

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58745; File No. SR-NYSEArca-2008-94)

October 7, 2008

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Accelerated Approval of a Proposed Rule Change Amending NYSE Arca Equities Rules 5.1(b)(14) and 5.2(j)(2) to Permit the Listing of Equity Linked Notes that are Linked to Securities Issued by Companies Registered Under the Investment Company Act of 1940

On August 25, 2008, 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 (“Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend NYSE Arca Equities Rules 5.1(b)(14) and 5.2(j)(2) to permit the listing of Equity Linked Notes (“ELNs”) that are linked to securities issued by companies registered under the Investment Company Act of 1940 (“1940 Act”)<sup>3</sup> and are listed on a national securities exchange. The proposed rule change was published in the Federal Register on September 19, 2008 for a 15-day comment period.<sup>4</sup> The Commission received no comments on the proposal. This order grants approval to the proposed rule change on an accelerated basis.

I. Description of the Proposal

The Exchange proposes to amend NYSE Arca Equities Rules 5.1(b)(14), the Exchange’s definition of ELNs, and NYSE Arca Equities Rule 5.2(j)(2), the Exchange’s listing standards for ELNs, to permit the listing of ELNs that are linked to securities issued by companies registered under the 1940 Act and are listed on a national securities exchange.

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

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

<sup>3</sup> 15 U.S.C. 80a-1.

<sup>4</sup> See Securities Exchange Act Release No. 58518 (September 11, 2008), 73 FR 54446.

A. Definition of ELN

NYSE Arca Equities Rule 5.1(b)(14) currently defines ELNs as notes that are linked, in whole or in part, to the market performance of up to thirty common stocks or non-convertible preferred stocks. The Exchange proposes to amend NYSE Arca Equities Rule 5.1(b)(14) and define ELNs as notes that are linked, in whole or in part, to the market performance of up to thirty underlying equity securities that meet the criteria in NYSE Arca Equities Rule 5.2(j)(2).

B. Securities Underlying ELNs

NYSE Arca Equities Rule 5.2(j)(2) currently provides minimum standards applicable to the securities underlying ELNs and the issuers of such securities. Under NYSE Arca Equities Rule 5.2(j)(2)(C)(ii), each issuer of an underlying security to which an ELN is to be linked must be a reporting company under the Exchange Act that is listed on a national securities exchange. The Exchange proposes to expand this provision to provide that an issuer of an underlying security to which an ELN is to be linked may also be a 1940 Act registered investment company. In addition, the Exchange proposes to further clarify the rule to state that, in either case, any underlying security to which the ELN is linked must be listed on a national securities exchange.

The Exchange further proposes to replace the term “common stock” with the term “shares” in NYSE Arca Equities Rule 5.2(j)(2)(C)(ii)(2) to take into account that certain underlying securities, particularly those that are securities issued by 1940 Act registered investment companies, are not labeled “common stock.” Similarly, in NYSE Arca Equities Rule 5.2(j)(2)(D)(i), the Exchange proposes to delete the term “common” when it qualifies “shares” to take into account that certain underlying securities, particularly those that are securities issued by 1940 Act registered investment companies, are not labeled “common shares.” For purposes of NYSE Arca Equities Rule 5.2(j)(2), as amended, the term “shares” shall encompass common

stock, non-convertible preferred stock, and securities issued by 1940 Act registered investment companies as eligible underlying securities. As a result, with respect to NYSE Arca Equities Rule 5.2(j)(2)(C)(ii)(2), the combined trading volume of each non-U.S. security (a security issued by a non-U.S. company) and other related non-U.S. securities occurring in the U.S. market or in markets with which the Exchange has in place a comprehensive surveillance sharing agreement must represent (on a share equivalent basis for any American Depositary Shares (“ADSs”)) at least 50% of the combined worldwide trading volume in each such non-U.S. security, other related non-U.S. securities, and other classes of common stock, non-convertible preferred stock, or securities of 1940 Act registered investment companies related to each such non-U.S. security, as the case may be, over the six month period preceding the date of listing. In addition, with respect to NYSE Arca Equities Rule 5.2(j)(2)(D)(i): (1) an issuance of ELNs relating to any underlying U.S. security may not exceed five percent of the total outstanding common stock, non-convertible preferred stock, or securities of 1940 Act registered investment companies for each such underlying security, as the case may be; and (2) the issuance of ELNs relating to any underlying non-U.S. security represented by ADSs, common stock, non-convertible preferred stock, or securities of 1940 Act registered investment companies, or otherwise, may not exceed: (a) two percent of the total shares outstanding of the relevant underlying security worldwide if at least 20 percent of the worldwide trading volume in each non-U.S. security and related non-U.S. security occurs in the U.S. market during the six-month period preceding the date of listing; or (b) three percent of the total shares outstanding of the relevant underlying security worldwide if at least 50 percent of the worldwide trading volume in each non-U.S. security and related non-U.S. security occurs in the U.S. market during the six-month period preceding the date of listing; and (c) five percent of the total shares outstanding of

the relevant underlying security worldwide if at least 70 percent of the worldwide trading volume in each non-U.S. security and related non-U.S. security occurs in the U.S. market during the six-month period preceding the date of listing.

C. Additional Technical Changes

Lastly, the Exchange proposes to correct the numbering of NYSE Arca Equities Rule 5.2(j)(2)(C)(iv) to NYSE Arca Equities Rule 5.2(j)(2)(C)(iii). The Exchange also proposes to change the reference to the Division of Market Regulation to the Division of Trading and Markets in NYSE Arca Equities Rule 5.2(j)(2)(D)(i).

II. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Exchange Act<sup>5</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>6</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Exchange Act,<sup>7</sup> which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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.

With respect to the proposal to expand the listing criteria for ELNs to encompass notes that are linked to the securities of 1940 Act registered investment companies, the Commission

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<sup>5</sup> 15 U.S.C. 78f.

<sup>6</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>7</sup> 15 U.S.C. 78f(b)(5).

notes that the proposed rule requires such securities to be listed and trading on a national securities exchange. The Commission also notes that the issuers of such underlying securities must be registered under the 1940 Act and, pursuant to the disclosure requirements thereunder, financial and other types of information relating to the registered investment companies would be readily available for investors and other market participants. Finally, the Commission notes that the securities issued by 1940 Act registered investment companies would trade on the same platforms as equity securities under the Exchange Act and would be subject to the same Exchange trading rules as equity securities. As such, the Commission believes that this proposal will benefit investors by providing investors and other market participants with enhanced investment options and flexibility, while maintaining sufficient transparency and minimum standards with respect to the securities underlying ELNs.

The Commission also believes that the proposed amendments in NYSE Arca Equities Rules 5.2(j)(2)(C)(ii)(2) and 5.2(j)(2)(D)(i) to characterize the word “shares” conform with the overall purpose of the proposed rule change and clarify the application of the proposed amendments as they relate to the eligibility of securities underlying ELNs. In addition, the Commission believes that the additional technical corrections made to NYSE Arca Equities Rule 5.2(j)(2) further clarify the application of the rule. For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act<sup>8</sup> and the rules and regulations thereunder applicable to a national securities exchange.

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<sup>8</sup> 15 U.S.C. 78f(b)(5).

### III. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,<sup>9</sup> for approving the proposed rule change prior to the thirtieth day after the date of publication of the Notice in the Federal Register. The Commission notes that the proposal is similar to NYSE Arca Equities Rule 5.2(j)(6)(B)(I), the Exchange's Equity Index-Linked Securities listing rules, which allow underlying indexes to include, in whole or in part, on securities issued by certain companies registered under the 1940 Act and are listed on a national securities exchange.<sup>10</sup> The Commission finds that the proposed rule change does not raise any novel regulatory issues and believes that accelerating approval of this proposal should benefit investors by creating, without undue delay, additional competition in the marketplace for ELNs.

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

<sup>10</sup> See Securities Exchange Act Release No. 56879 (December 3, 2007), 72 FR 69271 (December 7, 2007) (SR-NYSEArca-2007-110).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,<sup>11</sup> that the proposed rule change (SR-NYSEArca-2008-94) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

Florence E. Harmon  
Acting Secretary

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<sup>11</sup> 15 U.S.C. 78s(b)(2).

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