

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-56763; File No. SR-NYSEArca-2007-81)

November 7, 2007

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Trade Shares of Funds of the Rydex ETF Trust Pursuant to Unlisted Trading Privileges

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> notice is hereby given that on August 2, 2007, NYSE Arca, Inc. (the “Exchange”), through its wholly-owned subsidiary, NYSE Arca Equities, Inc. (“NYSE Arca Equities”), filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. This order provides notice of the proposed rule change and approves the proposed rule change on an accelerated basis.

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

The Exchange, through NYSE Arca Equities, proposes to trade shares (“Shares”) of 45 funds of the Rydex ETF Trust (“Trust”) based on numerous domestic indexes pursuant to unlisted trading privileges (“UTP”). The text of the proposed rule change is available at the Exchange, the Commission’s Public Reference Room, and [www.nyse.com](http://www.nyse.com).

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 Exchange 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 these statements may be examined at the places specified in

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

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

Item III below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

Under NYSE Arca Equities Rule 5.2(j)(3), which permits the trading of Shares either by listing or pursuant to UTP,<sup>3</sup> the Exchange proposes to trade pursuant to UTP shares of 45 funds of the Trust that are designated as Rydex Leveraged Funds (the “Leveraged Funds”), Rydex Inverse Funds (the “Inverse Funds”), and Rydex Leveraged Inverse Funds (the “Leveraged Inverse Funds” and together with the Leveraged Funds and Inverse Funds, the “Funds”). The Commission has approved the listing and trading of the Shares on the American Stock Exchange LLC (“Amex”).<sup>4</sup> Each of the Funds will have a distinct investment objective by attempting, on a daily basis, to correspond to a specified multiple of the performance, or the inverse performance, of a particular equity securities index as described in the Amex Notice. A detailed discussion of the investment objective of each of the Funds; the portfolio management methodology for each

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<sup>3</sup> In October 1999, the Commission approved NYSE Arca Equities Rule 5.2(j)(3), which sets forth the rules related to listing and trading criteria for “Investment Company Units.” See Securities Exchange Act Release No. 41983 (October 6, 1999), 64 FR 56008 (October 15, 1999) (SR-PCX-1998-29). In July 2001, the Commission also approved the Exchange’s generic listing standards for listing and trading, or the trading pursuant to UTP, of Investment Company Units under NYSE Arca Equities Rule 5.2(j)(3). See Securities Exchange Act Release No. 44551 (July 12, 2001), 66 FR 37716-01 (July 19, 2001) (SR-PCX-2001-14). The definition of an Investment Company Unit is set forth in NYSE Arca Equities Rule 5.1(b)(15), which provides that an Investment Company Unit is a security representing an interest in a registered investment company that could be organized as a unit investment trust, an open-end management investment company, or a similar entity.

<sup>4</sup> See Securities Exchange Act Release No. 56713 (October 29, 2007) (SR-Amex-2007-74) (granting approval to list and trade the Shares on Amex) (“Amex Approval Order”); Securities Exchange Act Release No. 56218 (August 7, 2007), 72 FR 45469 (August 14, 2007) (SR-Amex-2007-74) (providing notice of Amex’s proposal to list and trade the Shares (“Amex Notice”)).

of the Funds, including specific information about the portfolio composition for each Fund (e.g., the “IIV File” and portfolio composition file or “PCF”); the investment techniques for each of the Funds; the creation and redemption of baskets of Shares for each of the Funds; and the calculation methodology of the net asset value (“NAV”) for each of the Funds, among other things, can be found in the Amex Notice.

The Funds will be based on the following benchmark indexes: (1) the S&P 500 Index; (2) the S&P MidCap 400 Index; (3) the S&P Small Cap 600 Index; (4) the Russell 1000 Index; (5) the Russell 2000 Index; (6) the Russell 3000 Index; (7) the S&P 500 Consumer Discretionary Index; (8) the S&P 500 Consumer Staples Index; (9) the S&P 500 Energy Index; (10) the S&P 500 Financials Index; (11) the S&P 500 HealthCare Index; (12) the S&P 500 Industrials Index; (13) the S&P 500 Information Technology Index; (14) the S&P 500 Materials Index; and (15) the S&P 500 Utilities Index (each index individually referred to as an “Underlying Index,” and all Underlying Indexes collectively referred to as the “Underlying Indexes”).

As noted in the Amex Approval Order, quotations and last-sale information for the Shares will be disseminated through the facilities of the Consolidated Tape Association (“CT”). In addition, the NAV per Share of each Fund will be calculated and disseminated daily.<sup>5</sup> To provide updated information relating to each Fund for use by investors, professionals, and persons wishing to create or redeem Shares, Amex will disseminate through CT and CQ High Speed Lines information with respect to an Indicative Intra-Day Value (“IIV”) at least every 15 seconds throughout Amex’s trading day (as calculated by Amex),<sup>6</sup> market value of a Share for each Fund, recent NAV for each Fund, number of Shares outstanding for each Fund, and the

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<sup>5</sup> See Amex Notice, 72 FR at 45477.

<sup>6</sup> A detailed discussion of the calculation methodology of the IIV for each of the Funds can be found in the Amex Notice. See Amex Notice, 72 FR at 45477.

estimated cash amount and total cash amount per Creation Unit.<sup>7</sup> Amex will also make available on its Web site daily trading volume, the closing prices, the NAV, and the final dividend amounts to be paid for each Fund.

In addition, the value of each Underlying Index will be updated intra-day on a real-time basis as its individual component securities change in price. These intra-day values of each Underlying Index will be disseminated at least every 15 seconds throughout the trading day by Amex or another organization authorized by the relevant Underlying Index provider. Several independent data vendors also package and disseminate Underlying Index data in various value-added formats (including vendors displaying both securities and Underlying Index levels and vendors displaying Underlying Index levels only).

The Trust's Web site ([www.rydexinvestments.com](http://www.rydexinvestments.com)) will contain the following information for each Fund's Shares: (1) the prior business day's closing NAV, the reported closing price, and a calculation of the premium or discount of such price in relation to the closing NAV; (2) data for a period covering at least the four previous calendar quarters (or the life of a Fund, if shorter) indicating how frequently each Fund's Shares traded at a premium or discount to NAV based on the daily closing price and the closing NAV, and the magnitude of such premiums and discounts; (3) its prospectus and product description; and (4) other quantitative information, such as daily trading volume. The prospectus and/or product description for each Fund will inform investors that the Trust's Web site has information about the premiums and discounts at which the Fund's Shares have traded.

The Exchange represents that it will cease trading the Shares of the Fund if: (1) the listing market stops trading the Shares because of a regulatory halt similar to a halt based on

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<sup>7</sup> Each Fund will issue and redeem Shares only in aggregations of at least 50,000, each aggregation, a "Creation Unit." See Amex Notice, 72 FR at 45474.

NYSE Arca Equities Rule 7.12; or (2) the listing market delists the Shares. Additionally, the Exchange may cease trading the Shares if such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.<sup>8</sup> UTP trading in the Shares is also governed by the trading halts provisions of NYSE Arca Equities Rule 7.34 relating to temporary interruptions in the calculation or wide dissemination of the IIV or the value of the Underlying Index.

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4:00 a.m. Eastern Time ("ET) to 8:00 p.m. ET. The Exchange states that it has appropriate rules to facilitate transactions in the Shares during all trading sessions.

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules. The Exchange may obtain information via the Intermarket Surveillance Group ("ISG") from other exchanges that are members or affiliates of the ISG. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

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<sup>8</sup> The Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of a Fund. Trading 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 an Underlying Index and/or the Financial Instruments (as defined in the Amex Notice) of a Fund, or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In addition, trading in Shares could be halted pursuant to the Exchange's "circuit breaker" rule or by the halt or suspension of trading of the underlying securities. See NYSE Arca Equities Rule 7.12 (Trading Halts Due to Extraordinary Market Volatility).

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin (“Bulletin”) of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) the procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (2) 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;<sup>9</sup> (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated IIV will not be calculated or publicly disseminated; (4) how information regarding the IIV is disseminated; (5) 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 (6) trading information. In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the registration statement for the Fund. The Bulletin will also discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act.

## 2. Statutory Basis

The proposal is consistent with Section 6(b) of the Act,<sup>10</sup> in general, and Section 6(b)(5)

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<sup>9</sup> NYSE Arca Equities Rule 9.2(a) provides that an ETP Holder, before recommending a transaction, must have reasonable grounds to believe that the recommendation is suitable for the customer based on any facts disclosed by the customer as to his other security holdings and as to his 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 they believe would be useful to make a recommendation. See Securities Exchange Act Release No. 54045 (June 26, 2006), 71 FR 37971 (July 3, 2006) (SR-PCX-2005-115).

<sup>10</sup> 15 U.S.C. 78f(b).

of the Act,<sup>11</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 mechanism of a free and open market and a national market system. In addition, the proposal is consistent with Rule 12f-5 under the Act<sup>12</sup> because the Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities.

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

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

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. 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-2007-81 on the subject line.

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<sup>11</sup> 15 U.S.C. 78f(b)(5).

<sup>12</sup> 17 CFR 240.12f-5.

Paper comments:

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

All submissions should refer to File Number SR-NYSEArca-2007-81. 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 such filing also will be available for inspection and copying at the principal offices 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-2007-81 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

**IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change**

After careful review, 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.<sup>13</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>14</sup> which requires that an exchange have rules designed, among other things, 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 this proposal should benefit investors by increasing competition among markets that trade the Shares.

In addition, the Commission finds that the proposal is consistent with Section 12(f) of the Act,<sup>15</sup> which permits an exchange to trade, pursuant to UTP, a security that is listed and registered on another exchange.<sup>16</sup> The Commission notes that it previously approved the original listing and trading of the Shares on Amex.<sup>17</sup> The Commission finds that the proposal is consistent with Rule 12f-5 under the Act,<sup>18</sup> which provides that an exchange shall not extend UTP to a security unless the exchange has in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends UTP. The Exchange has represented that it meets this requirement because it deems the Shares to be equity securities, thus rendering

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<sup>13</sup> In approving this 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).

<sup>14</sup> 15 U.S.C. 78f(b)(5).

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

<sup>16</sup> Section 12(a) of the Act, 15 U.S.C. 78l(a), generally prohibits a broker-dealer from trading a security on a national securities exchange unless the security is registered on that exchange pursuant to Section 12 of the Act. Section 12(f) of the Act excludes from this restriction trading in any security to which an exchange “extends UTP.” When an exchange extends UTP to a security, it allows its members to trade the security as if it were listed and registered on the exchange even though it is not so listed and registered.

<sup>17</sup> See supra note 4.

<sup>18</sup> 17 CFR 240.12f-5.

trading in the Shares subject to the Exchange’s existing rules governing the trading of equity securities.

The Commission further believes that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Act,<sup>19</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. Quotations for and last-sale information for the Shares will be disseminated through the facilities of the CT. In addition, the NAV per Share of each Fund will be calculated and disseminated daily. Amex disseminates a variety of information through the facilities of the CT including the IIV per Share at least every 15 seconds throughout Amex’s trading day, including the market value of a Share for each Fund, the recent NAV for each Fund, the number of Shares outstanding for each Fund, and the estimated cash amount and total cash amount per Creation Unit. Moreover, the value of each Underlying Index will be updated intra-day on a real-time basis as its individual component securities change in price. These intra-day values of each Underlying Index will be disseminated at least every 15 seconds throughout the trading day by Amex or another organization authorized by the relevant Underlying Index provider. Finally, the Trust’s Web site will provide various information, including data for at least the four previous calendar quarters (or the life of a Fund, if shorter) indicating how frequently each Fund’s Shares traded at a premium or discount to NAV based on the daily closing price and the closing NAV, and the magnitude of such premiums and discounts.

The Commission also believes that the Exchange’s trading halt rules are reasonably designed to prevent trading in the Shares when transparency is impaired. Existing NYSE Arca

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<sup>19</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

Equities Rule 7.34(a)(4), which will apply to the trading of the Shares, provides that, if the IIV is no longer calculated or disseminated as required (a) during the Opening Session (4:00 a.m. to 9:30 a.m. ET), the Exchange may continue to trade the Shares for the remainder of the Opening Session; (b) during the Core Trading Session (9:30 a.m. to 4:00 p.m. ET), the Exchange must halt trading in the Shares; and (c) during the Late Trading Session (4:00 p.m. to 8:00 p.m. ET), the Exchange may continue trading in the Shares only if the original listing market traded such Shares until the close of its regular trading session without halt. If the Indicative IIV continues not to be calculated or disseminated as of the next business day's Opening Session, the Exchange will not commence trading in the Shares in such Opening Session. The Exchange may resume trading in the Shares only if the calculation and dissemination of the IIV resumes, or trading in the Shares resumes in the original listing market.

The Commission notes that, if the Shares should be delisted by the listing exchange, the Exchange would no longer have authority to trade the Shares pursuant to this order.

In support of this proposal, the Exchange has made the following representations:

- (1) The Exchange's surveillance procedures are adequate to address any concerns associated with the trading of the Shares on a UTP basis.
- (2) The Exchange would inform its members in an Information Bulletin of the special characteristics and risks associated with trading the Shares, including risks inherent with trading the Shares during the Opening and Late Trading Sessions when the updated IIV is not calculated and disseminated and suitability recommendation requirements.
- (3) The Exchange would require its members to deliver a prospectus or product description to investors purchasing Shares prior to or concurrently with a

transaction in such Shares and will note this prospectus delivery requirement in the Information Bulletin.

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

The Commission finds good cause for approving this proposal before the thirtieth day after the publication of notice thereof in the Federal Register. As noted above, the Commission previously approved the original listing and trading of the Shares on Amex. The Commission presently is not aware of any regulatory issue that should cause it to revisit those findings or would preclude the trading of the Shares on the Exchange pursuant to UTP. Accelerating approval of this proposal should benefit investors by creating, without undue delay, additional competition in the market for such Shares.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>20</sup> that the proposed rule change (SR-NYSEArca-2007-81) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>21</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>20</sup> 15 U.S.C. 78s(b)(2).

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