

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-78614; File No. SR-NYSEArca-2016-64)

August 18, 2016

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, to List and Trade Shares of the AdvisorShares KIM Korea Equity ETF

On May 2, 2016, NYSE Arca, Inc. (“Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the AdvisorShares KIM Korea Equity ETF (“Fund”) under NYSE Arca Equities Rule 8.600. On May 13, 2016, the Exchange submitted Amendment No. 1 to the proposed rule change.³ The Commission published notice of the proposed rule change, as modified by Amendment No. 1, in the Federal Register on May 23, 2016.⁴ On May 23, 2016, the Exchange submitted Amendment No. 2 to the proposed rule change.⁵ On July 7, 2016, pursuant to Section 19(b)(2) of the Act,⁶ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 replaced and superseded the original filing in its entirety. Amendment No. 1 is available at <https://www.sec.gov/comments/sr-nysearca-2016-64/nysearca201664-1.pdf>.

⁴ See Securities Exchange Act Release No. 34-77847 (May 17, 2016), 81 FR 32364 (NYSEArca-2016-64) (“Notice”).

⁵ In Amendment No. 2, which replaced and superseded the original filing in its entirety, the Exchange clarified certain statements relating to the Fund’s investments in Depository Receipts and certain representations by the Exchange relating to surveillance. Amendment No. 2 is available at <https://www.sec.gov/comments/sr-nysearca-2016-64/nysearca201664-2.pdf>. Because Amendment No. 2 does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 2 is not subject to notice and comment.

⁶ 15 U.S.C. 78s(b)(2).

whether to disapprove the proposed rule change.⁷ The Commission received no comments on the proposed rule change. This order institutes proceedings under Section 19(b)(2)(B) of the Act⁸ to determine whether to approve or disapprove the proposed rule change, as modified by Amendment Nos. 1 and 2.

I. The Exchange’s Description of the Proposal⁹

The Exchange proposes to list and trade the Shares under 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”), an open-end management investment company.¹⁰ The investment adviser to the Fund will be AdvisorShares Investments LLC (“Adviser”) and Korea Investment Management Co., Ltd. will be the Fund’s sub-adviser (“Sub-Adviser”). Foreside Fund Services, LLC will be the principal underwriter and distributor of the Fund’s Shares, and the Bank of New York Mellon will serve as the administrator, custodian, and transfer agent for the Fund.

⁷ See Securities Exchange Act Release No. 78240, 81 FR 45332 (July 13, 2016). The Commission designated August 21, 2016, as the date by which the Commission would either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

⁸ 15 U.S.C. 78s(b)(2)(B).

⁹ Additional information regarding the Fund, the Shares, and the Trust (as defined herein), including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings, disclosure policies, calculation of net asset value, distributions, and taxes, among other things, can be found in the Notice and the Registration Statement, as applicable. See Notice, supra note 4, and Registration Statement, infra note 10.

¹⁰ The Exchange states that the Trust is registered under the Investment Company Act of 1940 (“1940 Act”) and that on March 25, 2016, the Trust filed with the Commission amendments to its registration statement on Form N-1A under the Securities Act of 1933 (“Securities Act”) and under the 1940 Act relating to the Fund (File Nos. 333-157876 and 811-22110) (“Registration Statement”). In addition, the Exchange states that 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).

The Fund's Principal Investments

The Exchange states that the investment objective of the Fund will be to seek to provide long-term capital appreciation above the capital appreciation of its primary benchmark, the MSCI Korea Index, and other Korea-focused indexes. The Fund will seek to achieve its investment objective by investing primarily in growth-oriented stocks of any capitalization range listed on the Korea Exchange. Under normal circumstances,¹¹ the Fund will invest at least 80% of its net assets (plus any borrowings for investment purposes) in equity securities listed on the Korea Exchange.¹²

The Exchange states that the Sub-Adviser will manage the Fund's portfolio by buying and holding stocks of companies at attractive valuation that it believes have growth potential. The Sub-Adviser will focus on corporate fundamental research in its stock selection, often called "bottom up" analysis. The Sub-Adviser will invest the Fund's assets with a mid- to-long-term view, typically seeking to avoid short-term trading. In selecting investments for the Fund's portfolio, the Sub-Adviser will place emphasis on fundamentals rather than on short-term momentum and continuously monitor market risks. In deciding whether to sell investments in the Fund's portfolio, the Sub-Adviser will consider the following factors: a company's stock price reaches its target price; a company in the portfolio experiences negative fundamental changes; errors are found in the previous assumptions or forecasts of a company; and more profitable alternatives are found.

¹¹ The Exchange states that the term "under normal circumstances" means, without limitation, the absence of extreme volatility or trading halts in the equity markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance.

¹² The Korea Exchange is a member of the Intermarket Surveillance Group ("ISG").

In addition to individual stock selection, the Exchange states that the Sub-Adviser will engage in sector allocation based on analysis of the macro economy and its effect on corporate competitiveness and industry cycles. This is often called “top down” analysis. The Sub-Adviser will strive to invest with large economic cycles as compared to short-term market trends and short-term supply and demand.

The Fund’s Non-Principal Investments

The Exchange represents that while the Fund, under normal circumstances, will invest at least 80% of its assets in the securities described above in the “Principal Investments of the Fund,” the Fund may invest its remaining assets in the securities and financial instruments as described below.

The Fund may invest in the following equity securities traded on a U.S. or foreign exchange or over-the-counter, including equity securities of foreign issuers in emerging countries: common stocks, preferred stocks, warrants, rights, securities convertible into common stock, and investments in master limited partnerships.

The Fund may invest in issuers located outside the United States directly and may invest in exchange-traded funds (“ETFs”),¹³ exchange-traded notes (“ETNs”),¹⁴ and exchange-traded

¹³ For purposes of the proposed rule change, ETFs are 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); and Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600). The ETFs that the Fund invests in all will be listed and traded in the U.S. on registered exchanges. The Fund will invest in the securities of ETFs 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 ETF investments in conformity with the requirements of Regulation M of the Internal Revenue Code of 1986, as amended. While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged or inverse leveraged ETFs (e.g., 2X or 3X).

products (“ETPs”)¹⁵ that are indirectly linked to the performance of foreign issuers. The Fund may invest in “Depository Receipts,” consisting of American Depository Receipts (“ADRs”), Global Depository Receipts, European Depository Receipts, International Depository Receipts, “ordinary shares,” and “New York shares” issued and traded in the U.S.¹⁶

The Fund may invest in non-exchange-traded investment company securities to the extent that such investments would be 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. Consistent with the restrictions discussed above, the Fund may invest in U.S. and non-U.S. exchange-listed closed-end funds and business development companies. Except with respect to inverse ETFs as described above,¹⁷ the Fund will not invest in inverse, leveraged, or inverse leveraged investment company securities.

The Fund may invest in U.S. government securities and may invest in certain U.S. government securities that are issued or guaranteed by agencies or instrumentalities of the U.S. government.¹⁸ The Fund also may invest in non-exchange-traded convertible securities that are

¹⁴ For purposes of the proposed rule change, ETNs include Index-Linked Securities (as described in NYSE Arca Equities Rule 5.2(j)(6)). While the Fund may invest in inverse ETNs, the Fund will not invest in leveraged or inverse leveraged ETNs (e.g., 2X or 3X).

¹⁵ For purposes of the proposed rule change, ETPs include Trust Issued Receipts (as described in NYSE Arca Equities Rule 8.200) and Currency Trust Shares (as described in NYSE Arca Equities Rule 8.202). While the Fund may invest in inverse ETPs, the Fund will not invest in leveraged or inverse leveraged ETPs (e.g., 2X or 3X).

¹⁶ The Exchange represents that not more than 10% of the Fund’s assets will be invested in non-exchange-traded ADRs. In addition, the Exchange represents that other Depository Receipts in which the Fund invests will be exchange-traded.

¹⁷ See note 13, *supra*.

¹⁸ According to the Exchange, securities issued or guaranteed by the U.S. government or its agencies or instrumentalities include the following: U.S. Treasury securities, which are backed by the full faith 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

bonds, debentures, notes, or other securities that may be converted or exchanged (by the holder or by the issuer) into shares of the underlying common stock (or cash or securities of equivalent value) at a stated exchange ratio. Finally, the Fund may invest in shares of U.S. or non-U.S. exchange-traded real estate investment trusts and repurchase agreements and reverse repurchase agreements.¹⁹

The Fund's Investment Restrictions

The Exchange represents that the Fund may hold up to an aggregate amount of 15% of its net assets in assets deemed illiquid by the Adviser.²⁰ 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, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets.²¹

ten years; U.S. Treasury bonds, which generally have initial maturities of greater than ten years; and U.S. Treasury zero-coupon bonds.

¹⁹ The Fund may purchase securities on a when-issued, delayed-delivery or forward commitment basis (i.e., delivery and payment can take place between a month and 120 days after the date of the transaction).

²⁰ The Exchange states that, under the supervision of the Fund's Board of Trustees, the Adviser determines the liquidity of the Fund's investments. In determining the liquidity of the Fund's investments, the Adviser may consider various factors, including (1) the frequency and volume of trades and quotations; (2) the number of dealers and prospective purchasers in the marketplace; (3) dealer undertakings to make a market; and (4) the nature of the security and the market in which it trades (including any demand, put or tender features, the mechanics and other requirements for transfer, any letters of credit or other credit enhancement features, any ratings, the number of holders, the method of soliciting offers, the time required to dispose of the security, and the ability to assign or offset the rights and obligations of the security).

²¹ Illiquid assets 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 Exchange also represents that the Fund will not invest in options, futures, swaps, or forward contracts. Further, the Fund's investments will be consistent with its investment objective and will not be used to provide multiple returns of a benchmark or to produce leveraged returns. Finally, the Exchange represents that not more than 10% of the net assets of the Fund in the aggregate invested in equity securities (other than non-exchange-traded investment company securities) shall consist of equity securities whose principal market is not a member of the ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2016-64 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act²² to determine whether the proposed rule change, as modified by Amendment Nos. 1 and 2, should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as modified by Amendment Nos. 1 and 2. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change, as modified by Amendment Nos. 1 and 2.

Pursuant to Section 19(b)(2)(B) of the Act,²³ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for the submission of additional analysis regarding the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national

²² 15 U.S.C. 78s(b)(2)(B).

²³ Id.

securities exchange be “designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,” and “to protect investors and the public interest.”²⁴

The Exchange provides that the Fund will invest at least 80% of its net assets in equity securities listed on the Korea Exchange. The Exchange, however, proposes no other quantitative standards with respect to the types of equity securities listed on the Korea Exchange in which the Fund, at the Sub-Adviser’s discretion, may invest. The Commission has recently noted that appropriate quantitative standards, such as minimum market value and trading volume requirements, “should reduce the extent to which Managed Fund Shares holding Non-U.S. Component Stocks may be susceptible to manipulation.”²⁵ Accordingly, the Commission seeks comment on whether the Exchange’s representations relating to the Korean equity securities held by the Fund are sufficient to prevent the susceptibility of the Fund’s portfolio to manipulation and are thereby consistent with the requirements of Section 6(b)(5) of the Act, which, among other things, requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.

III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written

²⁴ 15 U.S.C. 78f(b)(5).

²⁵ See Securities Exchange Act Release No. 78397 (July 22, 2016), 81 FR 49320, at 49325 (July 27, 2016). The term “Non-U.S. Component Stocks” is defined in NYSE Arca Equities Rule 5.2(j)(3) as an equity security that is not registered under Sections 12(b) or 12(g) of the Act and that is issued by an entity that (a) is not organized, domiciled, or incorporated in the United States, and (b) is an operating company (including Real Estate Investment Trusts and income trusts, but excluding investment trusts, unit trusts, mutual funds, and derivatives). See NYSE Arca Equities Rule 5.2(j)(3).

views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.²⁶

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice²⁷ and in Amendment No. 2 to the proposed rule change,²⁸ in addition to any other comments they may wish to submit about the proposed rule change, as modified by Amendment Nos. 1 and 2.

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. Please include File Number SR-NYSEArca-2016-64 on the subject line.

²⁶ Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

²⁷ Supra note 4.

²⁸ Supra note 5.

Paper Comments:

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

All submissions should refer to File Numbers SR-NYSEArca-2016-64. 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 these filings 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-2016-64 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁹

Robert W. Errett
Deputy Secretary

²⁹ 17 CFR 200.30-3(a)(12).