

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-57626; File No. SR-NYSEArca-2008-28)

April 4, 2008

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Trade Pursuant to Unlisted Trading Privileges Shares of the Bear Stearns Current Yield Fund

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 March 13, 2008, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”), through its wholly owned subsidiary NYSE Arca Equities, Inc., 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 proposal on an accelerated basis.

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

The Exchange proposes to trade pursuant to unlisted trading privileges (“UTP”) shares of the Bear Stearns Current Yield Fund, an investment portfolio of the Bear Stearns Active ETF Trust. The text of the proposed rule change is available at the Exchange’s principal office, 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

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

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

in 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

The Exchange proposes to trade pursuant to UTP shares (“Shares”) of the Bear Stearns Active ETF Trust (the “Trust”) under NYSE Arca Equities Rule 8.600.<sup>3</sup> The Trust consists of one investment portfolio, the Bear Stearns Current Yield Fund (“Fund”), and is an actively managed open-end investment company.

Recently, the American Stock Exchange LLC (“Amex”) adopted rules relating to listing and trading of securities issued by actively managed open-end investment companies (Managed Fund Shares), and to list Shares of the Trust pursuant to those new rules (“Amex Proposal”).<sup>4</sup>

a. Description of the Fund and the Trust

The Trust is organized as a Delaware statutory trust and is an open-end registered investment company under the Investment Company Act of 1940 (“1940 Act”).<sup>5</sup> The Fund, an exchange-traded fund, is the sole investment portfolio of the Trust.

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<sup>3</sup> Recently, the Commission approved NYSE Arca Equities Rule 8.600, which permits the listing and trading, or trading pursuant to UTP, of Managed Fund Shares. See Securities Exchange Act Release No. 57619 (April 4, 2008) (SR-NYSEArca-2008-25). Managed Fund Shares will be structured very similarly to Investment Company Units and Portfolio Depositary Receipts based on a stock index and listed or traded pursuant to UTP under NYSE Arca Equities Rules 5.2(j)(3) and 8.100, respectively. However, Managed Fund Shares will be managed like traditional actively-managed open-end investment companies and will have specified investment goals and objectives. Unlike exchange-traded funds based on a stock index, those goals and objectives will not involve seeking to replicate, or provide investment results that correspond generally to, the price and yield or total return performance of a specified index.

<sup>4</sup> See Securities Exchange Act Release No. 57297 (February 8, 2008), 73 FR 8723 (February 14, 2008) (SR-Amex-2008-02) (notice of the proposed rule change); Securities Exchange Act Release No. 57514 (March 17, 2008), 73 FR 15230 (March 21, 2008) (SR-Amex-2008-02) (order approving the proposed rule change).

The investment objective of the Fund is to seek as high a level of current income as is consistent with the preservation of capital and liquidity. The Fund will be actively managed by its portfolio manager, who will have discretion to choose securities for the Fund's portfolio consistent with the Fund's investment objective. The Fund's portfolio manager seeks to attain the Fund's objective by investing primarily in short-term debt obligations, including U.S. government securities, bank obligations, corporate debt obligations, mortgage-backed and asset-backed securities, municipal obligations, foreign bank obligations (U.S. dollar denominated), foreign corporate debt obligations (U.S. dollar denominated), repurchase agreements, and reverse repurchase agreements. The Fund is not a "money market" fund, nor is it subject to certain rules and regulations under the 1940 Act governing money market funds.

The Registration Statement for the Trust, including the prospectus and Statement of Additional Information ("SAI"), will provide a detailed description of the Fund including, but not limited to, structure, creation/redemption process, investment objectives and policies, characteristics, tax status, and distributions.<sup>6</sup> Investors are directed to the Fund's prospectus and SAI for a complete explanation of the Fund.

b. Availability of Information Regarding the Fund and the Shares

The daily NAV for the Fund will be calculated each business day and disseminated publicly to all market participants at the same time.

Prior to the opening each business day, the Fund will make publicly available on its Web site a file of all the portfolio securities held by the Fund and the quantities thereof, as of the close of business on the prior business day, reflecting all securities bought and sold on such prior

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<sup>5</sup> 15 U.S.C. 80a.

<sup>6</sup> See Securities Act Registration No. 333-141421 and Investment Company Act Registration No. 811-22038.

business day. This information will be available to investors and market participants accessing the Fund's Web site and will form the basis for the Fund's calculation of NAV as of the close of regular trading on the Exchange (ordinarily 4:00 p.m.).

Amex will disseminate, at least every 15 seconds, during regular Amex trading hours, through the facilities of the Consolidated Tape Association, an estimated value for the Fund on a per-Share basis (for purposes of proposed NYSE Arca Equities Rule 8.600, the "Portfolio Indicative Value"). An independent pricing service will calculate a Portfolio Indicative Value for the Fund in the manner discussed below. The Portfolio Indicative Value is designed to provide investors with a reference value which can be used in connection with other related market information. Amex will not guarantee the accuracy or completeness of the Portfolio Indicative Value. None of the Trust, the Board of Trustees of the Fund, or the Advisor is responsible for the calculation or dissemination of the Portfolio Indicative Value, and they make no warranty as to its accuracy or its usefulness to traders of Shares. The pricing service will calculate the Portfolio Indicative Value during hours of trading on the Exchange by dividing the "Estimated Fund Value" as of the time of the calculation by the total Shares outstanding. "Estimated Fund Value" is the sum of the estimated amount of cash held in the Fund's portfolio, the estimated value of the securities held in the Fund's portfolio, and the estimated amount of accrued interest, minus the estimated amount of liabilities.

The Fund's Web site will display the Prospectus, the SAI, and additional quantitative information that is updated on a daily basis, including, among other things, the following information, on a per-Share basis: (1) the prior business day's NAV; (2) and the reported mid-point of the bid-ask spread at the time of NAV calculation ("Bid-Ask Price"); (3) a calculation of the premium or discount of the Bid-Ask Price against such NAV; and (4) data in chart format

displaying the frequency distribution of discounts and premiums of the Bid-Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. Amex also intends to disseminate a variety of data with respect to Shares on a daily basis, by means of CTA and CQ High Speed Lines, including quotation and last-sale data information and the number of Shares outstanding.

As previously noted, prior to the opening of each business day, the Fund will make publicly available on its Web site the portfolio securities held by the Fund as of the close of business on the prior business day. All investors and market participants will have access to the Fund's Web site. This Web site disclosure of portfolio holdings will be made daily and will include, as applicable, the specific types and amounts of short-term debt securities and the amount of cash held in the portfolio of the Fund.

As with other exchange-traded funds, information regarding secondary market prices and volume of the Shares will be broadly available in real time throughout the trading day.

c. Trading Halts

The Exchange represents that it will cease trading the Shares of the Fund if the listing market stops trading the Shares because of a regulatory halt similar to a halt based on NYSE Arca Equities Rule 7.12. UTP trading in the Shares will also be governed by the trading halt provisions of NYSE Arca Equities Rule 7.34, relating to temporary interruptions in the calculation or wide dissemination of the Portfolio Indicative Value or the value of the underlying index.

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of a Fund.<sup>7</sup> Trading in Shares of the Fund

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<sup>7</sup> See NYSE Arca Equities Rule 7.12, Commentary .04.

will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also 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 a Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

d. Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which will include Managed Fund Shares) 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 and applicable federal securities laws.<sup>8</sup>

The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange may obtain information via the Intermarket Surveillance Group ("ISG") from other exchanges who are members or affiliate members of the ISG.<sup>9</sup>

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> See email dated April 4, 2008 from Michael Cavalier, Associate General Counsel, NYSE Group, Inc., to Christopher Chow, Special Counsel, Commission.

<sup>9</sup> A list of the current members and affiliate members of ISG may be found at [www.isgportal.com](http://www.isgportal.com). The Exchange notes that not all of the Fund's portfolio holdings may trade on exchanges that are members or affiliate members of the ISG.

e. Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of applicable suitability requirements and 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 Portfolio Indicative Value is not calculated and disseminated. Specifically, the Bulletin will discuss the following: (1) the procedures for purchases and redemptions of Shares in Creation Unit size (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>10</sup> (3) how information regarding the Portfolio Indicative Value is disseminated; (4) 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 (5) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Trust's Registration Statement. The Bulletin will discuss any exemptive, no-action, or interpretive relief granted by the Commission from any rules under the Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m. Eastern Time each trading day.

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<sup>10</sup> NYSE Arca Equities Rule 9.2(a) provides that ETP Holders, 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 the ETP Holder believes would be useful to make a recommendation. See Securities Exchange Act Release No. 34-54026 (June 21, 2006), 71 FR 36850 (June 28, 2006) (SR-PCX-2005-115).

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,<sup>11</sup> in general, and furthers the objectives of Section 6(b)(5)<sup>12</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. The Exchange believes that the proposed rule change will enhance competition among market participants to the benefit of investors and the marketplace.

In addition, the proposed rule change is consistent with Rule 12f-5 under the Act<sup>13</sup> because the Exchange deems the Shares to be equity securities, thus rendering the Shares subject to the Exchange's 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 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

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

## III. Solicitation of Comments

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

<sup>12</sup> 15 U.S.C. 78f(b)(5).

<sup>13</sup> 17 CFR 240.12f-5.

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-2008-28 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NYSEArca-2008-28. 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 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-2008-28 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>14</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act<sup>15</sup> 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, 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>16</sup> which permits an exchange to trade, pursuant to UTP, a security that is listed and registered on another exchange.<sup>17</sup> The Commission notes that it approved the original listing and

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

<sup>16</sup> 15 U.S.C. 78l(f).

<sup>17</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

trading of the Shares on Amex.<sup>18</sup> The Commission also finds that the proposal is consistent with Rule 12f-5 under the Act,<sup>19</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 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>20</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 and last-sale information regarding the Shares will be disseminated through the facilities of the CTA and Consolidated Quote High Speed Lines. Amex will disseminate through the facilities of the CTA an updated Portfolio Indicative Value on a per-Share basis at least every 15 seconds during regular Amex trading hours. The following information regarding the Trust will be disseminated on a daily basis: the portfolio securities held by the Trust; the NAV, which will be disseminated to all market participants at the same time; and the number of Shares outstanding.

The Commission also believes that the proposal is reasonably designed to prevent trading in the Shares when transparency is impaired. The Exchange represents that it will halt trading in the Shares if the listing market institutes a regulatory halt in trading of the Shares. The Exchange

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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>18</sup> See supra note 4.

<sup>19</sup> 17 CFR 240.12f-5.

<sup>20</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

also has represented that it would follow the procedures with respect to trading halts set forth in NYSE Arca Equities Rule 7.34, which provides, inter alia, for trading halts in certain circumstances when the Portfolio Indicative Value is not being disseminated as anticipated.

The Commission notes that, if the Shares should be delisted by the listing exchange, NYSE Arca 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 properly monitor trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.
2. Prior to the commencement of trading, the Exchange would inform its ETP Holders 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 Portfolio Indicative Value is not calculated and disseminated, and of suitability recommendation requirements.
3. The Information Bulletin also would discuss the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction.

This approval order is based on these representations.

The Commission finds good cause for approving the proposed rule change prior to the 30<sup>th</sup> day after the date of publication of the notice of filing thereof in the Federal Register.

Previously, the Commission found that the listing and trading of the Shares on Amex is consistent with the Act. The Commission presently is not aware of any regulatory issue that should cause it to revisit that finding or would preclude the trading of the Shares on the Exchange pursuant to UTP. Therefore, accelerating approval of this proposal should benefit investors by creating, without undue delay, additional competition in the market for the Shares.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>21</sup> that the proposed rule change (SR-NYSEArca-2008-28) is hereby 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).