

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-66818; File No. SR-NYSEArca-2012-33)

April 17, 2012

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Peritus High Yield ETF

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on April 10, 2012, NYSE Arca, Inc. (“Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to reflect a change to the holdings of the Peritus High Yield ETF to achieve its investment objective to include equity securities. 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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

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

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

1. Purpose

The Commission has approved a proposal to list and trade on the Exchange shares (“Shares”) of the Peritus High Yield ETF (“Fund”) under NYSE Arca Equities Rule 8.600,<sup>3</sup> which governs the listing and trading of Managed Fund Shares.<sup>4</sup> The Shares are 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>5</sup> The Fund is currently listed and traded on the Exchange under NYSE Arca Equities Rule 8.600.

The investment adviser to the Fund is AdvisorShares Investments, LLC (“Adviser”).

Peritus I Asset Management, LLC is the Fund’s sub-adviser (“Sub-Adviser”).

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<sup>3</sup> See Securities Exchange Act Release No. 63329 (November 17, 2010), 75 FR 71760 (November 24, 2010) (SR-NYSEArca-2010-86) (“Prior Order”). The notice with respect to the Prior Order was published in Securities Exchange Act Release No. 63041 (October 5, 2010), 75 FR 62905 (October 13, 2010) (“Prior Notice” and, together with the Prior Order, “Prior Release”).

<sup>4</sup> A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1) (“1940 Act”) organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

<sup>5</sup> The Trust is registered under the 1940 Act. On October 28, 2011, the Trust filed with the Commission an amendment to its registration statement on Form N-1A under the Securities Act of 1933 (15 U.S.C. 77a) and the 1940 Act relating to the Fund (File Nos. 333-157876 and 811-22110) (“Registration Statement”). The description of the operation of the Trust and the Fund herein is based, in part, on the 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”).

According to the Registration Statement and as stated in the Prior Release, the Fund's investment objective is to achieve high current income with a secondary goal of capital appreciation. The Sub-Adviser seeks to achieve the Fund's investment objective by selecting, among other investments, a focused portfolio of 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. The Adviser represents that the investment objective of the Fund is not changing.

The Exchange proposes to reflect a change to the holdings of the Fund to achieve its investment objective to include equity securities. Thus, in addition to the investments referenced in the Prior Release, the Fund seeks to invest to a lesser extent (generally, no more than 10% of its net assets) in equity securities that the Sub-Adviser believes will yield high dividends.<sup>6</sup> According to the Registration Statement, equity securities in which the Fund may invest will include common stock, preferred stock, warrants, convertible securities, rights, master limited partnerships, depositary receipts (including American Depositary Receipts ("ADRs") and Global Depositary Receipts ("GDRs")),<sup>7</sup> and real estate investment trusts. Depositary receipts held by the Fund may be sponsored or unsponsored, provided that no more than 10% of the Fund's net assets will be

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<sup>6</sup> The change to the Fund's holdings to include equity securities will be effective upon filing with the Commission of an amendment to the Trust's Registration Statement on Form N-1A, and shareholders will be notified of such change by means of such amendment.

<sup>7</sup> According to the Registration Statement, ADRs and GDRs are certificates evidencing ownership of shares of a foreign issuer. 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, including forwarding dividends and interest and corporate actions.

invested in unsponsored depositary receipts. With the exception of unsponsored depositary receipts, all equity securities held by the Fund will be listed and traded on U.S. national securities exchanges.

Pursuant to the terms of the Exemptive Order, the Fund will not invest in options contracts, futures contracts, or swap agreements. The Fund's investments will be consistent with its investment objective and will not be used to enhance leverage.

As stated in the Prior Release, on each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund discloses on its website the Disclosed Portfolio, which will include information relating to equity securities, among other investments, that will form the basis for the Fund's calculation of net asset value ("NAV") at the end of the business day. The intra-day, closing, and settlement prices of the portfolio securities, including any equity securities held by the Fund, are also readily available from the national securities exchanges trading such securities, automated quotation systems, published or other public sources, or on-line information services. All representations made in the Prior Release regarding the availability of information relating to the Shares, trading halts, trading rules, the Portfolio Indicative Value, and surveillance, among others, will continue to apply to trading in the Shares.

The Adviser represents that the proposed change to permit limited investment in equity securities, as described above, is consistent with the Fund's investment objective, and will further assist the Adviser and Sub-Adviser to achieve such investment objective. Specifically, by investing to a limited extent in equity securities, the Fund will have additional flexibility to achieve high current income through investments in dividend-paying equity securities, and to achieve the secondary goal of capital appreciation through possible price appreciation of such equity investments. Except for the change noted above, all other representations made in the Prior Release

remain unchanged.<sup>8</sup> The Fund will continue to comply with all initial and continued listing requirements under NYSE Arca Equities Rule 8.600.

## 2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(5)<sup>9</sup> that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 8.600. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange may obtain information via the Intermarket Surveillance Group (“ISG”) from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. No more than 10% of the Fund’s net assets will be invested in unsponsored depositary receipts. With the exception of unsponsored depositary receipts, all equity securities held by the Fund will be listed and traded on U.S. national securities exchanges.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the NAV per Share is calculated daily and that

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<sup>8</sup> See note 3, *supra*. All terms referenced but not defined herein are defined in the Prior Release.

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

the NAV and the Disclosed Portfolio is made available to all market participants at the same time. In addition, a large amount of information is publicly available regarding the Fund and the Shares, thereby promoting market transparency. The Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600 (c)(3), is disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Core Trading Session. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund discloses on its website the Disclosed Portfolio that will form the basis for the Fund's calculation of NAV at the end of the business day. 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 quotation and last-sale information is available via the Consolidated Tape Association high-speed line. The intra-day, closing, and settlement prices of the portfolio securities, including any equity securities held by the Fund, are also readily available from the national securities exchanges trading such securities, automated quotation systems, published or other public sources, or on-line information services. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Trading in the Shares is subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted. The website for the Fund includes a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information. In addition, as stated in the Prior Notice, investors have ready access to information regarding the Fund's holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last-sale information for the Shares.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as stated in the Prior Notice, investors have ready access to information regarding the Fund's holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last-sale information for the Shares.

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

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>10</sup> and Rule 19b-4(f)(6) thereunder.<sup>11</sup> Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of

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<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>12</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission notes that waiver of the operative delay would permit the Fund to invest immediately in equity securities that the Sub-Adviser believes will yield high dividends.<sup>13</sup>

With the exception of unsponsored depositary receipts in which the Fund may invest up to 10% of its net assets, all equity securities proposed to be held by the Fund would be listed and traded on U.S. national securities exchanges. In addition, the Fund will generally not invest more than 10% of its net assets in such equity securities. The Exchange represents that the limited investments in equity securities would be consistent with the Fund's investment objective, which is to achieve high current income and capital appreciation. Specifically, the Exchange represents that, by investing to a limited extent in equity securities, the Fund would have additional flexibility to achieve high current income through investments in dividend-paying equity securities and to achieve capital appreciation through possible price appreciation of such equity investments. Further, the Exchange represents that such investment objective is not changing, all other representations made in the Prior Release remain unchanged, and the Fund will continue to comply with all of the listing requirements under NYSE Arca Equities

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<sup>12</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>13</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

Rule 8.600. For the foregoing reasons, the Commission believes that the proposed change does not raise novel or unique regulatory issues that should delay the implementation of the Fund's proposed investments in certain equity securities. Therefore, the Commission waives the 30-day operative delay requirement because the rule change is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2012-33 on the subject line.

##### Paper Comments:

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

All submissions should refer to File Number SR-NYSEArca-2012-33. 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 website (<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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2012-33 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).