

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59146; File No. SR-NYSEArca-2008-136)

December 22, 2008

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NYSE Arca, Inc. Amending NYSE Arca Equities Rule 5.2(j)(6), the Exchange's initial listing standards for Equity Index-Linked Securities, Commodity-Linked Securities, Currency-Linked Securities, Fixed Income Index-Linked Securities, Futures-Linked Securities and Multifactor Index-Linked Securities

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on December 10, 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 the Exchange. 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

The Exchange proposes to amend NYSE Arca Equities Rule 5.2(j)(6), the Exchange's initial listing standards for Equity Index-Linked Securities, Commodity-Linked Securities, Currency-Linked Securities, Fixed Income Index-Linked Securities, Futures-Linked Securities and Multifactor Index-Linked Securities. The text of the proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://www.nyse.com), at the Exchange's principal office and at the Commission's Public Reference Room.

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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.

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 amend NYSE Arca Equities Rule 5.2(j)(6), the Exchange’s initial listing standards for Equity Index-Linked Securities, Commodity-Linked Securities, Currency-Linked Securities, Fixed Income Index-Linked Securities, Futures-Linked Securities and Multifactor Index-Linked Securities (“Index-Linked Securities”), to provide for greater flexibility in the listing criteria for such securities, as set forth below.

Currently, 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 direct or inverse performance of an underlying Reference Asset,<sup>4</sup> and in no event will a loss or negative payment

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<sup>4</sup> As defined in Rule 5.2(j)(6), “Reference Assets” include “Equity Reference Assets,” which consist of an underlying index or indexes of equity securities; “Commodity Reference Assets,” which consist of a basket or index of one or more physical commodities or commodity futures, options or other commodity derivatives or Commodity-Based Trust Shares (as defined in Rule 8.201); “Currency Reference Assets,” which include a basket or index of one or more currencies, or options or currency futures or other currency derivatives or Currency Trust Shares (as defined in Rule 8.202); “Fixed Income Reference Asset” which consist of one or more indexes or portfolios of 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; “Futures Reference Asset” which consists of

at maturity be accelerated by a multiple that exceeds twice the performance of an underlying Reference Asset.

The Exchange proposes to amend Rule 5.2(j)(6)(A)(d) to allow the Exchange to consider for listing and trading Index-Linked Securities that provide that in no event will a loss or negative payment at maturity be accelerated by a multiple that exceeds three times the performance of an underlying Reference Asset.

The Exchange proposes these changes in order to allow the Exchange to initially consider for listing and trading Index-Linked Securities that employ investment strategies similar or analogous to certain Exchange-Traded Funds which list and trade on the Exchange pursuant to NYSE Arca Equities Rule 5.2(j)(3).<sup>5</sup> Currently, Exchange-Traded Funds are able to seek daily investment results, before fees and expenses, that correspond to three times the inverse or opposite of the daily performance (-300%) of the underlying indexes.

#### Limitation on Leverage

In connection with Index-Linked Securities 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>6</sup> In particular, NYSE Arca

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an index of (a) futures on Treasury Securities, GSE Securities, supranational debt and debt of a foreign country or a subdivision thereof, or options or other derivatives on any of the foregoing; or (b) interest rate futures or options or derivatives; and "Multifactor Reference Asset" which consists of any combination of two or more Equity Reference Assets, Commodity Reference Assets, Currency Reference Assets, Fixed Income Reference Assets or Futures Reference Assets.

<sup>5</sup> See Securities Exchange Act Release No. 58825 (October 21, 2008), 73 FR 63756 (October 27, 2008) (SR-NYSEArca-2008-89). Order approving inverse fund shares that cannot exceed -300% of the inverse or opposite of the daily performance of an underlying index.

<sup>6</sup> 15 U.S.C. 78s(b)(2).

Equities Rule 5.2(j)(6) would expressly prohibit Index-Linked Securities 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, from being approved by the Exchange for listing and trading pursuant to Rule 19b-4(e) under the Act.<sup>7</sup>

The Exchange believes that a -300% limitation will permit Index-Linked Securities to provide investors with an incremental additional degree of leverage similar to instruments available to professional investors to manage risk. In addition, recommendations to investors of transactions in Index-Linked Securities are subject to the customer suitability requirements of NYSE Arca Equities Rule 9.2, as discussed below.

The Exchange notes that 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, ETP Holders will be reminded in the Information Bulletin 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.

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<sup>7</sup> 17 CFR 240.19b-4(e).

The Exchange believes that these changes will allow the Exchange greater flexibility in the listing of Index-Linked Securities, which will allow the Exchange to offer investors more investment options and to remain competitive in the marketplace. The Exchange believes that investors will continue to be protected because the payment at maturity cannot be based on a multiple that exceeds three times the inverse performance of an underlying Reference Asset.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)<sup>8</sup> of the Act, in general, and furthers the objectives of Section 6(b)(5),<sup>9</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 facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, the Exchange believes that the proposed change to the standards for listing and trading Index-Linked Securities enhances the investment opportunities for our users by providing them with an additional degree of leverage, while also limiting potential losses or negative payments to -300%.<sup>10</sup>

### 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.

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

<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> See email from Andrew Stevens, Chief Counsel-U.S. Equities & Derivatives, NYSE Arca, Inc., to Mitra Mehr, Special Counsel, Division of Trading and Markets, Commission, dated December 22, 2008.

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.

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 Exchange 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 2008-136 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-2008-136. 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-2008-136 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>11</sup>

Florence E. Harmon  
Acting Secretary

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<sup>11</sup> 17 CFR 200.30-3(a)(12).