

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-68408; File No. SR-NYSEArca-2012-117)

December 11, 2012

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change to List and Trade Shares of the Pring Turner Business Cycle ETF under NYSE Arca Equities Rule 8.600

On October 17, 2012, 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 Pring Turner Business Cycle ETF (“Fund”). The proposed rule change was published for comment in the Federal Register on October 31, 2012.<sup>3</sup> The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change.

I. Description of the Proposal

The Exchange proposes to list and trade Shares 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> Securities Exchange Act Release No. 68108 (October 25, 2012), 77 FR 65920 (“Notice”).

<sup>4</sup> The Trust is registered under the 1940 Act. On October 12, 2012, 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 under the 1940 Act relating to the Fund (File Nos. 333-157876 and 811-22110) (“Registration Statement”). The Fund will seek to qualify for treatment as a Regulated Investment Company under the Internal Revenue Code. The Commission has issued an order granting certain exemptive relief to the Trust

Investments, LLC (“Adviser”). Pring Turner Capital Group (“Sub-Adviser”) is the Fund’s 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 Bank of New York Mellon serves as the administrator, custodian, transfer agent and fund accounting agent for the Fund. The Exchange states that neither the Adviser nor the Sub-Adviser is affiliated with a broker-dealer.<sup>5</sup>

Investment Objective. The Fund’s investment objective is to seek long-term total return from capital appreciation and income. The overriding investment goal of the Fund is to protect the value of the Fund’s portfolio during unfavorable market conditions and to grow the value of the Fund’s portfolio in favorable market conditions. Utilizing its proprietary business cycle research, the Sub-Adviser proactively will change the Fund’s asset allocation and sector emphasis in seeking to minimize the Fund’s portfolio risk and to optimize portfolio returns throughout the business cycle.

Fund Holdings. The Sub-Adviser will invest the Fund’s portfolio in securities that provide diversified exposure to the three primary asset classes (i.e., stocks, bonds and commodities) across a wide range of economic sectors. In seeking its objective, the Fund may invest in U.S. and foreign equity securities; debt securities; exchange-traded products (“Underlying ETPs”)<sup>6</sup>; and cash and cash equivalents, as described below. The Fund may invest

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under the 1940 Act. See Investment Company Act Release No. 29291 (May 28, 2010) (File No. 812-13677) (“Exemptive Order”).

<sup>5</sup> The Exchange represents that in the event (a) the 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. See Notice, *supra* note 3, 77 FR at 65921.

<sup>6</sup> Underlying ETPs include Investment Company Units (as described in NYSE Arca

in equity securities of any capitalization range and in any market sector at any time as necessary to seek to achieve the Fund's investment objective.

According to the Registration Statement, the equity securities in which the Fund may invest include common and preferred stock, Master Limited Partnerships, rights, U.S.- listed REITs, and depositary receipts, including American Depositary Receipts ("ADRs"), as well as Global Depositary Receipts ("GDRs"), which are certificates evidencing ownership of shares of a foreign issuer. Depositary receipts may be sponsored or unsponsored.<sup>7</sup> The Fund may invest in issuers located outside the United States, or in financial instruments that are indirectly linked to the performance of foreign issuers. Examples of such financial instruments include ADRs, GDRs, European Depositary Receipts, International Depositary Receipts, "ordinary shares," and "New York shares" issued and traded in the United States. The U.S. equity securities in which the Fund will invest will be listed on a national securities exchange, except that the Fund may invest up to 10% of total assets in ADRs that are not listed on any national securities exchange

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Equities Rule 5.2(j)(3)); Index-Linked Securities (as described in NYSE Arca Equities Rule 5.2(j)(6)); 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 U.S. on registered exchanges. The Fund may invest in the securities of Underlying ETPs registered under the 1940 Act 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. 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. While the Fund may invest in inverse Underlying ETPs, the Fund will not invest in leveraged (e.g., 2X, -2X, 3X or -3X) Underlying ETPs.

<sup>7</sup> The Fund generally will invest in sponsored ADRs but it may invest up to 10% of total assets in unsponsored ADRs.

and that are traded over-the-counter. The Fund also may invest in equity securities of foreign issuers; the foreign equity securities, including any depositary receipts, in which the Fund may invest will be limited to securities that trade in markets that are members of the Intermarket Surveillance Group (“ISG”), which includes all U.S. national securities exchanges and certain foreign exchanges, or are parties to a comprehensive surveillance sharing agreement with the Exchange.

From time to time, the Sub-Adviser may invest a portion of the Fund’s portfolio in unleveraged inverse ETFs to stabilize the Fund’s portfolio values. An unleveraged inverse ETF is designed to provide a return opposite of an index or other benchmark, typically for a single trading day.

The Fund may invest in debt securities.<sup>8</sup> Some debt securities, such as zero coupon bonds, do not make regular interest payments but are issued at a discount to their principal or maturity value. Debt securities include a variety of fixed income obligations, including, but not limited to, corporate debt securities, government securities, municipal securities, convertible securities, and mortgage-backed securities. Debt securities include investment-grade securities, non-investment-grade securities, and unrated securities. Investments in non-investment grade debt securities will be limited to 15% of the Fund’s net assets. The Fund may invest in variable and floating rate securities. The Fund may invest in U.S. government securities and U.S. Treasury zero-coupon bonds. Securities issued or guaranteed by the U.S. government or its agencies or instrumentalities include U.S. Treasury securities, which are backed by the full faith

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<sup>8</sup> In this context, the Exchange describes a debt security as a security consisting of a certificate or other evidence of a debt (secured or unsecured) on which the issuing company or governmental body promises to pay the holder thereof a fixed, variable, or floating rate of interest for a specified length of time, and to repay the debt on the specified maturity date.

and credit of the U.S. Treasury and which differ only in their interest rates, maturities, and times of issuance; U.S. Treasury bills, which have initial maturities of one-year or less; U.S. Treasury notes, which have initial maturities of one to ten years; and U.S. Treasury bonds, which generally have initial maturities of greater than ten years.

According to the Registration Statement, to respond to adverse market, economic, political or other conditions, the Fund may invest 100% of its total assets, without limitation, in high-quality debt securities and money market instruments either directly or through Underlying ETPs. The Fund may be invested in this manner for extended periods depending on the Sub-Adviser's assessment of market conditions. These short-term debt instruments and money market instruments include shares of other mutual funds, commercial paper, certificates of deposit, bankers' acceptances, and U.S. government securities.

In the ordinary course of business, the Fund may purchase securities on a when-issued or delayed-delivery basis (i.e., delivery and payment can take place between a month and 120 days after the date of the transaction). These securities are subject to market fluctuation and no interest accrues to the purchaser during this period. At the time the Fund makes the commitment to purchase securities on a when-issued or delayed-delivery basis, the Fund will record the transaction and thereafter reflect the value of the securities, each day, in determining the Fund's net asset value ("NAV"). The Fund will not purchase securities on a when-issued or delayed-delivery basis if, as a result, more than 15% of the Fund's net assets would be so invested.

The Fund may engage in short sales transactions in which the Fund sells a security it does not own.

The Fund may enter into repurchase agreements with financial institutions, which may be deemed to be loans. The Fund may enter into reverse repurchase agreements without limit as

part of the Fund's investment strategy. However, the Fund does not expect to engage, under normal circumstances, in reverse repurchase agreements with respect to more than 33 1/3% of its assets.

Investment Policies and Restrictions. 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. For purposes of this policy, the issuer of a depositary receipt will be deemed to be the issuer of the respective underlying security.<sup>9</sup>

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. The Fund will not invest 25% or more of its total assets in any investment company that so concentrates. This limitation does not apply to investments in securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities, or shares of investment companies. For purposes of this policy the issuer of ADRs will be deemed to be the issuer of the respective underlying security.

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities and loan participation interests. The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if,

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<sup>9</sup> The diversification standard is set forth in Section 5(b)(1) of the 1940 Act.

through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid securities. Illiquid securities include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

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.<sup>10</sup>

## II. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act<sup>11</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>12</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>13</sup> which requires, among other things, that the Exchange's rules be 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 notes that

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<sup>10</sup> Additional information regarding the Trust and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions and taxes is included in the Registration Statement and/or the Notice.

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

<sup>12</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

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>14</sup> which sets forth Congress’s 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. 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 Core Trading Session.<sup>15</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), held by the Fund that will form the basis for the Fund’s calculation of NAV at the end of the business day.<sup>16</sup> The NAV of the Fund will be determined at the close of regular trading (ordinarily 4:00 p.m. Eastern Time) every day the New York Stock Exchange is open. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the

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<sup>14</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

<sup>15</sup> According to the Exchange, several major market data vendors widely disseminate Portfolio Indicative Values taken from CTA or other data feeds. See Notice, supra note 3, 77 FR at 65925 n.27.

<sup>16</sup> On a daily basis, the Adviser will disclose for each portfolio security and other financial instrument of the Fund the following information: ticker symbol (if applicable); name and, when available, the individual identifier (CUSIP) of the security and/or financial instrument; number of shares and dollar value of securities and financial instruments held in the portfolio; and percentage weighting of the security and financial instrument in the portfolio. The website information will be publicly available at no charge.

day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. The intra-day, closing and settlement prices of many of the portfolio investments (e.g., exchange-traded equity securities and ETPs) also are readily available from the national securities exchanges trading such securities, automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters. The Fund's website will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

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>17</sup> In addition, trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares may be halted. The Exchange 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 present.<sup>18</sup> Further, the Commission notes that the

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<sup>17</sup> See NYSE Arca Equities Rule 8.600(d)(1)(B).

<sup>18</sup> See NYSE Arca Equities Rule 8.600(d)(2)(C) (providing additional considerations for the suspension of trading in or removal from listing of Managed Fund Shares on the Exchange). With respect to trading halts, the Exchange may consider other relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading in Shares 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

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>19</sup> The U.S. equity securities in which the Fund will invest will be listed on a national securities exchange, except that the Fund may invest up to 10% of total assets in ADRs that are not listed on any national securities exchange and that are traded over-the-counter. The Fund also may invest in equity securities of foreign issuers. The foreign equity securities, including any depositary receipts, in which the Fund may invest will be limited to securities that trade in markets that are members of the ISG, which includes all U.S. national securities exchanges and certain foreign exchanges, or are parties to a comprehensive surveillance sharing agreement with the Exchange. The Exchange may obtain information via the ISG from other exchanges that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. The Exchange represents that neither the Adviser nor the Sub-Adviser is affiliated with a broker-dealer.<sup>20</sup>

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reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

<sup>19</sup> See NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

<sup>20</sup> See *supra* text accompanying note 5. 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 its 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)

The Exchange 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 be subject to NYSE Arca Equities Rule 8.600, which sets forth the initial and continued listing criteria applicable to Managed Fund Shares.
- (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.
- (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 Units (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

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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.

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 must be in compliance with Rule 10A-3 under the Act,<sup>21</sup> as provided by NYSE Arca Equities Rule 5.3.
- (6) All Underlying ETPs and securities in which the Fund may invest will be listed on securities exchanges, all of which are members of ISG or have entered into a comprehensive surveillance sharing agreement with the Exchange, provided that the Fund may invest up to 10% of total assets in ADRs that are not listed on any national securities exchange and are traded over-the-counter. The Fund will not invest in leveraged (e.g., 2X, -2X, 3X or -3X) Underlying ETPs. Consistent 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 its investment objective and will not be used to enhance leverage.
- (7) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities and loan participation agreements.
- (8) Investments in non-investment grade securities will be limited to 15% of the Fund's assets.
- (9) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.

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<sup>21</sup> 17 CFR 240.10A-3.

This approval order is based on all of the Exchange's representations and description of the Fund, including those set forth above and in the Notice.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act<sup>22</sup> and the rules and regulations thereunder applicable to a national securities exchange.

### III. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>23</sup> that the proposed rule change (SR-NYSEArca-2012-117) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>24</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>22</sup> 15 U.S.C. 78f(b)(5).

<sup>23</sup> 15 U.S.C. 78s(b)(2).

<sup>24</sup> 17 CFR 200.30-3(a)(12).