness that include, but are not limited to, U.S. Department of Treasury securities, government-sponsored entity securities, municipal securities, trust preferred securities, supranational debt, and debt of a foreign country or a subdivision thereof. See Commentary .02 to NYSE Arca Equities Rule 5.2(j)(3).

<sup>5</sup> Rule 19b-4(e) under the Act provides that the listing and trading of a new derivative securities product by a self-regulatory organization (“SRO”) shall not be deemed a proposed rule change, pursuant to Rule 19b-4(c)(1) under the Act, if the Commission has approved, pursuant to Section 19(b) of the Act, the SRO’s trading rules, procedures, and listing standards for the product class that would include the new derivative securities product, and the SRO has a surveillance program for the product class. See 17 CFR 240.19b-4(e)(1). A new derivative securities product means any type of option, warrant, hybrid securities product, or any other security, other than a single equity option or a security futures product, whose value is based, in whole or in part, upon the performance of, or interest in, an underlying instrument. See 17 CFR 240.19b-4(e).

<sup>6</sup> See Commentaries .02 and .03 to NYSE Arca Equities Rule 5.2(j)(3) (currently prohibiting the Exchange from approving for listing and trading pursuant to Rule 19b-4(e) a series of ICUs that are issued by an open-end management investment company that seeks to provide investment results that either exceed the performance of a specified index by a specified multiple or that correspond to the inverse of the performance of a specified index by a specified multiple).

Lastly, the Exchange proposes to make a minor, non-substantive language change to Commentary .02(ii) to NYSE Arca Equities Rule 5.2(j)(3).

#### Limitation on Leverage

In connection with the listing and trading of Multiple Fund Shares, Commentaries .01, .02, and .03 to NYSE Arca Equities Rule 5.2(j)(3), as amended, would not provide a limitation on leverage. Specifically, the proposal would permit the Exchange to approve, pursuant to Rule 19b-4(e) under the Act, the listing and trading of Multiple Fund Shares that seek to provide investment results, before fees and expenses, corresponding to any multiple, without limitation, of the percentage performance on a given day of a particular domestic or international equity index, Fixed Income Securities index, or a combination thereof.

In connection with Inverse Fund Shares, Commentaries .01, .02, and .03 to NYSE Arca Equities Rule 5.2(j)(3), as amended, would expressly prohibit the Exchange from approving pursuant to Rule 19b-4(e) under the Act the listing and trading of Inverse Fund Shares that seek to provide investment results, before fees and expenses, in an amount that exceeds -300% of the percentage performance of the underlying benchmark index. Specifically, with respect to the listing and trading of Inverse Fund Shares that seek to provide investment results, before fees and expenses, in an amount that exceeds -300% of the percentage performance of the underlying benchmark index, the Exchange's proposal would continue to require specific Commission approval pursuant to Section 19(b)(2) of the Act.<sup>7</sup>

#### Availability of Information about Fund Shares and Underlying Indexes

The Exchange also proposes to adopt new Commentary .04 to NYSE Arca Equities Rule 5.2(j)(3), which would only apply to a series of Multiple Fund Shares and Inverse Fund Shares

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<sup>7</sup> 15 U.S.C. 78s(b)(2).

issued by an open-end management investment company. Proposed Commentary .04 to NYSE Arca Equities Rule 5.2(j)(3) would require the composition of portfolio holdings of a fund be disclosed daily on its Internet Web site and to include, as applicable: (1) the identity and number of shares held of each specific equity security; (2) the identity and amount held of each specific Fixed Income Security; (3) the specific types of financial instruments, which include, but are not limited to, stock index futures contracts, options on futures contracts, options on securities and indices, equity caps, collars, and floors, swap agreements, forward contracts, and repurchase agreements (collectively, “Financial Instruments”), as well as the characteristics of such Financial Instruments; and (4) the cash equivalents and amount of cash held in such portfolio.

The Exchange states that this public Web site disclosure of the portfolio composition of a fund would coincide with the disclosure of the “IIV File”<sup>8</sup> and the “PCF File.”<sup>9</sup> Therefore, the same portfolio information (including accrued expenses and dividends) would be provided on the public Web site, as well as in the IIV File and PCF File provided to “Authorized Participants.”<sup>10</sup> The Exchange further states that the format of the public Web site disclosure and the IIV File

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<sup>8</sup> Because the National Securities Clearing Corporation’s (“NSCC”) system for the receipt and dissemination to its participants of the portfolio composition file (“PCF File”) is not currently capable of processing information with respect to Financial Instruments, an “IIV File” has been developed, which is used to disclose a fund’s holdings of Financial Instruments. The IIV File is posted to a password-protected Web site before the opening of business on each business day, and all NSCC participants and the Exchange have access to a password and the Web site containing the IIV File.

<sup>9</sup> The PCF File for a fund includes the list of names and the required number of shares of each deposit security, as well as any cash information to be included in the next trading day’s “Creation Unit” (the minimum aggregation size of shares required to effect a creation or redemption of shares). The information in the PCF File will be available to all participating in the NSCC system.

<sup>10</sup> Authorized Participants are the only persons that may place orders to create and redeem Creation Units. Authorized Participants must be registered broker-dealers or other securities market participants, such as banks and other financial institutions, that are exempt from registration as broker-dealers to engage in securities transactions, who are Depository Trust Company participants.

and PCF File could differ because the public Web site will list all portfolio holdings, while the IIV File and PCF File would similarly provide the portfolio holdings, but in a format appropriate for Authorized Participants, i.e., the exact components of a Creation Unit. Accordingly, investors would have access to the current portfolio composition of a fund through the fund's Web site.

### Trading Halts

The Exchange states that existing trading halt requirements for ICUs would apply to Multiple Fund Shares and Inverse Fund Shares. In particular, NYSE Arca Equities Rule 5.5(g)(2)(b) provides that, if the intraday indicative value ("IIV") or the index value applicable to that series of ICUs is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV or the index value occurs. If the interruption to the dissemination of the IIV or the index value persists past the trading day in which it occurred, the Exchange would halt trading no later than the beginning of the trading day following the interruption.<sup>11</sup>

In addition, proposed Commentary .04(b) to NYSE Arca Equities Rule 5.2(j)(3) requires the Exchange to halt trading of Fund Shares if the Exchange becomes aware that the net asset value ("NAV") is not being disseminated to all market participants at the same time or the daily public Web site disclosure of its portfolio holdings does not occur. Proposed Commentary .04(b) to NYSE Arca Equities Rule 5.2(j)(3) further provides that the Exchange may resume trading in such Fund Shares only when the NAV is disseminated to all market participants at the same time or the daily public Web site disclosure of portfolio holdings occurs, as appropriate.

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<sup>11</sup> If a series of ICUs are traded on the Exchange pursuant to unlisted trading privileges, the Exchange would halt trading if the primary listing market halts trading in such series. See NYSE Arca Equities Rule 7.34(a).

In addition to other factors that may be relevant, the Exchange states that it may consider factors in exercising its discretion to halt or suspend trading in Multiple Fund Shares and/or Inverse Fund Shares. These factors would include, without limitation, (1) the extent to which trading is not occurring in securities comprising an underlying index and/or the Financial Instruments relating to the Fund Shares, or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.<sup>12</sup> In the case of Financial Instruments, the Exchange represents that a notification procedure would be implemented so that timely notice from the investment adviser is received by the Exchange when a particular Financial Instrument is in default or shortly to be in default. Notification from the investment adviser would be made by phone, facsimile, or e-mail. The Exchange would then determine on a case-by-case basis whether a default of a particular Financial Instrument justifies a trading halt of the Multiple Fund Shares and/or Inverse Fund Shares, as applicable. Trading in Multiple Fund Shares and/or Inverse Fund Shares would also be halted if the circuit breaker parameters pursuant to NYSE Arca Equities 7.12 are reached.<sup>13</sup>

#### Continued Listing and Trading Criteria

The Exchange states that the continued listing and trading requirements for ICUs set forth in NYSE Arca Equities Rule 5.5(g)(2) would apply to Multiple Fund Shares and Inverse Fund Shares.

#### Suitability

Currently, NYSE Arca Equities Rule 9.2(a) (Diligence as to Accounts) provides that an ETP Holder, before recommending a transaction in ICUs, must have reasonable grounds to believe that the recommendation is suitable for the customer based on any facts disclosed by the

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<sup>12</sup> See NYSE Arca Equities Rule 5.5(g)(2)(b).

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 must 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 would inform its ETP Holders of the suitability requirements of NYSE Arca Equities Rule 9.2(a) in an Information Bulletin. Specifically, ETP Holders would be reminded in the Information Bulletin that, in recommending transactions in these securities, they must have a reasonable basis to believe that (1) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such member, and (2) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in Multiple Fund Shares and Inverse Fund Shares. In connection with the suitability obligation, the Information Circular would also provide that members must make reasonable efforts to obtain the following information: (1) the customer's financial status; (2) the customer's tax status; (3) the customer's investment objectives; and (4) such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.

### III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act<sup>14</sup> and the rules and regulations

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<sup>13</sup> See id.

<sup>14</sup> 15 U.S.C. 78f.

thereunder applicable to a national securities exchange.<sup>15</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>16</sup> which requires, among other things, that the Exchange's rules be designed 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 Commission believes that the proposal 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 it has previously approved the listing and trading of various leveraged exchange-traded funds, including trading pursuant to unlisted trading privileges on the Exchange, that seek daily investment results, before fees and expenses, that correspond to twice the inverse or opposite of the daily performance (-200%) of the underlying index.<sup>17</sup> The Commission also notes that the

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<sup>15</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>16</sup> 15 U.S.C. 78f(b)(5).

<sup>17</sup> See, e.g., Securities Exchange Act Release Nos. 56713 (October 29, 2007), 72 FR 61915 (November 1, 2007) (SR-Amex-2007-74) (approving the listing and trading of Rydex Leveraged Funds, Inverse Funds and Leveraged Inverse Funds); 52553 (October 3, 2005), 70 FR 59100 (October 11, 2005) (SR-Amex-2004-62) (approving the listing and trading of the ProShares Ultra Funds and Short Funds); 54040 (June 23, 2006), 71 FR 37629 (June 30, 2006) (SR-Amex-2006-41) (approving the listing and trading of the ProShares UltraShort Funds); 55117 (January 17, 2007), 72 FR 3442 (January 25, 2007) (SR-Amex-2006-101) (approving the listing and trading of Ultra, Short and UltraShort Funds based on various indexes); 56592 (October 1, 2007), 72 FR 57364 (October 9, 2007) (SR-Amex-2007-60) (approving the listing and trading of ProShares Ultra, Short and UltraShort Funds based on various international indexes); and 56998 (December 19, 2007), 72 FR 73404 (December 27, 2007) (SR-Amex-2007-104) (approving the listing and trading of ProShares Ultra, Short and UltraShort Funds based on several fixed income indexes, among others). See also, e.g., Securities Exchange Act Release Nos. 56763 (November 7, 2007), 72 FR 64103 (November 14, 2007) (SR-NYSEArca-2007-81) (approving UTP trading of shares of funds of Rydex ETF Trust); 56601 (October 2, 2007), 72 FR 57625 (October 10, 2007) (SR-NYSEArca-2007-79) (approving UTP trading of shares of eight funds of the ProShares Trust); 55125 (January 18, 2007), 72 FR

proposed rule change is similar to another exchange's generic listing requirements for Multiple Fund Shares and Inverse Fund Shares.<sup>18</sup> With respect to the listing and trading of a series of Inverse Fund Shares that seek to provide investment results that exceed -300% of the percentage performance of an underlying benchmark index, the Commission further notes that the Exchange would be required to obtain prior Commission approval pursuant to Section 19(b)(2) of the Act.

The Commission also notes that Fund Shares must comply with all of the applicable provisions under NYSE Arca Equities Rules 5.2(j)(3), as proposed to be amended, and 5.5(g)(2), as well as all other requirements applicable to ICUs including, without limitation, requirements relating to the dissemination of intraday indicative value, index value, disclosure of portfolio holdings, rules and policies governing the trading of equity securities, trading hours, trading halts, surveillance, firewalls, and Information Bulletins to ETP Holders, as set forth in prior Commission orders approving the generic listing rules applicable to the listing and trading of ICUs.

The Commission further notes that the proposed rule change is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. Proposed Commentary .04 to NYSE Arca Equities Rule 5.2(j)(3) requires daily public Web site disclosure of the composition of a fund's portfolio holdings, including the identities and amount of securities comprising the underlying benchmark index, the specific types and characteristics of

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3462 (January 25, 2007) (SR-NYSEArca-2006-87) (approving UTP trading of shares of 81 funds of the ProShares Trust); and 54026 (June 21, 2006), 71 FR 36850 (June 28, 2006) (SR-PCX-2005-115) (approving UTP trading of shares of funds of the ProShares Trust).

<sup>18</sup> See Securities Exchange Act Release No. 57660 (April 14, 2008), 73 FR 21391 (April 21, 2008) (SR-Amex-2007-131) (approving generic listing standards for Multiple Fund

Financial Instruments, and any cash and cash equivalents held in such portfolio. With respect to such Financial Instruments, the Commission notes that a notification procedure will be implemented by the Exchange so that timely notice from the investment adviser is submitted to the Exchange if a particular Financial Instrument is in default or is shortly to be in default. The Exchange states that, after receipt of such notice, it would determine on a case-by-case basis whether such default justifies a trading halt of Multiple Fund Shares or Inverse Fund Shares, as the case may be. The Commission also notes that the Exchange would be required to halt trading in Multiple Fund Shares and Inverse Fund Shares if certain values are not disseminated as required or cease to be disseminated to all market participants at the same time.<sup>19</sup>

In addition, the Commission notes that NYSE Arca Equities Rule 9.2(a), which sets forth the Exchange's suitability requirements, would apply to the trading of Multiple Fund Shares and Inverse Fund Shares. Specifically, ETP Holders, before recommending a transaction to a non-institutional customer in such securities, must have reasonable grounds to believe that the recommendation is suitable for the customer, based on facts disclosed by the customer after reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information that such ETP Holder believes would be useful to make a recommendation. ETP Holders must also have a reasonable basis to believe that the customer can evaluate the special characteristics, and is able to bear the financial risks, of investments in Multiple Fund Shares and Inverse Fund Shares. An Information Bulletin would inform ETP Holders of the suitability requirements of NYSE Arca Equities Rule 9.2(a) prior to the commencement of trading in such securities.

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Shares and generic listing standards for Inverse Fund Shares that correspond inversely up to -200% of the percentage performance of a particular underlying benchmark index).

In sum, the Commission believes that the Exchange's proposed amendments to Commentaries .01, .02, and .03, and adoption of new Commentary .04, to NYSE Arca Equities Rule 5.2(j)(3) relating to the listing and trading of Multiple Fund Shares and Inverse Fund Shares should fulfill the intended objective of Rule 19b-4(e) under the Act by allowing such derivative securities products to be listed and traded without separate Commission approval. The Commission believes that the proposed rule change should facilitate the listing and trading of additional types of exchange-traded products and reduce the time frame for bringing these securities to market, thereby reducing the burdens on issuers and other market participants and promoting competition.

For the foregoing reasons, the Commission believes that the proposed rule change is consistent with the Act and finds good cause for approving the proposed rule change.

#### IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>20</sup> that the proposed rule change (SR-NYSEArca-2008-89) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

Florence E. Harmon  
Acting Secretary

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<sup>19</sup> See proposed Commentary .04(b) to NYSE Arca Equities Rule 5.2(j)(3); NYSE Arca Equities Rule 5.5(g)(2).

<sup>20</sup> 15 U.S.C. 78s(b)(1).

<sup>21</sup> 17 CFR 200.30-3(a)(12).