

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-56694; File No. SR-ISE-2007-61]

**Self-Regulatory Organizations; International Securities Exchange, LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to Specific Performance Commitments for Primary Market Makers**

October 24, 2007.

On July 17, 2007, the International Securities Exchange, LLC ("ISE" or "Exchange") 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 amend its Rule 802(b)(2) regarding specific performance commitments for Primary Market Makers ("PMMs"). On September 10, 2007, ISE filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on September 19, 2007.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

**I. Description of the Proposal**

Currently, ISE Rule 802(b)(2) requires PMMs to submit specific performance commitments each time they request an allocation of options on indices, foreign currency options and Fund Shares (collectively, "Index-Based Products"). The initial rationale behind adopting a requirement on PMMs to submit proposed performance commitments for allocations of options on new Index-Based Products was to require a stronger commitment for certain competitive products like exchange-traded funds and indices and to assist the Exchange's Allocation Committee when choosing between PMMs seeking the same product.

The Exchange now believes that its rule is overbroad and may actually discourage some PMMs from seeking allocations of options on Index-Based Products. Therefore, ISE is proposing to amend the rule to provide that specific performance commitments need only be submitted in response to a request by the Exchange, thereby eliminating their submission as a uniform requirement

each time a PMM seeks a new allocation of options in Index-Based Products.<sup>4</sup>

**II. Discussion**

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>5</sup> Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>6</sup> which requires 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 for 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 proposed amendment of ISE Rule 802(b)(2) will encourage PMMs to seek allocations of products on the Exchange, and thereby remove impediments to and perfect the mechanism for a free and open market. Further, the Exchange will continue to evaluate performance standards of its market makers pursuant to existing practice. The proposed rule also allows the Exchange to require the submission of specific performance commitments from a PMM seeking a new allocation as the Exchange in its discretion deems appropriate. Accordingly, the Commission finds that the proposal promotes just and equitable principles of trade and protects investors and the public interest.

**III. Conclusion**

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-ISE-Phlx-2007-61), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

**Nancy M. Morris,**

*Secretary.*

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<sup>4</sup> ISE notes that modifying this requirement will not affect a PMM's other obligations as a market maker on the Exchange under Chapter 8 of ISE's Rules.

<sup>5</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>6</sup> 15 U.S.C. 78f(b)(5).

<sup>7</sup> 17 CFR 200.30-3(a)(12).

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-56697; File No. SR-NYSE-2007-90]

**Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Fee Charged to Member Organizations for Participation in the Exchange's Continuing Education Program**

October 24, 2007.

Pursuant to section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 ("Act"), and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 1, 2007, New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been substantially prepared by NYSE. The Exchange has designated the proposed rule change as establishing or changing a due, fee, or other charge applicable only to members, pursuant to section (b)(3)(A)(ii) of the Act,<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. On October 19, 2007, the Exchange submitted Amendment No. 1 to the proposed rule change.<sup>5</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

NYSE proposes to amend, effective October 1, 2007, the fees charged for the Continuing Education Program for Active Floor Members from a \$100 semi-annual participation fee, plus an additional \$100 fee to re-register for additional sessions, to a flat \$50 fee per training module. The text of the proposed rule change is available on NYSE's Web site at <http://www.nyse.com>, at NYSE, and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, NYSE included statements concerning

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

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

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

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

<sup>5</sup> In Amendment No. 1, the Exchange made clarifying, non-substantive changes to the filing.

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

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

<sup>3</sup> See Securities Exchange Act Release No. 56383 (September 11, 2007), 72 FR 53612.

the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NYSE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The Exchange proposes to amend, effective October 1, 2007, the fees charged for the Continuing Education Program for Active Floor Members from a \$100 semi-annual participation fee, plus an additional \$100 fee to re-register for additional sessions, to a flat \$50 fee per training module. The Exchange is proposing this change to reflect the changes being implemented in the delivery of such program.

As required by NYSE Rule 103A, the Exchange provides Floor members with a mandatory continuing education program, known as the Floor Member Continuing Education Program ("FMCE Program"). The Exchange has been offering the FMCE Program in two training sessions per year. Members could complete such training at an on-site computer training laboratory only. As set forth in the current Price List, members were charged for each time they visited the lab to take a session of FMCE training. Accordingly, the minimum fees charged to members for such training was \$200 per year, but could increase in \$100 increments if a member was unable to complete a session in a single visit.

Beginning in October 2007, the Exchange will be offering the FMCE Program via a web-based interactive program that members can access from an Internet-capable computer.<sup>6</sup> Because of the web-based nature of this delivery method, members will no longer need to visit an on-site laboratory to complete their FMCE Program requirements. Accordingly, the current billing structure, which is based on when a

member visits the on-site laboratory, is no longer applicable.

To reflect the delivery method of the revised, web-based FMCE Program, the Exchange proposes charging members a flat \$50 fee for each training module offered. The Exchange anticipates issuing approximately six training modules per year. This number may vary depending on changes in rules and regulations that may warrant either more or less training per year.<sup>7</sup>

For this flat fee, members will have the capability to access the FMCE Program during their own time and from their own computers. Unlike the prior delivery method, members will also be able to stop and start a training module at any point and return to a module once completed without any additional charge. In addition, the Exchange is providing member organization compliance officers with access to the FMCE Program at no charge to the firms so that compliance officers may monitor their members' compliance with the FMCE Program. Again, this is a benefit that was not previously available to firms under the prior FMCE Program delivery method.

2. Statutory Basis

NYSE believes that the proposed rule change is consistent with the provisions of section 6<sup>8</sup> of the Act in general and section 6(b)(4) of the Act<sup>9</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

NYSE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Written comments were neither solicited nor received.

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

The foregoing rule change is effective upon filing pursuant to section

19(b)(3)(A)(ii)<sup>10</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>11</sup> thereunder, because it establishes a due, fee, or other charge imposed by NYSE, applicable only to members. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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-NYSE-2007-90 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR-NYSE-2007-90. 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 Web site (<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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available

<sup>6</sup> A number of factors impact the actual launch of the web-based FMCE Program, however, NYSE Regulation anticipates going live with the program sometime in October. In anticipation of the launch of the redesigned FMCE Program, NYSE closed its on-site laboratory. Accordingly, there is no possibility that pending the launch of the web-based program, a member will be charged under the prior pricing scheme. NYSE is filing this fee amendment in advance of the launch to ensure that the fee structure for the new, web-based program is in effect as of the first date that the new FMCE Program is available to members.

<sup>7</sup> In addition to this fee filing, NYSE is submitting a proposed rule change to amend NYSE Rule 103A to reflect the administrative changes to the delivery of the FMCE program.

<sup>8</sup> 15 U.S.C. 78f.

<sup>9</sup> 15 U.S.C. 78f(b)(4).

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

<sup>11</sup> 17 CFR 240.19b-4(f)(2).

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-NYSE-2007-90 and should be submitted on or before November 20, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

Nancy M. Morris,  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-56695; File No. SR-  
NYSEArca-2007-111]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change Relating to the Listing and Trading of Shares of the HealthShares™ Ophthalmology Exchange-Traded Fund

October 24, 2007.

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> notice is hereby given that on October 19, 2007, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”), through its wholly owned subsidiary, NYSE Arca Equities, Inc. (“NYSE Arca Equities”), 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 substantially by the Exchange (“Exchange Proposal”). This order provides notice of the proposed rule change and approves the proposed rule change on an accelerated basis.

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

The Exchange proposes to list and trade shares of the HealthShares™ Ophthalmology Exchange-Traded Fund (the “Fund”).<sup>3</sup> The text of the proposal 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 Exchange 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 these statements may be examined at the places specified in Item III below, and the most significant aspects of such statements are set forth in Sections A, B, and C below.

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

###### 1. Purpose

The Exchange proposes to list and trade the shares of the Fund (the “Shares”), which is based on the HealthShares™ Ophthalmology Index (the “Underlying Index”), under NYSE Arca Equities Rule 5.2(j)(3). NYSE Arca Equities Rule 5.2(j)(3) states that the Exchange may consider for trading, whether by listing or pursuant to unlisted trading privileges (“UTP”), Investment Company Units.<sup>4</sup> The Fund is currently listed on the New York Stock Exchange LLC (“NYSE”) and trades on NYSE Arca pursuant to UTP.<sup>5</sup> HealthShares, Inc. (the “Corporation”) has determined to transfer the listing of the Fund Shares to the Exchange.<sup>6</sup>

<sup>4</sup> NYSE Arca Equities Rule 5.2(j)(3) defines an Investment Company Unit as a security that represents an interest in a registered investment company that could be organized as a unit investment trust, an open-end management investment company, or a similar entity.

<sup>5</sup> The Exchange states that the Fund Shares were listed on NYSE on March 12, 2007 pursuant to the “generic” listing criteria contained in Section 703.16(C) of the NYSE Listed Company Manual, which permits the listing of Investment Company Units pursuant to Rule 19b-4(e) under the Act (17 CFR 240.19b-4(e)). NYSE Arca further represents that the Fund Shares commenced trading on the Exchange pursuant to UTP under the generic listing criteria contained in NYSE Arca Equities Rule 5.2(j)(3) applicable to Investment Company Units and Rule 19b-4(e) under the Act on the first day the Fund Shares launched for trading on NYSE. E-mail from Tim Malinowski, Director, Exchange Traded Funds, NYSE Group, Inc., to Edward Cho, Special Counsel, Division of Market Regulation, Commission, dated October 23, 2007 (“Exchange Confirmation”).

<sup>6</sup> The Exchange represents that, except for Commentary .01(B)(2) to NYSE Arca Equities Rule 5.2(j)(3), the Fund Shares currently satisfy all of the generic listing standards under NYSE Arca Equities Rule 5.2(j)(3). See Exchange Confirmation. Commentary .01(B)(2) to NYSE Arca Equities Rule 5.2(j)(3) requires that component stocks that, in the aggregate, account for at least 90% of the weight of

The Fund, which can invest in both U.S. securities and non-U.S. securities not listed on a national securities exchange, seeks to track the performance, before fees and expenses, of the Underlying Index. XShares Advisors, LLC, the investment adviser to the Fund (“Advisor”), uses a passive, or indexing, approach in managing the Fund, investing at least 90% of its assets in the common stocks of Ophthalmology companies in the Underlying Index, or in American Depositary Receipts (“ADRs”) or Global Depositary Receipts (“GDRs”) based on securities of international Ophthalmology companies in the Underlying Index. The Fund may also invest up to 10% of its assets in futures contracts, options on futures contracts, options, swaps on securities of companies in the Underlying Index, as well as cash and cash equivalents, such as money market instruments (subject to applicable limitations of the 1940 Act). The Fund attempts to replicate the Underlying Index by matching the weighting of securities in its portfolio with such securities’ weightings in the Underlying Index.<sup>7</sup> In managing the Fund, the Advisor seeks a correlation of 0.95 or better between the Fund’s performance and the performance of its Underlying Index. A figure of 1.00 would mean perfect correlation.

Detailed descriptions of the Fund, the Underlying Index (including the methodology used to determine the composition of the Underlying Index), procedures and payment requirements for creating and redeeming Shares,

the Underlying Index or portfolio, must each have a minimum worldwide trading volume during each of the last six months of at least 250,000 shares. The Exchange states that, as of October 1, 2007, those component stocks comprising the Underlying Index that individually exceed the minimum worldwide monthly trading volume of 250,000 shares during each of the last six months account, in the aggregate, for only 88.2 % of the weight of the Underlying Index (i.e., 1.8% below the required 90% requirement). Therefore, NYSE Arca has filed the instant proposed rule change to obtain Commission approval to list and trade the Shares on the Exchange pursuant to Section 19(b)(2) of the Act (15 U.S.C. 78s(b)(1)) and Rule 19b-4 thereunder (17 CFR 240.19b-4). The Exchange further represents that the continued listing standards under NYSE Arca Equities Rule 5.5(g)(2) applicable to Investment Company Units shall apply to the Fund Shares. See Exchange Confirmation.

<sup>7</sup> The Exchange states that, from time to time, it may not be possible, for regulatory or other legal reasons, to replicate the Underlying Index, and in such cases, the Advisor may pursue a sampling strategy in managing the portfolio. Pursuant to this strategy, the Fund may invest the remainder of its assets in securities of companies not included in the Underlying Index if the Advisor believes that such securities will assist the Fund in tracking the Underlying Index. If a Fund pursues a sampling strategy, it will continue to invest at least 90% of its assets in the common stocks, ADRs, or GDRs of the companies in the Underlying Index.

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

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

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

<sup>3</sup> The Fund is registered under the Investment Company Act of 1940 (the “1940 Act”).