

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79885; File No. SR-NYSEArca-2016-100)

January 26, 2017

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendments No. 1, No. 2, and No. 3, to List and Trade Shares of the Direxion Daily Municipal Bond Taxable Bear 1X Fund under NYSE Arca Equities Rule 5.2(j)(3)

I. Introduction

On July 13, 2016, 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” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade shares (“Shares”) of the Direxion Daily Municipal Bond Taxable Bear 1X Fund (“Fund”), a series of the Direxion Shares ETF Trust (“Trust”). The proposed rule change was published for comment in the Federal Register on August 3, 2016.³ On September 14, 2016, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On September 15, 2016, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced the original filing in its entirety.⁶ On November 1, 2016, the Commission

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 78433 (July 28, 2016), 81 FR 51241.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 78840, 81 FR 64552 (September 20, 2016). The Commission designated November 1, 2016, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

⁶ In Amendment No. 1, the Exchange: (1) revised the description of the Fund’s principal investments and (2) made other technical amendments. Amendment No. 1 is available at

instituted proceedings under Section 19(b)(2)(B) of the Act⁷ to determine whether to approve or disapprove the proposed rule change.⁸ On November 23, 2016, the Exchange filed Amendment No. 2 to the proposed rule change.⁹ On January 24, 2017, the Exchange filed Amendment No. 3 to the proposed rule change.¹⁰ The Commission received no comments on the proposed rule change. This order approves the proposed rule change, as modified by Amendments No. 1, No. 2, and No. 3.

II. The Exchange's Description of the Proposal¹¹

The Exchange proposes to list and trade the Shares under NYSE Arca Equities Rule 5.2(j)(3), Commentary .02, which governs the listing and trading of Investment Company Units

<https://www.sec.gov/comments/sr-nysearca-2016-100/nysearca2016100-1.pdf>. Because Amendment No. 1 does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 1 is not subject to notice and comment.

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ See Securities Exchange Act Release No. 79211 (November 7, 2016), 81 FR 78231.

⁹ In Amendment No. 2, the Exchange clarified how securities would be valued and made certain technical amendments. Amendment No. 2 is available at <https://www.sec.gov/comments/sr-nysearca-2016-100/nysearca2016100-2.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.

¹⁰ In Amendment No. 3, the Exchange corrected the name of the municipal bond index from which the Index constituents are derived, and clarified that individual issuers that represent at least 5% of the weight of the Index cannot account for more than 50% of the weight of the Index in the aggregate. Amendment No. 3 is available at <https://www.sec.gov/comments/sr-nysearca-2016-100/nysearca2016100-1528182-131062.pdf>. Because Amendment No. 3 does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 3 is not subject to notice and comment.

¹¹ Additional information regarding the Trust, the Fund, the underlying index, and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings, disclosure policies, calculation of the NAV, distributions, and taxes, among other things, can be found in Amendment No. 1, *supra* note 6, Amendment No. 2, *supra* note 9, Amendment No. 3, *supra* note 10, and the Registration Statement, *infra* note 13.

based on fixed income securities indexes. The Exchange submitted the proposed rule change because the index underlying the Fund does not satisfy the requirement set forth in Commentary .02(a)(2) of NYSE Arca Equities Rule 5.2(j)(3) applicable to the generic listing of Investment Company Units based on fixed income securities indexes.¹²

The Fund is a series of the Trust.¹³ Rafferty Asset Management, LLC would be the investment adviser to the Fund. Foreside Fund Services, LLC would be the distributor of the Fund's Shares. The Bank of New York Mellon would serve as the accounting agent, custodian, and transfer agent for the Fund. U.S. Bancorp Fund Services, LLC would serve as the Fund's administrator.

A. The Underlying Index

The Standard & Poor's National AMT-Free Municipal Bond Index ("Index") would be the Fund's benchmark.¹⁴ The Index is a broad, comprehensive, market value-weighted index designed to measure the performance of the tax-exempt, investment-grade U.S. municipal bond market. Index constituents are derived from the S&P Municipal Bond Index. To be classified as an eligible bond for inclusion in the Index, a bond must meet all of the following criteria on the

¹² Specifically, as of May 23, 2016, only 32.75% of the weight of the index components had a minimum original principal amount outstanding of \$100 million or more, and Commentary .02(a)(2) requires that at least 75% of the weight of an index's components have a minimum original principal amount outstanding of \$100 million or more. The Exchange states that the underlying index satisfies all of the other requirements for generic listing. See Amendment No. 1, supra note 6, at 9.

¹³ The Trust is registered under the Investment Company Act of 1940 ("1940 Act"). According to the Exchange, on February 29, 2016, the Trust filed a registration statement on Form N-1A under the Securities Act of 1933 and the 1940 Act (File Nos. 811-22201 and 333-150525) ("Registration Statement").

¹⁴ S&P Dow Jones Indices is the "Index Provider" with respect to the Index. The Index Provider is not a broker-dealer or affiliated with a broker-dealer and has implemented procedures designed to prevent the use and dissemination of material, non-public information regarding the Index.

rebalancing date: the bond issuer is a state, local government, or agency such that interest on the bond is exempt from federal income tax; a bond must have a rating of at least BBB-by Standard & Poor's, Baa3 by Moody's, or BBB by Fitch; the bond must be denominated in U.S. Dollars ("USD"); each bond must be a constituent of a deal where the deal's original offering amount was at least \$100 million USD; as of the next rebalancing date, the bond must have a minimum term to maturity and/or call date greater than or equal to one calendar month plus one calendar day; and the bond must have a minimum par amount of \$25 million USD. At each monthly rebalancing, no one issuer can represent more than 25% of the weight of the Index, and individual issuers that represent at least 5% weight of the Index cannot account for more than 50% of the weight of the Index in the aggregate. Generally, the Index is reviewed and rebalanced on a monthly basis. The following bond types are specifically excluded from the Index: bonds subject to the alternative minimum tax; commercial paper; derivative securities (inverse floaters, forwards, swaps); housing bonds; insured conduit bonds where the obligor is a for-profit institution; non-insured conduit bonds; non-rated bonds; notes; taxable municipals; tobacco bonds; and variable rate debt.

B. The Fund's Principal Investments

The Fund would seek to track 100% of the inverse of the daily performance of the Index.¹⁵ Under normal circumstances, the Fund would create net short positions by investing at least 80% of the Fund's assets (plus any borrowings for investment purposes) in the following financial instruments ("Financial Instruments"): options on exchange-traded funds ("ETFs")¹⁶

¹⁵ The Fund would not seek income that is exempt from federal, state, or local income taxes.

¹⁶ For purposes of this filing, 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

and indices, traded on U.S. exchanges (based on aggregate gross notional value); swaps that provide short exposure to the securities included in the Index and various ETFs (based on aggregate gross notional value); and short positions in ETFs, as described below in this section, that, in combination, provide inverse exposure to the Index.

The Fund might invest in options that provide short exposure to the Index or various ETFs, including iShares National Muni Bond ETF, SPDR Nuveen Barclays Municipal Bond ETF, iShares Short-term National Muni Bond ETF, SPDR Nuveen Barclays Short-Term Municipal Bond ETF, Market Vectors High-Yield Municipal Index ETF, SPDR Nuveen S&P High Yield Municipal Bond ETF, Market Vectors AMT-Free Intermediate Municipal Index ETF, PowerShares National AMT-Free Municipal Bond Portfolio, Vanguard Tax-Exempt Bond ETF, and the PIMCO Intermediate Municipal Bond Active Exchange-Traded Fund (such ETFs, collectively, “Named ETFs”). The Fund might also invest in swaps that provide short exposure to the securities included in the Index and various ETFs, including the Named ETFs. Finally, the Fund might take direct short positions in ETFs, such as the Named ETFs. The Fund would not take long positions in ETFs or invest in options that overlie inverse, leveraged, or inverse leveraged ETFs.

C. The Fund’s Non-Principal Investments

According to the Exchange, under normal circumstances, at least 80% of the Fund’s assets will be invested in Financial Instruments to establish net short positions, as described above, and the Fund’s remaining assets might be invested in cash and the following cash equivalents (in addition to cash or cash equivalents used to collateralize the Fund’s investments

Rule 8.600) and also are securities listed on another national securities exchange pursuant to substantially equivalent listing rules. The Fund will not take short positions in inverse, leveraged, or inverse leveraged ETFs.

in Financial Instruments): money market funds, depository accounts with institutions with high quality credit ratings, U.S. government securities that have terms-to-maturity of less than 397 days, and repurchase agreements that have terms-to-maturity of less than 397 days.

III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal to list and trade the Shares, as modified by Amendments No. 1, No. 2, and No. 3, is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁷ In particular, 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 Exchange Act,¹⁸ 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. According to the Exchange, quotation and last-sale information for the Shares will be available via the Consolidated Tape Association ("CTA") high-speed line, and information regarding the previous day's closing price for the Shares may be found in the financial section of certain major U.S. newspapers. 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.

The Commission also finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,¹⁹ which requires, among other things, that the Exchange's rules be

¹⁷ 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).

¹⁸ 15 U.S.C. 78k-1(a)(1)(C)(iii).

¹⁹ 15 U.S.C. 78f(b)(5).

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 a national market system, and, in general, to protect investors and the public interest. The Commission 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. The Intraday Indicative Value (“IIV”) for the Shares, calculated by a third party market data provider, will be widely disseminated at least every 15 seconds during the Core Trading Session²⁰ by one or more major market data vendors.²¹ The IIV calculation will include all of the Fund’s assets. Additionally, the portfolio of instruments held by the Fund will be disclosed daily on the Fund’s website. The Fund’s website will also include the prospectus for the Fund and additional data relating to the NAV, as well as applicable quantitative information. Quotation and last-sale information for U.S. exchange-listed securities will be available from the exchange on which they are listed. Quotation and last-sale information for exchange-listed options cleared via the Options Clearing Corporation will be available via the Options Price Reporting Authority. A source of price information for municipal securities underlying the derivatives held by the Fund is the Electronic Municipal Market Access, which is administered by the Municipal Securities Rulemaking Board. Price information for cash equivalents and swaps may be obtained from brokers and dealers who make markets in such securities or through nationally recognized pricing services through subscription agreements.

The Commission also believes that the proposal is designed to prevent trading when a reasonable degree of transparency cannot be assured. The Exchange states that: (1) if the IIV or

²⁰ Ordinarily the Exchange’s Core Trading Session is between 9:30 a.m. and 4:00 p.m. EST.

²¹ According to the Exchange, several major market data vendors display or make widely available IIVs taken from CTA or other data feeds.

the Index values are not being disseminated as required, it may halt trading during the day in which the interruption to the dissemination of the applicable IIV or Index value occurs; and (2) if the interruption to the dissemination of the applicable IIV or Index value persists past the trading day in which it occurred, the Exchange will halt trading in the Shares.²² The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and made available to all market participants at the same time.²³ Under NYSE Arca Equities Rule 7.34(a)(5), if the Exchange becomes aware that the NAV is not being disseminated to all market participants at the same time, it will halt trading in the Shares until that time as the NAV is available to all market participants.

To support this proposal, the Exchange has made the following representations:

- (1) The Exchange deems the Shares to be equity securities, and therefore trading in the Shares will be subject to the Exchange's existing rules governing the trading of equity securities.²⁴
- (2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.²⁵
- (3) Trading in the Shares will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by the Financial Industry Regulatory Authority ("FINRA") on behalf of the Exchange, which are adequate to properly monitor Exchange trading of the Shares

²² See Amendment No. 1, supra note 6, at 15-16.

²³ See id. at 16.

²⁴ See id.

²⁵ See id.

in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.²⁶

- (4) The Index and the Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rules 5.2(j)(3) and 5.5(g)(2), except that the Index will not meet the requirement of Commentary .02(a)(2) to NYSE Arca Equities Rule 5.2(j)(3), as described above.²⁷
- (5) The Exchange, or FINRA on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares, ETFs, and options with other markets and other entities that are members of the Intermarket Surveillance Group (“ISG”), and the Exchange, or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in such securities from such markets and other entities.²⁸ In addition, the Exchange may obtain information regarding trading in such securities from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.²⁹
- (6) Not more than 10% of the net assets of the Fund in the aggregate invested in exchange-traded options shall consist of options whose principal market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

²⁶ See id. The Exchange states that FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement, and that the Exchange is responsible for FINRA’s performance under this regulatory services agreement. See id. at n.20.

²⁷ See supra note 12.

²⁸ See Amendment No. 1, supra note 6, at 17.

²⁹ See id.

- (7) The Fund will not take short positions in inverse, leveraged, or inverse leveraged ETFs, or invest in options that overlie inverse, leveraged, or inverse leveraged ETFs.
- (8) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets. 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.
- (9) For initial and continued listing, the Fund must be in compliance with Rule 10A-3 under the Exchange Act.³⁰
- (10) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.
- (11) The Index Provider is not a broker-dealer or affiliated with a broker-dealer and has implemented procedures designed to prevent the use and dissemination of material, non-public information regarding the Index.³¹
- (12) The Exchange has a general policy prohibiting the distribution of material, non-public information by its employees.³²
- (13) Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders ("ETP Holders") in an Information Bulletin ("Bulletin") of the special characteristics and risks associated with trading the Shares of the

³⁰ See id. at 16.

³¹ See Amendment No. 1, supra note 6, at 6-7, n.8.

³² See id. at 15.

Fund. Specifically, the Bulletin will discuss the following: (a) the procedures for purchases and redemptions of Shares in Creation Units (as defined in Amendment No. 1) (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 (as defined in Amendment No. 1) when an updated IIV or Index value will not be calculated or publicly disseminated; (d) how information regarding the IIV and Index 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.

- (14) All statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures, shall constitute continued listing requirements for listing the Shares on the Exchange.
- (15) The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor³³ for compliance with the continued listing requirements. If the Fund is

³³ The Commission notes that certain other proposals for the listing and trading of shares of other exchange-traded products include a representation that the exchange will “surveil” for compliance with the continued listing requirements. See, e.g., Securities Exchange Act Release No. 77499 (April 1, 2016), 81 FR 20428, 20432 (April 7, 2016) (SR-BATS-2016-04). In the context of this representation, it is the Commission’s view that “monitor” and “surveil” both mean ongoing oversight of the Fund’s compliance with the continued listing requirements. Therefore, the Commission does not view “monitor” as a

not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Equities Rule 5.5(m).

This approval order is based on all of the Exchange's representations, including those set forth above and in Amendments No. 1, No. 2, and No. 3.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act³⁴ and Section 11A(a)(1)(C)(iii) of the Exchange Act³⁵ and the rules and regulations thereunder applicable to a national securities exchange.

more or less stringent obligation than “surveil” with respect to the continued listing requirements.

³⁴ 15 U.S.C. 78f(b)(5).

³⁵ 15 U.S.C. 78k-1(a)(1)(C)(iii).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,³⁶ that the proposed rule change (SR-NYSEArca-2016-100), as modified by Amendments No. 1, No. 2, and No. 3, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁷

Eduardo A. Aleman
Assistant Secretary

³⁶ 15 U.S.C. 78s(b)(2).

³⁷ 17 CFR 200.30-3(a)(12).