

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58500; File No. SR-NYSE-2008-57]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change To Adopt on a Permanent Basis a Pilot Program Which Allows the Exchange To Adjust the Earnings of Companies for Purposes of Its Earnings Standard by Reversing the Income Statement Effects of Changes in Fair Value of Financial Instruments Extinguished at the Time of Listing

September 9, 2008.

#### I. Introduction

On July 23, 2008, the New York Stock Exchange LLC (“NYSE” 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 enable the Exchange to adjust the earnings of companies by reversing the income statement effects for all periods of any changes in fair value of financial instruments classified as a liability recorded by the company in earnings, provided such financial instrument is either being redeemed with the proceeds of an offering occurring in conjunction with the listing or converted into or exercised for common stock of the company at the time of listing. The proposed rule change was published for comment in the **Federal Register** on August 5, 2008. <sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

#### II. Description of the Proposal

The Exchange proposes to amend the earnings standard of Section 102.01C(I) of the Exchange’s Listed Company Manual (“Manual”) to enable the Exchange to adjust the earnings of companies listing in conjunction with an initial public offering (“IPO”) by reversing the income statement effects for all periods of changes in fair value of financial instruments classified as a liability recorded by the company in earnings, provided such financial instrument is either being redeemed with the proceeds of an offering occurring in conjunction with the listing or converted into or exercised for common stock of the company at the

time of listing. The proposed amendment was originally implemented for a six-month period as a Pilot Program. <sup>4</sup> The Pilot Program expired and was subsequently renewed for an additional three months, expiring on September 2, 2008. <sup>5</sup>

The Exchange believes that it is appropriate to exclude the effects of changes in fair value of a financial instrument classified as a liability from a company’s earnings where the financial instrument is being retired at the time of a company’s listing either out of the proceeds of a concurrent offering or by conversion into common stock at the time of listing. The Exchange believes that adjusting company earnings for charges arising out of the changes in fair value of financial instruments that are retired with the proceeds of an offering occurring in conjunction with the listing or converted into common stock at the time of listing is consistent with the adjustments that are currently permitted under Section 102.01C. Section 102.01C currently provides for adjustments to earnings for certain nonrecurring charges to earnings that are included in net income as recorded under GAAP, such as the exclusion of impairment charges on long-lived assets, the exclusion of gains and losses on sales of a subsidiary’s or investee’s stock and the exclusion of in-process purchased research and development charges. The Exchange believes that this adjustment is reasonable given the purpose of the earnings standard, which is to determine the suitability for listing of companies on a forward-looking basis.

The Exchange has stated that, as with all companies listed on the Exchange, the Financial Compliance staff of NYSE Regulation will monitor on an ongoing basis the compliance with the Exchange’s continued listing standards of any companies listed in reliance upon the proposed amendment. The Exchange represents that such companies will be subject to delisting if they are found at any time to be below the Exchange’s continued listing standards.

In its proposal, the Exchange stated that as it gains experience in listing companies in reliance upon the proposed amendment, it will continue to carefully reevaluate its appropriateness. If the Exchange becomes aware that companies listed pursuant to the proposed amendment

have difficulty complying with the Exchange’s continued listing standards, it will inform the Commission and discuss with the Commission the desirability of the continued use of the provision.

#### III. Discussion and Commission 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 and, in particular, with Section 6(b)(5) of the Act, <sup>6</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 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. <sup>7</sup>

The Commission believes that the proposed rule change is consistent with other adjustments the Exchange currently makes for certain nonrecurring charges to earnings when evaluating applicants on a forward-looking, post-IPO basis under the existing earnings standard in Section 102.01C(I) of the Manual and is reasonable given the purpose of the earnings standard, which is to determine the suitability for listing of companies on a forward-looking basis. The Commission notes that in determining a company’s eligibility for listing, these changes will allow the Exchange to reverse the income statement effects for all periods of changes in fair value of financial instruments classified as a liability recorded by the company in earnings, provided such financial instrument is either being redeemed with the proceeds of an offering occurring in conjunction with the listing or converted into or exercised for common stock at the time of listing and will not impact the preparation of financial statements by the company listing on the Exchange. In addition, the Commission notes that the Exchange will monitor companies listing using this new adjustment and notes that the Exchange has agreed to discuss the standard with the Commission should it prove difficult for such companies to

<sup>4</sup> See Securities Exchange Act Release No. 56290 (August 20, 2007), 72 FR 49033 (August 27, 2007) (SR-NYSE-2007-75).

<sup>5</sup> See Securities Exchange Act Release No. 57905 (June 2, 2008), 73 FR 32613 (June 9, 2008) (SR-NYSE-2008-44).

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

<sup>7</sup> 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).

<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. 58253 (July 30, 2008), 73 FR 45509.

comply with the Exchange's continued listing standards.

#### IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>8</sup> that the proposed rule change (SR-NYSE-2008-57) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

Florence E. Harmon,

Acting Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58484; File No. SR-NYSEAcra-2008-89]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Amending NYSE Arca Equities Rule 5.2(j)(3) in Connection With Generic Listing Standards for Multiple Fund Shares and Inverse Fund Shares

September 8, 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 August 25, 2008, NYSE Arca, Inc. ("NYSE Arca" 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 prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange, through its wholly-owned subsidiary NYSE Arca Equities, Inc. ("NYSE Arca Equities"), proposes to amend its rules governing NYSE Arca, LLC (also referred to as the "NYSE Arca Marketplace"), the equities trading facility of NYSE Arca Equities. The Exchange is proposing to amend NYSE Arca Equities Rule 5.2(j)(3), the Exchange's initial listing standards for Investment Company Units ("ICUs"), to include generic listing standards for series of ICUs that seek to provide investment results that either exceed the performance of a specified index by a

specified multiple ("Multiple Fund Shares") or that correspond to the inverse (opposite) of the performance of a specified index by a specified multiple ("Inverse Fund Shares") (collectively, "Fund Shares"). The text of the proposed rule change is available on the Exchange's Web site at <http://www.nyse.com>, at the Exchange's principal office, and at the Commission's Public Reference Room.<sup>3</sup>

#### 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 Arca 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. NYSE Arca 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 is proposing to amend NYSE Arca Equities Rule 5.2(j)(3), the Exchange's initial listing standards for ICUs, to include generic listing standards for series of Multiple Fund Shares and Inverse Fund Shares.<sup>4</sup> The Exchange notes that the Commission has previously approved the listing and trading of various Multiple Fund Shares

<sup>3</sup> E-mail from Tim Malinowski, Director, NYSE Euronext, to Edward Cho, Special Counsel, Division of Trading and Markets, Commission, dated September 3, 2008.

<sup>4</sup> Fund Shares differ from traditional exchange-traded fund ("ETF") shares in that they do not merely correspond to the performance of a given securities index, but rather attempt to match a multiple or inverse of such underlying index performance. Multiple Fund Shares seek to provide investment results, before fees and expenses, that correspond to a specified multiple of the percentage performance on a given day of a particular foreign or domestic equities index or Fixed Income Securities (as described below) index or a combination thereof. Inverse Fund Shares seek to provide investment results, before fees and expenses, that correspond to the inverse (opposite) of the percentage performance on a given day of a particular foreign or domestic equities index or Fixed Income Securities index or a combination thereof, by a specified multiple. Fixed Income Securities are described in NYSE Arca Equities Rule 5.2(j)(3) as debt securities that are notes, bonds, debentures or evidence of indebtedness that include, but are not limited to, U.S. Department of Treasury securities, government-sponsored entity securities, municipal securities, trust preferred securities, supranational debt and debt of a foreign country or a subdivision thereof.

and Inverse Fund Shares.<sup>5</sup> Multiple Fund Shares and Inverse Fund Shares currently trading on the Exchange include the Short Funds and UltraShort Funds of the ProShares Trust and the Inverse Funds and Leveraged Inverse Funds of the Rydex ETF Trust, which trade on the Exchange pursuant to unlisted trading privileges ("UTP") under NYSE Arca Equities Rule 5.2(j)(3).<sup>6</sup>

This rule proposal is similar to a proposed rule change by American Stock Exchange LLC ("Amex") in which the Commission approved generic listing standards for Multiple Fund Shares and Inverse Fund Shares.<sup>7</sup> In addition, the Exchange notes that the Commission has approved generic listing standards in NYSE Arca Equities Rule 5.2(j)(6), the Exchange's initial listing standards for Equity Index-Linked Securities, Commodity-Linked Securities, Currency-Linked Securities, Fixed Income Index-Linked Securities, Futures-Linked Securities and MultiFactor Index-Linked Securities,

<sup>5</sup> See Securities Exchange Act Release Nos. 56713 (October 29, 2007), 72 FR 61915 (November 1, 2007) (SR-Amex-2007-74) (approving the listing and trading of Rydex Leveraged Funds, Inverse Funds and Leveraged Inverse Funds); 52553 (October 3, 2005), 70 FR 59100 (October 11, 2005) (SR-Amex-2004-62) (approving the listing and trading of the ProShares Ultra Funds and Short Funds); 54040 (June 23, 2006), 71 FR 37629 (June 30, 2006) (SR-Amex-2006-41) (approving the listing and trading of the ProShares UltraShort Funds); 55117 (January 17, 2007), 72 FR 3442 (January 25, 2007) (SR-Amex-2006-101) (approving the listing and trading of Ultra, Short and UltraShort Funds based on various indexes); 56592 (October 1, 2007), 72 FR 57364 (October 9, 2007) (SR-Amex-2007-60) (approving the listing and trading of ProShares Ultra, Short and UltraShort Funds based on various international indexes); and 56998 (December 19, 2007), 72 FR 73404 (December 27, 2007) (SR-Amex-2007-104) (approving the listing and trading of ProShares Ultra, Short and UltraShort Funds based on several fixed income indexes, among others).

<sup>6</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 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 underlying indexes. See Securities Exchange Act Release Nos. 56763 (November 7, 2007), 72 FR 64103 (November 14, 2007) (SR-NYSEArca-2007-81) (approving UTP trading of shares of funds of Rydex ETF Trust); 56601 (October 2, 2007), 72 FR 57625 (October 10, 2007) (SR-NYSEArca-2007-79) (approving UTP trading of shares of eight funds of the ProShares Trust); 55125 (January 18, 2007), 72 FR 3462 (January 25, 2007) (SR-NYSEArca-2006-87) (approving UTP trading of shares of 81 funds of the ProShares Trust); 54026 (June 21, 2006), 71 FR 36850 (June 28, 2006) (SR-PCX-2005-115) (approving UTP trading of shares of funds of the ProShares Trust).

<sup>7</sup> See Securities Exchange Act Release No. 57660 (April 14, 2008), 73 FR 21391 (April 21, 2008) (SR-Amex-2007-131) (order approving generic listing standards for Multiple Fund Shares and Inverse Fund Shares) ("Amex Proposal").

<sup>8</sup> 15 U.S.C. 78s(b)(2).

<sup>9</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.