

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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR-NASDAQ-2008-001 and should be submitted on or before February 12, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Florence E. Harmon,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57149; File No. SR-NYSEArca-2007-122]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to Certain Modifications to the Initial Listing Standards for Index-Linked Securities

January 15, 2008.

#### I. Introduction

On November 28, 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"), 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 proposal to modify certain initial listing standards for Index-Linked Securities. The proposed rule change was published for comment in the **Federal Register** on December 12, 2007.<sup>3</sup> The Commission received no comments on the proposal. On January 8, 2008, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> This order approves the proposed rule change, as amended.

#### II. Description of the Proposal

The Exchange proposes to amend one of the requirements of NYSE Arca Equities Rule 5.2(j)(6)(A), which sets forth the listing requirements applicable to all types of Index-Linked Securities to be listed and traded on the Exchange, to provide for greater flexibility in the listing criteria for such securities. Currently, NYSE Arca Equities Rule 5.2(j)(6)(A)(d) provides that the payment at maturity of a cash amount for Index-Linked Securities may or may not provide for a multiple of the positive performance of an underlying Reference Asset, and in no event will payment at maturity be based on a multiple of the negative performance of an underlying Reference Asset.

The Exchange proposes to amend NYSE Arca Equities Rule 5.2(j)(6)(A)(d) to: (1) Allow the Exchange to consider for listing and trading Index-Linked Securities that provide for payment at maturity based on a multiple of the direct or inverse performance of an underlying Reference Asset; and (2) provide that in no event will a loss or negative payment at maturity be accelerated by a multiple that exceeds twice the performance of an underlying Reference Asset. The Exchange proposes these changes in order to permit the listing and trading of Index-Linked Securities that employ investment strategies similar or analogous to certain exchange-traded funds like the Short Funds and UltraShort Funds of the ProShares Trust and the Inverse Funds and Leveraged Inverse Funds of the Rydex ETF Trust, each of which trade on the Exchange pursuant to unlisted trading privileges ("UTP") under NYSE

Arca Equities Rule 5.2(j)(3).<sup>5</sup> The Short Funds and Inverse Funds seek daily investment results, before fees and expenses, that correspond to the inverse or opposite of the daily performance (-100%) of the respective underlying indexes, and the Ultra Short Funds and Leveraged Inverse Funds seek daily investment results, before fees and expenses, that correspond to twice the inverse or opposite of the daily performance (-200%) of the respective underlying indexes.

NYSE Arca Equities Rule 9.2(a) provides that an ETP Holder, before recommending a transaction in Index-Linked Securities, must have reasonable grounds to believe that the recommendation is suitable for their customer based on any facts disclosed by the customer as to its other security holdings and as to its financial situation and needs. Further, the rule provides, with a limited exception, that prior to the execution of a transaction recommended to a non-institutional customer, the ETP Holder shall make reasonable efforts to obtain information concerning the customer's financial status, tax status, investment objectives, and any other information that such ETP Holder believes would be useful to make a recommendation. Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of this suitability requirement. Specifically, the Information Bulletin will remind ETP Holders that, in recommending transactions in these securities, they must have a reasonable basis to believe that the customer can evaluate the special characteristics, and is able to bear the financial risks, of such investment.

#### III. Commission's Findings

After careful review, 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>6</sup> In particular, the

<sup>5</sup> See, e.g., Securities Exchange Act Release Nos. 56763 (November 7, 2007), 72 FR 64103 (November 14, 2007) (SR-NYSEArca-2007-81) (approving the trading of shares of funds of the Rydex ETF Trust pursuant to UTP); 56601 (October 2, 2007), 72 FR 57625 (October 10, 2007) (SR-NYSEArca-2007-79) (approving the trading shares of eight funds of the ProShares Trust based on international equity indexes pursuant to UTP); 55125 (January 18, 2007), 72 FR 3462 (January 25, 2007) (SR-NYSEArca-2006-87) (approving the trading of shares of 81 funds of the ProShares Trust pursuant to UTP); and 54026 (June 21, 2006), 71 FR 36850 (June 28, 2006) (SR-PCX-2005-115) (approving the trading of shares of certain other funds of the ProShares Trust pursuant to UTP).

<sup>6</sup> In approving this proposed rule change, the Commission notes that it has considered the

<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. 56907 (December 5, 2007), 72 FR 70640 ("Notice").

<sup>4</sup> In Amendment No. 1, the Exchange clarified that certain suitability standards, including those under NYSE Arca Equities Rule 9.2(a) (Diligence as to Accounts), would apply to Index-Linked Securities, as described herein, and that such standards would be disclosed in an Information Bulletin. Because Amendment No. 1 is technical in nature, the Commission is not publishing it for public comment.

<sup>11</sup> 17 CFR 200.30-3(a)(12).

Commission finds that the proposed rule change is consistent with section 6(b)(5) of the Act<sup>7</sup> in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and 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 believes that the Exchange's proposal is consistent with the Act, and, in particular, reasonably balances the removal of impediments to a free and open market with the protection of investors and the public interest, two principles set forth in section 6(b)(5) of the Act. The Commission notes that a variety of exchange-traded funds seeking to provide (a) investment results that correspond to or exceed twice (200%) the direct performance of a specified stock index, or (b) investment results that correspond to twice (-200%) the inverse or opposite of the index's performance, are currently traded on the Exchange.<sup>8</sup> In addition, the Commission further believes that heightened suitability standards are appropriate for derivative securities products, including Index-Linked Securities, which seek to provide investment results that correspond to the direct or inverse performance of an underlying reference asset by a specified multiple and allow for a loss or negative payment at maturity to be accelerated by a specified multiple. Before recommending transactions in these types of leveraged products, ETP Holders must have a reasonable basis to believe that the customer can evaluate the special characteristics, and is able to bear the financial risks, of such investment. The Commission expects the Exchange to continue to monitor the application of these suitability requirements, including those under NYSE Arca Equities Rule 9.2(a).

#### IV. Conclusion

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>9</sup> that the proposed rule change (SR-NYSEArca-2007-122), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57158; File No. SR-NYSEArca-2007-120]

#### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change Relating to Restrictions on Acting as Market Makers and Floor Brokers

January 15, 2008.

On November 27, 2007, the NYSE Arca, Inc. ("NYSE Arca" 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 certain Exchange rules to restrict an OTP Holder from concurrently registering as both a Market Maker and a Floor Broker. The proposed rule change was published for comment in the **Federal Register** on December 11, 2007.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

Presently, OTP Holders may be registered as either a Market Maker or a Floor Broker, or in certain situations, both. An OTP Holder that wished to act in both capacities must apply for and receive approval from the Exchange.<sup>4</sup> The Exchange represented that presently there are no OTP Holders registered in the dual capacity of Market Maker and Floor Broker, nor does the Exchange have any pending applications from existing OTP Holders.

The Exchange further represented that the practice of dual registration dates back to the early days of floor-based, open outcry trading. Open outcry trading was for the most part a manual process, necessitating the need for a large number of Floor Brokers. On occasion, often in periods of unusually active market conditions, there might have been a shortage of brokers on the floor, and in the interest of maintaining a fair and orderly market, Market

Makers might be called upon to act as a Floor Broker. The vast majority of trades on NYSE Arca now occur electronically, and thus, there is a dramatic decrease in open outcry trading executions done by Floor Brokers.

For the reasons stated above, the Exchange proposes to establish new Rule 6.33(b) stating that an OTP Holder registered as a Market Maker on NYSE Arca may not be concurrently registered as a Floor Broker on NYSE Arca. Accordingly, the Exchange also proposes establishing new Rule 6.44(b), stating that an OTP Holder presently registered as a Floor Broker on NYSE Arca cannot be concurrently registered as a Market Maker on NYSE Arca. The Exchange also proposes making non-substantive changes regarding the numbering of existing rules in order to accommodate the new rules.

Pursuant to NYSE Arca Rule 6.82(h)(3), Lead Market Makers ("LMM") may perform the functions of a Floor Broker. Historically, LMMs might perform the duties of a Floor Broker and represent public customer orders when there was a shortage of Floor Brokers available. As stated above, due to increased automation in the marketplace, the Exchange does not anticipate a shortage of Floor Brokers such that it would necessitate an LMM to have to act as a Floor Broker. As such, the Exchange proposes deleting Rule 6.82(h)(3) in its entirety. The Exchange also proposes deleting Commentary .02 to Rule 6.82 relating to a LMMs handling of public customer orders.

Presently, OTP Holders acting as both Floor Broker and Market Maker are subject to certain restrictions under NYSE Arca Rule 6.38. Upon approval of the above mentioned rule changes, these restrictions will become obsolete. Since Market Makers will be prohibited from acting as a Floor Broker, and visa-versa, there is no need to have specific restrictions governing their trading activity. Therefore, the Exchange proposes eliminating Rule 6.38 in its entirety.

The Exchange noted that LMMs and InterMarket Linkage Maker Makers ("IMM") are exempt from certain provisions contained in NYSE Arca Rule 6.38. Currently, LMMs and IMMs may be called upon to send Principal Acting as Agent ("P/A") Orders through the InterMarket Linkage System ("Linkage") pursuant to NYSE Arca Rules 6.92 and 6.93. Linkage is a fully automated process on NYSE Arca, and while the IMM or LMM may be acting in an agency capacity, as the responsible party for sending the order, they are not acting in the capacity of a Floor Broker.

proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

<sup>8</sup> See *supra* note 5 and accompanying text.

<sup>9</sup> 15 U.S.C. 78s(b)(2).

<sup>10</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> See Securities Exchange Act Release No. 56899 (December 5, 2007), 72 FR 70367 ("Notice").

<sup>4</sup> See NYSE Arca Rule 6.38(b)(4).