

## APPENDIX A—Continued

Company	Ticker symbol(s)
Barclays PLC .....	BCS
Citigroup Inc. ....	C
Credit Suisse Group .....	CS
Daiwa Securities Group Inc. ....	DSECY
Deutsche Bank Group AG .....	DB
Allianz SE .....	AZ
Goldman, Sachs Group Inc .....	GS
Royal Bank ADS .....	RBS
HSBC Holdings PLC ADS .....	HBC and HSI
J.P. Morgan Chase & Co. ....	JPM
Lehman Brothers Holdings Inc. ....	LEH
Merrill Lynch & Co., Inc. ....	MER
Mizuho Financial Group, Inc. ....	MFG
Morgan Stanley .....	MS
UBS AG .....	UBS
Freddie Mac .....	FRE
Fannie Mae .....	FNM

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-58161; File No. SR-Amex-2008-39]

**Self-Regulatory Organizations; American Stock Exchange LLC; Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Listing and Trading of Trust Issued Receipts That Directly Hold Investments in Certain Financial Instruments and To Permit the Listing and Trading of Shares of Fourteen Funds of the Commodities and Currency Trust**

July 15, 2008.

**I. Introduction**

On May 9, 2008, the American Stock Exchange LLC (“Amex” 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 seeking to: (1) Amend Commentary .07 to Amex Rule 1202 to permit the listing and trading of certain trust issued receipts (“TIRs”) that directly hold any combination of investments including cash, securities, options on securities and indices, commodities, futures contracts, options on futures contracts, forward contracts, equity caps, collars, and floors, and swap agreements (collectively, “Financial Instruments”); and (2) list and trade the shares (“Shares”) of

fourteen funds (“Funds”) of the Commodities and Currency Trust (“Trust”) based on certain commodity indexes, commodities, and currencies pursuant to Commentary .07 to Amex Rule 1202, as proposed to be amended. On June 4, 2008, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change was published for comment in the **Federal Register** on June 12, 2008.<sup>3</sup> The Commission received no comments regarding the proposal. This order approves the proposed rule change, as modified by Amendment No. 1 thereto.

**II. Description of the Proposal**

The Exchange proposes to amend Commentary .07 to Amex Rule 1202 to permit the listing and trading of certain TIRs that directly hold any combination of investments in Financial Instruments.<sup>4</sup> In addition, the Exchange proposes to list and trade the Shares of the Funds pursuant to Commentary .07 to Amex Rule 1202, as proposed to be amended.

*Proposed Amendments to Commentary .07 to Amex Rule 1202*

Commentary .07 to Amex Rule 1202 currently permits the Exchange to list and trade TIRs where the underlying trust holds “Investment Shares.”<sup>5</sup> As a result, TIRs that are listed pursuant to current Commentary .07 to Amex Rule 1202 are required to be in the form of a “master-feeder” structure, whereby the listed security holds or invests in the security of the fund that is investing in the prescribed financial instruments.

As a result of a recent interpretation by the staff of the Internal Revenue Service relating to the inability to interpose a grantor trust in order to utilize a certain tax reporting form, the Exchange has been notified that the need for the current master-feeder structure set forth in Commentary .07 to Amex Rule 1202 is no longer necessary.

<sup>3</sup> See Securities Exchange Act Release No. 57932 (June 5, 2008), 73 FR 33467 (“Notice”).

<sup>4</sup> The Exchange represents that permissible securities in connection with Financial Instruments would not include foreign equity securities.

<sup>5</sup> Investment Shares are defined in Commentary .07(b)(1) to Amex Rule 1202 as securities that are (a) issued by a trust, partnership, commodity pool, or other similar entity that invests in any combination of futures contracts, options on futures contracts, forward contracts, commodities, swaps or high credit quality short-term fixed-income securities and (b) issued and redeemed daily at net asset value (“NAV”) in amounts correlating to the number of receipts created and redeemed in a specified aggregate minimum number. See Commentary .07(a) to Amex Rule 1202. See also Securities Exchange Act Release No. 53105 (January 11, 2006), 71 FR 3129 (January 19, 2006) (SR-Amex 2005-059) (approving, among other things, the adoption of Commentary .07 to Amex Rule 1202).

The Exchange represents that there are no substantive differences between the proposed structure (TIRs directly holding Financial Instruments) and the current master-feeder structure (TIRs holding Investment Shares that invest in certain financial instruments). Amex states that its proposal would provide an alternative for issuers so that TIRs may be listed and traded on the Exchange that directly invest in or hold Financial Instruments, rather than through an additional security of a fund.

Specifically, the proposal seeks to expand the application of Commentary .07 to Amex Rule 1202 to both Investment Shares and Financial Instruments. Accordingly, new Commentary .07(b)(4) to Amex Rule 1202 would be added to define “Financial Instrument” as any combination of cash, securities, options on securities and indices, commodities, futures contracts, options on futures contracts, forward contracts, equity caps, collars, and floors, and swap agreements. Amex seeks to add the term “Financial Instrument” to where the term “Investment Shares” appears throughout Commentary .07 to Amex Rule 1202 to indicate that TIRs directly holding Financial Instruments may be listed and traded on the Exchange.

*Proposal To List and Trade the Shares of the Funds*

The Shares of each Fund will generally be subject to the Amex rules applicable to TIRs. The Shares represent common units of fractional undivided beneficial interests in, and ownership of, each Fund. Each Fund will invest the proceeds of its offering of Shares in various Financial Instruments that will provide exposure to the Funds’ underlying currency, commodity, or commodity index, as applicable. In addition, the Funds will also maintain cash positions in cash or money market instruments for the purpose of collateralizing such positions taken in the Financial Instruments.

Shares of seven of the Funds of the Trust will be designated as Ultra ProShares while the Shares of the other seven Funds of the Trust will be designated as UltraShort ProShares.<sup>6</sup> Each of the Funds will have a distinct

<sup>6</sup> The Funds are the: (1) Ultra DJ-AIG Commodity ProShares; (2) UltraShort DJ-AIG Commodity ProShares; (3) Ultra DJ-AIG Agriculture ProShares; (4) UltraShort DJ-AIG Agriculture ProShares; (5) Ultra DJ-AIG Crude Oil ProShares; (6) UltraShort DJ-AIG Crude Oil ProShares; (7) Ultra Gold ProShares; (8) UltraShort Gold ProShares; (9) Ultra Silver ProShares; (10) UltraShort Silver ProShares; (11) Ultra Euro ProShares; (12) UltraShort Euro ProShares; (13) Ultra Yen ProShares; and (14) UltraShort Yen ProShares. See Exhibit A to Amex’s proposed rule change on Form 19b-4.

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

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

investment objective. The Funds will attempt, on a daily basis, to achieve their investment objective by corresponding to a specified multiple or an inverse multiple of the performance of a particular benchmark commodities index, commodity, or currency (each an "Underlying Benchmark" and collectively, the "Underlying Benchmarks").

Six Funds will be based on the following Underlying Benchmark indexes: (1) The Dow Jones-AIG Commodity Index<sup>SM</sup>; (2) the Dow Jones-AIG Crude Oil Sub-Index<sup>SM</sup>; and (3) the Dow Jones-AIG Agriculture Sub-Index<sup>SM</sup> (each, an "Underlying Index" and collectively, the "Underlying Indexes"). Four Funds will be based on the following Underlying Benchmark commodities: (1) Gold; and (2) silver (each, an "Underlying Commodity" and collectively, the "Underlying Commodities"). Lastly, four Funds will be based on the following Underlying Benchmark currencies versus the U.S. dollar: (1) The Euro; and (2) the Japanese Yen (each, an "Underlying Currency" and collectively, the "Underlying Currencies").

The Exchange proposes to list and trade the Shares of the Funds, that seek daily investment results, before fees and expenses, that correspond to twice (200%) the daily performance of the Underlying Benchmark (the "Ultra Funds"). If each such Fund is successful in meeting its investment objective, the NAV<sup>7</sup> of the Shares of each such Fund is expected to gain on a percentage basis, approximately twice as much as each such Fund's respective Underlying Benchmark when the price of the Underlying Benchmark increases on a given day, and should lose approximately twice as much when such price declines on a given day, before fees and expenses.

The Exchange also proposes to list and trade Shares of the Funds, that seek daily investment results, before fees and expenses that correspond to twice the inverse (-200%) of the daily performance of the Underlying Benchmark (the "UltraShort Funds"). If each such Fund is successful in meeting its objective, the NAV of the Shares of each such Fund is expected to increase approximately twice as much, on a percentage basis, as the respective

Underlying Benchmark loses on a given day, or should decrease approximately twice as much as the respective Underlying Benchmark gains when the Underlying Benchmark rises on a given day, before fees and expenses.

Detailed discussions regarding each of the Underlying Benchmarks, the structure and management of the Funds, the investment objective for each of the Funds, the Portfolio Investment Methodology, policies and procedures for creating and redeeming Shares of the Funds, the Funds' investment techniques, and NAV, among others, can be found in the Notice.<sup>8</sup> In addition, the Exchange states that the Registration Statement for each Fund will provide a detailed description, including, but not limited to, the structure, creation/redemption process, investment objective and strategies, characteristics, tax status, and distributions. Investors are directed to each Fund's Registration Statement for a complete explanation.

*Availability of Information Regarding the Shares.* The Web sites for the Fund and/or the Exchange, which are publicly accessible at no charge, will contain the following information: (1) The daily current NAV per Share, the prior business day's NAV per Share, and the reported closing price; (2) the mid-point of the bid-ask price in relation to the NAV per Share as of the time it is calculated (the "Bid-Ask Price");<sup>9</sup> (3) calculation of the premium or discount of such price against the NAV per Share; (4) data in chart form displaying the frequency distribution of discounts and premiums of the Bid-Ask Price against the NAV per Share, within appropriate ranges for each of the four previous calendar quarters; (5) the applicable prospectus; and (6) other quantitative information.

As described above, the NAV per Share will be calculated and disseminated daily.<sup>10</sup> Amex will disseminate for the Funds on a daily basis by means of the Consolidated Tape Association/Consolidated Quotation High Speed Lines information with respect to the corresponding Indicative Fund Value (as discussed below), recent NAV per Share, and the number of Shares outstanding. The Exchange will also make available on its Web site daily

trading volume of the Shares and closing prices of the Shares.

Each Fund's total portfolio composition will be disclosed on the Web site of the Trust (<http://www.proshares.com>) or another relevant Web site as determined by the Trust and/or the Exchange. The Trust will provide Web site disclosure of portfolio holdings daily and will include, as applicable, the names and number of Financial Instruments and characteristics of such instruments and cash equivalents, and amount of cash held in the portfolio of each Fund. This Web site disclosure of the portfolio composition of each Fund will occur at the same time as the disclosure by the Managing Owner of the portfolio composition to Authorized Participants so that all market participants are provided portfolio composition information at the same time. Therefore, the same portfolio information will be provided on the public Web site as well as in electronic files provided to Authorized Participants. Accordingly, each investor will have access to the current portfolio composition of each Fund through the Trust's Web site and/or at the Exchange's Web site at <http://www.amex.com>.

The value of each Underlying Benchmark will be updated intra-day on a real time basis as its components change in price. The daily closing index value and the percentage change in the daily closing index value for each Underlying Index will be publicly available on various Web sites, such as <http://www.ino.com> and <http://www.finance.yahoo.com>. Dow Jones will disseminate the levels for each of the Underlying Indexes at least every 15 seconds from 8 a.m. to 3 p.m. ET and will publish daily Underlying Index levels at approximately 5 p.m. ET each business day on its Web site at <http://www.djindexes.com>. Data regarding each Underlying Index is also available from the respective index provider to subscribers. In addition, data is also available regarding the underlying component commodities of each Underlying Index from those futures exchanges that list and trade futures contracts on those commodities. Several independent data vendors also package and disseminate index data in various value-added formats (including vendors displaying both index constituents and index levels and vendors displaying index levels only).

Real-time dissemination of spot pricing for gold, silver, euro, and Japanese yen is available on a 24-hour basis worldwide from various major market data vendors. Data regarding spot pricing of the Underlying

<sup>7</sup> NAV means the total assets of a Fund including, but not limited to, all cash and cash equivalents or other debt securities, less total liabilities of such Fund, each determined on the basis of generally accepted accounting principles in the United States, consistently applied under the accrual method of accounting. In particular, NAV includes any unrealized profit or loss on open swaps and futures contracts and any other credit or debit accruing to a Fund but unpaid or not received by a Fund.

<sup>8</sup> See Notice, *supra* note 3. Terms used but not otherwise defined herein shall have the same meanings as referenced in the Notice.

<sup>9</sup> The Bid-Ask Price of Shares is determined using the highest bid and lowest offer as of the time of calculation of the NAV.

<sup>10</sup> The Exchange stated that it would obtain a representation from the Trust, prior to the listing of the Shares, that the NAV per Share will be calculated daily and made available to all market participants at the same time.

Benchmark commodities (gold and silver) is publicly available on a 24-hour basis from various financial information service providers, such as Reuters and Bloomberg. In addition, the daily London fix for gold and silver is also disseminated by various market data vendors and is available from the LBMA Web site at <http://www.lbma.org.uk>. The closing and settlement prices of the futures contracts held by the Funds are also readily available from CME, NYMEX, CBOT, ICE/NYBOT, LME, automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters. There is considerable public price and data information regarding the Underlying Benchmark currencies (euro and Japanese yen). Spot pricing related to the foreign currency exchange is available to investors and market professionals on a 24-hour basis. A variety of public Web sites and professional and subscription services provide market and price information regarding the euro and the yen. Current spot prices are also generally available from foreign exchange dealers.

To provide updated information relating to the Funds for use by investors, professionals, and persons wishing to create or redeem the Shares, the Exchange will disseminate an updated "Indicative Fund Value." The Indicative Fund Value will be disseminated on a per-Share basis at least every 15 seconds during regular Amex trading hours of 9:30 a.m. to 4 p.m. ET. The Indicative Fund Value will be calculated based on the cash required for creations and redemptions for a Fund, adjusted to reflect the price changes of the Financial Instruments.

**Criteria for Initial and Continued Listing.** The Funds will be subject to the criteria in Commentary .07(d) of Amex Rule 1202 for initial and continued listing of the Shares. The Funds will accept subscriptions for Shares in Creation Units from Authorized Participants expected to be in a range from \$20 to \$70 per Share during an initial offering period, commencing with the initial effective date of the prospectus and terminating no later than the 90th day following such date, subject to certain exceptions. The anticipated minimum number of Shares for each Fund to be outstanding at the start of trading will be 50,000 Shares. The Exchange represents that, for the initial and continued listing of the Shares, the Shares must be in compliance with Section 803 of the *Amex Company Guide* and Rule 10A-3 under the Act.<sup>11</sup>

**Trading Rules.** The Shares are equity securities subject to Amex rules governing the trading of equity securities, including, among others, rules governing priority, parity, and precedence of orders, specialist responsibilities and account opening, and customer suitability (Amex Rule 411). Initial equity margin requirements of 50% will apply to transactions in the Shares. The Shares will trade on Amex until 4 p.m. ET each business day and will trade in a minimum price variation of \$0.01 pursuant to Amex Rule 127-AEMI. Trading rules pertaining to odd-lot trading in Amex equities (Amex Rule 205-AEMI), stop and stop limit orders for securities that are derivatively priced (Amex Rule 154-AEMI), and the prevention of trade-through transactions of protected quotations (Amex Rule 126A-AEMI) will also apply to the Shares.

Specialist transactions in the Shares made in connection with the creation and redemption of Shares will not be subject to the prohibitions of Amex Rule 190(a).<sup>12</sup> The Shares will generally be subject to the Exchange's stabilization rule (Amex Rule 170), except that specialists may buy on "plus ticks" and sell on "minus ticks," in order to bring the Shares into parity with (i) The underlying asset or commodity on which the Shares are based, (ii) the NAV of the Shares, or (iii) the futures contract(s) on the underlying asset or commodity on which the Shares are based.<sup>13</sup>

The trading of the Shares will also be subject to certain conflict of interest provisions set forth in Commentary .07(e) to Amex Rule 1202. Lastly, Commentary .07(g)(3) to Amex Rule 1202 prohibits the specialist in the Shares from using any material, non-public information received from any person associated with a member, member organization, or employee of such person regarding trading by such person or employee in the Underlying Index commodities, related futures, or options on futures, or any other related derivatives.

**Surveillance.** The Exchange represents that its surveillance procedures are adequate to detect and deter violations of Exchange rules

<sup>12</sup> Amex Rule 190(a) states that no specialist or his member organization, or any member, officer, employee, or approved person therein, may, directly or indirectly, effect any business transaction with a company or any officer, director or 10% stockholder of a company in which stock the specialist is registered. See Commentary .05 to Amex Rule 190 (exempting specialists registered in a security issued by a trust, listed pursuant to, among other rules, Amex Rule 1202, from the requirements of Amex Rule 190(a)).

<sup>13</sup> See Commentary .07(f) to Amex Rule 1202.

relating to the trading of the Shares. The surveillance procedures will be similar to those used for other commodity-based TIRs, Commodity-Based Trust Shares, Currency Trust Shares, and exchange-traded funds and will incorporate and rely upon existing Amex surveillance procedures governing options and equities.

The Exchange represents that it currently has in place comprehensive surveillance sharing agreements with ICE, LME, and NYMEX for the purpose of providing information in connection with the trading in futures contracts traded on their respective exchanges comprising the Underlying Benchmarks, and notes that CBOT, CME, and NYBOT are members of the Intermarket Surveillance Group. As a result, the Exchange asserts that market surveillance information is available from relevant futures exchanges, if necessary, due to regulatory concerns that may arise in connection with the futures contracts

**Information Circular.** Amex will distribute an Information Circular to its members in connection with the trading of the Shares. The Information Circular will discuss the special characteristics and risks of trading this type of security, such as commodity or currency fluctuation risk. Specifically, the Information Circular, among other things, will discuss: (1) What the Shares are and how Shares are created and redeemed; (2) the requirement that members and member firms deliver a prospectus to investors purchasing the Shares prior to or concurrently with the confirmation of a transaction, applicable Amex rules; (3) dissemination information and trading information; (4) applicable suitability rules;<sup>14</sup> (5) that the Fund is subject to various fees and expenses described in the Registration Statement; (6) that there is no regulated source of last-sale information regarding physical commodities and currencies, that the SEC has no jurisdiction over the trading of physical commodities or currencies, and that the CFTC has regulatory jurisdiction over the trading

<sup>14</sup> The Exchange notes that pursuant to Amex Rule 411, members and member organizations are required in connection with recommending transactions in the Shares to have a reasonable basis to believe that a customer is suitable for the particular investment given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such member. See Commentary .05 to Amex Rule 411 (providing heightened suitability requirements for derivative securities seeking to provide investment results that either exceed the performance of an underlying reference asset by a specified multiple or that correspond to the inverse (opposite) of the performance of an underlying reference asset by a specified multiple).

<sup>11</sup> See 17 CFR 240.10A-3.

of futures contracts and options on futures contracts; (7) the procedures for purchases and redemptions of Shares and that Shares are not individually redeemable but are redeemable only in one or more Creation Units; (8) any relief, if granted, by the Commission from any rules under the Act; (9) that the trading hours of the Shares will be from 9:30 a.m. to 4 p.m. ET and that the NAV for the Shares will be calculated shortly after 4 p.m. ET each trading day; and (10) information about the Shares will be publicly available on the Amex Web site and the Funds' Web sites.

**Trading Halts.** The Exchange represents that the Information Circular will also inform members of Exchange policies regarding trading halts in the Shares. Specifically, trading in the Shares will be halted in the event the market volatility trading halt parameters set forth in Amex Rule 117 have been reached. Second, in addition to the parameters set forth in Amex Rule 117, the Exchange will halt trading in the Shares if trading in a significant number of underlying related futures contract(s) is halted or suspended. Third, the Exchange will halt trading if it becomes aware that a Fund's NAV or disclosure of the portfolio composition is not being disseminated or has not been disseminated to all market participants at the same time. Fourth, the Exchange will halt trading in the Shares if the value of an Underlying Benchmark is no longer calculated or available on at least a 15-second basis through one or more major market data vendors during the time the Shares trade on Amex or if an Indicative Fund Value per Share updated every 15 seconds is no longer calculated or available.<sup>15</sup> Fifth, with respect to a halt in trading that is not specified above, the Exchange may also consider other relevant factors and the existence of unusual conditions or circumstances that may be detrimental to the maintenance of a fair and orderly market.

### III. Discussion

After careful consideration, the Commission finds that the proposed rule change is consistent with the

<sup>15</sup> If the value of the Underlying Benchmark or the Indicative Fund Value is not being disseminated on at least a 15-second basis during the hours the Shares trade on the Exchange, the Exchange may halt trading during the day in which the interruption to the dissemination of the value of the Underlying Benchmark or the Indicative Fund Value occurs. If the interruption to the dissemination of the value of the Underlying Benchmark or the Indicative Fund Value persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>16</sup> In particular, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act,<sup>17</sup> which requires, among other things, that the rules of a national securities exchange be designed 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 notes that it has permitted the listing and trading of exchange-traded fund-like products linked to the performance of underlying currencies and commodities.<sup>18</sup> The Commission further notes that the shares of other UltraFunds and UltraShort Funds based on various securities indexes have previously been approved by the Commission.<sup>19</sup>

<sup>16</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>17</sup> 15 U.S.C. 78f(b)(5).

<sup>18</sup> See, e.g., Securities Exchange Act Release Nos. 55632 (April 13, 2007), 72 FR 19987 (April 20, 2007) (SR-Amex-2006-112) (approving the listing and trading of the United States Natural Gas Fund, LP); 53582 (March 31, 2006), 71 FR 17510 (April 6, 2006) (SR-Amex 2005-127) (approving the listing and trading of the United States Oil Fund, LP); 53521 (March 20, 2006), 71 FR 14967 (March 24, 2006) (SR-Amex 2005-072) (approving the listing and trading of the iShares Silver Trust); 53105 (January 11, 2006), 71 FR 3129 (January 19, 2006) (SR-Amex 2005-059) (approving the listing and trading of the DB Commodity Index Tracking Fund); 53059 (January 5, 2006), 71 FR 2072 (January 12, 2006) (SR-Amex 2005-128) (approving the trading of the Euro Currency Trust pursuant to unlisted trading privileges ("UTP")); 51058 (January 19, 2005), 70 FR 3749 (January 26, 2005) (SR-Amex 2004-38) (approving the listing and trading of the iShares COMEX Gold Trust); and 51446 (March 29, 2005), 70 FR 17272 (April 5, 2005) (SR-Amex-2005-032) (approving the trading of streetTRACKS Gold Shares pursuant to UTP). See also Securities Exchange Act Release Nos. 55029 (December 29, 2006), 72 FR 806 (January 8, 2007) (SR-Amex 2006-76) (approving the listing and trading of the DB Multi-Sector Commodity Trust); 54450 (September 14, 2006), 71 FR 55230 (September 21, 2006) (SR-Amex 2006-44) (approving the listing and trading of shares of the DB Currency Index Value Fund); 55292 (February 14, 2007), 72 FR 8406 (February 26, 2007) (SR-Amex 2006-86) (approving the listing and trading of shares of the PowerShares DB U.S. Dollar Index Bullish Fund and the PowerShares DB U.S. Dollar Index Bearish Fund); 56969 (December 14, 2007), 72 FR 72424 (December 20, 2007) (approving the listing and trading of shares on the GreenHaven Continuous Commodity Index Fund).

<sup>19</sup> See, e.g., Securities Exchange Act Release Nos. 52553 (October 3, 2005), 70 FR 59100 (October 11, 2005) (SR-Amex-2004-62) (approving the listing and trading of shares of the xtraShares Trust); 54040 (June 23, 2006), 71 FR 37629 (June 30, 2006) (SR-Amex-2006-41) (approving the listing and trading of shares of the ProShares Trust); 55117 (January 17, 2007), 72 FR 3442 (January 25, 2007) (SR-Amex 2006-101) (approving the listing and trading of

### *Proposed Amendments to Commentary .07 to Amex Rule 1202*

The Commission notes that Amex's proposal to permit the listing and trading of TIRs that directly hold any combination of investments in Financial Instruments on the Exchange is subject to existing rules, safeguards, and procedures governing the listing and trading of TIRs, generally, and Commentary .07 to Amex Rule 1202, in particular. Prior to listing and trading on the Exchange, Amex must file a separate proposed rule change pursuant to Section 19(b) of the Act for each series of TIRs based on separate Investment Shares or Financial Instruments. In addition, all such securities listed and/or traded under Commentary .07 to Amex Rule 1202, as proposed to be amended, will be subject to the full panoply of Amex rules and procedures that currently govern the trading of equity securities on the Exchange. The Commission believes that the proposed rule change will facilitate the listing and trading of additional types of exchange-traded derivative securities products that will enhance competition among market participants, to the benefit of investors and the marketplace.

### *Proposal to List and Trade the Shares of the Funds*

The Exchange proposes to list and trade the Shares pursuant to Commentary .07 to Amex Rule 1202, as proposed to be amended.<sup>20</sup> Amex represents that the Shares will conform to the existing initial and continued listing criteria under such rule and must be in compliance with Section 803 of the Amex Company Guide and Rule 10A-3 under the Act.<sup>21</sup>

The Commission believes that the proposal to list and trade the Shares of the Funds on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,<sup>22</sup> which sets forth Congress' finding

shares of the ProShares Trust); 56592 (October 1, 2007), 72 FR 57364 (October 9, 2007) (SR-Amex-2007-60) (approving the listing and trading of shares of the ProShares Trust based on international equity indexes); and 56998 (December 19, 2007), 72 FR 73404 (December 27, 2007) (SR-Amex-2007-104) (approving the listing and trading of shares of the ProShares Trust).

<sup>20</sup> The Commission believes that the Exchange's existing rules and procedures are adequate with respect to the Shares. However, the Commission notes that other proposed series of TIRs may require additional Exchange rules and procedures to govern their listing and trading on the Exchange. For example, in the case of a proposed series of TIRs that are based on a portfolio, at least in part, of non-U.S. equity securities, rules relating to comprehensive surveillance sharing agreements and quantitative initial and continued listing standards may be required.

<sup>21</sup> See *supra* note 11.

<sup>22</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

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. Quotations and last-sale information for the Shares will be disseminated by means of CTA and Consolidated Quotation High Speed Lines.<sup>23</sup> In addition, the value of each Underlying Benchmark will be updated intra-day on a real time basis as its components change in price. The Indicative Fund Value will be disseminated at least every 15 seconds throughout Amex's trading hours, in accordance with Commentary .07(d)(2)(iii) to Amex Rule 1202, and the NAV of each Fund will be calculated by the Administrator and made available each business day at the times set forth in the Notice.<sup>24</sup> Real-time dissemination of spot pricing for gold, silver, euro, and Japanese yen is available on a 24-hour basis worldwide from various major market data vendors. Data regarding spot pricing of the Underlying Benchmark commodities (gold and silver) is publicly available on a 24-hour basis from various financial information service providers, such as Reuters and Bloomberg. In addition, the daily London fix for gold and silver is also disseminated by various market data vendors and is available from the LBMA Web site. The closing and settlement prices of the futures contracts held by the Funds are also readily available from CME, NYMEX, CBOT, ICE/NYBOT, LME, automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters. Spot pricing related to the foreign currency exchange is available to investors and market professionals on a 24-hour basis. A variety of public Web sites and professional and subscription services provide market and price information regarding the euro and the yen. Current spot prices are also generally available from foreign exchange dealers. Moreover, each Fund's total portfolio composition will be disclosed on the Web site of the Trust (<http://www.proshares.com>) or another relevant Web site as determined by the Trust and/or the Exchange. The Trust will provide Web site disclosure of portfolio holdings daily and will include, as

<sup>23</sup> E-mail from Daniel Mollin, Associate General Counsel, Amex, to Edward Cho, Special Counsel, Division of Trading and Markets, Commission, dated July 9, 2008 (confirming dissemination of quotations and last-sale information regarding the Shares).

<sup>24</sup> See Notice, *supra* note 3, at 33471.

applicable, the names and number of Financial Instruments and characteristics of such instruments and cash equivalents, and amount of cash held in the portfolio of each Fund. Amex will also disseminate via CTA and Consolidated Quotation High Speed Lines various other data, including corresponding Indicative Fund Values, recent NAV per Share, and the number of Shares outstanding. In addition, the Exchange will also make available on its Web site daily trading volume of the Shares, closing prices of the Shares, and the NAV per Share. The Fund's Web site will also contain a variety of other information for the Shares, including a display of the applicable prospectus and quantitative information on a per-Share basis.

Furthermore, 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 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 Trust, prior to listing, that the NAV per Share for the Funds will be calculated daily, and that the NAV will be made available to all market participants at the same time.<sup>25</sup> The Exchange has represented that the disclosure of the portfolio composition for each Fund will be made available to all market participants at the same time. The Exchange may consider the suspension of trading in, or removal from listing of, the Shares if, among others: (1) the underlying index or portfolio is no longer calculated or available on at least a 15-second delayed basis through one or more major market data vendors during the time the TIRs trade on the Exchange; or (2) the Indicative Fund Value is no longer made available on at least a 15-second delayed basis. Commentary .07(e) to Amex Rule 1202 restricts any equity specialist, his member organization, or any other member, limited partner, officer, or approved person thereof from acting as a market maker in an underlying asset or commodity, related futures or options on futures, or any other related derivatives, unless certain procedures restricting the flow of material, non-public market information are established. In addition, Commentary .07(g)(3) to Amex Rule 1202 states that, in connection with trading the underlying physical asset or commodity, related futures or options on futures or any other related

<sup>25</sup> See *infra* note 26.

derivative (including TIRs), the specialist registered as such in TIRs may not use any material, non-public information received from any person associated with a member, member organization, or employee of such person regarding trading by such person or employee in the physical asset or commodity, futures or options on futures, or any other related derivatives.

The Commission believes that the Exchange's trading halt rules are reasonably designed to prevent trading in the Shares when transparency is impaired. Trading in the Shares will be halted: (1) In the event the market volatility trading halt parameters set forth in Amex Rule 117 have been reached; (2) if trading in a significant number of underlying related futures contract(s) is halted or suspended; (3) if the Exchange becomes aware that a Fund's NAV or disclosure of the portfolio composition is not being disseminated or has not been disseminated to all market participants at the same time;<sup>26</sup> (4) if the value of an Underlying Benchmark is no longer calculated or available on at least a 15-second basis through one or more major market data vendors during the time the Shares trade on Amex or if an Indicative Fund Value per Share updated every 15 seconds is no longer calculated or available.<sup>27</sup> With respect to a halt in trading not specified above, the Exchange may also consider other relevant factors and the existence of unusual conditions or circumstances that may be detrimental to the maintenance of a fair and orderly market.

The Commission further believes that the trading rules and procedures to which the Shares will be subject pursuant to this proposal are consistent with the Act. The Exchange has represented that the Shares are equity securities subject to Amex's rules governing the trading of equity securities.

In support of this proposal, the Exchange has made the following representations:

(1) The Shares will conform to the initial and continued listing criteria under Commentary .07 to Amex Rule 1202, as proposed to be amended.

<sup>26</sup> See also Securities Exchange Release No. 58111 (July 7, 2008), 73 FR 40643 (July 15, 2008) (SR-Amex-2008-40; SR-NASDAQ-2008-046; SR-NYSE-2008-39; SR-NYSEArca-2008-50) (adopting, among other things, new Amex Rule 117A and Commentary.01 thereto, which requires that the Exchange halt trading in the Shares once it becomes aware that the NAV for such Shares are not being disseminated to all market participants at the same time).

<sup>27</sup> See *supra* note 15.

(2) The Exchange's surveillance procedures are adequate to deter and detect violations of Exchange rules relating to the trading of the Shares. Specifically, the surveillance procedures will be similar to those used for other commodity-based TIRs, Commodity-Based Trust Shares, Currency Trust Shares, and exchange-traded funds. In addition, the Exchange will incorporate and rely upon existing Amex surveillance procedures governing options and equities.

(3) The Exchange will distribute an Information Circular, the contents of which are more fully described herein, to its members in connection with the trading of the Shares.

(4) The Exchange represents that the Trust is required to comply with Section 803 of the *Amex Company Guide* and Rule 10A-3 under the Act<sup>28</sup> for the initial and continued listing of the Shares.

This approval order is based on the Exchange's representations.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>29</sup> that the proposed rule change (SR-Amex-2008-39), 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>30</sup>

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8-16614 Filed 7-18-08; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58149; File No. SR-FINRA-2008-034]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to the Elimination of Certain Fee References in the Incorporated NYSE Rules

July 11, 2008.

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 June 26, 2008, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a

National Association of Securities Dealers, Inc. ("NASD")) 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 FINRA. 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

FINRA is proposing to amend Incorporated NYSE Rules 311, 342, 345, 346, and 416 to delete references to legacy New York Stock Exchange ("NYSE") fees that are not charged by FINRA pursuant to those rules.

The text of the proposed rule change is available at FINRA, the Commission's Public Reference Room, and at <http://www.finra.org/RulesRegulation/RuleFilings/index.htm>.

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

In its filing with the Commission, FINRA 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 IV below. FINRA 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

On July 30, 2007, NASD and NYSE consolidated their member firm regulation operations into a combined organization, FINRA. As part of the consolidation, NYSE committed to transfer to FINRA certain regulatory revenues for the remainder of 2007. NYSE fees subject to the transfer agreement included a gross FOCUS (Financial and Operational Combined Uniform Single Report) fee<sup>3</sup> (comparable to NASD's Gross Income Assessment)<sup>4</sup> and registration fees for

<sup>3</sup> See Securities Exchange Act Release No. 56181 (August 1, 2007), 72 FR 44206 (August 7, 2007) (SR-NYSE-2007-70).

<sup>4</sup> See Section 1(c) of Schedule A to FINRA's By-Laws ("Schedule A"). The Commission recently approved a new fee structure for the Gross Income Assessment that combines the two legacy fee structures of NASD and NYSE. See Securities

branch offices<sup>5</sup> (comparable to NASD's Branch Office System Processing Fee)<sup>6</sup> and registered representatives<sup>7</sup> (comparable to NASD's registration fees for the registration of representatives or principals).<sup>8</sup>

As part of the consolidation, FINRA evaluated whether to consolidate or eliminate any duplicative fees, as well as whether to maintain or increase any non-duplicative fees. As a result of that process, FINRA determined that a number of fees previously charged by NYSE could be eliminated because they are duplicative of other FINRA fees. On December 31, 2007, NYSE filed a proposed rule change with the Commission to eliminate certain NYSE registration and regulatory fees effective as of January 1, 2008.<sup>9</sup> The current proposed rule change deletes references in the Incorporated NYSE Rules to NYSE fees that were eliminated by NYSE effective as of January 1, 2008, and that are not charged by FINRA pursuant to those rules.

Specifically, the proposed rule change would delete from the Incorporated NYSE Rules references to the following fees:

- The NYSE membership application fee referenced in NYSE Rule 311;<sup>10</sup>
- The NYSE Branch Office Fees referenced in NYSE Rule 342.11;<sup>11</sup>
- The NYSE Registered Persons Fees referenced in NYSE Rule 345.14;<sup>12</sup>
- The Statutory Disqualification Filing Fee and the Statutory Disqualification Review Fee referenced in NYSE Rule 346(f);<sup>13</sup> and
- The late filing fee referenced in NYSE Rule 416(b).<sup>14</sup>

FINRA proposes that the effective date of this proposed change be retroactive to January 1, 2008, to coincide with the NYSE's elimination of these fees as of January 1, 2008.

###### 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions

Exchange Act Release No. 57474 (March 11, 2008), 73 FR 14517 (March 18, 2008).

<sup>5</sup> See NYSE Rule 342.11.

<sup>6</sup> See Section 4(a) of Schedule A.

<sup>7</sup> See NYSE Rule 345.14.

<sup>8</sup> See Section 4(b) of Schedule A.

<sup>9</sup> See Securities Exchange Act Release No. 57093 (January 3, 2008), 73 FR 1654 (January 9, 2008) (SR-NYSE-2007-127) ("Release No. 34-57093").

<sup>10</sup> FINRA charges its own application fees pursuant to Sections 4(b) and 4(e) of Schedule A.

<sup>11</sup> FINRA charges a similar fee pursuant to Section 4(a) of Schedule A.

<sup>12</sup> FINRA charges a similar fee pursuant to Section 4(b) of Schedule A.

<sup>13</sup> FINRA charges a similar fee pursuant to Section 12 of Schedule A.

<sup>14</sup> FINRA charges a similar fee pursuant to Section 4(g) of Schedule A.

<sup>28</sup> 17 CFR 240.10A-3.

<sup>29</sup> 15 U.S.C. 78s(b)(2).

<sup>30</sup> See 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.