

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-66201; File No. SR-NYSEArca-2011-86)

January 20, 2012

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change to List and Trade the Accuvest Global Opportunities ETF under NYSE Arca Equities Rule 8.600

I. Introduction

On November 16, 2011, NYSE Arca, Inc. (“Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”), 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> a proposed rule change to list and trade shares (“Shares”) of the Accuvest Global Opportunities ETF (“Fund”) under NYSE Arca Equities Rule 8.600. The proposed rule change was published for comment in the Federal Register on December 7, 2011.<sup>3</sup> The Commission received no comments on the proposal. This order grants approval of the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to list and trade the Shares of the Fund pursuant to NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares on the Exchange. The Shares will be offered by AdvisorShares Trust (“Trust”), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.<sup>4</sup> The investment adviser to the Fund is AdvisorShares

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

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

<sup>3</sup> See Securities Exchange Act Release No. 65862 (December 1, 2011), 76 FR 76457 (“Notice”).

<sup>4</sup> The Trust is registered under the Investment Company Act of 1940 (“1940 Act”). On May 9, 2011, the Trust filed with the Commission Post-Effective Amendment No. 25 to Form N-1A under the Securities Act of 1933 (15 U.S.C. 77a) and under the 1940 Act

Investments, LLC (“Adviser”). Accuvest Global Advisers is the Fund’s sub-adviser (“Sub-Adviser”) and provides day-to-day portfolio management of the Fund. Foreside Fund Services, LLC is the principal underwriter and distributor of the Fund’s Shares. The Exchange states that neither the Adviser nor the Sub-Adviser is affiliated with a broker-dealer.<sup>5</sup>

### Description of the Fund

The Fund will seek long-term capital appreciation in excess of global equity benchmarks such as the MSCI All Country World Index. The Fund will be a “fund-of-funds” that seeks to achieve its investment objective by investing primarily in other U.S.-listed exchange-traded products (“Underlying ETPs”).<sup>6</sup> The Sub-Adviser will seek to achieve the Fund’s investment objective by investing in Underlying ETPs that provide diversified exposure to select economies around the world. The Sub-Adviser will rank countries on a monthly basis using its proprietary

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relating to the Fund (File Nos. 333-157876 and 811-22110) (“Registration Statement”). In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. See Investment Company Act Release No. 29291 (May 28, 2010) (File No. 812-13677) (“Exemptive Order”).

<sup>5</sup> See Commentary .06 to NYSE Arca Equities Rule 8.600. The Exchange represents that in the event (a) the Adviser or the Sub-Adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes affiliated with a broker-dealer, it will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

<sup>6</sup> Underlying ETPs include Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)); Portfolio Depositary Receipts (as described in NYSE Arca Equities Rule 8.100); Trust Issued Receipts (as described in NYSE Arca Equities Rule 8.200); Commodity-Based Trust Shares (as described in NYSE Arca Equities Rule 8.201); Currency Trust Shares (as described in NYSE Arca Equities Rule 8.202); Commodity Index Trust Shares (as described in NYSE Arca Equities Rule 8.203); Trust Units (as described in NYSE Arca Equities Rule 8.500); Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600), and closed-end funds. The Underlying ETPs all will be listed and traded in the United States on registered exchanges. The Underlying ETPs in which the Fund may invest will primarily be index-based exchange-traded funds that hold substantially all of their assets in securities representing a specific index.

country ranking model in order to determine their relative attractiveness. The Sub-Adviser then will endeavor to invest in Underlying ETPs that individually or in combination correspond generally to the price and yield performance of the specific countries (or regions) identified as most attractive by the model. The Fund's portfolio will be invested only in countries with the highest ranking as identified by the Sub-Adviser's proprietary country ranking process.

The Fund intends to invest primarily in the securities of Underlying ETPs consistent with the requirements of Section 12(d)(1) of the 1940 Act, or any rule, regulation or order of the Commission or interpretation thereof. The Fund will only make such investments in conformity with the requirements of Section 817 of the Internal Revenue Code of 1986, as amended ("Code").<sup>7</sup>

The Fund, through its investment in Underlying ETPs, may invest in equity securities, which represent ownership interests in a company or partnership and consist of common stocks, preferred stocks, warrants to acquire common stock, securities convertible into common stock, investments in master limited partnerships and American Depositary Receipts ("ADRs"), as well as Global Depositary Receipts ("GDRs," and together with ADRs, collectively, "Depositary Receipts").<sup>8</sup> The Fund, through its investment in Underlying ETPs, may invest in closed-end funds, pooled investment vehicles that are registered under the 1940 Act and whose shares are listed and traded on U.S. national securities exchanges. The Fund, through its investment in

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<sup>7</sup> 26 CFR 1.817-5.

<sup>8</sup> ADRs and GDRs are certificates evidencing ownership of shares of a foreign issuer. Depositary Receipts may be sponsored or unsponsored. These certificates are issued by depositary banks and generally trade on an established market in the United States or elsewhere. The underlying shares are held in trust by a custodian bank or similar financial institution in the issuer's home country. The depositary bank may not have physical custody of the underlying securities at all times and may charge fees for various services.

Underlying ETPs, may invest in shares of real estate investment trusts, which are pooled investment vehicles that invest primarily in real estate or real estate related loans.

The Underlying ETPs in which the Fund will invest will primarily hold substantially all of their assets in securities representing a country (or region) specific index. The Underlying ETPs may invest in complex securities such as equity options, index options, repurchase agreements, foreign currency contracts, swaps, and futures contracts.

#### Investment Process and Portfolio Construction

The Sub-Adviser has developed its proprietary country ranking model around the premise that in the long run, country-specific effects are the most important drivers of global equity returns. Through its country ranking model, the Sub-Adviser ranks countries on a monthly basis in order to determine their relative merit.

The Sub-Adviser will use a four step process to create its portfolio allocations:

1. **Qualify Countries:** In order to determine which countries are to be included in the country ranking model, the Sub-Adviser will apply two consistent criteria. All qualified countries (a) must be part of the MSCI All Country World Index and (b) have a liquid Underlying ETP that tracks the performance of its equity market.
2. **Analyze Factor Data:** The Sub-Adviser will collect and analyze monthly factor data on every qualified country in the model. Currently, the Sub-Adviser uses nearly 40 factors that are classified within fundamental (e.g., short-term earnings growth), momentum (e.g., 3 month local price momentum), risk (e.g., change in 30-day standard deviation), and valuation (e.g., earnings growth) factor groups.
3. **Rank Countries:** Each month the Sub-Adviser will use the weighted individual factor scores for each country in the model to assign each country a relative

attractiveness score. This monthly score will be used to rank countries from most attractive to least attractive.

4. Create Portfolio: The Sub-Adviser will create the portfolio based on the underlying attractiveness score of each country in the model. The most attractive five to six countries will receive allocations in the portfolio, and the Sub-Adviser will purchase single country Underlying ETPs that represent investments in those countries' equity markets. No single country Underlying ETP may receive more than a 25% allocation at purchase price.

#### Other Investments

To respond to adverse market, economic, political, or other conditions,<sup>9</sup> the Fund may invest 100% of its total assets, without limitation, in high-quality, short-term debt securities and money market instruments. The Fund may be invested in these instruments for extended periods, depending on the Sub-Adviser'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, U.S. Government securities, repurchase agreements,<sup>10</sup> and bonds that are BBB or higher. The Fund may also invest a substantial portion

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<sup>9</sup> Adverse market conditions would include large downturns in the broad market value of two or more times current average volatility, where the Sub-Adviser views such downturns as likely to continue for an extended period of time. Adverse economic conditions would include significant negative results in factors deemed critical at the time by the Sub-Adviser, including significant negative results regarding unemployment, Gross Domestic Product, consumer spending, or housing numbers. Adverse political conditions would include events such as government overthrows or instability, where the Sub-Adviser expects that such events may potentially create a negative market or economic condition for an extended period of time.

<sup>10</sup> The Fund may enter into repurchase agreements with financial institutions, which may be deemed to be loans. The Fund follows certain procedures designed to minimize the risks inherent in such agreements. These procedures include effecting repurchase transactions only with large, well-capitalized, and well-established financial institutions whose

of its assets in such instruments at any time to maintain liquidity or pending selection of investments in accordance with its policies.

While under normal market conditions the Fund will primarily invest in Underlying ETPs, the Fund may, to a limited extent, invest directly in other investments. The Fund, or the Underlying ETPs in which it invests, may invest in U.S. government securities. The Fund may invest in exchange-traded notes (“ETNs”).<sup>11</sup> The Fund, or the Underlying ETPs in which it invests, may invest in U.S. Treasury zero-coupon bonds.<sup>12</sup>

The Fund will seek to qualify for treatment as a regulated investment company under Subchapter M of the Code. The Fund may not (i) with respect to 75% of its total assets, purchase securities of any issuer (except securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities or shares of investment companies) if, as a result, more than 5% of its total assets would be invested in the securities of such issuer, or (ii) acquire more than 10% of the outstanding voting securities of any one issuer. In addition, the Fund may not invest 25% or more of its total assets in the securities of one or more issuers conducting their principal business activities in the same industry or group of industries (this limitation does not apply to

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condition will be continually monitored by the Sub-Adviser. In addition, the value of the collateral underlying the repurchase agreement will always be at least equal to the repurchase price, including any accrued interest earned on the repurchase agreement. In the event of a default or bankruptcy by a selling financial institution, the Fund will seek to liquidate such collateral. In addition, the Fund may enter into reverse repurchase agreements without limit as part of the Fund’s investment strategy. Reverse repurchase agreements involve sales by the Fund of portfolio assets concurrently with an agreement by the Fund to repurchase the same assets at a later date at a fixed price.

<sup>11</sup> ETNs are debt obligations of investment banks which are traded on exchanges and the returns of which are linked to the performance of market indexes.

<sup>12</sup> These securities are U.S. Treasury bonds which have been stripped of their unmatured interest coupons, the coupons themselves, and receipts or certificates representing interests in such stripped debt obligations and coupons. Interest is not paid in cash during the term of these securities, but is accrued and paid at maturity.

investments in securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities, or shares of investment companies). The Fund will not invest 25% or more of its total assets in any investment company that so concentrates.

The Fund will not purchase illiquid securities, including Rule 144A securities and loan participation interests. Further, in accordance with the Exemptive Order, the Fund will not invest in options contracts, futures contracts, or swap agreements. The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. Except for Underlying ETPs that may hold non-U.S. issues, the Fund will not otherwise invest in non-U.S. issues.

Additional information regarding the Trust, Fund, Shares, Fund's investment strategies, risks, creation and redemption procedures, fees, portfolio holdings and disclosure policies, distributions and taxes, availability of information, trading rules and halts, and surveillance procedures, among other things, can be found in the Notice and the Registration Statement, as applicable.<sup>13</sup>

### III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 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> which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to

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<sup>13</sup> See Notice and Registration Statement, supra notes 3 and 4, respectively.

<sup>14</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>15</sup> 17 U.S.C. 78f(b)(5).

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 notes that the Fund and the Shares must comply with the requirements of NYSE Arca Equities Rule 8.600 to be listed and traded on the Exchange.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,<sup>16</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. Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association ("CTA") high-speed line, and for the Underlying ETPs, will be available from the national securities exchanges on which they are listed. In addition, the Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Core Trading Session.<sup>17</sup> 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 the net asset value ("NAV") at the end of the business day.<sup>18</sup> The Fund will calculate NAV once each business day as of the regularly

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<sup>16</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

<sup>17</sup> According to the Exchange, several major market data vendors display and/or make widely available Portfolio Indicative Values published on the CTA or other data feeds.

<sup>18</sup> On a daily basis, the Adviser will disclose on the Fund's website for each portfolio security or other financial instrument of the Fund the following information: Ticker

scheduled close of trading on the New York Stock Exchange (normally 4:00 p.m. Eastern Time). In addition, information regarding market price and trading volume of the Shares 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 for the Shares will be published daily in the financial section of newspapers. The Fund's website will also include a form of the prospectus for the Fund, information relating to NAV, and other quantitative and trading information. Moreover, 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 NYSE via the National Securities Clearing Corporation.

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 per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.<sup>19</sup> In addition, 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 may halt trading in the Shares if trading is not occurring in the securities and/or the financial instruments comprising the Disclosed Portfolio of the Fund, or if other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are

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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. The website information will be publicly available at no charge.

<sup>19</sup> See NYSE Arca Equities Rule 8.600(d)(1)(B).

present.<sup>20</sup> The Exchange will consider the suspension of trading in or removal from listing of the Shares if 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.<sup>21</sup> The Exchange represents that neither the Adviser nor the Sub-Adviser is affiliated with a broker-dealer.<sup>22</sup> Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio must 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.<sup>23</sup> The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. The Commission also notes that the Exchange is able to

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<sup>20</sup> 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 the Fund. Trading in Shares of the Fund 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.

<sup>21</sup> See NYSE Arca Equities Rule 8.600(d)(2)(C)(ii).

<sup>22</sup> See supra note 5 and accompanying text. The Commission notes that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (“Advisers Act”). As a result, the Adviser and Sub-Adviser and their related personnel are subject to the provisions of Rule 204A-1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A-1 under the Advisers Act. In addition, Rule 206(4)-7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

<sup>23</sup> See NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

obtain information with respect to the Underlying ETPs from the U.S. exchanges, which are members of the Intermarket Surveillance Group, listing and trading such Underlying ETPs.

The Exchange further represents 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 applicable to derivative products, which include Managed Fund Shares, 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. All Underlying ETPs will be listed on national securities exchanges, all of which are members of the Intermarket Surveillance Group.
- (4) Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit ("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 (and 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 Portfolio Indicative Value will not be calculated or publicly disseminated; (d) how information regarding the Portfolio Indicative Value is disseminated; (e) 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 (f) trading information.

- (5) For initial and/or continued listing, the Fund will be in compliance with Rule 10A-3 under the Act,<sup>24</sup> as provided by NYSE Arca Equities Rule 5.3.
- (6) The Fund will not: (a) purchase illiquid securities, including Rule 144A securities and loan participation agreements; (b) pursuant to the terms of the Exemptive Order, invest in options contracts, futures contracts, or swap agreements; and (c) except for Underlying ETPs that may hold non-U.S. issues, otherwise invest in non-U.S. issues.
- (7) The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage.
- (8) A minimum of 100,000 Shares of the Fund will be outstanding at the commencement of trading on the Exchange.

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 Act<sup>25</sup> and the rules and regulations thereunder applicable to a national securities exchange.

#### IV. Conclusion

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<sup>24</sup> See 17 CFR 240.10A-3.

<sup>25</sup> 15 U.S.C. 78f(b)(5).

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>26</sup> that the proposed rule change (SR-NYSEArca-2011-86) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>27</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>26</sup> 15 U.S.C. 78s(b)(2).

<sup>27</sup> 17 CFR 200.30-3(a)(12).