

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58734; File No. SR-NYSEArca-2008-105)

October 6, 2008

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change  
Relating to Listing Certain Derivative Products Pursuant to Continued Listing Criteria

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 1, 2008, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NYSE Arca. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

NYSE Arca, through its wholly owned subsidiary NYSE Arca Equities, Inc. (“NYSE Arca Equities”), proposes to adopt Commentary .01 to Rule 5.2(b) to allow NYSE Arca to list Derivative Products (as defined in the proposed Commentary .01 to Rule 5.2(b)) that (1) were originally listed on another registered national securities exchange on an initial listing basis and continue to be listed on such other registered national securities exchange, and (2) satisfy the Exchange’s continued listing criteria. The text of the proposed rule change is set forth below (new language underlined):

Rule 5.2(b)

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Commentary:

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

.01 The Exchange is permitted to list any Derivative Product, as described below, that (1) was originally listed on another registered national securities exchange (“Other SRO”) and continues to be listed on such Other SRO; and (2) satisfies the Exchange’s continued listing criteria that are applicable to the product class that would include such Derivative Product. For the purposes of this rule, the term “Derivative Product” shall include securities described in NYSE Arca Equities Rules 5.2(j)(2) (Equity Linked Notes); 5.2(j)(3) (Investment Company Units); 5.2(j)(4) (Index-Linked Exchangeable Notes); 5.2(j)(6) (Equity Index-Linked Securities, Commodity-Linked Securities, Currency-Linked Securities, Fixed Income Index-Linked Securities, Futures-Linked Securities and Multifactor Index-Linked Securities); 8.100 (Portfolio Depositary Receipts); and Commentary .01 to Rule 8.200 (Trust Issued Receipts).

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to adopt Commentary .01 to NYSE Arca Equities Rule 5.2(b) to allow NYSE Arca to list Derivative Products (as defined in the proposed Commentary .01 to

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<sup>2</sup> 17 CFR 240.19b-4.

Rule 5.2(b))<sup>3</sup> that (1) were originally listed on another registered national securities exchange (“Other SRO”) on an initial listing basis and continue to be listed on such Other SRO and (2) satisfy the Exchange’s continued listing criteria applicable to the relevant product class. Such Derivative Products would be listed pursuant to NYSE Arca Equities continued listing criteria.

For example, in the case of an Index-Linked Security that is listed on an Other SRO, the staff of the Exchange would determine whether the Index-Linked Security met the continued listing criteria. If the Index-Linked Security met the continued listing criteria, then the Exchange would proceed<sup>3</sup> to list such security on the Exchange. If the Index-Linked Security did not meet the continued listing criteria, the staff of the Exchange would then, in its sole discretion, either file a separate rule filing under Rule 19b-4 of the Exchange Act proposing that the Index-Linked Security be listed on the Exchange pursuant to the criteria set forth in the rule filing, or decline to list the Index-Linked Security on the Exchange.

The Exchange believes that application of continued listing criteria is appropriate to facilitate the listing of Derivative Products from Other SROs to the Exchange. Because the

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<sup>3</sup> For purposes of proposed Rule 5.2(b), Commentary .01, the term “Derivative Products” includes securities described in Rule 5.2(j)(2) (Equity-Linked Notes); Rule 5.2(j)(3) (Investment Company Units); Rule 5.2(j)(4) (Index-Linked Exchangeable Notes); and Rule 5.2(j)(6) (Index-Linked Securities); and the following securities enumerated in provisions of section 2 to Rule 8: Portfolio Depositary Receipts; and Trust Issued Receipts to be listed pursuant to Rule 8.200, Commentary .01. Exchange rules relating to listing and trading, including trading pursuant to unlisted trading privileges, of “Derivative Products” as described above permit listing and trading pursuant to Rule 19b-4(e) under the Exchange Act. Rule 19b-4(e) under the Exchange 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 section (c)(1) of Rule 19b-4, if the Commission has approved, pursuant to Section 19(b) of the Exchange Act, the SRO’s trading rules, procedures, and listing standards for the product class that would include the new derivatives securities product, and the SRO has a surveillance program for the product class. See Securities Exchange Act Release No. 40761 (December 8, 1998), 63 FR 70952 (December 22, 1998) (File No. S7-13-98).

Exchange's continued listing criteria are similar or identical to those of certain Other SROs, the Exchange believes there would be no significant regulatory concerns with facilitating the efficient and timely listing of Other SRO-listed Derivative Products by allowing such products to satisfy continued listing criteria.<sup>4</sup> Also, in light of the similar nature of the continued listing criteria of the Exchange and Other SROs, such as the Amex, the Exchange believes that having the ability to apply continued listing criteria in verifying that the Derivatives Products are qualified to be listed on the Exchange will not harm investors. In addition, such flexibility will assist certain issuers of Derivative Products in remaining listed and traded on a national securities exchange, without risking possible delisting based on a failure to meet the applicable Exchange initial listing criteria.

Prior to listing on the Exchange, the issuer of a Derivative Product would be required to properly delist from the Other SRO and satisfy the applicable listing procedures of the Exchange and applicable statutory and regulatory requirements, including, without limitation, Section 12 of the Act,<sup>5</sup> relating to listing such Derivative Product on the Exchange.

The Exchange represents that, for any Derivative Product listed pursuant to proposed Commentary .01 to Rule 5.2(b), other than the initial listing standards, the shares of such Derivative Product will comply with all other pertinent requirements applicable to the product class that would include such Derivative Product, including, but not limited to, requirements

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<sup>4</sup> For example, the following are American Stock Exchange LLC ("Amex") listing standards for Derivative Products having similar or identical continued listing standards to those of the Exchange: Index Fund Shares (Amex Rule 1000A et seq.); Portfolio Depositary Receipts (Rules 1000 et seq.); Trust Issued Receipts (Rules 1200 et seq.); and securities listed under Section 107 of the Amex Company Guide, including Equity-Linked Term Notes; Index-Linked Exchangeable Notes; Index-Linked Securities; Commodity-Linked Securities; Currency-Linked Securities; Fixed Income-Linked Securities; Futures-Linked Securities; and Combination-Linked Securities.

relating to the dissemination of key information, such as an index value, reference asset value, and intraday indicative value, rules governing the trading of equity securities, trading hours, trading halts, surveillance, firewalls, and Information Bulletins to ETP Holders, as set forth in Exchange rules applicable to such Derivative Product and prior Commission orders approving the generic listing rules applicable to the listing and trading of such Derivative Product.<sup>6</sup>

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b)<sup>7</sup> of the Act in general and furthers the objectives of Section 6(b)(5)<sup>8</sup> in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transaction in securities, and, in general to protect investors and the public interest. The proposed rule change would assist Other-SRO Derivative Product issuers to list on the Exchange, thus removing a potential impediment to the mechanism of a free and open market and protecting the public interest.

### B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

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<sup>5</sup> 15 U.S.C. 78(l).

<sup>6</sup> See email from Michael Cavalier, Chief Counsel, NYSE Euronext, to Christopher Chow, Special Counsel, Commission, dated October 2, 2008.

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

<sup>8</sup> 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- A. by order approve the proposed rule change; or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

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-2008-105 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NYSEArca-2008-105. 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-2008-105 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

Florence E. Harmon  
Acting Secretary

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<sup>9</sup> 17 CFR 200.30-3(a)(12).