

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-60717; File No. SR-NYSEArca-2009-74)

September 24, 2009

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, Relating to Listing Four Grail Advisors RP Exchange-Traded Funds

On August 12, 2009, 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 proposed rule change to list and trade shares (“Shares”) of the following Grail Advisors actively-managed exchange-traded funds: RP Growth ETF, RP Focused Large Cap Growth ETF, RP Technology ETF and the RP Financials ETF (each an “ETF” or “Fund” and collectively the “ETFs or “Funds”). The proposed rule change was published in the Federal Register on August 28, 2009.<sup>3</sup> The Commission received no comments on the proposal. On September 21, 2009, the Exchange filed Amendment No. 1.<sup>4</sup> This order provides notice of the filing of Amendment No. 1, and approves the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

I. Description of the Proposal

The Exchange proposes to list and trade the Shares pursuant to NYSE Arca Equities Rule 8.600, which governs the listing of Managed Fund Shares. The Shares will be offered by Grail

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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. 60552 (August 20, 2009), 74 FR 44417 (“Notice”).

<sup>4</sup> Amendment No. 1 reflects the issuer’s decision that the creation and redemption unit size for each Fund would be 50,000 Shares, not 25,000 shares as was stated in the Notice.

Advisors ETF Trust (“Trust”),<sup>5</sup> a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company. The investment objective of each of the Funds is long-term capital appreciation. The ETFs expect to invest primarily in the securities of US companies, and may also invest in US securities tied economically to foreign investments, such as American Depositary Receipts. None of the Funds will invest in non-U.S. equity securities.

The Exchange states that the Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600, and that the Funds will comply with Rule 10A-3 under the Act,<sup>6</sup> as provided by NYSE Arca Equities Rule 5.3.

Additional information regarding the Funds, the Shares, the Funds’ investment objectives, strategies, policies, and restrictions, risks, fees and expenses, creations and redemptions of Shares, availability of information, trading rules and halts, and surveillance procedures, among other things, can be found in the Registration Statement and in the Notice, as applicable.<sup>7</sup>

## II. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 1 to the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

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<sup>5</sup> The Trust is registered under the Investment Company Act of 1940 (15 U.S.C. 80a) (“1940 Act”). On June 8, 2009, the Trust filed with the Commission post-effective Amendment No. 1 to its registration statement on Form N-1A under the Securities Act of 1933 (15 U.S.C. 77a), and under the 1940 Act relating to the Funds (File Nos. 333-148082 and 811-22154) (“Registration Statement”). The description of the operation of the Trust and the Funds herein is based on the Registration Statement.

<sup>6</sup> 17 CFR 240.10A-3.

<sup>7</sup> See, supra, notes 3 and 5.

### 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-2009-74 on the subject line.

### Paper comments

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

All submissions should refer to File Number SR-NYSEArca-2009-74. 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 Web site (<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 inspection and copying 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2009-74 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

### 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>8</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>9</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>10</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 notes that the Shares must comply with the requirements of NYSE Arca Equities Rule 8.600 to be listed and traded on the Exchange.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,<sup>11</sup> which sets forth Congress' 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. Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association ("CTA") high-speed line, and the Exchange will disseminate the Portfolio Indicative Value ("PIV") at least every 15 seconds during the Core Trading Session through the facilities of the CTA. In addition, the Fund will make available on its Web site on each business day the Disclosed Portfolio that will form the basis for its calculation of the net asset value ("NAV"), which will be determined as of the close of the

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<sup>8</sup> 15 U.S.C. 78f.

<sup>9</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>10</sup> 17 U.S.C. 78f(b)(5).

<sup>11</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

regular trading session on the New York Stock Exchange (ordinarily 4:00 p.m. Eastern Time) on each business day. The Fund's Web site will also include additional quantitative information updated on a daily basis relating to trading volume, prices, and NAV. Information regarding the market price and volume of the Shares will be continually available on a real-time basis throughout the day via electronic services, and the previous day's closing price and trading volume information for the Shares will be published daily in the financial sections of newspapers.

The Commission further 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 when a reasonable degree of transparency cannot be assured. The Commission notes that the Exchange will obtain a representation from the Fund that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.<sup>12</sup> Additionally, if it becomes aware that the NAV or the Disclosed Portfolio is not disseminated daily to all market participants at the same time, the Exchange will halt trading in the Shares until such information is available to all market participants.<sup>13</sup> Further, if the PIV is not being disseminated as required, the Exchange may halt trading during the day in which the disruption occurs; if the interruption persists past the day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.<sup>14</sup> The Exchange represents that the Manager has implemented a "fire wall" between

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<sup>12</sup> See NYSE Arca Equities Rule 8.600(d)(1)(B).

<sup>13</sup> See NYSE Arca Equities Rule 8.600(d)(2)(D).

<sup>14</sup> Trading in the Shares may also be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the securities comprising the Disclosed Portfolio and/or the financial instruments of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

it and its broker-dealer affiliate with respect to access to information concerning the composition and/or changes to the Fund's portfolio. Similarly, one of the sub-advisors, Wedgewood, a registered broker-dealer, also has implemented such a "fire wall."<sup>15</sup> Any additional Fund subadvisers affiliated with a broker-dealer will be required to implement a firewall to prevent its broker-dealer affiliate from accessing information concerning the composition and/or changes to the Fund's portfolio.<sup>16</sup> Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the portfolio.<sup>17</sup>

The Exchange has represented that the Shares are equity securities subject to the Exchange's rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including:

- (1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600.
- (2) The Exchange's surveillance procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.
- (3) Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with

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<sup>15</sup> The Exchange also represents that RP, the Fund's primary sub-adviser, is not affiliated with a broker-dealer, and that any additional Fund sub-advisers that are affiliated with a broker-dealer will be required to implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the portfolio.

<sup>16</sup> See Notice, 74 FR at 44420.

<sup>17</sup> See NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

trading the Shares. Specifically, the Information Circular will discuss the following: (a) the procedures for purchases and redemptions of Shares and that Shares are not individually redeemable; (b) NYSE Arca Equities Rule 9.2(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; (c) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated PIV will not be calculated or publicly disseminated; (d) how information regarding the PIV is disseminated; (e) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(4) The Funds will be in compliance with Rule 10A-3 under the Act.

(5) The Funds will not invest in non-U.S. equity securities.

This approval order is based on the Exchange's representations.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>18</sup> for approving the proposal prior to the thirtieth day after the date of publication of the Notice in the Federal Register. The Commission notes that it has approved the listing and trading on the Exchange of shares of other actively managed exchange-traded funds based on a portfolio of securities, the characteristics of which are similar to those to be invested by the Fund.<sup>19</sup> The Commission also

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<sup>18</sup> 15 U.S.C. 78s(b)(2).

<sup>19</sup> See, e.g., Securities Exchange Act Release Nos. 58512 (September 11, 2008), 73 FR 53915 (September 17, 2008) (SR-NYSEArca-2008-85) (approving the listing and trading of shares of the PowerShares Active U.S. Real Estate Fund); and 57619 (April 4, 2008), 73 FR 19544 (April 10, 2008) (SR-NYSEArca-2008-25) (approving the listing and

notes that it has received no comments regarding the proposed rule change. Further, the Commission believes that the increased creation and redemption unit sizes for the Funds described in Amendment No. 1<sup>20</sup> do not raise any regulatory concerns. The Commission finds that the proposed rule change does not raise any novel regulatory issues and believes that accelerating approval of this proposal should benefit investors by creating, without undue delay, additional competition in the market for Managed Fund Shares.

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trading of shares of the PowerShares Active AlphaQ Fund, PowerShares Active Alpha Multi-Cap Fund, and PowerShares Active Mega-Cap Portfolio, among other funds).

<sup>20</sup> See supra note 4.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>21</sup> that the proposed rule change (SR-NYSEArca-2009-74), as modified by Amendment No. 1 thereto, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>21</sup> 15 U.S.C. 78s(b)(2).

<sup>22</sup> 17 CFR 200.30-3(a)(12).