

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-63329; File No. SR-NYSEArca-2010-86)

November 17, 2010

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change Relating to the Listing and Trading of Shares of the Peritus High Yield ETF

I. Introduction

On September 23, 2010, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the Peritus High Yield ETF (“Fund”). The proposed rule change was published for comment in the Federal Register on October 13, 2010.³ The Commission received no comments on the proposal. This order grants approval of the proposed rule change.

II. 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 and trading of Managed Fund Shares.⁴ The Shares will be offered by AdvisorShares Trust (“Trust”), a statutory trust organized under the laws of the State of

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 63041 (October 5, 2010), 75 FR 62905 (“Notice”).

⁴ A Managed Fund Share is a security that, among other things, represents an interest in an investment company registered under the Investment Company Act of 1940 (“1940 Act”) organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment advisor consistent with its investment objectives and policies. See NYSE Arca Equities Rule 8.600(c)(1).

Delaware and registered with the Commission as an open-end management investment company.⁵ The investment advisor to the Fund is AdvisorShares Investments, LLC (“Advisor”), and Peritus I Asset Management, LLC is the Fund’s sub-advisor (“Peritus” or “Sub-Advisor”).⁶ The Exchange represents that the Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600 and that, for initial and/or continued listing, the Fund will be in compliance with Rule 10A-3 under the Exchange Act,⁷ as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.

The Fund’s investment objective is high current income with a secondary goal of capital appreciation. The Fund, under normal circumstances, will invest at least 80% of its net assets, plus any borrowings for investment purposes, in high-yield debt securities, which include senior and subordinated corporate debt obligations (such as bonds, debentures, notes and commercial paper). The Fund does not have any portfolio maturity limitation and may invest its assets from time to time primarily in instruments with short-term, medium-term or long-term maturities.

In selecting securities for the Fund’s portfolio, Peritus will perform its own independent investment analysis of each issuer to determine its creditworthiness. Peritus will focus on the secondary market, predominantly investing in assets at a discount to par (\$100), allowing for a potential opportunity to generate capital gains in addition to current yield. Peritus will place

⁵ The Trust is registered under the 1940 Act. On May 11, 2010, the Trust filed with the Commission Post-Effective Amendment No. 6 to Form N-1A relating to the Fund (File Nos. 333-157876 and 811-22110) (“Registration Statement”).

⁶ The Exchange represents that the Advisor and Sub-Advisor are not affiliated with a broker-dealer. See Commentary .06 to NYSE Arca Equities Rule 8.600 (requiring that, if the investment adviser is affiliated with a broker-dealer, the investment adviser erect a “fire wall” between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to the portfolio).

⁷ 17 CFR 240.10A-3.

limited value on credit ratings and instead will focus on true cash flow while looking to buy credit at prices that it feels provide a margin of safety. Additional factors will be considered when constructing the portfolio including, but not limited to, excess cash on the balance sheet and/or a history of producing real free cash flow, as well as a capital structure that can be sustained on conservative forecasts. The Fund's portfolio will typically consist of 40-60 holdings,⁸ which will be disclosed on its website (www.advisorshares.com) daily after the close of trading on the Exchange and prior to the opening of trading on the Exchange the following day.

The Fund may seek investments in corporate debt securities representative of one or more high-yield bond or credit derivative indices, which may change from time to time. Selection will generally be dependent on independent credit analysis or fundamental analysis performed by the Sub-Advisor. The Fund may invest in all grades of corporate securities, including those below investment grade.⁹ The Fund will only invest in liquid securities and only purchase performing securities and not distressed debt.¹⁰ To a lesser extent, the Fund also may invest in unrated securities. The Fund may invest in the securities of other investment companies to the extent that such an investment would be consistent with the requirements of Section 12(d)(1) of the 1940 Act, or any rule, regulation or order of the Commission.

To respond to adverse market, economic, political or other conditions, the Fund may invest 100% of its total assets, without limitation, in high-quality short-term debt securities and

⁸ The Fund represents that the portfolio will include a minimum of 13 non-affiliated issuers.

⁹ The Fund has represented that it will invest only in U.S.-registered bonds that are listed or traded in the United States. However, certain of the Fund's debt holdings may be issued by corporations domiciled outside the United States.

¹⁰ Distressed debt is debt that is currently in default and is not expected to pay the current coupon.

money market instruments. The Fund may be invested in these instruments for extended periods, depending on the Sub-Advisor's assessment of market conditions. These short-term debt securities and money market instruments include shares of other mutual funds, commercial paper, certificates of deposit, bankers' acceptances, and U.S. Government securities.

Additional details regarding the Shares and the Fund including, among other things, the organization and structure of the Fund, the investment objectives and methodologies, investment risks, dissemination and availability of key information about the Fund, the Shares, and the portfolio, creations and redemptions of Shares, trading halts, trading rules, surveillance, and the Information Bulletin can be found in the Notice and the Registration Statement, as applicable.¹¹

III. Discussion and Commission's Findings

After careful consideration, 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.¹² In particular, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act,¹³ which requires, among other things, that the Exchange's rules be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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 finds that the proposal to list and trade the Shares on the Exchange is

¹¹ See supra notes 3 and 5.

¹² 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).

¹³ 15 U.S.C. 78f(b)(5).

consistent with Section 11A(a)(1)(C)(iii) of the Act,¹⁴ 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 disseminated through the facilities of the Consolidated Tape Association. In addition, the Portfolio Indicative Value ("PIV") will be disseminated at least every 15 seconds during the Core Trading Session by one or more major market data vendors. On each business day before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its website the Disclosed Portfolio, as defined in NYSE Arca Equities Rule 8.600(c)(2), that will form the basis for the Fund's calculation of net asset value ("NAV") at the end of the business day.¹⁵ In addition, information regarding market price and trading volume of the Shares is and will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and the previous day's closing price and trading volume information will be published daily in the financial section of newspapers. The Fund will also make available on its website daily trading volume of the Shares, closing prices of the Shares, NAV, and other related quantitative and trading information. A basket composition file, which includes the security names and share quantities required to be delivered in exchange for Fund shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the New York Stock Exchange ("NYSE") via the National Securities Clearing Corporation. The basket represents one Creation Unit of the Fund. The NAV of the Fund

¹⁴ 15 U.S.C. 78k-1(a)(1)(C)(iii).

¹⁵ On a daily basis, the Advisor will disclose for each portfolio security or other financial instrument of the Fund the following information: ticker symbol (if applicable), name of security or financial instrument, number of shares or dollar value of financial instruments held in the portfolio, and percentage weighting of the security or financial instrument in the portfolio.

will normally be determined as of the close of the regular trading session on the NYSE (ordinarily 4:00 p.m. Eastern Time) on each business day.

The Commission further believes that the proposal to list and trade the Shares 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 issuer of the Shares that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.¹⁶ The Exchange may halt trading in the Shares if the value of the Portfolio Indicative Value is no longer calculated or available or the Disclosed Portfolio is not made available to all market participants at the same time.¹⁷ In addition, NYSE Arca Equities Rule 8.600(d)(2)(B)(ii) requires that the Reporting Authority that provides the Disclosed Portfolio 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. Lastly, the Commission notes that the Exchange will halt trading in the Shares under the specific circumstances set forth in NYSE Arca Equities Rule 8.600(d)(2)(D) and that, if there is an additional Fund sub-advisor that is affiliated with a broker-dealer, that sub-advisor must erect a fire wall between it and such broker-dealer with respect to access to information

¹⁶ See NYSE Arca Equities Rule 8.600(d)(1)(B) (also requiring that the Exchange obtain a representation from the issuer that the NAV per Share will be calculated daily).

¹⁷ See NYSE Arca Equities Rule 8.600(d)(2)(C)(ii). With respect to trading halts, the Exchange may consider other relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading on the Exchange in the Shares may 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.

concerning the composition and/or changes to the investment portfolio of the Fund.¹⁸

The Exchange has represented that the Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing 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 has appropriate rules to facilitate transactions in the Shares during all trading sessions.
- (3) 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.
- (4) 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 trading the Shares. Specifically, the Information Bulletin will discuss the following: (a) the procedures for purchases and redemptions of Shares in Creation Unit aggregations (including noting 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

¹⁸ The Commission notes that the Exchange has represented that neither the Fund's Advisor nor Sub-Advisor is affiliated with a broker-dealer. See supra note 6.

issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

- (5) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.
- (6) For initial and continued listing, the Shares must comply with Rule 10A-3 under the Act.¹⁹

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 Section 6(b)(5) of the Act²⁰ and the rules and regulations thereunder applicable to a national securities exchange.

¹⁹ 17 CFR 240.10A-3.

²⁰ 15 U.S.C. 78f(b)(5).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²¹ that the proposed rule change (SR-NYSEArca-2010-86), be, and it hereby is, approved.

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

Florence E. Harmon
Deputy Secretary

²¹ 15 U.S.C. 78s(b)(2).

²² 17 CFR 200.30-3(a)(12).